THE DECLINE OF THE RIGHT TO PRIVACY AND SECURITY: GATES AND THE STATES — THE FIRST THREE YEARS

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INTRODUCTION

In 1983, the United States Supreme Court decided Illinois v. Gates.1 Gates held that the probable cause protection against governmental searches and seizures provided by the federal Constitution's fourth amendment was a protection to be granted citizens on a case-by-case basis, by reference to the total circumstances of the case, at least when the police were relying on hearsay information to convince a magistrate that probable cause to search or seize existed.2 The Gates decision abandoned the Court's test of probable cause to issue a warrant to search or seize that had developed in the Aguilar-Spinelli line of cases.3 The Aguilar-Spinelli test required that the government have two types of factual allegations — crime/culprit/evidence facts (type one facts), and credibility facts (type two facts) — in order to justify a magistrate's conclusion that probable cause existed, at least when the law enforcement officer's claim of probable cause is based on hearsay.4

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2. Id. at 238. The holding in Gates was reconfirmed the following term in a per curiam opinion. Massachusetts v. Upton, 466 U.S. 727, 732 (1984).
4. Aguilar v. Texas, 378 U.S. 108, 112-14 (1964); Spinelli v. United States, 393 U.S. 410, 413 (1969). The Aguilar-Spinelli test is straightforward and relatively simple. The first kind of factual allegations (type one facts) that must be present to satisfy even the most minimal proof standard are allegations of events or behavior which provide a basis to reasonably conclude that a crime has occurred, is happening, or will occur. Aguilar, 378 U.S. at 113; Spinelli, 393 U.S. at 416. To make a minimal case to arrest, additional factual allegations of this first type must describe some basis to reasonably believe that the individual to be arrested committed the identified crime. Aguilar, 378 U.S. at 112-13; Spinelli, 393 U.S. at 418. To arrest in a home, the type one factual allegations must, in addition, provide a basis to reasonably believe the crime suspect will be found in that home. Aguilar, 378 U.S. at 112-13; Spinelli, 393 U.S. at 412-13. See Payton v. New York, 445 U.S. 573, 575-76 (1980). To search, additional type one factual allegations must establish some basis to reasonably believe crime evidence or evidence that a culprit will be found at the locale to be searched. Aguilar, 378 U.S. at 112-13; Spinelli, 393 U.S. at 412-13.
5. Other pre-Gates commentators recognized that probable cause, in order to be a viable proof standard, must have the same elements as trial proof standards. Moylan, Hearsay and Probable Cause: An Aguilar and Spinelli Primer, 25 MERCER L. REV. 741, 743 (1974). Type one facts are needed to justify all findings of probable cause, re-
The major premise of this Article is that Gates decision represented a significant change in the probable cause standard — a change that lessened significantly the quantum of evidence needed by the government to establish that its need to search or seize outweighed the privacy and security interests of citizens. This premise will be tested first by examining the Court’s perception of the justifications for the Gates case. The first section of this Article will also examine the reaction of the commentators to the Gates decision. The significance of Gates is primarily tested by an examination of those state supreme court decisions in the three years immediately after the Gates case which have evaluated its significance, analyzed its rationale, and determined if it is a standard that should be followed as a matter of state constitutional law.
Other premises of this Article are related to testing the significance of *Gates* by evaluating the reaction of state supreme courts. The first of these premises is that state supreme courts have the right to interpret their state constitutional probable cause provisions to provide greater protection to their citizens rights than is required by the United States Supreme Court.\(^8\) This premise will be tested by evaluating the degree to which state supreme courts have recognized, since *Gates*, their authority to provide greater protection than *Gates* by reliance on the state constitutional provision analogous to the fourth amendment of the federal constitution.\(^9\)

The second of these premises is that in the three years following the *Gates* decision, most of the state supreme courts and/or state legislatures had the opportunity to determine if they wished to adopt the new *Gates* probable cause standard.\(^10\) This premise will be tested by surveying the number of states which have reviewed their standard in light of the *Gates* case, and by tallying the number of states that have decided to follow *Gates*, to reject *Gates*, or have declined to make a decision on this point.\(^11\)

The Article will next study the significance of the *Gates* case as

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8. See infra notes 45-73, 149-54 and accompanying text.
9. See infra notes 149-54 and accompanying text. *Accord* People v. Tisler, 103 Ill. 2d 226, —, 469 N.E.2d 147, 163-64 (1984) (Clark, J., concurring) (pointing out that ten out of the twelve listed state supreme courts had expressly determined that their respective state constitutions can provide greater protection to civil liberties than the United States Constitution as construed by the United States Supreme Court). *Accord* State v. Chaisson, 125 N.H. 510, —, 486 A.2d 297, 301 (1984) (stating that when a case presents both a state and federal constitutional claim, the court will review the state claim first and, possibly, exclusively); Sterling v. Cupp, 290 Or. 611, 613, 625 P.2d 123, 126 (1981) (echoing the sentiment of the New Hampshire Court); Massachusetts v. Upton, 466 U.S. 727, 736 (1984) (Stevens, J., concurring) (indicating that the history of the federal system supports this "state's rights" first approach to constitutional claims).
10. See infra notes 45-73 and accompanying text. The opportunity of the states to review the wisdom of *Gates* as the state constitutional standard is dependent upon the defense bar in each state raising the state constitutional rule as a separate and broader protection of privacy and security rights. However, commentators have urged the criminal defense bar to expressly make independent state constitutional arguments in criminal cases. See, e.g., Brennan, 90 HARV. L. REV. at 502.
11. See infra notes 45-73 and accompanying text.
measured by the substantive evaluations of the state supreme courts, including whether the adoption or rejection of Gates altered the outcome of the probable cause evaluation. In this regard the Article will examine the policy justifications used by the state supreme courts in adopting, rejecting, or declining to follow the Gates decision.

The Article's final premise is that the evaluations of Gates by the Court itself, commentators, and most importantly, the state supreme courts, will produce important information about the current vitality in the federal system of the protections provided citizens against arbitrary governmental searches and seizures. The most important information the evidence presented in this Article provides is that the Supreme Court and many state supreme courts equate probable cause with reasonable suspicion and that this unitary standard is almost a total capitulation to the interests of the government.


The facts of the Gates case are by now well known to all students of the federal Constitution's regulation of governments' authority to conduct searches and seizures. However, certain aspects of Gates' factual backdrop deserve attention in order to assess the significance of the decision for the law of search and seizure. First, the majority opinion in Gates ignored the fact that the search warrant affidavit omitted any reference to whether, according to street address records, the Gateses lived anywhere close to the vicinity stated by the unknown informant in the letter that precipitated the investigation.

The anonymous informant identified the street on which the Gateses lived and the proximate major thoroughfare in Bloomingdale, Illinois. The police found one address for the Gateses in Bloomingdale through a driver's license check when they initiated a follow-up investigation. Subsequently, they allegedly had an unidentified informant conduct a review of financial records (ostensibly those of the Gateses) to detect a more recent address for the Gates. At no time did the police indicate in the affidavit that either of the addresses they discovered matched the locale provided in the unsigned letter.

Other commentators have pointed to other facts that detract from the conclusion

12. See infra notes 74-128 and accompanying text.
13. See infra notes 129-54 and accompanying text.
14. See infra notes 155-86 and accompanying text.
15. See infra notes 28-31, 82-86 and accompanying text. By the Court's own admission, reasonable suspicion is a lesser burden of proof. Terry v. Ohio, 392 U.S. 1, 26-27 (1967). However, the Court stated also that reasonable suspicion would be an inadequate basis upon which to arrest or conduct a full-scale search. Id. at 26-27.
17. Gates, 462 U.S. at 225-26. The anonymous informant identified the street on which the Gateses lived and the proximate major thoroughfare in Bloomingdale, Illinois. The police found one address for the Gateses in Bloomingdale through a driver's license check when they initiated a follow-up investigation. Subsequently, they allegedly had an unidentified informant conduct a review of financial records (ostensibly those of the Gateses) to detect a more recent address for the Gates. At no time did the police indicate in the affidavit that either of the addresses they discovered matched the locale provided in the unsigned letter. Id.
Second, the record of the *Gates* case demonstrated that the magistrate made no written record of the basis of his finding that probable cause existed. The majority opinion not only failed to state that such a record was desirable, but went further by implying that an appellate court, including the supreme court itself, was free to speculate as to basis, and even provide its own reasons for the magistrate's finding of probable cause.\(^\text{18}\) Third, the Court in *Gates* continued to interpret the probable cause standard as a proof standard that can be satisfied without the government providing even minimum documentation in support of the factual allegations found in the affidavit.\(^\text{19}\)

Fourth, the *Gates* facts demonstrated that the informant’s letter did not state a single date on which criminal activity was alleged to have occurred at the Gateses’ home.\(^\text{20}\) The Court found probable cause despite this omission of any allegation of a date and a time. Hence, the circuit court judge issued a search warrant even though the information that formed the basis of the informant’s report may have been stale, a conclusion supported by the additional facts that the Gateses were allegedly in Florida at the same time to purchase more drugs.\(^\text{21}\) Other commentators reviewing the facts of *Gates* and the significance given those facts by the majority opinion have concluded that the majority sanctioned the ignoring of facts that negate probable cause.\(^\text{22}\)

Finally, with respect to the significance of the facts, Justice Rehnquist, after the decision, commented that *Gates* was based upon facts that “‘reeked’ of probable cause.”\(^\text{23}\) *Gates* was therefore a very significant decision based on the use of facts by the majority. The majority opinion implies that conflicting factual allegations, specula-
tive factual allegations, stale factual allegations, material omissions, and post-hoc facts may provide the basis of satisfying the probable cause proof standard.

Justice Rehnquist, however, sought to minimize the impact of the Gates decision on the standard of probable cause by casting the decision not as a change in that standard, but as a return to the traditional probable cause standard that existed prior to Aguilar-Spinelli.24 Rehnquist buttressed this contention by referring to prior Court decisions that established the flexible “attitude” that courts should have about the probable cause decision.25 This attitude, Rehnquist insisted, was more compatible with a totality of the circumstances approach than with the two mandatory rules of Aguilar-Spinelli.26 Later, Rehnquist boldly cited three pre-Spinelli decisions as authority for the contention that probable cause as a proof standard has been and should be a totality of the circumstances approach.27

Self-disclaimers aside, the Rehnquist majority opinion is of great significance when measured by the probable cause doctrine statements made therein. Most significantly, Justice Rehnquist expressly equated probable cause with suspicion, citing as his only authority an 1813 decision, and ignoring the conflicting, more recent line of Terry doctrine cases that recognize that even reasonable suspicion is a lesser proof standard than probable cause and is too low a proof

24. Gates, 462 U.S. at 230-31. Justice Rehnquist even attempted to demonstrate that Aguilar did not clearly establish that both factual allegations related to the informant’s basis of knowledge, and factual allegations tending to establish the informant’s credibility were independent requirements. Id. at 230 n.6. A Pre-Gates commentator, however, demonstrated that Aguilar-Spinelli were decisions representing a consistent progression in the evolution of the probable cause standard, see Moylan, supra note 4 at 781-84. A post-Gates commentator, after extensively reviewing the Court's probable cause decisions prior to Aguilar-Spinelli, concluded that Aguilar-Spinelli were more faithful than the Gates decision to the lessons of those cases, see Recent Developments, Illinois v. Gates, 29 Vill. L. Rev. 151, 179 (1983-84).

25. Id. at 230-32. The prior decisions were used by Justice Rhenquist to assert that probable cause has always been a flexible, practical, non-technical, common sense, layperson's standard of proof. This attitude towards probable cause as a proof standard was reconfirmed in the term following Gates by the per curiam opinion of the Court in Massachusetts v. Upton, 466 U.S. 727, 732 (1984).

26. Id. at 232. The proof standard is therefore fact-sensitive and must be fashioned to accommodate the diversity of forms in which informants' tips come to the police. Id. at 231-32.

27. Id. at 238. See Jones v. United States, 362 U.S. 257 (1960); United States v. Ventresca, 380 U.S. 102 (1965); and Brinegar v. United States, 338 U.S. 160 (1949) (all used by Rehnquist without specific reference). As noted in the dissent by Justice Brennan with reference to another citation of the majority, two of these three decisions pre-dated the Aguilar decision. Gates, 462 U.S. at 298-97 n.3 (Brennan, J., dissenting).

28. Gates, 462 U.S. at 235 (discussing Locke v. United States, 7 Cranch 339 (1813)).

29. See Terry v. Ohio, 392 U.S. 1 (1968); see also supra note 15.
standard to justify an arrest or search.30 The Gates opinion expressly merged the doctrinal analysis of the Terry suspicion and probable cause cases, suggesting that they were both proof standards based on practical probabilities as perceived by laypersons using common sense.31 Suspicion to seize a person was also recognized in the Gates majority opinion as a potentially adequate basis for the satisfaction of probable cause.32 The Court resurrected, as a valid consideration in analyzing probable cause to search or seize, allegations that the suspect has a bad reputation or status as a criminal, even if the allegations are totally devoid of reference to specific events, transactions, or criminal records.33

The majority opinion in Gates also suggested that probable cause is a proof standard that can be satisfied even if the government fails to make factual allegations to support a conclusion that a crime has occurred at a specific place and time, so long as the informant's honesty is well established.34 This conclusion is of great significance because it demonstrates that the Court has lost sight of a critical practical lesson that should inform the application of any proof stan-

30. Gates, 462 U.S. at 231. Prior citations to Locke by the court, however, had viewed it as standing for a less startling proposition than Justice Rhenquist's conclusion. In United States v. Ventresca, 380 U.S. 102, 107 (1965), for example, Locke was cited for the proposition that the probable cause proof standard required less proof than the standard required to establish guilt. Justice Rhenquist went on to cite a more recent case, Brinegar v., 338 U.S. 168, at 173 (1960), but only for the rule that the probable cause proof standard does not require the same amount of proof as "ordinary judicial proceedings." Noted by other Gates commentators, see Recent Developments, Illinois v. Gates, supra note 26, at 168 n.77. See also the initial discussion of the Terry case supra note 15. Professor Kamisar concluded that Gates represented a very significant change in the probable cause standard in that it changed the standard to one tantamount to a "good faith" probability of probable cause, see supra note 16 at 552. See also Lafave, Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, And Balancing Askew) 74 J. Crim. L. & Criminology 1171, 1194 (1983), concluding that Gates may well signal a significant watering down of the probable cause standard. The suspicion theme as reflected in state supreme court decisions reacting to Gates is discussed infra notes 82-86 and accompanying text.

31. Id. Justice White's concurring opinion in Gates also seemed to merge the probable cause and reasonable suspicion proof standards. See id. at 269 (White, J., concurring).

32. Id. at 232.

33. Illinois v. Gates, 462 U.S. 213, 231 n.7 (1983). In contrast to the Spinelli v. United States, 393 U.S. 410, 414 (1969) decision in which the majority opinion of Justice Harlan characterized such status characterizations as bald and unilluminating assertions of suspicion which are entitled to no weight in the appraising of the magistrate's decision. Other commentators, however, have noted the historical fact that even prior to the birth of this country, some of the colonies permitted arrest based solely upon a consensus of public opinion that the individual had committed a crime or was keeping company with persons of scandalous reputation. See Alschuler, Bright Line Fever and The Fourth Amendment, 45 U. PITTS. L. REV. 227 (1984).

34. Gates, 462 U.S. at 233.
standard, e.g., an honest person can make an honest mistake.\footnote{35} Conversely, the Court's majority opinion in \textit{Gates} ignored a reality to which any proof standard must also be sensitive, e.g., certain persons are excellent liars. The opinion created the possibility that if an informant is a good liar, if he provides a detailed and allegedly first-hand but false account of a crime, all that need be alleged are at least credible conclusions that he is not lying.\footnote{36}

Justice Brennan in his dissent, and other commentators have noted that as a consequence of \textit{Gates}' elimination of the need for allegations of both type 1 and type 2 facts, a magistrate cannot realistically perform the function of making a credible, independent evaluation of the adequacy of the basis for finding probable cause.\footnote{37} Another commentator on the \textit{Gates} decision has further noted that because the \textit{Gates} majority expressly stated that the appellate courts owe the police finding of probable cause great deference, those courts have little to review with respect to the magistrate's decision.\footnote{38} Finally, other commentators have stated that \textit{Gates} is significant because it advocates that appellate courts should leniently review initial magistrate findings of probable cause and proscribes a reduced substantive role for magistrates, and that consequently a workable, consistent standard of probable cause is less likely to be developed by study of the resulting case law.\footnote{39}

\footnote{35. \textit{Id.} at 272-73 (White, J., concurring). Justice White, in his concurrence, did recognize the fallacy of the majority reasoning with respect to this point. It should be noted, however, that some of the Court's pre-\textit{Gates} decisions also demonstrated that the Court has not been very curious about the failure of the police to ask an informant the basis of his knowledge of alleged crime facts or crime locale facts, even in cases where the informant was known by the police and apparently accessible. See, e.g., \textit{Spinelli}, 393 U.S. at 417.}

\footnote{36. \textit{Id.} at 244-45. Professor LaFave recognized the same flaw in the Gates majority opinion, see \textit{supra} note 30 at 1193. Other commentators also concluded that as a result of \textit{Gates}, less proof of an informant's basis of knowledge and less proof of an informant's veracity is required to justify a probable cause finding; Roe, \textit{supra} note 8 at 1098, and Reilly, Witlin, Curran, \textit{supra} note 8, at 371. Of course, it is true that in prior decisions the Court had sanctioned at least the possibility that it would speculate and identify a plausible factual scenario to substantiate the reliability of the informant. In \textit{United States v. Harris}, 403 U.S. 573, 580 (1971), for example, a plurality of the Court speculated that an unidentified informant's statement of crime facts, crime suspect and crime locale facts was a declaration against penal interests. This assumption was made because the informant alleged he had participated in an illegal sale. The Court, however, lacked an adequate record to determine if prosecution of the alleged informant was likely or possible.}

\footnote{37. \textit{Gates}, 462 U.S. at 287 (Brennan, J., dissenting); Kamisar, 69 \textit{Iowa L. Rev.} at 556; Reilly, 17 \textit{J. Marshall L. Rev.} at 371. See discussion \textit{supra} note 4.}

\footnote{38. Roe, 35 \textit{Syracuse L. Rev.} at 1110. Justice Rehnquist of course referred to the obligation of appellate courts to pay great deference to the magistrates' decisions. However, given the lesser role of magistrates in the process, it is proper to characterize the deference as deference to the police.}

The majority opinion in *Gates* is also of significance because it suggested that the fact that a warrant has been obtained is an important and independent consideration in justifying a search or seizure, regardless of the fairness of the proof standard or the process used to obtain the warrant. Hence, the opinion elevated form over substance. The startling changes in the probable cause standard effected by the majority opinion seem to be provoked by the Justices' judgment that the government's overriding function is to maximize protection of citizens and property. The majority opinion concluded with the suggestion that the probable cause proof standard of the federal Constitution no longer needs to be a uniform standard; instead, each magistrate is authorized to exercise her individual judgment, drawing whatever inferences she feels are warranted.

Many commentators have been critical of the *Gates* decision and its rationale. Other commentators have examined each of the ra-
tionale offered by Justice Rehnquist for abandoning the Aguilar-Spinelli test and found those reasons inadequate.\textsuperscript{44}

II. THE SIGNIFICANCE OF GATES: THE STATES' REACTIONS

In the first three years following the Gates decision, 1983-1986, approximately ten state supreme courts decided to adopt Gates as their state constitutional probable cause standard, including the high courts of Alabama,\textsuperscript{45} Arizona,\textsuperscript{46} Arkansas,\textsuperscript{47} Colorado,\textsuperscript{48} Georgia,\textsuperscript{49} Illinois,\textsuperscript{50} Maryland,\textsuperscript{51} Mississippi,\textsuperscript{52} Montana,\textsuperscript{53} North Carolina,\textsuperscript{54} and enough evidence to satisfy a conclusive standard that there was a substantial possibility of criminal activity. Substantial evidence means less than a forty percent chance that criminal activity has occurred or is occurring. \textit{Id.} at 476. Professor Grano supports this view by referring to \textsc{Model Code of Pre-Arraignment Procedure} § 210.1(7), which takes the position that probable cause can be satisfied by evidence that establishes less than a fifty percent chance that criminal activity has occurred. \textit{Id.} at 477. No reference is ever made to a standard that identifies what constitutes a factual allegation, or whether the state must allege at least one fact that identifies a crime event, a culprit, or crime evidence. Professor Grano suggested that his forty percent solution can be satisfied at least in part by a non-empirically tested assertion that there is no empirical evidence that most people who send anonymous letters to the police alleging crimes and culprits are lying. \textit{Id.} at 477. Professor Grano simply ignored the reality that the letter by its own terms is anonymous, hence making extremely difficult the verification and follow-up investigation that is the essential function of a professional police department. Professor Grano also ignored the fact that crediting such a letter by assuming that such a letter may be reliable means that a citizen's home becomes more vulnerable to entry and search by the government without presentation of a single factual allegation to justify the government's intrusion.

\textsuperscript{44} See Kamisar, 69 IOWA L. REV. at 571-84; Roe, 35 SYRACUSE L. REV. at 1101-1111.


\textsuperscript{49} State v. Stephens, 252 Ga. 181, 311 S.E.2d 825 (1984); State v. Luck, 252 Ga. 347, 312 S.E.2d 791 (1984). The Georgia Supreme Court, while not expressly adopting Gates as the state constitutional standard, did expressly cite with approval the Gates totality of the circumstances approach. The Georgia Supreme Court did qualify in theory its approval of the Gates approach by urging police to present to the magistrate all available facts demonstrating the reliability of the informant. \textit{Luck}, 312 S.E.2d at 792-93.

\textsuperscript{50} People v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147 (1984) (adopting Gates in the context of a contraband drug possession charge).


\textsuperscript{52} Lee v. State, 435 So. 2d 674 (Miss. 1983) (adopting Gates in the context of
Pennsylvania. Another ten state supreme courts have cited *Gates* favorably, and have used it to evaluate and find probable cause in a state prosecution, but without expressly adopting *Gates* as the state constitutional standard. These states include Indiana, Iowa, Kansas, Minnesota, Nebraska, Texas, Vermont, Virginia, Wisconsin, and Wyoming.

Fewer than ten state supreme courts have rejected, totally or partially, the lesser proof standard adopted by *Gates* as their state constitutional standard, including Alaska, Connecticut, Massachusetts, and Washington. For a variety of reasons a handful of other state supreme courts have declined to decide if *Gates* should be re-

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57. State v. Luter, 346 N.W.2d 802 (Iowa 1984) (citing *Gates* with approval in the context of a drug possession with intent to distribute charge).
58. State v. Walter, 234 Kan. 78, 670 P.2d 1354 (1983) (citing *Gates* with approval in the context of a drug possession with intent to sell charge based on contraband found as a result of the search in question). In this instance, the court referred without objection to the "adoption" of the *Gates* totality of circumstances approach by an intermediate Kansas appellate court. *Id.* at 1358.
jected or accepted. For example, a state supreme court declined to
determine whether Gates should be adopted as the state constitu-
tional fourth amendment standard on the grounds that the defendant
failed to properly raise the issue at the trial or pre-trial stage of the
prosecution.70 Another state supreme court refused to consider substi-
tuting Gates for Aguilar-Spinelli as the state constitutional prob-
able cause standard because the lower courts had not decided the
case on that basis.71 The Connecticut Supreme Court at first de-
clined substitution of the Gates probable cause standard for the Agui-
lar-Spinelli standard on the grounds that the legislature had adopted
the Aguilar-Spinelli standard as the specific state statutory standard
of probable cause, at least for certain specific types of searches or
seizures.72 Finally, two state supreme courts citing Gates declined
consideration of the adoption of Gates as the state constitutional stan-
dard because the facts of the case led the court to conclude that prob-
able cause existed under either the Gates standard or the Aguilar-
Spinelli standard.73

Several state supreme court decisions have cited with approval
Gates' relaxed view toward the basis for finding probable cause and
the reverence appellate judges should pay to the magistrate's finding
of probable cause.74 Some of these state supreme courts, after citing
this reverence for a finding of probable cause, have ignored substanci-
onclusions in the affidavit with respect to allegations of crime loca-

context of a prosecution for possession of drugs).
Court noted that several states in enacting wiretap legislation had expressly adopted
the Aguilar-Spinelli probable cause standard as the statutory wiretap standard. Id. at
738.
73. State v. Ronngren, 361 N.W.2d 24 (N.D. 1985); State v. Iverson, 364 N.W.2d 518
(S.D. 1985).
74. People v. Chase, 675 P.2d 315, 317 (Colo. 1984); State v. Luter, 346 N.W.2d 802,
807 (Iowa 1984); Whisman v. Commonwealth, 667 S.W.2d 394, 397 (Ky. Ct. App. 1984);
Winters, 301 Md. at —, 482 A.2d at 891; Arrington, 311 N.C. at —, 319 S.E.2d at 260;
Doucette, 143 Vt. at —, 470 A.2d at 684; Garza, 228 Va. at —, 323 S.E.2d at 129.
75. Chase, 675 P.2d at 318. The Colorado Supreme Court reasoned that because
the contraband may be located at one of three places, the police therefore had prob-
able cause to search all three places. The fact that they did not seek a search warrant
for the other places did not undermine the basis for searching the home they selected.
The Colorado Supreme Court ignored the fact that the police had the suspect under
surveillance, and could have stated in the affidavit where the package, which they al-
leged in the affidavit they suspected contained contraband, was in fact delivered to the
accused. The contraband therefore could have been obtained by the accused at any of
the three locales (two homes and a car), but only one of the locales, yet the magistrate
authorized the police to search the residence they requested; State v. Luter, 346
N.W.2d 802, 807 (Iowa, 1984). The Iowa Supreme Court assumed that the police au-
crime evidence was located at the place the magistrate authorized and the appellate court sanctioned to be searched.

A state supreme court has cited favorably Gates' preference for warrants to conduct searches.\textsuperscript{76} Other state supreme courts which have adopted Gates as the state constitutional probable cause standard have implicitly found it significant by concluding that the totality of circumstances standard requires only enough proof to satisfy a conclusionary standard of a fair probability that crime evidence locale facts exist in a search warrant case.\textsuperscript{77} Certain of the state supreme courts adopting or citing Gates favorably have also cited with approval its relaxed standard for court review of a magistrate's initial finding of probable cause.\textsuperscript{78} The reviewing courts in these states need only be satisfied that there is a substantial basis in the record to credit the magistrate's belief that evidence of wrongdoing might be detected at the place to be searched.\textsuperscript{79} In other words, probable cause in these states at the review stage has become "plausible" cause of crime fact, culprit fact, or crime evidence fact.

Some of these state supreme courts have proceeded to assume that probable cause exists in this post-Gates era, without reference to a single specific supporting factual allegation in the affidavit under scrutiny.\textsuperscript{80} Other state supreme courts have followed the lead of the Gates opinion and have stated that the national standard of probable cause after Gates is flexible, fluid, fact sensitive, and not capable of being reduced to a quality legal standard.\textsuperscript{81}

Another persuasive indicator that Gates has had a significant impact on the law of search and seizure in the states are interpretations of Gates by state supreme courts expressly or implicitly altering the federal Constitution's fourth amendment probable cause standard.
The most significant change in the federal Constitution's probable cause standard, as interpreted by state supreme courts, is the equation of probable cause with suspicion in order to seize or search.\textsuperscript{82} State supreme courts have used the Gates decision as the federal Constitutional standard to justify a finding of probable cause based only upon suspicion, even while acknowledging that Aguilar-Spinelli prevented findings of probable cause based only on suspicion.\textsuperscript{83}

Gates has also resulted in a tendency of state supreme courts to justify the conclusion that factual allegations were made in the affidavit that justified a search or seizure by labeling the suspect (and or those that visit the suspect) as a criminal. A few state supreme courts, for example, have correctly interpreted Gates as having sanctioned the significance of assertions that the officer at the time of the search or seizure knew that the suspect was previously involved in similar criminal activities.\textsuperscript{84} Other state supreme courts following Gates have gone so far as to excuse the absence of specific allegations of a crime, a culprit, evidence, or locale facts, on the basis of allegations that persons involved with the suspect had general reputations of past criminal involvement.\textsuperscript{85} The Wisconsin Supreme Court has even pointed to Gates to justify giving substantial significance to a bald allegation by an unknown informant that the father of children had a bad temper in order to justify the conclusion that a reasonable basis existed to believe that the children could be subject to "further" abuse at any time.\textsuperscript{86}

A significant change produced by Gates in the federal Constitution's probable cause standard is reflected in state decisions suggesting that the standard is satisfied despite omissions or even possible fabrications of factual allegations of a crime, a culprit, crime evidence, or credibility of a third-party informant. A state supreme court has used Gates as the federal Constitutional standard to con-

\begin{itemize}
\item \textsuperscript{82} Clifford, 474 N.E.2d at 970; Eisenhauer, 678 S.W.2d at 954. Suspicion is an adequate proof standard even if police confirm only innocent factual allegations provided by an informant whose basis of knowledge and alleged reliability is completely omitted. \textit{Eisenhauer}, 678 S.W.2d at 954.
\item \textsuperscript{83} Clifford, 474 N.E.2d at 970.
\item \textsuperscript{84} State v. Brooks, 452 So. 2d 149, 152 (La. 1984). See also State v. O'Neill, 679 P.2d 760 (Mont. 1984). In justifying probable cause, the Montana Supreme Court considered significant an allegation that seven years before the initiation of the investigation at issue the suspect had plead guilty to possession and transportation of marijuana in California. \textit{Id.} at 762. See \textit{supra} note 33 and accompanying text.
\item \textsuperscript{85} Arrington, 311 N.C. at —, 319 S.E.2d at 259; Ronngren, 361 N.W.2d at 229; Jackson, 102 Wash. 2d at —, 688 P.2d at 138. The Jackson court, while rejecting the Gates standard, found extremely significant the facts that the police followed an alleged drug dealer to the suspect's home, and that the dealer spent some time in that home where he picked up a bag of marijuana.
\item \textsuperscript{86} Boggess, 115 Wis. 2d at —, 340 N.W.2d at 524-25. The informant only speculated that the children may be battered. \textit{Id.} at —, 340 N.W.2d at 524.
\end{itemize}
clude that probable cause to seize existed, despite the fact that no indication was given of the factual basis that led to the issuance of the warrant.\textsuperscript{87} State supreme courts citing Gates favorably, or adopting Gates, have found probable cause with respect to a specific item seized during the course of a house search, despite the fact that the courts failed to make reference to a single factual allegation supporting the conclusion that the item seized was to be found at the home at the time of the search.\textsuperscript{88} The Wyoming Supreme Court has correctly interpreted Gates as supportive of a finding of probable cause to search a home, even though the search warrant affidavit failed to specifically allege a single date on which a crime or crime evidence was witnessed in that home.\textsuperscript{89}

State supreme courts have also correctly interpreted Gates to mean that the federal probable cause standard now sanctions the practice of permitting “credibility” type factual allegations to cure defects or omissions in allegations of crime, culprit, evidence, or locale facts.\textsuperscript{90} A state supreme court, for example, has used Gates to cure defects or omissions in factual allegations related to crime locale and crime contraband locale by substituting a factual allegation related solely to the credibility of a third person who allegedly provided the information.\textsuperscript{91}

\textsuperscript{87} Doucette, 143 Vt. at —, 470 A.2d at 685.
\textsuperscript{88} Winters, 301 Md. at —, 482 A.2d at 892-93. The Maryland Court of Appeals was required, because of a joint search by state and federal officials of the home, to review whether there was probable cause to justify the federal search warrant. \textit{Id.} The federal officers were looking for drugs in the home of a lawyer. \textit{Id.} at —, 482 A.2d at 889. The state officer was interested in the possibility that the defendant had failed to pay state income taxes. The warrant sought to search for records of drug deals. The state officer used this clause to examine and discover possible records of unreported client fees. No fact was reported by the state court to support a conclusion that records of drug transactions would be found in the home. \textit{Id.} at —, 482 A.2d at 889. See also \textit{State v. Roungren}, 361 N.W.2d 224 (N.D. 1985). In Roungren, a next door neighbor retrieved a garbage bag dragged by a dog. He believed it was the defendant’s garbage, but did not see the dog take the bag from the suspect’s home. The bag contained marijuana residue. The police later observed similar garbage bags at the home, but no indication was given that the bags had any distinctive characteristics. \textit{Id.} at 227-28. The North Dakota Supreme Court seemed to believe that the neighbor’s lack of direct observation could be remedied by characterizing him as a citizen informant, and then asserting that such a person is more credible than a paid informant. Curiously, the North Dakota Supreme Court concluded that probable cause did not exist without further support even under the \textit{Aguilar-Spinelli} standard. \textit{Id.} at 229.

\textsuperscript{89} Bonsness v. State, 672 P.2d 1291, 1293 (Wyo. 1983). In the Bonsness case, the police alleged that an identified suspect in another crime told them, during the course of his interrogation of an unrelated incident, that he had scored a “baggie” of marijuana from the apartment of the accused. The date of that purchase was unspecified. The informant did predict for the police officer that the occupant of the home would be acquiring more marijuana that day. No basis for this prediction was offered or requested. \textit{Id.} at 1292-93. See supra notes 20-21 and accompanying text.

\textsuperscript{90} See supra notes 33-37 and accompanying text.

\textsuperscript{91} Arrington, 311 N.C. at —, 319 S.E.2d at 259. The North Carolina Supreme
State supreme courts, on the other hand, have correctly interpreted Gates to permit a finding of probable cause in a search warrant case, when the only allegations of a crime, a culprit, crime evidence, or locale facts were provided by a third party to the police, and no allegations of fact were made in the warrant to provide a basis for believing that third person, nor were there allegations demonstrating that the police investigation had corroborated the informant's claims. The Rhode Island Supreme Court has suggested that the Gates standard of probable cause permits a finding that the police have authority to search, even if the affidavit is based on hearsay and is devoid of factual allegations establishing an informant's veracity, as long as factual allegations are made establishing that the "culprit" factual allegations made by the informant are reliable.

State supreme court decisions have also cited Gates favorably and have proceeded to find probable cause in cases where strong evidence suggested that the police may have fabricated an informant as the source of the crime, culprit, or crime evidence allegations. A state supreme court, after adopting the Gates totality of the circum-

Court found that one of two informants involved in the case called the police, and told them that he had made a drug purchase. This was considered to be a declaration against penal interests. Such a finding, by the court's own admission, helps to provide some credibility to the informant. The defects that had caused the lower North Carolina courts to suppress the evidence in the case, however, were that the informant's statements failed to specify where and when he had purchased the drugs. Id. How the informant's credibility filled these gaps was not expressly addressed by the North Carolina Supreme Court.

92. Winters, 301 Md. at —, 482 A.2d at 893. In Winters, a confidential informant, a former secretary of the suspect, provided the crime fact allegations, which were relied upon along with additional information gathered in an investigation, in issuing a warrant. Id. at —, 482 A.2d at 889. The Maryland Court of Appeals expressly acknowledged a finding that because the informant was granted immunity, her story could not be credited on the basis that it was against her penal interests; however, the court agreed that there was sufficient additional information in the affidavit to support issuance of the warrant. Id. at —, 482 A.2d at 892.


94. Kimbro, 197 Conn. at —, 496 A.2d at 503. At issue in Kimbro was whether or not there was probable cause to justify the warrantless street arrest of a suspect that resulted in the discovery of cocaine on his person. The officer alleged that he had had the suspect under surveillance for two weeks in the vicinity of the arrest, yet apparently had never observed even an attempted street sale of drugs. He claimed, however, that on the day of the arrest he received a call from an informant who told him that he overheard the suspect tell someone he was selling drugs, although the informant did not see such a sale. The Connecticut Supreme Court did not expressly recognize the possibility that the officer fabricated the informant but did reject the factual allegations as an adequate basis to find probable cause. Id. See also Arrington, 311 N.C. 633, 319 S.E.2d 249 (1984). In Arrington, the North Carolina Supreme Court found probable cause by ignoring the coincidence that a second undisclosed informant conveniently called the police the same day to corroborate information provided by a prior undisclosed informant by telling a police officer that he (the second informant) had already conducted the follow-up surveillance of the suspect's home. Id. at —, 319 S.E.2d at 259. See also supra note 19 and accompanying text.
stances standard, gave little or no significance to findings that the police fabricated at least part of the crime facts and crime local facts alleged in the affidavits for a search warrant, and indeed the court used precedent to justify upholding the finding of probable cause which was only relevant precedent if the facts found to be false in the warrant affidavits were accepted as true.95

In other cases the evidence of possible fabrication is not so strong, but the state supreme courts use of Gates at least opens the door to the fabrication of informants, or at least crime, culprit, or evidence location factual allegations. State supreme courts, for example, have correctly interpreted the Gates totality of the circumstances approach as sanctioning the use of hearsay allegations, even though it was obvious that the informant was relying on predictive information about a future crime event provided by another unidentified person, perhaps the suspect.96 Two state supreme courts have increased the possibility that the police may fabricate an informant in such crime prognostication cases by crediting an alleged informant’s prediction of a crime, culprit, or crime evidence locale in a warrantless seizure.

95. People v. Hill, 690 P.2d 856, 858-59 (Colo. 1984). The state district court judge reviewing the motion to suppress found that the police affiant had not told the truth to the magistrate in alleging facts to establish a crime, a crime locale, and crime contraband locale. The district judge found that the police had lied in claiming they observed two sales of drugs to the same man at the residence to be searched. The Colorado Supreme Court reversed. The Colorado Supreme Court, while forced to confirm the lie in the affidavit, nevertheless cited as a key precedent their prior ruling which it characterized as very similar to the case under review. The court proceeded to point to the facts it used to uphold the affidavit in the earlier case. One of the key facts was the police observation on two occasions of visitors to the same house, allegedly observed sampling drugs. The court proceeded to switch its analysis to the facts of the case under consideration. After noting the affiant officer’s drug case experience, the court pointed out the apparent true statement in the affidavit that the officer had observed the same person on one other occasion leaving the room with a marijuana cigarette. No significance was given to the fact that the officer lied about two of three alleged observations, and hence, unlike in the earlier case, no pattern of drug sales was suggested. Nor did the court acknowledge the doubt cast upon the remaining alleged observation given the two lies the police had told about the other similar observations. The Colorado Supreme Court thereby violated the current national constitutional standard used to evaluate complaints that the police lied in a search or arrest affidavit, stated in Franks v. Delaware, 438 U.S. 154 (1978). The Franks standard requires the complete exclusion of all fact allegations found by the reviewing court to be lies.

96. State v. Hendrickson, Mont., 704 P.2d 1368, 1370-71 (1985); Eisenhauer v. State, 678 S.W.2d 947, 960 (Tex. Crim. App. 1984). Police officer alleged that an informant phoned and identified a suspect by name, description, and type of clothes. The officer failed to ask the informant the basis for his prognostication. State v. Anderson, 701 P.2d 1099, 1100 (Utah, 1985); State v. Boggess, 115 Wis. 2d 443, 340 N.W.2d 516, 524 (1983). In this case, the informant’s call was to a social worker. The informant expressly stated that he did not know for a fact that children were battered. Instead the caller stated that the children may be battered. The social worker failed to request the basis of the informant’s speculation; Bonsness v. State, 672 P.2d 1291, 1293 (Wyo., 1983). The documentation that Gates does support such a conclusion can be found supra note 21 and accompanying text.
and search case.97 These courts found that the police had probable cause to conduct a warrantless search and seizure based solely on allegations that the police acted because an undisclosed informant predicted crime facts, crime locale facts, and culprit facts.98 None of the police officers in these cases bothered to ask the informant-prognosticator the basis of her knowledge, despite the clear opportunity to do so, and none of these supreme courts noted or thought significant that omission.99

Another type of strong indicator that Gates is working a significant change in the federal Constitution's probable cause proof standard is the use of Gates by state supreme courts to evaluate the quantum of evidence needed to satisfy probable cause in a warrantless search or seizure case.100 In certain of these cases the extension of Gates to warrantless probable cause determinations was made, despite the fact that the state supreme court expressly recognized that earlier United States Supreme Court decisions had hinted that the probable cause standard in warrantless cases may be more stringent.101 The Wisconsin Supreme Court decided to extend the Gates
probable cause standard to a warrantless entry into a home because of an emergency need to assist a person in the home, despite the fact that an emergency was not alleged by the unknown informant.\textsuperscript{102}

In addition to changing the federal Constitution's probable cause standard, \textit{Gates} has resulted in the dilution of other fourth amendment protections by state supreme courts. State supreme courts citing \textit{Gates} favorably, for example, have used it as grounds to find a search constitutional despite the fact that the scope of the search went beyond that authorized by any factual allegation in the search warrant affidavit.\textsuperscript{103} Hence, \textit{Gates} is not only producing reduced protection of the interests of individuals provided by the probable cause provision of the fourth amendment but it is also being used by state supreme courts to denigrate the separate specificity requirement of the warrant clause.

Another indicator of the significance of the \textit{Gates} decision is that a few of the state supreme courts adopting or citing \textit{Gates} with approval have proceeded to abolish specific elements of the state constitutional probable cause standard.\textsuperscript{104} Dissenters to the favorable citation of \textit{Gates} by majorities in state supreme court decisions have concluded that state statutes adopting \textit{Aguilar-Spinelli}'s two-pronged test as the state standard were ignored by the majority opinions.\textsuperscript{105}

The final type of proof of the significance of the \textit{Gates} case based upon state supreme court interpretations and applications of the \textit{Gates} probable cause standard are those state court decisions which expressly or implicitly suggest that the change from the \textit{Aguilar-Spinelli} standard was outcome-determinative. Some state supreme

\textit{Gates} totality of the circumstances approach, reasoning that police as magistrates are faced with common sense, nontechnical judgment calls, and the probable cause standard should reflect that reality.

\textsuperscript{102} \textit{Boggess}, 115 Wis. 2d at —, 340 N.W.2d at 523-24.

\textsuperscript{103} \textit{Chase}, 675 P.2d at 318; \textit{Luter}, 346 N.W.2d at 807; \textit{Arnold}, 214 Neb. at 773, 336 N.W.2d at 99. In \textit{Arnold}, the search warrant made express reference to a large quantity of marijuana. The warrant when executed resulted in discovery of no marijuana, but rather resulted in the discovery of 82 L.S.D. capsules in the resident's purse which became the sole basis for the prosecution. The Nebraska Supreme Court did not question why the police searched her purse to find a large quantity of marijuana. The affidavit did make reference to drug records, but no fact allegation supported this "records" requests. \textit{Id. See also Garza}, 228 Va. at —, 323 S.E.2d at 129, in which factual allegations supported the conclusion that contraband would be found only in the interior of an automobile, but were used to sanction a search of the entire automobile, including the trunk.

\textsuperscript{104} \textit{State v. Luck}, 252 Ga. 347, 312 S.E.2d 791, 792-93 (1984). In \textit{Luck}, the Georgia Supreme Court relaxed a previous requirement that factual allegations must be sufficient to warrant the conclusion that the information was not stale. Based on the \textit{Gates} approach, the Georgia Supreme Court found that adequate crime evidence locale facts were alleged, notwithstanding the absence of any dates.

\textsuperscript{105} \textit{Thompson}, 280 Ark. at —, 658 S.W.2d at 354 (Purtle, J., concurring); \textit{Eisenhauer}, 678 S.W.2d at 958-59 (Teague, J., dissenting).
court decisions have expressly found that their decisions to adopt or
reject the Gates totality of the circumstances approach to probable
cause does change the outcome of the probable cause determination
in the case.\textsuperscript{106} Another clear indication that state supreme courts are
interpreting the Gates decision to be outcome-determinative is an
opinion suggesting that after the adoption of Gates, probable cause
exists except when the affidavit contain only conclusionary asser-
tions.\textsuperscript{107} The Virginia Supreme Court interpreted the Gates case to
permit a search of an entire car, including the trunk, when the fac-
tual allegations in the affidavit established, at most, only a
probability that contraband would be found in the interior of the
car.\textsuperscript{108}

The outcome-determinative nature of Gates is further illustrated
by comparing the outcomes of those cases adopting or citing Gates fa-
vorably with those cases rejecting the Gates standard as the state con-
titutional standard.\textsuperscript{109} Where Gates was either adopted or cited
favorably, the courts generally concluded that probable cause did ex-
ist, while where Gates was rejected as the state constitutional stan-
dard, the courts generally concluded that probable cause was not
proven by the government's factual allegations. Retention of Agui-
lar-Spinelli, for example, resulted in greater scrutiny of the govern-
ment's factual allegations to prove the reasonable basis for believing
an informant who is the primary source of allegations of crime, crime
evidence, and crime evidence locale facts in a search warrant case.\textsuperscript{110}
These state supreme courts have found that a magistrate or a court

\begin{footnotes}
\item 106. Potts, 300 Md. at —, 479 A.2d at 1337. The Maryland Court of Appeals noted
that the lower court had found that the search warrant affidavit in question was inade-
quate under AgUILar-Spinelli, but may satisfy the diluted protection provided by the
Gates standard. See Gray, 509 Pa. at —, 503 A.2d at 924. The court in Gray had before
it a search warrant affidavit where the crime locale and crime evidence locale facts
were supplied by one unknown informant whose reliability was confirmed only indi-
directly by two other unknown informants who characterized the crime suspect as a
known drug dealer, and by the police confirmation of related non-crime facts supplied
by the first informant. See also Eisenhauer, 678 S.W.2d at 955. In Eisenhauer, the ma-
jority opinion stated that the totality of circumstances standard of Gates was satisfied
with respect to the warrantless arrest of a drug suspect. Id. In his dissenting opinion
in Eisenhauer, Justice Clinton claimed that the majority used the Gates standard to
change the outcome of the case under the prior constitutional standard. Id. at 955-56
(Clinton, J., dissenting). Post-Gates commentary has already identified early decisions
in the federal courts which provide a basis for inferring that Gates will be interpreted
in a manner to alter the outcome of probable cause analysis in the federal courts, see
Recent Developments, supra note 26 at 181 n.138. Several commentators made general
predictions that Gates decision would be outcome determinative, see Kamisar, supra
note 16 at 581 and LaFave, supra note 30 at 1194-95.
\item 107. Doucette, 143 Vt. at —, 470 A.2d at 685.
\item 108. Garza, 228 Va. —, 323 S.E.2d 127, 129.
\item 109. See supra notes 45-65, and 66-69 (identifying sets of cases in sequence).
\item 110. Jones, 706 P.2d at 325-26.
\end{footnotes}
should not believe crime allegations simply because of an assertion that the allegations of the third party are against that person's penal interests.\textsuperscript{111}

The outcome-determinative nature of Gates is further illustrated by comparing the outcome of cases in which state supreme courts rejected the extension of Gates to a warrantless arrest or search probable cause determination, with cases which made the decision to adopt and extend Gates to warrantless arrests or searches.\textsuperscript{112} In similar fact situations, the states rejecting Gates found the government's interests inadequate, while those adopting Gates found probable cause.\textsuperscript{113} Finally, the outcome-determinative nature of the Gates decision is also implicitly demonstrated in the preceding discussion of the significant changes in the federal and state constitutional standards of probable cause that have resulted from the Gates decision.\textsuperscript{114}

THE REST OF THE STORY — STATE SUPREME COURT DECISIONS FINDING GATES EXPRESSLY OR IMPLICITLY INSIGNIFICANT

Some state supreme courts have indicated that Gates is insignificant with respect to the attitude reviewing courts should take in scrutinizing a magistrate's finding of probable cause. These courts have indicated that Gates did not represent a substantial departure from Aguilar-Spinelli because under the probable cause standard of the latter, the appellate courts were still obligated to give great deference

\textsuperscript{111} Id. A magistrate cannot credit statements based on declaration against penal interests rationale unless there is a realistic likelihood that the third person would be prosecuted based on those admissions, at least at the time such admissions were made. An informant cannot be believed because his factual allegations are against his own penal interests if the informant enjoys immunity from prosecution or expects immunity to result from the admissions at the time of the admissions. Id. Accord People v. Johnson, 66 N.Y.2d 398, 403-04, 488 N.E.2d 439, 443, 497 N.Y.S.2d 618, 622 (1985).

\textsuperscript{112} See Kimbro, 197 Conn. at 496 A.2d at 504-05, 507; Johnson, 66 N.Y.2d at 400, 488 N.E.2d at 441, 497 N.Y.S.2d at 620 (both rejecting the extensional Gates to warrantless arrests or searches). See also supra notes 100-02 (cases extending the Gates probable cause standard to warrantless arrest or searches); Dale v. State, 486 So. 2d 196 (Ala. Crim. App. 1985); Espinoza-Gamez, 139 Ariz. 415, 678 P.2d 1379; Tisler, 103 Ill. 2d 226, 469 N.E.2d 147; Brooks, 482 So. 2d 149.

\textsuperscript{113} In Espinoza-Gamez, 139 Ariz. at —, 678 P.2d at 1380, 1383-84, the Arizona Supreme Court upheld a warrantless arrest based on the phone call from an unspecified informant. In Johnson, 66 N.Y.2d at 403-04, 488 N.E.2d at 443, 497 N.Y.S.2d at 622, the New York Court of Appeals held that there was no probable cause to justify a warrantless arrest based on the statements of an identified person, a suspect in the case, even though such statements might be viewed as against the penal interests of that informant.

\textsuperscript{114} See supra notes 74-105 and accompanying text. Prior to Gates, a commentator suggested that United States Supreme Court decisions supported the conclusion that the fourth amendment would provide more protection to homes. See Bacigal, 1979 Ill. L. REV. at 798. But, those state supreme courts either citing Gates favorably or adopting Gates have consistently sanctioned the search of homes. See, e.g., supra note 92.
to a magistrate’s determination that probable cause existed in order to justify the police search.\textsuperscript{115} Gates also suggested that in borderline probable cause determinations, when the police did seek a warrant, doubt should be resolved in favor of encouraging the police to follow the warrant procedure.\textsuperscript{116} State supreme courts have reacted to Gates by suggesting that the Aguilar-Spinelli standard also required that in doubtful cases, courts should hold that probable cause exists in order to encourage law enforcement officers to use the warrant process.\textsuperscript{117}

Gates also suggested that affidavits for search warrants should be evaluated in light of factual and practical considerations rather than from a technical, legal standpoint.\textsuperscript{118} State supreme courts have reacted to this point by finding that even prior to Gates this was a proper consideration in evaluating whether probable cause was established.\textsuperscript{119} State supreme courts have also held or implied that Gates is insignificant because it creates no substantial change in the specifics of the federal constitutional standard of probable cause. Until the decision of the United States Supreme Court in Massachusetts \textit{v. Upton},\textsuperscript{120} a few state supreme courts had interpreted Gates as not having abandoned the two-pronged Aguilar-Spinelli test of probable cause.\textsuperscript{121} Several state supreme courts have implicitly found Gates insignificant because they found that even under the Aguilar-Spinelli standard of probable cause, courts in fact had found probable cause in cases where no facts alleging credibility of an informant were provided the magistrate. A state supreme court implicitly found Gates insignificant when it cited approvingly to pre-Gates decisions that held that an affidavit need not allege any credibility facts, when the third party who supplied the information was characterized as an eye-

\textsuperscript{115} Walker v. State, 473 So. 2d 435, 438-39 (Miss. 1985) (citing U.S. \textit{v. Flynn}, 644 F.2d 1296 (5th Cir. 1982); McCready v. Sigler, 406 F.2d 1264, 1269 (8th Cir. 1969)). \textit{See also} Ross, 194 Conn. at \textemdash\ 481 A.2d at 735. The Connecticut Supreme Court in \textit{Ross} indicated, however, that a key reason for justifying the deference was the content required by the \textit{Aguilar-Spinelli} standard. \textit{Id.} at \textemdash\ 481 A.2d at 738-39. \textit{See also} State \textit{v. Iverson}, 364 N.W.2d 518, 522 (S.D. 1985); \textit{Bonsness}, 672 P.2d at 1292. The Wyoming Supreme Court in \textit{Bonsness} cited as authority the 1960 United States Supreme Court decision in \textit{Jones v. United States}, 362 U.S. 257 (1960). This reference to \textit{Jones} would seemingly refute the Connecticut Supreme Court’s claim that the great deference standard was a by-product of the \textit{Aguilar-Spinelli} probable cause standard since the \textit{Jones} decision predated those decisions.

\textsuperscript{116} \textit{See supra} note 40 and accompanying text.


\textsuperscript{118} Gates, 466 U.S. at 230-32. \textit{See discussion supra} note 25 and accompanying text.

\textsuperscript{119} \textit{Ricci}, 472 A.2d at 296.

\textsuperscript{120} 466 U.S. 727 (per curiam) (1984).

\textsuperscript{121} \textit{Ricci}, 472 A.2d at 295-96. The Rhode Island court believed that only the rigid application of the \textit{Aguilar-Spinelli} two-pronged test was rejected by Gates. \textit{Id.} at 296.
witness rather than an informant. Conversely, another state supreme court, while citing Gates favorably, nevertheless recognized that the probable cause standard of the state constitution did have the purpose of safeguarding the privacy and security interests of individual citizens against unwarranted government searches and seizures.

Some state supreme courts have also held or implied that the Gates case is not outcome-determinative. For example, the North Dakota Supreme Court, after adopting Gates, has held that the Gates probable cause standard does not mean that probable cause can be based solely upon a conclusionary assertion of crime facts provided by an informant whose reliability was not alleged and where the police failed to conduct an adequate investigation. Conversely, the Washington Supreme Court, after rejecting Gates and acknowledging that the police follow-up investigation should confirm more than exculpatory facts, nevertheless upheld a finding of probable cause in exactly such a situation. Finally, the Arizona and Illinois Supreme Courts have implied that Gates was insignificant because it could be applied retroactively in that the decision was a change not in the standard itself but only in the process of applying the standard.

In concluding this discussion of the insignificance of Gates, it should also be noted that a commentator prior to the Gates decision reviewed the Court’s probable cause decisions and concluded that in fact the Court was already employing a totality of the circumstances standard for the entire fourth amendment, and that, therefore, the specific protections of the warrant clause, including probable cause,

122. Walker v. State, 473 So. 2d 435, 438-439; citing U.S. v. Flynn, a 1982 Federal Fifth Circuit Case, and a 1969 eighth circuit decision in McCreary v. Sigler, 406 F.2d 1264, 1269 (1969). Pre-Gates commentators also recognized that certain courts had interpreted Aguilar-Spinelli to permit probable cause to substantially rely on allegations such as the past criminal conduct or reputation of the suspect, Bacigal, supra note 4, at 784. Another Pre-Gates commentator had analyzed decisions ostensibly purporting to follow Aguilar-Spinelli and found that no allegations need be made to demonstrate that a non-swearing private law enforcement officer was telling the truth in providing crime facts to the affiant police officer, see Moylan, supra note 4 at 766, discussing a decision when the commentator judge credited a report provided by a Pinkerton Detective Agent.

123. Boggess, 115 Wis. 2d at —, 340 N.W.2d at 520.

124. State v. Thompson, 369 N.W.2d 363, 364 (N.D. 1985). In Thompson, an informant had alleged that the defendants were dealing drugs from their new residence and their vehicle. The informant failed to provide the basis of his allegations. The police alleged that the informant sought to establish his own credibility by alleging that he had provided information used to convict a defendant in a criminal prosecution. The police did not ask the accused to provide details, nor did they confirm his allegation by independent investigation. Id. at 369-70.

125. Jackson, 102 Wash. 2d at —, 688 P.2d at 138.

126. Espinosa-Gamez, 139 Ariz. at —, 678 P.2d at 1384; Tisler, 103 Ill. 2d at —, 469 N.E.2d at 157-58.
were but considerations in the judgment of whether the government’s action in searching or seizing was reasonable.\textsuperscript{127} Hence, it was the commentator’s belief that depending upon the Court’s intuition about the relative interests at stake in the case, probable cause could be equated with proof barely adequate to exceed bare suspicion, or proof that came close to establishing guilt.\textsuperscript{128}

\textbf{STATE SUPREME COURTS’ JUSTIFICATIONS FOR ACCEPTING OR REJECTING ADOPTION OF THE GATES STANDARD}

State supreme courts adopting \textit{Gates} as the state standard, or at least citing it favorably, have not developed independent rationale, except that of federalism, for the justice of that decision. Instead, they have relied upon specific rationale from the \textit{Gates} case, or have embraced all of its rationale without further analysis.\textsuperscript{129} Most frequently, these courts have relied upon the practical reasons offered by the \textit{Gates} majority for abandoning the \textit{Aguilar-Spinelli} test. A state supreme court adopting \textit{Gates}, for example, concluded that it is the correct standard because probable cause is a standard that must be applied by laypersons both as law enforcement officers and, frequently, as magistrates.\textsuperscript{130} Other state supreme courts have adopted \textit{Gates} because the totality of the circumstances standard makes more common sense since it requires a “nontechnical analysis.”\textsuperscript{131} Finally, a state supreme court adopted \textit{Gates} because of its judgment that the \textit{Gates} standard is more flexible than \textit{Aguilar-Spinelli}.\textsuperscript{132}

A few of the state supreme courts adopting or citing \textit{Gates} favorably have justified their decision by expressly or implicitly identifying and evaluating the interests that the government and citizens have at stake in forging a probable cause standard. State supreme courts adopting \textit{Gates} have adopted the \textit{Gates} majority rationale that the totality of the circumstances approach more fairly balances the interests of citizens against those of the government in fashioning the

\textsuperscript{127} Bacigal, 1979 ILL. L. REV. at 764-65. Other commentators after reviewing decisions of other courts applying the \textit{Aguilar-Spinelli} standard concluded that courts already allowed strong veracity to compensate for weak basis of knowledge, and vice-versa. See Moylan, \textit{supra} note 4, at 774.

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Arrington}, 311 N.C. at —, 319 S.E.2d at 260 (embracing all of the rationale of \textit{Gates} without analysis of the merits). One pre-\textit{Gates} commentator’s view is that state supreme courts most often adopt new Supreme Court criminal procedure decisions without independent rationale. See Howard, 62 VA. L. REV. at 886.

\textsuperscript{130} \textit{Dale}, 466 So. 2d at 199. The preferable standard is one that laypersons can understand and tolerate. \textit{Id.}

\textsuperscript{131} \textit{Gray}, 509 Pa. at —, 503 A.2d at 925; \textit{Whisman}, 667 S.W.2d at 397.

\textsuperscript{132} \textit{Thompson}, 280 Ark. at —, 658 S.W.2d at 352. The Arkansas Supreme Court did not elaborate upon why “flexibility” was the prime policy goal to be achieved by the probable cause standard. \textit{Id.}
appropriate probable cause standard. The Pennsylvania Supreme Court, for example, in adopting Gates as the state constitutional standard, relied upon a rationale of the Gates decision that the Aguilar-Spinelli test, if rigorously applied, seriously impeded the task of law enforcement because anonymous tips would be of greatly diminished value in police work.

State supreme courts accepting Gates have consistently made reference to their perceptions of how federalism should operate to justify their decision. Certain state supreme courts adopted Gates because they preferred that the scope of the protection of the state constitution be the same as that of the federal Constitution as interpreted by the United States Supreme Court, unless there are good reasons for providing more protection. State supreme courts have also adopted Gates because the language of their constitutional provision is identical to or almost identical to the language of the fourth amendment. These state courts interpret the scope of their state constitutional protection from unreasonable search and seizure as having descended from the federal Constitution's protection against unreasonable searches and seizures.

The Wyoming Supreme Court demonstrated a bizarre interpretation of federalism in support of its favorable citation of Gates. The court suggested that it had never accepted the Spinelli-Aguilar standard. Hence, the Gates decision, according to the Wyoming Supreme Court, simply brought the federal standard in line with the existing probable cause standard in Wyoming.

In contrast to state supreme courts adopting Gates, state supreme courts rejecting it have evaluated the reasoning of the case and have identified the interests at stake in forging a constitutional search and seizure standard. These courts have justified the decision to reject

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133. Tisler, 103 Ill. 2d at —, 469 N.E.2d at 157; Gray, 509 Pa. at —, 503 A.2d at 927.
134. Gray, 509 Pa. at —, 503 A.2d at 927.
135. Tisler, 103 Ill. 2d at —, 469 N.E.2d at 156. The Illinois Supreme Court referred to its consistent interpretation of the standard in use by the United States Supreme Court. Id.; Potts, 300 Md. at —, 479 A.2d at 1340; Gray, 509 Pa. at —, 503 A.2d at 926. The Pennsylvania Supreme Court in Gray also noted that there was no substantial textual difference between the probable cause standard in the federal constitution and the standard as stated in Article I, Section 8 of the Pennsylvania Constitution.
136. Tisler, 103 Ill. 2d at —, 469 N.E.2d at 155; Boggess, 115 Wis. 2d at —, 340 N.W.2d at 520 n.8. But see Arrington, 311 N.C. at —, 319 S.E.2d at 260 (adopting Gates as state constitutional standard, despite express recognition that the language of the state constitutional provision is different from that of the national constitution's fourth amendment).
137. Bonsness, 672 P.2d at 1293.
138. Id. at 1293.
139. Id. The Wyoming Supreme Court did not suggest that its pre-Gates failure to use the Aguilar-Spinelli test was unconstitutional.
140. Earlier commentators have examined state supreme court cases deciding to
Gates by concluding that it too easily sanctioned the government's assertion of interests to search or seize.\textsuperscript{141} A state supreme court in rejecting Gates justified that decision by reference to the state constitutional provision comparable to the fourth amendment, concluding that the provision requires that the government interests are only adequate to permit a search or seizure of a citizen or his property when the police conduct a follow-up investigation that directly confirms an allegation of crime evidence or locale facts made by a third party.\textsuperscript{142} The Massachusetts Supreme Court has also suggested that the Gates standard must be rejected because it sanctions searches and seizures based upon factual allegations sufficient only to suspect a person of crime, or to suspect that evidence is located in a particular place.\textsuperscript{143}

An additional substantive reason which state supreme courts have offered for rejecting the Gates standard is that Gates failed to recognize the central role of an independent determination of probable cause by a magistrate.\textsuperscript{144} Several state supreme courts have rejected the probable cause standard of Gates as their state constitutional standard because the totality of circumstances standard provides inadequate guidance to law enforcement officers and magistrates.\textsuperscript{145} These decisions also suggest another reason for rejecting apply a standard different from that applied by the United States Supreme Court decisions to comparable provisions in analogous cases. See, Galie, The Other Supreme Courts: Judicial Activism Among State Supreme Courts, 33 SYRACUSE L. REV. 731, 733 (1982). Sometimes these commentators characterized state supreme courts providing more protection to citizens rights as activist courts. \textit{Id.} at 733-85.

\textsuperscript{141} Kimbro, 197 Conn. at 219, 496 A.2d at 507-08 (citing Upton, 394 Mass. at —, 476 N.E.2d at 558; Jackson, 103 Wash. 2d at —, 688 P.2d at 142). See Davies, A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of Lost Arrests, 1983 Am. Bar Found. Research J. 611 (1983).

\textsuperscript{142} Upton, 394 Mass. at —, 476 N.E.2d at 558. The court pointed to the absence in the affidavit supporting the search warrant of facts discovered by the police that would tend to demonstrate that the crime evidence facts were likely to be found in the motor home in which the search was subsequently conducted. The Massachusetts Supreme Court noted that the police possessed such facts, but failed to disclose the facts, including the discovery of the suspect’s wife’s identification in the motel room. \textit{Id.} See Roe, 35 SYRACUSE L. REV. at 1082-84 n.115 (discussing the New York Court of Appeals pre-Gates interpretation of Aguilar-Spinelli requiring the government to prove that the follow-up police investigation directly confirms crime, culprit, evidence, or locale facts in order to cure a defect in an informant’s basis of knowledge).

\textsuperscript{143} Upton, 394 Mass. at —, 476 N.E.2d at 554.

\textsuperscript{144} Jones, 706 P.2d at 322. See supra note 36 and accompanying text (discussing the Gates discussion of this point). The Alaska Supreme Court in Jones emphasized that an independent judgment by a magistrate cannot be exercised unless the law enforcement agent is required to allege in the affidavit crime facts, crime evidence facts, and crime evidence locale facts, and facts that provide a reason to believe these factual allegations. Jones, 706 P.2d at 322. Accord Jackson, 102 Wash. 2d at —, 688 P.2d at 139.

\textsuperscript{145} See, e.g., Jones, 706 P.2d at 323. The Alaska Supreme Court cited Justice White’s concurrence in Gates for the point that it is the duty of the courts to provide
Gates — it is an unacceptable standard of probable cause because it provides the police with little incentive to conduct even a minimal investigation to corroborate facts provided by third persons.146

Some state supreme courts have rejected the totality of the circumstances probable cause standard adopted by Gates because they found unconvincing certain reasons offered in Gates to support its approach. State supreme courts have stated, for example, that the probable cause standard should expressly encourage police to seek a warrant, that the deference to be paid by an appellate court to the probable cause evaluation of a magistrate is a two-edged sword, and that deference should be paid to that decision, whatever the outcome of the magistrate's evaluation.147 The New York Court of Appeals rejected the reasoning of Gates on the grounds that the reasoning is not applicable when the probable cause determination is made solely by the police in a warrantless search or seizure.148

Federalism-based reasons are frequently offered by state supreme courts to justify their decision to reject the Gates case. State supreme courts in rejecting the Gates decision have held that the change would represent an unwarranted and unjustifiable change in their state constitutional standard.149 One reason that the Alaska guidance to laypersons or magistrates who must make the first determination of probable cause. The Alaska Court cited LaFave, Fourth Amendment Vagaries, 74 J. of Crim. L. & Criminology 1171, 1189-90 (1983), for the proposition that without standards there is nothing to review because probable cause will be based on the predilections of the law enforcement officers and the magistrate. See also Upton, 394 Mass. at —, 476 N.E.2d at 556 (1985) (stating clear lines defining constitutionally permissible conduct are most desirable to guide the police, magistrates, prosecutors, defense counsel, and judges). People v. Johnson, at 624 (1985); stating that the preference of the New York Court of Appeals in interpreting the state constitutional provision is to encourage a predictable and structured approach to the analysis of the quality of evidence needed to establish probable cause. The New York Court of Appeals went on to suggest that by seeking to articulate a standard that maximizes predictability and structure it furthered the specific goal of providing a bright line guidance to the police. The Court cited its decision in People v. Belton, 55 N.Y.2d 49, 55 (1980). The New York Court did not point out that the United States Supreme Court in its review of the Belton decision 449 U.S. 1409 (1981), embraced the value of the articulation of a fourth amendment standard that provides police bright line guidance, and how the majority decision in the Gates case ignored the denigration of that value by the adoption of the totality of the circumstances standard; State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136, 139 (1984) Washington Supreme Court characterized the Gates standard as nebulous.

146. People v. Campa, 204 Cal. Rptr. 114, 119-20 (1984). Crime facts, crime locale facts, and culprit facts cannot be furnished solely by an informant who is a suspect in a crime, or presently being prosecuted for the same crime, since such a person has a strong motive to shift responsibility to other persons, and thus their uncorroborated accusations cannot constitute probable cause; Upton, 394 Mass. at —, 476 N.E.2d at 557.
147. Jones, 706 P.2d at 323; Kimbro, 197 Conn. at —, 496 A.2d at 508.
149. Jones, 706 P.2d at 321. (noting that the Alaska Supreme Court had followed Aguilar-Spinelli with respect to the interpretation of the Alaska constitutional provi-
Supreme Court offered in rejecting Gates was an express state constitutional provision recognizing the right to privacy, not found in the federal Constitution, that justified a finding that Alaska citizens were entitled to greater protection of the right to be left alone.\textsuperscript{150} The Washington Supreme Court, in rejecting Gates, relied in part upon the substantial difference in the wording of its state constitutional equivalent to the fourth amendment of the federal Constitution.\textsuperscript{151} A closely-related reason expressed by the Connecticut Supreme Court in rejecting Gates is that the state constitution is the first line of protection that must be considered, and that the breadth of protection of basic liberties should be determined by what citizens of the state have come to expect.\textsuperscript{152}

Another federalism-based reason suggested by state supreme courts in rejecting Gates is an historical one; i.e., that these courts had developed a test of probable cause at least as stringent as Aguilar-Spinelli prior to the adoption of Aguilar-Spinelli by the United States Supreme Court.\textsuperscript{153} Among the states taking this position are some of the original members of the union whose state supreme courts have asserted that the fourth amendment was modeled after their comparable state constitutional provision.\textsuperscript{154}

\begin{footnotes}
\item[150] Jones, 706 P.2d at 324 (citing ALASKA CONST. art. 1, § 22 (containing an express right of privacy)).
\item[151] Jackson, 102 Wash. 2d at —, 688 P.2d at 141.
\item[152] Kimbro, 197 Conn. at —, 496 A.2d at 506, n.16 (quoting Horton v. Meskill, 172 Conn. 615, —, 376 A.2d 359, 371 (1977)).
\item[153] People v. Campa, 204 Cal. Rptr. 114, 118-19 (1984). See Upton, 394 Mass. at —, 476 N.E.2d at 555. Professor Galie made reference to an earlier New York Court of Appeals decision that held that the right to counsel was established in New York long before modern Supreme Court interpretations of the right to counsel. Galie, 33 SYRACUSE L. REV. at 740. Professor Galie made reference to the California Constitution, which provides for a right to privacy and contains such an express statement of the independence of the rights guaranteed by the state constitution. Id.
\item[154] Upton, 394 Mass. at —, 476 N.E.2d at 555. Accord, Brennan, 90 HARV. L. REV. at 502 (referring to an earlier article, the author outlined the fact that at least one of the original states had guaranteed each of the federal Constitution's Bill of Rights prior to its adoption at the national level).
\end{footnotes}
III. GATES AND ITS AFTERMATH: THE CURRENT VALUE AMERICA'S SUPREME COURTS PLACE ON CITIZENS' RIGHT TO BE LEFT ALONE BY THE GOVERNMENT

On balance, study of the majority opinion in Gates and the reactions of most state supreme courts to Gates justifies the conclusion that most of the judges of the supreme courts in the United States currently believe that the probable cause requirement for search and seizures does not protect important individual rights which society is willing to honor. There is substantial evidence which documents that the United States Supreme Court in Gates and the majority of state supreme courts reacting to Gates are currently willing to conclude that the ends justify the means. That is, they are ready to assume without any facts, or too few facts, that the government has interests of significant magnitude at stake anytime it conducts a search or seizure that produces crime facts, culprit facts, or crime evidence facts. The most significant evidence is briefly reviewed and highlighted in the following paragraphs.

There is evidence that Gates sanctions, and has encouraged state supreme courts to sanction, inadequate police follow-up investigations, leaving the government with little or no evidence that its interests in stopping and solving crime are present at the time of the search or seizure. First, Gates is a particularly good example of a case in which the majority's standard encourages an inadequate police follow-up investigation. Second, state supreme court decisions...
adopting or citing *Gates* favorably have held, or have suggested, that the federal Constitution and their state constitutions authorize the government to search the homes of citizens based on allegations of crime, crime locale, and crime evidence facts supplied solely by unknown third persons, notwithstanding the fact that the police made no effort to conduct a follow-up investigation which they had time to conduct, and which could have directly confirmed the allegations.\textsuperscript{159} Hence, these courts do not require the government to cope with its failure to effectively perform its function of stopping and solving crime by conducting an adequate investigation based upon the information provided by a non-law enforcement person.\textsuperscript{160} The North Carolina Supreme Court has gone so far in assuming the government's need to protect its interests in stopping crime that it has found probable cause even where those interests are based on double hearsay and are not confirmed because the government made no attempt to investigate the accuracy of that information.\textsuperscript{161} By contrast, investigation stopped without the police in the Florida or Illinois phases of the investigation taking the steps, within their ability, to directly confirm crime facts. If drugs had been in the car upon its return from Florida, for example, surveillance may well have led to direct observation of those drugs. At worst, surveillance would have had to continue until the Gateses or their alleged drug dealer cohorts embarked upon the course of attempting to distribute the drugs. Hence, no government interests would have been impaired by requiring the police to conduct a more thorough investigation. \textit{Id.}

\textsuperscript{159} See supra notes 75, 80, 85, 88, 89, 92, 98 and accompanying text. A further illustration of this willingness to ignore the failure of the police to conduct a minimally competent follow-up investigation may further document the willingness of the supreme courts of this country to simply assume that the government's interests in stopping and solving crime is at stake. \textit{Id.} in \textit{Potts}, the police alleged they were told by an unidentified informant that the accused was dealing drugs at his home, another house, and on occasion out of his automobile. The police failed to set up a sale at either or both places. There is no evidence that the police surveyed both places or observed alleged street sales of drugs from the accused's car. \textit{Potts}, 300 Md. at 567, 479 A.2d at 1339.

\textsuperscript{160} State v. Hendrickson, 701 P.2d 1368, 1371 (Mont. 1985). The Montana Supreme Court permitted the search of a suspect's car based on an allegation of future criminality provided by hearsay information received by the informant. The officer did not specify when the suspect was stopped in relation to the time the alleged automobile trip to sell drugs in another city took place.

\textsuperscript{161} State v. McDonald, 312 N.C. 264, --, 321 S.E.2d 849, 854-55 (1984). The facts indicated that a police officer sought a warrant, alleging that he was told by witnesses that the suspect in a first degree murder case had suggested that the victim was a robbery candidate just before the closing of the place where the victim worked, but away from the crime scene. \textit{Id.} The officer alleged that witnesses told him that the suspect made a threat to rob the victim one hour before the closing of the place where the victim worked. \textit{Id.} The North Carolina Supreme Court, despite the conflicts in the reports, credited both stories in part in concluding that there was a basis for probable cause. \textit{Id.} at --, 321 S.E.2d at 844. Another North Carolina case involved a police officer who filed an affidavit for a search warrant which alleged that one confidential informant had purchased drugs at the suspect's mobile home. \textit{Arrington}, 311 N.C. at --, 319 S.E.2d at 255-56. He then alleged that a second informant had subsequently contacted him and told him that within the last twenty-four hours there had been a
there are state supreme court decisions rejecting *Gates* which have done so because *Gates* encourages inadequate police follow-up investigations.\(^{162}\)

Furthermore, state supreme courts adopting or citing *Gates* favorably have held that the government need not demonstrate that its interests in crime prevention and crime detection are truly at stake; in its place, the government may substitute character assassination and innuendo.\(^{163}\) State supreme court decisions adopting *Gates*, for example, have concluded that the federal Constitution and their state constitutions authorize the government to search or seize a citizen or a home based substantially upon a finding that a consensus exists among citizens and the police that a certain person is or was involved in criminal activity.\(^{164}\) Even more disturbing is the evidence from earlier sections of this article, demonstrating that *Gates* and state supreme courts following it have increased the likelihood that the government may successfully fabricate an informant to act as the source of factual allegations of crime, culprit, and crime evidence.\(^{165}\)

Substantial evidence has been presented in this Article that the United States Supreme Court in *Gates* and state supreme courts in following *Gates* have failed to even identify the interests that citizens have at stake when the government seizes them or searches their property.\(^{166}\) The most significant elements of this evidence will be briefly reviewed in the following paragraphs.

Most of the states adopting *Gates* as the state constitutional standard have omitted in their analysis even an attempt to identify the interests that all citizens have at stake in the crafting of a proof standard used in a mature democracy to justify search or seizure by the government.\(^{167}\) State supreme courts have expressly or implicitly

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162. See supra notes 141-42 and accompanying text.

163. See infra notes 34, 84-86 and accompanying text.

164. See supra notes 84-86 and accompanying text; Brooks, 452 So. 2d at 152; Gray, 509 Pa. at —, 503 A.2d at 926. The Pennsylvania Supreme Court in *Gray* expressly relied on the fact that three people, one police officer, and two confidential informants all stated that the defendant was a "known" drug dealer. Gray, 509 Pa. at —, 503 A.2d at 926. The opinion does not indicate why, if the accused was such a "known" drug dealer, the police investigation had not focused on the defendant on a continuing basis in the two years he was known to them, or why such an investigation had failed to disclose to the police any direct evidence of crime facts or crime evidence locale facts.

165. See supra notes 94-99 and accompanying text.

166. See supra notes 74-95 and accompanying text.

167. See supra notes 74-95 and accompanying text (involving multiple examples of state supreme courts making only conclusionary findings of probable cause). Pre-*Gates* commentators, after study of the Court's probable cause decisions, concluded that the
viewed *Gates* as having sanctioned the omission in judicial analysis of identification and evaluation of citizens' interests which under the probable cause standard should be balanced against the interests of the government in crime prevention. 168 Because the interests of the citizenry are not required to be identified, the issue can then be characterized as whether or not it was too much trouble for the police in a warrantless search or seizure case to seek a magistrate's approval that probable cause existed, andor whether or not the police acted in good faith. 169 Of course, these supreme courts may simply be finding a means to justify their view that drug dealers and other violators of the criminal law are not entitled to have their interest in privacy and security protected by the federal Constitution's fourth amendment or its state equivalents. 170

In contrast to the argument that state supreme courts are ignoring citizens' rights, but consistent with and supplementing the assumption of government interests, is the substantial evidence presented in this Article that the United States Supreme Court in *Gates* and state supreme courts following *Gates* have elevated, without justification, the government's need to conduct searches and seizures. 171 Perhaps the most significant statement in the majority opinion in the *Gates* case lies in its elevation of the government's interests in stopping and solving crime, which was accomplished through the value judgment that the government's most important function is to provide for the security of individuals and their property. 172 Justice Brennan noted in his dissent in *Gates* that the value judgment adopted by the majority was that the government needs the widest possible authority to search property and seize citizens in order to assure the security of law-abiding citizens. 173

The most significant consequence of this value judgment is that the government in fact need have only suspicion to warrant a search

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168. See supra notes 74-95 and accompanying text. See also *Whisman*, 667 S.W.2d at 397. The court expressly noted that the *Gates* standard permitted courts to defer to the difficulty faced by police in seeking a warrant under certain circumstances. The court further noted that the police acted in good faith in believing that they should protect themselves by searching the glove compartment of a car for a gun. *Id.*

169. *Whisman*, 667 S.W.2d at 397.

170. See supra notes 45-65 and accompanying text.

171. See supra notes 82-86, 93 and accompanying text.


173. *Gates*, 462 U.S. at 289 (Brennan, J., dissenting). Justice Brennan also concluded that the majority's value judgment was the critical justification for abandonment of *Aguilar-Spinelli*. *Id.*
or seizure.\textsuperscript{174} Several state supreme courts have concurred in this patently erroneous judgment that suspicion is adequate evidence of the government's interest to justify a search or a seizure.\textsuperscript{175}

The second significant consequence of the Court's elevation of the government's interests without explanation is demonstrated in a recent decision of the Illinois Supreme Court.\textsuperscript{176} The Illinois Supreme Court extended \textit{Gates} to warrantless probable cause determinations after finding that the totality of the circumstances test would "achieve a fairer balance between the relevant public and private interests."\textsuperscript{177} The court failed to explain why this was true, and did not identify the government's interests.

The government's interests in stopping and solving crimes have been implicitly elevated by other state supreme courts which, like the Illinois Court, have adopted and extended \textit{Gates} to warrantless arrests or seizures. This extension means that these courts are requiring that the judiciary credit the government's own assessment of whether its interests warrant invasion of the security and privacy of citizens.\textsuperscript{178} By contrast, the state courts rejecting \textit{Gates} have found that its probable cause standards does not represent a reasonable reconciliation of the competing interests of the government and citizenry, because the government's law enforcement officers are permitted to make the initial and presumptively correct evaluation that the government's interests are sufficient to justify a search or seizure.\textsuperscript{179}

Third, other state supreme court decisions adopting or citing \textit{Gates} favorably have implicitly overvalued the government's interests with respect to a viable probable cause standard in a mature democracy. That is, these courts have ignored the fact that the search they sanctioned was far broader in scope than that justified by the factual allegations made in applying for the warrant, and hence have threatened the privacy interests of its citizens without justification.\textsuperscript{180}

While the government's interest in stopping and solving crime was elevated by the \textit{Gates} case and many subsequent state supreme court cases, substantial evidence was presented in this Article that

\textsuperscript{174} See supra notes 31-33 and accompanying text (discussing Justice Rehnquist's sanction of suspicion in fact as adequate, despite its illegality).

\textsuperscript{175} See supra notes 82-86 and accompanying text. See also note 143 and accompanying text (discussing a state court opinion rejecting \textit{Gates} at least in part because it equated probable cause with suspicion). See supra note 31 and accompanying text (discussing reasons why suspicion cannot justify a search or seizure).

\textsuperscript{176} \textit{Tisler}, 103 Ill. 2d 226, 469 N.E.2d 147.

\textsuperscript{177} \textit{Tisler}, 103 Ill. 2d at --, 469 N.E.2d at 157.

\textsuperscript{178} See supra notes 100-02 and accompanying text.

\textsuperscript{179} See supra notes 141-46 and accompanying text.

\textsuperscript{180} See supra notes 75, 103, 108 and accompanying text.
the United States Supreme Court in *Gates* and several state supreme courts have decided that the interests of citizens in privacy and security protected by the fourth amendment are not important rights meriting strong judicial protection.\footnote{181}

The majority opinion in the *Gates* case suggested that citizens' interests are adequately protected by an assurance that the government has gone through the procedure of obtaining a warrant, notwithstanding the substantive and procedural protections attendant to that warrant process.\footnote{182} Certain of the state supreme courts adopting or citing *Gates* favorably have implicitly denigrated citizens' interests in security and privacy by suggesting that those who have the status of known criminals at the time of the government's investigation have less of a justifiable expectation that the government will leave them alone.\footnote{183}

Finally, several state supreme courts have denigrated the citizens' interests in privacy and security protected by the fourth amendment and analogous state constitutional provisions by holding that *Gates* may be retroactively applied.\footnote{184} The theory partially relied upon by these courts is that citizens have no reasonable expectation of the greater protection provided by the *Aguilar-Spinelli* standard.\footnote{185} According to these state supreme courts the police do have a

\footnote{181. *See supra* notes 40-41, 103, 167-70 and accompanying text.}

\footnote{182. *See supra* note 40 and accompanying text. Other commentators concluded that *Gates* denigrated, without adequate justification, the privacy and security interests citizens have at stake when a legal standard is fashioned that justifies government intrusion on these interests. *Roe*, 35 SYRACUSE L. REV. at 1115. The commentator quoted Justice Jackson's description of the legitimacy of the citizen's interests: "These [Fourth amendment rights] ... are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Roe*, 35 SYRACUSE L. REV. at 1110. *Gates*, 462 U.S. at 274-75 (Brennan, J., dissenting) (quoting *Brinegar v. United States*, 388 U.S. 160, 180 (1967)).}

\footnote{183. *See supra* notes 84-86 and accompanying text.}

\footnote{184. *Tisler*, 103 Ill. 2d at —, 469 N.E.2d at 157-58. The Illinois Supreme Court held that *Gates* could be applied retroactively to a warrantless arrest case, even though the United States Supreme Court's retroactivity standard stated in *United States v. Johnson*, 457 U.S. 537 (1982), would not permit retroactivity in light of the fact that *Gates* represented a sharp break from the prior *Aguilar-Spinelli* standard. The Illinois Supreme Court, however, in a classic example of turning the world on its head, concluded that because *Gates* limited the rights of citizens rather than expanding the constitutional protection of citizens, the *Johnson* standard had no application. The court proceeded to apply the pre-*Johnson* Supreme Court test. It concluded that the totality of the circumstances approach justified retroactive application of *Gates* to a warrantless arrest case. *Id.*}

\footnote{185. *Tisler*, 103 Ill. 2d at —, 469 N.E.2d at 155-56; *Potts*, 300 Md. at —, 479 A.2d at 1341. The Maryland Court of Appeals cites to several decisions holding that *Gates* may be applied retroactively. *Id.*}
legitimate expectation that when they comply with the existing standard, a change in the standard will not render their conduct illegal.\textsuperscript{186} Hence, police who know that they are violating the present scope of the protection provided by the search and seizure constitutional probable cause requirement may do so with impunity if the standard is subsequently changed to provide less protection because in the “Alice in Wonderland” world of these courts, a citizen has no right to reasonably rely on that greater protection.

CONCLUSION AND RECOMMENDATIONS

Most commentators, including this author, do not approve of the watered down probable cause standard of \textit{Gates}, or the reasons that the United States Supreme Court offered for adoption of that standard.\textsuperscript{187} By contrast, the substantial majority of state supreme courts have endorsed the \textit{Gates} standard, and several of these courts have expressly decided that the \textit{Gates} standard is their state constitutional standard.\textsuperscript{188} State supreme courts adopting or citing favorably the \textit{Gates} standard have offered, for the most part, only the reasons that the United States Supreme Court used in adopting the totality of the circumstances approach.\textsuperscript{189}

One of the major premises of this Article was that our federal system granted to the states the right to provide more protection to fourth amendment rights than that provided by the \textit{Gates} case.\textsuperscript{190} Most state supreme courts have declined to do so simply because their vision of federalism is that state constitutions do not presump-tively provide an independent source of protection to citizens to be secure from government interference.\textsuperscript{191}

This Article has also demonstrated that a majority of state supreme courts have, in applying \textit{Gates}, denigrated citizens' interests in privacy and security in that these interests were viewed narrowly as the interests of obvious violators of the criminal codes, most typically drug dealers.\textsuperscript{192} The implications of this trend is frightening to

\textsuperscript{186} \textit{Potts}, 300 Md. at —, 479 A.2d at 1342; \textit{Tisler}, 103 Ill. 2d at —, 469 N.E.2d at 158.
\textsuperscript{187} \textit{See supra} notes 43-44 and accompanying text.
\textsuperscript{188} \textit{See supra} notes 45-65, especially notes 45-55 and accompanying text.
\textsuperscript{189} \textit{See supra} notes 130-32 and accompanying text.
\textsuperscript{190} \textit{See supra} note 8 and accompanying text.
\textsuperscript{191} \textit{See supra} notes 135-39, and contrasts to the federalism perspective of the smaller number of states rejecting the \textit{Gates} decision, \textit{supra} notes 149-54 and accompanying text.
\textsuperscript{192} \textit{See supra} notes 45-65 and accompanying text, documenting that the \textit{Gates} approach was adopted by state supreme courts most frequently in the context of drug sales cases. Justice Brennan observed in his dissent in \textit{Gates}, that the “[r]ights secured by the fourth amendment are particularly difficult to protect because their ‘advocates are usually criminals.’” \textit{Gates}, 462 U.S. at 314 (1989) (Douglas, J., dissenting).
anyone who views probable cause as a legitimate proof standard and not as an authorization for the government to search or seize based on hunch and suspicion. Those who oppose the *Gates* standard recognize that the rights of innocent citizens are also at risk where a probable cause standard is fashioned. In this era, however, most of the judges of our highest courts intuitively balance the interests of criminals against the state's interests in crime prevention or solution even where inadequate police investigative work is involved.\(^\text{194}\)

*Gates* and the state supreme court decisions adopting or approving it may, therefore, reflect the view that greater societal gains are achieved by punishing serious criminal law violators than by deterring poor investigative work.\(^\text{195}\) Ignored by the Supreme Court and state supreme courts following the *Gates* decision are the rights of persons who are searched and seized under circumstances where no crime evidence is seized as a result of the governmental intrusion. The rights of innocent persons are not considered by the courts because the rights of innocents to security and privacy are not identified by the federal and state supreme courts as at risk in search and seizure cases. Careful research needs to be undertaken to determine the frequency with which innocent persons are seized and searched by government law officers acting on their own conclusion or that of a magistrate that probable cause exists.\(^\text{196}\) Research is also needed to study the actual reasons for which magistrates have concluded that probable cause did or did not exist.

The minority of state supreme courts rejecting *Gates* have at times expressly recognized that the interests of all citizens, as well as the government, are at risk and have concluded that the intent of *Gates* was not to endorse slovenly or careless law enforcement work.\(^\text{198}\) Unfortunately, however, such endorsement appears to be the real consequence of the *Gates* decision.

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193. See supra notes 82-86, 143 and accompanying text.
194. See supra notes 157-62. While all cases discussed exhibit some degree of such poor police work, at least one example deserves specific mention here. In *Bonsness*, the search warrant affidavit contained an assertion that another police officer had received four independent reports from four different informants that the suspect whose home was to be searched had sold drugs at the schools. The officer apparently failed to conduct any investigation to confirm these reports. The majority of the Wyoming Supreme Court rejected this assertion as supportive of a finding of probable cause, but a concurring justice thought it probative under the totality of the circumstances approach. *Bonsness*, 672 P.2d at 1294 (Thomas, J., concurring).
195. See supra notes 41, 170 and accompanying text.
196. See supra note 141, making reference to such a study.
197. See supra note 18 (documenting that *Gates* permits speculation by appellate courts with respect to the reasons that prompted a magistrate to conclude that there were adequate allegations of facts to conclude probable cause).
198. See supra notes 140-46 and accompanying text.