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Informer's Tip as Probable Cause for Search or Arrest

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THE INFORMER'S TIP AS PROBABLE CAUSE FOR SEARCH OR ARREST

An informer's tip[1] provides constitutionally adequate grounds for arrest or search, whether with or without a warrant,[2] only if it affords

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1 *See generally* M. HARNEY AND J. CROSS, THE INFORMER IN LAW ENFORCEMENT (1962), providing examples showing the informer's tip to be a necessary tool of law enforcement.

2 Although courts encourage the use of warrants, Jones v. United States, 362 U.S. 257, 270-71 (1960), both arrests and searches are possible without warrant. A warrantless arrest for a felony is valid if based upon probable cause. Wong Sun v. United States, 371 U.S. 471, 479 (1963); Draper v. United States, 358 U.S. 307, 310-11 (1959). Warrantless arrest for a misdemeanor requires commission in the officer's presence. Carrol v. United States, 267 U.S. 132, 156-57 (1925) (dictum). A warrantless search is permitted either where probable cause is present and it is impracticable to obtain a warrant, *id.* at 156, or where the search is incidental to a lawful arrest. United States v. Rabinowitz, 339 U.S. 56, 60 (1950). A good analysis of both warrantless search situations is contained in United States v. Ventresca, 380 U.S. 102, 107 n.2 (1965). Since a warrantless search is incidental to lawful arrest only if there was probable cause for the arrest, all searches and arrests must ultimately be based on some probable cause.

The definition of probable cause is the same regardless of whether a warrant is used. *See, e.g.,* Draper v. United States, *supra,* applying to a warrantless arrest the probable cause test applied to a warrantless search in Brinegar v. United States, 338 U.S. 160 (1949); McCray v. Illinois, 386 U.S. 300, 304 (1967), applying to a warrantless arrest the same test as was applied to a search warrant in Aguilar v. Texas, 378 U.S. 108 (1964).

To encourage the use of warrants, a "probable cause" standard might be used for warrant cases and a "very probable cause" standard for warrantless cases, but a multiplicity of standards would probably resemble the different degrees of negligence, which analytically at least are semantic nonsense. A more useful method, enunciated by Justice Goldberg in United States v. Ventresca, *supra,* is to make a presumption in favor of probable cause if a warrant has issued and against probable cause if no warrant has issued:

> In *Jones v. United States,* 362 U.S. 257, 270, this Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.

Id. at 106. Justice Goldberg is arguably twisting *Jones.* Where Goldberg creates a presumption against warrantless searches in close cases, *Jones* merely states that more evidence should not be required for a search warrant than for a warrantless search, and that "[i]n a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant . . . ." 362 U.S. at 270. Furthermore, Justice Goldberg's use of presumptions may make it harder to sustain a warrant than does *Jones.* Logically, it would seem that a warrant could more easily be upheld under the "substantial basis" test (where a substantial basis would be conclusive) than under the Goldberg judicial review technique (where the warrant gains the benefit of presumptive validity only in close cases). But the difference may be only semantic. *See* United States v. Ventresca, *supra,* which uses both tests without differentiation. Nevertheless the Goldberg approach is a sensible way to encourage warrants without trying to define a double standard, and there is precedent for his position. *See* Chapman v. United States, 365 U.S. 610, 614-15 (1961); Johnson v. United States, 333 U.S. 10, 13-14 (1948). In both cases warrantless searches were invalidated with indications that they would have been sustained if under warrant. The Goldberg theory is repeated in Aguilar v. Texas, *supra.*

"probable cause."[3] Probable cause exists when a police officer has personal knowledge or reasonably trustworthy reports of facts that are sufficient to warrant a reasonably cautious man's believing that an offense has been or is being committed.[4] In the context of informers' tips, then, the problem is to distinguish those tips that are "reasonably trustworthy" from those that are not. The Supreme Court devised a fairly clear, albeit rigorous, test in *Aguilar v. Texas*,[5] but subsequent decisions, especially *Spinelli v. United States*,[6] have both confused the *Aguilar* test and made unsatisfactory alterations to it.

I

THE SUPREME COURT AND THE TRUSTWORTHY TIP

In *Aguilar*, a search warrant for narcotics issued upon an affidavit reciting merely that the affiant police officer had received "reliable information from a credible person" and believed narcotics were kept at the described premises for purposes of illegal sale.[7] The search produced evidence resulting in conviction. The Supreme Court reversed the con-

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Another way to encourage the use of warrants would be for the Supreme Court to hold that under the fourteenth amendment the prosecution has the burden at trial of proving probable cause in a warrantless case. This is the rule in federal courts, but it does not yet extend to the states, some of which put the burden of proving lack of probable cause in warrantless cases on the defendant. *See* Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege*, 45 DENVER L.J. 399, 411 n.57 (1968). Although the burden of proof may not be fundamental enough to deserve due process treatment, such treatment may be necessary to encourage warrants.

3 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. The probable cause requirement is the same under the fourth and fourteenth amendments. Aguilar v. Texas, 378 U.S. 108, 110 (1964); Kerr v. California, 374 U.S. 23, 33 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

Even though an informer's tip constitutes hearsay inadmissable at trial, it can still be sufficient to establish probable cause. Jones v. United States, 362 U.S. 257, 270 (1960); Draper v. United States, 358 U.S. 307, 311-12 (1959); Brinegar v. United States, 338 U.S. 160, 172-74 (1949).

4 Carroll v. United States, 267 U.S. 132, 162 (1925). *See also* Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

The requirements for probable cause are thus less than the requirements for guilt. Jones v. United States, 362 U.S. 257, 270 (1960); Draper v. United States, 358 U.S. 307, 311-12 (1959); Brinegar v. United States, *supra*.

5 378 U.S. 108 (1964).

6 393 U.S. 410 (1969).

7 378 U.S. at 109. The magistrate apparently had only the affidavit upon which to base his decision to issue the warrant. A reviewing court can consider only information brought to the magistrate's attention. *Id.* at 109 n.1.

viction, holding the warrant invalid under the fourteenth amendment because the affidavit failed both parts of a two-part test:

> [T]he magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."[8]

The first test, the basis of knowledge test,[9] demands that the informer have obtained his knowledge by personal observation or in some other dependable manner rather than through casual rumor. It can be rephrased in terms of the magistrate's first question to the police officer or, in a warrantless case, the police officer's first question to himself: "How does the informer know there are narcotics in this house?"

The second test, the reliability test, guards against tips provided by untruthful or unreliable informers. It can be rephrased in terms of the magistrate's or police officer's second question: "Why should we believe this particular informer?" This second test speaks of two possibilities—a "credible" informant *or* "reliable" information. This distinction suggests that an informant is credible if he has provided truthful tips in the past, and that the information is reliable if corroborated by independent investigation.[10]

Both tests require only that *some* of the underlying circumstances be sworn to. The opinion does not state how many or what type of circumstances are sufficient and thus leaves much to the magistrate's or police officer's judgment. Yet the dual requirement was criticized in Justice Clark's dissent as overly rigid and technical.[11] To evaluate the *Aguilar* test, the alternatives presented in subsequent cases should be examined.

In *United States v. Ventresca*,[12] a search warrant issued upon an affidavit reciting that the request for a search warrant was based on "observations made by [affiant, an Internal Revenue Service investiga-

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8 *Id.* at 114 (footnote omitted).

9 The *Aguilar* basis of knowledge test may only have been a clear expression—in the informer's tip context—of an already-existing requirement that any allegation of criminal activity be supported by a basis of knowledge statement. *See, e.g.*, Nathanson v. United States, 290 U.S. 41 (1933).

10 The *Aguilar* opinion cited the affidavit in Jones v. United States, 362 U.S. 257 (1960), as sufficient. That affidavit contained sworn statements (*1*) that the informer had given accurate tips on previous occasions, and (*2*) that the tip was corroborated by information from other informers. *Aguilar* fails to clearly indicate whether either statement alone is sufficient to fulfill the reliability test. 378 U.S. at 114-15 n.5.

11 *Id.* at 122.

12 380 U.S. 102 (1965).

tor], and . . . upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division . . . and reports orally made to [affiant] describing the results of their observations and investigation . . . ." The affidavit also recited that investigators had smelled mash while walking near Ventresca's house and had heard sounds, like those of a motor, coming from the house.[13] A search made under the warrant led to an illegal still, and Ventresca was convicted. The court of appeals reversed the conviction.[14] It concluded that the affidavit failed the *Aguilar* basis of knowledge test because it did not expressly state that the information was based on the personal knowledge of affiant or other investigators; thus, the information obtained from the other investigators could have been based on unreliable hearsay.[15]

The Supreme Court reversed the court of appeals and sustained the conviction.[16] Justice Goldberg wrote that affidavits for search warrants must be tested and interpreted by magistrates and courts in a common sense, realistic fashion; technical requirements have no place in this area of the law.[17] The opinion indicates that the affidavit, viewed realistically, passed each of the *Aguilar* tests. Since IRS investigators are presumed to be truthful,[18] a statement that information came from IRS investigators satisfies the reliability test. The basis of knowledge test is met because at least some of the information was stated to be derived from the observations of other investigators, and the smell of mash and sounds of a motor were explicitly stated to be personal observations of investigators.[19]

The opinion lacks, however, a clear affirmation of the necessity to apply both *Aguilar* tests. Its emphasis on the desirability of a common-sense, non-technical approach produces uncertainty as to whether *Aguilar* must be applied literally or whether one or both of its dual requirements can be ignored if common sense indicates that a tip provides probable cause.[20]

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13 *Id.* at 103-04.

14 324 F.2d 864 (1st Cir. 1963).

15 *Id.* at 868-70.

16 380 U.S. 102 (1965).

17 *Id.* at 108.

18 *Id.* at 111.

19 *Id.* at 110, 111.

20 Justice Goldberg probably meant only that common sense should be used in determining whether sufficient circumstances have been set forth to pass each of the tests required by *Aguilar*. But some courts have used *Ventresca* to justify the failure to apply both *Aguilar* tests. For example, in People v. Schnitzler, 18 N.Y.2d 457, 223 N.E.2d 28, 276 N.Y.S.2d 28 (1966), an affidavit for a search warrant recited that an informer had seen

This confusion is apparent in *Spinelli v. United States.*[21] Here a search under warrant produced evidence that was used to convict defendant of interstate gambling. The warrant was issued upon an affidavit reciting the following information: Federal Bureau of Investigation agents had four times seen Spinelli drive from Illinois to St. Louis and enter a specific apartment building, and on one occasion they had seen Spinelli enter a particular apartment. The FBI had learned from the telephone company that the apartment contained two telephones listed in another's name. The FBI had been "informed by a . . . reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of [these] telephones . . . ."[22] Spinelli was known to the affiant and other law enforcement agents as a gambler.[23]

Justice Harlan's opinion for a four-man majority invalidated the warrant. Applying the basis of knowledge test, he noted that the affidavit lacked any explanation of the underlying circumstances from which the informer concluded Spinelli was running a gambling operation. There was no allegation that the informer had seen Spinelli at work or had placed a bet with him.[24] Nor was there a statement that the informer had obtained his information from another reliable source.[25]

Justice Harlan indicated, however, that the purpose of the *Aguilar* basis of knowledge test could be fulfilled without a statement of the circumstances from which the informer derived his information. He suggested that if the tip was sufficiently detailed, it would be self-verifying; one could fairly conclude that the informer was not relying on mere rumor.[26] The tip in question failed this alternative test. The only

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narcotics delivered to defendant's apartment. The affiant police officer failed to state circumstances showing why the informer was believed reliable, merely swearing that he was reliable. Chief Judge Desmond, for a 4-3 majority, relied on *Ventresca* and upheld the warrant. Judge Keating, in dissent, argued that the affidavit failed to pass the *Aguilar* reliability test.

The *Schnitzler* decision would be wrong today, for there was no corroboration to help the affidavit over the *Aguilar* reliability hurdle. Spinelli v. United States, 393 U.S. 410 (1969). *See* pp. 963-64 *infra.*

21 393 U.S. 410 (1969).

22 *Id.* at 422.

23 *Id.* at 413, 414

24 *Id.* at 416.

25 *Id.* This indicates that multiple hearsay can afford probable cause so long as the *Aguilar* tests are met.

26 *Id.* at 416, 417. This was clearly a departure from *Aguilar,* which required a statement as to the informer's basis of knowledge and lacked any provision for the self-verifying detail substitute suggested by Justice Harlan. *See* pp. 964-66 *infra.*

fact it supplied was that defendant used two specified telephones, allegedly to conduct a gambling operation, and Justice Harlan observed that this allegation could easily have been based on a conversation overheard by the informer at a neighborhood bar.[27]

Moving to the *Aguilar* reliability test, Justice Harlan noted that the affidavit gave no reason for believing the informer reliable. There was a bald assertion of reliability but no mention of previous tips.[28] But Justice Harlan then went on to consider "the other allegations which corroborate the information contained in the hearsay report,"[29] to determine whether "the tip, . . . when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration."[30] Since only one fact—the phone numbers—had been corroborated, there was insufficient corroboration to establish the informer's reliability.[31]

The notion that corroboration of a tip can establish the informer's reliability is derived from *Draper v. United States*.[32] There the FBI's informer (*1*) stated that Draper would arrive in Denver on the train from Chicago on the eighth or ninth of September, (*2*) described Draper's appearance and how he would be dressed, (*3*) stated that Draper walked with a fast gait, (*4*) stated that he would be carrying a tan zipper bag, and (*5*) stated that he would be carrying three ounces

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27 393 U.S. at 417.

28 *Id.* at 416. In using past tips to establish reliability, a mere assertion that the informer has given truthful tips on previous occasions is sufficient. The previous occasions need not be enumerated. Jones v. United States, 362 U.S. 257, 268-69 (1960).

29 393 U.S. at 415.

30 *Id.* Justice Harlan apparently assumed that the *Aguilar* reliability test could only be met by a statement that the informer was known to be reliable (for example, because of previous tips), but that corroboration might validate an affidavit failing that test. Yet, as pointed out at p. 960 *supra*, *Aguilar* itself may have provided for corroboration as a means of justifying the inferential conclusion that the informer was reliable. Thus, while Justice Harlan viewed corroboration as a substitute for passing the *Aguilar* reliability test, it might well be considered simply an additional way of passing it.

The quote from Justice Harlan's opinion may indicate that he also viewed corroboration as a means of passing the basis of knowledge test. But as Justice White points out in his concurring opinion, 393 U.S. at 427, corroboration should not be considered in applying this test. Independent corroboration of some of the facts alleged by the informer may indicate truthfulness; *i.e.*, that the tip is not completely fabricated, but does not suggest that the informer's knowledge was obtained through personal observation or other dependable manner.

31 393 U.S. at 417, 418. Justice Harlan then undertook a further analysis to see if the affidavit, completely apart from the tip, presented probable cause; he concluded that none of the other elements—Spinelli's entry into the apartment, the presence of two phones listed in another name, Spinelli's reputation as a gambler—had probative value. *Id.* at 418, 419.

32 358 U.S. 307 (1959).

of heroin.[33] By waiting for Draper at the Denver station, an FBI agent was able to corroborate all but the fifth allegation. He arrested Draper and, in a warrantless search pursuant to the arrest, found the heroin. The Supreme Court found probable cause, the tip having been rendered trustworthy by the corroboration of so many of its alleged facts and by the informer's having given accurate tips on previous occasions.[34]

II

THE LIMITED EFFICACY OF SELF-VERIFYING DETAIL AND INDEPENDENT CORROBORATION

A. *Self-Verifying Detail as a Substitute for the Aguilar Basis of Knowledge Test*

In *Spinelli,* Justice Harlan asserted that a tip may be so detailed as to be "self-verifying," on the ground that extensive detail may imply that the informer has based his conclusion on personal observation.[35] But *Spinelli* offers little guidance for determining when a tip is detailed enough to be self-verifying.

One possible criterion is the number of facts alleged. In a hypothetical situation *R,* a reliable informer who has provided accurate tips in the past, states (*1*) that *D* uses apartment 600 as a business office; (*2*) that *D* uses telephones WAger 2-0007 and WAger 2-0008 in his business; and (*3*) that *D*'s business is illegal bookmaking. A magistrate

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33 *Id.* at 309.

34 *Id.* at 312-13.

Justice White, concurring in *Spinelli,* suggested that *Aguilar* may have overruled *Draper.* 393 U.S. at 427-29. *Aguilar,* a warrant case, required that the affidavit contain a statement as to the informer's basis of knowledge and a statement evidencing the informer's reliability. In a warrantless case, *Aguilar* would presumably require that the officer conducting the search or arrest (*1*) know that the informer's basis of knowledge was sound (preferably personal observation) and (*2*) have good reason to believe the informer reliable. *Draper,* a warrantless case decided before *Aguilar,* held that there was probable cause because (*1*) the informer had given accurate information in the past and (*2*) four of the five facts alleged by the informer were corroborated by the FBI agent before making the arrest. The *Draper* Court appeared to treat both factors as reasons for believing the informer reliable but showed no visible concern with a basis of knowledge test. Thus, *Draper* is arguably incompatible with *Aguilar,* but the *Draper* opinion is really too brief to indicate the Court's reasoning. In *Spinelli,* both Justices Harlan and White believed the *Draper* tip contained self-verifying detail sufficient to infer an adequate basis of knowledge. Thus, under *Spinelli,* the *Draper* decision is sound as applied to its facts. *See* note 9 *supra.*

35 393 U.S. at 416, 417.

Although Justice Harlan announced that he would look for "corroboration" when that the details alleged in the tip be corroborated by independent police investigation. *Id.* the *Aguilar* tests were not literally met, this self-verification substitute does not require

is asked to issue a search warrant, is told about the previous tips, but is not told how the informer obtained the knowledge related in this tip. Is the tip, with three facts alleged, detailed enough to be self-verifying? Justice Harlan concluded that the *Spinelli* tip was not self-verifying because it alleged only the phone numbers and the gambling, but that the *Draper* tip was self-verifying because it alleged time of arrival at Denver station, appearance, and amount of heroin.[36] Surely, however, the number of facts alleged cannot be determinative. A well-developed rumor or a casual conversation is as likely to contain three facts as two.

A second possible criterion involves the question, "How would such knowledge ordinarily be obtained?" In another hypothetical situation *R*, again shown by past tips to be reliable, (*1*) states that *D* uses apartment 600 as an office, (*2*) describes the apartment in great detail, locating every piece of furniture, including a desk, and (*3*) alleges that *D* keeps illegal gambling books locked in the desk.[37] Is this tip self-verifying? Justice Harlan believed the *Draper* tip was self-verifying because only a person who acquired his information in a dependable manner would possess the informer's detailed knowledge of Draper's appearance and time of arrival.[38] But this does not mean that the information about the heroin was obtained in the same manner. The informer might easily have met Draper at the Denver station as Draper was about to leave for Chicago, heard Draper say he would return in a day or two, observed that Draper carried no luggage except a small zipper bag, and that evening overheard a rumor that Draper was going to Chicago to buy heroin. Likewise, in the last hypothetical, *R* has undoubtedly visited apartment 600 himself; otherwise he would have been unable to describe it so precisely. But *R*'s only basis for his assertion that *D* keeps gambling books in his desk may be a rumor to that effect. The detailed description of the apartment alone is a poor substitute for the *Aguilar* requirement of a statement of the informer's basis of knowledge.

The difficulty with the tip in the last hypothetical suggests a third criterion for self-verifying detail: Are the facts detailed in the tip incriminating facts or merely innocent facts?[39] In the last hypothetical, the situation would have been different if *R* had described the gambling books in great detail and given their precise location in the desk.[40]

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36 *Id.* at 417, 418.

37 The hypothetical is based on one of Justice White's. *Id.* at 427.

38 *Id.* at 417 (Harlan, J.), 425, 426 (White, J., concurring).

39 This distinction is suggested in Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840, 843-44 n.22 (1965).

40 This situation is suggested by another of Justice White's hypotheticals. 393 U.S. at 425.

The location of the furniture in the apartment involves mere innocent facts, but the description of the gambling books involves incriminating facts. Detailed knowledge of the apartment furniture does not indicate that the information about the gambling books was obtained through personal observation, but the detailed description of the books themselves is probably based upon personal observation. Such a tip seems to be self-verifying; the incriminating detail is the substantial equivalent of passing the *Aguilar* basis of knowledge test.

The best solution to the problems of the self-verifying detail test may be the one suggested by Justice White: abandon it and return to a literal application of *Aguilar*. Although he agreed with Justice Harlan that a detailed tip may be self-verifying, Justice White, concurring in *Spinelli*, argued that where it may be so easily inferred from the affidavit that the informer observed the facts himself, "no . . . harm could come from requiring a statement to that effect, thereby removing the difficult . . . questions which arise in such situations."[41] This suggestion appears sound. In a warrantless situation, the policeman can more easily and surely decide whether he has probable cause to make an arrest or search by asking himself, "Do I know how the informer got his information," than he can by asking, "Is this tip so detailed as to be self-verifying?" Where a magistrate is being asked to issue a warrant, he cannot question the informer to determine whether the tip is based on rumor. The police officer who interviews the informer can, however. It seems senseless to force the magistrate to rely on a possibly incorrect inference from the detailed nature of the tip when the officer could make a statement as to the basis of knowledge. Since it is unlikely that forcing an informer to reveal his source of information will substantially impede law enforcement,[42] the self-verifying test is an unnecessary and complicated alternative to *Aguilar* that could be dispensed with.

B. *Independent Corroboration as a Substitute for the Aguilar Reliability Test*

Whether independent corroboration is viewed as a way to pass the *Aguilar* reliability test or as a substitute for passing that test,[43]

41 *Id.* at 426.

42 If there were frequent occasions in which the informer cannot disclose his basis of knowledge without compromising his identity, the self-verifying detail substitute would be necessary to protect the informer's privilege. But it is unlikely that there are many such occasions; the only situation in which disclosure of the basis of knowledge would compromise the informer's identity would be one in which he is the only person having this basis of knowledge. And in such a situation, he would hesitate to inform at all because the mere giving of the tip would compromise his identity.

43 *See* note 30 *supra*. Of course, the corroboration problem will not arise if previous truthful tips establish the informer's past reliability.

Spinelli indicated that independent corroboration of facts alleged in the tip may establish the informer's truthfulness. Again, however, the opinions are of minimal assistance in developing criteria for sufficient corroboration.

Suppose *U*, an informer, explaining in detail how his information was obtained, reports (*1*) that *D* is engaged in an illegal bookmaking operation; (*2*) that *D* uses apartment 600 as his bookmaking office; and (*3*) that *D* uses WAger 2-0007 and WAger 2-0008 to conduct his bookmaking business. Here the police officer can satisfy the basis of knowledge test but is unable to give the magistrate or a court any reason for believing *U* to be honest or reliable.

It is doubtful that the purpose of the reliability test is satisfied if the officer swears merely that police investigation has corroborated the allegations relating to the apartment and the phone numbers. Justice Harlan believed that four corroborated facts in *Draper* were sufficient, but that corroboration of only one fact in the *Spinelli* tip—the phone numbers—was not.[44] The number of facts criterion, however, is as unsuitable here as it is in the self-verifying detail context.

Whether the corroborated facts are circumstantially incriminating or merely innocent is a more relevant criterion. Corroboration of innocent facts, such as the apartment number and the telephone numbers, shows that the informer has some familiarity with the suspect's affairs, but it does not suggest that those affairs include criminal activity; a skillful liar would always allege *some* true innocent facts to make his story appear credible.[45] Only corroboration of an incriminating allegation should be relevant.

The last hypothetical would be significantly altered if *U*, the informer of unknown reliability, were to allege an additional fact: On busy days, *D* conducts his gambling business by five phones, the auxiliary numbers being WAger 2-0009, WAger 2-0010, and WAger 2-0011, none of which is listed in the telephone book. If this information is subsequently corroborated by police investigation, the tip becomes more believable. Corroboration of the allegations of *D*'s use of the apartment and two listed telephones does not provide sufficient reason to believe in the truthfulness of the allegation of *D*'s bookmaking activity; many people have two telephones. But *five* telephones in one

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

45 The danger of fabricated tips is certainly real. HARNEY AND CROSS, *supra* note 1, written from the policeman's point of view, lists some of the usual motives for becoming an informer: elimination of a competing racketeer, the possibility of a lighter sentence if apprehended, revenge, a feeling of importance, and money obtained by "selling informa-

apartment suggests a bookmaking operation.[46] When this "incriminating" fact is corroborated, one can fairly conclude that the informer has not fabricated his allegation that *D* was conducting a gambling business.[47]

CONCLUSION

Aguilar required that an affidavit for a warrant contain a statement of some of the underlying circumstances from which the informer obtained his knowledge, and a reason for believing the informer reliable.[48] The major question has been whether *Aguilar* must be strictly followed. The common-sense or non-technical emphasis of *Ventresca* produced uncertainty as to whether both *Aguilar* tests had to be literally applied to each tip. That uncertainty should have been dispelled by *Spinelli*'s unequivocal demand that the informer's report first be measured against the standards of *Aguilar*'s twin-pronged test.

But *Spinelli* also provides for self-verifying detail as a valid substitute for passing the basis of knowledge test, and for independent corroboration as a substitute for passing the reliability test. Courts will

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46 *See* Spinelli v. United States, 393 U.S. 410, 418 (1969).

47 *See* Comment, *supra* note 39, at 843-44 n.22. Some additional corroboration problems can be dealt with briefly:

Corroboration by Another Tip. In the last hypothetical, if *U*'s facts are not corroborated by police investigation but are repeated in a tip received from *V*, who is also of unknown reliability, has *U*'s tip now passed the reliability test? It is doubtful that one untrustworthy tip can validate another. *U* and *V* could have jointly fabricated their story for any number of reasons. *See* note 45 *supra*. If *V* is known to be reliable, however, he probably could corroborate *U's* tip. Of course, if *V's* tip passes the *Aguilar* tests and establishes the probability of criminal conduct, *U's* tip becomes unnecessary for probable cause purposes.

Corroboration by Incriminating Facts Not Alleged in the Tip. If *U* reports only two telephone numbers, but independent police investigation reveals the three additional numbers, *U*'s allegation of gambling becomes believable. *See* Spinelli v. United States, 393 U.S. 418, 419 n.7 (1969).

Classes of Informers for Whom the Reliability Test Can be Relaxed. Ventresca suggested that policemen are presumed to be reliable, and that an affiant policeman need not give additional reasons for believing the report of another policeman. 380 U.S. at 111. In Jaben v. United States, 381 U.S. 214 (1965), the Court distinguished informers in tax fraud cases from informers in narcotics cases, "or other common garden varieties of crime," and ruled that the former are exempt from the reliability test. *Id.* at 224. A statement that the informer is a policeman could provide a sufficient circumstance for believing the informer reliable. But the mere fact that tax fraud is alleged should not exempt the affiant from telling the magistrate why he believes his informer reliable. *Id.* at 231 (Goldberg, J., concurring and dissenting).

48 In a warrantless case, the arresting or searching officer must possess knowledge of circumstances indicating the informer's basis of knowledge and his reliability. *See* notes 2 & 34 *supra*.

now be confronted with the task of determining the extent to which self-verifying detail and independent corroboration can be so employed.

It would have been preferable to adhere strictly to *Aguilar*, interpreted as denying the efficacy of self-verifying detail in the basis of knowledge context, but permitting the corroboration of incriminating facts to satisfy the reliability test. *Aguilar* is not unduly rigid. Given a statement of some of the underlying circumstances relevant to each of the two tests, magistrates and reviewing courts have ample room in which to use common sense. So interpreted, *Aguilar* permits effective utilization of the informer in law enforcement, while ensuring that the knock at the door will come only with probable cause.

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