Constitutional Law - Fourth Amendment - Search and Seizure - Probable Cause

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CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE—PROBABLE CAUSE—The United States Supreme Court has held that a search warrant based on information from an anonymous informant can withstand a constitutional challenge when viewed by a “totality of the circumstances” approach.


On May 3, 1978, the Bloomingdale, Illinois Police Department received an anonymous, handwritten letter which stated that Lance Gates and his wife Susan were involved in selling drugs. The letter detailed a scheme whereby Susan would drive their car to Florida to be filled with drugs and then fly back home. Lance would then fly to Florida to drive the car filled with drugs back to Bloomingdale. The letter set forth the area in which the Gates resided and noted that the Gates currently had over $100,000 worth of drugs in the house. Bloomingdale’s police chief presented the letter to Detective Mader who was then informed by state authorities that a driver’s license had been issued to a Lance Gates with a Bloomingdale address. Mader then contacted a confidential informant who obtained a recent address for Gates. The detective

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   This is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. in the condominiums. Most of their buys are done Florida. Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flies down and drives it back. Sue flies back after she drops the car off in Florida. May 3 she is driving down there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.

   They brag about the fact they never have to work, and make their entire living on pushers.

   I guarantee if you watch them carefully you will make a big catch. They are friends with some big drug dealers, who visit their house often.

   Lance & Susan Gates
   Greenway
   in Condominiums

*Id.*

2. 103 S. Ct. at 2325.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
also contacted a Chicago police officer at O'Hare Airport who informed Mader that Lance Gates had a reservation on Eastern Airlines Flight 245, which was to depart Chicago for West Palm Beach, Florida on May 5 at 4:15 p.m.  

Mader sought the assistance of the Drug Enforcement Administration, an agent of which observed Gates board the Eastern Flight in Chicago. Other DEA agents observed Gates land in West Palm Beach and check into a room at a Holiday Inn registered in the name of Susan Gates. At seven o'clock the next morning the DEA agent reported that Gates and an unidentified woman left the motel in a Mercury bearing Illinois plates heading north on the interstate most often used by travelers to Chicago. The DEA agent also informed Mader that the license plate on the Mercury was registered to Gates, but the plate was registered for another vehicle.

An affidavit signed by Detective Mader setting forth these facts and a copy of the anonymous letter were submitted to a judge sitting on the Circuit Court of DuPage County. Based on this information, the judge issued a search warrant for both the Gates' residence and the automobile they were driving. Early on the morning of March 7, Susan and Lance Gates returned home where Bloomingdale Police had been waiting. A search of their automobile produced almost 350 pounds of marijuana and a search of the house uncovered more marijuana, weapons, and other contraband.

Prior to trial, the Gates filed a pretrial motion to quash the search warrant and suppress all evidence seized. Relying on Aguijar v. Texas, the Gates argued that the letter did not set forth

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7. Id.
8. Id.
9. Id. at 2325-26.
10. Id. at 2326.
11. Id. The DEA agent also informed Detective Mader that it took approximately 22 to 24 hours to drive from West Palm Beach to Bloomingdale, a suburb of Chicago. Id.
12. Id.
13. Id.
14. Id. Approximately 36 hours had lapsed from the time Lance Gates boarded the plane to Florida and his return home. Id.
15. Id.
17. 378 U.S. 108 (1964). In Aguilar, a search warrant was held to be invalid because the magistrate was not informed of some of the underlying circumstances which justified the affiant's belief that the informant was a credible person or that his information was reliable. The affiant gave no information about the informant but acquired a search warrant based on an affidavit which stated:
the reliability of the author nor was there a showing that the au-

theor received his information in a reliable manner.\textsuperscript{18} After a hear-
ing, the trial court granted the motion and on appeal the Illinois Appellate Court and the Illinois Supreme Court affirmed.\textsuperscript{19}

The Illinois Appellate Court based its reasoning on \textit{Aguilar's} two pronged test and \textit{Spinelli v. United States},\textsuperscript{20} which further explained \textit{Aguilar}.\textsuperscript{21} The court stated that the affidavit for the search warrant did not reveal the manner in which the anonymous in-

formant had obtained his information and there was insufficient detail in the letter to allow the issuing magistrate to infer that the informer had obtained his information in a reliable way, thus fail-

ing the basis of knowledge prong of the test.\textsuperscript{22} As to the other part of the test, the court noted that partial corroboration, as was evi-
dent, only satisfies the veracity prong and does not establish the basis of knowledge prong, therefore the requirements of \textit{Aguilar} and \textit{Spinelli} were not met.\textsuperscript{23}

The Illinois Supreme Court agreed with the lower courts in hold-
ing that the magistrate did not have sufficient information on

\begin{quote}
"Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above described premises for the sole purpose of sale and use contrary to the provisions of law." \textit{Id.} at 109.

\textit{Aguilar} has come to be understood as establishing a two-pronged test used to verify the validity of an informant's tip. The first prong, the basis of knowledge prong, is concerned with where or how the informant came about his information; the second deals with the veracity or credibility of the informant, or with the reliability of his information. \textit{Id. See, e.g.}, \textit{Spinelli v. United States}, 393 U.S. 410 (1969).

18. 82 Ill. App. 3d at 752-53, 403 N.E.2d at 80.


20. 393 U.S. 410 (1969). In \textit{Spinelli} the affidavit submitted to obtain a warrant stated that the FBI had watched Spinelli for five days and that he was observed crossing the border between Illinois and St. Louis, Missouri. The affidavit also stated that an FBI agent had checked with the telephone company and found that the apartment Spinelli had visited was equipped with two telephones with different numbers. The application for the warrant stated that Spinelli was known to the affiant and law enforcement agencies as a bookmaker and a gambler. Finally the affidavit stated the FBI "has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones. . . ." \textit{Id.} at 414.

The Supreme Court held that the warrant did not fulfill the requirements set forth in \textit{Aguilar} but stated that, in the absence of a statement by the informant setting forth his basis of knowledge, sufficient detail within the confidential informant's tip itself may satisfy the requirements. The Court reasoned that sufficient detail is important when the magis-

trate is basing his determinations of probable cause on information supplied by a confident-

ial informant so the magistrate knows he is basing his determinations on something more than a casual rumor or the general reputation of the suspect. \textit{Id.} at 416.


22. \textit{Id.} at 753-54, 403 N.E.2d at 80.

23. \textit{Id.} at 754, 403 N.E.2d at 81.
which to issue a search warrant. The Illinois Supreme Court referred to both the fourth amendment to the United States Constitution and article 1, section 6 of the Constitution of Illinois as providing assurances against unreasonable searches and seizures.27 According to the Illinois Supreme Court, the Aguilar test was the proper test applicable to anonymous tips under these constitutional provisions.28 The court concluded that there was no basis of knowledge established in the tip, nor was there information to conclude that the informant was credible or his information reliable.29 The court also considered the concept set forth in Spinelli, of self verifying detail in connection with corroborative evidence supplied by the police.30 The court concluded that the corroboration of innocent activity, coupled with the detail of the anonymous letter, was insufficient for a finding of probable cause under the Aguilar tests.31

The United States Supreme Court granted certiorari to consider whether the magistrate’s issuance of the search warrant on the basis of a partially corroborated anonymous tip violated the fourth amendment.32 After oral argument, the Court requested the parties to address the question of whether the exclusionary rule should be modified so as not to exclude evidence which is obtained in a reasonable belief that the search and seizure is consistent with the Constitution and then scheduled the case for reargument.33 After

25. U. S. CONST. amend. IV. The fourth amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
   Id.
26. ILL. CONST. art. I, § 6. Article I, section 6 provides:
   The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communication by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.
   Id.
27. 85 Ill. 2d at 381-82, 423 N.E.2d at 889.
28. Id. at 382, 423 N.E.2d at 890.
29. Id. at 384-86, 423 N.E.2d at 890-91.
30. Id. at 388, 423 N.E.2d at 891-92.
31. Id. at 390, 423 N.E.2d at 893.
32. 103 S. Ct. at 2321.
33. Id. The exclusionary rule bars the use of evidence which has been obtained in violation of the rights guaranteed by the United States Constitution. See Mapp v. Ohio, 367 U.S. 643 (1961).
reargument, however, the Court retreated and announced that since the issue had not been addressed or presented in the Illinois courts, it would be improper for the Court to make a decision on the exclusionary rule.34

Justice Rehnquist, writing for the majority,35 agreed with the Illinois Supreme Court's conclusion that the anonymous letter, standing alone, would not supply a magistrate with enough information for a determination of probable cause.36 He also agreed with the lower court that an informant's veracity, reliability and basis of knowledge are highly relevant in determining the value of the informant's tip.37 Justice Rehnquist did not agree, however, that these elements should be understood as entirely separate and independent requirements of Aguilar that are to be rigidly applied to every case where an anonymous informant's tip is to be used.38 Instead, he stated that these requirements should be understood as closely intertwined issues which determine probable cause in a common sense and practical manner and thus adopted an approach that took into account all the indicia involved: a "totality of the circumstances" approach.39

The Court, after a brief discussion of the history of probable cause, agreed with previous decisions of the Court in that it is quite proper to issue search warrants based on nontechnical, common sense judgments of laymen.40 The Court stated that when a court reviews a magistrate's determination of probable cause a trial de novo should not be held.41 According to the Court, an overscrutinizing or grudging review toward warrants is inconsistent with the fourth amendment's preference for searches conducted pursuant to a search warrant and courts should not invalidate warrants based on a hypertechnical rather than a common sense review.42

34. 103 S. Ct. at 2321. As Justice Rehnquist regretfully stated, "[w]e decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it." Id.
36. 103 S. Ct. at 2326.
37. Id. at 2327.
38. Id. at 2327-28. See 85 Ill. 2d 376, 423 N.E.2d 887 (1981).
39. 103 S. Ct. at 2328.
41. 103 S. Ct. at 2331.
42. Id.
The Court stated that the informant's veracity or reliability and his basis of knowledge are better understood as relevant considerations in the totality of the circumstances analysis than are these tests when applied separately. Under a totality approach, a deficiency in one area can be overcome by a strong showing in the other. According to the Court, the two-pronged test has encouraged overtechnical dissection of an informant's tip with undue attention being given to satisfying each prong separately; thus a totality approach should be used which would permit a balancing of the relative weights of all various indicia of reliability surrounding the tip.

Noting Jones v. United States and United States v. Harris, Justice Rehnquist said the traditional standards for review of a magistrate's issuance of a search warrant have been whether there is a substantial basis for believing a search would uncover evidence of wrongdoing. He also reasoned that subjecting warrants to severe scrutiny on review, as some courts have done, encourages police to resort to warrantless searches in hope that in some manner—either through consent of those searched or some other exception to the warrant requirement—the search will be validated. Justice Rehnquist believed that the substantial basis standard for a search warrant is a better test of probable cause than the two-pronged test in Aguilar and Spinelli because it is more consistent with the traditional deference to the probable cause de-

43. Id. at 2329.
44. Id.
45. Id. at 2330.
46. 362 U.S. 257 (1960). In Jones, the Court upheld a search warrant based on an affidavit of a narcotics agent, Officer Didone, who claimed to have no direct knowledge of the presence of narcotics in the apartment. Didone swore that the day before making the affidavit he received information that petitioner and another kept narcotics at the apartment. He swore that the informant claimed to have purchased narcotics on many occasions at the apartment. Didone also swore the informant had given information in the past which had been correct and that the same information given Didone had been given by other informants. Id. at 268-69.
47. 403 U.S. 573 (1971). The Harris Court upheld a conviction based on an affidavit which stated that Harris had a reputation of being a trafficker in non-tax-paid liquor, and that the affiant received information about Harris' reputation from all types of persons. The affidavit also stated that a stash of non-tax-paid liquor was found in an abandoned house under the control of Harris and that the affiant had information from a confidential informant, who feared for his life if his name be used, and who, for more than two years, had purchased liquor from Harris. Id. at 575-76.
48. 103 S. Ct. at 2331.
49. Id.
termination of magistrates.  

The Court maintained that the decisions following Spinelli poorly serve the government's function of protecting the security of the individual and his property because the strictures of the two-pronged test cannot avoid seriously impeding the task of law enforcement. Anonymous tips would seldom survive an application of either prong of the test, the Court submitted. The Court reasoned that an ordinary citizen, much like an ordinary witness, would not be able to meet the strict requirements of the two-pronged test because citizens do not often give extensive details of their observation, and thus they would not fulfill the basis of knowledge prong or the veracity prong of the test.

The Court also said that when dealing with anonymous informants, it is almost impossible to fulfill the veracity prong because there is no way of knowing if the informant is reliable or credible. Because of the difficulty in applying the test to anonymous tips, such tips would be rendered useless in police work if each prong were applied separately and rigidly. The Court agreed that such tips, especially when corroborated by independent police work, are useful, that some sort of assessment should still be used for the crediting of anonymous tips and further that an assessment which would render these tips useless is not required by the fourth amendment.

Justice Rehnquist stated that the better course would be to abandon the Aguilar and Spinelli two-pronged test and adopt the totality of the circumstances approach which was traditionally used as the basis of probable cause, citing Jones v. United States, United States v. Ventresca, and Brinegar v. United

50. Id. Similarly, the Court reiterated the concept that when police officers conduct an arrest or search with a warrant in hand, the public's perception as to the lawfulness of the act is greatly increased because it assures the individual of the lawful authority of that officer's actions and the restriction placed upon him. Id.  
51. Id.  
52. Id. at 2332.  
53. Id. at 2331.  
54. Id. at 2331-32.  
55. Id. at 2331.  
56. Id. at 2332. The Court stated: "[s]uch tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.' While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not." Id.  
58. 380 U.S. 102 (1965). The Ventresca Court upheld an affidavit for a search warrant although the affidavit did not specifically state which alcohol and tobacco investigators ob-
States. A magistrate, said Justice Rehnquist, when deciding on whether probable cause exists, should make a practical common sense decision given all the circumstances, including the veracity and basis of knowledge of the informant. He believed that a flexible, more easily applied standard, would better accommodate the fourth amendment requirements than the test announced in Aguilar and Spinelli.

Reviewing earlier cases which involved the validity of search warrants and anonymous tips, the Court noted Nathanson v. United States and Aguilar and stated that even under a totality of the circumstances approach the search warrants in those two cases would have been invalid in that they were based solely on conclusions of the informant and no facts concerning the reliability, credibility, or basis of knowledge of the informant were given. The Court believed, however, that the fourth amendment probable cause requirement does not lend itself to a particular set of rules and is much better served by the common sense standards previously set forth in Ventresca, Jones and Brinegar.

Justice Rehnquist, answering Justice Brennan's dissent, said the majority's decision would not downgrade the role of the neutral magistrate as Justice Brennan feared, but would do just the contrary because the magistrate would be free to draw reasonable inferences from the material given to him by the search warrant's

served the activity under investigation. The Court based its decision on the grounds that there was substantial basis for crediting the affidavit. Id. at 109-11. See infra notes 124-128 and accompanying text.

59. 338 U.S. 160 (1949). In Brinegar the Court upheld the conviction where the arresting officer had arrested petitioner five months earlier, knew the reputation of the petitioner as a trafficker in illegal liquor, possessed hearsay information concerning the general reputation of the petitioner, personally observed suspicious activity, and upon confronting Brinegar found twelve cases of liquor in Brinegar's automobile. Id. at 162-63.

60. 103 S. Ct. at 2332.

61. Id.

62. 290 U.S. 41 (1933). In Nathanson, the Court held violative of the fourth amendment a search warrant based solely on the conclusions of a suspecting police officer. The affidavit stated:

 Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J.J. Nathanson. . . .

Id. at 44.

63. 103 S. Ct. at 2332-33.

Justice Rehnquist wrote that the magistrate has more discretion under the totality of the circumstances approach than under the test established through Aguilar and Spinelli. Justice Rehnquist also addressed Justice Brennan's argument that the magistrate should be restricted on his determinations of probable cause by the confines of Aguilar and Spinelli to insure that tips are obtained by reliable and credible people; Justice Rehnquist submitted that a magistrate, under the totality standard, is perfectly free to extract whatever assurances he feels are necessary from the informant or the applicant whenever making a determination of probable cause. Finally, Justice Rehnquist responded to Justice Brennan's concern over the majority's use of the terms "practical," "nontechnical," and "common sense," which Justice Brennan perceived as indicative of an overly permissive expansion of police powers in derogation of the fourth amendment. Justice Rehnquist replied that loyalty to the Constitution is not achieved by upholding bizarre claims of individual rights or accepting the most restrictive claims of government.

Concluding that the totality of the circumstances is the proper test for probable cause, the Court next compared the present case with Draper v. United States, a classic decision involving the value of corroborative efforts by police. The Court surmised that the showing of probable cause was as compelling in the instant case as it was in Draper. The evidence in Draper, as in Gates, was corroborated by independent police investigation of substantially all of the informant's tip. While the informant in Draper was known and reliable, the anonymous informant's honesty and reliability were unknown to the police in Gates; but the independent police corroboration of the facts given by the information in Gates, Justice Rehnquist stated, rendered the distinction less significant because an informant who is right about some things is...

65. 103 S. Ct. at 2333.
66. Id.
67. Id.
68. Id.
69. Id.
70. 358 U.S. 307 (1959). In Draper, the Court held that there was probable cause for an arrest based on information from a known informant who told police Draper would be arriving in Denver from Chicago carrying heroin. The informant gave a description of Draper, including the clothes he would be wearing, the type of bag he would be carrying, and the way he would be walking. All of this was corroborated by law enforcement officials. Id. at 309.
71. 103 S. Ct. at 2334.
72. Id.
likely to be right about others.\textsuperscript{73}

In conclusion, the majority maintained that while the informant's information regarding the Gates' travel plans may not have set forth the basis of knowledge of the anonymous informant, it is sufficient that there was a fair probability that the writer had obtained the information from Susan or Lance Gates or someone they trusted.\textsuperscript{74} Corroboration of significant portions of the letter provided just that probability, according to Justice Rehnquist.\textsuperscript{75} Thus, he concluded, the magistrate had a substantial basis for having determined that probable cause existed to search the Gates' residence and automobile.\textsuperscript{76}

Justice White, concurring, believed that the Court should have addressed the issue of the modification of the exclusionary rule.\textsuperscript{77} After expressing his dissatisfaction with the rule, Justice White stated that the Court should create a good faith exception.\textsuperscript{78} Justice White stated, however, that if the Court were to formulate a good faith exception, the Illinois Supreme Court would be free to decide if a good faith exception is consistent with the Illinois Constitution.\textsuperscript{79}

According to Justice White, the Court does not follow its own prudential advice.\textsuperscript{80} He stated that the Illinois Supreme Court found not only a violation of the fourth amendment of the United States Constitution but also a violation of article 1, section 6 of the Illinois Constitution.\textsuperscript{81} If the Court is to be consistent, Justice White stated, the Illinois courts should be given the opportunity to consider whether a totality of the circumstances test should replace the more precise rules of \textit{Aguilar} and \textit{Spinelli}.\textsuperscript{82}

Justice White, addressing the issue with which the majority

\textsuperscript{73} Id. at 2335. Justice Rehnquist seemed to over-emphasize the value of the corroboration in order to compensate for a lack of reliability in the informant when comparing the present case to \textit{Draper}. Id.

\textsuperscript{74} Id. at 2336.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id. (White, J., concurring).

\textsuperscript{78} Id. at 2339 (White, J., concurring).

\textsuperscript{79} Id. Justice White averred that although the Court was free to consider changes in the \textit{Aguilar-Spinelli} test under the Federal Constitution, only the Illinois Supreme Court could consider changes in that test applicable to Illinois law under the Illinois Constitution. According to Justice White, the Illinois Supreme Court was not clear on which constitution it relied upon in invalidating the search, and thus, if that court relied on the Illinois Constitution, only that state's highest court could change the state's \textit{Aguilar-Spinelli} test. Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.
dealt, stated that the fact the anonymous tip was corroborated by the actions of the suspects, whether innocent or not, gives rise to the inference that the informant is credible and that he acquired the information in a reliable manner. Justice White believed it was not necessary to abandon the Aguilar-Spinelli test, but that a proper application of that test would have led to the same result as that reached by the majority. Justice White expressed his reluctance to approve any standard that does not require some showing of facts that support an inference that the informant is credible and that the information is obtained in a reliable manner before a search warrant is issued.

Justice Brennan, joined by Justice Marshall, dissenting, stated that findings of probable cause and the issuance of a search warrant should not be authorized unless there is some assurance that the information relied upon has been obtained in an honest or credible manner. Justice Brennan stated that by requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable cause inquiries, Aguilar and Spinelli had assured the magistrate's role as an independent arbitrator of probable cause and guaranteed greater accuracy in probable cause determinations.

Justice Stevens, joined by Justice Brennan, dissenting, focused on the anonymous letter and the facts known to Detective Madar. The discrepancies were important, according to Justice Stevens, because they cast doubt on whether the Gates had $100,000 worth of drugs in their home. The letter, he noted, indicated a pattern of travel that would leave one spouse at home at all times, presumably to protect the remaining drugs; but he believed the inference failed once the pair were observed together away from

83. Id. at 2348 (White, J., concurring). Justice White also compared Gates to Draper (see supra note 70) in evaluating the weight to be accorded corroboration on seemingly innocent activity. Id. at 2348-49 (White, J., concurring).
84. Id. at 2349 (White, J., concurring).
85. Id. at 2350 (White, J., concurring).
86. Id.
87. Id. at 2355 (Brennan, J., dissenting). Justice Brennan agreed with Justice Stevens' dissent that even under a totality of the circumstances approach the search warrant was invalid. Id. at 2351 (Brennan, J., dissenting).
88. Id. at 2355 (Brennan, J., dissenting).
89. Id. at 2360 (Stevens, J., dissenting).
90. Id. 
their home.\textsuperscript{91} According to Justice Stevens, this discrepancy made the Gates' conduct seem substantially less unusual than the informant had predicted when the informant wrote that Susan would return home and then Lance would fly to Florida when in fact the couple only spent the night in the Holiday Inn and then drove back together.\textsuperscript{92} Justice Stevens stated that the fact that the anonymous letter contained a material mistake undermined the reasonableness of relying on it as a basis for a search of the home.\textsuperscript{93} He concluded that the Court's evaluation of the search warrant was tainted by subsequent events, that there was no probable cause to search the home at the time the warrant was issued, and that the case should be remanded for a decision as to the validity of the car search in light of the Supreme Court's decision in \textit{United States v. Ross}.\textsuperscript{94} Under \textit{Ross}, Justice Stevens suggested, the validity of the search would be upheld if there was probable cause to search after the Gates had arrived home.\textsuperscript{95}

The fourth amendment guarantees to the people the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and provides that a warrant shall not be issued unless based upon probable cause supported by oath or affirmation.\textsuperscript{96} The amendment was intended to put an end to the search and seizure abuses of the colonial days when writs of assistance and public warrants empowered revenue agents to conduct searches at their discretion.\textsuperscript{97}

In 1914, the United States Supreme Court adopted the exclusionary rule in \textit{Weeks v. United States},\textsuperscript{98} stating that the fourth amendment barred the use, in federal prosecutions, of evidence which was obtained by an unreasonable search and seizure.\textsuperscript{99} Thirty-five years later, in \textit{Wolf v. Colorado},\textsuperscript{100} the Court refused to

\textsuperscript{91.} Id.
\textsuperscript{92.} Id.
\textsuperscript{93.} Id. Justice Stevens also thought deference should be given to the lower courts determinations as to reliability of the information in that these determinations should at least be given a presumption of accuracy. \textit{Id.} at 2362 (Stevens, J., dissenting).
\textsuperscript{94.} Id. at 2361 (Stevens, J., dissenting). See United States v. \textit{Ross}, 456 U.S. 798 (1982). \textit{Ross} involved the warrantless search of an automobile. The Court upheld a search of containers inside the automobile where there was probable cause to search only the vehicle. \textit{Id.} at 825.
\textsuperscript{95.} 103 S. Ct. at 2361.
\textsuperscript{96.} U.S. Const. amend. IV. See \textit{supra} note 25.
\textsuperscript{97.} \textit{See} \textit{Boyd v. United States}, 116 U.S. 616, 625-27 (1886).
\textsuperscript{98.} 232 U.S. 383 (1914).
\textsuperscript{99.} \textit{Id.} at 398.
\textsuperscript{100.} 338 U.S. 25 (1949).
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apply the rule to unreasonable searches and seizures in a state prosecution. In 1961, however, in Mapp v. Ohio, the Court reversed its position, holding that illegally seized evidence is inadmissible even in a state prosecution.

The language of the fourth amendment seems to indicate that an arrest or search may only be effected with a warrant. Nonetheless, there are circumstances in which the police are permitted to make arrests and searches without first obtaining a warrant. The courts, however, have historically favored warranted actions over warrantless actions in order to provide the police with an incentive to procure a warrant, for, if the requirements for warrantless actions are less stringent than warranted actions, the police would have little inducement to obtain a judicially approved warrant before acting upon a search or an arrest.

Probable cause deals with probabilities, and proof of the accused's guilt is not needed. Probable cause, however, is based on more than mere suspicion. Probable cause exists where the facts and circumstances within the officer's knowledge, and of which he had reasonably trustworthy information, are sufficient for a man of reasonable caution to believe an offense has been committed. The determination of probable cause is based upon nontechnical and practical considerations of everyday life on which reasonable and prudent men, not technicians, act.

A warrant must be issued by a magistrate who is neutral, detached, and capable of determining whether probable cause exists for the requested arrest or search. If a magistrate is not neutral

101. Id. at 33.
103. Id. at 655.
105. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963). In Wong Sun the Court held that the defendant's conviction for transportation and concealment of heroin was invalid because the sources of information upon which the arrest were made were too vague and untested to determine probable cause. Id.
108. Brinegar, 338 U.S. at 175.
109. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972). In Shadwick the Court upheld a city charter provision which authorized municipal court clerks to issue arrest warrants for municipal ordinance violations, finding that the clerks were capable of making probable cause determinations for such ordinances and were neutral and detached. Id.
and detached the warrant is invalidated as a violation of both the fourth and fourteenth amendments.  

Within the area of warranted and warrantless actions for both arrests and searches, the United States Supreme Court has struggled for years to espouse a manageable, applicable standard on which to credit hearsay information in determining probable cause. The Court has said that hearsay may be the basis for a determination of probable cause, as long as there is a substantial basis for crediting the hearsay. Applications for warrants based on hearsay usually emanate from information given by named but confidential informants, unnamed confidential informants, or anonymous informants.

The Supreme Court has not dealt with informant cases in a consistent or clear fashion, thus it is not surprising that a majority of probable cause issues raised in appellate courts concern information obtained from informants. The Court has applied the same standards to assess the credibility of information whether obtained by named, unnamed, or anonymous informants. While the Court had not squarely confronted the issue of anonymous informants before Gates, it had previously addressed the problems of named and unnamed informants. Two cases which deal primarily with known or named informants are Draper v. United States and

110. Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971). The Court found that a state attorney general was not neutral and detached because he was the chief government enforcement agent of the state. The state attorney general in this case was also in charge of the investigation and acted as prosecutor at trial. Id. at 450.

111. See, e.g., Grau v. United States, 287 U.S. 124 (1932). In Grau the Court concluded that hearsay evidence cannot provide the probable cause necessary for the issuance of a search warrant. The Court stated that a warrant will issue only upon evidence which would be competent at trial of the offense before a jury. Id. at 128. But see Jones v. United States, 362 U.S. 257 (1960). In Jones the Court specifically stated that hearsay can be the basis of probable cause. Id. at 271. See also Brinegar v. United States, 338 U.S. 160, 172-73 (1949) (rejecting the contention that only evidence which would be admissible at a trial is permitted when determining probable cause for a search warrant).


113. 1 J. Varon, Search, Seizures and Immunities 352 (2d ed. 1974).

114. See LaFave, supra note 104, § 3.3, at 500.


116. See, e.g., Draper, 358 U.S. 307 (where informant was named and had a past reputation of being accurate); Aguirar, 378 U.S. 108 (where the informant was unnamed); Gates, 103 S. Ct. 2317 (where the informant was anonymous).

United States v. Ventresca.\textsuperscript{118}

In Draper, the Court upheld an arrest without a warrant based on information obtained from an informant, Hereford, who was a special employee of the Bureau of Narcotics in Denver.\textsuperscript{119} Hereford told Denver narcotics agents that Draper was selling narcotics and that Draper had gone to Chicago and was to return to Denver by train with heroin.\textsuperscript{120} Hereford also gave a detailed description of Draper, including the clothing he would be wearing upon his return, the type of bag he would be carrying and the way he would be walking.\textsuperscript{121} Hereford had been reliable in the past, and after the facts which Hereford stated were verified by police observation, Draper was arrested and searched, whereupon the police found two envelopes containing heroin.\textsuperscript{122} The Draper Court found that under the facts and circumstances of the case, the police had reasonable grounds to believe that Draper was violating the applicable drug laws, and therefore, the arrest and subsequent search were valid.\textsuperscript{123}

Ventresca concerned the validity of a search warrant which was based upon an affidavit containing information of the affiant and other Alcohol and Tobacco Division investigators who were not specifically named in the affidavit.\textsuperscript{124} The Supreme Court overruled the court of appeals, which had held that the warrant was insufficient because the affidavit did not specifically state that the information it contained was based upon personal knowledge of the affiant or that the information gathered by other investigators was not based on hearsay from unreliable informants.\textsuperscript{125} Justice Goldberg wrote that such warrants must be tested and interpreted by magis-

\begin{footnotes}
\item 118. 380 U.S. 102 (1965). See infra notes 124-128 and accompanying text.
\item 119. 358 U.S. at 309.
\item 120. Id.
\item 121. Id.
\item 122. Id. at 309-10.
\item 123. Id. at 314.
\item 124. 380 U.S. 102 (1965). The affidavit contained a lengthy description of observed activity of Ventresca and his home, including sounds and smells emanating from the house that led investigators to conclude that Ventresca was distilling spirits. The affidavit was prefaced:
\begin{quote}
Based upon observation made by me, and based upon information received officially from other investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observation and investigation, this request for the issuance of a search warrant is made.
\end{quote}
\item 125. Id. at 104-05.
\end{footnotes}
trates and courts in a common sense and realistic fashion.\textsuperscript{126} He stated that where the circumstances are detailed, where there is reason for crediting the source of information, and where a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a practical, manner.\textsuperscript{127} Thus, the \textit{Ventresca} Court upheld the search warrant and gave validity to the affidavit, even though all the sources of the information were not specifically named.\textsuperscript{128}

In the area of unnamed confidential informants a suitable starting point for analysis is the Supreme Court's decision in \textit{Gior
denello v. United States},\textsuperscript{129} where the defendant was accused of unlawful possession of narcotics and an arrest warrant was issued based on the affidavit of a federal narcotics agent.\textsuperscript{130} It appeared from testimony given at the suppression hearing that the affiant received his information from other law enforcement officers and other persons in Houston, none of whom appeared before the commissioner or signed affidavits in support of the arrest warrant.\textsuperscript{131} The Court found that the warrant was invalid because the complaint contained no affirmative allegation that the affiant spoke with personal knowledge and it did not indicate any sources of the affiant's belief.\textsuperscript{132}

Four years later in \textit{Jones v. United States},\textsuperscript{133} the Court upheld a search warrant based on an affidavit consisting mostly of hearsay information from an unnamed informant; the Court found a substantial basis for crediting the hearsay.\textsuperscript{134} The affidavit stated that a Detective Didone had been given information by an unnamed informant who was proven reliable in the past, that the suspect

\begin{quote}
\textsuperscript{126} \textit{Id.} at 108.  \\
\textsuperscript{127} \textit{Id.} at 109.  \\
\textsuperscript{128} \textit{Id.} at 110.  \\
\textsuperscript{129} 357 U.S. 480 (1958).  \\
\textsuperscript{130} \textit{Id.} at 481. The arrest warrant was based on the following affidavit: The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston Texas . . . Veto Giorenello did receive, conceal, etc., narcotic drugs, . . . with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code. And the complainant states further that he believes that __________________________ are material witnesses in relation to this charge. \\
\textsuperscript{131} \textit{Id.} at 485.  \\
\textsuperscript{132} \textit{Id.} at 486.  \\
\textsuperscript{133} 362 U.S. 257 (1960).  \\
\textsuperscript{134} \textit{Id.}
and another were involved in drug trafficking, that they kept a ready supply of heroin on hand and that the informant had purchased drugs at the suspect's apartment on many occasions. Justice Frankfurter, writing for the majority, concluded that hearsay may be the basis for a warrant, and because the informant had been proven reliable in the past, his tip had been corroborated by other sources of information and the defendant was known by the police to be a user of narcotics, there was a substantial basis for a magistrate to conclude that narcotics were probably present in the apartment.

Rugendorf v. United States was the next important case the Supreme Court heard concerning the credibility of hearsay from an unnamed informant. The informant, who had furnished reliable information in the past, told police that in the previous week he had seen seventy-five to eighty mink, otter and beaver stoles and jackets in the home of Samuel Rugendorf, that the labels had been removed and that he was told the stoles had been stolen. The police verified the description of the furs and, based upon the police verification and the informant's information, a search warrant was obtained. The Court stated that there was a substantial basis for the Commissioner to conclude that the stolen furs were probably in petitioner's basement given the detail of the information provided by the informant and the corroboration of that information by the police.

During the same term, the Court handed down the landmark decision in Aguilar v. Texas, declaring that although a search warrant may be based on hearsay, the administering magistrate must be informed of some of the underlying circumstances relied upon by the person providing the information and informed of some of

135. Id. at 268.
136. Id. at 271.
137. 376 U.S. 528 (1964).
138. Id. at 530. Another confidential informant, who had also proven reliable, told an FBI agent that Leo Rugendorf was a fence and that Samuel and Leo were brothers and both were associated in the meat business. The Court found factual inaccuracies in the informant's tip in that an allegation was made that Samuel Rugendorf was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—when in actuality Samuel had terminated his association with his brother in the meat business in 1952. The Court stated that such inaccuracies were only of peripheral relevancy to the showing of probable cause and did not go to the integrity of the affidavit. Id. at 532.
139. Id. at 531.
140. Id. at 532-33.
the underlying circumstances upon which the affiant concluded that the informant was credible or his information reliable. The affidavit in support of the search warrant in Aguilar merely stated that the affiants had received information from a credible person and that the affiants believed that there was heroin at the defendant's residence. The facts of the case indicate that there was no police corroboration of the tip or any detail given about how the informant learned the information, thus, the warrant was issued only on the mere conclusions of the informant. Writing for the majority, Justice Goldberg stated that there was an insufficient basis of probable cause since the magistrate was not informed of how the informant came about his information or whether the unnamed informant was credible or his information reliable.

In 1969 the Court granted certiorari in Spinelli v. United States to further clarify the requirements espoused in Aguilar. The affidavit in support of the Spinelli search warrant stated that the FBI had kept Spinelli under surveillance for five days and on four of these days he had been seen leaving Illinois and going to an apartment in St. Louis, that the apartment had two telephones with different numbers, that Spinelli was known to the affiant and other law enforcement agents as a bookmaker, and that the FBI had been informed by a confidential, reliable informant that Spinelli was operating a bookmaking operation. According to the majority, the commissioner could not credit the informant's tip without abdicating his constitutional function. In holding that the affidavit fell short of the standards set forth in Aguilar, the Spinelli Court said that the tip did not contain a sufficient statement of the underlying circumstances from which the informant could conclude Spinelli was running a bookmaking operation, the affiant did not set forth any reason why he felt his informant was reliable, and the informant's information was not sufficiently detailed to give reliability to the tip. The Court also stated that

142. Id. at 114.
143. Id. at 109. See supra note 17.
144. See 378 U.S. at 113-14. Corroboration was found to be determinitive in Draper. See supra notes 117-123 and accompanying text. In Jones, the Court stated that a very important factor in the affidavit is that the affiant set forth the credibility of the informant. 362 U.S. at 271. See supra note 46 and accompanying text.
145. 378 U.S. at 114-16.
147. Id. at 413-14.
148. Id. at 416.
149. Id. at 416-19. The Court stated:
corroboration of the information cannot support the inference that the informant was generally trustworthy or reliable.150

The Aguilar-Spinelli two-pronged test was thus the standard by which the constitutional validity of search warrants had been tested when such warrants were based upon hearsay.151 The first part of the test concerned the basis of knowledge of the informant's information; the second part dealt with the credibility of the informant and the reliability of his information.152 Spinelli intimated that a deficiency in one of these prongs could be cured by a tip which was sufficiently detailed.153 Justice Harlan, the author of the Spinelli opinion, flatly refused to adopt a totality of the circumstances approach, stating that such an approach would sweep too broadly in the area of probable cause.154 United States v. Harris155 was decided two years after Spinelli and it, too, concerned the weight to be accorded statements made by unnamed informants.156 The search warrant in Harris was based on an affidavit which stated that Harris had a reputation for being a trafficker in non-tax-paid liquor and that liquor had been found in a shack which had been under Harris' control.157 In upholding the warrant the Court said that Aguilar could not be read as having questioned the validity of the more readily applied substantial basis standard for determining probable cause; therefore, there could be no basis whatsoever for finding the affidavit wanting.158 The Harris Court gave considerable weight to the affidavit because the affiant had

In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Id. at 416.

150. Id. at 417.
151. Id. at 415-16.
152. Id.
153. Id. at 416.
154. Id. at 415. Justice Harlan wrote: "We believe, however, that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis." Id.
156. Id. at 575-76.
157. Id. The affiant further stated that he had received information from a reliable informant who feared for his life if he were identified, but that the informant was a prudent person who had previously bought liquor from Harris, and the affiant knew others who had purchased non-tax-paid liquor from Harris. Id.
158. Id. at 581.
set forth his own personal knowledge of the suspect's reputation, that the information obtained from the informant had set forth the informant's basis of knowledge, and that the informant in giving such information had gone against his penal interest by having implicated himself in the illegal sale of liquor.\textsuperscript{159}

While the Supreme Court had decided cases concerning named and unnamed informants before Gates, the lower courts had struggled to formulate a standard for evaluating anonymous tips.\textsuperscript{160} Three recent pre-Gates decisions dealing with anonymous tips based the credibility of these tips on an Aguilar-Spinelli standard.

In \textit{United States v. Rasor},\textsuperscript{161} the Fifth Circuit Court of Appeals stated that if the anonymous tip fulfilled the requirements of Aguilar-Spinelli, the tip by itself could establish probable cause.\textsuperscript{162} The Rasor court stated that if the tip fails such a test, the search warrant can properly issue if the tip is sufficiently corroborated.\textsuperscript{163} In 1981, however, in \textit{United States v. Hirschhorn},\textsuperscript{164} the same court stated that a hearsay tip from an anonymous informant cannot alone furnish probable cause for a search warrant since it lacks the basic criteria to judge both the reliability of the informant and the reliability of the information furnished by him.\textsuperscript{165} Although otherwise inconsistent with its previous decision in Rasor, the Hirschhorn court did recognize that a tip of unknown reliability can be shown to be reliable through police corroboration.\textsuperscript{166}

\textit{United States v. Zucco},\textsuperscript{167} decided by the Second Circuit Court
of Appeals, gave credibility to an anonymous tip when the inform-
ant stated that he had seen the suspected activity himself and the
tip had been sufficiently detailed and corroborated by the police.\textsuperscript{168}
The court, however, refused to accept the government’s argument
that anonymous tips are inherently credible, noting there was no
evidence in the affidavit from which it could be inferred that the
informants were without motive to lie.\textsuperscript{169}

To clarify the standards applicable in the named, unnamed and
anonymous informant cases, the \textit{Gates} Court adopted the totality
of the circumstances approach and abandoned the often contorted
standard of \textit{Aguilar-Spinelli}.\textsuperscript{170} The \textit{Gates} Court said that when
determining probable cause under the totality approach, consider-
ation should be given to all indicia of reliability, including the ba-
sis of knowledge of the informant, the informant’s past accuracy,
the informant’s reputation, the detail of the informant’s tip, police
corroboration of the tip and the reputation of the suspect.\textsuperscript{171}

Two recent decisions interpreting the \textit{Gates} totality of the cir-
cumstances approach are \textit{United States v. Kolodziej}\textsuperscript{172} and \textit{United
States v. Sorrels}.\textsuperscript{173} In \textit{Kolodziej}, three persons were arrested for
possessing large amounts of drugs; each of the three implicated
Kolodziej as his major supplier and each stated that Kolodziej kept
large amounts of money from drug sales in his automobile.\textsuperscript{174} The
Fifth Circuit Court of Appeals, in interpreting \textit{Gates}, held that the
search warrant was invalid because the tip provided nothing but
mere conclusions that the defendant was engaged in criminal activ-
ity and there was no basis of knowledge for the tip.\textsuperscript{175} The court
stated, however, that even absent some underlying facts from
which the informant could conclude that criminal activity was tak-
ing place, a finding of probable cause could still be warranted
under \textit{Gates} if a strong showing of the informant’s reliability is

\textsuperscript{168} \textit{Id. at 47.}
\textsuperscript{169} \textit{Id. at 47-48.}
\textsuperscript{170} 103 S. Ct. at 2332.
\textsuperscript{171} \textit{Id. at 2330, 2333-36.}
\textsuperscript{172} 712 F.2d 975 (5th Cir. 1983). \textit{Kolodziej} was before the court on a petition for
rehearing in order for the court to reconsider its ruling in light of \textit{Gates}. \textit{Id. at 976.}
\textsuperscript{173} 714 F.2d 1522 (11th Cir. 1983).
\textsuperscript{174} 712 F.2d at 976.
\textsuperscript{175} \textit{Id. at 977.}
Concluding that there had been no showing of the informant's reliability or any police corroboration of the tips, the court held there was no probable cause for the search warrant. The court seemed to have assessed the information supplied in this case as if the Aguilar-Spinelli test had never been abandoned by using language similar to that of pre-Gates decisions.

Sorrels concerned the conviction of several men for firearms violations. Information was supplied by a confidential informant/special employee who cooperated with the Bureau of Alcohol, Tobacco and Firearms in a two-month investigation and posed as a large-scale purchaser of firearms. The Eleventh Circuit Court of Appeals, in interpreting Gates, stated that it is no longer necessary for a magistrate to determine whether both prongs of Aguilar-Spinelli have been satisfied; the focus, the court submitted, should be on whether the constitutional rights of the party subjected to the search will be violated if the warrant is issued. In upholding the warrant, the court stated that the affidavit was sufficiently detailed although it did not relate the credibility of the informant.

In deference to the Aguilar-Spinelli test, the court stated that it did not recommend or endorse omissions in the affidavit of credibility or reliability since the test in Aguilar-Spinelli has served many useful purposes. The Sorrels court, while giving lip service to the attributes of the Aguilar-Spinelli test, seems to have interpreted Gates as abandoning any de minimis requirements of that test in favor of a test which assesses validity only upon whether the constitutional rights of the party searched have been infringed.

176. Id.
177. Id. at 977-78.
178. Id. at 977. The court used the following language:

Absent some of the underlying facts from which the informant concluded that criminal activity had taken place, a finding of probable cause is nonetheless warranted . . . if a strong showing regarding the informant's reliability is made. The affidavit does not contain an affirmative allegation that any of the three informants was known to be reliable. Nor does it state . . . that an independent police investigation corroborated the informant's tip.

179. See 714 F.2d 1522.
180. Id. at 1524-26.
181. Id. at 1528.
182. Id.
183. Id. at 1528-29.
184. Id. at 1528. The court stated: "The focus of judicial inquiry should not be upon a 'grading of the paper' of the affiant, but rather; should be based upon whether the constitutional rights of the party subject to the search will be violated if the warrants issue." Id.
In the area of informants, named, unnamed or anonymous, it is still entirely likely that confusion as to the amount of credibility to be given such tips will continue. The area of probable cause is fraught with judgmental decisions to be made by magistrates who give different weight to different aspects of evidence. *Aguilar-Spinelli* defined the minimum requirements of such tips when the magistrate is confronted with an affidavit containing only hearsay evidence. Under *Gates* there seem to be no absolute minimum requirements for such evidence. *Gates* determined that a magistrate may take into consideration any factor which may have a bearing on probable cause, but the *Gates* majority did not indicate whether this determination is to be subjective or objective. Nor does *Gates* address the question of how much weight is to be accorded other aspects of probable cause and hearsay. The Court left open the question of whether greater weight is to be given to the known reputation of the informant or the reputation of the suspect, and the Court did not answer the question whether the detail of the informant's tip is a better indication of reliability than the informant's past accuracy.

*Gates* may represent the new *de minimis* requirements needed for obtaining a search warrant, whatever they may be, or it may simply indicate a change in the phraseology of the Court. No longer may the courts use such terms as a substantial basis or reasonable grounds; instead the new term will be the totality of the circumstances.

As illustrated, it is likely that *Gates* will create more problems than it will solve for the lower courts. If the two recent circuit court decisions applying the totality of the circumstances approach are any indication of the applicability of such a standard, it is indeed likely that this area will continue to be fraught with contorted evaluations of what constitutes probable cause. If *Gates* is the definitive law in this area, police and magistrates will be unable to predict with any degree of certainty what is required for determinations of probable cause when hearsay evidence is involved. It seems clear that other cases within this area will have to be heard to address the unanswered questions in *Gates* and to determine with some degree of certainty what is required for probable cause.

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185. *See supra* notes 17 and 20.
186. *See supra* note 171 and accompanying text.