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The Supreme Court was expected to announce a decision in Illinois v. Gates modifying the exclusionary rule to include a "good-faith" exception. However, the Court declined to rule on that issue. The Supreme Court instead abandoned the Aguilar-Spinelli test for assessing probable cause based on information derived from informants. The Court replaced the Aguilar-Spinelli test with a "totality of the circumstances" approach, and upheld the search warrant in Gates. Gates is the first Supreme Court decision to specifically address the use of anonymous informants' tips as the probable cause basis for securing a search warrant. Gates represents the Court's continuing attempt to refine the use of hearsay affidavits to establish probable cause.

This Note will outline the legal background of Gates, tracing the development of the Aguilar-Spinelli test. The Note will then analyze the Court's abandonment of the Aguilar-Spinelli test and examine the policy implications in view of recent debate over modifications to the exclusionary rule. The Note will also consider the Court's reasoning within the framework of possible modifications to the Aguilar-Spinelli test. It concludes that the abandonment of Aguilar-Spinelli was unjustified because the test provides appropriate guidelines for magistrates to properly assess hearsay affidavits.

I. BACKGROUND OF GATES

A. Development of the Aguilar-Spinelli Test

Before issuing a warrant, a magistrate must examine the affidavit presented by the police and conclude that there is probable cause to search, seize, or arrest. Generally, an affidavit will report those personal obser-

2. See generally Supreme Court to Decide Revision of Exclusionary Rule, 9 SEARCH & SEIZURE L. REP. (CLARK BOARDMAN CO.) 93 (1982) (fundamental issue of the continued viability of the exclusionary rule will be decided in Gates).
3. 103 S. Ct. at 2321. See infra note 101.
5. Gates, 103 S. Ct. at 2332.
6. Id. at 2332, 2336.
ections of a detective or investigator that lead him to believe that a warrant should issue. The neutral and detached magistrate then draws her own conclusions from that same information to determine whether there is probable cause.\(^8\) The magistrate may not rely solely on the conclusions of the police officer; she must have enough information to draw her own conclusions.\(^9\)

A determination of probable cause is complicated by the introduction of an informant\(^10\) whose hearsay information must establish probable


9. Nathanson v. United States, 290 U.S. 41 (1933). In Nathanson, a warrant was issued on a statement by the affiant police officer that he had "cause to suspect and [did] believe" that evidence was in a specified location. \(\text{Id. at 44.}\) The Supreme Court held the statement to be void of supporting facts and insufficient to support a finding of probable cause. \(\text{Id. at 46. Accord Aguilar v. Texas, 378 U.S. 108 (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958).}\)


Tips from anonymous informants raise the most difficult issues. It is not possible to verify identity or motive. \(\text{Id. at 107 & nn.78-82.}\) This is particularly true when the informant relates information by way of letter, for there is no opportunity to question him as to his conclusions or his reliability. \(\text{Id. at 107-08.}\) Anonymous informants are therefore considered presumptively unreliable. People v. McLaurin, 43 N.Y.2d 902, 374 N.E.2d 614, 615, 403 N.Y.S.2d 720, 721 (1978) (Fuchsberg, J., dissenting) (anonymous tips are notoriously false); People v. DeBour, 40 N.Y.2d 210, 352 N.E.2d 562, 573, 386 N.Y.S.2d 375, 386 (1976) (anonymous tips are the "weakest sort"); Comment, supra, at 115.

The most common type of informant is the confidential informant whose identity is known to the police but not necessarily to the defendant or magistrate. See, e.g., McCray v. Illinois, 386 U.S. 300 (1967). The typical confidential informant is drawn from the criminal element in society and is paid or protected by the police. M. HARNEY & J. CROSS, THE INFORMER IN LAW ENFORCEMENT 40 (2d ed. 1968). This proximity to the underworld gives the informant a pool of information to draw upon. Because he is hidden behind a "cloak of anonymity," however, he is regarded as "inherently suspect." Moylan, Hearsay and Probable Cause: An Aguilar and Spinelli Primer, 25 MERCER L. REV. 741, 765, 767 (1974); Rebell, The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards, 81 YALE L.J. 703, 712-13 (1974).

The citizen informant is the most credible type of informant. See United States v. Harris, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting). A citizen informant is typically an average person who has accidently witnessed a crime or was the victim of criminal conduct. A sense of civic duty typically prompts her reports to the police; she is therefore deserving of a presumption of reliability. LaFave, Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication, 1977 U. ILL. L.F. 1, 2 n.5; Comment, supra, at 99. See generally Moylan, supra, at 765-73 (discussing citizen informants).

Some courts have held that the Aguilar standards were not meant to apply to the citizen informant. Applying the Aguilar-Spinelli test, others hold that the nature of these informants establishes their credibility and thus satisfies the veracity prong of Aguilar-Spinelli. See infra note 89. Compare United States v. Bell, 457 F.2d 1231, 1239 (5th Cir. 1972) (Aguilar and Spinelli standards were not
cause. In *Jones v. United States*,\(^{11}\) the Supreme Court held that a warrant may issue upon hearsay alone, as long as a "substantial basis for credit-
ing the hearsay is presented."\(^{12}\) In *Aguilar v. Texas*,\(^{13}\) the Court identified the criteria necessary to establish probable cause based on an informant's tip. The Court in *Aguilar* held that the hearsay affidavit presented to the magistrate must contain "some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'"\(^{14}\) Thus, the *Aguilar* test requires the magistrate to examine the facts in the affidavit and analyze whether those facts show (1) the informant's basis of knowledge and (2) the veracity of the informant's statements.\(^{15}\)

The "two-prong" *Aguilar* test was refined in *Spinelli v. United States*.\(^{16}\) Recognizing that the two prongs may not always be expressly satisfied by the hearsay information, the Court in *Spinelli* discussed alternative ways to satisfy the *Aguilar* standards. According to *Spinelli*, a tip which is sufficiently detailed may permit an inference that the information was procured in a reliable way, satisfying the basis of knowledge prong of *Aguilar*.\(^{17}\) Additionally, the *Spinelli* Court stated that the

\(^{11}\) 362 U.S. 257 (1960).

\(^{12}\) Id. at 269.

\(^{13}\) 378 U.S. 108 (1964). In *Aguilar*, a warrant was issued upon an affidavit that stated "[a]ffiliants have received reliable information from a credible person and do believe that . . . narcotics . . . are being kept at the above described premises." Id. at 109. The Court found this affidavit at least as defective as the one in *Nathanson*, see supra note 9, because the suspicion was that of an unidentified informant, not that of the affiant police officer. 378 U.S. at 113–14. The Court therefore reasoned that the magistrate must have accepted the informant's belief without question and held that the search warrant was invalid. Id. at 114–16.

\(^{14}\) *Aguilar*, 378 U.S. at 114.


\(^{16}\) 393 U.S. 410 (1969). In *Spinelli*, police officers observed the defendant going to and from a particular apartment, which had two telephones with separate numbers. A previously reliable, confidential informant told the police that the phones were being used for illegal gambling purposes. The Supreme Court held a search warrant issued on the basis of this information and corroboration invalid under the *Aguilar* test. Id. at 419.

\(^{17}\) The Court cited Draper v. United States, 358 U.S. 307 (1959), as a suitable benchmark. In *Draper*, the police were told by a confidential informant that Draper would be arriving in Denver by train with three ounces of heroin on one of two specified mornings. The informant described with particularity the clothes Draper would be wearing, the bag he would be carrying, and how he would be walking; detectives verified these detailed facts. With this amount of detail, the *Spinelli* Court reasoned that a magistrate could be confident that the informant was relying on something "more substantial than a casual rumor circulating in the underworld." 393 U.S. at 416.
pendent police corroboration of the tip would lend credence to the information and thus satisfy the veracity prong.18

These two cases produced what is known as the two-prong Aguilar-Spinelli test. The basis of knowledge prong may be satisfied by personal knowledge19 or self-verifying detail.20 The veracity prong may be satisfied by a presumptively reliable informant,21 a demonstrably reliable informant,22 or sufficient police corroboration of the details provided in the tip.23

B. The Gates Case

The Bloomingdale, Illinois police department received an anonymous letter on May 3, 1978, alleging that Sue and Lance Gates were selling drugs. The letter provided information on the couple's next drug purchase, stating that Sue would drive to Florida to receive the shipment and then fly home, and that Lance would fly down a few days after his wife to

18. The Spinelli Court again cited Draper, this time as an example of sufficient corroboration to support a finding of probable cause. The Court noted that the police had verified all of the tip but the crucial fact, the presence of narcotics. 393 U.S. at 417–18.

19. Id. at 416; see also Comment, supra note 10, at 102.

20. Spinelli, 393 U.S. at 416; see also United States v. Smith, 598 F.2d 936, 939 (5th Cir. 1979) (tip must contain "correct and intimate" detail); United States v. Montgomery, 554 F.2d 754, 758 (5th Cir.) (facts within general public knowledge are inadequate), cert. denied, 434 U.S. 927 (1977); United States v. Tuley, 546 F.2d 1264, 1273 (5th Cir.) (Godbold, J., dissenting) (facts sufficient to show that the informant had a "personal pipeline" to the suspect's scheme), cert. denied, 434 U.S. 837 (1977).

21. See supra note 10; see also United States v. Ventresca, 380 U.S. 102, 111 (1965) (no question raised as to the credibility of law enforcement officers action as informants).

22. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3(b) (1978) (an informant with a "track record" of providing reliable information in the past): see Draper, 358 U.S. at 309 (the affidavit named the informant and stated that he had provided reliable information on numerous past occasions). But c.f. People v. Brethauer, 174 Colo. 29, 482 P.2d 369, 373 (1971) (mere statement that the informant has provided past credible tips is not sufficient to meet the "reliability" prong of Aguilar).

23. Spinelli, 393 U.S. at 415. See Moylan, supra note 10, at 748.

Additionally, a statement against penal interest will satisfy the veracity requirement. United States v. Harris, 403 U.S. 573, 580, 583–84 (1971) (because the informant provided information incriminating himself, the magistrate could reasonably infer that the informant was speaking truthfully).

The admission against interest element serves to establish the truthfulness of the statement made by the informant because persons do not lightly provide police with evidence that may be used against them. Id. at 583. However, this rationale is less plausible when the informant is a "protected stool pigeon" whose indiscretions may be tolerated by the police and who may be compensated in some way for the information. LaFave, supra note 10, at 27. An admission in this instance would be of little value unless it could be shown that the statement was made under circumstances when the informant would have no apparent reason to lie. Id. at 28–29. For further discussion, see id. at 23–35; Note, Probable Cause and the First-Time Informer, 43 U. COLO L. REV 357, 366–68 (1972).
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drive the car back to Illinois. The letter also alleged that the Gates had
drugs stored in their basement.24

The police pursued the tip and discovered the Gates' address, car regis-
tration, and a reservation made by "L. Gates" for a flight to Florida on
May 5. According to surveillance detectives, Lance Gates arrived in Flor-
da and went to a Holiday Inn room registered to Susan Gates. The fol-
lowing morning, the two drove north on a highway in the direction of
Chicago.25 With all of this information, the police obtained a search war-
rant for the Gates' home and car.26 The search and arrest took place when
the Gates returned to their home on May 7. The search revealed a weapon
and large amounts of marijuana.

The Illinois Circuit Court ordered suppression of the items on the
grounds that the affidavit failed to set forth sufficient facts to meet the
standards of Aguilar-Spinelli.27 The Illinois Appellate Court and Illinois
Supreme Court affirmed the decision of the lower court, holding that nei-
ther prong of the test had been satisfied; the tip did not contain enough
detail to be self-verifying, and the corroboration went only to innocent
facts. They therefore held that the affidavit was inadequate to establish
either the informant's basis of knowledge or veracity.28

II. OPINION OF THE COURT

The United States Supreme Court reversed, holding that the Gates'
fourth amendment rights had not been violated by the search of their car
and house.29 The Court abandoned the Aguilar-Spinelli test and an-
nounced a "totality of the circumstances" approach as its replacement.30
Under this new approach, the Court upheld the issuance of the search
warrant in Gates.

Writing for the majority, Justice Rehnquist acknowledged that an in-
formant's basis of knowledge and veracity are "highly relevant" in deter-
mining probable cause.31 However, these two elements are not indepen-
dent requirements; rather, they are "closely intertwined issues" that aid a

25. Id. at 2325–26. This corroboration revealed an inaccuracy in the informant's predictions.
   The tip stated that Sue would fly back to Chicago, but detectives verified that she drove back with her
   husband. Id.
26. Id. at 2326.
27. Id.
29. 103 S. Ct. at 2336.
30. Id. at 2332.
31. Id. at 2327.
magistrate in determining the overall reliability of an informant’s tip. After *Gates*, the magistrate’s task is to look at all the circumstances set forth in the affidavit, including the informant’s veracity and basis of knowledge, and make a practical, common-sense decision as to whether there is probable cause.

The Court concluded that the *Aguilar-Spinelli* test is overly technical and rigid. According to the Court, a highly technical application of the two-prong test places undue emphasis on isolated factors without giving sufficient weight to the overall facts of the case. The Court explained that the concept of probable cause cannot be reduced to technical rules because of the wide diversity among informants and their tips. These complex rules cannot possibly be understood by those making the final assessment of probable cause, leading to overly rigid applications of the test.

The Court then examined the practical considerations of the *Aguilar-Spinelli* test. It claimed that such legal rules are not appropriate to the warrant procedure because warrants are often issued in the “‘midst and haste’” of a criminal investigation by laypersons unfamiliar with judicial refinements of the law. Moreover, the situation is not conducive to full-scale analysis because of the need for quick decisions during the pressures of a criminal investigation. The Court therefore reasoned that these laypersons should not be shackled by rigid legal rules. Instead, magistrates should make common-sense decisions based on all the facts, including an informant’s veracity and basis of knowledge. Hence, the new test requires merely that the totality of the circumstances set forth in the affidavit supports the conclusion of probable cause.

Applying the new totality of the circumstances test, the Court upheld the search warrant in *Gates*. The Court ruled that the independent police corroboration and the detail provided by the informant combined to suggest a fair probability of drug trafficking, which was a sufficient basis upon which to find probable cause.

32. *Id.* at 2327–28.
33. *Id.* at 2332.
34. *Id.* at 2330.
35. *Id.* at 2328–29.
36. *Id.* at 2330–31.
37. *Id.* at 2330 (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).
38. 103 S. Ct. at 2330.
39. *Id.* at 2330–31.
40. *Id.* at 2332.
41. *Id.* at 2336.
42. *Id.* at 2334–36.
43. *Id.* at 2336.
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Justice White concurred in the result, but favored a retention of the Aguilar-Spinelli test and concluded that sufficient probable cause existed in Gates. Justice Brennan, joined by Justice Marshall, dissented, objecting to the “unjustified and ill-advised rejection of the two-prong test.” Justice Stevens, joined by Justice Brennan, concluded that the warrant was invalid even under the totality of the circumstances approach.

III. ANALYSIS OF THE COURT’S OPINION

A. Defense of Aguilar-Spinelli

The Court’s opinion in Gates raised several important issues. The Court’s determination that the two prongs of the Aguilar-Spinelli test are not independently necessary to find probable cause may be inconsistent with prior rulings. Additionally, in characterizing the two-prong test as unduly complex, the Court failed to recognize the value of a structured framework for probable cause assessments. Furthermore, the Court overlooked obvious inadequacies inherent in the totality of the circumstances test. Finally, the Aguilar-Spinelli test was mistakenly viewed as constituting a serious interference with law enforcement.

1. Independence of the Prongs

The Gates Court incorrectly advocated the elimination of the independence of the two prongs of the Aguilar-Spinelli test. Because of the inherent problems with informants’ tips, probable cause requires both some indication that the informant’s source and conclusions are reliable and some assurance that the informant is an honest or credible person.

Factors which may satisfy one prong are logically separate from ones which will satisfy the other. For example, independent police observations can lend credence to the informant’s story and thus support his veracity, but provide no assurance that the informant obtained his information in a reliable manner. In the same way, a greatly detailed tip implies

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44. Id. at 2347 (White, J., concurring).
45. Id. at 2351 (Brennan, J., dissenting).
46. Id. at 2361 (Stevens, J., dissenting).
47. See supra notes 30–32 and accompanying text.
49. Stanley, 313 A.2d at 861; Moylan, supra note 10, at 751–52.
50. Stanley, 313 A.2d at 860; 1 W. LAFAVE, supra note 22, at 562–63; Moylan, supra note 10, at 780; Note, The Informer’s Tip as Probable Cause for Search or Arrest, 54 CORNELL L. REV. 958.
that the informant obtained information from personal observations, but does not support the truthfulness of the informant.\textsuperscript{51} Thus, a surplus of the factors necessary to meet the standards of one prong will not compensate for a deficiency in the other.

The Court specifically suggested that “a deficiency in one [prong] may be compensated for . . . by a strong showing as to the other [prong].”\textsuperscript{52} For example, if an informant fails in a particular case to set forth adequately his basis of knowledge but is unusually reliable, the Court suggested that a magistrate can find the requisite probable cause for a warrant.\textsuperscript{53} If this is the case, a more reliable source could apparently offer even less in showing the basis of knowledge. Thus, a presumptively reliable police officer swearing under oath might not have to reveal the basis of his conclusions at all. This is directly contrary to the holding in Nathanson, expressly affirmed by the Gates Court,\textsuperscript{54} that a wholly conclusory affidavit is invalid.\textsuperscript{55} If this is not the case, the Court would seem to be requiring less showing of reliability from a paid and protected “stool pigeon” than from a police officer.\textsuperscript{56}

Extending the argument to the veracity requirement, the Court would sanction the issuance of a warrant upon a hearsay tip when the truthfulness of the informant was in doubt if the informant had provided specific details of his personal observations.\textsuperscript{57} However, without sufficient information as to the source’s trustworthiness, the hearsay-based affidavit would be treated no differently than an affidavit based on the oath of a police officer, and the Jones requirement that the hearsay be credited would not be met.\textsuperscript{58}

Therefore, unless the Court is willing to accept a finding of probable cause based on deference to the conclusions and inferences of an informant, or upon a warrant that cannot be shown to be trustworthy, each

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\textsuperscript{52} Gates, 103 S. Ct. at 2329.
\textsuperscript{53} Id.
\textsuperscript{54} 103 S. Ct. at 2332 (citing Nathanson v. United States, 290 U.S. 41, 44 (1933)); \textit{see also 1 W. LAFAVE, supra note 22, at 137–39 (Supp. 1984).}
\textsuperscript{55} \textit{See supra} note 9.
\textsuperscript{56} \textit{See 103 S. Ct. at 2335 n.2} (Brennan, J., dissenting); 1 W. LAFAVE, \textit{supra} note 22, at 137 (Supp. 1984); Moylan, \textit{supra} note 10, at 751–52.
\textsuperscript{57} 103 S. Ct. at 2329–30.
\textsuperscript{58} In \textit{Jones v. United States}, the Court made the distinction between an affidavit based on a police officer’s oath, and one based on an informant’s hearsay, by requiring from the latter a showing of “substantial credibility.” 362 U.S. 257, 269 (1960). \textit{See also 1 W. LAFAVE, supra} note 22, at 137–39 (Supp. 1984).
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prong must meet the minimum requirements of both Nathanson and Jones.

2. Characterization of Complexity

The Court in Gates incorrectly characterized the Aguilar-Spinelli test as overly complicated. The analytical framework of Aguilar-Spinelli is the best device for structuring probable cause assessments when based on hearsay information. The Court reasoned that a simple and generalized approach is justified because of the hurried context in which a probable cause standard must be applied. On the contrary, because of the "midst and haste" surrounding the procurement of a warrant and because warrants are generally issued by laypersons, a structured inquiry is necessary to ensure greater accuracy. A more precise test will help the issuing magistrate pinpoint both what the facts are and what they reveal about the tip. Thus, she will be better able to determine whether probable cause exists.

In portraying the Aguilar-Spinelli test as hypertechnical, the Court emphasized the form of the test over its substance. The substance of the test, however, may be retained and clarified by merely expressing it in terms of the information the test is designed to uncover. There are only two questions the magistrate need ask herself about the affidavit presented to her: (1) how did the informant come to the conclusion of illegal activity, and (2) why should this particular informant be believed? If she does not know the answer to (1), then she is accepting the informant's "mere conclusions." If she cannot answer (2), then she has no reason to believe the informant.

59. 103 S. Ct. at 2331.
60. The Court relied on Shadwick v. City of Tampa, 407 U.S. 345, 348-50 (1972), to suggest that persons authorized to issue search and arrest warrants cannot keep up with judicial refinements of the probable cause doctrine. 103 S. Ct. at 2330. This type of logic implies that laypersons are not qualified to interpret and apply the doctrine as it develops. However, Shadwick held that an issuing magistrate must be capable of determining whether probable cause exists for the requested arrest or search. 407 U.S. at 350; see also Gates, 103 S. Ct. at 2345 n.17 (White, J., concurring).
61. 103 S. Ct. at 2355 (Brennan, J., dissenting).
63. 103 S. Ct. at 2333. Some lower courts have also expressed confusion with the language of the test. See Stanley, 313 A.2d at 859; Manley v. Commonwealth, 211 Va. 146, 176 S.E.2d 309, 313 (1970). This is primarily because of the overuse of the term "reliability" for different aspects of the Aguilar-Spinelli requirements. See generally Stanley, 313 A.2d at 857-60; Moylan, supra note 10, at 754-57; Note, supra note 23, at 360 n.14.
64. See Note, supra note 50, at 960.
65. The inability to satisfy the basis of knowledge prong of the test has always been considered a
to credit the hearsay. In either case, the warrant should not issue. Re-phrased, the test is neither hypertechnical nor complex. It is a clear and meaningful approach to guide magistrates in understanding the kind and amount of information necessary to establish probable cause when an affidavit is based on an informant’s tip.

Throughout the opinion, the Court instructed the magistrate to consider “all the circumstances” in making a decision, implying that the Aguilar line of cases omits some relevant considerations to a probable cause finding based on hearsay information. The Court tells magistrates to consider “all the circumstances” and to balance the “relative weights of all the various indicia of reliability,” yet does not specify the “indicia.” Without indicating what those circumstances or indicia may be and to what extent they may support a finding of probable cause, Gates will only add confusion to an already complex task.

The Aguilar-Spinelli test is an appropriate mechanism for proper applications of traditional probable cause standards to hearsay affidavits. The test does not require a technical finding of proof beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence. The magistrate need not be certain that the allegations are true; rather, she must simply have a basis to ensure that the police are not act-

clear indication of the failure to meet the probable cause standard. Aguilar v. Texas, 378 U.S. 108, 114 (1964); Giordenello v. United States, 357 U.S. 480 (1958); Nathanson v. United States, 290 U.S. 41 (1933). The Gates Court’s insistence that the two prongs are not separate, and that a strong showing in one may compensate a deficiency in the other, 103 S. Ct. at 2329, is inconsistent with this reasoning. See supra Part III A1.

66. Jones v. United States, 362 U.S. 257 (1960); see supra note 58. When a warrant relies primarily on an informant’s tip, Jones requires more from the tip than would be routinely required of a police officer. This additional requirement is substantial credibility. See 362 U.S. at 269.


68. Gates, 103 S. Ct. at 2328–30, 2332.

69. Previous decisions have taken into account specifically detailed tips, Spinelli v. United States, 393 U.S. at 416, independent police corroboration, id. at 417, statements made against penal interest, United States v. Harris, 403 U.S. 573, 580 (1971), reliable track record, id. at 581–82, suspect’s reputation, id. at 583, and history of arrests and convictions, United States v. McNally, 473 F.2d 934, 940 (3d Cir. 1973). This seems sufficient to take into account the possible factors which may help determine the basis of knowledge or veracity of the informant. It should also be noted that these circumstances must be included in the affidavit, for that is all the magistrate may use in the decisionmaking process. Giordenello v. United States, 357 U.S. 480, 486 (1958).

70. 103 S. Ct. at 2330.

71. See Stanley v. State, 19 Md. App. 508, 313 A.2d 847, 860 (“As long as we are properly committed to accept some, but not all, hearsay to establish probable cause, Aguilar and Spinelli are well-honed instruments for sorting the trustworthy from the untrustworthy.”).

Out of the thousands of cases applying the Aguilar-Spinelli test, the Gates Court cites to three cases in support of its position that the test has been rigidly applied. 103 S. Ct. at 2330 n.9. Rejection of the test is unnecessary, however, when the Court could disapprove of those holdings within the Aguilar-Spinelli framework. Id. at 2350 n.26 (White, J., concurring).
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ing primarily on suspicion.⁷² Therefore, the *Aguilar-Spinelli* test is consistent with traditional concepts of probable cause.⁷³

3. *Weaknesses in the Totality of the Circumstances Test*

The Court in *Gates* failed to provide any meaningful guidelines to magistrates in their probable cause determinations.⁷⁴ The result is that the authority of the magistrate is strengthened, yet at the same time her role is weakened. Under the totality of the circumstances test, there are no specific standards for magistrates to apply. The totality of the circumstances formulation gives the magistrate considerable power without adequate guidelines to ensure that the power is implemented consistently within fourth amendment principles.⁷⁵ The role of the magistrate is to stand between the citizen and the frequently over-zealous police officer and draw independent conclusions from the facts presented in the affidavit. Under the totality of the circumstances test, the magistrate may rely more on the conclusions reached by either the police or the informant.⁷⁶ Thus, the magistrate becomes ineffective as a guardian of fourth amendment protections.⁷⁷

The Court confuses these two points, finding them analytically inconsistent.⁷⁸ However, these are two distinct points: (1) *Aguilar* and *Spinelli* preserve the role of the magistrate as a neutral and detached arbiter of probable cause findings; and (2) *Aguilar* and *Spinelli* provide appropriate structure to keep magistrates’ findings within the parameters of the fourth amendment.⁷⁹ Traditional values of the warrant process are incompatible with the totality of the circumstances approach.

The *Gates* Court itself illustrated the pitfalls in assessing a hearsay affidavit under the totality of the circumstances test. The *Gates* Court failed to distinguish between the two locations authorized by the search warrant.⁸⁰ The tip in *Gates* revealed to the police information concerning a

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⁷². This is in accordance with the traditional standard of probable cause as less than that necessary to establish guilt but more than bare suspicion. See, e.g., United States v. Brinegar, 338 U.S. 160, 175–76 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925).
⁷³. United States v. Ventresca, 380 U.S. 102, 105 (1965) (citing *Aguilar* with approval as consistent with the concept of probable cause); United States v. Harris, 403 U.S. 573, 577 (1971) ("*Aguilar* in no way departed from these sound principles” of traditional probable cause).
⁷⁴. 103 S. Ct. at 2350 (White, J., concurring); id. at 2355–56 (Brennan, J., dissenting); Abramovskv, supra note 15, at 152.
⁷⁵. 103 S. Ct. at 2357, 2359 (Brennan, J., dissenting).
⁷⁶. Comment, supra note 10, at 121.
⁷⁸. 103 S. Ct. at 2333.
⁷⁹. Id. at 2357 (Brennan, J., dissenting).
⁸⁰. See id. at 2335 n.14 (opinion of the Court).
prearranged trip by the Gates to pick up drugs and transport them by car to Chicago. The detail in the tip related only to the trip to pick up drugs.\textsuperscript{81} Moreover, the police investigation focused solely on the source’s accusations in the tip that the Gates would be transporting narcotics.\textsuperscript{82} Even if the affidavit established probable cause for a warrant to search the car, the tip and verification could not support a search warrant for the house.\textsuperscript{83} As a result of the Court’s focus on the overall reliability of the tip, rather than on specific findings, this distinction was overlooked.\textsuperscript{84}

An application of the \textit{Aguilar-Spinelli} test to the facts of \textit{Gates} would have led the Court to reach the opposite result. The tip provided no information to answer the first inquiry; the tip revealed no statement of personal knowledge, nor was the tip sufficiently detailed to be self-verifying.

Under the second inquiry, the informant’s veracity was left in question. Though the police corroborated many facts in the tip,\textsuperscript{85} the corroboration was incomplete and revealed inaccuracy in the supplied information.\textsuperscript{86}

\begin{itemize}
  \item \textsuperscript{81} \textit{Id.} at 2325.
  \item \textsuperscript{82} \textit{Id.} at 2325–26.
  \item \textsuperscript{83} Justice White, concurring in \textit{Spinelli}, said:
    \begin{quote}
    Nor would it suffice, I suppose, if a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for a warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607.
    \end{quote}
  \item \textsuperscript{84} With respect to the home, the search was conducted on grounds similar to those in \textit{Aguilar}, where the magistrate was found to have relied totally on the informant’s conclusion. \textit{Aguilar} v. Texas, 378 U.S. at 109 n.1. The majority in \textit{Gates} specifically recognized that the tip standing alone was insufficient and needed “\ldots something more . . . before a magistrate could conclude that there was probable cause to believe that contraband would be found in the Gates’ home and car.” 103 S. Ct. at 2326.
  \item \textsuperscript{85} \textit{See Gates}, 103 S. Ct. at 2335 & n.13. The value of corroboration lies in its testing and verifying the source’s information. The police must establish “a substantial basis for crediting the hearsay.” \textit{Jones} v. United States, 362 U.S. 269 (1960). This is achieved once the police have sufficiently reduced the possibility that the informant is lying. Verification of sufficient amounts of innocent behavior supplied by the informant can achieve this purpose. Once it has been demonstrated that the source can be trusted, the requirement in \textit{Jones} has been met. \textit{See Aguilar}, 478 U.S. at 109 n.1. \textit{But see} United States v. Johnstone, 574 F.2d 1269 (5th Cir. 1978) (details not sufficient to rise above mere suspicion); United States v. Brennan, 538 F.2d 711 (5th Cir. 1976) (innocent detail has insufficient corroborative value), \textit{cert. denied}, 429 U.S. 1092 (1977). Because an inverse relationship exists between the required corroboration and the necessary showing of veracity, the less reliable the informant, the more probative the corroboration should be in order to meet the veracity prong. Moylan, \textit{supra} note 10, at 778; \textit{Dawson} v. State, 14 Md. App. 18, 284 A.2d 861 (1971). If the amount or kind of detail is being relied upon in order to establish the adequacy of the tip, then inaccuracy of material elements should be fatal. \textit{See 103 S. Ct. at 2360} (Stevens, J., dissenting); United States v. Smith, 598 F.2d 936, 940 (5th Cir. 1979).
  \item \textsuperscript{86} \textit{Gates}, 103 S. Ct. at 2360 (Stevens, J., dissenting). The tip predicted that Sue would drive to Florida two days before her husband, but the police failed to corroborate that part of the tip and “for
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Thus, the veracity of the presumptively unreliable anonymous informant was not proven. The partially corroborated tip failed to show a reliable and accurate informant. Since neither prong of the Aguilar-Spinelli test was met, the search warrant in Gates should have been held invalid.

B. Policy Implications of Gates

A strong motivating force behind the result in Gates was the Court's concern with the law enforcement problems associated with use of informants. The Court claimed that the Aguilar-Spinelli test hinders law enforcement. Because the veracity of persons supplying anonymous tips cannot be known, and because such persons seldom provide extensive details of their observations, it is more difficult for anonymous tips to satisfy the Aguilar-Spinelli test. Thus, the Court concluded that the test handcuffs the police, restraining them from providing protection to citizens.

all the officers knew, she had been in Florida for a month." Id. at 2360 n.1. At the time of presenting the affidavit, the police knew only that the pair were on a highway used by travelers to the Chicago area. But as Justice Stevens' dissent points out, this same highway leads to many tourist and vacation spots in the Florida area. Id. at 2360 n.3. Finally, the corroboration revealed a material inaccuracy in the informant's predictions. Sue did not fly back, as suggested in the tip, but instead accompanied Lance by car. Id. at 2325–26.

87. Id. at 2361 n.7 (Stevens, J., dissenting). A tip supported by corroboration must be as trustworthy as one that would independently meet the Aguilar-Spinelli test. Spinelli v. United States, 393 U.S. at 415.

88. 103 S. Ct. at 2331.

89. Id. Here, the Court failed to recognize the distinction between anonymous informants and the other two classes of informants. See supra note 10. The Court was concerned that the Aguilar-Spinelli test unreasonably restricts the use of information provided by ordinary citizens of unquestionable honesty. 103 S. Ct. at 2331–32. This concern is not resolved by the expanded use of information from anonymous informants. The Court's concern could have been addressed by limiting the scope of the test to exclude citizen informants, or to find that citizen informants by definition meet the credibility requirement of Aguilar-Spinelli. See supra note 10. This would focus the test's requirements on the two classes of informants of more questionable reliability, anonymous and confidential. See generally Moylan, supra note 10, at 765–73. When an ordinary citizen comes forward with reports of criminal activity, there is no need to subject the information to the same special scrutiny of undisclosed informants. See People v. Glaubman, 175 Colo. 41, 485 P.2d 711, 717 (1971) (a citizen informer's "information should not be subjected to the same tests as are applied to the information of an ordinary informer"); United States v. Bell, 457 F.2d 1231, 1239 (5th Cir. 1972) ("Aguilar and Spinelli requirements are limited to the [confidential] informant situation only"); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466, 481 (1968) ("usual requirement of prior reliability . . . does not apply to information supplied by ordinary citizens"), cert. granted, 394 U.S. 957 (1969), cert. dismissed, 397 U.S. 660 (1970). This modification would have allowed the Court to resolve its concern over the technical application of Aguilar-Spinelli to ordinary citizen informants without doing away with the special criteria for assessing anonymous and confidential tips.

90. 103 S. Ct. at 2331–32.
1. General Considerations

The Court cautioned that without a relaxed standard for the issuance of warrants, the police might resort to warrantless searches in the hope that an exception to the warrant requirement would be available.\(^{91}\) The Court therefore concluded that the totality of the circumstances standard supports and encourages the warrant process and is consistent with traditional policies of deference to magistrates’ decisionmaking.\(^{92}\)

The fourth amendment does not suggest, however, that an improper search with a warrant is better than an improper search without a warrant.\(^{93}\) Without a conscientious finding of probable cause, a search violates the Constitution regardless of the presence of a warrant.\(^{94}\) The Court should focus not on whether searches will occur with or without warrants, but on the proper predicate for probable cause. Because if the police and the magistrate can be reasonably sure of the kind and amount of information necessary to establish probable cause, the likelihood of abuses in the warrant process will be diminished.\(^{95}\)

Moreover, the Court’s basic premise—that Aguilar-Spinelli hinders law enforcement—ignored three important considerations. First, because anonymous informers are presumptively unreliable, they must be shown to be credible.\(^{96}\) The fact that a tip is anonymous should make it harder, not easier, to obtain a warrant.\(^{97}\) Second, anonymous tips contribute to police investigative work whether or not they establish probable cause. The information may be used as a starting point for further investigation and may ultimately lead to an independent finding of probable cause. Third, independent police corroboration of the tip may demonstrate sufficient trustworthiness to meet the veracity standard of Aguilar-Spinelli.\(^{98}\) Thus, the Aguilar-Spinelli test strikes a balance between law enforcement interests in the use of informants’ tips and fourth amendment guarantees.

Although not expressly stated, the Court may have been particularly concerned with the practical necessity for the use of anonymous in-

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\(^{91}\) Id. at 2331.

\(^{92}\) Id.

\(^{93}\) The Court pointed out that a warrant helps to prescribe limits of intrusion by specifying the police authority, the need to search, and the limits of that power. Id. at 2331. See United States v. Chadwick, 433 U.S. 1, 9 (1977).

\(^{94}\) “[A]nd no warrants shall issue, but upon probable cause . . .” U.S. CONST. amend. IV.

\(^{95}\) 103 S. Ct. at 2358 n.9 (Brennan, J., dissenting); 1 W. LAFAVE, supra note 22, at 139 (Supp. 1984).

\(^{96}\) See supra note 10 (discussion of categories of informants); see also Harney, Cross & Livermore, The Draper-Spinelli Problem, 21 ARIZ. L. REV. 945, 946–54 (1979).

\(^{97}\) Gates, 103 S. Ct. at 2356 (Brennan, J., dissenting).

\(^{98}\) Spinelli v. United States, 393 U.S. at 415.
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Informants in the government's war against drugs.\textsuperscript{99} If this was indeed the rationale upon which the majority decided to abandon \textit{Aguilar-Spinelli}, then the Court should have voiced and discussed the issue within the framework of the fourth amendment. If the Court intended to apply a crime-specific rationale and expand police powers in order to ferret out drug offenses, the question remains whether the fourth amendment permits such a distinction.\textsuperscript{100}

2. \textit{An Implicit Exception to the Exclusionary Rule}

A final policy issue implicated in \textit{Gates} is the propriety of the exclusionary rule itself.\textsuperscript{101} Though it declined to decide the exclusionary rule question,\textsuperscript{102} the Court effectively created an exception to the exclusionary rule with respect to probable cause assessments based on informants' tips.\textsuperscript{103}

The Court intended that the totality of the circumstances test would give magistrates greater discretion by easing the restrictions on obtaining a search warrant based on hearsay information.\textsuperscript{104} With probable cause parameters enlarged and clouded, the grounds for a magistrate's determi-

\begin{itemize}
\item [99.] This underlying rationale surfaced in Justice Brennan's dissent in \textit{Gates}: "Everyone shares the Court's concern over the horrors of drug trafficking . . . ." \textit{Id.} at 2359 (Brennan, J., dissenting).
\item [100.] A large majority of the cases involving the use of informants are narcotics-related. \textit{See} United States v. White, 648 F.2d 29, 43-44 (D.C. Cir. 1981) ("the peculiar nature of narcotics crimes means that arrests are almost totally dependent on tips and undercover work"), \textit{cert. denied}, 454 U.S. 924 (1981); Rebell, \textit{supra} note 10, at 703 n.3 ("Reliance on hearsay testimony of informants is especially significant in narcotics cases."). Therefore, the police begin with a disadvantage they do not experience in other areas of crime control. M. \textsc{HARNEY} \& \textsc{J. CROSS}, \textit{supra} note 10, at 26. Informants provide the essential link between police and the drug underworld, supplying valuable information—sometimes the only information—about covert drug operations.
\item [101.] Justice Brennan thought not: "[B]ut under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil." 103 S. Ct. at 2359 (Brennan, J., dissenting). The Court would have a more compelling argument in favor of a crime-specific rationale if these types of crimes posed some physical danger to the community. LaFave, "\textit{Street Encounters}" and the Constitution: Terry, Sibron, Peters and Beyond, 67 \textsc{Mich. L. Rev.} 39, 78 (1968).
\item [102.] Significantly, the Court in \textit{Gates} asked both sides to prepare for argument on the issue of modification of the exclusionary rule, specifically mentioning a possible good-faith exception. Illinois v. Gates, 103 S. Ct. 436 (1982) (ordering additional argument).
\item [103.] \textit{Gates}, 103 S. Ct. at 2321-25. The Court applied its rule against deciding claims "not pressed or passed upon below" because the question of the good-faith exception had not been specifically argued in the Illinois courts.
\end{itemize}
nation of probable cause is expanded. In addition, great deference must be paid to the decisions of a magistrate.\(^{105}\) In the absence of precise standards for assessing probable cause, reviewing courts are restricted in enforcing the probable cause standard.\(^{106}\) Thus, a search warrant is unlikely to be invalidated as long as the magistrate had some justification for concluding that probable cause had been established.\(^{107}\) In this way, the *Gates* Court succeeded in achieving the desired objectives of a good-faith exception to the exclusionary rule. Now that search warrants are less vulnerable to invalidation, evidence obtained by police officers will be excluded in only the rarest of situations.\(^{108}\)

If the Court does adopt a good-faith exception to the exclusionary rule,\(^{109}\) the combined effect of the exception and *Gates* will severely undermine the fourth amendment probable cause requirement when evidence is obtained pursuant to hearsay information.\(^{110}\) To exclude evidence, a defendant will have to show that (1) given the totality of the circumstances, the magistrate did not have a "substantial basis" for finding a "fair probability" that probable cause existed, and (2) the police officer did not act in good faith.\(^{111}\) The defendant would have to overcome deference to a magistrate's decision that is based on vague language and standards, as well as show that the facts were "so clearly lacking in

\(^{105}\) Id.

\(^{106}\) Id. at 2332 ("duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]'] that probable cause existed") (quoting Jones v. United States, 362 U.S. at 271).

\(^{107}\) The Supreme Court, 1982 Term, *supra* note 103, at 184–85.

\(^{108}\) Id. This conclusion is supported by the fact that the majority of cases that apply the exclusionary rule to fourth amendment violations involve informant hearsay information. I W. LAFAVE, *supra* note 22, at 500.


\(^{110}\) Kamisar, *supra* note 50, at 589. Carving out a good-faith exception to the exclusionary rule would diminish the protections offered by the fourth amendment, in addition to affecting the exclusionary rule directly. See Ball, *supra* note 109, at 655–56; Mertens & Wasserstrom, *supra* note 109, at 430–31. The exception would stifle litigation of fourth amendment violations, prevent judicial checks on police misconduct, and diminish the effectiveness of the fourth amendment as a general police deterrent. Mertens & Wasserstrom, *supra* note 109, at 401–06.

\(^{111}\) The courts may address the question of good-faith prior to a consideration of whether there was a violation of the fourth amendment. Such a preliminary examination would preclude further consideration of fourth amendment doctrine. See United States v. Williams, 622 F.2d 830, 847–48 (5th Cir. 1980) (Hill, J., with Fay, J., concurring specially) (proper to dispose of a case without addressing the constitutional question), cert. denied, 449 U.S. 1127 (1981); Mertens & Wasserstrom, *supra* note 109, at 415 n.258. If so, the opinion in *Gates* strengthens the position that the police were acting in good faith because of the lack of clear guidelines.
probable cause that no well-trained officer could reasonably have thought that a warrant should issue." In a practical sense, therefore, the Court in Gates did not avoid addressing the exclusionary rule modification issue. The easing of restrictions for obtaining a warrant results in less evidence being excluded at trial in spite of potential fourth amendment violations. These sweeping effects of Gates are somewhat inconsistent with the Court's assurance that it was "hold[ing] the balance true" between concerns for effective law enforcement and citizens' fourth amendment rights.

IV. CONCLUSION

In Gates, the Supreme Court failed to present any persuasive reasoning for rejecting the standards of Aguilar and Spinelli. In dispensing with Aguilar-Spinelli, the Court also failed to provide meaningful guidelines for probable cause assessments in this complex area. Instead, the Court adopted an approach which is vague and imprecise, resulting in further restrictions on the ability of courts to review the probable cause predicate for issuance of warrants. The better approach would have been to clarify the existing test and thus retain the standards necessary for magistrates' decisionmaking process. State courts should be mindful of these considerations when reviewing decisions construing state constitutions in light of Gates. Moreover, the Gates decision represents another example of the Burger Court's prioritization of crime control policies and law enforcement interests. The Court's ruling in Gates erodes the probable cause standard, and fails to uphold the fourth amendment's guarantee against unreasonable governmental intrusions into the lives of citizens.

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