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Criminal Procedure—Search Warrants—The Totality of the Circumstances Test for Determination of Probable Cause is Adopted

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NOTES

CRIMINAL PROCEDURE — SEARCH WARRANTS — THE TOTALITY OF THE CIRCUMSTANCES TEST FOR DETERMINATION OF PROBABLE CAUSE IS ADOPTED. *Thompson v. State,* 280 Ark. 265, 658 S.W.2d 350 (1983).

Dr. Robert Thompson was convicted of twenty separate offenses of carnal abuse in the Circuit Court of Pulaski County.[1] His appeal to the Arkansas Supreme Court was based in part on a contention that the trial court erred in holding an affidavit sufficient to support issuance of a search warrant. The affidavit was based on an anonymous informant's tip. The affidavit contained correct information as to Thompson's profession, place of employment, and residence; a description of the victim and his father;[2] and the informant's admission to engaging in sodomy with Thompson, an admission against interest which would subject the informant to criminal liability.[3] The informant also had a key to the residence, given to him by Thompson, and he drew a detailed sketch of the residence.

Thompson challenged the sufficiency of the affidavit on fourth amendment grounds, contending it did not meet the requirements of the two-prong test set out in *Aguilar v. Texas*[4] and codified in the Arkansas Rules of Criminal Procedure.[5] The *Aguilar* test requires that an affidavit based on an informant's tip first establish the basis of the in-

1. Thompson was sentenced to the statutory maximum sentence of 10 years imprisonment and a $10,000 fine for each count, to run consecutively.

2. The informant also made a positive identification of the victim's father from a photographic spread.

3. Thompson v. State, 280 Ark. 265, 270, 658 S.W.2d 350, 352.

4. 378 U.S. 108 (1964).

5. ARK. R. CRIM. P. 13.1(b) provides:

> The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

formant's knowledge.[6] The magistrate must be able to determine the facts and circumstances that lead the informant to his conclusion. Second, the affidavit must demonstrate that the informant is credible or his information reliable.[7] The court held that the affidavit was sufficient under the two-prong test, but further stated that the proper test in future cases would be the totality of the circumstances test announced by the United States Supreme Court in *Illinois v. Gates.*[8] *Thompson v. State,* 280 Ark. 265, 658 S.W.2d 350 (1983).

The fourth amendment[9] originated as a response to the widespread use and abuse of general warrants in England.[10] A broad search and seizure power was first exercised in England as a means to enforce governmental restrictions on freedom of the press.[11] All publications in England were required to be licensed by the Crown.[12] To enforce this requirement, an almost unlimited power to search and seize unlicensed materials was conferred upon law enforcement officials.[13] However, as a response to this indiscriminate power of search and seizure, the common law formulated a body of rules restricting the right to search, seize and arrest.[14] These rules applied to everyday crimes, rather than to violations of licensing rules. Lord Coke went so far as to declare that the common law could not confer upon anyone the power to search a man's home, while Sir Matthew Hale took a more conservative view. According to Hale's theory, warrants were valid only if specific and based on probable cause.[15]

It was not until 1763, however, that the common-law courts handed down a decision that expressly condemned the use of general warrants and allowed a recovery of damages by one whose home had been wrongfully searched pursuant to a general warrant.[16] This was soon followed by *Entick v. Carrington,*[17] a famous decision which con-

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6. *Aguilar,* 378 U.S. at 114-15.
7. *Id.*
8. 103 S. Ct. 2317 (1983).
9. U.S. CONST. amend. IV 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."
10. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-20 (1966).
11. *Id.* at 21.
12. *Id.*
13. *Id.* at 20-22. This expansive power continued from approximately 1538 until approximately 1694. *Id.* at 21.
14. *See id.* at 26.
15. *Id.* at 26-27.
16. Wilkes v. Wood, 19 How. St. Tr. 1153 (C.P. 1763).
17. 19 How. St. Tr. 1029 (C.P. 1765).

demned the use of general search warrants except when executed for the search of stolen goods or contraband.[18] This decision is notable not only for its condemnation of the general warrant, but also for the fact that it made no exception for a general search made pursuant to the investigation of a serious crime.[19]

This abusive search and seizure power found its way across the Atlantic to the American colonies in an attempt to enforce English laws requiring that a duty be paid on imported goods. Because of the prevalence of smuggling in the colonies, the Crown authorized the use of writs of assistance in an attempt to enforce payment of the duties.[20] These writs were general warrants which vested the holder with an unlimited and discretionary power to search and seize.[21] The fourth amendment addressed itself to the abuse of these writs.[22] The Framers intended to prevent this abuse by requiring that all searches and/or seizures be reasonable and that all search warrants be specific and based on probable cause.[23]

Early in the history of the new nation, the United States Supreme Court addressed the issue of what is required for a valid search warrant.[24] In an opinion by Chief Justice John Marshall, the Court required that a warrant allege that a suspect is guilty of a particular offense. It is not sufficient to state facts that do not constitute an offense.[25]

The Court later defined "probable cause" and set out its requirements.[26] "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure [and presumably search as well], has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion."[27] The often cited and best known judicial definition of probable cause was stated in *Stacey v. Emery*:[28] "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been commit-

18. *See* J. LANDYNSKI, *supra* note 10, at 54-55.
19. *See id.* at 55.
20. *Id.* at 30. Writs of assistance first appeared in England sometime during the reign of James I. *Id.* at 22.
21. *Id.* at 31.
22. *See generally* LANDYNSKI, *supra* note 10, at 37-42.
23. Boyd v. United States, 116 U.S. 616, 625 (1886).
24. *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).
25. *Id.* at 452.
26. Stacey v. Emery, 97 U.S. 642 (1878).
27. Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813).
28. 97 U.S. 642 (1878).

ted, it is sufficient."[29]

It was not until 1886, in *Boyd v. United States,*[30] that the Supreme Court interpreted the language of the fourth amendment itself. The holding in *Boyd* was based on an extensive analysis of *Entick v. Carrington.*[31] Justice Bradley, who delivered the opinion, stated that the Framers undoubtedly relied on Lord Camden's opinion "as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizure. . . ."[32] The principles surrounding the right to be free from unreasonable searches and seizures apply to any and all invasions by the government that affect the sanctities of a man's home and his privacies of life.[33] A search is then unreasonable if it invades "his indefeasible right of personal security, personal liberty, and private property. . . ."[34] The Court held that the fourth amendment rights applied in criminal cases, but "criminal" was given a rather broad interpretation as any offense that might result in a forfeiture of a man's property.[35]

The next wealth of decisions concerning probable cause[36] stemmed from alleged violations of the National Prohibition Act.[37] In *Carroll v. United States,*[38] probable cause was established by certain facts and circumstances within the knowledge of the law enforcement officials, including the actions, conduct, and place of residence of the defendants.[39]

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29. *Id.* at 645.

30. 116 U.S. 616 (1886).

31. 19 How. St. Tr. 1029. *See supra* text accompanying notes 17-19.

32. 116 U.S. at 630.

33. *Id.*

34. *Id.*

35. *Id.* at 633-34. The *Boyd* decision had another notable aspect. It married the fourth amendment right to be free from unreasonable searches and seizures to the fifth amendment privilege against self-incrimination. The court held that the fourth amendment privilege was enacted to prevent compulsory self-incrimination. *Id.* at 633. Justice Miller wrote a concurring opinion, joined by the Chief Justice, in which he stated that "search" should be confined to its traditional meaning and that the privileges protected by the two amendments should be kept separate and distinct. 116 U.S. at 640-41. Although Justice Bradley's opinion remains a landmark decision in search and seizure law as well as constitutional interpretation, the fourth and fifth amendments have since become recognized as separate and distinct. *See generally* LANDYNSKI, *supra* note 10 at 55-60.

36. *See, e.g.,* Carroll v. United States, 267 U.S. 132 (1925); Dumbra v. United States, 268 U.S. 435 (1925).

37. National Prohibition Act, Ch. 85, 41 Stat. 305, (1919) (repealed 1935).

38. 267 U.S. 132. (This was a warrantless search, therefore no affidavit was involved. The test for probable cause remains the same, however.).

39. *Id.* at 160-61.

A statement of facts in an affidavit based on the affiant's personal knowledge was held sufficient in *Dumbra v. United States*.[40] The Court stated that there is sufficient probable cause to issue a search warrant if an affidavit sets out sufficient evidentiary facts that justify a belief that a particular offense is being committed at a particular place.[41]

Sufficient evidentiary facts were defined as those facts that present enough evidence to allow the magistrate to draw his own legal conclusion as to the presence or absence of probable cause.[42] Unless the magistrate makes an independent determination, he is not functioning as an intermediary between the state and the accused.[43] If a magistrate merely accepts a legal conclusion from the law enforcement official, he is not making a legal determination, and the warrant will fail.[44] This requirement is to prevent a magistrate from becoming a "rubber stamp" for the police, thus negating his true function.[45]

Probable cause is not guilt beyond a reasonable doubt, therefore, facts which establish probable cause need not be admissible at trial.[46] "[P]robable cause, however, as the very name implies, . . . deal[s] with probabilities."[47]

Neither may probable cause be evaluated by the success or failure of the search.[48] The inquiry must be focused on the situation as it appeared at the time the warrant was issued.[49] In other words, the judge should not let hindsight color his findings; if there is no probable cause to issue a warrant, the warrant is not validated because the illegal search was successful.[50]

The determination of probable cause based on the affiant's personal knowledge and observations presented relatively simple cases for the Court. An affidavit was sufficient if it set out sufficient facts in order to allow the magistrate to draw his own conclusions.[51] The diffi-

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40. 268 U.S. 435.

41. *Id.* at 441.

42. Nathanson v. United States, 290 U.S. 41, 41-47 (1933); *See also* United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

43. *Ventresca*, 380 U.S. at 109.

44. *Id.* at 108-09.

45. *Id.* at 109.

46. Brinegar v. United States, 338 U.S. 160, 172-73 (1949). *See also* Henry v. United States, 361 U.S. 98, 102 (1959) (citing *Brinegar*).

47. *Brinegar*, 338 U.S. at 175.

48. Byars v. United States, 273 U.S. 28, 29 (1927). "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light. . . ." *Id.* at 29. *See also* United States v. Di Re, 332 U.S. 581, 595 (1948); *Henry*, 361 U.S. at 103.

49. *See Dumbra*, 268 U.S. at 441.

50. *Byars*, 273 U.S. at 29. *See also* cases cited *supra* in note 48.

51. *See, e.g., Carroll*, 267 U.S. at 162. *See also Brinegar*, 338 U.S. at 170-71 (citing *Carroll*

culty began when law enforcement officials wished to establish probable cause based on an informant's tip. Courts were faced with the difficult task of reconciling competing interests. Courts must protect citizens from unfounded and unreasonable invasions of their privacy, based on mere suspicion. At the same time, they must allow fair leeway for enforcing the law.[52]

Because the informant who remains anonymous is more greatly removed from judicial safeguards, the United States Supreme Court was faced with a new twist to an old problem. The Court first imposed rather strict standards and held that an informant's tip could not alone, without sufficient corroboration, establish probable cause.[53] Later, the Court relaxed this standard somewhat in *Draper v. United States*.[54] An informant's tip in *Draper* contained detailed information as to the physical description of the suspect. These neutral details were personally verified by the law enforcement agents prior to any fourth amendment activity.[55] Thus, an informant's tip could establish probable cause if personally verified by law enforcement officials before the search or seizure occurred.

In *Giordenello v. United States*,[56] the Court addressed the issue as to whether an informant's tip alone could establish probable cause. While recognizing the problem with establishing probable cause based solely on an informant's tip, the Court decided the case on non-constitutional grounds and invalidated the warrant pursuant to the Federal Rules of Criminal Procedure rather than the fourth amendment. It did provide, however, a foreshadowing of things to come.

In *Jones v. United States*,[57] one year after *Draper*, the Court held that hearsay could establish probable cause.[58] The informant in *Jones* remained anonymous, but the information was sufficiently corroborated by the officer's sworn statement accepting the basis for the informant's story. The informant had given correct information in the past. Thus,

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with approval); *Nathanson*, 290 U.S. at 47 (an affidavit must set forth those facts underlying probable cause to allow a judicial determination).

52. *Brinegar*, 338 U.S. at 176.

53. Johnson v. United States, 333 U.S. 10, 13 (1948). In this case, an informant's tip that the defendant was using narcotics did not justify a warrantless search although the officers detected the smell of narcotics. The Court held that the smell could not establish probable cause unless a magistrate finds, through testimony, that the affiant is qualified to know the odor and that it is distinctive.

54. 358 U.S. 307 (1959).

55. *Id.* at 313. The informant had given reliable information in the past. *Id.*

56. 357 U.S. 480 (1958).

57. 362 U.S. 257 (1960).

58. *Id.* at 271.

due to the reliability of the informant, the officer did not need to make any personal inquiry into the information so long as there was a "substantial basis for crediting the hearsay."[59]

It was this "substantial basis" requirement that led the Court to first formulate some sort of test that could be applied to those situations where probable cause was to be based on an anonymous tip. Early decisions defined probable cause as a non-technical, flexible concept that dealt with probabilities rather than certainties.[60] Nonetheless, in *Aguilar*[61] the Court imposed stricter requirements when probable cause was based totally on information given the police in an anonymous tip. These stricter standards were needed to lessen the chances that searches and seizures would be made on mere suspicion.[62] Citing *Rugendorf v. United States*,[63] the Court concluded that the affidavit in *Aguilar* did not adequately set out evidentiary facts that would allow the magistrate to draw his own conclusion, therefore there was not a substantial basis for crediting the tip.[64] Because the magistrate could not independently assess the evidence that led to the informant's conclusion, the affidavit could have been based solely on the informant's suspicions. Without full probable cause, the search was invalid.[65]

The Court held that the magistrate must analyze two separate areas. He must first be informed of the underlying circumstances on which the informant relied to assure him that the informant's tip was adequately supported by facts that constituted probable cause. This analysis satisfied the "basis of knowledge" prong. The magistrate must then analyze the facts and circumstances which led the affiant to conclude that the informant was reliable or his information was credible. This analysis formed the veracity prong.[66] To satisfy the two-prong test, the affidavit must set out evidentiary facts relied on by the informant as well as information that supported the tip's reliability or the informant's credibility.

The next year, the Court arguably retreated from *Aguilar* by mandating that warrants be assessed in a common sense, rather than a

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59. *Id.* at 272. *See also* Rugendorf v. United States, 376 U.S. 528 (1964) (citing *Jones* with approval, the Court held that an anonymous informant's tip could establish probable cause); *See also* Franks v. Delaware, 438 U.S. 154 (1978).

60. *Brinegar*, 338 U.S. at 175; *Ventresca*, 380 U.S. 102; *Stacey*, 97 U.S. 642.

61. 378 U.S. 108 (1964).

62. *Id.* at 114-15.

63. 376 U.S. 528 (1964).

64. 378 U.S. at 113-15.

65. *Id.*

66. *Id.* at 114-15.

hypertechnical, manner.[67] Any doubts caused by prior inconsistent holdings were dissipated by *Spinelli v. United States*.[68] The Court relied extensively on the *Aguilar* test, and clarified the requirements. The tip in *Spinelli* was from an anonymous but previously reliable informant. However, although it was partially corroborated, the corroboration was not sufficient to establish probable cause. The affidavit contained no information as to what led to the legal conclusion nor did it contain facts that demonstrated the informant's credibility or reliability.[69] The tip was first analyzed under the *Aguilar* test to determine its probative value. If the tip itself was inadequate to establish probable cause, then the focus must be on the corroboration. If independent corroboration was necessary, the tip must be found equally as trustworthy without the corroboration. In short, the magistrate must be assured that the tip is supported by facts that lead to probable cause.[70]

After the tip itself was substantiated, the focus then turned to the informant. The magistrate must be assured that the information is reliable or that the informant is credible. The *Spinelli* Court felt that this prong was perhaps more important; it must be satisfied in order for the magistrate to be assured that there is indeed probable cause rather than casual rumor.[71] The affidavit must set out facts that demonstrate first the processes that led to the informant's conclusion and second, the veracity of the information.

The tip in *Spinelli* failed to satisfy the *Aguilar* test because the affidavit did not set out facts that established the veracity of the information, but merely alleged that the anonymous informant knew Spinelli was engaged in illegal gambling.[72] Although the tip was partially corroborated, those aspects essential to a finding of probable cause remained uncorroborated. Thus, the tip itself was largely uncorroborated.

Spinelli expressly rejected the totality of the circumstances test when probable cause is to be determined by an anonymous tip.[73] The Court stated that when the tip is a necessary element of probable

67. *Ventresca*, 380 U.S. at 109. The Court recognized that the circumstances were sufficiently detailed and the reason for crediting the source was given, but maintained that the warrant should be interpreted in a common sense manner.

68. 393 U.S. 410 (1969).

69. *Id.* at 414-16.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 415.

cause, the tip must be precisely analyzed.[74] In other words, just as an affidavit based on the affiant's personal observations can be scrutinized, an affidavit based on an anonymous tip must give the magistrate enough information to scrutinize the tip equally as precisely as he would an affiant's personal observations.

The *Aguilar/Spinelli* test was applied by the Court throughout the 1970's and was used as a measuring stick for determining the validity of warrants.[75] *United States v. Cortez*[76] was the first real indication of a change in the *Aguilar/Spinelli* test. *Cortez* applied to border patrol situations, and did not concern probable cause based on an anonymous tip, but nonetheless evidenced a trend toward a more flexible test for probable cause. The Court stated that probable cause involved an assessment of the whole picture based on all circumstances.[77]

In *Illinois v. Gates*,[78] the Court merged the independent prongs of *Aguilar/Spinelli* into one totality of the circumstances test. The Court felt this merger was necessary to facilitate judicial findings of probable cause.[79] The informant's tip in *Gates* contained extensive information as to the *modus operandi* used by the defendants to buy and sell illegal narcotics. An agent of the Drug Enforcement Administration partially corroborated the tip by conducting a surveillance of the defendants. The agents personally observed the defendants conduct themselves according to the information supplied by the informant. However, because the informant was anonymous, the tip would not be sufficient under the *Aguilar/Spinelli* test, as the affidavit could not allege facts that would satisfy the veracity prong.

Under the *Aguilar* test, courts were forced to apply an elaborate set of rules that often invalidated search warrants without just cause. The Court noted that "basis of knowledge" and "veracity/reliability" remained highly relevant. However, the independent prongs should be merged into one, so that deficiency in one would not preclude a finding of probable cause if the other "prong" were fully satisfied. This view, according to the Court, was more consistent with the earlier decisions

74. *Id.*

75. *See, e.g.*, Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1971); United States v. Harris, 403 U.S. 573 (1971) (plurality opinion). An informant's self-incriminating statement was sufficient to satisfy the reliability/credibility prong of the *Aguilar* test. 403 U.S. at 583-84. The Court noted that the *Aguilar* test was not consistent with the *Ventresca* common sense test of probable cause determination. 403 U.S. at 577.

76. 449 U.S. 411 (1981).

77. *Id.* at 418.

78. 103 S. Ct. 2317 (1983).

79. *Id.* at 2333.

defining probable cause.[80]

The Court abandoned the strictures of the two-prong test in an attempt to accommodate public and private interests in enforcing the law.[81] The Court re-affirmed earlier decisions that held legal conclusions insufficient.[82] In addition, the Court emphasized a need for magistrates to be able to find probable cause from an unknown informant's tip.[83] Under the *Aguilar/Spinelli* test, the veracity of these persons could rarely, if ever, be determined, yet they often supply valuable information that leads to solving crimes.[84] An assessment of probable cause must contain a place for the anonymous informant.[85]

The fourth amendment is binding on the states through the due process clause of the fourteenth amendment.[86] It follows then that the states must offer their citizens at least that protection accorded them by the federal government.[87] Thus, Arkansas recognizes the same legal limitations on the issuance of warrants, namely that the supporting affidavits set out sufficient evidentiary facts.[88] Arkansas also allows anonymous information to be the basis for a warrant.[89]

The *Aguilar* test is codified in the Arkansas Rules of Criminal Procedure as the proper method for determining probable cause.[90] However, Arkansas has been far from consistent in its application of the *Aguilar/Spinelli* test. The court has, upon occasion, strictly adhered to the two-prong test and required that search warrants adequately demonstrate sufficiency under both prongs.[91] At other times, the court has attempted to apply a common sense *Ventresca* standard

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80. *Id.* at 2332 (citing *Brinegar* and *Ventresca* with approval, the Court stated that probable cause is a flexible concept).

81. *Id.* at 2331.

82. *Id.* at 2332.

83. *Id.*

84. *Id.*

85. *Id.*

86. Mapp v. Ohio, 367 U.S. 643 (1961).

87. *Id.*

88. *See, e.g.*, Lunsford v. State, 262 Ark. 1, 552 S.W.2d 646 (1977); Montgomery v. State, 251 Ark. 645, 473 S.W.2d 885 (1971); Walton v. State, 245 Ark. 84, 431 S.W.2d 462 (1968) (an affidavit must set forth evidentiary facts rather than legal conclusions); *accord* Cockrell v. State, 256 Ark. 19, 505 S.W.2d 204 (1974); Durham v. State, 251 Ark. 164, 471 S.W.2d 527 (1971).

89. *See, e.g.*, Flaherty v. State, 255 Ark. 187, 500 S.W.2d 87 (1973); *Walton*, 245 Ark. 84, 431 S.W.2d 462 (1968); Glover v. State, 248 Ark. 1260, 455 S.W.2d 670 (1970). The court refused to extend *Walton*, holding that limits are dictated by common sense.

90. ARK. R. CRIM. P. 13.1(b). *See supra* note 5.

91. *See, e.g.*, Little Rock Police Dep't *ex rel.* Munson v. One 1977 Lincoln Continental Mark V, 265 Ark. 512, 580 S.W.2d 451 (1979); Byars v. State, 259 Ark. 158, 533 S.W.2d 175 (1976); Maxwell v. State, 259 Ark. 86, 531 S.W.2d 468 (1976).

while attempting to follow the more rigid *Aguilar/Spinelli* test.[92] In *State v. Lechner*,[93] the affidavit merely stated that the informant had given reliable information in the past, without asserting any facts that would allow the magistrate to draw his own conclusion. The court took notice of the conflicts between the two-prong test and the non-technical standard. The court stated that the two-prong test was effective in preventing abuse of anonymous tips, as it assures that the informant supplies probable cause and not mere rumor.[94] However, the court noted that this rigidity was also a drawback, especially if the informant had never given information to the officials in the past.[95] The court concluded by applying the *Aguilar* test, tempered with common sense.[96] *Lechner* stated what would satisfy each prong. The "basis of knowledge" prong could be satisfied by the informant's statement that he personally observed illegal activity, or by independent corroboration by law enforcement officials. The "reliability/credibility" prong could be satisfied by a statement demonstrating the past reliability of the informant, or by an informant's self-incriminating statement. But it is often difficult to establish the reliability of an unknown, law-abiding informant.[97]

The most recent and perhaps strongest statement of the court's approval of the *Aguilar* test was in *State v. Prue*.[98] The affidavit was invalidated due to a lack of sufficient evidence that established the informant's reliability. Again, the affidavit contained nothing to establish the veracity of the informant. The court noted the citizens were apparently content with the *Aguilar* test and the protection it afforded them against unreasonable searches.[99] Thus, the court stated that probable cause based on anonymous information should be strictly scrutinized.[100] If searches were allowed on unfounded hearsay, fourth amendment safeguards would soon come to an end.[101]

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92. *See* Baxter v. State, 262 Ark. 303, 556 S.W.2d 428 (1977) (court cited the *Aguilar* test as the proper standard, but stated that the practical, non-technical approach is the better rule); Cary v. State, 259 Ark. 510, 534 S.W.2d 230 (1976) (court cited *Spinelli* but urged a non-technical reading of affidavits).

93. 262 Ark. 401, 557 S.W.2d 195 (1977).

94. *Id.* at 405, 557 S.W.2d at 197.

95. *Id.* at 405, 557 S.W.2d at 198.

96. *Id.*

97. *Id.*

98. 272 Ark. 221, 614 S.W.2d 221, *cert. denied*, 454 U.S. 863 (1981) (impliedly overruled by Thompson v. State, 280 Ark. 265, 658 S.W.2d 350 (1983)).

99. 272 Ark. at 228-29, 614 S.W.2d at 225.

100. *Id.*

101. *Id.* at 229, 614 S.W.2d at 225.

The court in *Thompson*[102] impliedly overruled *Prue* by replacing the *Aguilar* test with the more flexible totality test, announced by the United States Supreme Court in *Illinois v. Gates*.[103] The totality test allows the magistrate to take a practical, common sense approach to the determination of probable cause based on anonymous information, by considering all relevant circumstances. The two-prong test required that each affidavit be analyzed on two separate and independent "prongs"—the informant's basis of knowledge (the facts that led him/her to reach the conclusion) and the informant's reliability/credibility. The Court held that the affidavit in *Thompson* would be sufficient under *Aguilar*, yet further stated that the totality test would be applied in the future, as it is more flexible.[104]

Justice Purtle concurred in the judgment but disagreed with the majority's application of the *Gates* decision.[105] Because the tip was sufficient under *Aguilar/Spinelli*, the majority's inclusion of *Gates* was inappropriate.[106] In *Gates*, there was extensive independent and neutral corroboration which supplied the probable cause.[107] The tip was merely the starting point for the investigation.[108] The informant's reliability/credibility remained highly relevant. By adopting *Gates*, as it was read by the majority, Justice Purtle charged that the fourth amendment was in danger of gradual destruction by decisions made due to the social outcry for harsher penalties for criminals rather than decisions based on sound interpretation of the fourth amendment.[109]

Justice Purtle also stated that the majority did not have the power to abrogate the Arkansas Rules of Criminal Procedure in favor of a rule which offers less protection to the citizenry.[110] He stated that the court adopted the rules; they apply to all proceedings that come before the court; and the court must follow the rules until they are changed. In addition, he stated that it was improper for the court to state what test should be applied in the future.[111]

State v. Thompson altered a wealth of Arkansas precedent as to the proper test to be applied in determining probable cause. The major-

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102. 280 Ark. 265, 658 S.W.2d 350.
103. 103 S. Ct. 2317.
104. 280 Ark. at 271, 658 S.W.2d at 352.
105. 280 Ark. at 273, 658 S.W.2d at 353-54.
106. *See supra* text accompanying notes 2 and 3.
107. *Gates*, 103 S. Ct. at 2325-26.
108. *Id.*
109. 280 Ark. at 273-74, 658 S.W.2d at 353-54.
110. *Id.*
111. 280 Ark. 265, 658 S.W.2d 350.

ity of Arkansas cases followed the *Aguilar/Spinelli* two-prong test, in form if not in substance.[112] The *Aguilar* test is required by the Arkansas Rules of Criminal Procedure as well.[113] However, the legislature granted the power to promulgate these rules to the court[114] and the court has stated that it has the power to amend these rules.[115] Notwithstanding the power vested in the court to amend the rules, the court should not have so readily exercised that power. If Rule 13.1(b) is no longer in effect,[116] a magistrate will make a probable cause determination by analyzing any and all relevant circumstances, rather than independently analyzing the basis of the informant's knowledge and his veracity. While the totality of the circumstances test on its surface fits better with the notion that probable cause is fluid, there must be some guidelines spelled out for those who are to apply the test. There are no guidelines in *Thompson.* The court expressly states that the affidavit would be sufficient under the *Aguilar* test, but that the totality test will be used in the future.[117] The decision offers no advice on what circumstances are to be considered or how they are to be weighted. The only guideline is an affidavit which would be sufficient under either test. The decision neglects to inform the reader *how* the totality test is to be used, or what its effect is, if any, on Rule 13.1(b). The decision approximates an advisory opinion.[118]

Opponents of the *Aguilar/Spinelli* two-prong test point to its rigidity as a fatal drawback.[119] The criticism centers around a notion that the *Aguilar/Spinelli* test precludes the use of common sense.[120] However, the test was successfully applied for nearly a decade without serious repercussions.[121] The *Gates* test is recently formulated, and its

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112. *See, e.g.*, State v. Prue, 272 Ark. 221, 614 S.W.2d 221, *cert. denied*, 454 U.S. 863 (1981); Byars v. State, 259 Ark. 158, 533 S.W.2d 175 (1976); Maxwell v. State, 259 Ark. 86, 531 S.W.2d 468 (1976). *But see* Baxter v. State, 262 Ark. 303, 556 S.W.2d 428 (1977); Cary v. State, 269 Ark. 510, 534 S.W.2d 230 (1976); State v. Lechner, 262 Ark. 401, 557 S.W.2d 195 (1977).

113. ARK. R. CRIM. P. 13.1(b).

114. ARK. STAT. ANN. § 22-242 (Supp. 1983).

115. Jennings v. State, 276 Ark. 217, 633 S.W.2d 373, *cert. denied*, 459 U.S. 862 (1982).

116. The court did not expressly abrogate or amend Rule 13.1(b) in *Thompson;* rather, the opinion merely refers to Rule 13.1(b) as mandating the *Aguilar* test and then states that the totality of the circumstances test will be applied in the future. 280 Ark. at 271, 658 S.W.2d at 352.

117. *Id.*

118. *Id.* at 271-72, 658 S.W.2d at 353 (Purtle, J., concurring).

119. *See* Illinois v. Gates, 103 S. Ct. 2317 (1983); Baxter v. State, 262 Ark. 303, 556 S.W.2d 428 (1977).

120. *Gates*, 103 S. Ct. at 2328.

121. *See Whiteley*, 401 U.S. 560; *Harris*, 403 U.S. 573.

problems are unknown. The facts in *Gates* are not helpful, as there was a great deal of independent, neutral corroboration before fourth amendment activity occurred.[122] While the tip was only partially corroborated, it was sufficiently detailed so that self-verification could satisfy the veracity prong of the two-prong test by establishing that the information was reliable.[123] The *Aguilar* test required that the veracity prong be satisfied. However, this prong was satisfied by a showing that the informant was credible *or* the information was reliable.[124] Because the facts in *Gates* involved self-verification, it is not sufficiently analogous to situations similar to *Thompson,* where there is no partial corroboration prior to fourth amendment activity. Thus the facts in *Gates* do not supply any guidelines for future decisions.

The majority's reading of *Gates* is that the informant's tip alone supplied probable cause.[125] This does not take into account the independent corroboration that occurred in *Gates.* Thus there is a very real risk that, without sufficient guidelines, probable cause could be based on an anonymous tip alone, without any assurance that the tip is more than casual rumor or mere suspicion.

The *Gates* decision acknowledged that state courts misapplied the holdings in *Aguilar* and *Spinelli* by apparently reading the two-prong test as requiring an elaborate set of guidelines and rules.[126] The danger now is that state courts will misread *Gates* and will not require a true showing of probable cause. This would lead to the very result that the fourth amendment sought to prevent. Given the decision in *Thompson,* which has a dearth of guidelines and exhibits a woefully inadequate logical basis, this is a very real risk indeed.

A further risk of the totality test is that, upon review of search issues of this type, the focus will be on the fruits of the search rather than the attendant facts which lead to the determination of probable cause prior to the search. This danger could easily be illustrated by the *Thompson* case itself. The court's distaste for the nature of Thompson's crime is clear.[127] If the affidavit were not forced to meet the stricter

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122. *See supra* text accompanying notes 78-80.

123. *Cf. Draper,* 358 U.S. 307. In *Draper,* the informant's tip was corroborated by the agent as to neutral details before any search or seizure. This self-verification aspect made the tip more reliable, thus sufficient.

124. *Aguilar,* 378 U.S. at 114-15.

125. *Thompson,* 280 Ark. at 271, 658 S.W.2d at 352. In *Gates,* the Court specifically stated that an informant's tip alone would not establish probable cause. 103 S. Ct. at 2326.

126. *Gates,* 103 S. Ct. at 2327.

127. *Thompson,* 280 Ark. at 270, 658 S.W.2d at 352. "The sexual abuse of children is an abhorrent crime which clearly poses a threat to society." *Id.*

standard, it is entirely possible that the courts would allow the nature of the crime and the fruits of the search to prejudice their decisions as to probable cause. Because the sufficiency of probable cause, if contested, will always be made after the fact, the test applied should contain guidelines to lessen the reliance on hindsight and the tendency to let the success of the search color the finding of probable cause.

The fourth amendment clearly mandates that warrants be specific and based on probable cause. Allowing an unverified informant's tip alone to justify the violation of a citizen's right to be free from unreasonable searches and seizures is the very evil the fourth amendment sought to prevent.[128] Certainly these anonymous tips are important in protecting society against crime. They should not, however, be allowed to support issuance of a search warrant without any independent corroboration.[129] "If the courts become lax and allow unreliable hearsay statements to constitute the foundation for the issuance of a search warrant, then . . . [n]o domicile would be safe because a disgruntled neighbor or former friend could have a search warrant issued for purely personal reasons."[130]

The fourth amendment should be zealously guarded against even the most seemingly innocuous infringements of the rights it seeks to protect. Arkansas should not have so readily departed from a test that offers its citizenry greater protection against unreasonable searches and seizures. The totality test, as adopted here, absent any guidelines or limitations, is highly susceptible to misapplication; that misapplication is likely to result in an invasion of fourth amendment rights. Especially in a time of fear and conflict, these rights must be preserved, for "the rule we fashion is for the innocent and guilty alike."[131] The *Thompson* decision does not adequately safeguard these rights. In the future the court should set out guidelines for the application of the totality test, or abandon it in favor of a return to the *Aguilar/Spinelli* two-prong test.

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128. *Thompson*, 280 Ark. at 273, 658 S.W.2d at 354 (Purtle, J., concurring).
129. *Id.*
130. *Prue*, 272 Ark. at 229, 614 S.W.2d at 225.
131. *Draper*, 358 U.S. at 314 (Douglas, J., dissenting).