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COMMENT

ILLINOIS V. GATES: BROADENING THE STANDARD FOR DETERMINING PROBABLE CAUSE BASED ON INFORMANTS' TIPS

Police utilization of informants' tips in the investigation of criminal activity presents the courts with complex fourth amendment issues.² The fourth amendment to the United States Constitution guarantees individuals the right to be free from unreasonable searches and seizures by government officers.³ The

1. See M. HARNEY & J. CROSS, *THE INFORMER IN LAW ENFORCEMENT* 40 (2d ed. 1968). Informants' tips aid police in their investigation and apprehension of criminals. *Id.* The informant is usually someone in the criminal community or close enough to the fringes of criminal activity to obtain accurate information. *Id.* Individuals become informants for a variety of reasons. See Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 *YALE L.J.* 703, 712-13 (1972). Motives for an individual becoming an informant include an offer to the individual of immunity or sentence reduction in exchange for information, revenge directed at a criminal competitor, or offers of money payments in exchange for information. *Id.*

2. See *Stanley v. State*, 19 Md. App. 508, 509, 313 A.2d 847, 849 (1973) (defining law concerning probable cause for warrants based on informants' tips as "murky" and in need of explication). Prior to the recent Supreme Court case of *Illinois v. Gates*, courts employed different standards in determining the extent of factual information required for a magistrate to base a finding of probable cause on an informant's tip. See *Illinois v. Gates*, 103 S. Ct. 2317, 2328 (1983) (Court held that magistrate should determine probable cause for warrant based on informant's tip through examination of "totality of the circumstances"); *infra* text accompanying notes 42-50 (examination of totality of the circumstances analysis); accord *United States v. Harris*, 403 U.S. 573, 581 (1971) (Court employed "substantial basis for crediting" standard for determining whether informant's tip supported finding of probable cause); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (magistrate may base finding of probable cause on informant's tip if affiant provides evidence of informant's veracity and basis of informant's knowledge). Prior to *Gates*, courts also differed on the probative value of an anonymous tip as opposed to a tip from a source known to police in a determination of probable cause. See *Gates*, 103 S. Ct. at 2329 (anonymous tip may support finding of probable cause); *Stanley*, 19 Md. App. at 535, 313 A.2d at 863 (same). But see *United States v. McLeroy*, 584 F.2d 746, 747 (5th Cir. 1978) (magistrate may not base finding of probable cause on an anonymous informant's tip); *United States v. Robinson*, 536 F.2d 1298, 1300 (9th Cir. 1976) (same). See generally LaFave, *Probable Cause for Informants: The Effect of Murphy's Law on Fourth Amendment Adjudication*, 1977 *J. ILL. L.F.* 1, 2 (issue of probable cause based on information supplied by informant has resulted in confusion and conflict among courts).

3. U.S. CONST. amend. IV. The fourth amendment protects persons, their houses, papers and effects against unreasonable searches and seizures by providing that warrants should issue only following a finding of probable cause. *Id.*; see *infra* text accompanying notes 6 & 8 (defining probable cause to search and probable cause to arrest). Fourth amendment protections extend only to conduct initiated pursuant to governmental authority. See *Coolidge v. United States*, 403 U.S. 443, 487 (1971) (fourth amendment protection against unreasonable searches and seizures does not extend to searches and seizures conducted by private individuals); *Burdeau v. McDowell*, 256 U.S. 465, 475-76 (1921) (drafters intended fourth amendment to restrain only governmental

Supreme Court has held that a search or seizure conducted without a warrant is unreasonable per se unless the intrusion is one of a limited number of clearly specified judicial exceptions to the warrant requirement.⁴ Absent a judicially mandated exception, a magistrate must find probable cause for a search or seizure to be reasonable.⁵ Probable cause to search exists when circumstances in a given situation are sufficient to lead a person of reasonable caution to believe that the area that police intend to search contains contraband or incriminating evidence.⁶ Probable cause to arrest⁷ exists when the circumstances in a given situation lead a person of reasonable caution to believe that the suspect has committed or is committing an offense.⁸

A neutral and detached magistrate must make the probable cause determination in any warrant proceeding.⁹ The Supreme Court has held that re-

activities and did not extend fourth amendment's application to searches and seizures conducted by private individuals).

4. See *Katz v. United States*, 389 U.S. 347, 357 (1967) (subject to series of clearly defined exceptions, search is unreasonable per se unless conducted pursuant to warrant properly supported by probable cause). The Supreme Court has established thirteen exceptions to the warrant requirement. See Note, *Reasonable Suspicion and Probable Cause in Automobile Search Cases: A Validity Checklist for Police, Prosecutors and Defense Attorneys*, 40 WASH. & LEE L. REV. 361, 362 n.10 (1983) (thirteen exceptions to warrant requirement are: inventory search of vehicles, hot pursuit, border and customs searches, searches of highly regulated businesses, stop and frisk, abandoned property, emergency aid, consent, seizure of items in plain view, fire and homicide investigations, detention facilities, search incident to arrest, and vehicle search).

5. See *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (probable cause standard reflects relevant factors of fourth amendment reasonableness requirement); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (probable cause requirement implemented to protect citizens from rash and unreasonable intrusions).

6. See *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (probable cause to search standards requires more than mere suspicion); *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Supreme Court held that the amount of evidence needed to find probable cause was less than the amount needed to justify conviction. *Id.* at 161-62. The evidence necessary to sustain a finding of probable cause, however, had to be greater than the good faith belief of the officer that the seizable items were in the place to be searched. *Id.*

7. See *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (arrest is seizure of person that fourth amendment allows). Courts have defined arrest as the restriction of a person's liberty by law enforcement agents to the extent that the suspect may not voluntarily leave the custody of the agents. See *Orozco v. Texas*, 394 U.S. 324, 325 (1969) (time of arrest measure at moment when suspect was no longer free to move); *Henry v. United States*, 361 U.S. 98, 103 (1959) (arrest defined as restriction of suspects' freedom of movement). *But see Terry v. Ohio*, 392 U.S. 1 (1968). The *Terry* Court held that a brief stop of the suspect by police, pat of the suspect's outer clothing, and seizure of an item concealed inside the clothing did not constitute an arrest. *Id.* at 26. The *Terry* Court stated that although all arrests are seizures, all seizures are not necessarily arrests. *Id.* at 27.

8. See *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (officer's knowledge of petitioner and petitioner's previous record of criminality did not satisfy probable cause to arrest requirements); *Henry v. United States*, 361 U.S. 98, 103-04 (1959) (affidavit failed to meet probable cause to arrest standard when only evidence available to officers was petitioner's carrying of package in neighborhood where theft of number of similarly shaped packages had occurred).

9. See *Giordenello v. United States*, 357 U.S. 480, 486 (1958) (fourth amendment protections dictate that only neutral and detached magistrate may determine the existence of probable cause from facts of case); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (neutral and detached magistrate must determine probable cause, not police officer who is engaged in business of crime prevention); see also *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In *Coolidge*, the justice of the peace who made the probable cause determination was also the potential prosecuting attorney.

quiring a neutral and detached magistrate to determine probable cause is necessary to protect adequately the fourth amendment rights of an individual.¹⁰ Magistrates face a complicated task when the affidavit in support of the warrant relies primarily on a confidential informant's tip.¹¹

In *Aguilar v. Texas*¹² the Supreme Court developed a two-prong test for determining the existence of probable cause based on informants' tips.¹³ The *Aguilar* text provided specific evidentiary standards that affidavits must meet to support a finding of probable cause.¹⁴ The first prong of the *Aguilar* test required that the affidavit provide facts demonstrating the informant's basis of knowledge in obtaining the information.¹⁵ The *Aguilar* Court noted that information revealing an informant's sources and relating the informant's methods for obtaining facts and drawing conclusions provided the means for establishing the informant's basis of knowledge.¹⁶

Id. at 450. The *Coolidge* Court held that the justice of the peace was not neutral and that the search was per se unreasonable. *Id.*

10. See *Johnson v. United States*, 333 U.S. 10 (1948). The *Johnson* Court ruled that an individual's right to privacy must at times yield to a law enforcement agent's right to search. *Id.* at 14. Generally, only a neutral and detached magistrate, and not law enforcement agents, should decide when the necessity of a search justifies an intrusion upon an individual's right to privacy. *Id.* This rule, however, is not absolute. See *supra* text note 4 (discussion of exceptions to warrant requirement).

11. See *Illinois v. Gates*, 103 S. Ct. 2317, 2328 (1983) (advocating totality of the circumstances analysis as correct test for determining probable cause based on informant's tip); *infra* text accompanying notes 73-76 (examination of *Gates* totality of the circumstances analysis). *But see Stanley v. State*, 19 Md. App. 508, 523, 313 A.2d 847, 857 (separate examination by magistrate of informant's basis of knowledge and veracity was proper probable cause analysis); *infra* text accompanying notes 54-60 (examination of *Stanley* court's severability analysis). See generally Comment, *Anonymous Tips, Corroboration, and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99, 108-13 (1982) (discussion of difficulties encountered by lower courts in weighing confidential informants' tips in probable cause determinations) [hereinafter cited as *Anonymous Tips*].

12. 378 U.S. 108 (1964).

13. *Id.* at 114. In *Aguilar*, Houston police applied for a warrant to search the home of the petitioner. *Id.* at 109. The police officers submitted an affidavit in support of the application. *Id.* The affidavit stated that a reliable informant had alerted the officers to the possibility that the petitioner had narcotics in his house. *Id.* Based on the affidavit, the local Justice of the Peace issued the search warrant. *Id.* The police entered the home of the petitioner and arrested the petitioner as he attempted to dispose of a packet of narcotics. *Id.* at 110. The trial court admitted the evidence obtained through the search over the objection of the petitioner. *Id.* The Texas Court of Criminal Appeals affirmed the conviction. See *Aguillar v. State*, 172 Tex. Crim. 629, 631, 362 S.W.2d 111, 112 (1962). The United States Supreme Court overturned the Texas Court of Criminal Appeals by holding that the affidavit failed to demonstrate a sufficient amount of basis of knowledge evidence to enable the magistrate to determine probable cause. 378 U.S. at 116. The Supreme Court further ruled that all evidence that the police obtained from the search was inadmissible. *Id.* at 115-16.

14. 378 U.S. at 114.

15. *Id.* The *Aguilar* Court stated that the affidavit had to set forth the underlying circumstances that formed the basis of the informant's knowledge regarding the location and quantity of narcotics. *Id.*

16. See *Id.* at 113, quoting (*Giordenello v. United States*, 357 U.S. 480, 486 (1958)) The most persuasive form of basis of knowledge evidence is information that the informant obtains through first-hand observation. See *State v. Archer*, 23 Ariz. App. 584, 534 P.2d 1083 (1975). In *Archer*, the informant was an accomplice to the crime that police were investigating. *Id.* at

The *Aguilar* Court emphasized the importance of establishing the basis of the informant's knowledge, stating the basis of knowledge evidence provides the magistrate with sufficient information to determine that the informant obtained his information in a reliable of manner.¹⁷ The Court reasoned that evidence relating to the informant's method for obtaining the information allowed the magistrate to minimize the possibility that the informant's source of the information was not rumor or general reputation.¹⁸ The *Aguilar* Court held that absent a showing that the informant had not based his testimony on mere rumor, a magistrate cannot make a proper evaluation of whether sufficient probable cause exists for a warrant to issue.¹⁹ The Court reasoned that the actions of a magistrate without adequate basis of knowledge evidence would amount to nothing more than blind approval of conclusions that either police officers or informants drew from potentially unreliable or inaccurate information.²⁰ The *Aguilar* Court concluded that a magistrate who approves the evaluations of a police officer without considering the basis on which the officer derives his conclusions has abdicated his constitutional obligation to be a neutral and detached arbiter of probable cause.²¹

_____, 534 P.2d at 1085. The informant claimed that he obtained the information contained in the tip through his role as an accomplice to the crime. *Id.* at _____, 534 P.2d at 1085. The Court of Appeals of Arizona held that the first-hand information presented by the informant clearly satisfied the basis of knowledge prong. *Id.* at _____, 534 P.2d at 1085-86. See *United States v. Carmichael*, 489 F.2d 983, 986-87 (7th Cir. 1973) (court held that affiant also must demonstrate third party's basis of knowledge). See generally *LAFAYE*, *supra* note 2, at 35-42 (examination of various judicial interpretations of probative value of first-hand observation in probable cause determinations).

17. 378 U.S. at 114-15. The Court in *Aguilar* implied that the basis of knowledge requirement preserved the rule established in *Giordenello v. United States*. See *id.* at 115; *Giordenello*, 357 U.S. 480, 486 (1958). In *Giordenello*, the affidavit failed to provide the source of the information on which the affiant based his conclusion of criminal activity. *Id.* at 486. Without the basis of knowledge information, the magistrate could not weigh accurately the facts to make a proper probable cause determination. *Id.* at 486-87.

18. See 378 U.S. at 113-14; *Spinelli v. United States*, 393 U.S. 410, 416 (1969) (Court required sufficient basis of knowledge evidence to ensure that magistrate would determine probable cause on something more substantial than underworld rumor).

19. See 378 U.S. at 112 (magistrate cannot make proper probable cause determination unless affiant supplies magistrate with adequate underlying facts); *Nathanson v. United States*, 290 U.S. 41 (1933). In *Nathanson* the affidavit stated the affiant's suspicion that the suspect was engaged in criminal activity. *Id.* at 44-45. The affidavit provided no information regarding the investigations or observations of the officer. *Id.* at 46. The Court held that a warrant that a magistrate issued solely on the basis of the officer's suspicion without any evidence supporting that suspicion was invalid. *Id.* at 47.

20. 378 U.S. at 114; see *United States v. Ventresca*, 380 U.S. 102 (1965). In *Ventresca*, the affidavit stated that the affiants obtained information about the suspect from personal knowledge and from other agents. 380 U.S. at 104. Further, the affidavit recounted in detail incidents in which the agents observed the suspect engaging in illegal or suspicious activity. *Id.* The Supreme Court found that the affidavit contained sufficient basis of knowledge information to support a probable cause determination. *Id.* at 111. The Court emphasized, however, that affidavits based solely on the affiant's conclusions may not support a finding of probable cause. *Id.* at 108-09. The *Ventresca* Court stated that without evidence of underlying circumstances, the magistrate becomes a "rubber stamp" of the police. *Id.* at 109.

21. 378 U.S. at 115. The *Aguilar* Court held that the constitution requires that a neutral and detached magistrate determine probable cause. *Id.* The *Aguilar* Court stated further that

The basis of knowledge prong enunciated in *Aguilar* is not unique to the evaluation of warrants that a magistrate issues on the basis of an informant's tip.²² In any warrant situation, the requirement that the affiant supply the magistrate with basis of knowledge evidence exists to ensure that the magistrate will make an accurate, detached probable cause determination.²³ For example, when an affiant/officer bases the affidavit solely on personal knowledge and observation rather than on an informant's testimony, the affiant/officer must nonetheless provide adequate information indicating the method by which the officer derived the information to allow the magistrate to properly determine probable cause.²⁴ Additionally, the fact that an informant's tip provides the basis for a warrant affidavit does not require the magistrate to apply a more stringent standard of proof for the basis of knowledge test than if the affiant/officer bases the affidavit on personal knowledge.²⁵ The constitutional rationale for requiring an officer to relate the sources of his information is that a neutral, detached, and informed magistrate is more competent to determine probable cause than a biased police officer seeking a conviction.²⁶

The second prong of the *Aguilar* test, the veracity prong, specifically pertained to the truthfulness of affidavits based on informants' tips by requiring the affiant to offer additional facts establishing the credibility of the informant or the reliability of his information.²⁷ In situations in which the affiant reports his own observations and investigations, the oath or affirmation of the affiant ensures the veracity of the affidavit.²⁸ In contrast, the *Aguilar* Court

a magistrate's mere approval of the conclusion of the police officer allows the officer to become the determinor of probable cause. *Id.*; see *Johnson v. United States*, 333 U.S. 10, 14 (1948) (fourth amendment protection is dependent up on magistrate as impartial determinor of probable cause rather than police officer who is active in competitive enterprise of crime solution); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (same).

22. 378 U.S. at 112-13.

23. See *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (search warrant based on officer's suspicion must provide basis of knowledge evidence).

24. See *id.*

25. See *Aguilar*, 378 U.S. at 112-14. The basis of knowledge standard is the same regardless of the source of the affidavit. Compare *Aguilar*, 378 U.S. at 114 with *Nathanson*, 290 U.S. at 47 (Supreme Court requires same basis of knowledge standard for affidavit that officer bases on either informant's tip or on affiant/officer's personal suspicion).

26. See *Illinois v. Gates*, 103 S. Ct. 2317 (1983) (Brennan, J., dissenting). In his *Gates* dissent, Justice Brennan stated that a police officer is presumptively reliable. *Id.* at 2358. Justice Brennan stated that regardless of a police officer's reliability, the officer could no more properly determine probable cause than a presumptively unreliable confidential informant. *Id.*

27. *Aguilar*, 378 U.S. at 114-15; see *Spinelli v. United States*, 393 U.S. 410, 413 (1969) (affidavit based on informant's tip requires extra factual information that demonstrates veracity of information). The affiant need not identify the informant despite the fact that the informant's veracity was in question. See 378 U.S. at 114; *Rugendorf v. United States*, 376 U.S. 528, 534-35 (1964) (proceeding to determine probable cause does not require disclosure of informant's identity).

28. See *United States v. Turner*, 558 F.2d 46 (2d Cir. 1977). In *Turner*, the Second Circuit stated that the purpose of the oath or affirmation was to ensure that the affiant was telling the truth. *Id.* at 50. The *Turner* court stated that the rationale behind the use of the oath or affirmation was that the moral, legal, or religious significance to the affiant of the oath or affirmation would increase the likelihood that the affiant was being truthful. *Id.*; see U.S. CONST. amend. IV (warrant will not issue absent determination of probable cause supported by oath or affirmation of affiant); *supra* note 3 (explanation of general purposes of fourth amendment).

found that the oath of the affiant could not ensure the veracity of the affidavit when evidence supplied by an absent informant formed the basis of the affidavit.²⁹ Therefore, in situations involving informants' tips, the *Aguilar* Court held that the affiant had to supply underlying facts that pertained to the informant's truthfulness in order to ensure the veracity of the affidavit.³⁰

In *Spinelli v. United States*,³¹ the Supreme Court noted that the Eighth Circuit's confused application of the *Aguilar* holding justified a further explication of the two-prong test.³² In his concurring opinion to *Spinelli*, Justice White elaborated on the *Aguilar* decision by delineating specific cures for affidavits that failed either or both prongs of the *Aguilar* test.³³ The first *Spinelli* cure addressed the problem of affidavits that failed to provide adequate basis of knowledge evidence.³⁴ Justice White stated that a sufficient level of detail

29. See *Aguilar*, 378 U.S. at 114; *Jones v. United States*, 362 U.S. 257, 271 (1960) (in evaluating information supplied by informant, magistrate must find sufficient supporting evidence about informant to reduce possibility of untrustworthy testimony).

30. See *Aguilar*, 378 U.S. at 114. The most common type of underlying fact utilized to prove the veracity of an informant is the past reliability of the informant in similar situations. See *McCray v. Illinois*, 386 U.S. 300, 304 (1967). In *McCray*, the police officer testified that he had known the informant for approximately two years. *Id.* at 304. During that two-year period, the informant supplied information to the officer approximately twenty-five times. *Id.* The tips subsequently led to a number of convictions. *Id.* The *McCray* Court concluded that the past performance of the informant assured that the information the informant supplied was trustworthy. *Id.*

31. 393 U.S. 410 (1969). In *Spinelli v. United States*, the United States District Court for the Eastern District of Missouri found the petitioner guilty of illegal interstate gambling activities. *Id.* at 411-12. The district court convicted Spinelli for travelling from Illinois to Missouri with the intent to conduct illegal gambling activities. *Id.* at 411; see 18 U.S.C. § 1952 (1976) (federal statute prohibiting interstate gambling activities). The execution of a search warrant that the magistrate granted on the basis of a confidential informant's tip provided the police with evidence that resulted in the petitioner's conviction. 393 U.S. at 411. The search warrant affidavit alleged that the petitioner was a bookmaker conducting business from two phones in an apartment in St. Louis. *Id.* at 413-14. Specifically, the affidavit stated that a confidential informant had alerted the Federal Bureau of Investigation (FBI) to the petitioner's illegal book-making activity. *Id.* at 414. The informant provided the numbers of the two phones allegedly located in the petitioner's apartment. *Id.* The FBI agents corroborated all of the informant's facts except the conclusion that the suspect was conducting illegal bookmaking activities. *Id.* at 413. The agents observed the petitioner crossing the Illinois-Missouri border on four occasions. *Id.* The agents also observed the petitioner enter the apartment building that the informant claimed to house the bookmaking operation. *Id.* Finally, the FBI agents corroborated the phone numbers mentioned in the tip. *Id.* at 414.

The Eighth Circuit upheld the petitioner's conviction. See 382 F.2d 871 (8th Cir. 1967) (en banc). The Supreme Court reversed the holding of the Eighth Circuit, stating that the affidavit was insufficient to establish probable cause. 393 U.S. at 412. The Supreme Court held that the affidavit failed both the basis of knowledge and veracity prongs of the *Aguilar* test. *Id.* at 417-18.

32. 393 U.S. at 412. In *Spinelli*, the Court cited that the confusion of the lower courts and the great number of cases involving warrants based on informants' tips motivated the Court to re-examine the *Aguilar* test. *Id.* The Court stated that a magistrate must evaluate an informant's tip in light of the two-prong analysis of the *Aguilar* test. *Id.* at 415. If the magistrate determines that the tip is inadequate to support a finding of probable cause, the affiant may buttress the tip with certain specific information. *Id.*

33. *Id.* at 425-28 (White, J., concurring).

34. *Id.* at 425 (White, J., concurring).

in the informant's tip could compensate for an affiant's failure to satisfy the requirements of the basis of knowledge prong.³⁵ Justice White reasoned that specificity of detail in a tip supported an inference that the informant had based the tip on personal observation.³⁶ Justice White concluded that the inference of personal observation satisfied the requirement of the basis of knowledge prong.³⁷

Justice White's concurrence also elaborated on the majority's holding that independent police corroboration of specific facts provided by the informant could establish the informant's reliability and therefore buttress a defective veracity prong of the *Aguliar* test.³⁸ Justice White explained that verification by police of some facts in the informant's tip lent credence to the unverified facts.³⁹ White stated that the corroboration of some facts, in addition to the implied accuracy of the unverified facts could prove the informant's truthfulness, thereby satisfying the veracity prong's requirement that the affiant provide evidence pertaining to the reliability of the informant.⁴⁰

35. *Id.* (White, J., concurring). In *Spinelli*, Justice White stated that self-verifying details could cure a defective affidavit only when the affidavit had already satisfied the veracity prong of the *Aguliar* test. *Id.* Justice White defined self-verifying detail as detail specific enough to support an inference of personal observation by the informant, thereby satisfying the basis of knowledge prong. *Id.* at 426. Justice White cited the facts of *Draper v. United States* as an example of the type of detail necessary to buttress a defective basis of knowledge prong. *Id.* at 420; see *Draper v. United States*, 358 U.S. 307, 308-09 (1959); *infra* text accompanying notes 96-101 (facts of *Draper* affidavit). The tip in *Draper* included details of the suspect's travel itinerary and physical appearance. 358 U.S. at 309. The physical description of the suspect included his height, weight, clothing, and the color of a bag that the suspect would be carrying. *Id.*

36. 393 U.S. at 425. (White, J., concurring) In his *Spinelli* concurrence, Justice White based the inference that the informant provided evidence derived from personal observation on the assumption that a person ordinarily does not obtain minutely detailed information through casual, day-to-day conversation. *Id.* at 425-26. Justice White surmised that an informant gains detailed information only through a reliable method such as personal observation. *Id.*

37. *Id.* at 426. (White, J., concurring) In his concurring opinion to *Spinelli*, Justice White stated that, assuming the affidavit contained information sufficient to satisfy the veracity prong, the inference of personal observation satisfied the basis of knowledge prong. *Id.* The inference of personal observation allowed a finding of probable cause. *Id.*; see *supra* text accompanying note 16 (probative effect of personal observation on basis of knowledge examination).

38. 393 U.S. at 426-27. (White, J., concurring) In his *Spinelli* concurrence, Justice White stated that the verification of facts of the affidavit was probative of the honesty of the informant because verification insured that the informant was not reporting a fabricated story. *Id.* at 426.

39. *Id.* at 427. (White, J., concurring) In *Spinelli*, Justice White stated that police corroboration could only prove an informant's veracity. *Id.* The rationale used by Justice White to find that police corroboration could establish an informant's veracity was that because the police proved that the information was correct regarding some facts, the informant is more likely to be right on allegations of illegal activity as well. *Id.* Justice White stressed that police corroboration of an informant's tip alone cannot establish probable cause. *Id.* White stated that if police corroborated nine facts supplied by an informant, the corroboration did not justify a finding of probable cause on the unverified conclusion. *Id.* White stated that although the informant was accurate on the facts, thereby satisfying the veracity prong, the corroboration could not provide the magistrate with sufficient basis of knowledge evidence to evaluate the informant's conclusions. *Id.*; see *infra* text accompanying notes 94-113 (examination of use of police corroboration as basis of knowledge evidence).

40. 393 U.S. at 427. Courts have differed on the question of whether the police should

A major interpretative difficulty of the *Aguilar-Spinelli* test for courts was whether a magistrate must sever the two prongs of the test or evaluate the veracity and basis of knowledge of the informant interdependently by an assessment of the "totality of the circumstances."⁴¹ Under the totality of the

corroborate incriminating facts or seemingly innocent facts to meet the *Spinelli* requirement. See Comment, *Anonymous Tips supra* note 11 at 101 (type of fact that must be corroborated to buttress informant's veracity is area of conflicting judicial interpretation). Some courts have held that corroboration of innocent facts, which on their face would not incriminate a suspect, satisfies the *Aguilar* veracity prong. See, e.g., *United States v. Weinrich*, 586 F.2d 481, 490 (5th Cir. 1978) (corroboration of physical descriptions, addresses, phone numbers, and automobiles satisfied test for informant's reliability), *cert. denied*, 441 U.S. 927 (1979); *United States v. Ashley*, 569 F.2d 975, 982 (5th Cir.) (FBI corroboration of innocent facts is sufficient to establish informant's reliability), *cert. denied*, 439 U.S. 853 (1978); *United States v. Canieso*, 470 F.2d 1224, 1230-31 (2d Cir. 1972) (same). Courts adhering to the innocent fact standard state that a demand for a stricter standard misinterprets the purpose of police corroboration. See *United States v. Ashley*, 569 F.2d 975, 981-85 (5th Cir.), *cert. denied*, 439 U.S. 853 (1978). In *Ashley*, the Fifth Circuit held that corroboration of innocent facts supports an inference that the informant is truthful. *Id.* at 982. The innocent facts corroborated by the police in *Ashley* were a description of both the suspect and the automobile the suspect was driving. *Id.* The *Ashley* court stated that the purpose of corroboration of informants' facts was to buttress the reliability of the informant, not to establish probable cause. *Id.* at 983. The court concluded, therefore, that corroboration of innocent facts demonstrates the informant's ability to tell the truth as adequately as corroboration of incriminating facts. *Id.*

Other courts have held that police corroboration of innocent facts is inadequate to cure a defective veracity prong. See *Whitely v. Warden*, 401 U.S. 560, 567 (1971). In *Whitely*, the Supreme Court held that police must corroborate facts directly related to the crime to buttress a defective veracity prong. *Id.* at 567. The rationale for requiring corroboration of incriminating facts to prove an informant's veracity is that corroboration of innocent facts does not offer sufficient reliability to support a finding of probable cause since the corroborated facts are accessible to the general public. See LaFave, *supra* note 2, at 55 (view that innocent fact corroboration inadequately protects fourth amendment rights). But see *Stanley v. State*, 19 Md. App. 508, 313 A.2d 847 (1974). The *Stanley* court disputed the incriminating fact requirement by noting that sufficient corroboration of incriminating details establishes probable cause without the tip. *Id.* at 528, 313 A.2d at 860. Corroboration of incriminating details therefore takes the affidavit out of the *Spinelli* context by rendering the informant's tip superfluous. *Id.* at 528, 313 A.2d at 860; see *United States v. Doty*, 714 F.2d 761, 763 (8th Cir. 1983) (independent police corroboration of incriminating fact of possession of marijuana with intent to sell constituted probable cause).

Other courts have established a middle ground approach to the fact corroboration issue. See *United States v. Montgomery*, 554 F.2d 754 (5th Cir.), *cert. denied*, 434 U.S. 927 (1977). This intermediate, or "pipeline" theory requires that the information corroborated demonstrate the informant's personal connection to the criminal activity. *Id.* at 757-58. In *Montgomery*, the Fifth Circuit held that police corroboration of the time that the suspect would be leaving both the motel and the city demonstrated a knowledge of private facts that ensured the reliability of the informant. *Id.* at 757; see *United States v. Spach*, 518 F.2d 866, 871-72 (9th Cir. 1975) (corroboration of totally innocent information may satisfy defective veracity prong if information is not subject of public knowledge).

41. See *United States v. Sellers*, 483 F.2d 37, 41 (5th Cir. 1973) (quantum of underlying circumstances and informant's reliability are main issues in totality of the circumstances analysis), *cert. denied*, 417 U.S. 908 (1974); *Stanley v. State*, 19 Md. App. 508, 523, 313 A.2d 847, 857 (1974) (basis of knowledge and veracity of informant are independent requirements in probable cause determination). See generally, Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 774-81 (1974) (discussing specific purposes and independent nature of two *Aguilar-Spinelli* prongs).

circumstances approach, the magistrate does not analyze the two prongs of the *Aguilar-Spinelli* test as distinct requirements.⁴² The magistrate instead analyzes the basis of knowledge and veracity evidence together to formulate a nontechnical probable cause determination.⁴³ The purpose of the totality of the circumstances test is to increase the discretion of the magistrate by allowing him to make a practical, common sense probable cause determination free from overly technical rules and analyses.⁴⁴

The implementation of the totality of the circumstances analysis has resulted in magistrates relying on independent police corroboration, which under Justice White's analysis in *Spinelli* police could use only to buttress insufficient proof of an informant's reliability,⁴⁵ as evidence of an informant's basis of knowledge.⁴⁶ The rationale for the use of police corroboration as basis of knowledge as well as veracity evidence is that the corroboration may lead to an inference that the informant observed the activity first-hand.⁴⁷ A second result of the totality of the circumstances analysis is that courts have found that a strong determination of an informant's veracity alone is sufficient evidence to support probable cause, without any further demonstration of the informant's basis of knowledge.⁴⁸ Reviewing courts have justified a finding

42. See *Sellers*, 483 F.2d at 41. The *Sellers* court noted that a strong demonstration of one *Aguilar* prong could buttress weaker evidence in the other prong. *Id.*

43. See *id.*; *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (magistrates should examine warrants in practical, realistic fashion and not rely on specific, technical requirements).

44. See *Gonzales v. Beto*, 425 F.2d 963 (5th Cir. 1970), *cert. denied*, 400 U.S. 928 (1971). The *Gonzales* court stated that a magistrate should base his determination of probable cause on inferences drawn from all the facts rather than technical requirements. *Id.* at 970.

45. 393 U.S. at 426-27 (White, J., concurring); see *supra* text accompanying notes 37-39 (explaining rationale of using police corroboration to prove informant's veracity).

46. See *United States v. Anderson*, 500 F.2d 1311 (5th Cir. 1974). In *Anderson*, the affiant reported to the magistrate that the informant had on eight separate occasions provided information that led to seizures of narcotics. *Id.* at 1316. The court held that the informant's past satisfied the veracity prong. *Id.* Using the totality of the circumstances analysis, the *Anderson* court further stated that police corroboration could not only buttress a defective veracity prong, but also could cure a defective basis of knowledge prong by ensuring that the informant had not based the tip on rumor or reputation. *Id.*; *United States v. Drew*, 436 F.2d 529, 533-34 (5th Cir. 1970) (corroboration may buttress inadequate basis of knowledge evidence), *cert. denied*, 402 U.S. 977 (1971).

47. See *Anderson*, 500 F.2d at 1316. The *Anderson* court stated that police corroboration could support an inference that the informant observed the activity first-hand, thereby satisfying the basis of knowledge prong. *Id.*; *supra* note 16 (discussion of probative value of first-hand observation in basis of knowledge determination). *But see infra* text accompanying notes 108-113 (description of analytical flaws in allowing corroborations to buttress defective basis of knowledge prong).

48. See *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974). In *Sellers*, the court noted that the informant had supplied police with reliable information on more than one hundred occasions. *Id.* at 41. The court determined that such a strong demonstration of reliability decreased the level of basis of knowledge evidence necessary to support a probable cause determination. *Id.*, see also *United States v. Crawford*, 462 F.2d 597, 599 (9th Cir. 1972) (strong demonstration of informant's reliability may obviate need for basis of knowledge evidence), *cert. denied*, 409 U.S. 915 (1973). See *supra* text accompanying note 30 (example of magistrate's reliance on informant's past performance to establish reliability).

of probable cause that a magistrate based exclusively on the informant's reliability by noting that a rigorous basis of knowledge examination is superfluous due to the established reliability of the informant.⁴⁹ Courts have viewed the rationale of allowing a strength in one prong to counterbalance a weakness in the other prong as a departure from overly technical probable cause determinations in favor of a practical, common sense approach to probable cause.⁵⁰

The independent, or "severability" approach to applying the *Aguilar-Spinelli* test maintains that the *Aguilar* opinion required the magistrate to make separate determinations whether sufficient evidence of the informant's sources existed to support the basis of knowledge prong and whether sufficient evidence of the informant's honesty existed to support the reliability prong.⁵¹ Under the severability approach, therefore, a strong showing in one *Aguilar* prong may not affect a weaker showing in the other prong.⁵² Courts that advocate the severability approach prefer the more precise, technical analysis to the totality of the circumstances test.⁵³ The Maryland case of *Stanley v. State*⁵⁴ clearly explains the severability analysis. In *Stanley*, the state offered independent police corroboration, ordinarily the constitutional cure for an inadequate demonstration of an informant's veracity, as evidence of the informant's basis of knowledge.⁵⁵ The *Stanley* court held that sufficient evidence existed to satisfy

49. See *Illinois v. Gates*, 103 S. Ct. 2317, 2329 (1983) (vigorous examination of basis of knowledge information not necessary when reliability of source is unquestionable); *Sellers*, 483 F.2d at 41 (same). Although the *Gates* and *Sellers* rationale are similar, the basis for establishing the reliability of the informant differs in each case. Compare *Gates*, 103 S. Ct. at 2329 (informant's reliability based on honest reputation in community) with *Sellers*, 483 F.2d at 41 (informant's reliability based solely on past performance as successful tipster).

50. See *Gates*, 103 S. Ct. at 2330 (common sense compels finding of probable cause based on strong showing in one prong); *Sellers*, 483 F.2d at 41 (same); *Gonzalez v. Beto*, 425 F.2d 963, 970 (5th Cir. 1970) (evaluations of probable cause by magistrates should be made on basis of common sense, not technical requirements), *cert. denied*, 400 U.S. 928 (1971); *infra* text accompanying notes 77-81 (explaining common sense rationale for majority holding in *Gates*).

51. See, e.g., *People v. Palanza*, 55 Ill. App. 3d 1028, 1031-32, 371 N.E.2d 687, 689 (1978) (court invalidated warrant issued by magistrate because informant of uncontested veracity failed to demonstrate adequately basis of his knowledge); *Stanley v. State*, 19 Md. App. 508, 513, 313 A.2d 847, 851 (1974) (magistrate must find sufficient evidence in both prongs of *Aguilar* test to support finding of probable cause); *Dawson v. State*, 14 Md. App. 18, 31, 284 A.2d 861, 868 (1971) (same); *infra* text accompanying notes 52-60 (explaining rationale of separate prong approach to determinations of probable cause).

52. See *Stanley*, 19 Md. App. at 522, 313 A.2d at 857.

53. See *Spinelli*, 393 U.S. at 415. The *Spinelli* Court held that the Eighth Circuit's totality of the circumstances approach was too imprecise to determine properly probable cause. *Id.*

54. 19 Md. App. 508, 313 A.2d 847 (1974). In *Stanley*, the evidence supporting the informant's veracity consisted in part of the affiant's statement that, on two previous occasions, the informant had given the affiant/officer information which led to the arrest of eight suspects and the seizure of a considerable amount of marijuana. *Id.* at 511-13, 313 A.2d at 850-51. The affidavit, however, offered no evidence demonstrating the informant's basis of knowledge. *Id.*, 313 A.2d at 851.

55. *Id.* at 514-15, 313 A.2d at 852. The affiant in *Stanley*, aware that the basis of knowledge evidence in the affidavit was probably inadequate, attempted to buttress the evidence of that prong with evidence of independent police corroboration. *Id.* at 515, 313 A.2d at 852. The weakness

the informant's basis of knowledge,⁵⁶ but rejected the state's attempt to use the police corroborative information as evidence for both prongs.⁵⁷ The *Stanley* court stated that police corroboration evidence was pertinent only to the determination of an informant's veracity and inappropriate in a basis of knowledge evaluation.⁵⁸ The court found that the application of the severability approach was appropriate because each *Spinelli* remedy applied to a particular *Aguilar* prong.⁵⁹ The *Spinelli* remedies therefore were not interchangeable because each prong addressed itself to a different aspect or weakness of the affidavit.⁶⁰

The Supreme Court recently addressed the issue of whether a strong demonstration in one prong of the *Aguilar-Spinelli* test could offset an inadequate showing in the other prong to support a magistrate's finding of probable cause. In *Illinois v. Gates*,⁶¹ Bloomington, Illinois police arrested defendants Lance and Sue Gates for unlawful possession of a controlled substance.⁶² The state obtained the entirety of its evidence from a search of the defendants' home and car.⁶³ In issuing the warrant, the magistrate based his finding of probable cause to search the defendants' home in part on an anonymous letter to the Bloomington police outlining the defendants' travel plans and procedure for transporting narcotics from Florida to Illinois.⁶⁴ The police cor-

of the basis of knowledge prong stemmed from the absence of information in the affidavit that the informant had based his information on personal observation or otherwise had obtained the information in a reliable manner. *Id.* at 513, 313 A.2d at 851. See *infra* text accompanying notes 94-106 (examining use of independent police corroboration as basis of knowledge evidence under totality of the circumstances analysis).

56. 19 Md. App. at 533, 313 A.2d at 863. In *Stanley*, the court stated that the affidavit failed to provide any basis of knowledge evidence. *Id.*, 313 A.2d at 863. The court held, however, that the detail of the tip was sufficiently specific to cure the defective basis of knowledge prong. *Id.* at 535, 313 A.2d at 863.

57. *Id.* at 531-33, 313 A.2d at 861-63.

58. *Id.* at 531, 313 A.2d at 861-62. The court in *Stanley* stated that police corroboration does not ascertain the source of the tip or validate the informant's conclusions. *Id.*, 313 A.2d at 861-62. The *Stanley* court added in dictum that the specificity of detail necessary to cure inadequate basis of knowledge evidence is not probative of an informant's veracity. *Id.* at 531-32, 313 A.2d at 862. The court stated that detail in a tip could not prove that an informant was telling the truth because a creative liar could easily fabricate his tale with elaborate, specific details. *Id.* at 533, 313 A.2d at 862.

59. *Id.*, 313 A.2d at 857. The *Stanley* court re-emphasized that the *Spinelli* remedy of self-verifying detail was a direct response to the problem of insufficient basis of knowledge, and that the *Spinelli* court specifically designed the remedy of independent police corroboration to buttress inadequate evidence of an informant's veracity. *Id.*, 313 A.2d at 857. The *Stanley* court stated that the use of police corroboration of an informant's tip to satisfy the basis of knowledge test amounted to "truth serum for an informant whose integrity is in good health but who desperately needs bifocal lenses." *Id.*, 313 A.2d at 857.

60. *Id.*, 313 A.2d at 857.

61. 103 S. Ct. 2317 (1983).

62. *Id.* at 2326.

63. *Id.* In *Illinois v. Gates*, the Bloomington police searched the trunk of the petitioners' automobile, uncovering approximately three hundred and fifty pounds of marijuana. *Id.* The police also searched the Gates' home, finding marijuana, weapons, and other contraband. *Id.*

64. *Id.* at 2325. In *Gates*, the anonymous letter sent to the Bloomington police identified the petitioners as dealers of a significant quantity of narcotics. *Id.* The letter stated that the first

roborated Lance Gates' plane reservation, Sue Gates' accommodations in Florida, and the Gates' time of departure.⁶⁵

At trial, the defendants filed a motion to quash the warrant and suppress all evidence that the police had obtained as a result of the search.⁶⁶ In their successful motion to quash, the defendants contended that no sufficient basis of probable cause existed for a warrant to issue.⁶⁷ The Illinois state appellate court affirmed the decision of the trial court,⁶⁸ as did the Supreme Court of Illinois.⁶⁹ The Supreme Court of Illinois held that the factual detail of the anonymous tip lacked the necessary specificity to satisfy the basis of knowledge prong by the *Aguilar-Spinelli* test.⁷⁰ The court explained that because the tip lacked the necessary level of detail, the magistrate was unable to properly examine the informant's method of obtaining the information and therefore could not make an accurate probable cause determination.⁷¹ The Illinois court also

step of the drug transporting procedure used by the Gates couple consisted of Sue Gates driving the petitioners' car to Florida. *Id.* Next, Lance Gates would fly to Florida to pick up the car, which had been loaded with narcotics. *Id.* In the interim, Sue Gates would have flown back to Illinois. *Id.* Lance Gates then would drive back to Illinois alone. *Id.* The letter stated that May 3rd was the date of the commencement of the next drug transportation operation and concluded by stating that the Gates' automobile would contain over \$100,000 worth of narcotics. *Id.*

65. *Id.* The anonymous letter in *Gates* accurately described Lance Gates' flight to Florida on May 5th and departure for Illinois the next morning. *Id.* Further, the letter accurately described Sue Gates' actions after arriving in Florida. *Id.* The letter, however, inaccurately stated that Sue Gates would fly back to Illinois alone. *Id.* Instead, the police observed Sue Gates returning to Illinois by car with her husband. *Id.*

66. 103 S. Ct. at 2326. In *Gates*, the defendants filed a motion to suppress the evidence obtained as a result of the search warrant based on the anonymous informant's letter. *Id.*

67. *Id.*; see *People v. Gates*, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980), *aff'd*, 85 Ill. 2d 376, 423 N.E.2d 887 (1981), *rev'd*, 103 S. Ct. 2317 (1983) In the motion to quash the warrant, the defendants in *Gates* contended that the warrant was invalid due to the failure of the affidavit to meet the probable cause requirements of *Aguilar*. *Id.* at 752-53, 403 N.E.2d at 80. The defendants stated that the affidavit failed both prongs of the *Aguilar* test by demonstrating neither the reliability of the anonymous informant nor an adequate basis of the informant's knowledge. *Id.* at 753, 403 N.E.2d at 80.

68. See *People v. Gates*, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980). In *Gates*, the Illinois Appellate Court affirmed the holding of the trial court that probable cause did not exist. *Id.* at 755, 403 N.E.2d at 81. The appellate court based its holding on the failure of the affidavit to satisfy the *Aguilar* basis of knowledge prong. *Id.*

69. See *People v. Gates*, 85 Ill. 2d 376, 390, 423 N.E.2d 887, 893 (1981) (decision of Supreme Court of Illinois to affirm trial court's grant of motion to quash search warrant), *rev'd* 103 S. Ct. 2317 (1983).

70. *Id.* at 389-90, 423 N.E.2d at 893. The *Gates* court held that the detail of the tip did not meet the basis of knowledge test requirements discussed by Justice White in *Spinelli*. See *Spinelli v. United States*, 393 U.S. 410, 426-27 (1969) (White, J., concurring); *supra* text accompanying notes 33-37 (discussion of use of detail to cure defective basis of knowledge prong). The Illinois Supreme Court further stated that independent police corroboration could not buttress a defective basis of knowledge prong. 85 Ill. 2d at 390, 423 N.E.2d at 893; see *Spinelli*, 393 U.S. at 427 (White, J., concurring) (stating that police corroboration is not acceptable basis of knowledge evidence); *supra* text accompanying notes 57-60 (same).

71. 85 Ill. 2d at 389-90, 423 N.E.2d at 893. The *Gates* court held that without basis of knowledge evidence, the magistrate could not ensure that the informant had not based the tip on general rumor or reputation. *Id.*; see *supra* text accompanying notes 17-26 (rationale of basis of knowledge test is to ensure the informant has viable sources of facts and conclusions).

held that the facts that the police corroborated were not of an incriminating nature and therefore could not independently justify a finding of probable cause.⁷²

The Supreme Court overturned the decision of the Illinois Supreme Court in *Gates* and invalidated the severability interpretation of the *Aguilar-Spinelli* test.⁷³ The Court held that the totality of the circumstances analysis was the proper test for probable cause determinations involving informants' tips.⁷⁴ The *Gates* Court reasoned that the totality of the circumstances analysis more properly adhered to the common sense principles for determining probable cause by avoiding rigid, overly technical determinations.⁷⁵ The Court criticized the severability analysis as being the prototype of an overly technical, legalistic analysis of probable cause.⁷⁶

The *Gates* Courts stated that the informal, hurried context surrounding the issuance of most warrants exacerbated the difficulties faced by magistrates when employing the severability analysis.⁷⁷ The *Gates* Court further stated that the totality of the circumstances analysis would provide magistrates with the necessary discretionary powers to evaluate the varied situations that occur while making probable cause determinations.⁷⁸ Furthermore, the *Gates* Court found that the severability analysis made obtaining a search warrant unduly burdensome for police.⁷⁹ The Court explained that requiring that an affidavit

72. *Id.*; see *supra* note 4 (police corroboration of incriminating facts independently may support finding of probable cause, thereby taking warrant out of realm of *Aguilar-Spinelli* context).

73. 103 S. Ct. 2317 (1983).

74. *Id.* at 2327-28. The *Gates* Court defined the totality of the circumstances analysis as a consideration of veracity, reliability, and basis of knowledge information. *Id.* at 2328. The Court emphasized, however, that the various factors are too closely intertwined for a magistrate to be able to consider them in an independent manner. *Id.*

75. *Id.* The *Gates* Court stated that probable cause is an assessment of factual and practical probabilities. *Id.* The Court described probable cause as a fluid concept, changing with each factual situation. *Id.* Noting that informants' tips will vary greatly in terms of both investigative value to police and judicial value to magistrates, the Court emphasized the inapplicability of rigid legal rules in an area of such diversity. *Id.* at 2329. The Court concluded that only a flexible, common sense approach would be adequate for such a broad, diverse concept as probable cause. *Id.*; see *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (discussing inapplicability of overly technical judicial analyses in probable cause determinations).

76. 103 S. Ct. at 2330. The *Gates* Court stated that a complex, legalistic test such as the severability analysis was of little aid to magistrates, who typically are not lawyers. *Id.* See *supra* text accompanying notes 51-60 (discussion of severability analysis).

77. 103 S. Ct. at 2330. Due to the hurried atmosphere surrounding the issuance of warrants, courts have held that perfect specificity of detail is not an essential element in a probable cause determination. See *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (elaborate specificity found in common-law pleading has no place in probable cause determinations). Because of the time limitations and the judicial allowances for less than perfect affidavits or warrant applications, the *Gates* Court concluded that the built-in legal subtleties the *Gates* Court concluded that the built-in legal subtleties of the severability analysis would not aid a magistrate. 103 S. Ct. at 2331. The Court therefore stated that a common sense approach to probable cause determinations better suited a magistrate's work environment. *Id.*

78. *Id.* at 2333 (totality of the circumstances analysis provides magistrate with greater latitude to determine probable cause than severability analysis).

79. *Id.* at 2331. The *Gates* Court stated that the difficulty encountered by police in obtaining warrants fostered under the severability analysis served to frustrate the efforts of police. *Id.* The

contain sufficient evidence to satisfy both prongs of the *Aguilar-Spinelli* test virtually precluded magistrates from basing a finding of probable cause on an anonymous informant's tip because the veracity of a person supplying an anonymous tip is by nature unknowable.⁸⁰ The *Gates* Court concluded that the fourth amendment does not require a standard so strict as to eliminate such a valuable asset to the police detection of illegal activity.⁸¹

Justice Brennan's dissent in *Gates* advocated retention of the severability analysis of the *Aguilar-Spinelli* test.⁸² Justice Brennan refuted the majority's contention that the severability analysis eliminated police use of anonymous tips by requiring that affiants demonstrate both adequate basis of knowledge and veracity evidence.⁸³ Citing the inherent unreliability of anonymous informants as justification for the strict probable cause standard, Justice Brennan stated that only an adequate showing in both *Aguilar-Spinelli* prongs could properly protect the fourth amendment rights of an individual.⁸⁴ Brennan posited that the totality of the circumstances analysis reflected the majority's desire to promote overly aggressive police investigations rather than to protect citizens' rights to be secure from unreasonable searches and seizures by officers.⁸⁵

Illinois v. Gates represents a clarification of the confused law concerning probable cause for warrants that a magistrate issues on the basis of an informant's tip.⁸⁶ The *Gates* Court's adoption of the totality of the circumstances analysis, however, may result in unreasonable, albeit court-approved intrusions of persons and private property by police. The totality of the circumstances analysis permits a magistrate to find probable cause when under

Court concluded that the frustration of the police would result in police officers dispensing with the warrant process in the hope that an exception to the warrant clause would develop at the time of the search. *Id.*

80. *Id.* at 2332.

81. *Id.*

82. *Id.* at 2351 (Brennan, J., dissenting) (stating that rejection of separate prong analysis of the *Aguilar-Spinelli* test was unjustified and ill-advised).

83. *Id.* at 2359 (Brennan, J., dissenting). In his *Gates* dissent, Justice Brennan stressed that the severability analysis could result in a finding of probable cause for an affidavit based on an anonymous informant's tip. *Id.* at 2358. Brennan noted that the specific detail of the tip could satisfy the basis of knowledge prong and that police corroboration could satisfy the veracity prong, thereby establishing probable cause. *Id.* at 2356-58.

84. *Id.* at 2356 (Brennan, J., dissenting). In his *Gates* dissent, Justice Brennan emphasized the necessity for rigorous application of the severability analysis when examining anonymous tips. *Id.* Justice Brennan stated that magistrates should presume that anonymous informants are unreliable. *Id.* Justice Brennan's conclusion rested in part on the inability of police to gain any information from an anonymous informant subsequent to the tip. *Id.* Justice Brennan also stated that a magistrate could presume an informant to be dishonest based on the informant's desire to remain anonymous. *Id.*; see *United States v. Harris*, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting) (honest, lawabiding citizen would not hesitate to go before magistrate).

85. 103 S. Ct. at 2351.

86. *Id.* at 2330-31. The *Gates* Court held that a main function of the totality of the circumstances analysis was to eliminate the intricate series of evidentiary and analytical rules that accompanied the *Aguilar-Spinelli* test. *Id.* The *Gates* Court believed that the totality of the circumstances analysis more adequately would serve the nonlawyers who determine probable cause. *Id.*

the severability analysis a warrant could not issue because the evidence in the affidavit was inadequate to support one of the *Aguilar-Spinelli* prongs.⁸⁷ For example, the *Gates* Court stated that a tip from an informant of unquestionable veracity need not contain adequate basis of knowledge evidence to enable the magistrate to find probable cause.⁸⁸ Under traditional fourth amendment analysis, the execution of a warrant following a magistrate's finding of probable cause without considering the basis of the informant's knowledge constituted an unreasonable intrusion.⁸⁹ The *Gates* Court, however, dismissed the traditional analysis by allowing magistrates to base a finding of probable cause solely on the veracity of the informant.⁹⁰ The *Gates* decision allows a magistrate to find probable cause without evaluating the source or validity of an informant's or an officer's conclusions.⁹¹ By failing to examine the source of the information, the magistrate abdicates his constitutional obligation to be a neutral and detached arbiter of probable cause, and reduces the magistrate's role to that of a "rubber stamp" for the probable cause determinations of police or informants.⁹² The *Gates* decision therefore allows for unreasonable searches and seizures by permitting someone other than a neutral and detached magistrate to determine probable cause.⁹³

The totality of the circumstances analysis also allows police corrobora-

87. *Id.* at 2329. The *Gates* Court held that the failure of an affidavit to satisfy one prong of the *Aguilar-Spinelli* test would not preclude a finding of probable cause. *Id.*

88. *Id.* The *Gates* Court offered two examples of informants whose strong demonstrations of veracity could allow a magistrate to find probable cause despite the absence of basis of knowledge evidence. *Id.* The first type is the informant with an impressive reputation among law enforcement officers for supplying accurate information. *Id.* The second type of informant is the ordinary citizen with a reputation in the community as an honest individual. *Id.* The *Gates* Court held that in either situation, the fact that the informant cannot adequately state the basis of his knowledge will not preclude a magistrate from finding probable cause. *Id.*

89. See *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965) (explaining that magistrate who makes probable cause determination without basis of knowledge evidence fails to be "detached" and therefore renders invalid probable cause determination); *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (search warrant based on affidavit without basis of knowledge facts is invalid, rendering subsequent search unreasonable); *supra* text accompanying notes 17-24 (examining history and constitutional rationale of basis of knowledge prong).

90. 103 S. Ct. at 2329; see *supra* text accompanying notes 77-81 (*Gates* Court rationale for finding probable cause without sufficient basis of knowledge information).

91. 103 S. Ct. at 2323 (basis of knowledge information not absolute requirement in probable cause determination); see *Giordenello v. United States*, 357 U.S. 480, 486-87 (1958) (magistrates use basis of knowledge information to evaluate sources of information).

92. See *United States v. Ventresca*, 380 U.S. 102, 108 (1965) (affidavit without basis of knowledge evidence is conclusory affidavit and cannot support finding of probable cause); *supra* text accompanying note 17 (magistrate is unable to perform constitutional function as neutral determiner of probable cause without basis of knowledge information).

See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (probable cause determination made by biased magistrate is unconstitutional); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968) (warrant issued by district attorney was not issued by "neutral and detached" magistrate and therefore is unconstitutional); *Aguilar*, 378 U.S. at 114-15 (probable cause determination drawn by police officer instead of magistrate absent exigent circumstances is invalid); see *supra* text accompanying note 9 (probable cause determination made by anyone other than neutral and detached magistrate is unreasonable under fourth amendment).

tion to strengthen evidence of an informant's basis of knowledge as well as veracity and thereby satisfy a determination of probable cause.⁹⁴ Courts that allow police corroboration as evidence of an informant's basis of knowledge rely on the theory that police corroboration of the informant's facts ensures that the informant based his story on something greater than mere rumor or reputation.⁹⁵ The use by courts of police corroboration to satisfy both prongs of the *Aguilar-Spinelli* test reflects a misinterpretation of the *Spinelli* Court's use of *Draper v. United States*.⁹⁶ In *Draper*, an informant told Denver, Colorado police officers that a suspect would be arriving in Denver by train.⁹⁷ The informant described the suspect and his apparel, and stated that the suspect would be walking quite rapidly.⁹⁸ The informant also stated that the suspect was carrying three ounces of heroin.⁹⁹ After corroborating all the details supplied by the informant except the incriminating possession of heroin, the police arrested the suspect without a warrant.¹⁰⁰ In a pre-*Aguilar* decision, the Supreme Court held that the corroboration of all the elements of the tip except the conclusion that the suspect was committing the crime of possession of heroin provided the police with probation cause to arrest the suspect.¹⁰¹ In his *Spinelli* concurrence, Justice White did not cite *Draper* for the proposition that police corroboration alone could satisfy both prongs of the *Aguilar-Spinelli* test, and thereby satisfy a finding of probable cause.¹⁰² Justice White used the facts

94. See *supra* notes 46-49 (examining rationale of totality of the circumstances approach in allowing independent police corroboration to buttress inadequate basis of knowledge prong).

95. See *State v. Ellington*, 18 N.C. App. 273, 276, 196 S.E.2d 629, 632 (court held that police corroboration of suspects' descriptions, clothes, and suitcases supported inference and informant obtained information through first-hand observation), *aff'd*, 284 N.C. 198, 200 S.E.2d 177 (1973).

96. 393 U.S. at 426 (White, J., concurring). The *Spinelli* concurrence cited *Draper v. United States* as an example of the amount of detail needed to buttress an inadequate basis of knowledge prong. *Id.*; see *Draper*, 358 U.S. 307 (1959). Justice White explicitly differentiated between the *Draper* Court's holding and the holding in *Spinelli*. 393 U.S. at 426. In *Spinelli*, Justice White stated that the *Draper* holding stood for the proposition that independent police corroboration alone could support a finding of probable cause. *Id.* at 426-27. Justice White then clearly stated that the rationale enunciated in *Draper* did not extend to the *Spinelli* holding. *Id.* at 427.

97. 358 U.S. at 309.

98. *Id.* The specificity of detail in the tip in *Draper* was extensive. *Id.* The informant stated that the suspect was black, five feet eight tall, weighed approximately 160 pounds, and would be wearing a raincoat, brown pants, and black shoes. *Id.* The informant further provided that the suspect would be carrying a tan bag and had a habit of walking very rapidly. *Id.*

99. *Id.* In *Draper*, the informant stated that the suspect would be transporting the heroin from Chicago to Denver. *Id.*

100. *Id.* at 309. At the time of the arrest in *Draper*, the police found the defendant in possession of two envelopes containing approximately three ounces of heroin. *Id.* at 310. Section 7607 of the Internal Revenue Code entitled the police to dispense with the warrant requirement before arresting the suspect. *Id.*; see 26 U.S.C. § 7607 (1976) (stating that arrest warrant is not necessary when probable cause exists to believe that suspect has committed an offense related to narcotics laws in presence of arresting officer).

101. 358 U.S. at 313. In *Draper*, the Court held that after police had corroborated every element of the informant's tip, the police officers reasonably could conclude that the informant's unverified conclusion that the suspect was in possession of heroin was also true. *Id.*

102. 393 U.S. at 426-27 (White, J., concurring). In his concurrence to *Spinelli*, Justice White expressed strong reservations about the *Draper* holding. *Id.* Justice White stated that the cor-

in *Draper* as an example of the level of detail needed to cure an inadequate demonstration of an informant's basis of knowledge.¹⁰³ The use of police corroboration in the totality of the circumstances approach therefore is not supported by Justice White's explanation of the use of police corroboration in his concurrence to *Spinelli*.¹⁰⁴ Justice White stressed that police corroboration alone could not provide a basis for a finding of probable cause because police corroboration could not support an inference that the informant's uncorroborated conclusions were true.¹⁰⁵ Courts following the totality of the circumstances analysis, including the *Gates* Court, however, have reinterpreted the *Draper* rationale to allow police corroboration to support a finding of probable cause.¹⁰⁶

In *Stanley v. State*¹⁰⁷ the Court of Special Appeals of Maryland elaborated on the *Spinelli* Court's unwillingness to approve the dual use of police corroboration as both basis of knowledge and veracity evidence.¹⁰⁸ The *Stanley* court stated that the purpose of basis of knowledge evidence is to allow the magistrate to evaluate the source of the tip to determine the accuracy of the information.¹⁰⁹ The court further stated the police corroboration, while probative of the veracity of the informant, did not provide any evidence that a magistrate could examine to evaluate the source of the tip.¹¹⁰ The *Stanley* court proffered an example of an informant who bases his tip on a series of underworld rumors to demonstrate how a magistrate's use of corroboration to satisfy the basis of knowledge prong can result in unreasonable searches and seizures.¹¹¹ The *Stanley* court explained that under the totality of the circumstances analysis a magistrate can base a finding of probable cause on the

roborated facts did not prove the unverified conclusion, but only proved the reliability of the informant. *Id.* at 427.

103. *Id.* at 426 (White, J., concurring).

104. See 393 U.S. at 427 (White, J., concurring). In his concurring opinion to *Spinelli*, Justice White explicitly stated that police corroboration could not buttress a defective basis of knowledge prong. *Id.* Justice White stated that corroboration was unsuitable as basis of knowledge evidence because the corroboration did not provide evidence that pertained to the informant's methods for obtaining his information. *Id.*

105. *Id.* at 426-27; see *infra* notes 107-113 (*Stanley* court's analysis of inapplicability of independent police corroboration as basis of knowledge evidence).

106. See *Gates*, 103 S. Ct. at 2334. The *Gates* Court cited *Draper* for the rationale that independent police corroboration could satisfy a finding of probable cause. *Id.* The findings of probable cause based on police corroboration in *Gates* and *Draper* are analytically different from determinations of probable cause based on corroboration of innocent details. See *Stanley v. State*, 19 Md. App. 508, 528, 313 A.2d 847, 860 (1974) (sufficient police corroboration of incriminating facts in tip may lead to independent probable cause, thus rendering informant's testimony superfluous). In both *Draper* and *Gates*, the facts corroborated by the police did not indicate any criminal activity. See *supra* text accompanying notes 64-65 and 97-100 (corroborated facts in *Draper* and *Gates*).

107. 19 Md. App. 508, 313 A.2d 847 (1974).

108. *Id.* at 531-32, 313 A.2d at 861-62 (stating that each *Spinelli* remedy addresses specific *Aguilar* prong, and that particular remedy will not satisfy prong for which it was not designed).

109. *Id.* at 530, 313 A.2d at 861; see *supra* text accompanying notes 17-21 (explaining purpose of basis of knowledge requirement).

110. 19 Md. App. at 531-32, 313 A.2d at 862.

111. *Id.* at 532, 313 A.2d at 862.

corroboration of one of the rumors. Regardless of a contrary holding in *Gates*, police corroboration does not provide a magistrate with adequate evidence to evaluate accurately the source of the remainder of the rumors.¹¹² The *Gates* holding therefore approves unreasonable searches and seizures based on nothing more substantial than a veracious informant's recounting of underworld rumor.¹¹³

The totality of the circumstances analysis makes the police officer's task of obtaining a warrant easier by no longer requiring that a magistrate find satisfactory evidence in both prongs of the *Aguilar-Spinelli* test.¹¹⁴ The *Gates* holding, furthermore, potentially has facilitated the task of police by broadening considerably the totality of the circumstances analysis itself.¹¹⁵ The traditional totality of the circumstances analysis permitted a very strong showing in one prong of the *Aguilar* test to compensate for an inadequate level of evidence in the other prong.¹¹⁶ Although the *Gates* Court found that magistrates should consider the totality of the circumstances in determining the existence of probable cause, the *Gates* affidavit clearly would have failed under the traditional totality of the circumstances analysis.¹¹⁷ The *Gates* Court admitted that the evidence contained in the warrant affidavit was insufficient to satisfy either prong of the *Aguilar* test.¹¹⁸ The *Gates* Court further stated that under the *Spinelli* test the tip lacked the specific details necessary to satisfy the basis of knowledge prong.¹¹⁹ Furthermore, the facts concerning the *Gates*' travel plans that the police corroborated were insufficient to support a finding of the informant's veracity,¹²⁰ much less probable cause.¹²¹ The Supreme Court's

112. *Id.* In *Stanley*, the court stated that police corroboration could prove that the informant was telling the truth. *Id.* The court stated, however, that the corroboration could not ensure the accuracy of any other rumors that the informant had inculcated into the tip. *Id.* The court concluded that police corroboration cannot prove that the source of the informant's tip was personal knowledge or another reliable method of obtaining the information. *Id.*

113. *Id.*; see *supra* text accompanying note 19 (basing of probable cause determination on mere rumor or general reputation is unconstitutional).

114. See *supra* text accompanying notes 87-113 (description of situations in which magistrate may find probable cause under totality of the circumstances analysis when magistrate would not have found probable cause under severability analysis).

115. See *infra* text accompanying notes 116-122 (discussing differences between *Gates* analysis and traditional totality of the circumstances analysis).

116. See *United States v. Sellers*, 483 F.2d 37, 41 (5th Cir. 1973) (strong showing in veracity prong offsets inadequate basis of knowledge evidence), *cert. denied*, 417 U.S. 908 (1974); *supra* text accompanying notes 42-44 (examination of traditional totality of the circumstances analysis).

117. 103 S. Ct. at 2335.

118. *Id.* at 2334-35.

119. *Id.* at 2336. The Court in *Gates* stated that there was a fair probability that the informant obtained the information in a reliable way. *Id.* The Court admitted, however, that the detail of the tip did not permit the clear inference that the informant obtained his information through personal observation or other reliable source, thereby failing the *Spinelli* requirement. *Id.* at 2327; see *Spinelli*, 393 U.S. at 426 (White, J., concurring) (stating that certain level of specificity in tip will lead to inference of personal observation, thereby satisfying basis of knowledge prong).

120. 103 S.Ct. at 2335; see *id.* at 2360 (Stevens, J., dissenting). In his dissent to *Gates*, Justice Stevens noted that the informant's tip was partially inaccurate. *Id.* Justice Stevens stated that this mistake disproved any claims of the informant's veracity. *Id.*

121. See *id.* (Stevens, J., dissenting) (discussing the innocuousness of defendant's activities

finding of probable cause despite both the questionable basis of knowledge information and dubious veracity evidence therefore constituted a much broader holding than any totality of the circumstances holding cited by the *Gates* Court.

The *Gates* Court's adoption of the totality of the circumstances analysis increased the potential for an overly permissive standard of probable cause.¹²² The judicial standard of review for findings of a magistrate further intensifies the potential for unreasonable searches and seizures. Under the totality of the circumstances analysis, the magistrate has broad discretionary powers that strict judicial review does not temper.¹²³ Instead, a reviewing court gives great deference to a magistrate's finding of probable cause.¹²⁴ Prior to *Gates*, the clearly defined standards of the *Aguilar-Spinelli* severability analysis counterbalanced reviewing courts' deferential attitudes.¹²⁵ The abandonment of the strict severability analysis, coupled with a court's presumption that a magistrate's decision is a proper one, leaves magistrates with neither guidance nor strict judicial supervision.¹²⁶ The *Gates* holding may lead to disparate, often inaccurate findings of probable cause based not on a strict constitutional standard, but on the instincts of a single individual.¹²⁷

The confusion and inconsistency of lower court holdings demanded a clarification of the *Aguilar-Spinelli* rule. The Supreme Court, however, erred in overruling the severability analysis and replacing it with a totality of the circumstances test. The present totality of the circumstances test is unclear and may lead to unreasonable and haphazard probable cause determinations

that police corroborated); *Stanley*, 19 Md. App. 508, 532, 313 A.2d at 847, 862 (facts corroborated must be incriminating in nature for police corroboration to establish probable cause).

122. See *supra* text accompanying notes 113-121 (application of totality of the circumstances analysis to *Gates* facts).

123. See *Gates*, 103 S. Ct. at 2333. The *Gates* Court stated that the totality of the circumstances analysis increases the role of the magistrate in probable cause determinations. *Id.* The Court stated that under the totality of the circumstances analysis the magistrate is free to demand or ignore the requirements established by *Aguilar* and *Spinelli*. *Id.* The *Gates* Court concluded that the totality of the circumstances analysis frees magistrates from the restrictions imposed by the "labyrinthine body of judicial refinement" of *Aguilar* and *Spinelli*. *Id.*; *supra* text accompanying notes 41-60 (comparison of totality of the circumstances and severability analyses).

124. 103 S. Ct. at 2331. The *Gates* Court stated that judicial review of a magistrate's determination of probable cause should not consist of a *de novo* review. *Id.* Reviewing courts give great deference to a magistrate's determination of probable cause because the magistrate most closely is acquainted with the facts and therefore is in the best position to make an accurate determination. See *United States v. Allen*, 588 F.2d 1100, 1106 (5th Cir.), *cert. denied*, 441 U.S. 965 (1978). The *Gates* Court cited *United States v. Ventresca* for the proposition that there is a strong preference for judicial approval of a magistrate's finding of probable cause. 103 S. Ct. at 2331; see *Ventresca*, 380 U.S. 102, 108-09 (1965). In *Ventresca*, the Supreme Court held that reviewing courts should resolve marginal cases of probable cause in favor of validity of the warrant. *Id.* at 109. The *Ventresca* Court reasoned that a positive attitude by courts toward magistrate's conclusions of probable cause would encourage police to work within the structures of fourth amendment requirements and not resort to warrantless searches. *Id.* at 108.

125. See *supra* text accompanying notes 51-53 (discussion of evidentiary elements that constituted probable cause under the severability analysis).

126. 103 S. Ct. at 2358 (Brennan, J., dissenting). In his *Gates* dissent, Justice Brennan stated that the totality of the circumstances analysis removed the guidelines that aided a magistrate in structuring proper probable cause inquiries. *Id.*

127. *Id.* at 2359.

by magistrates.¹²⁸ The Supreme Court should reinstate the *Aguilar-Spinelli* test, maintaining the severability of the two prongs.¹²⁹ Only through this change can the Supreme Court ensure a reasonable and consistent standard of probable cause for warrants based on informants' tips.

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128. See *supra* text accompanying notes 87-106 (discussion of potential increase in unreasonable searches and seizures under *Gates* totality of the circumstances analysis).

129. See *supra* text accompanying notes 51-60 (discussion of rationale of severability analysis).