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EMPLOYMENT OF INFORMANT'S STATEMENTS IN ESTABLISHING PROBABLE CAUSE FOR ISSUANCE OF A SEARCH WARRANT

by MICHAEL LEVINSON*

The Supreme Court is moving toward a new definition of the scope of probable cause for the issuance of search warrants, based an an affidavit which is supported in varying degree by informant's information.

Situations exist wherein the affidavit contains insufficient information to support a finding of probable cause thereby invalidating the search warrant. This discussion is limited to an evaluation of an affidavit's validity under the probable-cause-for-issuance test when affiants rely, in part, upon the statements of an informer.

On the issuance of a search warrant, the Fourth Amendment sets forth the requirement that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."[1]

Further, Rule 41(c) of the Federal Rules of Criminal Procedure provides, in part, that:

> A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant. . . .

There exists some confusion over the meaning of "probable cause" in the context of criminal procedure, primarily because it appears as a constitutional limitation on arrests as well as searches. Probable cause has been defined as the degree of evidence required which lies somewhere between bare suspicion and proof beyond a reasonable doubt.[2] It usually requires personal knowledge or reasonably trustworthy information from others sufficient to warrant a man of reasonable caution to reach his conclusions.[3]

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[1] U.S. CONST. amend. IV.

[2] *E.g.*, Dean v. State, 205 Md. App. 278, 107 A.2d 88 (1954); Bland v. State, 197 Md. App. 546, 80 A.2d 43 (1951).

[3] *See* Brinegar v. United States, 338 U.S. 160, 179 (1948); People v. Rodger, 280 N.Y.S.2d 174 (1967).

SUPREME COURT DECISIONS

To understand the development of the Court's thinking on the use of informants and their statements in establishing probable cause for the issuance of a search warrant, the following leading cases shall be examined in chronological order:[4] *Jones v. United States;*[5] *Rugendorf v. United States;*[6] *Aguilar v. Texas;*[7] *United States v. Ventresca;*[8] *and Spinelli v. United States.*[9] These cases and their implications pose fundamental questions as to the sufficiency of an affidavit which relies on the hearsay statements of an informer.

The 1960 case of *Jones v. United States,*[10] involved a prosecution for violation of the federal narcotics laws. Here, affiant stated that he believed his informant's statements "[b]ecause the source of information . . . has given information to the undersigned on previous occasion and which was correct. . . ."[11] The defendant here, relying on the *Nathanson v. United States*[12] decision as authority, contended that *probable cause* required statements evidencing affiant's personal observations regarding the presence of narcotics in the apartment. In rejecting this contention and *Nathanson* as authority, the *Jones* Court concluded that the affiant " . . . may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge."[13] Reversing the decision of the lower court, the Court, through Justice Frankfurter, stated, " . . . hearsay alone does not render an affidavit insufficient . . . so long as there was a substantial basis for crediting the hearsay."[14]

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[4] Other lower court decisions where this issue has been raised include: Giacona v. United States, 257 F.2d 450 (5th Cir. 1958); *cert. denied,* 358 U.S. 873 (1958); United States v. Joseph, 278 F.2d 504 (3d Cir. 1960), *cert. denied,* 364 U.S. 823 (1960); Hall v. United States, 279 F.2d 389 (7th Cir. 1960); United States v. Eisner, 297 F.2d 595 (6th Cir. 1962), *cert. denied,* 369 U.S. 859 (1962); Monnette v. United States, 299 F.2d 847 (5th Cir. 1962); United States v. Crews, 326 F.2d 755 (4th Cir. 1964), *cert. denied,* 377 U.S. 955 (1964); United States v. Freeman, 358 F.2d 459 (2d Cir. 1966), *cert. denied,* 385 U.S. 882 (1966); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966); Lopez v. United States, 370 F.2d 8 (5th Cir. 1966); United States *ex rel.* Schnitzler v. Follette, 379 F.2d 846 (2d Cir. 1967); United States v. Suarez, 380 F.2d 713 (2d Cir. 1967).

[5] 362 U.S. 257 (1960).

[6] 376 U.S. 528 (1964).

[7] 378 U.S. 108 (1964).

[8] 380 U.S. 102 (1965).

[9] 393 U.S. 410 (1969).

[10] 362 U.S. 257 (1960).

[11] *Id.* at 268.

[12] 290 U.S. 41 (1933) wherein the Court noted that an affidavit does not establish probable cause which merely states the affiant's belief that there is cause to search, without stating facts upon which that belief is based. *Id.* at 47.

[13] 362 U.S. 257, 269 (1960).

[14] *Id.* at 272.

Jones then stands for the proposition that hearsay evidence may be considered in establishing probable cause for the issuance of a search warrant.[15]

In 1964, the Supreme Court in *Rugendorf v. United States*[16] fortified *Jones* by sustaining an affidavit of an agent of the Federal Bureau of Investigation based on statements of informants[17] who had " . . . furnished reliable information in the past." Apparently impressed by the detail of informant's description — including number and type of stolen furs — together with independent FBI investigation, the Court concluded that there was substantial basis for crediting the hearsay. In essence, the Court found sufficient *detail* for crediting the hearsay.[18] Of particular importance is the Court's disregard of the basis or source of the informant's conclusions.

In the same year as *Rugendorf*, the Court decided *Aguilar v. Texas*.[19] Here, the Court retreated somewhat from its pronouncements in *Jones* and *Rugendorf*. The affidavit read: "Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above-described premises for the purpose of sale and use contrary to the provisions of the law."[20] While paying lip service to the *Jones* principle that "an affidavit may be based on hearsay,"[21] the Court invalidated the state search warrant because the magistrate was not informed of ". . . [1] some of the *underlying circumstances* from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the *underlying circumstances* from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[22] Applying this test, the Court held that the affidavit could not support a finding of probable cause, thus the warrant and the evidence secured pursuant thereto were invalidated.[23]

The theoretical foundation for the "underlying circumstances" requirement first promulgated in *Aguilar* can be traced

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[15] It should be noted that *Jones* does not restrict its "substantial basis for crediting the hearsay" test to informant situations, but extends its requirement to other instances wherein incompetent evidence (wiretape, rumor) is considered in establishing probable cause. For earlier cases *contra*, see: Grau v. United States, 287 U. S. 124 (1932); Sparks v. United States, 90 F.2d 61 (6th Cir. 1937); Davis v. United States, 35 F.2d 957 (5th Cir. 1929); Wagner v. United States, 8 F.2d 581 (8th Cir. 1925).

[16] 376 U.S. 528 (1964).

[17] The affidavit contained the informant's detailed description of the stolen furs along with another informant's statement labeling defendant a "fence."

[18] 376 U.S. 528, 530 (1964).

[19] 378 U.S. 108 (1964).

[20] *Id.* at 109.

[21] *Id.* at 114.

[22] *Id.* (Emphasis added).

[23] *Id.* at 115-16.

to these prior observations of Justice Jackson:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[24]

It follows from these observations, that if the warrant should issue absent evidence establishing a foundation for informant's beliefs and/or a basis for affiant's conclusion as regards informant's reliability, the inference from the facts will be drawn not by a neutral and detached magistrate but instead by a police officer.[25]

The *Aguilar* Court further indicated that its rulings were consistent with *Jones*[26] and *Rugendorf*. Perhaps the Court in *Aguilar* was coining a new phrase for a legal standard previously established in *Jones* and *Rugendorf*.[27] At any rate, *Aguilar* engrafted "underlying circumstances" to "substantial basis."

As a practical matter, both the underlying circumstances supporting the informant's conclusions as well as supporting his reliability should be particularly and adequately described in the search warrant affidavit.

In the next significant case, *United States v. Ventresca*,[28] the informants were fellow investigators of the affiant, an investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. The Supreme Court, in reversing the lower court's decision, held:

> . . . where [the underlying] circumstances are detailed, where [the] reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant. . . .[29]

Thus, it can be said that the Court equated the *Aguilar* test of underlying circumstances with specificity of detail.

Addressing himself to this point, Justice Douglas, in his dissent, criticized the majority:

> The present case, illustrates how the mere weight of lengthy and

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[24] Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[25] *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958).

[26] 362 U.S. 257 (1960). In the *Jones* opinion, although the informant's reliability issue was submerged by the discussion dealing with the validity of an affidavit based on hearsay, the Court did, in fact, conclude that there was a "substantial basis" for accepting the hearsay. *Id.* at 271.

[27] See text at note 16 *supra*.

[28] 380 U.S. 102 (1965).

[29] *Id.* at 109. The *Ventresca* affidavit contained a lengthy description of observations made on seven occasions including such details as the make of the car involved in transporting illegal goods and the exact places, dates and times of the observations.

> vague recitals takes the place of reasonably probative evidence of the existence of crime.
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> . . . .
>
> In each paragraph [of the affidavit] the alleged events are simply described directly, or else it is said that certain events 'were observed.' Scarcely a clue is given as to who the observer might have been. . . .
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> . . . .
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> The Court's unconcern over the failure of the affidavit to identify the sources of the information recited seems based in part on the detailed, lengthy nature of the factual recitals. . . .
>
> The Court of Appeals was surely correct when it observed that 'the affidavit leaves as a complete mystery the manner in which the investigators discovered their information.'[30]

Hence, unlike the affidavits in *Jones* and *Rugendorf*, the language of the *Ventresca* affidavit was carefully couched in ambiguous terms as to the source of affiant's information. Thus *Ventresca* diverged from *Aguilar* by not requiring the "underlying circumstances" or foundation upon which the informant based his conclusions.[31]

The practical effect of the *Ventresca* decision is that the absence of the basis or source of informant's conclusions will not invalidate the search warrant as long as sufficient detail about the criminal activities of the accused is presented in the affidavit.

The Supreme Court's most recent pronouncement in this area is in *Spinelli v. United States*.[32] In the trial court, Spinelli was convicted of illegal gambling activities. Initially, at the pre-trial suppression hearing, the U.S. District Court held that Spinelli "lacked standing to raise a Fourth Amendment objection."[33] Subsequent to their reversal of the district court's ruling, the Eighth Circuit Court of Appeals, upon en banc rehearing, sustained the warrant and affirmed the conviction.[34] On appeal the Supreme Court reversed.[35]

The affidavit in *Spinelli* stated, in substance, the following: At various times affiant and other agents observed Spinelli driving across a bridge between East St. Louis, Illinois and St. Louis, Missouri and into a parking area next to an apartment building, walking into the building and entering apartment F on second floor thereof. The telephone company records showed that Apartment F had two telephones under a woman's name. Appellant was known to affiant and other federal and local law en-

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[30] *Id.* at 117, 119, 120, 122.

[31] This, of course, presupposes that the mere purchase of drugs by the informant from the defendant was insufficient as a basis for the allegations contained in the affidavit.

[32] 393 U.S. 410 (1969).

[33] *Id.* at 412.

[34] 382 F.2d 871 (8th Cir. 1967), *rev'd*, 393 U.S. 410 (1969).

[35] 393 U.S. 410, 420 (1969).

forcement officers as a bookmaker, a gambler, and an associate of bookmakers and gamblers. A confidential reliable informant informed the FBI that appellant was operating a handbook and accepting wagers and disseminating wagering information by telephones listed for that apartment by the telephone company.[36]

Relying on the principles stated in *Aguilar*, the Court invalidated the search warrant for two reasons: (1) "Though the affiant swore that his confidant (informer) was 'reliable,' he offered the magistrate no reason in support of this conclusion." (2) "The tip does not contain a sufficient statement of the *underlying circumstances* from which the informer concluded that Spinelli was running a bookmaking operation."[37] The Court continued, "We are not told how the FBI's source received his information — it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him."[38]

Concluding that the *Aguilar* tests were not satisfied, the *Spinelli* Court then went on to apply the "sufficient detail" test by stating that:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in *sufficient detail* that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.[39]

Using the informant's statements in *Draper v. United States*[40] as an example of sufficient detail required in an affidavit, the Court commented: "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."[41] Here, however, the *Spinelli* affidavit stated merely that Spinelli was using two specified telephones and that these phones were being used in gambling operations. So the Court concluded that "[t]his meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."[42]

In this same vein, Justice White, in his concurring opinion, conceded that to view the informant's statements in isolation compels the conclusion that the *Aguilar* standards of under-

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[36] *Id.* at 413-14.
[37] *Id.* at 416 (Emphasis added).
[38] *Id.*
[39] *Id.* (Emphasis added).
[40] In Draper v. United States, 358 U.S. 307 (1959) where the factual setting centered around the transportation of heroin by train from Chicago to Denver, the informant described the accused's clothing, luggage and arrival time at a railroad station. Here, the arrest and search were conducted without a warrant.
[41] 393 U.S. 410, 417 (1969).
[42] *Id.*

lying circumstances are not satisfied.[43] Yet, Justice White felt that the informant's statements coupled with independent police work[44] satisfied the *Draper* standard (sufficient detail) and reasonably justified the issuance of the search warrant.

In this writer's opinion, that part of the *Spinelli* opinion dealing with "sufficient detail" lacks specificity sufficient for predictability. It can be read broadly to stand for the proposition that unless the informant describes "with minute particularity"[45] the actions of the defendant, the affidavit is constitutionally infirm, or the opinion can also be read narrowly and limited to its facts. The only facts supplied in the affidavit were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. These facts were held insufficient by *Draper* standards. Yet, the *Draper* standards of detail, like *Spinelli's*, are difficult to apply to other fact situations. For as Mr. Justice White notes in his concurring opinion:

> The *Draper* approach would reasonably justify the issuance of a warrant in this case, particularly since the police had some awareness of Spinelli's past activities. The majority, however, while seemingly embracing *Draper*, confines that case to its own facts.[46]

Hence, it seems clear that on the matter of affidavit detail, the majority opinion in *Spinelli* casts considerable doubt on the proper prospective application of this concept of "sufficient detail." Further, with regard to detail and credibility of informant's statements, a sharp division in the Court is evident.[47] Justice Black, after referring to his dissent in *Aguilar*, further regrets the substitution of the Court's judgment for that of the magistrates' and lower courts':

> It cannot be said that the trial judge and six members of the Court of Appeals committed flagrant error in finding from evidence that the magistrate had probable cause to issue the search warrant here. It seems to me that this Court would best serve itself and the administration of justice by accepting the judgment of the two courts below. After all, they too are lawyers and judges, and much closer to the practical, everyday affairs of life than we are.[48]

It is difficult to accept Black's argument on this point. The issue is not solely the propriety of overruling the magistrate's or reviewing judge's decision, but rather whether the affidavit

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[43] *Id.* at 423-29.

[44] *Id.* at 422 (Appendix to the opinion of the Court). The FBI kept Spinelli under surveillance and he was "known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

[45] *Id.* at 417.

[46] *Id.* at 428-29.

[47] In Aguilar v. Texas, 378 U.S. 108, 120 (1968), Justice Clark joined by Justices Black and Stewart, disagreed with the majority holding that the test of an informer's reliability is what he says. Clark believes "[t]he officer's experience with the informer is the test and here the two officers swore that the informer was credible and the information reliable."

[48] 393 U.S. 410, 434 (1969).

meets the probable cause for issuance test. Hence, the more appropriate inquiry involving probable cause is whether the informant's tip, even when corroborated by affiant's personal observations, is sufficient to provide the *basis* for a finding of probable cause. Despite this, Justice Black foresees the elevation of "... the magistrates hearing for issuance of a search warrant to a full-fledged trial, where witnesses must be brought forward to attest personally to all the facts alleged."[49]

Justice Fortas, in his dissent, agreed with Justice White that the *Spinelli* affidavit contained sufficient detail to support the issuance of the search warrant.[50]

Thus, while one group of dissenters, White and Fortas, are not doctrinally at odds with the majority, but are simply satisfied with the detail of the *Spinelli* affidavit, the other group, Black and Stewart, focus their attack on the Court's interpretation of probable cause.

For Justice Black and Justice Stewart, *Spinelli* signals an undesirable retreat from the principles regarding the standard of probable cause as stated in *United States v. Ventresca*:

> . . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.[51]

In its application, the *Spinelli* doctrine demonstrates that the affidavit must, in compliance with *Aguilar*, set forth the basis or source of informant's conclusions or describe in "sufficient detail" the accused's criminal activities. Yet, while the standard seems clear, its application is complicated by factual vagaries. Nevertheless, since the Court has consistently attacked the generality of the affidavit and warrant, there seems to be little doubt that the legality of the warrant is established when: (1) the basis or source of informant's conclusions is adequately stated, (2) the reliability is factually established, and (3) the accused's activities are described in sufficient detail. Obviously, with regard to informant's reliability, *Spinelli* calls for independent investigative activity by the prosecuting officials.

The important theoretical difficulty with the rationale employed in *Spinelli* is the substitution of "sufficient detail" for

[49] *Id.* at 429.
[50] *Id.* at 435-39. Mr. Justice Stewart in a two sentence dissenting opinion agrees with Black and Fortas. *Id.* at 439.
[51] 380 U.S. 102, 108 (1964).

"underlying circumstances." Though the Court reasons that sufficient detail enables the magistrate to draw the necessary inferences from the affidavit, this combination of essentially different juristic concepts must lead to misunderstanding.

For an affidavit to satisfy the "sufficient detail" test, it need not present either the "underlying circumstances" from which the affiant concludes the informer is reliable or the "underlying circumstances" upon which the informer bases his conclusions.[52] Likewise, for an affidavit to satisfy the "underlying circumstances" test, it may lack "sufficient detail."

In summary, of the two juristic concepts — "underlying circumstances" and "sufficient detail" — it appears that the Court's preference for "sufficient detail," as clearly noted in *Rugendorf, Ventresca, Draper* and *Spinelli,* is stronger by far than for "underlying circumstances." As a practical matter, however, satisfaction of either of these tests will probably result in a finding of probable cause, thereby validating the search warrant.

APPLICATION OF SPINELLI IN THE FEDERAL COURTS

Analysis of a few recent illustrative cases, will prove beneficial in determining whether *Spinelli* initiated a trend in federal judicial interpretation of probable cause for search warrants based on informant's statements.[53]

An example of a broad interpretation of *Spinelli* at the district court level is shown in *Von Utter v. Tulloch.*[54] The defendant was charged with possession of narcotics. The federal district court in Massachusetts invalidated the search warrant and issued a writ of habeas corpus, partly on the ground that the affidavit upon which the search warrant was based, "[did] not set forth any factual basis to support a finding that the informer's tip was reliable."[55]

The affidavit stated, with regard to informant's reliability, the following:

> 1. Information [was] received from a confidential informant who is an admitted user and is known by me personally to associate

[52] *See, e.g.,* Draper v. United States, 358 U.S. 307 (1959); United States v. Ventresca, 380 U.S. 102 (1964).

[53] For district court decisions not applying *Spinelli, see* United States *ex rel.* Pugach v. Mancusi, 310 F. Supp. 691 (S.D. N.Y. 1970). Here, the court's holding, structured on the *Jones* rationale as well as the decision in Brinegar v. United States, 338 U.S. 160 (1949), cautioned against technical interpretations of search warrants. *See also* Morales v. Cady, 309 F. Supp. 640 (E.D. Wis. 1970).

[54] 304 F. Supp. 1055 (D.C. Mass. 1969). Even though *Spinelli* was decided after the trial of this case, the court applied it because "Spinelli represents no substantial change in the law, but is merely a particular application of principles which the Supreme Court had already enunciated several years before in Aguilar v. Texas." *Id.* at 1058, 1059.

[55] *Id.* at 1057.

> with convicted narcotic users, and the informant admittedly associates with convicted users, who have past convictions for narcotic violations, and who has a user's knowledge of narcotics.[56]

The court recognized that affiant's statement

> . . . shows, of course, that [informant] was in a position where it was possible for him to acquire information about Von Utter's future activities. There is, however, nothing to indicate that the information he passes on is trustworthy. There is no statement that he has in the past given information which investigation showed to be true.[57]

So the reluctance of the court in accepting, without more, affiant's opinion on informer's reliability is indeed consonant with the rationale employed in *Aguilar* and *Spinelli*. Yet, there is a sharp distinction between these cases and *Von Utter*. The *Aguilar* affidavit read in part, "[a]ffiants have received reliable information from a credible person and do believe . . . ."[58] The *Spinelli* affidavit read, "[t]he Federal Bureau of Investigation has been informed by a confidential reliable informant that . . . ."[59] The *Von Utter* affidavit, however, unquestionably sets forth much more on informer's reliability than either the *Aguilar* or *Spinelli* affidavits.[60] Attempting to provide the court with additional facts and thus a stronger basis for a probable cause ruling, the *Von Utter* affidavit is distinguishable from other, less detailed affidavits. Hence, on the similarity of the affidavits, it appears that the court's reliance on *Aguilar* and *Spinelli* is misplaced.

Moreover, from a practical viewpoint in narcotics cases, if the informant uses narcotics, associates with convicted narcotics users, and provides information regarding illegal narcotic activities, then, even absent any past history of trustworthiness, these facts should be sufficient to enable the magistrate to decide that the informant is reliable.

Because the *Von Utter* affidavit set forth more detail upon which to decide informant's reliability than *Spinelli* or *Aguilar*, the district court's position seems unduly harsh. However, in demanding more facts regarding informant's reliability, the court's attitude coincided with the policy underpinnings of the *Spinelli* approach. A close parallel here can be drawn between the *Von Utter* and *Spinelli* affidavits because of the like recitation of facts implicating the defendant, and the failure to indicate how the information was acquired by the informer.

Further, after noting *Spinelli*, the court came to the same

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[56] *Id.* at 1056.
[57] *Id.* at 1057.
[58] Aguilar v. Texas, 378 U.S. 108, 109 (1964).
[59] Spinelli v. United States, 393 U.S. 410, 422 (1969).
[60] See text at note 55 *supra*.

conclusion as did the *Spinelli* court: there was no indication of how the informant knew of defendant's illegal activities besides the informant's association with narcotics as a user.

United States v. Dye,[61] another district court decision, demonstrates the use of the "sufficient detail" facet of *Spinelli* to validate a search warrant. In this case involving an alleged violation of the National Firearms Act, the informant observed a sawed-off shotgun in defendant's house. In commenting thereon, the court stated:

> *Spinelli* basically condemns a search and seizure on a simple assertion of police suspicion supported by innocent-seeming activities. Here, the affidavit reveals that the informant saw the weapon at the location described with his own eyes and that it was an illegal firearm.[62]

The court concluded that a common sense reading of the affidavit by the magistrate would satisfy the probable cause test, yet other district court cases interpreting *Spinelli* have emphasized independent corroboration of information supplied by the informant.[63]

Spinelli has also been cited at the appellate level.[64] A recent Seventh Circuit decision, relying on *Spinelli*, validated a search warrant based on an informant's statements. The rationale behind the holding in *United States v. Allsenberrie*[65] was stated as follows:

> The Court in Spinelli . . . further defined the first part of the *Aguilar* test [underlying circumstances upon which the informant based his conclusions] by providing that a search warrant based on an informer's tip can meet the standard of probable cause even if the basis of the informer's knowledge is not set forth, if "the tip described the accused's criminal activity in sufficient detail so that the magistrate may know that he is relying on something more substantial than a casual rumor ***[66]

As such, *Allsenberrie* views *Spinelli* as nothing more than a refinement of *Aguilar*.

In summary, judged by the aforementioned cases, the direct

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[61] 303 F. Supp. 504 (W.D. Okl. 1969).

[62] *Id.* at 506.

[63] *See*, United States v. Gardner, 308 F. Supp. 425 (S.D. N.Y. 1969); United States v. Manetti, 309 F. Supp. 174 (D.C. Del. 1970); United States *ex rel.* Henderson v. Brierley, 300 F. Supp. 638 (E.D. Penn. 1969). United States v. Main, 312 F. Supp. 736 (D.C. Del. 1970). In United States *ex rel.* Henderson v. Mazurkiewicz, 312 F. Supp. 576 (E.D. Penn. 1969) the court ruled that both the corroborating evidence and informant's tip were inadequate to establish probable cause. See also text at note 40.

[64] Recent federal appellate cases employing *Spinelli* include; Saville v. O'Brien, 420 F.2d 347 (1st Cir. 1969); United States v. Melvin, 419 F.2d 136 (4th Cir. 1969); Williams v. Wainright, 416 F.2d 1042 (5th Cir. 1969); DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969); McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969), *cert. denied*, 395 U.S. 984 (1970); United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); United States v. Berry, 423 F.2d 142 (10th Cir. 1970).

[65] 424 F.2d 1209 (7th Cir. 1970).

[66] *Id.* at 1214.

impact of *Spinelli* at the federal level is clear. By taking a hostile view toward general, unsupported statements of informers and requiring specificity, the courts seek to reinforce the foundation upon which the issuing magistrate's decision rests. This goal is to be applauded.

THE LAW IN ILLINOIS

Illinois, like most of the other states, has not been consistent in deciding what constitutes a "substantial basis" for crediting the hearsay.[67] *People v. Jackson*,[68] the first notable case in this area, dealt with a prosecution for unlawfully possessing certain policy paraphernalia and for maintaining a place for policy playing. In this case, a search warrant was issued on the basis of an affidavit relying, in part, on information given to affiant "by an undisclosed person." The defendant contended that the warrant was invalid because it was based on hearsay. But the court concluded "[t]he simple truth is that the complaint does not purport to be based on hearsay or conclusions, but on facts within the complainant's own knowledge, learned while the defendant's residence was under surveillance."[69] Obviously influenced by the *Jones* case, the court, in sustaining the warrant held in judicial dictum that hearsay may be used to establish probable cause for a warrant so long as there is a substantial basis for believing the hearsay.[70] Thus, while paying lip service to *Jones*, the Illinois Court upheld the warrant's validity, sidestepping the hearsay question.

In *People v. Williams*,[71] a gambling prosecution case, the Supreme Court of Illinois, in reversing the trial judge's order which quashed a search warrant and suppressed the evidence seized under the warrant, observed:

> [T]he personal observations of another set out in an affidavit are sufficient to establish probable cause, so long as a substantial basis for crediting the hearsay is presented . . . . the informant was known to the affiant, and had on previous occasions given information which was correct.[72]

Hence, this decision, like Jackson, after noting the personal observations of informant, merely reiterates the ritualistic incantation of *Jones* "so long as a substantial basis for crediting the hearsay is presented."[73] Not only does the *Williams* court fail to delve beyond the superficial import of the "substantial

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[67] See text at note 10 *supra*.
[68] 22 Ill. 2d 382, 176 N.E.2d 803 (1961); *cert. denied*, 368 U.S. 985 (1962).
[69] *Id.* at 387, 176 N.E.2d at 805.
[70] *Id.*
[71] 27 Ill. 2d 542, 190 N.E.2d 303 (1963).
[72] *Id.* at 544, 190 N.E.2d at 304.
[73] *Id.*

basis" phrase, but also it blindly accepts the statement — "informant was known to the affiant, and had on previous occasion given information which was correct"[74] — as evidence of informant's reliability.

In *People v. York*,[75] the Illinois court, citing with approval the prior *Jackson* and *Williams* decisions, had no trouble in finding a "substantial basis," since the informer in *York* personally witnessed the activities.[76] Contrary to *Jackson* and *Williams*, however, the court, by equating informant's personal knowledge of illegal activities with "substantial basis," took a major step toward clarifying the Illinois rule to be applied in evaluating search warrants, based on informant's statements.

In the next significant decision, *People v. Williams*,[77] the court, citing with approval *York* and the prior *Williams* case, validated the search warrant and observed "[t]he affidavit set forth personal observations of informers who had furnished reliable information in the past."[78]

Therefore, the second *Williams* case seems to have adopted the "personal knowledge equals substantial basis" approach promulgated in *York* and indicated in the prior *Williams* case. Hence, in each subsequent case, the Illinois Supreme Court has moved more and more in the direction of a mechanical formula[79] rather than basing legality upon a case by case evaluation of the informant's personal observations.

This indulgence of the court in fixed rules is justified as a means of promoting certainty and ease of enforcement in the drafting of search warrants. No one will deny that there is a need for fixed rules in law enforcement, but where a mechanical application of rules is inconsistent with the probable cause requirement of the Fourth Amendment, this can only lead to injustice.

Consider, for example, a reliable informer who personally observes the accused, on some occasions, using a public telephone that is being employed in gambling operations. Arguably, this is legally insufficient to justify the issuance of the search warrant. Yet, if the Court relies solely upon the informant's per-

[74] *Id.*

[75] 29 Ill. 2d 68, 193 N.E.2d 773 (1963).

[76] The pertinent section of the affidavit read as follows: [affiant had] talked with an informant who had previously given reliable information concerning gambling . . . [who] . . . had been in the above described premises on four previous occasions during the preceding two weeks and that he had seen bookmaking on horse races and poker being played on each occasion.

[77] 36 Ill. 2d 505, 224 N.E.2d 225 (1967), *cert. denied*, 389 U.S. 828 (1967).

[78] *Id.* at 508, 224 N.E.2d 225, 227 (1967).

[79] *See*, Homer, *General Observations on the Effects of Personal, Political and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922), wherein this practice is described as the "mechanical theory."

sonal observations of the activities of the accused and finds a "substantial basis" for validation of the warrant, this would be inconsistent with the probable cause requirement of the Fourth Amendment, which of necessity demands that the illegality of the accused's conduct be determined by a neutral and detached magistrate and not by the law enforcement officials.

Illinois, however, recently shifted its rationale in *People v. Considine.*[80] The Illinois Appellate Court for the Second District, deeply influenced by *Aguilar* and *Spinelli,* refused to credit *ipso facto* either the personal observations of informant or the talismanic phrase "[a] confidential informant, known to the investigators to be competent, accurate, and reliable told . . . ", since the affidavit failed to set forth the "underlying circumstances" upon which the affiant concluded the informer was reliable.[81] The *Considine* court reasoned that absent concrete facts establishing the reliability of the informant, even personal observation of illegal activities[82] did not save the warrant from judicial condemnation.

After *Considine,* the Illinois Supreme Court was called upon in *People v. Dillon*[83] to apply *Spinelli* notwithstanding the failure of the affidavit to expressly state the source of the informer's statements, his reliability, or the circumstances under which the information was secured. At issue was the probable cause for the issuance of a warrant to search the defendant's automobile in which he had been riding when arrested for a robbery.

At first glance, the aforementioned deficiencies in the affidavit seemed fatal. Nevertheless, quoting *Spinelli,* the court held the affidavit to be sufficient because of substantial corroboration of the informer's statements by the police that certain premises were being used as a policy station. Facts corroborated by the police were: (1) that the premises reported on by the informer had previously been raided by the police, (2) that the informer entered the premises and returned with a policy ticket pursuant to police instructions, (3) that at each of three separate periods of police surveillance, numerous persons were seen visiting the premises for a stay of a few minutes, (4) that the affiant police officer stated that the informer's tips had always been correct in the past and had resulted in three convictions and four arrests pending trial. In the court's words:

> The abundance of substantial corroboration for the informant's

[80] 107 Ill. App. 2d 389, 246 N.E.2d 81 (1969).
[81] *Id.* at 393, 246 N.E.2d 81, 83 (Emphasis added).
[82] According to the affidavit, the informant observed the defendant place a stolen glass pane on the front door of a tavern, owned by defendant's family. *Id.* at 391, 246 N.E.2d 81, 82 (1969).
[83] 44 Ill. 2d 482, 256 N.E.2d 451 (1970).

> report here leads us to the conclusion that this affidavit could surely have prompted the judicial officer who issued the search warrant to 'reasonably infer that the informant had gained [her] information in a reliable way,' as required under *Aguilar* and *Spinelli*.[84]

In short, the *Dillon* case shows that the Illinois Supreme Court, on the question of an informant's statements, was concerned with the basis[85] for the magistrate's determination of probable cause. Rather than merely equating informant's personal knowledge or independent corroboration of informant's statements with probable cause, the *Dillon* approach was to decide on the basis of the affidavit whether the magistrate had sufficient information to decide that probable cause existed. Thus, it seems that the Illinois Supreme Court was rejecting the mechanical formula approach and returning to a case by case evaluation.

From a practical standpoint, however, absent the "underlying circumstances" of informant's statements or informant's reliability, only a description of the defendant's criminal activity in sufficient detail or independent corroboration by the police would save the warrant from judicial condemnation.

CONCLUSION

Under federal law, for an affidavit relying on informant's statements to withstand the "probable cause for issuance" test, a "substantial basis" for crediting the hearsay must be established.[86] A "substantial basis" is established when the magistrate is informed of the underlying circumstances from which the affiant concludes that the informant was credible as well as the underlying circumstances from which informant bases his conclusions.[87] A "substantial basis" is also established when the accused's criminal activity is described in sufficient detail so that the magistrate can reasonably infer that the informant gained his information in a reliable way.

In cases subsequent to *Spinelli,* the federal district and appellate courts have emphasized independent corroboration of information supplied by the informant.

Considering the practical aspects of drafting the affidavit and warrant, as indicated in the above mentioned federal and state court decisions, the affidavit, if possible, should detail: what information was transmitted to affiant by the informant; how the informant acquired his knowledge of the accused's activities;

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[84] *Id.* at 486, 256 N.E.2d 451, 454.

[85] Jones v. United States, 362 U.S. 257 (1960).

[86] Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

[87] Draper v. United States, 358 U.S. 307 (1959); Rugendorf v. United States, 376 U.S. 528 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

what independent investigation of the accused has been conducted by affiant and what independent investigation of informant's reliability has been conducted by affiant.

In summation, the basic function of the juridical tests promulgated by the courts is to require the affiant to supply facts in the affidavit sufficient to enable the judge, and not the law enforcement officials, to determine whether or not probable cause is established. As such, search warrants and affidavits must be drafted in light of this objective.

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