# CLEARLY ERRONEOUS REVIEW IS CLEARLY ERRONEOUS: REINTERPRETING *ILLINOIS V. GATES* AND ADVOCATING DE NOVO REVIEW FOR A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE IN APPLICATIONS FOR SEARCH WARRANTS

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## I. INTRODUCTION

This Article highlights the importance of choosing a standard of review for probable cause determinations authorizing search warrants and advocates a proper standard consistent with the Fourth Amendment. More specifically, it is the task of this Article to expose the offered justifications for deferential review of magistrates' probable cause determinations as mere pretense for unacceptable judicial preferences limiting Fourth Amendment rights. Part II summarizes both the climate in which modern interpretations of probable cause have evolved and the latest attempts by American courts to define and justify the standard of review for a magistrate's probable cause determination based on the four corners of the affidavit. Part III analyzes the debate surrounding the interpretation of the Supreme Court's decision in *Illinois v. Gates*—the most detailed and significant attempt by the Court to justify deferential review for search warrant probable cause determinations.[1] Part IV advocates that the proper interpretation of *Gates* requires intermediate, or substantial basis, review. Most importantly, it argues that a popular federal circuit interpretation of *Gates*, that a magistrate's determination of probable cause be reviewed for clear error, is directly inconsistent with the language in *Gates* and the Court's subsequent decision in *United States v. Leon*, which adopted the good faith exception to the Fourth Amendment exclusionary rule.[2] Lastly, Part V attempts to denounce all possible interpretations of *Gates*, including substantial basis review, and concludes

1. Illinois v. Gates, 462 U.S. 213 (1983).
2. United States v. Leon, 468 U.S. 897 (1984).

by advocating de novo review of magistrates' findings of probable cause in the issuance of search warrants.

## II. SETTING THE FRAMEWORK: THE MODERN STANDARD OF REVIEW FOR THE EXISTENCE OF PROBABLE CAUSE IN SEARCH WARRANTS

### A. *The Standard for Magistrate Evaluation of Probable Cause*

Both the standard for evaluating the existence of probable cause and the standard for reviewing a magistrate's determination of probable cause have evolved in a judicial climate that seeks to balance individual liberties with societal protection.[3] The level of probable cause required to issue a search warrant is essentially the threshold at which the necessity of government intrusion intersects with an individual's right to privacy.

In *Gates*, the Supreme Court held that a magistrate is to evaluate the existence of probable cause based on the totality of the circumstances.[4] More specifically,

> The task of the issuing magistrate [or suppression judge in warrantless searches] is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit [or testimony] before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.[5]

The *Gates* court was concerned with inflexible, specific, and rigid probable cause evaluations by magistrates as a result of *Aguilar v. Texas*[6] and *Spinelli v. United States*.[7] *Aguilar* and *Spinelli* dealt with determinations of probable cause based on affidavits which relied, at least in part, on informant information. Both cases highlighted the importance of the informant's knowledge and veracity to the existence of probable cause. Subsequently, magistrates essentially began treating probable cause determinations as an elemental evaluation[8] requiring proof of the

3. *See Gates*, 462 U.S. at 241.
4. *Id.* at 230–32.
5. *Id.* at 238.
6. Aguilar v. Texas, 378 U.S. 108 (1964).
7. Spinelli v. United States, 393 U.S. 410 (1969).
8. *Gates*, 462 U.S. at 230 (stating relevant elemental considerations are not independent requirements but issues that illuminate the commonsense approach to probable cause).

informant's basis of knowledge and veracity.[9] The veracity prong was satisfied by proof of the informant's reliability or credibility.[10] Instead of making practical commonsense decisions, magistrates required specific types of information and descriptions in order to satisfy probable cause requirements.[11] Consequently, the Court used *Gates* to simplify probable cause determinations into commonsense probability assessments, even for applicants that do not rely on informant hearsay.[12]

In analyzing the totality of the circumstances, magistrates may only consider matters brought to their attention.[13] Moreover, it is settled that magistrates generally only consider the four corners of the affidavit.[14] In other words, they can only rely on what is contained in the affidavit. The existence of probable cause can be determined simply by the affiant handing an affidavit to the magistrate and allowing him or her to examine it.[15] After reading the affidavit, the magistrate can either issue or refuse to issue the search warrant.[16] An officer may request a warrant without an affidavit; however, verbatim records must be kept of the testimony presented to the magistrate so that a court may review the same information considered by the magistrate regarding the issuance of the

9. *Id.* at 228–29.

10. *Spinelli*, 393 U.S. at 412–13; *Aguilar*, 378 U.S. at 114.

11. *See Spinelli*, 393 U.S. at 415–16; *Aguilar*, 378 U.S. at 113–15.

12. The fact pattern in *Gates* was similar to *Spinelli* and *Aguilar*. As a result, it was the perfect opportunity for the Court to reexamine the standard for assessing the existence of probable cause with regard to informant hearsay, an area which had sparked tremendous controversy. The Bloomingdale Police Department in Bloomingdale, Illinois received an anonymous letter informing them that Sue and Lance Gates were selling drugs. *Gates*, 462 U.S. at 225. The letter described in detail how Sue and Lance purchased their drugs in Florida. *Id.* Sue drove a car to Florida to be loaded with drugs. *Id.* Lance then flew to Florida and drove the car back to Illinois. *Id.* Sue flew back after dropping the car off in Florida. *Id.* An application for a search warrant was presented to a magistrate alleging that probable cause existed to believe that drugs would be found in the home and car of Sue and Lance Gates based on the informant tip and a police investigation which seemed to corroborate the allegations of the anonymous informant. *Id.* at 226. The magistrate determined that probable cause did exist and issued the search warrant. *Id.* A search of the home and car uncovered weapons, about 350 pounds of marijuana, and other contraband. *Id.* at 227.

13. *Aguilar*, 378 U.S. at 109 n.1.

14. United States v. Rubio, 727 F.2d 786, 795 (9th Cir. 1983) ("The facts upon which the magistrate bases his probable cause determination must appear within the four corners of the warrant affidavit; the warrant cannot be supported by outside information."); United States v. Leichtling, 684 F.2d 553, 555 (8th Cir. 1982).

15. *See Rubio*, 727 F.2d at 795.

16. *See generally id.* (limiting probable cause analysis to the contents of an affidavit).

warrant.[17]

The rationale for the totality of the circumstances approach extends from very early probable cause jurisprudence. In *Brinegar v. United States*,[18] the Court stated that "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[19] Therefore, "evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."[20] Affidavits drafted by nonlawyers should not be rejected because they lack hypertechnical, legal specificity.[21] The Court in *Gates* was concerned that probable cause determinations were shifting away from general probability assessments to rigid, unrealistic, rule-based evaluations.[22] Essentially, the Court was unwilling to compromise security, law enforcement effectiveness, and efficiency simply because a nonlawyer failed to understand the inflexible technicalities of Fourth Amendment law.[23]

However, the reaffirmation of early commonsense probable cause determinations does not equate to giving magistrates unfettered discretion. "Sufficient information must be presented to the magistrate to allow that

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17. FED. R. CRIM. P. 41(d)(3)(B)–(C). Specifically, the rule provides that:

> Upon learning that an applicant is requesting a warrant, a magistrate judge must:
>
> (i) place under oath the applicant and any person on whose testimony the application is based; and
>
> (ii) make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing.
>
> . . . The magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk.

*Id.*

18. Brinegar v. United States, 338 U.S. 160 (1949).
19. *Id.* at 175.
20. United States v. Cortez, 449 U.S. 411, 418 (1981).
21. United States v. Ventresca, 380 U.S. 102, 108 (1965).
22. Illinois v. Gates, 462 U.S. 213, 241 (1983).
23. *See id.*

official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."[24] If bare bone conclusory affidavits were permitted, the danger is that law enforcement officials would be determining probable cause instead of an independent, unbiased magistrate detached from the investigation.[25] In other words, as the Court stated in *United States v. Ventresca*, a magistrate is not a "rubber stamp" or conduit for law enforcement.[26] Consequently, magistrates still must "conscientiously review the sufficiency of affidavits" even though probable cause is determined generally rather than rigidly.[27] Although there is some doubt that overwhelmed magistrates are realistically performing more than brief, skeletal affidavit examinations,[28] virtually every probable cause opinion reaffirms the need for actual analysis and inspection rather than blind issuance of warrants.

### B. *The Standard for Reviewing a Magistrate's Determination of Probable Cause*

Although the *Gates* Court was primarily concerned with the magistrate's standard for evaluating probable cause, it also reaffirmed its established position regarding the standard for reviewing a magistrate's determination of probable cause in the issuance of search warrants. "[T]he 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."[29] Reviewing courts, including trial courts, are to give great deference to a magistrate's determination of probable cause.[30] "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo*

24. *Id.* at 239; *see also* United States v. Wilhelm, 80 F.3d 116, 120 (4th Cir. 1996) (finding the magistrate judge erred "by simply accepting the unsupported conclusions of the affidavit").

25. Johnson v. United States, 333 U.S. 10, 13–14 (1948).

26. United States v. Ventresca, 380 U.S. 102, 109 (1965).

27. *Gates*, 462 U.S. at 239. "[T]here must be enough evidence reasonably to believe that evidence of illegal activity will be present at the specific time and place of the search." United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985).

28. *See* Daniel L. Rotenberg, *On Seizures and Searches*, 28 CREIGHTON L. REV. 323, 340 (1995) (concluding that magistrates, operating on limited resources, are unable to scrutinize affidavits with the care required by the Fourth Amendment).

29. *Gates*, 462 U.S. at 236 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

30. Spinelli v. United States, 393 U.S. 410, 419 (1969).

review."[31] Thus, a reviewing court's job is to determine whether there was a substantial basis for a magistrate's determination that an affidavit satisfied the totality of the circumstances test.

The decision to give great deference to a magistrate's determination of probable cause is yet another example of the Court's attempt to strike a balance between public and private interests.[32] In close cases, giving less deference to the initial determination of probable cause has the effect of increasing the possibility that the results of important searches will be suppressed. In other words, the more scrutiny appellate courts give to an affidavit, the higher the chance that the facts contained in the four corners of the affidavit will be deemed insufficient to establish probable cause. Although this proposition is true, the most important question is: Why did the Court decide on "great deference" as the balancing threshold? Surprisingly, not many decisions have seriously discussed the rationale underlying this standard.

### C. *The Rationale for Great Deference*

Because of the collateral treatment by courts,[33] very little discussion can be found in court opinions regarding the justifications for giving great deference to a magistrate's determination of probable cause.[34] What makes *Gates* unique is not that it pronounces a novel standard for reviewing magistrate determinations of probable cause. In fact, it merely reaffirms the Court's longstanding position.[35] Instead, *Gates* is the first

31. *Gates*, 462 U.S. at 236; *see also* Massachusetts v. Upton, 466 U.S. 727, 733 (1984) (upholding the preference for deferential review set forth in *Gates*).

32. *See Gates*, 462 U.S. at 241; United States v. Ventresca, 380 U.S. 102, 111–12 (1965).

33. Often, courts only make a conclusive statement reciting the standard of review before actually reviewing the magistrate's determination. Surprisingly, the level of review is rarely an issue of contention. Consequently, a court rarely has to justify the level at which they review magistrate determinations. *See, e.g.*, *Jones*, 362 U.S. at 271–72; United States v. Bertrand, 926 F.2d 838, 841 (9th Cir. 1991).

34. Although the issue of review is rarely in contention, when it is, both federal and state courts frequently do nothing more than cite *Gates* or conclusively and collaterally reaffirm deferential review prior to moving on to the next issue on appeal. *See, e.g.*, State v. Norman, 133 S.W.3d 151, 159 (Mo. Ct. App. 2004) (stating that "initial judicial determinations of probable cause . . . will [be] reverse[d] only if that determination is clearly erroneous"). *But cf.* State v. Navas, 913 P.2d 39, 49 (Haw. 1996) ("rejecting the 'substantial basis' and 'clearly erroneous' standards of review" and adopting de novo review for magistrates' determinations of probable cause in search warrants).

35. *Gates*, 462 U.S. at 236 (reaffirming "[a] magistrate's 'determination of

case in which the Supreme Court actually details the justifications behind the deferential standard of review.[36] *Gates*, and a few subsequent decisions, have attempted to rationalize great deference by offering two substantive and two procedural justifications.[37]

The most popular substantive explanation, and the one that received the most attention in *Gates*, is that reducing the level of deference would deter law enforcement officials from seeking warrants altogether.[38] A reviewing court's grudging attitude toward warrants "is inconsistent both with the desire to encourage use of the warrant process by police officers and with the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case."[39]

This theory is premised on two independent propositions. First, a lower level of deference would increase the possibility that search warrants would later be ruled invalid. A trial or appellate court judge could give less deference to the original magistrate and greater deference to his or her own determination of the existence of probable cause. In other words, for cases in which the existence of probable cause is a close call, a lower standard of review would increase the chance that the search warrant would be overturned.

Second, if warrants are subjected to stricter scrutiny at the appellate level, "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."[40] The easier overturning a warrant becomes, the less likely it is that an officer will seek a warrant in the first place. Giving great deference to a magistrate assures the police officer that, in most cases, the magistrate's determination is final, and the important results of a search will not be strictly reexamined and, subsequently, suppressed. In other words, a defense attorney gets one shot at suppression rather than two, three, or even four—depending on the number of appeals the client wishes to pursue. Thus, the Court's

probable cause should be paid great deference by reviewing courts'" and holding a magistrate's decision should not be reviewed de novo (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969))).

36. *Id.* at 236–37.

37. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 698 (1996); Massachusetts v. Upton, 466 U.S. 727, 732–33 (1984).

38. *Gates*, 462 U.S. at 236.

39. *Upton*, 466 U.S. at 733.

40. *Gates*, 462 U.S. at 236.

preference for the warrant process[41] outweighs any advantage resulting from reducing the level of deference.

The best example of this rationale comes from the Court's comparison of the standard of review for probable cause in search warrants with the standard in warrantless searches. In *Ornelas v. United States*,[42] the Court faced the issue of whether to extend *Gates*'s deferential review to warrantless searches.[43] Instead of extending deferential review, it determined that warrantless searches are to be reviewed de novo.[44] Unlike the great deference paid to a magistrate's determination of probable cause for a search warrant, a trial court's decision to sustain or overrule a motion to suppress based on lack of probable cause in a warrantless search is to receive no deference whatsoever.[45] The Court explained that the review for warrantless searches must be more scrupulous than searches in which a warrant was issued in order to maintain the public policy preference for warrants.[46] By giving great deference to a magistrate's evaluation, trial and appellate courts are less likely to suppress evidence. Consequently, the difference in appellate assessment provides an incentive for law enforcement officials to seek warrants rather than risk the suppression of the fruits of a warrantless search and, in many cases, the charge being dismissed.

The second most popular explanation for great deference is derived from the Court's preference for nontechnical, commonsense review.[47] Recall that the *Gates* Court discouraged strict rule-based evaluations for probable cause and favored a general "totality-of-the-circumstances approach."[48] The justification was that strict legal evaluations of probable cause are inconsistent with commonsense probability assessments.[49] Many argue that reducing the deference given to the magistrate, and as a result, giving trial and appellate judges a greater role in the evaluation process, is inconsistent with the totality of the circumstances approach, and is essentially another form of hypertechnical review.[50] In other words, the

41. *See, e.g.*, *Upton*, 466 U.S. at 733; United States v. Ventresca, 380 U.S. 102, 109 (1965).
42. Ornelas v. United States, 517 U.S. 690 (1996).
43. *Id.* at 698–99.
44. *See id.* at 699.
45. *Id.*
46. *Id.*
47. *See* Illinois v. Gates, 462 U.S. 213, 230–32 (1983).
48. *Id.* at 230–31.
49. *Id.* at 231–32.
50. *See* Peter J. Kocoras, Comment, *The Proper Appellate Standard of Review*

merits would fall victim to unnecessary legal and procedural rigidity. Because a probable cause determination is nothing more than a commonsense probability assessment, there is no need to have multiple courts review the initial evaluation and put their own spin on the existence of probable cause.

The most popular procedural argument for deferential review is judicial efficiency. The rationale is that it does not make sense to require appellate courts to evaluate the existence of probable cause when a magistrate has already done so. Were deference to be reduced, appellate courts would be swamped with probable cause determinations on both post-conviction and interlocutory appeals.[51] Because the workload for appellate courts has significantly increased, deferential review is imperative.[52] By relieving itself of the burden of reexamining affidavits, an appellate court can now "devote more of [its] time and energy to reviewing questions of law."[53]

The final procedural argument is that the magistrate is "closer to the facts than the appellate judges and is therefore better able . . . to assess their legal significance."[54] This argument is often used, but rarely explained in detail. Conceivably, the explanation is similar to the justification for deferential review of fact-intensive inquiries by trial courts in other areas of civil and criminal litigation. A trial judge is present during factual investigations, and is in the best position to evaluate their legal consequences. However, it is both troubling and confusing that this argument is offered to support deferential appellate review of a magistrate's four corners probable cause examination. In this situation, the magistrate relies solely on the written facts presented to him in the search warrant application. Because the application is also presented to the trial and appellate courts when review is requested, there should be absolutely no argument that a magistrate had any distinct advantage in determining the existence of probable cause.

It is possible that proponents of deferential review are referring to

*for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1450–51 (1993).

51. *See* United States v. McKinney, 919 F.2d 405, 420 (7th Cir. 1990) (Posner, J., concurring).

52. *Id.*

53. Kocoras, *supra* note 50, at 1417; *see infra* Part IV.B. This argument, of course, is facially puzzling since determining whether probable cause exists within the four corners of an affidavit is a mixed question and requires no factual investigation.

54. *McKinney*, 919 F.2d at 419.

non-four corners probable cause review. "The Fourth Amendment does not require that the basis for probable cause be established in a written affidavit; it merely requires that the information provided the issuing magistrate be supported by 'Oath or affirmation.'"[55] A magistrate may consider oral testimony when determining the existence of probable cause.[56] Even if this is the case, the argument is still troubling. Typically, the argument that the trial court is closer to the facts and that deference should be given to its factual determinations is a result of the judge's ability to assess witness credibility under the rigor of direct and cross examination.[57] The fact that an officer's testimony is presumed to be credible, even if unrecorded and oral, makes this argument much more tenuous. Here, a magistrate is not making a credibility assessment after rigorous examination; rather, the magistrate is simply assessing whether the written or unwritten facts given by the officer satisfy the probable cause standard. More importantly, even assuming that the justification above is valid and applies to the magistrate's probable cause determination based on unrecorded testimony, the vast majority of probable cause determinations are based solely on the four corners of the affidavit.[58] Furthermore, the argument is irrelevant to four corners probable cause review.

While the four arguments above are consistently offered to justify deferential review, the Court clearly regards its warrant encouragement rationale as the most persuasive. First, the Court never misses a chance to declare the Fourth Amendment's preference for warrants.[59] In fact, warrantless searches are presumptively unreasonable.[60] Second, the

55. United States v. Clyburn, 24 F.3d 613, 617 (4th Cir. 1994) (quoting U.S. CONST. amend. IV). However, this is the exception rather than the rule. Most often, magistrates only consider information contained in an affidavit. *See, e.g.*, United States v. Rubio, 727 F.2d 786, 795 (9th Cir. 1983); United States v. Leichtling, 684 F.2d 553, 555 (8th Cir. 1982).

56. *Clyburn*, 24 F.3d at 617.

57. *See* Ornelas v. United States, 517 U.S. 690, 701 (1996) (Scalia, J., dissenting).

58. *See, e.g.,* United States v. Stanert, 762 F.2d 775, 778–79 (9th Cir. 1985) (holding the affidavit supported a finding of probable cause that the defendant's residence contained an illicit laboratory); *Rubio*, 727 F.2d at 795 (holding an affidavit's reference to an indictment did not allow the indictment to serve as the basis for probable cause); *Leichtling*, 684 F.2d at 556 (holding the search warrant was valid because the affidavit established a probability of criminal activity).

59. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 109 (1965).

60. Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

procedural efficiency justifications are clearly not sufficient. In *Ornelas* the Court confusingly offered efficiency as a justification for selecting de novo review of law enforcement determinations of probable cause in warrantless searches.[61] Even though both claims of efficiency are not necessarily mutually exclusive, the fact that efficiency is somehow an effect of selecting both de novo and deferential review suggests that the substantive policy justifications are clearly the driving force behind the choice of giving great deference.

Although other arguments might be offered in favor of deferential review, the preceding four explanations are the only ones offered by courts and scholarly journals. Thus, they were presumptively the only justifications considered when the Supreme Court pronounced, and subsequent lower courts reaffirmed, deferential review for magistrate probable cause determinations. Consequently, it remains the task of this Article to debunk the justifications for great deference and advocate a proper standard of review consistent with the Fourth Amendment.

## III. QUESTIONABLE REVIEW: THE DEBATE OVER THE INTERPRETATION OF *GATES*

At first glance, the instructions to reviewing courts from *Gates* seem straightforward. "[T]he 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."[62] However, much confusion exists among circuits regarding what exactly this pronouncement means. Surprisingly, this confusion has not produced extensive debate within appellate opinions or scholarly journals. Instead, different circuits merely pronounce their interpretation with little justification, explanation, or detail. Nonetheless, it is evident from these various circuit pronouncements that the established standard in *Gates* is much more ambiguous than one might have originally thought.

Upon closer inspection, the *Gates* pronouncement is extremely confusing. Does it leave the door open for circuits to utilize their own standard of review in determining whether the magistrate had a substantial

unreasonable under the Fourth Amendment . . . ."); *see also* United States v. Warren, 42 F.3d 647, 652 (D.C. Cir. 1994).

61. *See Ornelas*, 517 U.S. at 697–98.

62. Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting Jones v. United States, 362 U.S. 257, 271 (1960)).

basis for finding probable cause? Does it establish an intermediate standard of review? Or, does the requirement of great deference definitively necessitate clear error review? If clear error review was what the Court intended, why did they not simply and specifically express this intention? Why did they choose this ambiguous language for probable cause determinations? The internal confusion over the ambiguous substantial basis statement in *Gates* has resulted in a number of different circuit interpretations.

One interpretation, followed by the Seventh,[63] Eighth,[64] and Ninth[65] Circuits, reviews magistrates' probable cause determinations for clear error. Although this seems simple, when phrased in the language of *Gates*, the reviewing court's task becomes much more complicated and confusing. The reviewing courts in these circuits use a clear error standard to determine whether the magistrate had a substantial basis for probable cause.[66] In other words, an assessment by a reviewing court requires an analysis of two independent standards: (1) whether there was a substantial basis for probable cause; and (2) whether there was clear error in the substantial basis determination.

Although explanations for utilizing clear error are rare, the implicit justification appears to be that clear error is consistent with the Court's requirement that great deference be given to issuing magistrates.[67] In other

63. United States v. Spears, 965 F.2d 262, 271 (7th Cir. 1992).

64. United States v. Wright, 145 F.3d 972, 975 (8th Cir. 1998). The Eighth Circuit interpretation is extremely confusing. *Wright* cites United States v. Mahler, 141 F.3d 811, 813 (8th Cir. 1998), for the proposition that a reviewing court reviews a magistrate's determination for clear error. In fact, *Mahler* makes no such pronouncement. Instead, it states a reviewing court should review a district court's determination for clear error. Thus, the Eighth Circuit's actual interpretation of *Gates* is somewhat unclear. This confusion, however, further bolsters the lack of clarity in *Gates*.

65. United States v. Vizcarra, No. 93-10104, 1994 WL 245611, at *1 (9th Cir. June 6, 1994) ("We will not reverse a magistrate's determination of probable cause absent a finding of clear error."); United States v. Watson, No. 89-10232, 1990 WL 182035, at *1 (9th Cir. Nov. 23, 1990) ("The standard of review for a magistrate's determination that probable cause existed is whether the magistrate's determination is clearly erroneous."); United States v. McQuisten, 795 F.2d 858, 861 (9th Cir. 1986) ("We may not reverse a magistrate's finding of probable cause unless it is clearly erroneous."); United States v. Stanert, 762 F.2d 775, 779 (9th Cir. 1985) ("We apply a narrow standard of review to a magistrate's decision to issue a search warrant. . . . We may not reverse such a conclusion unless the magistrate's decision is clearly erroneous." (citations omitted)).

66. *See, e.g.*, United States v. Seybold, 726 F.2d 502, 503 (9th Cir. 1984).

67. *Id.*

words, these three circuits read *Gates* as giving leeway to reviewing courts, as long as they give great deference to an issuing judge, to choose whatever standard of review they wish when analyzing whether a magistrate possesses a substantial basis for finding probable cause.

Most notably, the Seventh Circuit has discussed its decision to adopt clearly erroneous review in detail in *United States v. Spears*.[68] *Spears* established the clearly erroneous standard of review, overruling *United States v. McKinney*,[69] which had expressly established substantial basis as an intermediate standard of review somewhere between clearly erroneous and de novo.[70] The court in *Spears* found an intermediate standard of review such as "substantial basis" directly inconsistent with the *Gates* great deference requirement.[71] Additionally, *Spears* emphasized that *Gates* never expressly established "substantial basis review" and instead only indicated that a magistrate must have a substantial basis for finding the existence of probable cause.[72] In other words, *Gates* permits a court to utilize whatever standard of review it wants as long as it gives great deference to a magistrate's determination when analyzing whether the magistrate had a substantial basis for issuing the search warrant.[73] Strikingly, *Spears* is the only circuit opinion that discusses in detail the decision to adopt clearly erroneous review for probable cause determinations based on the *Gates* pronouncement of great deference.[74] Either the issue has never been raised or these three circuits have regarded their interpretations as so self-evident that further discussion, explanation, and justification are deemed unnecessary. If anything, the court merely pronounces what standard of review its jurisdiction utilizes as a corollary to case-specific analysis about the individual magistrate's determination of the existence of probable cause.[75]

Conversely, the First,[76] Second,[77] Third,[78] Fourth,[79] Fifth,[80] Sixth,[81]

68. *Spears*, 965 F.2d at 269–70.

69. United States v. McKinney, 919 F.2d 405 (7th Cir. 1990).

70. *Id.* at 414.

71. *Spears*, 965 F.2d at 270.

72. *Id.*

73. While *Gates*, facially, provides some leeway, *Spears* implies that no level of review other than clear error is consistent with the requirement of great deference. *Spears*, 965 F.2d at 270.

74. *See id.*

75. *See, e.g.*, United States v. Bertrand, 926 F.2d 838, 841 (9th Cir. 1991).

76. United States v. Nocella, 849 F.2d 33, 39 (1st Cir. 1998) ("What matters, in the long run, is whether the issuing magistrate had a 'substantial basis' for finding that probable cause was extant." (quoting Illinois v. Gates, 462 U.S. 213, 238–39 (1983)));

Tenth,[82] Eleventh,[83] and District of Columbia[84] Circuits interpret *Gates* much differently, applying substantial basis review for the magistrate's determination of probable cause. More specifically, these circuits have either not established a specific standard of review or have read *Gates* as requiring reviewing courts to find that there was a substantial basis for a finding of probable cause. Unlike the clear error circuits, these circuits have either read *Gates* as establishing an intermediate standard of review or failed to pronounce a standard for whether magistrates have a substantial basis for determining the existence of probable cause on their own.[85]

Specifically, in *United States v. Leake*,[86] the court discussed the standard of review for both searches authorized by a warrant and warrantless searches.[87] In discussing warrantless searches, the court, as it did in *Ornelas*, differentiated between a trial court's factual findings and findings of law.[88] Appellate courts review a lower court's factual findings for clear error, whereas, they provide plenary review to a lower court's finding of law.[89] In the same discussion, the court indicated that an appellate court is to review whether a magistrate had a substantial basis for finding probable cause prior to issuing a search warrant.[90] Notably, the court chose not to utilize the clear error language it had previously

United States v. Caggiano, 899 F.2d 99, 102 (1st Cir. 1990).

77. United States v. Wagner, 989 F.2d 69, 72 (2d Cir. 1993) ("The reviewing court's determination should be limited to whether the issuing judicial officer had a substantial basis for the finding of probable cause.").

78. United States v. Ritter, 416 F.3d 256, 264 (3d Cir. 2005).

79. United States v. Long, 11 F. App'x. 106, 107 (4th Cir. 2001) ("Our inquiry is limited to whether there was a substantial basis for the magistrate judge's conclusion that probable cause existed.").

80. United States v. Gibson, 55 F.3d 173, 177 (5th Cir. 1995) ("Without question, there was a substantial basis on the face of the affidavit for [the judge's] determination that probable cause existed for the issuance of a search warrant . . . .").

81. United States v. Rodriguez-Suazo, 346 F.3d 637, 643 (6th Cir. 2003); United States v. Leake, 998 F.2d 1359, 1363 (6th Cir. 1993); United States v. Smith, 783 F.2d 648, 653 (6th Cir. 1986).

82. United States v. Duegaw, 150 F. App'x. 803, 805 (10th Cir. 2005).

83. United States v. Foree, 43 F.3d 1572, 1576 (11th Cir. 1995).

84. United States v. Warren, 42 F.3d 647, 652 (D.C. Cir. 1994).

85. *See supra* notes 63–71 and accompanying text.

86. United States v. Leake, 998 F.2d 1359 (6th Cir. 1993).

87. *Id.* at 1366–67.

88. *Id.* at 1362; *see also* Ornelas v. United States, 517 U.S. 690, 699 (1996).

89. *Leake*, 998 F.2d at 1362.

90. *Id.* at 1363.

highlighted and chose instead to favor the lighter substantial basis language emphasized in *Gates*. [91]

Thus, it appears that some confusion exists with regard to the interpretation of *Gates*. Furthermore, even if *Gates* was specific in establishing clear error review, the language makes effectuating its requirements incredibly difficult.[92] While a few circuits have expressly established clear error review, others have either intentionally left the standard of review vague or decided upon an intermediate standard.[93] Consequently, a reexamination of *Gates* is necessary in order to provide courts with a road map for probable cause review.

## IV. THE CORRECT CONSTRUAL: THE LANGUAGE AND CONTEXT OF *GATES* REJECT CLEARLY ERRONEOUS REVIEW

It is puzzling why the Seventh, Eighth, and Ninth Circuits have adopted clearly erroneous review. While *Gates* expressly prohibits de novo review,[94] it does not explicitly mandate any specific standard of review.[95] All *Gates* requires of a reviewing court is that it determine whether the magistrate had a substantial basis for issuing the search warrant.[96] The only logical explanation for clear error review is the Court's consistent emphasis on great deference.[97] While clearly erroneous review would provide great deference to an issuing judge's probable cause determination, an intermediate standard of review would as well. Moreover, the adoption of clearly erroneous review is likely inconsistent with the language of *Gates*, the application of the good faith exception to the exclusionary rule established in *United States v. Leon*,[98] and the Court's history in dealing with questions of law and mixed question review.

### A. *A Textual Argument Against Clearly Erroneous Review*

It is readily apparent from the language in *Gates* that the Supreme

91. *See id.*
92. *See supra* Part III.
93. *Id.*
94. Illinois v. Gates, 462 U.S. 213, 236 (1983).
95. *Id.*
96. *Id.*
97. *See id.*; Spinelli v. United States, 393 U.S. 410, 419 (1969).
98. United States v. Leon, 468 U.S. 897, 924 (1984) (explaining the good faith exception of the exclusionary rule).

Court did not endorse clearly erroneous review.[99] First, if the Court was going to require clearly erroneous review, it could have expressly adopted it. Instead, it chose only to require great deference.[100] It is not as if clearly erroneous review was some foreign concept at the time of *Gates*. Clear error and de novo review are the two most popular forms of review.[101] More importantly, the Court has expressly required clearly erroneous review for warrantless searches:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[102]

In fact, the Court had an opportunity to rephrase the review required for search warrants when comparing them to warrantless searches. Instead, it continued to describe the review warranted as nothing more specific than one of great deference.[103]

Second, statutory construction jurisprudence provides some additional support for the notion that clear error was not intended. "When Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded."[104] If the Court is using the term "clear error" in some of its search and seizure review decisions and not in others, common-sense would suggest the Court did not mean to imply it where it specifically left it out. While canons are usually intended to apply to the interpretation of statutes, it would be highly unpersuasive to suggest they do not apply to the interpretation of court decisions as well. Moreover, canons of

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99. *Gates*, 462 U.S. at 236 (noting "that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review").

100. *Id.*

101. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Leake, 998 F.2d 1359, 1362 (6th Cir. 1993).

102. *Ornelas*, 517 U.S. at 699.

103. *Id.* at 698 ("The Court of Appeals, in adopting its deferential standard of review here, reasoned that *de novo* review for warrantless searches would be inconsistent with the 'great deference' paid when reviewing a decision to issue a warrant . . . ." (internal quotation marks omitted)).

104. Ariz. Elec. Power Coop. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987); *see also* W. Coast Truck Lines, Inc. v. Arcata Cmty. Recycling Ctr., Inc., 846 F.2d 1239, 1244 (9th Cir. 1988).

interpretation are meant to reflect commonsense readings and interpretations of statutes and should not merely be isolated to the reading and impressions of specific documents.

Last, clear error review would be incredibly confusing. Were a reviewing court required to review for clear error, it would have to perform two independent and ambiguous tasks. A court would have to determine whether it was *clearly erroneous* for a magistrate to determine that there was a *substantial basis* for finding probable cause. It is hard to imagine that the Court was determined to intentionally make review unnecessarily difficult. *Gates* merely requires a reviewing court to determine whether there was a substantial basis for finding probable cause. It would be much easier and more consistent with the test for a reviewing court to do just that. There is no reason to employ a double layer of ambiguous review. Moreover, if the Court intended that courts apply *solely* clear error review, continually reaffirming and emphasizing its substantial basis language would be entirely unnecessary.[105]

Thus, a logical and commonsense reading of *Gates* suggests that the Court did not mandate reviewing magistrates' determinations of probable cause for clear error. Recall that the Seventh Circuit adopted clearly erroneous review and expressly overruled *McKinney* in *Spears*, stating that an intermediate standard of review such as substantial basis was directly inconsistent with the *Gates* great deference requirement.[106] In other words, the Seventh Circuit suggested that *Gates* implicitly mandated clear error review. However, a more logical reading of *Gates* suggests that if the Court intended to require clear error review it would have expressly done so. Moreover, even if it had expressly done so, the review established by the language in *Gates* would be nothing short of confusing.

### B. *A Contextual Argument Against Clearly Erroneous Review:* United States v. Leon

Not only does *Gates* reject clearly erroneous review but the Court's subsequent decision in *Leon* supports, at the very least, an intermediate level of review. *Leon* represented another blow to Fourth Amendment idealists. In *Leon*, the Court held that the Fourth Amendment exclusionary rule does not apply to evidence obtained by officers acting in

105. *Ornelas*, 517 U.S. at 698; United States v. Leon, 468 U.S. 897, 915 (1984); *Gates*, 462 U.S. at 236.

106. United States v. Spears, 965 F.2d 262, 270 (7th Cir. 1992).

reasonable reliance upon an invalid search warrant.[107] Thus, the Court held that even if a reviewing court found that the magistrate lacked a substantial basis for issuing the search warrant, the evidence obtained as a result of the warrant would not be excluded unless the magistrate abandons his detached, uninterested judicial role[108] or issues a search warrant based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'"[109] In other words, when the affidavit is so lacking in probable cause that a reasonable officer could not act in good faith based on the magistrate's determination, the evidence obtained as a result of the warrant will be suppressed. The *Leon* decision, in short, established what is known as the "good faith" exception to the Fourth Amendment exclusionary rule.[110]

It is undoubtedly true that *Leon* eroded a defendant's suppression arsenal.[111] Nonetheless, *Leon* does not extinguish or erode the necessity of analyzing probable cause.[112] An issuing magistrate must still determine whether probable cause is present, and a reviewing court must initially review that decision.[113] It is only if the magistrate is found to lack a substantial basis for his or her decision that a reviewing court will turn to a good faith analysis.[114]

This two step process is logically correct. Without looking first to the warrant, a good faith analysis could not be performed. The reviewing court must analyze the affidavit for probable cause in order to determine whether it was so lacking that a reasonable officer would not have a good faith belief that probable cause existed.[115] Thus, the standard of review for probable cause determinations in search warrants is still extremely important not only to the initial step of determining the existence of probable cause, but to the subsequent good faith exception analysis as well.[116]

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107. *Leon*, 468 U.S. at 922.

108. *Id.* at 923.

109. *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)).

110. This carved out an exception from the exclusionary rule, which originally broadly provided that evidence obtained in violation of the Constitution may not be used against an accused at trial. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

111. *See Leon*, 468 U.S. at 918.

112. *Id.* at 923.

113. *Id.*

114. *See id.* at 922–23.

115. *Id.* at 923.

116. *Id.* at 925. The Court stated further:

Although the *Leon* decision clearly limits the ability to suppress evidence, it also indicates that the Court in *Gates* did not intend to establish clearly erroneous review. If clearly erroneous review was the standard, only clearly erroneous warrants would be invalidated. If this were the case, how could an officer ever act in good faith based on a warrant so lacking in probable cause that it would be clearly erroneous for a magistrate to issue it? If the warrant was so lacking that the magistrate's determination was clearly erroneous, a reasonable officer should be able to realize this as well.[117] This is especially the case due to the fact that magistrates are not supposed to impose hypertechnical review.[118] By looking at the totality of the circumstances, magistrates are supposed to remove their legal lenses and analyze a warrant application from the viewpoint of a police officer without a law degree.[119] If a reviewing court finds that the determination of probable cause was clearly erroneous even when read and analyzed through a nonlegal lense, it would be nonsensical to suggest that a nonlegal expert, such as an experienced officer, could still reasonably rely on such a clearly erroneous warrant.

Therefore, the fact that the Court established the *Leon* good faith exception to the Fourth Amendment exclusionary rule after it issued the *Gates* opinion indicates that the Court did not intend to establish clear error review. On the contrary, *Gates* should be interpreted as only requiring some level of deferential review between clear error and de novo, namely, substantial basis. Because *Leon* was decided after *Gates*, it seems odd that the Court would develop a huge new area of law, when, if *Gates* had established clearly erroneous review, they would have already achieved the effect of *Leon*—suppressing evidence only if the warrant was so lacking in probable cause (i.e., clearly erroneous) that even a reasonable

> Nor are we persuaded that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state. There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated . . . .
>
> . . . Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

*Id.* at 924, 925 (footnote omitted).

117. *Id.* at 923.

118. Illinois v. Gates, 462 U.S. 213, 236 (1983).

119. *See id.* at 240–41.

non-legal expert could recognize that fact.[120] In other words, if the Court intended to establish clear error review in *Gates*, the *Leon* decision would appear to be moot. Because the Court went to the trouble of carving out a good faith exception to the exclusionary rule, *Gates* must reject clearly erroneous review.

## V. A REASSESSMENT: A REJECTION OF DEFERENTIAL REVIEW AND ADOPTION OF DE NOVO REVIEW FOR MAGISTRATES' DETERMINATIONS OF PROBABLE CAUSE IN THE ISSUANCE OF SEARCH WARRANTS

Although confusion exists among federal circuits with regard to the correct level of review required by *Gates*, de novo is universally rejected.[121] The Supreme Court explicitly rejected de novo review in *Gates*, instructing appellate courts that "[a] magistrate's 'determination of probable cause should be paid great deference.'"[122] This is unfortunate, because the justifications and explanations for any type of deferential review, whether it be clear error, substantial basis, or some novel form of intermediate review, are misleading, unfounded, and transparent. Conversely, de novo review is justified, consistent with precedent, and strikes the appropriate balance between societal and Fourth Amendment protections in a post-*Leon* climate where the Fourth Amendment is gradually and consistently being eroded.

### A. *Denouncing the Offered Justifications for Deferential Review*

To establish a case for de novo review it is appropriate to consider each of the four justifications, both substantive and procedural, offered in *Gates* and subsequent opinions for deferential review and expose them as mere pretense for unacceptable Fourth Amendment liberty limitations. Without legitimate justifications, restricting appellate review on probable cause determinations would be purely arbitrary and lack any merit. Consequently, the first step in making the case for de novo review is to expose each justification in turn.

120. *See Leon*, 468 U.S. at 923.

121. *Gates*, 462 U.S. at 236.

122. *Id.* (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)); *see also* United States v. Seybold, 726 F.2d 502, 503 (9th Cir. 1984) (noting that "the Supreme Court clearly indicated that it was inappropriate for appellate courts to subject supporting affidavits to de novo review").

1. *De Novo Review Will Not Encourage Warrantless Searches*

The argument that de novo review will serve as a disincentive to seek search warrants, as mentioned previously, is the clear driving force behind applying great deference. Unfortunately, it is misleading and unsupported. First, there is absolutely no empirical support for this proposition. One would think that if the Court was going to limit a defendant's Fourth Amendment rights, the justification would be more than a baseless accusation about police choice, incentives, and practice. Second, even with de novo review, officers will still be persuaded to seek out search warrants. Warrantless searches are presumptively invalid.[123] Even though an officer may recognize that it is harder for a warrant to pass muster with de novo review, a search pursuant to a warrant, unlike a warrantless search, is not presumed to be unreasonable or invalid. Further, courts validate warrants that are close calls, which is not true of warrantless searches due to their presumed invalidity. "[T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."[124] Moreover, officers seeking warrants can benefit from the good faith exception carved out of Fourth Amendment jurisprudence by *Leon*.[125]

Last, the Court has long stated that the Fourth Amendment has a preference for warrants,[126] which is textually true.[127] In practice, however, courts' preference for warrants is anything but absolute. The warrant requirement is riddled with exceptions.[128] Moreover, the Court now refuses

123. Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches 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." (footnote omitted)).

124. United States v. Ventresca, 380 U.S. 102, 109 (1965).

125. *See Leon*, 468 U.S. at 922–23.

126. *Ventresca*, 380 U.S. at 109.

127. The Fourth Amendment states:

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

U.S. CONST. amend. IV. The Constitution only mentions searches authorized by warrants. Consequently, courts have held that the amendment contains a preference for warrants. *Ventresca*, 380 U.S. at 109.

128. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 337 (1990) (protective sweep exception); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (school searches exception);

to suppress evidence recovered as a result of an invalid warrant so long as an officer acted in good faith.[129] Thus, it is ironic that the Court finally hides behind the warrant preference only to justify its actions limiting Fourth Amendment rights, namely by preventing subsequent review of magistrate probable cause determinations.

2. *De Novo Review Is Not Hypertechnical*

The argument that increasing appellate scrutiny in the search warrant evaluation process is the type of hypertechnical review that *Gates* and *Ventresca* worried about is extremely misleading. *Gates* was concerned that the determination of probable cause was becoming increasingly rigid, requiring magistrates to perform virtual formulaic calculations to determine the existence of probable cause.[130] In other words, probable cause determinations were becoming increasingly technical instead of being based on commonsense probability assessments.

The level of appellate review is completely unrelated to these hypertechnical assessment worries. Specifically, an appellate court reviewing the existence of probable cause in an affidavit for a search warrant is still utilizing the totality of the circumstances test which was established to remedy and specifically prevent the hypertechnical evaluation in *Gates*.[131] No matter how many times an affidavit is reviewed, the court will always be utilizing the same simplistic, commonsense assessment. Kocoras misleadingly asserts that:

> Since the magistrate is to apply a flexible standard, appellate courts should not scrutinize the affidavit more closely than the magistrate did by applying a standard of review of less deference than clear error. By applying a standard of less deference, appellate courts may be doing more work than the magistrate did in evaluating the affidavit.[132]

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Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (consent exception); Terry v. Ohio, 392 U.S. 1, 30 (1968) (stop and frisk exception); Carroll v. United States, 267 U.S. 132, 156 (1925) (automobile exception). This list is, of course, not exhaustive and merely lists some of the many warrant requirement exceptions.

129. *Leon*, 468 U.S. at 922–23.

130. *See* Illinois v. Gates, 462 U.S. 213, 240–41 (1983) ("That such a labyrinthine body of judicial refinement [descending from *Spinelli*] bears any relationship to familiar definitions of probable cause is hard to imagine."); *Ventresca*, 380 U.S. at 108 ("Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in [probable cause determinations].").

131. *Gates*, 462 U.S at 230–31.

132. Kocoras, *supra* note 50, at 1450–51.

Nothing about the level of review makes the probable cause test more demanding or challenging. Appellate courts are applying the exact same test as the magistrate under the exact same set of facts—the information included within the four corners of the affidavit. How a court determines the existence of probable cause would be entirely unaffected by, and is inherently unrelated to, the level of appellate review. Thus, the hypertechnicality argument is nothing more than a pretense for arbitrarily limiting Fourth Amendment rights.

3. *De Novo Review Does Not Reduce Judicial Efficiency*

The argument that de novo review would overwhelm the courts is unfounded. First, one must remember that *Gates* dealt with four corners review.[133] All a magistrate does in determining the existence of probable cause is read the supplied affidavit. Thus, this does not require much work of a reviewing court. The court must simply read the same short document the magistrate used to issue the search warrant. Second, regardless of whether the level of review is de novo, substantial basis, or clearly erroneous, the appellate court must still read the affidavit. For example, to determine whether the magistrate's determination that there was a substantial basis for the existence of probable cause was clearly erroneous, an appellate court must read the affidavit and consider whether, given great deference, the magistrate's determination that probable cause existed is permissible. No review can be performed blindly. If the appellate court declined to read the affidavit it would have no idea what facts existed to provide the magistrate with the substantial basis to issue the warrant, as required by *Gates*.

Third, *Gates* does not give total, unfettered deference to a magistrate.[134] The appellate court is not allowed simply to rubber stamp a magistrate's determination.[135] Under any level of review, the appellate court must do some work. Fourth, the argument also lacks empirical support, and, consequently, is not sufficient in and of itself to justify great deference.

[A]n obstacle to the persuasive use of the efficiency rationale by either

133. *See Gates*, 462 U.S. at 238.

134. *See id.* at 239 ("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."); United States v. Wilhelm, 80 F.3d 116, 119 (4th Cir. 1996).

135. *See Gates*, 462 U.S. at 239; *Wilhelm*, 80 F.3d at 119.

> side of the debate is the lack of empirical data proving the efficacy or waste associated with a de novo rule in mixed-question situations. Unlike other policy factors at issue, efficiency must focus only on the actual consequences of a judicial decision. Whether appellate resources are more efficiently utilized in reviewing trial court determinations for precise correctness or in clarifying broad legal rules is a question to which the answer can only be surmised, since no data exist to assist this examination. Advocates must therefore turn to other factors for justification.[136]

Fifth, deferential review might even require more time than plenary review because a reviewing court must read the affidavit and determine whether suppression is required in light of both the court's understanding of the basic requirements for probable cause and the great deference owed to the magistrate's determination. Without deferential review, a court would simply read the affidavit and determine the existence of probable cause on its own without the confusing language of secondary review that developed post-*Gates*. Last, de novo review might actually increase judicial efficiency. De novo review allows higher courts to "facilitate the development of clear rules that can be applied by laymen, such as law enforcement agents, before Fourth Amendment rights are abridged by an improper search or seizure."[137]

In addition, Kocoras's argument that clear error review relieves an appellate court "of the burden of a complete and independent evidentiary review"[138] is confusing as independent review would not require any additional time. It appears that Kocoras is confusing four corners de novo review with potential de novo review of a district court's factual determinations pertaining to corollary search warrant issues such as whether to conduct a *Franks* hearing,[139] which understandably would be

136. Jeffrey M. Grybowski, Note, *The Appellate Role in Ensuring Justice in Fourth Amendment Controversies:* Ornelas v. United States, 75 N.C. L. REV. 1819, 1840–41 (1997) (footnote omitted).

137. *Id.* at 1827 (emphasis omitted).

138. Kocoras, *supra* note 50, at 1417.

139. An assessment of whether to conduct a *Franks* hearing consists of a factual investigation conducted by a trial court when the defendant alleges that the affiant "knowingly and intentionally, or with reckless disregard for the truth," made a false statement in the affidavit for a search warrant. Franks v. Delaware, 438 U.S. 154, 155–56 (1978). The court determines through testimony whether a false or misleading statement was made and considers whether a *Franks* hearing needs to be conducted. Such a hearing will determine the fate of the search warrant. *Id.* at 156. The court's ruling is reviewed for clear error because the district court was closer to the facts and able to make individual credibility assessments. *See, e.g.*, United States v. Hunter, 86

burdensome. In the latter case, the lower court is privy to witness credibility, which an appellate court simply lacks the ability to assess. Under four corners probable cause review, however, a reviewing court is privy to all of the information the magistrate was provided prior to issuing the search warrant. Any outside communications between the applicant and the magistrate must be recorded, certified, and presented to the reviewing court.[140]

Importantly, however, no matter which level of review requires more time, if any, neither type is truly a rigorous undertaking. Utilizing judicial economy and court clog arguments as a justification for a particular standard of review implies, not so subtly, that both outweigh Fourth Amendment protections. When one considers the Fourth Amendment rights at stake, it is extremely troubling that a court would hide behind judicial efficiency arguments under any circumstance, especially one such as this, which is blatantly unfounded.

4. *Magistrates Are Not Closer to the Facts*

The argument that magistrates are closer to the facts and, thus, best suited to make probable cause determinations is the least founded and easiest to refute of the four offered justifications. The application process is not a mini-hearing where the magistrate makes credibility assessments. Magistrates conducting four corners examinations merely receive an affidavit and decide whether it states probable cause for issuing the search warrant.[141] The same affidavit or statement is available for all reviewing courts and, consequently, magistrates do not learn any more than a reviewing court would prior to making its determination. In fact, some argue that the application process is nothing more than a ministerial ratification due to the time constraints on magistrates and the sheer amount of applications in many districts.[142] Thus, Judge Posner's argument that magistrates are better able to evaluate the legal significance of the facts presented in the affidavit is extremely confusing, because the same affidavit is presented to the reviewing courts.[143] Again, this argument tends to confuse formal, collateral hearings related to a search warrant in which a judge must consider testimony with simple, informal probable cause

F.3d 679, 682 (7th Cir. 1996).

140. FED. R. CRIM. P. 41(d)(3)(B)–(C).

141. FED. R. CRIM. P. 41(d)(1).

142. Rotenberg, *supra* note 28, at 339.

143. United States v. McKinney, 919 F.2d 405, 419 (7th Cir. 1990) (Posner, J., concurring).

determinations by a magistrate usually conducted outside of a courtroom.

### B. *Probable Cause Determinations Are Mixed Questions and Should Be Treated Accordingly*

A magistrate's determination of probable cause is a mixed question.[144] Specifically, a magistrate's duty is to apply the law of probable cause to a set of defined facts within the four corners of an affidavit. After applying the law to the facts, the magistrate determines whether probable cause exists to issue the search warrant.

Mixed questions, like questions of law, are traditionally reviewed de novo.[145] This makes logical sense. While mixed questions require a factual analysis, they do not simultaneously require credibility and reliability judgments about those facts. All a judge does is apply the law to a set of facts. The same set of facts is available to an appellate court when it comes time for review. Moreover, where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law."[146]

What is remarkable is that the Court in *Ornelas* identified the district court's determination of probable cause for a warrantless search as a mixed question and, consequently, applied de novo review.[147] Surprisingly, the Court was quick to emphasize that even though probable cause determinations based on search warrants are also mixed questions, a magistrate's determination would still be afforded great deference.[148] The Court again attempts to justify this arbitrary distinction by emphasizing a preference for the warrant process.[149] Not only is this justification transparent and without merit, but the Court also amazingly chose to arbitrarily change its long history of mixed question jurisprudence because of public policy. This is another obvious example of the Court attempting

144. Ornelas v. United States, 517 U.S. 690, 696 (1996).

145. United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992) ("As a mixed question of law and fact, we review *de novo* whether reasonable suspicion existed for this investigatory stop."); Sandler v. All Acquisition Corp., 954 F.2d 382, 385 (6th Cir. 1992) ("The general rule is that mixed questions of law and fact are subject to *de novo* review by this court.").

146. Miller v. Fenton, 474 U.S. 104, 114 (1985).

147. *Ornelas*, 517 U.S. at 696–99.

148. *Id.* at 699.

149. *Id.*

to limit Fourth Amendment protections through an arbitrary and pretextual justification. Because the offered explanations for deferential review are misleading and illegitimate, the Court should return probable cause mixed questions to their rightful location and conduct de novo review over magistrates' determinations of probable cause.

## VI. CONCLUSION: WITHOUT ANY LEGITIMATE JUSTIFICATION FOR DEFERENTIAL REVIEW, DE NOVO REVIEW SHOULD BE ADOPTED FOR MAGISTRATES' PROBABLE CAUSE DETERMINATIONS

In a post-*Leon* climate in which Fourth Amendment rights are consistently eroded in favor of efficient police practice and societal protection, lower courts have attempted to offer explanations for the pronouncement of great deference in *Gates*. The justifications suggested, however, are a mere pretext for arbitrarily eroding Fourth Amendment liberties. Without any legitimate rationale, it is hard to believe that courts could still persuasively advocate deferential review. At the very least, if courts are so defiant in rejecting de novo review as a standard, one would think they would attempt to justify this defiance in a better way than mere conclusory statements explaining that de novo review is illegitimate and undoubtedly not permitted. Without an opaque justification, deferential review represents a further attempt to arbitrarily and unnecessarily curtail important Fourth Amendment protections. If courts continue to refuse de novo review, a proper reading of *Gates* should be encouraged, consistent with both the Court's subsequent decision in *Leon* and the Court's jurisprudence regarding mixed questions and questions of law. In short, clearly erroneous review of a magistrate's determination of probable cause in the issuance of search warrants should be expressly prohibited.