CONSTITUTIONAL LAW—SEARCH AND SEIZURE—TOTALITY OF CIRCUMSTANCES ANALYSIS APPLIED TO INFORMANT'S TIPS—*Illinois v. Gates*, 103 S. Ct. 2317 (1983).

To protect private citizens from unreasonable intrusions upon their "persons, houses, papers, and effects,"[1] the fourth amendment requires a finding of "probable cause" before a search warrant may be issued.[2] That provision fails, however, to delineate what constitutes probable cause, thus necessitating judicial interpretation.[3] Consequently, the United States Supreme Court has searched for definitive standards by which determinations of probable cause can be made.[4] Such determinations have been particularly troublesome in those cases involving the use of an informant's tip, either confidential, or, as in the case of *Illinois v. Gates*,[5] anonymous.[6]

On May 3, 1978, the Bloomingdale, Illinois Police Department received a handwritten, anonymous letter with no return address.[7] The letter described in detail the ongoing illegal drug trafficking of Lance and Sue Gates, a local couple, who made "their entire living [selling to] pushers."[8] The anonymous informant predicted an impending deal involving the transport of a large quantity of marijuana

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[1] U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[2] *Id.* Probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he] 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. Carroll v. United States, 267 U.S. 132, 162 (1925).

[3] *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949) (probable cause deals with probabilities and practical considerations, not legal technicalities); Nathanson v. United States, 290 U.S. 41 (1933) (mere affirmance of belief or suspicion not enough to find probable cause); Carroll v. United States, 267 U.S. 132 (1925) (reasonably trustworthy information leading to belief of criminal activity sufficient to establish probable cause).

[4] *See* Locke v. United States, 11 U.S. (7 Cranch) 339 (1813) (initial inquiry as to standard for determining probable cause).

[5] 103 S. Ct. 2317 (1983).

[6] *See infra* text accompanying notes 137-39 (discussing anonymous informants); *infra* notes 65 & 79 (discussing confidential informants).

[7] People v. Gates, 82 Ill. App. 3d 749, 750, 403 N.E.2d 77, 78 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

[8] *Gates*, 103 S. Ct. at 2325. The letter read, in part:
Most of their buys are done in Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys [sic] down and drives it back. Sue flys [sic] back after she drops the car off in Florida.
Id.

from Florida to Bloomingdale,[9] specified the location of the Gates's residence,[10] and stated that the couple had "over $100,000 worth of drugs in their basement."[11]

Upon receipt of the letter, the Bloomingdale police chief delivered it to Detective Charles Mader, who promptly initiated a follow-up investigation.[12] Mader discovered that an Illinois driver's license had been issued to Lance Gates,[13] although the address shown thereon was inconsistent with the one in the anonymous note.[14] Consequently, Mader contacted his own confidential informant, who revealed that Lance Gates's actual place of residence coincided with that given by the anonymous informant.[15]

Mader also discovered from Officer Ott, a Chicago policeman assigned to O'Hare Airport, that an "L. Gates" had made a reservation on an Eastern Airlines flight from Chicago to West Palm Beach on May 5.[16] At Detective Mader's request, agents of the Drug Enforcement Agency (DEA)[17] maintained surveillance of that flight and reported that Gates did, in fact, board the plane.[18] Shortly

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9 *Id.* The informant alleged that on May 3, Sue Gates would drive to Florida and within a few days, Lance would fly down and then drive the car back, "loaded with over $100,000.00 in drugs." *Id.*

10 *Id.* The note stated that Lance and Sue Gates lived "on Greenway, off Bloomingdale Rd. in the condominiums." *Id.*

11 *Id.* Had the letter's author not indicated that the Gates also had a large quantity of drugs in their home, an additional issue may have arisen as to whether there existed probable cause to search the premises. *See infra* notes 68-78 and accompanying text.

12 People v. Gates, 85 Ill. 2d 376, 379-80, 423 N.E.2d 887, 888 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

13 People v. Gates, 82 Ill. App. 3d 749, 751, 403 N.E.2d 77, 79 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). A physical description of Lance Gates was obtained from this driver's license. This later aided in identifying him while he was in the process of consummating the alleged drug transaction. *Id.*

14 *Gates*, 103 S. Ct. at 2325.

15 People v. Gates, 82 Ill. App. 3d 749, 751, 403 N.E.2d 77, 79 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). Detective Mader had, within the previous two years, obtained reliable information from this informant resulting in seven criminal convictions. *Id.*

16 *Id.* Upon making this flight reservation, Gates gave his phone number as 980-8427. The Illinois Bell Telephone Company verified this number as having been issued to Lance B. Gates, whose address was 198 B Greenway Drive, the same as that indicated by both the anonymous letter and the confidential informant. *Id.*

17 The DEA, a Federal agency, is frequently called upon to maintain surveillance and conduct investigatory operations in airports and, through the use of "drug courier profiles," detect drug trafficking and intercept "couriers" transporting narcotics. *See* United States v. Mendenhall, 446 U.S. 544, 562 (1980). These profiles "describe the characteristics generally associated with narcotics traffickers." *Id. But cf.* Reid v. Georgia, 448 U.S. 438, 441 (1980) (seizure of defendant fitting "drug courier profile" unlawful because agents' unparticularized suspicion insufficient).

18 *Gates*, 103 S. Ct. at 2325.

thereafter, a DEA agent in Florida observed Gates arrive in West Palm Beach, travel to a nearby Holiday Inn, and enter a room registered to Susan Gates.[19]

Early the following morning (May 6), Lance Gates and an unidentified woman left the hotel and, in a gray Mercury bearing Illinois license plates, drove northbound on a highway commonly used by travelers heading to Chicago.[20] Mader contacted the Illinois Secretary of State and discovered that the plates on the Mercury, although registered to Lance Gates,[21] had been issued for a Hornet station wagon.[22]

Detective Mader then filed a complaint for a search warrant, attaching thereto a signed affidavit, which contained the foregoing facts, as well as a copy of the anonymous letter.[23] The Circuit Court Judge of DuPage County approved the request and issued a warrant authorizing the police to search Mr. and Mrs. Gates, their Bloomingdale condominium, and the gray Mercury that they had driven from Florida.[24]

At 5:15 a.m. on May 7, twenty-two hours after their departure from West Palm Beach, the Gates arrived at their residence in Bloomingdale, where Illinois police awaited their return.[25] A search of the Mercury, conducted pursuant to the warrant, uncovered more than 350 pounds of marijuana,[26] while in the Gates' home, an additional twenty pounds of marijuana were found, along with drug paraphenalia and unlicensed firearms.[27] The Gates were arrested and later indicted on narcotics and firearms charges.[28] Prior to trial, they filed a motion to quash the arrest and search warrants, and to suppress all evidence thereby obtained,[29] asserting that the requirements for probable cause established in *Aguilar v. Texas*[30] had not

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19 *Id.* at 2325-26.

20 *Id.* at 2326.

21 People v. Gates, 85 Ill. 2d 376, 380, 423 N.E.2d 887, 889 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

22 People v. Gates, 82 Ill. App. 3d 749, 752, 403 N.E.2d 77, 79 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

23 *Id.* at 752 & n.1, 403 N.E.2d at 79 & n.1.

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

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

26 *Id.*

27 People v. Gates, 82 Ill. App. 3d 749, 752, 403 N.E.2d 77, 80 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

28 *Id.*

29 People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

30 378 U.S. 108 (1964). For an explanation of the *Aguilar* "two-pronged test" for probable cause, see *infra* notes 82-90 and accompanying text.

been met.[31] Specifically, the defendants argued that the anonymous letter did not set forth the underlying basis upon which the information was acquired, and that there had been no showing that the author was a "reliable" source.[32]

The Circuit Court of DuPage County granted the defendants' motion and the State of Illinois appealed.[33] On appeal, the prosecution argued that because there had been full corroboration of the allegations set forth in the letter, there was a "substantial basis" for crediting the information supplied.[34] In affirming the trial court's decision, the Illinois appellate court held that the information supplied in the anonymous letter did not "contain sufficient detail to allow the issuing judge to reasonably infer that the informer had obtained his information in a reliable way."[35] Upon the state's subsequent petition for leave to appeal, the Illinois Supreme Court affirmed, noting that the anonymous letter, coupled with Mader's affidavit, were insufficient to establish probable cause to issue a warrant.[36]

The State of Illinois filed a petition seeking review and the

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

[32] People v. Gates, 82 Ill. App. 3d 749, 752-53, 403 N.E.2d 77, 80 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). They further argued that the evidence obtained by Detective Mader through independent investigation in no way corroborated any accusations of criminal activity. People v. Gates, 85 Ill. 2d 376, 381, 423 N.E.2d 887, 889 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983); *see also* Spinelli v. United States, 393 U.S. 410 (1969) (discussing independent corroboration as additional factor in meeting requirements for establishing probable cause).

[33] People v. Gates, 85 Ill. 2d 376, 377, 423 N.E.2d 887, 889 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983).

[34] People v. Gates, 82 Ill. App. 3d 749, 754, 403 N.E.2d 77, 81 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). By employing a "substantial basis" argument, the State of Illinois, in effect, adopted the test for probable cause articulated by the Supreme Court in Jones v. United States, 362 U.S. 257 (1960).

[35] People v. Gates, 82 Ill. App. 3d 749, 754, 403 N.E.2d 77, 80 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). Judge Lindberg, writing for the majority, maintained that since the test for probable cause set forth in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), was not met, the lower court's order to quash and suppress must be affirmed. *Gates*, 82 Ill. App. 3d at 754, 403 N.E.2d at 80.

[36] People v. Gates, 85 Ill. 2d 376, 390, 423 N.E.2d 887, 893 (1981), *rev'd sub nom.* Illinois v. Gates, 103 S. Ct. 2317 (1983). The Illinois Supreme Court first applied the two-pronged test enunciated in Aguilar v. Texas, 378 U.S. 108 (1964), and found that its requirements were not satisfied. The court then analyzed Spinelli v. United States, 393 U.S. 410 (1969), to determine if the corroboration supplied by Detective Mader was sufficient to cure the failure of the *Aguilar* test. The Court found that such evidence corroborated only "innocent" activity and was therefore insufficient to support a finding of probable cause. *Gates*, 85 Ill. 2d at 390, 423 N.E.2d at 893.

United States Supreme Court granted certiorari.[37] While the *Gates* Court agreed that the letter alone did not provide a basis for establishing probable cause, it nonetheless reversed the state court's decision.[38] The Court determined that because major portions of the letter's predictions were corroborated by the information provided by Federal agents, the warrant had been properly issued.[39]

Since the early nineteenth century, in the seminal case of *Locke v. United States*,[40] the United States Supreme Court has analyzed the fourth amendment's probable cause requirement in exhaustive detail.[41] In that case, Chief Justice Marshall defined probable cause as "less than evidence which would justify condemnation" or conviction.[42] Chief Justice Marshall failed, however, to prescribe the minimum quantum of evidence that would be necessary to support a finding of probable cause,[43] and the Court has greatly elaborated upon his early definition in numerous subsequent decisions.

In *Carroll v. United States*,[44] decided in 1925, the Court articulated what has remained a viable and fundamental standard for determining the existence of probable cause.[45] Chief Justice Taft stated therein that probable cause exists when an officer has personal knowledge or "reasonably trustworthy information" as to facts and circumstances that "are sufficient to warrant a man of reasonable caution" to believe that an offense has been or is being committed.[46] Although Chief Justice Taft's analysis has become the standard for judging the propriety of a finding of probable cause,[47] additional in-

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

38 *Id.* at 2326, 2336.

39 *Id.* at 2336.

40 11 U.S. (7 Cranch) 339 (1813).

41 *See generally* LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 2-3 (noting "the Supreme Court frequently has confronted [the probable cause] issue," and discussing "inconsistencies," "divergencies and obscurities which currently exist").

42 *Locke*, 11 U.S. (7 Cranch) at 348.

43 See Brinegar v. United States, 338 U.S. 160 (1949), wherein Justice Rutledge indicated that according to Justice Marshall's opinion in *Locke*, probable cause was no more than "bare suspicion." *Brinegar*, 338 U.S. at 175.

44 267 U.S. 132 (1925).

45 *See* Comment, *Informer's Word As the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965).

46 *Carroll*, 267 U.S. at 162. Chief Justice Taft concluded that the search and seizure in *Carroll* was justified, based upon his synthesis of a number of previous cases defining probable cause. *Id.* at 161-62.

47 Subsequent to *Carroll*, however, there have been many additional interpretations of the probable cause requirement. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 108 (1965) (Probable cause "must be tested and interpreted . . . in a commonsense and realistic fashion. [Search warrants] are normally drafted by nonlawyers in the midst and haste of criminal investigation. Technical requirements of elaborate specificity once ex-

quiries as to reliability must be made when the issuance of a warrant is based on an "informant's tip."[48] Distinguishing those tips that are "reasonably trustworthy" under *Carroll* from those that are not has been not only a recurring issue, but "one of the most important in the field of search and seizure law."[49]

The Supreme Court was first called upon to determine the reliability or trustworthiness of an informant's tip in *Draper v. United States*,[50] a case involving a warrantless search pursuant to arrest. The critical issue in that case was whether corroboration of information given to an arresting officer could, by itself, constitute probable cause.[51] Therein, a "previously reliable" informant[52] alerted a narcotics agent that James Draper would be arriving in Denver by train from Chicago on one of two specified dates and would be carrying three ounces of heroin.[53] The informant supplied a detailed description of Draper's physical appearance, including the clothing he would be wearing. Moreover, the informant stated that Draper habitually "walked real fast," and would be carrying a tan zipper bag.[54] At the Denver station, the agent was able to corroborate virtually all of the allegations, and in a warrantless search pursuant to arrest, he found three ounces of heroin in Draper's raincoat pocket.[55]

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acted under common law pleadings have no proper place in this area."); Brinegar v. United States, 338 U.S. 160, 175 (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.").

48 Not only can an informant's tip provide constitutionally adequate grounds for arrest or search, but such information, and persons supplying it, have also proved to be valuable parts of the law enforcement effort. *See* Comment, *supra* note 45, at 840; *see also* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1093 (1951) (informers particularly effective in enforcement of certain proscribed behavior). *See generally* M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT (1962).

49 Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 703 n.3 (1972) (citing United States v. Harris, 403 U.S. 573, 575 (1971)).

50 358 U.S. 307 (1959).

51 *See id.* at 310-11.

52 *Id.* at 309. The informant, Hereford, had been engaged as a "special employee" of the Denver Narcotics Bureau and, from time to time over a six-month period, had given Marsh information regarding violations of the narcotics laws. Hereford was paid small sums of money, and Marsh had always found his information to be accurate and reliable. *Id.* See *infra* note 79 and accompanying text for a discussion on past performance of informants as a means of establishing credibility.

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

54 *Id.* Hereford described the defendant as "a Negro of light brown complexion, 27 years old, 5 feet 8 inches tall, weighing about 160 pounds," and stated that he "was wearing a light colored raincoat, brown slacks and black shoes." *Id.* at 309 n.2.

55 *Id.* at 309-10.

The Supreme Court upheld the validity of the warrantless arrest and subsequent search, determining that the "hearsay" information supplied by the informant and thereafter corroborated by the agent constituted "legally competent evidence."[56] Justice Whittaker reasoned that because the agent had personally verified nearly all the provided details, his belief that the suspect would be carrying heroin, although unverified, was reasonable.[57]

Relying on the standard of probable cause enunciated in *Carroll*,[58] the *Draper* Court held that corroboration of an informer's allegations was sufficient to justify a finding of probable cause.[59] As a result of that holding, however, the Court would later grapple with whether only the details of innocent activity alleged by an informant need to be corroborated, or whether verification of incriminating details is a requisite for establishing probable cause.[60]

In 1960, the Court expanded upon its holding in *Draper* in *Jones v. United States*,[61] holding unequivocally that not only was it appropriate for a magistrate to accept hearsay in determining probable cause, but also that such hearsay could independently satisfy the dictates of the fourth amendment.[62] In *Jones*, an affidavit signed by a detective assigned to a District of Columbia narcotics squad was the sole evidence upon which a search warrant was issued.[63] The affidavit dis-

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56 *Id.* at 311-13. The Court acknowledged that since Hereford's "information had always been found accurate and reliable, it [was] clear that Marsh [the agent] would have been derelict in his duties had he not pursued [the tip]." *Id.* at 313.

57 *Id.*

58 *Id.* at 313-14. The *Draper* Court also relied on its analysis of probable cause in Brinegar v. United States, 338 U.S. 160 (1949).

59 *Draper*, 358 U.S. at 313-14. *But see id.* at 314 (Douglas, J., dissenting). Justice Douglas, also applying the *Carroll* standard, disagreed with the majority's conclusion that there were "reasonable grounds to believe" that an offense was being committed. He noted that "[t]he arresting officers *did not know the grounds on which the informer based his conclusion*; nor did they seek to find out what they were. They *acted solely on the informer's word.* In my view, that was not enough." *Id.* at 315 (Douglas, J., dissenting) (emphasis added).

Justice Douglas's dissent, in effect, provided that the establishment of probable cause, based on an informant's tip, requires that the basis of the informer's knowledge be known to the arresting officers. *See id.*; *accord* Giordenello v. United States, 357 U.S. 480, 486 (1958) (warrant not granted where no allegation of personal knowledge present); *cf.* Jaben v. United States, 381 U.S. 214, 221-22 (1965) (IRS agent stated personal knowledge in complaint). *But see* Spinelli v. United States, 393 U.S. 410, 417 (1969) (*Draper* tip sufficiently detailed to enable magistrate to infer informant's information had been gained in reliable way).

60 *See infra* note 99. *See generally* LaFave, *supra* note 41, *passim*; Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the* Spinelli/Draper *Dichotomy in* Illinois v. Gates, 20 AM. CRIM. L. REV. 99, 104-05 (1982).

61 362 U.S. 257 (1960).

62 *Id.* at 269-71.

63 *Id.* at 267 & n.2.

closed no direct knowledge on the part of the affiant of illicit drug trafficking by the defendant.[64] Rather, it stated that the affiant had received information from an unnamed source,[65] that the source had given him correct information previously, and that the same information had been supplied by other sources.[66]

The *Jones* Court rejected the defendant's argument that the affidavit was insufficient to establish probable cause because it rested wholly on hearsay rather than setting forth the affiant's personal observations.[67] The Court held, instead, that "[a]n affidavit is not to be deemed insufficient on that score, so long as a *substantial basis* for crediting the hearsay is presented."[68] Alluding to *Draper*, the *Jones* Court reasoned that if an officer could utilize only hearsay in determining whether there was probable cause to effect a warrantless arrest, then the presentation of such evidence by an affidavit should *a fortiori* be a sufficient basis to support the issuance of a warrant.[69] Thus, concluded the Court, even absent production of the informants or disclosure of their names, its substantial basis requirement had been satisfied.[70] The Court, however, failed to delineate exactly what would constitute a substantial basis for crediting hearsay.[71]

Four years later, in *Aguilar v. Texas*,[72] the Court articulated more structured guidelines for the evaluation of hearsay information.[73]

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64 *Id.* at 267. The affidavit stated, however, that the defendant, a known drug user was familiar to the detective and other members of the narcotics squad. *Id.* at 268 n.2. The *Jones* Court observed that this fact "made the charge against him much less subject to scepticism than would be such a charge against one without such a history." *Id.* at 271.

65 *Id.* at 268. That the informant remained unnamed was immaterial insofar as his reliability or credibility was concerned. Because he had provided reliable information in the past, and because his identity was known to the affiant, he could properly be classified as a "confidential" informant, and thus, his identity was protected from disclosure. *See id.* at 271-72; *see also* McCray v. United States, 386 U.S. 300, 308-09 (1967) (state court under no absolute duty to require disclosure of informer's identity); Comment, *supra* note 45, at 840 (discussing " 'informer's privilege' as a device for encouraging informers to communicate information without fear of subsequent retribution") (citation omitted). *But cf.* Roviaro v. United States, 353 U.S. 53, 60-63 (1957) (protecting disclosure of informer's identity must be balanced "against the individual's right to prepare his defense").

66 *Jones*, 362 U.S. at 267-69, 267 n.2.

67 *Id.* at 269.

68 *Id.* (emphasis added). For examples of other cases applying this "substantial basis" test, see Rugendorf v. United States, 376 U.S. 528, 533 (1964); Ker v. California, 374 U.S. 23, 34 (1963).

69 *Jones*, 362 U.S. at 270.

70 *Id.* at 272.

71 Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741, 745 (1974).

72 378 U.S. 108 (1964).

73 *See* Moylan, *supra* note 71, at 745.

Once again, it was confronted with the validity of a search warrant issued pursuant to an affidavit based only upon hearsay.[74] Two Houston police officers had applied for a warrant to search Aguilar's home for narcotics, stating in their affidavit only that they had "received reliable information from a credible person" regarding the defendant's alleged criminal conduct.[75]

In evaluating whether that affidavit sufficiently established probable cause, Justice Goldberg, writing for the majority, reiterated the *Jones* principle that an informant's tip alone could be sufficient.[76] The *Aguilar* Court, however, fashioned a two-pronged test for ascertaining whether an informant's tip could establish the existence of probable cause.[77] The first prong—the "basis of knowledge" test—required that the issuing magistrate be apprised of some of the underlying circumstances upon which the informant based his allegations.[78] The second prong—the "veracity" test—required that the officer support his conclusion that either the informant, who could remain unidentified, was "credible" or that the information provided was "reliable."[79] The *Aguilar* Court emphasized that the issuing

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[74] *See Aguilar*, 378 U.S. at 109.

[75] *Id.* Justice Goldberg observed that "[t]he record does not reveal, nor is it claimed, that any other information was brought to the attention of the Justice of the Peace." *Id.* at 109 n.1. Compare this with the affidavit in *Jones*, *supra* notes 63 & 64 and accompanying text.

[76] *Aguilar*, 378 U.S. at 114; *see Jones*, 362 U.S. at 269 (direct observations by affiant not required).

[77] *See id.* The oft-mentioned "*Aguilar* two-pronged test" was first labeled as such in Spinelli v. United States, 393 U.S. 410, 413 (1969), as were the terms that would come to describe the prongs. *See* Moylan, *supra* note 71, at 102 n.34.

[78] *Aguilar*, 378 U.S. at 114. This prong requires that the affiant indicate either how the information was received by the informant, or his basis for alleging the criminal conduct in question. *See* LaFave, *supra* note 41, at 4; *see also* Burnett, *Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates*, 64 J. CRIM. L. & CRIMINOLOGY 270, 271-72 (1973) (unless affidavit demonstrates how informant received his information, search warrant should not issue). The first prong is also satisfied if the affidavit describes the informant's personal observation of criminal activity. *See* Comment, *supra* note 60, at 102 & n.35 (sample of cases in which such affidavits were held sufficient); *see also* Jones v. United States, 362 U.S. at 268 n.2 (affidavit revealed informant had gone to defendant's apartment to purchase narcotics).

[79] *Aguilar*, 378 U.S. at 114. It is in this sense that the "veracity" prong is said to have two "spurs," a "credibility" spur and a "reliability" spur, either of which, if met, can satisfy the second prong requirement. *See* LaFave, *supra* note 41, at 4. *See generally*, Moylan, *supra* note 71, at 757-65.

The credibility spur invariably involves a showing of the informant's "past performance" or his character (his reputation and demonstrated history of honesty and integrity). *See* LaFave, *supra* note 41, at 10. If the informant had given reliable and accurate information in the past, which led to arrests and convictions, he is deemed credible, and the "veracity prong" is satisfied. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967) (informant had supplied officer with accurate information some 15 or 16 times, resulting in numerous arrests and convictions); Draper v. United States, 358 U.S. 307 (1959) (over

magistrate may consider only information that is actually contained in the affidavit.[80] Because the affidavit in *Aguilar* recited none of the "underlying circumstances," the Court found that the issuing judge had necessarily accepted "mere conclusions."[81] The Court's test, therefore, had not been met.[82]

One year after the *Aguilar* test for probable cause was established, it was supplemented by the Court in *Ventresca v. United States*.[83] Reaffirming its *Aguilar* holding, the Court directed that affidavits submitted in support of the issuance of search warrants be tested and interpreted in a "commonsense and realistic fashion."[84] According to the *Ventresca* Court, the "technical requirements of elaborate specificity once exacted under the common law" were improper.[85]

In *Spinelli v. United States*,[86] decided five years after *Aguilar*, the Court added a new dimension to probable cause analysis—the "cor-

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six month period, informant had given officer information regarding violations of narcotics laws which officer had always found to be accurate and reliable).

The Supreme Court, in *Aguilar*, did not discuss satisfaction of the reliability spur. *See* LaFave, *supra* note 41, at 5. Professor LaFave suggests that to meet that spur, courts must consider whether, in a particular instance, the informant's information is reliable, by focusing "upon the nature of the information given and the circumstances under which that information was tendered." *Id.* at 23. As an illustration of how the reliability spur can be met, Professor LaFave cites United States v. Harris, 403 U.S. 573, 583 (1971). LaFave, *supra* note 41, at 5.

[80] *Aguilar*, 378 U.S. at 109-14. The Court relied on Giordenello v. United States, 357 U.S. 480, 486 (1958) (only information brought to magistrate's attention may be considered by reviewing court), and Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("inferences [to] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"). The *Aguilar* Court held that if the magistrate considers *more* than what is contained in the affidavit or in some other way does not perform his neutral and detached function, he would "serve merely as a rubber stamp for the police." *Aguilar*, 378 U.S. at 111. *But cf.* Draper v. United States, 358 U.S. 307 (1959) (Court considered surrounding circumstances to determine probable cause in *warrantless* search).

[81] *Aguilar*, 378 U.S. at 113-14. Justice Goldberg noted that "the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession," and the magistrate "certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show probable cause.' " *Id.* (quoting Giordenello v. United States, 357 U.S. 480, 486 (1958)).

[82] *Id.* at 114-15.

[83] 380 U.S. 102 (1965).

[84] *Id.* at 108. The *Ventresca* approach appears to create some confusion as to whether the requirements of the *Aguilar* test must be strictly complied with, or whether they can be ignored if common sense indicates that probable cause existed. *See* Moylan, *supra* note 71, at 961. The author suggests that the Court "probably meant only that commonsense should be used in determining whether sufficient circumstances have been set forth to pass each of the tests required by *Aguilar*." *Id.* at 961 n.20.

[85] *Ventresca*, 380 U.S. at 108. The *Ventresca* Court reasoned that "the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract." *Id.*

[86] 393 U.S. 410 (1969).

roboration factor."[87] Justice Harlan noted in that case that the sufficiency of an affidavit must first be measured against the *Aguilar* test and that, "[i]f the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered."[88] He qualified his analysis, however, by requiring that even if certain parts of a tip are corroborated by independent sources, it must still be as trustworthy a tip as one that would pass the *Aguilar* test without corroboration.[89]

The *Spinelli* majority expressly rejected the "totality of the circumstances" approach,[90] which was taken by the court of appeals, reasoning that where an informant's tip is a necessary element in establishing probable cause, a more precise analysis is necessary.[91] The Court determined that neither prong of the *Aguilar* test had been satisfied, inasmuch as the affiant offered no evidence in support of his conclusion that the informant was reliable and presented no underlying circumstances indicating how the informant learned that Spinelli was involved in illegal gambling activity.[92] According to the *Spinelli* Court, however, that deficiency could be "cured," and probable cause found to exist, if the independently corroborated tip was sufficiently detailed to enable a magistrate reasonably to infer that the informant had gained his knowledge in a reliable way.[93]

Using the specificity of the informant's tip in *Draper* as a "suitable benchmark,"[94] Justice Harlan examined the *Spinelli* tip, which alleged merely that the defendant was using two telephone lines for gambling operations.[95] Although FBI corroboration established that

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87 See *infra* note 89.

88 *Spinelli*, 393 U.S. at 415. The *Spinelli* Court provided that should the affidavit be facially insufficient to satisfy the *Aguilar* test, a magistrate or reviewing court could then consider the specificity of details provided and corroboration thereof as a method of meeting the fourth amendment requirement for probable cause. *Id.*

89 *Id.* By virtue of this requirement, the Court emphasized that it is the function of the magistrate, not the officer, to determine whether probable cause exists. *See id.*

90 *Id.* ("We believe . . . that the 'totality of the circumstances' approach . . . paints with too broad a brush."). *But see* Illinois v. Gates, 103 S. Ct. 2317, 2332 (1983) ("[W]e reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.").

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

92 *Id.* at 416.

93 *Id.* at 417. Justice Harlan stipulated that the criminal activity must be described in sufficient detail so that it is reasonable for the magistrate to believe that the informant "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." *Id.* at 416. *But see* United States v. Harris, 403 U.S. 573, 582 (1971) (suspect's reputation, among other things, may be considered).

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

95 *Id.* at 413-17. Although Justice Harlan conceded that in both situations there was

Spinelli did, in fact, have access to an apartment containing two phones, the Court found that such verification was not sufficiently suggestive of criminal conduct.[96] Justice Harlan reasoned that because there is nothing unusual about an apartment containing two separate telephones, corroboration of such a seemingly innocent detail could hardly bespeak criminal activity.[97] He found the allegation that Spinelli was a "known" gambler and an associate of gamblers to be "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."[98] The *Spinelli* Court thus articulated a method by which the *Aguilar* test could be satisfied indirectly—self-verifying details could serve to provide an implied basis of knowledge or inferred trustworthiness.[99]

In *Gates*, the Supreme Court expressly abandoned the *Aguilar-Spinelli* standard for evaluating an affidavit that is based on a partially corroborated anonymous letter, and adopted in its place a "totality of the circumstances" analysis.[100] Justice Rehnquist, writing

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corroboration of only innocent details, he reasoned that the independent police work in *Draper* corroborated much more than the one small detail that had been provided in *Spinelli*, and thus, the magistrate in *Draper* could have reasonably inferred reliability. *Id.* at 417. Justice Fortas, dissenting, believed, however, that the *Spinelli* affidavit contained *many* detailed facts, thereby justifying the issuance of a warrant. *Id.* at 437 (Fortas, J., dissenting). Justice Black, in a separate dissenting opinion, agreed that the *Spinelli* affidavit was sufficiently detailed, and he explicitly rejected *Aguilar*'s two-pronged test. *Id.* at 429-30 (Black, J., dissenting). He criticized the *Spinelli* majority's concern with detail, observing that "[n]othing in our Constitution . . . requires that the facts be established with that degree of certainty and with such elaborate specificity." *Id.* at 429 (Black, J., dissenting).

96 *Id.* at 418. The Court found that mere investigation and corroboration of two telephone numbers did not create "an aura of suspicion by virtue of the informant's tip." *Id.*

97 *Id.* at 414. Justice Harlan commented that "[m]any a householder indulges himself in this petty luxury." *Id.* It is interesting to note that *after* execution of the warrant and subsequent search of the apartment, the officers found a box containing three additional uninstalled telephones. *Id.* at 418 n.6.

98 *Id.* at 414 (citing Nathanson v. United States, 290 U.S. 41, 46 (1933)).

99 Whether the *Spinelli* Court meant that a deficiency in *either* or *both* of the *Aguilar* prongs could be cured through corroboration has been the subject of much controversy. *Compare, e.g.*, Stanley v. State, 19 Md. App. 508, 533, 313 A.2d 847, 862 (1974) (" 'self-verifying detail' technique cannot repair a defect in 'veracity' prong") *with Spinelli*, 393 U.S. at 425-27 (White, J., concurring) (self-verification relates only to the veracity prong). See LaFave, *supra* note 41, at 7-68 for a discussion of the uncertainty surrounding *Spinelli*'s self-verification method.

100 *Gates*, 103 S. Ct. at 2332. The *Gates* majority explained that while it was rejecting the "rigid categorization suggested by some of [*Spinelli*'s] language," it was not abandoning "*Spinelli*'s concern for the trustworthiness of informers and for the principle that it is the magistrate who must ultimately make a finding of probable cause." *Id.* at 2332 n.11.

In *Spinelli*-like situations, where the sufficiency of a tip is measured in accordance

for the majority, postulated that the new approach would permit a "balanced assessment" of the various indicia of reliability, whereas the *Aguilar-Spinelli* test unduly focused on isolated issues which could not sensibly be segregated from the facts as a whole.[101]

The *Gates* Court agreed with the Illinois Supreme Court that an "informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant [factors] in determining the value"[102] of a tip, but it did not share the latter's belief that they should be viewed as separate and distinct requirements to be "rigidly exacted in every case."[103] Justice Rehnquist stated that although the *Aguilar-Spinelli* prongs may prove useful in ascertaining whether there has been a showing of probable cause, he reasoned that the totality of the circumstances analysis comports more closely with the Court's prior treatment of probable cause than do the inflexible requirements of the two-pronged test.[104]

Employing the descriptions of probable cause articulated in *Brinegar v. United States*[105] and *United States v. Cortez*,[106] Justice Rehnquist construed probable cause as being a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[107] He emphasized that because affidavits ordinarily are hastily drafted by

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with the amount of detail presented and the degree of corroboration, the issue of innocent versus incriminating details again surfaces. Some commentators have strongly suggested that there should be some corroboration of an incriminating detail and not simply verification of innocuous details. *See, e.g.*, Note, *Probable Cause and the First-Time Informer*, 43 COLO. L. REV. 357, 362-63 (1972); Comment, *The Informer's Tip as Probable Cause for Search and Arrest*, 54 CORNELL L. REV. 958, 966-68 (1969).

101 *Gates*, 103 S. Ct. at 2330. The majority asserted that lower courts were applying the two-pronged test in an overly technical and unduly rigid manner. *Id.* at 2330 n.9 (citing People v. Brethauer, 174 Colo. 29, 482 P.2d 36 (1971); People v. Palanza, 55 Ill. App. 3d 1028, 371 N.E.2d 687 (1978); Bridger v. State, 503 S.W.2d 801 (Tex. Cr. [sic] App. 1974)). See Stanley v. State, 19 Md. App. 508, 515-22, 313 A.2d 847, 852-58 (1974) (expressly rejecting possibility of meeting probable cause requirement other than through strict adherence to two-pronged test).

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

103 *Id.* at 2327-28. Justice Rehnquist explained that the *Aguilar* language necessitated only a showing of "some of the underlying circumstances" from which a basis of knowledge, reliability, and credibility could be ascertained. *Id.* at 2328 n.6 (quoting *Aguilar*, 378 U.S. at 114).

104 *Id.* at 2328.

105 338 U.S. 160, 176 (1949) ("probable cause is a practical, nontechnical conception").

106 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

107 *Gates*, 103 S. Ct. at 2328. Justice Rehnquist also observed that "[o]ne simple rule will not cover every situation." *Id.* at 2329 (quoting Adams v. Williams, 407 U.S. 143, 147 (1972)).

nonlawyers, it is unlikely that the "complex superstructure" of the *Aguilar-Spinelli* test would prove helpful to magistrates making probable cause determinations.[108] Justice Rehnquist acknowledged the established preference for searches conducted pursuant to a warrant, but he noted that retention of the *Aguilar-Spinelli* standard could result in a far greater number of warrantless searches by police hoping to fit within some exception to the warrant requirement.[109] In the majority's opinion, the probable cause standard developed in *Jones*, that the magistrate have a " 'substantial basis' for concluding that a search warrant would uncover evidence of wrongdoing," would better encourage recourse to warrants.[110]

The *Gates* majority maintained that anonymous tips could rarely survive the rigorous *Aguilar-Spinelli* requirements.[111] Accordingly, their future value in police work would be greatly diminished.[112] Justice Rehnquist reasoned that the *Aguilar-Spinelli* test could seriously hinder law enforcement activities, and he implied that unless the totality of the circumstances approach is utilized, magistrates might be forced to ignore potentially valuable tips.[113]

The *Gates* Court did, however, articulate some limitations "be-

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108 *Id.* at 2330-31.

109 *Id.* at 2331. Justice Rehnquist additionally explained that

> [t]he possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'

Id. (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

110 *Id.* (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). Not only did the Court rely heavily on the *Jones* "substantial basis" test for probable cause, but it also impliedly equated it with the "totality of the circumstances" approach: "In . . . place [of the two-pronged test] we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations." *Id.* at 2332 (citing Jones v. United States, 362 U.S. 257 (1960)). The *Gates* Court also believed that the *Jones* standard would be more consistent with the Court's traditionally deferential treatment of a magistrate's determination than was the *Aguilar-Spinelli* test. *Id.* at 2331. For a discussion of *Jones*, see *supra* notes 61-68 and accompanying text.

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

112 *Id.*

113 *Id.* Under the *Gates* approach, the issuing magistrate was

> to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 2332.

yond which a magistrate [could] not venture."[114] The majority noted that "wholly conclusory statements" in an affidavit could not provide a sufficient basis for a finding of probable cause, and that issuance by a magistrate of a warrant could not be a "mere ratification of bare conclusions of others."[115] The Court concluded that, even under a totality of the circumstances analysis, a "barebones" affidavit could not satisfy the requirements of the fourth amendment.[116]

Based upon this foundation, Justice Rehnquist analyzed the facts surrounding the affidavit in question.[117] Citing *Draper*, the majority underscored the probative value of police corroboration as a basis for determining probable cause.[118] Because so many of the details contained in the anonymous letter were substantiated by independent investigation, the Court concluded that probable cause had been established as convincingly as it had been in *Draper*.[119]

Justice Rehnquist noted a significant difference between the two cases: The informant in *Draper* had been reliable on two previous occasions, whereas the *Gates* informant's honesty and reliability were unknown.[120] In the majority's opinion, however, the police work done by Mader and the DEA minimized that distinction.[121] While conceding that the tip in *Gates* might not pass the *Spinelli* test, the

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114 *Id.*

115 *Id.* (citing Nathanson v. United States, 290 U.S. 41, 54 (1933)). The Court noted that, for example, "a sworn statement of an affiant that 'he has cause to suspect and does believe that' " a crime is afoot will not suffice. *Id.* (quoting Nathanson v. United States, 290 U.S. 41, 54 (1933)). Additionally, "[a]n officer's statement that 'affiants have received reliable information from a credible person and believe' that heroin is stored in a home, is likewise inadequate." *Id.* (quoting Aguilar v. Texas, 378 U.S. 108 (1964)).

116 *Id.* at 2332-33.

117 *Id.* at 2334-36. The Court, utilizing the totality of the circumstances approach, reasoned that "[i]t is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduce[s] the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.' " *Id.* at 2335 (quoting *Jones*, 326 U.S. 257, 269, 271 (1960)).

118 *Id.* at 2334. The *Gates* majority observed that the *Draper* tip might not have survived a rigid application of the two-pronged test, a view which is consistent with its finding that the *Gates* tip would not pass the *Aguilar-Spinelli* test either. *See id.* at 2334 n.12.

119 *Id.* at 2334. In noting that the letter alone did not constitute probable cause, Justice Rehnquist reasoned that "[it] provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, [it] gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities." *Id.* at 2336.

120 *Id.* at 2335. Because the anonymous letter had no return address, *see supra* note 7 and accompanying text, the Bloomingdale police could not discover who its author was, and hence, could not inquire as to his credibility.

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

Court concluded that enough of the letter's predictions had been confirmed to permit a magistrate to make a "practical, common-sense judgment" that probable cause had been established.[122]

Justice White concurred in the majority's holding but rejected its underlying analysis in favor of an examination based upon the *Aguilar-Spinelli* principles.[123] In his view, police corroboration of the letter's allegations rendered the tip as trustworthy as one that would satisfy the *Aguilar* test. He reasoned that because the informant had specific knowledge of the Gates' unusual travel plans, it could be inferred that he had obtained his information in a reliable manner.[124] Justice White strongly objected to the majority's decision to abandon the two-pronged test, envisioning "an evisceration of the probable cause standard."[125] He felt that the totality of the circumstances approach operated to reject the holdings of prior Supreme Court decisions that had been incorrectly used by the majority for its support.[126] Moreover, he was reluctant to endorse a standard that did not expressly require the offering of some proof from which the credibility of the informant and the reliability of the information could be inferred.[127] Conceding that lower courts had been applying the *Aguilar-Spinelli* test in an "unduly rigid manner,"[128] Justice White nonetheless believed that the problem should be alleviated through clarification of the test rather than its abandonment.[129]

Justice Brennan, dissenting, also found the majority's rejection of the two-pronged test to be "unjustified and ill-advised."[130] He explained that, because the evaluation of an affidavit that is issued on the basis of an informant's tip involves a difficult inquiry into the reliability and credibility of the source, that inquiry must be structured so as to provide some degree of accuracy.[131] Justice Brennan

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122 *Id.* The Court implied that a "basis of knowledge" could be inferred from the extensive details contained in the anonymous letter which concerned future actions of third parties which could not easily be predicted. The specificity and accuracy of the author's predictions of the Gates' travel plans were of such a character that it was very likely to have been obtained from the Gates themselves, or someone very familiar with their arrangements. *Id.*

123 *Id.* at 2347 (White, J., concurring).

124 *Id.* at 2349-50 (White, J., concurring).

125 *Id.* at 2350 (White, J., concurring).

126 *Id.*

127 *Id.*

128 *Id.* See *supra* note 101 and accompanying text.

129 *Gates*, 103 S. Ct. at 2350 (White, J., concurring). Justice White believed that the "overly-technical applications of the *Aguilar-Spinelli* standard . . . could easily be disapproved without reliance on a 'totality of the circumstances' analysis." *Id.* at 2350 n.26 (White, J., concurring).

130 *Id.* at 2351 (Brennan, J., dissenting).

131 *Id.* at 2355 (Brennan, J., dissenting).

believed that "the standards announced in *Aguilar*, and refined in *Spinelli*, fulfill that need,"[132] inasmuch as they both alert police to what information must be supplied in order to secure a warrant, and inform magistrates as to which facts must be before them in order to properly determine whether probable cause exists.[133] He concluded that the two-pronged test "preserve[s] the role of magistrates as independent arbiters of probable cause, insure[s] greater accuracy in probable cause determinations, and advance[s] the substantive value" of such findings.[134]

Justice Brennan further observed that when an anonymous tip is central to an evaluation of probable cause,[135] the need to apply a structured test, in order to ensure that the warrant's issuance is based upon reliable information received from an honest or credible person, is especially great.[136] While he noted that tips offered by anonymous informants are "presumptively unreliable,"[137] Justice Brennan maintained that such tips could provide the basis for a finding of probable cause if they passed the *Aguilar-Spinelli* test.[138] He reasoned that through police corroboration or the "self-verifying detail" test set forth in *Spinelli*, anonymous hearsay could provide a sufficient basis for satisfying the requirements of the fourth amendment.[139]

In addition to implying that the *Aguilar-Spinell* analysis is more consistent with the Court's previous treatment of probable cause than is the totality of the circumstances approach, Justice Brennan strongly criticized the majority's continued tolerance of police practices that disregard rights guaranteed in the fourth amendment.[140]

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132 *Id.*

133 *Id.*

134 *Id.* at 2357 (Brennan, J., dissenting).

135 *Id.* Justice Brennan noted that prior to the *Gates* decision, the Supreme Court had never directly applied the *Aguilar-Spinelli* standards to an anonymous tip. *Id.* at 2356 (Brennan, J., dissenting). He reasoned that because, "[b]y definition, nothing is known about an anonymous informant's identity, honesty, or reliability," there was even more reason to apply the two-pronged test. *Id.* See also Comment, *supra* note 60, in which the author notes that "[t]he Court's only express consideration of the use of anonymous tips occurred in dictum in Adams v. Williams," 407 U.S. 143, 144-45 (1972), wherein the Court compared the constitutional propriety of a "stop and frisk" based on a confidential informant's tip to a search and seizure resulting from an anonymous tip. Comment, *supra* note 60, at 105-06.

136 *Gates*, 103 S. Ct. at 2356 & n.6 (Brennan, J., dissenting).

137 *Id.* at 2356 (Brennan, J., dissenting); *accord* Comment, *supra* note 60, at 107 ("[T]he 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.")(citation omitted).

138 *Gates*, 103 S. Ct. at 2356 (Brennan, J., dissenting).

139 *Id.*

140 *Id.* at 2359 (Brennan, J., dissenting).

He reasoned that the Court's failure to present any persuasive rationale for its abandonment of the two-pronged test was a display of its growing impatience with the labyrinth of rules governing search and seizure.[141] Justice Brennan feared that, by replacing the *Aguilar-Spinelli* analysis with the unstructured totality of the circumstances approach, the majority's decision might " 'obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state, where they are the law.' "[142]

Justice Stevens, in a separate dissenting opinion, also concluded that probable cause should not have been found to exist.[143] He focused on what he perceived to be a critical discrepancy between the letter's predictions and the investigations performed by Detective Mader and the DEA,[144] arguing that the informant's allegation that "Sue drives their car to Flordia . . . [then] flies back" constituted a "material mistake" because, in reality, she drove back to Bloomingdale with Lance.[145] He reasoned that that discrepancy cast doubt upon the veracity of the letter's statement concerning the presence of drugs in the Gates' home.[146] As a result, he questioned the authorization to search the house.[147]

Justice Stevens further observed that the Gates' actual travel plans were neither so unusual nor so indicative of criminal activity that they should have served as the basis for a finding of probable cause.[148] He concluded that the majority's "evaluation of the warrant's validity ha[d] been colored by subsequent events,"[149] and he

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141 *Id.*

142 *Id.* (quoting Johnson v. United States, 333 U.S. 10, 17 (1948)).

143 *Id.* at 2360-61 (Stevens, J., dissenting). Justice Stevens additionally observed that because there are " 'constitutional differences' " between a car search and a house search, the search of the Gates' car required a separate and different probable cause evaluation. *Id.* at 2361 (Stevens, J., dissenting) (quoting Chambers v. Maroney, 339 U.S. 42, 52 (1970)).

144 *Id.* at 2360 (Stevens, J., dissenting).

145 *Id.*

146 *Id.* Justice Stevens believed that the informant's allegations that the Gates already had "over $100,000 worth of drugs in their basement," coupled with the predicted "itinerary that always kept one spouse in Bloomingdale," led to a logical conclusion that their home would never remain unprotected. *Id.* He then reasoned that because Lance and Sue were actually together in West Palm Beach, the allegation that there were drugs in the Gates' home became somewhat dubious. *Id.*

147 *Id.*

148 *Id.*

149 *Id.* at 2361 (Stevens, J., dissenting). Justice Stevens reasoned that because the predictions were faulty, and had been corroborated by innocent activity, the majority must have considered events (e.g., the overnight drive, the 400 pounds of marijuana in the car) that occurred subsequent to the warrant's issuance in order to find probable cause.

attacked the Court's failure to give due consideration to the conclusions drawn by three separate levels of state courts.[150]

Since 1813, when the *Locke* Court first addressed the problem of defining probable cause,[151] the concept has undergone considerable modification and refinement. This process of evolution is understandable; indeed, the Supreme Court has noted that there are "vague, undefinable, admonitory provisions of the Constitution whose scope is inevitably addressed to changing circumstances."[152] Assuming that the fourth amendment's probable cause requirement is such a provision,[153] the propriety of the Court's decision in *Gates* rests upon whether the manner in which it altered existing probable cause standards was constitutionally appropriate.

Finding the *Aguilar-Spinelli* two-pronged test to be too "rigorous" and too difficult for lower courts to apply correctly,[154] the *Gates* majority believed that its decision provided a method for equitably evaluating the validity of a warrant. Although the Court articulated some ostensibly viable reasons for eliminating *Aguilar-Spinelli*'s structured requirements, the totality of the circumstances standard does not resolve the constitutional dilemma posed by striking a balance between the rights of private individuals and those of society.[155] The *Gates* approach does not overtly favor either of those competing values, but because of its neutral and unstructured nature, it is likely to

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Id. He also noted the impropriety of including such subsequent events in evaluating a probable cause determination. *Id.* (citing Vale v. Louisiana, 339 U.S. 30, 33-35 (1970)).

150 *Id.* at 2361-62 (Stevens, J., dissenting). Justice Stevens observed that a total of nine judges and justices on three state court levels all found the *Gates* warrant to be invalid due to an absence of probable cause. He further argued that since they "are better able to evaluate the probable reliability of anonymous informants in Bloomingdale, Illinois," than the Supreme Court, their judgments should be accorded at least a "presumption of accuracy." *Id.*

151 See *supra* notes 40-43 and accompanying text.

152 Ullmann v. United States, 350 U.S. 422, 438 (1956).

153 It can be argued that a "changing circumstance" which "addresses" the probable cause provision is the continually rising crime rate in the United States, as reflected through criminological surveys and statistics. *See generally* A. HARTJEN, CRIME AND CRIMINALIZATION 185-87 (1978) (while population increased by 5% between 1970 and 1975, rate of reported crime rose by 33%; if estimates of unreported crime were included, actual increase closer to 39%); 2 CRIMINOLOGY REVIEW YEARBOOK 705 (E. Bittner & S.L. Messinger eds. 1980) ("[C]rime is an ever-increasing part of contemporary American life.").

However, it is essential to consider whether this increase in crime justifies relaxation of the standards for finding probable cause. It is possible that the judiciary's awareness and concern over this problem has resulted in their willingness to invoke less stringent requirements for establishing probable cause.

154 *Gates*, 103 S. Ct. at 2330 n.9.

155 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1, at 437-38 (1978).

generate a greater number of decisions supporting law enforcement interests than would be possible under the two-pronged test.[156]

The fourth amendment mandates that individuals' rights to be secure in their "persons, houses, papers, and effects,"[157] be balanced against the concomitant obligation that the community be protected against wrongdoers.[158] Although the *Gates* majority indicated that it was attempting to strike a proper balance between those opposing interests,[159] it failed to assess realistically whether its new standard could be applied in an unprejudicial manner. The Court believed that relaxation of the probable cause standards was necessary in order to ensure that the states' interest in law enforcement would not be subverted by the utilization of inappropriate criteria that might result in criminals escaping justice on the basis of technicalities. Given the benefit of hindsight, this rationale is certainly palatable. Once a criminal is caught "red-handed," it is difficult to justify permitting him to evade punishment simply because the initial application for his warrant had not satisfied certain meticulous requirements.[160] In determining the constitutional adequacy of any standard, however, foresight rather than hindsight should be the primary focus. Use of foresight indicates that practical application of the totality of the circumstances approach will more readily result in probable cause determinations favorable to law enforcement.[161] An

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156 Professor Yale Kamisar asserts that the totality of the circumstances approach "achieved the accomodation of law enforcement interests to a much greater extent than it accommodated what the *Gates* Court called 'private interests.' " *Supreme Court Review and Constitutional Law Symposium*, 52 U.S.L.W. 2228, 2230 (Oct. 25, 1983) [hereinafter cited as *Law Symposium*].

157 U.S. CONST. amend. IV.

158 1 W. LAFAVE, *supra* note 155, at 437-38 (citing Henry v. United States, 361 U.S. 98 (1959) and Brinegar v. United States, 338 U.S. 160 (1949)).

159 *Gates*, 103 S. Ct. at 2332. The *Gates* majority was "convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*." *Id.*

160 It is interesting to note Justice Douglas's dissenting opinion in *Draper*, wherein he states:

> Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals. Yet the rule we fashion is for the innocent and guilty alike.

Draper, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting) (footnote omitted).

161 *See Law Symposium*, *supra* note 156, at 2330. Professor Kamisar has expressed the belief that the totality of the circumstances approach is a standard that is largely "unreviewable," and thus more favorable to law enforcement interests. *Id.* He states that the

officer of the court, given the broad discretion that is permitted under *Gates*, will naturally be inclined to accede to the warrant requests of other law enforcement officials, notwithstanding the possibility that an individual's constitutional rights would be infringed thereby.

To assert that the totality of the circumstances approach is not the most suitable standard for determining whether probable cause exists, however, is not to imply that the *Aguilar-Spinelli* test is the most appropriate analysis. The difficulties inherent in applying the two-pronged test are apparent, in view of the various interpretations of its requirements which have been issued by the Supreme Court, as well as the lower courts.[162] For example, in *United States v. Harris*,[163] the Supreme Court, while not expressly overruling *Aguilar* or *Spinelli*, clearly deviated from the spirit of those decisions. The *Spinelli* Court had asserted that a suspect's reputation should not be taken into consideration when evaluating probable cause, yet the Court held in *Harris* that a magistrate should not be precluded from relying on such "probative information" in deciding whether to issue a warrant.[164] Moreover, by allowing an informant's statement against penal interest[165] to be sufficient to satisfy the veracity prong,[166] the *Harris* Court departed from the *Aguilar-Spinelli* requirements.[167] Furthermore, in separate concurrences, Justice Blackmun would have overruled *Spinelli*[168] and Justice Black would have overruled both

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Gates majority makes it plain that the task of a reviewing court is "modest. . . . [T]he warrant is to be upheld as long as there is a 'substantial basis' for a 'fair probability' that evidence will be found in a particular case." Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 569-70 (1984). Under the *Gates* standard of review, then, it appears that absent a clear abuse of discretion, a magistrate's probable cause finding will be affirmed.

162 *See supra* notes 101 & 129; *see also* Note, Illinois v. Gates: *The Court Turns from Technicality to Practicality for Search Warrant Probable Cause Determinations*, 35 MERCER L. REV. 725, 732-33 (1984) (two conflicting methods of applying two-pronged test were prevalent throughout lower courts).

163 403 U.S. 573 (1971).

164 *Id.* at 582. Chief Justice Burger, writing for the *Harris* Court, criticized the *Spinelli* Court's interpretation of the holding in Nathanson v. United States, 290 U.S. 41 (1933). According to the Chief Justice, *Nathanson* had held that "reputation, *standing alone*, was insufficient; it surely did not hold it irrelevant when supported by other information." *Harris*, 403 U.S. at 582 (emphasis in original).

165 *Harris*, 403 U.S. at 580. The *Harris* Court held that the informant's admission that he had recently purchased whiskey from the defendant was "plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself." *Id.*

166 *Id.* at 583-84.

167 *See* Note, *supra* note 162, at 737 (*Harris* Court's addition of reputation as indicia of reliability was marked departure from strict adherence to two-pronged test).

168 *Harris*, 403 U.S. at 586 (Blackmun, J., concurring).

Aguilar and *Spinelli*.[169] Thus, the majority opinion in *Gates* was not the first expression of dissatisfaction with the two-pronged test.

Further indicia that application of the *Aguilar-Spinelli* standard is troublesome is manifested by the diametrically opposed conclusions drawn by Justices White and Brennan in *Gates*. Both Justices believed that the majority was incorrect in its decision to abandon the two-pronged test.[170] While they made their probable cause determinations on the basis of the *Aguilar-Spinelli* standard, they reached opposite conclusions concerning the validity of the *Gates* warrant[171]—Justice White concurring with the majority's finding that probable cause to issue a warrant existed,[172] and Justice Brennan believing that it did not.[173] Thus, if two members of the Supreme Court, applying the same criteria to the same factual circumstances, can arrive at different conclusions, it is difficult to imagine that such a test can be utilized accurately and consistently by our judicial system.

In view of these substantial difficulties in implementing the *Aguilar-Spinelli* test, it could not remain the definitive standard for determining the existence of probable cause. While the *Gates* majority's displeasure with the two-pronged test was not unfounded, its decision to eliminate the necessity of fulfilling any requisite elements was too extreme. The totality of the circumstances test does offer certain guidelines.[174] However, merely suggesting to a magistrate the factors that should be taken into consideration, without actually requiring that particular criteria be met,[175] bestows discretion that is too broad to safeguard the individual rights that are protected under the fourth amendment. In some areas of the law, a reasonableness standard may be appropriate[176] but in this area of criminal law, where one's liberty is at risk, a stricter standard should be employed. Under a totality of circumstances approach, unless there is a clear

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169 *Id.* at 585 (Black, J., concurring).

170 *Gates*, 103 S. Ct. at 2347 (White, J., concurring); *id.* at 2351 (Brennan, J., dissenting).

171 *See id.* at 2347-50 (White, J., concurring); *id.* at 2351-57 (Brennan, J., dissenting).

172 *Id.* at 2347 (White, J., concurring).

173 *Id.* at 2351 (Brennan, J., dissenting).

174 *See supra* notes 113-17 and accompanying text.

175 The amorphous totality of the circumstances approach never set any hard and fast rules; it merely articulated that the veracity and basis of knowledge of the informant were "highly relevant factors" in determining the value of a tip, and that they *may* usefully illuminate the common sense, practical question as to whether probable cause exists. *Gates*, 103 S. Ct. at 2327-28.

176 *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 150-51 (4th ed. 1971) (to find guilt on part of tortfeasor, appropriate standard to be applied is one of reasonableness).

abuse of discretion, there is no remedy for the individual whose constitutional rights have been mistakenly violated.

Perhaps, as suggested by Justice White,[177] a better approach would be to modify and clarify the criteria set forth in *Aguilar* and *Spinelli* by devising a set of requisite elements that courts could understand and apply consistently in assessing the existence of probable cause. For example, a more flexible approach would be to permit consideration of factors such as reputation, and to allow a strong showing in one prong to overcome a slight deficiency in the other.[178] Although extension of the *Aguilar-Spinelli* test to allow for a broader range of methods by which probable cause can be found might not appear to differ significantly from adoption of a totality of the circumstances approach, the distinguishing element which must be retained is the requirement that an issuing magistrate satisfy some fixed criteria. Absent such criteria, even the prospect that a reviewing court will reexamine a magistrate's determination does not provide adequate assurance that a proper balance will be struck between the societal interest in law enforcement and the individual's right to be free from governmental intrusions.

Subsequent to *Gates*, several lower courts have applied the totality of the circumstances approach. The view of those courts has overwhelmingly been that the "basis of knowledge" and "veracity" prongs, along with the *Spinelli* explication, must remain integral parts of probable cause determinations.[179] Despite the lingering influence of the *Aguilar-Spinelli* analysis in the lower courts, the Supreme Court

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[177] *Gates*, 103 S. Ct. at 2350 (White, J., concurring).

[178] Conversely, under Justice Rehnquist's view, an absolute deficiency in one prong could be satisfied by a strong showing in the other. *See id.* at 2329.

It has never been clear whether the corroboration of a tip by independent police work could suffice to overcome a deficiency in only the basis of knowledge prong, or whether the veracity prong could be similarly satisfied. *See supra* note 99. One method of compromise between the two-pronged test and the *Gates* approach, then, would be to allow *either* of those prongs to be satisfied through corroboration as per *Spinelli*.

[179] *See, e.g.*, United States v. Kolodziej, 712 F.2d 975 (5th Cir. 1983) (although totality of circumstances test applied, court found warrant invalid because underlying facts regarding informant's basis of knowledge or reliability were not shown); United States v. Sorrells, 714 F.2d 1522 (11th Cir. 1983). The *Sorrells* court applied what it referred to as the *Gates* totality of the circumstances approach, but which, in reality, was much more akin to the *Aguilar-Spinelli* test:

> We do not, however, recommend or endorse omissions in the affidavit of the informant's credibility or reliability. The test in *Aguilar* has served many useful purposes aside from insuring that the constitutional rights of citizens be respected. It has given to law enforcement officers, prosecuting attorneys and courts a straightforward test for resolving disputes over the issuance of a warrant.

Id. at 1528-29.

recently reaffirmed its rejection of the test in *Massachusetts v. Upton*,[180] wherein it dismissed the interpretation of the totality of the circumstances analysis advanced by the Massachusetts Supreme Court.[181] The latter court, finding it difficult to discern whether *Gates* had significantly altered the requirements for issuance of search warrants, relied upon the *Aguilar-Spinelli* approach.[182] Noting that the Massachusetts court had "misunderstood" *Gates*, the Supreme Court reversed.[183] It explained that it "[had] not merely refine[d] or qualif[ied] the 'two-pronged test.' "[184]

It is evident that lower Federal courts as well as state courts are reluctant to abandon totally the *Aguilar-Spinelli* test in favor of the standardless *Gates* approach.[185] This should indicate that the totality of the circumstances approach may not provide a sufficient analytical framework to determine the existence of probable cause. It remains to be seen, however, whether courts will gradually take a more permissive attitude in issuing warrants under the *Gates* analysis. Justice White's fear that the totality of the circumstances approach "may foretell an evisceration of the probable cause standard,"[186] while perhaps extreme, was not entirely groundless. If the Supreme Court continues, in the name of effective law enforcement,[187] to encourage the issuance of warrants without providing clearer guide-

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180 104 S. Ct. 2085 (1984).

181 *Id.* at 2087-88. The Supreme Court believed that the Massachusetts court "apparently viewed *Gates* as merely adding a new wrinkle to this two-pronged test," and criticized the lower court's decision for not considering the subject affidavit in its entirety, as the *Gates* standard requires. *Id.* at 2087.

182 *Id.* at 2086-87.

183 *Id.* at 2087.

184 *Id.*

185 *See* State v. Jackson, 53 U.S.L.W. 1049, 1050 (Wash., Oct. 2, 1984) (refusing to "blindly" follow *Gates* approach and retaining, instead, *Aguilar-Spinelli* approach). *Contra* Potts v. State 53 U.S.L.W. 2195 (Md., Aug. 28, 1984) (following *Gates*); State v. Arrington, 53 U.S.L.W. 2195 (N.C., Aug. 22, 1984)(same).

186 *Gates*, 103 S. Ct. at 2350 (White, J., concurring).

187 It is essential to note that in its most recent cases involving criminal procedure decisions, the Supreme Court has adopted new standards which clearly favor law enforcement interests. For example, in Nix v. Williams, 104 S. Ct. 2501, 2507 (1984), the Court recognized and adopted the so-called "ultimate or inevitable discovery" exception to the exclusionary rule. That doctrine holds that if the sought-after evidence would eventually have been discovered even if no misconduct had taken place, such evidence is not rendered inadmissable on that score. *Id.* at 2509. Additional evidence of the Court's desire to provide for more effective law enforcement can be found in two recently-decided cases wherein the exclusionary rule was modified so as to provide for a good-faith exception. Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Leon, 104 S. Ct. 3405 (1984).

It is interesting to note that the Supreme Court had first considered modification of the exclusionary rule in *Gates*. The Court, however, declined to rule on the issue, because it has not been addressed by the lower courts. *Gates*, 103 S. Ct. at 2321-25.

lines, it will be difficult to view the fourth amendment as the safeguard for individual rights which it was intended to be.

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