State v. Reesman: Totality of the Circumstances Or a Recipe for Mulligan Stew?

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STATE V. REESMAN: TOTALITY OF THE CIRCUMSTANCES OR A RECIPE FOR MULLIGAN STEW?

James D. Johnson*

I. INTRODUCTION

The first Congress of the United States established the Fourth Amendment, which guarantees a citizen's rights against unreasonable searches. It specifies that a warrant authorizing a search will not be issued unless probable cause is established. To obtain a search warrant, law enforcement must submit an affidavit to a judicial magistrate specifying what incriminating evidence the officers expect to find and where they expect to find it. The officers must provide facts establishing probable cause

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2. See JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §1.1(g) (3d ed. 1999).

3. U.S. CONST. amend. IV.
that a crime has been or is currently being committed. If the magistrate determines information in the warrant application is sufficient to establish probable cause, he will issue the search warrant. When a warrant is issued, the defendant may file a motion to exclude the seized evidence for lack of probable cause.4

The use of informant tips is a key element in the warrant process. In the early era of informant jurisprudence, the U.S. Supreme Court followed the two-pronged Aguilar-Spinelli test. Under this test, the Court required a search warrant affidavit utilizing informant information to support both the informant's veracity and basis of knowledge in establishing probable cause.5 If the affidavit was insufficient to prove the informant's veracity and basis of knowledge, further police corroboration of the informant's tip was necessary.6

In Illinois v. Gates, the U.S. Supreme rejected the two-pronged test and adopted the "totality of the circumstances" approach for determining probable cause.7 Rejecting Aguilar-Spinelli's technical approach, the Court stated probable cause determination should not be broken down into a "neat set of legal rules."8 Montana adopted the Gates test in 1983 and has since consistently applied the test.9

In State v. Reesman,10 the Montana Supreme Court examined the state's post-Gates jurisprudence, specifically the use of informant tips. The court outlined some basic parameters and situations in which probable cause is established and where further police corroboration is required. First, the court determined that any anonymous tip used in establishing probable cause must be corroborated by law enforcement. Second, the court held that even if the informant is not anonymous, if the informant did not personally observe the alleged criminal activity, police corroboration is required. Third, the court determined even in the instance of an identified informant who witnessed the alleged criminal activity first-hand the informant must be reliable11 to establish probable cause.

Facially, the parameters established in Reesman appear

8. Id. at 232.
10. 2000 MT 243, 301 Mont. 408, 10 P.3d 83.
11. See infra Part III.C.1.
contradictory to the Gates language—a recipe for mulligan stew. The Montana Supreme Court, however, has further assured the state's citizens protection against unreasonable searches by instituting state constitutional safeguards. The decision gives guidance to law enforcement, judicial magistrates, and prosecutors to determine the degree of weight given to an informant's tip. Reesman merely takes some subjectivity out of the totality of the circumstances.

The first section of this note examines the U.S. Supreme Court's history of the use of informant tips for probable cause determination. The second section analyzes the recent jurisprudence of the Montana Supreme Court, specifically, the Court's application of the Montana State Constitution. The third section explains the facts, holding, and reasoning of Reesman. The fourth section addresses the police corroboration requirements from State v. Griggs and the recent application of Reesman. The fifth part examines the application of Gates in the fifty states. The final section of the note presents two hypothetical scenarios to analyze the practical consequences of Reesman.

II. THE USE OF INFORMANT TIPS UNDER THE FOURTH AMENDMENT

A. Hearsay and Probable Cause Tests Under the U.S. Supreme Court

The U.S. Supreme Court adopted the two-pronged test for probable cause determination in Aguilar v. Texas and Spinelli v. United States. This test required the search warrant affidavit to include facts about both the informant's veracity and basis of knowledge. The basis of knowledge requirement refers to the underlying factual circumstances of the informant's conclusion of criminal activity. In Aguilar, the Court noted that although an informant need not have direct personal observation of the alleged criminal activity, the magistrate must be aware of some of the underlying circumstances in order to
determine the credibility of the tip.\textsuperscript{17} The best way to satisfy the basis of knowledge prong is to show that the informant based his or her information on personal observation.\textsuperscript{18}

The veracity requirement refers to the credibility or reliability of the informant on the particular occasion of the alleged crime.\textsuperscript{19} A mere conclusion that the informant is credible is insufficient; reasons for believing the informant's credibility must be presented to the issuing magistrate.\textsuperscript{20}

The \textit{Spinelli} Court affirmed the \textit{Aguilar} holding and supplemented the probable cause standard. The Court noted that abundant detail may cure a deficiency in basis of knowledge\textsuperscript{21} and independent corroboration of details may cure a deficiency in the informant's reliability.\textsuperscript{22} The Court stated:

If the tip is found inadequate under \textit{Aguilar}, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in \textit{Aguilar} must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass \textit{Aguilar}'s tests without independent corroboration? . . . A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes \textit{Aguilar}'s requirements when standing alone.\textsuperscript{23}

The \textit{Spinelli} majority determined that a totality of the circumstances approach for determining probable cause “paints with too broad a brush” and “[w]here, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.”\textsuperscript{24}

Fourteen years later, in \textit{Illinois v. Gates}, the U.S. Supreme Court abandoned the \textit{Aguilar-Spinelli} two-prong test and instead recommended a totality of circumstances analysis.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. at 112.
  \item \textsuperscript{21} 393 U.S. at 416.
  \item \textsuperscript{22} Id. at 417.
  \item \textsuperscript{23} Id. at 415-16.
  \item \textsuperscript{24} Id. at 415.
  \item \textsuperscript{25} \textit{Gates}, 462 U.S. 213 (1983). Initially, the parties were instructed to include the good faith exception in their briefs. Id. at 217. The court decided not to address the good faith exception here, however in \textit{United States v. Leon}, just a few months later, the Court upheld the good faith exception. \textit{Leon}, 468 U.S. 897 (1984).
\end{itemize}
According to the Court, the task of the issuing magistrate is simply to make a practical, common-sense decision based on all of the circumstances set forth in the affidavit including the "veracity" and "basis of knowledge" of persons supplying hearsay information, that there is a fair probability that contraband or evidence of a crime will be found in a particular place. The Court stated veracity and reliability merely illuminate probable cause, and a deficiency in one can be compensated by strength in another.\(^{26}\) The Court also noted that informant tips, like other evidence, vary greatly in their value and reliability, and thus rigid legal rules are ill-suited to an area of such diversity.\(^{27}\)

Under *Gates*, the issuing magistrate's determination of probable cause is given greater discretion than under *Aguilar-Spinelli*.

In *Gates*, law enforcement received a letter from an anonymous informant alleging the defendants were trafficking drugs from Florida. The letter predicted Susan Gates would drive to Florida on May 3rd.\(^{28}\) Thereafter, Lance Gates would fly to Florida and drive the car back to Illinois with a large quantity of drugs.\(^{29}\) The informant's letter lacked any indication of how the informant knew about the Gates' illegal activities. Law enforcement corroborated the tip and verified the predicted activity from the letter. Law enforcement obtained a search warrant and seized 350 pounds of marijuana.\(^{30}\)

The Illinois Supreme Court determined the two-pronged test for probable cause had not been satisfied. The Court, recognizing that law enforcement corroboration of the informant's tip might cure a deficiency in the two-pronged test, nevertheless held that the investigation only revealed innocent activity.\(^{31}\) Thus, the Court held that probable cause had not been established.

On appeal, the U.S. Supreme Court identified two major flaws in the *Aguilar-Spinelli* framework. First, because courts and commentators generally regarded the two prongs of the test as independent of each other, courts had struggled to formulate rules regarding what type of information and corroboration might satisfy each of the prongs.\(^{32}\) The second principal flaw in

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27. *Id.* at 232 (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)).
28. *Id.* at 225.
29. *Id.*
30. *Id.* at 226-27.
31. *Id.* at 228-30.
the application of *Aguilar-Spinelli* was that the test had caused reviewing courts, both at suppression hearings and on appeal, to test the sufficiency of warrant affidavits by *de novo* review. Such review, in the eyes of the *Gates* majority, was inconsistent with the Constitution's "strong preference for searches conducted pursuant to a warrant." A reviewing court should determine whether the magistrate issuing the warrant had a "substantial basis" for concluding that a search would reveal evidence of criminal activity.

The *Gates* Court gave other reasons for rejecting the two prong test. Sheriffs and police officers often draft search warrants. A complex test requiring analytical and evidentiary rules would be inappropriate for laymen. *Aguilar-Spinelli*, when rigidly applied, could serve to discourage law enforcement from pursuing search warrants and result in an increase in warrantless searches. Furthermore, the continued application of the two-pronged test would virtually bar the use of anonymous informants and hinder the government's protection of its citizenry.

In his concurrence, Justice White argued that, although the *Aguilar-Spinelli* test had often been applied too rigidly, it should not be abandoned. In his view, the rules concerning police corroboration were critical. White noted that the confirmation of the predicted activity by the police gave rise to the inference that the incriminating information given by the informant was correct. Thus, Justice White concluded that under the *Aguilar-Spinelli* test, the police corroboration in *Gates* was sufficient to establish probable cause.

**B. Recent Decisions under the Reasonable Suspicion Standard—Alabama v. White* and Florida v. J.L.*

In *Alabama v. White*, the post-*Gates* U.S. Supreme Court addressed the issue of anonymous informants to determine

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33. *Id.* at 236.
34. 462 U.S. at 236.
35. *Id.*
36. *Id.* at 235-36.
37. *Id.* at 236.
38. *Id.* at 237.
39. *Id.* at 267.
42. 529 U.S. 266 (2000).
reasonable suspicion. Reasonable suspicion is a lesser evidentiary standard than probable cause. However, the same issues of concern in determining probable cause, such as an informant’s veracity and basis of knowledge, are also relevant in establishing reasonable suspicion. In White, law enforcement received an anonymous tip that the defendant would be at the Lynwood Terrace Apartments at a particular time in a brown station wagon with a broken taillight. The informant predicted that White would drive to a particular motel. The informant also stated White would be in possession of an ounce of cocaine in a brown attaché case. Law enforcement investigated the tip and confirmed the predicted activity. The police pulled the woman over and, upon consent, searched the vehicle. They seized marijuana and three milligrams of cocaine in a brown attaché bag.

On appeal, the U.S. Supreme Court noted that veracity, reliability, and basis knowledge are relevant in the reasonable suspicion context, although allowances must be made in applying them for the lesser showing required to demonstrate reasonable suspicion. Even though the police corroboration in this case was not as complete as it was in Gates, the confirmation of the future behavior was sufficient to justify the stop. The Court held that the anonymous tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop of the defendant’s vehicle.

In Florida v. J.L., an officer received information from an anonymous informant that there was a black man wearing a plaid shirt at a bus stop who was in possession of a gun. This officer later spotted a man at a bus stop who matched that description. The officers patted him down and found a gun. The Florida Supreme Court held the search invalid under the Fourth Amendment because the anonymous tip lacked any

44. White, 496 U.S. at 327.
45. Id.
46. Id. at 328-29.
47. Id. at 332.
48. Id.
49. J.L., 529 U.S. at 268.
50. Id.
indicia of reliability. On appeal, the U.S. Supreme Court distinguished *J.L.* from *White*. In *J.L.*, the anonymous tip provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. The Court held that an anonymous tip lacking indicia of reliability does not justify a stop and frisk.

Thus, a major focus in U.S. Supreme Court cases dealing with anonymous tips is the confirmation of future activity. In *Gates*, as in *White*, the case turned on the police confirmation of the informant's prediction of criminal activity. In *Florida v. J.L.*, however, the anonymous tip lacked any prediction of criminal action, and therefore verifying the informant's reliability was impossible.

III. PROBABLE CAUSE DETERMINATION IN MONTANA AND APPLICATION OF THE STATE CONSTITUTION

Montana first adopted the two-pronged *Aguilar-Spinelli* test in *State ex. rel. Townsend v. District Court*. In *State v. Kelly*, however, Montana adopted the "totality of circumstances" test without officially overruling or abandoning the two-pronged test. In *State v. Erler*, the court held the search warrant valid under the *Aguilar* test and therefore did not apply the "less stringent" *Gates* test. In *State v. O'Neill*, the court borrowed more language from *Gates*, referring to its totality of circumstances test and the appellate review in probable cause cases; the language of *Aguilar* was less apparent in *O'Neill*. In *State v. Hendrickson*, the Court finally officially abandoned *Aguilar*, echoing the United States Supreme Court's holding, that it was "wiser to abandon the two-pronged test" and apply the totality of the circumstances test. Notably, however, the court never examined the *Gates* test under the Montana State Constitution.

In the mid-1980's, the Montana Supreme Court first applied

52. *J.L.*, 529 U.S. at 274.
53. *Id.*
58. *O'Neill*, 208 Mont. at 396, 679 P.2d at 765. It should also be noted that the Court continues to cite to *Aguilar* on this same issue.
the state constitution independent of the federal model. In *Butte Community Union v. Lewis* the court noted: "We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution." In *State v. Sierra*, the court wrote:

>[as] long as we guarantee the minimum rights guaranteed by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution. 61

Shortly thereafter the court interpreted the state constitution as giving citizens broader protection than the Fifth Amendment of the U.S. Constitution. 62

Recently the Montana Supreme Court has applied both the state's constitutional privacy provision 63 and the state's constitutional search and seizure provision 64 to give Montanans broader protection than the federal counterpart. In *State v. Bullock*, the court held that the right to privacy disallows federal "open fields" search as an exception to the warrant requirement. 65 The court asserted that: "states are free to grant citizens greater protections based on state constitutional provisions than the United States Supreme Court divines from the United States Constitution." 66 In *State v. Hardaway*, the Montana Supreme Court held that the right to privacy disallows swabbing blood samples from hands of an arrestee as a warrantless search incident to lawful arrest. 67 The right to

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60. 219 Mont. 426, 433, 712 P.2d 1309, 1313 (1986).
63. MONT CONST. art II, § 10. The provision reads: "Right to Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."
64. MONT. CONST. art II, § 11. The provision reads:
   Searches and Seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.
67. 2001 MT 252, ¶ 58, 307 Mont. 139, ¶ 58, 38 P.3d 900, ¶ 58.
privacy also negated the federal automobile exception to the warrant requirement.\textsuperscript{68} The right to privacy has also been applied in other areas of law as well.\textsuperscript{69}

Although the Montana Supreme Court has begun to breathe life into article II, section 10, it has not been willing to overturn the adoption of the \textit{Gates}. Washington, which Montana has previously looked to in interpreting article II, section 10,\textsuperscript{70} rejected \textit{Gates} under its own hybrid search and seizure/privacy provision.\textsuperscript{71} Three other states have also chosen to continue to follow \textit{Aguilar-Spinelli} because of broader state constitutional protection.\textsuperscript{72} Montana has referred to its own privacy provision as the "cornerstone of protections against unreasonable searches and seizures."\textsuperscript{73} This protection, however, has yet to extend to the \textit{Aguilar-Spinelli} mandate.

\textbf{IV. \textsc{State v. Reesman}}

\textbf{A. The Facts}

On November 28, 1995, Detective Don Hansen received information from a confidential informant who had allegedly witnessed a variety of drug activity at a trailer home in Big Sky, Montana.\textsuperscript{74} The confidential informant stated that a person named "Brent Hoge," or "Beau Dylan Hogge," had shown the informant live marijuana plants, drying marijuana buds and

\begin{itemize}
  \item \textsuperscript{68} State v. Elison, 2000 MT 288, ¶ 46, 302 Mont. 228, ¶ 46, 14 P.3d 456, ¶ 46.
  \item \textsuperscript{69} See \textit{e.g.} State v. Nelson, 283 Mont. 231, 941 P.2d 441 (1997) (The right to privacy disallows unauthorized access to personal medical records without a subpoena); \textit{Gryczan} v. \textit{State}, 283 Mont. 433, 942 P.2d 112 (1997) (The right of consenting adults to engage in private, non-commercial sexual conduct strikes at the very core of Montana's constitutional right of individual privacy; and, absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny).
  \item \textsuperscript{71} State v. Jackson, 688 P.2d 136, 143 (Wash. 1984)
  \item \textsuperscript{72} See Supra, note 157.
  \item \textsuperscript{73} State v. Solis, 214 Mont. 310, 319, 693 P.2d 518, 522-23 (1984).
  \item \textsuperscript{74} State v. \textit{Reesman}, 2000 MT 243, ¶¶ 6-7, 301 Mont. 408, ¶¶ 6-7, 10 P.3d 83, ¶¶ 6-7.
\end{itemize}
illegal mushroom spores during the weekend of October 28th.\(^7\)

The warrant application provided no testimony concerning the informant's past reliability.\(^6\)

The warrant application also stated that an anonymous informant contacted Detective Hansen about the same residence. According to the warrant application, this anonymous citizen, who had supposedly given reliable information in the past, told Hansen that marijuana had been growing at this residence for over a year.\(^7\)

Hansen's warrant application, however, was silent about the anonymous informant's basis of knowledge.\(^8\)

On November 30, 1995, Hansen requested and obtained a search warrant for the trailer located in Big Sky.\(^9\) That same day Hansen searched the trailer and seized more than one hundred hits of LSD.\(^10\) On July 12, 1996, the State charged Reesman with criminal possession of dangerous drugs with intent to sell and criminal possession of drug paraphernalia.\(^1\)

On May 22, 1998, nearly two and half years after the search, Reesman moved to suppress the drug evidence.\(^2\) Reesman argued the search of the entire trailer was overbroad and that the search warrant lacked probable cause.\(^3\) In July of 1998, the district court denied Reesman's motion, reasoning the corroboration of the confidential informant's tip by the anonymous informant weighed heavily in favor of the confidential informant's reliability and was sufficient to establish probable cause.\(^4\)

\section*{B. Holding}

The Montana Supreme Court reversed the district court, holding the search warrant insufficient to establish probable cause. The confidential informant's report, which contained detailed information concerning the informant's basis of knowledge, nevertheless lacked any testimony concerning her

\begin{itemize}
  \item \(^7\) Id., \S\ 7.
  \item \(^8\) Id., \S\ 6, \S\ 8.
  \item \(^9\) Id., \S\ 8.
  \item \(^10\) Id.
  \item \(^1\) Reesman, \S\ 10.
  \item \(^2\) Id., \S\ 12.
  \item \(^3\) Reesman, \S\ 16, 301 Mont. 408 at \S\ 13, 10 P.3d 83 at \S\ 13.
  \item \(^4\) Id., \S\ 10.
  \item \(^5\) Id. \S\ 15.
\end{itemize}
veracity or reliability and therefore police corroboration of the tip was required. The state's attempt to corroborate the confidential informant tip with the anonymous informant's tip failed; a source of information that requires further corroboration cannot meet that requirement by a source which also requires further corroboration.\textsuperscript{85} Accordingly, the court held that the search warrant lacked probable cause and the district court had erred in denying Reesman's motion to suppress.

\textbf{C. Reasoning}

\textit{1. The Majority Opinion}

Essentially, the issue before the court boiled down to whether the anonymous informant's tip, combined with the information from the confidential informant, was sufficient to establish probable cause. Montana Code Annotated Section 46-5-221, which codifies state constitutional search and seizure protection, requires an application for a search warrant to contain facts sufficient to show probable cause for the issuance of the warrant. The court followed the \textit{Gates} totality of circumstances test. According to the \textit{Gates} test, a magistrate must look within the four corners of a search warrant and make a practical, common-sense decision to determine whether a crime has been committed and whether there is a fair probability that in-crminating items will be found.\textsuperscript{86}

Noting that the \textit{Gates} test rejects "any rigid demand that specific tests be satisfied by every informant's tip," the majority determined that seventeen years of post-\textit{Gates} precedent established a "fairly uniform equation for determining whether an informant's statements, without further law enforcement corroboration or investigation, are sufficient to establish probable cause."\textsuperscript{87}

The first part of the majority's equation focused on the anonymous informant. A Crimestopper's tip is a common example of information provided by an anonymous informant. Echoing its decision in \textit{State v. Rinehart}, the court noted that "corroboration of an informant's information through other sources is necessary when the information is hearsay or the

\textsuperscript{85} Id. ¶ 46-47.
\textsuperscript{86} Id. ¶ 24.
\textsuperscript{87} Id. ¶ 27.
informant is anonymous." 88 According to the court, an issuing magistrate has no way to determine the veracity or reliability of an anonymous informant tip and therefore additional police corroboration of an anonymous tip is mandatory to establish probable cause.

The court next focused on personal observation. If the informant is not anonymous, a second threshold question arises: is the informant's information based on first-hand personal observation? If the answer is no, further police corroboration is always required. 89 The court cited to Rinehart, noting "an informant's personal observation of criminal activity does not constitute hearsay evidence." 90 In State v. Kaluza, the court concluded that the lack of reference to personal observation or personal knowledge of an informant's information made the tip worthless. 91 Finally, in State v. Wilson, the court found that the informant's "bare assertion" of personal observation of marijuana growing in defendant's home was deficient because of lack of specificity in describing the interior of the house and the location of the growing operation. 92

The court's third threshold question concerned informant reliability. The court created three levels of reliability for analysis purposes: 1) the confidential informant (C.I.); 2) the admission against interest; and 3) the concerned citizen. For the C.I. to be deemed reliable, the informant must have provided reliable and accurate information in the past. 93 An affirmation by the applying law enforcement officer that the C.I. has provided reliable information in the past is sufficient to satisfy this qualification. The court cited to Kaluza, in which a sworn statement by a law officer that an informant had been previously reliable and provided accurate information was sufficient to deem the informant reliable. 94 The court also cited to State v. Walston, noting that "information of a criminal activity known from observation by a previously reliable informant... is sufficient to establish the probability of criminal

88. Reesman, 2000 MT 243 at ¶ 28, 301 Mont. 408 at ¶ 28, 10 P.3d 83 at ¶ 28 (citing Rinehart, 262 Mont. 204, 211-12, 864 P.2d 1219, 1223-24 (1993)).
89. Id. ¶¶ 29-30.
90. Id. ¶ 29 (citing Rinehart, 262 Mont. at 212, 864 P.2d at 1224).
91. Id. (citing State v. Kaluza, 272 Mont. 404, 411, 901 P.2d 107, 111 (1995)).
92. Id. (citing State v. Wilson, 254 Mont. 317, 319, 837 P.2d 1346, 1347 (1992)).
93. Id. ¶ 32.
94. Reesman, 2000 MT 243 at ¶ 32, 301 Mont. 408 at ¶ 32, 10 P.3d 83 at ¶ 32 (citing Kaluza, 272 Mont. at 410, 901 P.2d at 111).
activity without investigation and verification of the reported information." 95 Thus, corroboration of a C.I.'s tip is not required when an affirmation of past reliability is given.

A second scenario examined was the admission against interest. An admission against interest generally establishes reliability and thus requires no further corroboration by law enforcement. 96 In State v. Adams, the court held that an admission of participation in a marijuana growing operation, without any further corroboration, was sufficient to provide a basis for probable cause determination. 97

The court's third common scenario concerned reports motivated by "good citizenship." 98 Generally, the reporting of incriminating information motivated by good citizenship is deemed reliable. 99 The underlying circumstances of the report itself tend to determine whether the report is motivated by good citizenship. 100 The court cited State v. Valley, in which it had concluded that although a citizen informant is presumed reliable, this is not a per se presumption. 101

Applying these parameters to the scenario in Reesman, the court first determined that the confidential informant's report satisfied the first two threshold questions; the informant was not anonymous and the informant's knowledge was based on first-hand personal observation. The lack of any indication of the C.I.'s reliability, however, made further police corroboration mandatory in this case.

The final section of the court's decision focused on the quantity and quality of police corroboration required when the tip alone does not establish probable cause. The State argued corroboration of the confidential informant's tip by the anonymous informant was sufficient to establish probable cause. The court began its analysis stating: "as an underlying general rule, further independent corroboration or investigation by law enforcement personnel is the panacea for most warrant

95. Id. (citing State v. Walston, 236 Mont. 218, 223, 768 P.2d 1387, 1390 (1989)).
96. Id. ¶ 33.
97. Id. (citing State v. Adams, 284 Mont. 25, 37, 943 P.2d 955, 962 (1997) ("admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search") (quoting United States v. Harris, 403 U.S. 573 (1971))).
98. Id. ¶ 34.
99. Id.
100. Reesman, 2000 MT 243 at ¶ 34, 301 Mont. 408 at ¶ 34, 10 P.3d 83 at ¶ 34.
applications where information is supplied by an informant."102 The majority cited several Montana cases involving action taken by law enforcement to corroborate the tips given by the informants.103 Furthermore, the court adopted language from Gates stating the value of "corroboration of details of an informant's tip by independent police work establish[es] 'substantial basis for crediting the hearsay.'"104

Applying the law to the facts of this case, the Montana Supreme Court held that the tip from the anonymous informant "provides no indicia of reliability of a citizen informant in terms of personal observation, or the circumstances under which the person made his or her personal observations."105 Thus, the anonymous tip added nothing to the warrant as a whole and therefore, probable cause was not established.

2. The Concurring and Dissenting Opinions

Not all of the Justices on the court were willing to adopt the full majority opinion. Justice Regnier's concurrence focused on the police corroboration requirements. Justice Regnier argued the court's conclusion, that corroboration must be accomplished through "police investigation," was too restrictive.106 Justice Regnier also advised law enforcement:

A sufficient warrant application should always detail both how the officer acquired the information giving rise to probable cause, and, if the officer is relying on an informant, how the informant acquired his or her knowledge and circumstances which would indicate that the informant's report is worth crediting. For instance, as noted by the majority, Detective Hanson could have indicated how the confidential informant happened to be in the trailer home and this may have provided the judge with grounds for crediting the veracity of the confidential informant's report.107

Justice Regnier still found the information given in the warrant too conclusive and insufficient to establish probable cause.108

In an opinion somewhat analogous to a reply brief, Justice

102. Reesman, 2000 MT 243 at ¶ 43, 301 Mont. 408 at ¶ 43, 10 P.3d 83 at ¶ 43.
103. Id. ¶ 48.
104. Id. ¶ 44 (citing Gates, 462 U.S. at 241-42).
105. Id. ¶ 47.
106. Id. ¶ 49. According to Justice Regnier, the Court's conclusion that corroboration must be accomplished through "police investigation" is too restrictive. Id.
107. Id. ¶ 66.
Nelson dissented, in part, to the majority opinion he authored. Justice Nelson was well-prepared to reply to his concurring justices. He asked: “what other kind of corroboration exists, besides corroboration by police investigation?” Justice Nelson noted the concurring justices failed to provide any other examples of corroboration.

V. POST-REESMAN DEVELOPMENTS

A. Indicia of Criminal Activity—State v. Griggs

In Reesman, the court established a formula for determining whether an informant’s report is sufficient to establish probable cause. A question remained, however, as to what amount of corroboration is required to establish probable cause when the informant’s tip alone is insufficient. State v. Griggs addressed the corroboration requirements for informant tips that alone could not fulfill the requirements for probable cause.110 In Griggs, the Gallatin County Sheriff’s Department received an anonymous informant’s tip reporting an operation for growing illegal hallucinogenic mushrooms.111 The anonymous informant stated he had witnessed the operation first-hand one month earlier.112 The anonymous informant also gave a description of the residence, the make of a truck, and the name of the alleged criminal. The sheriff’s department confirmed parts of the tip by driving by the residence and checking the name Griggs in the phonebook. 113 The magistrate issued a warrant for a search of the residence and the police seized illegal drugs.114 Griggs filed a motion to exclude the seized evidence for lack of probable cause.115 The district court determined the corroboration, merely verifying the innocent details of Griggs’ truck and residence did not meet probable cause requirements.116

On appeal, the Montana Supreme Court affirmed the lower court’s decision. The Court determined that sufficient corroboration must consist of more than merely innocent public

109. Id. ¶ 70.
111. Griggs, 2001 MT 211 at ¶¶ 6, 8, 306 Mont. 366 at ¶¶ 6, 8, 34 P.3d 101 at ¶¶ 6, 8.
112. Id.
113. Id. ¶ 7.
114. Id. ¶ 13
115. Id. ¶ 15
information. Law enforcement corroboration of an anonymous tip, required under the Reesman paradigm, must reveal indicia of human conduct, which becomes suspicious in conjunction with the incriminating information in the anonymous tip. "The necessary indicia of suspicion resulting from police corroboration of otherwise innocent information must reveal a pattern of human behavior associated with the alleged criminal activity, or activities which, when viewed as a whole, are consistent with the alleged criminal activity."

Justice Rice, who was not on the court for the Reesman decision, expressed his displeasure with the holding in Griggs. In his concurrence Rice cited to Gates, stating although he admitted that the Reesman framework was helpful in determining probable cause, he felt that the decision was too far a divergence from Gates. "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. By definition, there cannot be a precise recipe for Mulligan Stew."

B. Sufficient Corroboration? State v. Gray and Hauge v. Dist. Court

The court first applied Reesman and Griggs in State v. Gray, emphasizing the indicia of suspicion requirement. In Gray, the court found the innocuous details of the defendant's name and description insufficient for adequate corroboration. However, the search warrant also listed other facts, including 1) a criminal history of drug convictions; 2) "known drug user" traffic at the residence; and 3) inordinately high power consumption at the residence. The court determined the facts taken as a whole were sufficient to establish probable cause.

In Hauge v. Dist. Court, the court emphasized that innocent

117. Id. ¶ 50.
118. Id.
120. Id. ¶¶ 57-58.
121. Id. ¶ 57.
122. 2001 MT 250, 307 Mont. 124, 38 P.3d 775.
125. Id. ¶ 20.
126. Id. ¶ 21.
127. Id.
details of the informant's tip must raise an issue of criminal activity in order to provide adequate police corroboration. The Hauge Court concluded the officer adequately corroborated the tip by viewing the house on three separate occasions. The officer's observations revealed a pattern of short-term visits to residences by known drug users. The officer also contacted a neighbor who had complained of drug activity and high traffic patterns.

The "indicia of criminal activity" rule from Griggs, as applied in Gray and Hauge is not overly restrictive. Both cases considered a combination of facts raising an indication of criminal activity. Although the scope of the Griggs rule was not clearly defined in Gray or Hauge, basic contours and parameters have developed. The Griggs Court suggested that facts such as prior convictions related to the alleged criminal activity, would be sufficient to fulfill the police corroboration requirement. Facts indicating the existence of drug activity such as "traffic" and supplies or cultivation information are also highly relevant. Nevertheless, hearsay, which is not specifically related to alleged criminal activity, is irrelevant.

One could argue that in Montana the "common sense practical" language echoed in Gates now applies to the magistrate's decision on the sufficiency of the police corroboration. If law enforcement's investigation uncovers an indication of criminal activity, an informant's lack of prior reliability or first-hand basis of knowledge may not matter.

On the one hand, the court has protected Montana citizens' individual rights by enunciating the minimum requirements to establish probable cause. By the same token, the court has also handicapped law enforcement by greatly diminishing the weight given to an anonymous informant's tip. Nevertheless, the gray area for probable cause determination is narrowed. The next question though, is whether police investigation that uncovers slight indicia of suspicion would be sufficient police corroboration.

129. Id.
130. Id.
132. Id.
133. Id. ¶ 41.
C. The Citizen Informant—State v. Martinez and State v.
Olson

Many of the same criteria for determining probable cause are also used for determining reasonable or particularized suspicion. In Martinez, the Montana Supreme Court shed some light on the area of citizen informants. According to the court, factors such as prior convictions and unclear motivations can affect the status of an informant in determining whether to classify the informant as citizen or as confidential informant. This in turn will affect the deference of reliability given to the informant.

In Martinez, the court concluded that the motivation for an informant’s report was questionable because of her prior criminal convictions. In light of the informant’s questionable motivation, her reliability too was questionable, and as such, further police corroboration of the informant’s tip was necessary to establish reasonable suspicion of criminal activity.

The Montana Supreme Court also dealt with the citizen informant in State v. Olson. In Olson, Mike Smith contacted law enforcement regarding a possible methamphetamine operation on his wife’s property in Great Falls. Smith stated that while he was retrieving items from his wife’s garage he had observed tubing, mason jars, and coffee filters connected together, along with the smell of anhydrous ammonia. He also alleged that he spoken with a man in the garage who asked him “to keep this cool, now, right?” Law enforcement observed the residence and observed people moving items from the garage and into a vehicle. Police subsequently stopped a vehicle, which was registered to Sharon Olson, and Olson admitted that methamphetamine equipment was in her car. The police obtained a search warrant and seized equipment used to manufacture methamphetamine. Olson filed a motion to exclude the seized

134. 2003 MT 65, 314 Mont. 434, 67 P.3d 207.
138. Id. ¶¶ 56-58.
139. Olson, 2003 MT 61 at ¶ 6, 314 Mont. 402 at ¶ 6, 66 P.3d 297 at ¶ 6.
140. Id.
141. Id.
142. Olson, 2003 MT 61 at ¶ 8, 314 Mont. 402 at ¶ 8, 66 P.3d 297 at ¶ 8.
evidence, which the district court denied.143

On appeal, Olson argued that the search warrant for her vehicle lacked probable cause. The Montana Supreme Court applied the Reesman test to determine whether the informant's tip was sufficient to establish probable cause.144 Since the informant was not anonymous and witnessed the alleged criminal activity first-hand, the only issue was whether the informant could be deemed reliable. The district court determined that the informant had immediately reported the alleged criminal activity and therefore qualified as a "concerned citizen, motivated by 'good citizenship.'"145 The Supreme Court upheld the district court's conclusion, noting that although there was evidence of a strained relationship between the informant and his wife, it was not sufficient to overcome the presumption that he acted as a good citizen.146

The concerned citizen concept still appears to be evolving,147 but Martinez and Olson identify relevant factors. In Martinez, the court focused on the informant's prior criminal conviction and concluded the informant's motivation was questionable. Olson focused on the timeliness of the informant's report. Although there were reasons to question the informant's motivation, the fact that he contacted law enforcement immediately after he witnessed the drug operation was sufficient to deem him reliable.

VI. THE APPLICATION OF GATES IN STATE COURTS

An intriguing phenomenon occurs in law in that nearly identical factual scenarios can result in opposite results. Many state courts will take different approaches to the same issue, applying or disregarding various legal doctrines, and thus reaching different results. A good example of this is the states' application of the Fourth Amendment's prophylactic remedy of the exclusionary rule. The United States Supreme Court in Mapp v. Ohio held the exclusionary rule, which excludes

143. Id. ¶¶ 9-10.
144. Id. ¶¶ 25-27.
145. Id. ¶ 27.
146. Id.
illegally seized evidence, applies to the states. Although the states must recognize the exclusionary rule, each state is free to interpret its own constitution, statutes, and common law to guide it in determining whether to afford its citizens broader protections than the U.S. Constitution. Because of this federalism dichotomy, the courts of each individual jurisdiction can choose which exceptions to the exclusionary rule to apply. Unconstitutionally seized evidence, which will be excluded in jurisdiction A, (because it chose not to recognize the "good faith" exception), may well be admissible in jurisdiction B. The effects of the exclusionary remedy can be tremendous.

State constitutional provisions, statutes, and common law allow state courts to determine whether to follow the minimum requirement for constitutional rights tests developed by the U.S. Supreme Court or to afford their citizens more protection. The Fourth Amendment provides the minimum requirements for establishing probable cause for search and seizure. Some state constitutions, however, provide greater protection than the Fourth Amendment. Moreover, a state court case decided under the state's own constitution is not subject to judicial review by the United States Supreme Court.

Forty-two states have adopted the Gates test. Many of

152. The United States Supreme Court reversed the Montana Supreme Court in Montana v. Egelhoff. 518 U.S. 37 (1996). In Egelhoff, the Montana Supreme Court held that there was an intoxication defense under the Fourth Amendment. Id. at 41. The U.S. Supreme Court held that the fourth amendment provided no intoxication defense. Id. at 56. If, however, the Montana Supreme Court had held the decision under the Montana State Constitution, it would not have faced federal judicial review.
these states borrowed the language directly from *Gates* and set it into precedent. Scholars have argued that a second layer of constitutional rights via the states is necessary to protect the citizenry.\(^{154}\) Some states choose only one layer. Florida’s state constitutional search and seizure provision requires the state’s courts to follow lock-step the U.S. Supreme Court’s interpretation of the Fourth Amendment.\(^{155}\) Florida’s approach provides a legal certainty to the interpretation of state’s search and seizure provision, but affords no added protection beyond the Fourth Amendment.

Eight of the fifty states continue to apply the two-pronged *Aguilar-Spinelli* test.\(^{156}\) Of the eight, Alaska, Hawaii, Massachusetts, New Mexico, New York, Tennessee, and Washington continue to apply *Aguilar-Spinelli* under broader state constitutional provisions.\(^{157}\) Of those seven states, Alaska, Massachusetts, and Washington have rejected the *Gates* test under broader state constitutional privacy rights. Hawaii’s privacy provision requires *de novo* appellette review of all probable cause determinations.\(^{158}\) Oregon has codified the two-pronged test into state law.\(^{159}\)

In *State v. Jones*, the Alaska Supreme Court concluded that the *Gates* approach failed to provide adequate protection under

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\(^{155}\) See FLA. CONST. art. I, § 12 (1982) (“This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”).


\(^{158}\) State v. Navas, 913 P.2d. 39 (Haw. 1996)

\(^{159}\) OR. REV. STAT. § 133.545 (2001).
the state constitution search and seizure provision.\footnote{706 P.2d 317, 324 (Alaska 1985).} According to the \textit{Jones} Court, diverging from the federal model was justified under the broader protection afforded to Alaska's citizens via the state's constitutional privacy provision.\footnote{Id.}

In \textit{State v. Jackson}, the Washington Supreme Court considered whether to adopt the \textit{Gates} test.\footnote{688 P.2d 136 (Wash. 1984).} The \textit{Jackson} Court focused on whether the \textit{Gates} test provided adequate protection to the state's citizens under article I, section 7 of the Washington State Constitution.\footnote{The provision reads: "No person shall be disturbed in his private affairs, his home invaded, without authority of law." This provision adopts elements of both privacy and search and seizure.} It found many of the reasons the U.S. Supreme Court offered in abandoning the two-prong test unpersuasive. The \textit{Jackson} Court concluded \textit{Gates} "lacks sufficient specificity and analytical structure to adequately inform magistrates as to the appropriate standards required to protect the right of privacy secured by Const. Art 1, § 7."\footnote{Jackson, 688 P.2d at 143.}

Other states have wavered in determining whether to adopt \textit{Gates}. For example, in \textit{State v. Kimbro}, the Connecticut Supreme Court originally rejected \textit{Gates}.\footnote{496 A.2d 498, 507 (Conn. 1985).} Six years later in \textit{State v. Barton}, the court overruled \textit{Kimbro}.\footnote{594 A.2d 917, 926-27 (Conn. 1991).} Similarly, the Oklahoma Supreme Court also originally rejected \textit{Gates} under the state constitution and then overruled itself two years later.\footnote{Originally the Oklahoma Criminal Appellate Court determined the state constitution mandated the \textit{Aguilar-Spinelli} test. \textit{Merry v. State}, 766 P.2d 1377, 1379 (Okla. Crim. App. 1988). Two years later the Court held that the \textit{Gates} test was more "practical." \textit{Langham v. State}, 787 P.2d 1279, 1280-81 (Okla. Crim. App. 1990).}

Even though most state courts adhere to \textit{Gates}, the application of the test can vary. The test is subjective in form and state courts can reach different results on substantially similar facts. Although basis of knowledge, veracity, and police corroboration are all highly relevant factors in the probable cause analysis, different states may give varying weight to each of these factors. Compare the fact pattern in \textit{Griggs} with the similar facts of \textit{State v. Berry}.\footnote{801 S.W.2d 64 (Mo. 1990).} In \textit{Berry}, an anonymous informant reported that the defendants, a married couple, were
in possession of illegal drugs.\textsuperscript{169} The tip also gave non-criminal facts about the Berrys, such as a description of their home, automobile, and items on the property. The deputy was able to corroborate all of the non-criminal facts and obtained a search warrant. The Missouri Supreme Court (\textit{en banc}) upheld the magistrate's probable cause determination. The \textit{Berry} Court focused on the anonymous caller's first hand observation of the marijuana, which established a strong basis of knowledge. Based on the strong basis of knowledge and the corroborative efforts of the law enforcement, which helped confirm the informant's veracity, the Missouri Supreme Court held a magistrate could make a practical common sense decision that probable cause existed.\textsuperscript{170}

Although both Montana and Missouri follow the \textit{Gates} test, the Missouri Supreme Court took a different approach to probable cause determination. In \textit{Berry}, strong weight was given to the anonymous informant's basis of knowledge. The \textit{Reesman} requirements, however, made the anonymous informant's firsthand observation in \textit{Griggs} meaningless. The lack of veracity of an anonymous informant's tip was dispositive and basis of knowledge was not considered. The Missouri Supreme Court was not constrained by \textit{Reesman}'s technical rules for determining probable cause.

\textbf{VII. HYPOTHETICAL SCENARIOS}

In this section I present two hypothetical scenarios in an attempt to analyze the application of the \textit{Reesman} paradigm, as well as the police corroboration requirements from \textit{Griggs}. Each scenario examines the likelihood of a probable cause determination. I realize many criminal investigations are complex and involve a large number of facts. The facts in these scenarios are simplified merely to demonstrate the test's application. Assume that all of the following facts are true, sworn to, and listed in the search warrant affidavit.\textsuperscript{171}

\textit{Scenario 1:} Confidential Informant 10-9000 reports to local law enforcement that John Doe at 350 Red Deer Road in Shelby, MT is selling methamphetamines out of his house. The informant de-

\textsuperscript{169} Id. at 64.
\textsuperscript{170} Id. at 67.
\textsuperscript{171} For the sake of the reader (and the author), sub-facial warrant challenges will not be addressed. For an excellent examination of this issue in Montana, see Peter William Mickelson, \textit{Good Riddance to Good Faith?: Deciphering Montana's New Text for Subfacial Challenges to Search Warrant Affidavits}, 62 MONT. L. REV. 175 (2001).
scribes to the officers the exterior of the residence and the vehicles at the residence. The search warrant affidavit states the informant witnessed the sale of drugs first-hand. It also states that the informant has provided reliable information in the past. Local law enforcement found the name “John Doe” in the phonebook and his residence matched the address given by the informant. The officer is unable to determine any criminal activity by Mr. Doe in the past. The officer then drives by the residence and confirms the description of the residence given by the informant.

In this scenario, a magistrate would most likely determine that there is sufficient evidence to support a probable cause determination. Here, the informant is not anonymous, so we can proceed to the second part of the Reesman paradigm. The affidavit states that the informant witnessed the alleged criminal first-hand. This satisfies the second part of Reesman. Finally, for law enforcement to use the tip for probable cause, in and of itself, the informant must be deemed reliable. Under Reesman, a confidential informant is deemed reliable if “he or she [has] provided reliable and accurate information to officers in the past...”172 A sworn statement by a law enforcement officer is sufficient to determine reliability.173 In this scenario the informant satisfies all three requirements under Reesman. Although law enforcement takes investigative measures to corroborate the tip, these measures appear to be unnecessary.

A critical variable is the deemed reliability of the informant. Under Reesman, law enforcement’s sworn statement that the informant has provided reliable and accurate information in the past is sufficient to find informant reliability.174 This standard, however, should be more clearly defined. For example, what if the informant had provided accurate information on two prior occasions, but had provided false information in three other instances? Or what if the previously reliable information was information that was of innocent activity, and thus easily attainable? Perhaps a more reasonable standard to deem the confidential informant reliable would require the confidential informant’s previous tip(s) to have led to criminal conviction(s).175 Another possibility would require the search

172. Reesman, 2000 MT 243 at ¶ 32, 301 Mont. 408 at ¶ 32, 10 P.3d 83 at ¶ 32.
173. Id.
174. Id.
175. See e.g. People v. Paquin, 811 P.2d 394, 398 (Colo. 1991) (sufficient that affidavit “states that the informant provided information on past occasions that resulted in at least one felony arrest”) But see Commonwealth v. Rojas, 531 N.E.2d 255 (1988) (using
warrant affidavit list the previous reliable information given by the confidential informant. A more clearly defined standard would allow the issuing magistrate to thoroughly examine the informant’s previous reliability.

Scenario 2: A local Fish and Game office receives a phone call from an anonymous citizen. The informant states that she witnessed a man shoot a deer this same day. The caller states that she is aware that hunting season is over. She gives a description of the shooter, along with a description of the shooter’s vehicle and license plate number. She states the incident took place near Gold Creek by the Blackfoot River. The informant gives no information concerning the circumstances where she came upon the alleged poacher. The Fish and Game officer runs a check on the license plate and determines the vehicle is registered to “Brad Jones” in Bonner, Montana. Law enforcement investigates the Bonner residence. They determine that Jones’ vehicle is similar to the vehicle described by the informant. The officers then question Jones. His physical attributes are also similar to the alleged poacher. The man denies the allegations.

Under these facts and the Reesman and Griggs analysis, an issuing magistrate would most likely determine that the evidence is insufficient to establish probable cause. Because the anonymous informant’s tip lacks reliability, police corroboration is required. Under Griggs, the police corroboration must uncover indicia of criminal activity in order to establish probable cause. Although law enforcement’s independent investigation supports the informant’s allegations, there is no direct evidence to support the poaching allegation. All of the facts given by the informant are readily available and relate to innocent activity. Therefore, the police corroboration would be insufficient to resuscitate the anonymous informant’s lack of reliability.

The situation changes dramatically if the tip was given by a concerned citizen who gave his or her name to law enforcement. As noted in Reesman, a tip given by an informant who witnesses the criminal activity first-hand and is deemed reliable is sufficient to establish probable cause.176

This scenario demonstrates the possible futility of anonymous informant tips. The facts are analogous to Griggs in that police investigation may be limited in determining criminal

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176. It is important to note that named informants who report false information can be criminally prosecuted. Furthermore, they could face civil liability under the doctrines of malicious prosecution and negligent false arrest.
activity after an initial investigation. In Griggs, the court suggested that an attempt by law enforcement to verify sales of products necessary in an illegal mushroom growing operation would have helped link Griggs to criminal activity. But is this standard practical? Although methamphetamine manufacturing operations require specialized chemicals which are possibly traceable, the same may not be true with marijuana or hallucinogenic mushroom operations. In the end, law enforcement may be left with an anonymous tip, which is limited in investigative value and eventually will become stale.

There are other considerations as well. Even though an anonymous tip alone may not establish probable cause, it can clearly be a starting point for a criminal investigation. Investigators may use other search mechanisms to corroborate the informant's reports. Garbage searches could be a powerful tool for law enforcement to establish probable cause. The same holds true for canine sniffs. Although warrantless thermal imagery searches have been held unconstitutional under the Montana Constitution, there seems to be little in the way to prevent law enforcement from utilizing this tool in a broader search. By the same token, however, any unethical or illegal searches by law enforcement raise the realistic possibility of blowing an investigation that may have had hundreds or thousands of hours invested.

VIII. CONCLUSION

From a policy standpoint, one might argue that Reesman is yet another example of judicial activism by the Montana Supreme Court. The court has recently been criticized for its "misguided and impractical" decisions. No doubt county attorneys and law enforcement are frustrated with the court's reversal of criminal convictions. It is the court's duty, however, to uphold the law of the land, including the Montana State Constitution. The thrust of Reesman holds that search warrants based on allegations of unreliable informants and corroboration of innocent facts simply will not establish probable cause under the Montana Constitution. The decision merely defines the

minimum probable cause requirements when using informants.

The Montana Supreme Court should recognize that the Reesman test is a Gates hybrid because of the bright line rules the court created. The Gates test, however, although subjective in form, is not without its own parameters. The Montana Supreme Court has merely identified some of these parameters and set them out in a rule. Furthermore, some of the judicial discretion from Gates remains in the police corroboration determination laid out in State v. Griggs.

The court has also done a favor to law enforcement, prosecutors, and defense attorneys. Scenarios such as the fact patterns in Reesman and Griggs, which might be difficult to recognize or qualify as sufficient probable cause in other jurisdictions, now have a predictable level of certainty in Montana. Reesman’s formula clearly identifies how informants can aid in obtaining in search warrants. While there may be no exact recipe for mulligan stew in Montana, we now know what not to put in the stew.