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Fourth Amendment--Totality of the Circumstances Approach to Probable Cause Based on Informant's Tips

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FOURTH AMENDMENT—TOTALITY OF THE CIRCUMSTANCES APPROACH TO PROBABLE CAUSE BASED ON INFORMANT'S TIPS

Illinois v. Gates, 103 S. Ct. 2317 (1983).

I. INTRODUCTION

In *Aguilar v. Texas*[1] and *Spinelli v. United States*,[2] the Supreme Court developed a two-pronged test to determine whether an informant's tip contains sufficient probable cause[3] to support the issuance of a warrant under the fourth amendment.[4] The first prong of the test required the police to inform a magistrate of the circumstances supporting the informant's allegation of criminal activity. The second prong of the test required the police to demonstrate that the informant was credible or his information reliable.[5] Last term, in *Illinois v. Gates*, the Supreme Court abandoned the *Aguilar-Spinelli* test and adopted a totality of the circumstances approach to determine whether an informant's tip establishes probable cause for the issuance of a warrant.[6] Contrary to its prior indication, the Court also refused to rule on the possibility of a

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1 378 U.S. 108 (1964).

2 393 U.S. 410 (1969).

3 Probable cause exists "where 'the facts and circumstances within their [the 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 had been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (bracketed material in original). The Supreme Court has held that a determination of probable cause may be based on hearsay. Jones v. United States, 362 U.S. 257, 271 (1960), *overruled on other grounds*, United States v. Salvucci, 448 U.S. 84 (1980).

4 The fourth amendment provides:

> 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 fourth amendment warrant clause has been interpreted to require three things: that warrants be issued by neutral, disinterested judicial officers, that warrants be based on probable cause, and that warrants particularly describe the place and person or things to be seized. Dalia v. United States, 441 U.S. 238, 255 (1974).

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

6 103 S. Ct. 2317, 2332 (1983).

good-faith exception to the exclusionary rule.[7]

This Note examines the *Gates* decision and considers its impact on the probable cause requirement of the fourth amendment. This Note concludes that, by replacing the *Aguilar-Spinelli* standards with the totality of the circumstances approach, the Court has failed to provide magistrates and judges with practical guidelines for a determination of probable cause. In addition, this Note suggests that the Court should require that the corroboration of an informant's tip be of criminal, instead of innocent, activity.

II. FACTS OF *GATES*

On May 3, 1978, the police in Bloomingdale, Illinois, received an anonymous letter stating that Lance and Susan Gates were engaged in selling drugs. The letter included the Gates' address in Bloomingdale and said that on May 3, Susan Gates would drive their car to Florida and, after a few days, Lance would fly down to Florida and drive the car back with the trunk loaded with drugs. The letter also stated that the Gates currently had over $100,000 worth of drugs in their basement.[8]

Acting on the tip, Detective Mader of the Bloomingdale Police Department determined the Gates' current address and learned that Lance Gates had made a May fifth airplane reservation to West Palm Beach, Florida.[9] An agent of the Drug Enforcement Agency monitored the flight. Subsequently, federal agents in Florida reported that they had observed Lance Gates arrive in West Palm Beach, take a taxi to a nearby hotel, and go to a room registered to Susan Gates. The next morning Lance Gates and an unidentified woman left the hotel in a car bearing Illinois license plates issued to Lance Gates and drove north on

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[7] *Id.* at 2321.

[8] *Id.* at 2325. The letter stated:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance 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 $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.
>
> They brag about the fact they never have to work, and make their entire living on pushers.
>
> I guarantee if you watch them carefully you will make a big catch. They are friends with some big drugs dealers, who visit their house often.
>
> Lance & Susan Gates
> Greenway
> in Condominiums

Id.

[9] *Id.*

an interstate frequently used by travelers to Chicago.[10]

Mader presented a signed affidavit containing the foregoing facts together with a copy of the anonymous letter to a judge of the Circuit Court of DuPage County. Based thereon, the judge issued a search warrant for the Gates' house and automobile.[11]

When the Gates returned home, the Bloomingdale police were waiting. They searched the trunk of the Gates' car and found approximately 350 pounds of marijuana. A search of the Gates' home revealed marijuana, weapons, and other contraband.[12] The couple was indicted for unlawful possession of cannabis with intent to deliver and with unlawful possession of a controlled substance.[13]

The Illinois Circuit Court ordered that all the items discovered be suppressed on the ground that the search violated the fourth amendment because the affidavit failed to establish probable cause that the Gates' automobile and house contained the discovered items.[14] Both the Illinois Appellate Court[15] and the Illinois Supreme Court[16] affirmed the suppression of the evidence.

III. THE GOOD-FAITH EXCEPTION

After receiving the briefs and hearing the oral arguments in *Gates*, the Supreme Court requested the parties to submit additional briefs specifically addressing whether the exclusionary rule[17] should permit a good-faith exception for evidence obtained by police in a search and seizure which they reasonably believed to be valid under the fourth amendment.[18] The Court, however, decided not to rule on the good-

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[10] *Id.* at 2325-2326.

[11] *Id.* at 2326.

[12] *Id.*

[13] People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981), *rev'd* 103 S. Ct. 2317 (1983).

[14] 103 S. Ct. at 2326.

[15] People v. Gates, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd*, 103 S. Ct. 2317 (1983).

[16] People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd*, 103 S. Ct. 2317 (1983).

[17] In order to enforce the fourth amendment Warrant Clause, *see supra* note 4, the Supreme Court has developed an exclusionary rule whereby evidence obtained in violation of the Warrant Clause is inadmissible in court. *See* Weeks v. United States, 232 U.S. 383 (1914). In Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that the exclusionary rule applied to the states through the fourteenth amendment.

[18] The Court had asked the parties to address the following question:

> Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 . . . (1961); *Weeks v. United States*, 232 U.S. 383 . . . (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Illinois v. Gates, 103 S. Ct. 436, 436 (1982) (parallel citations omitted).

Justice White first suggested a good-faith exception in his dissent in Stone v. Powell:

faith exception because the issue had not been presented to the Illinois courts.[19] The Court concluded that it could not rule on the validity of a modification of the exclusionary rule in this case[20] due to the potential inadequacy of the record[21] and the possibility that the issue might have been decided on an independent state ground.[22] Thus, the Court left the fate of the good-faith exception to be decided in another term.[23]

IV. THE *AGUILAR-SPINELLI* TEST

The Supreme Court's decision in *Gates* abandoned the two-pronged test that the Court had developed in *Aguilar v. Texas*[24] and *Spinelli v. United States*[25] to determine whether an informant's tip established sufficient probable cause for the issuance of a search or arrest warrant. In *Aguilar*, the Court held that although an affidavit supporting a warrant

"[T]he [exclusionary] rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." 428 U.S. 465, 538 (1976) (White, J., dissenting).

The theory behind the good-faith exception is that where officers honestly believe that they are acting within the law, the exclusionary rule has no deterrent effect and serves only to keep reliable, probative evidence from the jury. *Id.* at 540. Justice White reaffirmed his adherence to the good-faith exception in his concurrence in *Gates*. 103 S. Ct. at 2341-47 (White, J., concurring). The Court of Appeals for the Fifth Circuit has already adopted a good-faith exception to the exclusionary rule. *See* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). For a thorough discussion of the good-faith exception, see Mertens & Wasserstrom, *The Good Faith Exception to The Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

19 103 S. Ct. at 2321. The Court relied on the "not pressed or passed upon" doctrine to avoid deciding the good-faith issue. Under this doctrine, the Court will not consider any claim that has not been presented to or decided by the highest court in the state where the action is brought. *Id.* at 2321-22.

20 *Id.* at 2324-25. Justice White disagreed with the Court's refusal to decide whether the exclusionary rule should be modified. Noting that the Gates' fourth amendment claim had been raised at every level of the Illinois court system, he concluded that "the exclusionary rule issue is but another argument pertaining to the Fourth Amendment question squarely presented in the Illinois courts." *Id.* at 2337 (White, J., concurring). Thus, Justice White saw no reason for the Court to avoid deciding the good-faith exception issue in *Gates*. *Id.* at 2340.

21 *Id.* at 2323. The Court noted that the record in the *Gates* case contained little information regarding the subjective good faith of the officers who searched the Gates' house and property. Such information would be crucial to the Court's determination of the validity of a good-faith exception. *Id.*

22 *Id.* The Court noted that the Illinois Supreme Court had adopted its own exclusionary rule and might have chosen not to adopt a good-faith exception even though the United States Supreme Court had modified the federal rule.

23 The Court has granted certiorari to three cases involving the good-faith exception for the coming term: United States v. Leon, 103 S. Ct. 3535 (1983); Colorado v. Quintero, 103 S. Ct. 3535 (1983); Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983). The Court has since dismissed its grant of certiorari in *Quintero* because of the death of the respondent. 34 CRIM. L. RPTR. at 4129.

24 378 U.S. 108 (1964).

25 393 U.S. 410 (1969).

may be based on hearsay information, the magistrate must be informed of both the circumstances supporting the informant's allegations (the basis-of-knowledge prong) and the circumstances demonstrating the informant's credibility (the veracity prong).[26]

The magistrate in *Aguilar* had issued a search warrant on the basis of an affidavit which stated that police officers had "received reliable information from a credible person" that the petitioner possessed drugs.[27] The Supreme Court noted that a magistrate cannot base a determination of probable cause on conclusory statements or on an affiant's belief alone,[28] and found the affidavit defective because neither the officers nor their informant had alleged in the affidavit that they had personal knowledge of the information.[29] Thus, the Court concluded that the affidavit did not contain sufficient information to enable the magistrate to independently judge the validity of the informant's conclusions and make a proper determination of probable cause.[30]

In *Spinelli*, the Court expanded the *Aguilar* test to cover affidavits which contained information partially corroborating an informant's tip.[31] The Court held that in evaluating such an affidavit, the magistrate must first measure the informant's report against the *Aguilar* standards to assess its probative value. If the tip is inadequate under *Aguilar*, the magistrate must examine the corroborating information to determine if probable cause exists.[32] The corroborated tip, however, must be as trustworthy as a tip that would pass the *Aguilar* test without corrobo-

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26 378 U.S. at 114.

27 *Id.* at 109. The affidavit in *Aguilar* stated: " 'Affiants have received reliable information from a credible person and do believe that [drugs] . . . are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law.' " *Id.* (quoting Affidavit).

28 *Id.* at 113; *see also* Nathanson v. United States, 290 U.S. 41 (1933), where the Supreme Court held that a magistrate may not issue a warrant based on a wholly conclusory statement. The Court held inadequate an affidavit which had stated:

> 'Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J.J. Nathanson . . . .'

Id. at 44 (quoting Affidavit).

29 378 U.S. at 113.

30 *Id.* at 113-14.

31 393 U.S. at 415. In *Spinelli*, FBI agents received information from an informant that Spinelli was engaged in gambling activities. The agents submitted an affidavit for a search warrant which, in addition to the tip, contained allegations that the agents had observed Spinelli going to and from an apartment in St. Louis which the telephone company said contained two telephones. The agents also stated that they were aware of Spinelli's general reputation for gambling. *Id.* at 413-14. The Court applied the *Aguilar* test and found that the affidavit did not establish probable cause to issue a search warrant. *Id.* at 418.

32 *Id.* at 415.

ration.[33] If the affidavit fails to adequately set forth the informant's basis of knowledge, the tip nevertheless may be so detailed that the magistrate may reasonably infer that the information was based on the informant's personal knowledge.[34]

In *People v. Gates*, the Illinois Supreme Court applied the two-pronged test and found that Detective Mader's affidavit failed both the basis-of-knowledge and veracity prongs.[35] The court found that the anonymous tip failed the basis-of-knowledge prong because it did not indicate that the information was based on the informant's personal knowledge.[36] The court concluded that the tip also failed the veracity prong because the informant's anonymity prevented the court from determining the informant's credibility or the tip's reliability.[37] The court then stated that the corroborated information in the letter was insufficiently detailed for the magistrate to infer that the tip was based on the informant's personal knowledge.[38]

Finally, the Illinois Supreme Court noted that the evidence corroborated by the police, including the verification of the Gates' address and travel plans, was of clearly innocent activity.[39] The court held that corroboration of innocent activity was insufficient to establish probable cause.[40]

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[33] *Id.*

[34] *Id.* at 416-17.

[35] 85 Ill. 2d at 384-86, 423 N.E.2d at 890-91.

[36] *Id.* at 384, 423 N.E.2d at 890. The Illinois Supreme Court noted that although the informant had stated that the Gates had boasted of their illegal activities, the court could not determine whether they had made that statement directly to the informant. Similarly, while the letter said that the Gates had over $100,000 worth of drugs in their basement, no statement demonstrated that the informant had seen the drugs or was told about them. Thus, the court concluded that the letter contained mere conclusions. *Id.* at 384, 423 N.E.2d at 890.

[37] *Id.* at 384-86, 423 N.E.2d at 890-91. The Illinois Supreme Court reasoned that, although the identity of the informant need not be revealed, the credibility requirement was usually satisfied by the police officer relating prior instances in which the officer had obtained information from the informant that had resulted in arrests and convictions. In *Gates*, however, no one knew the informant's identity. *Id.* at 384-85, 423 N.E.2d at 891.

[38] *Id.* at 386-89, 423 N.E.2d at 892-93. The court applied the concept of "self-verifying" detail which the Supreme Court had developed in *Spinelli*. *See supra* text accompanying note 34; *infra* text accompanying notes 91-92.

The court limited the use of self-verifying detail to satisfying the basis-of-knowledge prong and found that naming the street where the Gates lived and stating that the Gates would be driving from Florida in early May with drugs in their car did not meet the specificity required to establish probable cause. *Id.* at 389, 423 N.E.2d at 893.

[39] *Id.* at 390, 423 N.E.2d at 893. The court noted that "Mader's independent investigation revealed only that Lance and Susan Gates lived on Greenway Drive; that Lance Gates booked passage on a flight to Florida; that upon arriving he entered a room registered to his wife; and that he and his wife left the hotel together by car." *Id.* at 390, 423 N.E.2d at 893.

[40] *Id.* at 390, 423 N.E.2d at 893 (citing Whiteley v. Warden, 401 U.S. 560, 567 (1971)) (additional information acquired by police officers must in some sense be corroborative of the informer's tip that the suspects committed or were in the process of committing a felony).

V. THE SUPREME COURT'S DECISION

Writing for the majority in *Gates*, Justice Rehnquist reaffirmed the totality of the circumstances test for determining whether an informant's tip can establish probable cause.[41] He stated that the totality of the circumstances test was far more consistent with the Court's prior treatment of probable cause than the *Aguilar-Spinelli* test.[42] While he acknowledged that an informant's veracity, reliability, or basis of knowledge may be relevant in determining whether probable cause exists, Justice Rehnquist concluded that these concerns are better understood in the balancing approach of a totality of the circumstances test.[43]

Justice Rehnquist expressed concern over the difficulty faced by nonlawyer magistrates in applying the complex set of analytical and evidentiary rules that had developed under the *Aguilar-Spinelli* test.[44] He reasoned that a common sense totality of the circumstances approach would help alleviate this problem.[45] In addition, because of the fourth amendment's strong preference for warrants and the Supreme Court's traditional discouragement of *de novo* review of probable cause findings, Justice Rehnquist determined that the fourth amendment required only that a reviewing court find that the magistrate had a substantial basis for concluding that a search would reveal evidence of a crime before issuing a search warrant.[46] The magistrate's action cannot, however, be "a mere ratification of the bare conclusions of others."[47]

Justice Rehnquist further indicated that rigid application of the two-pronged test by the state courts had encouraged an "excessively technical dissection of informants' tips"[48] and had resulted in significant

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41 103 S. Ct. at 2332.

42 *Id.* at 2328. Justice Rehnquist suggested that the two prongs were intended simply as guidelines for magistrates and not as independent standards to be applied in every case. He emphasized that, in *Aguilar*, the Court required only that the affiant give some facts regarding the basis of knowledge and veracity of the informant. *Id.* at 2328 n.6.

43 *Id.* at 2329. Thus, according to Justice Rehnquist, "probable cause is a fluid concept—turning on the assessment of probablities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 2328.

44 *Id.* at 2330-31.

45 *Id.* Justice Rehnquist stated that the totality of the circumstances test would better enable magistrates to draw reasonable inferences from the material supplied in the affidavit because they would not be restricted by set rules. Furthermore, magistrates could still demand any necessary assurances to demonstrate the informant's basis of knowledge or veracity. *Id.* at 2333.

46 *Id.* at 2331.

47 *Id.* at 2332.

48 *Id.* at 2330. Several lower courts which have applied the *Aguilar-Spinelli* rule have further subdivided the veracity prong into reliability and credibility spurs. These courts have required that the basis-of-knowledge prong and both spurs of the veracity prong be independently satisfied before probable cause can exist to support the issuance of a warrant. *See, e.g.*, People v. Gates, 85 Ill. 2d at 383-84, 423 N.E.2d at 890-91; Stanley v. State, 19 Md. App.

injustices.[49] He also suggested that hypertechnical inspection of warrants by the courts with the two-pronged test encouraged police to engage in warrantless searches with the hope of later relying on one of the exceptions to the Warrant Clause to justify their search.[50]

Justice Rehnquist also reasoned that the *Aguilar-Spinelli* test interfered with law enforcement because anonymous tips would rarely survive its scrutiny.[51] Noting the important role that such tips have played in solving crime, he concluded that "[w]hile a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not."[52]

Justice Rehnquist admitted that, unsupported, the anonymous letter in *Gates* was inadequate to establish probable cause even under the totality of the circumstances test.[53] Therefore, he examined the police corroboration to determine whether the corroboration of the letter was sufficient to establish the necessary probable cause. Justice Rehnquist noted that the corroborated details such as the flight to Florida, the brief overnight stay, and the immediate return to Chicago were indicative of

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507, 525, 313 A.2d 847, 858, *cert. denied*, 271 Md. 745 (1974); *cf.* United States v. Smith, 598 F.2d 936 (5th Cir. 1979); United States v. McNally, 473 F.2d 934 (3d Cir. 1973) (both courts using a totality of the circumstances approach to find probable cause).

For further discussions of application of the *Aguilar-Spinelli* test, see LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. Ill. L.F. 1; Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974); Note, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling The Spinelli/Draper Dichotomy In* Illinois v. Gates, 20 AM. CRIM. L. REV. 99 (1982) [hereinafter cited as Note, *Anonymous Tips*]; Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958 (1969) [hereinafter cited as Note, *The Informer's Tip*].

[49] 103 S. Ct. at 2330 n.9. Justice Rehnquist cited three cases where reviewing state courts had invalidated search warrants used to obtain crucial evidence because the underlying affidavit, although apparently adequate to establish probable cause, failed some technical aspect of the *Aguilar-Spinelli* test. *See* People v. Brethauer, 174 Colo. 29, 482 P.2d 369 (1971) (en banc) (affidavit which stated that drugs were located on certain premises and where affiant had previously supplied the police with drugs was held defective under both prongs of *Aguilar-Spinelli*); People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978) (cocaine excluded because the affidavit did not indicate how the informant could tell the difference between cocaine and other substances); *cf.* Bridger v. State, 503 S.W.2d 801 (Tex. Crim. App. 1974) (affidavit failed basis-of-knowledge prong even though the location of the gun was given by an accomplice although admission into evidence held to be harmless error).

[50] 103 S. Ct. at 2331. Justice Brennan responded to Justice Rehnquist's suggestion by noting that, subject to a few exceptions, warrantless searches and seizures are *per se* unreasonable. Furthermore, the proponent of the exceptions would have a heavy burden of proof. *Id.* at 2358-59 n.9 (Brennan, J., dissenting).

[51] *Id.* at 2331-32. Justice Rehnquist noted that anonymous informants usually do not provide an elaborate recitation of the basis for their observations. Furthermore, the veracity of persons supplying anonymous tips is largely unknown and unknowable. *Id.* See *infra* note 90 and accompanying text for a discussion of the unreliability of anonymous tips.

[52] 103 S. Ct. at 2332.

[53] *Id.* at 2326.

a drug run suggesting that the Gates were trafficking in drugs.[54] Citing *Draper v. United States*[55] as the "classic" case on the value of police corroboration, Justice Rehnquist concluded that "[t]he showing of probable cause in the present case was fully as compelling as that in *Draper*."[56]

Moreover, while Justice Rehnquist acknowledged that the details verified in *Gates* amounted only to " 'the corroboration of innocent activity,' "[57] he rejected the Illinois Supreme Court's conclusion that innocent activity could not establish probable cause.[58] Because probable cause does not require an actual showing of criminal activity, Justice Rehnquist reasoned that innocent behavior in light of suspicious circumstances may provide the basis for establishing probable cause.[59]

Finally, Justice Rehnquist noted that the anonymous letter contained details concerning future activities that the informant likely had obtained from either the Gates themselves or someone familiar with their plans.[60] Justice Rehnquist also rejected Justice Stevens' concern in dissent that an inaccuracy in the letter undermined its probative value.[61] Justice Rehnquist stated that "probable cause does not de-

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[54] *Id.* at 2334.

[55] 358 U.S. 307 (1959). In *Draper*, a known informant told federal agents that Draper would arrive in Denver by train on either September eighth or ninth and that he would be carrying three ounces of heroin. The informant also supplied a detailed description of Draper and the clothes he would be wearing. The informant said that Draper would be carrying a "tan zipper bag" and walking "real fast." *Id.* at 309. On September ninth, police observed a man matching Draper's description alight from a train and walk rapidly towards the exit. His clothing and luggage exactly matched the informant's description. *Id.* at 309-10. The Court noted that the police had "personally verified every facet of the information given [them] . . . except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag." *Id.* at 313. Thus, the Court held the arrest lawful and concluded that, based on the details in the tip and the police corroboration, the agents had probable cause to believe that Draper had committed a narcotics violation. *Id.* at 314.

[56] 103 S. Ct. at 2334. Justice Rehnquist noted that the police had corroborated the informant's predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that the Gates would immediately return to Bloomingdale. He concluded that "[i]t is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing a 'substantial basis for crediting the hearsay.' " *Id.* at 2335 (quoting Jones v. United States, 362 U.S. 257, 269, 271 (1960)).

[57] *Id.* at 2335 n.13, quoting Joint Appendix at 12a, Illinois v. Gates, 103 S. Ct. 2317 (1983). See *infra* notes 81-94 and accompanying text for a discussion of corroboration of innocent activity.

[58] 103 S. Ct. at 2335 n.3.

[59] *Id.* Justice Rehnquist concluded that "[i]n 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." *Id.*

[60] *Id.* at 2335.

[61] *Id.* at 2335 n.14. Although the anonymous letter had said that Susan Gates would drive to Florida and then fly back to Illinois, the affidavit reported that she drove back with her husband. *Id.* at 2325-26.

mand the certainty we associate with formal trials. It is enough that there was a fair probability that the writer of the anonymous letter had obtained his entire story either from the Gates or someone they trusted."[62] Thus, Justice Rehnquist concluded that the judge issuing the warrants had a substantial basis for concluding that probable cause existed to search the Gates' home and car.[63]

Justice White, in his concurrence, agreed that sufficient probable cause existed to issue a search warrant but specifically rejected the totality of the circumstances test.[64] Instead, he found that the warrant in *Gates* could have been upheld within the *Aguilar-Spinelli* framework.[65] Justice White feared that the Court's totality of the circumstances test would lead to an "evisceration" of the probable cause standard.[66]

Justice Brennan dissented from the Court's rejection of the *Aguilar-Spinelli* test.[67] Because of the inherent unreliability of anonymous informant tips,[68] he concluded that magistrates must apply the *Aguilar-Spinelli* test to anonymous informant tips to ensure that the probable cause justifying intrusions on an individual's privacy is based on information from a credible person who acquired it in a reliable way.[69]

Justice Brennan also disputed the majority's concern that the *Aguilar-Spinelli* standards serve only to confuse nonlawyer magistrates. On the contrary, he stated that the standards could help to structure and

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62 *Id.* at 2336.

63 *Id.* For cases involving the application of the totality of the circumstances test to other aspects of the fourth amendment protection against unreasonable searches and seizures, see United States v. Cortez, 449 U.S. 411, 417-18 (1981) (particularized suspicion for investigatory stops); Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (voluntariness of consent to search).

64 103 S. Ct. at 2350 (White, J., concurring).

65 *Id.* at 2347. Justice White agreed with the majority that the tip, by itself, did not establish probable cause. He found, however, that the corroborated activity suggested a pattern of drug-dealing. Moreover, Justice White stated that the critical issue was not the nature of the suspects' activities but whether those actions gave rise to the inference that the informant was credible and obtained the information in a reliable manner. *Id.* at 2348.

Justice White reasoned that once the police had corroborated that Sue Gates would drive to Florida, that Lance Gates would fly there in a few days and that they would drive the car back, the magistrate could reasonably have inferred that the informant had not invented the story but had obtained the information in a reliable way. Thus, Justice White concluded that "the police investigation . . . had satisfactorily demonstrated that the informant's tip was as trustworthy as one that would alone satisfy the *Aguilar* tests." *Id.* at 2349.

66 *Id.* at 2350.

67 *Id.* at 2351 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissent.

68 See *infra* note 90 and accompanying text for a discussion of the unreliability of anonymous tips.

69 *Id.* at 2357 (Brennan, J., dissenting). Justice Brennan determined that *Aguilar* and *Spinelli* fulfilled an important fourth amendment role by informing both police and magistrates of the standard of information necessary to establish probable cause. *Id.* at 2356 n.6.

guide magistrates' probable cause determinations.[70]

Finally, Justice Brennan feared that, as Justice White had suggested, the totality of the circumstances test would lead to an "evisceration" of the probable cause standard.[71] He warned that the majority's opinion demonstrated "an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment."[72]

VI. THE EFFECT OF *GATES* ON PROBABLE CAUSE DETERMINATIONS

According to Justice Rehnquist, the Supreme Court's reaffirmation of the totality of the circumstances test was simply a return to the flexible, common sense standard developed in pre-*Aguilar* cases.[73] For example, in *Draper v. United States*,[74] the Court used the totality of the circumstances approach even though the informant had provided no basis of knowledge for his tip. The Court determined that the police verification of the details provided in the tip was sufficient to establish probable cause.[75] Both Justices White and Brennan, however, suggested

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[70] *Id.* at 2358. Justice Brennan said that the *Aguilar-Spinelli* rules "structure the magistrate's probable cause inquiry and, more importantly, they guard against findings of probable cause, and attendant intrusions, based on anything other than information which magistrates reasonably can conclude has been obtained in a reliable way by an honest or credible person." *Id.* at 2357 n.6.

[71] *Id.* at 2359.

[72] *Id.* Justice Stevens also dissented. He pointed out that although Justice Rehnquist had stated that the Gates' behavior was indicative of a drug run, *see supra* text accompanying note 54, the affidavit did not report that the Gates had done any of the things that drug couriers are noted for doing. *Id.* at 2360 n.2 (Stevens, J., dissenting).

Justice Stevens was also concerned with an error in the letter. *See supra* note 61. He found the error significant for three reasons. First, it cast doubt on the informant's statement that the Gates had over $100,000 worth of drugs in their basement because, contrary to the informant's prediction, the Gates did not arrange their travels to leave one person at home to guard the drugs. Second, the discrepancy made the Gates' conduct seem less unusual since instead of driving to Florida, leaving the car and immediately returning to Bloomingdale, Susan Gates stayed and drove back with her husband. Third, the fact that the letter contained a material mistake undermined the reasonableness of relying on it to make a search of a private home. *Id.* at 2360.

Thus, Justice Stevens concluded that no probable cause existed under any test to justify the search of the Gates' home. *Id.* at 2361. However, he would have vacated and remanded the case to the Illinois Supreme Court to decide if the search of the Gates' car was valid under the Supreme Court's recent decision in United States v. Ross, 456 U.S. 798 (1982). *Gates*, 103 S. Ct. at 2361-62. In *Ross*, the Court held that a police officer does not need a warrant to search an automobile if the officer has probable cause to believe that it contains contraband. 456 U.S. at 809. The Supreme Court has traditionally distinguished between home and automobile searches for the purposes of the fourth amendment. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

[73] *Gates*, 103 S. Ct. at 2333.

[74] 358 U.S. 307, 310-11 (1959).

[75] *Id.* at 313-14.

in *Gates* that the Court's return to the totality of the circumstances test will result in the "evisceration" of the probable cause standard.[76] Although the results of *Gates* may not be as drastic as Justices White and Brennan predicted, the *Gates* decision does present problems because the Court failed to articulate clear guidelines for determining probable cause.

The *Aguilar-Spinelli* standards, although rigid, assisted magistrates' determinations of probable cause by ensuring that they issued warrants only on the basis of reliable information.[77] By adopting the totality of the circumstances test in *Gates*, the Court requires magistrates to consider all the information in the affidavit including the informer's reliability, credibility, and basis of knowledge and to make a practical, common sense decision whether to issue a warrant.[78] Yet, the test gives no practical guidance as to the relative weights assigned to any of these considerations. The Court stated that the strength of one consideration may compensate for a deficiency in another.[79] For example, judges and magistrates may continue to use the strength of police corroboration to overcome deficiencies in the informer's reliability or basis of knowledge. In the past, however, the Court has been inconsistent in its treatment of corroborative evidence;[80] under the totality of the circumstances test, therefore, the standard of corroboration will require further clarification.

In *Gates*, the Court used *Draper* to support its contention that police corroboration can establish probable cause.[81] As in *Gates*,[82] all of the details corroborated in *Draper* were of innocent activity.[83] Yet, both *Draper* and *Gates* appear to be irreconcilable with *Spinelli*, the Court's only other major decision concerning the nature of corroborative evidence sufficient to establish probable cause.[84] In *Spinelli*, the police also had corroborated certain details of the informant's tip and, as in *Draper*

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76 103 S. Ct. at 2350 (White, J., concurring); *id.* at 2359 (Brennan, J., dissenting).

77 *Id.* at 2358 (Brennan, J., dissenting); *see supra* note 70 and accompanying text.

78 103 S. Ct. at 2332.

79 *Id.* at 2329.

80 *See* LaFave, *supra* note 48, at 58.

81 103 S. Ct at 2334.

82 103 S. Ct. at 2335 n.13.

83 *Draper*, 358 U.S. at 313.

84 *Draper* can be distinguished from *Spinelli* on the basis of the number of details verified. In *Draper*, the police verified the suspect's description, his travel plans from Chicago to Denver, and the train on which the suspect arrived. The Court said that the police had personally verified every facet of the information except whether Draper was actually carrying the heroin. 358 U.S. at 313. In *Spinelli*, by contrast the agents verified only that Spinelli had made frequent trips to St. Louis where he had visited an apartment containing two telephones. 393 U.S. at 413-14.

Justice White, however, recognized the conflict between the *Aguilar-Spinelli* and *Draper* cases in his concurrence in *Spinelli*:

and *Gates*, the corroborated activity was innocent.[85] The *Spinelli* Court, however, found that the corroborated details did not establish probable cause.[86] Further, the Court in *Spinelli* had explicitly rejected a totality of the circumstances approach as being too broad.[87]

In *Gates*, Justice Rehnquist failed to deal adequately with the irreconcilability of *Gates* and *Spinelli*. He declined to decide whether, under the totality of the circumstances test, the Court would now find the *Spinelli* affidavit adequate.[88] This irreconcilability between *Spinelli* and *Gates* may confuse judges and magistrates because it is unclear how much corroboration of innocent activity will be sufficient to establish probable cause.

Moreover, several commentators have strongly suggested that corroboration of innocent activity alone is insufficient to establish probable cause.[89] Instead, to establish probable cause, corroborated details should be of criminal activity. Requiring corroborative details to be of criminal activity reduces the possibility that an informant is being untruthful in two situations. First, although both *Draper* and *Spinelli* involved informants known to the police, the informant in *Gates* was anonymous. Because the reliability and basis of knowledge of an unknown informant are difficult to determine, corroboration becomes especially important under a totality of the circumstances approach. Anonymous tips may be presumptively unreliable because the motives of an anonymous informant are unknown and therefore inherently

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> The tension between *Draper* and the . . . *Aguilar* line of cases is evident from the course followed by the majority opinion. First, it is held that the report from a reliable informant that Spinelli is using two telephones with specified numbers to conduct a gambling business plus Spinelli's reputation in police circles as a gambler does not add up to probable cause. This is wholly consistent with *Aguilar* . . . : the informant did not reveal whether he had personally observed the facts or heard them from another and, if the latter, no basis for crediting the hearsay was presented. . . . The *Draper* approach would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities.

393 U.S. at 427-28 (White, J., concurring).

85 *See Spinelli*, 393 U.S. at 418. The Court found that the details "contain[ed] no suggestion of criminal conduct when taken by themselves . . . and they [were] . . . not endowed with an aura of suspicion by virtue of the informer's tip." *Id.*

86 *Id.* at 418-19.

87 *Id.* at 415.

88 103 S. Ct. at 2332 n.11. Justice Rehnquist noted:

> Whether the allegations submitted to the magistrate in *Spinelli* would, under the view we now take, have supported a finding of probable cause, we think it would not be profitable to decide. There are so many variables in the probable cause equation that one determination will seldom be a useful "precedent" for another. Suffice it to say that while we in no way abandon *Spinelli*'s concern for the trustworthiness of informers and for the principle that it is the magistrate who must ultimately make a finding of probable cause, we reject the rigid categorization suggested by some of its language. *Id.*

89 *See, e.g.*, LaFave, *supra* note 48, at 47; Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 716 (1972); Note, *The Informer's Tip, supra* note 48, at 965-66.

suspect.[90]

Second, the *Spinelli* Court developed the concept of self-verifying detail to correct the deficiencies in an informant's tip. Thus, a tip may be so detailed that a magistrate could reasonably infer that the informant had obtained the information in a reliable way.[91] Even though the self-verifying details create a strong inference of personal knowledge, the informant could still have fabricated the details.[92] Thus, a vindictive informant could develop any number of innocent details that police could easily corroborate[93] which would, under the *Gates* rationale, establish probable cause.

In both situations the Court could prevent this potential erosion of fourth amendment protection against unwarranted intrusions by requiring that the corroborative details sufficient to establish probable cause be of criminal activity, thereby reducing the likelihood that the informant was lying about the alleged criminal activity.[94]

A totality of the circumstances approach also will prevent the de-

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[90] *See* Rebell, *supra* note 89, at 714; LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L.REV. 39, 77-78 (1968); Note, *Anonymous Tips, supra* note 48, at 107, 122.

[91] *Spinelli*, 393 U.S. at 417. Courts, however, have limited this test to correcting deficiencies in the informant's basis of knowledge. *See, e.g.*, People v. Gates, 85 Ill. 2d at 388, 423 N.E.2d at 892; *see also* Note, *Probable Cause and the First Time Informer:* United States v. Harris, 43 COLO. L. REV. 357, 362 (1972).

[92] Comment, *Adequacy of Informant's Tip as Basis for Probable Cause Is Questioned*: United States v. Mitchell, 45 N.Y.U. L. REV. 908, 916-17 (1970).

[93] *See* LaFave, *supra* note 48, at 55; Note, *The Informer's Tip*, *supra* note 48, at 967. An anonymous informant may be motivated by a sense of revenge. As Justice Harlan noted in his dissent in United States v. Harris: "We cannot assume that the ordinary law-abiding citizen has qualms about . . . cooperation with law enforcement officers." 403 U.S. 573, 599 (Harlan, J., dissenting).

[94] *See* LaFave, *supra* note 48, at 55. Professor LaFave has suggested:

> For corroboration to be incriminating rather than innocent, it is not necessary that the events observed by the police supply probable cause by themselves or that they point unequivocally in the direction of guilt. It is sufficient that they are "unusual and inviting explanation," though "as consistent with innocent as with criminal activity."

1 W. LAFAVE, SEARCH AND SEIZURE § 3.3(f) (1978) (quoting People v. Alaimo, 34 N.Y. 2d 187, 189, 313 N.E.2d 55, 56, 356 N.Y.S. 2d 591, 592 (1974)).

Judge Godbold of the Fifth Circuit has said that the corroborated details must not involve information that is generally available to the public but instead must show that the informant possessed a "personal pipeline to the suspect's scheme." United States v. Tuley, 546 F.2d 1264, 1273 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 434 U.S. 837 (1977).

Finally, one commentator has suggested that to establish probable cause based on an undisclosed informant's tip, the Court should require a showing that the police investigation uncovered "probative indications of [the] criminal activity" suggested by the informant as opposed to "innocent behavioral patterns" like those in *Draper*. Rebell, *supra* note 89, at 716 n.70. To illustrate his theory, Rebell presents a hypothetical situation where an informant has told police that every Tuesday at 8:00 p.m. a suspect, A, drives up to a specified address in a blue convertible with a certain license plate number, and that A carries a brown attache case which contains heroin that he sells. Under Rebell's theory, the police could establish probable cause for a warrant only if, in addition to verifying the facts, they, for example,

velopment of uniform standards because courts must resolve problems on a case-by-case basis.[95] Although the Court was concerned that some courts were applying the *Aguilar-Spinelli* test in an overly technical manner,[96] perhaps, as Justice White suggested, the Court simply should have clarified the *Aguilar-Spinelli* rule instead of substituting common sense for guidelines.[97]

In addition, the anonymous letter in *Gates* contained an inaccuracy which the Court dismissed as unimportant,[98] but the *Gates* Court did not specify when the inaccuracies in a tip become sufficiently serious that the magistrate should begin to question the reliability of the tip. Thus, one inaccuracy is insufficient to cast doubt on an informant's tip.

Finally, the effect of the totality of the circumstances test will depend on how the courts and magistrates who make the determinations of probable cause use the test. Bereft of the *Aguilar-Spinelli* guidelines, courts and magistrates may rely more heavily on police expertise and routinely approve any affidavit based on an informant's corroborated tip. The magistrates and courts could then become a "rubber stamp" for the police, eviscerating the standard of probable cause and severely infringing upon citizens' fourth amendment rights.[99]

Of course, as Justice Rehnquist noted, the Supreme Court has held that the magistrate's action cannot be a mere affirmation of the conclusions or beliefs of others.[100] Furthermore, Justice Rehnquist also pointed out that under the totality of the circumstances test, magistrates are free to continue to follow the *Aguilar-Spinelli* standards.[101] Thus,

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observed known narcotics users entering and leaving the premises soon after A's arrival. *Id.* at 717-18.

95 Comment, *supra* note 92, at 917. Professor Weinreb has characterized the result in a totality of the circumstances case as a long recitation of facts followed by a conclusion with no logical connection between the two. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974). Another commentator has referred to the totality of the circumstances test as the " 'I know it when I see it school of jurisprudence.' " Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 793.

96 *See Gates*, 103 S. Ct. at 2330. The Court's fears may have been unfounded because the lower courts may already have been using a balancing test in applying the *Aguilar-Spinelli* test to determine whether probable cause supported issuance of a warrant. *See* LaFave, *supra* note 48, at 60-67; Note, *Anonymous Tips*, *supra* note 48, at 108-13.

97 103 S. Ct. at 2350 (White, J., concurring).

98 *Id.* at 2335 n.14; *see supra* note 61.

99 Professor Amsterdam has suggested that

> [i]f there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. The ultimate conclusion is that "the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974) (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)) (footnote omitted).

100 *See Gates*, 103 S. Ct. at 2332.

101 *See id.* at 2333.

those courts which have routinely applied the *Aguilar-Spinelli* rule may continue to do so. Moreover, many states, like Illinois, have adopted their own exclusionary rules.[102] These states may continue to apply the *Aguilar-Spinelli* guidelines under their rules even though the Supreme Court has modified the federal exclusionary rule.[103]

VII. CONCLUSION

In *Gates* the Supreme Court abandoned the two-pronged *Aguilar-Spinelli* test in favor of a totality of the circumstances approach for determining when an informant's tip is sufficient to establish probable cause for the issuance of a warrant. The effect of the test on the standard of probable cause is uncertain. By removing the *Aguilar-Spinelli* standards without providing any practical guidelines, the Court has made the test difficult to apply. Moreover, under the totality of the circumstances approach, courts will have to resolve future problems on a case-by-case basis. To reduce the likelihood that warrants will be issued on the basis of untrue informants' tips, the Court should insist that any corroborating details used to establish probable cause be of criminal activity.

CATHY E. MOORE

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102 *Id.* at 2323.
103 *Id.*