

private-employer context—do not violate the Fourth Amendment.” He agreed with Justice O’Connor that the search in the instant case was reasonable because officials had reasonable suspicion to believe that the employee had stolen property.

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented in *Ortega*. The dissenters agreed with Justice Scalia’s view that government employees had a reasonable expectation of privacy in their offices. But they argued that the reasonableness of the search should be judged by standards of probable cause rather than the lesser standards of reasonable suspicion. For further discussion on the reasonableness of searches of public employees, see the section on “special needs” searches later in this Chapter.

III. THE TENSION BETWEEN THE REASONABLENESS AND THE WARRANT CLAUSES

A. THE IMPORTANCE OF THE WARRANT CLAUSE GENERALLY

Searches and seizures conducted without a warrant are presumed to be unreasonable. The language of the Court is that “searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967).

But the vision of a tough, sweeping *per se* warrant rule yielding only to the most demanding claims for exceptions is at odds with reality. Despite the Court’s ringing language, the so-called *per se* rule can be restated as follows:

A search and seizure in some circumstances is presumed to be unconstitutional if no prior warrant is obtained, but in many other circumstances the prior warrant is unnecessary to justify a search or seizure.

As Justice Scalia stated in his concurring opinion in *California v. Acevedo*, 500 U.S. 565 (1991), the Court’s jurisprudence with respect to the warrant requirement has “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone.” According to Justice Scalia, the result is that the warrant requirement has become “so riddled with exceptions that it [is] basically unrecognizable.”

B. THE REASON FOR THE WARRANT REQUIREMENT

The following case is probably the Supreme Court's most thorough explication and justification of the warrant requirement. It lays the foundation of the current presumption that warrants are required for searches and seizures.

JOHNSON V. UNITED STATES

Supreme Court of the United States, 1948.
333 U.S. 10.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Q Petitioner was convicted of four counts charging violation of federal narcotic laws. The only question which brings the case here is whether it was lawful, without a warrant of any kind, to arrest petitioner and to search her living quarters.

Taking the Government's version of disputed events, decision would rest on these facts:

At about 7:30 p.m. Detective Lieutenant Belland, an officer of the Seattle police force narcotic detail, received information from a confidential informer, who was also a known narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. Belland communicated with federal narcotic agents and between 8:30 and 9 o'clock went back to the hotel with four such agents. All were experienced in narcotic work and recognized at once a strong odor of burning opium which to them was distinctive and unmistakable. The odor led to Room 1. The officers did not know who was occupying that room. They knocked and a voice inside asked who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said, "I want to talk to you about this opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room." The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. This evidence the District Court refused to suppress before trial and admitted over defendant's objection at the trial. Conviction resulted and the Circuit Court of Appeals affirmed.

The defendant challenged the search of her home as a violation of the rights secured to her, in common with others, by the Fourth Amendment to the Constitution.

* * *

Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.

At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. * * * If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, * * * it might very well be found to be evidence of most persuasive character.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the

testimony of the officers to that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

[The Court held that the officers had no probable cause to arrest the defendant until they entered the defendant's quarters, and reasoned that the search (entry and visual inspection) preceded the arrest. It was not possible, therefore, to justify the officers' conduct on a search incident to a valid arrest theory. Justices Black, Reed, and Burton, together with Chief Justice Vinson, dissented without opinion.]

NOTE ON JOHNSON

Johnson represents a victory for those who would have the police secure warrants. As the majority intimates, there almost certainly was enough evidence known to the police to justify a magistrate's issuance of a warrant. Yet, because no warrant was sought, the search is deemed constitutionally "unreasonable" or invalid. Why is this the correct result? If you would answer that the Framers assumed that warrants generally would be required, you must recognize that the Warrant Clause is actually designed as a *limitation* on the issuance of warrants ("No warrant shall issue without probable cause . . .") and does not explicitly state a preference for warrants. How does the Court reason from a limitation on warrants to a warrant requirement?

Note that the government did not argue in *Johnson* that a warrant should be excused because of the risk that the evidence would be destroyed by the time they got a warrant. What if they had? See *Kentucky v. King*, 131 S.Ct. 1849 (2011) (finding exigent circumstances in a similar case and distinguishing *Johnson* as a case in which the government did not argue exigent circumstances). *King* is discussed later in this Chapter in the section on the exigent circumstances exception to the warrant requirement.

C. THE FUNCTION OF THE WARRANT REQUIREMENT

For searches and seizures that are subject to the warrant requirement, probable cause represents the threshold of proof that must be satisfied before the power to search and seize is legitimated. That proof requirement means that the government must demonstrate a factually-based interest in people, places or things *before* using its power to disturb them. The proof requirement protects against *unjustified* searches and seizures.

Related to the proof requirement are the "Oath or affirmation" and particularity provisions of the Amendment. Probable cause is to be shown by persons willing to swear to or affirm the truth of their statements and thus to be held accountable for their representations. In addition, the

applicant for the warrant is committing to a public record the information that is known *before* the search so that, after the search takes place, there is no confusion between the ex-post and ex-ante positions of the applicant. Without an antecedent warrant requirement, an officer questioned about probable cause can work backwards from the search, and fill in the facts as if they were known beforehand.

The specificity requirement implies that the government can only interfere with those persons, places or things that it has shown a valid interest in. Here, too, the written record made in advance of the search may decrease the danger that after a search is completed, the police will claim that whatever is found is exactly what was sought. Also, the specification of objects sought to be seized may inform the magistrate's decision on whether the proposed search is reasonable or excessive. A showing of probable cause, then, does not mean that any search and seizure authorized by a warrant is valid; it means that any search and seizure directed by warrant at the people, places, or things to which the probable cause specifically relates satisfies the warrant clause of the Fourth Amendment. These limitations guard against *arbitrary* searches and seizures.

By placing a magistrate between the citizen and the police, the Amendment, in the words of the *Johnson* majority, establishes that a neutral observer is to decide whether the probable cause and specificity requirements have been satisfied. This is one way in which the Amendment operates to prevent unjustified searches and seizures; the presumption is that a magistrate will make fewer errors than "the officer engaged in the often competitive enterprise of ferreting out crime."

By interposing the magistrate between the "competitors"—the police and the suspect—the Amendment may also serve another function. It gives the neutral magistrate an opportunity to refuse a warrant, even if the application is supported by oath, probable cause and specifics, on the ground that a search and seizure would be unreasonable under the circumstances. For example, if the police have probable cause to believe that A has marijuana cigarettes in his home, and if possession of small quantities of marijuana is punishable by fine only, a magistrate might be inclined to disapprove a warrant to search A's entire house on the ground that the scope of the search would be beyond what reasonable persons would accept in light of the government's minimal interests at stake. The same magistrate might be persuaded to permit a search of A's briefcase. Similarly, if the police obtain a warrant to search A's house on Monday and execute the warrant that same day, but find nothing, a magistrate might hesitate to issue another warrant to search on Tuesday, and perhaps another to look again on Wednesday, even if the police still have probable cause. Or, in an income tax evasion case, if the police asked for authority to search for and seize everything found in a home as evidence

of an income greater than that recorded on a tax return, a magistrate might balk at issuing such a warrant. However, the same magistrate might authorize an entry into the house to take photographs. By imposing limitations on searches, a magistrate may prevent *excessive* governmental intrusions.

Another important function of the warrant requirement was identified by the Court in *Illinois v. Gates*, discussed later in this Chapter. The Court stated that “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.”

As you go through the remainder of the Chapter, see if you can identify other goals of the warrant requirement. Might one be to remind police of their obligation to comply with the legal constraints placed upon them? Could it also be argued that without the specific limitation of the warrant requirement, the Fourth Amendment’s general command that a search be “reasonable” would be inherently ambiguous and subject to the case-by-case balancing of shifting majorities in the courts? Is it possible for the Supreme Court to give specific and principled guidance under the reasonableness clause, without any reference to a presumption in favor of warrants?

The Warrant Requirement in Reality

The above discussion articulated a number of theoretically sound reasons for the warrant requirement. But does the warrant process, in practice, serve these purposes? For example, the Administrative Office of the United States Courts compiled statistics on warrants issued for electronic surveillance. The *New York Times* reported on these statistics as follows:

The figures show that Federal and state judges are largely rubber stamps for law enforcement when it comes to electronic surveillance, despite all the talk of the need for an independent review by the courts of bugs and wiretaps. The last time a court denied a wiretap application was in 1988; all told, only 7 applications out of 8,950 since 1983 have been turned down.

Labaton, *Before the Explosion, Officials Saw Little Risk for Building in Oklahoma City*, *New York Times*, May 2, 1995, p. A19. The data is similar for warrants to search for physical evidence.

What is the point of requiring a warrant if the warrant process is simply a formality as a practical matter? Could the almost-certain success of a warrant application be a reason for the Court’s expansion of the

exceptions to the warrant requirement? Is the Court attempting to focus the warrant requirement on those few areas in which a magistrate's determination might make a difference?

Could it be argued that the success rate for obtaining warrants is attributable not to lax review but to the care that is being put into warrant applications by police officers fearful that their applications will be rejected?

The exceptions to the warrant requirement will be considered shortly. Before reaching them, it is useful to understand what practical protections the warrant application procedure affords.

IV. OBTAINING A SEARCH WARRANT: CONSTITUTIONAL PREREQUISITES

A. DEMONSTRATING PROBABLE CAUSE

1. Source of Information on Which Probable Cause Is Based

The Fourth Amendment mandates a showing of probable cause as justification for a search warrant. Scant attention was paid to the term *probable cause* until the 1960's, when two major cases were decided, *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). *Spinelli* is set forth below; the earlier *Aguilar* decision is discussed in the majority opinion. Both of these cases deal with regulation of the source of information on which probable cause is based. These cases must be read in light of the case that follows, *Illinois v. Gates*, which tempered the standards for determining probable cause on the basis of informants' tips.

SPINELLI V. UNITED STATES

Supreme Court of the United States, 1969.
393 U.S. 410.

MR. JUSTICE HARLAN delivered the opinion of the Court.

William Spinelli was convicted * * * of traveling to St. Louis, Missouri, from a nearby Illinois suburb with the intention of conducting gambling activities proscribed by Missouri law. At every appropriate stage in the proceedings in the lower courts, the petitioner challenged the constitutionality of the warrant which authorized the FBI search that uncovered the evidence necessary for his conviction. * * *

In *Aguilar*, a search warrant had issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. While recognizing that the constitutional

requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge of the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was "'credible' or his information 'reliable.'" The Government is, however, quite right in saying that the FBI affidavit in the present case is more ample than that in *Aguilar*. Not only does it contain a report from an anonymous informant, but it also contains a report of an independent FBI investigation which is said to corroborate the informant's tip. We are, then, required to delineate the manner in which *Aguilar's* two-pronged test should be applied in these circumstances.

In essence, the affidavit * * * contained the following allegations:^a

1. The FBI had kept track of Spinelli's movements on five days during the month of August 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri, between 11 a.m. and 12:15 p.m. On four of the five days, Spinelli was also seen parking his car in a lot used by residents of an apartment house at 1108 Indian Circle Drive in St. Louis, between 3:30 p.m. and 4:45 p.m. On one day, Spinelli was followed further and seen to enter a particular apartment in the building.

2. An FBI check with the telephone company revealed that this apartment contained two telephones listed under the name of Grace P. Hagen, and carrying the numbers WYdown 4-0029 and WYdown 4-0136.

3. The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

4. Finally, it was stated that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

There can be no question that the last item mentioned, detailing the informant's tip, has a fundamental place in this warrant application. Without it, probable cause could not be established. The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and

^a It is, of course, of no consequence that the agents might have had additional information which could have been given to the Commissioner. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas*, 378 U.S. 108, 109, n. 1 (emphasis in original). * * *

from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones. Many a householder indulges himself in this petty luxury. Finally, the allegation that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision.

So much indeed the Government does not deny. Rather, *** the Government claims that the informant's tip gives a suspicious color to the FBI's reports detailing Spinelli's innocent-seeming conduct and that, conversely, the FBI's surveillance corroborates the informant's tip, thereby entitling it to more weight. It is true, of course that the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit. We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration?

Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was "reliable," he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar's* other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable.

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.

The detail provided by the informant in *Draper v. United States*, 358 U.S. 307 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford, went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.^b Such an inference cannot be made in the present case. Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar.

Nor do we believe that the patent doubts *Aguilar* raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. At most, these allegations indicated that Spinelli 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 Spinelli on the basis of information obtained in a reliable way. Once again, *Draper* provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established.

We conclude, then, that in the present case the informant's tip—even when corroborated to the extent indicated—was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip

^b While *Draper* involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue.

was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves—and they are not endowed with an aura of suspicion by virtue of the informer's tip. Nor do we find that the FBI's reports take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises ostensibly used by others for perfectly normal purposes. Such an argument would carry weight in a situation in which the premises contain an unusual number of telephones or abnormal activity is observed, but it does not fit this case where neither of these factors is present.^c All that remains to be considered is the flat statement that Spinelli was "known" to the FBI and others as a gambler. But just as a simple assertion of police suspicion is not itself a sufficient basis for a magistrate's finding of probable cause, we do not believe it may be used to give additional weight to allegations that would otherwise be insufficient. *

* * *

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[Justice White's concurring opinion is omitted.]

MR. JUSTICE BLACK, dissenting.

In my view, this Court's decision in *Aguilar v. Texas*, 378 U.S. 108 (1964), was bad enough. That decision went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial, where witnesses must be brought forward to attest personally to all the facts alleged. But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions. * * * Nothing in our Constitution * * * requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search.

* * *

^c A box containing three uninstalled telephones was found in the apartment, but only after execution of the search warrant.

MR. JUSTICE FORTAS, dissenting.

* * *

A policeman's affidavit should not be judged as an entry in an essay contest. It is not "abracadabra." As the majority recognizes, a policeman's affidavit is entitled to common-sense evaluation. * * *

[Justice Stewart's dissenting opinion is omitted.]

Applying Spinelli

The majority in *Spinelli* appears to accept the following propositions:

- A police officer is presumed to be honest when making an affidavit.
- What may be questioned, however, is the source of the officer's information.
- If the officer avers that she has first-hand knowledge of the facts used to demonstrate probable cause, the only question is whether the sworn facts are sufficient to meet the threshold.
- If the officer is relying on someone else for part or all of the information, then it is necessary to make three additional determinations:
 - (i.) Who is the source of the information, and is the source reliable? Reliability is the first prong of the *Spinelli* test.
 - (ii.) What are the bases and details of the source's knowledge? Credible information is the second prong of the test.
 - (iii.) Assuming reliability of the source, are the facts, either standing alone or taken together with other facts provided by the affiant, sufficient to satisfy the proof threshold, probable cause?
- If the source is not known to the police to be reliable, the police may be able to demonstrate reliability by corroborating the details provided by the informant. The Court in *Spinelli* required a substantial amount of corroboration in such circumstances. Corroborating the fact that Spinelli had two telephone lines in his apartment was not enough to eliminate the concerns about the informant's reliability.
- If the informant's basis of information is unclear, it may be sufficient that the information is so detailed that it could only have come from the informant's personal observation.

- If the information provided by the informant falls short of demonstrating probable cause, the police can gather other information to be included in the application for a warrant.
- When the magistrate looks at all the information provided to assess whether probable cause is shown, she is to take a common sense approach to the application and ask whether the government has shown "the probability" of criminal activity.

Spinelli does not impose a limitation where a *crime victim* or *eyewitness* reports an alleged crime immediately after he or she says it took place. It only addresses warrant applications in which the police rely on 1) tipsters who operate as paid informants or snitches; or 2) anonymous informants. It is these two categories of informants whose reliability is most questionable.

The *Spinelli* majority shows a mistrust of paid and anonymous informants. Is that justified? Consider an anecdote from Dallas, where informants were paid millions of dollars based on tips that certain people were carrying drugs. The informants would pick up migrant laborers, give them a backpack, and tell them to wait to be picked up at a certain corner, where they would be taken to a factory for employment for the day. The bag would contain a powdery substance with trace amounts of cocaine. Then the informants would "tip" the police that a person was standing at a street corner holding a backpack containing narcotics. The "tip" would include a detailed description of the person holding the bag. The scam was not uncovered until years later when the substances were retested and found to be largely ground up masonry, with only trace amounts of cocaine.

Whatever your own opinion is, you should know that *Spinelli* was not well received by law enforcement officials. Generally speaking, law enforcement officers read *Spinelli* as prohibiting warrants based on information from paid or anonymous informants; in the view of law enforcement, the *Spinelli* Court set a standard for corroboration of those tips that was equivalent to independent evidence of criminality approaching probable cause. But if officers had to corroborate with independent evidence approaching or equaling probable cause, it followed that the tip itself was all but irrelevant to the probable cause determination. Also, the decision may have appeared to be more complicated and even more hostile to police than it was intended to be.

2. Rejection of a Rigid Two-Pronged Test

In the following case, the Court held that the two-pronged test of *Aguilar* and *Spinelli* would no longer control the determination of probable cause when police obtain information from paid, professional, or anonymous informants. Yet the Court took some pains to emphasize that

the *Aguilar-Spinelli* structure still has continuing relevance when police rely in whole or in part on an informant's tip.

ILLINOIS V. GATES

Supreme Court of the United States, 1983.
462 U.S. 213.

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. * * *

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. * * *

* * *

* * * 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 flys down and drives it back. Sue flys 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' 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.

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' 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' 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' 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' 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' home and car.

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. 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*. The Illinois 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. 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," found that the test had not been 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 Bloomingdale Police Department] was credible." 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. In addition, the letter gave no indication of the basis of its writer's knowledge of the Gates' 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 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, 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 commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

*** This totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is 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." ***

[P]robable 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 many shapes and sizes from many different types of persons. ***

[T]he "two-pronged test" directs analysis into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge." 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.

*** 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,^a with undue attention being focused on isolated issues

^a 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.Cr.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

that cannot sensibly be divorced from the other facts presented to the magistrate.

*** 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.

Standard
for prob.
cause

We have also recognized that affidavits are normally drafted by nonlawyers in the midst and haste of a criminal investigation. *** 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—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in formal legal proceedings.

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." 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. ***

Finally, the *** strictures that inevitably accompany the "two-pronged test" cannot avoid seriously impeding the task of law enforcement. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work. Ordinary citizens *** generally do not provide extensive recitations of the basis of their everyday observations. Likewise, as the Illinois Supreme Court recognized in this case, the veracity of persons supplying anonymous tips is by hypothesis

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."

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." 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*.^b In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. 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 *** conclud[ing]" that probable cause existed. ***

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*. 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

^b *** 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.

which had developed from *Spinelli*. Instead, the flexible, common-sense standard * * * better serves the purposes of the Fourth Amendment's probable cause requirement.

Justice Brennan's dissent suggests in several places that the approach we take today somehow downgrades the role of the neutral magistrate, because *Aguilar* and *Spinelli* "preserve the role of magistrates as independent arbiters of probable cause. * * *" Quite the contrary, we believe, is the case. * * * Nothing in our opinion in any way lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant; indeed, he is freer than under the regime of *Aguilar* and *Spinelli* to draw such inferences, or to refuse to draw them if he is so minded.

* * *

* * * Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gateses 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. Lance Gates' 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*.^c The Supreme 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 Gateses' 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"—including the claim regarding the Gateses' illegal activity. This may well not be the type of "reliability" or "veracity" necessary to satisfy some

^c The Illinois Supreme Court thought that the verification of details contained in the anonymous letter in this case amounted only to "the corroboration of innocent activity," 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." And it bears noting that *all* of the corroborating detail established in *Draper, supra*, was of entirely innocent activity * * *.

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."

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. 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.

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 Gateses' was of a character likely obtained only from the Gateses' 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 or she had access to reliable information of the Gateses' alleged illegal activities.^d Of course, the Gateses' travel plans might have been learned

^d Justice Stevens' dissent seizes on one inaccuracy in the anonymous informant's letter—its statement the 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.

Likewise, there is no force to the dissent's argument that the Gateses' 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 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 Gateses' 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 Gateses' 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 Gateses, he probably also had a reliable basis for his statements that the Gateses kept a large quantity of drugs in their home and frequently were visited by other drug traffickers there.

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, 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 Gateses or someone they trusted. And corroboration of major portions of the letter's predictions provides just this probability. *** The judgment of the Supreme Court of Illinois therefore must be

Reversed.

JUSTICE WHITE, concurring in the judgment.

*** [I]t is not at all necessary to overrule *Aguilar-Spinelli* in order to reverse the judgment below. Therefore, because I am inclined to believe that, when applied properly, the *Aguilar-Spinelli* rules play an appropriate role in probable cause determinations, and because the Court's holding may foretell an evisceration of the probable cause standard, I do not join the Court's holding.

The Court reasons that the "veracity" and "basis of knowledge" tests are not independent, and that a deficiency as to one can be compensated for by a strong showing as to the other. Thus, a finding of probable cause may be based on a tip from an informant "known for the unusual reliability of his predictions" or from "an unquestionably honest citizen," even if the report fails thoroughly to set forth the basis upon which the information was obtained. If this is so, then it must follow *a fortiori* that "the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building" must be acceptable. It would be "quixotic" if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement. Thus, this portion of today's holding can be read as implicitly rejecting the teachings of these prior holdings.

The Court may not intend so drastic a result. Indeed, the Court expressly reaffirms the validity of cases such as *Nathanson* that have held that, no matter how reliable the affiant-officer may be, a warrant should not be issued unless the affidavit discloses supporting facts and circumstances. The Court limits these cases to situations involving affidavits containing only "bare conclusions" and holds that, if an affidavit contains anything more, it should be left to the issuing magistrate to decide, based solely on "practical[ity]" and "common-sense," whether there is a fair probability that contraband will be found in a particular place.

Thus, as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates. I am reluctant to approve any standard that does not expressly require, as a prerequisite to issuance of a warrant, some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way. * * *

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

* * *

[O]ne can concede that probable cause is a "practical, nontechnical" concept without betraying the values that *Aguilar* and *Spinelli* reflect. *Aguilar* and *Spinelli* require the police to provide magistrates with certain crucial information. They also provide structure for magistrates' probable cause inquiries. In so doing, *Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way. Neither the standards nor their effects are inconsistent with a "practical, nontechnical" conception of probable cause. * * *

* * *

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The fact that Lance and Sue Gates made a 22-hour nonstop 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.*" Yet Detective Mader's affidavit reported that she "left the West Palm Beach area driving the Mercury northbound."

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 Gateses already had "over \$100,000 worth of drugs in their basement." The informant had predicted an itinerary that always kept one spouse in Bloomingdale, suggesting that the Gateses 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 miles from home.

Second, the discrepancy made the Gateses' 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, that she was joined by her husband at the Holiday Inn on Friday, and that the couple drove north together the next morning are neither unusual nor probative of criminal activity.

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.

*** 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.

NOTE ON GATES

The Court moves to a totality of the circumstances test and abandons, as too rigid, the two-pronged test that it had previously established. Is there any way for a magistrate to independently screen applications for warrants without looking at who provides the underlying information that appears in the applications and how these people obtained their information?

Does the substitution of a totality of the circumstances test for the two-pronged test mean that the two-pronged test is no longer relevant? Or does *Illinois v. Gates* simply say that the prongs of the *Aguilar* and *Spinelli* are relevant but not necessarily independent or dispositive? See, e.g., *United States v. Morales*, 171 F.3d 978 (5th Cir.1999) (noting that the *Gates* totality of the circumstances test "includes four factors: (1) the nature of the information; (2) whether there has been an opportunity for the police to see or hear the matter reported; (3) the veracity and the basis of knowledge of the informant; (4) whether there has been any independent verification of the matters reported through police investigation."). See also *United States v. Gagnon*, 373 F.3d 230 (2d Cir. 2004) (after *Gates* "it is clear that the reliability or veracity of the informant and the basis for the informant's knowledge are but two of several relevant considerations when determining the existence of probable cause based on an informant's tip, and that 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.”).

If you were teaching magistrates, which test, the two-pronged *Spinelli* test or the *Gates* totality of the circumstances test, would be more helpful to you in explaining how magistrates are to evaluate warrant applications?

The New York Court of Appeals rejected *Gates* in the context of warrantless police activity in *People v. Johnson*, 66 N.Y.2d 398, 497 N.Y.S.2d 618, 488 N.E.2d 439 (1985). In so holding, the court followed the lead of the Washington Supreme Court in *State v. Jackson*, 102 Wash.2d 432, 688 P.2d 136 (1984). See also *State v. Jacumin*, 778 S.W.2d 430 (Tenn.1989) and *State v. Jones*, 706 P.2d 317 (Alaska 1985), both rejecting *Gates* in favor of the *Spinelli* two-pronged test. All of these decisions are based on a construction of the respective court's State constitution.

Strong Prong/Weak Prong

Does it make sense that a strong showing on one of the *Spinelli* prongs can make up for a weak showing on the other? For cases in which courts used this reasoning from *Gates* to uphold a finding of probable cause, see *Carter v. United States*, 729 F.2d 935 (8th Cir.1984) (no specific statement as to informant's basis of knowledge for stating that marijuana was growing on certain property; however, some detail concerning the location of the property was given, and any deficiency in basis of knowledge is compensated for by informant's prior track record of reliable tips); *United States v. Phillips*, 727 F.2d 392 (5th Cir.1984) (questionable veracity of informant who hated defendant was overcome by wealth of detail in the tip).

The Function of Corroboration After Gates

The biggest effect of *Gates* is its more permissive view of the nature and extent of corroboration necessary to shore up a defective tip. For a post-*Gates* example of the use of corroboration, consider *United States v. Warner*, 894 F.2d 957 (8th Cir.1990). A “confidential and reliable source” informed the Sheriff's office that he had seen Warner fire a machinegun at Warner's residence. The next day, an anonymous caller reported that Warner had shot a machinegun the previous day at Warner's residence. The officer checked firearms registrations and found that Warner had no registered firearms. On the basis of this information, a warrant was issued to search Warner's house for an unregistered firearm. The court of appeals upheld the magistrate's determination of probable cause, reasoning that the two tips were “mutually corroborative,” and that the officer's check of firearms records provided further crucial corroboration. Would this corroboration have been sufficient under *Spinelli*? Did the officer's corroboration mean that Warner had an unlicensed gun, or that

he had no gun? How did the court know that the “mutually corroborative” tips came from two different people?

The effect of *Gates* is apparent in cases like *United States v. Peyko*, 717 F.2d 741 (2d Cir.1983). An officer received an anonymous tip that Peyko was and would be receiving weekly deliveries of drugs by Federal Express. The officer investigated and found that Peyko had been using Federal Express to send and receive packages regularly. The court found that the tip, together with the corroboration, provided probable cause to seize a Federal Express package addressed to Peyko. While the corroboration was of completely innocent activity (regularly sending and receiving packages), it lent color to the tip, which lent color to the corroboration, which led to probable cause under the *Gates* totality of circumstances approach. In light of *Peyko*, is there any risk that an innocent person with enemies will be subject to a search of his house or possessions?

As seen in *Peyko*—and in *Gates* itself—it will be very important to a finding of probable cause if the informant’s tip contains some prediction and that prediction bears out. When predictions are corroborated, a magistrate can draw the conclusion that the informant has some inside information about the defendant’s activity, and that, because he got one activity correct, he is also correct about his assessment of criminal activity. See, e.g., *United States v. Steppello*, 664 F.3d 359 (2d Cir. 2011) (probable cause of drug activity existed where informant “predicted just what Steppello would do in response to his cryptic call.”).

Insufficient Corroboration

There are a few reported cases finding that police corroboration was insufficient to shore up a defective tip, even under the *Gates* totality of the circumstances approach. One such case is *United States v. Leake*, 998 F.2d 1359 (6th Cir.1993). An anonymous informant phoned the police narcotics office and stated that he was a tradesman hired to do some work at 4825 Westport Road. While working, he smelled and saw marijuana in the basement. When questioned as to how he knew it was marijuana, he stated that in his “younger days” he had been a marijuana user, but that now he was older, with children, and was very “anti-drug.” Surveillance was initiated at 4825 Westport Road. No undue amount of traffic was observed. It was confirmed that the house had a basement. Two vehicles were registered to the address, one owned by Leake. On the basis of the tip and the investigation, the magistrate issued a warrant to search the premises at 4825 Westport Road, and officers recovered over 300 pounds of marijuana in the basement.

The court in *Leake* held that the warrant lacked probable cause. The court first observed that unlike *Gates*, the anonymous caller in *Leake* had

not provided much detail. No names of particular individuals were ever mentioned, no dates were provided, and "no planned future activity was described as in *Gates*." Nor was the corroboration sufficient to overcome the defective tip.

The *Leake* court found a moral in this story:

Ultimately, this case demonstrates the importance of taking sufficient time to verify an anonymous tip before a warrant is requested. Detective Murphy's investigation of the caller's information was inadequate. More police work was needed. The supporting affidavit was too vague and Detective Murphy's limited two-night surveillance was insufficient to verify important elements of the anonymous caller's information.

See also *United States v. Wilhelm*, 80 F.3d 116 (4th Cir.1996), where the officer received information from a "reliable source" who observed marijuana in the defendant's home and provided directions to that home. The court found, understandably, that this barebones information was not sufficient to establish probable cause, but the government argued that the tip had been corroborated by the facts that: 1) the informant had given accurate directions to the defendant's home and 2) the informant, in describing the defendant's activity, had accurately described what marijuana looks like and how it is packaged and sold. The court found that this corroboration was not enough to cure the defect in the tip under *Gates*, because "[a]lmost anyone can give directions to a particular house without knowing anything of substance about what goes on inside that house, and anyone who occasionally watches the evening news can make generalizations about what marijuana looks like and how it is packaged and sold."

The Gates Test Applied: Massachusetts v. Upton

The Court reiterated its "totality of the circumstances" test in *Massachusetts v. Upton*, 466 U.S. 727 (1984), a per curiam disposition reversing the state supreme court. The Court described the facts as follows:

At noon on September 11, 1980, Lt. Beland of the Yarmouth Police Department assisted in the execution of a search warrant for a motel room reserved by one Richard Kelleher at the Snug Harbor Motel in West Yarmouth. The search produced several items of identification, including credit cards, belonging to two persons whose homes had recently been burglarized. Other items taken in the burglaries, such as jewelry, silver and gold, were not found at the motel.

At 3:20 p.m. on the same day, Lt. Beland received a call from an unidentified female who told him that there was "a motor home full of stolen stuff" parked behind #5 Jefferson Ave., the home of respondent George Upton and his mother. She stated that the stolen items included jewelry, silver and gold. As set out in Lt. Beland's affidavit in support of a search warrant:

She further stated that George Upton was going to move the motor home any time now because of the fact that Ricky Kelleher's motel room was raided and that George Upton had purchased these stolen items from Ricky Kelleher. This unidentified female stated that she had seen the stolen items but refused to identify herself because "he'll kill me," referring to George Upton. I then told this unidentified female that I knew who she was, giving her the name of Lynn Alberico, who I had met on May 16, 1980, at George Upton's repair shop off Summer St., in Yarmouthport. She was identified to me by George Upton as being his girlfriend, Lynn Alberico. The unidentified female admitted that she was the girl that I had named, stating that she was surprised that I knew who she was. She then told me that she'd broken up with George Upton and wanted to burn him. She also told me that she wouldn't give me her address or phone number but that she would contact me in the future, if need be.

Following the phone call, Lt. Beland went to Upton's house to verify that a motor home was parked on the property. Then, while other officers watched the premises, Lt. Beland prepared the application for a search warrant, setting out all the information noted above in an accompanying affidavit. He also attached the police reports on the two prior burglaries, along with lists of the stolen property. A magistrate issued the warrant, and a subsequent search of the motor home produced the items described by the caller and other incriminating evidence. The discovered evidence led to Upton's conviction on multiple counts of burglary, receiving stolen property, and related crimes.

The *Upton* Court explained why the state supreme court's invalidation of the warrant was inconsistent with *Gates*:

[T]he Massachusetts court reasoned, first, that the basis of the informant's knowledge was not "forcefully apparent" in the affidavit. Although the caller stated that she had seen the stolen items and that they were in the motor home, she did not specifically state that she saw them in the motor home. Second, the court concluded that "[n]one of the common bases for determining the credibility of an informant or the reliability of her information is present here." The

caller was not a "tried and true" informant, her statement was not against penal interest, and she was not an "ordinary citizen" providing information as a witness to a crime. "She was an anonymous informant, and her unverified assent to the suggestion that she was Lynn Alberico does not take her out of that category."

Finally, the court felt that there was insufficient corroboration of the informant's tip to make up for its failure to satisfy the two-pronged test. The facts that tended to corroborate the informant's story were that the motor home was where it was supposed to be, that the caller knew of the motel raid which took place only three hours earlier, and that the caller knew the name of Upton and his girlfriend. But, much as the Supreme Court of Illinois did in the opinion we reviewed in *Gates*, the Massachusetts court reasoned that each item of corroborative evidence either related to innocent, nonsuspicious conduct or related to an event that took place in public. * * *

The Supreme Court took the Massachusetts Court to task in the following analysis:

We think that the Supreme Judicial Court of Massachusetts misunderstood our decision in *Gates*. We did not merely refine or qualify the "two-pronged test." We rejected it as hypertechnical and divorced from "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." * * *

* * * The court did not consider Lt. Beland's affidavit in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability) attending the tip. Instead, the court insisted on judging bits and pieces of information in isolation against the artificial standards provided by the two-pronged test.

The Supreme Judicial Court also erred in failing to grant any deference to the decision of the magistrate to issue a warrant. Instead of merely deciding whether the evidence viewed as a whole provided a "substantial basis" for the magistrate's finding of probable cause, the court conducted a de novo probable cause determination. We rejected just such after-the-fact, de novo scrutiny in *Gates*. * * *

The *Upton* Court then applied the *Gates* analysis to the facts and found that the warrant was supported by probable cause:

Examined in light of *Gates*, Lt. Beland's affidavit provides a substantial basis for the issuance of the warrant. No single piece of evidence in it is conclusive. But the pieces fit neatly together and, so viewed, support the magistrate's determination that there was "a fair

probability that contraband or evidence of crime” would be found in Upton’s motor home. The informant claimed to have seen the stolen goods and gave a description of them which tallied with the items taken in recent burglaries. She knew of the raid on the motel room—which produced evidence connected to those burglaries—and that the room had been reserved by Kelleher. She explained the connection between Kelleher’s motel room and the stolen goods in Upton’s motor home. And she provided a motive both for her attempt at anonymity—fear of Upton’s retaliation—and for furnishing the information—her recent breakup with Upton and her desire “to burn him.”

The Massachusetts court dismissed Lt. Beland’s identification of the caller as a mere “unconfirmed guess.” But “probable cause does not demand the certainty we associate with formal trials.” Lt. Beland noted that the caller “admitted that she was the girl I had named, stating that she was surprised that I knew who she was.” It is of course possible that the caller merely adopted Lt. Beland’s suggestion as “a convenient cover for her true identity.” But given the caller’s admission, her obvious knowledge of who Alberico was and how she was connected with Upton, and her explanation of her motive in calling, Lt. Beland’s inference appears stronger than a mere uninformed and unconfirmed guess. It is enough that the inference was a reasonable one and conformed with the other pieces of evidence making up the total showing of probable cause.⁸

On remand in *Upton*, the Massachusetts Supreme Judicial Court declined to follow *Gates* and reaffirmed its commitment to the two-pronged test under the state constitution. *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985). It reasoned that the two-pronged test “aids lay people, such as the police and certain lay magistrates, in a way that the ‘totality of the circumstances’ test never could.” Did the state supreme court correctly apply the *Spinelli* test to the *Upton* facts?

3. The Citizen Informant

Under both *Spinelli* and *Gates*, the courts have distinguished police informants and anonymous informants from an ordinary citizen who identifies himself and reports a crime. The reason is that paid informants are presumptively unreliable given their dubious character and financial (or other) arrangements, and anonymous informants must be presumed unreliable because they may be using their anonymity for suspect reasons (e.g., to frame or harass an enemy). In contrast, identified citizen informants are considered reliable because they are presumed to be

⁸ Justice Stevens concurred in the judgment, expressing the opinion that the state supreme court should have indicated whether the warrant was valid under state law. Justices Brennan and Marshall dissented from the summary reversal of the state court.

motivated by “concern for society or for [their] own safety.” *State v. Paszek*, 50 Wis.2d 619, 184 N.W.2d 836 (1971). See also *United States v. Decoteau*, 932 F.2d 1205 (7th Cir.1991) (where citizen-informant known to the officer told him that she had seen the defendant with a sawed-off shotgun, the informant’s statement itself provided probable cause and corroboration was unnecessary); *United States v. Blount*, 123 F.3d 831 (5th Cir.1997) (en banc) (information coming from an identified neighbor of the defendant constituted probable cause, because the officers “had no reason to disbelieve Ms. Cooksey, or to question her motives or credibility”). There is also a thought that citizen-informants are not likely to lie directly to police because lying to police is a crime. Are you persuaded that citizen informants should be presumed reliable?

4. Accomplices

In *United States v. Patterson*, 150 F.3d 382 (4th Cir.1998), the police arrested Greene after two masked men robbed a bank. Greene confessed and identified Patterson as his accomplice. On the basis of this statement, the officers searched Patterson’s car and found incriminating evidence. Patterson challenged the search as lacking probable cause. But the court held that the confession of a co-participant is itself sufficient to establish probable cause—no corroboration is required. The court noted that a defendant can be *convicted* solely on the basis of the uncorroborated testimony of an accomplice, and reasoned that “it would be contradictory to allow a defendant to be convicted based on the uncorroborated testimony of his co-perpetrator while refusing to find that the same statement would be sufficient to support probable cause.” But is the accomplice’s testimony under oath at trial really the “same statement” as the accomplice’s stationhouse, hearsay confession implicating another in the crime?

5. Quantity of Information Required for Probable Cause

Gates dealt with the *quality* of information that could be considered in the probable cause determination, i.e., whether the informant’s tip is reliable enough to be considered as proof of probable cause. Assuming that all the information is reliable, another question arises: has the information submitted established a “fair probability” of criminal activity? This question arises not only with respect to affidavits submitted to magistrates, but also with warrantless searches and seizures; even if the search or seizure is conducted pursuant to an exception to the warrant requirement, the officer is ordinarily required to have probable cause.

Equivocal Activity

One circumstance in which a "fair probability" question is presented is where it is unknown whether a crime has been or is being committed. For example, what if the officer sees a person at 2:00 a.m. carrying a television and a stereo down the street in a shopping cart? There are many innocent explanations for this activity. Does that mean that there is no fair probability of criminal activity?

Consider *United States v. Prandy-Binett*, 995 F.2d 1069 (D.C.Cir.1993). Judge Randolph introduced the facts as follows:

Detective John Centrella saw a small rectangular block wrapped in silver duct tape. To the uninitiated, the object's outward appearance said nothing about its contents. To Detective Centrella, the size, shape and wrapping of the object signified one kilogram of illegal narcotics. * * *

Detective Centrella and another narcotics detective were on duty at Union Station, meeting trains arriving from New York City, a "source city" for drugs. As they watched departing passengers, their attention was drawn to an individual walking through the station faster than the others and trying to get around them. When the individual—Prandy-Binett—made eye contact with the detectives, who were in plain clothes, he moved even more quickly toward the exit. The detectives approached him and identified themselves. After telling the officers he had come from New Jersey, Prandy-Binett produced a one-way train ticket, purchased with cash, showing that his trip originated at Penn Station, New York City. After saying he lived in Washington, D.C., he handed the officers a driver's license showing Hyattsville, Maryland, as his residence. Detective Centrella's suspicions, aroused by these possible inconsistencies, were heightened by the cloth "tote" or "gym" bag Prandy-Binett carried on his shoulder. Prandy-Binett reported having spent a week working in New Jersey. Yet his only luggage was the small bag, which did not appear full. Asked whether the bag contained drugs or guns, Prandy-Binett said no. Detective Centrella then requested permission to search the bag. Prandy-Binett replied that he did not have to consent and that the bag contained only clothing. He took the bag from his shoulder, placed it on the ground, knelt down (as did the detective next to him), unzipped the bag and began pulling out a pair of blue jeans. This action uncovered a miniature shopping bag lying on its side, deep purple in color, a "perfume or a cologne bag" from Elizabeth Taylor Perfume. Unprompted, Prandy-Binett said, in evident reference to the perfume bag, "this is a gift." As Prandy-Binett continued to manipulate the blue jeans, a portion of a rectangular block, wrapped in silver duct tape, slid out of the

perfume bag. Believing the block to contain illegal drugs, Detective Centrella handcuffed Prandy-Binett, examined the wrapped object further, and seized it and the gym bag. A later field test on the contents of the wrapped block revealed cocaine.

Judge Randolph concluded that, based on the totality of circumstances, there was a fair probability that the rectangular block contained drugs, and upheld the narcotics conviction on which the search and seizure were based. He analyzed the fair probability question as follows:

Somewhere between "less than evidence which would justify conviction" and "more than bare suspicion," probable cause is satisfied. The precise point is indeterminate. * * * This is why the detectives' observations up to the time the block slipped out of the perfume bag cannot be disregarded. * * * Is the probability increased if the passenger moves quickly through the station after leaving the train? Greater if the passenger also gives apparently deceptive answers when the police question him? Greater still if the passenger opens his bag and refers to a package wrapped in duct tape inside a fancy perfume bag as a "gift?" Neither courts nor law enforcement officers, nor anyone else for that matter, can quantify any of this. * * * Still, we are convinced that, up to the sighting of the duct tape package, the conditional probability was low, much too low to have satisfied the Fourth Amendment in light of the interests it protects.

The case thus comes down to the detectives' inference of narcotics from the appearance of the wrapped block, and on the extent to which that inference enhanced the probability of Prandy-Binett's possessing drugs. We put the question in these terms because "probable cause" is evaluated not only from the perspective of a "prudent man," but also from the particular viewpoint of the officer involved in the search or seizure. * * *

Judge Randolph concluded that the sighting of the rectangular block wrapped in duct tape added enough to the other facts to constitute a fair probability of criminal activity. He noted three factors bearing on this probability assessment:

There was first the block's bulk. * * * Detective Centrella was quite familiar with the bulk of packages containing one kilogram of cocaine. * * * Detective Centrella * * * thus had good reason for believing that the wrapped block in Prandy-Binett's gym bag was about the size of a package containing one kilogram of cocaine or heroin.

The second consideration was the rectangular shape of the object. The portion protruding from the perfume bag was consistent with what the detectives knew to be the standard configuration, the

typical “kilo brick.” * * * The brick-like shape of the object thus further alerted the detectives, in light of their training and experience, to the possible presence of narcotics.

The third factor was wrapping—silver duct tape (over plastic). Duct tape is attractive to traffickers because fingerprints are difficult to lift from its surface and because some criminals believe—erroneously—that it masks the odor of the drugs from police dogs.
* * *

To Detective Centrella the wrapped block thus conveyed the message “one kilo of narcotics” just as surely as if the words were written on the tape. The circumstances leading up to the arrest and the incongruity of the crudely wrapped block inside the fancy perfume bag, together with Prandy-Binett’s unsolicited disclaimer “This is a gift,” must have confirmed what the detective saw in his mind’s eye. * * * We cannot say exactly how probable it was that the block contained drugs, but we are convinced that it amounted, at the least, to a “fair probability” Prandy-Binett was committing an offense.

Judge Edwards wrote a vigorous dissent in *Prandy-Binett*. He complained that the majority, “relying on a bizarre theory of ‘conditional probabilities,’ holds that probable cause can be based on the appearance of duct tape.” He argued that the officers were motivated more by racial profiling than by any assessment of probability:

The circumstances that actually arouse police “suspicion” are obvious to anyone who bothers to look—individuals traveling through Union Station who are evidently poor, or people of color, are the individuals who are approached, questioned, stopped and searched. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *Yale L.J.* 214, 225–37 (1983) (describing the varied uses of race as a motivation for police detention, and as an element in probable cause and reasonable suspicion analyses); *Developments in the Law: Race and the Criminal Process*, 101 *Harv. L. Rev.* 1472, 1496 (1988) (noting studies that reveal that “police use race as an independently significant, if not determinative, factor in deciding whom to follow, detain, search, or arrest”).

Judge Edwards dismissed the supposed incongruity of carrying a package wrapped in duct tape as a gift in an expensive bag:

The majority also finds suspicious the “incongruity” of the sight of a “crudely wrapped block inside the fancy perfume bag.” Such comment reveals a distinct lack of empathy for some members of our society—those without much disposable income, for example—who readily find use for a discarded shopping bag and who might very well wrap

a gift with whatever packaging material is on hand, including duct tape.

Judge Edwards concluded that the placement of a rectangular object wrapped in duct tape inside one's luggage was simply not enough to rise to a fair probability of criminal activity. He argued that the "brick-like shape of a package might provide the observer with a general hint about the size of its contents, but the shape of such a package is too generic to make reasonable the inference that the contents of the package are also brick-shaped."

Who has the better argument in *Prandy-Binett*? Of course it is true that Prandy-Binett might have wrapped some figurines into a rectangular mass of duct tape. But does that mean there wasn't a fair probability that the package contained contraband?

Every circuit has decided cases on probable cause as applied to downloading or distributing child pornography on a computer. Most courts have held that probable cause can be found even without direct evidence that the defendant ever downloaded or distributed illegal images. Is that a proper application of the fair probability standard? See, e.g., *United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006) (en banc) (defendant's membership in a website that gave him unlimited access to child pornography on the site provided probable cause to believe that the defendant had actually downloaded illegal images); *United States v. Martin*, 426 F.3d 68 (2d Cir. 2005) (probable cause to search defendant's home existed on the basis of his membership in a chat group dedicated to child pornography; membership established a fair probability that the defendant did in fact exchange or download child pornography; it is "common-sense that one who voluntarily joins a child-pornography group and remains a member of that group * * * would download such pornography from the website and have it in his possession."). See also *United States v. Perez*, 484 F.3d 735 (5th Cir. 2007) (association between an IP address used for child pornography and a physical address constitutes a fair probability that criminal activity is occurring at that address: "though it was possible that the transmissions originated outside of the residence to which the IP address was assigned, it remained likely that the source of the transmissions was inside that residence.").

Probable Cause to Arrest

The probable cause requirement applies to arrests as well as to searches. Probable cause to search is determined by whether there is a fair probability that the area or object searched contains evidence of a crime. Probable cause to arrest is determined by whether there is a fair probability to believe that the person arrested has committed a crime. Often these two fair probability assessments are actually one. For

example, if there was probable cause to believe that the rectangular object in Prandy-Binett's luggage contained contraband, then there was also probable cause to arrest Prandy-Binett on a narcotics offense. In some situations, however, there may be probable cause to arrest, but not probable cause to search. For example, there may be a fair probability that a person robbed a bank five years ago; but that does not mean there is a fair probability to believe that the defendant's briefcase contains any evidence of the five year-old bank robbery. In other cases, there may be probable cause to search but not probable cause to arrest, such as where a criminal leaves a suitcase full of drugs in the home of an unsuspecting friend.

In the arrest context, the question of fair probability sometimes arises where police know that a crime has been committed, but they are not certain that a suspect is the perpetrator. Consider *United States v. Valez*, 796 F.2d 24 (2d Cir.1986), where the court set forth the following facts and analysis:

At 4:30 p.m. on October 16, 1984, New York City Police Sergeant Albert Zarr and Officer James Allen were parked in a surveillance vehicle on West 48th Street between Eighth and Ninth Avenues in Manhattan. Zarr sat near the rear window watching the street with binoculars; Allen remained in the front seat. After observing what appeared to be a narcotics sale on the southeast corner of 48th and Ninth, Zarr sent one of his undercover police officers to make a drug buy.

Zarr saw the undercover officer hand money to two men at the corner and in return receive two packets that later proved to contain cocaine. Zarr observed that one of the sellers was an Hispanic male in his twenties, wearing a black leather jacket, grey pants with a comb in the back pocket, and a white or off-white V-neck shirt with dark trim on the collar.

Zarr described the sellers to Allen and radioed the description to the field team. At that point, the seller with the black jacket walked around the corner and disappeared from view. Zarr instructed Allen to follow the subject and make an arrest.

Allen left the van immediately and proceeded west on 48th Street and then south on Ninth Avenue in search of the seller. Allen walked to the next corner, but did not see his subject. He decided to turn back on the hunch that the seller had ducked into one of the stores. When Allen returned to the corner of 48th and Ninth, he saw a man coming out of a Blimpie's fast food restaurant who matched the description that Zarr had given him. At 4:40 p.m., five to ten minutes after Allen left the surveillance van, he arrested the man. The person whom Allen had arrested was Valez. [Valez was brought

to the station, and a search of his person uncovered packets of cocaine.]

When Sergeant Zarr and the undercover officer who made the "buy" returned to the stationhouse, they realized that Allen had arrested the wrong man. [Valez moved to suppress the cocaine on the ground that the arrest was illegal for lack of probable cause.] Valez relied primarily on the fact that Zarr's description did not include any mention of facial hair, whereas Valez had a small goatee and a thick moustache. Valez also argued that Zarr's description of the seller was overly general and that the mistaken arrest resulted from the negligent and unorganized conduct of the surveillance team.

The *Valez* Court held that the description of the perpetrator was not overly general, and that the officers had acted properly in arresting Valez, even though he was not in fact involved in the sale to the undercover officer:

Given Zarr's detailed description of the seller's clothing, his failure to mention that the seller was clean-shaven does not constitute an unreasonable oversight. * * * [T]he police may justifiably place little reliance on the presence or absence of facial hair on a suspect who otherwise matches a description because facial hair may be worn or taken off as a disguise. * * *

Dissenting Judge Oakes argued that Officer Zarr's description was too general to support the conclusion that there was probable cause to arrest:

By sending an officer into the area with a description only of race, approximate age, and clothing and, oh yes, of a comb in the hip pocket—but not mentioning facial hair or its absence, or the length of the suspect's haircut—Zarr was insufficiently distinguishing the person who made the sale from other Latin males of not uncommon appearance in the immediate area. It was the equivalent of "identifying" a suspect in the Wall Street area by describing him as a white, thirty-ish man with a button-down shirt and dark pinstripe suit, carrying a leather attache case.

Who has the better of the argument on probable cause, the majority or the dissent? Would it have mattered if Zarr had arrested the real seller before Allen had arrested Valez?

Compare the result in *Valez* with that of *United States v. Kithcart*, 134 F.3d 529 (3d Cir. 1998). Officers received three radio transmissions reporting separate armed robberies. Two robberies were reported in Bensalem Township and one in the adjacent Bristol Township. The time and the exact location of the robbery in Bristol Township was not specified. The perpetrators were described as "two black males in a black

sports car." One of the perpetrators might have been wearing white clothes, and the vehicle was described as a "possible Z-28, possible Camaro." Ten minutes after the last radio transmission, concerning the robbery in Bristol Township, Officer Nelson spotted a black Nissan 300ZX, about a mile from Bristol Township. The vehicle was being driven by an African-American male, who appeared to be the only person in the car. Officer Nelson testified that since she had received the last radio transmission, this was the first time she had come upon either a black car or an African-American driver. She signalled the car to pull over, and "saw two sets of arms raised toward the roof of the car, and she realized that there were two people in the car." Eventually the officer searched the car, and found firearms. Kithcart, the driver, was charged with being a felon in possession of a firearm. The trial court denied Kithcart's suppression motion, holding that Officer Nelson had probable cause to arrest Kithcart when she pulled him over, and therefore that the search of the car was a proper search incident to a valid arrest.

The court of appeals, however, held that Officer Nelson did not have probable cause to arrest Kithcart when she pulled him over. The court analyzed the probable cause standard, in light of the facts, as follows:

The mere fact that Kithcart is black and the perpetrators had been described as two black males is plainly insufficient. * * * Moreover, the match between the description of the perpetrators' car (a black sports car, "possible Z-28, possible Camaro") and the vehicle in which Kithcart was spotted (a black Nissan 300ZX) was far from precise. Although the Camaro Z-28 and the Nissan 300ZX could be considered "sports cars," there was no evidence offered at the suppression hearing that the shapes of the two cars were sufficiently similar so as to warrant an inference that a 300ZX could be mistaken for a Z-28.

Nor is probable cause established by either the location or time of the stop. There was no evidence presented as to where in Bristol Township the final robbery occurred; nor was there evidence presented that the Bristol robbery occurred shortly before Officer Nelson stopped the car carrying Kithcart. * * * In other words, armed with information that two black males driving a black sports car were believed to have committed three robberies in the area some relatively short time earlier, Officer Nelson could not justifiably arrest any African-American man who happened to drive by in any type of black sports car.

What accounts for the different results in *Valez* and *Kithcart*? What more could the officer in *Kithcart* have found to make the case for probable cause?

For another interesting case on probable cause, see *Valente v. Wallace*, 332 F.3d 30 (1st Cir. 2003), where the court found probable cause to arrest an employee for writing notes to the employer containing bomb threats. The arrest was based mostly on the conclusion of a handwriting analyst. The court recognized that handwriting analysis was an “inexact science” but found the expert’s conclusion to be a “powerful start” toward probable cause. Added to this was the fact that the letters began shortly after the employee started working for the company; that they were found in the building where she worked; and that she acted nervously when questioned about the notes.

Mistaken Arrests

As indicated by *Valez*, probable cause to arrest (or to search) can exist even though the police are mistaken in believing that the person arrested committed a crime. The question for probable cause is not accuracy but rather fair probability. See *Hill v. California*, 401 U.S. 797 (1971) (if police have probable cause to arrest Hill and have probable cause to believe that Miller is Hill, they act properly if they arrest Miller); *Hirsch v. Burke*, 40 F.3d 900 (7th Cir.1994) (police had probable cause to arrest a person for public drunkenness, even though in fact the person was a diabetic in a state of insulin shock).

Probabilities with Multiple Suspects

If a police officer finds drugs in a car, does he have probable cause to arrest everyone in the car? That is the question in the following case.

MARYLAND V. PRINGLE

Supreme Court of the United States, 2003.
540 U.S. 366.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

At 3:16 a.m. on August 7, 1999, a Baltimore County Police officer stopped a Nissan Maxima for speeding. There were three occupants in the car: Donte Partlow, the driver and owner, respondent Pringle, the front-seat passenger, and Otis Smith, the back-seat passenger. The officer asked Partlow for his license and registration. When Partlow opened the glove compartment to retrieve the vehicle registration, the officer observed a large amount of rolled-up money in the glove compartment. The officer returned to his patrol car with Partlow’s license and registration to check the computer system for outstanding violations. The computer check did not reveal any violations. The officer returned to the stopped car, had Partlow get out, and issued him an oral warning.

After a second patrol car arrived, the officer asked Partlow if he had any weapons or narcotics in the vehicle. Partlow indicated that he did not. Partlow then consented to a search of the vehicle. The search yielded \$763 from the glove compartment and five plastic glassine baggies containing cocaine from behind the back-seat armrest. When the officer began the search the armrest was in the upright position flat against the rear seat. The officer pulled down the armrest and found the drugs, which had been placed between the armrest and the back seat of the car.

The officer questioned all three men about the ownership of the drugs and money, and told them that if no one admitted to ownership of the drugs he was going to arrest them all. The men offered no information regarding the ownership of the drugs or money. All three were placed under arrest and transported to the police station.

Later that morning, Pringle waived his rights under *Miranda v. Arizona*, and gave an oral and written confession in which he acknowledged that the cocaine belonged to him, that he and his friends were going to a party, and that he intended to sell the cocaine or "use it for sex." Pringle maintained that the other occupants of the car did not know about the drugs, and they were released.

The trial court denied Pringle's motion to suppress his confession as the fruit of an illegal arrest, holding that the officer had probable cause to arrest Pringle. A jury convicted Pringle of possession with intent to distribute cocaine and possession of cocaine. * * * The Court of Appeals of Maryland, by divided vote, reversed, holding that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession." We granted certiorari, and now reverse.

* * *

It is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The sole question is whether the officer had probable cause to believe that Pringle committed that crime. Maryland law defines "possession" as "the exercise of actual or constructive dominion or control over a thing by one or more persons."

* * *

In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was \$763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon

questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.

We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.

Pringle's attempt to characterize this case as a guilt-by-association case is unavailing. His reliance on *Ybarra v. Illinois* (discussed in the section on stop and frisk, *infra*) * * * is misplaced. In *Ybarra*, police officers obtained a warrant to search a tavern and its bartender for evidence of possession of a controlled substance. Upon entering the tavern, the officers conducted patdown searches of the customers present in the tavern, including Ybarra. Inside a cigarette pack retrieved from Ybarra's pocket, an officer found six tinfoil packets containing heroin. * * * We held that the search warrant did not permit body searches of all of the tavern's patrons and that the police could not pat down the patrons for weapons, absent individualized suspicion.

This case is quite different from *Ybarra*. Pringle and his two companions were in a relatively small automobile, not a public tavern. * * * [A] car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing. Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.

* * *

QUESTIONS ON PRINGLE

Would the officers have had probable cause to arrest Pringle's 15 year-old son if he were a fourth occupant in the car? What about Pringle's 87 year-old great grandmother? Would the result in *Pringle* have been the same if the officer found no drugs in the car but obtained consent to search the trunk and found the drugs there?

Assume after *Pringle* that officers are in an area known for drug-trafficking and they know that at least one of every three residents is committing drug crimes. They just don't know which ones. Can they arrest every third person that comes walking down the street on the fair probability that they are involved in drug crimes? What about one out of every three residents in the area?

Dog Sniffs and Probable Cause: Florida v. Harris

A dog sniff of luggage is not a search under *United States v. Place*, *supra*, but what about the *opening* of the luggage after a positive dog sniff? That would be a search because it could uncover legitimate private activity. This is because a dog's positive alert to a piece of luggage does not always mean that drugs are located there. Dogs are fallible.

If a dog positively alerts, the question arises whether that is sufficient to constitute probable cause. The Supreme Court addressed that question in *Florida v. Harris*, 133 S. Ct. 1050 (2013). Justice Kagan wrote for the Court as it addressed a vehicle stop by an officer with a drug sniffing dog. The dog alerted at the driver's door handle after the suspect appeared nervous and refused consent. A search of the car revealed no drugs the dog was trained to detect but a number of substances used to make methamphetamine. Florida charged Harris with possessing pseudoephedrine for use in manufacturing methamphetamine. While he was released on bail, the same officer stopped him again, the dog alerted at the same place, and nothing was found in a search of the car. A trial judge denied a motion to suppress, and the Florida Supreme Court reversed. Justice Kagan described the issue as follows: * * *

The Florida Supreme Court * * * [held] that Wheatley [the officer] lacked probable cause to search Harris's vehicle under the Fourth Amendment. "[W]hen a dog alerts," the court wrote, "the fact that the dog has been trained and certified is simply not enough to establish probable cause." To demonstrate a dog's reliability, the State needed to produce a wider array of evidence:

"[T]he State must present . . . the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability."

* * *

Justice Kagan analyzed the probable cause question, and reliability concerns, as follows:

Evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a

training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field * * * may sometimes be relevant * * *. And even assuming a dog is generally reliable, circumstances surrounding a particular alert may undermine the case for probable cause—if, say, the officer cued the dog (consciously or not), or if the team was working under unfamiliar conditions.

In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. * * *

Justice Kagan found that the record “amply supported the trial court’s determination that Aldo’s alert gave Wheatley probable cause to search Harris’s truck.” The state produced “substantial evidence” of the dog’s training and efficiency, as it had completed two recent drug-detection courses and maintained its proficiency through weekly training exercises. Moreover, Harris’s cross-examination of the handler failed to rebut the State’s showing of reliability. Justice Kagan explained as follows:

Harris principally contended in the trial court that because Wheatley did not find any of the substances Aldo was trained to detect, Aldo’s two alerts must have been false. But * * * here we doubt that Harris’s logic does justice to Aldo’s skills. Harris cooked and used methamphetamine on a regular basis; so as Wheatley later surmised, Aldo likely responded to odors that Harris had transferred to the driver’s-side door handle of his truck. A well-trained drug-detection dog *should* alert to such odors; his response to them might appear a mistake, but in fact is not. And still more fundamentally, we do not evaluate probable cause in hindsight, based on what a search does or does not turn up. For the reasons already stated, Wheatley had good cause to view Aldo as a reliable detector of drugs. And no special circumstance here gave Wheatley reason to discount Aldo’s usual dependability or distrust his response to Harris’s truck.

Probable Cause for an Arrest Different from the Charge on Which the Defendant Was Arrested: Devenpeck v. Alford

In *Devenpeck v. Alford*, 543 U.S. 146 (2004), Justice Scalia wrote for a unanimous Court (the Chief Justice not participating) as it addressed “the question whether an arrest is lawful under the Fourth Amendment when the criminal offense for which there is probable cause to arrest is not “closely related” to the offense stated by the arresting officer at the time of arrest.” Alford had stopped to assist a disabled automobile before Washington State Patrol Officer Haner came to the scene and Alford left. Haney informed his supervisor, Devenpeck, that Alford appeared to be an impersonator or “wannabe cop”. Haney pursued Alford and found that he was listening to a sheriff’s office police frequency on a special radio, and that handcuffs and a hand-held police scanner were in the car.

Sergeant Devenpeck arrived at the scene where Haner stopped Alford, was told by Haner that he believed Alford had been impersonating a police officer. Devenpeck discovered that Alford had a tape recorder with the play and record buttons depressed on the passenger seat of his car and asked Alford about his wig-wag headlights. Devenpeck ordered Alford to play the recorded tape, found that Alford was taping his conversations with the officers, and arrested Alford for a violation of the state privacy act.

Haner booked Alford for violating the privacy act and issued a ticket for his flashing headlights. A state court dismissed both charges, and Alford filed suit against the officers for an unlawful arrest, claiming that there was no probable cause warranting arrest. A jury found for the officers despite the fact that it was instructed that at the time of Alford’s arrest a state court of appeals had clearly held that the taping of the officers was not a crime.

The court of appeals held 2–1 that there was “no evidence to support the jury’s verdict.” The majority rejected the argument that probable cause existed to arrest Alford for the offenses of impersonating a law-enforcement officer and obstructing a law-enforcement officer because those offenses were not “closely related” to the offense invoked by Devenpeck as he took Alford into custody.

The Supreme Court reversed. Justice Scalia explained:

Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. * * *

The rule that the offense establishing probable cause must be “closely related” to, and based on the same conduct as, the offense

identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not "closely related" to that subjective reason. This means that the constitutionality of an arrest under a given set of known facts will vary from place to place and from time to time, depending on whether the arresting officer states the reason for the detention and, if so, whether he correctly identifies a general class of offense for which probable cause exists. An arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie *in precisely the same circumstances* would not. We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection.

*** Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

6. Collective Knowledge

In *Whiteley v. Warden*, 401 U.S. 560 (1971), the Supreme Court declared that "police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." This approach means that once Officer A demonstrates to a magistrate probable cause to arrest a suspect, any other officer can make the arrest on the assumption that the warrant is valid. The arresting officer need not have independent knowledge of the arrestee's criminal activity. The same rule applies in warrantless arrest cases. If Officer B makes an arrest pursuant to orders from Officer A, and the latter had probable cause for the order, the arrest is valid—Officer B need not be familiar with the facts supporting probable cause. Likewise with searches—the officer who actually conducts the search need not have personal knowledge of the facts supporting probable cause. All that is required is collective knowledge in the police department that rises to the level of probable cause.

7. Staleness of Information

One problem that sometimes arises in assessing probable cause is that the officer's information is dated. For example, an officer may receive information from a reliable informant that the defendant had an ounce of marijuana in his home on January 1. Assuming that the informant's tip

satisfies *Gates*, there is still a problem if the search of the defendant's home is conducted on July 1. Certainly, there is no fair probability that the same ounce of marijuana is still in the defendant's house six months later.

An example of a staleness problem arose in *United States v. Harris*, 20 F.3d 445 (11th Cir.1994). Police had probable cause to believe that Ford was involved in a narcotics conspiracy in 1988. However, the warrant to search Ford's house was not issued until 1990. 1989 had apparently been a bad year for the conspiracy: several drug couriers had been arrested and large amounts of drugs had been seized. Two of Ford's top coconspirators had become embroiled in an altercation, and each had reported the other to the authorities. Ford argued that, under these circumstances, the information that he was involved in a narcotics conspiracy had become stale. The *Harris* Court had this to say about the staleness inquiry:

When reviewing staleness challenges we do not apply some talismanic rule which establishes arbitrary time limitations * * *. In this case-by-case determination we may consider the maturity of the information, nature of the suspected crime (discrete crimes or ongoing conspiracy), habits of the accused, character of the items sought, and nature and function of the premises to be searched.

Applying these factors, the *Harris* Court found that the information provided to the magistrate established a fair probability that Ford was still involved in a narcotics conspiracy in 1990. The court noted that the conspiracy was "longstanding and protracted" and that the affidavit showed that Ford "had no visible source of income, yet owned a large house" and was still associated with some of his coconspirators. See also *United States v. Spikes*, 158 F.3d 913 (6th Cir.1998) (four-year-old information concerning drug activity was not stale where it was corroborated by more recent information, to lead to a fair conclusion that the defendant was engaged in continuous large-scale drug activity); *United States v. Farmer*, 370 F.3d 435 (4th Cir. 2004) (nine month-old information about the defendant's large-scale counterfeiting operation was not stale because it was "unlikely to have been suddenly abandoned" and the information indicated that the operation had been going on for a long time).

8. First Amendment Concerns

In *New York v. P.J. Video*, 475 U.S. 868 (1986), Justice Rehnquist wrote for the Court as it held that warrants authorizing the seizure of "adult" tapes from a video store were supported by probable cause to believe that the tapes were pornographic. Justice Rehnquist first noted that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated

under the same standard of probable cause used to review warrants generally." The Court found that the affidavits in the instant case contained more than enough information to conclude that there was a "fair probability" that the movies satisfied the statutory definition of obscenity (i.e., predominant appeal to prurient interest in sex, specific sexual conduct presented in patently offensive manner, and no serious redeeming social value).

Justice Marshall, joined by Justices Brennan and Stevens, dissented. He argued that the affidavits described only some excerpted scenes, and not the entirety of each film. So in his view the magistrate could not have determined that the sex acts pervaded the films or that the films as a whole lacked artistic value; while the *affidavits* were pervaded with sex acts, it did not necessarily follow that the *films* were obscene. The majority's response to Justice Marshall's argument was that one of the affidavits, for example, described five hardcore sex scenes, taking place in a 93 minute film; therefore the sheer volume of sex acts depicted in the affidavit established at least a fair probability that there was no time left for the film to include any matters of redeeming social value.

When *P.J. Video* returned to the state courts, the New York Court of Appeals held in *New York v. P.J. Video, Inc.*, 68 N.Y.2d 296, 508 N.Y.S.2d 907, 501 N.E.2d 556 (1986), that the state constitution barred reliance on the totality of circumstances approach for warrants directed at allegedly obscene materials. It reasoned that all aspects of the statutory definition of obscenity are significant and that the Supreme Court's approach effectively ignored some of the statutory elements.

B. PROBABLE CAUSE, SPECIFICITY AND REASONABLENESS

1. The Things That Can Be Seized

Up until 1967, the Court had consistently held that the Fourth Amendment prohibited the government from searching for or seizing anything other than the "fruits and instrumentalities" of a crime. "Mere evidence" of a crime was considered beyond the scope of a permissible Fourth Amendment search. So for example, if officers had probable cause to believe that the defendant was a narcotics dealer, they could search for and seize narcotics and related paraphernalia, but they would not be permitted to look for phone records or storage locker rental agreements, because these things were "mere evidence" of the crime. Obviously, the mere evidence rule severely constricted the scope of a search that a magistrate could authorize.

"mere
evidence
rule"

In the following case, the Warren Court rejected the "mere evidence" limitation—a decision that dramatically expanded the possibilities for law

enforcement, both when searching pursuant to a warrant and when searching pursuant to an exception to the warrant requirement.

WARDEN V. HAYDEN

Supreme Court of the United States, 1967.
387 U.S. 294.

JUSTICE BRENNAN delivered the opinion of the Court.

We review in this case the validity of the proposition that there is under the Fourth Amendment a "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

A Maryland court sitting without a jury convicted respondent of armed robbery. Items of his clothing, a cap, jacket, and trousers, among other things, were seized during a search of his home, and were admitted in evidence without objection. After unsuccessful state court proceedings, he sought and was denied federal habeas corpus relief in the District Court for Maryland. A divided panel of the Court of Appeals for the Fourth Circuit reversed. The Court of Appeals believed that ***
COA respondent was correct in his contention that the clothing seized was improperly admitted in evidence because the items had "evidential value only" and therefore were not lawfully subject to seizure. *** We reverse.

[The Court held that the search of Hayden's house, while without a warrant, was justified by exigent circumstances].

We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are "mere evidence." The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. *** We today reject the distinction as based on premises
H no longer accepted as rules governing the application of the Fourth Amendment.

Nothing in the language of the Fourth Amendment supports the distinction between "mere evidence" and instrumentalities, fruits of crime, or contraband. On its face, the provision assures the "right of the

people to be secure in their persons, houses, papers, and effects . . . ,” without regard to the use to which any of these things are applied. This “right of the people” is certainly unrelated to the “mere evidence” limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. * * * Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same “papers and effects” may be “mere evidence” in one case and “instrumentality” in another.

* * *

The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for “mere evidence” or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of “mere evidence,” probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required. But no such problem is presented in this case. The clothes found * * * matched the description of those worn by the robber and the police therefore could reasonably believe that the items would aid in the identification of the culprit. *

* * *

The rationale most frequently suggested for the rule preventing the seizure of evidence is that “limitations upon the fruit to be gathered tend to limit the quest itself.” But privacy would be just as well served by a restriction on search to the even-numbered days of the month. * * * And it would have the extra advantage of avoiding hair-splitting questions * * *. The “mere evidence” limitation has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of “a neutral and detached magistrate.” The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure “mere evidence” from intrusions to secure fruits, instrumentalities, or contraband.

The judgment of the Court of Appeals is reversed.

JUSTICE BLACK concurs in the result.

(The concurring opinion by JUSTICE FORTAS, joined by CHIEF JUSTICE WARREN, is omitted).

JUSTICE DOUGLAS, dissenting.

*** The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. *** The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

*** I would *** leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. ***

NOTE ON THE MERE EVIDENCE RULE

By abrogating the mere evidence limitation, the *Warden v. Hayden* Court dramatically expanded the search power of police officers. For example, without a mere evidence limitation, an innocent third party's home or office may be the legitimate object of a search; evidence that might be relevant to a crime can be spread far and wide, while the fruits and instrumentalities of a crime are more often kept with the perpetrators. As you proceed through this Chapter, try to determine how the cases discussed would have been resolved under a mere evidence limitation. You will undoubtedly conclude that *Warden v. Hayden* had a fundamental, pro-prosecution effect on Fourth Amendment law.

Does the result in *Warden v. Hayden* comport with your impression of the Warren Court's criminal procedure jurisprudence? See Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 *Drake L.J.* 179 (1993) (noting that the Warren Court's pro-defendant reputation is belied by cases like *Warden v. Hayden*).

2. Probable Cause as to Location of Evidence

Sometimes police have probable cause to believe that a suspect has committed a crime and is in control of certain evidence, but are less sure where the evidence is located. Can they obtain a search warrant for the premises where the suspect lives on the theory that it is the most likely place to search for evidence? The premises where the suspect works? The

places that the suspect frequents? In *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978), the majority stated that “[t]he critical element *** is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” This will depend on “the type of crime, the nature of the items sought, the suspect’s opportunity for concealment and normal inferences about where a criminal might hide” evidence of a crime. See *United States v. Jones*, 994 F.2d 1051 (3d Cir.1993) (sufficient nexus between robbery and defendants’ homes, because items sought, such as cash, were the kinds of things “that criminals like to keep in secure places like their homes”).

It follows that probable cause does not automatically exist to search a person’s home—or any other particular location—simply because that person has been involved in a crime. For example, in *United States v. Lalor*, 996 F.2d 1578 (4th Cir.1993), the court held that a warrant to search Lalor’s residence was invalid because it lacked probable cause. Investigation showed only that Lalor and others sold drugs on the street. The court reasoned that street sales did not raise a fair probability that Lalor kept evidence of drug activity at his house. The court emphasized that the government offered no information to the magistrate that linked the street sales with any activity at Lalor’s house. The court, citing cases, declared that “residential searches have been upheld only where some information links the criminal activity to the defendant’s residence.” Compare *United States v. Pitts*, 6 F.3d 1366 (9th Cir.1993) (finding a sufficient nexus between defendant’s narcotics activity and his home: “in the case of drug dealers, evidence is likely to be found where the dealers live”). See also *United States v. McCoy*, 483 F.3d 862 (8th Cir. 2007) (probable cause to believe that the defendant had child pornography in his house did not establish probable cause to search his car).

3. Searches of Non-Suspects’ Premises

In some investigations, police may have probable cause to search a person’s premises for evidence even though they are not suspected of a crime. That and several other problems arose in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Officers had probable cause to believe that a *Stanford Daily* photographer had taken pictures of demonstrators who attacked a group of police officers. A warrant was obtained to search the *Daily*’s offices for negatives, film, and pictures taken at the demonstration. There was no allegation that members of the *Daily* staff were in any way involved in unlawful acts. The *Daily*’s photographic laboratories, filing cabinets, desks, and wastepaper baskets were searched. Locked drawers and rooms were not opened. No evidence pertinent to the assault on the officers was uncovered. Thereafter, the *Daily* and some members of its staff brought a civil action seeking

declaratory and injunctive relief, alleging that the entry, even though with a warrant, was in violation of the Fourth Amendment.

The lower court in *Zurcher* held that the Fourth Amendment did not permit a warrant to search for materials in possession of one not suspected of a crime, unless it was apparent that a subpoena and a court order would be futile. But the Supreme Court reversed and found the warrant and the search valid, in an opinion by Justice White.

Justice White defined the question presented:

The issue here is how the Fourth Amendment is to be construed and applied to the "third party" search, the recurring situation where state authorities have probable cause to believe that fruits, instrumentalities, or other evidence of crime is located on identified property but do not then have probable cause to believe that the owner or possessor of the property is himself implicated in the crime that has occurred or is occurring.

Justice White declared that there was nothing special about the search of a third party's premises. The question in any case is whether there is probable cause to believe that evidence of a crime will be found in the place to be searched:

Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found. Nothing on the face of the Amendment suggests that a third-party search warrant should not normally issue. The Warrant Clause speaks of search warrants issued on "probable cause" and "particularly describing the place to be searched, and the persons or things to be seized." * * *.

* * *

The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific "things" to be searched for and seized are located on the property to which entry is sought. * * *

Justice White emphasized the practical problems that would arise for law enforcement if search warrants could not be issued for third party premises:

[S]earch warrants are often employed early in an investigation, perhaps before the identity of any likely criminal and certainly before all the perpetrators are or could be known. The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable party that he cannot be relied upon to

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retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. In any event, it is likely that the real culprits will have access to the property, and the delay involved in employing the subpoena *duces tecum*, offering as it does the opportunity to litigate its validity, could easily result in the disappearance of the evidence, whatever the good faith of the third party.

Justice White intimated that the reasonableness clause of the Fourth Amendment might impose some limitations on the execution of a search, even if the search was supported by a warrant issued upon probable cause. However, "the courts may not, in the name of Fourth Amendment reasonableness, forbid the States from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement."

Finally, Justice White rejected the argument that First Amendment concerns required a limitation on the use of warrants to search the office of a newspaper:

There is no reason to believe * * * that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. * * * Nor are we convinced * * * that confidential sources will disappear and that the press will suppress news because of fears of warranted searches.

Justice Stewart, joined by Justice Marshall, dissented in *Zurcher* and argued that the use of a warrant to search a newspaper constituted an infringement on First Amendment rights.

Justice Stevens wrote a separate dissent, in which he noted that the problem of third party searches had been created by "the profound change in Fourth Amendment law that occurred in 1967, when *Warden v. Hayden* was decided." He elaborated as follows:

In the pre-*Hayden* era warrants were used to search for contraband, weapons, and plunder, but not for "mere evidence." The practical effect of the rule prohibiting the issuance of warrants to search for mere evidence was to narrowly limit not only the category of objects, but also the category of persons and the character of the privacy interests that might be affected by an unannounced police search.

Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder. Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.

Justice Stevens argued that a “showing of probable cause that was adequate to justify the issuance of a warrant to search for stolen goods in the 18th century does not automatically satisfy the new dimensions of the Fourth Amendment in the post-*Hayden* era.” He concluded that “[t]he only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search.” As there was nothing in the warrant application to indicate that the Daily would destroy evidence, Justice Stevens contended that the search, even though pursuant to a warrant, was unreasonable.

Congress responded to *Zurcher* by enacting the Privacy Protection Act of 1980, 42 U.S.C. § 2000 aa-6(f), which limited searches of the media and the press.

4. Describing the Place to Be Searched

The warrant clause requires a particularized description of the place to be searched. The Colonial experience with general warrants was the major reason for including the Fourth Amendment in the Bill of Rights; the particularity requirement is designed to protect against the abuses of a general warrant, i.e., a warrant giving authority to an officer to search wherever the officer wants.

Function of the Particularity Requirement

The requirement of a particular description of the place to be searched provides at least three protections:

First, if the executing officer has no knowledge of the underlying facts, the particular description of the premises in the warrant operates

as a necessary control on his discretion. We would not want an unknowing officer, armed with a single search warrant, to search every "house on Second Avenue," for example. See, e.g., *United States v. Nafzger*, 965 F.2d 213 (7th Cir.1992) ("By accepting 'the Western District of Wisconsin' as a particular description of the place the truck was to be found we would be giving the government carte blanche to search anywhere in that district that the truck might conceivably be found, condoning the use of the pernicious general warrant, and redacting the particularity requirement from the fourth amendment."). See also *United States v. Stefonek*, 179 F.3d 1030 (7th Cir.1999) (particularity requirement is necessary to "make sure that the law enforcement officer who executes the warrant stays within the bounds set by the issuer").

Second, even if the executing officer knows the place she wants to search, the particular description in the warrant establishes a specific record of probable cause as to location *prior* to the search. The officer is not permitted, after the fact, to construct the case that would have supported probable cause to search the place she eventually chose.

Finally, the particularity requirement prevents the officer from using the warrant as a blank check to expand a search of a location by relying on an overly general description of the place to be searched. See, e.g., *United States v. Cannon*, 264 F.3d 875 (9th Cir. 2001) (warrant to search a house did not permit officers to search a building that was unconnected to the house).

Reasonable Particularity

The Fourth Amendment requires that the warrant must set forth the location of the place to be searched with reasonable particularity. Technical precision is not required in all cases. The degree of particularity that is reasonable depends on the nature of the place to be searched and on the information that an officer could reasonably obtain about the location before a warrant is issued.

For example, it is well accepted that "two or more apartments in the same building stand on the same footing as two or more houses. A single warrant cannot describe an entire building when cause is shown for searching only one apartment." *Moore v. United States*, 461 F.2d 1236, 1238 (D.C.Cir.1972). But in *Maryland v. Garrison*, 480 U.S. 79 (1987), the Court upheld a warrant authorizing the search of a "third floor apartment" even though there were actually two apartments on the third floor. Baltimore police officers had probable cause to believe that illegal activity was being conducted in an apartment on the third floor of a four-story building, and they conducted an investigation to determine whether there was more than one apartment on the floor. An officer obtained information from the utility company and telephone company that

appeared to indicate that the entire third floor consisted of one apartment. The officer checked out the door buzzers outside the apartment building, but they did not indicate how many apartments were on any particular floor—there were seven apartments listed, without specifying the floor, in the four-story building. The officer then obtained a warrant that authorized the search of the “third floor apartment.” After entering the apartment building, the officers eventually found that there were two apartments on the third floor, with one door to both apartments, and a shared entryway. McWebb, the suspect, occupied one of the apartments, and Garrison occupied the other. Before the officers realized that they were mistakenly in Garrison’s apartment, they discovered contraband leading to Garrison’s arrest and used at his trial to obtain his conviction.

The Court in *Garrison*, in an opinion written by Justice Stevens for six Justices, held that the description in the warrant of the place to be searched was sufficiently particular. Justice Stevens reasoned as follows:

Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude [Garrison’s] apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. * * * The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. On the basis of that information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.⁹

Compare *United States v. Johnson*, 26 F.3d 669 (7th Cir.1994), where the warrant authorized the search of an entire duplex occupied by several members of a narcotics conspiracy. Even though the officer was aware that it was a multiple dwelling, the court upheld the warrant as sufficiently particular:

The defendant argues that in “multiple dwelling” cases we must suppress all the evidence seized pursuant to the overbroad warrant. While that may be true when the warrant authorizes the search of an

⁹ Of course, a validly issued warrant may be improperly executed. In *Garrison*, however, the Court found that the officers acted reasonably, though mistakenly, by searching Garrison’s apartment, because the layout of the two apartments made it appear as if it actually was a single apartment. By the time the officers discovered that there were two separate apartments (presumably when they found two kitchens) they had already discovered the evidence that was used against Garrison.

entire structure and the officers do not know which unit contains the evidence of illegal conduct, that analysis does not apply when (1) the officer knows that there are multiple units and believes there is probable cause to search each unit, or (2) the targets of the investigation have access to the entire structure.

Single family dwellings usually present less of a problem of particular description than the multi-family dwellings discussed above. In urban areas, a street address is considered sufficiently particular. In rural areas, less particularized descriptions may be reasonable due to the absence of street addresses. See *United States v. Dorrrough*, 927 F.2d 498 (10th Cir.1991) (warrant sufficiently particular where it describes a well-marked turnoff leading to the house, a quarter mile up a mountain, and the defendant's house is the only one up the mountain). The ultimate question is "whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched." *United States v. Pelayo-Landero*, 285 F.3d 491 (6th Cir. 2002) (trailer home sufficiently described where directions are given to the trailer park and the warrant describes the particular trailer by color, by a certain exterior trim and by a wooden deck).

The Wrong Address

In some cases, warrants have misdescribed an address. These mistakes arise most often where a building is on a corner or is set back from a street. The fact that the warrant is for the wrong address will not be dispositive if the warrant sufficiently directs the officer to the correct premises. For example, in *Lyons v. Robinson*, 783 F.2d 737 (8th Cir.1985), the warrant listed the place to be searched as 325 Adkinson Street; Lyons' residence was actually 325 Short Street, on the corner of Short and Adkinson. The *Lyons* Court stated that the description, though inaccurate, was sufficiently particular because it made it unlikely under the circumstances that another premises might be mistakenly searched.

The Breadth of the Place to Be Searched

The cases discussed above deal with whether the warrant sufficiently describes the location of the premises to be searched. A different particularity question that sometimes arises is whether the warrant sufficiently describes particular places in the general area to be searched. For example, if the warrant authorizes the search of the "premises" at 1825 Elm Street, do the police have the authority to search a freestanding garage behind the house at that address?

In *United States v. Earls*, 42 F.3d 1321 (10th Cir.1994), the court held that a warrant to search "the premises" at a particular location covered a detached garage, a shed, and an office, each of which was located within the curtilage of the house described in the warrant. See also *United States v. Kyles*, 40 F.3d 519 (2d Cir.1994) (warrant to search an apartment authorized the agent to search the defendant's locked bedroom, even though the defendant was not named as a suspect; the room was not a separate residence outside the scope of the warrant).

One of the most difficult problems for the courts has been the scope of the search of the property of *persons* who happen to be on the premises that are being searched pursuant to a warrant. Most courts have held that *any* person's property is subject to search so long as the property could physically contain the items described in the warrant. *United States v. Gonzalez*, 940 F.2d 1413 (11th Cir.1991) (upholding the search of a visitor's briefcase capable of concealing evidence sought in the warrant).

All of these scope rulings are simply an application of the principle that a warrant permitting a search of a house or a building authorizes the police to search anywhere within the building (or curtilage) that is large enough to contain the evidence the police are looking for. The scope of the authority to search a described area is set forth in colorful language by Judge Posner in *United States v. Evans*, 92 F.3d 540 (7th Cir.1996):

If they are looking for a canary's corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less.

In *Evans*, the defendant objected to the search of the trunk of his car, which was parked in the detached garage of a house. The warrant authorized a search for drugs in both the house and detached garage. Evans complained, among other things, that he resided at the house (and parked his car there) only intermittently. But Judge Posner found no problem with the search:

It seems to us that a car parked in a garage is just another interior container, like a closet or a desk. If, as in this case, the trunk or glove compartment is not too small to hold what the search warrant authorizes the police to look for, they can search the trunk and the glove compartment. * * * It does not matter whose [car] it is unless it obviously belonged to someone wholly uninvolved in the criminal activities going on in the house. If an innocent guest leaves a trunk in the host's house and the police obtain a search warrant to search the house for something small enough to fit in the trunk, then, unless it is apparent that the trunk does not belong to anyone

scope
of
warrant X

connected with the illegal activity—a condition that will rarely be satisfied—the police can search the trunk and if it happens to contain evidence that the guest is a criminal after all, albeit innocent of any involvement in the criminal activities of his host, he is out of luck.

How could it ever be apparent that a trunk does not belong to someone connected with illegal activity like drugs which can be stored in any type of container?

5. Particularity for Arrest Warrants

An arrest warrant must describe the person to be seized with sufficient particularity. Does the fact that the officers have probable cause to arrest a person mean that the person can be specifically described? Is a warrant authorizing the arrest of "John Doe a/k/a Ed" sufficiently particular? The court in *United States v. Doe*, 703 F.2d 745 (3d Cir.1983), held that such a warrant was overbroad, and held further that the insufficient description was not cured by the fact that the officer who executed the warrant had independent personal knowledge that the arrestee was the person for whom the warrant was intended. Why doesn't the officer's personal knowledge solve the problem? Would the warrant have been sufficiently particular if it described "John Doe, a/k/a Ed, a white male six feet tall and 200 pounds"?

6. Describing the Things to Be Seized

The warrant clause mandates that a warrant, to be valid, must particularly describe the things that the officers can look for and seize. In essence, this particularity requirement operates to limit the possibility of a general warrant on a particular premises. But how does one determine whether a warrant's description of the things to be seized is sufficiently particular? The following case is the Supreme Court's major pronouncement on the particularity requirement as applied to the things to be seized.

ANDRESEN V. MARYLAND

Supreme Court of the United States, 1976.
427 U.S. 463.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

* * *

In early 1972, a Bi-County Fraud Unit, acting under the joint auspices of the State's Attorneys' Offices of Montgomery and Prince George's Counties, Md., began an investigation of real estate settlement activities in the Washington, D.C., area. At the time, petitioner Andresen was an attorney who * * * specialized in real estate settlements in

Montgomery County. During the Fraud Unit's investigation, his activities came under scrutiny, particularly in connection with a transaction involving Lot 13T in the Potomac Woods subdivision of Montgomery County. The investigation *** disclosed that petitioner, acting as settlement attorney, had defrauded Standard-Young Associates, the purchaser of Lot 13T. Petitioner had represented that the property was free of liens and that, accordingly, no title insurance was necessary, when in fact, he knew that there were two outstanding liens on the property. In addition, investigators learned that the lienholders, by threatening to foreclose their liens, had forced a halt to the purchaser's construction on the property. When Standard-Young had confronted petitioner with this information, he responded by issuing, as an agent of a title insurance company, a title policy guaranteeing clear title to the property. By this action, petitioner also defrauded that insurance company by requiring it to pay the outstanding liens.

The investigators *** applied for warrants to search petitioner's law office and the separate office of Mount Vernon Development Corporation, of which petitioner was incorporator, sole shareholder, resident agent, and director. The application sought permission to search for specified documents pertaining to the sale and conveyance of Lot 13T. A judge *** concluded that there was probable cause and issued the warrants.

The searches of the two offices were conducted simultaneously during daylight hours on October 31, 1972. [The searches took a number of hours; approximately 4% of Andresen's files were seized.]

[Petitioner contends] that rights guaranteed him by the Fourth Amendment were violated because the descriptive terms of the search warrants were so broad as to make them impermissible "general" warrants ***.

The specificity of the search warrants. Although petitioner concedes that the warrants for the most part were models of particularity, he contends that they were rendered fatally "general" by the addition, in each warrant, to the exhaustive list of particularly described documents, of the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." The quoted language, it is argued, must be read in isolation and without reference to the rest of the long sentence at the end of which it appears. When read "properly," petitioner contends, it permits the search for and seizure of any evidence of any crime.

*** [T]he challenged phrase must be read as authorizing only the search for and seizure of evidence relating to "the crime of false pretenses with respect to Lot 13T." The challenged phrase is not a separate

sentence. Instead, it appears in each warrant at the end of a sentence containing a lengthy list of specified and particular items to be seized, all pertaining to Lot 13T.^a We think it clear from the context that the term "crime" in the warrants refers only to the crime of false pretenses with respect to the sale of Lot 13T. The "other fruits" clause is one of a series that follows the colon after the word "Maryland." All clauses in the series are limited by what precedes that colon, namely, "items pertaining to * * * lot 13, block T." The warrants, accordingly, did not authorize the executing officers to conduct a search for evidence of other crimes but only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T.^b

Petitioner also suggests that the specific list of the documents to be seized constitutes a "general" warrant. We disagree. Under investigation was a complex real estate scheme whose existence could be proved only by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact among those papers authorized to be seized. Similar dangers, of course, are

^a "[T]he following items pertaining to sale, purchase, settlement and conveyance of lot 13, block T, Potomac Woods subdivision, Montgomery County, Maryland:

"title notes, title abstracts, title rundowns; contracts of sale and/or assignments from Raffaele Antonelli and Rocco Caniglia to Mount Vernon Development Corporation and/or others; lien payoff correspondence and lien payoff memoranda to and from lienholders and noteholders; correspondence and memoranda to and from trustees of deeds of trust; lenders instructions for a construction loan or construction and permanent loan; disbursement sheets and disbursement memoranda; checks, check stubs and ledger sheets indicating disbursement upon settlement; correspondence and memoranda concerning disbursements upon settlement; settlement statements and settlement memoranda; fully or partially prepared deed of trust releases, whether or not executed and whether or not recorded; books, records, documents, papers, memoranda and correspondence, showing or tending to show a fraudulent intent, and/or knowledge as elements of the crime of false pretenses, in violation of Article 27, Section 140, of the Annotated Code of Maryland, 1957 Edition, as amended and revised, together with other fruits, instrumentalities and evidence of crime at this [time] unknown."

^b The record discloses that the officials executing the warrants seized numerous papers that were not introduced into evidence. Although we are not informed of their content, we observe that to the extent such papers were not within the scope of the warrants or were otherwise improperly seized, the State was correct in returning them voluntarily and the trial judge was correct in suppressing others.

present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

MR. JUSTICE BRENNAN, dissenting.

*** After a lengthy and admittedly detailed listing of items to be seized, the warrants in this case further authorized the seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown." The Court construes this sweeping authorization to be limited to evidence pertaining to the crime of false pretenses with respect to the sale of Lot 13T. *** The question is not how those warrants are to be viewed in hindsight, but how they were in fact viewed by those executing them. The overwhelming quantity of seized material that was either suppressed or returned to petitioner is irrefutable testimony to the unlawful generality of the warrants. The Court's attempt to cure this defect by *post hoc* judicial construction evades principles settled in this Court's Fourth Amendment decisions. ***

[JUSTICE MARSHALL also dissented, agreeing with Justice Brennan's Fourth Amendment analysis.]

NOTE ON ANDRESEN AND PARTICULARITY

Justice Blackmun reads the last portion of the *Andresen* warrant as authorizing the police "only to search for and seize evidence relevant to the crime of false pretenses and Lot 13T." Justice Brennan complains that the police reasonably believed the warrant was broader and authorized a search for evidence of other crimes. If a warrant is drafted in such a way that it is subject to two readings, one which would render it valid and another which would invalidate it, should a reviewing court adopt the reading that the police give the warrant, or the reading that the reviewing court believes that the magistrate, presumed to be acting constitutionally, intended? Which approach is more in line with the goals of the Fourth Amendment?

Searches of Computers

The Court in *Andresen* notes that in a search for documents, it is all but inevitable that the police will be required to peruse innocuous private documents. That problem frequently arises when the police search for information stored in a computer. Even a requirement of reasonable particularity will not shield most information stored in a computer from inspection, where police have probable cause to believe that incriminating evidence is somewhere on the hard drive.

Assume, for example, that an officer has a warrant to search for child pornography stored on a computer. In his search, he comes across a folder labeled "grocery lists." Can he open the folder? The answer generally given by the courts is, yes—otherwise a criminal could shield incriminating information from view simply by labeling the folder in a certain way. But this means that the search of the computer will by necessity be extensive and thorough, covering all files, including "cookies", history, deleted files, etc. See *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001) (officers with a warrant to search information located on a computer are permitted to seize the computer and conduct a thorough search of all files on the computer, as they are allowed to separate relevant files from unrelated files). As the court put it in *United States v. Adjani*, 452 F.3d 1140 (9th Cir. 2006), a case in which the defendant complained that the warrant should have restricted the search to a particular email program and specific search terms:

Computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of Adjani's * * * labeling of the files documenting Adjani's criminal activity. The government should not be required to trust the suspect's self-labeling when executing a warrant.

See also *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008) ("While officers ought to exercise caution when executing the search of a computer, just as they ought when sifting through documents that may contain personal information, the potential intermingling of materials does not justify an exception or heightened protection for computers beyond the Fourth Amendment's reasonableness requirement."); *United States v. Hill*, 459 F.3d 966 (9th Cir. 2006) (no requirement to search only those computer files most likely to contain the documents to be seized: "Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent. Images can be hidden in all manner of files, even word processing documents and spreadsheets. Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer."); *United States v. Triplett*, 684 F.3d 500 (5th Cir. 2012) ("Although officers should limit exposure to innocent files, in the end, there may be no practical substitute for actually looking in many (perhaps all) folders, and sometimes at the documents contained within those folders".).

One of the most helpful discussions of the particularity requirement as applied to computers is found in *United States v. Richards*, 659 F.3d 527 (6th Cir. 2011), a case involving the search of an entire server when there was probable cause to believe that Richards was involved in child pornography:

Courts that have addressed the permissible breadth of computer-related searches have grappled with how to balance two interests that are in tension with each other. On one hand, it is clear that because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required. On the other hand, granting the Government a *carte blanche* to search *every* file on the hard drive impermissibly transforms a limited search into a general one. * * * [G]iven the unique problem encountered in computer searches, and the practical difficulties inherent in implementing universal search methodologies, the majority of federal courts have eschewed the use of a specific search protocol and, instead, have employed the Fourth Amendment's bedrock principle of reasonableness on a case-by-case basis: "While officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant, . . . a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause." *United States v. Burgess*, 576 F.3d 1078, 1092 (10th Cir. 2009). We agree with the Tenth Circuit in *Burgess* that it is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives. One would not ordinarily expect a warrant to search filing cabinets for evidence of drug activity to prospectively restrict the search to "file cabinets in the basement" or to file folders labeled "Meth Lab" or "Customers." And there is no reason to so limit computer searches. But that is not to say methodology is irrelevant.

A warrant may permit only the search of particularly described places and only particularly described things may be seized. As the description of such places and things becomes more general, the method by which the search is executed becomes more important—the search method must be tailored to meet allowed ends. And those limits must be functional. For instance, unless specifically authorized by the warrant there would be little reason for officers searching for evidence of drug trafficking to look at tax returns (beyond verifying the folder labeled "2002 Tax Return" actually contains tax returns and not drug files or trophy pictures).

Respect for legitimate rights to privacy in papers and effects requires an officer executing a search warrant to first look in the most obvious places and as it becomes necessary to progressively move from the obvious to the obscure. That is the purpose of a search protocol which structures the search by requiring an analysis of the file structure, next looking for suspicious file folders, then looking for

files and types of files most likely to contain the objects of the search by doing keyword searches.

But in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files.

Consistent with this rule, the federal courts have not required a second warrant to search a properly seized computer where the evidence obtained in the search did not exceed the probable cause articulated in the original warrant.

Applying a reasonableness analysis on a case-by-case basis, the federal courts have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers. * * * In other words, in general, so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence.

In *Richards*, the defendant argued that the warrant to search the entire server was overbroad because he had set it up "in a neatly compartmentalized and segregated fashion, rendering it entirely unnecessary to search beyond the content maintained in the JustinsFriends file directory." But the court responded that "hindsight is 20/20" and also that a forensic evidence procedure could uncover "hidden, erased, compressed, password-protected or encrypted files." Therefore, "searching the entire server was necessary to look for child pornography related to the JustinsFriends websites because individuals often mislabel directory files, the server might contain related websites, and the unallocated server space might contain materials pertaining to those websites."

Compare *United States v. Galpin*, 720 F.3d 436 (2nd Cir. 2013) ("Once the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant. Thus there is a serious risk that every warrant for electronic information will become, in effect, a general warrant * * *. This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches.").

Reasonable Particularity

Ultimately, the particularity question with respect to items to be seized is one of reasonableness. "While a search warrant must describe items to be seized with reasonable particularity sufficient to prevent a general, exploratory rummaging in a person's belongings, it need only be reasonably specific, rather than elaborately detailed, and the specificity required varies depending on the circumstances of the case and the type of items involved." *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003).

Some property may not be susceptible to anything more than a general description (e.g., "United States currency"). Other property may be reasonably susceptible to a detailed description (e.g., a description of a gun as a murder weapon ordinarily should include the caliber of the gun, whether it is a handgun or shotgun, etc.). The reasonableness inquiry takes into account how much an officer would be expected to know about the property in the course of obtaining probable cause to seize it. See *United States v. Fuccillo*, 808 F.2d 173 (1st Cir.1987) (warrant to seize "stolen clothing" held insufficiently particular where officers were given a detailed list of the articles stolen before applying for the warrant). Compare *United States v. Upham*, 168 F.3d 532 (1st Cir.1999) (in a child pornography case, a description of the property to be seized as "any and all visual depictions, in any format or media, or minors engaged in sexually explicit conduct" was sufficiently particular because the officers could not be expected to describe the materials with any more specificity).

In *United States v. Strand*, 761 F.2d 449 (8th Cir.1985), postal inspectors suspected that Strand, a mail carrier, was stealing items from the mail. They obtained a warrant authorizing the seizure of "stolen mail" from Strand's house. The court held that some items seized from Strand's home were legally obtained, others illegally obtained. The court explained as follows:

We believe that the term "stolen mail" is sufficiently definite to enable a postal inspector to identify and seize items which clearly fit within such a generic class, such as letters and parcels, neither addressed to nor sent by the person whose property is being searched, bearing postage stamps or marks. A search for "stolen mail" does not, however, permit the seizure of items which do not fit into the generic category. Many of the items seized in the present case under the rubric of stolen mail were not found in parcels of mail, and included items such as socks, a sweatshirt, cosmetics, a sweater, a thermometer, a china plate, and gloves; * * *

Has the court in *Strand* given the searching officers too much or too little discretion to determine whether an item constitutes "stolen mail"? See also *United States v. Bridges*, 344 F.3d 1010 (9th Cir. 2003) (warrant was

overbroad where it did not specify the criminal activity that was being investigated, and yet set forth "a comprehensive laundry list of sundry goods and inventory that one would readily expect to discover in any small or medium-sized business in the United States").

Severability

Even if a clause in the warrant is overbroad, the defect will not ordinarily taint the entire search. Thus, in *United States v. Brown*, 984 F.2d 1074 (10th Cir.1993), a warrant to search a vehicle dismantling business described with particularity over forty items, including "bumpers, grills, fenders, hoods * * * blank registration forms", etc. But a catch-all clause was included to permit seizure of "[a]ny other item which the Officers determine or have reasonable belief is stolen while executing this search warrant." The Court held that the catch-all provision was overbroad. But this did not taint the evidence seized pursuant to the particular descriptions in the warrant. The Court stated:

At least eight circuits have held that where a warrant contains both specific as well as unconstitutionally broad language, the broad portion may be redacted and the balance of the warrant considered valid. In such cases only those items confiscated under the overbroad portion of the warrant are suppressed.

7. Reasonableness Limitations on Warranted Searches

A magistrate cannot issue a warrant that violates the reasonableness portion of the Fourth Amendment.

There are a few cases in which searches have been found unreasonable even though conducted with a warrant and probable cause. Most of these cases involve medical procedures. For example, in *Winston v. Lee*, 470 U.S. 753 (1985), the defendant had been wounded in the course of committing a robbery. The state obtained a court order forcing the defendant to undergo surgery under a general anesthetic to remove a bullet lodged at least 2.5 to 3 centimeters beneath the surface of his skin; the state clearly had probable cause that the search would uncover evidence, and had obtained a court order authorizing the procedure (tantamount to a warrant), but the defendant argued that the procedure was still unreasonable under the Fourth Amendment. Justice Brennan, writing for the Court, agreed with the defendant. He noted that the medical risks of the operation were disputed, and reasoned that the uncertainty militated against a finding that the operation was a reasonable search. Moreover, the Commonwealth failed to show a compelling need for the bullet, as it had substantial other evidence tying the defendant to the robbery and could offer evidence of the location of the bullet in the defendant's body.

It is possible, in light of Supreme Court cases like *Lee, Griswold v. Connecticut*, 381 U.S. 479 (1965) (asking “[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”), and *Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of obscene material in home constitutionally protected), that some magistrates might decline to issue warrants that would invade areas that traditionally have been regarded as off limits to the government. Similarly, some magistrates might decide that the scope of a warrant is too broad, even though there is probable cause to search and a particularized description of the things to be seized (e.g., a requested authorization to seize all books and records).

8. Details of the Warrant

Federal Rule of Criminal Procedure 41(e)(2)(A) sets forth the basic information that must be included in the warrant:

[T]he warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned. The warrant must command the officer to:

(i) execute the warrant within a specified time no longer than 14 days;

(ii) execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time; and

(iii) return the warrant to the magistrate judge designated in the warrant.

Daytime means the hours from 6:00 a.m. to 10:00 p.m. according to local time. Fed.R.Crim.P. 41(a)(2)(B). Searches for narcotics, however, are covered by a specific statute that “requires no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at the time.” *Gooding v. United States*, 416 U.S. 430 (1974) (citing 21 U.S.C. § 879). See also *United States v. Rizzi*, 434 F.3d 669 (4th Cir. 2006) (federal statute authorizing nighttime searches for narcotics was not unconstitutionally overbroad; the Fourth Amendment does not prohibit nighttime searches, and intrusion on privacy during daytime activities could be just as burdensome as a nighttime intrusion).

9. Anticipatory Warrants

Can government agents obtain an “anticipatory” search warrant conditioned upon future events that, if fulfilled, would create probable cause? In *United States v. Grubbs*, 547 U.S. 90 (2006), the Court held

that a warrant is not invalid simply because it is contingent on a future occurrence. *Grubbs* involved an investigation into receipt of child pornography. Law enforcement officers obtained a search warrant for Grubbs's house on the basis of an affidavit explaining that the warrant would be executed only after a controlled delivery of child pornography to that location. Specifically, the affidavit stated:

"Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence. . . . At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command."

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector delivered the package. Then a search of the house was conducted pursuant to the warrant.

Justice Scalia, writing for the Court, had this to say about the use and constitutionality of anticipatory warrants:

An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so-called "triggering condition." * * * If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued. *Grubbs* argues that for this reason anticipatory warrants contravene the Fourth Amendment's provision that "no Warrants shall issue, but upon probable cause."

We reject this view, as has every Court of Appeals to confront the issue. Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. Because the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. * * * Thus, when an anticipatory warrant is issued, the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as

there is probable cause to believe that it will be there when the search warrant is executed.

Justice Scalia then set forth the requirements for a valid anticipatory warrant.

Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed. It should be noted, however, that where the anticipatory warrant places a condition (other than the mere passage of time) upon its execution, the first of these determinations goes not merely to what will probably be found *if* the condition is met. (If that were the extent of the probability determination, an anticipatory warrant could be issued for every house in the country, authorizing search and seizure *if* contraband should be delivered—though for any single location there is no likelihood that contraband will be delivered.) Rather, the probability determination for a conditioned anticipatory warrant looks also to the likelihood that the condition will occur, and thus that a proper object of seizure will be on the described premises. In other words, for a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition *will occur*. The supporting affidavit must provide the magistrate with sufficient information to evaluate both aspects of the probable-cause determination.

Justice Scalia then applied these requirements to the warrant issued in *Grubbs*.

In this case, the occurrence of the triggering condition—successful delivery of the videotape to Grubbs' residence—would plainly establish probable cause for the search. In addition, the affidavit established probable cause to believe the triggering condition would be satisfied. Although it is possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely. The Magistrate therefore had a substantial basis for concluding that probable cause existed.

Justice Souter, joined by Justices Stevens and Ginsburg, concurred in part and in the judgment. Justice Alito took no part in the decision.

10. "Sneak and Peek" Warrants

Fed.R.Crim.P. 41(f)(1)(C) requires that an officer executing a warrant must give a copy to the person whose premises is searched. Thus, secret searches are generally prohibited. But Rule 41(f)(3) provides that a judge may delay any notice "if the delay is authorized by statute." And in reaction to the events of 9/11, there is now statutory authority for secret searches in some circumstances.

Section 213 of Public Law 107-56, 115 Stat. 272, the "Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA Patriot Act) Act of 2001," authorizes so-called "sneak and peek" warrants in certain situations. These warrants permit federal agents to enter a person's home or office covertly. The government can delay notice of a search if it can show "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result." "Adverse result" is defined as (1) endangering the life or physical safety of an individual, (2) flight from prosecution, (3) destruction of or tampering with evidence, (4) intimidation of potential witnesses, or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial. The government can also seize items without notice if it can show a "reasonable necessity" for the seizure.

Under what circumstances would it be necessary to employ a sneak and peek warrant?

C. EXECUTING THE WARRANT

1. The Knock and Announce Requirement

Statutes throughout the country require that officers executing a warrant knock and announce their presence before attempting to enter a dwelling. Typical of these statutes is 18 U.S.C.A. § 3109.

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

The purposes of the knock and announce requirement are set forth by the court in *United States v. Contreras-Ceballos*, 999 F.2d 432 (9th Cir.1993):

The requirement that law enforcement officers give notice of their authority and purpose prior to forcing entry to execute a warrant serves three purposes: it protects citizens and law enforcement

officials from violence; it protects individual privacy rights; and it protects against needless destruction of private property.

Constitutional Basis of the Knock and Announce Requirement

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), the Court considered whether the Fourth Amendment requires the police to announce their presence before entering a premises. Justice Thomas, writing for a unanimous Court, surveyed the common-law precedents and concluded as follows:

Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. * * * [W]e hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

Justice Thomas stressed, however, that the announcement rule was not a rigid constitutional requirement, but rather a component of the Fourth Amendment reasonableness inquiry. He stated that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." Among the countervailing circumstances that might permit an unannounced entry, the Court mentioned hot pursuit of a suspect, the risk of destruction of evidence, and the safety of officers. Justice Thomas concluded as follows:

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

The Court remanded to allow the state courts to determine whether circumstances existed sufficient to excuse the fact that officers entered Wilson's home without announcing their presence.

"Refused Admittance"

An officer can break open premises if he has announced his authority and purpose and is refused admittance. Clearly, if the homeowner says "you can't come in", this will justify a forced entry with a warrant. But refused admittance may also be implied from the circumstances. Thus, in

United States v. Knapp, 1 F.3d 1026 (10th Cir.1993), officers smashed down the defendant's door with a battering ram after announcing their presence and waiting in vain for twelve seconds for a response from the defendant, whom they knew was inside. The court found that the failure to respond within twelve seconds constituted a refusal of entry. The court noted that "the phrase 'refused admittance' is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal." On the other hand, in United States v. Moore, 91 F.3d 96 (10th Cir.1996), the officers announced their presence, waited three seconds, and when they got no response, they entered the premises by force. The court found that the forced entry was "virtually instantaneous" with the announcement and that this "precluded any claim that the officers were constructively refused admittance."

Courts have held that citizens should be allowed more time to answer the door when the warrant is executed in the nighttime hours—and accordingly the time can be reduced during the day. See United States v. Jenkins, 175 F.3d 1208 (10th Cir.1999) (where officers waited for 14 seconds after twice announcing their presence, a forced entry was reasonable; the required waiting period "was somewhat reduced because the officers executed the warrant at 10:00 a.m., when most people are awake and engaged in everyday activities."). Another relevant factor is whether the residence is small or large. See United States v. Sargent, 319 F.3d 4 (1st Cir. 2003) (lack of response for five seconds was especially significant, and deemed to be refused admittance, given the small size of the defendant's apartment).

2. Exceptions to the Notice Rule

No "Breaking"

If the door to a residence is already open, police are not required to announce their presence before entering, because the prohibition is against a "breaking" of the door. See United States v. Mendoza, 281 F.3d 712 (8th Cir. 2002) (police officers are not required to knock on the front door of a duplex, as the door opened to a common hallway as to which the defendant had no legitimate expectation of privacy; and they were not required to knock before entering the defendant's own apartment, as that apartment did not have a door on it).

Courts have also held that if the officer can trick the homeowner into opening the door, there is no violation of the knock and announce requirement, because there is no "breaking." See United States v. Alejandro, 368 F.3d 130 (2d Cir. 2004) (officers pretended that they were employees of a utility company checking out a gas leak; when the

defendant opened the door and the officers entered, there was no violation of the knock and announce requirement because there was no breaking).

Emergency Circumstances: Richards v. Wisconsin

As the Supreme Court stated in *Wilson*, supra, officers will be permitted to make an unannounced entry if announcement would create a risk of destruction of evidence or a risk of harm to the officers or others. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court considered the exigent circumstances exception to the knock and announce requirement in the context of a search of the premises of a suspected drug distribution operation. Justice Stevens, writing for the Court, set forth the facts of the case:

On December 31, 1991, police officers in Madison, Wisconsin obtained a warrant to search Steiney Richards' hotel room for drugs and related paraphernalia. The search warrant was the culmination of an investigation that had uncovered substantial evidence that Richards was one of several individuals dealing drugs out of hotel rooms in Madison. The police requested a warrant that would have given advance authorization for a "no-knock" entry into the hotel room, but the magistrate explicitly deleted those portions of the warrant.

The officers arrived at the hotel room at 3:40 a.m. Officer Pharo, dressed as a maintenance man, led the team. With him were several plainclothes officers and at least one man in uniform. Officer Pharo knocked on Richards' door and, responding to the query from inside the room, stated that he was a maintenance man. With the chain still on the door, Richards cracked it open. Although there is some dispute as to what occurred next, Richards acknowledges that when he opened the door he saw the man in uniform standing behind Officer Pharo. He quickly slammed the door closed and, after waiting two or three seconds, the officers began kicking and ramming the door to gain entry to the locked room. At trial, the officers testified that they identified themselves as police while they were kicking the door in. When they finally did break into the room, the officers caught Richards trying to escape through the window. They also found cash and cocaine hidden in plastic bags above the bathroom ceiling tiles.

The Wisconsin Supreme Court had held that the knock and announce requirement was automatically excused in any case in which the police were authorized to search for evidence of a felony drug crime. That court, in establishing a bright-line rule, reasoned that exigent circumstances justifying a no-knock entry are virtually always present in felony drug cases, due to the high risk of destruction of evidence and the likelihood that drug dealers will be armed and dangerous. But the Supreme Court

rejected this per se exigent circumstances exception to the knock and announce requirement. Justice Stevens reasoned as follows:

The Wisconsin court explained its blanket exception as necessitated by the special circumstances of today's drug culture, and the State asserted at oral argument that the blanket exception was reasonable in "felony drug cases because of the convergence in a violent and dangerous form of commerce of weapons and the destruction of drugs." But creating exceptions to the knock-and-announce rule based on the "culture" surrounding a general category of criminal behavior presents at least two serious concerns.

First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry. Wisconsin's blanket rule impermissibly insulates these cases from judicial review.

A second difficulty with permitting a criminal-category exception to the knock-and-announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others. Armed bank robbers, for example, are, by definition, likely to have weapons, and the fruits of their crime may be destroyed without too much difficulty. If a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless.

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

The Court's rejection of a *per se* exigent circumstances rule did not mean that the no-knock entry in *Richards* was unreasonable. Balancing the interests of the state and the individual, the Court set the standard of exigency that would be sufficient to justify a no-knock entry:

In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Terry v. Ohio*, (requiring a reasonable and articulable suspicion of danger to justify a pat-down search). This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

Thus, officers do not need probable cause to believe that evidence will be destroyed if they announce their presence. The lesser standard of reasonable suspicion is all that is required. Applying this standard to the facts of the case, the Court had little difficulty in determining that the no-knock entry in *Richards* was justified.

For other cases finding reasonable suspicion of exigent circumstances justifying a no-knock entry, see *United States v. Sutton*, 336 F.3d 550 (7th Cir. 2003) (information that pit bulls had been seen on the property and that individuals with drug or weapons convictions had been seen entering the home, when added to the lack of cover for officers approaching the home, gave officers reasonable suspicion that compliance with the knock and announce requirement might place them in danger); *United States v. Weeks*, 160 F.3d 1210 (8th Cir. 1998) (no-knock entry of drug stash house was justified where officers were informed that the residents answered the door with guns in their hands, one of the residents had been convicted of a firearms offense, and the front door was braced). Compare *United States v. Nielson*, 415 F.3d 1195 (10th Cir. 2005) (circumstances did not justify a no-knock entry to execute a warrant to search for drugs at the residence of a defendant who 1) had no history of violence, 2) was not involved in trafficking drugs, and 3) had cooperated with police during a previous search).

No-Knock Warrants

The officers in *Richards* asked the magistrate for a no-knock warrant, i.e., a warrant that provided advance authorization excusing the knock and announce requirement. The magistrate refused to issue such a

warrant, but that is not to say that such warrants can never be issued. If the officers make an advance showing of conditions at a premises that would excuse the knock and announce requirement, then a no-knock warrant can be valid as issued. As the Supreme Court stated in *United States v. Banks*, 540 U.S. 31 (2003): “When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a ‘no-knock’ entry.”

Indeed it would seem that there should be a preference to have the magistrate determine in advance whether conditions exist that will excuse the knock and announce requirement—rather than leaving the question to the officers in the competitive enterprise of ferreting out crime. According to the courts, though, the preference is a mild one. There is no *requirement* that an officer obtain a no-knock warrant, even if he knows that the conditions at the premises would justify such a warrant at the time it is issued. However, “if police obtain a no-knock warrant prior to the search, the defendant bears the burden to show that the entry method was not justified. If, however, police execute a general search warrant without knocking and announcing, then the government is required to justify use of the no-knock entry.” *United States v. Esser*, 451 F.3d 1109 (10th Cir. 2006).

***No-Knock Entries and Destruction of Property:
United States v. Ramirez***

In *United States v. Ramirez*, 523 U.S. 65 (1998), officers had a no-knock warrant to search a house for a dangerous escaped prisoner. Approaching the house in the early morning hours, they announced over a loud speaker system that they had a search warrant. Simultaneously, they broke a single window in the garage and pointed a gun through the opening, hoping to prevent the occupants of the house from rushing to the weapons stash that an informant had told them was in the garage. Awakened by the noise and fearful that his house was being burglarized, the owner of the house, Ramirez, grabbed a pistol and fired it into the garage ceiling. When the officers shouted “police,” Ramirez surrendered and was taken into custody. Ramirez was indicted on federal charges of being a felon in possession of a firearm. As it turned out, the escaped prisoner was not on the premises. However, Ramirez did not argue that the police lacked probable cause to search for the escaped prisoner. Rather, he argued that a heightened degree of exigent circumstances is required if the police are going to destroy property during a no-knock warrant entry.

Chief Justice Rehnquist, writing for a unanimous Court, held that officers are not held to a higher standard when a no-knock entry results in the destruction of property. He declared: "Under *Richards*, a no-knock entry is justified if police have a 'reasonable suspicion' that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. Whether such a 'reasonable suspicion' exists depends in no way on whether police must destroy property in order to enter." The Chief Justice recognized that the general Fourth Amendment reasonableness requirement imposes some limitation on the destructiveness of a search. However, in this case, the very limited destruction of property was reasonable, given the fact that the officers were acting to prevent possible violent activity. Compare *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000) (Fourth Amendment violated where officers unnecessarily broke down doors that were unlocked and open, with one officer stating "I like to destroy these kind of materials, it's cool").

3. Exigent Circumstances After Knocking

In *United States v. Banks*, 540 U.S. 31 (2003), the Court discussed how and whether exigent circumstances can allow police to break a door down *after* knocking. Justice Souter, writing for a unanimous Court, described the pertinent facts as follows:

With information that Banks was selling cocaine at home, [officers] got a warrant to search his two-bedroom apartment. As soon as they arrived there, about 2 o'clock on a Wednesday afternoon, officers posted in front called out "police search warrant" and rapped hard enough on the door to be heard by officers at the back door. There was no indication whether anyone was home, and after waiting for 15 to 20 seconds with no answer, the officers broke open the front door with a battering ram. Banks was in the shower and testified that he heard nothing until the crash of the door, which brought him out dripping to confront the police. The search produced weapons, crack cocaine, and other evidence of drug dealing.

The Court "granted certiorari to consider how to go about applying the standard of reasonableness to the length of time police with a warrant must wait before entering without permission after knocking and announcing their intent in a felony case."

Justice Souter found that exigent circumstances justified the officers' actions in knocking down the door and entering the premises. He explained that while the question was "a close one, we think that after 15 or 20 seconds without a response, police could fairly suspect that cocaine would be gone if they were reticent any longer."

Justice Souter noted that the defendant was confusing two different concepts: the time required to assume that a resident is refusing to answer the door, and the time required for a resident to destroy evidence:

And the argument that 15 to 20 seconds was too short for Banks to have come to the door ignores the very risk that justified prompt entry. True, if the officers were to justify their timing here by claiming that Banks's failure to admit them fairly suggested a refusal to let them in, Banks could at least argue that no such suspicion can arise until an occupant has had time to get to the door, a time that will vary with the size of the establishment, perhaps five seconds to open a motel room door, or several minutes to move through a townhouse. In this case, however, the police claim exigent need to enter, and the crucial fact in examining their actions is not time to reach the door but the particular exigency claimed. On the record here, what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. * * * And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.

4. Does the Violation of the Knock and Announce Requirement Justify Exclusion of Evidence?

In *Hudson v. Michigan*, 547 U.S. 586 (2006), the Court in a 5-4 decision held that a violation of the knock and announce requirement does not justify exclusion of evidence found in the subsequent search of the premises. Justice Scalia, writing for the majority, explained as follows:

The interests protected by the knock-and-announce requirement * * * do not include the shielding of potential evidence from the government's eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. * * * The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the opportunity to prepare themselves for the entry of the police. The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed. In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Justice Scalia found that the exclusionary rule was not necessary to deter violations of the knock and announce requirement, because victims of those violations could bring civil rights actions under 42 U.S.C. § 1983.

Justice Kennedy concurred in part and in the judgment. Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissented. He argued that without the threat of exclusion, officers have no reason to comply with the knock and announce rule. *Hudson* receives full-case treatment in the section on the exclusionary rule, at the end of this Chapter.

5. Timing and Scope of Execution

In view of the number of search and seizure cases that have been decided, it is surprising that few have discussed the permissible latitude that officers have in *executing* a warrant. Clearly they can only look in places where the objects specified might be found. As the Court stated in *United States v. Ross*, 456 U.S. 798 (1982): "A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or entry or opening may be required to complete the search." But beyond probable cause limits as to location, the manner of searching a premises has not received much treatment.

Destruction and Excessiveness

Does the authorization to search wherever evidence may be found mean that officers can break open walls, tear up floors and ceilings, and inflict other permanent damage? The case law, most of it old, offers little guidance. One case with a helpful discussion is *Buckley v. Beaulieu*, 104 Me. 56, 71 A. 70 (1908), where the court held that officers acted excessively and unreasonably when they searched unsuccessfully for liquor by tearing out the interior walls of a house. The court noted that the officers could have searched for any liquor concealed within the walls by using "some slender probe with comparatively little injury."

In contrast, the court in *United States v. Weinbender*, 109 F.3d 1327 (8th Cir.1997), found it reasonable for officers to remove a piece of drywall to search for clothes that would have tied the defendant to a crime. The officers found guns in the space behind the drywall. The court observed that the drywall was unfinished; it was a small square apparently covering a storage space; it was removed in a few seconds without tools;

and the officers had been informed that Weinbender used hiding places in his home. The court observed that "the manner in which a warrant is executed is always subject to judicial review to ensure that it does not traverse the general Fourth Amendment proscription against reasonableness." But in this case, the information possessed by the officers and the ease with which the drywall was removed led the court to conclude that the officers' actions were reasonable. And clearly it would be reasonable to do such things as break locks on briefcases and cabinets to search in areas where there is probable cause to believe that evidence exists. Otherwise, a person could stop a warranted search in its tracks simply by locking something up.

Use of Distraction and Intimidation Devices

Is it ever reasonable for officers to employ distraction and intimidation devices in the course of a warranted search? Is it always reasonable? The use of such a device was considered by the court in *United States v. Myers*, 106 F.3d 936 (10th Cir.1997). The Kansas Bureau of Investigation (KBI) had probable cause to believe that Myers was growing marijuana inside his home. KBI agents also discovered that Mr. Myers had prior convictions for burglary and theft, and cocaine trafficking. They also found out that, as a juvenile, Myers had been involved in the fire bombing of a jail or police vehicle and had been convicted of possession of an unregistered firearm and possession of a fire bomb.

The KBI obtained a warrant to search Myers's residence; the warrant authorized a night-time search. The agents knocked on Myers' front door and announced that they had a search warrant. They waited ten seconds, then battered down the door and rolled a Deftec Model 25 Distraction Device, also known as a "flash-bang," into the living room. The device exploded, and the agents then stormed the house, finding Mr. Myers, his wife, nineteen-year-old stepson, nine-year-old stepdaughter, and seventeen-month-old daughter. After subduing the family, the KBI conducted a search of the house, which revealed a substantial marijuana growing operation in the attic.

The court noted that the purpose of the flash-bang device is "to distract and disorient any occupants in the vicinity of the entry" and that the device explodes with a "brilliant flash of light and a loud bang." Myers argued that the use of the flash-bang device amounted to a "military-style assault" and was unreasonable. The court was not unsympathetic to the argument, but ultimately rejected it.

The use of a "flashbang" device in a house where innocent and unsuspecting children sleep gives us great pause. Certainly, we could not countenance the use of such a device as a routine matter.

However, we also recognize that we must review the agents' actions from the perspective of reasonable agents on the scene, who are legitimately concerned with not only doing their job but with their own safety. * * * The district court obviously credited police testimony that Mr. Myers's lengthy pattern of criminal activity—beginning with the fire bombing in 1971 and continuing until the cocaine conviction in 1988—made them apprehensive. The district court also found that the agents knew that there was a fair probability that Mr. Myers's residence contained an illegal marijuana growing operation.

Given the likelihood that a person involved in drugs may also have access to weapons, and may also have committed other crimes, will there ever be a situation during drug searches in which the use of a flash-bang device will be unreasonable? Will flash-bang devices always be reasonable in searches of the premises of suspected terrorists?

If the use of a flash-bang device is unreasonable under the circumstances, should the evidence found in the search be excluded? In *United States v. Jones*, 214 F.3d 836 (7th Cir. 2000), the court questioned whether the use of a flash-bang device was reasonable where officers invaded the house of a suspected drug dealer, knowing that his girlfriend and her six-year-old child was present. The court noted that "police cannot automatically throw bombs into drug dealers' houses, even if the bomb goes by the euphemism 'flash-bang device.'" But on the question of exclusion, the court reasoned as follows:

If this were a damages action * * * the claim would be a serious one. But * * * Jones wants us to hold that the fourth amendment precludes the use of the evidence that the officers found in his apartment. That argument must be rejected for a reason unrelated to the strength of the contention that the officers behaved inappropriately: the exclusionary rule depends on causation. * * * A battering ram, flash-bang device, or blow to the neck could affect the seizure [of evidence] only by surprising or stunning the occupants so that they could not destroy evidence. * * * An argument that the occupants could have destroyed the drugs, if only they had more time and full possession of their faculties, is not a good reason to suppress probative evidence of crime.

The analysis in *Jones* receives strong support from the Supreme Court's decision in *Hudson v. Michigan*, *supra*, where the Court held that a violation of the knock and announce requirement did not justify exclusion of evidence. Like the court in *Jones*, the *Hudson* Court found no causative connection between the manner of entry and the obtaining of evidence. The defendant could hardly argue, for example, that "if not for the flash-bang device, I wouldn't have been distracted and I would have been able

to destroy a lot of the evidence." See also *United States v. Ankeny*, 502 F.3d 829 (9th Cir. 2007) (relying on *Hudson* to hold that the unreasonable use of a flash-bang device and rubber bullets during a search did not justify exclusion of evidence).

Unnecessarily Intrusive Searches

An example of an unreasonably intense search arose in *Hummel-Jones v. Strobe*, 25 F.3d 647 (8th Cir.1994), a civil rights action brought by a husband (Jones) and wife (Hummel-Jones) after a 2:00 a.m. raid of the small birthing clinic at which they were staying. The court set forth the facts surrounding the search as follows:

This dispute arises out of an investigation of the Country Cradle, a well-established and openly-operated alternative birthing clinic located in rural Missouri. A registered nurse operated the clinic. Evidently, the defendants' concern that the nurse might be practicing medicine without a license prompted the search at issue.

On the afternoon of January 23, 1991, Board of Healing Arts Inspector Kistler became convinced that the nurse was delivering a baby at the clinic, and thereby practicing medicine without a license. Kistler contacted Deputy Sheriff Popplewell about the possibility of an investigation or a search. As a result, a reserve deputy was sent to the clinic that evening at 10 P.M. The couple, their toddler, and their four-hour old newborn were the only occupants at the time the deputy knocked on the door. The deputy told the family that he was a soldier on his way to the Gulf War. He claimed to be having car trouble, so the family admitted him to telephone for help. In reality, he was telephoning waiting officers to inform them that the Country Cradle was occupied by a family with a newborn infant.

*** The magistrate issued [a] warrant at approximately 1:00 A.M., and authorized a search for "video tapes, medical records, medical supplies, financial records, video equipment, medications or narcotics, sheets, [and] medical textbooks" being kept at the Country Cradle.

At 2:00 A.M. four uniformed and armed officers, two prosecuting attorneys, and the inspector raided the Country Cradle. *** Jones was ordered to sit on the waiting room couch and was questioned. Several others of the search party went into the separate bedroom where the pajama clad Hummel-Jones was attempting to nurse her newborn son, and began to question her. The couple declined to identify themselves. The searchers seized the couple and restricted them to the waiting room couch while the search was conducted. Whenever Hummel-Jones left the couch, an officer accompanied her. Inspector Kistler photographed the family as "evidence." Kistler also

photographed Hummel-Jones's lingerie soaking in the bathroom sink. Popplewell searched Hummel-Jones's overnight bag against her wishes. The searchers seized one of the family's banking slips to establish their identity. The searchers also seized the couple's personal video-tape of Hummel-Jones's afterbirth experience, despite the couple's objections. The search lasted for three and a half hours, or, essentially, throughout the night.

The court held that the search was so excessive—even though conducted pursuant to a warrant and probable cause—as to be unreasonable.

The primary justification the appellees put forth for performing this search of a well-established and openly-operating birthing clinic at 2:00 A.M. was to ensure that the mother and newborn would be present. Otherwise, we are told, items of evidence, to wit, the mother, newborn, and bloody sheets, might have been lost. Mothers and newborns at a birthing clinic are not "items of evidence." And, neither the warrant nor the warrant application mention either a mother or a newborn when particularly describing the "items" to be searched for and seized. In any case, the mother and newborn were not going to disappear. At worst, they were going to go home. Photographing the mother and her newborn on the clinic premises could not help establish whether or not there was unlicensed practice of medicine occurring at the clinic because it is not illegal to give birth wherever one happens to be when the moment arrives. Nor were the bloody sheets and lingerie attendant to a birth evidence of any illegality.

What should the officers have done in *Hummel-Jones* to make the search reasonable? Is the court simply saying that the crime that the officers suspected was not worth all the havoc they caused? Would the result have been the same if Hummel-Jones had been nursing her newborn in a house full of suspected terrorists or drug dealers?

When Is the Search Completed?

It is obvious that officers must terminate a search when all of the materials described in the warrant have been found. This standard works pretty well if officers are looking for a discrete object, like a particular stolen television. But sometimes it is difficult to determine whether all the evidence described in the warrant has been found. For example, if officers have a warrant to search for narcotics and paraphernalia, the search need not be terminated as soon as the officers find *some* narcotics. But does it follow that there is really no limitation on the scope and duration of a search for narcotics?

The courts do not seem very interested in imposing temporal or spatial limitations on searches for narcotics and related evidence. For

example, in *United States v. Stiver*, 9 F.3d 298 (3d Cir.1993), officers armed with a search warrant for narcotics, paraphernalia, and proof of residency, entered Stiver's apartment. During the course of the search, which lasted about 80 minutes, the telephone rang many times. An officer answered the phone and pretended to be one of Stiver's associates; he took 12 orders for drugs from the callers. Stiver argued that the officers exceeded their authority by answering the phone and taking orders from his customers. But the court held that this activity was within the scope of the search authorized by the warrant. The court noted that officers are not required to interpret narrowly the terms of the warrant, and reasoned as follows:

[T]he warrant authorized the officers to search for and seize, among other things, "all drug paraphernalia." In ordinary usage, the term "paraphernalia" is defined to mean "equipment and apparatus used in or necessary for a particular activity." [quoting the Random House Dictionary]. In light of the fact that the officers had ample cause to believe that the defendant had been using the apartment for heroin sales, * * * the officers had an entirely reasonable basis for concluding that the defendant's telephone was a piece of "equipment" or "apparatus" that was used in [drug activity]. The officers therefore acted properly in "searching" the telephone, i.e., answering it.

We also believe that the officers' conduct was authorized by the portion of the warrant permitting them to search for "any items to prove residency." Telephone calls for the defendant at the premises would provide evidence that he resided there.

Does the court's reasoning mean that the officers could occupy Stiver's apartment for a week in order to take more calls from his customers? Could they occupy the apartment for a year?

6. Presence of the Warrant

Must the officer who executes a search warrant actually have the warrant in hand at the time of the search? Courts have held that while Fed.R.Crim.P. 41(f) requires the officer to serve upon the person searched a copy of the warrant, it does not require that this be done before the search takes place. See, e.g., *United States v. Hepperle*, 810 F.2d 836, 839 (8th Cir.1987) ("[w]hile it may be foolhardy to proceed in the absence of the physical presence of the warrant, it is not unconstitutional"). Considering that one reason for the warrant is to provide the executing officer with a lawful show of authority, does this result make sense?

7. Enlisting Private Citizens to Help Search

Unwilling Assistance

In *United States v. New York Tel. Co.*, 434 U.S. 159 (1977), the Court, per Justice White, held that, upon a showing of probable cause, a district judge had power to order an unwilling telephone company to assist the government in installing pen registers. The All Writs Act, 28 U.S.C.A. § 1651(a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act was thought to be sufficient authority for a court to compel a private person to act. Justice Stevens wrote for himself and Justices Brennan and Marshall in dissent. Their position was that Congress did not empower Federal courts to compel private parties to carry out this kind of surveillance. Justice Stewart, also in dissent, agreed with this point. Justice Stevens argued that the majority's decision

provides a sweeping grant of authority without precedent in our Nation's history. Of course, there is precedent for such authority in the common law—the writ of assistance.

If a warrant is otherwise valid, why shouldn't a person be subject to an order to help the police enforce it? Sometimes such an order might minimize the intrusion the police otherwise would have to make. Would people like Andresen be worse off if secretaries and employees could be compelled to participate in searches in order to minimize intrusions? In the *New York Telephone* case, the majority said that without assistance from the company, the government could not have conducted the surveillance. The same would be true with Internet service providers. Should this make a difference in Fourth Amendment analysis?

Willing Assistance

New York Telephone involved civilians who were unwilling to assist the government. Is the Fourth Amendment question different if an individual *agrees* to assist the government in conducting a search of another person's property? In *Bellville v. Town of Northboro*, 375 F.3d 25 (1st Cir. 2004), the court found no Fourth Amendment violation where an officer asked two corporate employees to assist him in a search of a premises, at which there was probable cause to believe that electronic equipment stolen from the corporation had been stored. The court noted that the civilians were "serving a legitimate investigative function" because they could assist the officer, who did not have the necessary technical expertise to identify the property that belonged to the company. The court noted that the employees did not participate in the search "to further their own personal ends." See also *United States v. Bach*, 310

F.3d 1063 (8th Cir. 2002) (no error for officers to allow Yahoo technicians to retrieve all of the information from the defendant's Yahoo account in an investigation of child pornography; the court noted that "the technical expertise of Yahoo's technicians far outweighs that of the officers").

In contrast, in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir.1992), officers had a warrant to search for a stolen generator in the Bills' residence. They also suspected that the Bills had other stolen property on the premises, though the warrant listed only the generator. The officers asked a General Motors official if he wanted to come along on the search for the generator to see if he could identify any property which might have been stolen from General Motors. During the search, the GM official took 231 photographs of various parts and equipment. The court declared:

[The GM official] was present, not in aid of the officers or their mission, but for his own purposes, involving the recovery of stolen General Motors property not mentioned in any warrant. * * *

* * * Officers * * * may * * * exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises.

8. Media Ride Alongs

Are Fourth Amendment problems raised when officers invite the media along when they execute a search? This question was presented in *Wilson v. Layne*, 526 U.S. 603 (1999). Officers executing an arrest warrant for Dominic Wilson entered the home of his parents late at night. They brought a photographer and a reporter from the *Washington Post* along with them. Dominic's father became upset, and was subdued on the floor. Dominic's mother came out of the bedroom and witnessed the conflagration in her nightgown. Numerous photographs were taken, but none were ever published.

The Wilsons brought a civil rights action against the officers, contending that the "media ride along" violated their Fourth Amendment rights. The Supreme Court, in an opinion by Chief Justice Rehnquist, unanimously agreed that the media observation of the execution of the arrest warrant in the Wilson's home constituted a Fourth Amendment violation.

The Chief Justice stated that police actions undertaken in execution of a warrant must be "related to the objectives of the authorized intrusion." In this case, "the presence of reporters inside the home was not related to the objectives of the authorized intrusion." The Chief Justice emphasized that this was not a case "in which the presence of the third parties directly aided in the execution of the warrant" and noted

that when police enter a home to search for stolen property, "the presence of third parties for the purpose of identifying the stolen property has long been approved by this Court and our common-law tradition."

The officers cited a number of law enforcement objectives that might be met by a media ride along. But the Court rejected these interests as insufficient. The Chief Justice elaborated in the following passage:

Respondents argue that the presence of the Washington Post reporters in the Wilsons' home nonetheless served a number of legitimate law enforcement purposes. They first assert that officers should be able to exercise reasonable discretion about when it would "further their law enforcement mission to permit members of the news media to accompany them in executing a warrant." But this claim ignores the importance of the right of residential privacy at the core of the Fourth Amendment. It may well be that media ride-alongs further the law enforcement objectives of the police in a general sense, but that is not the same as furthering the purposes of the search. * * *

Respondents next argue that the presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities. * * * Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.

Finally, respondents argue that the presence of third parties could serve in some situations to minimize police abuses and protect suspects, and also to protect the safety of the officers. While it might be reasonable for police officers to themselves videotape home entries as part of a "quality control" effort to ensure that the rights of homeowners are being respected, or even to preserve evidence, such a situation is significantly different from the media presence in this case. The Washington Post reporters in the Wilsons' home were working on a story for their own purposes. * * *

Wilson was a civil action for damages, so the exclusionary rule was not operative. In a footnote, however, the Chief Justice took pains to note that with respect to media ride alongs, "if the police are lawfully present, the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home." The Court had "no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." For a lower court

answer to that question, see *United States v. Duenas*, 691 F.3d 1070 (9th Cir. 2012):

Where the media were present, but did not discover or develop any of the evidence later used at trial, the evidence need not be excluded. Here, the media did not expand the scope of the search beyond the warrant's dictates; nor did the media assist the police, or touch, move, handle or taint the admitted evidence in any way. Because the [officers] complied with the terms of the warrant and the media did not disturb any evidence later admitted, the more appropriate remedy here * * * is a *Bivens* or a 42 U.S.C. § 1983 action.

The analysis in *Duenas* receives strong support from the Supreme Court's decision in *Hudson v. Michigan*, *supra*, where the Court held that a violation of the knock and announce requirement did not justify exclusion of evidence. Like the court in *Duenas*, the *Hudson* Court found no causative connection between the manner of entry and the obtaining of evidence.

D. THE SCREENING MAGISTRATE

1. Neutral and Detached

What is required for a magistrate to be considered neutral and detached, as the Court referred to in *Johnson, supra*. In *Coolidge v. New Hampshire*, 403 U.S. 443, 449–453 (1971), the Court invalidated a warrant issued by the state's Attorney General, who was authorized by state law to act as a justice of the peace. The Court concluded that an executive officer, the head of law enforcement in the State, could not be the neutral and detached magistrate required by the Constitution. Justice Black, joined by Chief Justice Burger and Justice Blackmun, dissented. That three justices were willing to hold that a law enforcement officer could be the screener in the warrant process suggests something about the teeth they wanted to see that process have. However, in *Connally v. Georgia*, 429 U.S. 245 (1977), the Court was unanimous in holding that a magistrate who was paid a fee if he issued a warrant, and nothing if he denied an application, was not neutral and detached.

In *United States v. McKeever*, 906 F.2d 129 (5th Cir.1990), the defendant complained of the magistrate's neutrality on the following grounds: she was formerly involved in law enforcement and retained reserve officer status; her husband was a deputy; and she visited the site of the search while it was being conducted. The court found these factors "troubling" but not enough to show a lack of neutrality. The court stated that a magistrate may retain certain law enforcement duties without losing neutrality; that no showing was made that the magistrate's husband participated in the issuance of the warrant or the search; and

that the magistrate went to the site solely out of "curiosity" and did not assist in the search. Compare *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979) (magistrate loses neutral and detached status when he assists in the search).

Rubber Stamp

Of course, if the magistrate issues the warrant without even reading the application, he has become a rubber stamp and cannot be found neutral and detached. See *United States v. Decker*, 956 F.2d 773 (8th Cir.1992) (magistrate loses neutral and detached status when he fails to read a warrant because he was "intrigued" by the manner in which the officer became suspicious of the defendant). But it is difficult for the defendant to prove that the magistrate actually acted as a rubber stamp. For example, in *United States v. Brown*, 832 F.2d 991 (7th Cir.1987), the defendant sought to prove that the municipal judge who issued the warrant against him had acted as a rubber stamp. Brown submitted into evidence hundreds of search warrants issued by the municipal judge. Most of the affidavits approved by the judge were form affidavits. The court stated that the volume of warrants issued, especially in comparison to lesser amounts issued by other judges, proved not that the judge was a rubber stamp, but rather that the judge had "extraordinary experience in reviewing warrant applications." The court noted, with considerable understatement, that "it might be difficult for a litigant to establish" that a judge has abandoned her neutral and detached role.

2. Legal Training

In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court considered whether the Fourth Amendment required a magistrate to have legal training. In Tampa, municipal clerks, who were not lawyers, were authorized to issue arrest warrants for minor offenses. Justice Powell, writing for a unanimous Court, held that the clerks qualified as neutral and detached magistrates despite their lack of legal training. Justice Powell found that the two standards, of neutrality and competence, were met by the Tampa municipal clerks:

The clerk's neutrality has not been impeached: he is removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge.

Appellant likewise has failed to demonstrate that these clerks lack capacity to determine probable cause. The clerk's authority extends only to the issuance of arrest warrants for breach of municipal ordinances. We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen

guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish.

Justice Powell emphasized that the Court was not making a categorical rule that the issuance of warrants by non-lawyers would always satisfy the Fourth Amendment requirements of neutrality and detachment. Rather, the Court simply rejected the categorical rule that non-lawyers could never act as neutral and detached magistrates. Justice Powell concluded: "States are entitled to some flexibility and leeway in their designation of magistrates, so long as all are neutral and detached and capable of the probable-cause determination required of them."

NOTE ON SHADWICK

Shadwick dealt with arrest warrants, not search warrants. But, the Court's disclaimers notwithstanding, it is clear that the Court was defining the term "magistrate" for Fourth Amendment purposes. The *Shadwick* Court cited arrest and search cases interchangeably. And in *Illinois v. Gates*, 462 U.S. 213 (1983), considered *supra*, the Court assumed that non-lawyers may issue search warrants. Do you believe that the warrant clause is meaningful when the magistrate is not a lawyer? What message, if any, does *Shadwick* send to magistrates about the importance of their screening function?

3. Magistrate Decisions

There is no requirement that a magistrate give reasons for finding probable cause or for rejecting a warrant application. Is there an argument that magistrates should have to signify in writing their reasons for finding probable cause before issuing a warrant? Would you be persuaded by a counter-argument that it does not matter whether the magistrate reasoned properly as long as the Fourth Amendment probable cause standard actually is satisfied by the warrant application? Can the Fourth Amendment be satisfied if the magistrate is not reasoning properly?

V. TO APPLY OR NOT APPLY THE WARRANT CLAUSE

As stated previously, the Court has held that a search or seizure is presumptively unreasonable in the absence of a warrant based upon probable cause. However, the Court has found that the presumption of unreasonableness can be overcome in a variety of circumstances. Some of the circumstances excuse the officer from obtaining a warrant, but still require the officer to have probable cause. Other circumstances permit a search or seizure even though the officer has neither a warrant nor