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Finding Probable Cause in an Informants's Tip

Peter F. Mullaney

FINDING PROBABLE CAUSE IN AN INFORMANT'S TIP

INTRODUCTION

Effective law enforcement in America relies to a significant extent upon information supplied by informants. Studies conducted in the 1970s indicated that more than half of the search warrants issued relied, at least partially, on hearsay testimony of unnamed informants.[1] The majority of those warrants produced evidence of criminal conduct.[2] At present, police routinely receive information from a variety of individuals, among them turncoat criminals, paid police informers, interested citizens,[3] and some who prefer anonymity. Police reliance on this kind of information presents the American judicial system with a formidable challenge: to define, consistent with the fourth amendment,[4] a standard that proves the reliability of informant tips.

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1. *See* Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 703 n.3 (1972). Studies also reveal that reliance on hearsay is especially significant in drug-related cases. One study revealed that upwards of eighty percent of all warrants for drug-related searches were founded on informant reports. *See id. See also* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3 at 500 (1978) (likely that a majority of appellate decisions involving probable cause are concerned with information obtained from informants).

2. *See* Rebell, *supra* note 1, at 723, Table 5.

3. Many cities encourage citizens to supply information to law enforcement officials through various "crime line" operations. Typically, citizens are promised anonymity and a contingent monetary reward if, after observing criminal activity, they dial a toll-free number and report their observations. Some programs provide monetary rewards if information supplied by a citizen leads to an arrest; other programs provide rewards only upon conviction. For example, "CrimeLine Anonymous" operates in Milwaukee, Wisconsin. On successive weeknight news programs a local television station airs a segment which describes a recently committed criminal offense. Viewers are urged to report any information relating to the crime by dialing an out of state toll-free number. Calls are received by operators based in California, who also take calls from other cities running programs similar to the one in Milwaukee. Information received by the operators is then incorporated into written reports which are mailed or phoned in to Milwaukee police. From the program's inception in November 1983 through October 1984, "CrimeLine Anonymous" has produced several hundred phone calls, six arrests, and two convictions — mostly drug-related. The program gives citizens a $500 reward if information leads to conviction. Telephone interview with Allan May, Program Director of "CrimeLine Anonymous" (October 2, 1984). *See also* Note, *Reliability of Confidential and Anonymous Informants*, 12 N.M.L. REV. 517 (1982).

4. The fourth amendment provides:

Beginning with the United States Supreme Court's 1964 decision in *Aguilar v. Texas*,[5] as "further explicated" five years later in *Spinelli v. United States*,[6] informant tips have been measured against a two-pronged test. The purpose of the test is to ensure that police conduct searches and arrests based upon trustworthy information.[7] To this end, the first prong of the test inquires whether there are facts or circumstances indicating the informant's basis for concluding that criminal conduct is occurring or that contraband is where the informant claims it is (the "basis of knowledge" prong). This first prong is most frequently satisfied by a statement that the informant personally observed criminal activity.[8] The second prong requires the police officer-affiant to inform the magistrate of the officer's basis for believing that the informant is credible (the "veracity" prong). The veracity prong will be satisfied if the informant previously supplied accurate information to the police.[9]

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

U.S. CONST. amend. IV.

5. 378 U.S. 108 (1964).

6. 393 U.S. 410 (1969).

7. The Court has stated that the probable cause requirement of the fourth amendment applies to arrest as well as search warrants. *See* Giordenello v. United States, 357 U.S. 480, 485-86 (1958). The probable cause standard for search and arrest warrants also provides a minimum requirement for warrantless searches. *See* Spinelli v. United States, 393 U.S. 410, 417 n.5 (1969).

8. Justice White explained that this prong may also be satisfied if the informant comes by information indirectly and if there is a satisfactory explanation of why the informant's sources are reliable. Additionally, in the absence of a statement detailing the manner in which the information was gathered, an affidavit describing criminal activity in detail might make a tip "self-verifying." In this case, "[t]he informant is relying on something more substantial than casual rumor or an individual's general reputation." Illinois v. Gates, 103 S. Ct. 2317, 2347 n.20 (1983) (White, J., concurring) (citing *Spinelli*, 393 U.S. at 416).

9. *See* McCray v. Illinois, 386 U.S. 300, 303-04 (1967). The prong may also be satisfied by proof that the informant gave information against the informant's penal interest. *See* United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion). The credibility prong is sometimes described as having two "spurs," allowing the government to establish "either the general credibility of the informant or the reliability of the particular piece of information related." *See* Note, *Use of Hearsay to Establish Probable Cause*, 97 HARV. L. REV. 177, 178 (1983). Justice Rehnquist also identified these "spurs" in Illinois v. Gates, 103 S. Ct. 2317, 2333 (1983). This bifurcation, however,

As one commentator noted, the *Aguilar-Spinelli* framework provoked "apparently ceaseless litigation."[10] Many courts became hung up along the guidelines of the two-pronged standard. If, in the opinion of a magistrate or reviewing court, a warrant application " 'reeked' of probable cause,"[11] it might be upheld absent satisfaction of one or the other of the *Aguilar* prongs.[12] Some warrants were upheld by various methods of inferring satisfaction of the test,[13] although courts differed significantly as to the proper inferences to be drawn.[14] Conversely, strict fidelity to the *Aguilar* standard brought about hypertechnical applications in some

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produces nothing but confusion and should be disregarded. Insofar as one "spur" considers the piece of information related, it moves beyond the central inquiry of the credibility prong. The credibility prong focuses on the particular informant — not the information — to determine whether the informant is likely to be telling the truth. The basis of knowledge prong then focuses on the information the informant transmits.

10. 8A MOORE'S FEDERAL PRACTICE § 41.04 (2d ed. rev. 1984).

11. In an article written by the attorneys for Lance and Susan Gates, defendants in *Illinois v. Gates*, Justice William Rehnquist is quoted from a speech he delivered before the Washington Trial Lawyer's Conference. Justice Rehnquist observed:

> I think it can fairly be said that each of the two times the Justices of our Court came off the bench after hearing the [*Gates*] case argued, a majority of us felt that the facts simply 'reeked' of probable cause. . . . [I]f there were previous decisions of our Court that would have prevented a finding of probable cause in this case, it was very likely those decision were incorrect.

Reilley, Witlin & Curran, Illinois v. Gates: *Probable Cause Redefined?*, 17 J. MAR. L. REV. 335, 376 n.291 (1984). Lax application of the two-pronged test was often justified by judicial deference to decisions of magistrates. *See* Illinois v. Gates, 103 S. Ct. 2317, 2231 (1983) ("[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review."). Unspoken rationalizations no doubt included the desire to uphold warrants which in fact produced incriminating evidence. There may also have existed a feeling that the test simply was not an effective indicator of probable cause. One study conducted in 1969-1970 concluded that warrants that arguably did not meet the two-pronged test did not lead to a higher proportion of fruitless searches than those that clearly met the *Aguilar-Spinelli* standard. *See* Rebell, *supra* note 1, at 711-12.

12. *See, e.g.*, State v. Guy, 55 Wis. 2d 83, 197 N.W.2d 774 (1972); Molina v. State, 53 Wis. 2d 662, 193 N.W.2d 874 (probable cause found with no evidence supporting basis of knowledge), *cert. denied*, 407 U.S. 923 (1972).

13. *See, e.g.*, United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion) (veracity may be inferred from declaration against penal interest); State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971) (citizen-informants are presumptively credible).

14. *See* W. LAFAVE, *supra* note 1, § 3.3(e) and (f) (citing cases drawing different inferences from detail and police corroboration).

cases.[15] These decisions inevitably produced confusion over the meaning and purpose of the two-pronged framework.

With this troubled past in mind, the United States Supreme Court ostensibly "abandoned" the two-pronged test in *Illinois v. Gates*,[16] a 1983 decision. In its place, the Court adopted a "totality of circumstances" analysis.[17] Justice Rehnquist's majority opinion conceded that an informant's veracity and basis of knowledge remain "highly relevant in determining the value of [the informant's] report."[18] Still, significantly, the Court did "not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case . . . ."[19]

The *Gates* decision makes no attempt to provide a technical definition of the totality of circumstances. The focus of the decision instead reaffirms the importance of common sense and practicality in probable cause assessments. Justice Rehnquist wrote:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. 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.[20]

The purpose of this Comment is to propose an acceptable method of analyzing an informant's tip to determine probable cause under the totality of circumstances. A thorough understanding of *Illinois v. Gates* is of course essential to this purpose; therefore *Gates* will be taken up again in part II. Part III presents a case study of informant tips in state courts, based on Wisconsin law. Initially, however, it is critical to under-

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15. *See Gates*, 103 S. Ct. 2317, 2330 n.9 (1983) (citing examples of highly technical applications of the two-pronged test).

16. 103 S. Ct. 2317 (1983).

17. *Id.* at 2332.

18. *Id.* at 2327.

19. *Id.* at 2327-38.

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

stand some historical principles upon which analysis of informant tips must begin.

I. FOUNDATIONS OF THE TWO-PRONG TEST

A. *Pre*-Aguilar

Nathanson v. United States [21] is frequently cited for establishing the "ground floor" for any probable cause analysis. The 1933 *Nathanson* decision created an absolute prohibition against the issuance of warrants based solely on the conclusory statements of police. In *Nathanson*, the officer-affiant swore that he had "cause to suspect and [did] believe" that the suspect was engaged in criminal conduct.[22] The Court held that a warrant should not have issued since "[m]ere affirmance of suspicion of belief is not enough" to establish probable cause.[23] The officer-affiant was required to set out "facts or circumstances" which justified his conclusion.[24] The case stands for the proposition that if a magistrate is to be something more than a rubber stamp for police suspicions, a warrant will not issue unless there is some basis upon which the magistrate may make an *independent* judgment regarding probable cause.[25]

In the informant tip context, the *Nathanson* decision raised two fundamental questions. First, how much information does a magistrate require? Second, can a reasonable magistrate give any credit to information which is not a product of the affiant's direct knowledge, but is based upon hearsay

21. 290 U.S. 41 (1933).

22. *Id.* at 44.

23. *Id.* at 47.

24. *Id.*

25. The Supreme Court has repeatedly stressed that magistrates cannot abdicate to police their constitutional function of determining probable cause. The often cited rationale is attributable to Mr. Justice Jackson:

> 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.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1931).

statements provided by another person?[26] Partial answers to these questions were provided twenty-six years later in *Draper v. United States*.[27] In *Draper*, a paid police informant who had proven to be reliable and accurate in the past told a federal narcotics agent stationed in Denver that Draper was peddling drugs in that city. The informant provided a physical description of Draper and told the agent that Draper would arrive in Denver on one of two days; that he would arrive by train from Chicago; that he would be wearing a light-colored raincoat, brown slacks, and black shoes; that he would be carrying a tan zipper bag; and that he habitually "walked real fast." A person precisely matching the description provided by the informant did alight from an incoming Chicago train, agents arrested him, and incident to the arrest a search revealed two envelopes of heroin.[28]

The *Draper* Court determined first that hearsay, in the form of the tip, was properly considered by the federal agent in assessing whether he had probable cause to arrest the defendant.[29] The Court also determined that the information given to the federal agent was sufficient to show probable cause to believe that Draper had violated or was violating the

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26. Justice Douglas indicated in United States v. Ventresca, 380 U.S. 102, 121 (1965) (Douglas, J., dissenting) (asterisked material), that he might exclude hearsay from warrant proceedings altogether. This view has commanded little support among Supreme Court Justices, as it gives no weight at all to the legitimate law enforcement interests served by informant tips. The view also indicates a good measure of suspicion that police use hearsay to promote an overzealous pursuit of criminals. "[U]nless the constitutional standard of 'probable cause' is defined in meticulous ways, the discretion of police and of magistrates alike will become absolute." *Id.* at 117 (Douglas, J., dissenting).

27. 358 U.S. 307 (1959).

28. Various exceptions to the warrant requirement exist, one of which is when a search is incident to a lawful arrest. *See* Preston v. United States, 376 U.S. 364, 367 (1964).

29. *Draper*, 358 U.S. at 311-12. The Court rejected the contention that hearsay cannot be used in probable cause determinations because the evidence is not competent at trial to prove defendant's guilt. The argument

> goes much too far in confusing and disregarding the 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 . . . and therefore a like difference in the *quanta* and modes of proof required to establish them.

Id. (quoting Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (emphasis in original)).

narcotic laws.[30] The Court considered that the informant had proved to be accurate and reliable in the past and that the federal agent had personally verified every fact supplied by the informant. The agent therefore had probable cause to believe that the remaining unverified portion of the tip — that Draper would have the heroin with him — was likewise true.[31] The Court concluded:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[32]

The *Draper* decision has proven to be a critical and controversial decision in the informant tip area for several reasons. First, the language quoted in the above paragraph is frequently employed to justify a low standard for establishing probable cause, although its appeal to practicality and reasonableness is unremarkable.[33] Probable cause is plainly a matter of probabilities and reasonableness; the issue is how to define these terms. Second, the case is recognized for establishing a role for informant tips in a probable cause assessment. However, because the *Draper* decision involved a warrantless search, it was not until the following year in *Jones v. United States* [34] that the Supreme Court explicitly held that hearsay may be the basis for a search warrant.[35] Finally, the decision

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30. 358 U.S. at 312.

31. *Id.* at 313.

32. *Id.* (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

33. The Supreme Court's reliance on the *Draper* decision varies in accord with the current philosophical bent of the justices. The *Aguilar* and *Spinelli* decisions, products of the Warren Court, mandated strict scrutiny in probable cause determinations. The *Aguilar* Court ignored the *Draper* decision, and the *Spinelli* Court virtually limited it to its facts. In contrast, the *Gates* decision, a product of the Burger Court's more permissive view of probable cause, relied heavily on *Draper*. *See* Illinois v. Gates, 103 S. Ct. 2317, 2334 (1983).

34. 362 U.S. 257 (1960).

35. *See id.* at 269. The *Jones* opinion also made it clear that the standard for establishing probable cause in warrantless searches must be higher than that required for a

was the first to consider the value of hearsay information corroborated by police. The implication from the *Draper* decision is that if a tip is sufficiently detailed and the detail is corroborated, the tip may be inherently reliable or "self-verifying."[36] Yet this formulation was problematic in that the *Draper* opinion never defined the amount and kind of detail which, if corroborated, can make a tip self-verifying.

The Supreme Court offered some guidance, albeit imprecise, on the issue of police corroboration in a 1960 decision, *Jones v. United States*.[37] The Court reviewed an affidavit in support of a search warrant which contained a tip supplied by an informant who had given correct information in the past. The informant said that he had personally visited the defendants' apartment and had purchased drugs from them there. He also described where the drugs were hidden in the apartment. In support of the tip, the affidavit further stated that the same information had been given by "other sources" and that the defendants were known users of narcotics.[38] A warrant to search the defendant's apartment was issued. In upholding the magistrate's decision, the Court held that hearsay may be the basis of a search warrant "so long as a substantial basis for crediting the hearsay is presented."[39]

The "substantial basis" for crediting the *Jones* tip was predicated on three factors.[40] First, the informant had previously given accurate information. Similar informant "track record" statements by the affiant are assumed to be truthful,[41]

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search pursuant to a warrant. If it is easier to establish probable cause for warrantless searches, "warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged." *Id.* at 270. A prior case had also stated that if the probable cause standard for searches with and without a warrant were the same, the fourth amendment would be reduced to a nullity. *See* Johnson v. United States, 333 U.S. 10, 14 (1948).

36. The *Draper* decision only implied that a tip may be self-verifying. More recent Supreme Court cases have stated the matter explicitly. *See* Illinois v. Gates, 103 S. Ct. 2317, 2327 n.3 (1983); Spinelli v. United States, 393 U.S. 410, 426-27 (1969) (White, J., concurring).

37. 362 U.S. 257 (1960).

38. *Id.* at 268-69.

39. *Id.* at 269.

40. *Id.* at 271.

41. The assumption that a "track record" recitation is truthful and should be persuasive is not altogether justified. The affiant could misrepresent a connection with the informer or knowledge of the informer's reliability. *See* McCray v. Illinois, 386 U.S. 300, 312 n.2 (1967) (Douglas, J., dissenting); State *ex rel.* Furlong v. Waukesha Cty.

and cases before and after *Jones* indicate that courts readily infer present veracity from truthfulness in the past.[42] Second, the story was corroborated by "other [unnamed] sources" of information.[43] The Court concluded that "[c]orroboration . . . reduced the chances of a reckless or prevaricating tale," oddly crediting this bit of hearsay without any proof that corroboration actually occurred.[44] Finally, the defendant was known by the police to be a user of narcotics. The Court stated, "[t]hat petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history."[45] A few years after the *Jones* decision, the Supreme Court reversed itself and determined that a magistrate could not consider a suspect's prior reputation in a probable cause assessment.[46] Subsequently, the Court returned to the *Jones* position.[47]

Taken together, the *Draper* and *Jones* decisions established relatively permissive guidelines for magistrates and reviewing courts in the informant tip area. The *Jones* substantial basis standard gave magistrates a great deal of discretion, and their decisions were unlikely to be overturned given deferential standards of review. In addition, under the *Draper* standard even the most questionable tip might establish probable cause if it was corroborated to some (undetermined) extent.

Ct., 47 Wis. 2d 515, 177 N.W.2d 333 (1970) (officer lied about informant's past reliability). Also, a "previously reliable informer" might have given incorrect information on a substantial number of occasions. *See* United States v. Peisner, 311 F.2d 94, 104 (4th Cir. 1962) ("reliable informant" proven inaccurate on at least one prior occasion). *See also* Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840, 846-49 (1965) [hereinafter cited as Comment, *Informer's Word*]; Comment, *The Outwardly Sufficient Search Warrant Affidavit: What if it's False?*, 19 UCLA L. REV. 96, 134-36 (1971) [hereinafter cited as Comment, *Search Warrant*].

42. *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 303-04 (1967); Draper v. United States, 358 U.S. 307, 313 (1959).

43. *Jones*, 362 U.S. at 271.

44. *Id.*

45. *Id.* at 271-72.

46. *See* Spinelli v. United States, 393 U.S. 410, 414 (1969).

47. *See* United States v. Harris, 403 U.S. 573, 583 (1971) (plurality opinion).

B. Aguilar *and* Spinelli

Aguilar v. Texas[48] might be viewed as a synthesis of the *Jones* and *Draper* decisions.[49] To some degree, this is accurate. The two-pronged test established in *Aguilar*,[50] requiring that a police officer-affiant set forth the basis of the informant's knowledge and the reasons for the affiant's belief that the informant is credible, reflects elements that were present in the prior decisions. In both cases, the past reliability of the informant was a factor in crediting the tip,[51] and the *Jones* decision was cited in *Aguilar* as having met both prongs.[52] Despite the similarities, however, the *Aguilar* decision represents a clean break from the more discretionary approach to informant tips adopted in the Court's prior decisions. The case is striking because the *Draper* decision is not cited in the opinion[53] and the *Jones* "substantial basis" test does not enter into the Court's analysis. The new standard was intended to narrow the field of magistrate discretion, regulate police practices, and emphasize the private values secured by the fourth amendment over the public interest in law enforcement.[54] The *Aguilar* decision, unlike prior cases, established a standard for state as well as federal courts — a fact which likely prompted the court to create more precise guidelines.[55]

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48. 378 U.S. 108 (1964).

49. *See* Comment, *Informer's Word*, *supra* note 41, at 843.

50. The two-pronged test was not so labeled until Spinelli v. United States, 393 U.S. 410, 412-13 (1969). The Supreme Court in *Illinois v. Gates* questioned whether *Aguilar* comtemplated the creation of any kind of *test* at all. The Court suggested that *Aguilar* merely created "guides" to magistrate determinations of probable cause. *See* 103 S. Ct. 2317, 2328 n.6 (1983).

51. *See Jones*, 362 U.S. at 271.

52. *See Aguilar*, 378 U.S. at 114 n.5. The majority opinion in *Draper* did not analyze the informant's basis of knowledge, which was not disclosed. Justice Douglas' dissent noted this deficiency. *See Draper*, 358 U.S. at 315 (Douglas, J., dissenting).

53. Some of the *Draper* language is adopted by the dissent, however. *See Aguilar*, 378 U.S. at 119 (Clark, J. dissenting).

54. Not surprisingly, this shift coincided with a change in the Court's membership. The authors of the majority opinions in *Jones* and *Draper*, Justices Frankfurter and Whittaker, respectively, both retired prior to the *Aguilar* decision. Their replacements, Justices Goldberg and White, played major roles in the *Aguilar* and *Spinelli* decisions. Justice Goldberg wrote the *Aguilar* decision and Justice White wrote a frequently cited concurrence in *Spinelli*, in which he questioned the continued validity of the *Jones* and *Draper* decisions.

55. One year prior to the *Aguilar* decision, the Court decided Ker v. California, 374 U.S. 23 (1963), and held that the fourth amendment's proscriptions are enforced against

In *Aguilar*, a search warrant was issued based upon an affidavit reciting that "[a]ffiants have received reliable information from a credible person and do believe" that narcotics were being kept for sale on the described premises.[56] No additional information was presented to the magistrate.[57] The Supreme Court held that the affidavit was insufficient to establish probable cause. From the outset, the Court established that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests."[58] Citing *Nathanson v. United States*,[59] the Court found that the affidavit did not present sufficient facts or circumstances to permit a magistrate to make an independent, informed decision. The Court looked to *Giordenello v. United States*[60] for the proposition that an informant's basis of knowledge must be set forth in the warrant affidavit and suggested that the informant's personal knowledge is necessary to establish the reliability of the informant's story. As for an informant's credibility, the *Aguilar* decision established only that "underlying circumstances" must support it.[61] The case did not say precisely what circumstances would suffice, but conclusory statements of credibility or reliability were clearly inadequate.[62]

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the states through the fourteenth amendment, and that the standard of reasonableness is the same under the fourth and the fourteenth amendments. *See id.* at 23.

56. *Aguilar*, 378 U.S. at 108.

57. In fact, police kept the suspect's house under surveillance for about a week prior to applying for the search warrant, but did not disclose this fact to the magistrate. The Court stated: "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 109 n.1 (emphasis in original) (citations omitted).

58. 378 U.S. at 110-11 (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1931)).

59. 290 U.S. 41, 47 (1933).

60. 357 U.S. 480, 486 (1958).

61. *See Aguilar*, 378 U.S. at 114.

62. The Court has refused to recognize conclusory statements of credibility in the *Aguilar* (informant described as "credible"), *Spinelli* (informant described as "reliable"), and *Harris* (informant described as "prudent") decisions, among others. While an averment of the informant's previous reliability will satisfy the credibility prong, see *Aguilar*, 378 U.S. at 114 n.5 (citing *Jones*, 362 U.S. at 257), the Court has held that such an averment is not necessary to satisfy the credibility requirement. *See* United States v. Harris, 403 U.S. 573, 581-82 (1971) (plurality opinion). The *Harris* Court questioned whether an informant's past reliability has anything to do with whether the present information is truthful. *See id.* at 582. This objection, in addition to the possibility that

State courts implemented *Aguilar*'s minimum standards with a measure of confusion. An immediate and significant problem was determining whether the *Aguilar* decision in fact created a two-pronged test.[63] Some of the confusion can be traced to *United States v. Ventresca*,[64] an informant tip case decided one year after *Aguilar*. The Court in *Ventresca* did not methodically apply the *Aguilar* standard to the facts, but instead seemed to combine the *Aguilar* prongs by asking whether there were underlying circumstances for "crediting the source of the information."[65] In addition, certain dicta in *Ventresca* indicates that perhaps the Court did not intend to create any rigid rules in *Aguilar*. The Court in *Ventresca* said:

> [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants

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police may misrepresent an informant's "track record," has prompted the suggestion that corroboration plays a major role in strengthening the case for an informant's credibility. *See* Comment, *Informer's Word*, *supra* note 41, at 847. The *Harris* Court found that the informant was credible on the basis of several factors, including the informant's declaration against penal interest (which may independently support credibility), the suspect's prior reputation, and corroboration of the informant's report by "all types of persons." *See Harris*, 403 U.S. at 581-82. *See also* Note, *Sufficiency of Showing Probable Cause*, 40 FORDHAM L. REV. 687, 692 n.35 (1972) (suggesting that information may come from "non-credible" person if affiant has independent verification of the information).

63. *See supra* note 50.

64. 380 U.S. 102 (1965).

65. 380 U.S. at 108-09. The *Ventresca* affidavit described different occasions when a car was driven to the rear of respondent's house with loads of sugar or empty tins. Federal investigators then observed five-gallon cans, apparently full, being loaded into the car. The affidavit further stated that the investigators smelled fermented mash as they walked in front of the house and heard the sound of a motor pump and metallic noises coming from the house. The commissioner issued a warrant based on this information, pursuant to which a still was discovered, even though other parts of the affidavit contained uncorroborated hearsay. *Id.* at 103-04.

> will tend to discourage police officers from submitting their evidence to a judicial officer before acting.[66]

The Burger Court later employed this language to topple the two-pronged test.[67]

In addition to confusing precedent, lower courts were left without guidance on a matter brought out in an *Aguilar* footnote, suggesting that police surveillance might legitimize an otherwise inadequate tip.[68] Some courts, including the Eighth Circuit Court of Appeals in *Spinelli v. United States*,[69] combined this "loophole" with the holding in *Draper* to conclude that a tip need not explicitly satisfy the two-pronged test if it is corroborated.[70] After losing in the court of appeals, the government took *Spinelli* to the Supreme Court, which undertook a clarification of the role of corroboration in the two-pronged standard.

In *Spinelli*, a search warrant was issued based on several factors.[71] First, there was a tip from a "confidential, reliable informant" that William Spinelli was operating a handbook from telephones with the numbers WY4-0029 and WY4-0136. Police surveillance later revealed that Spinelli regularly visited a certain apartment, which contained two telephones with the numbers WY4-0029 and WY4-0136. The phones were not registered in Spinelli's name. Second, federal agents had observed a pattern of behavior which showed that at about 11:00 a.m. on successive days, Spinelli traversed a bridge leading from East St. Louis, Illinois to St. Louis, Missouri. At about 3:45 p.m. on these same days, the agents observed Spinelli's regular arrival at the Chiefton Manor Apartments and his en-

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66. *Id.* at 108.

67. *See* Illinois v. Gates, 103 S. Ct. 2317, 2330 (1983).

68. *See Aguilar*, 378 U.S. at 109 n.1. The Court stated:

> The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance . . . . If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

Id.

69. 382 F.2d 871 (8th Cir. 1967), *rev'd*, 393 U.S. 410 (1969). The Eighth Circuit concluded, "[a]s other facts and circumstances were presented to the Commissioner in the case before us, we believe it presents 'an entirely different case' and is not controlled by *Aguilar*." *Id.* at 883. *See also* Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966).

70. *See* 393 U.S. at 417.

71. *See Spinelli*, 393 U.S. at 413-14.

trance into the apartment where the phones were located. Finally, Spinelli was known to local and federal law enforcement agents as a bookmaker.

The Supreme Court found that Spinelli's travel to and from the apartment building and his entry into an apartment containing two separate telephones did not "bespeak gambling activity," but was "innocent-seeming" conduct.[72] Also, the Court held that the allegation that Spinelli was known as a gambler "is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."[73] In short, the tip itself, and the extent to which it was corroborated, provided the only significant information in the warrant application.[74]

In considering this information, the Court employed a two-step analysis, looking first to see if the tip alone satisfied the *Aguilar* standard. The Court held that the tip satisfied neither prong of the two-pronged test. The affiant's conclusory statement that his informant was "reliable" did not establish the informant's veracity, and the affidavit did not contain a statement detailing the informant's basis of knowledge.[75] The second step of the Court's analysis considered whether the teachings of *Draper*[76] can "cure" a tip that has been found inadequate under *Aguilar*.[77]

The *Draper* decision suggested that if police corroborated numerous details contained in a tip, it may reasonably be inferred that an informant is credible and that the informant gathered information in a reliable way. As to the latter inference, the *Spinelli* Court ruled that if a tip contains detail comparable to that contained in the *Draper* tip, "[a] magistrate . . . could reasonably infer that the informant had gained his

72. *Id.* at 414. The Court said there is nothing unusual about an apartment containing two separate telephones. "Many a householder indulges himself in this petty luxury." *Id.*

73. *Id.* (citing Nathanson v. United States, 290 U.S. 41, 46 (1933)).

74. The Court explicitly rejected the "totality of circumstances" approach taken by the court of appeals, saying it "paints with too broad a brush." 393 U.S. at 415.

75. *See id.* at 416.

76. *See supra* notes 33-36 and accompanying text.

77. The Eighth Circuit concluded that police had corroborated a sufficient amount of detail to establish both credibility and basis of knowledge. 382 F.2d at 882. *See also* Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 966-68 (1969).

information in a reliable way."[78] Given the "meager report" in *Spinelli*, the Court refused to draw the inference that the informant had a proper basis of knowledge and noted that the tip "could easily have been obtained from an offhand remark heard at a neighborhood bar."[79] The *Spinelli* majority also indicated that police corroboration of the details of a tip could provide a basis for satisfying the *Aguilar* standard.[80] However, as Justice Brennan has commented, "[t]he Court's opinion is not a model of clarity on this issue since it appears to suggest that corroboration can satisfy both the basis of knowledge and veracity prongs of *Aguilar*."[81] It is now generally conceded that Justice White's *Spinelli* concurrence laid down the proper rule, "that corroboration of certain details in a tip may be sufficient to satisfy the veracity, but not the basis of knowledge, prong of *Aguilar*."[82] Again, the *Spinelli* majority employed the *Draper* decision as a benchmark with respect to the kind of corroboration necessary to satisfy the veracity prong.[83]

The *Spinelli* decision proved to be an unsatisfactory explication of the *Aguilar* standard. Lower courts did not understand what the *Spinelli* case stood for,[84] primarily due to the Court's haphazard "reconciliation" of *Draper* with the two-pronged test. The *Spinelli* decision appeared to create a niche

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

79. *Id.*

80. *Id.* at 417-18.

81. Illinois v. Gates, 103 S. Ct. 2317, 2354 (1983) (Brennan, J., dissenting).

82. *Id.* (citing *Spinelli*, 393 U.S. at 427 (White, J., concurring)). Justice White stated in *Spinelli*:

> The thrust of *Draper* is not that the verified facts have independent significance with respect to proof of [another unverified fact]. The argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.

In a concurring opinion in *Illinois v. Gates*, Justice White clarified that he did not say in *Spinelli* that corroboration could *never* satisfy the basis of knowledge prong. If police corroborate what appears to be "inside information," as in *Draper* "this corroboration is sufficient to satisfy the basis of knowledge prong." *Gates*, 103 S. Ct. at 2349 n.22. Justice White's *Spinelli* concurrence is also significant for its recognition of the "tension" between the *Draper* and *Aguilar* decisions, and the failure of the *Spinelli* Court to reconcile the two cases. White concluded that if the *Draper* decision were good law, then the *Spinelli* warrant should be upheld.

83. *See Spinelli*, 393 U.S. at 417-18.

84. *See, e.g.*, State v. Mansfield, 55 Wis. 2d 274, 280, 198 N.W.2d 634, 639 (1972) (arguing that an informant's personal observation can establish credibility).

for police corroboration in the *Aguilar* framework, but questions persisted: Could corroboration satisfy one or both of the *Aguilar* prongs? Is the *Draper* decision a "benchmark" in terms of the *volume* or *type* of detail corroborated? The case appeared to suggest that only incriminating details created an inference of reliability, although the line separating an "innocent" from an incriminating detail may be thin indeed.[85] The *Spinelli* Court's refusal to consider a suspect's prior reputation also is subject to debate, considering the difference between the matter to be proved at trial and that to be proved in a warrant application. Furthermore, there is a strong argument that the Court simply reached the wrong outcome in *Spinelli*. The Court's refusal to find probable cause resulted from a narrow interpretation of the *Draper* decision, a reading which essentially limited that case to its facts.[86] It took only two years for a majority of the Court to begin to dismantle parts of the narrow, ambiguous holding in *Spinelli*.

C. United States v. Harris: *Heading Toward Totality*

Chief Justice Burger's plurality opinion in *United States v. Harris*,[87] decided in 1971, distinguished the *Aguilar* and *Spinelli* decisions,[88] and overruled a portion of *Spinelli*.[89] It also emphasized the need for a commonsense and realistic approach to probable cause and upheld a search warrant by relying more heavily on the *Jones* "substantial basis" standard than the two-pronged test.[90] The *Harris* affidavit contained four significant elements, from which the informant's basis of

85. The Court ruled that Mr. Spinelli's travel to and from an apartment containing two phones was "innocent-seeming" conduct. *Spinelli*, 393 U.S. at 414. Some courts interpreted this to mean that corroboration of "innocent" conduct carried no weight. *See Smith*, 358 F.2d at 833 (discussing distinction between innocuous and material details). The *Illinois v. Gates* decision has since declared that it is irrelevant whether particular details are "innocuous" or "guilty." 103 S. Ct. 2317, 2335 n.13 (1983).

86. *See* Note, *supra* note 77, at 964 n.34.

87. 403 U.S. 573 (1971) (plurality opinion).

88. *See id.* at 577-79.

89. *See id.* at 579.

90. *Compare* Rebell, *supra* note 1, at 703-04 ("*Harris* is fundamentally a continuation, rather than a repudiation, of past Supreme Court analyses of probable cause . . . .") *with* Note, 85 HARV. L. REV. 53, 53 (1972) (*Harris* is "another indication of the determination of the Supreme Court's changing membership to reverse the trend of the Warren Court's criminal procedure decisions").

knowledge was sufficiently established.[91] The issue was whether the affidavit sufficiently established the informant's veracity. Neither *Aguilar* nor *Spinelli* had specified how the veracity prong could be met. However, the *Jones* decision, cited with approval in *Aguilar*,[92] indicated that a statement of the informant's previous reliability might be required. The Harris Court nixed such a strict requirement, saying, "[t]his Court in *Jones* never suggested that an averment of previous reliability was necessary."[93] The Court acknowledged that the bare statement in the *Harris* affidavit that the informant was "prudent" did not establish credibility, but concluded that "[t]he affidavit in the present case contains an *ample factual basis* for believing the informant which, when coupled with an affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant."[94]

This analysis permits the informant's credibility to be inferred if there is an "ample factual basis" for believing that the informant is truthful. The Court's subsequent analysis did not overrule *Aguilar* or *Spinelli*,[95] but the shift from the two-pronged test back to a substantial basis analysis is apparent.[96] The Court upheld the *Harris* warrant under the substantial basis standard and concluded that a substantial basis may be based on such factors as corroboration of the tip by "other sources,"[97] the defendant's prior reputation,[98] and whether the informant's tip constituted a declaration against penal inter-

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91. The *Harris* affidavit stated: (1) that Harris had a reputation with the affiant for over four years as a trafficker of nontaxpaid liquor; (2) that during that time, a local constable had located a sizable stash of illicit whiskey in a house under Harris' control; (3) that the affiant received information from a "prudent" person who swore to personal knowledge of illicit whiskey within the Harris residence, personal purchase of the same for a period of more than two years, most recently within the past two weeks, and personal knowledge of Harris' sale of whiskey to others; and (4) that the affiant had also received information "from all types of persons" regarding Harris' activities. *Id.* at 575-76.

92. *Aguilar*, 378 U.S. at 114 n.5.

93. *Harris*, 403 U.S. at 581-82.

94. *Id.* at 579-580 (emphasis added).

95. In separate concurrences, Justices Black and Blackmun advocated overruling *Spinelli*, and Justice Black would overrule *Aguilar* as well. *Id.* at 585-86.

96. The Court stated: "*Aguilar* cannot be read as questioning the 'substantial basis' approach of *Jones*." *Harris*, 403 U.S. at 581. The *Harris* affidavit was then measured against the *Jones* affidavit, and a substantial basis was established. *Id.*

97. *Id.*

est.[99] To be sure, an informant's credibility and basis of knowledge continued to be central inquiries in informant tip cases. However, after the *Harris* decision, at least credibility could be established by inference from numerous factors on a more subjective and less formalistic, case-by-case basis. From here, the Court had little theoretical distance to travel in arriving at its conclusion in *Illinois v. Gates*.[100]

II. *ILLINOIS V. GATES*

Illinois v. Gates presented the Court with a classic dilemma: How can information supplied by an anonymous tipster, whose veracity and basis of knowledge are ipso facto unknowable, ever satisfy the requirements of the two-pronged *Aguilar* test?[101] In *Gates*, the Bloomingdale, Illinois police department received an anonymous handwritten letter.[102] The informant accused the Gateses of dealing drugs and having drugs in their home and predicted that within the next couple

98. *Id.* at 583. Only Justices Black and Blackmun joined the Chief Justice in this portion of the opinion.

99. This portion of the opinion did not command a majority. *Id.* at 583-84. The dissent disputed the wisdom of adopting "such a speculative theory," particularly since the government did not raise the issue. *Id.* at 594-96.

100. 103 S. Ct. 2317 (1983).

101. *See* Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99, 107 (1982) (suggesting that anonymous informants should be treated as presumptively unreliable); Note, *Reliability and the First-Time Informant*, 1 AM. J. CRIM. L. 290 (1972) [hereinafter cited as Note, *First-Time Informant*]; Note, *supra* note 3, at 517. *See also* Bies v. State, 76 Wis. 2d 457, 251 N.W.2d 461 (1977) (anonymous phone calls not possessed of even minimal indicia of reliability).

102. The letter read in part 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 Flordia. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys 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 in drugs. Presently they have over $100,000 worth of drugs in their basement.

Subsequent police investigation and surveillance revealed that the Gateses did live at the stated address in Bloomingdale; that Lance Gates flew to Florida on May 5; that on arrival he went to a motel and stayed in a room registered to Susan Gates; and that he and an unidentified woman left the motel at 7:00 a.m. on May 6 in a car bearing Illinois license plates, heading northbound on a road frequently used by travelers to the Chicago area. *Gates*, 103 S. Ct. at 2325-26.

of days they would follow a certain routine in obtaining more drugs. Police surveillance of the Gateses revealed that most[103] of the informant's predictions about the dates and manner of their movements were correct. On the basis of the tip and the police corroboration of its details, a search warrant for the Gates' car and residence was issued. The search uncovered approximately 350 pounds of marijuana and other contraband. The Illinois courts ruled that the warrant was issued without probable cause.[104] The Supreme Court reversed.

A. Out Goes the Two-Pronged Test

The Court's first order of business in *Gates* was to abandon what it termed the "labyrinthine body of judicial refinement"[105] and "elaborate set of legal rules"[106] surrounding the two-pronged test. The *Aguilar-Spinelli* framework, the Court concluded, was inconsistent with the "central teaching" of previous cases which defined probable cause as a "practical, nontechnical conception."[107] Indeed, the Court charged, the two-pronged test "encouraged an excessively technical dissection of informant's tips" and focused undue attention on "isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate."[108]

Several additional arguments buttressed the majority's criticism of the two-pronged test. Foremost among these was the Court's contention that the test "cannot avoid seriously impeding the task of law enforcement" and that it "poorly serves 'the most basic function of any government:' 'to provide for the security of the individual and of his property.' "[109] According to the Court, the two-pronged test inhibits law enforcement because it leaves virtually no place for anonymous informants who "frequently contribute to the solution of

103. The dissenters found it significant that Sue Gates drove back to Illinois and did not fly, as the informant predicted she would. *See id.* at 2360 (Stevens, J., dissenting).

104. *See* 103 S. Ct. at 2326.

105. *Id.* at 2333.

106. *Id.* at 2327.

107. *Id.* at 2328.

108. *Id.* at 2330.

109. *Id.* at 2331 (quoting Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting).

otherwise 'perfect crimes.' "[110] The Court offered two further justifications for abandoning the *Aguilar-Spinelli* framework. One argument suggested that police will resort to warrantless searches if affidavits continue to be measured against the two-pronged test.[111] Another argument favoring the new approach was that "affidavits are normally drafted by nonlawyers" and are "issued by persons who are neither lawyers nor judges."[112]

B. In Comes the Totality of Circumstances

The *Gates* majority chose to abandon the two-pronged test and, in its place, to "reaffirm the totality of circumstances analysis that traditionally has informed probable cause determinations."[113] The tradition to which the Court referred harkens back to the "substantial basis" test established in *Jones v. United States*[114] and to broad dicta in two other prior cases.[115] These cases, argued the majority, are the true forebears of the probable cause standard because they recognize that "probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."[116]

The two most salient features of the totality of circumstances standard are: first, that it is a remarkably subjective and amorphous test; and second, while the Court ostensibly "abandoned"[117] the two-pronged analysis, an informant's veracity and basis of knowledge remain "highly relevant"[118] under the new standard. The Court in *Gates* provided a neat

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110. *Id.* at 2332. Justice White's concurrence, *see* 103 S. Ct. at 2348-49, and Justice Brennan's dissent, joined by Justice Marshall, *see* 103 S. Ct. at 2358, contended that *Aguilar* and *Spinelli* do not bar the use of anonymous tips to establish probable cause.

111. 103 S. Ct. at 2331. *But see* 1 W. LAFAVE, *supra* note 1, § 3.3 at 139 (Supp. 1984) (arguing this assertion is unpersuasive).

112. 103 S. Ct. at 2330-31. *But see id.* at 2358 (Brennan, J., dissenting) (the *Aguilar* and *Spinelli* decisions "help to structure probable cause inquiries and, properly interpreted, may actually help a nonlawyer magistrate in making a probable cause determination."); 1 W. LAFAVE, *supra* note 1, § 3.3 at 138 (Supp. 1984) (fact that nonlawyers draft and issue warrants "cuts in exactly the opposite direction").

113. 103 S. Ct. at 2332.

114. 362 U.S. 257 (1960).

115. *See* United States v. Ventresca, 380 U.S. 102, 108 (1965); Brinegar v. United States, 338 U.S. 160, 176 (1949).

116. *Gates*, 103 S. Ct. at 2328.

117. *Id.* at 2332.

118. *Id.* at 2327.

summary of its holding, making plain both of the above points:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. 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.[119]

It is clear enough that the Supreme Court intends that an informant's veracity and basis of knowledge be treated as relevant circumstances "that may usefully illuminate the commonsense, practical question" whether probable cause exists.[120] It now appears that probable cause may exist even though one or both prongs of the two-pronged test are not thoroughly set forth because, the Court concluded, "these elements should [not] be understood as entirely separate and independent requirements to be rigidly exacted in every case."[121] The Court continued that "a deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."[122] This passage has received criticism because, for example, it may permit a finding of probable cause based solely on the predictions of an unquestionably honest citizen despite a lack of evidence supporting the citizen's basis of knowledge.[123] The Court left untouched the issue of whether a strong showing on one of the prongs can make up for a complete absence of evidence on the other.[124] But the tenor of the Court's opinion suggests that this is the case, particularly if there are other indicia of relia-

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119. *Id.* at 2332.

120. *Id.* at 2328.

121. *Id.* at 2327-28.

122. *Id.* at 2329.

123. *See id*; *id.* at 2350 (White, J., concurring). *See also* 1 W. LAFAVE, *supra* note 1, § 3.3 at 137-38 (Supp. 1984) (proposition is "dead wrong"). Moylan, *Illinois v. Gates: What it Did and What it Did Not Do*, 20 CRIM. L. BULL. 93, 113-14 (1984) (criticizing rule). *Cf.* State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971) (requiring additional "safeguard" to prove reliability of tip supplied by citizen-informer).

124. The court said that a strong showing on one prong will come into play where evidence on the other prong is not "thoroughly set forth." *Gates*, 103 S. Ct. at 2329.

bility, such as police corroboration or a suspect's prior reputation.

III. THE WISCONSIN APPROACH TO INFORMANT TIPS

Several months after *Illinois v. Gates*[125] was handed down, the Wisconsin Supreme Court recognized the validity of the totality of circumstances standard in *State v. Boggess*.[126] In *Boggess*, the Court applied a totality of circumstances analysis to permit a warrantless entry into a private home if a reasonable person would have believed there was an immediate need to render aid.[127] The *Boggess* decision did not involve a traditional probable cause determination, but instead concerned the reliability of an anonymous phone call received by a social worker. The caller related that Mr. Boggess had been, and possibly was at that time, abusing his children.[128] The case is perhaps distinguishable from the typical probable cause assessment because it involved a warrantless entry in which the police were not involved, and probable cause was found in the context of a possible emergency situation. Moreover, the case involved the emotionally charged issue of child abuse. Still, it is highly likely that in any future probable cause assessment, the Wisconsin court will apply the totality test as it was set forth in the *Gates* decision.[129]

The issue in Wisconsin and in all states that have adopted the totality test[130] concerns the quanta of evidence necessary

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125. 103 S. Ct. 2317 (1983).

126. 115 Wis. 2d 443, 340 N.W.2d 516 (1983).

127. *See id.* at 451-52, 340 N.W.2d at 522.

128. *Id.* at 446-47, 340 N.W.2d at 519.

129. The court fully embraced *Gates* in the context of the *Boggess* facts and gave no indication that the totality of circumstances test would be any less welcome in traditional probable cause determinations.

130. Only one state has thus far explicitly rejected the *Gates* decision under its state constitution in favor of continued reliance upon the two-pronged test. *See* State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984). A number of states have explicitly adopted the *Gates* decision as a matter of state constitutional law or have upheld searches based on *Gates* language. *See, e.g.*, State v. Espinosa-Gamez, 139 Ariz. 415, 678 P.2d 1379 (1984); Thompson v. State, 280 Ark. 265, 658 S.W.2d 350 (1983); Jefferson v. United States, 476 A.2d 685 (D.C. 1984); State v. Stephens, 252 Ga. 181, 311 S.E.2d 823 (1984); State v. Lang, 105 Idaho 683, 672 P.2d 561 (1983); State v. Tisler, 103 Ill. 2d 226, 469 N.E.2d 147 (1984); State v. Luter, 346 N.W.2d 802 (Iowa 1984); State v. Walter, 234 Kan. 78, 670 P.2d 1354 (1983); Bemmer v. Commonwealth, 665 S.W.2d 912 (Ky. 1984); State v. Manso, 449 So. 2d 480 (La. 1984); Potts v. State, 330 Md. 567, 479 A.2d 1335 (1984); Hanson v. State, 344 N.W.2d 420 (Minn. 1984); State

to satisfy the new standard. A review of the law under the two-pronged test provides some answers.

In 1968, the Wisconsin Supreme Court decided *State v. Beal*,[131] holding that article I, section 11 of the Wisconsin Constitution[132] should be governed by the same standards applicable to the federal fourth amendment. Since *Aguilar v. Texas*[133] established the federal standard for determining probable cause in informant tip cases, the *Beal* court adopted the two-pronged test. Adoption of the *Aguilar* standard implicitly overruled those portions of prior cases which ruled that a search warrant based on hearsay could not issue unless the hearsay informant appeared and swore before the magistrate.[134] The *Beal* decision also rectified a forty-five year old incongruity by holding that the standard for showing probable cause, which is a lesser burden than proof of guilt,[135] is the same for both search warrants and criminal complaints.

The Wisconsin Supreme Court took a generally permissive view toward probable cause under the *Aguilar* standard. In fact, several cases reveal a totality of circumstances approach to probable cause well before the *Gates* case was decided.[136] A number of arguments, most of which have precedent in federal cases, were utilized to permit satisfaction of the two-pronged test even in doubtful cases. Thus, the Court inferred an informant's credibility, when it was not obvious, from the

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v. Kelly, __ Mont. __, 668 P.2d 1032 (1983); State v. Robish, 214 Neb. 190, 332 N.W.2d 922 (1983); State v. Arrington, 311 N.C. 633, 319 S.E.2d 254 (1984); State v. Anderton, 668 P.2d 1258 (Utah 1983); State v. Doucette, 143 Vt. 573, 470 A.2d 676 (1983); Bonsness v. State, 672 P.2d 1291 (Wyo. 1983).

131. 40 Wis. 2d 607, 162 N.W.2d 640 (1968).

132. Article I, section 11 of the Wisconsin Constitution is identical to the fourth amendment to the United States Constitution. *See supra* note 4.

133. 378 U.S. 108 (1964).

134. The implication can be drawn from the purpose of the two-pronged test, which is to establish the reliability of information received from *confidential or anonymous* informants, who are unlikely or unwilling to personally testify. Further, the *Beal* decision did not require the identity of the informant to be disclosed. *Beal*, 40 Wis. 2d at 614, 162 N.W.2d at 643. Subsequent cases held that if an informant personally testifies before the magistrate, an affidavit in support of probable cause need not set out the informant's credibility or basis of knowledge. The magistrate can make an independent judgment as to whether these requirements are met. *See* State v. Benoit, 83 Wis. 2d 389, 265 N.W.2d 298 (1978); Rainey v. State, 74 Wis. 2d 189, 246 N.W.2d 529 (1976).

135. *See Beal*, 40 Wis. 2d at 614, 162 N.W.2d at 643 (quoting Brinegar v. United States, 338 U.S. 160, 172 (1949)).

136. *See infra* text accompanying notes 167-70.

fact that the informant personally observed criminal conduct,[137] provided a declaration against penal interest[138] or was a citizen-informer.[139] The Court also found that police corroboration of detail contained in a tip[140] and a suspect's prior reputation[141] created inferences which favor probable cause.

A. Informant Credibility

The surest way for law enforcement officials to establish an informant's credibility is to allege that the informant provided previously reliable information. The Wisconsin Supreme Court has repeatedly found this to be sufficient.[142] Previously supplied information need not have led to convictions; it is enough that the officer-affiant alleges that it was "reliable."[143]

In the absence of an allegation of previous reliability, Wisconsin permits establishment of an informant's credibility by four other methods. First, a "citizen-informer" is presumed to be credible. The Supreme Court stated in *State v. Paszek*[144] that:

> [A]n ordinary citizen who reports a crime which has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information. An informer of this type usually would not have more than one opportunity to supply information to the police, thereby pre-

137. *See, e.g.*, State v. Mansfield , 55 Wis. 2d 274, 198 N.W.2d 634 (1972).

138. *See, e.g.*, Laster v. State, 60 Wis. 2d 525, 534-35, 211 N.W.2d 13, 21 (1973). *See also* Schmidt v. State, 77 Wis. 2d 370, 253 N.W.2d 204 (1977); State *ex rel.* Bena v. Crosetto, 73 Wis. 2d 261, 243 N.W.2d 442 (1976).

139. *See, e.g.*, State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971). *See also* Note, *First-Time Informant*, *supra* note 101, at 289-92.

140. *See, e.g.*, Molina v. State, 53 Wis. 2d 662, 193 N.W.2d 874, *cert. denied*, 407 U.S. 923 (1972).

141. *See, e.g.*, Molina v. State, 53 Wis. 2d 662, 671, 193 N.W.2d 874, 878-79, *cert. denied*, 407 U.S. 923 (1972).

142. *See, e.g.*, Ritacca v. Kenosha Cty. Ct., 91 Wis. 2d 72, 79-80, 280 N.W.2d 751, 755 (1979).

143. *See id.* at 80, 280 N.W.2d at 755.

144. 50 Wis. 2d 619, 184 N.W.2d 836 (1971).

> cluding proof of his reliability by pointing to previous accurate information which he has supplied.[145]

The ordinary citizen-informer, therefore, is distinguishable from a confidential police informer, who generally supplies information in exchange for some concession or out of revenge against the subject.[146]

The *Paszek* decision recognized that although a citizen-informer may be credible, that is, worthy of belief,[147] the person is still prone to mistake or exaggeration. Therefore, the *Paszek* court established that there must be some "safeguard" to ensure the reliability of the information provided by a citizen.[148] This safeguard involves an initial inquiry into the citizen-informer's basis of knowledge: How did the person get the information? Was there an opportunity to hear and see the matters reported? In addition, the safeguard demands "verification of some of the details of the information reported, but it need not be to the same degree as required in evaluating the 'tips' of a police informer."[149] Whether a citizen-informer is a victim or witness to a crime, or has knowledge of a crime through some other source, some amount of police corroboration is necessary to meet the *Aguilar* standard.

A second method of establishing an informant's credibility is by alleging that the informant provided a declaration against penal interest. Typically, statements against penal interest are made by informants who purchase contraband from a seller and subsequently implicate themselves and the seller by informing police about the transaction. The Wisconsin Supreme Court, in *Laster v. State*[150] adopted a portion of the United States Supreme Court's plurality opinion in *United*

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145. *Id.* at 630-31, 184 N.W.2d at 843.

146. Referring to confidential police informers, the court said: "The nature of these persons and the information which they supply conveys a certain impression of unreliability . . . ." *Id.* at 630, 184 N.W.2d at 842. *See also* M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 40 (2d ed. 1968) (defining the typical confidential informant); LaFave, *Probable Cause from Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 2 n.5 (citizen informants deserve a presumption of reliability).

147. BLACK'S LAW DICTIONARY 330 (5th ed. 1979).

148. *Paszek*, 50 Wis. 2d at 631, 184 N.W.2d at 843.

149. *Id.* at 631-32, 184 N.W.2d at 843.

150. 60 Wis. 2d 525, 211 N.W.2d 13 (1973).

States v. Harris[151] which stated that "[a]dmissions of crime, like admissions against proprietary interests, carry their own indicia of credibility — sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct."[152]

Magistrates and courts in Wisconsin would do well to note Justice Harlan's dissent in the *Harris* case.[153] Justice Harlan's concern is that self-implicating statements will grant automatic credibility to an informant, without any assessment of whether the informant is taking a personal risk by making the statement.[154] Indeed, in situations in which law enforcement officials and informants work together closely, an informant's statements may create no risk of prosecution or other "loss." This type of declaration should, therefore, be carefully scrutinized before it is relied upon to establish informant credibility.

Third, Wisconsin permits an informant's credibility to be established if the informant personally observed criminal conduct and police rely on the informant. This proposition was introduced in *State v. Mansfield*.[155] In *Mansfield*, police received "reliable information" from two informants that the defendants were dealing heroin. One of the informants had seen heroin in the defendant's apartment. The court concluded that *Aguilar*'s basis of knowledge prong was satisfied because the informant had actually observed criminal conduct.[156] The court then argued, based on several Wisconsin cases[157] and two United States Supreme Court cases,[158] that an informant's personal observation can also establish the informant's credibility if police rely on the information.

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151. 403 U.S. 573 (1971) (plurality opinion).

152. *Id.* at 583-84.

153. *See id.* at 594-96 (Harlan, J., dissenting).

154. Justice Harlan argued that if a police informant is promised immunity in exchange for a statement, the declaration does not run counter to the informant's self-interest so much as it favors it. Justice Harlan also warned that a policy of permitting declarations against penal interest to establish credibility will "encourage the Government to prefer as informants participants in criminal enterprises rather than ordinary citizens . . . ." *Id.* at 595.

155. 55 Wis. 2d 274, 198 N.W.2d 634 (1972).

156. *See id.* at 279, 198 N.W.2d at 637.

157. The court cited State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971), State v. Knudson, 51 Wis. 2d 270, 187 N.W.2d 321 (1971), and State *ex rel.* Cullen v. Ceci, 45 Wis. 2d 432, 173 N.W.2d 175 (1970).

This conclusion is surprisingly far off the mark. The *Mansfield* court, citing cases which fail to support its position,[159] effectively nullified the credibility prong of the *Aguilar* standard. Under this rule, a paid police informant, an underworld figure or even somebody who is known to supply unreliable information is presumed to be credible simply because the person claims to have witnessed a crime, providing the police rely on the informant's truthfulness. It is clear that magistrates cannot perform their detached and disinterested function if they are bound by the police department's determination of an informant's reliability.

As the United States Supreme Court pointed out in a 1948 case:

> 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

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158. The court cited Spinelli v. United States, 393 U.S. 410, 424 (1969) (White, J., concurring), and United States v. Harris, 403 U.S. 573, 583-84 (1971) (plurality opinion).

159. Personal observation did not establish credibility in any of the Wisconsin cases. The *Paszek* decision held that the informant's personal observation of criminal conduct established the basis of knowledge prong; but credibility was established on another ground: the tipster was a "citizen-informer." *See Paszek*, 50 Wis. 2d at 628-31, 184 N.W.2d at 842-43. In *Knudson*, the informant's personal observation again established only a basis of knowledge. The informant was credible because she was a "citizen-informer" as well as a victim. *See Knudson*, 51 Wis. 2d at 275-78, 187 N.W.2d at 324-26. The *Cullen* case does contain some language supporting the position taken in *Mansfield*, *see Cullen*, 45 Wis. 2d at 445-46, 173 N.W.2d at 180-81, but it is questionable authority. The Court in *Cullen* did not conduct a complete analysis under the *Aguilar* standard. The case does not stand for the proposition that an informant's reliability may be established by personal observation of a crime because the case never discussed the issue of an informant's reliability. If it had, it could have found reliability based on the informant's position as "citizen-informer."

The *Mansfield* court also unjustifiably relied on Justice White's concurrence in *Spinelli*. The Court apparently misinterpreted Justice White's point, that the *Aguilar* standard requires something more than that the informant be credible; in addition, the informant's information must be a product of personal observation, rather than rumor. Justice White's position does not permit observation to establish credibility. Finally, the *Mansfield* court's reliance on the *Harris* decision is simply puzzling. The cited portion of *Harris* concerns declarations against penal interest, with no reference at all to whether an informant's observation may establish credibility. *See Harris*, 403 U.S. at 583-84. The *Mansfield* facts do not indicate that the informants made declarations against their penal interest. Possibly the official reporter miscited the court's reference to *Harris*. Justice Harlan's dissent, *see* 403 U.S. at 593-94, does state that personal observation may establish credibility, but only in two situations not applicable to *Mansfield*.

> 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.[160]

It is the magistrate's job to determine whether it is reasonable for police to rely on an informant, not to accept police conclusions on the matter. An informant's personal observation of criminal conduct, standing alone, does not create reasonable reliance because it does not establish that an informant is worthy of belief. Because an informant's personal observation of a crime does not support an inference that the informant is credible and because the fourth amendment prohibits police from judging credibility, the *Mansfield* decision is bad precedent and should be overruled.

Finally, the Wisconsin Supreme Court has indicated on several occasions that police corroboration of the details contained in a tip may establish an informant's veracity.[161] The court stated in the *Boggess* decision that "[a]ny deficiency in the veracity of the caller due to his anonymity was compensated for by both the specific detail contained in the information the caller provided and by the corroboration of portions of that information."[162]

B. Informant's Basis of Knowledge

Judicial concern with an informant's basis of knowledge stems from a desire to winnow out tips which "could easily have been obtained from an offhand remark heard at a neighborhood bar."[163] The focus of the inquiry is not whether the informant is worthy of belief. Instead, attention is directed at whether the informant was in a position to receive and accurately interpret information relating to the matter reported. In Wisconsin, a basis of knowledge is sufficiently established if

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160. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

161. *See* State v. Boggess, 115 Wis. 2d 443, 457, 340 N.W.2d 516, 524 (1983); State v. Doyle, 96 Wis. 2d 272, 291 N.W.2d 545 (1980) (use of corroboration); Molina v. State, 53 Wis. 2d 662, 193 N.W.2d 874 (use of corroboration), *cert. denied*, 407 U.S. 923 (1972).

162. *Boggess*, 115 Wis. 2d at 457, 340 N.W.2d at 524. This statement is misleading in that it suggests that detail alone can establish an informant's veracity. More accurately, it is corroboration of detail that may establish a tipster's veracity. The detail contained in a tip may establish an informant's basis of knowledge. *See infra* text accompanying notes 163-70.

163. Spinelli v. United States, 393 U.S. 410, 417 (1969).

an informant personally observes criminal conduct[164] or supplies a tip containing detail which allows an inference that the informant obtained information from personal observation. This latter principle was not clearly established until the *Boggess* decision, in which the court stated that "[t]he detail provided indicates that the caller was speaking from personal knowledge and not merely repeating an idle rumor."[165] The critical details supplied in the *Boggess* case concerned the names and descriptions of the persons involved in the criminal act and their location.[166]

Two Wisconsin cases, indicating that an informant's basis of knowledge may be established absent a detailed account of the matter reported or an allegation that the tipster had personally observed a crime, muddle the requirements of the two-pronged test. Both cases, *Molina v. State*[167] and *State v. Guy*,[168] were decided in 1972 and employed a thinly veiled totality of circumstances approach. The court in *Molina* apparently inferred a basis of knowledge based upon police corroboration of details contained in the tip. However, there is no explicit holding on this point. Probable cause rested on a series of factors, including the informant's previous record of reliability and the suspect's record of prior criminal convictions.[169] In *State v. Guy*, the court essentially ignored the basis of knowledge requirement.[170] These cases reflect the Wisconsin Supreme Court's confusion regarding proper analysis of facts under the two-pronged test and how facts create various inferences which may or may not be sufficient to satisfy the *Aguilar* standard. The cases also reveal a measure of judicial impatience with the rigid demands of the *Aguilar* decision.

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164. *See, e.g.*, Sanders v. State, 69 Wis. 2d 242, 230 N.W.2d 845 (1975).

165. 115 Wis. 2d at 456, 340 N.W.2d at 524.

166. *See id.*

167. 53 Wis. 2d 662, 193 N.W.2d 874, *cert. denied*, 407 U.S. 923 (1972).

168. 55 Wis. 2d 83, 197 N.W.2d 774 (1972).

169. *See Molina*, 53 Wis. at 673, 193 N.W.2d at 880.

170. *See Guy*, 55 Wis. 2d at 96, 197 N.W.2d at 781 (Heffernan, J., dissenting). Justice Heffernan also pointed out that police received the informant's tip four or five years before they acted on it. Thus, Justice Heffernan argued, the tip had no probative value at the time of the search and should not have been used to justify it. *Id.*

IV. ANALYSIS UNDER THE TOTALITY OF CIRCUMSTANCES

It is plain that if probable cause can be established under the more exacting two-pronged standard, it necessarily is established under the totality test. Assuming that magistrates and reviewing courts can decipher the United States Supreme Court's formulation of the two-pronged test, a logical first step under the totality analysis is to assess probable cause under the *Aguilar* standard. The two-pronged test, despite criticism of its technicality, offers at least a concrete and reliable analytical framework. If reasonable inferences are drawn from police corroboration, detail contained in a tip, and a suspect's prior reputation, the two-pronged framework can still be effectively employed under the totality approach. If a warrant application fails to satisfy the *Aguilar* standard, magistrates may require additional assurances before issuing a warrant, including: supplemental police investigation, corroboration of more of the details contained in a tip, disclosure of more facts or that an informant appear personally before the magistrate.[171]

The wisdom of the Supreme Court's ruling in *Illinois v. Gates*[172] is largely dependent upon the action of issuing magistrates. Because they analyze warrant affidavits after incriminating evidence has been produced, reviewing courts are less likely to define the totality standard with precision, particularly since the recent adoption of the good-faith exception to the exclusionary rule.[173] Magistrates must give substance to

171. Justice Harlan stated, "We cannot assume that the ordinary law-abiding citizen has qualms about [appearing before a magistrate]." United States v. Harris, 403 U.S. 573, 599 (1971) (plurality opinion) (Harlan, J., dissenting). *See also* Illinois v. Gates, 103 S. Ct. 2317, 2356 n.6 (1983) (Brennan, J., dissenting) (presumably police have access to their confidential informants, therefore it is reasonable that they disclose the facts upon which informants based their conclusions).

172. 103 S. Ct. 2317 (1983).

173. The Court created a good-faith exception to the exclusionary rule in two cases decided during the 1984 term. *See* United States v. Leon, 104 S. Ct. 3405 (1984); Massachusetts v. Shepard, 104 S. Ct. 3424 (1984). *See generally* Gammon, *The Exclusionary Rule and the 1983-1984 Term*, 68 MARQ. L. REV. 1 (1984). The parites in the *Gates* case were originally ordered to address the additional question whether a good-faith exception should be created. *See* Illinois v. Gates, 103 S. Ct. 436 (1982) (requesting parties to brief the issue). However, the Court later reversed itself, "with apologies to all," and decided not to rule on the matter because it had not been argued in the Illinois courts. *See Gates*, 103 S. Ct. at 2321-25. In addition, one commentator suggested that

the totality of circumstances and so should not abandon the teachings of the two-pronged test. The reasons are several.

First, police, federal agents and magistrates all benefit from well-defined probable cause requirements in informant tip cases. Police and federal agents will know, for example, that they must corroborate a story supplied by a first-time confidential informant or must allege that the informant gave a declaration against penal interest in order to establish the informant's credibility. In addition, magistrates will know what to look for in a warrant affidavit. Second, common sense recommends that magistrates require some evidence of an informant's veracity and basis of knowledge. Absent evidence of this sort, there is a danger that searches will be conducted pursuant to rumor or at the insistence of unreliable sources. And third, a practical application of the two-pronged standard will achieve law enforcement objectives as effectively as the totality of circumstances test, and will lessen the danger of unjustified intrusions.

The following presents a brief review of the Supreme Court's formulation of the two-pronged test in light of *Illinois v. Gates*.

A. Basis of Knowledge

An informant's basis of knowledge may be established by a statement that the informant personally observed criminal activity or, if information was obtained indirectly, by a satisfactory explanation of why the informant's sources were reliable.[174] In addition, under *Spinelli v. United States*[175] and *Draper v. United States*,[176] if an accused's criminal activity is described in sufficient detail, a magistrate may infer that the informant obtained the information in a reliable way. In *Gates*, the Court concluded that the anonymous letter, standing alone, gave "absolutely no indication of the basis for the

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the main reason the Court refused to rule on the good faith issue in *Gates* was that Justice Powell is a stickler for procedural protocol. He also suggested that the Court wanted to give a broader sweep to the good-faith exception by creating it in a case when no warrant issued. *Moylan, supra* note 123, at 118. *See also infra* note 204.

174. *See Gates*, 103 S. Ct. at 2347 n.20 (White, J., concurring in the judgment).

175. 393 U.S. 410 (1969).

176. 358 U.S. 307 (1959).

writer's predictions."[177] There were no allegations of the informant's personal observation or of reliable secondary sources. Furthermore, "the character of the details in the anonymous letter might well not permit a sufficiently clear inference regarding the letter writer's 'basis of knowledge.' "[178]

It appears after the *Gates* decision that the only certain way that an informant's basis of knowledge may be established is if the informant personally observed criminal conduct or had a reliable secondary source. The Court concluded that the details contained in the *Gates* tip, although substantial, intimate, and not easily predicted, did not permit an inference that the informant had access to reliable information.[179] If a basis of knowledge cannot be inferred from the numerous details in the *Gates* tip, the inference is permissible in few instances indeed. However, the *Gates* majority was equivocal in its conclusion, and the opinion could just as easily be read to say that a basis of knowledge was inferable from the details in the anonymous letter. It is wiser to interpret *Gates* in this fashion for it places consideration of detail in its proper context: as a method of determining the reliability of the informant's source. If detail is merely a factor in the totality of circumstances, it loses its value as an analytical tool.

B. An Informant's Veracity

Nothing in the *Gates* decision abrogates Supreme Court precedent permitting an informant's veracity to be established by a declaration against penal interest[180] or a previous "track record" of reliability.[181] In addition, the decision does not affect the rule that citizen-informers are presumptively credible.[182] The *Gates* Court did, however, consider whether an

177. *Gates*, 103 S. Ct. at 2326.

178. *Id.* at 2336.

179. *See id.* The Court said that the Gates' travel plans might have been learned from a talkative neighbor or travel agent. Still, the majority conceded that "[i]f the informant had access to accurate information of this type [travel plans] a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gates' alleged illegal activities." *Id.* at 2335.

180. *See, e.g.*, United States v. Harris, 403 U.S. 573 (1971) (plurality decision).

181. *See, e.g.*, McCray v. Illinois, 386 U.S. 300, 303-04 (1967).

182. *See, e.g.*, State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971). *See also* 1 W. LAFAVE, *supra* note 1, § 3.4.

informant's veracity may be inferred from the fact that police corroborate some of the informant's information. Previous cases had held that this inference could be drawn, provided that a sufficient amount of corroboration had occurred and that something more than innocent details were corroborated.[183]

The *Gates* Court argued that the police corroboration, although substantial, "may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'veracity prong' of *Spinelli*."[184] The majority's position, given the unusual amount of police investigation in *Gates*, indicates that police corroboration, like the detail contained in a tip, may no longer claim a meaningful niche in the framework of the two-pronged test. However, the Court again equivocated on the matter,[185] leaving open the possibility that police corroboration of the sort that occurred in *Gates* may establish an informant's veracity. Moreover, the *Gates* decision clarified and broadened the role of police corroboration by pointing out that even "seemingly innocent activity [can become] suspicious in light of the initial tip."[186]

C. *The "Cross-Over Effect" and a Suspect's Prior Reputation*

The *Gates* decision created a type of "cross-over effect," in which a "strong showing" as to one of the *Aguilar* prongs may compensate for a "deficiency" on the other.[187] Presumably, if there is a complete *absence* of evidence on one of the prongs, even a strong showing on the other will not rescue the tip. This is probably the best interpretation of the *Gates* decision since the two *Aguilar* prongs are "analytically severable"[188] to the extent that one focuses on the informant as an individual

183. *See supra* text accompanying notes 76-83.

184. *Gates*, 103 S. Ct. at 2335.

185. The Court granted that "[t]he corroboration of the letter's predictions . . . all indicated, albeit not with certainty, that the informant's other assertions also were true." *Id.*

186. *Id.* at 2335 n.13.

187. *Id.* at 2329. *See supra* notes 121-24 and accompanying text.

188. *See* United States v. Harris, 403 U.S. 573, 592 (1981) (plurality opinion) (Harlan, J., dissenting).

and the other focuses on the informant's information.[189] Recognition of this fact does not mean that magistrates and courts should require an abundance of evidence on both prongs, but it should preclude ignorance of either prong altogether. "Other indicia of reliability," principally a suspect's prior reputation, may compensate for deficiencies in the two-pronged test by adding to the reliability of the tip, but should not substitute for satisfaction of one or the other of the prongs.

V. CONCLUSION

As Justice Brennan suggested in his *Gates* dissent, "[t]he Court's complete failure to provide any persuasive reason for rejecting the *Aguilar* and *Spinelli* decisions doubtlessly reflects impatience with what it perceives to be 'overly technical' rules governing searches and seizures under the Fourth Amendment."[190] Indeed, the *Gates* Court was primarily concerned with holding true the balance between individual constitutional rights and claims of governmental authorities,[191] a balance which the Court was certain had swung in favor of criminal defendants. The Court was not inaccurate in this respect. Hypertechnical applications of and confusion regarding the two-pronged test allowed numerous suspects who were the subject of legitimate police activity to slip through the cracks in the criminal justice system.[192]

Still, the *Gates* Court did not dispute the utility of the two-pronged test as a means of assessing the reliability of information received from informants. Regarding an informant's veracity and basis of knowledge, the Court made it clear that under the totality of circumstances standard "magistrates remain perfectly free to exact such assurances as they deem necessary."[193] Moreover, the Court said that the *Aguilar* prongs remain "highly relevant"[194] and suggested that there must be

189. *See* State v. Paszek, 50 Wis. 2d 619, 184 N.W.2d 836 (1971) (laying down rule that regardless of citizen-informant's credibility, there must be an additional "safeguard" to prove reliablity of the tip).

190. Illinois v. Gates, 103 S. Ct. 2317, 2359 (1983) (Brennan, J., dissenting, joined by Marshall, J.).

191. *See* 103 S. Ct. at 2333.

192. *See id.* at 2330 n.9.

193. *Id.* at 2333.

194. *Id.* at 2327.

some evidence of both an informant's veracity and basis of knowledge, such that an excess as to one may compensate for a deficiency as to the other.[195] The Court's respect for the two-pronged test as an analytical tool indicates that the *Gates* decision was directed less at the test itself than at its sometimes unreasonable application in the lower courts.

Although the *Aguilar* standard lives, the Supreme Court in *Massachusetts v. Upton*,[196] decided about one year after *Gates*, pointedly reiterated that the *Gates* standard prohibits technical dissection of warrants being analyzed under the federal constitution. The Court stated that the *Gates* decision did more than add "a new wrinkle"[197] or "merely refine or qualify" the two-pronged test:[198] the *Gates* Court instead rejected the *Aguilar* standard because it tended to produce hypertechnical applications.[199] In *Upton*, as in *Gates*, the Court did not say that the two-pronged test has no place in probable cause determinations. Therefore, it is likely that law enforcement officials will turn to the two-pronged test, at least initially, to give substance to what has been characterized as the "vague, standardless" totality of circumstances test.[200] Still, the Court believes that the two-pronged test, standing alone, tends to isolate issues and encourage "an excessively technical dissection of informants' tips."[201]

The difficult issue after the *Gates* and *Upton* decisions is whether the Supreme Court lowered the probable cause standard in informant tip cases; that is, should warrants or warrantless searches be valid under the totality of circumstances if

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195. *See id.* at 2329. *See supra* notes 121-24 and accompanying text.

196. 104 S. Ct. 2085 (1984) (per curiam).

197. *Id.* at 2087.

198. *Id.* The Supreme Judicial Court of Massachusetts stated:

> It is not clear that the *Gates* opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. . . . [W]e conclude that the *Gates* opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards.

Commonwealth v. Upton, 390 Mass. 562, 568, 458 N.E.2d 717, 720 (1983), *rev'd per curiam*, 104 S. Ct. 2085 (1984). The Supreme Court said that the Massachusetts Supreme Court "misunderstood our decision in *Gates*." *Upton*, 104 S. Ct. at 2087.

199. *See* 104 S. Ct. at 2087-88.

200. Note, 52 U. CIN. L. REV. 1103, 1114 (1973).

201. *Upton*, 104 S. Ct. at 2088.

they do not pass muster under the two-pronged test?[202] The fear among *Gates* commentators[203] is that the case indeed lowered the probable cause requirement in the informant tip context,[204] but this fear is as yet unrealized. It can be persuasively argued that the warrants in both the *Gates* and *Upton* cases satisfied a reasonable interpretation of the two-pronted test regardless of the Court's adoption of the totality standard.[205] Moreover, it is likely that a majority of the warrants considered by reviewing courts will be valid under both the *Aguilar* and the *Gates* standards. The *Gates* decision will have its most significant impact in the relatively rare cases in which probable cause is only marginally apparent. It appears that

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202. Of the decisions that have adopted the *Gates* standard, *see supra* note 130, none indicate that the two-pronged test was not also satisfied. Several states have indicated that they will not consider the *Gates* ruling if a warrant can be upheld on the basis of the *Aguilar-Spinelli* test. *See, e.g.*, State v. Villiard, __ Colo. __, 679 P.2d 593 (1983); State v. Ross, 194 Conn. 447, 481 A.2d 730 (1984); Commonwealth v. Grzembski, 393 Mass. 516, 471 N.E.2d 1308 (1984).

203. *See, e.g.*, 1 W. LAFAVE, *supra* note 1, § 3.3 (Supp. 1984); Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from Illinois v. Gates*, 6 W. N. ENG. L. REV. 331 (1983); Reilley, Witlin & Curran, *supra* note 11; Note, *supra* note 200.

204. In theory at least, it is true that a warrant is more readily obtainable in the first instance under the new standard than under the two-pronged test. And assuming that a warrant is issued and produces incriminating evidence, defense attorneys face an uphill battle to exclude the evidence. In the first place, the *Gates* decision prohibits de novo review of probable cause determinations. The Court said:

> Similarly, we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." . . . Reflecting this preference for the warrant process, the traditional standard of review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more.

Gates 103 S. Ct. at 2331 (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969) and Jones v. United States, 362 U.S. 257, 271 (1960)). And second, the good faith exception to the exclusionary rule increases the likelihood that the evidence will be admissible. *See supra* note 173.

205. Justice White would have upheld the *Gates* warrant, but would have done so under a broad reading of the two-pronged test. He said "with clarification of the rule of corroborating information, the lower courts are fully able to properly interpret *Aguilar-Spinelli* and avoid such unduly-rigid application." 103 S. Ct. at 2350-51 (White, J., concurring). The informant in *Upton* presented some evidence of her credibility (she was a former girlfriend of the defendant; further, the affiant had possibly met the informant previously) and basis of knowledge (she had seen the stolen goods). Moreover, police had corroborated some of the facts reported. *See Upton*, 104 S. Ct. at 2086.

the Supreme Court chose to abandon, rather than clarify, the two-pronged test to prevent suppression of evidence in these doubtful cases.

The informant tip cases give rise to at least one enduring concept: absent some evidence of an informant's veracity and basis of knowledge, a tip may give rise to suspicion, but it arguably does not meet the constitutional threshold of probable cause.[206] Therefore, magistrates may be advised to require evidence on both *Aguilar* prongs, but must draw reasonable inferences from detail, corroboration, and any other indicia of reliability. If a search warrant is issued absent this sort of evidence or if a warrantless search is conducted on similarly tenuous grounds, the difficult fourth amendment issues raised in the *Gates* case are fully framed. In such a case, the *Gates* standard will probably allow the state to use the fruits of the search against the defendant.[207] There is a certain justice in this: defendants should not escape the implication of the incriminating evidence they produce. However, states must be aware that this interpretation of the *Gates* decision may authorize newly permissive police and magistrate practices. It is on this front that the *Gates* battle will be waged.

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206. It is particularly unnerving to some *Gates* critics that Justice Rehnquist's opinion seemed to blur the distinction between probable cause and "particularized suspicion," the standard necessary to justify a stop and frisk. *See* Mascolo, *supra* note 203, at 383, 391 n.390; Moylan, *supra* note 123, at 113-14; Note, *Use of Hearsay*, *supra* note 9, at 181 n.36. The Court equated probable cause and suspicion on several occasions, offering stop and frisk cases as precedent. *See Gates*, 103 S. Ct. at 2328 (citing United States v. Cortez, 449 U.S. 441 (1981)); Adams v. Williams, 407 U.S. 143 (1972)). *See also Gates*, 103 S. Ct. at 2330 ("the term 'probable cause' . . . imports a seizure made under circumstances which warrant suspicion"); *id.* at 2335 n.13 ("In making a determination 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 non-criminal acts.").

207. This is a reasonable conclusion in light of the Supreme Court's insistence that reviewing courts defer to magistrate decisions. *See supra* note 204. *See also Upton*, 104 S. Ct. at 2088.