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The Near Future
Implications for Law Enforcement

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The Judicial Preference for the Search Warrant

The Good Faith Warrant Exception to the Exclusionary Rule

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Consider the following passage in a Supreme Court opinion discussing the fourth amendment:[1]

> "Its [fourth amendment] protection consists in requiring that those inferences [probable cause to believe that a crime has been committed and that specific evidence is at a particularized location] 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 officer in making a search without a warrant would reduce the amendment to a nullity and leave the peoples' homes secure only in the discretion of police officers."[2]

At first glance that language may seem harsh in assessing the role of the law enforcement officer attempting to gather evidence in a criminal investigation; however, a closer and more reflective examination indicates it is only representative of the Supreme Court's strong preference for search warrants as the best means of upholding the protections afforded by the fourth amendment.[3]

A search warrant benefits the individual citizen by: 1) Providing a neutral magistrate to make probable cause decisions, 2) setting proper boundaries for the search, and 3) assuring the person whose property is searched of the lawful authority and limits of the search itself.[4] The Court has repeatedly expressed this strong preference for search by warrant, to the point of declaring that "in a doubtful or marginal case [of probable cause] a search under a warrant may be sustainable where without one it would fail."[5]

Notwithstanding the benefits to the citizen and the Supreme Court's preference, search warrants have often been viewed by law enforcement officers as an obstacle rather than an asset. Undoubtedly, one of the reasons for that perception was the somewhat complex and time-consuming process which had evolved for acquiring a warrant, particularly when information from a confidential source formed a basis for probable cause. Furthermore, even when a warrant was acquired, evidence obtained through its execution could still be readily susceptible to suppression if a reviewing court disagreed with the issuing magistrate's judgment.

Special Agent Fiatal

In recent decisions, the Supreme Court has further encouraged the law enforcement community to search pursuant to warrant. First, the Court eased the process for obtaining warrants by adopting a more flexible "totality of the circumstances" test to determine the sufficiency of probable cause supporting a search warrant when that probable cause is based upon an informant's tip. Then, in two subsequent decisions, the Court provided the law enforcement officer with additional incentive to search pursuant to warrant by formulating a good faith warrant exception to the exclusionary rule,[6] which makes evidence admissible if the seizing officer acts in objectively reasonable, good faith reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is later found to be invalid. Thus, not only is the acquisition of a search warrant made somewhat easier, but also once the warrant is obtained, any evidence seized pursuant to the warrant is less susceptible to exclusion.

The purpose of this article is to examine these recent Supreme Court decisions which have encouraged and provided further incentive for search pursuant to warrant and to analyze subsequent Federal and State cases that provide guidance as to what police conduct constitutes objectively reasonable good faith reliance upon a search warrant.

ENCOURAGEMENT FOR SEARCH BY WARRANT: *GATES* V. *ILLINOIS*

In *Gates* v. *Illinois,*[7] the Supreme Court significantly encouraged recourse to search warrant procedure by adopting a new "totality of the circumstances" standard in determining the sufficiency of probable cause supporting a search warrant when that probable cause is based upon an informant's tip. In *Gates,* police officers in the Chicago suburb of Bloomingdale, IL, received an anonymous letter informing them that the Gateses, husband and wife, "strictly make their living on selling drugs," and had "over $100,000 worth of drugs in their basement." The letter also detailed the manner in which the couple would transport the narcotics from Florida to their home. The wife would drive their car to Florida, leave it "to be loaded up with drugs," and fly back, whereupon the husband would fly to Florida and drive the loaded car back. The letter further specified that the wife would drive to Florida on May 3d and that the husband would fly down within a few days following his wife's departure. The husband would then drive the car back, which would be loaded with "over $100,000 in drugs."

Acting on the tip, the police determined that the husband had made a reservation on an airline flight to West Palm Beach, FL, on May 5th. Through surveillance, it was established that the husband had taken the flight, and upon arriving in Florida, had proceeded to a motel room registered in his wife's name. The husband was seen the next morning leaving the motel with an unidentified woman in an automobile bearing Illinois license plates registered to the husband and heading north on an interstate frequently used by travelers to the Chicago area.

Search warrants for the defendants' car and home were issued by a State circuit judge based upon affidavits setting forth both the contents of the anonymous letter and the facts learned by the police in their subsequent investigation. Marijuana was found at both locations in the resulting searches.

"'[The totality of the circumstances test] better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determination of magistrates.'"

The trial court suppressed the seized evidence. This determination was upheld by both the Illinois Appellate Court and the Illinois Supreme Court, as the anonymous letter and affidavit were deemed to be inadequate to sustain a determination of probable cause based upon the "two-pronged test" of *Aguilar* v. *Texas*[8] and *Spinelli* v. *United States*[9] when assessing the sufficiency of hearsay information. Particularly, the affidavit failed to 1) reveal the informant's basis of knowledge and 2) provide sufficient facts to establish the informant's veracity or the reliability of the informant's tip.[10]

The Supreme Court reversed, holding that the search warrants were based upon probable cause. In so deciding, the Court replaced the stringent "two-pronged test" with a more flexible "totality of the circumstances" standard. Under this standard, the duty of the magistrate who reviews the affidavit in support of a search warrant "is simply to make a practical, commonsense 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."[11] The Court made it perfectly clear, however, that "bare bones" affidavits, setting forth only the conclusions of others, would remain insufficient in determining probable cause even under this relaxed standard, as there must be some "substantial basis" for the magistrate's determination.[12] As an informant's basis of knowledge or veracity remain highly relevant in determining probable cause, conclusory allegations by the affiant-officer concerning these aspects should also be avoided.

Applying the "totality of the circumstances" test to the affidavit and accompanying anonymous letter in *Gates*, the Court was of the opinion that the anonymous letter, standing alone, did not provide the issuing magistrate sufficient probable cause. However, when the allegations in the letter were combined with the results of the independent police work, the magistrate had a substantial basis to conclude that probable cause existed.[13]

The Court, in justifying its "totality of the circumstances" test, was not unmindful of its progressive encouragement of search pursuant to warrant. Indeed, it stated that the new standard "better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determination of magistrates."[14]

The Court also indicated that it was aware of the inherent dangers to fourth amendment protections when such encouragement was lacking:

> "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."[15]

Similarly, in *Massachusetts* v. *Upton*,[16] the Supreme Court again applied the "totality of the circumstances" test of *Gates*. In *Upton*, a police officer had earlier assisted in the execution of a search warrant for the motel room of Richard Kelleher, which yielded some, but not all, of the items taken in recent burglaries. Approximately 3 hours later, the same officer received a call from an unidentified woman who related the existence of a motor home "full of stolen stuff" parked behind Upton's home. She indicated that she had personally seen these stolen items, which included gold, silver, and jewelry. She further stated that Upton planned to move the motor home in response to the search of Kelleher's motel room, as Upton had purchased these stolen goods from Kelleher. The informant initially refused to identify herself, but upon the police officer's assertions, admitted that she was Upton's ex-girlfriend.

The officer then went to Upton's home and verified the existence of a motor home on the property. He included all of the foregoing facts in his affidavit for search warrant. A local magistrate issued the search warrant, and the subsequent search produced the items described by the caller. The trial court admitted this incriminating evidence, but the Massachusetts Supreme Judicial Court reversed, believing that the *Gates* decision still required a showing of the informant's veracity and basis of knowledge, and if either or both was not sufficiently clear, only substantial corroboration of the informant's tip could still allow a finding of probable cause.

The Supreme Court rejected such an interpretation of its holding in *Gates* and reasserted its "totality of the circumstances" test, finding that under this standard, the police officer's affidavit provided a sufficient basis for the magistrate's determination of probable cause.[17]

The use of informants, whether they be anonymous citizen informants, as in *Gates* and *Upton*, or otherwise, is an invaluable tool in law enforcement, as most crimes do not occur in the presence of law enforcement officers.

"Police officers should not overlook independent corroboration of an informant's tip as a likely source of facts supporting probable cause."

Additionally, hearsay information garnered from such sources is frequently available. By abandoning the strict "two-prong test" and adopting the "totality of the circumstances" standard, the Supreme Court has clearly encouraged the law enforcement officer to use such information in obtaining a warrant prior to search, rather than foregoing the warrant procedure altogether.

As common sense would dictate, the more facts in an affidavit, the more likely probable cause to search will exist by the "totality of the circumstances." Police officers should not overlook independent corroboration of an informant's tip as a likely source of facts supporting probable cause. It is therefore recommended, particularly when doubt exists as to either sufficient basis of knowledge or veracity of the informant—which remain important in probable cause determinations—that the officer corroborate the informant's information as completely as time considerations allow.

INCENTIVE FOR SEARCH BY WARRANT: *LEON* V. *UNITED STATES*

The Supreme Court in *Gates* refused to consider whether the exclusionary rule should be so modified as to not require exclusion of evidence obtained in the reasonable belief on the part of the police officer that the search and seizure was made in accordance with the fourth amendment.[18] In 1984, however, the Court provided proper incentive, in addition to further encouragement, to the law enforcement officer to search pursuant to warrant by recognizing a good faith warrant exception to the exclusionary rule in the cases of *United States* v. *Leon*[19] and *Massachusetts* v. *Sheppard*.[20] By this exception, evidence is admissible if the seizing officer acted in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate, even if the warrant is later found to be invalid.

In *Leon*, a confidential informant of unproven reliability advised an officer of the Burbank, CA, Police Department in August 1981, that two individuals, later determined to be Sanchez and Stewart, were selling cocaine and methaqualone from their residence. The informant also indicated he had witnessed a methaqualone sale by Stewart 5 months earlier.

On the basis of this information, the Burbank police initiated an extensive investigation of Sanchez and Stewart and their residence and discovered, among other things, that Sanchez had previously been arrested for possession of marijuana; that several persons, at least one of whom had prior drug involvement, were observed arriving at the residence and leaving with small packages; that the automobile of Del Castillo, who had previously been arrested for possession of 50 pounds of marijuana, was seen at the residence; that Del Castillo's employer, Leon, had been arrested in 1980 on drug charges and a companion of Leon had informed the police at that time of Leon's heavy involvement in the importation of narcotics; that Burbank officers had previously learned that an informant had told a Glendale, CA, police officer that Leon stored a large quantity of methaqualone at his then residence in Glendale; and that Leon presently resided in Burbank.

An "experienced and well-trained" Burbank police officer used these facts and other observations in an affidavit in support of an application for a warrant to search, among other things, Leon's residence in Burbank. The warrant was issued by a State superior court judge, and the ensuing search of Leon's residence produced large quantities of narcotics. A motion to suppress this evidence was sustained by the trial court, which concluded that the affidavit was insufficient to establish probable cause. The court did find that the affiant-officer had acted in good faith, but refused to declare that the exclusionary rule should not apply even when there is a reasonable good faith reliance on a search warrant.

The U.S. Court of Appeals for the Ninth Circuit upheld this suppression, reasoning that the affidavit failed to satisfy the *Aguilar-Spinelli* "two-prong test." The court found no showing of the informant's basis of knowledge of Leon's criminal activities and the informant's reliability and stated that these deficiencies were not cured by the police investigation.

The Supreme Court did not consider whether there existed sufficient probable cause under the "totality of the circumstances" test of *Gates,* but instead modified the exclusionary rule so as to allow the use of evidence obtained by officers acting in objectively reasonable, good faith reliance on a search warrant issued by a neutral and detached magistrate but ultimately found to be unsupported by probable cause.

In arriving at this decision, the Court first noted that the purpose of the exclusionary rule is to deter police misconduct.[21] Again, the Court referred to its strong preference for search pursuant to warrant and stated that in most cases, "when an officer

acting in objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . there is no police illegality and nothing to deter."[22]

The Court made the practical determination that "in the ordinary case, an officer cannot be expected to question the magistrate's probable cause determination or his judgment that the form of the warrant is technically sufficient."[23] Since "penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations,"[24] the Court concluded that the "marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[25]

The Court found that the officer's application for the warrant to search Leon's house was clearly supported by more than a "bare bones" affidavit. It related the results of an extensive investigation, had been reviewed by several deputy district attorneys, and had provided evidence sufficient to have convinced some of the justices of the court of appeals that probable cause existed. Under these circumstances, the Court found that the officer's reliance upon the search warrant was objectively reasonable, and therefore, that the application of the exclusionary rule was inappropriate.

Similarly, in *Sheppard,* decided the same day as *Leon,* the Supreme Court found the seizing officers to have met the objectively reasonable reliance standard of the good faith warrant exception. In that case, a Boston police detective investigating a murder applied for a search warrant on the basis of an affidavit which listed a number of items police wished to search for in Sheppard's residence. These included clothing of the murder victim, a blunt instrument that may have been the murder weapon, wire and rope that matched that found on the body of the victim, and clothing that might have blood stains. The affidavit was reviewed and approved by the local district attorney, the district attorney's first assistant, and a police sergeant.

Because it was Sunday, however, the local court was closed, and an appropriate warrant application form could not be found. The detective finally located a warrant form previously used in another district to search for controlled substances. After making some changes in the form, the detective presented the form and the affidavit to a judge, informing him that the warrant might need further changes. Concluding that the affidavit established probable cause, the judge told the detective that the necessary changes in the warrant form would be made. In fact, the judge did make some changes, but did not incorporate the affidavit into the warrant or change that portion of the warrant which continued to authorize a search for controlled substances. The judge then signed the warrant, advising the detective that there was sufficient authority to conduct the requested search.

The evidence described in the affidavit was discovered in the ensuing search, which was directed by the same detective who had obtained the warrant. At trial, the judge ruled that notwithstanding the fact that the description of the items to be seized in the warrant was completely inaccurate, the evidence would be admitted because the police had acted in good faith in executing what they believed was a valid warrant. On appeal, the Massachusetts Supreme Judicial Court reversed Sheppard's conviction, reasoning that the warrant was defective and the evidence should have been suppressed.

The Supreme Court reversed, emphasizing that the officers who conducted the search had an objectively reasonable basis for their belief that the warrant validly authorized the search. The Supreme Court noted that the officers "took every step that could reasonably be expected of them."[26] The detective who obtained and directed the execution of the warrant was not "required to disbelieve a judge who had just advised him, by word and by action, that the warrant he possess[ed] authorize[d] him to conduct the search he ha[d] requested."[27] Any error of constitutional magnitude was committed by the issuing judge, not the police officers, and the purpose of the exclusionary rule, to deter police misconduct, would not be served in such a situation.

The Supreme Court did, however, qualify its decision in *Sheppard* by stating they were not addressing a factual situation where the executing officer was not the same officer who obtained the warrant or was unfamiliar with the warrant application.[28] In such situations, it would seem a reasonable officer would read the warrant itself prior to execution, notice its inaccuracies, and be required to take the necessary steps to correct these inaccuracies. As qualified, the good faith warrant exception is applicable when the magistrate, and not the police, has erred, and the police subsequently reasonably rely upon the issued warrant despite the error of the magistrate.

"The good faith warrant exception will not apply and evidence will be inadmissible in limited situations when the law enforcement officer lacks objectively 'reasonable grounds for believing the warrant was properly issued.'"

REQUIREMENTS FOR GOOD FAITH RELIANCE UPON A SEARCH WARRANT

The Supreme Court has provided the good faith warrant exception to the exclusionary rule as further encouragement and incentive for search pursuant to warrant. It is, therefore, imperative that the law enforcement officer know what is, and what is not, objectively reasonable, good faith reliance upon the issued search warrant. A closer examination of the *Leon* and *Sheppard* cases, as well as a survey of lower Federal and State cases which have applied this exception, is instructive.

Officers' Objectively Reasonable Good Faith

The primary focus in applying the good faith warrant exception is not upon the determination of probable cause by the magistrate, but the conduct of the police officer in relying upon the magistrate's authorization to search. In this regard, the police officer's reliance upon the search warrant must be objectively, and not subjectively, reasonable for the good faith warrant exception to apply. Such an objective test holds the police officer to a higher standard than a subjective analysis of his conduct would require.

For his reliance on the search warrant to be objectively reasonable, the police officer must meet a minimal level of knowledge of the law's requirements. He will be held to the standard of a "reasonably well-trained officer" in determining if he should have known "that the search was illegal despite the issuing magistrate's authorization."[29]

Holding officers to this standard necessitates continued police training programs, particularly with regard to the limits which the fourth amendment imposes on police conduct. In *United States* v. *Freitas*,[30] a U.S. district court placed great emphasis upon training standards in determining if there existed objectively reasonable, good faith reliance upon a search warrant. In finding that Agents of the Drug Enforcement Administration did not reasonably rely upon a warrant which authorized their surreptitious entry into a residence for the purpose of only seaching for, but not seizing, items to manufacture methamphetamine, the court referred to the absence of any reference to such a search, for which there was no jurisdictional basis,[31] in any of that agency's training manuals or training programs.

As professional and up-to-date training regimens are prompted by the objectively reasonable standard of the good faith warrant exception, so too are the implementation and adherence to proper police procedures by the officer making application for the warrant. In both *Leon* and *Sheppard*, for example, the officers who sought the warrant had the respective affidavits reviewed by at least one district attorney prior to application to the magistrate for search warrant. Such review procedure, whether it be by a local prosecuting attorney, a police legal adviser, or a senior experienced police officer, will tend to assure that the officer who is applying for the search warrant has taken every step that could reasonably be expected of him prior to securing the warrant.

Although this reasonableness standard is objective in nature, the Supreme Court in *Leon* warned that matters particularly known by the individual officer who applies for the warrant will not be disregarded in determining if the good faith warrant exception should apply. Therefore, "all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered"[32] in determining if the officer's reliance upon the warrant was reasonable.

Additionally, the objective reasonableness of not only the officer who executed the warrant but also of those officers who "obtained it or who provided information material to the probable cause determination"[33] are to be considered. The good faith of those officers who have obtained or executed the warrant is thus also affected by an objective review of the reasonable conduct of their fellow officers who have supportive roles in the process.

It is important to emphasize that the Supreme Court in *Leon* did not intend to condone careless police procedures or intentional violations of constitutional guarantees by its implementation of the good faith warrant exception to the exclusionary rule. Officers are held to an objectively reasonable standard in both issuance and execution of the search warrant. Exclusion remains a judicial remedy to deter misconduct if 1) reasonable grounds for believing the warrant is valid are lacking or 2) the search warrant is not executed properly. The objective reasonableness of all officers involved in terms of training, adherence to proper police procedures, and detailing all facts and circumstances to the magistrate are relevant in both aspects of the warrant process. Each is discussed in turn below.

Absence of Grounds to Believe Warrant is Proper

The good faith warrant exception will not apply and evidence will be inadmissible in limited situations when the law enforcement officer lacks objectively "reasonable grounds for

believing the warrant was properly issued."[34]

Several procedural requirements in obtaining a search warrant are so basic, and are of such common knowledge, that a finding of good faith has been precluded in their absence. Some courts, in applying the *Leon* standard for determining the applicability of the good faith warrant exception to the exclusionary rule, have found the failure of the officer-affiant to supply a written affidavit or recorded sworn testimony in support of the application for search warrant,[35] or to be placed under oath when before the issuing magistrate,[36] to be so fundamental in nature as to preclude the finding of objectively reasonable reliance on the search warrants issued.

This does not suggest that the officer-affiant must now assume the role of insurer against errors by the magistrate. In *United States* v. *Maggitt*,[37] for example, the U.S. Court of Appeals for the Fifth Circuit found Federal agents and police officers to have been reasonable in their belief that any flaws in their written affidavit for search warrant were cured by the issuing magistrate's detailed inquiry into the sources of the information in their affidavit. Although the magistrate had not recorded the oral responses to his inquiries as required by the Federal Rules of Criminal Procedure, the court ruled that to exclude the seized evidence because of that failure by the magistrate would serve no purpose in deterring police misconduct.

Additionally, the Supreme Court in *Leon* outlined four situations where the officer could not rely on the good faith exception because he would be unable to establish reasonable grounds to rely upon the validity of the search warrant. Those four situations are addressed separately.

Affidavit Deliberately or Recklessly False

When the law enforcement officer misleads the issuing magistrate by submitting an affidavit to the magistrate which the officer knows to contain false information or "would have known was false except for his reckless disregard of the truth,"[38] the good faith exception will not apply.

Illustrative of this type of situation is *United States* v. *Boyce*.[39] In that case, the affiant proffered to the magistrate an affidavit which set forth information from a confidential informant. The affiant stated that the informant had provided information to the affiant for the past month, and in all instances, the information had been corroborated by independent investigation. In fact, the affiant had met this informant only once prior to obtaining the information included in the application for the search warrant, and the police had then conducted no subsequent investigation to corroborate the informant's information. Additionally, the affiant failed to advise the magistrate that he knew the informant to be under the influence of narcotics when supplying the information contained in the affidavit. In light of the affiant's reckless disregard for the truth, the Federal district court determined that exclusion of the evidence found in the search made pursuant to the warrant was appropriate, and the good faith exception would not apply.[40]

Warrant Not Approved By Neutral and Detached Judicial Officer

The Supreme Court has repeatedly indicated that only a truly impartial magistrate can issue a valid search warrant by fourth amendment standards. The magistrate must be totally independent of the police or prosecutors[41] and have no personal or pecuniary interest in his conclusion to issue or deny the warrant.[42]

Just as the issuing official cannot be connected to the police, he also cannot act as a "rubber stamp" for them. No reasonably well-trained law enforcement officer should rely upon a magistrate's authorization to search when that officer is aware that the magistrate has wholly abandoned his role of a neutral and detached judicial official.[43]

In determining if such judicial abandonment will preclude a determination of good faith, the courts will concentrate on the police officer's knowledge of such abandonment. It is therefore important that the officer who obtains the warrant assure that the issuing magistrate carefully consider the submitted affidavit and application, and not just perform a perfunctory review and give automatic approval.

For example, in *United States* v. *Breckenridge*,[44] the U.S. Court of Appeals for the Fifth Circuit found that even though the issuing magistrate may not have read the supporting affidavit, the officer who obtained the search warrant reasonably relied in good faith upon the magistrate's authorization to search. The officer had orally explained the contents of the submitted affidavit to the magistrate while the magistrate appeared to the officer to be reading it. As the magistrate at least appeared to the officer to have fulfilled his role, there was no improper misconduct to deter, and therefore, no reason to apply the exclusionary rule.

With this "exception" to a good faith determination in mind, police should also avoid the practice of magistrate "shopping" when seeking a

" . . . when doubt exists as to either sufficient basis of knowledge or veracity of the informant—which remain important in probable cause determinations—the officer [should] corroborate the informant's information as completely as time considerations allow."

search warrant. If the magistrate is later determined to have abandoned his judicial role, the deliberate act of seeking out that particular magistrate would show knowledge on the part of the police of this abandonment of function on the part of the magistrate.

Warrant Patently Deficient

When the warrant itself is so facially deficient as to prohibit objectively reasonable reliance upon its validity, good faith will not apply.[45] A Texas appellate court has found this requirement to preclude reasonable reliance by executing officers on a search warrant which was not signed by the issuing magistrate.[46]

The Supreme Court in *Leon* also noted that depending on the circumstances, the warrant may be so deficient "in failing to particularize the place to be searched or the thing to be seized"[47] that the executing officers could not reasonably presume it to be valid. Despite the inaccuracies of description in the *Sheppard* warrant, it was not, under those circumstances, found to be so deficient as to prohibit good faith, as the officer who obtained and later directed execution of the warrant took every reasonable step to assure its validity and justifiably relied upon the magistrate's authorization.

Similarly, in *United States* v. *Arenol*,[48] the U.S. Court of Appeals for the Eighth Circuit found that a typographical error, which caused the subject warrant on its face to authorize a search of "3208," rather than the correct "3028" Third Avenue South, did not render the warrant, under the circumstances, so facially deficient as to preclude good faith reliance on its validity. Despite the typographical error, the officers in *Arenol* also did everything reasonably possible to assure the warrant's validity. The address was correctly typed on various documents submitted with the application and warrant. In addition, an officer, noticing the error, called the issuing magistrate and informed him of the mistake. The magistrate, in turn, advised the officer to correct the address on the warrant and execute it.

No Reasonable Basis for Finding Probable Cause

Lastly, good faith will not be applicable where the affidavit in support of the search warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" [citations omitted].[49] Again, the focus is not on whether the magistrate made a correct determination of probable cause, but whether a well-trained law enforcement officer could harbor an objectively reasonable belief in the existence of probable cause.

Illustrative of this focus on the reasonableness of the officer's belief in probable cause in *United States* v. *Fama*.[50] In that case Agents of the Drug Enforcement Administration were found to have reasonably relied on the probable cause determination of a U.S. district court judge who issued a search warrant, even though the probable cause to search the defendant's residence was based upon information received 35 days before it was presented to the judge. In making such a determination, the U.S. Court of Appeals for the Second Circuit pointed to: 1) The abundance of details in the affidavit, 2) drafting of the affidavit by a Federal prosecutor, 3) consideration of the same affidavit by another U.S. district court judge in issuing 30 arrest warrants and 20 search warrants, and 4) the fact that the judge who issued the search warrant in question had also issued 12 additional warrants based upon the same affidavit.

Conversely, a Texas decision is indicative of when probable cause has been found to be so lacking in the affidavit as to preclude good faith belief in its existence. In *Adkins* v. *State*,[51] the subject affidavit included the following conclusory information: 1) It had been reported to the affiant that the driver of the vehicle which was to be searched was a drug dealer, and 2) the driver was observed handing another reported drug dealer a package in the vehicle. The Texas court of appeals found this information to be so "bare bones" as to prohibit an objectively reasonable belief in its sufficiency.

Additionally, an Idaho appellate court has found that the good faith warrant exception is not applicable when the information in the affidavit in support of probable cause has been tainted by the police officer's own misconduct.[52] In that case, the affiant-officer included in his affidavit in support of a warrant to search the defendant's apartment information he had obtained from a previous illegal entry into the apartment, unbeknownst to the issuing magistrate. The court therefore found the warrant to be so tainted by the officer's illegal conduct as to preclude a finding of good faith on his part.

In summary, the *Leon* and *Sheppard* cases dictate, and subsequent Federal and State cases illustrate, that search by warrant is judicially preferred. When available, the warrant will assure admissibility of evidence, even if later ruled invalid, if law enforcement officers adhere to the following procedural and constitutional safeguards in seeking to have the warrant issued:

1) State accurate and specific facts in support of probable cause;

2) Assure that the issuing magistrate actually reviews and considers the affidavit; and

3) Describe the items to be seized and the place to be searched in such detail in the warrant that an officer unfamiliar with the investigation could execute the warrant without doubt.

These considerations can best be achieved through continued training in fourth amendment search and seizure areas and use of procedural guidelines, including supervisory and prosecutorial review of search warrant applications, prior to presentation to a judicial officer.

Properly Executed Warrant

Even if the police officer has an objectively reasonable belief in the proper issuance of the search warrant, he must still have "properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant."[53] For example, officers armed with a search warrant are usually required to give notice of their authority and purpose, or "knock and announce," prior to making forceful entry into residential premises to be searched,[54] unless, of course, such entry falls into a recognized exception to any announcement requirement.

Additionally, law enforcement officers cannot disregard the parameters of the search warrant and turn the search into what is in effect a general search, with all matters of discretion left to the executing officers, and still claim good faith reliance on the warrant.[55]

CONCLUSION

With the "totality of the circumstances" test and the "good faith warrant exception to the exclusionary rule," the Supreme Court has clearly encouraged the law enforcement officer to use the warrant procedure, even in instances that might fall into one of the narrowly drawn exceptions to the search warrant requirement. By obtaining a search warrant whenever practical, the officer most effectively meets his responsibility to respect the rights afforded to citizens by the fourth amendment. If reasonably relied upon and executed properly, the search warrant assures introduction of evidence integral to the truth-finding function of the judge or jury, even if the warrant is later found to be invalid.[56]

Footnotes

[1]U.S. Const. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2]*Johnson* v. *United States*, 333 U.S. 10, at 14 (1948).

[3]*E.g.*, *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *MacDonald* v. *United States*, 335 U.S. 451 (1948); *Jones* v. *United States*, 362 U.S. 257 (1960); *United States* v. *Chadwick*, 433 U.S. 1 (1977).

[4]*United States* v. *Chadwick*, *supra* note 3.

[5]*United States* v. *Ventresca*, 380 U.S. 102, at 106 (1965). *See, e.g.*, *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).

[6]*Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (The exclusionary rule essentially prohibits introduction of evidence acquired or derived through governmental conduct violative of the fourth amendment). For a detailed discussion of the exclusionary rule, see Schofield, Daniel L., "The Fourth Amendment Exclusionary Rule and the United States Supreme Court," *FBI Law Enforcement Bulletin*, vol. 46, No. 3, March 1977, pp. 26–31.

[7]462 U.S. 213 (1983) (hereinafter referred to as *Gates*).

[8]*Supra* note 4.

[9]*Supra* note 4.

[10]For a comprehensive discussion of the "two-pronged test" of *Aguilar* and *Spinelli*, see McGuiness, Robert L., "Probable Cause: Informant Information," *FBI Law Enforcement Bulletin*, vol. 51, Nos. 11–12, November-December 1982, pp. 23–31, pp. 19–24.

[11]*Supra* note 7 at 238. (The Court additionally stated that in determining the overall reliability of the tip, a deficiency in either the basis of knowledge, veracity, or reliability of the informant may be cured by a "strong showing" in the other. *Id.* at 233. With this in mind, courts will likely continue to place considerable reliance upon these factors in determining the sufficiency of probable cause based upon an informant's tip.)

[12]*Id.* at 239.

[13]*See, e.g.*, *United States* v. *Badessa*, 752 F.2d 771 (1st Cir. 1985); *United States* v. *Peyko*, 717 F.2d 743 (2d. Cir. 1983); *United States* v. *Pritchard*, 745 F.2d 1112 (7th Cir. 1984); *United States* v. *Robinson* 756 F.2d 56 (8th Cir. 1985); *United States* v. *Ross*, 713 F.2d 389 (8th Cir. 1983); *United States* v. *Doty*, 714 F.2d 761 (8th Cir. 1983); *United States* v. *Bereford*, 750 F.2d 57 (10th Cir. 1984) (It is not the purpose of this article to address the myriad of factual situations which would amount to sufficient probable cause based upon an informant's tip using the "totality of the circumstances" test).

[14]*Supra* note 7, at 237.

[15]*Id.* at 236.

[16]80 L.Ed.2d 721 (1984) (hereinafter referred to as *Upton*).

[17]On remand to the Massachusetts court, the "totality of the circumstances" test was rejected, and instead, the *Aguilar-Spinelli* "two-pronged test" was used in assessing the sufficiency of informant information, based upon State constitutional grounds; *Commonwealth* v. *Upton*, 476 N.E. 2d 548 (Sup. Ct. Mass. 1985). *Accord*, *State* v. *Jackson*, 688 P.2d 136 (Sup. Ct. Wash. 1984); *State* v. *Kimbro*, 496 A.2d 498 (Sup. Ct. Conn. 1985).

[18]Justice White had recognized a good faith warrant exception to the exclusionary rule in his concurring opinion in *Gates*, *supra* note 7, at 246. The Supreme Court had also earlier recognized an exception to the exclusionary rule when a police officer in making a search relies in good faith on a constitutional norm which is later changed by the courts, *United States* v. *Peltier*, 422 U.S. 531 (1975), or when an officer relies in good faith on a local ordinance which is later found to be unconstitutional, *Michigan* v. DeFillippo, 443 U.S. 31 (1979).

[19]82 L.Ed.2d 677 (1984) (hereinafter referred to as *Leon*).

[20]82 L.Ed.2d 737 (1984) (hereinafter referred to as *Sheppard*).

[21]*Id.* at 687 (Legal commentators have taken issue with the determination that the exclusionary rule is of deterrent value only and is not a personal right of the individual whose fourth amendment rights have been violated). See, LaFave, W., Search and Seizure—A Treatise on the Fourth Amendment, vol. 1, sec. 1.2 (1985).

[22]*Id.* at 697.

[23]*Id.* at 697.

[24]*Id.* at 697.

[25]*Id.* at 698.

[26]*Supra* note 20, at 744.

[27]*Id.* at 744.

[28]*Id.* at 744 n. 6.

[29]*Supra* note 19, at 698 n. 23 (The Supreme Court has recently applied the same reasonably well-trained officer standard in determining if an officer was objectively reasonable in believing that his affidavit in support of an arrest warrant established probable cause and that he properly applied for the warrant in order to avoid civil liability for alleged fourth amendment violations under the rule of qualified immunity. *Malley* v. *Briggs*, ___ U.S. ___ (1986) (Decided March 5, 1986.)

[30]610 F.Supp. 1560 (N.D. Cal. 1985).

[31]The Court found the search warrant failed to require seizure of the items named in the warrant and excused the executing agents from leaving a copy of the warrant and the inventory, as required by Fed. R. Crim. P. 41.

[32]*Supra* note 19, at 698 n. 23.

[33]*Id.* at 698 n. 24.

[34]*Supra* note 19, at 698.

[35]*State* v. *Anderson*, 688 S.W.2d 947 (Ark. Sup. Ct. 1985).

[36]*Collins* v. *Florida*, 465 So.2d 1266 (Fla. Ct. App. 1985).

[37]778 F.2d 1029 (5th Cir. 1985).

[38]*Supra* note 19, at 698-699, citing *Franks* v. *Delaware*, 438 U.S. 154 (1978). For a detailed discussion of *Franks*, see McGuiness, Robert L., "Misstatements in Affidavits for Warrants; *Franks* and its Progeny," *FBI Law Enforcement Bulletin*, vol. 51, No. 3, March 1982, pp. 24–31.

[39]601 F. Supp. 947 (D. Minn. 1985).

[40]*See also*, *United States* v. *Stannert*, 762 F.2d 775 (9th Cir. 1985), *modified* 769 F.2d 1410 (1985) (Affiant's failure to inform magistrate that the defendant had only been arrested and not convicted for a previous narcotics offense, that an explosion which had occurred at the place to be searched was prior to defendant's occupancy, and that an anonymous caller had suggested that residents of place to be searched were using ether to free base cocaine rather than to manufacture drugs as stated in affidavit, precluded good faith); *United States* v. *Reivich*, 610 F. Supp. 538 (D. Mo. 1985) (Failure to inform magistrate of inducement to informant precluded good faith); *Compare with*, *United States* v. *Estes*, 609 F. Supp. 564 (D. Vt. 1985) (Informing magistrate of communications which might be subject to marital privilege was not reckless or dishonest).

[41]*See*, *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) (Attorney general who was in charge of murder investigation to which warrant related was not an impartial magistrate).

[42]*See*, *Connally* v. *Georgia*, 429 U.S. 245 (1977) (Justice of peace who received $5 for issuing a search warrant and no fee for denying a warrant application was not an impartial magistrate).

[43]*Supra* note 19, at 699, citing *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979) (Magistrate who issued search warrant abandoned his neutrality by accompanying police to place to be searched to then determine what could be seized).

[44]782 F.2d 1317 (5th Cir. 1986). *See also*, *United States* v. *Hendricks*, 743 F.2d 653 (9th Cir. 1985) (Magistrate did not abandon his role for purposes of determining good faith on the part of the seizing law enforcement officers when he issued an anticipatory or prospective search warrant).

[45]*Supra* note 19, at 699.

[46]*Miller* v. *Texas*, 703 S.W.2d 352 (Tex. Ct. App. 1985).

[47]*Supra* note 19, at 699.

[48]768 F.2d 263 (8th Cir. 1985). *See also*, *United States* v. *Faul*, 748 F.2d 121 (8th Cir. 1984) (Describing items to be seized in the warrant as "all firearms" did not, under the circumstances, preclude good faith); *United States* v. *Accardo*, 749 F.2d 1477 (11th Cir. 1985) (Describing items to be seized as "all corporate records" did not preclude good faith where affidavit had been reviewed by several assistant U.S. attorneys prior to application for warrant); *In Re Motion to Quash Grand Jury Subpoena*, 593 F. Supp. 184 (S.D. W. Va. 1984) (Typographical error on warrant that it was to be executed by August 12, rather than on the correct August 22, did not preclude good faith).

[49]*Supra* note 19, at 699.

[50]758 F.2d 834 (2d Cir. 1985). *See, e.g.*, *United States* v. *Thomas*, 757 F.2d 1359 (2d Cir. 1985); *United States* v. *Gant*, 759 F.2d 484 (5th Cir. 1985); *United States* v. *Savoca*, 761 F.2d 292 (6th Cir. 1985); *United States* v. *Thornton*, 746 F.2d 39 (D.C. Cir. 1984).

[51]675 S.W.2d 604 (Tex. Ct. App. 1984). *See, e.g.*, *United States* v. *Sager*, 743 F.2d 1261 (8th Cir. 1984); *United States* v. *Granger*, 596 F. Supp. 665 (W.D. Wis. 1984); *State* v. *Thompson*, 369 N.W.2d 363 (N.D. Sup. Ct. 1985).

[52]*State* v. *Johnson*, 701 P.2d 239 (Idaho Ct. App. 1985).

[53]*Supra* note 19, at 696 n. 19.

[54]*See*, *State* v. *Sakellson*, 379 N.W.2d 779 (N.D. Sup. Ct. 1985) (Officers' failure to knock and announce not objectively reasonable).

[55]*See*, *United States* v. *Strand*, 761 F.2d 449 (8th Cir. 1985) (No objectively reasonable basis for believing the warrant which named "stolen mail" as the items to be seized, included normal household items).

[56]At least two States have rejected the good faith search warrant exception to the exclusionary rule based upon State constitutional grounds. *State* v. *Novembrino*, 491 A.2d 37 (N.J. Sup. Ct. 1985); *People* v. *Bigelow*, 488 N.E.2d 451 (N.Y. Sup. Ct. 1985).

AFI To Honor Outstanding Law Enforcement Officials

On November 7, 1986, the National Association of Federal Investigators (AFI) will again honor exceptional members of the law enforcement profession at its annual conference culminating in the awards banquet in Washington, DC. As in the past, the AFI awards will cover a broad array of professional accomplishments and recognize excellence in all aspects of law enforcement.

The categories for this year's awards are: Federal Investigator of the Year (one each for outstanding performance in the fields of criminal, financial, security/counterintelligence, fraud and civil/administrative, investigations), Law Enforcement Leadership Award, Legal Award, Legislative Award, and Public Service Award. In addition, AFI will accept nominations for the AFI Honor Roll, a distinction conferred posthumously to a law enforcement officer who has sacrificed his or her life in the line of duty.

Nominations are now being accepted for the above awards through law enforcement agencies. Nominees need not be affiliated with the AFI to qualify. For more information on the AFI awards banquet, or to obtain nomination forms for submission through your agency, please call or write:

National Association of Federal Investigators
1612 K Street, Suite 202
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(202) 466-7288

Intent to submit nominations must be filed no later than July 15, 1986, to be considered.