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Illinois v. Gates: Will *Aguila*r and *Spinelli* Rest in Peace?

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CASE COMMENTS

Illinois v. Gates: Will *Aguilar* and *Spinelli* Rest in Peace?

I. INTRODUCTION 875
II. EVOLUTION OF THE *Aguilar-Spinelli* TEST 878
A. *Pre-*Aguilar *Development* 879
B. Aguilar *and* Spinelli 882
III. *Illinois v. Gates* 890
IV. AN ANALYSIS OF *Gates* 896
V. THE IMPLICATIONS OF *Gates* 898
VI. CONCLUSION 900

I. INTRODUCTION

On May 3, 1978, the Police Department in Bloomingdale, Illinois, received by mail an anonymous handwritten letter stating that two local residents, Lance and Sue Gates, were dealing in illegal drugs.[1] The letter contained a detailed itinerary of the couple's operations; it alleged that the Gates periodically traveled to Florida, loaded their car with drugs, then returned to Bloomingdale.[2] The letter also predicted the date of the couple's next trip and stated that they had in their basement drugs worth over $100,000.00.[3] The Chief of Police referred the letter to Detective

1. Illinois v. Gates, 103 S. Ct. 2317, 2325 (1983).
2. *Id.*
3. The full text of the letter read as follows:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

Mader, who determined the Gates's exact address.[4] Additionally, Detective Mader learned from a police officer assigned to O'Hare Airport that Lance Gates had flown to Florida. He also learned from Drug Enforcement Administration agents that Lance Gates had checked into a motel room registered to Susan Gates then left the motel with an unidentified woman.[5] The Gates were observed leaving the motel in a Mercury bearing Illinois license plates and heading north on an interstate frequently used by travelers to the Chicago area.[6] Based upon the anonymous letter and upon an affidavit signed by him setting forth the results of his independent investigation, Mader obtained a search warrant for the Gates's residence in Bloomingdale and for their automobile. Two days later, when the Gates arrived at their home in Bloomingdale,[7] the Bloomingdale police served them with the warrant. A search of the Mercury uncovered approximately 350 pounds of marijuana.[8] Upon

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Lance & Susan Gates
Greenway
in Condominiums

Id.

4. *Id.* The office of the Illinois Secretary of State informed Mader that an Illinois driver's license had been issued to Lance Gates, who resided at a certain address in Bloomingdale. When that address proved to be outdated, Mader contacted a confidential informant. The informant's investigation of certain financial records disclosed a current address for the Gates.

The presence of this second informant was irrelevant to the establishment of probable cause. Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 118 n.179 (1982).

5. Illinois v. Gates, 103 S. Ct. at 2325-26.

> [Mader] learned from a police officer assigned to O'Hare Airport that "L. Gates" had made a reservation on Eastern Airlines flight 245 to West Palm Beach, Fla., scheduled to depart from Chicago on May 5 at 4:15 p.m.
>
> Mader then made arrangements with an agent of the Drug Enforcement Administration (DEA) for surveillance of the May 5 Eastern Airlines flight. The agent later reported to Mader that Gates had boarded the flight, and that federal agents in Florida had observed him arrive in West Palm Beach and take a taxi to the nearby Holiday Inn. They also reported that Gates went to a room registered to one Susan Gates and that, at 7:00 a.m. the next morning, Gates and an unidentified woman left the motel . . . .

Id. The unidentified woman turned out to be Susan Gates.

6. The DEA agent informed Mader that the license plate number on the Mercury was registered to a station wagon owned by Gates. The agent also told Mader that the driving time between Bloomingdale and West Palm Beach was approximately 22 to 24 hours. *Id.* at 2326.

7. The couple arrived home only 36 hours after Lance Gates had flown out of Chicago and 22 hours after they checked out of the motel. *Id.*

8. *Id.* A search of the Gates's residence uncovered more marijuana, as well as weapons, ammunition, drug paraphernalia, and several scales presumably used for weighing the drugs. In addition, the police found cocaine in the Gates's possession. *See* People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981); *see also* Comment, *supra* note 4, at 118 (detailed

motion made by the Gates prior to their trial on charges of violating state drug laws,[9] the trial court ordered suppression of all of the items seized.[10] The Illinois appellate court affirmed,[11] as did a divided Illinois Supreme Court.[12] The state supreme court examined the facts in light of *Aguilar v. Texas*,[13] which held that an informant's tip can establish probable cause only if police set forth the source of the informant's knowledge and their reasons for crediting the informant's veracity.[14] After finding that Mader's affidavit lacked both elements,[15] the court considered whether the deficiencies could be cured under *Spinelli v. United States*.[16] There, the Supreme Court allowed magistrates to find probable cause where the details contained in the tip, together with the police corroboration of the details, established the tip's overall trustworthiness.[17] The Illinois Supreme Court concluded that the affidavit was insufficient under the *Spinelli* standards as well, and held the search invalid.[18] On certiorari, the United States Supreme Court *held*, reversed: The two-prong test of *Aguilar* and *Spinelli* for determining whether an informant's tip establishes probable cause for the issuance of a warrant is abandoned, and the totality of the circumstances approach that traditionally has informed probable cause determinations is reinstated. Accordingly, the Court held that "the judge issuing the warrant had a 'substantial basis for . . . conclud[ing]' that probable cause to search the Gates' home and car existed."[19]

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discussion of facts in *Gates*).

9. The defendants argued in their motion to suppress Mader's affidavit that it did not set forth the underlying circumstances or the manner in which the informant acquired the information, and furthermore, that it did not set forth Mader's basis for accepting the reliability as Aguilar v. Texas, 378 U.S. 108, 114 (1964), required. People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981). The defendants also argued that the results of Detective Mader's independent investigation did not corroborate the anonymous informant's accusations that the Gates were involved in criminal activity so as to support the issuance of a search warrant based on probable cause. *Id.*

10. The trial court granted the motion "on the ground that the affidavit submitted to the Circuit Judge failed to support the necessary determination of probable cause to believe that the Gates's automobile and home contained the contraband in question." Illinois v. Gates, 103 S. Ct. at 2326.

11. People v. Gates, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980).

12. People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981).

13. 378 U.S. 108 (1964).

14. *Id.* at 114.

15. People v. Gates, 85 Ill. 2d at 386, 423 N.E.2d at 891.

16. 393 U.S. 410 (1969).

17. *Id.* at 415.

18. People v. Gates, 85 Ill. 2d at 389, 423 N.E.2d at 893.

19. Illinois v. Gates, 103 S. Ct. at 2336.

II. EVOLUTION OF THE *Aguilar-Spinelli* TEST

The backdrop of *Gates* is a struggle among the members of the Court with the larger issue whether to modify the exclusionary rule itself, which the Court evolved in a dozen decisions beginning with *Weeks v. United States*.[20] Justice Rehnquist hoped that *Gates* would be the vehicle to address this larger issue. However, on what he thought to be a jurisdictional impediment, Justice Rehnquist, writing for the Court, did not address that issue.[21] The struggle within the Court seems to be between Justices White and Rehnquist, who apologized for the inability of the Court to address the issue,[22] and Justice Brennan, who is adamantly against any modification of the exclusionary rule. His strategy for modifying the exclusionary rule being presently unavailable, Justice Rehnquist instead chose to modify the fourth amendment substantively, with respect to informants. Thus, *Gates* was not a product of itself, but the result of a larger, underlying jurisprudential struggle within the Court.

The moving force behind the Court's reasoning in *Gates* was practicality. The majority repeatedly stressed that probable cause is a "practical, nontechnical conception."[23] The Court reasoned that the two-prong test of *Aguilar*, as refined in *Spinelli* and applied in subsequent cases, had become unduly rigid and too technical to serve that concept.[24] The Court went too far, however. It was not necessary for the Supreme Court to overrule *Aguilar* and *Spinelli*. The warrant in *Gates* could have been upheld within the *Aguilar-Spinelli* rubric, while achieving at the same time the practicality and flexibility that the Court sought. The historical development leading up to *Gates* indicates that the *Aguilar* and *Spinelli* standards were never intended as overly rigid or technical guidelines; only confusion and misapplication of their standards by the lower courts produced this result. Accordingly, clarification of the standards, and perhaps a strong admonishment to the lower courts, would have sufficed; abandoning a long-standing and neces-

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20. 232 U.S. 383 (1914).

21. The "jurisdictional impediment" was Justice Rehnquist's interpretation of 28 U.S.C. § 1257, which has been judicially developed to require that an issue be "pressed or passed upon below." 103 S. Ct. at 2321-24. According to Justice Rehnquist, the issue whether to modify the exclusionary rule had not been presented to the state courts. *Id.* at 2324.

22. 103 S. Ct. at 2321.

23. *Id.* at 2328 (quoting Brinegar v. United States, 338 U.S. 160 (1949)).

24. *Id.* at 2328-29.

sary standard was not the answer. *Aguilar* and *Spinelli* have suffered an untimely demise.

A. *Pre-*Aguilar *Development*

Half a century ago, in *Nathanson v. United States*,[25] the Court invalidated a search warrant[26] reasoning that "a warrant to search a private dwelling may [not] rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances."[27] The Court stated that "[u]nder the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."[28] *Nathanson*, the genesis of modern probable cause law, has withstood 50 years of change.

Twenty-five years after *Nathanson*, in *Giordenello v. United States*,[29] the Court reviewed an arrest warrant based on the sworn complaint of a Federal Bureau of Narcotics agent.[30] Based on the agent's testimony at the suppression hearing, the Court noted that "until the warrant was issued . . . [the agent's] suspicions of petitioner's guilt derived entirely from information given him by law enforcement officers and other persons in Houston, none of whom either appeared before the Commissioner or submitted affidavits."[31] The Court found it unnecessary to decide whether a warrant could be based solely on hearsay information, for the com-

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25. 290 U.S. 41 (1933).

26. The search warrant read in pertinent part:

> Whereas said Francis B. Laughlin [agent] has stated under his oath that he has cause to suspect, and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is not deposited and contained within the premises of J.J. Nathanson said premises being described as a 2 story frame dwelling, located at 117 No. Bartram Ave. . . . .

Id. at 44.

27. *Id.* at 47.

28. *Id.*

29. 357 U.S. 480 (1958).

30. *Id.* at 481. The complaint read in part:

> The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

31. *Id.* at 485.

plaint was "defective in not providing a sufficient basis upon which a finding of probable cause could be made."[32] The Court was quick to identify who was to make this probable cause determination, however, by citing to *Johnson v. United States*.[33] In *Johnson* the Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[34]

The Court in *Giordenello* reaffirmed *Nathanson*[35] by stating that "[the Commissioner] should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."[36] Finally, the Court expressly rejected the argument that the deficiencies in the warrant could be cured by "the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer."[37]

In *Jones v. United States*,[38] the Court addressed for the first time the issue, left undecided in *Giordenello*, "whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another."[39] The Court held that hearsay information can support the issuance of a warrant "so long as a substantial basis for crediting

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32. *Id.* The complaint contained no affirmative allegations nor did it indicate any sources for the agent's conclusion. *Id.* at 486.

33. 333 U.S. 10 (1948).

34. *Id.* at 13-14 (footnote omitted).

35. 290 U.S. at 41.

36. *Giordenello*, 357 U.S. at 486.

37. *Id.*

38. 362 U.S. 257 (1960).

39. *Id.* at 269. In *Jones*, the defendant's apartment was searched pursuant to a warrant based on an informant's tip. The affidavit, signed by agent Didone of the Narcotic Squad in the District of Columbia, contained information from an unidentified source that the suspects were involved in narcotics trafficking and that they kept a supply of heroin on hand in the apartment. The informant also stated that he had purchased narcotics from the suspects at the apartment. The affidavit went on to state that the informant had previously given information that was correct and that other sources of information had corroborated. *Id.* at 267-68.

the hearsay is presented."[40]

The *Jones* Court cited *Draper v. United States*,[41] which held that an officer may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other means within the officer's knowledge.[42] The Court reasoned that "[i]f an officer may act upon probable cause without a warrrant when the only incriminating evidence in his possession is hearsay, it would be incongruous to hold that such evidence presented in an affidavit is insufficient basis for a warrant."[43]

The Court found that there was a substantial basis for crediting the hearsay involved in *Jones*. The Court stressed that the informant's report was based on his personal knowledge, and that he had provided accurate information in the past.[44] The Court also pointed out that the defendant was known to the police to be a narcotics user, and thus "the charge against him [was] much less subject to scepticism than would be such a charge against one without such a history."[45] Finally, the Court put much weight on the fact that "[c]orroboration through other sources of information reduced the changes of a reckless or prevaricating tale . . . ."[46]

The United States Supreme Court reaffirmed the substantial basis test in *Rugendorf v. United States*.[47] In *Rugendorf*, an in-

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40. *Id.* at 269.

41. 358 U.S. 307 (1959).

42. *Id.* at 313.

43. Jones v. United States, 362 U.S. at 270. The Court further reasoned that "[i]f evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimize police conduct, and resort to them would ultimately be discouraged." *Id.*

44. *Id.* at 271.

45. *Id.*

46. *Id.* The Court in *Jones* noted one more important point. Citing to *Draper*, the Court reiterated that there is a "difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search . . . . There is a large difference between the two things to be proved [guilt and probable cause] . . . and therefore a like difference in the quanta and modes of proof required to establish them." Draper v. United States, 358 U.S. at 311-12 (quoting Brinegar v. United States, 338 U.S. 160, 173 (1949)).

As early as Locke v. United States, 11 U.S. (7 Cranch) 339 (1813), Chief Justice Marshall observed that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . ." *Id.* at 348. In more recent times, the Court has stated that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause . . . ." Spinelli v. United States, 393 U.S. 410, 419 (1969) (citing Beck v. Ohio, 379 U.S. 89, 96 (1964)).

47. 376 U.S. 528 (1964).

formant provided a detailed description of allegedly stolen furs that he had seen in the defendant's basement.[48] An independent police investigation corroborated the information.[49] The Court, while emphasizing the amount of detail present in the affidavit, held that the affidavit presented a substantial basis for crediting the hearsay.[50] The stage was thus set for *Aguilar* and *Spinelli.*

B. Aguilar *and* Spinelli

The formulation of rigid guidelines for establishing probable cause originated in the seminal case of *Aguilar v. Texas.*[51] The case marked a departure from the vague substantial basis test applied in *Jones* and *Rugendorf.*[52] In considering a search warrant based on hearsay,[53] the Court reviewed *Nathanson* and *Giordenello*; it acknowledged the requirement established by those cases that an officer provide the magistrate with the underlying facts or circumstances that support the officer's conclusion that there is probable cause to justify the issuance of a warrant.[54] While recognizing that

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48. The affidavit stated that the informant's detailed description included the number and type of the stolen furs and that another informer knew the defendant as a "fence." *Id.* at 532.

49. Among the information corroborated was the fact that this Alabama burglary was the only recent one in the United States involving furs of the description and number that the informant saw in the defendant's basement. *Id.*

50. *Id.* at 532-33. The defendant in *Rugendorf* depended on certain factual inaccuracies in order to destroy the probable cause determination; i.e., the allegations in the affidavit that the defendant was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business. The Court held, however, that these factual inaccuracies were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit. *Id.* at 532.

The Court also held that "so long as there [is] a substantial basis for crediting the hearsay" the identity of the informant(s) need not be disclosed. *Id.* at 533 (quoting Jones v. United States, 362 U.S. at 272).

51. 378 U.S. 108 (1964). *Aguilar* was decided the same year as *Rugendorf.*

52. *See* Note, *Use of an Informant's Tip in Establishing Probable Cause*, 56 NEB. L. REV. 883, 886 (1977).

53. The warrant was obtained upon the basis of an affidavit which, in relevant part, recited that: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotics paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Aguilar*, 378 U.S. at 109.

The record did not reveal, nor was it ever claimed, that any other information was brought to the attention of the Justice of the Peace who issued the warrant. "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention." *Id.* at n.1 (citing Giordenello v. United States, 357 U.S. 480, 486 (1958)).

54. *Aguilar*, 378 U.S. at 112-13. The Court continued:

> The vice in the present affidavit is at least great as in *Nathanson* and *Gior-*

a warrant may be based on hearsay, the Court articulated the following two-prong test:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed (citation omitted) was "credible" or his information "reliable."[55]

The Court reasoned that if warrants were to be issued on the basis of the information provided in *Aguilar*, then the inferences from the facts that led to the complaint would not be drawn "by a neutral and detached magistrate," as the Constitution has been in-

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> *denello*. Here, the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegations that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion."

Id. at 113-14 (footnote omitted).

The Court noted that "[t]o approve this affidavit would open the door to easy circumvention of the rule announced in *Nathanson* and *Giordenello*." *Id.* at 114 n.4.

55. *Id.* at 114. The prongs from the test established in *Aguilar* have become known as the "basis of knowledge" prong and the "veracity" prong. The "veracity" prong has a "credibility" spur and a "reliability" spur. An informant's "credibility" concerns more his inherent character as a person—his reputation for truth or his demonstrated history of telling the truth. "Reliability," on the other hand, is distinct from the "credibility" of the source; it seemingly involves circumstances assuring trustworthiness on the particular occasion when the information is furnished. Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 761 (1974).

Aguilar fails to clearly indicate whether the "veracity" prong, with its two spurs, is disjunctive or conjunctive. In other words, will the satisfaction of one spur satisfy the whole prong or must both spurs be satisfied in order to satisfy the "veracity" prong? *See* Note, *The Informer's Tip As Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 960 n.10 (1969) [hereinafter cited as Note, *The Informer's Tip*]. The conclusion has been, however, that the "veracity" prong is disjunctive. *See* LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 5; Comment, *An Informant's Tip As The Basis for Probable Cause: Modified Aguilar Standards*, 20 S.D.L. REV. 363, 364 (1975).

The "basis of knowledge" and "veracity" prongs are conjunctive, however. Both prongs must be satisfied in order to meet the test established in *Aguilar*. For a discussion on how *Aguilar* developed from Draper v. United States, 358 U.S. 307 (1959), and Jones v. United States, 362 U.S. 257 (1960), *see* Note, *Spinelli v. United States: Searching For Probable Cause*, 30 U. PITT. L. REV. 735, 737 (1968-1969) [hereinafter cited as Note, *Searching for Probable Cause*].

terpreted to require.[56] Instead, those inferences would be drawn by a police officer "engaged in the often competitive enterprise of ferreting out crime."[57] The magistrate would in effect be accepting the police officer's judgment rather than his own, or worse yet, he would be accepting the judgment of an unidentified informer. The Court reversed, concluding that the warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause.[58]

In dissent, Justice Clark warned that "the Court has substituted a rigid, academic formula for the unrigid standards of reasonableness and 'probable cause' laid down by the Fourth Amendment itself—a substitution of technicality for practicality . . . ."[59] *Aguilar* should not be read like that, however. The Court intended neither a rigid, inflexible compartmentalization of the inquiries into an informant's "veracity," "reliability," and "basis of knowledge," nor that these inquiries be elaborate exegeses of an informant's tip. Rather, the Court required that only *some* of the facts bearing on two particular issues be provided in order to guide the magistrate's determination of probable cause.[60]

Illustrating this point is *United States v. Ventresca*.[61] Defen-

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56. The fourth amendment provides the governing standards:

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

U.S. CONST., amend. IV; *see, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (Constitution requires a neutral and detached magistrate).

57. *Aguilar*, 378 U.S. at 115 (citing *Giordenello*, 357 U.S. at 486; Johnson v. United States, 333 U.S. 10, 14 (1948)).

58. *Id.* at 115-16.

59. *Id.* at 122 (Clark, J., dissenting).

60. *See Gates*, 103 S. Ct. 2317, 2328 n.6 (1983); *cf.* United States v. Ventresca, 380 U.S. 102, 109 (1965) (the affidavit set forth "not merely '*some* of the underlying circumstances' supporting the officer's belief, but a good many of them") (emphasis added).

61. 380 U.S. 102 (1965). In *Ventresca* a search warrant was issued upon an affidavit reciting that the request for a search warrant was based on observations made by the affiant, an Internal Revenue Service investigator, and "upon information received officially from other investigators attached to the Alcohol and Tobacco Tax Division . . . and reports orally made to [the affiant] describing the results of their observations and investigation . . . ." *Id.* at 103-04. The affidavit also described seven different occasions when a specified automobile made deliveries to the suspect's house, the contents of the automobile on each occasion, the dates and times when the investigators reported the smell of fermenting mash emanating from the suspect's residence, and the dates when sounds similar to a motor or a pump were heard coming from the house. The affidavit concluded: "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have

dant Ventresca was convicted of possessing and operating an illegal distillery. The court of appeals reversed the conviction,[62] holding that the affidavit failed to pass the basis of knowledge test of *Aguilar*. The court reasoned that because the affidavit did not assert that the affiant or other investigators had personal knowledge, then the information obtained from the other investigators could have been untrustworthy hearsay.[63]

The Supreme Court reversed;[64] Justice Goldberg held that magistrates and courts must test affidavits for search warrants in a common-sense manner, without senseless technical requirements.[65] The Supreme Court went on to admonish the court of appeals for "misapprehend[ing] its judicial function reviewing this affidavit by giving it an unduly technical and restrictive reading."[66] Thus, the Supreme Court laid a predicate; *Aguilar* was not to be applied restrictively.

In *Ventresca*, the Supreme Court evidently incorporated the "sufficient detail" analysis of *Rugendorf* into the "underlying circumstances" test of *Aguilar*.[67] The detailed descriptions contained in the affidavit influenced the Court to uphold the warrant. The Court reasoned that these details,[68] if read in a common-sense manner, would be sufficient to assure a magistrate that the source was credible and the information reliable, and to supply a sufficient basis for establishing probable cause.[69] It is arguable, then, because the Court in *Ventresca* placed so much emphasis on the desirability of a practical, nontechnical approach, that it applied a totality of circumstances test. But *Ventresca* would have satisfied the two-pronged test because "basis of knowledge" and "veracity" were established. Thus, *Ventresca* produced uncertainty as to whether *Aguilar* must be applied literally or whether one or both

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been assigned to this investigation." *Id.* at 104. A search made under the warrant led to an illegal still. *Id.* at 103.

62. Ventresca v. United States, 324 F.2d 864 (1st Cir. 1963).

63. *Id.* at 868-70.

64. *Ventresca*, 380 U.S. 102 (1965).

65. *Id.* at 108.

66. *Id.* at 111.

67. Note, *supra* note 52, at 888.

68. The Court stated that the affidavit at issue in *Ventresca* was more detailed and specific than the one in *Aguilar*. *Ventresca*, 380 U.S. at 109.

69. *Id.* The Court indicates that the "veracity" prong was satisfied because IRS investigators are presumed to be truthful. *Id.* at 111. Furthermore, the "basis of knowledge" prong was apparently met because at least some of the information was stated to be derived from the personal observations of other investigators. This included the smell of mash and sounds of a running motor. *Id.* at 110-11.

of its requirements could be ignored if common sense indicated that a tip provided probable cause.[70]

This uncertainty was addressed in *Spinelli v. United States*.[71] In *Spinelli*, the Court reviewed a search warrant based on an affidavit that was "more ample" than the one in *Aguilar*.[72] The affidavit in *Spinelli* contained not only a tip from a confidential, reliable informant,[73] but also a report of an independent police investigation that allegedly corroborated the informant's tip.[74] The Court deemed the informant's tip[75] the fundamental item in the affidavit and isolated this factor in its analysis.[76] Rejecting of the "totality of circumstances" approach taken by the court of appeals,[77] the

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70. *See* Note, *The Informer's Tip*, *supra* note 55, at 961. Justice Goldberg probably meant that common sense should be used in determining whether sufficient circumstances have been set forth to pass each of the tests required by *Aguilar*. *Id.* at n.20.

The dissent in *Ventresca* warned that "[t]here is not a single statement in the affidavit that could well be hearsay or some other multiple form of hearsay." *Ventresca*, 380 U.S. at 122 (Douglas, J., dissenting).

71. 393 U.S. 410 (1969).

72. *Id.* at 413.

73. While the affiant swore that the informant was reliable, he presented no such evidence to the magistrate. *Id.* at 416.

74. The Court stated that the relevant portions of the affidavit were:

> 1) The FBI had kept track of Spinelli's movements on five days during the month of August 1965. On four of these occasions, Spinelli was seen crossing one of two bridges leading from Illinois into St. Louis, Missouri, between 11 a.m. and 12:15 p.m. On four of the five days, Spinelli was also seen parking his car in a lot used by residents of an apartment house at 1108 Indian Circle Drive in St. Louis, between 3:30 p.m. and 4:45 p.m. On one day, Spinelli was followed further and seen to enter a particular apartment in the building.
>
> 2) An FBI check with the telephone company revealed that this apartment contained two telephones under the name of Grace P. Hagan, and carrying the numbers WYdown 4-0029 and WYdown 4-0136.
>
> 3) The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."
>
> 4) Finally it stated that the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

Id. at 413-14. For the full text of the affidavit, see *id.* at 420-22.

75. The tip was a statement that gambling was taking place.

76. *Id.* at 414. The Court reasoned that:

> Without it [the informant's tip] probable cause could not be established. The first two items reflect only innocent-seeming activity and data. Spinelli's travels to and from the apartment building and his entry into a particular apartment on one occasion could hardly be taken as bespeaking gambling activity; and there is surely nothing unusual about an apartment containing two separate telephones. Many a householder indulges himself in this petty luxury.

Id.

77. Spinelli v. United States, 382 F.2d 871, 880 (8th Cir. 1967) (en banc). The Supreme

court held that the informant's tip alone must first be measured against the *Aguilar* standards.[78] Applying the basis of knowledge test, Justice Harlan noted that the affidavit lacked any explanation of the underlying circumstances from which the informer concluded that Spinelli was running a gambling operation.[79] There was no allegation that the informer had seen Spinelli at work or that he had placed a bet with him.[80] Nor was there a statement that the informer had obtained his information from another reliable source.[81] Moving to the reliability test, the majority noted that the affidavit gave no reason for believing that the informer was reliable.[82] There was a bald assertion of reliability but no mention of previous tips.[83]

Because the tip failed to meet the *Aguilar* test alone, the Court approved two additional ways of satisfying that test. First, the Court suggested that if the tip contained sufficient detail describing the criminal activity of the accused, it might satisfy the basis of knowledge prong.[84] Such detail might assure the magistrate that he is "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."[85] The Court stated that "[t]he detail provided by the informant in *Draper v. United States* . . . provides a suitable benchmark"[86] because "[a] magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."[87]

Court contradicted itself, however, by adding that "[t]his is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support." *Spinelli*, 393 U.S. at 418.

78. *Spinelli*, 393 U.S. at 415.

79. *Id.* at 416.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (citing Draper v. United States, 358 U.S. 307 (1959). Detail may also satisfy the reliability spur of the veracity prong. *See id.* at 417. For a discussion of why detail should not satisfy the veracity prong, see Lafave, *supra* note 55, at 42-49.

The Court noted some dissimilarity between probable cause for issuance of a warrant by a magistrate and probable cause required for the arrest in *Draper*. *Spinelli*, 393 U.S. at 417 n.5. Furthermore, there is evidence that the Court was blurring the two part test by using *Draper* as an example of basis of knowledge or reliability. *Id.* at 416.

85. *Spinelli*, 393 U.S. at 416. For a discussion of why the self-verifying detail test should be discarded, see Note, *The Informer's Tip*, *supra* note 55, at 966.

86. *Spinelli*, 393 U.S. at 416-17 (citation omitted).

87. *Id.* at 417 (footnote omitted). In *Draper* the FBI's informer (1) stated that Draper would arrive in Denver on the train from Chicago on the morning of the eighth or ninth of September, (2) described Draper's appearance and how he would be dressed, (3) stated that

The Court held, however, that the tip in *Spinelli* did not meet the *Draper* standard. "Here, the only facts supplied were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."[88]

Second, the Court stated that police corroboration of the details of an informant's tip could satisfy the veracity prong.[89] Justice White stated in concurrence that "because an informant is right about some things, he is more probably right about other facts, usually the critical, unverifiable facts."[90] Justice Harlan then went on to consider whether "the tip . . . when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip [that] would pass *Aguilar's* tests without independent corroboration."[91] The Court held, however, that because the FBI had corroborated only the phone numbers taken from its investigation of telephone company records, there was insufficient corroboration to establish the informer's reliability.[92] By stating that "the tip needed some further support," although it "could . . . properly

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Draper walked with a fast gait, (4) stated that he would be carrying a tan zipper bag, and (5) stated that he would be carrying three ounces of heroin. *Draper*, 358 U.S. at 309. On the second morning specified by the informant, the police saw a man with the exact appearance and attributes described by the informant alight from an incoming Chicago train. The man was carrying a tan zipper bag as the informant had predicted. The police arrested him and in the ensuing search incident to arrest found the heroin. *Id.* at 309-10.

The Court in *Draper* found that the arrest had been based on probable cause. Having verified every detail of the tip, except whether Draper possessed heroin, the police "had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's [the informant] information . . . was likewise true." *Id.* at 313. The Court also placed great weight on the fact that the informer gave reliable information in the past. *Id.*; *cf.* Justice White's concurrence in *Spinelli*: "[I]f what *Draper* stands for is that the existence of the tenth and critical fact is made sufficiently probable to justify the issuance of a warrant by verifying nine other facts coming from the same source, I have my doubts about that case." *Id.* at 426-27.

88. *Spinelli*, 393 U.S. at 417.

89. *Id.* The Court's opinion on this issue is not clear because it appears to suggest that corroboration can satisfy both the basis of knowledge and veracity prongs of *Aguilar*. *Id.* at 417. Because veracity was not at issue in *Draper*—the informant had given reliable information in the past—the opinion in *Spinelli*, therefore, might be read as suggesting that corroboration could also satisfy *Aguilar's* basis of knowledge test. The acceptance has been mixed. Corroboration has been used to satisfy both prongs. *See* Illinois v. Gates, 103 S. Ct. at 2349 n.22 (White, J., concurring); Lafave, *supra* note 55, at 54-59. *Contra* Illinois v. Gates, 103 S. Ct. at 2354-55 (Brennan, J., dissenting); Comment, *supra* note 55, at 368.

90. *Spinelli*, 393 U.S. at 427.

91. *Id.* at 415.

92. *Id.* at 417-18.

have counted in the magistrate's determination,[93] *Spinelli* hints that police must corroborate activity that is suggestive of criminal conduct before finding that probable cause exists.[94] The Court generated confusion, however, by citing *Draper*, a case where police only corroborated details of innocent activity.[95] Justice White, concurring, disagreed with the majority's application of *Draper*. He believed that under *Draper* the warrant in *Spinelli* should have been upheld.[96]

The *Spinelli* Court attempted to alleviate the difficulties encountered in applying the *Aguilar* two-pronged test. Instead, it raised the question of the amount of specificity needed for a tip to become self-verifying, and of the extent to which an informant's tip must be corroborated in order to satisfy the veracity prong. In addition, the Court underscored the issue whether the corroboration of innocent or incriminating details was necessary.[97]

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93. *Id.* at 418.

94. *See id.*

95. For a discussion on whether the corroborated facts may be innocent-seeming or should be suggestive of criminal activity, see Lafave, *supra* note 55, at 46-67 (suggesting that corroborated facts of criminal activity should count for much more than corroborated facts of innocent activity in a probable cause determination); Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1981-1982*, 71 GEO. L.J. 339, 358 n.56 (1982) (discussing this issue in light of the *Spinelli* Court's use of *Draper*).

96. *Spinelli*, 393 U.S. at 428. For a discussion on this point and on Justice White's concurrence as a whole, see Note, *Searching for Probable Cause*, *supra* note 55, at 739-41.

Justice White concurred with the result because a dissenting vote would have produced an equally divided Court, resulting in the affirmance of the Eight Circuit's opinion with which he disagreed. *Spinelli*, 393 U.S. at 428-29.

The dissent warned that "the Court is moving . . . toward the holding that no magistrate can issue a warrant unless according to some unknown standard of proof he can be persuaded that the suspect defendant is actually guilty of a crime." *Id.* at 435 (Black, J., dissenting).

97. *See* Comment, *supra* note 4, at 105.

There are indications that the Court, as well as a large part of the Justice Department, believed that the "confidential informant" in *Spinelli* was in fact a tap on the two telephone lines. This suspicion may account for the surprising strictness with which the *Spinelli* Court interpreted the *Aguilar* test. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 237 n.c. (4th ed. 1974).

After *Spinelli* and subsequent cases, a picture developed of the many different ways that *Aguilar's* two-pronged test could be satisfied. Generally speaking, the "veracity" prong could be satisfied by a recitation in the affidavit that the informant previously supplied accurate information to the police, *see* McCray v. Illinois, 386 U.S. 300, 303-04 (1967), by proof that the informant gave his information against his penal interests, *see* United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion) or by police corroboration, as *Spinelli* held. The "reliability" spur of the "veracity" prong is satisfied if enough detail is advanced in order to infer reliability. Spinelli v. United States, 393 U.S. at 417.

The "basis of knowledge" prong is satisfied by a statement from the informant that he personally observed the criminal activity, or, if he came by the information indirectly, by a

III. *Illinois v. Gates*

Illinois v. Gates[98] is significant for at least three reasons. First, the Supreme Court for the first time "squarely addressed the application of the *Aguilar* and *Spinelli* standards to tips from anonymous informants."[99] Second, the Court abandoned the *Aguilar-Spinelli* standard in favor of a "totality of circumstances" approach for determining whether an informant's tip establishes probable cause for issuance of a warrant.[100] Third, the decision is just one more indication of this Court's willingness to compromise those rights that the fourth amendment was intended to protect.[101]

The theme reiterated throughout the majority opinion is that probable cause is a "practical, nontechnical conception."[102] The Court reasoned that the two-pronged test enunciated in *Aguilar*, as refined in *Spinelli* and applied in subsequent cases, had become unduly rigid and too technical to serve that concept;[103] it believed that the Illinois Supreme Court's decision was just another example of this trend. Justice Rehnquist stated that the state supreme court, like others, had "apparently understood *Spinelli* as requiring that the anonymous letter satisfy each of two independent requirements" [the veracity and basis of knowledge prongs] before it could be relied on."[104] However, the Supreme Court points out that these requirements, although relevant to a probable cause determination, need not be met in every case:

> We agree with the Illinois Supreme Court that an informant's "veracity," "reliability" and "basis of knowledge" are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly ex-

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satisfactory explanation of why his sources were reliable, or by a description of the activity of the accused in sufficient detail. *Id.* at 416.

98. 103 S. Ct. 2317 (1983).

99. *Id.* at 2356. The Court did, however, in dictum, address this issue in Adams v. Williams, 407 U.S. 143, 146-47 (1972). That case, however, dealt with the Terry v. Ohio, 392 U.S. 1 (1968), stop-and-frisk exception to the warrant requirement.

100. 103 S. Ct. at 2332.

101. For another case, handed down in the same term as *Gates*, where the Court weakened fourth amendment protections, see United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983) (customs officials, acting without any suspicion of wrongdoing, did not violate the fourth amendment by boarding and searching vessel). Justice Rehnquist wrote for the majority in both *Gates* and *Villamonte-Marquez*.

102. 103 S. Ct. at 2328, (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

103. *Id.* at 2328-29.

104. *Id.* at 2326-27.

acted in every case . . . .[105]

Rather, under the "totality of circumstances" approach those factors "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause'. . . ."[106]

Writing for the majority, Justice Rehnquist stated that the "totality of circumstances" approach is far more consistent with the Court's prior treatment of probable cause than is the two-pronged test of *Aguilar* and *Spinelli*.[107] Probable cause is a "fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."[108] The two-pronged test, the Court asserted, "has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate."[109] However, under the "totality of circumstances" approach, "a deficiency in one [prong] may be compensated for . . . by a strong showing as to the other . . . ."[110] The Court believed that it was incongruous to have "[t]echnical requirements of elaborate specificity" when most "affidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation.' "[111] The Court's concern is that nonlawyers will not remain abreast of each judicial refinement in the definition of probable cause.

In reaching its decision, the Court considered the societal equities involved. It concluded that the continued use of non-flexible standards would greatly affect society. Police might resort to warrantless searches, the Court reasoned, and this is not preferred because "the possession of a warrant . . . greatly reduces the public perception of unlawful or intrusive police conduct . . . ."[112] Furthermore, "the direction taken by decisions following *Spinelli* poorly serves 'the most basic function of any government': 'to provide for the security of the individual and of his property.' "[113] The Court reasoned that the two-pronged test would seriously impede

105. *Id.* at 2327-28.

106. *Id.* at 2328 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).

107. *Id.*

108. *Id.*

109. *Id.* at 2330. The Court cited numerous cases where courts have been unduly technical and rigid in their application of *Aguilar* and *Spinelli*. *See id.* at 2326-27 n.3, 2328 n.5, 2329 n.8, 2330 n.9.

110. *Id.* at 2329.

111. *Id.* at 2330 (citations omitted).

112. *Id.* at 2331.

113. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting)).

the task of law enforcement by diminishing the value of informant's tips, which "frequently contribute to the solution of otherwise 'perfect crimes,' "[114] in police work. Reflecting this preference for the warrant requirement and for the continued security of society the Court set forth the following standard:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.[115]

Applying the newly announced standard, the Court reversed the Illinois Supreme Court and upheld the warrant in *Gates*. Reaffirming the value of corroboration of details of an informant's tip, the Court held that "[t]he showing of probable cause in the present case was fully as compelling as that in *Draper*. Even standing alone, the facts obtained through the independent investigation of Mader and the DEA at least suggested that the Gates were involved in drug trafficking."[116] Justice Rehnquist stated that in determining the informant's reliability the magistrate could have relied "on the anonymous letter, which had been corroborated in major part by Mader's efforts—just as had occurred in *Draper*."[117]

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114. 103 S. Ct. at 2332.

115. *Id.* at 2332 (quoting in part Jones v. United States, 362 U.S. 257, 271 (1960)).

116. 103 S. Ct. at 2334. The Court reasoned that Florida, in addition to being a popular vacation site, is known as a source of drugs. Furthermore, Lance Gates's flight to Palm Beach, his brief overnight stay, and his immediate return to Chicago in the family car, which was conveniently awaiting in Palm Beach, is as suggestive of a drug run, as it is of a vacation. *Id.*

117. *Id.* at 2334-35. The Court pointed out that the Illinois Supreme Court tried to distinguish *Draper* by stating that *Draper* involved an informant who had given reliable information in the past, while the reliability of the informant in *Gates* was unknown to the police. The Court rebutted by stating that:

> While this distinction might be an apt one at the time the police department received the anonymous letter, it became far less significant after Mader's independent investigative work occurred. The corrobation of the letter's predictions . . . all indicated, albeit not with certainty, that the informant's other assertions also were true.

Id. at 2335.

The Court also pointed out that the Illinois Supreme Court had concluded that the verification of details in *Gates* amounted only to "the corroboration of innocent activity" and thus was insufficient to support a finding of probable cause. *Id.* at n.13 (citation omitted). The Court responded by noting that all of the corroborated detail in *Draper* was of entirely innocent activity. *Id.* Furthermore, the Court reasoned that because probable cause

Corroboration reduced the chances that the informant gave untruthful equivocal information."[118] Finally, Justice Rehnquist reasoned that "the anonymous letter contained a range of details relating not just to easily obtained facts . . . but to future actions of third parties ordinarily not easily predicted."[119] The Court stated that where an informant had access to this type of accurate information, "it was not unlikely that he also had access to reliable information of the Gates' alleged illegal activities."[120] Therefore, the Court resolved, "the judge issuing the warrant had a 'substantial basis for . . . conclud[ing]' that probable cause to search the Gates' home and car existed."[121]

Justice White, concurring, reasoned that it was not necessary to abandon the two-pronged test. Although he agreed with the majority that the warrant in *Gates* should be upheld, he reached his conclusion within the *Aguilar* and *Spinelli* framework.[122] Justice White agreed with the Court that "some lower courts have been applying *Aguilar-Spinelli* in an unduly rigid manner"; however, he believed that clarification of the rule better served their responsibility in this area.[123]

Justice Brennan wrote separately to dissent from what he called "the Court's unjustified and ill-advised rejection" of *Aguilar* and *Spinelli*.[124] After reviewing the opinions in *Nathanson* and *Giordenello*, he concluded that "[i]f the conclusory allegations of a police officer are insufficient to support a finding of probable cause, surely the conclusory allegations of an informant should *a fortiori* be insufficient."[125] While the rules drawn from *Jones*, *Aguilar*, and *Spinelli* are cast in procedural terms, according to Justice Brennan they do advance an important underlying substantive value: "Findings of probable cause, and attendant intrusions, should not

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required only a probability or substantial chance of criminal activity, innocent behavior frequently will provide the basis for a showing of probable cause; the relevant inquiry is not whether particular conduct is "innocent" or "guilty" but the degree of suspicion that attaches to particular types of noncriminal acts. *Id.*

118. *Id.* at 2335.

119. *Id.*; *see supra* note 3. The Court went on to state that "the letter writer's accurate information as to the travel plans of each of the Gates was of a character likely obtained only from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans." 103 S. Ct. at 2335.

120. 103 S. Ct. at 2335 (footnote omitted).

121. *Id.* at 2336.

122. *Id.* at 2347-50 (White, J., concurring).

123. *Id.* at 2350-51 (footnote omitted).

124. *Id.* at 2351 (Brennan, J., dissenting).

125. *Id.* at 2352.

be authorized unless there is some assurance that the information on which they are based has been obtained in a reliable way by an honest or credible person."[126] Because affidavits based on hearsay require a more difficult inquiry[127] in order to ensure greater accuracy, "[t]he standards announced by *Aguilar*, as refined by *Spinelli* fulfill that need."[128] Justice Brennan concluded that "the Court's rejection of *Aguilar* and *Spinelli* and its adoption of a new totality of the circumstances test . . . 'may fortell an evisceration of the probable cause standard . . . .' "[129]

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126. *Id.* at 2355.

127. When the police rely on personal knowledge, requiring them to disclose that knowledge is no burden. When the police rely on information from confidential informants, requiring the police to disclose facts on which the informants based their conclusions imposes a more substantial burden on the police. It is, however, one that they can meet because they presumably have access to their confidential informants. But in cases where the police rely on information obtained from an anonymous informant, the police, by hypothesis, cannot obtain further information about the informant's reliability, honesty, basis of knowledge, etc., and therefore provide the magistrate with all the information on which they have based their conclusion. *See id.* at 2356 n.6. Hence, there is no basis for assuming that an anonymous informant has obtained his information in a reliable way. *Id.* at 2356.

128. *Id.* at 2355.

129. *Id.* at 2359 (quoting Justice White's concurring opinion at 2334). Before concluding, however, Justice Brennan took time to counter some of the majority's arguments. He began by stating that "*Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause . . . . Neither the standards nor their effects are inconsistent with a 'practical, nontechnical' conception of probable cause." *Id.* at 2357. Hence, the dissent believed that the totality of circumstances standard would downgrade the role of the neutral magistrate while eliminating an effective structure within which to make their probable cause determinations. The majority rebutted by stating that nothing in its opinion "lessens the authority of the magistrate to draw such reasonable inferences as he will from the material supplied to him by applicants for a warrant." *Id.* at 2333. Indeed, the majority concluded, the magistrate "is freer than under the regime of *Aguilar* and *Spinelli* to draw such inferences, or to refuse to draw them if he is so minded." *Id.* Similarly, the majority added, the magistrate may exact whatever assurances he deems necessary.

Justice Brennan's dissent differed with the majority's reasoning that *Aguilar* and *Spinelli* should be abandoned because they are inconsistent with the fact that non-lawyers frequently serve as magistrates. *Id.* at 2330-31. On the contrary, the dissent reasoned that "the [*Aguilar* and *Spinelli*] standards help to structure probable cause inquiries and, properly interpreted, may actually help a non-lawyer magistrate in making a probable cause determination." *Id.* at 2358. To the majority's supposition that rigorous scrutiny of affidavits will lead police to resort to warrantless searches with the hope of relying on consent or some other exception to the warrant requirement, *id.* at 2331, the dissent responded by citing the holding in Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971), that unconstitutional searches are *per se* unreasonable under the fourth amendment. Thus, the officer must carry the heavy burden of showing the exigencies which made that course of conduct imperative. *Id.* at 2358 n.9 (citation omitted). Furthermore, of particular interest to the dissent was the majority's theory that "the direction taken by decisions following *Spinelli* poorly serves 'the most basic function of any government': 'to provide for the security of the individual and of his property.' " *Id.* at 2331 (citation omitted). Justice Brennan attacked this theory by reasoning that "of particular concern to all Americans must be that the Court

Justice Stevens also wrote separately. His dissent concentrated on the significance of an inaccuracy in the anonymous letter.[130] He believed that the discrepancy was significant because it cast doubt on the informant's hypothesis that there was contraband in the Gates's basement,[131] it made the Gates's conduct seem less unusual,[132] and it undermined the reasonableness of relying on the letter as a basis for making a forcible entry into a private home.[133]

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gives virtually no consideration to the value of insuring that findings of probable cause are based on information that a magistrate can reasonably say has been obtained in a reliable way by an honest or credible person." *Id.* at 2359.

Finally, the Brennan dissent stated that the majority's use of words such as "practical," "nontechnical," and "commonsense" are but "code words for an overly permissive attitude towards police practices in derogation of the rights secured by the fourth amendment." *Id.* To this the majority rebutted that although it is true that only measures consistent with the fourth amendment may be employed by the government to cure the horrors of drug trafficking, *see id.* at 2359,

> "[f]idelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizzare claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true . . . ."

Id. at 2333-34.

The Brennan dissent concluded by stating that:

> Rights secured by the Fourth Amendment are particularly difficult to protect because their "advocates are usually criminals." But the rules "we fashion [are] for the innocent and guilty alike." By replacing *Aguilar* and *Spinelli* with a test that provides no assurance that magistrates, rather than the police, or informants, will make determinations of probable cause; imposes no structure on magistrates' probable cause inquiries; and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person, today's decision threatens to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

Id. at 2359 (citations omitted).

130. Justice Stevens was concerned that the informant had predicted that Sue Gates would fly back after she dropped the car off in Florida when in fact she left West Palm Beach with her husband in the Mercury. *Id.* at 2360 (Stevens, J., dissenting).

131. The dissent pointed out that the informant had predicted an itinerary that always kept one spouse in Bloomingdale, supposedly guarding the contraband. However, that could not be the case, Justice Stevens reasoned, "when it was known that the pair was actually together over a thousand miles from home." *Id.*

132. Justice Stevens reasoned that it would have been unusual if, as predicted, Sue Gates had driven to West Palm, left the car, and flown right back to Illinois. But the mere fact that she was in West Palm with the car (for possibly a month before her husband arrived, *see id.* at n.1), joined her husband, and drove north together the next morning "are neither unusual nor probative of criminal activity." *Id.* at 2360.

133. *Id.* The majority rebutted by stating that "[w]e have never required that informants used by the police be infallible, and can see no reason to impose such a requirement in this case. Probable cause, particularly when police have obtained a warrant, simply does

Furthermore, in his view, "the judgment of three levels of state courts, all of whom are better able to evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois, than we are, should be entitled to at least a presumption of accuracy."[134] Finally, Justice Stevens reasoned, because " 'there is a constitutional difference between houses and cars' "[135] that the car search should be reconsidered "in the light of our intervening decision in *United States v. Ross*."[136]

IV. AN ANALYSIS OF *Gates*

The conclusion in *Gates* was correct; the warrant approving the search of the Gates's house and car should be upheld, but that could have been accomplished without abandoning the rules enunciated in *Aguilar* and *Spinelli*.

The majority contradicts itself in two important respects. First, it admonishes decisions after *Spinelli* for being too "rigid" and "unpractical," yet concedes that the original phrasing of *Aguilar* was not so inflexible: "[W]e intended neither a rigid compartmentalization of the inquiries . . . nor that these inquiries be elaborate exegeses of an informant's tip." The Court points out that *Aguilar* required only *some* underlying facts.[137] Although *Spinelli* conceivably evolved the two-pronged test into a more "rigid" standard, the Court nonetheless cites *Adams v. Williams*,[138] a post-*Spinelli* decision, where the Court reasserted the proposition, as the majority states it, that "[r]igid legal rules are ill-suited to an area of such diversity."[139] If the majority is suggesting that *Spinelli* was wrongly decided or that lower courts have misapplied its standards, it should say so.[140] The *Gates* Court would have better complied with its judicial responsibility had it clarified *Spinelli* in light of *Draper* and subsequent cases. A strong admonishment,

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not require the perfection the dissent finds necessary." *Id.* at 2335 n.14. The majority also reasoned that it was unlikely that the issuing magistrate relied on the theory advanced by the dissent that one spouse would always stay at home in order to guard the contraband. *Id.*

134. *Id.* at 2361-62 (footnote omitted).

135. *Id.* at 2361 (quoting Chambers v. Maroney, 399 U.S. 42, 52 (1970)).

136. *Id.* at 2362. United States v. Ross, 456 U.S. 798 (1982), held that when police legitimately stop an automobile and have probable cause to believe that contraband is contained within it, they can conduct a warrantless search of the vehicle.

137. 103 S. Ct. at 2328 n.6.

138. 407 U.S. 143 (1972).

139. 103 S. Ct. at 2329.

140. The majority itself concedes that the decision in *Spinelli* has been criticized considerably. *See id.* at 2332 n.11 and accompanying citation.

such as the one given by the Court in *Ventresca*, would have resolved the problem; abandoning *Aguilar* and *Spinelli* did not.

Second, the Court states that a finding of probable cause may be based on a tip from an informant "known for the unusual reliability of his predictions" or from "an unquestionably honest citizen," even if the report thoroughly fails to set forth the basis upon which the information was obtained.[141] If this is so, a similar statement from an honest police officer may also support a finding of probable cause. But that would go against the teachings of *Nathanson* and *Jones*, cases expressly reaffirmed by the Court,[142] that mere conclusory statements by officers without any statement of adequate underlying facts cannot support a finding of probable cause. Similarly, *Nathanson* and *Giordenello* directly contradict the Court's suggestion that a strong showing on one prong of the *Aguilar* test should compensate for a deficient showing on the other.[143] How the majority can expressly reaffirm such cases, yet implicitly reject their teachings, is without reason.

As Justice White stated in concurrence, "it is not at all necessary to overrule *Aquilar-Spinelli* in order to reverse the judgment below."[144] The corroboration of facts in *Gates* sufficiently established the veracity of the anonymous informant. The tip predicted that Sue Gates would drive to Florida, that Lance would fly there a few days after May 3, and that Lance would then drive the car back. After the police corroborated these facts,[145] the magistrate could reasonably have inferred that the informant, who had specific knowledge of these unusual travel plans, did not make up his story and that he obtained his information in a reliable way. It is enough, for purposes of assessing probable cause, that " 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale.' "[146] Furthermore, the corroborated activity was quite suspicious.[147] In any event, however, the majority's use of *Draper*, where only innocent details were corroborated,

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141. *Id.* at 2329.

142. *See id.* at 2332.

143. *See id.* at 2358 (Brennan, J., dissenting).

144. *Id.* at 2350.

145. There was one inaccuracy in the tip; however, the Court has "never required that informants used by the police be infallible. . . ." *Id.* at 2335 n.14; *See supra* pp. 895-96 & notes 130-33.

146. *Id.* at 2335 (quoting Jones v. United States, 362 U.S. 257, 269, 271 (1960)).

147. "Lance Gates' flight to Palm Beach, an area known to be a source of narcotics, the brief overnight stay in a motel, and apparent immediate return North, suggest a pattern that trained law-enforcement officers have recognized as indicative of illicit drug-dealing activity." 103 S. Ct. at 2348 (footnote omitted).

resolves this quandary. The corroboration in *Gates* "is as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration."[148]

Finally, assuming that corroboration could not satisfy the "basis of knowledge" prong,[149] the detail in the tip was certainly sufficient to assure the issuing magistrate that he was "relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."[150] Using *Draper* as a "benchmark,"[151] the detail in *Gates* was at least as great.[152] Although theoretically the tip in *Gates* could have been supplied by a "vindictive travel agent," this is not determinative because "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."[153]

Hence, the warrant in *Gates* could have been upheld within the *Aguilar-Spinelli* rubric. Accordingly, the majority's proposition that "anonymous tips seldom would be of . . . value in police work" is weakened. While a rigid application of *Aguilar* and *Spinelli* would diminish the value of tips from anonymous informants as well as confidential informants, a more flexible standard, following more closely the intent of the *Aguilar* court, as discussed above, would validate tips such as the one in *Gates*, while ferreting out those not worthy of such merit.

V. THE IMPLICATIONS OF *Gates*

The decision in *Gates* is a paradox, full of conflicting ideals. Preferring to leave for another day the issue whether the exclusionary rule should be modified,[154] the Court instead chose to reject a long standing and successful standard for evaluating informants' tips.[155] Informants, especially anonymous ones, should be

148. Spinelli v. United States, 393 U.S. 410, 415 (1969).

149. Justice White believed that it could. "If, however, as in *Draper*, the police corroborate information from which it can be inferred that the informant's tip was grounded on inside information, this corroboration is sufficient to satisfy the basis of knowledge prong." 103 S. Ct. at 2349 n.22; *see supra* note 89.

150. Spinelli v. United States, 393 U.S. at 416.

151. *Id.*

152. *See supra* notes 3 and 87.

153. *Id.* at 419; *see* 103 S. Ct. at 2349 (White, J., concurring).

154. 103 S. Ct. at 2321-25. *See id.* at 2336-47 (White, J., concurring) (addressing the exclusionary rule issue and suggesting that it be modified).

155. Although the Court refused to modify the exclusionary rule, holding that that issue was not properly before it, it can be argued that by abandoning *Aguilar* and *Spinelli* and substituting the more lenient "totality of the circumstances" test, the same result (mod-

classified as presumptively unreliable.[156] Informants are frequently themselves criminals, drug addicts, or liars who give information for reasons other than the call of civic duty. The reasons motivating informants include offers of immunity or sentence reductions, promises of money payments, revenge, or the hope of eliminating criminal competition.[157] It is unreasonable that these "presumptively" reliable statements from informants, without an explanation as to how they obtained their information, can provide a basis for probable cause, while the same statement from an officer will not. An informant may have provided adequate information in the past but may subsequently give information for some ulterior purpose. Thus, there is even more reason to apply veracity and basis-of-knowledge standards to tips from anonymous informants—nothing is known about their reliability.

By enlarging the scope of informant evidence, society's interest in unintruded privacy takes a back seat in an important respect. The decision in *Gates* will "restore the preeminence and concomitant abuse of informant's tips by law enforcement officials."[158] No longer will officers be required to supply the issuing magistrate with the underlying circumstances surrounding the informants' veracity and basis of knowledge; information on either of these bases will suffice if the issuing magistrate is convinced that in the totality of the circumstances probable cause has been established.

This can lead to extreme abuses. Warrants can be issued on the mere fact that a known informant was previously reliable. In addition, *Gates* will provide an opportunity for officers to fabricate informants, if the establishment of probable cause would otherwise fail, because the informants' reliability will no longer be closely scrutinized, as is the reliability of the officer.[159] The possible

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ification of the exclusionary rule) was achieved as to informants. *See* 103 S. Ct. at 2338.

156. *See* Comment, *supra* note 4, at 107. *See generally* Comment, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703 (1972) (suggesting a probable cause model for assuring the credibility of incriminating information obtained from unidentified informants); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 177 (1969) (examination of *Spinelli* and its requirement of independent corroboration).

157. *See* Comment, *supra* note 156, at 712-13.

158. Comment, *supra* note 4, at 121. *See* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (en banc) In *Lankford*, police used unverified anonymous tips to search for two fugitives in more than 300 houses, most belonging to blacks. Officers carrying shotguns conducted the majority of the searches without consent, at around 2:00 a.m. The officers awakened individuals, including children, with shining flashlights.

159. *See supra* text accompanying note 142.

abuses from anonymous informants is even greater. Consequently, the most alarming result from *Gates* is that it once again presents the question, answered affirmatively thirty-six years ago in *Johnson v. United States*,[160] whether a "neutral and detached magistrate" will make probable cause determinations rather than the "officer engaged in the often competitive enterprise of ferreting out crime," or worse yet, whether an anonymous informant will make the determination. By requiring police to provide certain crucial information to the issuing magistrate and by structuring the magistrate's probable cause inquiries, the *Aguilar* and *Spinelli* framework assured the magistrate's independent role as the only arbiter of probable cause determinations.

That some courts may have been overly technical in their application of *Aguilar* and *Spinelli* is no justification for rejecting *Aguilar* and *Spinelli* outright. Rather, the Court in *Gates* could have clarified those cases and their interaction with *Draper*.[161] It also could have admonished the lower courts for being overly technical and rigid in applying *Aguilar* and *Spinelli*, instructing these courts on their proper application. If we are to continue to ensure that findings of probable cause, and their attendant intrusions, are based on information provided by a credible person who acquired the information in a reliable way, then the *Aquilar-Spinelli* standard, albeit in a less rigid form, must be revived, or a similar standard developed and applied to informants' tips, especially those from anonymous informants.

VI. CONCLUSION

Gates is just another example of the Supreme Court chipping away at the protections that the fourth amendment[162] guarantees, while at the same time giving lip service to its meaning. It is evident that the pendulum is swinging toward the extreme right; crime control is becoming the model at the expense of individial rights. How long this trend will continue before the fourth amendment is left valueless is anyone's guess.[163] Perhaps the fourth

160. 333 U.S. 10, 13-14 (1948).

161. *See* 103 S. Ct. at 2350-51.

162. Or, as Justice Brennan put it, "stop dead in its tracks judicial development of Fourth Amendment rights." United States v. Peltier, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

163. This movement of the constitutional pendulum continued during the Supreme Court's 1983-84 term. The movement was particularly noticeable with fourth amendment jurisprudence. *See, e.g.*, United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v.

amendment will regain its value when Justice Rehnquist and his ultra-conservative policies leave the Court. Maybe then the pendulum will swing back and the *Aguilar-Spinelli* standard will be resurrected or a similar one developed. But in the meantime, may *Aguilar* and *Spinelli* rest in peace.

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Sheppard, 104 S. Ct. 3424 (1984) (the fourth amendment's exclusionary rule should not be applied when law enforcement officials conducting the search act in objectively reasonable reliance on a search warrant, issued by a detached and neutral magistrate, that subsequently is determined to be invalid; this is often referred to as the "good faith" exception); Nix v. Williams, 104 S. Ct. 2501 (1984) (Court adopted an "inevitable discovery" exception to the fourth amendment's exclusionary rule).