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CRIMINAL PROCEDURE: "CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES" IN DETERMINING PROBABLE CAUSE FOR A SEARCH WARRANT BASED ON INFORMANT'S TIP

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

Acting under a search warrant, police officers seized contraband discovered in respondents' automobile and home and arrested respondents for violating state drug laws.[1] The trial court suppressed the seized evidence because it concluded the search warrant had been issued without probable cause.[2] The affidavit supporting issuance of the warrant stated that police had received an anonymous letter detailing the respondents' activities in selling illegal drugs and indicating the date of the next sale.[3] The affidavit further stated that an independent police investigation corroborated much of this information.[4] Because the anonymous tip did not establish the basis or reliability of the informant's knowledge, both the appellate court and the Supreme Court of Illinois affirmed the trial court's determination that probable cause had not been established.[5] On certiorari, the United States Supreme Court reversed and HELD, the "totality of the circumstances" must be considered in determining whether an informant's tip establishes probable cause for the issuance of a search warrant.[6]

The fourth amendment provides that a citizen's right to privacy shall not be violated by "unreasonable searches and seizures,"[7] nor

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1. 103 S. Ct. 2317, 2320 (1983).
2. *Id.* at 2326.
3. *Id.* at 2325. On May 3, 1978, the Bloomingdale Police Department received an anonymous letter stating that respondents made a living by selling drugs. The letter stated that Sue Gates typically would drive the car to Florida, leave it, and take an airplane back to Bloomingdale. After the car had been loaded with drugs, Lance Gates would fly to Florida and drive the car back to Bloomingdale. The letter indicated the next trip would be on May 3. *Id.*
4. *Id.* at 2326. Police investigation confirmed that Lance Gates had flown to Florida on May 5, checked into a motel room registered in his wife's name, and left the motel the next day with an unidentified woman. *Id.* at 2325-26.
5. *Id.* at 2326. The Illinois Supreme Court applied the "two-pronged test" enunciated by the United States Supreme Court in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). 103 S. Ct. at 2326-27.
6. *Id.* at 2332.
7. The fourth amendment provides in full:

> 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.

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shall a search warrant be issued except upon a showing of "probable cause."[8] The existence of probable cause is generally determined by a common sense, nontechnical reading of information provided in the search warrant application and supporting affidavits.[9] Because probable cause is such a flexibly defined standard,[10] courts reviewing probable cause determinations characteristically pay great deference to issuing magistrates.[11]

In keeping with this deferential approach, *Jones v. United States*[12] upheld the issuance of a warrant that was based almost entirely on hearsay statements of a confidential informant.[13] The Su-

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U.S. CONST. amend. IV.

8. The Supreme Court has repeatedly enunciated a preference for searches pursuant to a warrant over warrantless searches. *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[A] search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well delineated exceptions.' "). *See also* United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (searches pursuant to a warrant "are to be preferred over the hurried actions of officers. . . .").

As the court noted in Johnson v. United States, 333 U.S. 10 (1948), this preference does not deny law enforcement the support of the usual inferences which reasonable men may draw from evidence. Rather, a search pursuant to a warrant protects citizens by simply "requiring that those inferences 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." *Id.* at 13-14.

The probable cause standard is a compromise striking a balance between conflicting interests.

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give leeway for enforcing the law in the community's protection. . . . The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

Id.

9. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 108 (1965) ("affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion").

10. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)). "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

11. United States v. Ventresca, 380 U.S. 102, 108-09 (1965). "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. . . . [T]he courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Id.*

12. 362 U.S. 257 (1960).

13. *Id.* at 272. Search warrant applications frequently contain information provided by informants. *See* Comment, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 703 n.3 (1972). For a discussion of informants, see LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1, 1 n.5.

preme Court held that hearsay evidence may be considered by the magistrate "so long as a substantial basis for crediting the hearsay is presented."[14]

In *Aguilar v. Texas*,[15] the Supreme Court explained what would constitute a substantial basis for crediting hearsay.[16] The magistrate in that case had issued a search warrant based on an affidavit stating only that "reliable information from a credible person" indicated that the described premises contained narcotics.[17] Reversing defendant's drug conviction, the Court held the affidavit insufficient to establish probable cause because it was a "mere conclusion."[18] For hearsay evidence to establish probable cause, the affidavit must include the underlying circumstances which caused the informant to believe a crime was being committed and which led the affiant to conclude the informant's statements were reliable.[19] *Aguilar* thus created a two-pronged test for affidavits based on hearsay evidence consisting of a "basis of knowledge" prong[20] and a "veracity" prong.[21]

The Supreme Court elaborated on *Aguilar*'s test in *Spinelli v.*

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14. 362 U.S. at 269.

15. 378 U.S. 108 (1964).

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

17. 378 U.S. at 109.

18. *Id.* at 113-14. The Court relied on Giordenello v. United States, 357 U.S. 480 (1958) (invalidating an arrest warrant based on an affidavit which failed to indicate any sources for the affiant's conclusions) and Nathanson v. United States, 290 U.S. 41 (1933) (invalidating a search warrant based solely on custom agent's "mere affirmation of suspicion").

19. 378 U.S. at 114.

20. One commentator explains the purpose of this prong as follows: "The 'basis of knowledge' prong assumes an informant's 'veracity' and then proceeds to probe and test his conclusion: ('What are the raw facts upon which the informant based his conclusion?' 'How did the informant obtain those facts?')." Moylan, *supra* note 16, at 773.

See also LaFave, *supra* note 13, at 6. Professor LaFave points out that the most obvious and direct means of satisfying the "basis of knowledge" prong is to repeat exactly how the informant claims to have obtained the information given to the officer. For examples, see United States v. Schauble, 647 F.2d 113 (10th Cir. 1981) (affidavit indicated that informant personally observed marijuana); United States v. Francis, 646 F.2d 251 (6th Cir. 1981) (informant personally observed heroin).

21. The "veracity" prong is said to have a "credibility spur" and a "reliability spur," and thus it can be satisfied either by showing that the informant is generally credible or that the information on this particular occasion is reliable. Moylan, *supra* note 16, at 754-55.

The "credibility spur" of the veracity requirement is often satisfied by showing the informant has a "track record" for providing accurate information. LaFave, *supra* note 13, at 4-5. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967) (informant's previous tips led to a number of arrests and convictions); United States v. Whitney, 633 F.2d 902 (9th Cir. 1980) (informant's past reliability established). Absent the informant's general credibility, the reliability of the particular information offered may be inferred when the declarations were contrary to the informant's penal interests. United States v. Harris, 403 U.S. 573, 583 (1971) ("Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility. . . ."). Although this view may not have been supported by a majority of the court it has been consistently followed by lower courts. *See* LaFave, *supra* note 13, at 5 n.23, 24.

United States.[22] That case involved a search warrant issued on the basis of an affidavit by FBI agents.[23] The affidavit alleged that agents had been informed by "a confidential, reliable informant" that petitioner was engaged in illegal gambling and that an independent investigation had revealed that petitioner's apartment contained two telephones. A search pursuant to the warrant uncovered evidence which ultimately led to petitioner's conviction for gambling activities.[24]

Expressly rejecting a "totality of the circumstances" approach,[25] the *Spinelli* Court reaffirmed *Aguilar*'s two-pronged test as the appropriate method for determining probable cause when hearsay evidence is a crucial element.[26] The Court explained that the basis of knowledge prong could be satisfied without a direct statement, provided the tip contains sufficient detail to imply that the information was obtained in a reliable way.[27] Nevertheless, the Court held that the tip in *Spinelli* did not in itself meet the *Aguilar* standard for probable cause.[28] Extending *Aguilar*, the Court declared that where the informant's tip alone is inadequate, corroborating information may be considered together with the tip in ascertaining whether the two-pronged test is satisfied.[29] The affidavit in *Spinelli* also failed

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22. 393 U.S. 410 (1969).

23. *Id.* at 413-14.

24. *Id.* at 411.

25. *Id.* at 415.

26. *Id.* Although both *Aguilar* and *Spinelli* involve search warrants, the "two-pronged test" is equally applicable to probable cause determinations regarding warrantless arrests and searches. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967) (applying the "two-pronged test" to a warrantless arrest and an incidental warrantless search).

27. 393 U.S. at 416-17. This has been called the "self-verifying detail" technique. *See* Moylan, *supra* note 16, at 749. The *Spinelli* Court used the tip in Draper v. United States, 358 U.S. 307 (1959) as a "benchmark." 393 U.S. at 416. In *Draper*, police received a tip from a "special employee" of the Bureau of Narcotics that petitioner would be arriving by train on a certain date carrying three ounces of heroin. The tip identified petitioner's physical description and the clothes he would be wearing. The tip also indicated that he would be carrying a tan zipper bag and walking fast. 358 U.S. at 309. The *Spinelli* Court stated that "[A] magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." 393 U.S. at 417. *Draper*'s finding of probable cause was not based on this theory, but rather on the fact that police investigation corroborated the informant's tip. 358 U.S. at 313.

28. 393 U.S. at 416-17.

29. Whereas the search warrant in *Aguilar* was based solely on hearsay evidence, the affidavit in *Spinelli* contained additional corroborating evidence based on independent investigation. Delineating the manner in which *Aguilar*'s two-pronged test should be applied in this different circumstance, the *Spinelli* Court stated that the magistrate must ask: "Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar*'s tests without independent corroboration?" *Id.* at 415. Again relying on *Draper*, the Court noted that independent investigation corroborating a detailed tip may support a finding of probable cause. *Id.* at 417. *See supra* note 27.

under this analysis,[30] and the Court accordingly reversed petitioner's conviction.[31]

On facts similar to those of *Spinelli*,[32] the instant Court again addressed satisfying the fourth amendment requirements when issuing a search warrant based on hearsay evidence.[33] Reasoning that rigid, analytical rules were inappropriate for determining probable cause,[34] the majority[35] "abandoned" the *Aguilar/Spinelli* approach in favor of a "totality of the circumstances" analysis.[36] A finding of probable cause should be a common sense judgment based on all the circumstances alleged in the affidavit including, but not limited to, the "veracity" and the "basis of knowledge" of informants.[37]

The instant Court offered several reasons in support of its decision to abandon the *Aguilar/Spinelli* analysis. The two-pronged test promotes analytical "dissection" of informants' tips by dividing the analysis into two isolated investigations.[38] The Court reasoned that this level of scrutiny conflicts with the traditional notion that reviewing courts should defer to magistrates' determinations.[39] Moreover, because anonymous tips seldom satisfy either of the two prongs, this test hinders law enforcement activities by rendering such tips valueless.[40] Finally, the instant Court suggested that the *Aguilar/Spinelli* analysis was too technical for ready application by the many nonlawyers involved in the warrant process.[41] The Court concluded that, in view of the totality of the circumstances, probable cause to search the respondents' home and automobile existed and reversed the Illinois Supreme Court.[42]

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30. 393 U.S. at 416.
31. *Id.* at 420.
32. *Id.* at 439. Both *Spinelli* and the instant case involved partially corroborated tips.
33. 103 S. Ct. at 2321.
34. *Id.* at 2328-32. *See supra* notes 9-11 and accompanying text.
35. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger and Justices Blackmun, Powell and O'Connor joined. Justice White concurred and Justices Brennan, Marshall and Stevens dissented.
36. *Id.* at 2332.
37. *Id.*
38. *Id.* at 2329. The Court stated that the two prongs should not be granted this independent status, suggesting instead that "a deficiency in one may be compensated for in determining the overall reliability of a tip, by a strong showing as to the other." *Id.*
39. *Id.* at 2331. The instant Court stated that such scrutiny of magistrates' decisions may encourage warrantless searches, whereas the "totality of the circumstances" approach "better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable cause determinations of magistrates." *Id.*
40. *Id.* at 2332.
41. *Id.* "[A]ffidavits 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. . . .' Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges. . . ." *Id.* at 2330.
42. *Id.* at 2336. Considering the substance and detail of the anonymous letter, as well as

As the instant Court noted, probable cause determinations have conventionally been made in a practical, nontechnical fashion.[43] Useful guidelines for making such determinations, however, do not necessarily preclude this traditional approach.[44] *Aguilar* and *Spinelli* devised a structured analysis to assist magistrates in determining whether hearsay evidence is sufficiently reliable. While allowing room for a common sense determination of overall probable cause, this test provides a framework for the difficult evaluation of hearsay evidence and thereby promotes consistent and accurate decisions.[45] When hearsay evidence is essential to a finding of probable cause, the basis of the informant's knowledge and the informant's credibility should be assessed. Because these prongs are independently significant,[46] a deficiency in the proof of one should not be overcome by ample proof of the other.[47]

The instant Court's criticisms of the two-pronged test are unfounded. Both *Aguilar* and *Spinelli* expressly support the traditional notion that reviewing courts should pay deference to magistrates' probable cause determinations.[48] Although more structured than a "totality of the circumstances" approach, the two-pronged test does not amount to de novo review.[49] In addition, the instant Court incorrectly assumed the *Aguilar/Spinelli* analysis would render anony-

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the corroborative evidence supplied by independent investigation, the Court concluded that probable cause existed. *Id.* at 2334-36. The majority suggested that the affidavit in the instant case might have failed under the "two-pronged test." *Id.* at 2335-36.

43. *See supra* notes 9-10 and accompanying text.

44. *See Spinelli*, 393 U.S. at 415 ("Where, as here, the informant's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.").

45. "Insofar as it is more complicated, an evaluation of affidavits based on hearsay involves a more difficult inquiry. This suggests a need to structure the inquiry in an effort to insure greater accuracy. The standards announced in *Aguilar*, as refined by *Spinelli*, fulfill that need." 103 S. Ct. at 2355 (Brennan, J., dissenting).

46. *See* Moylan, *supra* note 16, at 747.

47. *See* 103 S. Ct. at 2350 (White, J., concurring in judgment).

> [A] finding of probable cause may be based on a tip from an informant "known for the unusual reliability of his predictions" or from "an unquestionably honest citizen," even if the report fails thoroughly to set forth the basis upon which the information was obtained. If this is so, then it must follow *a fortiori* that "the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building" must be acceptable. . . . It would be "quixotic" if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement. . . . Thus, this portion of today's holding can be read as implicitly rejecting the teachings of these prior holdings.

Id.

48. *Aguilar*, 378 U.S. at 111; *Spinelli*, 393 U.S. at 419.

49. 103 S. Ct. at 2331.

mous tips valueless.[50] By definition, an anonymous tip could not pass the two-prongs originally enunciated by *Aguilar*,[51] but it could satisfy that test as extended by *Spinelli*.[52] The instant Court's final reason for abandoning the two-pronged test is equally fallible. Precisely because the warrant process involves many who are neither lawyers nor judges,[53] a structured approach towards probable cause determinations is desirable. Police officers need to know what to include in an affidavit, and magistrates need guidance in making their determinations.[54]

Though preferable to a vague totality of circumstances analysis, the *Aguilar/Spinelli* approach is not faultless. *Spinelli*'s version of the two-prong test, for example, left a number of unanswered questions which have created confusion in lower courts.[55] Rather than simply abandon the test, the instant Court should have clarified and explained the points of dispute.[56] In establishing a different test, the totality of the circumstances test, the Court offers little guidance and tremendous discretion for magistrates making probable cause determinations.

The instant Court's elimination of essential guidelines from probable cause analysis cripples fourth amendment protections. The probable cause requirement of the fourth amendment aims to protect citizens from unreasonable invasions of privacy by the government. This objective is accomplished by requiring a neutral and detached determination of probable cause before issuance of a search war-

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50. *See supra* note 40 and accompanying text. The instant case is the first time the Supreme Court has considered the two-pronged test's application to tips from anonymous informants.

51. There is no way of knowing whether an anonymous informant is reliable; and, unless it is directly stated in the tip, there is no way to determine the basis of the informant's knowledge.

52. *See supra* notes 27-29 and accompanying text.

53. *See supra* note 41. *See, e.g.*, Shadwick v. City of Tampa, 407 U.S. 345 (1972) (holding that municipal court clerks could issue search warrants); State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975) (holding that ministerial recorder could issue search warrants).

54. 103 S. Ct. at 2355 (Brennan, J., dissenting).

55. For example, the *Spinelli* Court did not indicate what type of deficiencies corroborative evidence can overcome. The Court declared that it did not believe the FBI's independent investigative efforts adequately resolved doubts *Aguilar* raised as to the report's reliability. 393 U.S. at 417. This suggests corroboration is used to overcome deficiencies in the "veracity" prong. However, the Court continued by stating that the corroborating evidence "cannot by itself be said to support both the inference that the informer was generally trustworthy and that he had made his charge against Spinelli on the basis of information obtained in a reliable way." *Id.* This suggests that corroboration may be used to overcome deficiencies in both prongs.

Similarly, *Spinelli* does not clarify whether the corroboration must be of incriminating details or of mere innocent activity. *See* Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L. REV. 958, 966-68 (1969). *See generally* LaFave, *supra* note 12.

56. For an illustration of how the *Aguilar/Spinelli* analysis could be applied to the instant case, see Justice White's concurrence, 103 S. Ct. at 2347-50.

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rant.[57] When the test for determining probable cause lacks substance, this safeguard is rendered impotent and the requirement of a search warrant becomes little more than a legal formality.

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