FLORIDA V. J.L.—WITHDRAWING PERMISSION TO “LIE WITH IMPUNITY”: THE DEMISE OF “TRULY ANONYMOUS” INFORMANTS AND THE RESURRECTION OF THE AGUILAR/SPINELLI TEST FOR PROBABLE CAUSE

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Knowledge about a person’s future movements indicates some familiarity with that person’s affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband.¹

—Justice Ruth Bader Ginsburg

If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.²

—Justice Anthony Kennedy, joined by Chief Justice William Rehnquist

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¹ Id. at 275. Justice Ginsburg, writing for the Court in J.L., first pointed to the problem of anonymous sources not being reliable because of the absence of accountability. See id. at 270 (“Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143, 146-47 (1972), ‘an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity,’ Alabama v. White, 496 U.S. at 329.”).
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INTRODUCTION

These two observations: (a) that accurate predictions of legal conduct reveal virtually nothing about the reliability or accuracy of allegations of illegal conduct, and (b) that anonymous informants can never be reasonably relied upon because they can "lie with impunity" without being held accountable, would seem to be truisms. Nevertheless, for nearly twenty years a majority of the Supreme Court has upheld the use of anonymous informants to justify searches and seizures. This state of affairs is not likely to continue. In Florida v. J.L., decided last term, these simple observations were the basis of a ruling that has sounded the death knell for the "reasonably trustworthy anonymous informant" doctrine that dates back to 1983, when Illinois v. Gates established a "totality of the circumstances" test for determining probable cause.

Florida v. J.L. not only rejects the use of truly anonymous informants, but also describes how corroboration of predicted legal conduct may reasonably be used in evaluating the reliability of accusations of criminality by any informant. The thesis of this Article is that J.L. will result in a return to a variant of the two-part Aguilar/Spinelli test that Illinois v. Gates was understood to have replaced.

Part One of this Article reviews the tests that the Court has applied to determine the "reasonable trustworthiness" of third party information prior to the Gates "totality of the circumstances" test. Part Two analyzes the reasoning of the Court in Illinois v. Gates in creating the "totality of the circumstances" test and its application in Alabama v. White, the only other anonymous source case that has been upheld by the Court. Part Three reviews Justice Ginsburg's Florida v. J.L. opinion, in light of the previous informant-based search and seizure cases, to reveal the compelling logic that caused even those members

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3 See infra notes 364-71, 399-400.
4 See infra note 398.
5 See generally discussion infra Part Two (concerning Illinois v. Gates, 462 U.S. 213 (1983), in which the Court found probable cause where police followed an anonymous tip and observed no illegal conduct).
6 529 U.S. 266 (2000).
9 See generally infra Part One, entitled "Reasonably Trustworthy Informants" (discussing cases under the category of "reasonably trustworthy" informants).
10 See Alabama v. White, 496 U.S. 325 (1990). See generally infra Part Two, entitled "Totality of the Circumstances" and Anonymous Sources: Granting Permission to "Lie With Impunity." The only other anonymous source case besides Alabama v. White was United States v. Spinelli, 393 U.S. 410 (1969), which rejected the use of anonymous allegations of criminality because of the magistrate's inability to test the reliability and basis of knowledge of the source. See discussion infra notes 144-90.
of the Court who had endorsed the use of anonymous informants in previous cases to reject the use of the anonymous informant in Florida v. J.L.¹¹ Part Four of the Article considers the significance of this rare unanimity of opinion¹² and describes how Florida v. J.L. signals the likely resurrection of significant aspects of the Aguilar/Spinelli factors (the "reliability" of the informant with respect to previous allegations of criminality and the informant's "basis of knowledge" of the suspect's criminality)¹³ as essential elements of any constitutionally suffi-


¹² See infra notes 353-65.

¹³ See infra notes 353-65.
cient justification for searches or seizures based upon the use of informants. Further, it describes how the *Florida v. J.L* opinion reinvigorates the separation of powers concepts that are at the heart of the Fourth Amendment warrant requirement.

**An Overview**

In 1983, the long-standing rejection of the use of anonymous sources to justify searches and seizures was completely overturned by *Illinois v. Gates,* which supplanted the two-part *Aguilar/Spinelli* test with a “totality of the circumstances” test for determining probable cause. The new test required neither information describing the basis of an informant’s knowledge of illegal conduct, nor any evidence of an informant’s reliability in making accusations of criminality. Under the *Gates* test, anonymous accusations of illegal behavior could justify a search or seizure, if police could corroborate some, but not necessarily all, aspects of the anonymous informant’s predictions of a suspect’s legal behavior. The only other Supreme Court opinion that has ever upheld the use of anonymous sources, *Alabama v. White,* extended the “totality of the circumstances” test and the use of “corroboration” of anonymous predictions of legal behavior, to *Terry*-type investigative searches and seizures.

The “totality of circumstances” test, as described by Chief Justice Rehnquist’s majority opinion in *Illinois v. Gates,* purported to “balance” the *Aguilar/Spinelli* factors with corroboration of predicted behavior to justify the issuance of a warrant. The language of the *Gates*

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14 See infra notes 372-79.
15 "A contrary rule ‘that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.’" *Aguilar,* 378 U.S. 108, 111 (1964) (citing *Johnson v. United States,* 333 U.S. 10, 14 (1948)). See also *Giordenello v. United States,* 357 U.S. 480, 485-86 (1958) and discussion infra notes 386-95.
17 *Aguilar v. Texas,* 378 U.S. 108 (1964); *United States v. Spinelli,* 393 U.S. 410 (1969). The *Aguilar/Spinelli* two-part test required that applications for a warrant include information setting out (1) the basis for the informant’s knowledge of the criminality at issue, and (2) the officer’s reasons for concluding that the informant possess sufficient veracity or reliability to be “reasonably trustworthy” in making the accusations of criminal conduct. See discussion infra text accompanying notes 121-75.
18 See *Gates,* 462 U.S. at 243-44.
19 See id. (discussing an anonymous tipster, who was incorrect about a number of specifics in describing the suspects and the details of the Gates’s alleged criminal enterprise of dealing drugs, for example, that the suspect would travel to Florida to retrieve drugs and then return to Chicago). See discussion of *Gates* infra text accompanying notes 208-64. In *Alabama v. White,* an anonymous tip indicated that White would be leaving an apartment in her automobile and would subsequently travel to a hotel, but few particulars were corroborated and the contraband seized was not that predicted by the informant. See discussion infra notes 907-19.
21 See *Gates,* 462 U.S. at 238.
opinion suggested some sort of a sliding scale; for instance, a lesser basis of knowledge and less evidence of reliability could be compensated for by corroboration of otherwise innocent conduct predicted by an informant. However, as applied to the facts in Gates and White, the Court allowed corroboration of anonymous predictions of legal conduct alone to justify searches and seizures for which police lacked any information with respect to the basis of knowledge or the veracity of the informant. Thus, the language of the opinion notwithstanding, the practical effect of the "totality of the circumstances" was to allow probable cause to be determined upon corroboration of anonymous predictions of innocent conduct alone.

Permitting police to rely on anonymous informants, when the informant's predictions of legal conduct proved at least partially accurate, has the practical effect of removing the reliability of anonymous informants, as well as known informants, from any sort of meaningful judicial oversight with respect to the informant's accusations of criminality. The effect on the right of persons to be left alone in the absence of particularized suspicion, which resulted from Illinois v. Gates, was described by the dissent in Alabama v. White.

Millions of people leave their apartments every day at about the same time every day carrying an attaché case and heading for a destination known to their neighbors... An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming the commuter is in possession of an illegal substance....

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be able to formulate a tip....

However, neither the dissent in Illinois v. Gates nor Alabama v. White articulated the specific flawed assumptions implicit in the "totality of the circumstances" test as applied to anonymous informants

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22 Id. at 244. See also White, 496 U.S. at 350-31 (discussing the application of this "sliding scale").
25 White, 496 U.S. at 333 (Stevens, J., dissenting).
27 496 U.S. at 333 (Stevens, J., dissenting).
with sufficient logical clarity to prevent the majority in those cases from holding that anonymous accusations of illegality could be "reasonably trustworthy" based on corroboration of predicted legal conduct alone. The result has been a doctrine that, for nearly twenty years, has made it possible for anonymous, well-meaning but mistaken tipsters (or malevolent informers with an ax to grind, as suggested by the dissent in *Alabama v. White*) who possessed some knowledge of the legal activities of another person, to create scenarios that could be used to justify the search of another's home, or the seizure of their person.

The use of corroboration of predicted legal activity to support anonymous accusations of criminality also made it possible for overzealous officers to use a fictitious "anonymous source" to justify a lucky guess, after the fact, as Justice Kennedy suggested may have occurred in *Florida v. J.L.*, and which the dissent in *Alabama v. White* seemed to think had actually occurred in that case. Moreover, from a jurisprudential perspective, insofar as these cases created a virtually irrebuttable presumption that informants with some correct information about legal activity could be relied upon in making accusations of wrongdoing, the judicial oversight of all searches and seizures, based on corroboration of predicted legal activity provided by both known and anonymous sources, was significantly reduced.

Further, by failing to specifically articulate the role that corroboration of predicted legal behavior might logically play within "the totality of the circumstances" test, *Gates* and *White* did significant damage to fundamental separation of powers concepts, which underlie the Fourth Amendment warrant and probable cause requirements, as well as searches and seizures on less than probable cause.

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29 A clear articulation of the logical flaws inherent in the "totality of circumstances" doctrine as applied to anonymous sources was not provided in any case before *Florida v. J.L.* See discussion infra text accompanying notes 269-80.

30 *See White*, 496 U.S. at 333 (Stevens, J., dissenting).

31 529 U.S. at 275 (Kennedy, J., concurring).

32 496 U.S. at 333 ("[F]or all that this record tells us, the tipster may well have been another police officer who had a 'hunch' that respondent might have cocaine in her attaché case.") (Stevens, J., dissenting); see also Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 52, 178-81 (1972) (discussing concerns regarding fabricated information in *Adams v. Williams*).

33 Justice Kennedy acknowledged that an officer must be found credible with respect to "receipt of the tip [and] inquiry respecting the reliability of the informant." *J.L.*, 529 U.S. at 275. Although the trial court had found the officers credible in this case, "[t]here was testimony that an anonymous tip came in by a telephone call and nothing more. The record does not show whether some notation or other documentation of the call was made either by a voice recording or tracing the call to a telephone number. The prosecution recounted just the tip itself and the later verification of the presence of the three young men...." *Id.*

34 "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' Otherwise 'the inferences from the facts which lead to the
However, this trend was apparently reversed in Florida v. J.L., a thus far little-noticed opinion that significantly limits the use of anonymous sources in virtually all circumstances, and which implies significant changes in the test required to determine the “reasonable trustworthiness” of all third party informants. The logical power of Justice Ginsburg’s framing of the anonymous informant issue that: (1) no matter what the source, the accuracy of predictions of legal conduct reveals little or nothing about the basis of knowledge and veracity of the informant with respect to accusations of illegal conduct; and, (2) only sources who, at a minimum, are sufficiently identifiable to be held accountable for their accusations can be considered credible, reversed a twenty-year acceptance of anonymous sources with such obvious simplicity that none of the other members of the Court found it possible to frame a principled argument in dissent.

In this very brief, yet logically elegant opinion, Justice Ginsburg compellingly laid bare the analytical flaws in the previous anonymous source cases that even Chief Justice Rehnquist, the author of the “reasonably trustworthy” anonymous informant doctrine in Illinois v. Gates, joined with Justice Kennedy in a concurrence which appeared to admit the practical demise of the doctrine he created. The concurring opinion made clear that the use of “truly anonymous” sources creates inherent credibility issues that make such sources “unacceptable” for any purpose.

Further, by making clear that corroboration of predictions of legal behavior can only be logically used to confirm: (1) the identity of the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead by a police officer... or as in this case, by an identified informant.” Aguilar v. Texas, 378 U.S. 108, 114-15 (1964) (citing Giordenello v. United States, 357 U.S. 480, 486 (1958) and Johnson v. United States, 333 U.S. 10, 14 (1948)).

See discussion of Terry v. Ohio, infra notes 102-08, and Adams v. Williams, infra notes 174-200.

The theory of the case has been noted in several treatises and reporters but has not yet received specific analytical attention. See 1 RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW, ¶ 2.07[3], at 2.261-63, n.24 (2000); CHARLES WRIGHT & ALAN MILLER, FEDERAL PRACTICE AND PROCEDURE, § 668 (2001); David A. Sklansky, The Fourth Amendment and Common Law, 100 COLUM. L. REV. 437, 522 (2000). See infra Part Four.

In only a few paragraphs in a four-page opinion in Florida v. J.L. and citing only a few cases and one commentator, Justice Ginsburg’s reasoning effectively undercut what Justice Rehnquist needed several dozen pages of tendentious reasoning and dozens of cases, including an apparently intentional misuse of Draper, to justify the creation of the “totality of the circumstances” test in Illinois v. Gates. See infra notes 328-81.

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J.L., 529 U.S. at 275 (2000) (Kennedy, J., concurring). It is worth noting that it was precisely this sort of informant that was the source of information in the two cases in which the use of anonymous sources was upheld. See Illinois v. Gates, 462 U.S. 213 (1983); Alabama v. White, 496 U.S. 325 (1991). If this statement of the concurrence is to be taken at face value, the previous cases are no longer valid examples of the use of an informant’s tip.
person accused by the informant, and (2) that the informant has some knowledge of the suspect's affairs, but nothing more, the Florida v. J.L. opinion requires that, in the future, corroboration of predictions of legal conduct will be insufficient to support accusations of criminality made by either known or anonymous informants. The necessary result is likely to be a resurrection of the Aguilar/Spinelli methodology for evaluating the "reasonable trustworthiness" of all third party sources. The following is an analysis of the rise and fall of the doctrine of "reasonably trustworthy" anonymous informants created by the "totality of the circumstances" test of Illinois v. Gates.  

I. "REASONABLY TRUSTWORTHY" INFORMANTS

A. Background

Modern "third party informant" doctrine can be traced to the definition of probable cause developed by the Court in Carroll v. United States and Brinegar v. United States that has come to be accepted in every opinion issued over the past fifty years. In that defi-
ition the Court made clear that it was possible for officers to rely on "reasonably trustworthy" information from sources other than their own observations, presumably including information from others. However, reliance on information received from third parties in the probable cause context raises questions of credibility and accuracy that are not dissimilar from those addressed in a trial setting by the hearsay doctrine. The danger to be avoided in this context, however, is not the introduction of untested or unreliable evidence that might retrospect, to have been correct. The impact of Terry on the application of the probable cause standard as it may have affected third party source cases is only touched on in this Article, but is an issue that deserves a more developed analysis than is possible in this context. See discussion infra notes 104-20; 166-89.

In Brinegar, Oklahoma police saw Brinegar driving a car that was riding low on its springs, but was not violating any traffic law and was not otherwise suspicious, Oklahoma police stopped the vehicle. Even under the reasonable articulable suspicion standard of today, this stop would not have been justified. See Delaware v. Prouse, 440 U.S. 648 (1979) (holding an officer's stop of a vehicle was invalid where there were no observations of traffic or equipment violations nor any suspicious activity). It certainly could not be justified as having been based on probable cause. In 1948, possession of liquor was legal in Missouri, but not in Oklahoma. In Brinegar, the officers testified that they stopped the vehicle because they had seen Brinegar in Missouri, on another occasion, buying liquor and putting into his pickup truck. They also testified that Brinegar had previously been charged with liquor violations. Under the standard of today, unless the police had specific knowledge that Brinegar was currently being sought for commission of an offense, or unless an additional fact could connect the low-riding car to illegality in this instance, even an investigative stop would be questionable. However, it is quite clear that these facts would not amount to probable cause for arrest as it is understood under current doctrine. See United States v. Sokolow, 490 U.S. 1 (1989) (holding an investigative stop valid where factors other than specific knowledge of ongoing criminal activity justified the stop); INS v. Delgado, 466 U.S. 210 (1984) (allowing an investigative stop of factory employees where workers were believed to be illegal aliens); United States v. Cortez, 449 U.S. 411 (1981) (holding detaining officer's stop valid where there was evidence of criminal activity). After police stopped the car, Brinegar was asked if he was carrying liquor and he replied "not too much." At this point, the admission that he possessed contraband would certainly justify a Terry search for weapons, and perhaps an arrest. However, under the standard of today, it is not clear that this statement, apparently taken in response to questioning, would be admissible under Miranda v. Arizona, 384 U.S. 436 (1966) or United States v. Dickerson, 530 U.S. 428 (2000). However, it might be argued that the statement would be admissible under Berkemer v. McCarty, 486 U.S. 420 (1984), as questions associated with a "routine traffic stop."

Relying on the first automobile exception case, United States v. Carroll, the Court upheld the warrantless stop of the car, and the warrantless arrest of Brinegar. A concurring opinion by Justice Burton made clear that Brinegar's admission that alcohol was in the car was the basis for probable cause for the arrest. However, this admission could not have justified the initial stop of the vehicle. Justice Jackson dissented because he did not believe that probable cause existed to justify stopping the car in the first place. Based on today's standards to justify even investigative stops, Justice Jackson was probably correct. Without some "articulable suspicion" that Brinegar was engaged in illegal conduct, at the time of the stop, it is unlikely that he could have been properly stopped under the doctrine of Terry. For a discussion of current reasonable articulable suspicion standards, see Alabama v. White, 496 U.S. at 329-30 (stating that an officer "must be able to articulate something more than an 'inchoate and unperticularized suspicion or hunch'" (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989) (citing Terry, 392 U.S. at 27))). See also Prouse, 440 U.S. at 648; Whren v. United States, 517 U.S. 806 (1996) (holding a violation of traffic law is grounds for a stop).

There is no question that officers who actually observe suspicious or illegal conduct as the result of a tip may act on what they have observed. See United States v. Barnes, 2001 WL 43646 (E.D. Pa. 2001).
prejudice a trial, but rather the circumvention of Fourth Amendment requirements of particularity, probable cause, and meaningful judicial oversight of law enforcement.46

Early on, the Court established that probable cause determinations need not meet the level of proof required for findings of guilt, but could be based on information supplied from third parties that would not ordinarily be admissible at trial under the hearsay doctrine.47 However, the Court was very sensitive to the credibility dangers inherent in untested third party statements that have made the hearsay doctrine a mainstay in Anglo-American litigation procedure.48 In determining probable cause, the Court held that third party information must be "reasonably trustworthy."49 By 1969, the Court had established the two-prong Aguilar/Spinelli test,50 which required magistrates to make an independent determination whether: (1) the officer was reasonable in concluding an informant was reliable,51 usually based on a pattern of having provided accurate information in the past;52 and (2) whether the officer was reasonable in concluding that

46 See Aguilar v. Texas, 378 U.S. 108, 114 (citing Jones v. United States, 362 U.S. 257 (1960)); Rugendorf v. United States, 376 U.S. 528, 532 (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958); Johnson v. United States, 333 U.S. 10, 14 (1948). See also J.L., 529 U.S. at 275 ("[E]ven if the officer’s testimony about receipt of the tip is found credible, there is a second level of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous . . . [t]he reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.") (Kennedy, J., concurring).
47 See generally Draper v. United States, 358 U.S. 307 (1959) (holding that even if information received from an informant is hearsay, it can still be considered for probable cause).
49 Carroll v. United States, 267 U.S. 132, 162 (1925) (allowing police to search an automobile for contraband upon probable cause); see also Brinegar v. United States, 338 U.S. 160, 175 (1949) (affirming Carroll’s “reasonably trustworthy” standard).
51 See Spinelli, 393 U.S. at 415.
52 See McCray v. Illinois, 386 U.S. 300 (1967). See also United States v. Sumpter, 669 F.2d 1215, 1220 (8th Cir. 1982) (holding the credibility prong is satisfied when an informant had given information leading to arrests in prior cases); United States v. Seta, 669 F.2d 400, 403 (6th Cir. 1982) (per curiam) (holding credibility prong satisfied when informant had previously furnished information which led to several arrests and convictions); United States v. Bruner, 657 F.2d 1278, 1298 (D.C. Cir. 1981) (holding credibility prong satisfied when informant had provided information on prior occasions and never had been found to be unreliable); United States v. Skramstad, 649 F.2d 1259, 1262 (8th Cir. 1981) (holding credibility prong satisfied when informant “had in the past supplied accurate information to the police”); United States v. McGlynn, 671 F.2d 1140, 1145-46 (8th Cir. 1982) (holding credibility prong satisfied when two informants independently gave consistent information about different defendants, discovered to be roommates, linking each defendant to series of hospital pharmaceutical robberies); United States v. Lace, 669 F.2d 46, 49 (2d Cir. 1982) (holding credibility prong satisfied when police independently corroborated details provided by informant who was professed participant in criminal activity); United States v. Davis, 663 F.2d 824, 829 (9th Cir. 1981) (holding credibility prong satisfied when informants’ statements were mutually corroborative); United States v. Morisse, 660 F.2d 132, 135-36 (5th Cir. 1981) (holding credibility prong satisfied when observations of narcotics agent corroborated virtually every detail provided by informant including mechanics of distribution scheme); United States v. Maher, 645 F.2d 780, 782 (9th Cir. 1981) (per
the informant had a basis of knowledge of illegal conduct, usually by explaining in some detail how the informant claimed to have learned of the alleged illegality.

Under Aguilar/Spinelli, information regarding these two prongs of the test would have to be sufficiently detailed to allow a magistrate to independently determine whether the officer, herself, was "reasonable" in concluding that both the informant, and the information the officer relied on, were "trustworthy." The Court made clear that the requirement that a magistrate independently determine the "basis of the informant's knowledge" and "reliability of the source" could not be circumvented without violating the separation of governmental powers which is central to the Fourth Amendment. Under the Aguilar/Spinelli doctrine, the danger that unsubstantiated allegations might be the basis for improperly invoking the powers of the executive branch were minimal and the proper judicial role in the Fourth Amendment framework was permitted to function while still allowing police to act on information that was less reliable than usually necessary to establish guilt. Under Aguilar/Spinelli anonymous informants could never have provided the basis for probable cause.

After the Court upheld limited investigative searches and seizures on less than probable cause in Terry v. Ohio in 1968, the Court developed a method, which paralleled Aguilar/Spinelli, for developing the "reasonable articulable suspicion" necessary for an investigative stop in Adams v. Williams. The Court established a lower evidentiary standard for stop-and-frisk cases which paralleled the lower level of suspicion and more limited searches and seizures which Terry authorized. Although a test less rigorous than Aguilar/Spinelli was applied to investigative searches and seizures, the Court continued to require

curiam) (holding credibility prong satisfied when police received information "which was so sufficiently detailed to make it inherently reliable").

Spinelli, 393 U.S. at 416 (stating there was no basis of knowledge where source of informant's information was unknown).

4 United States v. Corbitt, 675 F.2d 626, 628 (4th Cir. 1982) (holding knowledge prong satisfied when informant had proved to be a reliable source on prior occasions and told agent that defendant was involved in transport of cocaine from New York to Washington, D.C., on Thursday or Friday, and defendant did); United States v. Strini, 658 F.2d 593, 598 (8th Cir. 1981) (holding knowledge prong satisfied when the informant provided details concerning defendant's appearance, presence in Aspen, Colorado, and flight on which defendant would arrive); United States v. Maher, 645 F.2d 780, 782 (holding knowledge prong satisfied when information concerning marijuana smuggling provided by informant was sufficiently detailed to be clearly based on more than casual rumor).

45 Spinelli, 393 U.S. at 415.

46 See id. at 415-416. (stating that a "magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes Aguilar's requirements when standing alone.")


50 Id. at 146.
that police demonstrate that third party information was “reasonably trustworthy” by requiring a showing that the officer had past experience with a known informant whose credibility could be tested, and that significant aspects of the informants accusation were corroborated by the observations of the officer.\textsuperscript{61} Under that standard, anonymous informants could never have provided a basis for a constitutionally permissible investigative stop.\textsuperscript{62}

In spite of this precedent, in 1983 the Court upheld the use of anonymous informants to establish probable cause in \textit{Illinois v. Gates}. In 1991, it extended the use of anonymous informants to investigative stops in \textit{Alabama v. White}. The following discussion of the pre-\textit{Gates} Supreme Court cases which addressed the question of “reasonably trustworthy” third party sources under the Fourth Amendment is a necessary starting point for understanding the significance of Justice Ginsburg’s contribution to the jurisprudence of the Fourth Amendment in \textit{Florida v. J.L.}\textsuperscript{63}

\textbf{B. Giordenello v. United States}

The question of the propriety of relying on third party information was first discussed directly in \textit{Giordenello v. United States}.\textsuperscript{64} In that case, the defendant alleged that police improperly relied on hearsay in arriving at their probable cause determination and that law enforcement officers merely made conclusory assertions that did not explain any factual basis for determining why those assertions of illegality were reasonable or trustworthy.\textsuperscript{65} In \textit{Giordenello}, a federal agent had secured an arrest warrant for the defendant based on the following assertion of probable cause:

\begin{quote}
The undersigned complainant [Finley] being duly sworn states:

That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code. ‘And the complainant further states that he believes that [there] are material witnesses in relation to this charge.’
\end{quote}

The next day, Agent Finley saw the defendant pull up to his house in a car, saw him enter the house, and saw him leave the house followed by a second car driven by someone Finley described as “a well-

\textsuperscript{61} See \textit{id.} at 146-47 (holding valid an investigative stop where the informant was known to the police officer and was subject to prosecution for filing a false report had her allegations proved in error).
\textsuperscript{62} \textit{Id}.
\textsuperscript{63} \textit{Florida v. J.L.}, 529 U.S. 266 (2000).
\textsuperscript{64} 357 U.S. 480 (1958).
\textsuperscript{65} \textit{Id.} at 486.
\textsuperscript{66} \textit{Id.} at 481.
known police character. Finley followed them to another house and arrested Giordenello when he came out of the house with a brown paper bag. At a pre-trial hearing, Finley admitted that his suspicions with respect to Giordenello were based solely on information he had received from other officers, and from other unidentified persons in Houston.

The Court did not discuss whether it was proper for Agent Finley to rely on third party information, and did not rule directly on the use of hearsay information as the basis for the warrant. Rather, the Court concluded that the assertions in Finley's complaint, with respect to the information received from the source, if one existed, were conclusory and did not comport with Criminal Rules [3] and [4], which required that a complaint for a warrant set out: (1) essential facts of the crime charged, and; (2) facts suggesting that there is probable cause to believe that an offense has been committed and that the defendant committed it.

Further, the Court held that these rules had to be read in light of the Fourth Amendment requirements of "probable cause" and "particularity" with respect to the person or things to be seized. Citing Johnson v. United States, which required that all warrants be presented to a neutral and detached magistrate, the Giordenello Court held that:

[The Fourth Amendment requires that] . . . the inferences from the facts which lead to the complaint . . . "be drawn by a neutral and detached magistrate instead of being judged of the officer engaged in the often competitive enterprise of ferreting out crime." The purpose of the complaint, then, is to enable the appropriate magistrate . . . to determine whether the "probable cause" required to support a warrant exists. The [magistrate] must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

The Supreme Court, in Giordenello, concluded that Finley had presented no evidence upon which a magistrate could make a reasoned decision that Giordenello committed any crime.

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67 Id. at 482.
68 Id.
69 Id. at 482-83
70 Id. at 486.
71 Id. at 485. The clarity of this formulation has not been repeated in subsequent cases. However, it is central to whether police can reasonably rely on an informant. The Agui lar/Spinelli "basis of knowledge of criminality" and the "reliability of the informant" factors are designed to allow a magistrate to be able to make a determination of these two questions. Information from anonymous sources can never provide a credible basis for concluding that either a crime has been committed, or that a particular defendant committed a crime. See discussion infra notes 170-78.
72 Id. The court noted that the language of the Fourth Amendment "of course applies to arrest as well as search warrants."
73 333 U.S. 10 (1948).
74 Giordenello, 357 U.S. at 486 (citing Johnson v. United States, 333 U.S. 10, 14 (1948)) (emphasis added).
determination whether Finley's suspicions were justified.\textsuperscript{75} According to the Court, the complaint in \textit{Giordenello}:

\textit{does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made . . . In these circumstances, it is difficult . . . to assess independently the probability that the petitioner committed the crime charged . . . if this complaint were upheld . . . the complaint would be of only formal significance, entitled to perfunctory approval by the [magistrate] . . . this would not comport with the protective purposes which a complaint [for a warrant] is designed to achieve.}\textsuperscript{76}

\textbf{Commentary}

It is not difficult to conclude that a magistrate would have a difficult time carrying out the judiciary's responsibility of independent fact finding as to whether the officer was reasonable in concluding that "a crime had been committed and that [Giordenello] had committed it,"\textsuperscript{77} based on the summary conclusions presented by Agent Finley.\textsuperscript{78} The bald assertion that Giordenello had "committed a crime" and that the officer believed that there were "material witnesses" to the crime provides little information upon which a magistrate might independently assess whether information the officer relied upon was "reasonably trustworthy," as required by \textit{Carroll} and \textit{Brinegar}.

However, in addition to making clear that magistrates must be presented with sufficient information to independently determine whether the information is "reasonably trustworthy," the Court's discussion of the importance of fulfilling the "protective purposes" of the warrant requirement in \textit{Giordenello} provided a clear explication of the importance of the separation of powers considerations embedded in the structure of the Fourth Amendment.\textsuperscript{80} According to the Court in \textit{Giordenello}, the entire purpose of the warrant requirement was to place the judiciary in a position of oversight of the executive in the execution of search and seizure powers.\textsuperscript{81} In evaluating the subse-

\textsuperscript{75} See id.
\textsuperscript{76} Id. at 486-87 (emphasis added).
\textsuperscript{77} \textit{Carroll} v. United States, 267 U.S. 132, 162 (1925) ("[Probable cause exists where] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [an offense has been or is being committed]." (quoted in \textit{Brinegar}, 338 U.S. 160, 175-76 (1949))).
\textsuperscript{78} As early as 1933, in \textit{Nathanson} v. United States, the Court had held that conclusory statements asserting the guilt of the suspect were insufficient as a basis for probable cause. In \textit{Nathanson}, the application for the warrant stated that the officer "has cause to suspect and does believe" that the defendant possessed contraband liquor. See \textit{Nathanson} v. United States, 290 U.S. 41, 44 (1933).
\textsuperscript{79} See discussion supra note 44.
\textsuperscript{80} \textit{Giordenello}, 357 U.S. at 485-87.
\textsuperscript{81} Id. at 485-86.
quent cases, which further refined the method for determining the "reasonable trustworthiness" of informants, Giordenello continues to provide an important touchstone for considering the fidelity of later cases to this fundamental principle, which remains unchallenged in Supreme Court jurisprudence.  

C. Draper v. United States

Whether it was ever proper to rely on third party informants as a basis for probable cause was still formally an open question as late as 1959 when it was addressed by the Court in Draper v. United States. 83 In Draper, an officer arrested a defendant based on information from a known, previously reliable informant that included: (a) a physical description of an individual and his clothing; (b) the prediction that he would be returning to town on a train in a few days; and (c) the accusation that he would be carrying drugs. 84 When the officer went to the station on the first day mentioned by the informant, no one got off the train who matched the description given by the informant. 85 On the next day, however, a person closely matching the description given by the informant got off the train and began walking "fast" toward the exit. 86 He was arrested on the spot. 87 After the arrest, the officers searched the defendant and found drugs in his possession. 88

In response to the defendant's argument that the arresting officers should not have been permitted to rely on third party information (i.e., "hearsay" evidence that would not be admissible at trial to prove guilt), 89 the Court referred back to Brinegar to establish that evidence need not be admissible at trial to be usable in determining probable cause: "There is a large difference between the two things to be proved [guilt and probable cause] as well as between the tribunals which determine them and therefore a like difference in the quaanta and modes of proof required to establish them." 90 The Court upheld the use of hearsay evidence to find probable cause. But Carroll and Brinegar both required that the information relied upon be "reasonably trustworthy." In the absence of the protections of the

82 At least with respect to warrants, the "originalist" Justice Scalia has been quite forceful on this issue. See discussion infra note 104.
84 Id. at 309.
85 Id.
86 Id. at 310.
87 Id.
88 Id. The contraband was discovered as the result of a search incident to arrest. For a discussion of the "search incident to arrest" doctrine, as its potential for misuse, see Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381 (2001).
89 Id. at 311.
90 Id. at 312 (citing Brinegar v. United States, 338 U.S. 160, 172-75 (1949)).
hearsay doctrine, the Court had few guidelines, other than \textit{Giordenello}, for developing an alternative test to determine when third party sources met the "reasonably trustworthy" requirement.

In \textit{Draper}, the majority held that because the informant had been reliable in the past, the officer was obliged\textsuperscript{91} to arrest the person getting off the train, once he was able to confirm that a person matching the description given by the informant actually existed and was on the train, as predicted by the informant. The Court did not describe how a magistrate would have been able to comply with \textit{Giordenello} by independently determining, on this record, that the informant was "reasonably trustworthy" in accusing the passenger of engaging in criminal conduct.

Although the officer had received no information about how the informant knew of the alleged criminal conduct, the majority was willing to consider the officer's reliance on the informant's accusation of criminality "reasonable" because the informant had been accurate on numerous prior occasions,\textsuperscript{92} and the "corroboration" of predicted legal behavior indicated that the informant knew something about the suspect's activities. However, there was nothing in the information provided to the officer to indicate how the informant knew of Draper's criminality in this instance, even if he had been reliable in providing information in past cases, regarding other individuals.\textsuperscript{93}

In a vigorous dissent, Justice Douglas pointed out that the finding of probable cause in \textit{Draper} violated the principles established in \textit{Giordenello} just a few months earlier:

The officers knew nothing except what they had been told by the informer. If they went to a magistrate to get a warrant of arrest and relied solely on the report of the informer, it is not conceivable to me that one would be granted. For they could not present to the magistrate any of the facts which the informer may have had. They could swear only to the fact that the informer had made the accusation . . . . No magistrate could issue a warrant based on the mere word of an officer, without more.\textsuperscript{94}

Justice Douglas accused the majority of establishing a lower standard for probable cause for on-scene arrest cases than for warrant cases, like \textit{Giordenello}, which was completely unsupported by the Fourth Amendment or previous cases.\textsuperscript{95} Further, he accused the ma-

\begin{footnotesize}
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\item[\textsuperscript{91}] See \textit{id.} at 313 (noting that the officer "would have been derelict in his duties had he not pursued" the tip from the reliable informant).
\item[\textsuperscript{92}] \textit{id.} at 312-13.
\item[\textsuperscript{93}] It was not until \textit{Florida v. J.L.} that any member of the Court articulated this flaw in the reasoning of previous cases. It seems quite clear that \textit{Draper} would not survive scrutiny under \textit{Aguilar/Spinelli}, see discussion \textit{infra} notes 154-75, particularly after the Court's \textit{Florida v. J.L.} opinion, but it is much more likely that an investigative \textit{Terry} stop of Draper would be justified under \textit{Adams v. Williams}. See \textit{infra} text accompanying notes 176-203.
\item[\textsuperscript{94}] \textit{Draper}, 358 U.S. at 324-25.
\item[\textsuperscript{95}] \textit{id.} at 325.
\end{itemize}
\end{footnotesize}
jority of considering the results of the officer's actions in concluding the actions were reasonable, a practice that had been rejected in United States v. Di Re and which is logically inconsistent with the judiciary's Fourth Amendment oversight function.

Commentary

In retrospect, this critique by Justice Douglas was almost certainly correct. The facts in Draper would have been insufficient to support the issuance of a warrant under the Giordenello requirement that a magistrate be sufficiently informed to reach an independent conclusion with respect to the inferences raised by those facts. There were no facts from which to infer the basis of the informant's supposed knowledge of Draper's criminal activity. These facts would most certainly not support the issuance of a warrant under the Aguilar/Spinelli test announced years later. There was simply no information regarding the basis of the informant's knowledge of criminal conduct on the part of the suspect. The conduct observed by the officer was not so inherently suspicious that the officer's observations of the person leaving the train, taken alone, would have justified either the issuance of a warrant or an on-scene arrest. Without the accusations of criminality supplied by the informant, the officer would have lacked any reasonable basis to seize Draper when he stepped off the train. Adherence to the Giordenello standard would have resulted in the Court having to conclude that the suspect had been improperly arrested, a difficult decision in light of the fact that the previously reliable informant in Draper had been accurate once again.

Justice Douglas also correctly maintained that the Court was "not justified in lowering the standard when an arrest is made without a warrant and allowing the officer more leeway than we grant the magistrate." The majority did exactly what Justice Douglas had accused them of doing. The Court established two different standards for probable cause, one for warrants in Giordenello, and another, in Draper, for warrantless on-scene searches and seizures. Of course, these varying standards are inconsistent with "probable cause" as a unitary concept. However, even today, the existence of these varying

96 Id. ("[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))).
97 The Aguilar/Spinelli test requires evidence of the basis of an informant's knowledge of the suspect's criminal conduct, as well as evidence of the reliability of the informant. See infra text accompanying notes 141-61.
99 Draper, 358 U.S. at 325. In fact, years later in United States v. Ornelas, 517 U.S. 690, 699 (1996), the Court held that officers were entitled to less deference than magistrates, and declared that de novo review was applicable in cases that do not involve a warrant.
standards in these two seminal cases has never been acknowledged, or approved, by the Court.\(^{100}\)

The failure to acknowledge the existence of this “two-tiered probable cause” became highly significant in later cases that further developed the “reasonably trustworthy informant” doctrine.\(^{101}\) Draper simply could not be reconciled with the line of probable cause for a warrant cases that developed from Giordenello. Except for one attempt to reconcile the irreconcilable in dicta in United States v. Spinelli, Draper remained, undiscussed and unexplained, on the margins of the probable cause doctrine. However, the consequences of this unacknowledged departure from the Giordenello formulation would prove to have serious consequences that were quite visible in subsequent cases\(^{102}\) because Draper, the exception to the Giordenello line of cases involving warrants, was the case relied upon by Chief Justice Rehnquist to justify lowering the probable cause standard for warrants in Illinois v. Gates some thirty years later.\(^{103}\)

How has this unacknowledged two-tier probable cause standard come to be, and why was it not noted in subsequent cases? The answer may lie in the fact that the Draper opinion, itself, was an anomaly that arose out of Supreme Court perceptions of doctrinal necessity in the period before Terry v. Ohio authorized investigative stops. In retrospect, it appears that the Draper anomaly may have been the result of the Court’s search for an on-scene Fourth Amendment seizure doctrine which, initially, led to the unacknowledged and constitutionally impermissible lowering of the probable cause standard for on-scene arrests in Draper. Later, this concern resulted in the Court’s creation of the Terry stop-and-frisk doctrine based on “reasonableness,” thus avoiding the doctrinal lacuna of multiple definitions of “probable cause” created by the Giordenello/Draper contradiction. Draper was decided almost ten years before Terry v. Ohio authorized the use of investigatory stops on less than probable cause in 1968. Thus, in Draper, the majority faced precisely the difficult “either/or” probable cause problem that Terry eventually resolved by establishing the “reasonable articulable suspicion” and the use of “stop-and-frisk.”

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\(^{100}\) See discussion of Aguilar/Spinelli infra text accompanying notes, 141-50.


\(^{102}\) In Draper, the Supreme Court was faced with exactly the sort of either/or proposition that caused it to create a new category of reasonable stops in Terry v. Ohio nearly eight years later. Under post-Terry doctrine, the officer would be able to justify stopping Draper for investigative purposes by arguing that he had reasonable articulable suspicion of current criminal activity because the assertions of illegality came from a known, previously reliable source. But nothing in Draper suggested that, had the accusations of criminal conduct come from an unknown, anonymous source, the officer would have been justified in seizing a person whose presence on the train had been accurately predicted by that informant. However, this is precisely how Draper was later used by Justice Rehnquist to justify the use of anonymous sources in Illinois v. Gates. See Illinois v. Gates, 462 U.S. 213, 242 (1983).

\(^{103}\) Id. at 243-44.
tactics.\footnote{The intensity of the debate over the need to engage in seizures based on less than probable cause was acknowledged to be at the heart of the endorsement of the “stop and frisk” procedures. See Terry v. Ohio, 392 U.S. 1, 9-20 (1968). At the heart of the debate that gave rise to Terry is the apparent disjuncture between the “reasonableness” clause of the Fourth Amendment and the specific requirements of “probable cause,” “oath and affirmation” and “particularity” requirements of the warrant clause. See U.S. CONST. amend. IV. The issue before Terry was decided is whether “reasonable” searches and seizures could only take place with probable cause, or whether some lesser, independent, reasonable standard was possible. Of course, the Terry Court answered in the affirmative in 1968. However, the debate over this question is far from over. Justice Scalia has asserted that “reasonable” may be determined in the first instance by the Court without reference to the specific features of the warrant requirement. See California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) (stating that the Fourth Amendment’s “reasonableness” requirement should be based on its traditional common law interpretation); Vernonia School District 47J v. Acton, 515 U.S. 646, 653 (1995) (“[A] warrant is not required to establish the reasonableness of all government searches,” and constitutional searches may result under law enforcement “special needs” despite the search being unsupported by probable cause); Whren v. United States, 517 U.S. 806, 817 (1996) (holding temporary detention of a motorist is not unreasonable under the Fourth Amendment if probable cause suggests the motorist committed a traffic violation). This point of view is also reflected in Justice Scalia’s scholarly writings, see Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CItL. L. REV. 1175, 1186 (1989) (arguing that the “reasonableness” of a search and seizure should be determined from the totality of the circumstances involved, a factual determination to be made by the lower courts); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing that judicial interpretation should be guided by the Constitution’s text); Scalia, Originalism: The Lesser Evil, 57 U. Citi. L. REV. 849, 862 (1989) (arguing that constitutional guarantees were enacted “to prevent the law from reflecting certain changes” in values held by the Founders’ society). However, with respect to the warrant clause, itself, Justice Scalia has been adamant in adhering to the probable cause requirement, at least with respect to judicial warrants. See Griffin v. Wisconsin, 483 U.S. 868, 877 (1987) (arguing that if a situation exists mandating a judicial warrant, the matter is also of such a nature as to require probable cause). See also Barry Jeffrey Stern, Warrants Without Probable Cause, 59 BROOK. L. REV. 1985, 1986-87 (1994) (noting that Justice Scalia has challenged the assumption that the Fourth Amendment authorizes warrants outside the traditional probable cause definition).}

The view that the Framers intended that law enforcement, and the courts, could engage in “reasonable” searches and seizures, without reference to warrant standards has also received scholarly support from other sources. See AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097 (1998). However, this view of the historical underpinnings of the “reasonableness” clause has been powerfully called into question by the work of Prof. Thomas Y. Davies. See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547 (1999) (presenting compelling historical evidence that misuse of warrants was the central problem to which the framers addressed their attention and that the “reasonableness” clause derived from the warrant clause and was not intended to convey a separate concept.).

In addition, recently republished writings by Professor Mitchell Franklin present yet another perspective on the “originalism” debate. See DIALECTICS OF THE U.S. CONSTITUTION: SELECTED WRITINGS OF MITCHELL FRANKLIN (James M. Lawler, ed., 2000). A student of French philosophy who wrote in the 1940’s and 1950’s, Professor Franklin revealed largely overlooked antecedents to the American Constitution in the writings of the “encyclopaedists” of France and the traditions of the Roman Code. He made the point that the Founders, certainly Jefferson and Madison, were familiar with this philosophical tradition that embraced a written codification of the law as a means of ensuring its fair and equal application over time. The development of a written constitution, itself, was a rejection of the un-written constitution and unwritten common law tradition of England. Id. at 64. When viewed as a “code,” the Constitution should be read as a whole, with an attempt to harmonize variations, rather than parsing individual phrases for a more intuitive reading. See id. This method of constitutional interpre-
a manner that allowed the officer to effectuate an on-scene arrest, or the suspect would be allowed to go free. Prior to Terry, the Court faced the problem of how to accommodate law enforcement concerns for crime prevention to allow the on-scene investigation procedures that Terry acknowledged were widely practiced, and which were widely considered by police to be essential.\(^\text{105}\)

The effects of the tendency to lower probable cause standards in warrantless arrest situations, prior to the advent of the Terry doctrine, were evidenced by the majority's comment in Draper that the officer was obliged to arrest the suspect, once the officer had corroborated the legal activity predicted by the informant,\(^\text{106}\) even though it was quite plain that the informant had been no more precise about the basis for his accusations of criminality than had the federal agent in Giordenello.\(^\text{107}\) Of course, as pointed out many years later by Justice Ginsburg in Florida v. J.L., corroboration of predictions of legal conduct does not explain how even a formerly reliable informant's accusations of criminality are accurate in any particular instance.\(^\text{108}\)


\(^{106}\) Draper v. United States, 358 U.S. 307 (1959), the Supreme Court's first major example of the Terry doctrine, involved a warrantless false arrest of a drug dealer. The dealer was stopped and searched, and drugs were found in his possession.

\(^{107}\) Terry v. Ohio, 392 U.S. 1 (1968), was the Supreme Court's first major example of the Terry doctrine, involving the search and seizure of a wallet containing drugs.

\(^{108}\) See discussion supra text accompanying notes 97-98.
In terms of the subsequent Aguilar/Spinelli test, the officer failed to establish the informant’s “basis of knowledge” in Draper and, on the same facts, the Court would have been obliged to suppress the results of the arrest under the Aguilar/Spinelli test. However, it is also true that, after Terry v. Ohio and certainly after Adams v. Williams, there is little question that the officer in Draper would have been able to make an investigatory stop, and probably justify a frisk, based on the known informant’s tip. This, in turn, would likely have led to the arrest of Draper. Under post-Terry doctrine, the officer would have had a reasonable articulable suspicion that crime was afoot under the standard for investigative Terry stops established in Adams v. Williams.

The unacknowledged existence of this two-tier probable cause standard was problematic because, after Terry authorized investigative stops on less than probable cause, whatever doctrinal necessity for the two-tier standard that may have existed at the time Draper was decided had clearly passed. Had the Court acknowledged the doctrinal reality that Justice Douglas had pointed out—that Draper had created a lower standard for on-scene arrests (that was both improper and unnecessary after Terry)—it would have been clear that Draper was inconsistent with Giordenello and did not apply in warrant situations at all. However, in light of the fact that the Fourth Amendment does not provide for this two-tier probable cause standard, it would have required an unusually candid majority to admit this departure from essential Fourth Amendment norms.

Another problematic aspect of the Court’s failure to acknowledge the anomalous nature of the Draper reasoning was the use of a generalized form of “corroboration” of predictions of legal behavior to support accusations of illegality, which Draper authorized and which remained part of Supreme Court jurisprudence. The precise value that corroboration of predicted legal behavior might logically have in determining probable cause remained undefined and the limitations on the use of corroboration that were central to the majority’s reasoning in Draper remained unexplored, except for some discussion in dicta in United States v. Spinelli. The result was that the Court’s failure to acknowledge the existence of a two-tier probable cause doctrine made possible the use of Draper as precedent for the “totality of the circumstances” test and the use of anonymous informants in Illinois v. Gates nearly twenty-five years after Justice Douglas sounded his warning. When the Court referred to Draper as precedent in post-Terry cases, the effects of this crucial change in search and seizure doctrine, which made Draper an anachronism, and the anomalous na-

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109 See discussion supra text accompanying notes 104-05.
110 See discussion infra notes 176-203.
111 See discussion infra notes 154-75.
tured of Draper with respect to the Giordenello/Aguilar/Spinelli line of cases was not, and has not been, noted by the Court.\(^\text{113}\)

Justice Douglas was also concerned that the majority was violating a fundamental logical principle, which the Court made explicit in United States v. Di Re. "A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."\(^\text{114}\) The outcome in Draper suggests that this task of the judiciary is much easier to accomplish when a magistrate is presented with a request for a warrant before a search or seizure, rather than having to rule on the "reasonable trustworthiness" of an informant after an on-scene arrest has established that the informant was accurate, as occurred in Draper.\(^\text{115}\) The tendency of law enforcement officers, and the courts, to engage in retrospective justification for arrests or searches is an issue that continues to re-appear in later cases.\(^\text{116}\)

The development of the post-Draper probable cause doctrine occurred exclusively in the context of warrant cases. This may have been due, at least in part, to the fact that allegations of probable cause presented to magistrates in complaints, prior to the issuance of a warrant, establish a clear factual basis upon which to rule, and can readily be evaluated on appeal.\(^\text{117}\) In addition, prior to the creation of the Terry stop-and-frisk doctrine in 1968, the tendency to validate on-scene arrests by lowering probable cause discussed above, together with the opportunity for officers to tailor factual descriptions in after-the-fact probable cause hearings,\(^\text{118}\) made on-scene arrest cases unlikely candidates for the development of a principled and consistent "reasonably trustworthy" third party informant doctrine.\(^\text{119}\) Moreover, it was not until 1975 that the Supreme Court clearly established that judicial review of "on-scene" probable cause determinations was re-

\(^{113}\) See Gates, 462 U.S. at 242.

\(^{114}\) United States v. Di Re, 332 U.S. 581, 595 (1948) (holding that an inference of probable cause from respondent's submission to custody and failure to discuss charges with his arresting officer was unwarranted). This temptation to view the basis for probable cause retrospectively, after police have been shown to have guessed right is powerful, and has at times been explicitly violated, as later cases demonstrate. See discussion of Illinois v. Gates, Alabama v. White and Florida v. J.L. infra text accompanying notes 205-43, 281-344, 345-91.

\(^{115}\) This concern for post-hoc judicial findings being influenced by the success of the seizure or search has not diminished over time and was a concern expressed by Justice Kennedy in Florida v. J.L. and by Justice Stevens in his dissent in Alabama v. White. See infra text accompanying notes 315-18.

\(^{116}\) Id.

\(^{117}\) The Court has recognized that after the fact judicial review presents particular problems and has held that the deference shown to magistrates in warrant cases is inappropriate in on-scene encounters. See United States v. Ornelas, 517 U.S. 690 (1996) (holding that determinations of probable cause and reasonable suspicion to make a warrantless search should be reviewed de novo on appeal).

\(^{118}\) See White, 496 U.S. at 333 (Stevens, J., dissenting).

\(^{119}\) Some of this ongoing concern that non-warrant cases may be particularly difficult to evaluate, together with a deference to magistrates in warrant cases was reflected in Ornelas, 517 U.S. at 697.
quired in *Gerstein v. Pugh.* In any case, after *Draper,* the development of third party source doctrine took place in the context of cases involving warrants and *Draper* was not central to the development of the doctrine, until the use of "corroboration" of predicted behavior in *Draper* was used by Justice Rehnquist to justify the use of anonymous informants in *Illinois v. Gates.*

D. *Aguilar v. Texas*

The next case in which the Court discussed the "reasonable trustworthiness" of informants was *Aguilar v. Texas,* an arrest warrant case. The Supreme Court had another opportunity to describe how information received from a third party might be considered "reasonably trustworthy" in the absence of hearsay limitations. In support of the request for an arrest warrant in *Aguilar,* the officers stated: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law."

The Court had no difficulty concluding that these statements did not present sufficient facts for a magistrate to determine independently whether the information was "reliable," whether the informant was "credible" and whether their belief that a crime had been committed by the defendant was "reasonable." According to the Court, "[t]he vice in the present affidavit is at least as great as in *Nathanson* and *Giordenello.* Here, the "mere conclusion" that petitioner possessed narcotics was not even the conclusion of the affiant, himself; it was presented in the affidavit as the conclusion of an unidentified informant. Corroboration of the informant’s statement was not an issue in the case and *Draper* was not discussed.

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120 420 U.S. 103 (1975) (holding that a person arrested and held for trial under prosecutor’s information is entitled to a judicial determination of probable cause for extended pretrial restraint of liberty under the Fourth Amendment, but is not constitutionally entitled to a determination of probable cause in the form of an adversary hearing where one respondent was denied bail and another was unable to post bond).


122 *Id.* at 109.

123 *Id.* at 114.

124 290 U.S. 41 (1933) (holding that the Fourth Amendment disallows the issuance of a warrant to search a private dwelling in the absence of a finding of probable cause from facts or circumstances presented, and that mere affirmation of a suspicion is insufficient) (footnote added).

125 357 U.S. 480 (1958) (holding that the seizure of narcotics was illegal where the complaint contained no affirmative allegation that the affiant spoke with personal knowledge of complaint, no sources for complainant’s belief and no other sufficient basis upon which probable cause could be established) (footnote added).

126 *Aguilar,* 378 U.S. at 113.

127 *Id.*
While agreeing that hearsay could be used as a basis for probable cause, the Court held that the magistrate should have been informed of: (1) some facts "from which the informant concluded that the narcotics were where he claimed they were," and (2) the circumstances from which the officer concluded that the informant was credible. Without this information, a magistrate would be unable to carry out the constitutionally mandated function of making an independent determination as to whether the information relied upon by the officer met the "reasonable trustworthiness" standard described in Carroll and Brinegar. The Court made clear that the evil it sought to prevent was rooted in separation of powers concerns raised earlier in Giordenello because, in the absence of such information, the "inferences from the facts that lead to the complaints" will be those of law enforcement, rather than the judiciary.

Commentary

Aguilar v. Texas follows directly from Giordenello in setting forth the type of information that would be logically required for a magistrate to carry out the independent evaluation of inferences required by Giordenello and Johnson. The "reasonable trustworthiness" of any third party can be evaluated independently only if there are facts bearing on the officer's reasons for relying on the veracity of the source and the basis of knowledge of the source are explained in sufficient detail to allow reasonable inferences to be drawn by a magistrate. The two prongs of this test not only eliminate the use of anonymous informants, but also make clear the nature of the shortcomings in the information provided by the informant in Draper. Had a warrant been requested on the pre-arrest facts in Draper, it would certainly have failed the second "basis of knowledge" prong of Aguilar.

Draper was not discussed in Aguilar, perhaps because it was a warrant case, or perhaps because there was no effort in Aguilar to cor-

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128 Id. at 114.
129 Id.
130 "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 160, 162 (1925)).
131 See discussion supra text accompanying note 74.
robate any information provided by an informant. The apparent contradiction between the Giordenello/Aguilar requirements for findings of probable cause by magistrates and the post-arrest finding of probable cause in Draper remained unexplained. Also, while Aguilar established a baseline for making reasoned determinations as to the reasonable trustworthiness of third parties, it is worth noting that the formulation it established of "basis of knowledge" and the "veracity" or "reliability" of informants did not make clear that the crucial question was the informant's basis of knowledge of illegality and the veracity of the source with respect to accusations of criminality. The lack of clarity on this question later contributed to the illogical use of corroboration in "totality of the circumstances" cases. This lack of precision in describing the importance of focusing on the reasonable trustworthiness of the accusations of illegality was not remedied until the Court issued its opinion in Florida v. J.L.\textsuperscript{133}

\textbf{E. United States v. Spinelli}

\textit{United States v. Spinelli}\textsuperscript{134} was also a warrant case, but, like Draper, police corroborated at least some of the legal behavior and facts predicted by an informant. However, unlike Draper, there was no indication that the informant had been reliable in the past, and there was no "basis of knowledge" as required by Aguilar. In Spinelli, the FBI agents asserted that they had received information from an unidentified informant that the defendant was running an illegal bookmaking operation. The affidavit for the warrant did not describe the identity or past reliability of the informant, or describe the basis of the unidentified informant's knowledge of the alleged illegal activity. It also failed to describe the operation in any detail, except to mention the telephone numbers that the defendant was allegedly using in the illegal operation.\textsuperscript{135}

This information was passed on to local law enforcement officers and they carried out several days of surveillance, during which they observed the defendant traveling back and forth between St. Louis, Missouri and East St. Louis, Illinois, and entering an apartment of a third person to whom the two telephone numbers were listed.\textsuperscript{136} Although there was nothing illegal about any of these acts, the State argued that they took on new significance in light of "other information"\textsuperscript{137} that made otherwise innocent conduct suspicious. The portion of the application for the warrant that the State argued con-

\begin{footnotesize}
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\begin{enumerate}
\item[133] See discussion infra text accompanying note 373.
\item[134] 393 U.S. 410 (1969).
\item[135] \textit{Id.} at 413-14.
\item[136] \textit{Id.} at 413.
\item[137] \textit{Id.} at 415.
\end{enumerate}
\end{footnotesize}
verted these otherwise innocent acts into suspicious conduct worthy of probable cause was the following:

William Spinelli is 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.

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 the telephones . . . . [The numbers matched phones assigned to the apartment that Spinelli was seen entering and leaving].

The Circuit Court of Appeals upheld the finding of probable cause on a "totality of the circumstances" test, under which it held that the innocent activity was given a "suspicious color" by the unidentified informant's tip, and that law enforcement observations of otherwise legal conduct sufficiently corroborated the tipster's assertions of illegality. The Court held that, even though police had observed a great deal of activity and had corroborated the use of phones predicted by the informant, it was the portion of the tip that included the accusations of illegality which required "a more precise analysis."

According to the Court in Spinelli, the proper question was whether the tip, even when partially corroborated by independent sources, would pass the constitutional requirements of Aguilar. In this case, as in Aguilar, there was no independent basis upon which to evaluate the credibility of the informant, other than corroborate the prediction that the defendant knew someone with the same telephone numbers given by the informant. In addition, there was no basis upon which a magistrate could independently conclude how the informant learned of the bookmaking operation.

We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at [his illegal] work or that he ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable.

The Supreme Court held that the warrant was not supported with reasonably trustworthy evidence of illegality under the "reliability of

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132 Id. at 422.
133 Id. at 415.
134 Id. This is a good example of the logical leap that Justice Ginsburg identified in Florida v. J.L., 529 U.S. 266, 271 (2000) ("Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband."). See discussion infra text accompanying notes 366-80.
135 Spinelli, 393 U.S. at 415.
136 Id. at 416-17.
137 Id. at 416. This is also the apparent flaw in the information upon which the arrest was based in Draper. See discussion supra note 102.
the informant” and the “informant’s basis of knowledge of illegality” standards established in *Aguilar*.\textsuperscript{144}

In dicta, the Court attempted to rationalize *Draper* with the requirements of *Giordenello* and with the even more precise requirements of *Aguilar*.\textsuperscript{145} However, rather than acknowledging that *Draper* was an on-scene arrest case that had, in fact, created a lower probable cause standard prior to the adoption of the *Terry* stop-and-frisk doctrine,\textsuperscript{146} the Court speculated that there might be some situations in which the “totality of the circumstances” language used in the Court of Appeals opinion might provide the basis for probable cause.\textsuperscript{147} However, the Court stated that it need not address that question directly because, in *Spinelli*, “the informer’s tip [was] a necessary element in a finding of probable cause, [and] its proper weight must be determined by a more precise analysis.”\textsuperscript{148} In *Spinelli*, there was no statement “detailing the manner in which the information was gathered.”\textsuperscript{149}

If a “particularized description” by an informant was to have value, as it did in *Draper*, according to the *Spinelli* dicta, the “tip [must] describe . . . the criminal activity in sufficient detail that the magistrate may know . . . he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely [upon] an individual’s general reputation.”\textsuperscript{150} The *Spinelli* Court cited *Draper* as an example of the amount of detail that would be sufficient.\textsuperscript{151} The Court pointed out that the informant’s description of Draper and the prediction of Draper’s future behavior was far more detailed than the facts alleged by the informant in *Spinelli*, which consisted only of Spinelli’s use of “his specified telephones and

\textsuperscript{144} See *Spinelli*, 393 U.S. at 419 (noting that the Court could not “sustain this warrant without diluting important safeguards”).

\textsuperscript{145} See id. at 416-18 (stating that the information provided in *Draper* was detailed and corroborated by police investigation, which justified the magistrate’s conclusion that the informant was reliable).

\textsuperscript{146} See *Draper*, 358 U.S. at 311-13 (finding that the standard for probable cause could be met regardless of whether the evidence upon which probable cause was based was hearsay and could not be admitted at trial). Cf. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968) (noting that the reasonableness of a warrantless search depends on the interests of law enforcement, the government, and the public in conducting the search balanced against the interests of the private citizen’s privacy rights).

\textsuperscript{147} See *Spinelli*, 393 U.S. at 415 (stating that a more precise analysis” is required where the informer’s tip is necessary for a finding of probable cause).

\textsuperscript{148} See id. at 415 (stating that the “totality of the circumstances” approach was too broad in this instance).

\textsuperscript{149} Id. at 416. The Court stated that where there is no statement explaining how the information was gathered, the tip must “describe the accused’s criminal activity in sufficient detail that the magistrate may know that he is relying on something more than a casual rumor . . . or an accusation based merely on an individual’s general reputation.”

\textsuperscript{150} Id.

\textsuperscript{151} See id. (stating that “[t]he detail provided by the informant in *Draper* provides a suitable benchmark”) (citation omitted).
that these phones were being used in gambling operations." The corroboration of the informant’s knowledge of Draper’s comings and goings was, therefore, much more predictive of illegal activity than the tip in this case. In addition, the activity observed in Spinelli was not so unusual that it provided additional suspicion in and of itself.  

Commentary

The issuance of a warrant based on unsupported assertions that law enforcement officials “knew” that Spinelli was involved in a crime would clearly violate the separation of powers required by the warrant clause discussed in Giordenello and Aguilar v. Texas. Moreover, if the magistrate could rely on the assertion of a local law enforcement officer that the FBI concluded that their informant was credible and reliable, the result would be the same. In this posture, not only was there no basis for an independent determination of whether the affiant or the FBI was reasonable in believing the informant, by the time the information provided to the FBI was relayed to the magistrate by local law enforcement, it was double hearsay. Even though both Draper and Spinelli involved some corroboration of predicted legal activity, both relied on the accusations of illegality made by the informant and the problem presented by both cases was that the officer observed legal conduct that was suspicious only because of accusations of criminality by the informant. The question is why should the observation of legal conduct result in a finding of probable cause in Draper but not in Spinelli?

First, it is worth noting, as did Justice Ginsburg in Florida v. J.L., that even intimate knowledge of another’s legal activities reveals little or nothing about the basis of their accusations of criminal conduct.

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152 Spinelli, 393 U.S. at 417. The Court noted that the information “could easily have been obtained from an offhand remark heard at a neighborhood bar.” Id.
153 See id. (noting that “[a]t most, these allegations indicated that Spinelli could have used the telephones specified by the informant for some purpose”).
154 See Aguilar, 378 U.S. at 114-15 (noting that where a warrant is to be issued based on an informant’s tip, the magistrate must be informed of the circumstances justifying the law enforcement officer’s belief in the information, otherwise the warrant would not be based on the conclusion of “a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer”).
155 See Spinelli, 393 U.S. at 418. See also supra note 56.
156 See id. at 415-16 (characterizing the report as “hearsay”).
157 Of course, had the officer observed inherently suspicious conduct, an arrest could have occurred without reliance on the anonymous source’s allegations at all. See discussion of Brinegar supra note 44.
158 See Draper, 358 U.S. at 313 (stating that since the informant’s information about the suspect’s legal behavior and dress gave the officer “reasonable grounds” to believe that the remaining unverified bit of Hereford’s information—that Draper would have heroin with him—was likewise true). See also Spinelli, 393 U.S. at 417-18 (noting that information provided by the informant regarding the suspect’s use of his specified telephones does not provide evidence of criminal conduct because the use of telephones for bookmaking is legal).
Moreover, the portion of the *Spinelli* opinion that discusses *Draper* failed to focus on the major distinction between the source of the information in *Draper* and that in *Spinelli*.\(^{160}\) Even a cursory comparison of *Draper* and *Spinelli* makes clear that the allegations of illegality by the informant in *Draper* were not more trustworthy simply because they were *more detailed*, since the details that were corroborated in both cases involved only legal activity. Rather, the Court in *Draper* found the informant’s allegations of illegality to be reliable because the informant was well known to the officer and had been accurate on numerous previous occasions.\(^{161}\)

The description of the defendant in *Draper* was certainly more detailed than in *Spinelli*,\(^{162}\) thus providing additional support for the idea that the informant knew something about Draper’s legal comings and goings. However, this difference in the level of detail that does not really distinguish the two cases because Draper’s actions in getting off the train were no more inherently suspicious than Spinelli’s multiple trips across Mississippi, and perhaps less so. Also, even if the corroboration of predicted legal behavior was more detailed, as Justice Ginsburg later made clear in *Florida v. J.L.*, the corroboration of the predictions of legal behavior could reveal nothing about the basis of the informant’s knowledge of criminal activity.\(^{163}\)

Rather, the *Draper* majority found it was reasonable for the officer to rely on the informant with respect to the allegations of illegality because the informant was *known* to the officer and had been *reliable* in the past.\(^{164}\) In *Spinelli*, the warrant affidavit did not provide any basis at all for concluding that the informant had been reliable at any time.\(^{165}\) Similarly, had the officer in *Draper* not relied on the informant in the past, it is inconceivable that the majority in that case would have upheld the seizure of a person getting off a train, merely because a person of unknown reliability predicted the physical description and clothing of a passenger who would be arriving from New York in the near future.\(^{166}\) There is nothing in *Spinelli* that suggests that the “totality of the circumstances,” or *Draper*, support the use of anonymous informants.

\(^{160}\) See *Spinelli*, 393 U.S. at 416-17 (focusing on the detail of the information provided by the informant in *Draper*).

\(^{161}\) See id.

\(^{162}\) See id. at 417 (noting that the informant in *Draper* provided Draper’s travel schedule and, “with minute particularity,” Draper’s clothing, while the *Spinelli* informant did not provide such detailed information).

\(^{163}\) See *J.L.*, 529 U.S. at 272. (stating that information about a suspect’s legal behavior is not evidence about the accuracy of the information regarding illegal activity).

\(^{164}\) See *Draper*, 358 U.S. at 313 (noting that the police officer had repeatedly received accurate information from the informant).

\(^{165}\) See *Spinelli*, 393 U.S. at 418.

\(^{166}\) See *Draper*, 358 U.S. at 324 (Douglas, J., dissenting) (stating that “the officers had no evidence—apart from the mere word of an informer—that petitioner was committing a crime”).
However, the reference to corroborating detailed descriptions of predicted conduct in *Draper*, and to a possible “totality of the circumstances” test for probable cause in the *Spinelli* dicta, obscured the fact that, under the *Aguilar/Spinelli* “basis of the informant’s knowledge” and “reliability of the informant” test, there could not have been a finding of probable cause in *Draper* itself. The unexamined existence of *Draper*, in the line of “informant based” probable cause cases created a fundamental contradiction with *Giordenello*, and all of the subsequent “probable cause for a warrant” cases involving informants.

In *Draper*, the “reliability of the informant” prong of the test was certainly met because the officer had relied on the informant on numerous occasions in the past, but the informant’s accusations of criminality in *Draper* were, as pointed out by Justice Douglas, mere assertions that a magistrate could not have relied upon in issuing a warrant. No matter how detailed the predictions of legal behavior, and no matter how detailed the corroboration of this legal behavior, the basis for the informant’s accusations of illegality, required under *Aguilar/Spinelli*, could not have been established under the facts in *Draper*.

The consequence of the failure of the Court to acknowledge the creation of a lower probable cause standard for on-scene arrests in *Draper*, alluded to above, can be seen in the difficulty the majority had in reconciling *Draper* to the requirements of *Giordenello* and *Aguilar* in the *Spinelli* dicta. Justice Douglas’ dissent had already pointed out that *Draper* could not be reconciled with *Giordenello*, but, since the creation of the two-tiered probable cause standard would have been difficult to acknowledge without calling into question the integrity of the Court’s probable cause jurisprudence, the majority apparently felt obligated to try.

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167 See *Spinelli*, 393 U.S. at 416-17 (comparing the detail of the information provided by the informants in *Draper* and *Spinelli*).
168 See id. at 415 (noting that “a more precise analysis” is necessary where the informant’s tip is needed to find probable cause).
169 See id. at 415-16 (stating that the officers would have been unable to obtain a warrant if they had approached a magistrate with only the information from an informant).
170 See *Spinelli* at 426-28 (White, J., concurring). In his concurrence in *Spinelli*, Justice White examined two possible interpretations of *Draper*. He indicated that he was doubtful of the decision in *Draper* if it held that the verification of nine independent details provided by an informant makes the tenth reliable, even if unrelated to criminal activity, and sufficiently probable to justify a warrant. Id. at 426-27. According to Justice White, *Draper* should be read to mean that the type of detail corroborated by a law enforcement officer must support an inference of criminal activity. Id. at 427-28. The detail in *Draper* met this test because police observation corroborated facts not generally known except to those intimately involved in making arrangements for meeting the suspect. Id. However, the lack of clarity with respect to the proper uses to which corroboration might be put was to continue until resolved in *Florida v. J.L.*.
171 See discussion supra notes 95-115.
172 See *Draper*, 358 U.S. at 324-25 (Douglas, J., dissenting) (citing *Giordenello* in support of his dissent).
Also pointed out earlier, the effort to affect this reconciliation in Spinelli was not only fruitless, it was also pointless. Because Spinelli was decided the year after Terry had authorized on-scene investigative stops, whatever practical justification might have existed earlier for the lower probable cause standard had been eliminated. Had the Spinelli Court simply overruled Draper as inconsistent with Giordenello and Aguilar, which it could easily have done after Terry without doing damage to on-scene police investigative practices,175 the problem of differing probable cause standards raised by Justice Douglas, which eventually led to Illinois v. Gates, would have been put to rest.

However, the Court did not overturn Draper outright, and the result was a continuation of the unacknowledged, two-tiered standard for determining probable cause: the Giordenello/Aguilar/Spinelli test for warrant cases, and another, unacknowledged, lower standard for on-scene arrests arising from Draper.174 Further, the references to Draper in the Spinelli dicta left unresolved the circumstances in which corroboration of an informant’s predictions of legal conduct might be used in determining the existence of probable cause.175

F. Adams v. Williams

The last significant “reasonably trustworthy” third party source case176 decided before Illinois v. Gates was Adams v. Williams.177 Adams

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175 Terry v. Ohio had been decided in 1968, the term preceding the Court’s opinion in Spinelli, and the reason for differentiating on-scene arrests from the issuance of warrants no longer existed at the time Spinelli was decided. Had the Court forthrightly acknowledged the confusion caused by that apparent lowering of standards in Draper and firmly established the two-prong test as the basis for probable cause, the later difficulty with anonymous sources being able to “lie with impunity” would not have arisen and Draper would have been unavailable for precedential purposes.

174 The Court has recognized a distinction between on-scene probable cause determinations and judicially authorized warrants. See Ornelas v. United States, 517 U.S. 690 (1996) (holding that the deference accorded magistrates is inappropriate when a warrantless search or seizure is at issue). An officer’s probable cause determination is subject to de novo review.

173 See Spinelli, 393 U.S. at 416-18 (comparing the level of detail provided by the informants in Draper and Spinelli).

172 Prior to Illinois v. Gates, the Court decided two informant probable cause cases that applied the Aguilar/Spinelli test. See United States v. Harris, 403 U.S. 573, 575 (1971), in which a plurality upheld a warrant based on information from a source of unknown reliability, whom the officer characterized as a “prudent person” with an affidavit that included the following: (1) Harris had a reputation as a bootlegger; (2) “all types” of people supplied information regarding his “activities”; (3) another officer had found bootleg whiskey with Harris four years earlier. The plurality also considered it important that the informant, who was known to police, had admitted the purchase of illegal alcohol and had made statements against his penal interest. Id. at 580.

Harris is interesting because of what it reveals about the difficulty the Court continued to have in reconciling Draper with Aguilar/Spinelli. Because the case did not have a majority opinion and has had little impact on the development of the doctrine, it is not discussed in any detail. For a discussion of Harris, see The Supreme Court, 1970 Term—Highlights of the Term, 85 HARV. L. REV. 40, 53 (1971). See also Taylor v. Alabama, 457 U.S. 687 (1982) (holding that there was no probable cause in the absence of the “reliability” prong of Aguilar/Spinelli).
established the standards to be applied to "reasonably trustworthy" third parties in the context of a Terry stop-and-frisk based on "reasonable articulable suspicion," rather than on probable cause. In Adams, a person known to police, who had provided information in the past, reported that a suspect in the immediate vicinity was selling drugs and was carrying a concealed weapon. The informant described the individual, the car in which he was sitting, and the precise location of the suspect's gun.

Based on this third party information, the officer approached the car and ordered the suspect, who was unknown to him and who had not been acting suspiciously, out of the car. Rather than following the officer's instruction to exit the car, the suspect rolled down the car window. The officer then reached into the car and seized a weapon in the waistband of the suspect's trousers in the place predicted by the informant. The suspect was arrested, charged, and convicted.

A majority of the Court upheld the officer's investigative stop of the defendant and upheld the search that resulted in the seizure of the weapon as valid under Terry v. Ohio. On the question of the "reasonable trustworthiness" of the third party report, the Court held that the officer was reasonable in relying on the informant because the informant was known to the officer and had provided information in the past, and had accurately described the suspect and the car.

In response to the dissent's argument that the source had not been shown to have been reliable in the past, the majority held that the Aguilar/Spinelli two-prong test could be met with a lessened showing of reliability in Terry stop-and-frisk cases. The majority concluded that the officer had reasonably relied on the informant because she was known to the officer and could have been prosecuted for filing a false report.

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178 See id. at 148-49.
179 Id. at 144-45.
180 Id. at 148.
181 Id. at 145. The suspect's behavior upon being approached by the officer may have provided an additional basis for the officer's actions. The question was whether there was a "stop" when the officer approached the car and asked the suspect to roll down the window, or whether the "stop" actually occurred when the officer reached into the waist band of the suspect's clothing. It is possible that the order to exit the car was not a seizure which would have implicated the Fourth Amendment as defined under Florida v. Bostick, 501 U.S. 429 (1991), and California v. Hodari D., 499 U.S. 621 (1991). If this is the case, the seizure would have occurred when the officer reached into the car, which occurred after the suspect behaved in a manner that the officer deemed suspicious. This suspicious conduct would have augmented the tip from the known informant. However, this fine distinction is not discussed by the majority or the dissent.
182 See id.
183 Id. at 148.
184 Id. at 146-47.
185 See id. at 192 (Brennan, J., dissenting).
false report had her allegations of criminality proved unfounded.\textsuperscript{186} The Court took great pains to distinguish the application of \textit{Aguilar}/\textit{Spinelli} for probable cause purposes from the related, but lower, standard for investigative searches and seizures.\textsuperscript{187} However, there is nothing in the opinion to suggest that the officer would have been justified in seizing or searching the suspect based on an anonymous report,\textsuperscript{188} or that the \textit{Aguilar}/\textit{Spinelli} factors could be eliminated completely had the predictions of \textit{legal} conduct by the informant been particularly detailed and been corroborated by the officer.\textsuperscript{189}

\section*{Commentary}

The \textit{Adams v. Williams} majority suggests that the "basis of knowledge" and "reliability" standards of \textit{Aguilar}/\textit{Spinelli} had a significant bearing on determining the "reasonable trustworthiness" of the third party source in investigative searches and seizures, but held that investigative stops require a relaxed version of the same analysis.\textsuperscript{190} The "reliability" prong was met for \textit{Terry} stop purposes, according to the Court, by the known informant having subjected herself to legal consequences had she been wrong.\textsuperscript{191} The "basis of knowledge" prong was met sufficiently, at least for purposes of an investigative stop, by corroboration of the informant's description of the suspect and the car.\textsuperscript{192} In addition to the officer's corroboration of the description provided by the informant, the suspect also failed to exit the car as instructed by the officer, thus arguably giving the officer additional information which might reasonably have added to any suspicions raised by the report of the informant.

Whether this additional information was significant with respect to the justification for the stop or not, the Court made clear that it was \textit{not} the corroboration of predicted legal facts that made the third party allegations of criminal conduct "reasonably trustworthy."\textsuperscript{193} Rather, like \textit{Draper}, it was the receipt of information from \textit{known} in-

\textsuperscript{186} Id. at 147.
\textsuperscript{187} Id.
\textsuperscript{188} The Court stated that "[t]his is a stronger case than obtains in the case of anonymous telephone tip." \textit{Id.} at 146.
\textsuperscript{189} The reference to \textit{Draper}-type corroboration in \textit{Spinelli} presented analytical difficulties that were to plague the \textit{Aguilar}/\textit{Spinelli} doctrine for years to come and provided precedential support for corroboration of anonymous sources in \textit{Illinois v. Gates}. See discussion infra note 229.
\textsuperscript{190} See \textit{Adams}, 407 U.S. at 147 (noting that "[o]ne simple rule will not cover every situation"). For a contemporary critique of \textit{Adams v. Williams}, see \textit{The Supreme Court, 1971 Term—Constitutional Law}, 86 \textit{Harv. L. Rev.} 171, 181 (1972) (pointing out that possible fabrication of the tip was one of the unexplored issues in the case).
\textsuperscript{191} \textit{Id.} at 146-47 (explaining that because the informant could have been arrested for making a false complaint, the information was sufficiently reliable to justify the forcible stop).
\textsuperscript{192} Viewed this way, \textit{Adams} actually appears to be a post-\textit{Terry} reprise of \textit{Draper}, in which the effects of the expansion of Fourth Amendment to include a lower level of suspicion to justify investigative stops can be seen in operation.
\textsuperscript{193} \textit{Id.} at 148-49.
formants, who: (a) in the context of a probable cause determination in *Draper*, had given reliable information in the past; and, (b) in the context of a "reasonable articulable suspicion" determination in *Adams v. Williams*, had exposed herself to adverse legal consequences had she been incorrect.\textsuperscript{194} Seen this way, neither *Draper* nor *Adams v. Williams* provides convincing precedent for using corroboration as a substitute for establishing the reliability of the source with respect to allegations of criminality, as occurred in the later anonymous source cases.\textsuperscript{195}

However, because *Draper* had not been clearly overruled, it remained available as precedent for an additional standard that could be applied to informants in situations that did not meet the *Aguilar/Spinelli* test, and which, in some undefined fashion, relied on corroboration of predicted behavior as a basis for probable cause.\textsuperscript{196} Between 1969 and 1983, the Supreme Court addressed the "reasonably trustworthy" informant question in only a few cases, notably *United States v. Harris*,\textsuperscript{197} *Whiteley v. Warden*\textsuperscript{198} and *Taylor v. Alabama*,\textsuperscript{199} none of which, however, discussed the contradiction between *Gior-
denello/Aguilar/Spinelli* and *Draper* to any significant extent. While

\textsuperscript{194} *Id.* at 146-47. See *supra* text accompanying note 186.

\textsuperscript{195} *J.L.*, 529 U.S. at 275 (in describing the circumstances created by the doctrine announced in *Illinois v. Gates* that allows the use of anonymous sources, Justice Kennedy observed that "truly anonymous" informants do not put their credibility at risk and can "lie with impunity").

\textsuperscript{196} There is no discussion in any case before *Florida v. J.L.* that clearly describes the value which corroboration of legal conduct might have in either the probable cause or reasonable articulable suspicion context. The question is: why would corroboration of predicted facts, not in and of themselves sufficient for police to act, provide any information regarding the reliability of an informant's accusations of criminal conduct to justify police action? As pointed out in *Florida v. J.L.*, corroboration of predicted legal behavior can provide little or no assistance in sorting out the reliability of an informant's accusations of criminality, however, it might have some value in establishing the informant has some knowledge of a suspect. *See Florida v. J.L.*, 529 U.S. at 271 ("Knowledge about a person's future movements indicates some familiarity with that person's affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband.").

\textsuperscript{197} *Harris*, 403 U.S. 573 (1971) (upholding, in a plurality opinion, the conviction in the absence of evidence of past reliability but finding the "reliability" prong met by a declaration against penal interest by a known informant). The search warrant in *Harris* was based on an affidavit that not only failed to allege the informant's reliability, but also contained no independent corroboration of the details of the tip. To credit the tip received by the affiant, the plurality opinion relied on the affiant's knowledge of the suspect's reputation for criminal activity and the informant's statements against penal interest. Although five Justices reinstated the defendant's conviction, a majority could not agree upon the factors that provided a basis for crediting the tip. For a contemporaneous critique of *Harris*, see *The Supreme Court, 1970 Term—Proof of Informant's Reliability in Probable Cause Affidavits*, 85 HARV. L. REV. 53 (1971).

\textsuperscript{198} *Whiteley*, 457 U.S. 867 (1982). In *Taylor v. Alabama*, the Supreme Court applied the principles developed in *Aguilar* and *Spinelli* to determine whether information consisting of an incarcerated individual's claim that "he had heard that defendant was involved in the robbery" was sufficient to establish probable cause to arrest. *Id.* at 888. The Court found the information insufficient, noting that the individual had never before given similar information to the officer involved, did not tell the officer where he had heard this information, and did not provide any details of the crime.
there were differences between jurisdictions as to the quantum of information necessary to establish the “reliability of the informant”\(^{200}\) and the “basis for that informant’s knowledge,”\(^ {201}\) only a few jurisdictions accepted the argument that the “totality of the circumstances” discussion in Spinelli could be read as establishing an alternative to Aguilar/Spinelli.\(^ {202}\) The possibility that the “totality of the circumstances” test might be read to provide a basis for probable cause to be based on information provided by anonymous sources, under either Draper or the Aguilar/Spinelli test, received virtually no support.\(^ {203}\)

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\(^{200}\) See United States v. McGlynn, 671 F.2d 1140, 1145-46 (8th Cir. 1982) (credibility prong was satisfied when two informants independently gave consistent information about the defendants and linked them to crimes); United States v. Sumpter, 669 F.2d 1215, 1220 (8th Cir. 1982) (credibility prong was satisfied when informant had been reliable in the past); United States v. Seta, 669 F.2d 400, 403 (6th Cir. 1982) (per curiam) (same); United States v. Lace, 669 F.2d 46, 49 (2d Cir. 1982) (credibility prong was satisfied when police corroborated details provided by a participant in the criminal activity); United States v. Davis, 669 F.2d 824, 829 (9th Cir. 1981) (credibility prong was satisfied when the statements of multiple informants corroborated each other); United States v. Maher, 645 F.2d 780, 782 (9th Cir. 1981) (per curiam) (credibility prong satisfied when the police confirmed detailed information provided by informant); United States v. Bruner, 657 F.2d 1278, 1297-98 (D.C. Cir. 1981) (credibility prong satisfied when statements of multiple reliable informants corroborated each other); United States v. Skramstad, 649 F.2d 1259, 1262 (8th Cir. 1981) (credibility prong was satisfied when informant had previously been helpful); United States v. Morisse, 660 F.2d 132, 135-36 (5th Cir. 1981) (credibility prong was satisfied when observations of narcotics agent corroborated details of criminal operation).

\(^{201}\) See United States v. Corbitt, 675 F.2d 626, 628 (4th Cir. 1982) (knowledge prong was satisfied when informant told police of time and location of drug transport); United States v. Strini, 658 F.2d 593, 598 (8th Cir. 1981) (knowledge prong was satisfied when informant predicted future location of the defendant); Maher, 645 F.2d at 782 (9th Cir. 1981) (per curiam) (knowledge prong was satisfied when information was more detailed than a rumor).

\(^{202}\) The corroboration discussion in Spinelli was criticized at the time the opinion was issued and led to confusion in the circuits with respect to the role of corroboration in probable cause determinations. See The Supreme Court, 1968 Term, 83 HARV. L. REV. 7, 180-81 (1969); compare Kislin v. New Jersey, 429 F.2d 950 (3d Cir. 1970) (police surveillance, yielding no more than vague indications that the suspect might be a bookmaker, when coupled with the suspect’s prior criminal record and a detailed informer’s tip, but lacking any aversion of the informer’s prior credibility, is sufficient for probable cause), with United States v. Melvin, 419 F.2d 136 (4th Cir. 1969) (clearly incriminating fruits of independent police investigation insufficient to corroborate tip). See also Henry S. Mather, Note, The Informer’s Tip as Probable Cause for Search or Arrest, 54 CORNELL L. REV. 958 (1969) (arguing that the usefulness of the Aguilar test was reduced by the Spinelli provision of self-verifying detail and independent corroboration analysis).

II. "TOTALITY OF THE CIRCUMSTANCES" AND ANONYMOUS SOURCES: GRANTING PERMISSION TO "LIE WITH IMPUNITY"

A. Illinois v. Gates

In 1983, the Supreme Court addressed the question of the use of anonymous informants in Illinois v. Gates. In Gates, police had received an anonymous letter claiming knowledge about the illegal activities of Lance and Susan Gates, neither of whom was previously known to police. Of course, because this was an anonymous source, it was impossible to determine the reliability of the informant or the basis of the informant's knowledge that would support the accusations of drug dealing. The anonymous letter could not have met the requirements of Aguilar/Spinelli as "reasonably trustworthy" third party information. The letter read:

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

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

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

Lance & Susan Gates
Greenway
in Condominiums

Because officers had no other information on the new suspects, and could not even be certain that Lance and Susan Gates even existed, they began to investigate the tip and learned that there was a Lance Gates who possessed a driver's license and lived in the same town. They then spoke with an unnamed confidential informant.

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204 In Florida v. J.L., Justice Kennedy identified the central problem presented by anonymous informants with respect to the judiciary independently evaluating the reliability of the source because such sources can "lie with impunity" and "[t]he reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable." 529 U.S. at 275.
206 Id. at 225.
207 Id. at 228-29.
208 Id. at 225.
209 Id. at 225-26.
who examined financial information and provided a “more recent address” for Lance and Susan Gates. An officer at O’Hare airport reported that an “L. Gates” had a reservation to West Palm Beach, Florida on May 5. Agents reported that an unidentified person used the “L. Gates” ticket to West Palm Beach and that he took a taxi to a hotel. That person went to a room that had been registered to an unidentified woman in the name of “Susan Gates.” At 7:00 the next morning, agents reported that the passenger identified as “L. Gates” got into a car with an unidentified woman and left the hotel in a Mercury automobile bearing plates that were registered to another car owned by Lance Gates. The agent informed the Illinois officer that the driving time between West Palm Beach and Chicago was between 22 and 24 hours. Based on this information, but long before the eventual destination of the car had been determined, the officer in Chicago requested, and was issued, a warrant to search the home located at the address that was “more recent” than the address mentioned in the letter.

The police were at that “more recent” address when the car with the two occupants arrived in the early morning the day after the warrant was issued. The car and house were searched and marijuana was found. The author of the anonymous letter was never identified. The trial court, the Illinois Appellate Court and the Supreme Court of Illinois all concluded that the anonymous letter did not meet the Aguilar/Spinelli standard for “reasonably trustworthy” third party information and suppressed the evidence.

The Supreme Court accepted certiorari on the probable cause question and the case was briefed and argued. However, rather
than issuing an opinion, the Court took the unusual step of asking that the case be re-briefed and reargued on the issue of whether the Court should adopt a "good faith" exception to the exclusionary rule. After the second argument, it was widely speculated that Gates would be the case in which the Court first announced the adoption of the then-controversial "good faith" exception.222 Much to the surprise of many commentators, rather than upholding the search of Gates' home as the product of "good faith" reliance on a flawed warrant, as occurred in the next term in United States v. Leon223 and Massachusetts v. Sheppard,224 the Court upheld the search by fundamentally altering the test for officer reliance on third party information and by eliminating, at least in practice, the long standing Aguilar/Spinelli test.225

The majority opinion by Justice Rehnquist recognized that, since the letter was anonymous, it failed to provide any basis upon which a magistrate might properly make the independent determination of "reasonable trustworthiness" that was necessary to fulfill its obligations under the separation of powers analysis of Giordenello.226

The letter provides virtually nothing from which one might conclude that its author is either honest or his information reliable; likewise, the letter gives absolutely no indication of the basis for the writer's predictions regarding the Gates' criminal activities. Something more, then, was required before a magistrate could conclude that there was probable cause ....227

However, rather than concluding that the product of the search should be suppressed, Justice Rehnquist opined that the requisite "something more" could be corroboration of the anonymous tip through police investigation of details of legal conduct predicted by the anonymous informant, similar to the corroboration of information received from the known, previously reliable informant in Draper. In addition, probable cause could be determined on a "totality-of-the-circumstances" standard that was mentioned in dicta in

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225 Gates, 462 U.S. at 238. The significance of this procedural history is that it demonstrates that Illinois v. Gates was decided at a time when the exclusionary rule, by implication, was on the cusp of major revisions. Because the "good faith" exception did not attract a majority in Gates, but was adopted a year later, the Gates treatment of probable cause can be seen as a compromise reached by a majority that had not yet come to terms with the "good faith" exception to the warrant which resulted, instead, in a lowering of the probable cause standard.
226 Id. at 237-38.
227 Id. at 227 (emphasis added).
The opinion failed to note that the reason the arrest had been upheld in *Draper*, and the search suppressed in *Spinelli*, was precisely because the source in *Draper* was known to the officer and had provided trustworthy on other occasions, while these factors were absent in *Spinelli*.

However, according to the Chief Justice, the magistrate properly issued the warrant in *Gates* because "the modus operandi of the Gateses [as described in the anonymous letter] had been substantially corroborated" by police investigation. He went on to detail the "corroboration" of predicted legal conduct that made the anonymous allegations of illegal conduct "reasonably trustworthy":

As the anonymous letter predicted, Lance Gates had flown from Chicago to West Palm Beach late in the afternoon of May 5th, had checked into a hotel room registered in the name of his wife, and, at 7 o'clock the following morning, had headed north, accompanied by an unidentified woman, out of West Palm Beach on an interstate highway used by travelers from South Florida to Chicago in an automobile bearing a license plate issued to him.

The Court held that officers could reasonably rely on anonymous assertions of illegality, if the anonymous source could be shown to have reliably predicted legal conduct. Perhaps most important, the majority in *Gates* never acknowledged that the probable cause upheld in *Draper* was the product of the two-level probable cause regime that had improperly distinguished between on-scene arrests and warrants, or that the accusations of illegality in *Draper* were found to be "reasonably trustworthy" because they were made by a formerly reliable source, not because the officer had corroborated predictions of legal behavior, alone.

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228 Id. at 238.

229 *See Draper*, 358 U.S. at 309. The informant in *Draper* had been a "special employee" of the Bureau of Narcotics for six months, which in common parlance is often known as "a snitch," who is paid or rewarded in some other way for providing information, and had proved reliable in the past. This sort of informant is not always found to be reliable, given the incentive for personal gain. *See People v. Sparks*, 734 N.E.2d 216 (Ill. App. Ct. 2000) (known informant provided detailed information, but was only known because of a previous arrest which resulted in a cooperation agreement; trial court held that such an informant was insufficiently trustworthy to be relied upon).


231 Id. at 226-27.

232 However, as Justice Ginsburg trenchantly pointed out in *Florida v. J.L.* some 20 years later, there is no logical reason to infer that truthful reporting of legal activity has any bearing on the accuracy or truthfulness of reports of criminal conduct. But even if corroboration of reports of legal conduct could logically infer that reports of wrongdoing were also "reasonably trustworthy," it is not at all clear that the investigation of the anonymous tip in *Gates* corroborated much, if any, of the "modus operandi" predicted by the anonymous source. *See* Marshall H. Silverberg, *Anonymous Tips, Corroboration and Probable Cause: Reconciling the Spinelli/Draper Dichotomy in Illinois v. Gates*, 20 AM. CRIM. L. REV. 99 (1982).

233 *See* discussion of *Draper supra* text accompanying notes 83-120.
Commentary

As mentioned earlier, the idea that probable cause may be determined based on the “totality of the circumstances” was really nothing new. Both Carroll and Brinegar actually defined probable cause in terms of the “facts and circumstances” within the knowledge of the officer. However, that definition also provided that information received from others, which was not within the personal knowledge of the officer, must meet the “reasonably trustworthy” standard, before it could be included in the “totality of the circumstances” on which the officer might rely. What Illinois v. Gates accomplished by allowing the use of anonymous sources—and the corroboration of predicted legal conduct alone—was a redefinition of “totality of the circumstances” that ignored the second part of the Carroll/Brinegar definition and virtually eliminated the possibility of independent judicial evaluation of this second aspect of the definition of probable cause, the requirement that police rely on “reasonably trustworthy” third party information.

By failing to make clear that tips from informants, under both Carroll and Brinegar, could only be considered within that “totality” if the informant and the tip were “reasonably trustworthy,” the use of “totality of the circumstances” language in Illinois v. Gates was both confusing and seriously misleading. Moreover, the use of Draper as precedent for support of this unacknowledged re-definition of Carroll/Brinegar was also highly problematic. As pointed out above, Draper was actually an anomaly in the development of the “reasonably trustworthy” informant doctrine, and was inconsistent with Gior- denello’s clearly stated requirement of independent judicial determination of the inferences upon which probable cause is based, and had not been followed in any of the warrant cases in which the “reasonable trustworthiness” of informants, as part of the probable cause determination, had been at issue.

However, by 1983, several developments in the probable doctrine had occurred that quite clearly indicated that the remaining precedential value of Draper, if any, was quite limited. The Aguilar/Spinelli test, which Gates purported to continue to recognize as part of the “totality of the circumstances” as applied to informants, made clear that the absence of the basis of the “knowledge of criminality” prong of the two-part test made Draper an anachronism. In addition, by 1983 it had become quite clear that Justice Douglas had been correct that Draper established a two-level probable cause standard that was completely contrary to the Fourth Amendment’s unitary conception

234 See supra note 41.
235 See discussion supra text accompanying notes 42-46.
236 Id.
237 See discussion supra text accompanying notes 94-103.
of probable cause and the advent of Terry "stop and frisk" doctrine removed whatever practical pressure that might have existed for maintaining the lowered standard.

However, no matter how one reads the precedential value of Draper, there can be little question that it did not stand for the principle that anonymous sources could provide the basis for probable cause, even though this is precisely how it was used in Gates. By failing to acknowledge either the changed doctrinal circumstances, or the fact that the reasoning in Draper depended heavily upon the informant's past reliability, the majority opinion in Gates now appears to be either innocent of any understanding of the actual posture of Draper within the development of the doctrine of "reasonably trustworthy sources," or embarrassingly disingenuous.

The one area in which Draper may have had continuing precedential value was the value of corroboration of information provided by known informants. Draper and Spinelli were the only cases before Gates that addressed the "corroboration" issue. Although both cases acknowledged that corroboration could play a role in determining probable cause, neither clearly articulated the relationship between corroboration of predictions of legal activity in determining whether a known informant was "reasonably trustworthy" in making criminal accusations. Moreover, in spite of the fact that Aguilar/Spinelli either overruled Draper, sub silentio, or made it obsolete, the reference to Draper and corroboration of detailed predictions in dicta in Spinelli only made the proper use to which corroboration might logically be put even more elusive.

1. Predictions and Corroboration in Illinois v. Gates

Logically, it would seem that "corroboration" can provide information that might have some bearing on the "totality of the circumstances" and that might amount to probable cause. However, by fail-

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238 See discussion supra text accompanying notes 94-96.
239 See discussion supra note 105.
240 See discussion supra text accompanying notes 111-13.
241 See discussion supra text accompanying notes 91-93, 111-15, 141-53.
242 The information in Draper failed to include any information regarding the basis of knowledge of criminality required by Aguilar/Spinelli. See discussion supra text accompanying notes 97-95.
243 See discussion supra text accompanying notes 167-68. Florida v. J.L. eventually offered the first coherent description of the inferences that might properly be drawn by predictions of legal conduct, i.e., that (1) the informant properly identified the person the informant meant to accuse; and (2) that the informant has some knowledge of the person's affairs, thus seeming to overrule the Gates treatment of corroboration. However, an examination of the level of corroboration that Illinois v. Gates endorsed may be useful in evaluating its future precedential value. The central question, of course, is whether the Gates method of determining that informants and their tips are "reasonably trustworthy" is faithful to the requirements of Carroll, Brinegar and Giordenello. See discussion supra text accompanying notes 415-18.
ing to make clear exactly how this corroboration might properly be used, the cases prior to Gates left an open question to which the majority in Gates provided an expansive answer. As utilized in Gates, predictions of legal conduct can substantiate accusations of illegality, if some portion of the predictions can be corroborated.241 Because the source in Gates was anonymous, one might reasonably expect the corroboration of the anonymous predictions of legal conduct to be quite detailed since this corroboration was being used to supplant both prongs of Aguilar/Spinelli.

A comparison of the anonymous informant's predictions with the facts developed by the investigation reveal that Justice Rehnquist's assertions notwithstanding, the predictions in Gates were much less accurate than those of the known, previously reliable informant in Draper.245 The letter made the following predictions of legal facts that were capable of corroboration: (1) "Sue and Lance Gates" exist; (2) they "live on Greenway, off Bloomingdale Rd. in the condominiums"; (3) "Sue drives... their car to Florida, where she leaves it"; (4) "Sue flies back after she drops the car off in Florida"; (5) "May 3 she is driving down there again"; (6) "Lance will be flying down in a few days"; and (7) Lance will pick up the car "to drive it back [alone]."246 As the following discussion reveals, almost none of these predicted "detailed facts" were strictly corroborated by the subsequent investigation:

(1) While investigation determined that two persons with these names did reside together somewhere in the community, there is no indication that a physical description of the persons later observed by the police in Florida, or at the airport were, in fact, the persons referred to in the letter.247

(2) The anonymous source stated that Lance and Susan Gates currently resided at a particular address that was the base of their illegal operations.248 Subsequent investigation revealed that the address was "stale," thus indicating the informant lacked current information.249

(3) The anonymous source predicted that Susan Gates would drive to Florida.250 But, because the woman in Florida was never positively

241 See discussion supra notes 228-33.
242 Although Rehnquist's opinion in Gates makes much of comparisons to Draper, see Gates, 462 U.S. at 242-44, the case is distinct from Draper. In Draper, the informant was known to officials and had previously proved reliable. See Draper, 358 U.S. at 309 (1959).
243 See Gates, 462 U.S. at 225.
244 Id. at 226-28.
245 Id. at 225.
246 Id. at 226. See Sgro v. United States, 287 U.S. 206, 215 (1932). Sgro and its progeny regard the sufficiency of out of date information as the basis for probable cause. It is worth noting that "staleness" issues have a special character in "corroboration of anonymous source" settings. Because probable cause hinges upon the accuracy of predictions, corroborating the timeliness of the information takes on increased importance because the reliability of the source cannot be evaluated.
247 Gates, 462 U.S. at 225.
identified before the warrant was issued, Susan Gates’s involvement was never actually corroborated, but rather could only be inferred from the name the unidentified woman used at the Florida hotel.\textsuperscript{251}

(4) The prediction that Susan Gates would leave the car and fly back to Chicago was either uncorroborated or substantively disproved, since the woman in Florida was present when “L. Gates” arrived.\textsuperscript{252}

(5) The time of the woman’s departure from Chicago was not corroborated, since she was already in Florida at the time “L. Gates” arrived. It might be inferred that the car had at least been in Chicago some time prior to his arrival, since it bore plates issued to Lance Gates, but this could not establish that the woman in the hotel had been in Chicago in the recent past, if ever.\textsuperscript{253}

(6) The man observed using the “L. Gates” airplane ticket was never positively identified as the person who resided at either the old address provided by the informant or the current address provided by police investigation,\textsuperscript{254} although the timing of the flight did corroborate that the informant had some knowledge of the travel plans of the person using the “L. Gates” ticket.\textsuperscript{255}

(7) The “\textit{modus operandi}” predicted by the informant was that Susan Gates returned from Florida separately from Lance Gates and that he would drive the car back from Florida alone.\textsuperscript{256} Investigation revealed that this prediction was completely incorrect, because, even if the police were reasonable in concluding the man and woman were Lance and Susan, the man and woman were last seen heading north together,\textsuperscript{257} which was completely contrary to the central aspect of the reported scheme.\textsuperscript{258}

Viewed in this light, the information provided by the anonymous source indicated some knowledge of the travel plans of the person who claimed the “L. Gates” ticket at the airport, but the informant was wrong about almost everything else, and was particularly inaccurate about the details of the “\textit{modus operandi}” which differed significantly from the sequence of otherwise innocent conduct observed by

\textsuperscript{251} Id. at 226-28.
\textsuperscript{252} Id. at 226 (noting that Gates was “accompanied by an unidentified woman”).
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id. at 225.
\textsuperscript{257} Id. at 226-27.
\textsuperscript{258} The disparity between the predictions and the corroboration were noted by others and there was no shortage of criticism of Gates at the time it was decided. See, e.g., Yale Kamisar, Gates, “Probable Cause,” “Good Faith,” and Beyond, 61 IOWA L. REV. 551 (1984); Wayne R. LaFave, Supreme Court Review: Fourth Amendment Vagaries of Improbable Cause, Imperceptible Plain View, Notorious Privacy and Balancing Askew, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983); Alexander Woolcott, Abandonment of the Two-Pronged Aguilar/Spinelli Test: Illinois v. Gates, 70 CORNELL L. REV. (1985); but see Joseph Grano, Probable Cause and Common Sense: A Reply to Critics of Illinois v. Gates, 17 U. MICH. J.L. REFORM. 465 (1984).
police.\textsuperscript{259} If one views the extent of this corroboration without considering the results of the search, as required by both logic and Supreme Court doctrine in \textit{Di Re},\textsuperscript{260} the "corroboration" is clearly a cut below that which was combined with a known reliable source in \textit{Draper}.\textsuperscript{261} Moreover, based on the observed behavior, the suspects did nothing that, standing alone, would either justify an arrest or an investigatory stop: a married couple lived in Bloomingdale; a man and woman using the names of that couple traveled to Florida separately; they met at a hotel in Florida where they spent the night, and; they left the next morning driving north on an expressway 1500 miles from Chicago in a car that was registered to a person with the same name as the person in the car.\textsuperscript{262}

Without the anonymous accusation that these activities had a criminal connection, it seems plain that a warrant could not have issued, and an arrest of the passengers in the Mercury on the highway in Florida could not have been made on the observations of police alone.\textsuperscript{263} Without the anonymous accusation of illegal purpose, it is difficult to see how the issuance of a warrant could be justified, unless the reviewing court would include additional facts, for example, that after the warrant was executed, police learned the informant had been correct. Obviously, the Court cannot engage in this sort of "after the fact" evaluation of probable cause. However, it is difficult to avoid the conclusion that a majority of the Supreme Court did exactly that in justifying the search, even under the "totality of the circumstances" test it announced. In this respect, \textit{Gates} provides some justification for Justice Douglas's warning in his dissent in \textit{Draper} regarding danger of the \textit{post-hoc} evaluation of facts to justify probable cause.\textsuperscript{264}

As further justification for issuance of the warrant, and perhaps as implicit acknowledgment that the corroboration was, at best, incomplete, Justice Rehnquist's opinion mentioned additional facts—that could not have been known to the officers at the moment the warrant issued—to justify the outcome in \textit{Gates}. These included: (a) the car was last seen in Fort Lauderdale driving northbound on an expressway that police and Justice Rehnquist characterized as "an interstate highway frequently used by travelers to the Chicago area,"\textsuperscript{265} but

\textsuperscript{259} \textit{Gates}, 462 U.S. at 227. Although the court laid out both scenarios, Justice Rehnquist's opinion did not consider the distinct differences between the predicted "modus operandi" and the actions actually observed by law enforcement sufficiently different to call the informant's information into question.

\textsuperscript{260} United States v. Di Re, 332 U.S. 581 (1948).

\textsuperscript{261} \textit{Gates}, 462 U.S. at 225-26.

\textsuperscript{262} \textit{Id.}

\textsuperscript{263} The lack of probable cause on these facts alone was acknowledged by Justice Rehnquist's majority opinion. \textit{See discussion supra} text accompanying notes 226-29.

\textsuperscript{264} \textit{Gates}, 462 U.S. at 225-26.

\textsuperscript{265} \textit{Id.} at 226.
which actually could have taken the occupants anywhere on the North American Continent, and (b) that the car and its yet unidentified occupants arrived at the Gates's home within the twenty-two to twenty-four hours predicted by Florida law enforcement officials. But the warrant issued long before the car arrived in Chicago, and this information could not have justified issuing the warrant. It is difficult to avoid the conclusion that the Rehnquist opinion includes a rhetorically skillful recitation of facts that are, at best, "make weight" and, at worst, are intentionally misleading with respect to the factual basis for the probable cause determination.

2. Probable Cause After Illinois v. Gates

The majority opinion obscured the real impact of Gates on the previously well-settled Aguilar/Spinelli doctrine. The opinion suggested that the "totality of circumstances" continued to include both "basis of knowledge" and "reliability" as aspects of the probable cause inquiry, along with corroboration of informant supplied prediction of legal conduct. This description of the doctrine implied that Gates did not have the effect of overruling existing doctrine. However, on the facts of the case, the Court found probable cause to exist in the complete absence of both Aguilar/Spinelli factors, thus making clear that the Gates "totality of circumstances" test, in practice, actually made Aguilar/Spinelli an empty doctrine.

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266 There are several highways that run the length of the Florida peninsula, and it is necessary to "head north" to reach anywhere in the rest of the country. It is approximately 400 miles from Fort Lauderdale to the Florida border. It strains credulity to accept the assertion that "heading north" on one of these expressways gives any indication what the eventual destination of an automobile might be, or when the auto might arrive at that destination.


The reference to the arrival of the Gateses in Chicago, at or near the time predicted by the agents, was not explicitly used by Justice Rehnquist to justify the warrant, but it helped to create an impression of reasonableness in executing the warrant that made it easier to accept the outcome of the case. This allusion to facts that occurred after the warrant was issued, or which were really not indicative of the direction or the duration of the automobile journey that began at about the same time the warrant was issued, is potent evidence for the existence of a tendency to engage in post-hoc justification of searches, even those authorized by warrants.

269 Gates, 462 U.S. at 230.

270 In footnote six Justice Rehnquist attempted to explain away the two-prong Aguilar/Spinelli test as intended to be merely "guides to a magistrate's determination of probable cause, not as inflexible, independent requirements applicable in every case .... Rather, we required only that some facts bearing on two particular issues be provided to the magistrate." Id. at 230-31 n.6 (emphasis in original). This is misleading. Aguilar, Spinelli, and Giordenello made clear that when third party information was concerned, simple logic requires that sufficient information be presented on each prong to allow a magistrate to carry out the function required of the judiciary under the Fourth Amendment—making an independent decision about the reliability of the source. As Justice Kennedy stated in the concurrence in Florida v. J.L., "truly anonymous" sources are inherently unreliable and should never be relied upon. Justice Rehnquist joined in this concurrence. However, he has yet to acknowledge the contradiction with the reasoning of his earlier opinion in Gates.

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In addition, the Court resolved the "two tier probable cause" problem, of which Justice Douglas had warned, by using Draper as precedent for lowering the probable cause requirement to a point that is actually lower than that established in Draper for on-scene arrests, through acceptance of anonymous tips as a basis for probable cause, which even the Draper majority did not condone. Although the Gates majority relied on Draper for the principle that corroboration could be used to establish probable cause, the majority failed to note that: (a) Draper had established a lower standard for on-scene arrests, as compared to warrants, which is not supported by the Fourth Amendment; (b) this two-tier doctrine arose at a time when the Court was searching for a method to accommodate procedures that were eventually established in Terry, and Draper was no longer required to justify on-scene arrests; and (c) that, even within the context of the lower probable cause standard, Draper was based upon information received from a known, previously reliable informant, not the corroboration of anonymous predictions of legal conduct alone.

The dissent took issue with this recasting of the probable cause doctrine, but did not clearly focus on the majority's mischaracterization of the basis for probable cause in Draper or the prior reliability of the known informant as the basis for the opinion in that case. In particular, the dissent did not pinpoint the false assumptions and the resulting logical leap from corroboration of informant's predictions of legal conduct to the unsupportable belief that an informant has a basis of knowledge, and is reliable, with respect to accusations of criminality, as well. The dissent also failed to elucidate clearly the significant discrepancies between the predicted modus operandi, and the actual conduct observed by the investigators. The absence of a clearly articulated explication of the logical and factual inconsistencies upon which Gates was premised allowed the majority

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272 See discussion supra text accompanying notes 240-43.
273 See discussion supra text accompanying notes 97-120.
274 See id.
275 See id.
276 See id. at 284-85. See also United States v. Harris, 403 U.S. 573, 579 (1971) (justifying the issuance of a warrant based on a combination of a solid factual basis and affiant's knowledge of respondent's background); Massachusetts v. Upton, 466 U.S. 727, 733 (1984) (justifying the issuance of a warrant because report taken as a whole substantially corroborated the facts, though no one element by itself was dispositive). In light of this precedent, it is a testament to the power of the reasoning of Aguilar/Spinelli that the Court has continued to refer to the test in every informant case that it has addressed since the test was first announced. Florida v. J.L. is no exception. See discussion infra notes 371-78.
277 The dissent discussed Draper extensively at footnote three, but failed to explore this contradiction. Gates, 462 U.S. at 780 n.3 (Brennan, J., dissenting).
278 See generally id. at 291 (Stevens, J., dissenting); id. at 274 (Brennan, J., dissenting).
279 Id. at 290.
opinion to enter Supreme Court jurisprudence without sufficiently compelling refutation to prevent the expansion of the doctrine that occurred in Alabama v. White.

B. Alabama v. White

Alabama v. White, the next case that shaped the development of the "third party informant" doctrine, revealed the direction the Gates "anonymous source" doctrine was taking, in what the majority acknowledged was a "close case." The investigative stop in Alabama v. White resulted from an anonymous telephone tip that an officer swore he received, but which had not been recorded or noted in any way. The trial court found that the officer was credible when he testified that an anonymous tipster had told the officer that:

Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine in a brown attaché case.

Because this was not a case involving a warrant, an affidavit was never presented to a magistrate. There was no evidence in the record that the phone call ever occurred, other than the testimony of the officer, and the testimony regarding the anonymous telephone tip occurred in a pre-trial suppression hearing, long after the arrest of the defendant.

Police testified that they "proceeded to the Lynwood Terrace Apartments [and] saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building." They also testified that they observed an unidentified woman, who was not carrying a briefcase or anything else, leave the "235" building and get into the brown Plymouth. The police stated that although the Plymouth never actually reached Dobey's Motel, the unidentified woman drove the car on "the most direct route possible to Dobey's

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280 The unanimity of the Florida v. J.L. opinion, which included many of the Gates majority, raises the question whether a logical refutation of the Gates rationale might well have prevented its adoption in the first place. However, given the apparent interest of at least some members of the Court in establishing the "good faith" exception in Gates, one might imagine that the Gates outcome was the result of political compromise between members of the Court who favored the adoption of the "good faith" exception and those who were not yet prepared to take that step. See supra note 225. However, the effect of the Gates opinion was widely criticized by commentators. Id. 496 U.S. 325 (1990). 281 Id. at 332. 282 Id. at 327. 283 Id. 284 Id. at 331, 333. 285 Id. at 331. 286 Id. at 331.
When the car turned onto the highway to Mobile, Alabama, near which Dobey's Motel was located, police stopped the car. The question addressed by the Court was whether these facts supported reasonable articulable suspicion for an investigative Terry stop of the unidentified woman in the brown Plymouth.

The officers testified that they asked the woman to step out of the car and informed her that they suspected her of carrying cocaine in her vehicle. They asked for her permission to search the car, which she voluntarily provided, according to the officers. Upon finding a locked brown briefcase, the police asked permission to open it and the woman consented, according to the officers. The officers did not find cocaine in the briefcase, as the anonymous informant had predicted, but they did find a small amount of marijuana. Ms. White was arrested and taken to the station, where during an inventory search of her purse officers found three milligrams of cocaine. The defendant pled guilty to possession of minor amounts of controlled substances and reserved her right to appeal. The Alabama Supreme Courts reversed the defendant's conviction, holding that police lacked reasonable articulable suspicion to stop the defendant's car under Terry v. Ohio. The Supreme Court granted certiorari because the lower court had not clearly decided the case on independent state grounds and "because of differing views in the state and federal courts over whether an anonymous tip may furnish reasonable suspicion for a stop."

The majority opinion acknowledged that the Court had never before found that an anonymous source could provide reasonable suspicion for a Terry stop, and that the closest the Court had come was Adams v. Williams, a case involving a known source who had given information in the past, and who could have been prosecuted under state law for making a false report. As outlined earlier, Adams v. Williams also included some predictions of the suspect's behavior that had been corroborated by the officer, along with the informant's accusations of criminality. The majority opinion in Alabama v. White

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208 Id. at 331.
209 Id. at 327.
210 Id. at 328. In Whren v. United States, 517 U.S. 806 (1996), the Court held that a pretextual stop is justified if there is some proper reason for the stop, such as a traffic violation. In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that officers must have some articulable suspicion for a stop, but that a mere traffic violation would be sufficient.
211 White, 496 U.S. at 327. This "after the fact" discovery of the marijuana and cocaine, of course, did not corroborate anything that could have been used to justify the stop, although the stop could have been made on the basis of the broken taillight alone.
212 Id. at 327-28.
213 Id. at 328.
214 Id.
216 Id. at 146-47.
217 See discussion infra text accompanying notes 191-92.
recited the Gates "totality of the circumstances" test and made clear that this test also applied to information supplied by anonymous informants when Terry stops were at issue.298

The majority in Adams v. Williams indicated awareness of the significant differences in the evidentiary posture of warrant cases from on-scene arrest or stop cases,299 and reaffirmed that, like the earlier warrant cases, "reliability" and "basis of knowledge" of the informant "remain highly relevant in determining the value of his report"300 in "reasonable articulable suspicion" cases, as well as cases involving probable cause. The majority conceded that, like the anonymous tip in Gates, "a tip such as this one, standing alone, would not 'warrant a man of reasonable caution in the belief that [a stop] was appropriate.'"301

Nevertheless, the majority found that the anonymously supplied predictions of legal activity in Alabama v. White were sufficiently corroborated by police investigation to make the anonymous source sufficiently trustworthy to justify a Terry investigative stop.302 As compared to Illinois v. Gates, "[t]he tip was not as detailed, and the corroboration was not as complete, as in Gates, but the required degree of suspicion [for an investigative stop] was likewise not as high [as the probable cause required to issue a warrant]."303 In applying the "totality of the circumstances test" from Gates304 to the Terry stop in Alabama v. White, the Court explained that both the "quality and the quantity" of the information can be considered.305 In this case, although there was no basis for considering the tip reliable, "the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity."

The Court conceded that, as in Gates, "not every detail mentioned by the tipster was verified."306 The corroboration of legal conduct that the Court found made the anonymous informant's assertions of illegality sufficiently reliable for police to seize the car were:

- the officers found a car precisely matching the description given by the informant;307

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298 See White, 496 U.S. at 330.
299 See Adams, 407 U.S. at 147.
300 White, 496 U.S. at 328 (citing Gates, 462 U.S. at 230).
301 Id. at 329 (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)).
302 Id. at 331.
303 Id. at 329.
304 Id. at 328.
305 Id. at 330 ("[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.").
306 Id. at 331.
307 Id.
308 Id. at 327, 331.
the car was parked in front of the 235 building which the informant supposedly mentioned; \(^{309}\)
- an unidentified woman got into the car not long after the informant’s call was made; \(^{310}\) and
- the unidentified woman took “the most direct route to Dobey’s Motel.” \(^{311}\)

The Court explained that the importance of these facts, like the information provided by the anonymous source in *Gates*, was the following:

[The tip] contained a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted . . . What was important was the caller’s ability to predict respondent’s future behavior, because it demonstrated inside information—a special familiarity with respondent’s affairs . . . Because only a small number of people are generally privy to an individual’s itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual’s illegal activities.

Justice White explained the justification for relying on the veracity of the unknown source, stating that:

The Court’s opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip engaged in criminal activity. Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer’s prediction imparted some degree of reliability to the other allegations made by the caller. \(^{312}\)

The Court remanded the case to the Alabama Court of Appeals for further proceedings. \(^{314}\)

The very brief dissent by Justice Stevens, in which Justices Brennan and Marshall joined, \(^{315}\) described the practical result of this application of the *Illinois v. Gates* anonymous source doctrine:

Millions of people leave their apartments at about the same time every day carrying an attaché case and heading for a destination known to their neighbors . . . An anonymous neighbor’s prediction about somebody’s time of departure and probable destination is anything but a reliable basis for assuming the commuter is in possession of an illegal substance . . . .

Anybody with enough knowledge about a given person to make her the target of a prank, or to harbor a grudge against her, will certainly be

\(^{309}\) *Id.* at 327.
\(^{310}\) *Id.*
\(^{311}\) *Id.*
\(^{312}\) *Id.* at 332 (emphasis added).
\(^{313}\) *Id.* at 331-32.
\(^{314}\) *Id.* at 332.
\(^{315}\) *Id.* at 333 (Stevens, J., dissenting).
able to formulate a tip like the one predicting Vanessa White’s excursion.”

Further, the dissent criticized the absence of corroboration of significant facts and the lack of any information about the basis of the informant’s prediction of behavior. The dissent suggested that it was even possible that the “tipster” may have been an officer with a “hunch.” According to the dissent, the majority opinion created the possibility that anyone could be subject to seizure by police officers who were “prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever the officer had just observed.” The damage done to Fourth Amendment protections by this application of the “anonymous” source doctrine, according to the dissent, was significant: “the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.”

Commentary

The Court explained that, in a Terry stop, “the officer must be able to articulate something more than inchoate and unpunelarized suspicion or hunch” and that the Fourth Amendment, itself, “requires some minimal level of objective justification for making a stop.” However, rather than requiring a “fair probability that contraband or evidence of a crime will be found,” as required for the probable cause determination in Gates, the Court explained that for Terry investigative stops a lower standard of proof applies:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is very different in quantity or content than that required for probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Adams v. Williams demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a Terry stop.

Adams v. Williams suggested that reasonable suspicion might arise from a tip from a known informant, even though there were only a

516 Id.
517 Id.
518 Id.
519 Id.
520 Id.
522 Id. at 330 (citing Sokolow, 490 U.S. at 7 (citing Gates, 462 U.S. at 238)).
few facts that the officer could corroborate to identify the suspect. However, it was the fact that the informant was known, and the officer had received information from the source before, that made it reasonable for the officer to act on the criminal accusation of the informant, not the corroboration of the description alone. Adams v. Williams did not suggest that the officer could have relied on corroboration of predictions of legal conduct from a completely anonymous source to justify relying on accusations of illegality. As pointed out earlier, neither Draper in the probable cause context, nor Adams v. Williams in the Terry stop context, suggested that corroboration of predicted legal conduct could completely replace evidence of the reliability of the source in determining the "reasonable trustworthiness" of accusations of criminality.

Perhaps the most troubling aspect of Alabama v. White is the extent to which the majority was willing to go in finding sufficient corroboration to justify the stop of Ms. White's car. Based on the corroboration of facts in Alabama v. White, police could not even corroborate that Ms. White was the person referred to by the informant because: (a) the name of the woman leaving the building was never verified before she was stopped and her physical description or even her race were not part of the tip; (b) Corporal Davis was unable to corroborate whether the woman leaving the building had a connection with the apartment mentioned by the anonymous source; (c) the officer never mentioned the time of the suspect's departure, which the informant supposedly predicted; (d) the unidentified woman was not seen carrying the brown briefcase mentioned by the informant; and (e) the car was stopped before the destination could be determined.

As later observed by Justice Ginsburg in Florida v. J.L., corroboration of predictions of legal activity might provide some information regarding the reliability of the informant's identification of the suspect as the person the informant intended to accuse, and corroboration of predicted legal activity shows some familiarity with a person's habits or itinerary. However, even for these limited purposes, the degree of corroboration of the identification of the suspect in White is far below that in either Adams v. Williams, or later, in Florida v.
The rest of the observations of police did very little to establish that the informant had much information about Ms. White. Police observed her: (a) getting into the car identified by the informant and (b) driving for some four miles in the direction of the motel described by the informant. She was not speeding, she was not seen carrying anything to the car that the informant identified, and she was stopped before she could reach Dobey's Motel, if that is where she was going.

There was certainly nothing in these facts that was inherently suspicious. The unsupported accusations of criminality, from a source that the police could never produce and that were supposedly received in an unrecorded telephone call, were the only hint of wrongdoing by Ms. White at the moment her car was stopped. Based on the level of corroboration in White, it is not clear that police would even have been reasonable in relying on the assertions of criminality of a known source, as occurred in Adams v. Williams, because neither the identification, nor the supposed modus operandi were corroborated in any significant way. Perhaps the most ironic feature of White is that the small amount of marijuana discovered in the briefcase and the small amount of cocaine found in her purse after she was taken into custody actually revealed that the anonymous source was completely wrong about the nature and scope of the crime that was supposedly afoot.331

The trial court's finding that the officers were credible in asserting that they had received the anonymous call, and that after the stop the defendant consented to searches of her car and briefcase, highlights how the "corroboration of anonymous informants" as part of the "totality of the circumstances" test might be improperly used by law enforcement to justify investigative stops or arrests after the fact. It is quite easy to imagine that, had officers actually stopped Ms. White on a hunch and had performed an illegal search of her car and briefcase, the temptation to justify the search and seizure, in retrospect, by describing the report of an anonymous informant would be substantial. As pointed out by Justice Douglas in the Draper dissent, this temptation is not limited to law enforcement officers. White is an example of how the use of anonymous sources to justify searches and seizures encourages violations of Di Re, particularly those undertaken without warrants.

It is extremely difficult to square this result of the Gates doctrine with the Fourth Amendment requirement that there "must be some minimal level of objective justification for making [a] stop."332 The

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331 White, 496 U.S. at 327 (noting that a small amount of marijuana, not cocaine, was found in the attaché case, and that the informant was proved completely wrong about the large amount of cocaine that the informant predicted would be found by police).

332 Id. at 329-30. See discussion supra text accompanying note 320. See discussion of Giordenello v. United States supra notes 78-80.
effect of the case is to reduce the judicial oversight function in anonymous source stop-and-frisk cases to little more than a rubber stamp, applied after-the-fact. Moreover, the dissent alludes to the particularly difficult problem that the Gates “anonymous source” doctrine creates for judicial oversight of warrantless searches or seizures of any kind, which can only be reviewed by the courts after police have found a reason to charge a person, and the person has been taken into custody:

Under the Court’s holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed . . . the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.

It may also be important to note that the precedential import of the reasoning in White is diminished by the fact that it was actually unnecessary to extend the Gates “anonymous source” doctrine to these facts to uphold the search. If the officer’s recitation of the facts is correct, the broken taillight, alone, provided reasonable articulable suspicion for the traffic stop. Once the valid traffic stop had occurred, the driver was asked to step out of the car, which is permissible under Pennsylvania v. Mimms. The search following the stop in White was not formally an issue because the trial judge found the police credible when they testified that the driver gave them permission to search her car.

The police also testified that when they found a locked brown attaché case, the woman voluntarily gave police the combination and permission to open the locked case. Although police found no cocaine when they opened the briefcase, as predicted by the informant,

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333 As the dissent in Alabama v. White graphically stated: “[E]very citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed.” White, 496 U.S. at 333 (Stevens, J., dissenting). And, as Justice Kennedy later stated in his concurrence in Florida v. J.L., anonymous sources can “lie with impunity,” thus making it impossible for the reviewing court to “judge the credibility of the informant.” J.L., 529 U.S. at 275 (Kennedy, J., concurring).

34 See generally Whren v. United States, 517 U.S. 806 (1996) (holding that detention of a motorist is reasonable where probable cause exists to believe that a traffic violation has occurred even if a reasonable officer would not have stopped the motorist); Delaware v. Prouse, 440 U.S. 648 (1979) (reinforcing the legality of vehicle stops for traffic violations when officers have probable cause or reasonable suspicion that a driver is violating traffic or equipment regulations); Terry v. Ohio, 392 U.S. 1 (1968) (discussing the limitations imposed by the Fourth Amendment and the reasonable suspicion necessary to justify an investigatory stop).

35 White, 496 U.S. at 327.

36 Id.
they found marijuana, which would justify an arrest. Once the defendant was in custody, the inventory search of her purse would be justified as well, and the small amount of cocaine that was found in White's purse would have been admissible without resort to this extension of the Gates “totality of the circumstances” test.

The existence of these alternative grounds make the precedential value of White, insofar as it supports the use of anonymous sources, less than compelling. It would be possible to overrule the "anonymous source" doctrine while retaining the White precedent. Since White was admittedly a factually “close case,” and because it might be upheld on other grounds, stare decisis would not present an insurmountable barrier to a re-evaluation of the use of the anonymous informants.

The central flaw in any use of corroboration of predictions of legal conduct by an anonymous informant to justify relying on the anonymous informant’s accusations of illegality is illustrated quite clearly in Justice White’s opinion for the majority in Alabama v. White.

The Court’s opinion in Gates gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity. Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer’s predictions imparted some degree of reliability to the other allegations made by the caller.

In Florida v. J.L., Justice Ginsburg demonstrated that this formulation of the issue is not only illogical, since there is no necessary connection between accurate predictions of legal conduct and an informant’s veracity or basis of knowledge with respect to accusations of criminality, but also addresses the wrong question. It fails to recognize the indisputable fact that there is no reason to “credit” a source with respect to accusations of illegality unless the source will suffer negative consequences in the event their accusation is wrong. In Florida v. J.L., a unanimous Court acknowledged this simple, yet logically compelling, principle.

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339 Id.
341 White, 496 U.S. at 331-32 (emphasis added) (holding that an anonymous tip corroborated with police work had sufficient reliability to provide reasonable suspicion to make the investigatory stop) (citation omitted).
342 See Florida v. J.L., 529 U.S. 266, 272 (2000) (noting that a tip's accuracy regarding the suspect's legal behavior “does not show that the tipster has knowledge of concealed criminal activity”).
343 See id. at 270 (distinguishing “a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated” from an anonymous tip which “alone seldom demonstrates the informant's basis of knowledge or veracity”).
344 See id. at 268 (holding that an anonymous tip that a person is carrying a gun is not sufficient to justify a police officer's stop and risk of that person).
III. THE END OF ANONYMITY?

A. Florida v. J.L.

The obvious contradiction with fundamental Fourth Amendment principles created by the "anonymous source" doctrine, including the separation of powers issues upon which the warrant requirement is grounded, invited an eventual re-examination. That re-examination occurred in the context of a challenge to the seizure and eventual arrest of a juvenile for illegal possession of a weapon, based on an anonymous tip. In many ways, Florida v. J.L. is factually similar to Adams v. Williams. However, in Florida v. J.L., rather than a known, previously reliable informant, the informant was anonymous and the police seized the juvenile after observing innocent activity predicted by the anonymous source.

In Florida v. J.L., the police approached a juvenile who had been standing at a bus stop with several others but who was doing nothing suspicious. Police performed a Terry stop-and-frisk. During the pat down, they found that he had a gun in his possession. They arrested him and charged him with underage possession of a firearm.

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545 See Alabama v. White, 496 U.S. 325, 333 (1990) (Stevens, J., dissenting) (arguing that since the arresting officer did not know the "informer's identity, his reason for calling, or the basis of his prediction," the informer could have been an individual who held a grudge against the defendant, or could even have been another police officer).

546 See id. (Stevens, J., dissenting) (stating that the Court's holding would permit an individual to be seized and questioned by an officer who falsely claims to have received an anonymous tip). See also discussion supra note 71 and infra notes 392-402.

547 Justice Ginsburg noted that Alabama v. White was a "close case" that was admittedly on the margins of the facts necessary to support a reasonable stop. J.L., 529 U.S. at 271.

548 See J.L, 529 U.S. at 268 (holding that a police officer is not justified in stopping and frisking an individual based solely on an anonymous tip).

549 Id. at 266.

550 See Adams v. Williams, 407 U.S. 143, 146 (1972) (holding that the officer's reliance on the informant's tip was justified because the officer knew the informant and the informant had provided information to the officer previously).

551 The outcome in Adams was dependent upon the accusation of an informant who was known to police, and who could have been prosecuted under state law for filing a false report had she been wrong. According to the Court in Adams, "[t]his is a stronger case than obtains in the case of an anonymous telephone tip." Id.

552 See J.L, 529 U.S. at 268 (noting that "[a]part from the tip, the officers had no reason to suspect any of the three [black males] of illegal conduct").

553 See id. (noting that "[t]he officers did not see a firearm, and J.L. made no threatening or otherwise unusual movements").

554 Id. The two other teenagers at the bus stop were also frisked, although the tipster had not mentioned them. However, since they were not prosecuted, they fell into that category of citizens whose rights have been violated by reliance on anonymous sources, but who lack either the means or the inclination to hold the police accountable for the violation. When the Florida v. J.L. facts are viewed from this perspective, the danger spoken of by the dissent in Alabama v. White was exemplified.
and with carrying a concealed weapon. The other juveniles were also stopped and frisked but neither was prosecuted.

At the hearing on the motion to suppress evidence, the state claimed that the police had stopped and frisked the young man because an anonymous caller had reported to the Miami-Dade Police, sometime earlier on the same day, that a young black male wearing a plaid shirt was standing at a particular bus stop and was carrying a gun. Although there was no recording or other evidence of the call, police claimed that sometime after this report was received, they were instructed to corroborate the tip.

About six minutes after being instructed to do so, officers arrived at the bus stop where they saw three black males "just hanging out [there]." One of the black males was wearing a plaid shirt. Police officers did not see any firearm or observe any unusual movements. However, based on the anonymous tip that the person in the plaid shirt was armed and the corroboration, supplied by their investigation, that such a person existed and was at the location predicted by the informant, the officers performed a pat down of the juvenile and found the weapon. On this evidence, the trial court found that the seizure violated the Fourth Amendment. The Court of Appeals reversed, and the Florida Supreme Court upheld the trial court.

The Florida Supreme Court distinguished tips from known informants from tips received from anonymous sources and stated that anonymous sources are generally less reliable and can form the basis for reasonable suspicion "only if accompanied by specific indicia of reliability, for example, the "correct forecast of a subject's 'not easily predicted' movements." The Supreme Court granted certiorari because of conflicts with other jurisdictions that upheld similar searches under Alabama v. White.

Justice Ginsburg's analysis of the anonymous tip began with a review of the "stop-and-frisk" cases previously decided by the Court. She noted that in Terry v. Ohio the stop depended upon the personal

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355 Id. at 269.
356 Id. at 268.
357 Id.
358 Id.
359 Id.
360 Id.
361 Id.
362 727 So.2d 204 (Fla. 1998).
363 J.L., 529 U.S. at 269.
364 See id. (citing Alabama v. White, 496 U.S. 325 (1990), which held that when much of the information regarding the suspect's legal behavior provided by the anonymous tip turned out to be accurate, the police had reasonable suspicion that the information regarding the suspect's illegal activity was also accurate).
365 Id.
366 See id. at 269-71 (examining Adams v. Williams, 407 U.S. 143 (1972), Terry v. Ohio, 392 U.S. 1 (1968), and Alabama v. White, 496 U.S. 325 (1990)).
observation of “unusual conduct” by a police officer that “leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” And, unlike the known source in *Adams v. Williams*, who could have been prosecuted for providing inaccurate information under state law, in *Florida v. J.L.* the Court was presented with “a tip from a[n] [un]known informant whose reputation can[not] be assessed and who can[not] be held responsible if her allegations turn out to be fabricated.” In addition, she noted that even in *Florida v. J.L.* the Court had recognized that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” She acknowledged that it might be theoretically possible for an anonymous tip to exhibit “sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.” However, she went no further in suggesting what these indicia of reliability might be and turned to an evaluation of the indicia of reliability presented in the facts of the case before the Court.

Justice Ginsburg began her analysis of the indicia of reliability in *Florida v. J.L.* by reviewing the “indicia” that were present in *White* and noting that the majority in that case acknowledged that the tip, standing alone, did not give rise to reasonable suspicion. She characterized the anonymous tip in that case as “asserting that a woman was carrying cocaine and predicting that she would leave an apartment building at a specific time, get into a car matching a particular description, and drive to a named motel.” The basis for the Court’s finding that the police were reasonable in relying on the anonymous accusations of illegality in that case, according to Justice Ginsburg, depended on police observations that “showed that the informant had accurately predicted the woman’s movements.”

While there is certainly some reason to question whether there really was any significant corroboration in *Alabama v. White*, Justice Ginsburg focused on the aspect of Justice White’s opinion which held that it was the anonymous informant’s predictions of legal behavior that

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567 Id. at 269-70 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).
568 J.L., 529 U.S. at 270 (emphasis added).
569 Id. (citing White, 496 U.S. at 329).
570 Id. (citing White, 496 U.S. at 327). However, when read in light of other portions of the opinion, including the concurrence, it is quite clear that at least “truly” anonymous accusations of criminality cannot be corroborated irrespective of the of the accuracy of predicted legal conduct. Possibly Justice Ginsburg is referring to the “unnamed but less than truly anonymous source” mentioned in the concurrence—any other reading creates a logical contradiction with the central thrust of the opinion. This may also be read as collegial deference to the Justices who joined the majority opinion in *Alabama v. White* and were now joining the unanimous opinion in this case.
571 See id. at 270 (stating that in White, “[o]nly after police observation showed that the informant had accurately predicted the woman’s movements . . . did it become reasonable to think the tipster had inside knowledge”).
572 Id.
573 Id.
574 See discussion supra notes 317-19.
made it “reasonable to think the tipster had inside knowledge about
the suspect and therefore [reasonable] to credit his assertion about
the cocaine.”\(^{375}\) While Justice Ginsburg did not purport to overrule
Alabama v. White, she characterized it as “borderline”\(^{376}\) and empha-
sized it was even considered a “close case” by the Court that decided
it.\(^{377}\) She then deftly described the absence of any logical relation-
ship between having “inside knowledge of a persons affairs” and spe-
cific knowledge of criminality.

Knowledge about a person’s future movements indicates some
familiarity with that person’s affairs, but having such knowledge does
not necessarily imply that the informant knows, in particular, whether
that person is carrying hidden contraband.\(^{378}\)

According to Justice Ginsburg, the tip in J.L. could be distin-
guished from that in White, because it lacked the indicia of reliability
that was “essential” in White. The informant in J.L. “provided no pre-
dictive information” for police to corroborate.\(^{379}\) Ginsburg also noted
that the fact that the search of the juvenile turned up the gun could
not be considered in evaluating the officers’ basis for the initial sei-
zure: “All the police had to go on in this case was the bare report of
an unknown, unaccountable informant who neither explained how he
knew about the gun nor supplied any basis for believing he had
inside information about J.L.”\(^{380}\)

Justice Ginsburg declined the invitation of the petitioner to create
a “firearms exception” that would have allowed this seizure because
the tip involved protecting officers and the general public from possi-
ble danger.\(^{381}\) According to Ginsburg, “[s]uch an exception would
enable any person seeking to harass another to set in motion an in-
trusive, embarrassing police search of the targeted person simply by
placing an anonymous call falsely reporting the target’s unlawful car-
riage of a gun.”\(^{382}\) This kind of exception from the Fourth Amend-
ment requirement of “particularized suspicion” based on some sort of
objective factors would provide justification for such an exception for
other dangerous items, such as narcotics, and the exception would
swallow the Fourth Amendment.\(^{383}\)

\(^{375}\) J.L., 529 U.S. at 270.
\(^{376}\) Id. at 271.
\(^{377}\) Id.
\(^{378}\) Id.
\(^{379}\) Id.
\(^{380}\) Id.
\(^{381}\) Id. at 272
\(^{382}\) Id. See also Carlson v. Illinois, 729 N.E.2d 858 (Ill. App. 2000); cert. denied, 121 S. Ct. 1229 (2001) (declining to consider this argument based on an anonymous tip that a suspect was “suicidal” and “armed”).
\(^{383}\) Id. at 273. “If police officers may properly conduct Terry frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in Adams and White, the Fourth Amendment
The concurrence by Justice Kennedy, in which Chief Justice Rehnquist joined, further emphasizes how difficult it may be to find "indicia of reliability" in anonymous tips:

When a police officer testifies that a suspect aroused the officer's suspicion . . . the courts can weigh the officer's credibility . . . even if no one . . . was present or observed the seizure. An anonymous telephone tip without more is different, however . . . If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.\footnote{Id. (Kennedy, J., concurring).}

The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.\footnote{Id. (Kennedy, J., concurring).}

The concurrence mentions the possible use of other "indicia of reliability" that might be used to evaluate the "trustworthiness" of sources that do not fall into the "truly anonymous" category. According to Justice Kennedy, these other indicia must arise from "features, either supporting reliability or narrowing the class of informants."\footnote{Id. at 274-75 (Kennedy, J., concurring) (emphasis added).}

Some of those factors might include: prediction of future conduct,\footnote{Id. (Kennedy, J., concurring).} a recognizable voice that has repeatedly been confirmed as being correct;\footnote{Id. (Kennedy, J., concurring).} or a face-to-face encounter with an unnamed person.\footnote{Id. (Kennedy, J., concurring).} The concurrence also suggested that caller I.D. and advanced technology may increase the ability to identify anonymous informants and might provide another indicia of reliability.\footnote{Id. at 276 (Kennedy, J., concurring).}

The indicia of reliability mentioned by the concurrence do not include corroboration of predicted legal conduct that indicate the informant possessed "inside information."\footnote{Id. at 271 (discussing "inside information" in the context of Alabama v. White).} Even though this undifferentiated information was an important indicium to the majority in both Gates and White, it was rejected as completely inconsistent with the observation that "truly anonymous" sources may never be relied

is not so easily satisfied."\footnote{Id. Justice Ginsburg did not dismiss outright the possibility of searches for dangerous items without "a showing of reliability." Id. For example, "a report of a person carrying a bomb" does not need to "bear the indicia of reliability we demand for a report of a person carrying a firearm . . . ." Id. at 273-74.}

She also took care to note that this case does not change the increased ability to stop and frisk in areas of diminished Fourth Amendment protections, or to frisk following a legitimate Terry stop. However, she made quite clear that the holding of the unanimous Court was that, "an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk" even if the illegal possession of a firearm is the subject of the tip.\footnote{Id. at 274.}

The predictions of future conduct reference is a bit confusing since the premise of the reasoning of the unanimous opinion is that predictions of legal conduct can have little bearing on determining the reliability of anonymous assertions of illegality. But as mentioned earlier, this may be the result of deference to members of the Court who were joining in the unanimous opinion that severely undercut prior cases in which they had upheld "truly anonymous" sources. See discussion supra note 370.\footnote{Id. (Kennedy, J., concurring).}
IV. The Use of Informants After Florida v. J.L.

The brevity of the unanimous opinion and concurrence in Florida v. J.L. belie the doctrinal importance of the principles established by the opinion. This is evidenced by the fact that four Justices, who upheld the use of anonymous sources in Illinois v. Gates or Alabama v. White, joined the unanimous opinion in Florida v. J.L., a case which seriously undermines the continued validity of both cases. Chief Justice Rehnquist authored Illinois v. Gates nearly twenty years ago and joined Justice White's majority opinion in Alabama v. White, along with currently sitting Justices Scalia, O'Connor and Kennedy. However, all four also joined in the unanimous rejection of anonymous sources in Florida v. J.L. While Justice Ginsburg's opinion does not explicitly overrule either Alabama v. White or Illinois v. Gates, the unanimous holding in Florida v. J.L., that: (1) corroboration of predicted legal behavior cannot be relied upon to evaluate the reliability of assertions of criminality, and (2) "truly anonymous" informants can never be relied upon, has created an analytical construction that is completely at odds with the two previous anonymous source cases and raises serious questions regarding their continued doctrinal vitality.

391 Id. at 276 (Kennedy, J., concurring) (stating that "[t]hese matters ... must await discussion in other cases, where the issues are presented by the record"). Justice Kennedy also implied that testing the credibility of the officer is also more difficult in the "after the fact" determination of reasonableness in non-warrant situations. There was police testimony that an anonymous telephone tip had been received, but there was no recording or other documentation that the call had actually been received, much less a record of the contents of the call. Therefore, Justice Kennedy seemed to question existence of the tip: "The prosecution recounted just the tip itself and the later verification of the presence of the three young men..." Id. at 275.

392 529 U.S. 266 (2000).

393 See discussion infra notes 374-82.


396 Florida v. J.L. was unanimous in all respects. Justices Kennedy and Rehnquist filed a concurrence, but stated, "[t]he Court says all that is necessary to resolve the case, and I join in the opinion in all respects." J.L., 529 U.S. at 274. The concurrence is completely at odds with the language in Gates that states, "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to specific non-criminal acts." Gates, 462 U.S. at 244 n.13.

397 See J.L., 529 U.S. at 269-74.

398 Id.

399 Id. See also id. at 275 (Kennedy, J., concurring).

The *Florida v. J.L.* opinion sidestepped the effect of this reasoning on previous cases by not discussing *Illinois v. Gates* and by allowing, in dicta, that: (a) *Alabama v. White* was a special case at the outer limits of the doctrine, in which the tip at issue was “more predictive” than the tip in *Florida v. J.L.*; and (b) a theoretical possibility that detailed predictions of legal conduct might provide corroboration for anonymous accusations of illegality might remain. However, this language cannot be taken too seriously in doctrinal terms because, as the State of Florida pointed out, there actually was predictive information supplied by the informant in *Florida v. J.L.*.

Justice Ginsburg made clear that the accuracy of the informant's description was only sufficient to allow the police to identify “the person whom the tipster mean[t] to accuse,” and that predictions of legal conduct only indicated some knowledge of the affairs of another. Her reasoning did not hinge on the amount of detail provided by the anonymous source. Rather, she took an analytical tack that makes the accuracy of predictions of legal behavior virtually irrelevant, by exposing the central logical flaw in both *Illinois v. Gates* and *Alabama v. White*. Justice Ginsburg observed that the accuracy of an anonymous tipster in predicting legal conduct, even if it is fully corroborated, tells little or nothing about the reliability of an anonymous informant’s accusations of criminal activity. “Such a tip, [which predicts legal behavior] however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality. . . .”

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401 People v. Carlson, 729 N.E. 2d 858 (Ill. App. Ct. 2000), cert. denied, 121 S. Ct. 1229 (2001) (applying *Florida v. J.L.* and rejecting the argument that dangerousness and the amount of detail in the tip was sufficient make the tip reliable, even though the informant could not be held accountable if wrong).

402 *J.L.*, 529 U.S. at 271. If the existence of specific predicted facts and corroboration are to be the touchstone, this level of specificity and corroboration certainly exceeded the virtually non-existent corroboration of the identity of the suspect in *Alabama v. White*. The impact of the reasoning that eliminates the use of “truly” anonymous informants actually would result overturning *Alabama v. White*, if it were heard after *Florida v. J.L.* and the use of corroboration has been limited to make it irrelevant in the case of anonymous sources.

403 *Id.* (emphasis added). The focus on knowledge and veracity with respect to criminal activity forces a significant restating of the *Aguilar/Spinelli* formulation because the issue never was “veracity” or “basis of knowledge” in a general sense. For probable cause, the question has always been whether the informant was “reasonably trustworthy” with respect to allegations of criminality. See discussion of Giordenello supra notes 64-82. After the unanimous opinion in *Florida v. J.L.*, the *Aguilar/Spinelli* factors must be described as (1) “veracity with respect to accusations of criminality” and (2) “basis of knowledge of criminal conduct.” The result is a reframing of the entire inquiry with respect to the use of informant tips.
This reasoning suggests that if a case factually similar to Alabama v. White, or perhaps even Illinois v. Gates, were to come before the Court, after Florida v. J.L., it is unlikely that any level of corroboration of predicted legal activity could provide a basis for concluding that the anonymous accusations of illegality could be relied upon. Although Florida v. J.L. did not specifically overturn Alabama v. White, the reasoning of the unanimous opinion necessarily leads to a very similar result. The unanimous opinion in Florida v. J.L. reflects one simple, logically unassailable proposition—with respect to corroboration of predicted legal behavior—that will make it difficult for the Court to uphold any Gates/White-type corroboration case in the future: “Knowledge about a person’s future movements indicates some familiarity with that person’s affairs, but having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband.”

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404 This conclusion is buttressed by the Court’s rejection of a case which raised this specific issue during the most recent term. See People v. Carlson, 729 N.E.2d 858 (Ill. App. Ct. 2000), cert. denied, 121 S. Ct. 1229 (2001) (raising the issue of the reliability of anonymous accusations during a recent term).

405 See id. This conclusion is reinforced by the Court’s rejection of certiorari in Illinois v. Carlson, which raised this issue.

406 J.L., 529 U.S. at 271. At its core, it is this observation that strikingly alters the use of corroboration as a basis justifying searches and seizures. Beginning with Draper, and continuing through Spinelli, Harris, Taylor, Adams v. Williams, Gates, and Alabama v. White, the Court failed to articulate precisely how the corroboration of known predicted facts might reasonably lead to the conclusion that an informant’s tip could reasonably be acted upon. Spinelli v. United States, 393 U.S. 410, 427-28 (1969) (White, J., concurring). In his Spinelli concurrence, Justice White indicated that he was doubtful of Draper, if it held that the verification of nine independent details provided by an informant makes the tenth believable. According to Justice White, Draper should be read to mean that the type of detail corroborated by a law enforcement officer must support an inference of criminal activity. Id. The detail in Draper met this test because police observation corroborated facts not generally known except to those intimately involved in making arrangements for meeting the suspect:

The thrust of Draper is not that the verified facts have independent significance with respect to proof of the tenth. The argument instead relates to the reliability of the source: because an informant is right about some things, he is more probably right about other facts, usually the critical, unverified facts.

Id. at 427. In Illinois v. Gates he attempted yet another explanation:

I did not say that corroboration could never satisfy the “basis of knowledge” prong. My concern was, and still is, that the prong might be deemed satisfied on the basis of corroboration of information that does not in any way suggest that the informant had an adequate basis of knowledge for his report. If, however, as in Draper, the police corroborate information from which it can be inferred that the informant’s tip was grounded on inside information, this corroboration is sufficient to satisfy the “basis of knowledge” prong.


The Court’s opinion in Gates gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity . . . . Thus, it is not unreasonable to conclude in this case that the independent corroboration by the police of significant aspects of the informer’s predictions imparted some degree of reliability to the other allegations made by the caller.

Alabama v. White, 496 U.S. 325, 331-32 (1990) (citation omitted). These attempts were as close
Further, by making clear that "truly anonymous" informants can never be found reliable, because such sources cannot be held accountable for lying or being wrong, it would seem that any future case that is based on the use of a "truly anonymous" informant, as were both Illinois v. Gates and Alabama v. White, will run afoul of the reasoning in Florida v. J.L. Neither of the anonymous informants in those cases had been sufficiently identified to be held accountable, if they had been wrong in making their accusations. Under Florida v. J.L. these anonymous assertions of illegality could not be considered "reasonably trustworthy," no matter how detailed the anonymous descriptions and corroboration of legal conduct because, as Justice Kennedy clearly stated, these "truly anonymous" informants can "lie with impunity" and are not acceptable as a basis for establishing the justification for searches or seizures. If this is so, allegations of criminality, after Florida v. J.L., will have to depend, in some fashion, on the ability of the judiciary to evaluate the reliability of "truly anonymous" accusations of illegality on factors other than corroboration of predicted legal behavior.

as the Court came to an explanation of the relationship between corroboration of predicted facts and accusation of criminality. Even well respected commentators had difficulty developing a coherent description of how corroboration fit with the two-prong Aguilar/Spinelli test. See, e.g., Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551 (1984); LAFAVE ET AL., CRIMINAL PROCEDURE § 3.3 (3d ed. 2000). The author is no exception. See I RUDSTEIN, ERLINDER, ET AL., CRIMINAL CONSTITUTIONAL LAW, ¶ 2.08[3], at 235 (2000). The important analytical distinction made by Justice Ginsburg is clear recognition that it is the accusation of criminality, not just an informant's knowledge and reliability in general, which is at the heart of the corroboration problem.


The conclusion that even detailed information that is fully corroborated falls short of the standard for anonymous sources cases that was buttressed by the denial of certiorari in People v.
The *Florida v. J.L.* opinion also identifies the logical limits of the use of corroboration of predicted legal conduct in evaluating reliability of assertions of criminality: (a) verifying the identity of the person the informant meant to accuse, and; (b) verifying that the informant has some familiarity with the accused person. By clarifying that all informants must be found reliable with respect to accusations of criminality for reasons *other than corroboration of predicted legal behavior*, the "totality of the circumstances" doctrine will no longer be able to be applied in the standardless fashion that was encouraged by the imprecise analysis of the majority in *Illinois v. Gates* and *Alabama v. White*.

A. The Resurrection of Aguilar/Spinelli

In addition to putting to rest the use of "truly anonymous" sources to justify searches and seizures in any context, perhaps the greatest value of the reasoning in *Florida v. J.L.* is that it brings greater analytical clarity to the use to which "corroboration" can logically be put *within* the "totality of the circumstances" scheme endorsed by *Illinois v. Gates* in a way that applies to *all* third party sources. Under *Gates*, the "totality of the circumstances" test ostensibly continued to value the two prongs of *Aguilar/Spinelli*, but added corroboration of predicted behavior as another factor in evaluating the "reasonable trustworthiness" of a source in an unspecific, un-defined manner. Prior

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411 *J.L.*, 529 U.S. at 274. "Truly anonymous" sources are completely foreclosed for any purpose by the reasoning of *Florida v. J.L.* Reliance on a source that presents information in-person where the informant may be held accountable for being wrong may still be allowable for investigative stops but it is unlikely that such "known but not previously trustworthy" sources could be used to establish probable cause.

412 "The Court's opinion in *Gates* gave credit to the proposition that because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Alabama v. White*,
to the Florida v. J.L. opinion, the Court had never clarified the questions upon which the corroboration of predictions of legal conduct might logically have a bearing.43

Because corroboration of predicted legal behavior provides virtually no information regarding either the "basis of an informant's knowledge of illegal conduct," or "the reliability of the informant in making those allegations,"44 such corroboration cannot logically be used to supplant the two questions that Aguilar/Spinelli and common logic require as the basis for determining the reliability accusations of criminality by any third party45. This reasoning, of course, also applies equally both to anonymous and to known informants, and must apply not only to investigative searches and seizures, but must also apply to arrests and searches requiring probable cause.

1. "Reasonable Articulable Suspicion," Known Sources and Corroboration

After Florida v. J.L., an anonymous tip that described in great detail an individual standing on a corner, and which predicted that the individual would "cross the street at 3:00 to sell drugs to a person in a white car with New York license plates that will arrive at the corner at precisely 2:45 that will blink its lights once" would be insufficient to justify an investigative stop. Police who observe every action predicted by the informant will certainly be able to conclude that the unknown informer had a great deal of knowledge about the intention of the parties to meet at the corner, at a particular time, in a particular manner. However, on the crucial question of "illegality," the only basis for further action would be the anonymous assertions of illegality made by the unknown informant.

Even though a high level of corroboration of predicted legal activity has occurred, the corroboration does not provide any basis to conclude that the informant is correct about the accusations of illegality. Justice Ginsberg's opinion for the unanimous Court, as well as the concurrence by Justice Kennedy, establishes there is simply no basis for a fact-finder to conclude that the "truly" anonymous informant was correct about accusations that the observed activities were crimi-

496 U.S. 325, 331 (1990). For a critique of the use of corroboration to establish reliability of an informant, see LAFAVE ET AL., CRIMINAL PROCEDURE, § 3.3 (3d ed. 2000).
43 See discussion infra notes 374-79. "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse." J.L., 529 U.S. at 272. "Knowledge about a person's future movements indicates some familiarity with that person's affairs . . . ." Id. at 271.
44 "[B]ut having such knowledge does not necessarily imply that the informant knows, in particular, whether that person is carrying hidden contraband." Id.
45 This is the central flaw in the formulation expressed in Gates and Alabama v. White. As Justice Ginsburg exposed, there is no necessary or even predictive connection between accuracy with respect to legal behavior and knowledge of criminality. Id. at 271-74.
nal in nature.\textsuperscript{416} After Florida v. J.L., therefore, corroboration of predicted legal conduct alone can never be sufficient to uphold an investigative search or seizure based on a "truly anonymous" tip, even in the face of very detailed corroboration.\textsuperscript{417}

With respect to the use of corroboration with known informants in investigative search cases, Florida v. J.L. suggests an elaboration of principles that were enunciated in Adams v. Williams.\textsuperscript{418} Although decided long before Illinois v. Gates formally re-introduced corroboration as a basis for searches or seizures, Adams v. Williams actually made use of a Draper-type "quasi-corroboration" analysis to justify the investigative stop-and-frisk at issue in that case.

Viewed through this "corroboration" prism, the known informant in Adams v. Williams predicted the location of the suspect, the suspect's car, and provided the suspect's description.\textsuperscript{419} The officer "corroborated" the aspects of the tip that only established the identity of the suspect and that the informant had some knowledge of the suspect's affairs. However, because an investigative stop was at issue, "reasonable suspicion" was satisfied by a lesser "basis of knowledge of criminal conduct" than would be required for probable cause for arrest. The deficit in the "basis of knowledge of criminality" prong was compensated for by the fact that the source was known and could be held accountable, had she been wrong in making the accusation.

Florida v. J.L. can be read as establishing that the "reliability of the accusations of criminality" prong of Aguilar/Spinelli may be satisfied at a lower level of suspicion applicable in investigative stop cases, as it was in Adams v. Williams. The officer in that case was able to rely on the accusations of criminality only because the source was known and, as Florida v. J.L. reconfirms, could only be considered reliable because the informant could be sufficiently identified to be held accountable for a false or erroneous report.\textsuperscript{420}

In the case of information received from sources who are sufficiently known to be held accountable,\textsuperscript{421} corroboration of predicted

\textsuperscript{416} See discussion of unanimous and specially concurring opinions in Florida v. J.L. supra notes 345-91.

\textsuperscript{417} In effect, this overrules the reasoning in Alabama v. White, although it is possible that the outcome in that case would not change since the seizure could have been upheld on other grounds. See discussion supra notes 338-40.

\textsuperscript{418} The suggestion is that corroboration may be used to verify the identity of the person the informant meant to accuse, but cannot provide verification of knowledge of criminal activity. See id. at 272.

\textsuperscript{419} Adams v. Williams, 407 U.S. 143, 144-45 (1972).

\textsuperscript{420} Florida v. J.L. has implications for cases involving known sources because corroboration of predicted facts does not necessarily verify the veracity of the informant, as Justice Ginsburg made clear in J.L., and merely being able to identify the informant may be insufficient to ensure reliability of that informant. See People v. Sparks, 734 N.E. 2d 216 (2000) (known informant provided detailed information, but was only known because of a previous arrest which resulted in a cooperation agreement and trial court held that such an informant was insufficiently trustworthy to be relied upon).

\textsuperscript{421} There remains a question as to how "identifiable" an informant must be and whether the
legal behavior still retains some utility to establish that the informant has identified a suspect and that the informant has some basis of knowledge of the suspect and the suspect’s affairs. After Florida v. J.L. and Adams v. Williams, the two prongs of Aguilar/Spinelli can be met for investigative stop purposes by using corroboration of predictions of legal behavior to help fill in the “basis of knowledge” of a known, reliable source.422

However, because the corroboration of predictions of legal conduct does not reveal anything with respect to the basis for the informant’s accusations of criminality, or the informant’s reliability in making the accusation, corroboration of legal behavior alone is not sufficient for justifying a search or seizure. This corroboration must be accompanied by an accusations made by a known source who is at least sufficiently identifiable to be held accountable for being wrong.423 Of course, this standard applies only to investigative stops and, as the Court noted in both Adams v. Williams and Alabama v. White, a higher level of proof is required to establish the basis for probable cause.424

2. Probable Cause, Known Sources and Corroboration

After Florida v. J.L., determinations of probable cause may also be based, in part, on corroboration of predicted facts from informants, but only to the extent that the corroboration is used to establish: a) the identity of the suspect the informant intends to accuse and b) that the informant has some knowledge of the person’s affairs.425 However, because probable cause requires a higher standard of suspicion to justify an arrest or search, any corroboration used for this limited purpose will necessarily have to be more detailed and the corroboration more exacting than that in Adams v. Williams.426 After Florida v. J.L. it also appears that, since corroboration of predictions of legal conduct cannot be used to establish either a basis of knowledge of criminality or reliability with respect to allegations of criminality to informant must know that they can be identified to be considered trustworthy. See discussion infra notes 384-89.

422 However, it should be noted that the use of “less reliable” evidence for determinations of reasonable articulable suspicion does not necessarily follow from Terry. See David Rudstein, White on White: Anonymous Tips, Reasonable Suspicion, and the Constitution, 79 Ky. L.J. 661 (1991).

423 Significantly, the Supreme Court declined to hear an anonymous source case that applied Florida v. J.L. to an anonymous report of a suspect being “armed” and “suicidal” and in which the state argued that the details were more fully developed than in Florida v. J.L. See Carlson v. Illinois, 729 N.E.2d 858 (Ill. App. 2000), cert. denied, 121 S. Ct. 1229 (2001).


425 See J.L., 529 U.S. at 271-72 (discussing the indicia of reliability of an anonymous tip).

establish the basis for an investigative stop, corroboration of predicted legal conduct must also be insufficient to meet the higher probable cause threshold.427

This means that both the "informant's reliability" and "basis of knowledge," with respect to the accusations of criminal conduct, will have to be established through the use of a standard higher than that applicable in Adams v. Williams or Florida v. J.L.428 Because probable cause requires a higher standard than that allowable in these investigative stop cases, the mere "identification of the informant sufficient for the informant to be held accountable," allowable under Florida v. J.L. for investigative purposes, will necessarily be an insufficient indication of reliability for probable cause purposes.

In order to maintain symmetry in the probable cause/reasonable articulable suspicion doctrine,429 the standard for evaluating the reliability of all post-Florida v. J.L. informants in probable cause cases will probably approximate that required by the Aguilar/Spinelli test. Because Florida v. J.L. forecloses the use of corroboration of predicted legal conduct to supplant either prong of the Aguilar/Spinelli test, corroboration as used in Draper v. United States430 can no longer be considered a viable substitute for "basis of knowledge of illegality," and "reliability of the informant" in making accusations of illegality. Probable cause must once again be determined, not on corroboration of predicted legal behavior or even upon the possibility that an informant might be held accountable for being wrong, but on a higher "probable cause" standard that will likely have to include additional specific information describing: (1) why the known informant should be considered reliable in making accusations of criminality, usually by describing reliability in the past,431 and (2) how an informant

427 The concurrence makes clear that "truly anonymous" sources can "lie with impunity" and the "risks of fabrication becomes unacceptable." J.L., 529 U.S. at 275 (Kennedy, J., concurring). This would seem to rule out the use of these informants for all purposes if they are not acceptable for investigatory stop purposes, they certainly can no longer be used for determining probable cause.
428 A secondary, but extremely important result of treatment of corroboration in Florida v. J.L. is that it ends the two tier probable cause standard by harmonizing the use of corroboration in Draper with the Aguilar/Spinelli two part test.
429 For a discussion of probable cause and reasonable articulable suspicion distinctions, see White, 496 U.S. at 329.
430 The basis of the informant's knowledge was never established in Draper, see discussion supra notes 97-98. After Florida v. J.L., basis of knowledge of criminality cannot be established by corroboration of predictions of legal conduct alone. In informant cases, the Aguilar/Spinelli test must return to prominence. However, if in corroborating the predictions of an informant, police observe criminal behavior, an arrest can certainly be made on those observations, as long as they are sufficiently suspicious standing alone, without the allegations of the informant. See Sibron v. New York, 392 U.S. 40 (1968).
431 Reliability for probable cause purposes is most commonly based on evidence that the informant has proved reliable in the past. See discussion of Draper supra notes 97-120; Aguilar/Spinelli, supra notes 154-75; Taylor v. Alabama, supra note 199. However, it is conceivable that this prong might be based on a known informant providing information against their own interest. See discussion of United States v. Harris, supra note 197. Although, when the informant
knows about a suspect's criminality, usually by describing the informant's basis of knowledge. Corroboration might be used to assist in establishing the informant's knowledge of the suspect and the suspect's legal affairs, but the informant's accusations of illegality and the basis of the informant's knowledge of illegality will have to be determined in a manner similar to the Aguilar/Spinelli two-prong test that Gates purported to replace.

B. The Re-affirmation of Fourth Amendment Separation of Powers

The elimination of “truly anonymous” informants removes one impediment to meaningful judicial oversight that was recognized by Justices Kennedy and Rehnquist: “If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.”

has a pre-existing arrangement with law enforcement, the indicia of reliability is reduced significantly. See Harris, 403 U.S. at 586-601 (dissenting opinion). But see People v. Sparks, 794 N.E.2d 216 (Ill. App. Ct. 2000) (even though informant was known, because the informant had made special arrangements to benefit from supplying information the accusations of illegality were reliable enough to support an investigative stop).

According to Professor LaFave:

[This criticism] does not compel the conclusion that the admission-against-interest approach should never be used, but rather that it should be used with caution . . . . [T]he informant's name is not disclosed then it is more likely . . . that he is a person whose indiscretions are tolerated by police . . . in exchange for information . . . who thus will perceive little risk in admitting such indiscretions . . . . [T]he declaration [against penal interest, also] must have a significant nexus to the information critical to the probable cause determination.


With respect to this prong, corroboration of predictions of legal behavior might be useful, as stated by Justice Ginsburg to confirm that the suspect is the person the informant meant to accuse, and that the informant has knowledge of the suspect’s personal or business affairs. J.L., 529 U.S. at 272. This corresponds to the “inside information” to which Justice Kennedy referred in his attempts to describe the corroboration rationale. See supra note 384-91. However, because corroboration of legal conduct cannot be used to corroborate an informant’s knowledge of illegality, J.L., 529 U.S. at 272, the description of the informant’s basis of knowledge of criminality must be established by the informant’s narrative in the same fashion required by Aguilar/Spinelli.

It is also worth noting that after Florida v. J.L., law enforcement officials are also on notice that reliance upon warrants based on assertions of illegality by “truly anonymous” informants is not justified. As a result, it is not obvious that officers acting under the authority of such warrants will be able to continue to avail themselves of the “good faith” exception to the exclusionary rule that might apply to warrants with other sorts of deficiencies. See United States v. Leon, 468 U.S. 897 (1984); Massachusetts v. Sheppard, 468 U.S. 981 (1984). See also discussion supra text accompanying notes 223-25.

J.L., 529 U.S. at 275 (Kennedy, J., concurring) (emphasis added). Since Florida v. J.L. was decided, a number of lower court opinions have upheld investigative stops involving informants who could be identified in some fashion. See United States v. Christmas, 222 F.3d 141 (4th Cir. 2000) (holding face-to-face informant reliable where he provided address but not name); United States v. Valentine, 292 F.3d 350 (5th Cir. 2000) (holding valid a face-to-face report of “man with a gun”); United States v. Thompson, 234 F.3d 725 (D.C. Cir. 2000) (holding tip reliable where information was given in person and tipster subjected himself to ready identification
However, another aspect of the *Florida v. J.L.* opinion that is likely to impact future developments in Fourth Amendment jurisprudence is the opinion's firm restatement of the obvious, but not often articulated, requirement that judicial evaluation of law enforcement practices must *not* consider the *results* of those practices. There is ample evidence from the dissenting opinion in *Draper*, and even in the treatment of facts by the majority opinion in both *Gates* and *White*, that it may be difficult for the judiciary to adhere to this bedrock principle when presented with a fruitful search, as in *Gates*, or even when presented with facts like those in *White*, in which police did *not* find what the informant predicted, thus *proving* the tip to have been fundamentally incorrect, but where *some* reason to arrest the suspect can be found. By reaffirming the truism that courts may not indulge in retrospective, "reasonableness in-light-of-the-results" analysis, by limiting the opportunity to do so by eliminating the use of "truly anonymous" informants, and, by establishing clear standards for evaluating "reasonably trustworthy" informants, the *Florida v. J.L.* opinion signals a renewed appreciation for the responsibilities of the judiciary to maintain the separation of powers required by the Fourth Amendment.

The problem of retrospective justification for a "successful" search or seizure is not new, as the tendency to lower probable cause standards in pre-*Terry*, on-scene warrantless arrest cases such as *Brinegar*...
and Draper attest. In warrantless, anonymous source cases, this is an even greater problem than in warrant cases, because officers who relied on the source will be called upon to reconstruct the tip for a court only after an arrest has already occurred. The temptation to recall aspects of the tip, or even the existence of a tip, that confirm the validity of an already successful search or seizure would certainly be powerful. The concurrence in Florida v. J.L. made reference to the possibility that such retrospective justification may have occurred in that case, since police could not point to any record that an anonymous tip had been received, much less the exact time it had been received, nor was there any record of its contents. This issue also arose in Adams v. Williams and Alabama v. White. Eliminating the use of "truly anonymous informants" goes a long way to limit the opportunities, and the temptation, to create anonymous tips to justify “successful” results.

However, clarifying the proper role for the use of corroboration of predictions of legal conduct as part of the “totality of the circumstances” test may, in the long run, have an even more important impact on judicial oversight of police use of informants. The confused state of affairs revealed by the rationale advanced by Justice White for relying on anonymous sources in Illinois v. Gates and Alabama v. White, made it possible for officers to argue that virtually any corroboration of predictions by a source, either known or unknown, was sufficient to make the officer’s reliance reasonable. In Florida v. J.L., the Court has re-established the “basis of the informant's knowledge of criminality” and the “reliability of the informant” as the standard that must apply in the evaluation of any informant, no matter how well known to police. This aspect of Florida v. J.L. returns the judiciary to its proper role in the separation of powers scheme established by the Fourth Amendment and described by the Court in Giordenello, the first “reasonably trustworthy” informant case decided by the Court. The Giordenello Court stated that:

[If the complaint] does not indicate any sources for the complainant’s belief and it does not set forth any other sufficient basis upon which a finding of probable cause could be made... it is difficult... to assess independently the probability that petitioner committed the crime charged. Indeed, if this complaint were upheld... the complaint would be of only formal significance, entitled to perfunctory approval by the

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440 See discussion supra note 44.
441 J.L., 529 U.S. at 275 (Kennedy, J., concurring).
442 See discussion supra note 313.
443 See LAFAVE ET AL., CRIMINAL PROCEDURE, § 3.3, at 156 (3d ed. 2000) (stating that “Gates rejects the notion that corroboration of innocent activity will not suffice. ‘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.’” (citing Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983))).
At the heart of the cases which required that a magistrate be provided with sufficient information regarding the basis of an informant's knowledge of criminality and the reliability of the informant to make an independent determination as to the "reasonable trustworthiness" of the informant, is a concern for maintaining the separation of powers that is explicitly required by the Fourth Amendment. In Giordenello, the Court referred to the much-quoted language of Justice Jackson in Johnson v. United States:

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.445

Thus, the fundamental constitutional objection to policies and procedures that fail to allow judicial officers to make independent determinations with respect to the "reasonable trustworthiness" of informants is that, ultimately, judicial officers rather than law enforcement officers must make the inferences necessary to decide whether reliance on an informant is reasonable in order to effectuate the separation of powers that is at the heart of the Fourth Amendment. In order for the judiciary to fulfill this function,

[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant... was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate' as the Constitution requires, but instead by a police officer 'engaged in the often competitive enterprise of ferreting out crime'... or as in this case, by an unidentified informant.

In Spinelli, the Court refined this analysis by making clear that, even when otherwise innocent activities are verified through investigation, the magistrate must be put in a position to determine the reliability of the informant or,

A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when corroborated—is not as reliable as one which passes Aguilar's requirements [i.e.,

basis of the informant’s knowledge of criminality and the basis for concluding the informant was reliable] when standing alone.447

Thus, when a magistrate is presented with information that is conclusory, and is asked to accept the inferences of law enforcement officers, what is at stake is nothing less than the “constitutional duty” of an independent judiciary.

The “totality of the circumstances” test, as described by Justice White, was premised upon the idea that “[b]ecause an informant is shown to be right about some things, he is probably right about other facts he has alleged, including the claim that the object of the tip is engaged in criminal activity.”448 However, once a unanimous Court, through Justice Ginsburg, made the observation that corroboration of predicted legal conduct did not necessarily show that the informant was accurate or reliable with respect to accusations of criminality in Florida v. J.L., the central analytical flaw of the previous applications of the “totality of the circumstances” test in Gates and White became clear. It allowed officers, or unknown informants, to draw conclusions regarding the reliability of accusations of criminality based upon corroboration of predictions of legal behavior, thus removing the judiciary from its proper role in determining the “reasonable trustworthiness” of informants in their accusations of criminal activity. That is why the Aguilar/Spinelli test required that both the “basis of knowledge of criminality” and “the reliability of the informant” be demonstrated, even if predicted legal behavior was corroborated. By revitalizing the Aguilar/Spinelli two-prong test, and consigning corroboration to its proper role in supporting that test, rather than supplanting it, the Court has once again put the judiciary in a position to carry out its “constitutional duty” under the Fourth Amendment.

C. Corroboration, Aguilar/Spinelli and the Future of the “Totality of the Circumstances”

The elimination of “truly anonymous” informants, who cannot be held accountable for incorrect accusations of criminal conduct, and the development of a more coherent explanation of the use to which corroboration of predicted behavior may be put, is plainly a preferable to a “totality of circumstances” in which anonymous informants could “lie with impunity,” and corroboration could be used for virtually any purpose. Both the author of Illinois v. Gates and a member of the majority in Alabama v. White are on record in observing that “truly anonymous” sources can never provide a basis for a judicial determination of “reasonable trustworthiness” that is “acceptable.”449 How-

449 See also Florida v. J.L., 529 U.S. 266 (2000) (showing both Justice Rehnquist and Justice
ever, the concurrence in *J.L.* paradoxically also mentioned that it may still be *theoretically* possible for an anonymous source to be considered reliable using some other, unspecified "indicia" of reliability.\(^5\)

The examples mentioned by Justice Kennedy only serve to emphasize how unlikely other "indicia of reliability" will occur in practice, and to indicate that this language cannot provide a basis for significant exceptions. According to Justice Kennedy, other *indicia* might include: "prediction of future conduct"\(^4\) (but under the reasoning endorsed by the unanimous Court, predictions of legal conduct provide little or no indication of reliability with respect to allegations of criminality and accusations from truly anonymous sources can never be "acceptable"); "a recognizable voice that has repeatedly been confirmed as being correct"\(^5\) (but, the voice will have to be identified sufficiently to hold the speaker accountable for providing incorrect information to be consistent with the unanimous opinion); or "a face to face encounter with an unnamed person" (but, an unnamed person, who can be held accountable for providing incorrect information, is actually not "anonymous" in the sense described by the concurring opinion, and the individual will have to be identified enough to be located later, in order to be held accountable).\(^5\)

Justice Kennedy's concurrence also suggests that caller I.D. and other advanced technology may increase the ability to identify anonymous informants and might provide another *indicia* of reliability.\(^4\) However, if sources who cannot be held accountable are not reliable tipsters, merely identifying a phone number will not be enough to determine the identity of the person who made the call, and the informant will remain "truly anonymous."\(^4\) Moreover, if the premise of the reliability of sources who *can* be identified is based upon the

\(^5\) *J.L.*, 529 U.S. at 274.

The reference to the predictions of future conduct is a bit confusing since the premise of the majority's reasoning is that predictions of legal conduct can have little bearing on determining the reliability of anonymous assertions of illegality.

\(^4\) *Id.* at 275. See *Buckner v. State*, 35 S.W.3d 417 (Mo. Ct. App. 2000). The court upheld an anonymous tip when a dispatcher testified having recognized the voice of anonymous informant from an earlier tip that resulted in an arrest. This scenario fits the example given by Justice Kennedy, but it is obvious that this informant, if "truly anonymous" could still have been lying "with impunity" about the second tip. Unless the tip was recorded, questions of developing a tip to fit the situation still remain under this scenario.

\(^3\) *Id.* at 276. Since *Florida v. J.L.* was decided, lower court opinions that have generally found that informants who appear in-person, or in face-to-face settings, can provide the basis for reasonable articulable suspicion. See *supra* note 434.


\(^5\) *J.L.*, 529 U.S. at 275 (Kennedy, J., concurring).
Thus, the only remaining question for investigative stops should be: whether unnamed sources are sufficiently identifiable by other means to be held accountable for their accusations to be considered "reasonably trustworthy." With respect to arrests, the only issue should be: whether the higher level of reliability that will be necessary for probable cause, approximating that of the Aguilar/Spinelli test, has been reached.

Given the extremely narrow range of facts in which these theoretical "indices of reliability" might exist, and the disadvantages that are inherent in the absence of clearly defined standards for both law enforcement personnel and the judiciary, not to mention the citizenry, the Court should build on the unassailable logic underlying the unanimous Florida v. J.L. opinion, rather than embark on a fact-based parsing of the unlikely scenarios presented by the concurrence. Because an informant's knowledge of innocent activities "does not necessarily imply that the informant knows" about illegal activity, and because "truly anonymous" sources can always "lie with impunity" and are "unacceptable," it is likely that the Court will soon have to acknowledge that a generalized "corroboration" of anonymous informants under the "totality of the circumstances" test is a failed undertaking, and that both Illinois v. Gates and Alabama v.

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460 The debate over the trade-off between predictability and flexibility with respect to determinations of probable cause is not new, nor is it completely resolved. See Wayne R. LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 SUP. CT. REV. 127 (1974); Albert Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. PIT. L. REV. 227 (1984); Joseph Grano, Probable Cause and Common Sense: A Reply to Critics of Illinois v. Gates, 17 MICH. L. REV. 465 (1984). In some areas the Court has indicated a clear preference for line-drawing that, in practice, can not be reasonably accomplished. See, e.g., New York v. Belton, 453 U.S. 454, 459-60 (deciding, in light of the difficulties of adjudicating rules that are not "straightforward," to create a bright line rule that police may search the passenger compartment of a car after arresting the occupant), modified by United States v. Ross, 456 U.S. 798 (1982) (holding that police may open containers found within a car only if they have probable cause to search for something that might be inside); Robbins v. California, 453 U.S. 420, 426-27, 428 (1981) (requiring exclusion from evidence of marijuana bricks acquired by opening a container, where the contents could be inferred from the container's appearance, and holding that "a closed, opaque container... may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile"), overruled by United States v. Ross, 456 U.S. 798, 824 (1982) ("The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.").


462 Id. at 271.

463 Id. at 275.
potential for identifiable informants to be held accountable, the reliability of the informant will depend not only upon ability of law enforcement to identify the informant, it must primarily depend upon informants’ awareness that they can be identified and held accountable, if they are wrong. If the informant is unaware of the possibility of suffering negative consequences for a malicious tip, there is no more reason to credit this sort of tip than information received from tipster who is anonymous. The technological capacity to identify the phone that was used to make the call, without specifically identifying the caller using the phone, fails to accomplish either of these objectives.

Each of these suggestions, however, is clearly premised on identifying the source in some fashion, even if not by name. But, the concurrence can be read as inviting a continuing search for particular “indices of reliability” on a case-by-case basis, rather than flatly requiring that police rely only on known sources, as was the case under the Aguilar/Spinelli/Adams v. Williams regime. As the now-effectively-repudiated “close case” of Alabama v. White makes clear, the absence of precise standards for determining the reliability of third party sources harms all parties because it provides no direction at all for both law enforcement officials and magistrates.

Unless the use of anonymous informants is unambiguously eliminated from Supreme Court jurisprudence, some law enforcement officers, or judges, might be encouraged to try to rationalize the three anonymous-source cases by engaging in tortured line-drawing between the “insufficient” predictive of details provided by the tip in Florida v. J.L. and the “sufficient” predictive details provided in Alabama v. White. However, that endeavor must be fruitless when a unanimous Court has already concluded that, no matter how detailed the corroboration of innocent facts, truly anonymous accusations of illegality can never be relied upon. The search for other “indices of reliability” for anonymous tips promises little benefit for law enforcement, and will undermine the virtues of predictability that would arise from clearly prohibiting anonymous sources completely.

456 I am indebted to Professor Wayne Logan for this additional insight regarding the ability of the proposals advanced by the concurrence in providing “reasonably trustworthy” alternative indicia of reliability.
457 J.L., 529 U.S. at 274.
458 See id. at 270-71 (discussing Alabama v. White, 496 U.S. 325 (1990)).
White will have to be discarded as having been wrongly, and illogically, decided.

CONCLUSION

After Florida v. J.L., the use of "truly anonymous" sources, as a basis for investigative searches and seizures, has been eliminated by a unanimous Court that has ruled that tipsters who are sufficiently known to be held accountable for supplying false information may be reasonably relied upon in stop-and-frisk settings. Further, by establishing that corroboration of legal conduct can only be used to corroborate that police have identified the suspect accused by the informant and that the informant has some knowledge of the suspect. By making clear that corroboration of predictions of legal conduct cannot supplant the basis of knowledge of criminality or the "reliability" of any informant with respect to allegations of criminality, the Court has clarified the "totality of the circumstances" test established by Illinois v. Gates that was applied in Alabama v. White. This clarification calls the outcome of both of these cases into question and requires a complete re-evaluation of the use of all third party information as the basis for both reasonable articulable suspicion and probable cause.

By necessary implication, after Florida v. J.L., even in the case of known informants, corroboration of predicted legal conduct can only be used to confirm an informant's identification of a suspect and the informant's knowledge of their legal affairs. Corroboration of predicted legal conduct cannot be used to support allegations of criminality, or the reliability of the informant with respect to those allegations.

The reasoning in Florida v. J.L. leads to the conclusion that not even known informants can be found "reasonably trustworthy," for probable cause purposes, without detailed information regarding the basis of the source's knowledge of criminality, and the reliability of the source in making allegations of criminality in a manner similar to that required by the two-prong Aguilar/Spinelli test. Whether the Court finds the opportunity to clearly overrule the "corroboration of anonymous sources" as a basis for probable cause or not, the necessary implications of the reasoning of Justice Ginsburg’s unanimous opinion in Florida v. J.L. clearly lead to that conclusion that it must do so in the near future.

In light of the unanimity of the Court in Florida v. J.L., lower courts would do well to recognize that the logical inconsistencies of Illinois v. Gates have been so thoroughly exposed that the only course that remains is to return to a probable cause standard that approxi-

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464 See discussion of White supra notes 320-44.
mates the Aguilar/Spinelli two-prong test that preceded the “totality of the circumstances” of Illinois v. Gates. Within that framework, the “basis of the informant’s knowledge” and “reliability with respect to accusations of criminality” will require a higher level of proof than those applicable for investigative procedures in Adams v. Williams and Florida v. J.L. In any case, the reign of the “reasonably trustworthy” anonymous informants appears to be at an end. All that remains for the Court is to announce its demise by either clearly articulating the role of corroboration in determining probable cause under the Illinois v. Gates “totality of the circumstances” test in the terms required by the reasoning of Florida v. J.L., or by consigning the “totality of the circumstances” test announced in Illinois v. Gates to a long overdue interment.