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_Illinois v. Gates: A Paradoxical Version of "Common Sense"

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ILLINOIS V. GATES:
A PARADOXICAL VERSION OF “COMMON SENSE”

INTRODUCTION

Each year law enforcement officers submit thousands of applications for search warrants to magistrates. Many of the affidavits submitted in support of these applications contain facts not directly known to the officer-affiants, but learned by them through informants' tips. In determining whether probable cause exists for a warrant to issue in such cases, magistrates may be required to evaluate hearsay information.

In considering informants' tips, magistrates and reviewing courts have applied a two part test first developed by the Supreme Court in Aguilar v. Texas\(^1\) and refined shortly thereafter in United States v. Spinelli.\(^2\) The “Aguilar-Spinelli two-prong test” has been guiding courts for over a decade, and has generated a substantial body of case law.

In June, 1983, the Supreme Court announced in Illinois v. Gates\(^3\) that it was abandoning the two-prong test, substituting in its place a “totality of the circumstances analysis.”\(^4\) Illinois v. Gates is the most recent in a long line of cases in which the Supreme Court has struggled with the knotty problem of hearsay in the context of probable cause.\(^5\) In breaking with Spinelli and its progeny, the Gates decision raises troubling questions for reviewing courts, magistrates, and law enforcement officials, and serves to highlight once again the difficulties inherent in hearsay issues.

4. Id. at 2332.
This note explores the dimensions of *Illinois v. Gates*. It begins with a brief discussion of the problem of hearsay in a probable cause context. It then provides a summary of *Aguilar* and *Spinelli* and a third key Supreme Court decision, *Draper v. United States*. The note briefly considers the effect these three decisions have had on the lower courts and on the legal literature of which the *Gates* majority is particularly critical. Next, the *Gates* decision itself is examined, and finally, an analysis of the majority opinion is offered.

**HEARSAY IN A PROBABLE CAUSE CONTEXT**

*Hearsay Generally*

The problem of hearsay has been analyzed most thoroughly in the context of in-court testimony. In a trial situation, the finder of fact makes inferences based on the testimony of the witness before him or her. Upon closer examination, this commonsensical, intuitive process can be broken down into two simple questions: First, does this witness really believe what he or she is telling me and, second, if so, does his or her belief reflect reality?

These two questions may be phrased in different ways, but they remain logically necessary elements in evaluating testimony. Answering both questions is often difficult, but when the witness is in front of the trier of fact, the trier can observe him or her directly and benefit from responses given under cross-examination. The task is rendered far more difficult when the trier of fact is called upon to consider hearsay evidence. Not only must the finder of fact judge the veracity and the basis of knowledge of the witness who is relating the out-of-court state-

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9. One commentator, for example, has shown the mental process by means of a triangle, representing a "trip" into the head of . . . the declarant . . . and a trip out . . . in order to match the declarant's assumed belief with the external reality sought to be demonstrated." Tribe, Triangulating Hearsay, 87 Harv. L. Rev. 957, 959 (1974).
10. "Hearsay" is defined in the Federal Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c).
ment, but he or she must also judge the veracity and basis of knowledge of the original declarant who cannot be observed or questioned. Courts generally have preferred hearsay to no evidence at all, provided that attendant circumstances minimize one or more of the dangers commonly associated with it. The complex set of standards for governing the admission of hearsay at trial reflects the historical search for specific indicia of reliability.

Hearsay in a Probable Cause Determination

At a probable cause hearing, hearsay is most often presented in the form of tips provided to the police by informants, frequently members of the underworld who receive favors for their services. Although problems of hearsay arise at probable cause hearings just as they would in a trial setting, the intricate hearsay rules and exceptions used for trials are out of place in less formal probable cause proceedings. The Supreme Court has repeatedly emphasized the differences between the amount and modes of proof involved in proving guilt in a criminal case versus showing probable cause for an arrest or search warrant. The Court has resisted the introduction of rules of evidence in probable cause hearings, eschewing the technical requirements of elaborate specificity once exacted under common law pleadings.

Nevertheless, some minimal criteria for evidence in probable cause determinations are imposed by the fourth amendment. The fourth amendment protects against unreasonable searches and seizures, and requires that "no warrants shall issue, but upon probable cause, supported by an oath or affirmation, and partic-

11. The dangers most commonly associated with hearsay are ambiguity, insincerity, erroneous memory, and faulty perception. See G. Lilly, An Introduction to the Law of Evidence 159 (1978); Tribe, supra note 9, at 957.
12. In the United States the use of hearsay in criminal trials has also been affected by the sixth amendment right to confrontation. See, e.g., Barber v. Page, 390 U.S. 719 (1968); Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 CRIM. L. BULL. 99 (1972).
ularly describing the place to be searched and the persons or things to be seized." 17 The Court has read the fourth amendment to require that a warrant be issued only by a neutral and detached magistrate,18 based on facts or circumstances from which he or she can draw his or her own independent conclusion.19

In Nathanson v. United States,20 the Court first held that merely conclusory statements, even when made by a trusted law enforcement officer under oath, would not support a finding of probable cause.21 Nathanson made it clear that even in the relative informality of a probable cause hearing, where most rules of evidence do not apply, the magistrate must still grapple with the two fundamental questions faced by a jury at trial. The magistrate must first assess the credibility of those who furnish information and then weigh the sufficiency of the factual basis for the information.22 Nathanson dealt with direct testimony of an officer-affiant, not with hearsay. It would seem to follow from Nathanson, however, that the logic which governs the evaluation of information from the primary source should also govern the evaluation of information from a secondary source, such as an informant's tip.23 In considering whether a tip provides probable cause, it would seem that not only must the magistrate decide that the officer-affiant is telling the truth and that the officer-affiant's conclusions reflect reality, but the magistrate must also conclude that the absent, non-swearing informant was also telling the truth and that the informant's conclusions reflected reality. In Aguilar v. Texas,24 decided some thirty years later, the Supreme Court explicitly adopted this corollary of Nathanson.

17. U.S. CONST. amend. IV.
20. Id.
21. Id. at 47. In Nathanson, an officer stated in a sworn affidavit that he had "cause to suspect and [did] believe" that contraband was on certain premises. Id. at 44. The Court held the affidavit insufficient because "it went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts." Id. at 46. Although Nathanson did not involve hearsay evidence, the principle it established was incorporated into subsequent decisions on informants' tips.
23. Id. at 750.
THE AGUILAR-SPINELLI TWO-PRONG TEST AND DRAPER V. UNITED STATES

In *Aguilar v. Texas*, the Supreme Court laid down a two part standard to be used in evaluating hearsay in a probable cause context that set forth the criteria to be used in evaluating informants' tips, i.e., independent facts that suggest, first, the informant's basis of knowledge and, second, his or her personal veracity. Questions remained, however, as to just what kinds of evidence would satisfy the new criteria. The Supreme Court

25. *Id.*
26. In *Aguilar*, the affidavit submitted by police in support of their application for a warrant stated:

Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphenalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.

*Id.* at 109. The Court concluded that the affidavit failed to inform the magistrate why the informer was credible or how he obtained his information, and hence could not support a finding of probable cause.

*Aguilar* was not the first Supreme Court decision to deal with probable cause and informants' tips. One major decision antedating *Aguilar* by four years was *Jones v. United States*, 362 U.S. 257 (1960). *Jones* was given renewed vitality in *Illinois v. Gates*. See infra note 113.

In *Jones*, the affidavit submitted in support of a request for a search warrant stated that the affiant-detective had "received information" from "persons familiar" to him who had "admitted to the use of narcotic drugs and display needle marks as evidence of same," and who had "given information ... on previous occasions and which was correct." 362 U.S. at 267-68. The tip related that defendant and another "kept a ready supply of heroin on hand . . . either on their person, under a pillow, on a dresser or on a window ledge in [their] apartment," and that the informant had "on many occasions . . . gone to said apartment and purchased . . . drugs." *Id.* The affidavit also stated that "this same information, regarding the illicit narcotic traffic . . . has been given to . . . [affiant] and to other officers . . . by other sources of information." *Id.* The Court upheld the warrant. It held that an affidavit is not to be deemed insufficient by virtue of the fact that it set out not the affiant's observations but those of another, "so long as a substantial basis for crediting the hearsay is present." *Id.* at 269. The Court specifically observed that the informant had previously given accurate information, his story had been corroborated by other sources of information, and he was known by police to be a user of narcotics. *Id.* at 271. "Corroboration," explained the Court, "reduced the chances of a reckless or prevaricating tale." *Id.*

Since the affidavit in *Jones* would have satisfied the *Aguilar-Spinelli* two-prong test, the "substantial basis" standard in *Jones* is generally read as the inchoate source of *Aguilar*. Moylan, supra note 22, at 781-82. Some courts, however, have viewed the "substantial basis" standard as a distinct alternative to the two-prong test. *Id.* The State of Illinois advanced this latter theory both in the lower courts and before the Supreme Court in *Illinois v. Gates*. Ultimately, the *Gates* Court appeared to have adopted a version of the latter position. See infra note 113 and accompanying text.

had already struggled with some of these evidentiary questions in pre-Aguilar decisions,\(^2\) most notably, Draper v. United States.\(^2\)

Draper explored the weight and relevance to be given to independent police investigation that corroborated the detail in an informant’s tip. This was an issue that came back to haunt the Court in later decisions, culminating in Illinois v. Gates. As a key to understanding Gates, Draper ranks in importance with Aguilar and Spinelli.

In Draper, a paid informant who had given police accurate information on past occasions provided a tip that Draper would be returning by train from Chicago to Denver at a specified time with three ounces of heroin. The tip contained a wealth of detail, including a complete description of Draper’s appearance and the clothes he would be wearing.\(^3\) At the specified time, Draper alighted from the train, dressed as predicted, and was arrested by detectives who had staked out the train station. They had independently verified every detail in the tip except whether Draper was, in fact, carrying heroin. The Court held that, even without confirmation of this final and crucial fact, the detectives had probable cause for an arrest. Because every other bit of detail in the tip had been personally verified, the Court found reasonable grounds to believe that the remaining, unverified bit of information that Draper had heroin on his person would also be true.\(^3\)

Draper is intuitively appealing, but logically troubling. Certainly the corroboration of details in a tip provides a magistrate with an independent basis for finding those details to be true. The crucial detail, however, was left unverified. Draper’s possession of heroin could have been pure invention by the tipster, or the tipster could have drawn a mistaken conclusion based on

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28. See supra notes 5 and 26.
29. 358 U.S. 307 (1959). No affidavit was in question in Draper because the arrest was made by an officer without a warrant. The issue was strictly whether the arresting detective had probable cause, and the inquiry thus focused on the knowledge of the detective, not, as is more common, that of the magistrate.
30. The tip stated that the suspect had gone to Chicago by train the day before, and would be bringing back three ounces of heroin either the next morning or the morning thereafter. The informant described the suspect as a light-complexioned black man, 27 years old, 5'8" tall, and weighing 120 pounds. The suspect would be wearing a light raincoat, brown slacks and black shoes, and would be carrying a tan zipper bag and walk "real fast." Id. at 309.
31. Id. at 313.
Draper’s reputation, or erroneously relied on a casual underworld rumor. Nevertheless, the Draper Court held that a magistrate would be justified in inferring the truth of the final fact.

The evidentiary issues in Draper were thrown into sharper relief when Aguilar announced the two-prong test four years later. To remain viable after Aguilar, Draper and its facts would have to satisfy the two prongs. The Court, in Spinelli v. United States, reaffirmed the two-prong test of Aguilar and the continued vitality of Draper. In doing so, the Spinelli Court laid down some rudimentary guidelines for the kinds of evidence that could satisfy each prong. A two step analysis was recommended. First, a magistrate was to consider whether the informant’s tip, standing alone, satisfied Aguilar’s two prongs. A tip that stated that the informant gained his or her information from first-hand observation, for example, would readily meet the basis of knowledge prong of the Aguilar test. The second prong, dealing with the informant’s honesty, could be satisfied by a statement in the

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32. This objection was raised in part by Justice Douglas’ dissenting opinion, id. at 324 (Douglas, J., dissenting), and later by Justice White in his concurring opinion in Spinelli v. United States, 393 U.S. at 426-27 (White, J., concurring).

33. 393 U.S. 410 (1969). The affidavit in Spinelli related the substance of the tip as follows:

The Federal Bureau of Investigation 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 telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136.

Id. at 422.

The Court held that, standing alone, the informant’s tip could not be credited by a magistrate “without abdicating his constitutional function.” Id. at 416. The affiant offered no reason why the informant was reliable, nor did the affiant present any of the underlying circumstances which led the informant himself to conclude that Spinelli was a bookmaker.

The Court then turned to other pieces of information in the affidavit to determine whether there was sufficient independent corroboration to cure the defects in the tip, and thus satisfy Aguilar. The affidavit related: (1) FBI observations of Spinelli driving from Illinois to St. Louis, parking his car and entering an apartment there; (2) a telephone company verification that the two phones in the apartment carried the numbers mentioned in the informant’s tip; and (3) Spinelli’s reputation among law enforcement officials as a bookmaker. The Court called the third allegation a “bald and unilluminating assertion of suspicion,” and gave it no weight. Id. at 413-14. The first two allegations suffered from another infirmity: they reflected only innocent-seeming activity and data. Id. The Court concluded that the corroborating information was too weak to cure the defects in the tip itself, and hence, the Aguilar criteria were not met.

The question of corroboration of seemingly innocent activity arose again in Illinois v. Gates, but there the Court took a very different position. See infra note 110.

34. LaFave, Probable Cause from Informants: The Effects of Murphy’s Law on Fourth Amendment Adjudication, 1977 U. ILL. L.F. 1, 36 (1977).
affidavit that police officers had, on previous occasions, received accurate tips from the informant.35

If, however, the tip, standing alone, could not satisfy both prongs, then Spinelli directed the magistrate to turn to other facts in the affidavit, and assess whether they supported an inference as to the informant’s basis of knowledge or credibility. Spinelli specified two factors that warranted inferences that each of Aguilar’s prongs had been satisfied, each drawn directly from the facts of Draper. First, when there is no past record of an informant’s truthfulness, independent police corroboration of some or all of the informant’s tale may satisfy the magistrate that the informant is telling the truth at least on this particular occasion.36 Spinelli pointed to Draper as a relevant comparison for the level of police verification needed.37 Second, when there is no direct assertion that the informant obtained his or her story from first-hand observation, a sufficient factual basis for the tip could nonetheless be inferred by the magistrate if the level of detail in the tip was so rich that the informant had to be relying on more than a casual underworld rumor or the suspect’s general reputation.38 Again, the Spinelli Court drew on Draper as a suitable benchmark for the requisite amount of detail.39

This dual reliance on Draper unfortunately compounded rather than solved the problem of how to justify the inferential leap from fully corroborated details in a tip to the truth of the uncorroborated, often-times crucial facts alleged.40 Perhaps the simplest way for the Court to have settled the issue would have been to reassert that a finding of probable cause did not require proof beyond a reasonable doubt.41 The Court might have held that, in weighing the facts in a particular warrant application, a magistrate may gauge the probability of the required inferences, and that one of the factors to consider is the amount of detail in the tip weighted by the degree to which it has been independently verified.

If this was, in fact, the message of Spinelli, it was unfortunately obscured by the language of the opinion. Spinelli did

35. Id. at 10.
36. 393 U.S. at 417.
37. Id.
38. Id. at 416.
39. Id.
40. Moylan, supra note 22, at 775.
41. See supra note 15 and accompanying text.
explicitly approve of the use of police corroboration to infer that the informant was not lying, but the Court said nothing concerning how such corroboration might relate to an inference that the informant had a solid basis for his knowledge for the tip. Instead, Spinelli emphasized the level of detail in the tip in its explanation of how the Draper facts satisfied this prong. The Court's reasoning left many with the impression that it was not police corroboration, but "self-verifying detail" that satisfied the basis of knowledge prong of Aguilar.

If this reading of Spinelli is correct, the opinion takes on a puzzling asymmetry. It has been observed that the use of "self-verifying detail" to infer a basis of knowledge appears forced and artificial compared to the practicality and common sense of using police corroboration to infer an informant's credibility. If corroboration can support a conclusion that the tipster was not lying about unverified facts, why can it not support a conclusion that the tipster was likewise not mistaken or relying on an underworld rumor? Some commentators have suggested that Spinelli in effect "rewrote" Draper to make it conform to the two-prong test by inventing the level-of-detail inference.

In sum, Spinelli illuminated some aspects of hearsay in a probable cause context, while obscuring others. It represented a step toward a coherent treatment of informants' tips, but it fell short of being a fully formed, systematic analytical framework. Unhappily, the lower courts appear to have overlooked

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42. 393 U.S. at 417.
43. Id. at 416-47.
44. See, e.g., LaFave, supra note 34, at 42-44; Moylan, supra note 22, at 775-77.
45. LaFave, supra note 34, at 43-44; Note, The Informer's Tip as Probable Cause for Search or Arrest, 54 CORNELL L. REV. 958, 966 (1969).
46. LaFave notes that Draper itself was not decided on the basis of "self-verifying detail," but "was 'rewritten' in a sense" by Spinelli. LaFave, supra note 34, at 8, 50 n.244. Justice White, concurring in Spinelli, also pointed out that Draper was not decided on a self-verifying detail theory, but on the basis of corroboration of the tip. 393 U.S. at 426-27. (White, J., concurring).
47. The Spinelli holding was, of course, shaped by the facts in that case. The rule fashioned by the Court was broad enough to cover only the evidence presented in that specific affidavit. The catalogue of evidence potentially useful in meeting Aguilar's two prongs, however, is far more extensive. For example, an informant's veracity might be inferable if the tip was in the form of a dying declaration or a spontaneous excited utterance. The only concrete step taken by the Supreme Court in the direction of supplementing Spinelli's evidentiary rule was in United States v. Harris, 403 U.S. 573 (1971). In that case, the Court added another basis for satisfying the veracity prong: when a tip contains a statement against the informer's penal interest. "Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility." Id. at 583. Other than Harris, there has been very little judicial expansion of the range of
the half-finished character of Spinelli, and have come instead to view it as the outer limit of permissible inference rather than a starting point.\textsuperscript{48} As a consequence, the ambivalence in Draper and Spinelli concerning partial corroboration of detailed tips has been reflected rather than resolved in subsequent judicial opinions.\textsuperscript{49}

\textbf{THE PROGENY OF AGUILAR, SPINELLI, AND DRAPER}

Given that the relevant Supreme Court decisions cannot be completely rationalized or reconciled,\textsuperscript{50} it is not surprising that the lower courts have had difficulty in applying the two-prong test.\textsuperscript{51} Another source of unnecessary confusion has been the courts' ambiguous use of the word "reliable."\textsuperscript{52} A third problem, it has been suggested, lies "not with Aguilar or Spinelli as opinions, but with the elusive nature of the hearsay problem, itself."\textsuperscript{53}

One notable exception to the general disorder in the lower courts has been the Maryland Court of Special Appeals. In a series of some fourteen decisions,\textsuperscript{54} Judge Charles E. Moylan has attempted to impose some rigor into the use of hearsay in the context of probable cause. Of these, \textit{Stanley v. State}\textsuperscript{55} stands as the seminal interpretation of the Supreme Court's decisions in Draper, Aguilar, and Spinelli.

Adopting virtually all of the reasoning in \textit{Stanley}, Professor Wayne R. LaFave has subsequently built on Judge Moylan's acceptable evidence from which inferences may be drawn.

\textsuperscript{48} See, e.g., infra note 69 and accompanying text.

\textsuperscript{49} LaFave, supra note 34, at 60-67.

\textsuperscript{50} Id. at 2-3.

\textsuperscript{51} Id.


\textsuperscript{53} Stanley v. State, 19 Md. App. at 555, 313 A.2d at 859-60; Moylan, \textit{supra} note 22, at 786.


\textsuperscript{55} 19 Md. App. 508, 313 A.2d 846 (1974). Judge Moylan took much of the text in his article verbatim from his opinion in \textit{Stanley}. See Moylan, \textit{supra} note 22. This note will cite identical passages to both sources.
work. Taken together, the writings of Moylan and LaFave have offered a coherent, systematic treatment of hearsay in a probable cause context that has had considerable influence on lower courts throughout the United States. Courts in no fewer than twenty-three states, fifteen of which are the highest courts in these states, have cited with approval or quoted extensively from Moylan or LaFave or both. Several federal courts, including four circuit courts, have also relied on one or both authorities. The prominence of the Moylan-LaFave approach in the jurisprudence of probable cause and informants' tips is perhaps best illustrated by the fact that the Supreme Court singled out Stanley v. State for special criticism in Illinois v. Gates.

Relating the Two-Prong Test to the Logic of Hearsay

The key contribution of Moylan and LaFave was to help lower courts, magistrates, and law enforcement officials draw the parallel between the two-prong test and the basic inferential process underlying all hearsay evaluations. The practical effect of the analysis shared by Moylan and LaFave has been to remove the two-prong test from the realm of judicial fiat to the field of common sense.

56. See generally W. LAFAVE, LAW OF SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978); LaFave, supra note 34.


59. See infra note 102 and accompanying text.

60. Moylan, supra note 22, at 743, 750-51.
The first step was to coin a more precise vocabulary than that used in *Aguilar* or *Spinelli*. This vocabulary operates in context as follows: The absent informer who provided the tip has, unlike the officer requesting a warrant, taken no oath. Hence, the magistrate must have a reason to be persuaded of the informant's truthfulness. This is the "veracity prong." The affidavit must show either the inherent credibility of the informant (the "credibility spur") or some other circumstances reasonably assuring the reliability of the information on the particular occasion of its being furnished (the "reliability spur"). The second prong concerns the magistrate's determination of how the informant has come to know what he or she states is true. The magistrate must still be persuaded that the informant has not made an error, albeit an honest one. This is the "basis of knowledge" prong.

The Moylan-LaFave approach emphasizes that the two prongs of *Aguilar* and *Spinelli* are completely independent. Because the questions posed in the two prongs are analytically severable, "'overkill' on one prong will not carry over to make up for a deficit on the other prong." In this respect, Judge Moylan's analysis comports with the common sense of hearsay inference and reflects the entire line of Supreme Court cases from *Nathanson* to *Spinelli*.

Judge Moylan's analysis is distinguished by his reading of *Draper* and *Spinelli* and the evidentiary rules he derives from them. Judge Moylan reads *Spinelli* as prescribing two distinct evidentiary "cures" for two very different types of "ailments" in an informant's tip. Corroboration, according to Moylan, may be used to satisfy the veracity prong of *Aguilar*, and self-verifying detail may be used to satisfy the basis of knowledge prong. He adamantly maintains, however, that each of the two *Spinelli*
"remedies" is logically relevant only to its own prong, and is not transferable to the other.\textsuperscript{68}

Judge Moylan's efforts have been ambitious on two fronts. First, he has attempted to relate what he knows about the inferential process of evaluating hearsay to the Nathanson-Spinelli line of decisions. Second, he has tried to reconcile all of the decisions themselves to reflect a consistent approach to probable cause and informants' tips. He has met complete success in neither task, however. Perhaps his difficulty has stemmed from an acceptance of the Spinelli decision as a more comprehensive statement of the evidentiary rules for hearsay in a probable cause context than it actually was.\textsuperscript{69} Judge Moylan seems to have created his system within the confines of Spinelli instead of expanding upon it. His approach may be internally consistent, but it has begun to an extent to resemble some of the elaborate, intricate hearsay rules that the Court in Nathanson v. United States\textsuperscript{70} specifically found inappropriate for probable cause determinations. The rigid, air-tight compartments into which Judge Moylan believes evidence has to be segregated may, perhaps, result from respecting not the spirit, but what he reads to be the letter, of Draper, Aguilar, and Spinelli.

Despite these shortcomings, Stanley v. State and LaFave's complementary writings have provided the lower courts with an easily applicable, sometimes almost mechanical formula for evaluating informants' tips. The "hornbook" cogency of the Moylan-LaFave approach has offered a welcome alternative to some of the more opaque pronouncements of the Supreme Court. After decades of ambiguity, there appeared to be emerging a more logical, common-sense structuring of probable cause congruent with the underlying inferential process. Granted, there has remained the task of clarifying the role of police corroboration of tips, along with a number of other evidentiary questions,\textsuperscript{71} but the

\textsuperscript{68} Stanley, 19 Md. App. at 523, 313 A.2d at 857; Moylan, supra note 22, at 774, 779. Judge Moylan stands on solid logical ground in arguing that the level of detail in a tip shows nothing about an informant's veracity. A skilled liar can easily fabricate a complicated story. The second side of Moylan's argument, however, falters. It is not at all obvious why police corroboration of a detailed tip is irrelevant to the informant's basis of knowledge. See supra note 46 and accompanying text; infra notes 121-23 and accompanying text.

\textsuperscript{69} See supra note 47. But see also infra note 71.

\textsuperscript{70} See supra note 16 and accompanying text.

\textsuperscript{71} Moylan and LaFave themselves identified several unsettled questions within the Aguilar-Spinelli framework to which the lower courts have provided sometimes conflict-
basic conceptual framework seemed in place. The stage seemed to be set for the Supreme Court to work out these issues in the proper perspective. Significant progress appeared to have been made doctrinal paths which, it was hoped, would lead to a sound, coherent, and consistent body of jurisprudence. It was within this intellectual context that *Illinois v. Gates* was decided.

**ILLINOIS V. GATES**

**Facts**

On May 5, 1978, at about 4:00 p.m., Lance Gates, a resident of Bloomingdale, Illinois, boarded Eastern Airlines flight 245 at O'Hare Airport, departing for Palm Beach, Florida. Upon arrival, he took a taxi to the nearby Holiday Inn, and went to a room registered in the name of Susan Gates. The next morning, at 7:00 a.m., Gates left the motel with a woman in an automobile bearing Illinois license plates, and started northbound on the interstate highway.

These facts, seemingly innocent enough standing alone, had a suspicious character for the various law enforcement officials who were observing them. The Gates had become a subject of interest for the Bloomingdale police department three days earlier, when an anonymous, handwritten letter had been delivered in the mail. The letter stated that the Gates were drug smugglers, describing in detail their modus operandi and predicting that their next attempt would occur on May 3.

Judge Moylan has emphasized the issue of the citizen-informant, as opposed to the "typical paid informant drawn from criminal milieu," and queried whether a more lenient standard would satisfy the veracity prong. Moylan, *supra* note 22, at 768-72.
The police set forth the results of their surveillance in an affidavit, attached a copy of the letter, and requested a judge of the Circuit Court of DuPage County to issue a search warrant for the Gates’ car and home. The judge found that probable cause existed, and issued the warrant. When the Gates returned to their home in Bloomingdale at 5:15 a.m., twenty-two hours after leaving Palm Beach, the police were waiting for them. A search uncovered some 350 pounds of marijuana in the trunk of the car, guns, other contraband, and more marijuana inside the house.\footnote{The Illinois Appellate Court quoted passages from Stanley v. State, 19 Md. App. 508, 313 A.2d 847 (1974), and LaFave, supra note 34.}

\textit{The Illinois Courts’ Decisions}

The Gates were prosecuted in the Circuit Court of DuPage County, Illinois, on various narcotics and firearms charges. They moved to suppress the evidence seized in the search on the ground that the warrant failed to comply with the \textit{Aguilar-Spinelli} two-prong test. The court granted the motion, and the state appealed.

The Illinois Appellate Court affirmed,\footnote{82 Ill. App. 3d at 754, 403 N.E.2d at 81.} in an opinion that is a classic application of the analysis in \textit{Stanley v. State}.\footnote{People v. Gates, 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980).} The appellate court reasoned that, since the police obviously could not know the identity of the anonymous letter writer, the basis of his or her knowledge would have to be inferred. Under \textit{Spinelli}, a magistrate could infer a reliable source for the informant’s tip if there was enough detail to make it self-verifying. The court used the facts in \textit{Draper} as a standard for the level of detail required, and found that the anonymous letter fell short.\footnote{Id. at 2325.} Because the tip

\begin{verbatim}
be loaded up with drugs, then Lance flys [sic] down and drives it back. Sue flys 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 and Susan Gates
Greenway
in Condominiums.
\end{verbatim}
failed to satisfy the basis of knowledge prong, the court never reached a decision as to whether it satisfied the veracity prong.

The Illinois Supreme Court affirmed the judgment of the appellate court. Like the court below, the Illinois Supreme Court used a Moylan-LaFave analysis. It agreed that the level of detail in the letter was insufficient under Draper. Unlike the court below, however, the Illinois Supreme Court went on to address the state’s argument that because the detail, such as it was, was corroborated to such a degree, probable cause did, in fact, exist. In effect, the state asked the court to answer the question posed in Draper and left unanswered in Spinelli, i.e., when, if ever, could a magistrate infer from corroboration of details in a tip that an informant had an adequate basis for his or her knowledge?

The Illinois Supreme Court cited both LaFave and Stanley v. State for the proposition that corroboration could be used only to support an inference of an informant’s credibility. The court also noted that the lower courts in the United States were not in agreement on this point. Although the Illinois Supreme Court set the stage for deciding whether partial corroboration, combined with detail in a tip, could satisfy either prong of Aguilar, it ultimately reserved the question. It reasoned that in the instant case, corroboration was of innocent activity only, and this was not enough. Consequently, no probable cause existed to search the Gates’ house or car.

The United States Supreme Court Decision

The Supreme Court granted certiorari to consider how the fourth amendment applied to search warrants issued on the basis of a partially corroborated anonymous informant’s tip. Justice Rehnquist wrote the opinion for the five member majority, Justice White concurring in the judgment in a separate opinion, and Justices Brennan, Marshall and Stevens dissenting in

80. Id. at 389, 423 N.E.2d at 892-93.
81. Id. at 386, 423 N.E.2d at 891.
82. Id. at 390, 423 N.E.2d at 893.
83. Id.
84. Id.
85. The case was briefed and argued before the United States Supreme Court on
two separate opinions. The Supreme Court reversed the Illinois high court, holding that the judge issuing the warrant to search the Gates' car and home had a "substantial basis" for finding probable cause. The majority agreed to abandon the two-prong test and "reaffirm the totality of the circumstances analysis that has traditionally informed probable cause determinations." A central theme running through the Court's opinion was that probable cause is a flexible, common-sense standard. The majority opinion drew heavily from language in earlier opinions to emphasize the fluidity of probable cause. The Court identified as perhaps the central teaching of these decisions that probable cause is a practical, non-technical concept. Because the probabilities in each factual context are different, the Court reasoned, the issuance of warrants could not be reduced to a "neat
set of legal rules," such as those that had developed from *Aguilar* and *Spinelli.* The Court stated that "the totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." Although the Court stated that it was "abandoning" the two-prong test of *Aguilar* and *Spinelli,* it never actually overruled the holdings in either case. The Court explicitly reserved the question of whether the affidavit invalidated in *Spinelli* would support a finding of probable cause under the newly announced totality of the circumstances test. In addition, though describing *Aguilar* as "the source of the two-pronged test," the Court appears to have attempted a rehabilitation of that decision, recommending its facts as illustrative of the limits beyond which a magistrate should not venture in issuing a warrant.

The Court seemed to reserve its strongest criticism not for its own prior decisions in *Aguilar* and *Spinelli,* but for "the elaborate set of legal rules that have developed among the various lower courts." Numerous references in the opinion leave the impression that the majority was at least as critical, if not more so, of *Spinelli*’s progeny as it was of *Spinelli* itself. Exem-

91. *Id.*
92. *Id.*
93. *Id.* at 2332.
94. *Id.* at 2332 n.11.
95. *Id.* at 2334.
96. "Our original phrasing . . . in *Aguilar* suggests that the two prongs were intended simply as guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case . . . [W]e intended neither a rigid compartmentalization of the inquiries . . . nor that those inquiries be elaborate exegeses of an informant's tip. Rather, we required only that some facts bearing on two particular issues be provided to the magistrate." *Id.* at 2328 n.6 (emphasis in original).

As the only dissenter in *Spinelli* who was still on the bench, Justice Stewart must have taken satisfaction in joining in the *Gates* majority's interpretation of *Aguilar.* Justice Black, dissenting in *Spinelli,* had written, "this Court's decision in *Aguilar* . . . was bad enough . . . . But not content with this, the Court today expands *Aguilar* to almost unbelievable proportions." 393 U.S. at 429 (Black, J., dissenting).
97. 103 S. Ct. at 2328 n.6.
98. *Id.* at 2327.
99. Examples include the following allusions:
   "The Illinois Supreme Court, like some others, apparently understood *Spinelli* as requiring . . ." *Id.* at 2326-27 (emphasis added).
   "an elaborate set of legal rules that have developed among various local courts to enforce the 'two-pronged test' . . ." *Id.* at 2327 (emphasis added).
   "the entirely independent character that the *Spinelli* prongs have assumed . . ." *Id.* at 2328 n.5 (emphasis added).
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plifying the overly technical approach in the lower courts, according to the Court, was Stanley v. State. The majority singled out Stanley for criticism in three extensive footnotes and, in the text of the opinion, disparaged Judge Moylan's articulation of the two-prong test. The conclusion thus appears virtually inescapable that the majority was deliberately and unequivocally rejecting the conceptual framework that had become the basis for probable cause determinations in many, if not most, states, under Spinelli.

It is also worth noting what the Court was not rejecting. The majority did not discount the relevance of the informant's verac-
ity or of his or her basis of knowledge in a probable cause determination. The Court viewed them as "highly relevant" elements which "usefully illuminate the commonsense, practical question whether there is 'probable cause.'"104 In fact, the Court intimated that veracity and basis of knowledge, now stripped of their status as prongs, nevertheless must enter into a magistrate's finding.105

The crucial issue on which the Gates Court departed from Spinelli and its predecessors was whether the (now defunct) prongs were analytically independent. The Court rejected the concept that an informant's believability, on the one hand, and his or her basis of knowledge, on the other, should be understood as entirely independent requirements to be rigidly exacted in every case.106 Instead, under the new totality of the circumstances analysis, what were formerly prongs were now to be "closely intertwined issues,"107 such that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."108

104. 103 S. Ct. at 2328.
105. Id. at 2332.
106. Id. at 2327-29.
107. Id. at 2328.
108. The Court offered two illustrations of situations in which a showing of an informant's veracity could compensate for inadequate information concerning the basis of knowledge. The first was based on United States v. Sellers, 483 F.2d 37 (5th Cir. 1973). The Supreme Court derived from that case the proposition that when an informant is known for unusual reliability to predict local crimes, his or her failure in a particular case to set forth thoroughly the basis of knowledge should not be an absolute bar to a finding of probable cause. 103 S. Ct. at 2329. The Court's attempt to state a general rule based on Sellers is problematic, however, because the facts of Sellers were truly unusual. The informant had given accurate tips in more than 100 cases, but on the particular occasion in question, the affidavit omitted the source of his information. The court of appeals said that the case was "both a unique and a close one" in upholding the warrant. 483 F.2d at 41. Professor LaFave discusses Sellers as an "exception to the general rule that the presentation of the informer's track record does not show his basis of knowledge," and considers the case "unique." LaFave, supra note 34, at 22-23.

   The Court drew its second example from one of its own decisions, Adams v. Williams, 407 U.S. 143 (1972). From this case, the Court generated the proposition that no scrutiny of an "unquestionably honest" citizen's basis of knowledge for a report of criminal activity should be required, when criminal sanctions exist for fabrication. 103 S. Ct. at 2329. Like its use of Sellers, the Court's use of Williams is open to criticism. The informant's tip in Williams triggered a "stop and frisk," not an arrest or search. Hence, it was not necessary that the tip provide probable cause. An arrest did follow the frisk, but it was based not on the tip, but on the suspect's illegal possession of a handgun, found during the frisk. Professor LaFave has noted that the finding of probable cause in Williams, though
The first step in applying the new totality of the circumstances analysis to the facts in Gates was to consider the tip, standing alone. As did the Illinois courts below, the Supreme Court held that the anonymous letter, by itself, did not support a probable cause finding. Significantly, the language used by the Court closely tracked that in Aguilar.\(^{109}\)

Second, the Court investigated whether the accompanying affidavit could supplement the anonymous letter by the independent corroboration of the tip or by the amount of detail in the tip.\(^{110}\) At this point, one may wonder how the totality of the circumstances analysis as applied by the Court in Gates differs from the discredited two-prong test. The answer appears to lie in the conclusions drawn from the evidence presented. The Court

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"stimulated" by the tip, was made "entirely apart from the informant's communication." LaFave, supra note 34, at 63-64. The Williams Court itself appeared to understand this distinction when it stated:

> While the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, here the Court cited Aguilar and Spinelli] the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

407 U.S. at 147. (Ironically, it was Justice Rehnquist who wrote this passage.).

The third example offered by the Gates Court was intended to illustrate how a strong showing of the informant's basis of knowledge could make up for a weak showing of the informant's veracity. The somewhat obscurely worded hypothetical stated:

> Even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrong-doing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.

103 S. Ct. at 2329-30.


110. This step also paralleled the second step in the Spinelli analysis.

On the question of corroboration, the Court said:

> The corroboration of the letter's predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north to Blomingdale, all indicated, albeit not with certainty, that the informant's other assumptions were also true . . . including the claim regarding the Gates' illegal activity.

103 S. Ct. at 2335.

The Court was not troubled that the police had verified only innocent activity. It said:

> Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause.

. . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of non-criminal acts.

Id. at 2335 n.13. The Court used Draper as precedent, where "seemingly innocent activity became suspicious in light of the initial tip." Id.
suggested that under the two-prong test, the detail in the letter might well not permit an inference as to the informant's basis of knowledge, since the detail was too scant. Likewise, the independent police corroboration of the Gates' activity predicted in the letter might not be extensive enough to satisfy the veracity prong of Spinelli.

Nevertheless, the Court found a sufficient basis for probable cause under its totality of the circumstances test. The corroboration of details was enough for a practical, common-sense judgment. In reaching its conclusion, the Court returned to Draper v. United States, referring to it as the "classic case" on corroboration. The Gates Court reread Draper without considering Spinelli's intervening interpretation of it. The simple holding in Draper was merely that probable cause existed in that case by virtue of the independent corroboration of details in the tip. The Gates majority now asserted that Draper had not, in fact, satisfied the two prongs of Aguilar because the informant had not really indicated the basis of his knowledge of Draper's possession of drugs. Nevertheless, the totality of the circumstances in Draper provided probable cause for arrest.

The Court found the facts of Draper directly controlling in Gates. The level of detail in the anonymous letter sent to the Bloomingdale police might not have been enough to satisfy Spinelli.

On the amount of detail in the letter, the Court said:

[T]he anonymous letter contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future action of third parties not easily predicted. The letter's accurate information as to the travel plans of each of the Gates was of a character likely obtained from the Gates themselves, or from someone familiar with their not entirely ordinary travel plans. If the informant had access to accurate information of this type a magistrate could properly conclude that it was not unlikely that he also had access to reliable information of the Gates' alleged illegal activities.

Id. at 2335.

111. Id. at 2335-36.
112. Id. at 2335.
114. 103 S. Ct. at 2334.
115. The Court's reading of Draper turned it back into a corroboration-only case, discarding the self-verifying detail factor that the Spinelli Court later read into Draper. If, in fact, Draper was rewritten by the Spinelli Court, as LaFave has suggested, then Gates restored Draper to its original meaning.
116. 103 S. Ct. at 2334.
117. Id. at 2336.
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_elli's basis of knowledge prong, but such a stringent test was no longer to be applied. All that was required was the probability that the tipster had obtained his or her story from the Gates or someone whom they trusted, "and corroboration of the letter's predictions provides just this probability." Here, at the conclusion of its opinion, the Court finally applied the totality of the circumstances analysis. The Court held that corroboration, under _Spinelli_ apparently relevant only to an informant's veracity, could now be used to compensate for a lack of evidence explaining how the informant knew what he or she knew. It is important to note that the Court did not hold that under certain circumstances the same evidence could be used to support each of two independent, analytically severable prongs. The Court did assert that when one of the now defunct prongs was satisfied by ample evidence, it could compensate for an evidentiary deficit in the other prong. Whether the detail in the anonymous letter and the police corroboration of the Gates' travels were mutually reinforcing, or whether the corroboration merely bolstered a lack of detail in the letter, the net effect was the same. The Court treated the criteria of veracity and basis of knowledge as closely intertwined issues rather than discrete tests. The totality of the circumstances analysis in _Gates_ was concerned not with subtotals, as it were, of key categories in the probable cause accounting ledger, but with the bottom line.

**THE IMPACT OF ILLINOIS V. GATES**

_ Stare Decisis_

The reasoning of the five Justices who subscribed to the majority opinion raises some puzzling questions. From the standpoint of legal precedent, the most enigmatic question is why the majority felt constrained to abandon _Aguilar_ and _Spinelli_ when it could have found the warrant valid within the two-prong framework.

118. *Id.*

119. It is less clear whether the detail in the letter was, in turn, used to bolster the inference as to the informant's veracity. Although the Court suggested that the police corroboration might not satisfy the _Spinelli_ veracity prong, it also appeared to conclude that the corroboration did satisfy Draper's and Jones' "substantial basis" standard, before any mention was made of detail in the letter. *Id.* at 2334.
The Court had before it in Gates an excellent opportunity to finally clarify how the facts in Draper satisfied the two prongs of Aguilar, an opportunity that the Court never fully exploited in Spinelli. In particular, the Court could have held that corroboration of a detailed tip not only permitted an inference of an informant’s credibility, but also of his or her basis of knowledge. All that would have been required to reach this result would have been a clarification of the reasoning in Spinelli.120

Much of the majority opinion does, in fact, lay the groundwork for such a holding. The Court’s emphasis on the fluid, non-technical nature of probable cause, for example, speaks directly to the logical problem of leaping from corroborated to uncorroborated facts in a tip. Likewise, when the Court expressed its dissatisfaction with the overly rigid evidentiary rules embodied in Stanley v. State, its reasoning paved the way for correcting what had become a common misreading of Spinelli. Rather than merely overruling by implication the lower courts’ widespread misinterpretation of Draper and Spinelli, however, the Supreme Court rejected two of its own pivotal opinions.

Justice White, in his concurring opinion, discussed in detail how the Court could have upheld the search warrant in Gates without sacrificing the two-prong test. He simply acknowledged that partial corroboration of details in a tip could, under the proper circumstances, satisfy both prongs of Aguilar and Spinelli.121 While cautioning against indiscriminate inferences from police corroboration, Justice White asserted that corroboration of extensive detail did make it sufficiently probable that a tip was grounded on inside information, as in Draper. “The rules would indeed be strange,” he commented, “if . . . the basis of knowledge prong could be satisfied by detail in the tip alone, but not by

120. See supra note 103.
121. First, Justice White agreed with the majority that corroboration need not be of incriminating details in the tip. 103 S. Ct. at 2348 (White, J., concurring). Then he addressed the relevance of corroboration as evidence of an informant’s basis of knowledge. He was careful to set the record straight on his view of how corroborating evidence could be used. He noted that some commentators, and even Justice Brennan, had erroneously interpreted his Spinelli concurrence as espousing the view that corroboration could satisfy only the veracity prong. Justice White clarified his position: “I did not say that corroboration could never satisfy the basis of knowledge prong.” Id. at 2349 n.22 (White, J., concurring) (emphasis in original). Rather, he had merely expressed caution lest corroboration be used in this way in instances where it did not suggest that the informant actually had an acceptable source for his or her information. Id. (White, J., concurring).
Justice White viewed the corroborated details in the anonymous letter in Gates sufficient to make it probable that, not only was the letter writer credible, but he or she had obtained the information in a reliable way. With Justice White's rationale so clearly argued, it is curious that he was unable to win the votes of the four Justices who ultimately joined Justice Rehnquist's opinion.

**Gates and the Neutral Magistrate Requirement**

Not only was the rejection of the two-prong test needless, at least from the perspective of legal precedent, but it also raised a serious fourth amendment question. Since the Court's seminal decision in Nathanson v. United States, courts have been guided by the principle that probable cause must be based on an independent assessment of the facts by a neutral and detached magistrate. The unsupported conclusory statements of even the most trustworthy officer cannot support probable cause. As Justice White had observed, concurring in Spinelli, it would be "quixotic," then, if any less were required of an informant. In Gates, Justice White voiced the same concern. Once the independence of the prongs has been broken down, presumably an evidentiary "overkill" as to an informant’s veracity could compensate for a serious lack of information as to the informant’s basis of knowledge. Justice White offered, perhaps too gently, that, to the extent the majority opinion could be read as an implicit rejection of Nathanson, "the Court may not intend so drastic a result."

**Gates and the Logic of Hearsay**

The third and perhaps most serious problem is that Gates' rejection of Spinelli's two-prong test is inconsistent with the underlying inferential process of evaluating hearsay. As the Gates Court itself admits, veracity and basis of knowledge are

122. Id. (White, J., concurring).
123. Id. at 2349 (White, J., concurring).
124. See supra notes 19-21 and accompanying text.
125. 393 U.S. at 424 (White, J., concurring).
126. The two examples offered by the majority, note 108 supra, certainly suggest as much. So does the Court's quoting with disapproval Judge Moylan's often cited "sainthood" remark. 103 S. Ct. at 2329 n.8. See supra note 65.
127. 103 S. Ct. at 2350 (White, J., concurring).
"highly relevant," and should be included in a magistrate's determination. What the Court apparently believes, however, is that a magistrate can reach a final judgment by obtaining a satisfactory answer to only one, not both, of the following questions: first, whether the speaker really believes what he or she is telling me, and second, whether his or her belief reflects reality.

To so hold is to ignore the very common sense that the Court was so zealously attempting to foster in Gates. The totality of the circumstances test, despite the Court's rhetoric, obscures rather than clarifies the necessary hearsay analysis. In pointing to the pre-Aguilar precedents as appropriate examples of probable cause analysis, the Court put magistrates and reviewing courts in a worse position than they were before the two-prong test. Because the predecessors to Aguilar and Spinelli may no longer be read as unarticulated two-prong analyses, they must now be read as something else. The lower courts must turn once again to the facts of earlier cases such as Draper, factor in the situation in Gates, and try to determine how a totality of the circumstances analysis is to be applied on a day-to-day basis. Just as Judge Moylan did with Spinelli, the lower courts will attempt to derive new rules to explain the factual relationships in those cases that the Court still upholds. As the chameleon-like history of Draper illustrates, however, the Court's opinions are susceptible to various readings. With Spinelli's obvious and logical analytical framework now rejected, "Murphy's Law," a force dreaded by Judge Moylan, Professor LaFave, and the Court alike, will operate with a greater vengeance than ever.

Under the Spinelli prongs, a police officer knew what questions to ask an informant, and how to formulate an affidavit in support of an application for a warrant. Under Gates, a new process of trial and error may begin, as magistrates attempt to work with the new totality analysis. It may be expected that

128. Id. at 2327.
129. See supra notes 46 and 115.
130. Murphy's Law states that "what can go wrong, will go wrong."
131. Stanley, 19 Md. App. at 528, 313 A.2d at 860; Moylan, supra note 22, at 786.
132. LaFave, supra note 34, at 2.
133. 103 S. Ct. at 2327 n.4.
134. One commentator has suggested that, if anything, it has been too easy to operate under Spinelli. Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. L.F. 405 (1971).
most law enforcement officers will attempt to play it safe, and
meet the two-prong test whenever possible in preparing affida-
vits containing informants' tips. Magistrates and lower courts,
too, can be expected to apply Spinelli when possible, to guaran-
tee a warrant's validity, and only fall back upon Gates when a
tip cannot pass Spinelli's more stringent requirements. Thus, the
two prongs may continue to "rule from the grave." If this predic-
tion is borne out, then the Gates decision may come to be
regarded for what it is: a compromise of common sense, permit-
ted in the name of more effective law enforcement.135

Criticism of Gates is warranted on the basis of its being a
needless exception to stare decisis and a departure from the
common sense that even lay jurors instinctively exercise. Agui-
lar may have announced the two prongs, but it did not create
them. The two part inquiry does not exist by virtue of judicial
fiat, but rather flows ineluctably from the inferential structure of
hearsay itself. By the same token, by rejecting the two-prong
approach, the Gates Court could not destroy it. The logic of Agui-
lar and Spinelli will come back to haunt the Court until it is in
some guise reinstated.

CONCLUSION

In Illinois v. Gates, a bare majority of the Supreme Court
abandoned the Aguilar-Spinelli two-prong test for a new "total-
ity of the circumstances analysis." Aguilar and Spinelli had
viewed the two prongs as analytically severable, independent
criteria, each of which must be satisfied by every informant's tip.
Under Gates, the two questions have become merely closely
intertwined issues, such that an unsatisfactory showing as to
one may be compensated for by a strong showing as to the other.
The difference in the two approaches is more than semantic; it
goes to the heart of the intuitive process of the finder of fact.

Prior to Gates, the lower courts were finally beginning to
develop a coherent, workable conceptual structure for dealing
with informants' tips in a probable cause context. The Gates
decision, however, put these efforts to naught, and turned back
the clock by at least two decades. One might expect, then, to find
powerful reasons motivating the Rehnquist opinion. This note

135. See 103 S. Ct. at 2351-59 (Brennan, J., dissenting).
offers no answers to the question of why the majority took the position that it did. Rather, it has attempted to demonstrate that two of the most likely explanations, logic and necessity, may be eliminated. Although the new “totality” test was ostensibly introduced in the name of common sense, ironically it actually runs against the grain of the fact finder’s intuitive process. Furthermore, if the Court had wished to illustrate that the exigencies of effective law enforcement justified abandoning Spinelli and its progeny, it picked the wrong case. The Gates search warrant arguably could have survived the old two-prong test. Whatever the actual motivations for the Gates decision may be, they cannot be discovered in either the facts or the logic of the decision itself.

As magistrates and law enforcement officials labor to apply Illinois v. Gates in the years ahead, they will find themselves more hampered than helped by the “totality” test. They can be expected to fall back on the dependable analysis in Aguilar and Spinelli as the ultimate criterion for probable cause. The two-prong test, discredited in the highest Court of the land, will be vindicated in daily practice by the common sense of laymen and laywomen closest to the facts.

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