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1	FORM	QUESTIONNAIRE	36	11/23/1987	B6

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U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

November 23, 1987

TO: Ben Cohen

FROM: TMB Tom Barba

RE: SJC Questionnaire

Here is a copy of what we sent to Judge Kennedy this evening. Please note what we have identified as tasks that you are handling. Give us a call if you have questions.

Attachment

COMMENTS RE SENATE JUDICIARY QUESTIONNAIRE

PART I

Paragraph

10 Information needed re each club:
(1) Dates of membership.
(2) Offices held.
(3) Nature and objectives of the club.
(4) Identify officer or other person who can provide info.
WHITE HOUSE WILL DRAFT ANSWERS.

12 (1) Are there transcripts of speeches other than Hawaii?
(2) List of speeches:
(a) Name and address of group.
(b) Date.
(c) Summary.
(3) Contact groups for transcripts or recordings.
(4) Produce notes of speeches.
(5) Produce press reports.

13 (1) List 25 significant opinions.
(2) Summary of decisions reversed and of affirmances with significant criticism.
(3) Summary of unpublished opinions reviewed by Supreme Court.
(4) Significant opinions on federal or state constitutional issues.

16(c) Get detailed info. re four cases added by A.M.K. Consider substituting a new one for the one that had an unfavorable disposition. [Which one was this?]

17 Get info re lobbying activities.

PART II

1, 4, 5 Questions re finances. **WHITE HOUSE WILL DRAFT ANSWERS.**

Part III

1 Describe pro bono work.

2 Clubs - detailed explanations required. **WHITE HOUSE WILL DRAFT ANSWERS.**

3 Describe judicial selection process.

6 Get info re research assistants, law clerks, and support staff.

12 Get info. re recusals.

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JUDICIARY COMMITTEE QUESTIONNAIRE
ANTHONY M. KENNEDY

Attachment to

Answer to Part I, Question 12

S. Hrg. 98-650

1983 OMNIBUS TERRITORIES

HEARING

BEFORE THE

SUBCOMMITTEE ON
ENERGY CONSERVATION AND SUPPLY

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 1366

A BILL TO IMPLEMENT THE RECOMMENDATIONS OF THE INTERIM REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS AND TO AMEND THE REVISED ORGANIC ACT OF THE VIRGIN ISLANDS AND THE ORGANIC ACT OF GUAM, AND FOR OTHER PURPOSES

S. 1367

A BILL TO REPEAL CERTAIN PROVISIONS OF LAW RELATING TO THE TERRITORIES AND INSULAR POSSESSIONS OF THE UNITED STATES

OCTOBER 6, 1983

Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

30-669 O

Senator WEICKER. Thank you all very much for your testimony. We greatly appreciate it. Thank you.

Our last witness is the Honorable Anthony Kennedy, Chairman of the Pacific Territories Committee of the Judicial Conference of the United States.

Mr. KENNEDY. Thank you, Mr. Chairman. Good morning.

Senator WEICKER. Good morning.

STATEMENT OF HON. ANTHONY M. KENNEDY, U.S. CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. KENNEDY. For the record, I am Anthony Kennedy, a Ninth Circuit of the United States circuit judge. I have noted that each of the witnesses here has thanked you for calling these hearings, and that is more than simply a requisite format.

Some of the matters that we will be talking about may seem like minor, technical, jurisdictional types of things, but I assure you that in these islands these matters are viewed with great serious concern and some degree or urgency.

This concept of a judicial link or participatory tie in Government through the courts is viewed by all of the citizens of these islands in the Pacific as being fundamental and of very great importance, and I was frankly surprised at that when I began to visit the islands and to hear these cases, so if in a major commercial dispute they find there is no diversity jurisdiction, if in an appeal by the prosecution of the Government of Guam they find out they cannot appeal a dismissal of an indictment, if the legislature of Guam is considering the necessity for an appellate court and they find out they don't have that authority, this is perceived by them as a matter of serious neglect, and by us as a source of real embarrassment in the furtherance of our judicial duties, so I would ask, Mr. Chairman—and I am not an expert on legislative procedures—but to the extent feasible and practicable, that you could identify those portions of the judicial bill affecting Guam and the Marianas that are noncontroversial and seek their speedy enactment, and this includes the restoration of the diversity jurisdiction, the right of this Government to dismissal of indictments in criminal cases, the right of the Government of Guam to establish its independent court system.

Now there is an area of disagreement between our committee's recommendation and the representative of the Guam bench, Judge Abbate, as to how long and how close the ninth circuit review should be maintained over local and appellate court systems. I think there is an area of compromise there and perhaps working with your committee we could quickly reach that and advise you.

The Guam bar, in our hearings on Guam, were the ones that were insistent that the ninth circuit review be maintained intact, but perhaps there is an area of compromise there. We now have mandatory review in all of their cases, and this is sometimes trouble because in the case where the result is clear, the appeal is frivolous, and if one party has an economic position, it may be that the right of appeal is abused. There are some measures we can take care of by the briefs. Most of our oral arguments are held in Honolulu which is the halfway point, and an important commercial

point for the members of the bar, so these matters we think are working well, and our court I am pleased to say is current on all of our calendar, including the cases from Guam and the Northern Marianas. There is a source of delay at the appellate division down at the district court, and various provisions of the bills that you have before us for our comments have indicated how that can be streamlined.

We do object or recommend against some portions of the bill pertaining to the high court of the Trust Territory of the Pacific, and to this complete elimination of ninth circuit jurisdiction. Those comments are on the record.

I might say, Mr. Chairman, that if it is consistent with your rules and practice, that your consultant, Mr. James Beirne, in the few times I have talked with him, reveals an extensive knowledge and scholarship in the area of territorial law, and I have learned a great deal from him. He is a highly skilled expert, and I am very grateful for the comments that he has given me as I have prepared this report.

I have no further comments, Mr. Chairman. I thank you for holding these hearings.

[The prepared statement of Mr. Kennedy follows:]

Statement of Anthony M. Kennedy
United States Circuit Judge
For the Ninth Judicial Circuit

Before the Subcommittee on Energy Conservation
and Supply of the United States Senate

S. 1366, 98th Cong., 1st Sess. (1983)

October 6, 1983

Mr. Chairman, Members of the Subcommittee on Energy Conservation and Supply:

Thank you for the invitation to appear before your Committee to comment upon S. 1366, as introduced May 25, 1983. My name is Anthony M. Kennedy; I am a United States Circuit Judge for the Ninth Judicial Circuit. The Circuit has within its jurisdiction Guam and the Northern Mariana Islands. I am currently chairman of the Pacific Territories Committee of the Judicial Conference of the United States and Chairman of the Pacific Territories Committee for the Ninth Circuit. My appearance here and the comments set forth below are expressly authorized by the Judicial Conference of the United States. My remarks are confined to those segments of the bill concerning Guam and the Commonwealth of the Northern Mariana Islands.

I.

Sections 209 and 210
Guam District Court Jurisdiction
Organic Act § 22

It is generally understood that the principal purpose of this amendment is to grant diversity jurisdiction to the District Court of Guam. This corrects the jurisdictional flaw found by the Supreme Court in Chase Manhattan Bank (N.A.) v. South Acres Development Co., 434 U.S. 236 (1978). We request the Committee support and approve this important provision.

The urgency for enacting the statutory amendment must be underscored. Major commercial and financial interests, now located in Guam or considering it for potential future operations, have serious concerns with lack of diversity jurisdiction. If the present jurisdictional problem remains uncorrected, commerical activity in Guam may be deterred. The matter is sufficiently important so that if complexities or uncertainties with respect to other parts of S. 1366 may delay its passage, the Committee should consider the possibility of a separate bill granting diversity jurisdiction to the Guam District Court.

Before the Supreme Court's decision in the Chase Manhattan Bank case, it had been assumed quite widely that the Guam District Court had diversity jurisdiction. The jurisdictional omission found by the Supreme Court apparently stems from an oversight in drafting. I know of no objection to the proposal to grant diversity jurisdiction.

The language parallels the grant of jurisdiction to the Northern Mariana Islands, which is understood to

include the diversity jurisdiction. The language appears to accomplish its intended purpose. Nevertheless, we recommend explicit mention in the Committee's report of an intent to correct the defect found by the Chase Manhattan Bank case.

II.

Local Appellate Courts
Organic Act Section 22A

Section 22A permits the legislature of Guam to establish a local appellate court. Our committee supports the proposal. As recognition of autonomy for the territory to structure its own system and as an expression of congressional confidence, the Guam legislature should be authorized to create a local appellate court if it deems it necessary to do so.

At hearings on Guam, our committee found that most of those who spoke in favor of granting Guam this authority felt that the establishment of such a court is not urgent, and probably not prudent now. Thus, the territorial legislature may decide not to create a local appellate structure until it is clear that the permanent institution is needed and its costs are warranted. The evaluation of the costs and benefits of the local appellate court, and the timing of its creation, should be left to the discretion of the Guam legislature. The proposed bill is consistent with that objective.

Please note, however, that the committee concludes, as discussed below, that review of some or all of the local law decisions rendered by such a court should be retained in the Ninth Circuit until such time as the territorial legal system evolves further. This is also consistent with the positions expressed by most members of the Guam bench and bar.

III.

Review of Local Appellate Courts
Organic Act Section 22B

This portion of the bill provides that the Ninth Circuit will retain jurisdiction to review final decisions of a Guam appellate court to resolve federal questions and questions on the consistency of local laws with the Organic Act. This jurisdiction is to expire fifteen years after the creation of a local Guam appellate court. After that time the Guam court would be treated in the same manner as the court of a state; review of its decisions involving federal questions would be exclusively in the Supreme Court of the United States.

The committee, and the Judicial Conference of the United States, objects to this provision.

(1) The Ninth Circuit should retain appellate jurisdiction over all classes of cases, including local law cases. A substantial number of members of the bench and bar of Guam agree with our position. The Guam bar has adopted a formal resolution to that effect. Guam is a close knit legal community, where outside review is deemed highly beneficial to the evolving legal system. The legal system on the island benefits greatly from the Ninth Circuit guidance and from contact with mainland jurisprudence. The Ninth Circuit is not burdened by appeals from Guam and the Northern Mariana Islands. The appeals from both entities combined comprise less than 1 percent of our caseload. We can continue to handle these cases expeditiously.

(2) It is recognized that the fifteen year time period, with a limitation of review to federal questions only, is consistent with what is already provided for the Commonwealth of the Northern Mariana Islands. The attempt to achieve parallelism, however, is not so simple as it might seem. In my view, the likelihood of Guam establishing an appellate court is far greater than that of the Northern Mariana Islands. Thus, it is likely that the Northern Mariana Islands would maintain a closer contact with Article III courts than would Guam, under the proposed provisions of the bill.

(3) After a local appellate court on Guam has been established, becomes permanent, and demonstrates to the Guam bench and bar and to its citizens that it has the institutional expertise to render final judgment on local law issues, consideration should be given to relinquishing Ninth Circuit jurisdiction.

Consideration could also be given, at or before that time, to a certiorari type of jurisdiction so that the Ninth Circuit could review cases decided by the Guam local appellate courts where that review appeared necessary, without taking review of cases in which the result appears clearly correct or for other prudential reasons. If the Committee is determined to restrict Ninth Circuit review of local law matters now, certiorari would be preferable to total foreclosure; in that way, at least in some local law cases, Ninth Circuit review would be retained. Our recommendation now, however, is to permit review as a matter of right in all cases decided by the Guam local appellate courts.

IV.

Appellate Division of the District Court
Organic Act Section 22C

Subsection (a) of section 22C provides that the Guam legislature will determine the appellate jurisdiction

of the appellate division of the District Court of Guam provided that appellate review of federal questions and of the consistency of local law, regulation, or executive action with the Organic Act, is mandatory. The proviso for the mandatory jurisdiction is not contained in existing law, though the Guam legislature currently vests appellate jurisdiction in such matters in the appellate division. The change is a very desirable one, and I am aware of no opposition to it.

The rephrasing of this subsection was also intended to ensure that the result in Sablan v. Santos, 634 F.2d 1153 (9th Cir. 1980), whereby district court decisions in the Northern Mariana Islands have to be appealed to the appellate division of the district court prior to appeal to the Ninth Circuit, will not be extended to Guam. Reference to this intent in your Committee's report is warranted.

The composition of the appellate division is addressed in subsection (b). The committee has no objection to this subsection. The subsection is, however, unclear as to who designates or presides over the panel if the district judge disqualifies himself or is otherwise unable to act. If the district judge is recused or disqualified, the Chief Judge of the Ninth Circuit should designate the members of the appellate division and its presiding judge.

Subsection (c) proposes to take away Ninth Circuit review of local law decisions of the appellate division of the district court. The committee opposes the suggestion. In effect it would mean that a judge of the District Court of Guam, a local law judge he designates to sit with him, and an outside judge assigned to the appellate division, would become the Supreme Court for Guam. This is inconsistent with the close relation the Ninth Circuit has maintained with the judicial and legal system of Guam. All of the objections made to section 22B respecting denial of Ninth Circuit review of local law in the event an appellate court system is established (see above) apply with even greater force to this section of the bill. The judges of the Ninth Circuit are familiar not only with federal laws, but the laws of the nine states within their jurisdiction. We are advised by members of the Guam bar that our decisions are of substantial assistance to the legal system of Guam in the formulation and interpretation of the territorial law. This benefit should not be taken from Guam unless a compelling showing is made that Ninth Circuit expertise and guidance is unneeded or unwanted. No such showing has been made to date. Indeed, the curtailment has not been suggested by any commentator, so far as I am aware. I must observe that many of us were greatly surprised at the proposal. It was not suggested or considered as a possibility by any of those who appeared.

before our committee at its hearings on Guam. We wonder if the proposal is the result of some drafting oversight.

V.

Application of Titles 18 and 28
Organic Act Section 22D

Section 22D provides that parts of Titles 18 and 28 of the United States Code shall apply to Guam. It is not clear that this language will be sufficient to remedy certain critical statutory lapses.

For instance, Guam v. Okada, 694 F.2d 565 (9th Cir. 1982), held the Guam legislature could not authorize appeals of criminal cases by its government from the appellate division of the district court to the Ninth Circuit. That decision puts Guam, and potentially the Commonwealth of the Northern Mariana Islands, in a less favorable position than the federal government, the government of every state, and the government of the Virgin Islands. 18 U.S.C. § 3731; Virgin Islands v. Christensen, 673 F.2d 713 (3d Cir. 1982). No justification is perceived for this result. The decision of the Okada court should be overturned by statute.

It is not clear, however, that the proposed language does this. The section is prefaced by the words "where appropriate." The Okada court identified certain policy reasons for requiring specific congressional authority for criminal appeals. If the intent of the bill is to overrule Guam v. Okada, more precise language should be used. Immediate congressional action is recommended to overturn the decision.

There is a second important problem that the Committee should address. In Ware v. United States, 699 F.2d 474 (9th Cir. 1983), the Ninth Circuit indicated that the Federal Youth Corrections Act could be interpreted not to apply in the District of Guam, and, inferentially, in the District of the Northern Mariana Islands. I call to your attention that the language of section 22D does not resolve the question one way or the other. After considering the views of the Department of Justice, if the Congress determines that the Youth Corrections Act should apply to Guam, additional and specific language is necessary to cure the deficiency noted in the Ware case. Until our committee is advised of the position of the Justice Department and of interested officials and representatives of the government, the committee has taken no position with respect to the Federal Youth Corrections Act's applicability. We think the Congress should study the problem, and promptly reach a decision on Youth Act coverage.

Except where more specific language is needed as indicated above, the committee has no objection to the language of section 22D.

VI.

Guam
Section 210
Term of Judge on District of Guam

The committee has no objection to the provisions of section 210 which extends the term of territorial judges from eight years to ten years.

VII.

Northern Mariana Islands
Section 212
Term of Judge for District of Northern Mariana Islands

The committee has no objection to the provisions of section 210 which extends the term of territorial judges from eight years to ten years.

VIII.

Section 213
Jurisdiction of District Court
Act of Nov. 8, 1977 § 2(a)

The law establishing the jurisdiction of the District Court for the Northern Mariana Islands is amended by section 213 of the Act so that that district court has jurisdiction over the Trust Territory of the Pacific Islands substantially as provided for foreign governments in the Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. §§ 1602-1611. This section would pretermit an evolutionary development whereby that district court is assuming jurisdiction over some matters involving the government of the Trust Territory. See Sablan Construction Co. v. Government of the Trust Territory of the Pacific Islands, 526 F. Supp. 135 (D.N.M.I. App. Div. 1981).

In a period when the government of the Trust Territory is changing its relation to the people of the islands of the West Pacific, we think it inappropriate to stifle evolving jurisdiction of the district court over the action of the Trust Territory government. While the committee has no objection to a congressional grant of jurisdiction over the Trust Territory substantially as provided under the Foreign Soverign Immunities Act, it objects to provisions which limit jurisdiction to that grant.

The whole question of lack of Article III review over decisions of the government of the Trust Territory, and of the jurisdiction of the High Court of the Trust Territory vis a vis the newly established courts on the Marshall Islands, the courts of the Federated States of Micronesia, and the courts of the Republic of Palau, is currently under examination by our committee. We plan to report on the subject to the Judicial Conference of the United States and thereafter to the Congress.

Further, the present language is both overinclusive and underinclusive of the FSIA standards. The present language does not exempt the Trust Territory from punitive damages, see 28 U.S.C. § 1606, or limit the role of attachment and execution. See 28 U.S.C. §§ 1609-1611. Section 213 on the other hand provides for no jurisdiction in the case of explicit or implicit waiver of immunity by the Trust Territory, see 28 U.S.C. § 1605(a)(1), or over counterclaims, see 28 U.S.C. § 1607. Further, Trust Territory officers and employees are granted jurisdictional immunity for all acts or omissions "colorably related to their official duties." No such broad immunity is given to the employees of foreign governments under the FSIA, and the language is puzzling, to say the least. It seems to contradict the waiver of immunity that has gone before. We recommend against enactment of this amendment.

IX.

Section 214
Local Appellate Jurisdiction
Act of Nov. 8, 1977 § 3(a)

We recommend adoption of section 3(a), and know of no opposition to it. The language limits the appellate division of the district court to review only of judgments and orders of courts established by the Constitution and laws of the Northern Mariana Islands. This overturns the unfortunate result of Sablan v. Santos, 634 F.2d 1153 (9th Cir. 1980), which held that the district court had to review cases originating there in its own appellate division prior to appeal to the Ninth Circuit. Also, as in the case of Guam, new language is added guaranteeing that the appellate division will have jurisdiction to review decisions of local courts on federal questions, interpretation of the covenant, and acts of United States officers. Again, this is a desirable addition. We know of no opposition.

X.

Composition of Appellate Division
Act of Nov. 8, 1977 § 3(b)

The committee has no objection to this section. As noted with regard to the identical provision for Guam, section 22C(b) of the Organic Act, the present language is inadequate in the case of disqualification or recusal of the district court judge as Presiding Judge. The Chief Judge of the Ninth Circuit, in that event, should act in his or her place.

XI.

Ninth Circuit Review
Act of Nov. 8, 1977 § 3(c)

We object to section 3(c). This would eliminate the jurisdiction of the Court of Appeals for the Ninth Circuit to review local law questions from the Commonwealth of the Northern Mariana Islands. The same considerations apply here as to the suggestion to limit jurisdiction over local law cases in Guam. There was unanimity among all witnesses at the committee's Northern Mariana Islands hearing to retain Ninth Circuit review of local law questions. The committee strongly recommends against adoption of the proposal to eliminate this jurisdiction, and again notes its surprise at the suggestion.

XI.

Conclusion

Though the populations of Guam and the Commonwealth of the Northern Mariana Islands are small, a study of those islands and an understanding of their people leaves one profoundly impressed with their unyielding commitment to a strong, close, and effective participation in the American political system. The United States courts are perceived, quite correctly, as a vital part of this link. Accordingly, we thank the Committee for giving its attention to the problems of jurisdiction and judicial structure contained in this bill. It may be that further and additional legislation will be required to bring our judicial ties with these islands to a full development. The provisions of the bill upon which we express a negative recommendation are destructive of that objective; the provisions of the bill we endorse are important steps to its achievement.

We appreciate the Committee's consideration of our testimony.

Senator WEICKER. Thank you very much, and we will be working with you on that in reaching some compromise, and Jim will be in touch with you.

Mr. KENNEDY. It's not often that I can be an active participant in formulating a process that can overrule the decisions of some of my colleagues.

Senator WEICKER. Thank you very much. We will be adjourned.

[Whereupon, at 11:40 a.m., the hearing was adjourned.]

JUDICIARY COMMITTEE QUESTIONNAIRE
ANTHONY M. KENNEDY

Attachment to

Answers to Part I, Questions 13(2) and 13(3)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1093
D.C. #CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, ET AL.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Central District of California
Wallace A. Tashima, District Judge, Presiding
Argued and submitted October 7, 1982

[Filed Jan. 19, 1983]

Before: KENNEDY, TANG AND FERGUSON, Circuit Judges.

The defendants are charged with violations of 21 U.S.C. § 846 (conspiring to possess and distribute cocaine) and 21 U.S.C. § 841(a)(1) (possessing methaqualone and cocaine with intent to distribute it). The defendants filed pretrial motions in the district court to suppress evidence obtained by police officers pursuant to a search warrant issued by a state judge, arguing that the affidavit supporting the warrant made an insufficient showing of probable cause. The district court granted the motions in part, holding that the affidavit given in support of the warrant was inadequate. The government brings this interlocutory appeal challenging the district court's determination. We affirm.

The government raises three issues on appeal: (1) whether the independent examination standard is applicable to appellate review of a district court's conclusion that an affidavit does not establish probable cause for the issuance of a search warrant; (2) whether the district court erred in concluding that the search warrant affidavit failed to establish probable cause; and (3) whether the evidence seized under an invalid search warrant should be suppressed if the police acted in good faith.

In *United States* v. *Chesher*, 678 F.2d 1353 (9th Cir. 1982) this court recognized that a determination of whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant is a question of law. *Id.* at 1359. Accordingly, we may make an independent examination of the propriety of such a determination. *See, e.g., United States* v. *One Twin Engine Beech Airplane, Etc.*, 533 F.2d 1106, 1108-09 (1976).

We have independently examined the probable cause issue, and conclude that the district court correctly decided that the affidavit failed to establish probable cause sufficiently. In seeking the search warrant, the affiant relied upon the assertions of informants and independent police investigation. The information from the informants and that obtained during the investigation did not provide sufficient cause for a search of any of the structures identified in the warrant.

We consider first the propriety of the authorization to search the Price Drive residence of Sanchez and Stewart. Where an affiant relies on information provided by an informant the affidavit must first, give facts to show the reliability of the information and second, give facts to support the credibility of the informant. *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 375 U.S. 108 (1964); *United States* v. *Johnson*, 641 F.2d 652 (9th Cir. 1980).

The affiant adequately set forth facts to permit the judicial officer making the probable cause determination to determine the basis of the informant's knowledge of the criminal activity which occurred at the Price Drive residence. However, the information was over five months old. The long delay between the informant's acquisition of the particular information and the search negates the inference of probable cause. *Durham* v. *United States*, 403 F.2d 190, 195 (9th Cir. 1968). Neither are we satisfied that the independent police investigation uncovered any evidence of ongoing criminal activity at the residence which would tend to cure the staleness defect. *Cf. United States* v. *Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981). As the district court observed, the police observations were as indicative of innocence as of guilt.

The affidavit was also insufficient in that it failed to establish the credibility of the informant. *Aguilar* v. *Texas*, 378 U.S. at 114. The independent police investigation did not produce information which corroborated the details of the informant's information. *Cf. United States* v. *Johnson*, 641 F.2d 652, 658-59 (9th Cir. 1980).

The affidavit satisfied neither prong of the *Aguilar-Spinelli* test. Thus, the district court properly ruled that the evidence derived from the search conducted at the Price Drive residence should be suppressed.

The affidavit is clearly deficient in providing justification to search Leon's Sunset Canyon residence. One informant told police 17 months before the search that Leon was involved with the "Cuban Mafia" and that he participated in the importation of drugs into this country. Another informant told police that Leon had a quantity of quaaludes at his residence. The affidavit is devoid of any factual circumstances indicating the basis of these statements. Moreover, the affidavit completely fails to establish the veracity of either informant. Again, the independent police investigation did not un-

cover information sufficient to cure any of these defects. Thus the district court correctly ordered the suppression of evidence discovered as a result of the Sunset Canyon search.

Finally, the government invites us to follow the lead of the Fifth Circuit and recognize a "good faith" exception to the exclusionary rule. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). We have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture.

AFFIRMED.

Re: *United States* v. *Leon* —No. 82-1093

KENNEDY, Circuit Judge, dissenting:

The majority opinion states the law correctly, but, I respectfully submit, it misapplies controlling legal principles to the facts of the case.

The affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith. It is true that the informant whose tip started the investigation had seen drugs in the house five months previously; but what the officers observed when surveillance began, together with the information obtained on the persons using the residences in question, was quite inconsistent with any explanation other than illegal drug activity. Known narcotics violators visited the principal residence in question for ten minutes or so, and would exit with a brown paper bag, usually placed in an automobile trunk. One of the persons suspected of being a principal supplier had previously been arrested for a Miami-Los Angeles transportation of drugs, and the occupants of this house traveled between those cities during this investigation.

The informant's observation pertained to ongoing criminal activity, not simply a single criminal act that was not likely to be repeated. Staleness is less significant where the activity is continuous. *See United States* v. *Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981).

Information in a warrant is not stale if the continuing course of suspicious conduct validates the information given at the outset. *See United States* v. *Huberts*, *supra*. That same course of conduct serves to corroborate the reliability of the informant.

One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit. The investigation described in the affida-

vit was made by a law enforcement officer with
sive training in the investigation of drug traffic. H
made over five hundred arrests. His opinion that
trafficking was going on is itself entitled to we
though the specific factual allegations taken alone
support the inference. The magistrate did not er
submit, in issuing the warrant.

Whatever the merits of the exclusionary rule, its r
idities become compounded unacceptably when cour
presume innocent conduct when the only common sens
explanation for it is on-going criminal activity. I woul
reverse the order suppressing the evidence.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1093
D.C. No. CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, et al.,
DEFENDANTS-APPELLEES.

[Mar. 4, 1983]

ORDER

Before: KENNEDY, TANG and FERGUSON, Circuit Judges.

The Petition for Rehearing is denied.

Judge Kennedy would grant the Petition for Rehearing but hold the case on the calendar until the Supreme Court's ruling in *Illinois* v. *Gates*.