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Abandonment of the Two-Pronged Aguilar-Spinelli Test Illinois v. Gates

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RECENT DEVELOPMENTS

ABANDONMENT OF THE TWO-PRONGED *AGUILAR-SPINELLI* TEST: *ILLINOIS V. GATES*

The Supreme Court developed the two-pronged *Aguilar-Spinelli* test to guide magistrates in determining when an informant's tip furnishes probable cause to issue a search warrant.[1] Under the test, a police officer applying for a warrant had to present the magistrate with a factual showing of both the informant's basis of knowledge and either the credibility of the informant or the reliability of his information.[2] The two-pronged test accommodated law enforcement interests by allowing search warrants based on informant tips. At the same time, it fostered fourth amendment protections by requiring that only reliable, trustworthy tips be used.

In *Illinois v. Gates*,[3] the Supreme Court abandoned the *Aguilar-Spinelli* two-pronged test and replaced it with an approach that considers the "totality of circumstances."[4] The Court argued that a totality of circumstances approach traditionally has guided probable cause determinations. The majority also claimed that the two-pronged test was unduly rigid and technical. These reasons, however, do not support rejection of the *Aguilar-Spinelli* test.[5] In addition, *Gates* does more than replace the two-pronged test with a simpler, more practical standard; it drastically expands the opportunity for police to use less than reliable information as a basis for warrants.[6] The Court could have better served both fourth amendment and police interests by retaining and clarifying the two-pronged test.

I
BACKGROUND

A. Theoretical Framework

The fourth amendment requires that police magistrates issue search

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1 *See infra* notes 30-36, 38-46 and accompanying text.

2 *Id.*

3 103 S. Ct. 2317 (1983).

4 *See id.* at 2332. The *Aguilar-Spinelli* test was developed in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

5 *See infra* notes 71-125 and accompanying text.

6 *See infra* notes 125-33 and accompanying text.

warrants only upon a showing of probable cause.[7] Because only reliable, trustworthy information can establish probable cause, the fourth amendment sometimes collides with law enforcement interests by limiting the use of suspicious but useful information as a basis for warrants.[8] Informant tips, which often provide police with valuable investigative assistance, are highly suspicious information because often little is known about the informant or the reliability of his information.[9] The Supreme Court developed the *Aguilar-Spinelli* two-pronged test[10] to guide magistrates in determining when an informant's tip furnishes probable cause. Under the test, a police officer applying for a warrant had to present the magistrate with facts indicating both the informant's basis of knowledge[11] and the credibility of the informant or the reliabil-

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7 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 thus bars the issuance of search warrants not supported by probable cause. In Brinegar v. United States, 338 U.S. 160 (1949), the Court defined probable cause to exist "where 'the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* at 175-76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)) (footnote omitted).

In certain limited circumstances, lawful searches may be conducted without a search warrant. *See* United States v. Ventresca, 380 U.S. 102, 106-07 & n.2 (1964). *See generally* Note, *The Informer's Tip as Probable Cause for Search or Arrest,* 54 CORNELL L. REV. 958, 958-59 n.2 (1969) (discussion of relationship between warranted and warrantless searches). The Supreme Court has strongly indicated its preference for warranted searches, *see Ventresca,* 380 U.S. at 106-07, even though the same probable cause standard applies to both types of searches. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.3, at 184 (1984). In warranted searches, a neutral, independent magistrate determines whether probable cause exists; in warrantless search situations, a possibly subjective and emotional police officer makes the determination. *Id.* at 185-86.

A "magistrate" is the judicial officer charged with determining whether probable cause exists to support the issuance of a search warrant.

8 *See* Hall, *Police and Law in a Democratic Society,* 28 IND. L.J. 133, 174 (1953). The fourth amendment often conflicts with the state's interest in effective law enforcement by constraining the ability of the police to conduct criminal investigations. The most prominent conflict concerns the so-called exclusionary rule, which bars the admission in court of improperly obtained evidence. *See* Weeks v. United States, 232 U.S. 383 (1914); *see also* United States v. Leon, 104 S. Ct. 3405 (1984) (establishing "good faith exception" to exclusionary rule), discussed *infra* note 135. *See generally* Glady, *The Exclusionary Rule,* 71 GEO. L.J. 434 (1982).

9 The term "informant" generally refers to an individual, often associated with or involved in criminal activity, who provides police with information about such activity. *See* M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT viii (2d ed. 1968). Information provided by anonymous sources, informants unknown to the police, is even more unreliable than information from known informants. *See Gates,* 103 S. Ct. at 2356 (Brennan, J., dissenting); *see also* Comment, *Anonymous Tips, Corroboration, and Federal Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 107 (1982) (suggesting that anonymous informants be treated as presumptively unreliable).

10 *See infra* notes 30-36, 38-46 and accompanying text.

11 *See Aguilar,* 378 U.S. at 114; *see also infra* notes 32-33 and accompanying text.

ity of his information.[12] The two-pronged *Aguilar-Spinelli* test served both fourth amendment and police interests by allowing informant based warrants, but only in carefully circumscribed situations.

B. Early Developments in Probable Cause Law

The articulation of the *Aguilar-Spinelli* doctrine was a culmination and clarification of major developments in fourth amendment probable cause law. The Supreme Court clarified the role of the magistrate in determining probable cause in *Johnson v. United States,*[13] describing it as "neutral and detached."[14] The magistrate had to determine, independently of a police officer's assertions, that probable cause existed.[15] In *Nathanson v. United States,*[16] the Court elaborated on what kind of information would justify a magistrate's probable cause determination. In *Nathanson,* a customs officer applying for a search warrant had sworn to the magistrate " 'that he ha[d] cause to suspect and [did] believe that' " contraband was at a certain suspected premises.[17] The Court held that the application was fatally defective because "[i]t went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts."[18] According to the Court, even a law enforcement officer, presumptively reliable, must provide the magistrate with more than bare conclusions.[19]

In *Draper v. United States,*[20] the Court recognized that hearsay information, in the form of an informant's tip, could furnish probable cause. In *Draper,* the Court held that a tip from a previously reliable informant, describing a suspect, in minute detail and predicting that the suspect would be carrying narcotics at a certain time and place, furnished probable cause for Draper's warrantless arrest.[21] The Court reasoned that

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12 *See Aguilar,* 378 U.S. at 114; *see also infra* notes 34-35 and accompanying text.

13 333 U.S. 10 (1948).

14 *Id.* at 13-14.

15 *See id.*

16 290 U.S. 41 (1933).

17 *Id.* at 44.

18 *Id.* at 46. *Nathanson*'s proscription of purely conclusory warrant applications was later embodied in *Aguilar-Spinelli*'s basis of knowledge requirement. *See Aguilar,* 378 U.S. at 112-14 (discussed *infra* notes 32-33 and accompanying text).

19 *Nathanson,* 290 U.S. at 47. In a similar case, Giordenello v. United States, 357 U.S. 480 (1958), the Supreme Court held that arrest warrants, like search warrants cannot be based on purely conclusory allegations. *Id.* at 485-87. The same probable cause standard governs search warrants and arrest warrants. *See* W. LAFAVE & J. ISRAEL, *supra* note 7, § 3.3, at 184-85.

20 358 U.S. 307 (1959).

21 *Id.* at 312-13. The informant's tip stated that Draper would arrive in Denver on a train from Chicago on either the eighth or ninth of September; that he would be dressed in a light colored raincoat, brown slacks, and black shoes; that he characteristically walked with a fast gait; that he would be carrying a tan zipper bag; and that he would be carrying a quantity of heroin. *Id.* at 309. The police, by waiting for Draper at the Denver train station, were able to corroborate all but the last allegation. *Id.* at 312-13.

because the police had confirmed the informant's detailed description of Draper, they could reasonably conclude that he also was carrying the drugs.[22] Thus, *Draper* holds that an informant's tip can establish probable cause if police corroborate a substantial number of the tip's details.[23]

Finally, in *Jones v. United States,*[24] the Court held that an informant's tip could furnish probable cause for issuance of a search warrant.[25] In *Draper,* the Court had accepted without discussion[26] the use of informant tips to establish probable cause. *Jones* expands *Draper* by permitting a tip, standing alone, to furnish probable cause, without any independent police corroboration.[27] The Court warned, however, that an informant's tip could serve as a basis for a warrant only "so long as a substantial basis for crediting the hearsay is presented."[28] The *Jones* Court, however, did not elaborate on or provide a test for determining what might constitute a "substantial basis."[29]

C. The Two-Pronged *Aguilar-Spinelli* Test

1. *Enunciation of the Two-Pronged Test:* Aguilar v. Texas

In *Aguilar v. Texas,*[30] the Supreme Court picked up on the task left by *Jones* and established a two-pronged test for determining when a "substantial basis" existed for crediting the hearsay information con-

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22 *Id.* at 312-13.

23 *Draper's* holding provided support for the Court's articulation of the independent corroboration technique as an indirect way of satisfying the veracity requirement of the *Aguilar-Spinelli* test. *See Spinelli,* 393 U.S. at 417 (discussed *infra* notes 44-46 and accompanying text).

24 362 U.S. 257 (1960). In *Jones,* the Court upheld a search warrant based on a tip from a reliable informant who had provided correct information to the police in the past and who had asserted that he personally purchased narcotics from the suspects, known by the police to be drug addicts. *Id.* at 266-69 & n.2.

25 362 U.S. at 269.

26 *See* Moylan, *Hearsay and Probable Cause: An* Aguilar and Spinelli *Primer,* 25 MERCER L. REV. 741, 744 (1974) (noting that *Draper* did not adddress itself "significantly" to a qualitative analysis of receivable hearsay); *see also* Brinegar v. United States, 338 U.S. 160 (1949) (hearsay accepted as legitimate factor in determining whether a policeman had probable cause for the warrantless search of an automobile).

27 There *was* some form of corroboration in *Jones.* The corroboration amounted to some confirmation "by other sources," and to a certain extent by the fact that the suspects were known drug addicts. 362 U.S. at 268-69. There was, however, no independent police corroboration, as there had been in *Draper* and as the Court later required in *Spinelli. See infra* notes 44-45 and accompanying text.

28 362 U.S. at 269.

29 *See* Moylan, *supra* note 26, at 781. The "substantial basis" language of *Jones* has had far-reaching implications. *See* Illinois v. Gates, 103 S. Ct. 2317, 2334 (1983) (finding "substantial basis" for concluding that probable cause existed); *see also infra* notes 77-82 and accompanying text (criticizing Court's reliance in *Gates* on the "substantial basis" language as providing a discrete probable cause test).

30 378 U.S. 108 (1964).

tained in an informant's tip.[31] According to that test, the officer had to first present the magistrate with the facts upon which the informant had based his conclusion that criminal activity had taken place.[32] This first requirement, the "basis of knowledge" prong, required that the informer have obtained his knowledge by personal observation or in some other dependable manner rather than through mere rumor.[33] Second, the officer had to provide the magistrate with facts establishing either the informant's credibility or the reliability of his information.[34] The veracity prong could be satisfied primarily by a showing that the informant previously had supplied the police with accurate information.[35] The Court

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31 The "two-pronged test," as it was termed in Spinelli v. United States, 393 U.S. 410 (1969), was contained in a single paragraph:

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

Aguilar, 378 U.S. at 114.

32 *Aguilar,* 378 U.S. at 114. The first prong has been termed the "basis of knowledge" prong. *See* Moylan, *supra* note 26, at 747; *see also Gates,* 103 S. Ct. at 2327. *See generally* Stanley v. State, 19 Md. App. 507, 530-31, 303 A.2d 847, 861 (1974) (thorough examination of two-pronged test).

33 *See* Note, *supra* note 7, at 960; *see also* Note, *Probable Cause and The First-Time Informer,* 43 U. COLO. L. REV. 357, 359 (1972) (informant must provide "the factual basis on which he grounds his claim that a crime has been committed"). In United States v. Ventresca, 380 U.S. 102 (1965), the Court did not explicitly apply the *Aguilar* two-pronged test, but it did suggest that personal observation by the informant satisfied the basis of knowledge proxy. *Id.* at 110-16. *Cf.* Comment, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards,* 81 YALE L.J. 703, 705 n.16 (1972) (basis of knowledge requirement "places a premium on personal observation; [i]f the informant claims first-hand knowledge, a detailed description of the incriminating evidence observed may not be required").

The court in *Aguilar* suggested an alternate way of satisfying the basis of knowledge requirement: " '[An] affirmative allegation that the affiant spoke with personal knowledge of the matters contained [in the tip].' " 378 U.S. at 113 (quoting Giordenello v. United States, 357 U.S. 480, 486 (1958)).

In *Spinelli,* the Court provided an indirect way to satisfy the basis of knowledge prong: abundant detail in the tip. *See Spinelli,* 393 U.S. at 416. A tip in sufficient detail would indicate that the informant "is relying on something more substantial than a casual rumor . . . or an accusation based merely on an individual's general reputation." *Id. See also infra* notes 41-43 and accompanying text.

34 378 U.S. at 114. This second requirement has been termed the "veracity prong." *See* Moylan, *supra* note 26, at 747; *see also Gates,* 103 S. Ct. at 2327. The veracity prong itself has been subdivided into two parts: the "credibility spur" and the "reliability spur." *See* Moylan, *supra* note 26, at 757.

35 Generally, the state attempts to satisfy the veracity prong by showing that the informant has a record of providing the police with reliable information, thus fulfilling the credibility requirement. *See, e.g.,* McCray v. Illinois, 386 U.S. 300, 303-04 (1967) (15 or 16 instances of providing accurate information over the course of a year sufficient to establish credibility). If the state cannot establish credibility, it faces the task of establishing the reliability of the informant. *See, e.g.,* United States v. Harris, 403 U.S. 573, 583-84 (1971) (statement against informant's own penal interest may establish reliability); Ventresca v. United States, 380 U.S. 102 (1965) (statement by government investigator may be presumptively reliable).

In *Spinelli,* the Court suggested an additional way to satisfy the veracity prong: independent police corroboration of some of the details of the tip. *Spinelli,* 393 U.S. at 417-18.

made it clear that each prong had to be satisfied independently.[36] Applying this two-pronged test to the facts of *Aguilar*, the Court struck down a search warrant issued on the basis of a police officer's affidavit, which recited, in part, merely that "[a]ffiants have received reliable information from a credible person and do believe that" narcotics are on the premises to be searched.[37]

2. *Elaboration of the Two-Pronged Test:* Spinelli v. United States

In *Spinelli v. United States*,[38] decided four years after *Aguilar*, the Court clarified and explained "*Aguilar*'s two-pronged test."[39] *Spinelli* emphasized that the basis of knowledge and veracity prongs had to be established independently;[40] a strong showing of one could not compensate for an insufficient showing of the other. *Spinelli* expanded the *Aguilar* analysis, however, by providing two ways a defect in either of the prongs could be cured.

Abundant detail in the tip could remedy a defective showing of basis of knowledge, provided the detail was as extensive as that in *Draper*, which, according to the Court, was a "suitable benchmark."[41]

For a more extensive discussion of this aspect of *Spinelli*, see *infra* notes 44-46 and accompanying text.

36 378 U.S. at 114. "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, *and* some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable' "). *Id.* (emphasis added) (footnote omitted). *See also Harris*, 403 U.S. at 592 (Harlan, J.,dissenting) (noting that two prongs were "analytically severable"); Comment, *Anonymous Tips, Corroboration and Probable Cause: Reconciling the Spinelli-Draper Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 100 (1982) (magistrate must know source of informant's knowledge, as well as police reasons for crediting informant's veracity).

37 *Aguilar*, 378 U.S. at 109. The affidavit presented no indication that the affiant's source " 'spoke with personal knowledge.' " *Id.* at 113. From the face of the affidavit, the Court could only discern that the informant "merely suspected, believed or concluded that there were narcotics in petitioner's possession." *Id.* at 113-14. Thus, "[t]he magistrate . . . could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' " *Id.* at 114.

38 393 U.S. 410 (1969). In *Spinelli* a search warrant was issued upon an affidavit which stated that FBI agents had seen the suspect, Spinelli, drive from Illinois to St. Louis and enter a particular apartment. The agents learned from the telephone company that there were two phones in this apartment. Neither phone, however, was listed in Spinelli's name. The affidavit went on to state that the FBI had been informed by a "reliable informant that . . . Spinelli [was] operating a handbook and accepting wagers." *Id.* at 413-14.

39 In *Spinelli*, the Court labelled requirements outlined in *Aguilar* as the "two-pronged test." *Id.* at 413. *See* Moylan, *supra* note 26, at 747.

40 *Spinelli*, 393 U.S. at 415-16; *see* United States v. Harris, 403 U.S. at 592 (Harlan, J., dissenting); Moylan, *supra* note 26, at 747 (Court in *Spinelli* first applied basis of knowledge prong and then independently and distinctly applied the veracity prong).

41 *Spinelli*, 393 U.S. at 416. In *Draper*, the informant did not indicate how he obtained the information, but he did report the day and means of the suspect's arrival, the amount of heroin he would be carrying, and the clothing he would be wearing. According to the Court in *Spinelli*, the extent of such detail supported a reasonable inference "that the informant had gained his information in a reliable way." *Id.* at 416-17 (footnote omitted).

The presence of this detail would verify effectively that the informant relied on more than rumor, thereby fulfilling the goal of the basis of knowledge requirement.[42] This "cure," which came to be known as the "self-verifying detail technique," departed from *Aguilar,* "which required a statement [of] the informer's basis of knowledge and lacked any provision for the self-verifying detail substitute."[43]

The *Spinelli* Court also indicated that independent police corroboration of some of the details in a tip could remedy a defective showing of veracity, provided that, even with corroborated detail, the tip was as trustworthy as a tip that would pass *Aguilar*'s test without corroboration.[44] Confirmation of some of the tip's details would lend credence to the remaining, unverified portion.[45] According to the Court, neither the self-verifying detail technique nor the independent corroboration technique saved the tip at issue in *Spinelli.*[46]

D. Other Developments in the *Aguilar-Spinelli* Framework

The Supreme Court also dealt with search warrants based on informants' tips in *United States v. Ventresca,*[47] and *United States v. Harris.*[48] In *Ventresca,* decided after *Aguilar* but before *Spinelli,* the Court held that a search warrant based on information supplied by Internal Revenue Service agents passed the *Aguilar* test. The agents' personal observations of the activity in question satisfied the basis of knowledge prong.[49] Furthermore, the Court went beyond *Aguilar* by finding the veracity prong satisfied without independent proof of the agents' credibility or the reli-

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42 *Id.* at 416-17.

43 Note, *supra* note 7, at 962 n.26. Judge Moylan coined the phrase "self-verifying detail technique." Moylan, *supra* note 26, at 749.

44 393 U.S. at 415. By referring to the *Aguilar* standard, the Court kept the independent corroboration technique within *Aguilar*'s analytical framework. One commentator has suggested that *Aguilar* itself may have indicated that independent corroboration could satisfy the veracity prong. *See* Note, *supra* note 7, at 960 & n.10 (citing *Aguilar,* 378 U.S. at 114-15 n.5).

45 *See* Moylan, *supra* note 26, at 748. A number of commentators have argued that probable cause based on independent corroboration of details should be limited to situations where police have confirmed incriminating details because "[c]orroboration of the innocent detail [alone] does not negate the possibility that the informer is lying about other incriminating facts." Note, *supra* note 33, at 362; *see also* Note, *supra* note 7, at 967 (arguing that only corroboration of incriminating allegations should be relevant because "a skillful liar would always allege *some* true innocent facts to make his story appear credible") (footnote omitted) (emphasis in original).

46 The basis of knowledge prong failed because "[t]he tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that [defendant] was running a bookmaking operation." 393 U.S. at 416. The veracity prong failed because allegations that defendants could have used the phones specified by the informant for illicit purposes "cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against [defendant] on the basis of information obtained in a reliable way." *Id.* at 417.

47 380 U.S. 102 (1965).

48 403 U.S. 573 (1971).

49 380 U.S. at 109 (affidavit sets forth a "good many" of underlying circumstances).

ability of their information.[50] Instead, the Court treated statements from IRS agents as presumptively reliable, noting that "[o]bservations of fellow officers of government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number."[51] In holding such observations plainly reliable, the Court urged magistrates not to invalidate a warrant "by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner."[52]

In *Harris,* the Court upheld a warrant based on an informant's tip even though the affidavit provided no factual basis to support the affiant's assertion that the informant was a "prudent person."[53] The plurality opinion, written by Chief Justice Burger, indicated that the veracity requirement was satisfied through two kinds of corroborative evidence: the suspect's reputation among law enforcement officers of frequent involvement in criminal activity[54] and the fact that the informant's statements were made against his penal interest.[55] *Harris,* therefore, elaborated on what types of facts police may present to the magistrate to satisfy the veracity prong; it did not depart from the basic *Aguilar-Spinelli* standard.[56]

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50 *Id.* at 111.

51 *Id.* (footnote omitted). *See also Gates,* 103 S. Ct. at 2356 (Brennan, J., dissenting) (police are presumptively reliable). *Cf.* Nathanson v. United States, 290 U.S. at 47 (police officer must present magistrate with more than conclusory allegations).

52 380 U.S. at 108-09. The Court in *Gates* erroneously seized on this dictum as supporting a "totality of circumstances" approach. 103 S. Ct. at 2333. *See infra* notes 83-86 and accompanying text.

53 403 U.S. at 575.

54 *Id.* at 583. The assertion in *Harris* that reputation may be corroborative at first glance seems inconsistent with *Spinelli.* In *Spinelli,* the Court discounted evidence that the suspect there was "a known gambler." 393 U.S. at 418-19. Furthermore, the *Harris* plurality disapproved *Spinelli* to the extent it disallowed the use of reputation. 403 U.S. at 583. The two cases, however, are distinguishable. The assertion of the suspect's reputation in *Spinelli* was unsupported by any facts; but in *Harris,* the affidavit detailed the informant's knowledge of Harris' reputation and indicated that others held a similar opinion. *Id.* at 575. *See also* Moylan, *supra* note 26, at 785 n.130. *But see Harris,* 403 U.S. at 590-91.

55 403 U.S. at 583. This inference has been criticized sharply by one commentator, who argued that because many informants are compensated for their information with an assurance of nonprosecution or leniency, superficially incriminating statements may actually not be against penal interest. *See* Comment, *supra* note 33, at 707 n.28.

56 The plurality opinion does not, however, demonstrate a strong commitment to the *Aguilar-Spinelli* test. At one point, the plurality suggested that the fact that the informant stated he observed the activity in question could help satisfy the veracity requirement. 403 U.S. at 581. Such a suggestion departs from the "analytical severability" of the two prongs of the *Aguilar-Spinelli* test. *See Harris,* 403 U.S. at 572 (Harlan, J., dissenting).

The potential questions raised by this language do not seem to have undermined the *Aguilar-Spinelli* test, as many lower courts in cases arising subsequent to *Harris* have required independent satisfaction of each of the two prongs of the test. *See, e.g.,* Stanley v. State, 19 Md. App. 507, 313 A.2d 847 (Md. App. 1974).

II

ILLINOIS V. GATES[57]

In May 1978, the Bloomingdale, Illinois, Police Department received by mail an anonymous letter stating that a local couple, Susan and Lance Gates, made their living strictly by selling illegal drugs and had over $100,000 worth of drugs in the basement of their home. The letter also detailed the typical *modus operandi* of the couple. The Gates periodically would travel to Florida, load a car with drugs and return to Bloomingdale. The letter predicted the date of the couple's next trip and described their travel arrangements. According to the informant, Susan Gates would not be accompanying her husband on the trip.[58] Police confirmed that Lance Gates had made a plane reservation to Florida, flown down, checked into a hotel, and left early the next morning in a car heading north on an interstate road with an unidentified woman, who later turned out to be his wife. Thus, one detail of the tip was erroneous, because Ms. Gates did accompany her husband on the return trip. On the basis of the letter and the subsequent police corroboration, the police obtained a search warrant for the Gates' house and car. A search conducted upon the couple's return from Florida produced a substantial quantity of illegal drugs.[59]

Prior to the Gates' trial for violating state drug laws, the Court suppressed all evidence obtained in the search on the ground that the warrant was not supported by probable cause.[60] The Illinois Supreme Court affirmed the suppression order reasoning that because the tip was from an anonymous source, and, because the letter contained mere conclusions, the tip failed to satisfy the *Aguilar* two-pronged test either directly or by way of the *Spinelli* self-verifying detail and independent corroboration techniques.[61] The United States Supreme Court granted certiorari to decide whether the Illinois court correctly decided that the tip did not establish probable cause.[62] The Court reversed in an opinion written by Justice Rehnquist.[63]

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57 103 S. Ct. 2317 (1983).

58 *Id.* at 2325.

59 *Id.* at 2325-26.

60 *See* People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981).

61 *Id.* at 390, 423 N.E.2d at 893. According to the Illinois Supreme Court, the tip did not directly satisfy the *Aguilar-Spinelli* test because it came from an anonymous source and stated mere conclusions. *Id.* at 383-86, 423 N.E.2d at 890-91. The court also found that neither of *Spinelli*'s remedial measures was satisfied. The basis of knowledge prong was not satisfied because the amount of detail in the tip did not approach the amount of detail in the tip in Draper v. United States, 358 U.S. 307 (1959). *See Gates,* 85 Ill. 2d at 389, 423 N.E.2d at 893. The veracity prong was not satisfied because the police had corroborated only innocent details. *See Gates,* 85 Ill. 2d at 390, 423 N.E.2d at 893. For a discussion of these two provisions of *Spinelli,* see *supra* notes 41-46 and accompanying text.

62 103 S. Ct. at 2321.

63 103 S. Ct. at 2336. Chief Justice Burger, and Justices Blackmun, Powell, and O'Connor joined Justice Rehnquist's opinion.

The *Gates* majority held that the magistrate issuing the warrant had a "substantial basis" for concluding that probable cause existed.[64] In reaching this conclusion, the Court rejected the two-pronged *Aguilar-Spinelli* test in favor of a "totality of circumstances" approach that it claimed "traditionally has informed probable cause determinations."[65] Although the majority agreed with the Illinois court that the tip, standing alone, did not provide probable cause,[66] it did find that "the totality of circumstances" provided a "substantial basis" for finding probable cause.[67] According to the majority, basis of knowledge and veracity were not irrelevant to the probable cause inquiry but were best understood as "closely intertwined issues that may usefully illuminate the common-sense practical question [of] whether there is a 'probable cause.' "[68] The majority argued that basis of knowledge and veracity should not be analyzed independently; instead, a strong showing of one should be able to compensate for a deficiency in the other.[69] The majority implied that only the totality of circumstances approach could alleviate what it perceived as the undue rigidity and over-technicality of the two-pronged test.[70]

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64 *Id.* at 2336. The majority borrowed the "substantial basis" term from Jones v. United States, 362 U.S. 257 (1960) (there was "substantial basis" to conclude that narcotics were present in place to be searched). *See supra* notes 28-29 and accompanying text. For criticism of the Court's use of *Jones,* see *infra* notes 77-82 and accompanying text.

65 *Gates,* 103 S. Ct. at 2332. This Note rejects the Court's contention that a "totality of circumstances" approach has traditionally guided probable cause determinations. *See infra* notes 74-91 and accompanying text.

Although abandoning the *Aguilar-Spinelli* test, the Court refrained from overruling the decisions themselves. Arguably, the outcome of each case, a finding of no probable cause, would be the same under *Gates*'s "totality of circumstances" approach.

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

67 The factors relied on by the Court in determining that the "totality of circumstanccs" supported a finding of probable cause, included "extensive" detail in the tip, *see id.* at 2334, the fact that the informer predicted a third party's future actions, *see id.*, police corroboration of some of the details, *id.* at 2334-35, and the suspiciousness of some of the corroborated facts. *Id.* at 2334. In their totality, these factors certainly do not overwhelmingly indicate probable cause for a search or seizure. The detail in the tip was not particularly extensive, nor were the corroborated facts, in themselves, or even in context, notably suspicious. Nor were the facts that the Gates flew to Florida, "well-known as a source of . . . illegal drugs," *see id.*, and that they left on a highway "used by travelers from South Florida to Chieago," *see id.* at 2326, particularly enlightening. These factors in their totality did warrant some suspicion but possibly not enough to overcome the inherent suspiciousness of the anonymous tip. *See id.* at 2360-62 (Stevens, J., dissenting).

68 *Id.* at 2328. The majority went out of its way to emphasize that probable cause is "a fiuid concept—turning on the assessment of probabilities in particular factual contexts," *see id.*, but the Court failed to demonstrate that the two-pronged test conflicted with such a characterization of probable cause. *See infra* notes 92-125 and accompanying text.

69 *See* 103 S. Ct. at 2329-30.

70 *See id.* at 2328-32. This Note contends that the two-pronged test was not unduly rigid or technieal. *See infra* notes 92-125 and accompanying text.

In a separate concurring opinion, Justice White criticized the majority for abandoning the *Aguilar-Spinelli* test. 103 S. Ct. at 2347 (White, J., concurring). According to White, it was not necessary to abolish the test either to alleviate confusion in the lower courts or to reverse

III
ANALYSIS

A. The *Gates* Court's Failed Attempt to Justify its Rejection of the *Aguilar-Spinelli* Two-Pronged Test

The *Gates* Court's justifications for abandoning the two-pronged test do not withstand close scrutiny. The majority failed to substantiate its contention that a totality of circumstances approach traditionally has guided probable cause determinations.[71] It also failed to demonstrate that the two-pronged test was too rigid and technical for effective use by law enforcement officials.[72]

1. *The Court's Failure to Identify a Pre-existing Totality of Circumstances Approach*

The majority in *Gates* misread several prior probable cause decisions in order to "reaffirm" a "traditional" totality of circumstances test. The majority claimed a totality of circumstances approach was "far more consistent with [the Court's] prior treatment of probable cause than . . . any rigid demand that specific 'tests' be satisfied by every informant's tip."[73] None of the cases cited by the Court applied a totality of circumstances approach or anything analogous to it. Moreover, the *Aguilar-Spinelli* test did not depart from the principles of the cases relied on by the *Gates* majority.

The *Gates* Court cited *Draper v. United States*[74] to support its assertion that a totality of circumstances approach "traditionally" guided probable cause determinations of informants' tips.[75] The *Draper* Court never revealed what "test," if any, it used to determine that the tip in that case established probable cause. Nonetheless, the Court's exclusive reliance on the abundant detail in the tip and the police corroboration of most of the details closely resembled *Spinelli*'s self-verifying detail and independent corroboration techniques.[76] Therefore, the *Aguilar-Spinelli* test did

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the Illinois court. *See id.* at 2350-51. Instead, White argued that the Court should have preserved and clarified the two-pronged test. *Id.* at 2350-51. Moreover, he feared the majority's decision may "foretell the evisceration of the probable cause standard." *Id.* at 2350.

In a vigorous dissent, Justice Brennan, joined by Justice Marshall, argued that the majority should not have eliminated the two-pronged test. *See id.* at 2351 (Brennan, J., dissenting). Justice Stevens, in a separate dissent joined by Justice Brennan, argued that the error in the informant's letter, *see supra* notes 58-59 and accompanying text, rendered the search warrant invalid under the majority's "totality of circumstances" test. *See* 103 S. Ct. at 2361-62 (Stevens, J., dissenting).

71 *See infra* notes 73-91 and accompanying text.

72 *See infra* notes 92-124 and accompanying text.

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

74 358 U.S. 307 (1959). *See supra* notes 20-23 and accompanying text.

75 *See* 103 S. Ct. at 2334.

76 For a discussion of *Spinelli,* see *supra* notes 38-46 and accompanying text.

not depart from *Draper*; indeed, *Draper* fits neatly into the *Aguilar-Spinelli* analytical framework.

The *Gates* majority seized on the "substantial basis for crediting hearsay" language of *Jones v. United States*[77] as evidence of a totality of circumstances approach.[78] In *Jones,* however, the "substantial basis" language referred solely to the issue of whether the informant's tip could be considered reliable.[79] The affidavit on its face indicated how the informant had acquired the information.[80] The *Jones* Court sought to determine only whether there was a "substantial basis" for crediting the informant's statement.[81] *Aguilar* then built the two-pronged test on the foundation laid by *Jones.*[82]

Justice Rehnquist interpreted the admonition in *United States v. Ventresca*[83] not to interpret affidavits for search warrants "in a hypertechnical rather than a common sense manner," as providing a distinct alternative to the two-pronged *Aguilar* test.[84] In *Ventresca,* however, the Court's directive to use common sense comes into play only after the Court has been informed of some of the underlying circumstances on which an informant's tip is based and facts suggesting the informant is credible or his information reliable.[85] Therefore, the *Ventresca* Court demanded information tending to establish *Aguilar*'s basis of knowledge and veracity prongs.[86] Moreover, the timing of the Court's decision in *Ventresca,* between *Aguilar* and *Spinelli,* neither of which espouse any alternative to strict compliance with the two-pronged test, weakens the majority's assertion.

Finally, the *Gates* majority relied on *United States v. Harris*[87] in support of a totality of circumstances test.[88] In fact, the plurality opinion in *Harris* did not depart from the *Aguilar-Spinelli* framework. Both Chief Justice Burger, writing for the plurality, and Justice Harlan, who dissented, acknowledged that the affidavit satisfied the basis of knowledge

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77 362 U.S. 257 (1960). *See supra* notes 24-29 and accompanying text.

78 *See* 103 S. Ct. at 2331.

79 *Jones,* 362 U.S. at 271-72.

80 *Id.* at 267-68 n.2.

81 *Id.* at 271-72; *see also* Moylan, *supra* note 26, at 781-82.

82 *See* 378 U.S. at 114-15; *see also* Moylan, *supra* note 26, at 781 ("the two-pronged test fleshed out the earlier phrase 'a substantial basis for crediting' "); Comment, *supra* note 33, at 705 (*Aguilar* built its two-pronged test on the foundation laid by *Jones*).

83 380 U.S. 102 (1965).

84 *See id.* at 109, *quoted in Gates,* 103 S. Ct. at 2331; *see also Gates,* 103 S. Ct. at 2333.

85 380 U.S. at 108-09.

86 As Judge Moylan noted, "*Ventresca*['s] oft quoted directive comes into play only after *Aguilar*'s standards have first been met." Moylan, *supra* note 26, at 783; *see also* Note, *supra* note 7, at 961 n.20 (The Court "probably meant only that common sense should be used in determining whether sufficient circumstances have been set forth to pass each of the tests required by *Aguilar.*").

87 403 U.S. 573 (1971).

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

requirement.[89] Nor was there any disagreement in *Harris* that the veracity requirement also had to be established independently.[90] The debate in *Harris* was merely over the *means* by which the veracity prong could be satisfied.[91]

Thus, the flaw in the *Gates* Court's "reaffirmation" of a totality of circumstances approach lay in its failure to recognize that the decisions upon which it was relying were inconsistent with such an approach. None of those cases applied a totality of circumstances approach.

2. *The Court's Erroneous Perception of the* Aguilar-Spinelli *Test as Unduly Rigid and Overly Technical*

The *Gates* Court also justified its rejection of the *Aguilar-Spinelli* two-pronged test on the ground that the test was too rigid and technical.[92] According to the Court, the test was inflexible because it required independent verification of the basis of knowledge on the one hand and veracity on the other.[93] The majority also concluded that the overly technical nature of the test was incompatible with the law enforcement setting in which warrant decisions are made.[94] The Court failed to provide adequate justification for either of these conclusions.

The Court failed adequately to consider the rationale underlying the requirement that the basis of knowledge and veracity prongs be satisfied independently. The two prongs protect fourth amendment rights from different risks. The basis of knowledge prong guards against the use of purely conclusory information;[95] the veracity prong ensures that there is some reason to trust the person who supplies the information.[96] Because the veracity prong and the basis of knowledge prong each serve a different function, any determination of probable cause should account for the prongs independently. An analogy between the role of the

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89 *See Harris,* 403 U.S. at 578-79 (affidavit recounts "personal and recent observations"); *id.* at 589 (Harlan, J., dissenting) ("the affidavit sets forth sufficient data to permit a magistrate to determine that, if the informer was likely telling the truth, information adequate to support a finding of probable cause was likely obtained in a reliable fashion"). *See also* Moylan, *supra* note 26, at 784 (all opinions "agreed that *Aguilar*'s 'basis of knowledge' prong was preeminently satisfied").

90 *See Harris,* 403 U.S. at 579 ("a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a *factual* basis for crediting the report of an unnamed informant") (emphasis in original); *see also* Moylan, *supra* note 26, at 784.

91 The plurality declared that a statement against penal interest could help satisfy the veracity prong, 408 U.S. at 583-84, a proposition condemned by Justice Harlan in dissent. *See id.* at 594-96 (Harlan, J., dissenting).

92 *See* 103 S. Ct. at 2328-32.

93 *See id.* at 2327-40. The Court stated that "the [*Aguilar-Spinelli*] test has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot be sensibly divorced from the other facts presented to the magistrate." *Id.* at 2330 (footnote omitted).

94 *See id.* at 2330-31.

95 *See* Note, *supra* note 7, at 960 n.9.

96 *See* Moylan, *supra* note 26, at 757-59.

magistrate in determining probable cause and the role of the fact finder in determining guilt demonstrates the necessity for establishing each prong separately. Both determinations call for an assessment of the credibility of those who furnish the information, and, if the source is credited, for a weighing of the information itself.[97] Even the *Gates* majority recognized the complementary roles played by the basis of knowledge and veracity requirements, noting that both factors are "highly relevant" in a probable cause inquiry.[98]

Requiring that the magistrate evaluate an informant's tip on the basis of both prongs ensures that only well-founded information from a credible source will be able to support a finding of probable cause for the issuance of a warrant.[99] By depriving the two prongs of their independent status, the *Gates* majority has neutralized the *Aguilar-Spinelli* test's protection against the issuance of warrants based on purely conclusory information provided by potentially unreliable informants.

The *Gates* majority also contended that the *Aguilar-Spinelli* test deprived law enforcement officials of the use of potentially valuable information by leaving "virtually no place for anonymous [tips]."[100] This argument is erroneous in two respects. First, the *Aguilar-Spinelli* test did not *bar* the use of anonymous tips to provide probable cause. Such tips merely would have to satisfy *Spinelli*'s independent corroboration technique,[101] because nothing can be discerned about the veracity of an anonymous informant. Second, the Court ignored the inherently suspicious nature of tips from anonymous informants. Such tips deserve particularly stringent scrutiny because of their suspicious origin.[102]

The Court provided three examples to demonstrate that the basis of knowledge and veracity prongs should not be treated as independent requirements.[103] These examples, however, ignore fourth amendment protections[104] and are inconsistent with probable cause decisions that the Court expressly endorsed in *Gates*. In the first example, the majority contended that a previously reliable informant presumptively satisfied the basis of knowledge requirement.[105] Under such an approach, a

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97 *See* Moylan, *supra* note 26, at 743. Judge Moylan does concede, however, that his analogy is "less than perfect." *Id.*

98 *See* 103 S. Ct. at 2327. The Court stated: "We agree with the Illinois Supreme Court that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." *Id.*

99 *See* Moylan, *supra* note 26, at 750-52.

100 *Gates,* 103 S. Ct. at 2331-32.

101 *See* Comment, *supra* note 9, at 107.

102 *See id.* ("A tip from an anonymous informant is presumptively unreliable because the police and the magistrate cannot know the motives of the anonymous informant—he may be motivated by a sense of civic duty, revenge, or a desire to eliminate criminal competition.") (footnote omitted).

103 *See Gates,* 103 S. Ct. at 2329-30.

104 *See supra* notes 95-99 and accompanying text.

105 *See Gates,* 103 S. Ct. at 2329. The Court stated that:

purely conclusory statement by a police officer known to be honest and reliable would also be acceptable.[106] In *Nathanson v. United States,*[107] however, the Court held that the unsupported assertions of a police officer can never furnish probable cause.[108] Thus, as Justice White noted in his concurring opinion, "[i]t would be 'quixotic' if a similar statement from an honest informant, but not one from an honest [police] officer could furnish probable cause."[109] The court's first example at best establishes a curious inconsistency and at worst eliminates *Nathanson*'s valuable protection against overreaching by the police.

As its second example, the Court stated that a tip from an unquestionably honest citizen would not require rigid scrutiny of the basis of knowledge requirement.[110] In support, the Court cited its opinion in *Adams v. Williams.*[111] *Adams,* however, concerned a *Terry*-stop,[112] not a determination of probable cause. The standard under which a policeman may conduct a *Terry*-stop, a "reasonable suspicion" of criminal activity, is less stringent than the probable cause standard.[113] Furthermore, in *Adams,* the policeman received the tip in question from a person he knew at 2:15 A. M. in a high crime area.[114] The Court did not indicate whether the informant was an "unquestionably honest citizen;" it merely stated that the informant had provided information in the past.[115] Consequently, the Court in *Adams* recognized that the tip at issue "may have been insufficient for a . . . search warrant."[116]

The Court's final example states that a highly detailed tip could satisfy the veracity requirement as well as the basis of knowledge requirement.[117] The specificity of a tip sheds no light on veracity[118] be-

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> [I]f, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip.

Id.

106 *See* LaFave, *Nine Key Decisions Expand Authority to Search and Seize,* 69 A.B.A. J. 1742, 1744 (1983).

107 290 U.S. 41 (1933).

108 *See id.* at 47; *see also Gates,* 103 S. Ct. at 2358 (Brennan, J., dissenting). Other cases have also held that the unsupported assertions of a police officer cannot support a finding of probable cause. *See, e.g.,* Whiteley v. Warden, 401 U.S. 560, 564-65 (1971); Jones v. United States, 362 U.S. 257, 269 (1960); Giordenello v. United States, 357 U.S. 480 (1958).

109 103 S. Ct. at 2350 (White, J., concurring).

110 *Id.* at 2329.

111 407 U.S. 143 (1972).

112 *See* Terry v. Ohio, 392 U.S. 1 (1968). *Terry* allows police to stop and question a suspect in the absence of grounds for an arrest if there is a reasonable suspicion of criminal activity. *Id.* at 20-27; *see* W. LAFAVE & J. ISRAEL, *supra* note 7, § 3.8, at 292-93.

113 *See Adams,* 407 U.S. at 147.

114 *Adams,* 407 U.S. at 144-45.

115 *Id.* at 146-47.

116 *Id.* at 147 (citations omitted).

117 *See Gates,* 103 S. Ct. at 2329-30.

118 *See* LaFave, *supra* note 106, at 1744.

cause, as one court has noted, "[i]f the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes."[119] The three examples, therefore, weaken rather than support the Court's rationale for treating the two prongs interdependently.

Justice Rehnquist, writing for the *Gates* majority, contended that the two-pronged test substantially impaired law enforcement. He asserted that the test seriously impeded " 'the most basic function of any government': 'to provide for the security of the individual and his property.' "[120] This argument shares the same weakness as the Court's characterization of the two-pronged test as too rigid; the criticism merely reflects the Court's advancement of police interests while ignoring another "basic function" of any government: protecting people from unwarranted incursions of their privacy.[121]

Finally, the majority argued that the "built-in subtleties"[122] of the two-pronged test were likely to confuse magistrates, who are typically neither lawyers nor judges.[123] The two-pronged test, however, assisted magistrates in determining probable cause by providing an analytical framework within which the nonlawyer could work.[124] The amorphous totality of circumstances approach will be far more confusing to magistrates because it is void of built-in guidelines.

B. The Future of Search Warrants Based on Informants' Tips

Illinois v. Gates will alter the balance between law enforcement and probable cause interests reflected in the *Aguilar-Spinelli* two-pronged test. The totality of circumstances approach advances police interests at the expense of privacy interests protected by the fourth amendment. The new approach will introduce mass confusion into lower court determinations of probable cause and make it difficult for reviewing courts to overturn a magistrate's determination of probable cause.

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119 Stanley v. State, 19 Md. App. 508, 533, 313 A.2d 847, 862 (Ct. Spec. Apps. 1974) (Moylan, J.).

120 *See* 103 S. Ct. at 2331 (citing Miranda v. Arizona, 384 U.S. 436, 539 (1966)).

121 *See generally* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

122 103 S. Ct. at 2331 (citing Stanley v. State, 19 Md. App. 507, 528, 313 A.2d 847, 860 (Md. App. 1974)). Judge Moylan wrote the *Stanley* opinion, which the *Gates* Court begrudgingly characterized as "conscientiously attempting to apply the 'two-pronged test.' " 103 S. Ct. at 2327 n.4. As the *Gates* majority noted, Judge Moylan's opinion in *Stanley* observed that "the built-in subtleties of the two-pronged test are such . . . that a slipshod application calls down upon us the fury of Murphy's Law[:] '[w]hat can go wrong, will go wrong.' " 19 Md. App. at 528 & n.21, 313 A.2d at 860 & n.21. Contrary to the Court's implication, however, Judge Moylan made this observation in the context of arguing for a rigorous, not loosened, application of the *Aguilar* test. *Id.* at 528, 313 A.2d at 860.

123 *See Gates,* 103 S. Ct. at 2330; *see also* Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972).

124 *See* LaFave, *supra* note 106, at 1743.

The decision in *Gates* does not simply replace the two-pronged test with a comparable approach as the Court contends. The totality of circumstances approach adopted in *Gates* will make it easier for police to obtain warrants based on tips from informants.[125] The new approach will permit magistrates to issue more warrants than the two-pronged test. Under the *Aguilar-Spinelli* test, a magistrate had to make two specific findings before considering whether a tip furnished probable cause. Under the standardless "totality of circumstances" approach, a magistrate has virtually unlimited discretion in determining whether an informant's tip supports a finding of probable cause.

The totality of circumstances approach will allow magistrates to find probable cause more frequently for two reasons. First, the lack of built-in guidelines will permit magistrates to rely on data wholly unrelated to determining whether probable cause exists.[126] Second, without the two-pronged test's requirement that the magistrate separately evaluate an informant's basis of knowledge and credibility, police officers may unduly influence a magistrate's decision whether to issue a warrant.[127] The often frenzied setting in which warrant decisions are made increases the risk of undue influence because magistrates are now not required to make specific findings, and more likely will rely, without question, merely on a police officer's allegation of probable cause. Thus, in many cases, the totality of circumstances approach effectively may shift the responsibility for determining when a tip provides probable cause from the magistrate to the investigating officer. A police officer, however, "engaged in the often competitive enterprise of ferreting out crime"[128] will not often give more than perfunctory consideration to a suspect's fourth amendment rights.[129]

The decision in *Gates* will limit significantly court review of magistrates' decisions.[130] It is well settled that reviewing courts must give great deference to a magistrate's determination of probable cause.[131] At the same time, since the police are the target of fourth amendment limitations, the primary responsibility for protecting fourth amendment

125 The most likely result of *Gates* will be an increase in the number of warrants issued. Conceivably, however, fewer warrants will be issued, because magistrates may cautiously apply the new, confusing standard. Whatever the empirical outcome, the demonstration in *Gates* of a permissive attitude toward law enforcement officials is potentially further reaching than the number of warrants issued.

126 *See* 103 S. Ct. at 2359 (Brennan, J., dissenting).

127 *See id.* Under the two-pronged test, the magistrate evaluated a police officer's assertion of probable cause against an objective standard. Without the objective standards of *Aguilar-Spinelli,* magistrates, particularly acquiescent ones, may have more trouble evaluating warrant applications.

128 Johnson v. United States, 333 U.S. at 13-14.

129 *See id.*

130 *See generally The Supreme Court, 1982 Term,* 97 HARV. L. REV. 1, 184 (1983) [hereinafter cited as *1982 Term*].

131 *See* Spinelli v. United States, 393 U.S. at 419.

rights lies with the courts.[132] The absence of clear standards in the totality of circumstances approach will make it extremely difficult for a reviewing court to overcome the presumption in favor of a magistrate's decision.[133] Because *Gates* virtually insulates the magistrate's decision from judicial review, the independence of his decision must be protected. The two-pronged test, however, unlike the totality of circumstances approach, provided such protection.

The two practical effects of *Gates,* increasing reliance by magistrates on police officers' contentions and increasing insulation of a magistrate's decision from judicial review, typify the Burger Court's advancement of law enforcement interests at the expense of fourth amendment protections. A further indication of this advancement was the Court's adoption after *Gates* of the good faith exception to the exclusionary rule in *United States v. Leon.*[134] In that case, the Court held that even when a reviewing court overturns a magistrate's finding of probable cause, the evidence seized under such an invalid warrant is nonetheless admissible when the law enforcement officials' "reliance on the magistrate's determination of probable cause was objectively reasonable."[135]

CONCLUSION

Under the *Aguilar-Spinelli* two-pronged test, hearsay statements from an informant could furnish probable cause for a magistrate to issue a warrant only if the warrant affidavit provided a factual indication of the informant's credibility or the reliability of his information. Decisions from the Supreme Court applying the test demonstrated its flexibility and utility in securing fourth amendment rights.

In *Illinois v. Gates,*[136] the Court ignored opportunities to refine and

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132 *See* Grinegar v. United States, 338 U.S. 160, 176 (1949).

133 *See 1982 Term, supra* note 130, at 184.

134 104 S. Ct. 3405 (1984).

135 *Id.* at 3423. *See also* Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984). In *Leon,* the magistrate's finding of probable cause was disapproved by the Ninth Circuit Court of Appeals, which applied the *Aguilar-Spinelli* test.

In *Leon* and *Sheppard,* the Court adopted the so-called "good faith" exception to the exclusionary rule. Under the exclusionary rule, evidence seized during searches conducted without probable eause was not admissible at trial. *See supra* note 8. Undcr this long-urged exception, *see, e.g.,* Stone v. Powell, 428 U.S. 465, 596-502 (1976) (Burger, C.J., concurring); United States v. Williams, 622 F.2d 830, 840-46 (5th Cir. 1980); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 90-94 (1981), such evidence is not excluded if the police had a good faith belief that a warrant was supported by probable cause. *Leon,* 104 S. Ct. at 3423, *Sheppard,* 104 S. Ct. at 3428.

136 *See 1982 Term, supra* note 130, at 185. In Massachusetts v. Upton, 104 S. Ct. 2085 (1984), the Court rcaffirmed its abandonment of the *Aguilar-Spinelli* test and adoption of a "totality of circumstances" approach. The Court also re-emphasized that "the task of a reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." *Id.* at 2085-86.

clarify this workable test. Driven by a desire to broaden police access to informant based search warrants, the Court replaced the two-pronged test with an amorphous "totality of circumstances" approach, that the Court erroneously argued traditionally has guided its past determination of probable cause. The reasons the Court advanced for abandoning the two-pronged test are unconvincing and camouflage the impact of the decision; these reasons conflict with well-established decisions, reaffirmed elsewhere in the opinion. *Gates* thus redefines the traditionally respected balance between police and fourth amendment interests to the detriment of privacy interests protected by the fourth amendment.

Alexander P. Woollcott