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Adoption of a Flexible Standard for Analyzing Informants' Tips in Illinois v. Gates

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CASE NOTE

Adoption of a Flexible Standard for Analyzing Informants' Tips in *Illinois v. Gates*

I. INTRODUCTION

In evaluating an application for a search warrant, a magistrate must determine whether there exists "probable cause" to believe evidence of criminal activity will be found in the place to be searched.[1] An applicant must present a sworn affidavit containing information which supports the allegation that evidence of criminal activity will be found at the specified location.[2] The magistrate's probable cause determination involves reviewing the information presented and evaluating the "probability" that such evidence exists.[3] A higher burden of proof—such as the "reasonable doubt" standard applied in criminal trials—has never been applied to the magistrate's review of a search warrant application.[4]

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1. The fourth amendment provides in its entirety:

> 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 person or things to be seized.

U.S. CONST. amend. IV (emphasis added). *See* Whiteley v. Warden, 401 U.S. 560 (1971). "The decisions of this Court . . . require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." *Id.* at 564. *See also* United States v. Ventresca, 380 U.S. 102, 106 (1965); Giordenello v. United States, 357 U.S. 480, 486 (1958); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

2. U.S. CONST. amend. IV.

3. *See* Brinegar v. United States, 338 U.S. 160 (1949). "In dealing with probable cause . . . , as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 175.

4. " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' . . . And this 'means less than evidence which would justify condemnation' or conviction . . . ." *Id.* (citations omitted); *see also* United States v. Harris, 403 U.S. 573, 584 (1971) ("[T]he issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises.").

In recent years, the United States Supreme Court had devised what became a rigid formula for evaluating the information presented to the magistrate[5] where the source of that information was an anonymous or confidential informant.[6] The purpose of the formula, which came to be known as the *Aguilar-Spinelli* two-pronged test,[7] was to provide the necessary conditions to credit the hearsay information. The formula required magistrates to analyze the trustworthiness of the information offered by focusing on the informant's veracity and the source of his knowledge. A warrant application which failed to include circumstances indicating both the source of the informant's knowledge and a basis for crediting the verity of his allegations was prima facie insufficient.[8]

The formalistic analysis that evolved from the *Aguilar-Spinelli* test evoked criticism that the probable cause analysis had become hyper-technical and had deprived the magistrate of his ability to deter-

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5. *See generally* text accompanying notes 14-34.

6. In Illinois v. Gates, 103 S. Ct. 2317 (1983), the Court was concerned with the veracity of an anonymous informant (a person whose identity is unknown). In previous cases, the Court was confronted with confidential informants (a person whose identity was known to police, but not the defense). Before *Gates* reached the Supreme Court, a note identified this as a significant factor with which the Court would wrestle. *See* Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling The* Spinelli/Draper *Dichotomy In* Illinois v. Gates, 20 AM. CRIM. L. REV. 99 (1982). The *Gates* majority, however, did not explicitly consider the distinction. The reason stems from the new test itself. If it is assumed, arguendo, that the veracity of an anonymous informant is more questionable than a confidential informant, the totality of circumstances test considers this factor. Suspect veracity should be compensated for by corroborating the tip. *See* 103 S. Ct. at 2332. *See generally* Rosencranz v. United States, 356 F.2d 310, 314 (1st Cir. 1966) (An anonymous informant was involved in *Rosencranz*. This did not trouble the court because the tip was corroborated.).

7. Spinelli v. United States, 393 U.S. 410, 413 (1969). Although the test originated in Aguilar v. Texas, 378 U.S. 108 (1964), the analysis was first labeled a "two-pronged" test by the *Spinelli* Court.

8. "[T]he dual requirements represented by the 'two-pronged test' are 'analytically severable' and an 'overkill' on one prong will not carry over to make up for a deficit on the other prong." Stanley v. State, 19 Md. App. 507, 530, 313 A.2d 847, 861 (1974). *See also* Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741, 751 (1974) ("Once the magistrate has decided that the informant is believable, he has still only half completed his ultimate determination. He must still decide what the information is worth."). Judge Moylan sat on the Court of Special Appeals in Maryland and authored the *Stanley* opinion. His article basically reiterates what he wrote in *Stanley*. The Supreme Court cited *Stanley* on three occasions in its *Gates* opinion. 103 S. Ct. at 2327 n.4, 2328 n.5, 2329 n.8.

mine the "probability" of the existence of evidence of criminal activity on the basis of information presented in the search warrant application.[9] Recently, the United States Supreme Court swept away the strictures of the *Aguilar-Spinelli* test in favor of a more traditional probable cause analysis. In *Illinois v. Gates*,[10] the Court adopted a "totality of circumstances" test to determine whether a police informant has provided information sufficient to justify the issuance of a warrant. The new approach permits the magistrate to review all the information presented in a warrant application, without concern for strict legal rules, to determine whether there is a "fair probability" that evidence of criminal activity will be found in the place to be searched. This analysis underscores the traditional notion that probable cause is a common sense standard, a concept ill-suited for precise legal formalities.[11]

This note will first explore the development and operation of the *Aguilar-Spinelli* two-pronged test and the role that police corroboration of an informant's tip played before *Gates*. It will then illustrate how the *Gates* Court incorporated elements of the two-pronged test and corroboration into the totality of circumstances test. Finally, a section will be devoted to the potential implications of *Gates*.

II. THE *AGUILAR-SPINELLI* TEST

The fourth amendment to the United States Constitution requires that warrants be supported by "oath or affirmation."[12] The "oath or affirmation" requirement, however, created conceptual problems in situations where the search warrant application was based solely on information supplied to the applicant by an unknown informant. The reliability of the hearsay information was not tested by oath and, moreover, since the informant was anonymous or confidential, the reliability of the source of his information was unknown.[13]

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9. *See infra* text accompanying notes 104-09.

10. 103 S. Ct. 2317 (1983).

11. *Id.* at 2328.

12. "[N]o warrants shall issue, but upon probable cause, *supported by oath or affirmation* . . . ." U.S. CONST. amend. IV (emphasis added).

13. For the purposes of this note, an informant is generally of the criminal element, not a citizen informant. "Informants are usually not members of high society. He who informs on alleged criminals is often a criminal himself . . . ." United States v. Damitz, 495 F.2d 50, 56 (9th Cir. 1974). Because the informant may be a criminal, there is no presumption that he is credible. *See* United States v. Ross, 713 F.2d 389, 393 (8th Cir. 1983); *see also* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 499-500 (1978).

Although the Supreme Court has recognized this concern, it has never labeled informants unreliable as a matter of law. Rather, the Supreme Court has ruled that information provided by an informant can support a finding of probable cause.[14] However, the Court has required a more exacting probable cause analysis in cases involving hearsay information, to compensate for the unknown reliability of the tip. It directed that at least some evidence of the informant's trustworthiness be presented to the magistrate.[15] Additionally, the Court required the tip to indicate that the informant's information was based on personal knowledge.[16] To this end the Supreme Court developed the *Aguilar-Spinelli* two-pronged test to evaluate the informant's tip.

The genesis of the two-pronged test occurred in *Aguilar v. Texas*.[17] In *Aguilar*, two Houston police officers submitted a search warrant application to a justice of the peace. The application was based on the officers' signed affidavit describing information provided by a police informant. The affidavit stated in conclusory terms that the informant was "credible" and his information "reliable."[18] A search warrant was issued and the ensuing search uncovered heroin, leading to a conviction for illegal possession of that substance. The convic-

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14. *See* Jones v. United States, 362 U.S. 257, 271 (1960). *Jones* was the first case where the Supreme Court squarely confronted the use of hearsay for obtaining a warrant. The Court noted that the informant had given accurate information in the past, his story was corroborated by other sources, and the petitioner was a known narcotics user. Based on these facts, the Court concluded "hearsay may be the basis for a warrant . . . [where there is a] substantial basis" for crediting the information. *Id.* The *Jones* Court found a substantial basis existed for concluding "narcotics were probably present in the apartment." *Id.*

15. *See infra* text accompanying note 21.

16. *Id.*

17. 378 U.S. 108 (1964). While the two-pronged test originated in *Aguilar*, the Court formulated the test out of constructs enunciated in Nathanson v. United States, 290 U.S. 41 (1933) and Giordenello v. United States, 357 U.S. 480 (1958). The *Aguilar* Court quoted *Nathanson* for the proposition that a magistrate could not issue a search warrant " 'unless he could find probable cause . . . from facts or circumstances presented to him under oath or affirmation.' " *Aguilar*, 378 U.S. at 112 (quoting *Nathanson*, 290 U.S. at 47) (emphasis omitted). Quoting *Giordenello*, the *Aguilar* Court stated that a " '[c]ommissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion . . . . ' " *Id.* at 113 (quoting *Giordenello*, 357 U.S. at 486). *See also Aguilar*, at 114 n.4.

18. The affidavit stated, in pertinent part: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Aguilar*, 378 U.S. at 109.

tion was affirmed by the Texas Court of Criminal Appeals.[19] The United States Supreme Court, however, reversed the Texas conviction.[20] Justice Goldberg, writing for the majority, enunciated the following test to guide a magistrate when analyzing a warrant application supported by hearsay:

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was "credible" or his information "reliable."[21]

The *Aguilar* tip failed to meet this standard as it lacked any facts from which the magistrate himself could adduce the veracity of the informant or the source of the informant's knowledge.

The *Aguilar* test for analyzing a warrant application supported by an informant's tip was perceived by appellate courts and the Supreme Court as being based on traditional notions of probable cause. During the five-year period between *Aguilar* and *Spinelli*, courts confronted with informants' tips thought a "practical, non-technical" analysis was all that a probable cause determination required.[22] This

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19. Aguilar v. State, 172 Tex. Crim. 629, 362 S.W.2d 111 (1962), *rev'd*, 378 U.S. 108 (1964).

20. In reversing the Texas court, the Supreme Court stated the affidavit contained a "mere conclusion" that petitioner possessed narcotics. The Court further noted that the affidavit did "not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' " *Aguilar*, 378 U.S. at 113.

21. *Id.* at 114.

22. Brinegar v. United States, 338 U.S. 160, 176 (1949). Although *Brinegar* predated *Aguilar*, the *Brinegar* rule that probable cause is a "practical, non-technical conception" was reiterated by other courts. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964). In *Beck*, the Supreme Court cited the principle from *Brinegar*, but still found the record concerning the informant and his information insufficient to sustain the arrest and thus the conviction. *Id.* at 92-93. The Supreme Court subsequently reaffirmed the teachings of *Brinegar* in United States v. Ventresca, 380 U.S. 102 (1965) (common sense probable cause approach of *Ventresca* is discussed *infra* text accompanying notes 23-27). The common sense approach of *Ventresca* was followed by lower courts during the five-year period between *Aguilar* and *Spinelli*. *See* United States v. Scolnick, 392 F.2d 320, 323-24 (3d Cir. 1968) (court recognized that affidavit "must be tested and interpreted in a common sense and realistic fashion"); United States v. Pinkerman, 374 F.2d 988, 990-91 (4th Cir. 1967) (court quoted and applied the common sense principle of *Ventresca*); Thomas v. United States, 376 F.2d 564, 564-65 (5th Cir. 1967) (court stated *Ventresca* imposed a duty on courts and magistrates to interpret affidavits for search warrants in a common sense fashion); Travis v. United States, 362 F.2d 477, 478-81 (9th Cir. 1966) (court was cognizant

approach was apparent in *United States v. Ventresca*.[23] Therein, the affidavit outlined the affiant's personal observations of incriminating distillery activity. This affidavit also contained hearsay information from alcohol investigators who witnessed the same activity.[24] Based on these statements, a warrant was issued.

A defense motion to suppress evidence seized under the warrant was denied by the district court.[25] However, the court of appeals reversed, on the grounds that the warrant application and affidavit "failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge."[26]

The Supreme Court subsequently reversed the appellate decision, chastising the court of appeals for its scrutiny of the affidavit: "[T]he Fourth Amendment's commands . . . are practical and not abstract. . . . Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area."[27] Thus *Ventresca* suggested that a more common sense or "practical" review of the warrant application was required by the fourth amendment, and that detailed scrutiny of technical requirements by the appellate court was inappropriate.

Despite the *Ventresca* Court's pronouncement that warrant applications based on informants' tips should be analyzed in a common sense manner, in *Spinelli v. United States*[28] the Court initiated a retreat from this principle in its explication of *Aguilar*. In *Spinelli*, FBI surveillance indicated the suspect crossed a bridge from an Illinois suburb to St. Louis, Missouri, and parked his car in an apartment building lot on four occasions.[29] After pinpointing an apartment Spinelli entered, an FBI check revealed two telephones in the apartment carrying different numbers.[30] An FBI confidential informant alleged, as agents suspected, that Spinelli was disseminating gambling information over these phones. Based on this information, Spinelli

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of common sense approach of *Ventresca* and examined the affidavit consistent with that approach).

23. 380 U.S. 102 (1965).

24. The affidavit described seven occasions over a one-month period when a car either carried loads of sugar to respondent's house, picked up empty tin cans or transported "apparently full five-gallon cans" from respondent's house to another residence. The affidavit also stated investigators smelled fermented mash outside respondent's house. *Id.* at 104.

25. *Id.*

26. Ventresca v. United States, 324 F.2d 864, 868 (1st Cir. 1963), *rev'd*, 380 U.S. 102 (1965).

27. *Ventresca*, 380 U.S. at 108.

28. 393 U.S. 410 (1969).

29. *Id.* at 413.

30. *Id.* at 414.

was arrested and convicted of conducting gambling activities proscribed by Missouri law.[31] When confronted with this affidavit, the Supreme Court thought a precise analysis was necessary for properly weighing the informant's tip.[32] The analysis the *Spinelli* Court required, the so-called *Aguilar-Spinelli* "two-pronged" test, included a basis of knowledge prong and a veracity prong, the latter containing a credibility spur and a reliability spur.[33] The *Aguilar-Spinelli* analysis required satisfaction of both "prongs" before an informant's hearsay information could be credited.[34]

THE VERACITY PRONG

The first prong of the *Aguilar-Spinelli* analysis was concerned with the veracity of the information provided.[35] It required the affiant to present facts from which the magistrate could adduce that the informant or his information was believable. The veracity prong could be satisfied by either of two methods.[36] One method allowed veracity to be shown by evidence that the informant was credible. Alternatively, veracity could be demonstrated by analyzing the information contained in the tip for an indication that it was reliable.

a. The Credibility Spur

To satisfy the credibility spur, inquiry centered on the informant.[37]

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31. *Id.* at 411.

32. The Court stated the " 'totality of the circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis." *Id.* at 415.

33. *Id.* at 413. *See also Stanley*, 19 Md. App. at 525, 313 A.2d at 858. While the *Spinelli* Court labeled *Aguilar* a "two-pronged" test, it did not specifically speak of "spurs" of the veracity prong. Judge Moylan's *Stanley* opinion is frequently cited as authority for the reliability and credibility spurs terminology. *See, e.g., Gates*, 103 S. Ct. at 2327 n.4.

34. *See Gates,* 103 S. Ct. at 2328 n.5; *see also supra* note 8.

35. The veracity prong served as "a substitute for the classic trustworthiness device of the oath." *Stanley*, 19 Md. App. at 525, 313 A.2d at 858. The veracity prong, Judge Moylan concluded, was an "alternative guarantee that the declarant spoke truthfully." *Id.*

36. *Aguilar*, 378 U.S. at 114. Judge Moylan stated in *Stanley*, "the 'veracity' prong may be satisfied by showing *either* the informant to be 'credible' *or* his information to be otherwise 'reliable'." 19 Md. App. at 525, 313 A.2d at 859 (emphasis in original).

37. The *Aguilar* Court made it clear credibility concerned the informant. The Court stated, "the magistrate must be informed of some of . . . the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " 378 U.S. at 114.

The accepted manner in which to determine an informant's credibility was to examine his past performance. The past performance method for indicating informant credibility was established in *McCray v. Illinois*.[38] In *McCray*, the affiant indicated that information the informant had supplied in the past had resulted in convictions.[39] Based on the informant's established track record, the Supreme Court concluded that the informant had some measure of credibility.[40] Lower courts followed *McCray* and past performance became the dominant measure of informant veracity.[41]

b. The Reliability Spur

In cases where the informant's credibility could not be shown,[42] an alternative was available to demonstrate veracity. The reliability analysis focused on the information provided in the warrant application to determine whether veracity could be inferred.[43] In *United States*

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38. 386 U.S. 300 (1967).

39. The police averred that the informant had supplied information some 15 or 16 times in the past which had led to several arrests and convictions. *Id.* at 304.

40. *Id. See also* 1 W. LAFAVE, *supra* note 13, § 3.3, at 502.

41. *See, e.g.*, United States *ex rel.* Hurley v. Delaware, 365 F. Supp. 282 (D. Del. 1973) (informant's past information led to convictions of those involved in gambling); People v. Garcia, 27 Ill. App. 3d 396, 326 N.E.2d 497 (1975) (informant's information led to three convictions and two bond forfeitures); People v. Hampton, 14 Ill. App. 3d 427, 302 N.E.2d 691 (1973) (seven convictions resulted from informant's information); State v. Meyer, 209 Neb. 757, 311 N.W.2d 520 (1981) (confidential informant provided information which resulted in arrests and convictions for controlled substance violations); State v. Roberts, 62 Ohio St. 2d 170, 405 N.E.2d 247, *cert. denied*, 449 U.S. 879 (1980) (informant successfully completed controlled purchases of narcotics for officers and provided information resulting in the arrest and conviction of drug law violators).

Although a track record of information leading to conviction was the ideal means for establishing informant credibility, it appears that past information leading to arrests or seizure of evidence could suffice. In *Stanley*, the informant's past information resulted in the arrest of two persons and the seizure of 43 pounds of marijuana on one occasion and the arrest of six persons and the seizure of 68 pounds of marijuana on a second occasion. The court concluded this information allowed a "reviewing trial court to make a truly informed judgment as to the credibility of a source of information." 19 Md. App. at 512-13, 313 A.2d at 851.

42. This would be the informant who has not provided information to police in the past. Without an established track record with police officials, this informant's credibility cannot be determined. This is generally the case with anonymous informants. *See Gates*, 103 S. Ct. 2317.

43. Judge Moylan stated: "Informational 'reliability' . . . would seem to involve circumstances assuring trustworthiness on the particular occasion of the information's being furnished." Moylan, *supra* note 8, at 761.

v. Harris,[44] a plurality of the Supreme Court stated that a tip was probably more reliable if the information provided linked the informant to the criminal activity described therein.[45] In *Harris*, a federal tax investigator's search warrant affidavit stated the informant "has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than two years, and most recently within the past two weeks."[46] A plurality of the Court concluded that common sense would compel a person to credit a tip containing an admission against the informant's penal interest.[47]

The *Harris* plurality, however, received strong criticism from dissenters on the Court.[48] Also, at least one state court noted *Harris* was a non-binding plurality opinion.[49] Nonetheless, courts embraced the "penal interest" theory, leading to a general acceptance of this index of reliability.[50]

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44. 403 U.S. 573 (1971).

45. *Id.* at 583; *see infra* note 47; *see also* 1 W. LAFAVE, *supra* note 13, § 3.3, at 523. LaFave states that "admissions against penal interest by an informant are regularly relied upon as a means of showing that his information is reliable."

46. *Harris*, 403 U.S. at 575.

47. The *Harris* plurality concluded:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions 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.

Id. at 583.

48. Justice Harlan's criticism focused on the informant who admits to a crime with hopes of receiving a "break" in return. "But where the declarant is also a police informant it seems at least as plausible to assume . . . that the declarant-confidant at least believed he would receive absolution from prosecution for his confessed crime in return for his statement." *Id.* at 595 (Harlan, J., dissenting).

49. The Burger plurality opinion was divided into three parts. Only Justices Black and Blackmun joined the Chief Justice in the entire opinion. Justice White joined in Part III which concerned admissions against penal interests. With Part III buttressed by four justices, lower courts have found the *Harris* plurality no more authoritative than the dissent. *See* Merrick v. State, 283 Md. 1, 6-7, 389 A.2d 328, 331-32 (1978). The Maryland Supreme Court noted that the *Harris* plurality's "findings, conclusions and views are not constitutionally the 'Supreme Law' of Maryland, nor are the Judges of this State and all the People of this State . . . bound thereby." In ironic fashion, however, the *Merrick* court concluded: "Upon analysis of *Harris* and the cases in other jurisdictions, we find the prevailing view to be that declarations by an informant against his penal interest may be considered in the determination of the informant's credibility." *Id.* at 15-16, 389 A.2d at 336.

50. *See, e.g.*, Armour v. Salisbury, 492 F.2d 1032, 1035 (6th Cir. 1974) (The *Armour* court stated an admission against one's penal interest is "a significant, and sometimes conclusive, reason for crediting the statements of an informant."); *see also*

THE BASIS OF KNOWLEDGE PRONG

While the veracity prong concerned itself with the informant's honesty or trustworthiness, the basis of knowledge prong focused on the source of the informant's information.[51] The magistrate examined the informant's tip to evaluate what the informant saw or heard firsthand.[52] This analysis served to assure that, notwithstanding a truthful informant, the information was derived from personal knowledge and not merely another's hearsay conclusions relayed through the informant.[53] An affirmative allegation in the tip of firsthand knowledge of criminal activity, either by participating in a crime or viewing evidence of it, was the surest method to satisfy the basis of knowledge prong.[54]

Prior to *Spinelli*, reviewing courts held that if an informant did

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State v. Patterson, 309 So. 2d 555, 556-57 (Fla. Dist. Ct. App. 1975) (An affidavit related statements of a juvenile informant, who admitted stealing property sought by police. The court recognized the statement as an admission against the juvenile's penal interest and found *Harris* controlling.); State v. Archuleta, 85 N.M. 146, 147, 509 P.2d 1341, 1342, *cert. denied*, 414 U.S. 876 (1973) ("Here, the informer's statement of ten different purchases of heroin at the residence is a declaration against the informant's penal interest."); Maxwell v. State, 259 Ark. 86, 91, 531 S.W.2d 468, 471 (1976) ("We unhesitantly find that the mere fact that Harris's statement was self-incriminating was an adequate basis for according reliability and credibility to the informant . . . .").

51. *See Aguilar*, 378 U.S. at 114. The *Aguilar* Court articulated the basis of knowledge prong by stating "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were." *See also Stanely* 19 Md. App. at 525, 313 A.2d at 858. Judge Moylan tersely stated: "The simple thrust of the 'basis of knowledge' prong was that the informant must not pass on his conclusion, let alone the conclusion of someone else, but must furnish the raw data of his senses, so that the reviewing judge could draw his own conclusion from that data."

52. The magistrate was to ask, " 'What are the raw facts upon which the informant based his conclusion?' 'How did the informant obtain those facts?' 'What precisely did he see or hear or smell or touch firsthand?' " *Stanley*, 19 Md. App. at 531, 313 A.2d at 861.

53. *Id.* at 513, 313 A.2d at 851.

54. *See* McCray v. Illinois, 386 U.S. 300, 304 (1967) (Allegation of firsthand knowledge satisfied the basis of knowledge prong in *McCray* where an officer testified that the informant "said he had observed [the petitioner] selling narcotics to various people."); *see also* United States v. Schmidt, 662 F.2d 498 (8th Cir. 1981) (informant personally observed marijuana in defendant's house; defendant conceded this information satisfied basis of knowledge prong); United States v. Bruner, 657 F.2d 1278, 1297 (D.C. Cir. 1981) (informant said he observed evidence of the crime); State v. Archer, 23 Ariz. App. 584, 534 P.2d 1083 (1975) (informant stated facts regarding personal observation of a theft); Laster v. State, 60 Wis. 2d 525, 211 N.W.2d 13 (1973) (informant told affiant she witnessed the crime involved).

not allege firsthand knowledge of criminal activity, the tip was insufficient to support a finding of probable cause.[55] Subsequently, an alternative to the affirmative allegation of personal knowledge developed in the basis of knowledge analysis. *Spinelli* suggested that a magistrate presented with a tip outlining criminal activity in sufficient detail could reasonably infer from such detail that the informant's allegations were beyond mere speculation and based on personal knowledge.[56] The inference rested on the assumption that a factually detailed tip was the result of knowledge acquired firsthand.[57]

The *Spinelli* Court cited *Draper v. United States*[58] as the "suitable benchmark"[59] for the degree of detail required to satisfy the "self-verifying detail" analysis. In *Draper*, the government's informant stated Draper had traveled by train to Chicago the preceding day and would return to Denver by train on one of two mornings carrying three ounces of heroin.[60] The informant further stated Draper "was a Negro of light brown complexion, 27 years of age, 5 feet 8 inches tall, weighing about 160 pounds, and that he was wearing a light colored raincoat, brown slacks and black shoes."[61] The informant finally described "a tan zipper bag" Draper would be carrying and indicated that he "walked real fast."[62] The *Spinelli* Court found that firsthand

55. *See, e.g., Aguilar*, 378 U.S. at 113. Failure of the tip in *Aguilar* to allege firsthand knowledge of criminal activity was a factor that persuaded the Supreme Court to hold that the warrant should not have been issued. "The affidavit . . . does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' "

56. *Spinelli*, 393 U.S. at 417. *See* United States v. Bush, 647 F.2d 357, 363 (3d Cir. 1981) (The *Bush* court correctly articulated the self-verifying detail approach. "In *Spinelli* the court held that sufficient detail in a tip can support the inference that the informant's basis of knowledge was legitimate."); United States v. Polus, 516 F.2d 1290, 1293 (1st Cir.), *cert. denied*, 423 U.S. 895 (1975) (The *Polus* court was also cognizant of how an inference of firsthand knowledge was drawn from a detailed tip. "Immediately prior to the arrest [the informant] gave the agents information of such specific detail concerning the location of the narcotics that it strongly supported the inference that he knew what he was talking about.").

57. The self-verifying detail test was articulated by the *Spinelli* Court as follows:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

393 U.S. at 416.

58. 358 U.S. 307 (1959).

59. *Spinelli*, 393 U.S. at 416.

60. *Draper*, 358 U.S. at 309.

61. *Id.* at n.2.

62. *Id.* at 309.

knowledge could be inferred from the detail in the *Draper* tip.[63]

Despite apprehensions expressed in Justice White's *Spinelli* concurrence[64] and some critical commentary from the scholarly sector,[65] lower courts have accepted the self-verifying detail test.[66] However, at least one court has suggested that a detailed factual account of innocent activity was as suspect as a mere conclusory statement of criminal activity.[67] This has caused some to suggest that even a detailed tip

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63. *Spinelli*, 393 U.S. at 417. Concerning the detail in *Draper*, the *Spinelli* Court concluded a magistrate "could reasonably infer that the informant had gained his information in a reliable way." When it analyzed the *Spinelli* tip, the Court stated "an inference cannot be made in the present case . . . . This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar." *Id.*

64. *Id.* at 426-27 (White, J., concurring). Justice White accepted the basic premise that a sufficiently detailed report will verify itself. He felt, however, that problems could be avoided by simply asking the informant how he received his information. "[I]t seems quite plain that if it may be so easily inferred from the affidavit that the informant has himself observed the facts or has them from an actor in the event, no possible harm could come from requiring a statement to that effect . . . ."

65. *See e.g.*, 1 W. LAFAVE, *supra* note 13, § 3.3, at 545. LaFave agreed with Justice White's suggestion of simply asking the informant how he received his information. LaFave went a step further, however, stating the test was " 'an unnecessary and complicated alternative to *Aguilar* that could be dispensed with.' " *Id.*

66. *See* United States v. Bush, 647 F.2d 357, 363 (3d Cir. 1981) ("In *Spinelli* the Court held that sufficient detail in a tip can support the inference that the informant's basis of knowledge was legitimate."); United States v. Schauble, 647 F.2d 113, 115-16 (10th Cir. 1981) (Court quoted the *Spinelli* test and noted the affidavit involved in *Schauble* provided "the underlying circumstances from which the informant concluded that drugs were on the Riggs premises in sufficient detail that a magistrate could determine the informant had a reasonable ground for his belief and was not relying upon rumor."); United States v. Spach, 518 F.2d 866, 870 (7th Cir. 1975) ("When an informer provides information which is specific and detailed, it is more probable that the information came from a reliable source than when the information is general."); United States v. Polus, 516 F.2d 1290, 1293 (1st Cir. 1975) (Court stated the informant "gave the agents information of such specific detail concerning the location of the narcotics that it strongly supported the inference that he knew what he was talking about."). *Compare* United States v. Long, 439 F.2d 628, 630 (D.C. Cir. 1971) (Court used the test, but found it did not satisfy the basis of knowledge prong. "There is no indication of the source of the informants' 'personal knowledge,' nor are their tips sufficiently detailed to allow a magistrate to 'infer that the informant[s] had gained [their] information in a reliable way.' " (quoting *Spinelli*)); Von Utter v. Tulloch, 426 F.2d 1, 4 (1st Cir. 1970) ("We are of the opinion that the detail set forth in the instant informer's tip is insufficient to permit a magistrate to infer that the informant spoke from personal observation or other particular knowledge of criminal activity.").

67. *See* United States v. Soyka, 394 F.2d 443, 447 (2d Cir. 1968), *cert. denied*, 393 U.S. 1095 (1969) (something more than a "wealth of detail" is required).

must have a distinct criminal flavor.[68]

CORROBORATION OF THE INFORMANT'S TIP

Police corroboration of the informant's tip was not an element of the two-pronged test. Rather, corroboration was an alternative factor to consider if the informant's tip failed the *Aguilar-Spinelli* analysis.[69] The independent nature of corroboration was illustrated by the Supreme Court's analyses first in *Draper* and then in *Spinelli*.[70]

In *Draper*, the police had corroborated much of the factually detailed tip concerning Draper's arrival in Denver.[71] The Court stated that since virtually every bit of the informant's tip was corroborated, there were reasonable grounds to believe that Draper possessed heroin as the informant alleged.[72]

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68. *See* Comment, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 965 (1969) (Comment states this position: "Are the facts detailed in the tip incriminating facts or merely innocent facts?"); 1 W. LAFAVE, *supra* note 13, § 3.3, at 549 ("What is needed—then, before details may properly be characterized as self-verifying, is that the facts detailed are incriminating facts rather than innocent facts."); *see also Spinelli*, 393 U.S. at 428 (White, J., concurring) (While Justice White did not state incriminating facts were necessary, he found the informant's tip believable because the information "was not neutral, irrelevant information but was material to proving the gambling allegation."). This was one of the reasons the Illinois Supreme Court rejected the tip in People v. Gates, 85 Ill. 2d 376, 423 N.E.2d 887 (1982), *rev'd*, 103 S. Ct. 2317 (1983). The court noted the tip provided details of "clearly innocent activity." *Gates*, 85 Ill. 2d at 390, 423 N.E.2d at 893.

69. *See infra* notes 73-74 and accompanying text.

70. In *Aguilar*, there was an indication the Court was cognizant of police corroborative efforts regarding the informant's tip. The majority stated the record did not indicate whether police corroborated the informant's tip. *See* 378 U.S. at 109 n.1. Justice Clark's dissenting opinion, however, stated two Houston police officers "kept the premises of petitioner under surveillance for about a week." *Id.* at 116 (Clark, J., dissenting). However, since the warrant application in *Aguilar* did not state the informant's information had been corroborated, the Supreme Court was precluded from considering police corroborative efforts because of an elementary rule in reviewing warrants. "[T]he reviewing court may consider *only* information brought to the magistrate's attention. . . . 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." *Id.* at 109 n.1 (emphasis in original).

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

72. The *Draper* Court stated:

> Marsh had personally verified every facet of the information given him by [the informant] except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of [the informant's] information being thus personally verified, Marsh had reasonable grounds to believe that the remaining

The *Spinelli* Court addressed corroboration in its probable cause analysis. However, the Court did not integrate corroboration into the two-pronged test. Rather, it stated that if a tip were found insufficient under the two-pronged test, independent corroboration of the tip could alternatively satisfy probable cause.[73] The only qualification the Court placed on the corroboration alternative was that the tip had to be as trustworthy as one that satisfied the two-pronged test.[74]

Some courts deviated from the *Spinelli* view that corroboration was an independent analysis, holding instead that corroboration was an integral factor within the two-pronged test.[75] However, many courts, particularly the Eighth Circuit Court of Appeals, followed the *Spinelli* view and held that independent corroboration was an alternative to the two-pronged test.[76]

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unverified bit of [the informant's] information—that Draper would have heroin with him—was likewise true.

Id. See also 1 W. LAFAVE, *supra* note 13, § 3.3, at 544 n.187. LaFave notes that the *Draper* decision was "based upon the fact that much of the informant's story had been corroborated by the police."

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

74. The informer's report must first be measured against *Aguilar*'s standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even 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?

Id.

75. Some courts apparently misinterpreted the *Spinelli* view on corroboration, believing that corroboration either buttressed a suspect veracity prong or cured a defect in the basis of knowledge prong. In Stanley v. State, 19 Md. App. 508, 313 A.2d 847 (1974), Judge Moylan articulated the former position, stating: "When independent police observations have verified part of the story told by an informant, that corroboration lends credence to the remaining unverified portion of the story by demonstrating that the informant has, to the extent tested, spoken truly." *Id.* at 529, 313 A.2d at 860-61. The latter position, that corroboration can cure a defective basis of knowledge prong, is the prevailing position in the lower courts. *See* United States v. Myers, 538 F.2d 424, 426 (D.C. Cir. 1976) (tip alone failed the *Aguilar* basis of knowledge prong; independent corroboration cured this problem); Joyce v. State, 327 So. 2d 255, 258-59 (Miss. 1976) (while court stated the tip was self-verifying, it also noted corroboration can buttress a tip to satisfy basis of knowledge prong); *see also* 1 W. LAFAVE, *supra* note 13, § 3.3, at 562 (corroboration is primarily used to cure a defective basis of knowledge prong).

76. "*Spinelli* thus stands squarely for the proposition that even if the two-pronged test of *Aguilar* is not met, the information before the magistrate may be sufficient if . . . [it is] sufficiently corroborated, to supply as much trustworthiness

The exact relation of corroboration to the *Aguilar-Spinelli* two-pronged test remained unsettled when Illinois courts heard the *Gates* case. Courts required satisfaction of both prongs of the *Aguilar-Spinelli* test while reaching different conclusions on the role of police corroboration of an informant's tip.[77] This disagreement did not dissuade law enforcement officials from supporting warrant applications with police corroboration.[78] Regardless of the divergent views concerning the role of corroboration, it appears police verification could only strengthen a warrant application. It was not the utility of corroboration that was questioned, but merely its relation to the *Aguilar-Spinelli* two-pronged test.

III. *PEOPLE V. GATES*

Against this judicial history and analysis Bloomingdale, Illinois, police received an anonymous letter which alleged that Lance and Sue Gates were involved in drug trafficking.[79] The handwritten letter gave

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as does the *Aguilar* test." United States v. Marihart, 472 F.2d 809, 813 (8th Cir. 1972); *see also* United States v. Carlson, 697 F.2d 231, 237 (8th Cir. 1983); United States v. Howe, 591 F.2d 454, 457 (8th Cir.), *cert. denied*, 441 U.S. 963 (1979); United States v. Scott, 545 F.2d 38, 40 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977); United States v. Regan, 525 F.2d 1151, 1156 (8th Cir. 1975); United States v. Cummings, 507 F.2d 324, 328 (8th Cir. 1974); United States v. Hill, 500 F.2d 315, 318 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975); Donaldson v. State, 46 Md. App. 520, 524, 420 A.2d 281, 283 (1980).

77. *Compare supra* note 75 and accompanying text (courts holding corroboration integrated into *Aguilar-Spinelli* analysis) *with supra* note 76 and accompanying text (courts holding corroboration an independent alternative to *Aguilar-Spinelli*).

78. *See, e.g.*, 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). The continued efforts of law enforcement officials to corroborate informants' tips is aptly illustrated in the *Gates* case. As *infra* text accompanying notes 80-82 indicates, Bloomingdale detective Charles Mader confirmed with his own sources most of the information contained in the informant's letter.

79. 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 Road, 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, than flys [sic] 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 worth of drugs in their basement.
>
> They brag about the fact that they never have to work, and make their entire living on pushers.
>
> I guarentee [sic] if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

the Gates' Bloomingdale address, the manner in which they transported drugs from Florida to the Chicago area, and alleged that the Gates' car and home would each contain over $100,000 worth of drugs.

Bloomingdale Police Department detective Charles Mader immediately began to investigate and corroborate the information in the letter.[80] After first receiving an outdated address from the Secretary of State's office, Mader confirmed the address provided by the informant.[81] A Chicago policeman confirmed for Mader that "L. Gates" was scheduled to leave on May 5, 1978, for West Palm Beach, Florida. A drug enforcement agent then verified that Lance Gates had boarded the flight to Florida and that he had arrived in West Palm Beach and proceeded to a hotel room registered to Susan Gates.[82] This agent confirmed for Mader that the couple left their hotel room on May 6, 1978, and proceeded to an interstate used by motorists to the Chicago area.

Mader submitted the anonymous letter and the information confirmed by various agents with his signed affidavit in a search warrant complaint. A warrant was issued authorizing police to search Lance and Susan Gates, their condominium and the gray Mercury driven by Lance Gates.[83] The subsequent search of the car uncovered over 400 pounds of cannabis, and the search of the residence revealed rifles, a handgun, twenty pounds of cannabis, handrolled cannabis cigarettes and various weighing devices.[84]

Lance and Sue Gates were arrested and indicted on firearm and narcotics charges.[85] Prior to trial, the defense moved to suppress the evidence seized pursuant to the warrant.[86] This motion was granted

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Gates, 82 Ill. App. 3d at 750-51, 403 N.E.2d at 78.

80. *Id.* at 751, 403 N.E.2d at 78. The anonymous letter was received on May 3, 1978, the same day the letter stated Sue Gates would be driving to Florida. Thus, Mader immediately had to begin corroborative efforts, especially concerning the Gates' activity in Florida.

81. *Id.* at 750-51, 403 N.E.2d at 78-79. The informant's letter stated the Gateses resided on Greenway Drive. When Mader contacted the Secretary of State's office, however, he received a computer reply that listed the Gates' address at 209-D Dartmouth Drive. A confidential informant told Mader the Gates' current address was actually 198-B Greenway Drive.

82. *Id.* at 751-52, 403 N.E.2d at 79.

83. *Id.* at 752, 403 N.E.2d at 79.

84. *Id.*, 403 N.E.2d at 79-80.

85. *Id.*, 403 N.E.2d at 80.

86. The appellate court opinion concisely stated the basis of the suppression motion as follows: "[T]he warrant failed to comply with the requirement of *Aguilar* . . . in that the author of the anonymous letter was not 'reliable' and that there was no showing that his or her information was obtained in a reliable manner." *Id.* at 752-53, 403 N.E.2d at 80.

and the state appealed. The Second District Appellate Court of Illinois affirmed the suppression of the evidence,[87] a decision which was affirmed by the Supreme Court of Illinois.[88]

The appellate court examined the case under the *Aguilar-Spinelli* two-pronged test, beginning its analysis with the basis of knowledge prong. The court noted the search warrant application did not "reveal the manner in which the anonymous informer obtained or gathered his information."[89] Since the letter did not allege firsthand knowledge, the court examined the tip under the self-verifying detail approach sanctioned in *Spinelli*.[90] The court observed that the letter contained only "general allegations" of illegal drug trafficking.[91] It viewed the letter as containing insufficient detail to permit a judge reasonably to infer that the informant possessed firsthand knowledge.[92] Since the *Aguilar-Spinelli* analysis required that both prongs be satisfied, the appellate court found it unnecessary to consider the veracity prong.[93]

The Illinois Supreme Court's analysis of the *Gates* case largely paralleled that of the appellate court opinion. The court began its inquiry with the basis of knowledge analysis and concluded that the letter did not indicate whether the information was gathered through firsthand knowledge.[94] The court emphasized that the informant did not state that he saw drugs in the Gates' residence or even that he had received the information from another person. "The letter set out mere conclusions and contained no statements of personal observation or firsthand knowledge."[95]

The supreme court also found the self-verifying detail approach unavailing. The court noted the letter was not especially detailed in that it merely provided the defendants' address and the fact that the couple would be driving from Florida in early May with drugs in their car. The court felt it could not "say that the information provided here was in sufficient detail to lead a magistrate to conclude that the tip was the product of firsthand knowledge or personal observation."[96]

The court acknowledged that the *Aguilar-Spinelli* two-pronged

87. *Id.* at 755, 403 N.E.2d at 81.
88. *Gates*, 85 Ill. 2d at 390, 423 N.E.2d at 893.
89. *Gates*, 82 Ill. App. 3d at 753, 403 N.E.2d at 80.
90. *Id.*
91. *Id.* at 754, 403 N.E.2d at 81.
92. *Id.*
93. *Id.* at 755, 403 N.E.2d at 81.
94. *Gates*, 85 Ill. 2d at 385, 423 N.E.2d at 890.
95. *Id.*
96. *Id.* at 389, 423 N.E.2d at 893.

analysis ended if either prong was not satisfied, but nonetheless discussed the veracity prong.[97] It concluded that neither of the established measures of veracity was present in the instant case. First, the court felt it could not say the informant was credible because Mader had no previous contact with the informant to establish his past performance.[98] Secondly, the court noted that the tip itself contained no extraordinary indicia of reliability finding that "there was no admission against penal interest."[99]

The Illinois courts illustrated the operation of the *Aguilar-Spinelli* test. When analyzing the basis of knowledge prong, both courts examined the informant's letter for indications of firsthand knowledge of criminal activity. Both courts agreed that the letter contained no allegations of firsthand knowledge, and that the letter was not sufficiently detailed to permit an inference of firsthand knowledge.[100] The courts recognized that the failure to satisfy either prong of the *Aguilar-Spinelli* test required a finding that no probable cause to issue the warrant existed.[101] The Supreme Court of Illinois, however, analyzed the information in the letter under the veracity prong and found no past performance to support a conclusion that the informant was credible, nor an admission against penal interest to indicate that the particular information was reliable.[102] Consistent with these analyses, both courts affirmed the suppression of contraband, believing the search warrant had been issued without probable cause.[103]

IV. *ILLINOIS V. GATES*

When the United States Supreme Court agreed to hear *Illinois v. Gates*,[104] the Court was concerned that the *Aguilar-Spinelli* test had become overly-rigid and inconsistent with a traditional concept of probable cause.[105] This concern was a manifestation of previous

97. *Id.* at 384, 423 N.E.2d at 891. The court realized it did not have to analyze the veracity prong but did so because the state's arguments concerning self-verifying detail and corroboration intertwined the prong.

98. *Id.* at 384-85, 423 N.E.2d at 891.

99. *Id.* at 385-86, 423 N.E.2d at 891. There was some indication that if confronted with an admission against penal interest, the Supreme Court of Illinois would have rejected the *Harris* opinion as a mere plurality. The court's reasoning likely would have paralleled that of the *Merrick* court in *supra* note 49.

100. *See supra* notes 89-92, 94-96 and accompanying text.

101. *See supra* notes 93, 97 and accompanying text.

102. *See supra* notes 97-99 and accompanying text.

103. *Gates*, 82 Ill. App. 3d at 755, 403 N.E.2d at 81; 85 Ill. 2d at 390, 423 N.E.2d at 893.

104. 103 S. Ct. 2317 (1983).

105. "[T]he 'two-pronged test' has encouraged an excessively technical dissec-

intra-court disagreement as to the application of the two-pronged test dating back to its conception. Justice Clark, dissenting in *Aguilar*, thought the two-pronged test represented a "rigid, academic formula" that would serve as an obstruction to law enforcement officials.[106] Justice Black, who had joined Justice Clark's *Aguilar* dissent, perpetuated this resistance with his vigorous *Spinelli* dissent. He was infuriated by the *Spinelli* majority's movement "toward the holding that no magistrate can issue a warrant unless according to some unknown standard of proof he can be persuaded that the suspect defendant is actually guilty of a crime."[107] This criticism of the *Spinelli* opinion was continued by Justice Blackmun in *United States v. Harris*.[108] In separate *Harris* concurrences, Justices Black and Blackmun expressed the view that *Spinelli* should be overruled in favor of a totality of circumstances test.[109]

Lower courts were also troubled by the *Aguilar-Spinelli* two-pronged test. In particular, the Eighth Circuit Court of Appeals read *Spinelli* as sanctioning an alternative method for analyzing an informant's tip predicated solely on corroboration.[110] Notwithstanding the Eighth Circuit's apparent satisfaction with the *Spinelli* corroboration alternative, it requested the Supreme Court to "clarify its views as to warrants and searches premised upon informers' tips."[111] Ten years after this request, the Supreme Court used *Illinois v. Gates* to explain its position on the use of informants' tips.

Gates presented two issues to the Supreme Court. First, the Court was to consider whether the *Aguilar-Spinelli* doctrine was still a viable means for determining if probable cause existed for the issuance of a search warrant based on an informant's tip. Second, the Court requested the parties to brief the issue of whether a good-faith excep-

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tion of informant's tips . . . ." *Id.* at 2330. See generally *supra* notes 3-4 for a traditional formulation of probable cause.

106. *Aguilar*, 378 U.S. at 122 (Clark, J., dissenting).

107. *Spinelli*, 393 U.S. at 435 (Black, J., dissenting).

108. 403 U.S. 573 (1971) (Blackmun, J., concurring).

109. Justice Black thought *Aguilar* and *Spinelli* should both be overruled. *Harris*, 403 U.S. at 585 (Black, J., concurring). Justice Black would have advocated a totality of circumstances test because he joined Justice Clark's *Aguilar* dissent. Justice Clark had advocated such a test in his dissent. *Aguilar*, 378 U.S. at 120 (Clark, J., dissenting). Justice Blackmun thought only *Spinelli* should be overruled. *Harris*, 403 U.S. at 586 (Blackmun, J., concurring). Justice Blackmun sat on the Eighth Circuit Court of Appeals when it heard *Spinelli*. The Eighth Circuit had applied a totality of circumstances test to which Justice Blackmun subscribed. *See* Spinelli v. United States, 382 F.2d 871, 880 (8th Cir. 1967), *rev'd*, 393 U.S. 410 (1969).

110. *See supra* note 76.

111. United States v. Marihart, 472 F.2d 809, 814 (8th Cir. 1972).

tion to the exclusionary rule should be adopted.[112] The Court's opinion addressed only the first issue, postponing decision on whether a good-faith exception to the exclusionary rule should be adopted.[113]

THE TOTALITY OF CIRCUMSTANCES TEST

Confronted solely with the question of the continued viability of the *Aguilar-Spinelli* analysis, the Supreme Court opted for a less rigid alternative to the two-pronged test. The *Gates* Court was alarmed that the two-pronged test, originally designed merely to guide a magistrate's probable cause determination,[114] had evolved into an excessively rigid analysis.[115] Since the Supreme Court recognized the continued utility of individual elements of the two-pronged test,[116] it did not completely discard the *Aguilar-Spinelli* test. Rather, the Court eliminated the strictures of the two-pronged test and emphasized that the veracity and basis of knowledge analyses were to serve as guides for the magistrate when analyzing an informant's tip.[117] As the Court stated:

> 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

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112. *Gates*, 103 S. Ct. at 2321.

113. In not deciding whether a good-faith exception to the exclusionary rule should be adopted, the majority relied primarily on the "not pressed or passed below" doctrine. *Id.* at 2321-23. The rule states that unless an issue was pressed or passed on in the highest court of a state, the United States Supreme Court will not hear the issue for the first time on certiorari.

Justice White accepted this doctrine, but emphasized that the Court does not consistently follow it. *Id.* at 2337. Justice White noted Illinois courts did not consider either issue presented to the Supreme Court of the United States. The Illinois Supreme Court did not consider discarding the *Aguilar-Spinelli* test, not did it consider adopting a good-faith exception to the exclusionary rule. *Id.* at 2339. Yet, Justice White pointed out, the majority heard the first issue but decided it could not hear the latter. *Id.* Since *Gates*, the Supreme Court has granted certiorari in three cases to consider whether a good-faith exception to the exclusionary rule should be adopted. United States v. Mahoney, 712 F.2d 956, 958 n.1 (5th Cir. 1983). *See* United States v. Leon, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); Colorado v. Quintero, 657 P.2d 948 (Colo. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 103 S. Ct. 3534 (1983). *See also* United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (Circuit had a good-faith exception to the exclusionary rule in warrantless cases. This exception was extended to warrant cases by the *Mahoney* decision).

114. *Gates*, 103 S. Ct. at 2328 n.6.

115. *See supra* note 105 and accompanying text.

116. *Gates*, 103 S. Ct. at 2327.

117. *Id.* at 2327-28, 2332.

> 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.[118]

The Court thus provided an inventory of relevant factors in the totality of circumstances test. First, the Court specifically stated that inquiry into veracity remains a relevant consideration in the new test.[119] This suggests an application for a warrant based on an informant's tip would be buttressed by illustrating the informant is credible or that his information is reliable.[120] Second, inquiry into the informant's basis of knowledge remains an important element in the *Gates* analysis.[121] Thus, whether an informant's tip alleges firsthand knowledge of criminal activity or is sufficiently detailed to reasonably infer firsthand knowledge of such activity remains a method to support the informant's tip.[122] Finally, the Court implicity indicated that police corroboration of the informant's tip is a relevant factor in the totality of the circumstances.[123]

In dicta, Justice Rehnquist, writing for the majority, posited several examples of combinations of factors which might tend to support a finding of probable cause. The examples did not comprise an exhaustive list[124] but merely served to illustrate some situations in which an informant's tip would likely support a finding of probable cause to issue a warrant.

The first scenario posited by Justice Rehnquist was of the infor-

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118. *Id.* at 2332.

119. *Id.* at 2327.

120. The Court also stated that reliability remains an important consideration. *Id.* This suggests the reliability of information should still be demonstrated, if possible, by showing an admission against the informant's penal interest. *See supra* note 50 (cases employing the penal interest theory). Past performance remains the accepted means of illustrating the informant's credibility. *See supra* notes 39-41.

121. *Gates*, 103 S. Ct. at 2327.

122. In his majority opinion, Justice Rehnquist posited a hypothetical situation which indicated that firsthand knowledge remains a consideration in the totality of circumstances test. *Id.* at 2329-30. The same hypothetical indicated that the self-verifying detail analysis remains an alternative method to demonstrate personal knowledge. *Id.* Indeed the Court used the self-verifying detail approach in analyzing the *Gates* tip, although apparently with less rigor than the Illinois courts. "[T]here was a *fair probability* that the writer of the anonymous letter had obtained his entire story from the Gates . . . ." *Id.* at 2336 (emphasis added).

123. *See infra* notes 129-32 and accompanying text.

124. Immediately preceding the hypotheticals, Justice Rehnquist noted that "[r]igid legal rules are ill-suited" for analyzing an informant's tip. *Gates*, 103 S. Ct. at 2329.

mant who had provided unusually accurate information in the past—the credible informant.[125] In this situation, he suggested, a thorough basis of knowledge is not necessarily required.[126] "Likewise, if an unquestionably honest" informant were to report criminal activity, scrutiny of his basis of knowledge would not be necessary.[127] Conversely, if an informant's veracity were unknown, a detailed description of the wrongdoing coupled with a statement of firsthand knowledge would entitle his tip "to greater weight than might otherwise be the case."[128]

The Court did not provide an example concerning the value of police corroboration. *Gates* indicates, however, that corroboration is invaluable where an anonymous informant is involved.[129] In *Gates*, the Supreme Court acknowledged the anonymous informant's veracity was unknown when Bloomingdale police received the letter, but noted police corroboration tended to diminish any fears about the informant's veracity.[130] Corroboration, the Court reasoned, suggests that " '[b]ecause an informant is right about some things, he is more probably right about other facts.' "[131] Corroboration of an anonymous tip " 'reduce[s] the chances of a reckless or prevaricating tale.' "[132]

THE BURDEN OF PROOF AND STANDARD OF REVIEW

While the totality of circumstances test represents a less-rigid alternative to the *Aguilar-Spinelli* analysis, *Gates* retains the traditional "probability" burden of proof to establish probable cause.[133] In *Brinegar v. United States*,[134] the Court attempted to give wide boundaries to the definition, stating that the probable cause standard requires more than a "bare suspicion" of criminal activity, but "less

125. *See supra* notes 38-41 (cases using past performance to show informant's credibility).

126. *Gates*, 103 S. Ct. at 2329.

127. *Id.*

128. *Id.* at 2329-30.

129. *Id.* at 2332. Moreover, the Court intimates that corroboration may likewise be valuable where a confidential informant's veracity is suspect. The Court stated that one of the purposes of corroboration is to guard against "reckless or prevaricating" tips. *Id.* at 2335.

130. *Id.* at 2335. See also Rosencranz v. United States, 356 F.2d 310, 314 (1st Cir. 1966) where the court was "not troubled by affiant's receipt of information from an anonymous informant." It reached this conclusion because the tip was corroborated by the affiant.

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

132. *Id.*

133. *See supra* notes 3-4.

134. 338 U.S. 160 (1949).

than evidence which would justify condemnation."[135] The *Gates* majority reaffirmed the *Brinegar* "probability" standard. The magistrate must determine from the totality of the circumstances presented in the warrant application whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place."[136] The Court refused to enunciate a precise, mathematical definition of "fair probability," but emphasized that a "prima facie showing" of criminal conduct is not required.[137]

Similarly, *Gates* reaffirms the traditional standard of review in search warrant cases.[138] According to the Court, judicial review of a warrant issued on hearsay information does not entail scrutiny in the search for specific elements,[139] but rather involves review of the entire warrant application "to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed."[140]

V. IMPLICATIONS

The rigid application of *Aguilar-Spinelli* required a magistrate to disregard seemingly valuable information received from an informant and to refuse to issue a search warrant in situations where one of the elements of veracity or personal knowledge was lacking. *Gates* establishes that the two elements are no longer to be viewed as absolute conditions for crediting an informant's tip in order to validate a search warrant application.

While the new test provides a less rigid analysis of an informant's information, *Gates* retains the traditional probable cause analysis. The burden remains on the state to demonstrate that there is a fair probability that evidence of criminal activity will be found in the place to be searched. *Gates* merely allows the state greater latitude in meeting its burden. *A fortiori*, it permits the magistrate to credit hearsay information in situations where, notwithstanding the absence of an *Aguilar-Spinelli* element, he is persuaded of the probable truth of the information. The magistrate still must have a "substantial basis" for his conclusion that probable cause exists. However *Gates* frees the magistrate to draw those inferences which common sense dictates in

135. *Id.* at 175.

136. *Gates*, 103 S. Ct. at 2332.

137. *Id.* at 2330.

138. *Id.* at 2331. *See* Jones v. United States, 362 U.S. 257, 271 (1960); *see also* United States v. Harris, 403 U.S. 573, 581 (1971); Rugendorf v. United States, 376 U.S. 528, 583 (1964).

139. *Gates*, 103 S. Ct. at 2331.

140. *Id.*

evaluating the credibility of hearsay and in determining whether, given all the evidence presented, probable cause exists.

Finally, *Gates* suggests a significant role for police corroborative efforts. In the case of the anonymous informant whose trustworthiness is unknown, police corroboration may provide evidence from which the magistrate may be persuaded to credit the information. Moreover where, as in *Gates*, the information corroborated details sufficiently suspicious activity, the corroborated tip may serve as the basis of the magistrate's probable cause determination.

VI. Conclusion

By articulating the totality of circumstances test as the standard by which a warrant application supported by an informant's tip should be analyzed, the Supreme Court has freed magistrates from the strictures of the two-pronged test of *Aguilar-Spinelli*. *Gates* also re-emphasizes that probable cause still means fair probability. A magistrate's task is to analyze the totality of the circumstances, including veracity, basis of knowledge and police corroboration, and determine if there is a fair probability that evidence of imminent criminal activity will be found in the place to be searched. Once this determination is made, *Gates* continues the policy of requiring that a reviewing court give great deference to the magistrate's decision.

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