The Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant

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INTRODUCTION

The Fourth Amendment to the U.S. Constitution provides that no search warrant may be issued without probable cause. This Comment discusses the proper appellate standard for reviewing a magistrate's determination that probable cause existed at the time the magistrate issued a search warrant.

Recently, a panel of the U.S. Court of Appeals for the Seventh Circuit held, in United States v. Spears, that the proper standard of appellate review for such determinations was the "clearly erroneous" standard of review used by appellate courts to review findings of fact by district courts. This holding reversed the Seventh Circuit's earlier decision in United States v. McKinney, where the court found the proper standard to be whether the magistrate issuing the search warrant had a "substantial basis" for finding probable cause. The court noted that the "substantial basis" standard was held to encompass less deference to the magistrate's probable cause finding.

1. U.S. CONST. amend. IV. The Fourth Amendment provides:

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

   Id.

2. This Comment does not address, however, the proper appellate standard for a district court's review of a magistrate's determination that probable cause to issue a search warrant existed. Rather, this Comment is concerned only with appellate review of the magistrate's probable cause finding after a district court has reviewed the same finding by the magistrate.

4. Id.

5. The "clearly erroneous" standard of review is also used by some federal appellate courts to review the application of law to fact. See infra notes 44-65 and accompanying text.

6. 919 F.2d 405 (7th Cir. 1990).
7. Id.
cause determination than clear error.\textsuperscript{8} However, one member of the \textit{McKinney} panel filed a concurring opinion arguing in favor of the clearly erroneous standard of review in these situations.\textsuperscript{9}

This Comment begins by examining the use of appellate standards of review in the search warrant context. The decisions of the Seventh Circuit in \textit{Spears} and \textit{McKinney} are then presented. Next, this Comment analyzes Supreme Court and federal appellate court precedent for the clearly erroneous standard of review and its practical value. This Comment then discusses the potential impact of \textit{Spears} by predicting that the decision will simplify federal appellate review and the search warrant process as well as encourage defendants in the Seventh Circuit to seek Fourth Amendment protection. Finally, this Comment concludes that \textit{McKinney} was wrongly decided and that the "substantial basis" standard of review should not have been perceived as an intermediate deference standard. Rather, the standard should be interpreted by other circuits as the equivalent of the clearly erroneous standard for appellate review of a magistrate's determination of probable cause to issue a search warrant.

\textbf{I. BACKGROUND}

This section first discusses the use of appellate standards of review and the process by which a magistrate issues a search warrant. The leading Supreme Court decision concerning the issuance of search warrants and appellate standards for reviewing their issuance are examined. Further, the Supreme Court decision in \textit{United States v. Leon},\textsuperscript{10} which established a "good-faith exception" to the exclusionary rule, is discussed. \textit{Leon} supports the use of clear error review by reducing the import of the probable cause determination made by a magistrate.\textsuperscript{11} Federal interpretation of \textit{Illinois v. Gates},\textsuperscript{12} as well as the use of the clearly erroneous standard of review by appellate courts in cases that do not involve search warrants, are then examined.

\begin{itemize}
  \item \textsuperscript{8} \textit{Id.}
  \item \textsuperscript{9} \textit{Id.} at 418 (Posner, J., concurring).
  \item \textsuperscript{10} 468 U.S. 897 (1984).
  \item \textsuperscript{11} \textit{See infra} part III.B.3.
  \item \textsuperscript{12} 462 U.S. 213 (1983)
\end{itemize}
A. Appellate Standards of Review

There are five standards of appellate review in federal courts; clear error, substantial evidence, substantial basis, abuse of discretion, and de novo.13 The two predominant standards are clear error and de novo.14

Appellate courts applying clear error review will defer to a lower court’s findings unless such findings of fact are clearly erroneous.15 A clearly erroneous finding of fact by a lower court occurs “when although there is evidence to support [the finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”16 In the Seventh Circuit, such a conviction may exist “if the trial judge’s interpretation of the facts is implausible, illogical, internally inconsistent or contradicted by documentary or other extrinsic evidence.”17 Further, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”18 Thus, the clearly erroneous standard of appellate review affords significantly more deference to a lower court’s determinations than does de novo review.19

13. See infra notes 15-32 and accompanying text.
14. See infra note 32.
15. FED. R. CIV. P. 52(a). The clearly erroneous standard of review applies to criminal cases as well. See United States v. McConney, 728 F.2d 1195, 1200 n.5 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984) (“Although rule 52(a) is a rule of civil procedure, the clearly erroneous test which it sets forth is applied in both civil and criminal proceedings.”).
16. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). In Anderson, the Supreme Court reversed a Fourth Circuit decision which held that the findings of fact by the district court were clearly erroneous. Id. at 580-81. The district court found that the plaintiff, a female applicant, had been denied the position of recreation director of the city because of her gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII). Id. at 568. The district court further found that the male applicant who was awarded the position was less qualified than the plaintiff, that the plaintiff was asked questions that the other applicants were not asked, and that the male members of the hiring committee had been biased against the plaintiff because she was a woman. Id. at 568-69. In reversing the Fourth Circuit, the Supreme Court stated that because the district court’s interpretation of the facts were supported by the record, its findings could not have been clearly erroneous and, therefore, should not have been reversed. Id. at 577.
17. Equal Employment Opportunity Comm’n v. Sears, Roebuck & Co., 839 F.2d 302, 309 (7th Cir. 1988) (citations omitted). In this case, the Equal Employment Opportunity Commission brought a Title VII sex discrimination suit against the defendant. Id. at 307. The district court entered judgment for Sears. Id. In affirming the district court, the Seventh Circuit held that the district court’s findings were not clearly erroneous because they were supported by facts in the record. Id. at 360.
18. Anderson, 470 U.S. at 574 (citations omitted).
19. Under clear error review, an appellate court may not reverse findings of fact by a district court merely because the appellate court may have made different factual findings or interpreted
The substantial evidence standard is related to the clear error standard of review. The substantial evidence standard is based on the premise that factual findings supported by substantial evidence cannot be clearly erroneous. The standard is applied primarily for appellate judicial review of administrative findings of fact, as well as for appellate review of a magistrate's decision to issue a search warrant. Federal courts interpret the substantial evidence standard as encompassing equal or more deference than clear error review. This standard, which may or may not be the equivalent of clear error review, will be discussed more fully in the Analysis section of this Comment.

The abuse of discretion standard is applied for appellate review of the discretionary decisions of a trial court. A trial court abuses its discretion by failing to exercise sound, reasonable, and legal discretion that is clearly against logic. The Supreme Court has interpreted the abuse of discretion standard as equivalent to clear error review.

The de novo standard assumes that the reviewing court is "the front-line judicial authority" and, therefore, pays no deference to a lower court's determinations. De novo review is primarily applied

the same evidence differently. Steven A. Childress, "Clearly Erroneous": Judicial Review Over District Courts in the Eighth Circuit and Beyond, 51 Mo. L. Rev. 93, 109 (1986).


24. See infra parts III.A, III.B.

25. Westby, supra note 20, at 834; see, e.g., Lawson Prod., Inc. v. Avnet, Inc., 782 F.2d 1429 (7th Cir. 1986) (applying the abuse of discretion standard to the granting or denial of a preliminary injunction by a district court).


27. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 401 (1990) ("When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.").


to a lower court's conclusions of law.\textsuperscript{31}

Clearly, the two main and root standards of appellate review are clear error and de novo.\textsuperscript{32} The use of these standards is examined more closely in this section in order to determine their applicability to the search warrant process.

\section*{B. The Choice of an Appellate Standard of Review}

Both clear error and de novo review serve important judicial functions. Clear error review serves two legal purposes. First, clear error review minimizes judicial error because the trial court is in a better position than the appellate court to evaluate and weigh the evidence.\textsuperscript{33} Second, by applying clear error, the appellate court is relieved of the burden of a complete and independent evidentiary review, thereby enabling appellate judges to devote more of their time and energy to reviewing questions of law.\textsuperscript{34}

\begin{itemize}
\item[] 31. Salve Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991); United States v. McConney, 728 F.2d 1195, 1200-01 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). De novo review is also called "plenary" review. \textit{id.} at 1201.

\item[] 32. Clear error and de novo are the main standards of review for two reasons. First, the standards are used for appellate review of independent and clearly discernible actions of a lower court; clear error review is used for reviewing findings of fact, see supra notes 15-18 and accompanying text, while de novo review is used for reviewing conclusions of law, see supra note 31 and accompanying text. Second, the substantial evidence, substantial basis, and abuse of discretion standards of review can be considered variations of clear error review. The abuse of discretion standard had been interpreted by the Supreme Court as the equivalent of clear error review, see supra note 30 and accompanying text, and the substantial basis standard has been interpreted by some circuits to be the equivalent of clear error review, see infra parts IIA, IIB. Furthermore, the substantial evidence standard of review is derived from clear error review and allows at least as much deference as clear error review. See supra notes 20-23 and accompanying text.


\item[] 34. McConney, 728 F.2d at 1201; see also infra notes 243-44 and accompanying text. In McConney, the Ninth Circuit held that de novo review was appropriate where the existence of exigent circumstances excused federal officers from their failure to wait for the defendant to refuse them access to his home before they entered. \textit{id.} at 1205. Exigent circumstances were defined as "those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." \textit{id.} at 1199. The Ninth Circuit further stated that the "concerns of judicial administration — efficiency, accuracy, and precedential weight" — would determine whether applications of law to fact should be subject to clear error or de novo review. \textit{id.} at 1202.

The Supreme Court has also discussed the value of the clearly erroneous standard to review questions of fact involving the credibility of witnesses. See Miller v. Fenton, 474 U.S. 104, 114 (1985). In Miller, the Supreme Court stated that a high degree of deference was appropriate because the trial court was in a better position to evaluate the demeanor of witnesses and to assess bias. \textit{id.} In contrast, de novo review was appropriate to compensate for the "perceived shortcomings of the trier of fact by way of bias or some other factor . . . ." \textit{id.} (quoting Bose Corp. v.
De novo review by appellate courts also serves important judicial functions. The Supreme Court has recognized that “trial judges often must resolve complicated legal questions without benefit of ‘extended reflection’ or ‘extensive information.’”35 There are several reasons for this. District judges, who preside over “fast-paced” trials, necessarily must devote most of their energy and resources to hearing witnesses and reviewing evidence.36 Furthermore, trial counsel is limited in its ability to assist the legal research of district judges with memoranda and briefs because of the time pressures surrounding a trial.37 On the other hand, federal courts of appeals are in a better position to produce accurate legal decisions by applying independent de novo review. At the time of the appeal, the factual record has been constructed by the district court and settled for purposes of appellate review, enabling appellate judges to “devote their primary attention to legal issues.”38 Since legal issues are the focus of appellate review, appellate counsel briefs will address these issues more extensively than at trial and provide appellate judges with more information and more comprehensive legal analysis.39 Additionally, the judgment of at least three members of an appellate panel is brought to bear on every case, minimizing the chance of judicial error.40 Minimal judicial error is necessary because appellate rulings of law become controlling precedent and affect the rights of future litigants.41 Thus, the appellate court has the primary responsibility to decide questions of law under the de novo standard because such courts are in the best position to do so.42

Serving important judicial functions, both clear error and de novo review have been used for appellate review of applications of law to
fact, which are also called mixed questions.\textsuperscript{43} An application of law to fact is the use of a legal standard to evaluate a set of facts which are not in dispute.\textsuperscript{44} A magistrate’s decision to issue a search warrant is an application of law to fact because a legal standard is applied to a set of undisputed facts.\textsuperscript{45}

The Supreme Court has explicitly refused to address the applicability of the clearly erroneous standard of review to applications of law to fact.\textsuperscript{46} The Court has stated that deferential review of mixed questions is appropriate when the district court is “better positioned” than the appellate court to decide the issue or when appellate review will not contribute to the clarity of legal doctrine.\textsuperscript{47} However, the Court has never discussed when a district court is “better positioned” outside of these specific factual contexts. The Court has held that one specific factual finding, the determination of actual malice under the First Amendment as established by the

\textsuperscript{43} Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982) (discussing the applicability of the clearly erroneous standard of review to applications of law to fact).

\textsuperscript{44} Id.

\textsuperscript{45} United States v. Rambis, 686 F.2d 620, 622 (7th Cir. 1982). In Rambis, the Seventh Circuit stated:

\begin{quote}
Whether the information in the affidavit establishes probable cause [to issue a search warrant] is a determination based solely on written evidence. Since this determination involves the application of law rather than an evaluation of factual evidence, on review the appellate court is not limited to a determination of whether the district court’s finding was clearly erroneous. It must independently review the sufficiency of the affidavit .
\end{quote}

\textit{Id.} Thus, the Seventh Circuit classifies the question of whether probable cause to issue a search warrant exists as an application of law to fact.

\textsuperscript{46} Pullman-Standard, 456 U.S. at 289 n.19. In Pullman-Standard, the Court, when confronted with the validity of a seniority system maintained by the defendant-petitioners under Title VII, stated:

\begin{quote}
We need not, therefore, address the much-mooted issue of the applicability of the Rule 52(a) [clearly erroneous] standard to mixed questions of law and fact — i.e., questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated. There is substantial authority in the Circuits on both sides of this question.
\end{quote}

\textit{Id.}

\textsuperscript{47} Miller v. Fenton, 474 U.S. 104, 114 (1985) (holding that the voluntariness of a confession is a legal question subject to de novo review); see also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402-04 (1990) (adopting the deferential abuse of discretion standard, which the Court interpreted to be equivalent to clear error, for appellate review of the imposition of Rule 11 sanctions by a district court).

The imposition of Rule 11 sanctions by a district court may be considered a mixed question of applying law to fact because the district court must determine whether the legal action is “frivolous” based on the facts surrounding the action. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989).
Court in *New York Times v. Sullivan*, 48 is subject to de novo review by appellate courts, 49 in spite of acknowledging that actual malice involves “purely factual” issues of a defendant’s intent, knowledge, and state of mind. 50 This holding is an exception to Rule 52(a)’s clearly erroneous standard 51 because of the First Amendment rights implicated, and it is not applicable to other factual issues. 52

The apparent indecisiveness of the Supreme Court has been recognized by federal appellate courts, which apply both clear error and de novo review to mixed questions. Appellate courts differ, however, as to when clear error and de novo review should be applied to mixed questions. 53 The First 54 and Seventh 55 Circuits apply the clear error standard of review for all mixed questions. The Second, 56

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50. *Id.* at 507-09.
51. FED. R. CIV. P. 52(a).
52. *Bose Corp.*, 466 U.S. at 503-11.
53. *See Lee, supra* note 30, at 247-56 (arguing that clear error review for appellate review of all mixed questions is the only standard consistent with the proper role of appellate courts).
54. Professor Lee has identified the First and Seventh Circuits as the only circuits applying clear error review for all mixed questions. *Id.* at 239; *see, e.g.*, *McLaughlin v. Hogar San Jose, Inc.*, 865 F.2d 12, 14 (1st Cir. 1989) (reviewing the good faith and reasonableness of an employer’s action under the Fair Labor Standards Act); Curley v. Mobil Oil Corp., 860 F.2d 1129, 1132 (1st Cir. 1988) (reviewing a breach of sales contract for failure to arrange a closing within a reasonable time); Sweeney v. Board of Trustees, 604 F.2d 106, 109 n.2 (1st Cir. 1979) (applying the clear error standard in a Title VII action), cert. denied, 444 U.S. 1045 (1980).
55. *See, e.g.*, Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989) (reviewing for clear error a district court’s decision to impose Rule 11 sanctions in civil cases); United States v. D’Antoni, 856 F.2d 975, 978-79 (7th Cir. 1988) (reviewing for clear error a district court’s denial of a motion to suppress evidence which called for the application of the legal rule that “an arrest may not be used as a mere pretext to avoid the warrant requirement of the fourth amendment” to the district court’s findings of fact); United States v. Binder, 794 F.2d 1195, 1198-99 (7th Cir.) (reviewing for clear error the classification of property as “abandoned” by a district court and the credibility witnesses at a suppression hearing), cert. denied, 479 U.S. 869 (1986); Mucha v. King, 792 F.2d 602, 605 (7th Cir. 1986) (reviewing for clear error the legal possession of a painting).

The legal standard at issue in *United States v. Binder* was described by the Fifth Circuit in a subsequent decision as:

Abandonment [of property] is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts . . . . The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

*United States v. Colbert*, 474 F.2d 174, 176 (5th Cir. 1973) (citations omitted). This definition of the legal standard was explicitly relied upon in *Binder*. *See Binder*, 794 F.2d at 1198. The *Binder* defendant did not dispute any of the relevant facts but, rather, disputed the interpretation of those facts. *Id.* at 1199.

56. Professor Lee has identified the Second, Third, Eighth, and D.C. Circuits as adopting this
Third, Eighth, and District of Columbia Circuits apply de novo review to mixed questions. The Ninth and Tenth Circuits apply either clear error or de novo review based on "concerns of judicial administration — efficiency, accuracy, and precedential weight." The Fourth, Fifth, Sixth, and Eleventh Circuits apply both


58. Besta v. Beneficial Loan Co., 855 F.2d 532, 533 (8th Cir. 1988) (reviewing de novo the unconscionability of a loan contract); United States v. Campbell, 843 F.2d 1089, 1092 (8th Cir. 1988) (reviewing de novo the constitutionality of the seizure of the defendant); Hill v. Blackwell, 774 F.2d 338, 343 (8th Cir. 1985) (reviewing de novo the constitutionality of a prison regulation prohibiting beards).

59. See, e.g., United States v. Yunis, 859 F.2d 953, 958 (D.C. Cir. 1988) (reviewing de novo the voluntary and knowledgeable waiver of a defendant's Fifth and Sixth Amendment rights); Carter v. Bennett, 840 F.2d 63, 64-65 (D.C. Cir. 1988) (reviewing de novo the reasonableness of an employer's accommodation under the Rehabilitation Act of 1973); Blitz v. Donovan, 740 F.2d 1241, 1244 (D.C. Cir. 1984) (reviewing de novo the issue of whether the government's position was "substantially justified" under the Equal Access to Justice Act).

60. United States v. McConney, 728 F.2d 1195, 1202 (9th Cir.), cert. denied, 469 U.S. 824 (1984). In McConney, the Ninth Circuit concluded that de novo review was appropriate for most applications of law to fact because "usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles." Id. The Ninth Circuit stated that de novo review was particularly appropriate for mixed questions which implicate constitutional rights. Id. at 1203-04. Thus, the Ninth Circuit concluded that, absent an exception, mixed questions would be reviewed independently. Id. at 1204. The Ninth Circuit did note two exceptions to its conclusion favoring de novo review: (1) mixed questions that involve strictly factual tests (such as state of mind) and (2) mixed questions of negligence. Id.

The Ninth Circuit also determined that the mixed question of whether exigent circumstances existed to excuse the failure of law enforcement officers to await refusal of admittance before entering a home should be reviewed under a de novo standard rather than a clearly erroneous test because the question was not "essentially factual." Id. at 1205. In applying this standard, the Ninth Circuit conducted its own review of the record and concluded that exigent circumstances were present. Id. at 1206.

The Tenth Circuit has explicitly adopted the reasoning of the Ninth Circuit in McConney. Supre v. Ricketts, 792 F.2d 958, 961 (10th Cir. 1986).

61. Lee, supra note 30, at 245-47; see, e.g., United States v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989) (implying that both clear error and de novo review are appropriate for mixed questions); Rawl v. United States, 778 F.2d 1009, 1014 n.9 (4th Cir.) (stating that a majority of courts has upheld an appellate court exercising independent review), cert. denied, 479 U.S. 814 (1985); Bonds v. Mortensen & Lange, 717 F.2d 123, 125 (4th Cir. 1983) (implying that mixed questions are reviewable under either clear error or de novo).

62. United States v. Muniz-Melchor, 894 F.2d 1430, 1439 n.9 (5th Cir.) (reviewing de novo the question of whether law enforcement officers had probable cause to conduct a warrantless search, but reviewing for clear error the issue of whether the defendant consented to inspection of
clear error and de novo review to mixed questions.

Before appellate standards to review the issuance of the warrant may be applied, the process by which a search warrant is issued must be understood. This process is examined next.

C. The Search Warrant Process

Absent a specified exception, the Fourth Amendment to the Constitution generally requires the issuance of a search warrant before a search of property can be conducted for law enforcement purposes.68

The Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure specify the three constitutional requirements for a valid search. First, the Fourth Amendment requires a determination of probable cause before a search warrant may be issued. 69 Second, the showing of probable cause must be supported by an oath or affirmation. 70 Third, the place to be searched, and the persons or things to be seized, must be described with particularity by law enforcement personnel. 71 The Federal Rules of Criminal Procedure specify several requirements as well. A search warrant may be issued by “a federal magistrate or a state court of record within the

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63. See, e.g., Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1186 (6th Cir. 1988) (applying clear error review to findings of fact, but de novo review to questions of law); K & M Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106, 1111 (6th Cir. 1982) (stating that in mixed questions of fact and law, the court is “not bound by the clearly erroneous standard”).


66. U.S. Const. amend. IV.

67. Id.

68. Id.
federal district." A federal warrant may be issued to search for and seize the following:

(1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of a crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

A federal warrant may be issued only upon a sworn written oath or "sworn oral testimony communicated by telephone or other appropriate means" that establishes the grounds for issuing the warrant. The warrant must be served upon the appropriate person in the daytime unless, "for reasonable cause shown," the execution of the warrant at night is authorized. The search must be conducted "within a specified period of time not to exceed 10 days."

Prior to the issuance of a warrant, evidence is presented to the magistrate ex parte, or outside the presence of the defendant. Ex parte proceedings are necessary in order to prevent the destruction or removal of evidence sought by the warrant. In Franks v. Delaware, the Supreme Court held that a defendant, in limited situations, has a right to a hearing subsequent to the seizure of evidence to challenge the veracity of the affidavits or other sworn statements which were presented to the magistrate before the issuance of the warrant (Franks hearing). The search warrant affidavit is presumed to be valid. In order to receive a Franks hearing, the defendant must allege deliberate falsehood or reckless disregard for the truth by the affiant, accompanied by an offer of proof. The defendant should specify the false portion of the warrant affidavit and supplement the allegation with a statement of supporting reasons. The defendant must furnish affidavits or sworn or "otherwise
reliable" statements, or she must "satisfactorily" explain their absence.\(^8\) If the remaining truthful content of the search warrant affidavit is sufficient to establish probable cause, no *Franks* hearing is required.\(^8\) The determination by a district court that the *Franks* requirements have not been satisfied is subject to clear error review by an appellate court.\(^8\)

Law enforcement officers may conduct warrantless searches.\(^8\) Although warrantless searches are presumptively unreasonable, the Supreme Court recognizes several exceptions to the presumption.\(^8\) One exception is automobiles — law enforcement officers may conduct a warrantless search of an automobile and may subsequently seize contraband, without violating the Fourth Amendment, if such actions are taken upon probable cause.\(^8\) Another example is exigent

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81. *Id.*
82. *Id.* at 171-72.
83. See, e.g., United States v. Parcels of Land, 903 F.2d 36, 46 (1st Cir.) (stating that the determination by a district court that the requisites of a *Franks* hearing have not been satisfied will be reviewed under the clear error standard), *cert. denied, 498 U.S. 916 (1990)*; United States v. Rumney, 867 F.2d 714, 720 (1st Cir.) ("A district court's determination that a defendant has not made the requisite [Franks] showing . . . will be upheld unless clearly erroneous."); *cert. denied, 491 U.S. 908 (1989)*. Appellate review of this determination, while related, is not equivalent to appellate review of a magistrate's finding that probable cause existed to issue the search warrant because the affidavit could still establish probable cause absent the alleged falsity or reckless disregard for the truth. *See Franks*, 438 U.S. at 171 ("[I]f, when material that is subject to the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant to support a finding of probable cause, no hearing is required."). This Comment addresses only the issue of appellate review of probable cause to issue the search warrant, not appellate review of the veracity of a search warrant affidavit.
86. See, e.g., United States v. Ross, 456 U.S. 798 (1982) (holding that police officers who have legitimately stopped an automobile and have probable cause to believe that contraband is concealed within it may conduct a warrantless search); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (holding that police officers who had legitimately stopped an auto and had probable cause to believe contraband was concealed in the auto, could conduct a warrantless search); *Carroll v. United States*, 267 U.S. 132, 162 (1925) (stating that police officers who had probable cause to believe that intoxicating liquor was being transported could conduct a warrantless search).

The scope of a search differs depending on the place to be searched. In *Carroll*, the Supreme Court stated:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.
circumstances — law enforcement officers may conduct warrantless entry into, and searches of, residences if exigent circumstances exist and there has been a sufficient showing of probable cause. A third exception is where the owner of the property consents to the search.

The scopes of warrant and warrantless searches of identical places are the same, and both require an agent of the government to determine whether an existing set of facts supports a determination of probable cause. The main difference for purposes of appellate review between warrantless and warrant searches is that in a nonwarrant search, the probable cause determination is initially made by a law enforcement officer and reviewed by a district judge, while in warrant searches, the probable cause determination is initially made by a magistrate.

*Id.* at 153.

This holding was subsequently followed by Chambers v. Maroney, 399 U.S. 42 (1970), in which the Supreme Court stated that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Id.* at 52.

87. Payton v. New York, 445 U.S. 573 (1980) (holding that an arrest warrant was required for police officers to constitutionally enter the defendant's apartment and seize a shell casing used at the defendant's subsequent trial).

The District of Columbia Court of Appeals has enumerated six relevant factors to determine whether a warrantless search of a residence is constitutional. See Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (en banc). These factors are: (1) a grave offense is involved; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause has been made; (4) the police have strong reason to believe the suspect is in the premises being entered; (5) there is a likelihood the suspect will escape if not swiftly apprehended; and (6) the unconsented law enforcement entry is being made peaceably. *Id.* at 392-93. The court also noted that the time of entry is relevant; if at night, it would be more justifiable to proceed without a warrant. *Id.* at 393.

A District of Columbia Court of Appeals decision subsequent to Dorman stated that not all the above factors need be present for a warrantless search to be constitutional. See United States v. Robinson, 533 F.2d 578, 583-84 (D.C. Cir. 1975) (en banc) (distinguishing Dorman because there is a lesser expectation of privacy in a car than in a home and because the police entry into the car, strongly believed to be the getaway car, was justified even though the suspect was plainly not inside), cert. denied, 424 U.S. 956 (1976).


89. See United States v. Ross, 456 U.S. 798, 824 (1982) (stating that the scope of a warrantless search of an automobile is defined by the object of the search and the place or places in which there is probable cause to believe the object may be found). Warrant and warrantless searches have the same scope because both are considered searches within the meaning of the Fourth Amendment, United States v. Spears, 965 F.2d 262, 270 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992), and the Supreme Court has never limited the scope of a valid warrantless search merely because the search was not conducted pursuant to a warrant.

90. See Spears, 965 F.2d at 271 (stating that it is the front-line judicial officer who determines whether there is probable cause).

91. *Id.*
Rule 41 of the Federal Rules of Criminal Procedure provides a defendant with two means at the trial level to challenge the validity of evidence seized by law enforcement officers: (1) a motion for return of property and (2) a motion to suppress evidence. Although these motions may be made whether the search has been performed with or without a warrant, the defendant has the burden of proving an invalid search if a search warrant was executed. A motion for return of property must be made before the filing of an indictment or information and must be made in a district court for the district in which the property was seized. It is based on the defendant's entitlement to lawful possession of the property. The motion to suppress evidence is more commonly used in federal court. This motion, governed by Rule 12 of the Federal Rules of Criminal Procedure, must be made prior to trial. The motion may be written or oral at the discretion of the judge. If the motion is granted, the seized evidence may not be used at trial. If the motion is denied and the defendant is subsequently convicted, the defendant may challenge the validity of the search warrant on appeal.

As stated earlier, the Constitution requires that probable cause exist if a magistrate's issuance of a search warrant is to be found valid.

D. Probable Cause to Search

The Fourth Amendment requires that all arrests and searches be based upon probable cause, even if a warrant is not present. The Supreme Court has decided that probable cause for a search warrant exists when "given all the circumstances set forth in the affida-

92. FED. R. CRIM. P. 41(e), 41(f).
93. Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (holding that a defendant had the burden of proving by a preponderance of the evidence that sworn statements in a search warrant affidavit were false or demonstrated a reckless disregard for the truth).
94. FED. R. CRIM. P. 41(e).
95. Id.
96. Id.
98. FED. R. CRIM. PRO. 12(B).
99. Id.
100. See United States v. Barnes, 909 F.2d 1059, 1068 (7th Cir. 1990) (holding that a defendant who had failed to challenge at trial the particularity of the description in a search warrant thereby waived the argument on appeal).
101. See supra note 1 and accompanying text.
vité before [the magistrate] ... there is a fair probability that contraband or evidence of a crime will be found in a particular place."\(^{103}\) The Fourth Amendment generally requires that the evidence be presently located in the relevant area and that the defendant be allowed to make a motion to suppress the evidence on the ground that the data used by law enforcement officers to obtain the search warrant was too "stale" to establish probable cause.\(^{104}\) In 1983, the Supreme Court established the current definition of probable cause to issue a search warrant in *Illinois v. Gates*.\(^{105}\)

I. *Illinois v. Gates*

The leading Supreme Court decision concerning both the definition of probable cause to issue a search warrant and the proper appellate standard of review for a magistrate's probable cause determination is *Illinois v. Gates*.\(^{106}\) In that case, the Supreme Court overruled two prior cases and endorsed a loose "totality-of-the-circumstances" analysis for magistrates to utilize when issuing search warrants.\(^{107}\)

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\(^{103}\) *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The term "fair probability" was not defined by the Supreme Court in *Gates*, but the Court stated that "[f]inally tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision." *Id.* at 235. Therefore, it appears that there is no threshold evidentiary standard which establishes fair probability that criminal evidence will be located in a particular area.

\(^{104}\) *Sgro v. United States*, 287 U.S. 206, 210-11 (1932) (holding that under the National Prohibition Act of June 15, 1917, a warrant to search for intoxicating liquor became void at the expiration of ten days from the date of its issuance and may not be revived without additional or new information present in the law enforcement officer's affidavit).

\(^{105}\) *462 U.S.* at 238.


\(^{107}\) *Id.* at 213. Specifically, the Supreme Court stated:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Id.*

Prior to *Gates*, magistrates, in determining probable cause to issue a search warrant, were required to apply a two-prong test under the Supreme Court's decisions in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Under this test, a magistrate assessing probable cause to issue a warrant had to: (1) evaluate the credibility of the sources of information and (2) if the source was credible, evaluate the information accepted as true and determine the probabilities emerging from that data. Charles E. Moylan, Jr., *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 747-50 (1974). Alternatively, the test has been described as requiring that the affidavit: (1) establish the informant's "basis of knowledge" and (2) give sufficient facts to establish either the informant's "veracity" or
In Gates, the Bloomingdale, Illinois Police Department received an anonymous letter alleging that the defendants were selling drugs. The letter also predicted one of the defendant's future travel plans between Illinois and Florida, which subsequently occurred. This letter was held sufficient to establish probable cause to search the defendants' car and home based upon the corroboration of the letter by a detective of the Bloomingdale Police Department and the Drug Enforcement Agency, both of whom conducted independent investigations of the Gateses. The letter also contained detailed information concerning the Gateses' future travel plans that was "ordinarily not predicted," suggesting that the letter writer had received the information from the Gateses or from someone they trusted. The fact that Florida was well known to law enforcement officers as a source of illegal drugs, the flight of Lance Gates to West Palm Beach, his brief stay in a motel, and his immediate return to Chicago also were "suggestive of a prearranged drug run."

The Gates Court formulated a looser test of probable cause for magistrates to follow when determining whether to issue a search warrant. The Court cited several policy reasons in support of this new test. It first declared that both search and arrest warrants had previously been issued by persons without legal training and that this practice had been ruled constitutional. In these situations, the Court reasoned, a technical test of probable cause, imposing complex "evidentiary and analytical rules," would be inappropriate for

the "reliability" of the information provided by the informant. In Gates, the Supreme Court addressed the two-prong test as follows:

We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place.

In Gates, details of the informant's tip were corroborated by actual events, including the defendant's "flight to West Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car." Thus, Gates also established the proposition that actual corroboration of an informant's data is an important factor to consider when applying the "totality of the circumstances" test.

In Gates, 462 U.S. at 230. In Gates, details of the informant's tip were corroborated by actual events, including the defendant's "flight to West Palm Beach, his brief, overnight stay in a motel, and apparent immediate return north to Chicago in the family car." Id. at 243. Thus, Gates also established the proposition that actual corroboration of an informant's data is an important factor to consider when applying the "totality of the circumstances" test.

108. Id. at 225-26.

109. Id. at 245-46. The letter was held sufficient to establish probable cause despite the fact that neither the police nor the Illinois judge knew the writer's identity and source of information. Id.

110. Id. at 243.

111. Id. at 213; see also supra note 107.

112. Gates, 462 U.S. at 235 (citing Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972)).
"laymen" to follow. The rushed context in which many search warrants were issued further made the use of a complicated probable cause test inappropriate. The Court next stated that a stricter test of probable cause would encourage police to conduct warrantless searches. This would be undesirable because a search warrant reduces the intrusion upon constitutionally protected privacy interests. Finally, the Court pointed out that continued application of the two-prong test in probable cause determinations would effectively bar the use of anonymous tips by law enforcement officers, and this result was inconsistent with "[t]he most basic function of any government: to provide for the security of the individual and of his property." The Court noted that anonymous tips frequently reveal the perpetrators of previously unsolved crimes. For these reasons, the Court favored application of the totality-of-the-circumstances test.

The Gates Court also considered the proper role of appellate courts in evaluating a magistrate's determination of probable cause in warrant cases. The Court stated that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclu[ding]' that probable cause existed." The Supreme Court stated that more warrantless searches would likely be conducted because police would later seek to validate a warrantless search by attempting to establish that the owner of the property consented. Alternatively, police would attempt to establish that some other exception to the warrant requirement of the Fourth Amendment existed in order to later validate a warrantless search. Anonymous tips would become useless because "the veracity of persons supplying anonymous tips is by hypothesis largely unknown, and unknowable." Consequently, anonymous tips would fail the first part of the Aguilar-Spinelli test.

The evidence used to convict the defendant was obtained pursuant to a search warrant based entirely on an affidavit from a member of the District of Columbia police department. The defendant argued that the affidavit was insufficient to establish probable cause to issue the warrant. In holding that the affidavit was sufficient for a U.S. commissioner to issue a search warrant, the Supreme Court stated, "The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient."
Court declared that in warrant cases, "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts,""122 which should not take the form of de novo review.123 The Supreme Court explained that "'A grudging or negative attitude by reviewing courts toward warrants' [will tend to discourage police officers]" and that "'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.'"124 Applying this standard, the Supreme Court found that the judge issuing the warrant had a substantial basis to conclude that probable cause existed.125

Gates remains good law126 and establishes the current requirements of probable cause to issue a search warrant and the proper appellate standard of review for such determinations — a substantial basis. Nonetheless, the importance of Gates has been decreased by the subsequent Supreme Court decision in United States v. Leon.127

2. The Good-Faith Exception: United States v. Leon

The significance placed upon a magistrate's probable cause determination in Gates was subsequently reduced by the Supreme Court in United States v. Leon.128 In Leon, the Supreme Court held that evidence obtained by law enforcement officers acting with reasonable reliance on an ultimately invalid search warrant issued by a de-

122. Gates, 462 U.S. at 236 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).
123. Id.
124. Id. (quoting United States v. Ventresca, 380 U.S. 102, 108-09 (1965)).
125. Id. at 246.
126. The Supreme Court has continued to adhere to the substantial basis standard of reviewing probable cause determinations in warrant cases subsequent to Gates. See, e.g., New York v. P.J. Video, Inc., 475 U.S. 868, 875 (1986) (holding that an application for a search warrant to seize allegedly obscene movies should be subjected to the same test of probable cause as other applications for search warrants even though the First Amendment was implicated); United States v. Leon, 468 U.S. 897, 915 (1984) ("[R]evolving courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" (quoting Illinois v. Gates, 462 U.S. 213, 239 (1983))); Massachusetts v. Upton, 466 U.S. 727, 728 (1984) ("[A] reviewing court is not to conduct a de novo determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant.").
128. Id.
tached and neutral magistrate would not be barred at trial. 129 The Supreme Court has thus adopted a "good-faith exception" to the exclusionary rule. 130 In Leon, the Court accepted the conclusion of the Ninth Circuit that the search warrant was invalid because it was based on a police officer's affidavit containing improper information from a confidential informant. 131 The Ninth Circuit had ruled that the affidavit was insufficient to establish probable cause to issue a search warrant because: (a) the information included in the affidavit was stale and (b) the affidavit established neither the informant's credibility nor the informant's basis of knowledge. 132 The government's petition for certiorari expressly declined to seek review of this determination. 133

In adopting a good-faith exception, the Court first declared that the goal of the exclusionary rule was to discourage police misconduct when there was no evidence that either judges or magistrates had been affected by the exclusion of evidence seized unconstitutionally. 134 Furthermore, "as neutral judicial officers, [judges and magistrates] have no stake in the outcome of particular criminal prosecutions," and thus could not be expected to be deterred by the threat of exclusion of evidence at trial. 135 The Court next reasoned that the goal of the exclusionary rule would not be met by excluding evidence in cases where the police officer's conduct was objectively reasonable because the officer would not alter such reasonable conduct in the future. 136 The Court concluded that application of the exclusionary rule was inappropriate in these instances. 137

The Leon decision has the practical effect of reducing the significance of a magistrate's probable cause determination because evidence seized on the basis of a good faith reliance on a search warrant can now be used at trial even if there was, in fact, no probable

129. Id. at 925.
130. The exclusionary rule requires that evidence obtained in violation of the Constitution may not be used against an accused at trial. Mapp v. Ohio, 367 U.S. 643, 652 (1961).
131. 468 U.S. at 901. The Ninth Circuit's determination was based upon the two-part test established in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Gates, which overruled these holdings, had not been decided at the time the case was argued before and decided by the Ninth Circuit. See Leon, 468 U.S. at 904.
132. Leon, 468 U.S. at 904-05.
133. Id. at 905.
134. Id. at 916.
135. Id. at 917.
136. Id. at 919-20 (citing Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).
137. Id. at 922.
cause to issue the search warrant.

E. Federal Appellate Court Interpretations of Gates

Federal appellate courts have interpreted Gates differently. Some federal circuits apply the clear error standard to review probable cause to search in both warrant and warrantless cases, while other circuits apply the "substantial basis" standard of review without equating the standard to clear error.¹³⁸

1. Appellate Courts That Apply Clear Error Review

The Seventh¹³⁸ and Ninth¹⁴⁰ Circuits apply the clear error stan-

¹³⁸ Under this interpretation of Gates, the substantial basis standard may be considered a standard of intermediate deference, between clear error and de novo. The Seventh Circuit has described the nature of this intermediate standard with respect to a magistrate's determination of probable cause to be,

given considerable weight and should be overruled only when the supporting affidavit,
read as a whole in a realistic and common sense manner, does not allege specific facts
and circumstances from which the magistrate could reasonably conclude that the
items sought to be seized are associated with the crime and located in the place
indicated.

United States v. Pritchard, 745 F.2d 1112, 1120 (7th Cir. 1984). In Pritchard, the defendant was convicted in a district court of unlawful possession of firearms and unlawful possession of wiretapping equipment. Id. at 1114. The defendant appealed to the Seventh Circuit, claiming that an affidavit used to obtain the search warrant for the defendant's residence failed to establish probable cause. Id. at 1120. Information alleged in the affidavit had been obtained by the FBI from two informants. Id. at 1114. In holding that the magistrate had a substantial basis to issue the warrant, the Seventh Circuit relied on the facts that the defendant was a suspected wiretapper, the information was based on personal knowledge of the informants, the informants had previously provided accurate information, and some of the informants' allegations were corroborated by FBI surveillance. Id. at 1120-21.

In Rambis, the United States appealed from an order quashing a warrant to search a house because the underlying affidavit did not establish probable cause. United States v. Rambis, 686 F.2d 620, 621 (7th Cir. 1982). The search uncovered an electronic detonating device that could have been used to commit arson. Id. The Seventh Circuit held there was probable cause to issue the warrant because the informant was an experienced agent who had previously proved reliable and because the facts alleged in the affidavit established an inference that the device would be found inside the house. Id. at 624.


¹⁴⁰ United States v. Huguez-Ibarra, 954 F.2d 546, 552 (9th Cir. 1992) ("We therefore find that the magistrate's determination that sufficient probable cause existed to issue the warrant was clearly erroneous . . . ."); United States v. McQuisten, 795 F.2d 858, 861 (9th Cir. 1986) ("We may not reverse a magistrate's finding of probable cause unless it is clearly erroneous."); United States v. Stanert, 762 F.2d 775, 779 (9th Cir. 1985) ("We may not reverse such a conclusion [that probable cause existed] unless the magistrate's decision is clearly erroneous."); United States v. Estrada, 733 F.2d 683, 684 (9th Cir. 1984) ("We may not reverse [a magistrate's determination of probable cause] unless it is clearly erroneous.").

The case relied upon by the above decisions as establishing the use of the clearly erroneous standard, United States v. Seybold, 726 F.2d 502 (9th Cir. 1984), does not include any discussion
dard to review a magistrate's determination of probable cause to issue a search warrant. The Seventh Circuit's position, which is identical to the Ninth Circuit's position, is discussed at length in subsequent sections. The Ninth Circuit has never addressed this issue at length in its decisions.

In nonwarrant cases, the First, Seventh, Eighth, and Tenth Circuits apply the clear error standard to review probable cause to search. United States v. Santana is a typical example of this approach. In Santana, members of the Salem, New Hampshire Police Department monitored conversations between an informant, who was wearing a hidden microphone, and the defendant,

of the clearly erroneous standard of review in these situations.

141. See infra notes 166-232 and accompanying text.

142. See supra note 140.

143. See, e.g., United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990) (reviewing the lower court's finding of probable cause under the clearly erroneous standard); United States v. Moore, 790 F.2d 13, 15 (1st Cir. 1986) (same).

144. United States v. Spears, 965 F.2d 262, 271 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992); Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (holding that in a civil trial, the issue of whether police had probable cause to enter and search a home without a warrant is a jury question and therefore subject to the clearly erroneous standard of review on appeal as a finding of fact). In Llaguno, the Court reversed and remanded the proceedings because of "cumulatively serious trial errors" committed by the district court, thus allowing the plaintiffs to receive a new trial. Id.

145. United States v. Williams, 897 F.2d 1430, 1435 (8th Cir. 1990) (applying the clear error standard to uphold a district court's determination that an officer had probable cause to arrest the defendant). In Williams the court stated, "Probable cause [to conduct a warrantless arrest] exists where the facts and circumstances within the arresting officer's knowledge were sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense." Id. (citing United States v. Purham, 725 F.2d 450, 455 (8th Cir. 1984)). The appellate panel found there was probable cause to arrest because the arresting officer testified that he saw the defendant take a handgun from the defendant's waistband, place the handgun in a black pouch, and place the pouch in the car in which the defendant was riding. Id. As a result of this finding, evidence seized during a search incident to the defendant's arrest was held to be properly admitted by the district court. Id. Thus, the conviction of the defendant for being a convicted felon in possession of a firearm was affirmed. Id.

146. United States v. Fox, 902 F.2d 1508, 1513 (10th Cir.) (applying clear error analysis to uphold a district court's finding that evidence seized during a warrantless search was admissible against the defendant), cert. denied, 498 U.S. 874 (1990). In Fox, the evidence was seized during a search incident to the defendant's arrest by agents of the Drug Enforcement Administration. Id. The arrest of the defendant was also performed without a warrant. Id. The evidence was used to convict the defendant of conspiracy to possess cocaine with the intent to distribute, conspiracy to distribute cocaine, and interstate travel for the purpose of promoting unlawful activity. Id. The Fox court stated that the decision of the lower court was not clearly erroneous because "the totality of these circumstances, viewed in the light most favorable to the government, supports the district court's finding that the agents had probable cause to arrest Fox . . . ." Id. The circumstances included the knowledge by the arresting officers that the defendant had participated in numerous meetings and discussions concerning purchases of cocaine. Id.

147. 895 F.2d 850 (1st Cir. 1990).
Santana. The informant told police he had previously purchased cocaine from Santana at a house in Lawrence, Massachusetts. On September 21, 1988, the informant told Santana he wished to purchase approximately three kilograms of cocaine from him. The transaction was scheduled for 2:00 p.m. that day. Santana told the informant that his driver's license had been suspended in New Hampshire and that he would not drive to the location of the purchase. At approximately 3:00 p.m. on September 21, a police officer who was observing the house in Lawrence, Massachusetts, to which Santana's beeper phone number was registered, saw two males leave the house and enter a car parked on the street. One of the males, the co-defendant Juan Tejada, was carrying a package under his arm as he entered the automobile. The Salem Police Department also conducted surveillance of the area by aircraft.

After the car had entered New Hampshire, it was stopped by uniformed Salem police officers. An officer with special expertise in searching for contraband discovered the cocaine in a plastic bag near the engine block. The defendants, who had not consented to a search of the front of the car, both entered conditional pleas of guilty to a charge of possession with intent to distribute cocaine.

Santana appealed the denial by the district court of his motion to suppress the evidence based upon the court's erroneous determination that the police had probable cause to believe the car contained contraband. The First Circuit, after stating the appropriate standard of review to be clear error, held that the district court's determination was not clearly erroneous. The First Circuit stated that, under the totality of the circumstances, probable cause was established through the monitoring by the police of the conversation between the informant and Santana, the information that Santana's

148. Id. at 851.
149. Id.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 850-51.
159. Id. at 851-52.
160. Id. at 852 (citing United States v. Figureroa, 818 F.2d 1020, 1024 (1st Cir. 1987)).
beeper number was registered to a house in Lawrence, Massachusetts, the information that the informant had purchased cocaine from Santana in the same house, and the expectation of the police that Santana would proceed to a designated location from the house in the presence of another person as a result of the suspension of Santana’s driver’s license.\(^{161}\)

All Circuits apply clear error to review the existence of one or more of the exceptions to the presumptive unreasonableness of warrantless searches.\(^{162}\) Clear error is applied because the exceptions are considered to be questions of fact.\(^{163}\)

*United States v. Sewell*\(^{164}\) illustrates this use of clear error review. In *Sewell*, Chicago Police narcotics officers conducted surveillance of the Chicago apartment of the defendant Sewell.\(^{165}\) At about 10:00 p.m., the officers observed approximately fifteen people enter and leave the building within ten minutes, after spending only a few moments inside the apartment.\(^{166}\) One of the officers entered the apartment building and knocked on the defendant’s door.\(^{167}\) After Sewell opened the door, the officer asked Sewell for ten dollars worth of marijuana laced with phencyclidine (PCP).\(^{168}\) After the officer gave the defendant ten dollars, Sewell handed the money to his

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161. *Id.* Although the First Circuit, in *Santana*, invoked the automobile exception to the requirement of obtaining a search warrant, the court did not rely upon this exception in its holding that the probable cause determination was not clearly erroneous. *See id.* at 852-53. The case thus supports the use of the clear error standard to review a warrantless search and seizure even with the absence of an exception to the presumptive unreasonableness of warrantless searches.

162. *See, e.g.*, United States v. Preciado-Robles, 954 F.2d 566, 569 (9th Cir. 1992) (applying the clear error standard to review consent); United States v. Vasquez, 953 F.2d 176, 179 (5th Cir.) (applying clear error review to exigent circumstances), *cert. denied*, 112 S. Ct. 2288 (1992); United States v. Sewell, 942 F.2d 1209, 1213 (7th Cir. 1991) (same); United States v. Lopez, 937 F.2d 716, 722 (2d Cir.) (applying clear error review to exigent circumstances); United States v. Reed, 935 F.2d 641, 642 (4th Cir.) (same), *cert. denied*, 112 S. Ct. 423 (1991); United States v. Antoon, 933 F.2d 200, 204 (3d Cir. 1991) (applying the clear error standard to review consent), *cert. denied*, 112 S. Ct. 300 (1991); United States v. Valdez, 931 F.2d 1448, 1451 (11th Cir. 1991) (applying the clear error standard to review consent); United States v. Lewis, 921 F.2d 1294, 1301 (D.C. Cir. 1990) (same); United States v. Radka, 904 F.2d 357, 361 (6th Cir. 1990) (applying clear error review to exigent circumstances); United States v. Arcobasso, 882 F.2d 1304, 1306 (8th Cir. 1989) (same); United States v. Freeman, 816 F.2d 558, 562 (10th Cir. 1987) (applying the clear error standard to review consent); United States v. Moore, 790 F.2d 13, 15 (1st Cir. 1986) (applying clear error analysis to review factual findings of exigent circumstances).

163. *See supra* note 128.

164. 942 F.2d 1209 (7th Cir. 1991).

165. *Id.* at 1210.

166. *Id.*

167. *Id.*

168. *Id.*
wife inside the apartment and gave the officer a tin foil packet.\textsuperscript{169} The officer looked through the doorway and observed a crushed green plant, tin foil packets, money, and a high caliber handgun on a table inside the apartment.\textsuperscript{170} After displaying his badge to the defendant, the officer prevented Sewell from closing the door, pursued Sewell into the apartment, and arrested him.\textsuperscript{171} Another officer entered the apartment and followed Sewell’s wife, who had grabbed items from the table and run to the rear of the apartment.\textsuperscript{172} After arresting Sewell’s wife, the officer’s seized the gun, marijuana, PCP, cash, and the tin foil packets.\textsuperscript{173}

After pleading guilty to possessing a narcotic drug with intent to distribute and illegal possession of a firearm, Sewell appealed the denial by the district court of his motion to suppress the evidence, arguing that no exigent circumstances were present to justify the entry by the officers.\textsuperscript{174} The Seventh Circuit, applying clear error to review the denial of the motion, held that exigent circumstances were present.\textsuperscript{175} The court stated that the officer could see through the door all of the elements of narcotics trafficking and, after the officers identified themselves as police officers, there was a realistic expectation that any delay in the apprehension of the defendants would result in the destruction of evidence.\textsuperscript{176}

2. \textit{Appellate Courts That Apply Substantial Basis Review}

The First,\textsuperscript{177} Second,\textsuperscript{178} Third,\textsuperscript{179} Fourth,\textsuperscript{180} Fifth,\textsuperscript{181} Sixth,\textsuperscript{182}

\textsuperscript{169}. \textit{Id.}
\textsuperscript{170}. \textit{Id.}
\textsuperscript{171}. \textit{Id.}
\textsuperscript{172}. \textit{Id.}
\textsuperscript{173}. \textit{Id.}
\textsuperscript{174}. \textit{Id.} at 1211.
\textsuperscript{175}. \textit{Id.} at 1212-13.
\textsuperscript{176}. \textit{Id.} The Seventh Circuit also relied heavily upon its decision in United States v. Fleming, 677 F.2d 602 (7th Cir. 1982), for its holding that warrantless entry by the officers into the home of the defendant was constitutional. \textit{See Sewell,} 942 F.2d at 1211-12.
\textsuperscript{177}. \textit{See, e.g.,} United States v. Nocella, 849 F.2d 33, 39 (1st Cir. 1988) (“What matters, in the long run, is whether the issuing magistrate had a ‘substantial basis’ for finding that probable cause was extant.”). \textit{But see United States v. Curzi,} 867 F.2d 36, 45 (1st Cir. 1989) (reviewing for clear error a district court’s determination that the remainder of a search warrant affidavit, after excluding impermissible references to tainted evidence, did not establish probable cause).
\textsuperscript{178}. \textit{See, e.g.,} United States v. Jakobetz, 955 F.2d 786, 804 (2d Cir.) (“Together, these considerations provide sufficient basis for determining that the information supplied in the affidavit was not stale.”), \textit{cert. denied,} 113 S. Ct. 104 (1992); United States v. Ponce, 947 F.2d 646, 650 (2d Cir. 1991) (quoting the probable cause test of \textit{Gates} without mentioning clear error), \textit{cert. denied,} 112 S. Ct. 1492 (1992); Rivera v. United States, 928 F.2d 592, 602 (2d Cir. 1991) (quoting the
Eighth, Tenth, Eleventh, and District of Columbia Circuits apply the substantial basis standard when reviewing a magistrate’s determination of probable cause to issue a search warrant, "substantial basis" language of Gates without mentioning clear error).

179. See, e.g., United States v. American Investors of Pittsburgh, Inc., 879 F.2d 1087, 1105 (3d Cir.) (stating that a magistrate must have had a substantial basis for determining that probable cause existed), cert. denied, 493 U.S. 955 (1989), and cert. denied, 493 U.S. 1021 (1990); United States v. Kepner, 843 F.2d 755, 762 (3d Cir. 1988) ("Accordingly, the magistrate issued a warrant because a common-sense interpretation of the affidavit provided a substantial basis for concluding that probable cause existed.").

180. See, e.g., In re Grand Jury Subpoena, 920 F.2d 235, 240 (4th Cir. 1990) (stating that "[a]ppellants correctly state[d] that a magistrate must have a 'substantial basis' for concluding that probable cause exists" and equating the existence of probable cause with the totality of the circumstances analysis of Gates); United States v. Suarez, 906 F.2d 977, 984 (4th Cir. 1990) (holding, without mentioning clear error, that "[a] magistrate's finding of probable cause is subject to great deference on review"), cert. denied, 111 S. Ct. 790 (1991).

181. See, e.g., United States v. Wake, 948 F.2d 1422, 1428 (5th Cir. 1991) (citing the "substantial basis" language of Gates without mentioning clear error and stating that "[o]n its face, the affidavit provided a sufficient basis to find the requisite probable cause"), cert. denied, 112 S. Ct. 2944 (1992); United States v. McKeever, 906 F.2d 129, 132 (5th Cir. 1990) ("There was a substantial basis for finding probable cause in this case."); United States v. Suarez, 906 F.2d 977, 984 (4th Cir. 1990) (holding, without mentioning clear error, that "[a] magistrate's finding of probable cause is subject to great deference on review"), cert. denied, 111 S. Ct. 790 (1991).

182. See, e.g., United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991) ("Our review of the affidavit in this case reveals a substantial basis for concluding that a search of Davidson's apartment 'would uncover evidence of wrongdoing.'") (quoting Illinois v. Gates, 462 U.S. 213, 236 (1983)); United States v. Pelham, 801 F.2d 875, 878 (6th Cir. 1986) ("[T]he information contained in the affidavit, which was based on the statements of a named informant, gave the issuing magistrate a substantial basis for concluding that a search would uncover evidence of wrongdoing."), cert. denied, 479 U.S. 1092 (1987); United States v. Loggins, 777 F.2d 336, 338 (6th Cir. 1985) (per curiam) ("The standard of review in this case is whether the magistrate had a substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found at the place cited.").

183. See, e.g., United States v. Anderson, 933 F.2d 612, 614 (8th Cir. 1991) (concluding that the magistrate had a substantial basis for determining the existence of probable cause); United States v. Kail, 804 F.2d 441, 444 (8th Cir. 1986) (stating that a magistrate must have had a substantial basis for determining that probable cause existed).

184. See, e.g., United States v. Morehead, 959 F.2d 1489, 1498 (10th Cir. 1992) (quoting the "substantial basis" language of Gates without mentioning clear error); United States v. Harris, 903 F.2d 770, 774 (10th Cir. 1990) (citing the "substantial basis" language of Gates without mentioning clear error).

185. See, e.g., United States v. Gonzalez, 940 F.2d 1413, 1419 (11th Cir. 1991) (stating that substantial basis is the appropriate standard without mentioning clear error), cert. denied, 112 S. Ct. 910, and cert. denied, 112 S. Ct. 1194 (1992). But see United States v. Hooshmand, 931 F.2d 725, 735 (11th Cir. 1991) (stating that the denial of a motion to suppress for insufficient probable cause to issue a warrant was a mixed question of law and fact, and applying clear error to the findings of fact but reviewing de novo the application of law to those facts).

186. See, e.g., United States v. Vaughn, 830 F.2d 1185, 1187 (D.C. Cir. 1987) (stating that "in light of the mutually supporting nature of the statements made by the reliable informant and the Source of Information," there was a substantial basis for the magistrate's conclusion that probable cause existed (citing Illinois v. Gates, 462 F.2d 213, 238-39 (1983) (citation omitted))); United States v. Laws, 808 F.2d 92, 106 (D.C. Cir. 1986) ("We hold that the affidavits in the case at bar provided the judge issuing the warrant with 'a "substantial basis for . . . concluding" that probable cause existed . . . .'") (quoting Gates, 462 F.2d at 238-39).
and do so without equating the standard to clear error. These circuits rely on the language of Gates for their position and do not elaborate further on the appropriate standard. No circuit applies this standard to review probable cause to conduct warrantless searches and seizures.

United States v. Davidson presents a typical example of the application of substantial basis review. In Davidson, an affidavit submitted by an agent of the Drug Enforcement Administration was used to obtain a search warrant on August 11, 1989, for the apartment of the defendant Davidson. The affidavit described surveillance reports from November 2, 1988, to August 9, 1989, of meetings between the defendant and "other individuals known to have criminal records for illegal drug distribution." The affidavit reported that Davidson had been observed on more than one occasion using a public telephone in the presence of co-defendant Marvin Mulligan. The affidavit also stated that the defendant was observed more than once traveling in an automobile with Florida license plates registered to a suspected drug trafficker. The search of the defendant's apartment revealed a quantity of fentanyl, a controlled substance, which was seized by law enforcement officers.

A jury found Davidson guilty of conspiracy to possess heroin and cocaine with intent to distribute. Davidson appealed to the Sixth Circuit arguing that the search of his residence was conducted without probable cause to believe that evidence or contraband would be found at the apartment. The Sixth Circuit rejected this argument and held that the totality of the circumstances presented in the affidavit provided a substantial basis for finding probable cause to search the residence. The Sixth Circuit referred to two specific surveillance reports in the affidavit that stated that in July and Au-

187. The Tenth Circuit also applies the substantial basis standard of review to the issue of whether a magistrate had probable cause to issue an arrest warrant without stating the clearly erroneous standard of review. St. John v. Justmann, 771 F.2d 445, 448 (10th Cir. 1985) (citing Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 564 (1971)).
188. See supra notes 144-54 and accompanying text.
189. 936 F.2d 856 (6th Cir. 1991).
190. Id. at 857.
191. Id. (quoting Affidavit of DEA Agent).
192. Id. at 859.
193. Id.
194. Id. at 858.
195. Id. at 857.
196. Id. at 858-59.
197. Id. at 859-60.
gust of 1989 an officer overhead "cryptic" references to drugs in conversations between the co-defendant Mulligan and other men after Mulligan had traveled to the defendant's apartment.198

3. Appellate Courts That Apply De Novo Review

The Second,199 Third,200 Fourth,201 Fifth,202 Sixth,203 Ninth,204 Eleventh,205 and District of Columbia Circuits206 review probable cause to conduct a warrantless search or seizure as a mixed question of law and fact, applying clear error review to the factual findings of a lower court and de novo review to the lower court's conclusions of law. These circuits do not consider the appropriate standard to be at issue in their decisions.207

United States v. Cooper208 illustrates the use of de novo review to find the absence of probable cause to conduct a warrantless search. In Cooper, police officers in Waco, Texas received a telephone call at approximately midnight on July 14, 1989, from an informant

198. Id.
199. See, e.g., United States v. Gorski, 852 F.2d 692, 694 (2d Cir. 1988) (reviewing de novo probable cause to conduct a warrantless search and seizure of the defendant's bag).
201. See, e.g., United States v. Campbell, 945 F.2d 713, 715 (4th Cir. 1991) (applying de novo review and stating, in dictum, that probable cause probably existed to search a residence); United States v. Ricks, 776 F.2d 455, 465 (4th Cir. 1985) (applying de novo review to probable cause to conduct a warrantless search of the defendant's apartment residence), cert. denied, 479 U.S. 1009 (1986), and cert. denied, 493 U.S. 1047 (1990).
202. See, e.g., United States v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991) ("Nevertheless, the ultimate question of the legality of the search or seizure of Cooper's car is a question of law alone and thus subject to de novo review.") (citing United States v. Muniz-Melchor, 894 F.2d 1430, 1433 (5th Cir.), cert. denied, 495 U.S. 923 (1990)).
204. See, e.g., Hopkins v. City of Sierra Vista, 931 F.2d 524, 527 (9th Cir. 1991) (reviewing de novo the granting of summary judgment to the defendants because probable cause existed to conduct a warrantless search).
205. See, e.g., United States v. Ramos, 933 F.2d 968, 972 (11th Cir. 1991) (stating that factual findings are reviewed under clear error doctrine while findings of law are reviewed de novo); United States v. Tobin, 923 F.2d 1506, 1510 (11th Cir.), cert. denied, 112 S. Ct. 299 (1991); United States v. Hurtado, 779 F.2d 1467, 1477 (11th Cir. 1985) ("[P]robable cause is purely a question of law and hence subject to plenary review by this court.").
206. See, e.g., United States v. Garrett, 959 F.2d 1005, 1007 (D.C. Cir. 1992) (classifying the existence of probable cause for a warrantless search as a mixed question of law and fact and reviewing de novo the legal conclusions of the trial court).
207. See supra notes 156-63 and accompanying text.
stating that the defendant Cooper was suspected of the robbery of a convenience store in Mart, Texas, located a few miles from Waco. Police officers in Mart told officers in Waco that an arrest warrant had been issued for Cooper. The Waco police officers located Cooper’s car in a parking area at the address furnished by the informant and began conducting surveillance of the car. At approximately 4:30 a.m., unidentified persons drove the car from the parking area. The police stopped the car in order to arrest Cooper after the car had traveled about two and one half blocks. Although Cooper was not in the car, the police conducted a warrantless search of the car and found a sawed-off shotgun in the trunk. Cooper was subsequently arrested and indicted by a federal grand jury of one count of unlawful possession of an unregistered firearm. After the district court denied Cooper's motion to suppress evidence of the shotgun, Cooper was convicted by a jury.

Cooper appealed to the Fifth Circuit, arguing that there was no probable cause to search his car because the sole reason for stopping the car had been to arrest Cooper. The Fifth Circuit, applying de novo review, agreed with Cooper. The Fifth Circuit stated that probable cause was absent because the Mart officers and the Waco officers neither knew nor believed that the shotgun was in Cooper’s car nor searched Cooper’s car because they believed it might contain the shotgun.

4. The Standard Applied by the Seventh Circuit

The Seventh Circuit applies the clear error standard to review warrantless searches and probable cause to issue a search warrant. Within the last two years, five separate opinions appearing

209. Id. at 740.
210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
215. Id. at 741.
216. Id.
217. Id. at 744.
218. Id. at 744-46.
219. Id. at 745. The Fifth Circuit held, however, that the district court properly refused to suppress evidence of the shotgun because the police had probable cause to believe the car itself was an instrument of evidence of a crime and because they conducted a proper inventory search subsequent to its seizure. Id. at 747-48.
in two Seventh Circuit cases have addressed this issue.\textsuperscript{221} The facts and procedural background of these cases must be examined before discussing the Seventh Circuit's position concerning the appropriate standard of review.

Two recent Seventh Circuit decisions discuss the proper standard of appellate review for a magistrate's determination that probable cause existed to issue a search warrant. In \textit{United States v. McKinney},\textsuperscript{222} the majority of an appellate panel held that the proper standard was whether the magistrate had a "substantial basis" for finding that probable cause existed, an intermediate standard of review.\textsuperscript{223} This holding was subsequently reversed in \textit{United States v. Spears},\textsuperscript{224} where an appellate panel held that clear error was the appropriate standard to review probable cause to conduct both warrant and warrantless searches.\textsuperscript{225}

In \textit{McKinney}, the defendant was arrested at his home in Springfield, Illinois after a search of his residence by Illinois State Police and agents of the Bureau of Alcohol, Tobacco, and Firearms.\textsuperscript{226} The search uncovered seven plastic bags of cocaine and six firearms.\textsuperscript{227} The search was performed pursuant to a search warrant issued by a U.S. magistrate.\textsuperscript{228} The warrant was based on an affidavit signed by an Illinois State Police officer, which stated that a woman named Carla Brown told the officer that she had observed cocaine, drug paraphernalia, marijuana, and firearms in the defendant's residence.\textsuperscript{229} Brown said the cocaine was located in the front bedroom of the defendant's residence while the firearms were located in the closet of the front bedroom.\textsuperscript{230} She also observed the defendant selling one-half gram of cocaine to a female customer and stated that the defendant had fired shots at her with a machine gun.\textsuperscript{231}

A thirteen-count indictment charged McKinney with possession
with intent to distribute cocaine, use of a firearm during and in relation to a drug trafficking crime, and unlawful possession of a firearm by a convicted felon. Before the trial, McKinney filed a motion to suppress the evidence seized through the search warrant, arguing that there was no probable cause to issue the warrant. McKinney specifically argued that the information in the officer's affidavit should have been corroborated before the search warrant was issued because the information was based on a confidential informant who had a drug addiction and a prior criminal record. District Court Judge Richard Mills of the United States District Court for the Central District of Illinois, denied the motion and ruled that probable cause to issue the warrant existed under the Supreme Court's decision in Gates.

After McKinney waived a jury trial, the district court found him guilty on all charges. He was sentenced to 121 months imprisonment on the cocaine possession charge, 30 years on the unlawful firearm possession charges, and 30 years on the unlawful firearm use charges. He was also sentenced to six years probation after release from prison. He appealed to the Seventh Circuit claiming that there was no probable cause to issue the search warrant and that the lower court erred by upholding the validity of the warrant. Therefore, he argued, evidence seized on the basis of the warrant should have been excluded.

The McKinney decision directly addressed the proper appellate standard of review for a magistrate's determination that probable cause existed to issue a search warrant. In affirming McKinney's convictions on all counts, Circuit Judge Joel Flaum upheld the magistrate's decision to issue the search warrant for McKinney's residence and stated that the applicable standard for appellate courts was whether the magistrate had a "substantial basis" for issuing the

232. Id.
233. Id.
234. Id.
235. Id. at 407-08 (citing Illinois v. Gates, 462 U.S. 213 (1983)).
236. Id. at 408.
237. Id.
238. Id.
239. Id.
240. Id. McKinney also argued that the evidence was insufficient to establish his guilt beyond a reasonable doubt and that the sentences he received for his firearm possession and use convictions violated the Double Jeopardy Clause of the Fifth Amendment. Id. at 416. These claims are not relevant to the present discussion.
warrant, a standard he equated with intermediate deference.241 He relied primarily on the decision of the Supreme Court in Gates.242

Judge Flaum first stated that the Supreme Court had never used the substantial basis standard of review concurrently with the clearly erroneous standard of review, and, therefore, appellate courts should not presume the two standards to be the same.243 The opinion stated that the Supreme Court did not intend to implicitly reject close appellate scrutiny of search warrants by its adoption of a good-faith exception to the exclusionary rule in United States v. Leon.244 a decision subsequent to Gates.245 Judge Flaum declared that Seventh Circuit precedent had always utilized an intermediate standard for reviewing probable cause determinations and stated that such a standard was more appropriate than the more deferential clearly erroneous standard because constitutional rights were at issue in these cases.246

Although Judge Flaum acknowledged that the use of substantial basis as an intermediate standard created multiple levels of appellate review, he stated that this approach was preferable because the clear error standard of review implicitly encompassed multiple levels of review as well.247 Although the judge acknowledged that the substantial basis standard of review was imprecisely defined, the opinion nevertheless concluded that the standard would be no more difficult to apply than was the magistrate's initial probable cause determination.248

Applying the substantial basis standard, Judge Flaum ruled that the magistrate had probable cause to issue the search warrant.249 He stated that the magistrate had a substantial basis to issue the warrant because the affidavit stated that the informant had personally observed the evidence within the defendant's residence and had personally been the victim of a violent crime committed by the de-

241. Id. at 408-09. Judge Flaum equated the standard to intermediate deference because he never considered it equivalent to clear error review while he acknowledged the standard to be more deferential than de novo. See id.

242. Id.

243. Id. at 409.


245. 919 F.2d at 410.

246. Id. at 411-15.

247. Id. Specifically, Judge Flaum stated that the clearly erroneous standard of review could be applied "rigorously" or it could be applied "as a symbol of appellate acquiescence." Id. at 415.

248. Id. at 414 n.12.

249. Id. at 416.
fendant. Judge Flaum further reasoned that the informant’s drug
dependency and criminal record were not sufficient to disregard the
affidavit because, under the Supreme Court’s totality of the circum-
stances test in *Gates*, reliability was simply one relevant factor to be
considered by the magistrate. The challenged evidence was there-
fore obtained constitutionally, according to Judge Flaum.

District Court Judge Hubert L. Will of the United States District
Court for the Northern District of Illinois, who was sitting by desig-
nation, filed a concurring opinion in support of the substantial basis
standard of review as an intermediate standard. Judge Will stated
that probable cause requires a higher degree of scrutiny than other
standards because probable cause is required by the Constitution.

He further stated that there was a significant difference between the
substantial basis and the clearly erroneous standards of review, and
that the distinction was more than semantic. Judge Will also dis-
puted Judge Posner’s proposition that appellate judges were less
able to assess the facts upon which the issuance of a warrant was
based and therefore should review such issuances with less
scrutiny.

Circuit Judge Richard Posner filed a concurrence but declared
the appropriate appellate standard of review to be the clearly erro-
neous standard. Judge Posner relied on several appellate court
opinions adopting this standard in cases involving a search and
seizure performed without a warrant. He also relied on a Seventh
Circuit opinion which adopted the clearly erroneous standard in re-
viewing a district court’s denial of a motion to suppress evidence.
The concurrence stated that the application of law to fact is a ques-

250. Id. at 415-16.
251. Id. at 415 (citing Illinois v. Gates, 462 U.S. 213, 234 (1983)).
252. Id. at 423 (Will, J., concurring).
253. Id. at 424.
254. Id. at 425. Judge Will stated that the difference was more than semantic because some
cases would be decided differently if the clearly erroneous standard was used in place of the
substantial basis standard of review. Id.
255. Id. Judge Will stated that appellate judges were usually just as able as magistrates to
assess the facts because almost all the facts relied upon by the magistrate will be contained in a
law enforcement agency’s affidavit, which is available to the court of appeals. Further, no substan-
tial record is developed during warrant hearings. Id.
256. Id. at 418 (Posner, J., concurring).
257. Id. at 419 (citing United States v. Santana, 895 F.2d 850, 852 (1st Cir. 1990); United
States v. Williams, 897 F.2d 1430, 1435 (8th Cir. 1990); United States v. Fox, 902 F.2d 1508,
1513 (10th Cir.), cert. denied, 498 U.S. 874 (1990)).
258. Id. (citing United States v. D'Antoni, 856 F.2d 975 (7th Cir. 1988)).
tion of fact for purposes of appellate review and, therefore, should be reviewed under the clear error standard. Judge Posner also asserted that the dramatic increases in workloads for federal appellate courts necessitated a looser standard of appellate review. Since Gates had nowhere stated that substantial basis was to be an intermediate and less deferential standard than clear error, Gates did not prohibit the use of a clear error standard of review. Posner further declared that the application by the Seventh Circuit of less deference to a district court's determination of probable cause in cases that did not involve search warrants was inconsistent with giving more deference to a magistrate's determination of probable cause in the search warrant context. Judge Posner contended that less appellate scrutiny was appropriate in warrant cases because appellate judges were further removed than magistrates from the facts upon which a search warrant was issued. He also relied upon Ninth Circuit precedent adopting the clear error standard to review a magistrate's probable cause determination in warrant cases.

**McKinney** was subsequently reversed by the Seventh Circuit in *United States v. Spears*. In *Spears*, the defendant was arrested on August 31, 1988, in Peoria, Illinois after a search of his vehicle by agents of the Federal Bureau of Investigation (FBI) revealed a radio pager, a kilogram of cocaine, and $23,000 in cash. The search was conducted without a warrant. The defendant's girlfriend had previously told an officer of the Peoria County Sheriff's Police that the defendant sold approximately a kilogram of cocaine a week and frequently traveled to Florida to obtain cocaine. A confidential

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259. Id.
261. Id. at 421-22.
262. Id. at 419-20. Such a position would appear to be illogical because cases in which search warrants are present involve constitutional rights and thus would deserve at least the same degree of appellate scrutiny as cases that do not involve search warrants.
263. Id. at 419.
264. Id. at 420 (citing United States v. McQuisten, 795 F.2d 858, 861 (9th Cir. 1986)).
265. 965 F.2d 262 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992). The court purported to overrule McKinney; however, its authority to do so is questionable because the decisions were each rendered by a three-judge panel of the Seventh Circuit. The Seventh Circuit subsequently declined to rehear the case en banc preventing all members of the Seventh Circuit to decide the issue. Id. at 282 (Flaum, J., dissenting from denial of rehearing). Therefore, the Spears decision, as the most recent decision of the Seventh Circuit, is the law in the Seventh Circuit.
266. Spears, 965 F.2d at 266.
267. Id.
268. Id. at 265.
informant had also informed an Assistant U.S. Attorney and an Illinois State Police officer that the defendant frequently traveled to Florida, New York, and Texas to purchase cocaine and that he would return on August 31 in a black car carrying cocaine. Other confidential sources had also informed the FBI of the defendant's illegal activities.

The defendant was charged with conspiracy to distribute cocaine, distribution of cocaine, and possession with intent to distribute. He made a pretrial motion to suppress evidence seized from his vehicle, alleging that the officers did not have probable cause, a warrant, or consent to search. The district court denied the motion. The defendant then pleaded guilty to the possession charge, reserved the right to appeal denial of the motion, and was sentenced to imprisonment. Spears appealed to the Seventh Circuit, arguing that the District Court erred in denying the motion to suppress.

The Seventh Circuit, reversing McKinney, in an opinion by Chief Judge William Bauer, affirmed the denial of the motion and held that the proper standard of appellate review was clear error in both warrant and warrantless cases. The opinion relied primarily on the Supreme Court's opinions in Gates and Massachusetts v. Upton and stated that these decisions required "plain and simple" factual review that should be conducted under the deferential clear error standard. The opinion then considered nonwarrant searches and seizures, which were deemed a mixed question. Chief Judge Bauer stated that because the test of probable cause was the same in these situations under Gates, the standard of review should also be clear error. The opinion thus adopted a single standard of appellate review, clear error, for all reasonable searches. In applying this standard, Chief Judge Bauer concluded that the district judge

269. Id. at 266.
270. Id.
271. Id. at 268.
272. Id.
273. Id.
274. Id.
275. Id.
276. See supra notes 222-64 and accompanying text (discussing McKinney).
277. Spears, 965 F.2d at 270-71.
279. Spears, 965 F.2d at 270.
280. Id.
281. Id.
282. Id.
was not clearly erroneous in determining that the agents had probable cause to conduct the search of Spears's vehicle.\textsuperscript{283}

Chief Judge James Moran of the United States District Court for the Northern District of Illinois, who was sitting by designation, filed a concurring opinion that disapproved of the adoption of the clear error standard of review.\textsuperscript{284} He stated that clear error was a "chameleonic" standard which would be applied with varying rigor in different contexts.\textsuperscript{285} He stated that the clear error standard thus did not necessarily require deference and minimal appellate scrutiny.\textsuperscript{286} Judge Flaum filed an opinion dissenting from a denial of a rehearing of the case en banc on the appellate standard issue.\textsuperscript{287} His dissent, which was joined by Circuit Judges Cummings, Cudahy, and Ripple, essentially restated the arguments of the majority opinion in McKinney.\textsuperscript{288}

\section*{II. Analysis}

The Spears court ruled that clear error was the proper standard for appellate review of a magistrate's probable cause determination in the search warrant context.\textsuperscript{289} This decision overruled the McKinney court, which had held that the substantial basis standard was an independent standard, evoking less deference to the magistrate.\textsuperscript{290} This Comment adopts the position set forth in the majority opinion in Spears and Judge Posner's McKinney concurrence that the clearly erroneous standard is the appropriate standard of review in these situations and should be considered equivalent to the substantial basis language of Gates.

\subsection*{A. Appellate Standards for Reviewing Search Warrants}

The adoption of substantial basis as an independent standard of review creates yet another standard of appellate review of a lower court's determinations.\textsuperscript{291} As discussed earlier, the Supreme Court and the Ninth Circuit have recently stated the policy reasons for the

\begin{itemize}
\item \textsuperscript{283} Id. at 272.
\item \textsuperscript{284} Id. at 281 (Moran, C.J., concurring).
\item \textsuperscript{285} Id. (citing United States v. McKinney, 919 F.2d 405, 411, 415 (7th Cir. 1990)).
\item \textsuperscript{286} Id. at 281.
\item \textsuperscript{287} Id. at 282 (Flaum, J., dissenting).
\item \textsuperscript{288} Id. at 282-83; cf. United States v. McKinney, 919 F.2d 405 (7th Cir. 1990).
\item \textsuperscript{289} Spears, 965 F.2d 262.
\item \textsuperscript{290} McKinney, 919 F.2d at 409.
\item \textsuperscript{291} The substantial basis standard of review was held by the Seventh Circuit to encompass an
The analyses of both the Supreme Court and the Ninth Circuit indicate that the reasons underlying the use of the clear error standard in other fact-intensive contexts may not be applicable to a magistrate's probable cause determination when issuing a search warrant. This is because most magistrates issue warrants based solely on information contained in a law enforcement officer's sworn affidavit. Further, a warrant hearing is not adversarial. The law enforcement officer is usually not cross-examined, and an informant, if one exists, does not usually appear in court. Thus, an appellate court is usually as close to the facts as the magistrate making the initial probable cause determination. Therefore, although the appellate court may be required to make a full evidentiary review under a less deferential standard than clear error, the court is not in a worse position to make such a review in warrant cases.

There are strong countervailing considerations, however, to the use of a standard of review other than clear error in warrant cases. A less deferential standard of review has the effect of neglecting the work of a lower court, as the appellate court is forced to engage in a greater degree of legal analysis. Moreover, the precedential value of a decision applying a less deferential standard of review may be reduced since the appellate judges are expending more time and effort duplicating the work of a lower court. This is especially true in cases involving search warrants because, as discussed above, an appellate court usually has all the information that was available to the magistrate when the probable cause determination was initially made. The court of appeals therefore must spend more of its limited time and energy discussing which facts supported a finding of probable cause and which did not and is less able to provide guid-

intermediate level of deference between the de novo and clearly erroneous standards of review. Id. at 409.

292. See supra notes 32-40 and accompanying text.
293. McKinney, 919 F.2d at 425 (Will, J., concurring).
294. Id.
295. Id.
296. Id. at 425-26.
297. Id. at 426.

298. See Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 934 (7th Cir. 1989) (holding that appellate review of a lower court's decision to impose sanctions under Rule 11 of the Federal Rules of Civil Procedure would not be subject to de novo review).
299. Id. at 933-34 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985)).
300. See supra note 35.
ance for magistrates in their future probable cause determinations.

This Comment next examines appellate standards for reviewing probable cause to search in further detail. The Gates decision is analyzed first, followed by an analysis of the use of the clearly erroneous standard to review applications of law to fact. The last part of this section analyzes the Leon decision as it affects this issue. This section concludes that the use of the clearly erroneous standard of review is supported by both Supreme Court and appellate court precedent.

B. Appellate Standards for Reviewing Probable Cause to Search

1. Gates Supports the Use of Clear Error Review

One interpretation of Gates is that the decision adopted a standard of review somewhere between clear error and de novo. Supporters of this interpretation reason that the Supreme Court explicitly rejected the use of a de novo standard in its opinion, yet failed to equate its substantial basis language with the clearly erroneous standard of review.301 Further, the Supreme Court has used the clearly erroneous standard of review in other contexts without mentioning the substantial basis test.302 Thus, some equate the substantial basis test with a standard of review of intermediate deference, between clear error and de novo.

Nevertheless, the Gates opinion is equally susceptible to the interpretation that the substantial basis test constitutes a clear error standard of review. The Gates opinion itself stated that “[a] magistrate’s ‘determination of probable cause should be paid great deference by reviewing courts.’”303 This is inconsistent with the establishment of an intermediate standard of review that is less deferential than clear error. Additionally, the substantial basis language of Gates is semantically similar to the standard for judicial review of administrative fact-findings, which will be affirmed on appeal if such findings are supported by substantial evidence.304 The substantial evidence standard of review is considered to be equally

302. See, e.g., Citibank, N.A. v. Wells Fargo Asia Ltd., 495 U.S. 660, 670 (1990) (holding that a district court’s factual findings concerning the scope of the parties’ prior agreement will not be reversed unless clearly erroneous).
or less deferential than the clearly erroneous standard of review.\textsuperscript{305} The \textit{Gates} opinion also does not state that the substantial basis test must be employed by each reviewing court. Rather, it requires employment of this test only by the initial reviewing court.\textsuperscript{306} Thus, the \textit{Gates} decision supports the clearly erroneous standard of review for appellate courts in search warrant cases.

\textit{Gates} may also be read as endorsing the clearly erroneous standard of appellate review for two other reasons. First, the \textit{Gates} court never stated it was creating a new standard of appellate review to be composed of intermediate deference.\textsuperscript{307} The case relied upon by the Supreme Court in \textit{Gates} for the requirement that a reviewing court ensure that the magistrate had a substantial basis to issue the warrant did not purport to establish a standard of appellate review.\textsuperscript{308} In \textit{Jones v. United States},\textsuperscript{309} the substantial basis language was used merely to describe the magistrate's probable cause determination and did not mention appellate standards of review.\textsuperscript{310} Thus, the Supreme Court would not have cited \textit{Jones} if it had intended to create a new standard of appellate review by using the words "substantial basis."

Second, the totality-of-the-circumstances test of \textit{Gates} is more consistent with a clearly erroneous standard of review than with a standard of less deference. Under \textit{Gates}, a magistrate evaluating an affidavit for probable cause must make a "practical, common-sense" decision whether the information in the affidavit establishes probable cause.\textsuperscript{311} No single item in the affidavit is to be dispositive, and the Supreme Court explicitly rejected the use of a "hypertechnical" analysis by the magistrate.\textsuperscript{312} This supports the use of the clearly erroneous standard of review for appellate courts reviewing the magistrate's decision. Since the magistrate is to apply a flexible
standard, appellate courts should not scrutinize the affidavit more closely than the magistrate did by applying a standard of review of less deference than clear error. By applying a standard of less deference, appellate courts may be doing more work than the magistrate did in evaluating the affidavit. This is inconsistent with the function of the court of appeals since the application for the search warrant is made initially to the magistrate, not the court of appeals. The appellate court is simply required to review the magistrate's probable cause determination and may not undertake its own probable cause determination because the Supreme Court explicitly rejected the use of de novo review by a court of appeals in *Gates.* In interpreting substantial basis as a standard of intermediate deference, the court of appeals may be acting contrary to *Gates* by applying more scrutiny to the law enforcement officer's affidavit than the Supreme Court intended the magistrate to apply. *Gates* thus supports the clearly erroneous standard of appellate review for a magistrate's decision to issue a search warrant.

The reasonableness of these interpretations of *Gates* is confirmed by appellate adoptions of both standards. The Ninth Circuit applies the clearly erroneous standard of review to a magistrate's probable cause determination in warrant cases. Other appellate courts, however, apply the substantial basis test in these situations as an intermediate standard, somewhere between clearly erroneous and de novo.

In his McKinney concurrence, Judge Posner stated that although the Ninth Circuit's position was in the minority, such a position was preferable because of the "great deference" language of *Gates.* This argument was quoted favorably by the majority opinion in *Spears.* Judge Will responded in his *McKinney* concurrence by stating that a "more stringent" standard of review than clear error was merited in cases involving search warrants because constitutional rights were implicated. Judge Will's response, however, ignores the command of *Gates* that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo

313. *Id.*
314. See supra note 140.
315. See supra notes 129-38.
It also ignores the fact that the Gates opinion did not state that it was creating a new, intermediate standard of appellate review. Furthermore, neither Judge Will nor Judge Flaum attempted to define this new substantial basis standard of review other than by citing the Gates opinion. Judge Will attempted to articulate the difference between substantial basis and clear error as follows:

But there is at least a psychological (and accordingly, in practice, a quite real) difference between saying (a) that we will reverse only if the decision below is clearly erroneous and (b) that we will affirm, if, giving deference to the lower court's determination, that determination has a substantial basis. The first formulation amounts to a recipe for almost routine affirmance. The second, by contrast, ensures a more detailed and searching review than a clear-error standard does and is the appropriate and correct standard for reviewing constitutional determinations.

Nevertheless, Judge Will did not mention any specific factual instances where cases would be decided differently, nor, other than the excerpt above, did he elaborate on the degree of judicial scrutiny required by the substantial basis standard.

The substantial basis standard of review was defined more precisely by the Seventh Circuit in United States v. Pritchard. This definition does not reflect a proper interpretation of Gates, however, because the definition was derived from United States v. Rambis, decided before Gates. The amount of judicial deference required under the substantial basis standard of review within the Seventh Circuit under McKinney was, thus, unclear.

Since the Gates opinion is subject to two valid interpretations as to the proper standard of appellate review, it would be useful to examine the use of the clearly erroneous standard of appellate review in cases that require the application of law to fact. Such cases typically involve the application by a lower court of a rule of law to a set of uncontested facts. As discussed below, this category applies to a magistrate's issuance of a search warrant. Thus, other cases involving fact/law applications may serve as precedential support.
for the use of the clearly erroneous standard of appellate review in cases where a search warrant was issued.

2. Use of Clear Error in Applications of Law to Fact

A magistrate's determination that probable cause exists to issue a search warrant is an application of law to fact. It entails the application of a legal standard to a specific set of facts contained in a law enforcement officer's affidavit. The McKinney decision was therefore inconsistent with Seventh Circuit precedent, which holds that other mixed questions should be subject to the clearly erroneous standard of appellate review. For example, the Seventh Circuit reviews a district court's denial of a motion to suppress evidence under the clear error standard. The Seventh Circuit also applies the clear error standard when reviewing a trial court's decision to impose Rule 11 sanctions in civil cases, which is also a mixed question of law and fact. Other circuits also apply the clearly erroneous standard of review to at least some applications of law to fact. Some appellate courts, however, apply a de novo standard of review to mixed questions. Thus, the use of the clearly erroneous standard of review to mixed questions of law and fact has some, albeit conflicting, precedential support.

The clearly erroneous standard has also been used to review searches and seizures conducted by law enforcement officers without a warrant. In certain circumstances, law enforcement officers may

325. See supra notes 32-35 and accompanying text.
326. See McKinney, 919 F.2d at 420 (Posner, J., concurring) (stating that since the determination of whether the information in the affidavit submitted to the magistrate involves an application of law, the appellate court is not limited to the clearly erroneous standard (quoting United States v. Rambis, 686 F.2d 620, 622 (7th Cir. 1982))).
327. See supra notes 83-89 and accompanying text.
328. Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989). This is a mixed question because a trial court judge must determine whether a pleading, motion, or other paper is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. FED. R. Civ. P. 11. This standard must be applied to an existing set of facts. Mars Steel, 880 F.2d at 933.
329. See supra notes 42-44, 122-23, and accompanying text.
330. See supra notes 45, 104-05, 140-47, and accompanying text.
331. Although this may also be considered a mixed question of law and fact, it is being discussed separately because of its close factual similarity to searches and seizures conducted by law enforcement officers with a warrant.
conduct warrantless searches and seizures without violating the Fourth Amendment, if they are based on probable cause.\textsuperscript{332} Several circuits apply the clearly erroneous standard of review to a trial court’s probable cause determination in this context.\textsuperscript{333} These cases are analogous to a magistrate’s determination of probable cause in issuing a search warrant. Nonwarrant searches and seizures have the same scope as those involving warrants,\textsuperscript{334} and, in both situations, an agent of the government is required to determine whether an existing set of facts supports a determination of probable cause.\textsuperscript{335} The main difference is that in nonwarrant situations, such a determination is made by a law enforcement officer, while in warrant situations, such a determination is made by a U.S. magistrate. Thus, the use of the clearly erroneous standard of review in warrant situations is supported by its use in appellate review of searches and seizures conducted without a search warrant.

3. United States v. Leon Supports the Use of Clear Error Review

The significance of the magistrate’s probable cause determination itself was limited somewhat by the Supreme Court’s adoption of a “good faith” exception to the exclusionary rule.\textsuperscript{336} In \textit{Leon}, the Supreme Court held that evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid, will not be barred at trial.\textsuperscript{337} Evidence which would otherwise be barred because a magistrate made an incorrect determination of probable cause will now be admitted under the “good faith” exception.\textsuperscript{338}

\textsuperscript{332} See supra notes 4-7, 72-78, and accompanying text.
\textsuperscript{333} See supra notes 72-78 and accompanying text.
\textsuperscript{334} See supra notes 72, 76.
\textsuperscript{335} See supra notes 72-78 and accompanying text.
\textsuperscript{337} Id. at 908-13. The Supreme Court thus reversed the decision of the Ninth Circuit barring large quantities of drugs and other evidence from being introduced into evidence in the defendants’ drug trafficking trial. \textit{Id.} at 926.
\textsuperscript{338} In \textit{Leon}, the Supreme Court repeated the Gates language that a reviewing court should not uphold the constitutionality of a search warrant if the magistrate did not have a substantial basis for determining the existence of probable cause. \textit{Id.} at 915. However, the Supreme Court also stated, regarding the search warrant at issue, that “a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate’s probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.” \textit{Id.} (citation omitted).

In \textit{Leon}, the Supreme Court stated, however, that the good-faith exception “is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment.”
Although *Leon* did not discuss the choice of appellate standards for reviewing a magistrate’s probable cause determination, the decision reduces the import of appellate review of such determinations. This is because evidence will now be admitted against an accused at trial if the law enforcement officers acted in good faith in obtaining the evidence pursuant to a search warrant. The choice of appellate standard of review has no importance in these situations because the evidence will be admitted regardless of whether an appellate court finds that the magistrate did not have probable cause to issue the search warrant.

The use of the clearly erroneous standard of appellate review in cases where the law enforcement officers did not act in good faith is more consistent with *Leon* than a standard of intermediate deference. Under *Leon*, evidence will be admitted at the trial of the defendant regardless of whether there was probable cause to issue a search warrant, as long as the officers acted in good faith. If the good faith exception of *Leon* is raised by the prosecution to counter a defendant’s motion to suppress the evidence based on a lack of probable cause, appellate scrutiny is shifted to determining whether the law enforcement officers actually acted in good faith in obtaining the warrant, rather than determining whether the magistrate had probable cause to issue the warrant.

Thus, *Leon* implicitly reduces the import of appellate scrutiny of a magistrate’s probable cause determination by shifting the focus of that scrutiny in situations where good faith of law enforcement officers is at issue. This is consistent with the deferential clearly erroneous standard of appellate review in probable cause determinations made by a magistrate where the good faith of law enforcement officers is not at issue. If the prosecution raises a *Leon* defense to rebut a defendant’s motion to suppress, the court of appeals will expend its energies scrutinizing whether good faith was present and ignore the issue of whether the magistrate had probable cause to issue a search warrant. If *Leon* is not implicated, the appellate court will still scrutinize the probable cause determination but will grant more deference under the clearly erroneous standard than under the substantial basis standard of review. This is consistent with the reduction in importance of appellate scrutiny of these determinations made by the Supreme Court in *Leon*.

*Id.* at 924.
In summary, the use of the clearly erroneous standard to review a magistrate’s determination of probable cause to issue a search warrant is supported by both Supreme Court and appellate court precedent.

C. The Substantial Basis Standard to Review Probable Cause Has Less Practical Value Than Clear Error

The adoption of the substantial basis standard as an intermediate standard of appellate review in warrant cases creates potential confusion for those courts that use it. The Supreme Court in *Gates* stated that such determinations “should be paid great deference by reviewing courts.” The amount of deference to be accorded to magistrate determinations in warrant cases under an intermediate standard of appellate review is unclear. *Gates* does not answer this question, and it is unlikely that an intermediate standard of appellate review, between clearly erroneous and de novo, would consist of “great deference.” Moreover, if by using the words “substantial basis” the Supreme Court meant only that such a standard of review would encompass more deference than de novo, then the words “great deference” should not have been used in describing the standard.

As mentioned earlier, the adoption of substantial basis as an independent standard of appellate review creates not merely a derivative standard, but an entirely new one. In his concurring opinion in *McKinney*, Judge Posner described such a scheme as “confusing, unworkable, and unnecessary.” This description appears to have merit since the substantial basis standard of appellate review is to be composed of “great deference,” yet is also to be less deferential than the clearly erroneous standard of appellate review. The task of describing the precise contours of such a standard is indeed difficult. Moreover, it is questionable whether such a task would be

340. *United States v. McKinney*, 919 F.2d 405, 423 (7th Cir. 1990) (Posner, J., concurring). In an opinion subsequent to *McKinney*, Judge Posner elaborated on his frustration with this approach. *Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991). In *Morales*, Judge Posner stated that verbal differences in standards of review are “merely semantic,” and the only real standards of review are “plenary” and “deferential.” *Id.* Further, the amount of deference to be applied by an appellate court depended upon factors specific to each particular case, such as the nature of the issue and the evidence, rather than the verbal standard of review. *Id.* This Comment does not purport to address this argument and only examines the proper standard to review probable cause to search.
a worthwhile undertaking since none of the opinions in the Spears or McKinney decisions provided any situation in which a different result would be reached under the two standards of review. The vast rise in federal appellate caseloads over the past few years suggests that appellate judicial effort should be expended elsewhere. The use of substantial basis as an intermediate standard of appellate review in warrant cases adds further complexity to appellate review and would do little to change the result of most cases. Therefore, the clear error standard of review has far greater practical value than the substantial basis standard. The McKinney decision added uncertainty to the search warrant process, which the Gates decision was intended to resolve. This uncertainty was eliminated by the Spears decision, which overruled McKinney.

CONCLUSION

The effect of the McKinney decision was to affirm the use of a standard of appellate review of intermediate deference for a magistrate's probable cause determination in cases involving search warrants. Under McKinney, there were three standards that could be used to review probable cause to search, de novo, substantial basis, and clearly erroneous, each encompassing a different level of judi-

342. Judge Will did state that some cases would be decided differently under the two standards, but he declined to specify them. McKinney, 919 F.2d at 425 (Will, J., concurring).
343. A recent report by the Federal Courts Study Committee illustrates the huge increase in the caseload for federal appellate judges. In 1945, an average of 26 appeals were pending before each federal appellate judge. 2 Federal Courts Study Comm., Working Papers and Sub-Comm. Reports 2, 25 (1990). This number rose to 91 appeals pending per judgeship in 1970, and by 1989, there was an average of 192 appeals pending before each federal appellate judge. Id. Federal appellate judges decide cases in panels of three. Id. In 1965, each federal appellate judge participated in the disposition of an average of 136 cases while sitting on an appellate panel. Id. By 1989, this number had risen to 382 cases per federal appellate panel. Id. When divided by three, these numbers mean that each federal appellate judge terminated an average of 45 cases per year in 1965, while in 1989 each judge terminated an average of 127 cases per year. Id. at 26. The Committee found that this large rise in cases had not affected case processing times for federal appellate judges. For example, the median time for processing each appeal was a little over ten months in 1989, which was a few days less than that of 1980. Id. However, the Committee stated that the increase in caseload presented serious dangers to the judicial process. The large rise in federal appeals had decreased the percentage of cases that the Supreme Court was able to decide, thus increasing the significance of appellate court decisions. Id. at 27. With the increased caseload, these decisions could be written with less care and effort than previously. Id. Further, appellate judges who were not writing the opinion for the panel would spend less time scrutinizing the decision. Id.
344. In any event, the appellate panel was precluded from adopting a new standard of review in these situations because the U.S. Attorney's office had not argued for a change in the standard of review to the appellate court. McKinney, 919 F.2d at 427 (Will, J., concurring).
cial deference. However, the amount of deference to be used by an appellate judge when applying the substantial basis standard of review to a magistrate's decision to issue a search warrant is indeterminate; an appellate judge must apply "great deference" to the magistrate's decision, but it must not be so deferential as to apply clear error review. The magistrate's decision could have been reversed only when the appellate judge had a "definite and firm" belief that the magistrate had made a mistake. The appellate judge thus had very little guidance as to the degree of scrutiny to pay probable cause determinations by magistrates after McKinney. After Spears, the appellate judge applies only one standard, clear error, to review probable cause in both warrant and warrantless cases.

As discussed earlier, none of the opinions in McKinney stated any specific instances in which the use of the clearly erroneous standard of appellate review, rather than the substantial basis standard of appellate review, would lead to a different result in appellate court decisions. Thus, the real impact of the McKinney decision was to further complicate federal appellate judicial review in general, and the search warrant process in particular, for both judges and litigants in the Seventh Circuit. The impact of Spears was to eliminate the complications caused by McKinney and thus simplify search warrant jurisprudence in the Seventh Circuit.

Convicted defendants seeking to establish the invalidity of search warrants in their cases must argue on appeal that the magistrate's probable cause determination was erroneous, but before Spears, the defendants had little guidance as to how clearly the error must have been shown. They may have been more inclined to abandon this argument altogether if they believed that the evidence that demonstrates the error is weak or that other arguments were more likely to

345. Gates, 462 U.S. at 236.
347. See supra notes 32-35 and accompanying text.
348. Judge Posner's concurrence argued forcefully for a more deferential clearly erroneous standard to review probable cause to search. Under the clearly erroneous standard of review, adopted by the Seventh Circuit in Spears, appellate courts will be more inclined to affirm the issuance of search warrants by magistrates. United States v. McKinney, 919 F.2d 405, 419-20 (7th Cir. 1990) (Posner, J., concurring). The initial probable cause determination made by the magistrate will, therefore, have greater significance because such decisions would be less likely to be reversed. An intermediate standard of appellate review, however, creates less likelihood that the magistrate's determination will be affirmed on appeal because the appellate courts would pay less deference to the magistrate's findings. The magistrate's probable cause determination is less important, however, because of the Supreme Court's decision in United States v. Leon, 468 U.S. 897 (1984). See supra text accompanying notes 116-23.
result in a reversal of their convictions. Thus McKinney also served to reduce the practical effect of the Fourth Amendment protection afforded by a search warrant if defendants chose not to seek this protection when appealing their convictions. The Spears decision eliminated this effect.

Both the clearly erroneous standard and the intermediate substantial basis standard to review a magistrate’s determination of probable cause to issue a search warrant are supported by Supreme Court and federal appellate court precedent. Illinois v. Gates does not resolve the issue, and appellate courts have adopted both standards of review. The use of the clearly erroneous standard of review by appellate courts in other situations supports its use here. The clearly erroneous standard of review has greater practical value in warrant cases than the intermediate substantial basis standard because the substantial basis standard is difficult to define, complicates the search warrant process, and may discourage defendants from seeking Fourth Amendment protection. Therefore, the substantial basis test established by the Supreme Court in Gates for appellate review of a magistrate’s finding that probable cause to issue a search warrant existed should not be deemed an independent standard of review but, rather, should be equated with the clearly erroneous standard. Thus, the holding of the Seventh Circuit in United States v. Spears was correct.

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