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Truth or Consequences: Self-Incriminating Statements and Informant Veracity

Mary Nicol Bowman

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By Mary Nicol Bowman*

Abstract: Courts treat self-incriminating statements by criminal informants as a significant factor favoring the reliability of the informant's information when making probable cause determinations for the issuance of search warrants. Courts do so even though admissions of criminal activity usually undercut, rather than support, credibility. In using self-incriminating statements to support the informant's reliability, courts tend to rely on a theory with significant theoretical flaws. Furthermore, recent United States Supreme Court jurisprudence in other contexts undercuts the reliability of using self-incriminating statements to support the veracity of other information. If courts adequately scrutinize the informant's self-incriminating statements and the circumstances surrounding the making of those statements, however, these statements can be used to support the informant's veracity in limited circumstances. This article therefore proposes an analytical framework courts can use to assess more accurately when an informant's self-incriminating statements should support the informant's veracity. The test proposed here is sufficiently flexible to allow the courts and police to consider the facts and circumstances of each case, but it will provide some guidance to courts and officers that will help protect the public from some of the abuses that can come with over-reliance on criminal informants.

Law enforcement today relies heavily on the flourishing industry of informants for prosecution of virtually all types of crimes.[1] Although there are several different types of informants,[2] most informants are themselves criminals who provide information about someone

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[1] *See* ROBERT R. BLOOM, RATTING 158 (2002) (quoting former FBI Director William Webster as stating that "[t]he informant is the single most important tool in law enforcement."); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645, 655 (2004) (noting the undisputed rise in the use of informants over the last twenty years, and theorizing that this rise flows in part from the confluence of the use of mandatory minimum sentences and the war on drugs); Clifford S. Zimmerman, *Toward A New Vision of Informants: A History of Abuses and Suggestions For Reform*, 22 HASTINGS CONST. L.Q. 81, 83 (1994) (informants are used for investigating a wide variety of crimes, but they are particularly important for policing "invisible crimes," in which there is no victim or the victim is unlikely to go to the police).

[2] The focus of this article is on "criminal informants," but the general term "informant" can also apply to "citizen informants," average citizens who witness a crime and provide information about it to the police. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 98 (2004). One author provides a useful but oversimplified explanation of the distinction between a criminal informant and a citizen informant: "The citizen-informer—with no ax to grind and motivated by civic duty—is, in stark contrast, the 'Hyperion' to the stool

else's alleged criminal activity in exchange for money or leniency for the informant's own crimes.[3] By providing this information against someone else, criminal informants may receive leniency for their own very serious crimes, such as kidnapping, arson, and even murder.[4] This system of providing leniency for cooperation has a tremendous potential for abuse, including the targeting and even conviction of potentially innocent people who have the misfortune to come into contact in some way with the criminal informant.[5]

Prosecutors rely on criminal informants' tips in many different contexts, but one extremely common use, which is the focus of this article, involves search warrant applications, authorizing the police to search the property of a person that the informant has incriminated.[6] In

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pigeon's 'satyr.'" Charles E. Moylan, Jr., *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 MERCER L. REV. 741, 769-70 (1974). For more nuanced views of the distinctions, *see* Amanda Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 303 (2001) (distinguishing between "cooperating defendants," "informant defendants," and "confidential informants," all within the general category of criminal rather than citizen informants) and Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informant's Example*, 37 SW. L. REV 1091, 1094-95 (2008) (defining "informants" to include jailhouse informants who offer statements allegedly made by the defendant while incarcerated, confidential informants who provide information but do not testify at trial, cooperators who testify in exchange for some benefit, and both criminal and citizen informants who offer information anonymously). This article focuses on criminal informants (i.e. informants who are in some way involved in criminal behavior) who provide information to the police at an early stage of investigation, whether or not they later testify at trial.

[3] Natapoff, *supra* note 1, at 652-54. "The typical paid or protected police informant –drawn from the criminal milieu—is almost universally viewed with a jaundiced eye. He is inherently suspect. He hides behind a cloak of anonymity. His information—just as the testimony of an accomplice—is looked upon with a healthy skepticism and is examined with great scrutiny." Moylan, *supra* note 2, at 769. In practice, however, courts often fail to use great scrutiny or healthy skepticism toward criminal informant information, as explained below.

[4] "Although drug defendants famously cooperate, no class of offenders is off-limits: snitching can reduce or eliminate liability for crimes as diverse as kidnapping, arson, gambling, and murder." Natapoff, *supra* note 1, at 653. *See also* Zimmerman, *supra* note 1, at Section II (detailing crimes committed by informants, including murder, bombing, and various types of other violent crimes).

[5] *See, e.g.,* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 N.W. U. L. REV. 1129, 1130 (2004) (discussing a study by the Innocence Project at Cardozo Law School that found that false testimony by a government informant contributed to 21% of wrongful convictions studied). *See also* Natapoff, *supra* note 1, at n. 85. For an interesting discussion of the history of FBI problems in managing confidential informants, see Schreiber, *supra* note 2.

[6] Studies of search warrant applications from cities such as San Diego, Atlanta, Boston, and Cleveland showed that somewhere between eighty and ninety-two percent of search warrants relied at least in part on information from a confidential informant. Natapoff, *supra* note 1, at 657 and accompanying footnotes. *See also* LAFAVE, *supra* note 2, at 98-99 ("Indeed, it seems likely that a majority of the appellate decisions involving a probable cause issue are concerned with information obtained from informants."). LaFave notes that the United States Supreme Court cases

evaluating search warrant applications, the magistrate or judge must determine whether the informant's statements contribute to a finding of probable cause; in making this determination, courts must have a reason to credit the information presented.[7] Despite the fact that criminal convictions or other criminal activity can be used in other contexts to attack a witness's credibility,[8] courts making probable cause determinations often use a criminal informant's admission of his own criminal activity as a key factor supporting the reliability of a tip.[9] This article examines the ways in which courts analyze, or fail to analyze, whether such statements against interests really do contribute to a finding of the informant's veracity.

In discussing an informant's self-inculpatory statements when assessing probable cause, courts use language that sounds similar to the analysis under ER 804(b)(3), the evidentiary rule allowing the admission of statements against penal interests at trial. According to the rationale contained in ER 804(b)(3), statements against penal interests are admissible because a reasonable person in the declarant's position would not make a statement contrary to his or her penal interests unless he or she believed the statement to be true.[10] As explained below, however,

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on informants are not clear and consistent, so the lower court decisions contain "a significant degree of ambiguity and outright conflict." *Id.* at 99.

[7] As discussed in Part IA, *infra*, there are two different approaches taken by the courts when evaluating tips from confidential informants. The federal courts and many state courts look to the totality of the circumstances to determine whether there is probable cause to believe a crime has been committed, while several states still adhere to the older approach of requiring a separate showing of the informant's "basis of knowledge" and "veracity." This article focuses more specifically on the law from jurisdictions using the latter approach, but as explained infra, the analysis I propose here is applicable under either test.

[8] For example, ER 609 allows the impeachment of a witness with his or her past criminal convictions in many circumstances, particularly those involving prior crimes of dishonesty. Furthermore, "one could [generally] infer that a person who has committed a crime may be less honest or less worthy of belief than a person who has not committed a crime. Indeed, much criminal conduct and most criminal convictions are recognized to be relevant to, and admissible as evidence to attack, a person's credibility as a witness in a trial." State v. Moon, 841 S.W.2d 336, 339-40 (Tenn. Crim. App. 1992).

[9] *See, e.g.,* United States v. Harris, 403 U.S. 573 (1971) (first concluding that statements against interests can support a finding of probable cause based on an informant's tip). *See also* Section I(C) *infra* (discussing the courts' theoretical justifications for using statements against interest in this way).

[10] ER 804(b)(3) creates an exemption from the hearsay rule for "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or

when courts talk about informants' statements against interests as contained in a search warrant applications, they do not subject the informant's statements to the kind of rigorous analysis required under the evidence rule.[11] Therefore, in the context of this article, when I use the term "statements against interest," I use the term as the courts do – to refer to statements by an informant that are generally self-inculpatory, which may be broader than just those statements that would qualify for admission at trial. And although I agree that the contribution to a probable cause determination from an informant's statements against interests should be analyzed differently from the admissibility of a statement against interest at trial,[12] courts need to scrutinize the informant's statements more carefully than they currently do.[13]

In fact, even though courts still generally express skepticism of the reliability of criminal informants,[14] the practice of relying on statements against interest to support an informant's veracity often leads courts to favor information from criminal rather than citizen informants.[15] This implicit preference for criminal rather than citizen informants can have a number of

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criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." The rule allows for the admission of such statements, notwithstanding the normal rules against admitting hearsay, when the declarant is unavailable. ER 804(b).

[11] *See, e.g.,* Harris, 403 U.S. at 584 (distinguishing between admissibility of statements at trial as evidence of guilt beyond a reasonable doubt and consideration of statements by a magistrate when making a probable cause determination).

[12] *See infra* Part II(C).

[13] *See infra* Part III.

[14] *See*, *e.g.*, State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *6 (Tenn. Crim. App. April 15, 2003) (discussing the more stringent scrutiny of warrants based on information from criminal informants); State v. Ibarra, 812 P.2d 114, 117 (Wash. Ct. App. 1991) (state has heavier burden to establish a professional informant's veracity than that of a named citizen informant, as the latter's information is less likely to be casual rumors or colored by the informant's self-interest).

[15] The dissent in the first case to use statements against interest to support an informant's veracity foreshadowed this problem by noting that the effect of such a procedure would be to encourage the government to rely on "criminal" informants rather than "citizen" informants. Harris, 403 U.S. at 594 (Harlan, J., dissenting). When *Harris* was argued, however, the government explicitly noted that citizen informants should be preferred over criminal informants because criminal informants "are often less reliable than those who obey the law." *Id.* at 595 (citing Brief for the United States at 14).

negative societal consequences. It can shift law enforcement efforts toward high-crime, low-income areas;[16] place significant law enforcement power in the hands of criminals;[17] and undermine the transparency of the judicial system "by shifting ultimate decisions about liability away from prosecutors to police."[18] When these criminal informants are unreliable, it can also lead to false arrests and criminal prosecutions based on perjury.[19] Furthermore, a lack of informant reliability furthers the public's cynicism toward law enforcement and the judicial system generally.[20]

Although law enforcement arguably needs to use these informants,[21] the courts need to look more skeptically at whether, and in what circumstances, statements against interest really should contribute to a finding of the informant's veracity. Rather than continuing the current practice of inferring an informant's veracity from any statement related to an informant's own criminal conduct,[22] courts should instead more carefully scrutinize the statements themselves and

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[16] *See* Natapoff, *supra* note 1, at 673 and accompanying footnotes (suggesting, for example, that the concentration of drug-related arrests and other law enforcement activity stems in part from an over-reliance by law enforcement on confidential informants).

[17] "When informants snitch on competitors or other enemies, the state effectively places its power at the disposal of criminals. [Even if these competitors and enemies are actually guilty,] the integrity of law enforcement discretion turns heavily on how the system selects among a vast pool of potentially culpable targets. Indeed, it is the quintessential role of the prosecutor to choose what crimes are to be prosecuted and how, in a way that validates broad public values of fairness and efficiency. The more reliant police and prosecutors become on snitches in the selection process, the more this aspect of the system's integrity is compromised." Natapoff, *supra* note 1, at 674.

[18] *See* Natapoff, *supra* note 1, at 674.

[19] *See* Zimmerman, *supra* note 1, at 83. Zimmerman notes a number of other harms from informant misconduct, including informant abuses promoted through rewards and felonious activity committed with the knowledge and even assent of police and prosecutors. *Id.*

[20] Paul G. Hawthorne, *Tips, Returning to and Improving Upon* Aguilar-Spinelli*: A Departure from the* Gates *"Totality of the Circumstances"*, 46 HOW. L.J. 327, 353-54 (2003) (citing CLIFFORD S. ZIMMERMAN, FROM THE JAILHOUSE TO THE COURTHOSE: THE ROLE OF INFORMANTS IN WRONGFUL CONVICTIONS at 73 (Saundra D. Westervelt & John A. Humphrey eds., 2001)).

[21] Many commentators, while acknowledging that the institutional use of informants must continue in some form, propose a number of other types of reforms. Those other reforms are beyond the scope of this article, but see generally Natapoff, *supra* note 1, at 676-80, 697-701; Zimmerman, *supra* note 1, at notes 20-36 and accompanying text; Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999).

[22] As discussed in Part III(A) below, courts fail to adequately scrutinize whether or not an informant's statement is actually against her interests when she makes it.

the circumstances surrounding the making of these statements. Such scrutiny is necessary to determine whether the informant's statement against interest really does suggest that her tip is truthful, or whether instead her statement against interest suggests that it is at least equally likely that the informant is lying or guessing, passing off rumor and innuendo as fact.[23] For only in limited circumstances do an informant's statements against interest actually support the informant's veracity.

Part I of the article will provide background on the historical and current constitutional analysis of search warrants based on informant information. Section A provides an overview of the various tests the courts have used to analyze search warrants based on an informant's tip, while Section B focuses more specifically on courts' analysis of an informant's veracity. Section C then details the theoretical justifications offered by courts for using an informant's statements against interests to contribute to a finding of veracity.

With that framework in mind, Part II of the article critiques the current law on this issue. Section A discusses the problems with the key rationale used by the courts, that someone would not make a statement against his or her interests unless it was true. In fact, although this rationale seems to rely on rational actor theory, it actually runs directly contrary to that theory. Furthermore, recent United States Supreme Court jurisprudence on the Sixth Amendment's Confrontation Clause questions the reliability of statements against penal interests. Section B relies on other Supreme Court jurisprudence for the point that, even if a particular statement against interest is itself reliable, it is analytically unsound to assume that other information provided by the same speaker is therefore more reliable. However, as explained in Section C

[23] See *infra*, Part III, offering a framework for analyzing when an informant's statement against interest supports the veracity determination versus when the statement suggests the informant may be lying or guessing.

when an informant's statement against interest is properly scrutinized and considered in the context of its making, it can contribute to the informant's veracity and probable cause generally.

Thus, Part III offers proposed safeguards for courts to use in scrutinizing the informant's statement in context, to determine whether the informant's statement against interests supports his veracity, or whether it on the contrary suggests that he is merely passing along lies or rumors. These safeguards would ensure that the informant's statement against interest is itself likely to be true and that the court can properly infer from that statement that rest of the informant's tip is likely to be reliable. Specifically, this Part recommends that, before a court relies on a statement against interest as supporting an informant's veracity, the court must determine that (A) the information is sufficiently detailed as to suggest current criminal activity that provides the police with new information against the informant; (B) a nexus exists between the crime confessed to and the criminal activity that is the subject of the warrant; and (C) a reasonable informant would have perceived her statements as highly incriminating.

I. Background on Assessing a Confidential Informant's Reliability

In order to understand how courts should evaluate a confidential informant's reliability based on his or her statements against interest, the reader must first understand the overall analytical framework within which the courts evaluate probable cause based on a confidential informant's statements. Part A discusses the evolution of the two major tests used by the courts for this analysis. Part B focuses more specifically on how the courts have evaluated an informant's veracity. Part C then explains the various theories the courts use to justify supporting an informant's veracity with statements against the informant's interests.

A. Evolving Standards Evaluating Informants' Tips Generally

Historically, the courts used a two prong inquiry, often referred to as the *Aguilar-Spinelli* test, to evaluate a search warrant application based on information from a confidential

informant.[24] Under this approach, the affidavit presenting the confidential informant's story must describe the informant's "basis of knowledge," i.e. the way the informant obtained his or her information.[25] The affidavit must also demonstrate the informant's "veracity," either by showing the credibility of the informant as a person or the reliability of his or her information.[26] The affidavit must provide sufficient detail to allow the magistrate to use informed and independent judgment in deciding whether the prongs of the test are satisfied.[27] A deficiency in the showing under either prong can be remedied through police corroboration of some of the information provided.[28]

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[24] Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). For a good discussion of the law leading to *Aguilar-Spinelli*, the decisions themselves, and some early problems that arose as courts began to apply *Aguilar-Spinelli*, see generally Moylan, *supra* note 2.

[25] Aguilar, 378 U.S. at 113-14 (finding affidavit from a police officer insufficient because it relayed information from an unidentified informant but did "not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.'"); Spinelli, 393 U.S. at 416 ("The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation.").

[26] Aguilar, 378 U.S. at 114-15 (affidavit must contain some of the underlying circumstances from which the officer concluded that the informant "was 'credible' or his information 'reliable.'"); Spinelli, 393 U.S. at 416 (affidavit insufficient when "the affiant swore that his confidant was 'reliable,' [but] he offered the magistrate no reason in support of this conclusion."). As described in more detail below, the courts consider statements against interest when evaluating the informant's veracity, so this article focuses on the veracity prong of the test.

[27] "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 the evidence. Its protection is 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." Aguilar, 378 U.S. at 111 (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)). *See also* State v. Jackson, 688 P.2d 136, 139 (Wash. 1984) ("Underlying the *Aguilar-Spinelli* test is the basic belief that the determination of probable cause to issue a warrant must be made by a magistrate, not law enforcement officers who seek warrants."). In fact, the decisions in both *Aguilar* and *Spinelli* drew heavily from previous decisions involving affidavits by police officers relaying their own information, rather than information from a confidential informant. *See* Aguilar, 378 U.S. at 112-13 (relying Nathanson v. United States, 290 U.S. 41 (1933) and Giordenello v. United States, 357 U.S. 480 (1958)). Those previous decisions required that the police officer's affidavit demonstrate the officer's basis of knowledge, and the *Aguilar* court noted that unless courts required a similar showing for affidavits based on confidential informants, officers could easily circumvent the rules from *Nathanson* and *Giordenello* by telling a fellow officer of his suspicions and then let the fellow officer seek the warrant. *Id.* at 114 n.4. *See also* Spinelli, 393 U.S. at 424 ("Indeed, if the affidavit of an officer, known by the magistrate to be honest and experienced, . . . is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause.") (J. White, concurring).

[28] After *Aguilar* and *Spinelli*, the law was actually somewhat unclear as to whether corroboration could make up for a deficient showing regarding either prong of the test, or whether it could only support an informant's veracity. *Use*

In 1983, however, the United States Supreme Court declared that *Aguilar-Spinelli* had "encouraged an excessively technical dissection of informants' tips" and therefore abandoned the two pronged test in favor of a "totality of the circumstances" approach to analyzing warrants based on an informant's tip.[29] Under the *Gates* totality of the circumstances approach, the informant's basis of knowledge and veracity are "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."[30] Under this approach, the deficiency in the showing under one prong of the test may be compensated for by a particularly strong showing under the other prong of the test or even by some other showing of reliability.[31] Nevertheless, the Supreme Court in *Gates* emphasized that the veracity of the informant is still "highly relevant" in determining whether a search warrant was properly issued.[32] Because the informant's reliability is still a "highly relevant" consideration under *Gates*, the analysis proposed in this article applies under either the *Gates* or *Aguilar-Spinelli* tests.

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of Hearsay to Establish Probable Cause, 97 HARV. L. REV. 177, 179 (1983). The precise contours of that debate and its resolution in various jurisdictions are beyond the scope of this article.

[29] Illinois v. Gates, 462 U.S. 213, 230, 234 (1983). Among other rationales for its decision, the *Gates* court stressed the practical, non-technical nature of probable cause determinations. *Id.* at 231. It also pointed out that search warrant applications are often drafted and reviewed by non-lawyers who could not be expected to keep up with complex and evolving interpretations of *Aguilar-Spinelli*. *Id.* at 235-36. Finally, the Court expressed fear that the complexities of *Aguilar-Spinelli* would both impede law enforcement and would lead police to act without warrants, both of which could undermine individual security. *Id.* at 236-37.

[30] Gates, 462 U.S. at 230.

[31] Gates, 462 U.S. at 233. Commentators have extensively criticized the *Gates* decision. *See, e.g.,* LAFAVE, *supra* note 2, at 105-13 (extensively critiquing and refuting the reasoning of the *Gates* majority); Hawthorne, *supra* note 20, at 335 (characterizing *Gates* as "an act of complete disregard for Fourth Amendment protection"); Peter Erlinder, 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*, 4 U. PA. J. CONST. L. 1 (2001); Alexander Penelas, Comment, Illinois v. Gates*: Will* Aguilar *and* Spinelli *Rest in Peace?*, 38 U. MIAMI L. REV. 875, 890 (1984); Alexander Woollcott, Recent Development, *Abandonment of the Two-Pronged* Aguilar-Spinelli *Test:* Illinois v. Gates, 70 CORNELL L. REV. 316, 331 (1985).

[32] Gates, 462 U.S. at 230. *See also id.* at 233 (the informant's basis of knowledge and veracity are "relevant considerations in the totality-of-the-circumstances analysis . . ."); *id.* at 239 n. 11 (although adopting the totality of the circumstances test, the court "in no way abandon[s] *Spinelli*'s concern for the trustworthiness of informers"). *See also* LAFAVE, *supra* note 2, at 112 ("courts should continue to place considerable reliance on upon" the informant's veracity and basis of knowledge, even after *Gates*).

Although the federal courts and many states now use this "totality of the circumstances" approach, a number of states have rejected it and reaffirmed the use of the *Aguilar-Spinelli* framework, requiring a separate inquiry into both the informant's basis of knowledge and veracity.[33] Most of the state courts that have rejected the *Gates* approach have stressed, among other reasons,[34] the critical importance of showing an informant's veracity.[35] For example, the

[33] Nine states continue to apply *Aguilar-Spinelli* on state law grounds, while three other states have taken a somewhat different, and arguably more protective, approach than that of *Gates*. Six states quickly rejected *Gates* and reaffirmed *Aguilar-Spinelli* as a matter of state constitutional law. State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989); State v. Cordova, 784 P.2d 30 (N.M. 1989); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988); State v. Jones, 706 P.2d 317 (Alaska 1985); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985); State v. Jackson, 688 P.2d 136 (Wash. 1984). Hawaii also rejected *Gates* in favor of the continued use of *Aguilar-Spinelli*. Carlisle *ex. rel.* State v. Ten Thousand Four Hundred Forty Seven Dollars in United States Currency, 89 P.3d 823, 830 n.9 (Haw. 2004). Vermont has codified *Aguilar-Spinelli*, so that it applies by state rule. *See* State v. Goldberg, 872 A.2d 378, 381-82 (Vt. 2005) (discussing Vermont Rule of Criminal Procedure 41(c)). Additionally, *Aguilar-Spinelli* standard was codified in Or. Rev. Stat. 133.545(4), but the application of this statute is specifically limited to unnamed informants. Where the information in the affidavit is provided by a named informant, the *Aguilar-Spinelli* standard is not required. State v. Farrar, 786 P.2d 161, 171 (Or. 1990); *see also* State v. Black, 721 P.2d 842, 846 (Or. Ct. App. 1986) (where the informant is named, the courts have abandoned *Aguilar-Spinelli* in favor of the "totality of the circumstances" analysis). Two other states require that one or the other prong of *Aguilar-Spinelli* be satisfied when a search warrant is based on information from an unnamed informant. *See* People v. Hawkins, 668 N.W.2d 602, 611 (Mich. 2003) (construing M.C.L.A. 780.653 § 3); State v. Myers 570 N.W.2d 70, 73 (Iowa 1997) (pursuant to I.C.A. § 808.3, if the informant has not provided reliable information on previous occasions, the court must find that the informant or information appears credible). Additionally, although Montana still formally adheres to *Gates* and its totality of the circumstances test, the Supreme Court of Montana has adopted a three step inquiry to guide review of probable cause determinations. State v. Reesman, 10 P.3d 83 (Mont. 2000), *overruled in part on other grounds*, State v. Barnaby, 142 P.3d 809 (Mont. 2006) (overruled *Reesman* regarding how proper corroboration can be established). One commentator described Montana's new approach as a "Gates hybrid" because of the use of bright line rules. James D. Johnson, State v. Reesman*: Totality of the Circumstances or a Recipe for Mulligan Stew*, 65 MONT. L. REV. 159, 186 (2004). Finally, even in states that follow the *Gates* approach, police officers may be trained to use the *Aguilar-Spinelli* framework. *See* Corey Fleming Hirokawa, Comment, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 Emory L.J. 295 (2000).

[34] For example, several state courts have stressed the importance of providing clear guidance to non-lawyers who draft and interpret warrants, finding the totality of the circumstances test deficient as it relies mostly on standardless common sense. *See*, *e.g.*, Jackson, 688 P.2d at 142; Jones, 706 P.2d at 323. Without specific standards and a clear analytical structure, individual privacy rights may be left unprotected. *See*, *e.g.*, Jackson, 688 P.2d at 143; Griminger, 524 N.E.2d at 412. These courts also reject the *Gates* majority's suggestion that *Aguilar-Spinelli* created overly rigid rules, noting instead that application of the *Aguilar-Spinelli* test still allowed sufficient room for an analysis of the unique facts of the particular case. *See, e.g.,* Jackson, 688 P.2d at 141; Jones, 706 P.2d at 324; Griminger, 524 N.E.2d at 411-12. *See also* Gates, 462 U.S. at 287 (J. Brennan, dissenting) ("*Aguilar* and *Spinelli* preserve the role of magistrates as independent arbiters of probable cause, insure greater accuracy in probable cause determinations, and advance the substantive value of precluding findings of probable cause, and attendant intrusions, based on anything less than information from an honest or credible person who has acquired his information in a reliable way. Neither the standards nor their effects are inconsistent with a 'practical, non-technical' conception of probable cause.").

[35] *See, e.g.,* Griminger, 524 N.E.2d at 411 (New York's highest court emphasized that "[o]ur courts should not blithely accept as true the accusations of an informant unless some good reason for doing so has been established.")

Washington Supreme Court noted, "A claim of first-hand observation should not compensate for the lack of any assurance that the informant is credible. A liar could allege first-hand knowledge in great detail as easily as could a truthful speaker."[36] Therefore, although the analysis proposed in this article applies to cases decided under either the two pronged test of *Aguilar-Spinelli* or the totality of the circumstances approach under *Gates*, it is particularly troubling to see courts that reaffirmed the veracity prong's independent importance then fail to scrutinize whether an informant's statements against interest really do contribute a finding of veracity.[37]

B. Analyzing Veracity Generally

From the first articulation of the veracity prong in *Aguilar*, courts have been able to find this prong satisfied either when the informant himself, of the information provided, is reliable.[38] Commentators describe this two-faceted approach to satisfying the veracity prong as involving a "credibility spur" and a "reliability spur."[39] The "credibility spur" deals with the "inherent and ongoing characteristics" of the speaker as a person, his or her "reputation and demonstrated

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(internal quotation omitted); Jones, 706 P.2d at 322 (Alaska Supreme Court noted that a detailed showing under the basis of knowledge prong "sheds no light on an informant's veracity" because the informant could fabricate a detailed statement as easily as a general one).

[36] Jackson, 688 P.2d at 142. *See also* Gates, 462 U.S. at 277 (J. Brennan, dissenting) (because informants, unlike police officers, are not presumptively reliable, special care must be taken in crediting hearsay from informants); Moylan, *supra* note 2, at 781 ("If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes. Minute detail tells us nothing about 'veracity.'").

[37] Although the analysis in this article still applies under *Gates*, this article draws most heavily on the law from jurisdictions using *Aguilar-Spinelli* analysis because those courts have reaffirmed the importance of making a specific assessment of the informant's veracity.

[38] Aguilar v. Texas, 378 U.S. 108, 114-15 (1964) (affidavit must contain some of the underlying circumstances from which the officer concluded that the informant "was 'credible' or his information 'reliable.'"). *See also* State v. Lair, 630 P.2d 427, 430 (Wash. 1981) ("The veracity prong of the *Aguilar-Spinelli* test may be satisfied in either of two ways: (1) the credibility of the informant may be established; or (2) even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth.") (internal citations omitted). The *Aguilar* court did not explain why the veracity prong could be satisfied in either of these two ways, and subsequent cases (and even law review articles) seem to have taken this dual approach for granted.

[39] *See, e.g.,* LAFAVE, *supra* note 2, at 100, 131; Moylan, *supra* note 2, at 754, 765.

history of honesty and integrity."[40] Because criminal informants generally cannot demonstrate their reputation for truth-telling or integrity, courts typically find the credibility spur satisfied by the informant's track record of providing accurate information in previous investigations.[41] Such a "track record" reasonably supports the inference that the informant is currently telling the truth.[42]

The "reliability spur," on the other hand, focuses on the information: it relates to the particular circumstances under which the information at issue was furnished to see if those circumstances demonstrate the trustworthiness of that information.[43] Statements against interests fall within the "reliability spur," in that they use the circumstances surrounding the information provided to suggest that the information is reliable.[44] The courts sometimes look to additional

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[40] Moylan, *supra* note 2, at 757.

[41] Moylan notes that the informant's credibility could theoretically be established in a number of ways, such as by showing that the informant had been awarded a Boy Scout medal for trustworthiness, happened to be a pillar of the church, or offered testimonials as to his reputation for truth and veracity; because criminal informants are unlikely to be able to rely on these types of indicia of credibility, however, we are typically left relying on the informant's track record. *Id.* at 758. *See, e.g.,* McCray v. Illinois, 386 U.S. 300, 303-04 (1967) ("no doubt" informant was sufficiently credible when he had provided accurate information between 15 and 25 times before, resulting in numerous arrests and convictions). Therefore, in "track record" cases, the courts typically do not require any other indicia of reliability. *See, e.g.,* State v. Gomez, 623 P.2d 110, 114 (Idaho 1980); Commonwealth v. Brown, 581 N.E.2d 505, 507 (Mass. App. Ct. 1991); State v. Volz, C.C.A. No. 01C01-9604-CC-00171, 1997 WL 719050, at *4 (Tenn. Crim. App. Nov. 19, 1997); State v. Mejia, 766 P.2d 454, 457 (Wash. 1989).

[42] *See, e.g.,* Lair, 630 P.2d at 430. Magistrates should be provided, however, with sufficient detail to make a full assessment of the informant's real track record, including information about situations when the informant provided information that later proved to be incorrect, so the magistrate could evaluate the informant's "full batting average" rather than just his successes. Moylan, *supra* note 2, at 759. For a good discussion of the extent to which track records actually demonstrate an informant's credibility, and the problems that sometimes arise in such cases, *see* LAFAVE, *supra* note 2, at 113-29.

[43] Moylan, *supra* note 2, at 757-58. *See also* Lair, 630 P.2d at 430 ("Even knowing nothing about the inherent credibility of a source of information, we may still ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.") (internal quotations omitted).

[44] *See* LAFAVE, *supra* note 2, at 131. *See also* Lair, 630 P.2d at 431 ("Particularly where the admission is not the only indication of reliability, we think it is one factor to consider when analyzing whether hearsay information provided by an informer without a "track record" is trustworthy enough to establish probable cause.").

factors in finding the reliability spur satisfied as well,[45] but statements against interest are often crucial.

C. Theories as to Why Statements Against Interest Should Be Considered Reliable

The analysis in current cases of statements against interest in the context of probable cause determinations generally flow from a Supreme Court case, *United States v. Harris*, that was decided only two years after *Spinelli*.[46] The *Harris* court, upholding the validity of a search warrant based largely on statements from an informant, reasoned that the informant's statements against interest create their own indicia of reliability sufficient to support a finding of probable cause to issue a search warrant.[47] In so doing, the court offered two primary reasons in support

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[45] Other circumstances that the courts have relied on in finding the informant's information reliable include (1) the detailed nature of the information provided; (2) the informant's testimony before the magistrate in support of the search warrant application; (3) the informant being named in the warrant application; and (4) the informant being in police custody at the time the information was provided. *See, e.g.*, State v. Patterson, 679 P.2d 416 (Wash. Ct. App. 1984) (veracity established when unnamed informant testified before court, offered detailed information, and provided statements against penal interest); State v. O'Connor, 692 P.2d 208 (Wash. Ct. App. 1985) (veracity prong satisfied when named informant offered detailed information and statements against penal interest while under arrest). As explained in Part III(C) below, these additional factors under the reliability spur should not be considered separately from statements against interest; instead, the courts should consider these circumstances as part of analyzing whether a statement against interest supports a finding of veracity.

[46] 403 U.S. 573, 583 (1971). Although subsequent courts cite the lead opinion in *Harris* as controlling law for its discussion of statements against penal interest, no portion of the opinion that dealt with statements against interests received the necessary five votes. Chief Justice Burger wrote the lead opinion, which Justices Black and Blackmun joined in its entirety. Justice Stewart joined Part I of the opinion, which included a statement that the informant's accusation "was plainly a declaration against interest," and he concurred in the court's judgment, but he did not write his own opinion or join in Part III of the court's opinion, which developed the court's analysis on using statements against interest when making probable cause determinations. *See id.* at 585. Justice White joined that more detailed analysis in Part III and concurred in the judgment because "the affidavit, considered as a whole, was sufficient to support the issuance of the warrant," but he did not join in Part I. *See id.* But subsequent cases have consistently relied on *Harris* for the proposition that statements against interest support a finding of veracity, and the point seems to be settled law. *See* LAFAVE, *supra* note 2, at 132. I will therefore follow the conventional approach and refer to Chief Justice Burger's opinion as the majority opinion.

[47] Harris, 403 U.S. at 583. In *Harris*, the police sought and obtained a search warrant for premises suspected of containing whisky for which federal taxes had not been paid. *Id.* at 575. The search warrant was based on information from an anonymous informant whose identity was known to the police and who the officer believed to be "prudent." *Id.* at 583. The affidavit did not provide any more information about the officer's knowledge of the informant, and the Sixth Circuit had found that the affidavit did not provide sufficient information to allow the magistrate to assess the informant's reliability and trustworthiness. *See id.* at 575-76 (citing *United States v. Harris*, 412 F.2d 796, 797 (6th Cir. 1969)). But the affidavit did indicate that the investigator knew that the defendant had a reputation for trafficking in illegal whisky, including a previous seizure of illegal whisky from a residence under the defendant's control. *Id.* at 575. In finding that the magistrate appropriately issued a search warrant based on this

of its conclusion that statements against interest should be a significant positive factor towards satisfying the veracity prong.[48] The first and most significant justification rested on what the court described as the common sense notion that someone would not lightly admit criminal activity to the police unless such statements were true.[49] As secondary support, the court relied on the procedural context in which the statement was being used; the court emphasized that the lower courts were using the statement to determine probable cause, not guilt beyond a reasonable doubt.[50] Each of these reasons will be discussed in more detail below.

1. **Admitting Criminal Activity is Inherently Risky**

The *Harris* court's major justification for using statements against interest to support veracity emphasized the inherent risk involved in admitting one's own criminal conduct: "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions."[51] For example, the informant in *Harris* told the investigator that he had purchased illegal whiskey at the residence for a period of more than two years, most recently within two weeks.[52]

Despite the court's sometimes broad language, however, the opinion does not indicate that statements against interest <u>always</u> suggest that the information is reliable: "Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of

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affidavit, the court linked knowledge of the informant and the defendant, saying that the affidavit "contains an ample factual basis for believing the informant which, when coupled with the affiant's own knowledge of the respondent's background, afforded a basis upon which a magistrate could reasonably issue a warrant." *Id.* at 579-80.

[48] Somewhat surprisingly, the government in *Harris* never argued that an informant's statements against interest could support the credibility determination; this idea first appeared in *Harris* in the Chief Justice's lead opinion *Id.* at 594 (Harlan, J., dissenting).

[49] *Id.* at 583.

[50] *Id.* at 584.

[51] *Id.*

[52] *Id.* at 575.

another."[53] Additionally, the majority's opinion used a reasonably high standard for determining that the informant's statement was against his interests: "The accusation by the informant was plainly a declaration against interest since it could readily warrant a prosecution and could sustain a conviction against the informant himself."[54] The court appealed to common sense, suggesting that because someone would not make such an admission lightly, common sense would lead a disinterested observer to believe the informant's statements.[55]

Later courts have stressed this reasoning in concluding that statements against interest contribute to a finding of veracity.[56] For example, many cases stress that "one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys."[57]

Furthermore, the rationale regarding the inherent risks in admitting criminal conduct was later codified in the evidence rule allowing for the admission of statements against penal interests at trial.[58] Specifically, ER 804(b)(3) exempts from the definition of hearsay "a statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in

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[53] *Id.* at 575 (citing the length of time involved in the admissions and the specificity of the information related to the premises as indicia of reliability in this case).

[54] *Id.* at 580. The court also said that the informant's statements were against his penal interest because "he thereby admitted major elements of an offense under the Internal Revenue Code." *Id.* at 583.

[55] *Id.* at 583. Despite these apparent limitations in the *Harris* opinion, however, the court failed to articulate a clear standard for use in determining when courts should use an informant's statements against interest to support a reliability determination.

[56] *See, e.g.*, State v. Lair, 630 P.2d 427, 430 (Wash. 1981); State v. Barker, 844 P.2d 839, 841-42 (N.M. Ct. App. 1992); Ivanoff v. State, 9 P.3d 294, 299 (Alaska Ct. App. 2000); Snover v. State, 837 N.E.2d 1042, 1049 (Ind. Ct. App. 2005); Lovett v. Commonwealth, 103 S.W.3d 72, 78-79 (Ky. 2003); State v. Ward, 580 N.W.2d 67, 71-72 (Minn. Ct. App. 1998); People v. Calise, 682 N.Y.S.2d 149, 152 (N.Y. App. Div. 1998).

[57] This language originally came from LaFave, *supra* note 2, at 139. It has been quoted in many cases, such as State v. Diaz, 952 A.2d 124, 144 (Conn. App. Ct. 2008); Graddy v. State, 596 S.E.2d 109, 110 (Ga. 2004); Lopez v. State, 664 S.E.2d 866, 869 (Ga. Ct. App. 2008); State v. Steinzig, 987 P.2d 409, 417 (N.M. Ct. App. 1999); State v. Hopkins, 117 P.3d 377, 384 (Wash. Ct. App. 2005). In echoing this reasoning, however, courts have not always paid sufficient attention as to whether the statements against interest really do provide the courts with "significant evidence" against the informant. *See infra* Part III(A).

[58] ER 804(b)(3).

the declarant's position would not have made the statement unless believing it to be true."[59] The Advisory Committee emphasized this rationale: "persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."[60] Thus, both the *Harris* court's reasoning and the rationale in ER 804(b)(3) indicate that if someone makes a statement against her legal interests, and at the moment of making that statement understands that the consequences of the statement are against her interests, then the statement must be true.[61] In other words, as applied to an informant's situation, the informant would not have made the statement against his or her interest unless she believed that it was true.

2. Probable Cause Determinations Allow for Reliance on Statements Against Interest That Might be Inadmissible at Trial

In addition to stressing the inherent risks in admitting criminal conduct, the *Harris* court also offered a second line of reasoning, drawing a distinction between admitting a statement for proof of guilt beyond a reasonable doubt and considering a statement when determining whether probable cause exists.[62] The court first tied the inherent risk of admitting criminal activity to the probable cause standard when setting forth the first rationale described above: "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their

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[59] *Id*. When ER 804(b)(3) was enacted in 1975, it codified the common law allowing the admission of statements against pecuniary or proprietary interests, but it departed significantly from common law by making statements against penal interests admissible as well. *See* John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 SETON HALL L. REV. 1, 6-7 (2002).

[60] *Id.* at 10 (quoting Fed. R. Evid. 804 advisory committee's note to Subdivision (b), Exception (3)). *See also* Lilly v. Virginia, 527 U.S. 116, 126-27 (1999) (plurality opinion of Stevens, J.) (unlike many other hearsay exceptions, the exception for statements against penal interests "is founded on the broad assumption 'that a person is unlikely to fabricate a statement against his own interest at the time it is made.'") (quoting Chambers v. Mississippi, 410 U.S. 284, 299 (1973)).

[61] *See* Cronan, *supra* note 59, at 14.

[62] *See* United States v. Harris, 403 U.S. 573, 584 (1971). When *Harris* was decided, statements against penal interests were inadmissible under *Donnelly v. United States*, 228 U.S. 243 (1913) or *Bruton v. United States*, 391 U.S. 123 (1968), although *Donnelly*'s suggestion that statements against penal interests are without value and per se inadmissible had been widely criticized. *See* Harris, 403 U.S. at 584.

own admissions. Admissions of crime . . . carry their own indicia of credibility-sufficient at least to support a finding of probable cause to search."[63]

The court later more explicitly distinguished between the admissibility of statements against penal interests at trial and their use in search warrant proceedings evaluating the existence of probable cause: "It may be that this informant's out-of-court declarations would not be admissible at respondent's trial . . . [T]he issue in warrant proceedings [however] is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises."[64] Therefore, an informant's admission that he had bought illegal whisky on the defendant's property created probable cause to justify the search in *Harris*.[65]

Most decisions post-*Harris* tend to stress the court's first rationale, the inherent risks of admitting criminal conduct, rather than this second rationale, that a statement against interest can support probable cause even when that statement would not be admissible at trial.[66] Although many fewer courts rely on this second rationale than on the one discussed above, a few courts have at least mentioned the fact that the informant's statements against penal interests do not need to be admissible at trial in order to be considered for a probable cause determination.[67]

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[63] *Id.* at 583 (emphasis added).

[64] *Id.* at 584. *See also* United States v. Neal, 500 F.2d 305, 307 (10th Cir. 1974) (relying in part on *Harris* to distinguish between the common sense, non-technical approach to probable cause determinations and the more stringent rules that apply at trial to prevent "dubious and unjust convictions.") (internal quotation omitted).

[65] Harris, 403 U.S. at 584.

[66] For just a few of the many cases that stress the inherent risk of admitting criminal conduct, see Ivanoff v. State, 9 P.3d 294, 299 (Alaska Ct. App. 2000); Snover v. State, (Ind. Ct. App. 2005); Lovett v. Commonwealth, 103 S.W.3d 72, 78-79 (Ky. 2003); State v. Ward, 580 N.W.2d 67, 71-72 (Minn. Ct. App. 1998); People v. Calise 682 N.Y.S.2d 149, 152 (N.Y. App. Div. 1998).

[67] State v. Barker, 844 P.2d 839, 843 (N.M. Ct. App. 1992) ("we do not require that declarations against penal interest in an affidavit be shown to have the same degree of reliability that such evidence must have for admission at trial"); Commonwealth v. Melendez, 551 N.E.2d 514, 516 n. 3 (Mass. 1990) ("We do not mean to suggest that the standard for determining probable cause should be as strict as that needed for the admission of evidence in a trial. The question is not whether the evidence is admissible at trial . . ."). *See also* State v. Garberding, 801 P.2d 583,

II. Flaws in Courts' Current Use of Statements Against Interest When Assessing the Reliability of the Informant's Information

Although the two rationales above have surface appeal, the first rationale about the inherent risks of admitting to criminal activity in particular does not hold up to closer scrutiny. As explained in subpart (A) below, the courts are incorrect in treating the statements as inherently reliable. Furthermore, even when an informant's statement against interest can be considered reliable in describing the informant's own criminal conduct, that does not mean that the rest of the informant's narrative, such as the statements that incriminate someone else, are necessarily true, as explained in subpart (B) below. However, as explained in subpart (C) below, an informant's statements against interest can still provide a limited contribution to a veracity determination, particularly in light of the second rationale regarding the difference between probable cause analysis and the admissibility of statements against interests at trial.

A. Statements Against Interest Are Not Necessarily Inherently Reliable

Although *Harris* and its progeny stresses the inherent reliability of an informant's statements against interests because of the risk of admitting to criminal conduct, in fact that theoretical justification is inherently flawed. Furthermore, recent United States Supreme Court jurisprudence further shows that statements against penal interests may actually be inherently unreliable.

(1) Rational Actor Theory Does Not Actually Support the Reliability of Statements Against Penal Interests

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585-86 (Mont. 1990) (quoting *Harris* with approval: "The Supreme Court also makes it clear that the 'issue in warrant proceedings is not guilt beyond a reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises'"). A few other cases note in very general terms the existence of different standards for evaluating probable cause determinations and the admissibility of evidence at trial, but they do not give any detail on the differing standards, nor do they specifically deal with an informant's statements against penal interests. *See, e.g.,* Bouche v. State, 143 P.3d 643, 646 (Wyo. 2006) ("Search warrant affidavits are tested by a less vigorous standard than those governing the admissibility of evidence at trial"); State v. Prince, 760 P.2d 1356, 1360 (Or. Ct. App. 1988) ("An affidavit supporting a search warrant is tested by much less rigorous standards than govern the admissibility or weight of evidence at trial").

At first blush, both the *Harris* court's reasoning and the ER 804(b)(3) justification seem logical, and the *Harris* majority framed it as an issue of common sense.[68] Again, both of these sources justify the reliability of a statement against an individual's penal interests on the theory that because of the risk inherent in admitting criminal conduct to the police, the person would not make the statement unless it was true.[69] But this analysis rests on more than just common sense – it "rests on a behavioral approach to law that mirrors 'rational actor theory.'"[70] Although the rationale for the reliability of statements against interest seems to rely on rational actor theory for its validity, in fact it actually directly contradicts one of the key premises of rational actor theory.[71]

Rational actor theory rests on three premises: methodological individualism, instrumental rationality, and self-interest maximization.[72] The first premise, methodological individualism, also underlies the theory of reliability for statements against interest. Methodological individualism is the belief that social structures arise from the behavior of individuals and are best explained in terms of human behavior.[73] Similarly, the justification for the reliability of statements against interest premises the operation of the social structure (the criminal justice

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[68] Harris, 403 U.S. at 583.

[69] *See supra*, section I(C).

[70] Cronan, *supra* note 59, at 2. For a more general discussion of rationale actor theory, see Edward L. Rubin, *Symposium: Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 22-34 (2001). Like Mr. Cronan, I am not arguing for or against the inherent validity of rationale actor theory in all contexts. *See* Cronan, *supra* note 59, at 14 n.69 (noting objections to the rational actor theory generally). Instead, for purposes of this article, I accept *arguendo* the general validity of theory, and I question instead the *Harris* court's application of that theory -- whether it really does justify using an informant's statements against interest as a positive factor in assessing veracity.

[71] *See* Cronan, *supra* note 59. He argues that the rationale for the reliability of statements against interests really is rational actor theory, but then he concludes that the evidence rule actually runs counter to rational actor theory. I would refine his thesis to say that although it seems like ER 804(b)(3) rests on rational actor theory, rational actor theory actually directly contradicts the rationale behind the reliability of statements against penal interests. See the discussion below.

[72] Edward L. Rubin, *Putting Rational Actors in Their Place: Economics and Phenomenology*, 51 VAND. L. REV. 1705, 1713 (1998).

[73] *Id.*

system) on the operation of individual behavior (e.g., a person making a statement against interest).

The second premise of rational actor theory, instrumental rationality, also underlies the rationale for the reliability of statements against interests. Instrumental rationality, also called utility maximization, is the claim that people try to achieve their goals in the most effective manner.[74] Similarly, the rationale behind the reliability of statements against interests assumes that the declarant is aware of the consequences of acting and that those consequences shape her decision to make the statement against interest.[75] Under the evidentiary rule, for example, courts require that at the time the statement was made, the declarant perceived the statement to be against her interests.[76] The theory of reliability for statements against penal interests, in either the evidentiary or constitutional context, rests on the idea that the speaker makes the statement with knowledge of the consequences and with the purpose of achieving his or her desired goals.

Finally, however, the rationale for the reliability of statements against interests directly contradicts the third key premise underlying rational actor theory, self-interest maximization. This concept of self-interest maximization is the belief that individuals will strive to maximize their own self interests.[77] Rational actor theory posits that each person possesses a relative stable

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[74] *Id.* at 1714. Instrumental rationality does not require that the person actually achieve the most effective strategy, only that he or she attempt to do so. *Id.* Thus, rational actor theory can accommodate the cognitive limitations of the individual, structural limitations of the organization in which the person acts, or a lack of adequate information on which to act. *Id.* at 1714-15. *See also* Cronan, *supra* note 59 at 15 (rational actor theory acknowledges limits to human computational skills and memory, but suggests that individuals nevertheless strive to follow their preferences to maximize utility); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Actor*, 74 DENVER U. L. REV. 979, 985 (1997) ("Psychological interrogation is effective at eliciting confessions because of a fundamental fact of human decision-making--people make optimizing choices given the alternatives they consider.").

[75] *See* Cronan, *supra* note 59, at 13-14.

[76] Cronan, *supra* note 59, at 13. Cronan also notes that courts impose a reasonable person standard when evaluating the admissibility of a statement against penal interests, so that the court requires that the statement must be against the interests "from the perspective of a rational actor." *Id.*

[77] Rubin, *supra* note 72, at 1715-16. *See also* Cronan, *supra* note 59, at 14-15.

set of preferences, which are rank-ordered, and that each person tries to maximize her individual satisfaction as defined by her preference list.[78] Yet the theory behind the reliability of statements against interests suggests that the person making the statement against interest deliberately makes the statement knowing that the statement runs contrary to his own interests.[79] According to rational actor theory, however, a person would not act against his own interests, so if the person perceived a statement to be contrary to his own interests, he would not make the statement.[80] When a person does act consciously against her own interests, then the rationale behind the reliability of the statement fails, because the person would have ceased to act reasonably.[81]

Thus, if a person actually makes a statement against interest, one of two things must have happened. First, the rational actor could have decided that some other interest is more important than his or her penal interests. Or second, the rational actor could have concluded that the statement only seems to be against her penal interests, but the statement is in fact consistent with his or her penal interests. Each of these points is discussed in turn below, and either of these situations undermines the inference that a statement against interest must be reliable.

(a) A Statement Against Penal Interests Can Suggest that the Speaker Decided Some Other Interest Was More Important

When a speaker prioritizes some other interest ahead of her penal interests, the theory for the reliability of the statement against interest no longer applies. For example, an informant who makes a statement against his own penal interests while incriminating someone else may be

[78] *See* Rubin, *supra* note 72, at 1714 and Cronan, *supra* note 59 at 14-15.

[79] Cronan, *supra* note 59, at 14 ("The Rule presumes that if [a person] consciously makes a statement against his legal interests, and at the instant of the declaration comprehends the consequences of that statement, the statement is likely to be true.").

[80] Cronan, *supra* note 59, at 2 ("A rational actor who truly perceived a declaration to be contrary to his interests would not have made the statement.").

[81] Cronan, *supra* note 59, at 3.

doing so out of vengeful motives. Although it does not make sense that a person would incriminate only himself because of a desire to seek revenge, it is much more plausible that he would say something that incriminates himself while giving the police a significant quantity of information against someone else, against whom he wants revenge. In doing so, he would be able to interest the police in pursuing his enemy, while hoping for leniency for himself, a topic discussed in the section below.

(b) The Informant May Have Concluded that the Statement Will Further His or Her Penal Interests

When police use aggressive or coercive interrogation tactics in questioning an informant, the informant may conclude that a "confession" is actually in his or her penal interests.[82] A number of scholars have written about the problems of coerced false confessions,[83] and many commentators consider the problem of false confessions to be the greatest threat to the reliability of statements against penal interests.[84] Two leading authorities on false confessions, Richard Ofshe and Richard Leo, state that investigators often elicit false confessions by leading the innocent person to believe that his or "situation, though unjust, is hopeless and will only be improved by confessing."[85] The more heavy-handed the interrogator is in communicating "an

[82] *See, e.g.,* Ofshe & Leo, *supra* note 74, at 1060-61 and 1077 (discussing how false confessions often result from interrogators stressing, whether indirectly or directly, the systemic benefits of confessing and the systematic punishment for remaining silent). For example an interrogator might suggest that if a suspect confesses, he or she will be more likely to receive psychiatric care and treatment but that continued denials of guilt will lead to prison and punishment. *Id.* at 1073.

[83] *See*, e.g., Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 429 (1998); Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997); Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B. U. PUB. INT. L. J. 719 (1997). False confessions occur regularly within the criminal justice system, usually when interrogators are not properly trained in using interrogation techniques, in avoiding false confessions, or in recognizing and distinguishing the characteristics of false confessions. Ofshe & Leo, *supra* note 74, at 983.

[84] Cronan, *supra* note 59, at 19-20.

[85] Ofshe & Leo, *supra* note 74, at 986. The other major source of false confessions is investigators convincing suspects that they committed the crime even though they have no memory of doing so, and that confessing is the optimal next step. *Id.*

expectation of significant differential punishment outcomes for silence and confession," the more likely it becomes that a confession will result, from an innocent individual as well as from a guilty one.[86] Thus, the mere fact that an individual admits to incriminating activity does not suggest that the person actually believes the statement is against his or her interests, which undermines the courts' reasoning about the reliability of informants' statements against interests.

Even in the absence of coercive interrogation tactics, informants may well reach the conclusion that making a statement that seems to be against their penal interests actually will help them because the statements will not be held against them. The dissent in *Harris* noted this risk.[87] In response to the majority's statement that someone would not lightly admit criminal activity to the police unless such statements were true, the dissent noted that "where the declarant is also a police informant it seems at least as plausible to assume . . . that the declarant-confidant . . . believed he would receive absolution from prosecution for his confessed crime in return for his statement."[88] The dissent pointed to a lack of information about government practices or the particular facts regarding the *Harris* informant's expectations, and noted that in future cases, "some showing that the informant did not possess illusions of immunity might well be essential."[89]

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[86] *Id.* at 1077. So long as the suspect believes that the police have evidence against him, whether real or fabricated, then "it makes very little difference whether the suspect knows he is guilty or knows he is innocent." *Id.* Either way, the suspect is likely to confess to try to receive less, rather than more, punishment. *Id.* Whether the suspect is innocent or guilty, the key is the tactic that suggests that the individual will receive a benefit for confessing. *See id.* at 985-86.

[87] United States v. Harris, 403 U.S. 573, 595 (1971) (Harlan, J., dissenting).

[88] *Id.*

[89] *Id.* Similarly, the Advisory Committee notes from the adoption of ER 804(b)(3) reflected this concern by warning against allowing statements made to a grand jury to qualify for admission as statements against penal interests, because such statements may really just be an attempt to gain favor with the authorities. Cronan, *supra* note 59, at 19 (citing Fed. R. Ev. 804(b)(3) advisory committee's note to Subdivision (b), Exception (3)). *See also infra* Part III(C)(4) (regarding informants' motivations for making statements directly to the police).

Other commentators have noted the incentive an informant has to give a statement against interest as a way of currying favor with authorities:

> One who is questioned by the police and is under arrest or soon may be, is already in trouble. The question in the mind of the rational actor is not whether to concede points that police have discovered or soon will, but how to make the best of a bad situation. The likely human response is to give up what must be conceded anyway and make peace with the other side – in other words, to curry favor with police and prosecutors and become a witness in someone else's trial, while making the best possible deal for oneself.[90]

When a criminal informant makes a statement against his own penal interests, he does so in the context of giving police information about someone else. In such a situation, a rational actor, more specifically a rational informant, would likely perceive a real advantage in providing some self-incriminating information while shading the story given to make someone else a more appealing target for the police.[91] "Even if the speaker is scrupulously honest, human nature inclines us toward minimizing personal blame and maximizing that of others."[92] A criminal informant is already unlikely to be a scrupulously honest person. And in serving as an informant, he or she by definition gives information about someone else, so the informant always has this motivation to minimize his own culpability and maximize the culpability of the person he is accusing. Thus, a rational actor in this situation may well make an apparently self-incriminatory statement without real fear that the statement would be used against him as he shifts blame to someone else.

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[90] Christopher B. Mueller, *Tales Out of School – Spillover Confessions and Against-Interest Statements Naming Others*, 55 U. MIAMI L. REV. 929, 940-41 (2001).

[91] There is a significant analytical difference between a statement against interest that only admits the speaker's guilt (e.g. "yes, I took that lady's purse") and a statement that admits the speaker's criminal activity but also implicates someone else (e.g. "yes, I took her purse, but only after Smith grabbed her, put a gun to her head, and told me that he might shoot me if I did not take the victim's purse."). Statements against interest that implicate only the speaker himself provide a greater suggestion of reliability than those implicating someone else as well.

[92] Mueller, *supra* note 90, at 941.

An informant may therefore make a statement that is apparently against his or her interests for a variety of reasons, such as out of vengeful motives, because of police coercion, or as an attempt to shift blame and curry favor. Any of these motives could undermine the reliability of the informant's statement itself, and courts would therefore not be justified in concluding that the statement against interest contributes to a finding of the informant's veracity.

(2) The Recent "Confrontation Clause" Jurisprudence of the United States Supreme Court Questions the Reliability of Statements Against Penal Interests

Case law dealing with the Confrontation Clause further underscores problems with the reliability of blame-shifting statements. "[W]hen an accomplice confesses to law enforcement in a manner that incriminates the accused, there is the danger that the accomplice may be acting in his own interests, rather than against it."[93]

The United States Supreme Court's Sixth Amendment Confrontation Clause analysis over the last ten years has dealt with these tensions, and it underscores the inherent reliability problems with informants' statements against penal interests. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses against him.[94] In applying this clause, the courts have sought to determine when statements by non-testifying individuals can be admitted in a criminal trial as evidence against the defendant.[95]

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[93] Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409 (2005).

[94] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[95] Confrontation Clause analysis applies to the admissibility of out-of court statements during trial, *see* Crawford v. Washington, 541 U.S. 36, 40 (2004), so the Confrontation Clause would not bar the magistrate from hearing and relying on the informant's statements when assessing probable cause to issue a search warrant. *See also* United States v. Harris, 403 U.S. 573, 584 (1971) (". . . the Confrontation Clause of the Sixth Amendment . . . seems inapposite to ex parte search warrant proceedings under the Fourth Amendment.").

Until recently, Confrontation Clause analysis turned on reliability.[96] Statements falling within a firmly-rooted exception to the hearsay doctrine were deemed sufficiently reliable to be admitted, but statements that did not fall within a firmly-rooted exception would have to be analyzed for various guarantees of trustworthiness.[97]

Applying this framework, the Supreme Court in 1999 unanimously decided the Confrontation Clause was violated by the admission of a co-defendant's entire confession, which contained both statements incriminating the defendant and inculpatory statements against the co-defendant's own penal interests.[98] Although the court's decision was unanimous, there were several different opinions and rationales in the case.[99] Despite the difficulties posed by the fractured opinions in *Lilly*, commentators note that most if not all the Justices supported the idea that the Confrontation Clause required a particularized showing of trustworthiness for statements against penal interests.[100]

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[96] *See* Crawford, 541 U.S. at 42, 60 (discussing the framework from *Ohio v. Roberts*, 448 U.S. 56 (1980)). As discussed below, *Crawford* overruled *Roberts*, replacing the *Roberts* reliability analysis with a Confrontation Clause analysis that allows admission of nontestimonial hearsay in accordance with evolving evidentiary rules but prohibits the admission of testimonial statements without the witness's unavailability and a prior opportunity for cross examination. Crawford, 541 U.S. at 68. The court in *Crawford* acknowledged the importance of reliability, but concluded that the Confrontation Clause guarantee provided a procedural rather than substantive guarantee, in that Confrontation Clause analysis should require unavailability and a prior opportunity for cross-examination before a statement can be deemed reliable enough to be admitted at trial. *See id.* at 61 ("The Confrontation Clause commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

[97] Mueller, *supra* note 90, at 942-43. *See also* Crawford, 541 U.S. at 40 (discussing the *Roberts* test).

[98] Lilly v. Virginia, 527 U.S. 116 (1999). Although the fractured opinions in *Lilly* make it very difficult to draw clear principles from the decision, all nine justices thought the statement should be inadmissible. Mueller, *supra* note 90, at 943.

[99] Justice Stevens wrote the lead opinion, which announced the judgment of the court and delivered the opinion of the court with respect to the facts (Section I), a jurisdictional question (section II), and the ultimate conclusion that the Confrontation Clause had been violated (Section VI). Justice Breyer, Justice Scalia, Justice Thomas, and Chief Justice Rehnquist all wrote separate concurrences, the last of which was joined by Justice O'Connor and Justice Kennedy. *See* Lilly, 527 U.S. 116.

[100] Mueller, *supra* note 90, at 943-44 (plurality opinion concluded that the statement-against-interest exception is not firmly rooted under *Roberts*; some favored a per se rule excluding accomplice statements incriminating the accused, while others favored case-by-case approach).

More specifically, the plurality opinion emphasized the inherent unreliability of an accomplice's statement that incriminates himself and his co-defendant.[101] The plurality further noted that it "it is highly unlikely that the presumptive unreliability . . . can be effectively rebutted" whenever the state is involved in producing the statement that describes past events and that statement has not been subjected to adversarial testing.[102] This description applies perfectly to statements against an informant's interest that are presented to a magistrate as part of a probable cause determination – they are often made while in police custody, describing past events, and are not subject to the adversarial process of testing. Thus, the plurality's reasoning in *Lilly*, as applied to informants' statements against interests, suggests that such statements should be considered presumptively unreliable.

The difficulties found in *Lilly* about reaching a unified rationale and reasoning were reflected in lower court decisions attempting to assess the reliability of particular statements:

> Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculpation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeting," The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect[.][103]

In light of these difficulties, as well as a reassessment of the historical underpinnings of the Confrontation Clause, the United States Supreme Court decision in its 2004 *Crawford* decision replaced the balancing test for assessing reliability with a focus on whether or not the statement

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[101] *See* Lilly, 527 U.S. at 131-32 (discussing several cases that have found such statements to be inherently unreliable).

[102] Mueller, *supra* note 90, at 945 (citing *Lilly*, 527 U.S. at 137).

[103] Crawford v. Washington, 541 U.S. 36, 63 (2004) (internal citations omitted).

was testimonial.[104] According to *Crawford,* the Confrontation Clause allows admission of testimonial statements only when the declarant is unavailable and there has been a prior opportunity for cross-examination.[105] The Court concluded that the Confrontation Clause provides a procedural rather than a substantive guarantee for reliability: "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."[106]

The *Crawford* court's emphasis on cross-examination as the key method for assessing reliability for Confrontation Clause purposes cannot apply in the context of applying for a search warrant, because such applications are necessarily *ex parte*. Although Confrontation Clause analysis therefore does not control situations that are the focus of this article, i.e. how magistrates should analyze an informant's statement in the context of a probable cause determination,[107] that analysis and the rationales offered for it further illuminate the problems with the courts' analysis of statements against interest offered by informants during probable cause assessments. The same reliability problems arise in assessing an informant's statements against her own interests in a probable cause determination as arise when assessing the reliability of an out of court statement for Confrontation Clause purposes. These reliability problems, particularly the Court's

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[104] Capra, *supra* note 93, at 2410 (citing Crawford, 541 U.S. at 51-52, 61-62, 68-69). Hearsay statements made by non-testifying individuals can be admitted without violating the Confrontation Clause so long as the statements are "non-testimonial." *See* Crawford, 541 U.S. at 68. On the other hand, "testimonial" statements cannot be admitted without a showing that the witness is unavailable and that there was a prior opportunity for cross-examination. *Id.* Non-testimonial statements are "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis v. Washington, 547 U.S. 813, 822 (2006). In contrast, statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id*.

[105] Crawford, 541 U.S. at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

[106] *Id.* at 61.

[107] *See supra* note 99 (regarding the inapplicability of the Confrontation Clause to proceedings regarding the issuance of a search warrant).

views on the inherent unreliability of accomplice "confessions" that implicate someone else, undermine the *Harris* court's reasoning that an informant's statements against his own penal interests are necessarily likely to be reliable.

B. Statements Against Interest Rarely Contribute to a Finding that the Informant's Other Statements are Also Reliable

Apart from the problems discussed above about the questionable reliability of statements against penal interests generally, an additional problem arises when a court uses an informant's statement against interest to support the informant's overall veracity. Even if the informant's statement against his own interest is itself reliable (i.e. if the informant's statement accurately describes his own criminal involvement), that does not necessarily suggest that his statements incriminating someone else should also be seen as likely to be true.

In the evidentiary context of ER 804(b)(3), the Supreme Court pointed out the fallacy involved in drawing this inference from a person's statement against penal interests to the reliability of the other information in the same narrative.[108] In *Williamson v. United States*, the Court concluded that ER 804(b)(3) only allows admission of specific statements that are truly inculpatory, not other statements within the same narrative, such as statements that may incriminate someone else.[109] Rejecting the defendant's argument that the rule allowed for the admission of a speaker's entire narrative, the court noted that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-

[108] Williamson v. United States, 512 U.S. 594 (1994).

[109] *Id.* at 600-01 ("In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."). *See also* Mueller, *supra* note 90, at 934 (**"**At the very least, *Williamson* . . . blocked [use of ER 804(b)(3) for] admit[ting] against a criminal defendant most third party statements to police by co-offenders and statements where the speaker appears to be shifting blame from himself to the defendant.").

inculpatory parts."[110] Yet this is precisely the inference that courts draw from an informant's statement against interests – because the informant has made a particular statement that incriminates himself, the rest of the narrative is more likely to be true.[111]

The *Williamson* court also correctly stressed the importance of examining the context in which the statements were made to determine whether or not they were truly self-inculpatory, or whether they were actually merely attempts to shift blame or curry favor with authorities.[112] As one commentator has noted, human nature inclines even the most honest speaker towards minimizing personal blame for wrongful acts and directing that blame towards others who are also involved.[113] The *Williamson* court thus noted that when part of a confession is actually exculpatory, then the rationale behind ER 804(b)(3), that someone would not make a statement against interest unless it was true, no longer applies with any real force.[114] The *Williamson* court emphasized that courts have long recognized that a codefendant's statements about his accomplice "have been viewed with special suspicion" and "are less credible than ordinary hearsay evidence."[115] These problems of blame shifting and currying favor are even more potent in the context of an informant's tip than they are in the *Williamson* situation of an accomplice's

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[110] Williamson, 512 U.S. at 599. In *Williamson*, the trial court allowed a police officer to testify in Williamson's trial about a conversation he had with Reginald Harris shortly after Harris's arrest, because Harris refused to testify during Williamson's trial. *Id.* at 597-98. During his conversation with the officer, Harris admitted transporting drugs but said he was doing so for Williamson. *Id.* at 597.

[111] *See supra* note 44 (statements against interests are used to determine the veracity of the informant's information, not the credibility of the informant as a person). *See also* United States v. Harris, 403 U.S. 573, 583 (1971) (treating the informant's statement against his own penal interests as "an additional reason for crediting the informant's tip" as a whole, rather than just for believing the informant's self-incriminating statement).

[112] Williamson, 512 U.S. at 603. *See also id.* at 604 ("The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, and this question can only be answered in light of all the surrounding circumstances.") (internal quotation omitted).

[113] Mueller, *supra* note 90, at 941.

[114] Williamson, 512 U.S. at 600.

[115] *Id.* at 601 (internal quotation omitted).

jailhouse confession because it is more likely that an informant is thinking about how the authorities will use the information he or she is providing.[116]

Although *Williamson* has been criticized by various commentators, these challenges are not significant for purposes of the analysis discussed in this article. For example, one commentator has noted that *Williamson* wrongly suggests that a statement against someone's interests can only relate to the speaker's conduct, even though accomplice liability rules that make everyone in a conspiracy liable for the acts of others mean that statements describing a co-conspirator's criminal activity can be against the speaker's own penal interests.[117] As described above, however, when an informant describes someone else's criminal activity, a rational informant will likely believe that this information will not be used against her.[118] Furthermore, although *Williamson* failed to adequately delineate which statements will qualify for admission under the decision's attempted bright-line rule,[119] the courts have correctly refused to incorporate the evidentiary standards under ER 804(b)(3) when deciding what constitutes a statement against

[116] A criminal informant, the type focused on in this article, would almost certainly know that the police would be using the information he or she provides to pursue an investigation against someone else. Thus, the informant would likely be thinking about the police reaction to the information presented. But someone in a situation like that of Harris in *Williamson*, i.e. someone who has recently been arrested and who is being interrogated but who has not made the choice to become an informant, may be less savvy about how the police will use the information provided. *See infra* Part III(C)(4) (discussing suggestions for evaluating an informant's motivations when the informant makes statements directly to the police after being apprehended and how those motivations affect the significance of his or her statements against interests). *See also* Mueller, *supra* note 90, at 642 (the problem of assessing motivation affects the against-interest hearsay exception more than other hearsay exceptions because only this exception depends on assessing motives, and the other hearsay exceptions compensate for the problem of motives in other ways).

[117] *See* Mueller, *supra* note 90, at 936-40.

[118] *See supra* Part II(A)(1)(b) (a rational actor making a statement against interest will likely conclude that her statement will not be held against her).

[119] *See* Mueller, *supra* note 90, at 934 (describing Richard Sahuc, Comment, *The Exception that Swallows the Rule: The Disparate Treatment of Federal Rule of Evidence 804(b)(3) as Interpreted in* United States v. Williamson, 55 U. MIAMI L. REV. 867 (2001)). *See* also *id.* at 933-34 (not clear that the court really adopted the so-called "narrow view" of how much of a statement really qualifies for the statements against interests exception to the bar on the admission of hearsay).

interests within the context of an informant's narrative.[120] These challenges do not undermine the validity of the Court's basic insight about the unreliability of a self-inculpatory statement that is made while incriminating someone else, nor the serious analytical problem with inferring the reliability of an entire narrative just because it contains some statements that are against the speaker's penal interests.

C. When Properly Scrutinized, Statements Against Interests Can Still Contribute to a Finding of an Informant's Veracity

It might be easy to conclude from these problems that an informant's statements against therefore never suggest the reliability of the informant's information.[121] That conclusion goes too far, however, for two reasons.

First, because an informant's tip inherently focuses the police on someone else's criminal activity, a statement against interest included in an informant's tip is unlikely to stem from some of the things that can create false confessions in other contexts.[122] For example, one common

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[120] The *Harris* dissenters were troubled by the more permissive attitude towards statements against interests in probable cause determinations in this constitutional context than the attitude towards such statements when considering their admissibility at trial. *See* United States v. Harris, 403 U.S. 573, 594 (1971) (Harlan, J., dissenting). The dissent found this approach to be inconsistent with *Aguilar*, *Spinelli*, and other cases on the topic, because "the basic thrust of [those cases] is to prohibit the issuance of a warrant on mere uncorroborated hearsay." *Id.* The dissent's reasoning may initially seem persuasive, in that it does seem odd for a court to be more lax on an issue under a constitutional standard than it would be in analyzing the issue under the evidentiary rules. However, when a statement against penal interests is admitted at trial, the fact-finder will consider the statement when deciding the defendant's guilt beyond a reasonable doubt, and the defendant's liberty or even life may be at stake. But when a magistrate considers an informant's statement against interest when determining whether probable cause exists to issue a search warrant, the stakes are considerably lower. Thus, courts in these two different situations will use the informant's statement to answer two different questions, whether probable cause exists to believe a search warrant should issue or whether the defendant is guilty beyond a reasonable doubt. As explained in Part II(C), *infra*, the different uses for the statements and the different contexts in which they will be used are significant. Because the courts are using the statements to answer different questions, the analysis of each issue should focus on how the statement helps answer the question at hand. *See also infra*, Part III (detailing how courts should use an informant's statement against interest when considering whether the statement supports a probable cause determination).

[121] In fact, Cronan argues for the elimination of statements against penal interests from ER 804(b)(3), so that the rule would be limited to statements against proprietary or pecuniary interests. Cronan, *supra* note 59, at 28-29.

[122] Cronan argues that the sociological and psychological research into false confessions provides further support for his thesis that statements against penal interests are not inherently reliable, and therefore should not be admitted at trial. *Id.* at n. 98-124 and related texts. Thus, Cronan may be right to argue that statements against penal interests should not be admitted in a criminal trial, but the different context of using statements against interests in this context indicates that they may retain some value in supporting a probable cause determination.

type of false confession involves someone falsely incriminating himself out of a desire to protect the "real culprit."[123] But an informant's tip does not focus the police on his or her admission of guilt; it instead directs the police towards someone else involved in the crime, the person who will become the target of the search warrant. Similarly, an informant's tip seems very unlikely to involve a "voluntary false confession," i.e. confessing because of the ensuing publicity, because of a perceived need to atone for a past wrongful act, or because of delusions that the confessor really did commit the crime.[124] Even when an informant includes a statement against her own penal interests when giving the police a tip, she is unlikely to do so for any of the reasons listed above involving voluntary false confessions, and therefore the informant's statement may be more reliable than some other statements against penal interests.

Even more significantly, however, is the context in which an informant's tip is used: by a judge rather than a jury, and for analyzing probable cause versus guilt beyond a reasonable doubt. When courts analyze statements against interest under ER 804(b)(3), they are concerned about admitting the statement as evidence that a jury could use to convict someone, so there is a danger that the jury could be misled by an inaccurate statement. But when an informant's tip is used in a search warrant application, a judge or magistrate will consider it in the course of making a probable cause determination. Thus, a judge, rather than a jury, will ultimately evaluate the significance of the statement.[125] And the judge will not be asked to find guilt

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[123] Cronan, *supra* note 59 at 21-22 (citing GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY (1992)). Cronan gives the example of a wife who incriminates herself to protect her husband from prosecution; in doing so, she knows the consequences of incriminating herself but considers them less important than her desire to protect her husband. *Id.* at 16-17. The idea that this type of confession is common comes from, among other sources, Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions – and From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 519 (1998).

[124] *See* Cronan, *supra* note 59, at 20-21 nn.102-09 and accompanying text (discussing "voluntary false confessions").

[125] *See, e.g.,* 1 CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:28, at 193-94 (3d ed. 2007) (judges, rather than juries, are best situated to evaluate the reliability and utility of hearsay information).

beyond a reasonable doubt; instead, he or she will be applying the lower probable cause standard, determining whether the statement, combined with other information in the application, creates probable cause to believe that a crime has been committed and that the search would provide evidence of that crime.[126] For example, the *Harris* court concluded that the informant's admission that he had bought illegal whisky on the defendant's property supported a finding of probable cause to justify a search of the defendant's property for evidence of illegal whisky.[127] The *Harris* court was correct about that inference – a statement that someone has obtained contraband from a specific location can, when combined with other information that also supports probable cause, be enough to provide probable cause to believe that a search of the particular residence would reveal evidence of a crime such as possession of that type of contraband. Thus, because of the lower standard (probable cause rather than beyond a reasonable doubt), and because of the nature of the inquiry (whether evidence of a crime will be found at a particular location rather than whether a specific individual is guilty of the crime), an informant's statements against interest can provide some contribution to the conclusion as to the reliability of the informant's information.

Again, context is key. Courts considering statements against interests in an informant's tip should be very careful to avoid over-emphasizing the reliability of statements against interest, but statements against an informant's interest can, in certain circumstances, make a contribution to the reliability of the informant's information.

Part III: Proposed Safeguards to Ensure Statements Against Interest Suggest Reliability Rather than Unreliability in a Particular Situation

[126] United States v. Harris, 403 U.S. 573, 584 (1971). *See also supra* Part I(C)(2).

[127] *Id.* at 584.

In order to better assess whether so-called statements against penal interest really do suggest that the informant's tip as a whole is reliable in a particular circumstance, courts should follow a three-step inquiry.[128] First, the courts must scrutinize the informant's statements, to ensure that they really are against the informant's penal interests.[129] Specifically, the court should ensure that the informant does not simply offer vague statements, but instead specifically confesses to a crime. Only then do the statements satisfy the rationale for believing the particular statement against interest itself.[130]

Second, the court should consider how the informant's confession fits in with the investigation for which the warrant is sought. The court should ensure that there is a nexus between the crime confessed to and the criminal activity that is the subject of the warrant.[131]

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[128] This three step inquiry I propose here weaves together strands of analysis used in courts of various states, although no court has proposed or adopted all these strands together. As discussed above in Part I(B), the analysis in this article can be applied in jurisdictions that use the *Gates* totality of the circumstances test as well as in those jurisdictions still adhering to the more rigorous *Aguilar-Spinelli* test. Although the *Gates* test does not require specific rules for its application, the proposal below is not inherently inconsistent with *Gates.* For example, the Montana courts have adopted a more detailed analytical framework while adhering to *Gates*. State v. Reesman, 10 P.3d 83 (Mont. 2000). Furthermore, police attempting to comply with either test may actually prefer the existence of a specific analytical framework within which they should act, rather than the standardless "reasonableness" test. *See* Hirokawa, *supra* note 33, at 296 (research suggests that "police departments strongly prefer that their officers work within a framework of articulable standards"). Hirokawa's article focuses in particular on how police academies in Georgia teach officers how to comply with both *Aguilar-Spinelli* and *Gates*. *See generally id.* at 319-27. Georgia has formally adopted *Gates* but that state's case law continues to note the significance of *Aguilar-Spinelli*, and "all but one of the departments studied said that they taught their officers to approach the use of confidential informants either by applying the *Aguilar-Spinelli* test or by applying some other specific set of factors developed by the instructor or the department." *Id.* at 319.

[129] None of the states discussed in this article have adequately emphasized the need to ensure that a statement really is against the informant's interests. *See* subsec. A below.

[130] If the particular statement is not really against the informant's interest, then there is no reason that such a statement would suggest reliability for the rest of the informant's information. *See* Part III(A), *infra.*

[131] The courts in Alaska, New Mexico, and Tennessee make this nexus requirement part of their analysis. *See, e.g.,* Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (citing 1 W.R. LAFAVE, SEARCH AND SEIZURE § 3.3(c), at 531 (1978)); State v. Barker, 844 P.2d 839, 842, 843 (N.M. Ct. App. 1992); State v. Moon, 841 S.W.2d 336, 340 (Tenn. Crim. App. 1992). The Massachusetts courts have ostensibly rejected this "nexus" requirement, but the case that did so improperly confused this step in the analysis, whether there is a nexus involved, and the next step of the analysis, whether the defendant has a reasonable fear of prosecution. *See* Commonwealth v. Muse, 702 N.E.2d 388, 390 (Mass. App. Ct. 1998). In *Muse*, when named informant Willett was arrested for stealing his grandmother's jewelry, he told police he used it to buy drugs from the defendant. *Id.* The court found that this statement was not against his penal interest for the narcotics case because it would not support charges and even if the police gathered more evidence, Willett was unlikely to be charged in the narcotics case. *Id.* However, the court found that his

Such a nexus is necessary to counter the usual presumption that criminal activity or previous crimes undermines rather than supports an individual's credibility.[132]

Third, if the information passes both of those hurdles, then the court should examine the circumstances surrounding the informant's making the statement against interest and the way in which that information reaches the magistrate. In doing so, the court must ensure that the evidence suggests a real risk to the informant for bad information, a reasonable fear of prosecution for the informant if the information proves wrong.[133] This part of the test looks at whether an informant has an incentive to provide accurate information and a disincentive for providing inaccurate information, either guesses or lies.[134] When the court can find such a reasonable fear of prosecution for providing false information, then the informant's statement against interests contributes favorably to a veracity determination in support of the issuance of a search warrant.

A. Step One: The Informant's Statements Must Provide Detailed Information of His or Her Actual Criminal Activity

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statement was against his interests in the larceny case, and Willett would have had a reasonable fear that the statement would be used against him in his larceny case. *Id.* The court therefore refused to impose a "nexus requirement." *Id.* However, *Muse* did involve a nexus between the crime admitted to and the subject of the investigation because the informant admitted to purchasing drugs at the residence that was the target of the search warrant. *See id.*

[132] *See, e.g.,* Moon, 841 S.W.2d at 339-40 ("Generally, one could infer that a person who has committed a crime may be less honest or less worthy of belief than a person who has not committed a crime. Indeed, much criminal conduct and most criminal convictions are recognized to be relevant to, and admissible as evidence to attack, a person's credibility as a witness in a trial.").

[133] Four states (Alaska, Massachusetts, New Mexico, and New York) use at least some form of this analysis. *See, e.g.,* Elerson, 732 P.2d at 194; People v. Cassella, 531 N.Y.S.2d 639, 641 (N.Y. App. Div. 1988); Barker, 844 P.2d at 842, 843; Commonwealth v. Melendez, 551 N.E.2d 514, 516 (Mass. 1990).

[134] The circumstances should suggest that the informant would reasonable fear *additional* consequences for providing a false tip, rather than just fearing prosecution for his or her own criminal activity regardless of how his or her tip turned out. *See, e.g.,* Fields v. State, No. 13A01-0808-CR-398, 2009 WL 606298, at *4 (Ind. Ct. App. Mar. 9, 2009) (discussing the potential consequences for providing false information in terms of a potential false reporting charge and harsher treatment in the prosecutor's handling of the charges for which the informant was already arrested).

When confronted with a so-called statement against penal interest by a criminal informant in connection with a probable cause analysis, the court should first scrutinize the statement to make sure that the statement really is specific enough to be against the informant's interests. The statement at issue in *Harris*, for example, was clearly against the informant's interests because "it could readily warrant a prosecution and could sustain a conviction against the informant himself."[135] Furthermore, the courts use statements against penal interests in this context because the substance of the comments suggests they would not be made lightly.[136] In order for this rationale to make sense, however, the statements need to provide the police with meaningful ammunition against the defendant; otherwise, the statements may be little more than a savvy informant admitting knowledge but little personal culpability.[137]

Although the courts have appropriately rejected application of the evidentiary standards to this analysis,[138] they have currently failed to provide any clear standard in its place. Thus, courts too often have simply asserted that an informant has made a statement against interest, without actually scrutinizing the statement to ensure that the statement really is against the informant's interests.[139] In order to scrutinize the informant's statement appropriately, however,

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[135] United States v. Harris, 403 U.S. 573, 575, 580 (1971) (informant told investigator that he had purchased illegal whiskey at the defendant's residence for a period of more than two years, most recently within two weeks). *See also* State v. King, No. 20490-1-III, 2002 WL 31303556, at *5 (Wash. Ct. App. Oct. 15, 2002) ("But a statement is against penal interest only if it would support new criminal charges or bolster existing charges.").

[136] *See* Part I(C)(1), *supra.*

[137] Under the current evidentiary standard, for example, a statement against interest must "so far tend[] to subject the declarant to civil or criminal liability" before it can be admitted. ER 804(b)(3).

[138] *See supra* note 120 and Part II(C) for the discussion of why the evidentiary standards should not control in this context.

[139] In some cases, the courts assert without further analysis that the informant made a statement against interest, but the statement itself is only found in the fact section of the opinion. *See., e.g.*, State v. Merkt, 102 P.3d 828, 830, 831, 832 (Wash. Ct. App. 2004). In other cases, the courts assert that an informant made a statement against interest, but the opinion contains no detail about what that statement might have been, so the reader cannot verify that the statement truly was against the informant's interests. *See, e.g.,* People v. Cassadei, 565 N.Y.S.2d 286, 289 (N.Y. App. Div. 1991); State v. Johnson, 561 P.2d 701, 703 (Wash. Ct. App. 1977), *abrogated on other grounds by* Horton v. California, 496 U.S. 128 (1990) (regarding the "plain view" doctrine). In still other cases, the courts assert that the informant made a statement against interests, but the information contained in the case about the

courts should ensure that the statement against interest is detailed enough to (1) actually implicate the informant and (2) provide information that could be used against the informant.

First, the informant must truly implicate himself in criminal activity. It should not be sufficient for the informant to implicate only the potential target of the search warrant.[140] For example, courts should not find that an informant has made a statement against penal interest when he merely admits to being present when someone else engages in criminal activity, such as a drug transaction, because it is not against the law to observe criminal activity.[141] Similarly, the conduct that the informant admits to must have actually been against the law at the time of the informant's statement.[142] On the other hand, when the informant offers significant details about his own activities that truly are illegal, this step of the analysis should be satisfied.[143]

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informant's statements are not actually against the informant's interests at all. *See, e.g.,* State v. Thein, 957 P.2d 1261 (Wash. Ct. App. 1998) (informant's statements described in the opinion only provided information about the target of the warrant, not about the informant's own criminal activity); State v. Steinzig, 987 P.2d 409, 413 (N.M. Ct. App. 1999) (one of the two informants only implicated the other informant and others, not herself).

[140] People v. Johnson, 488 N.E.2d 439, 443 (N.Y. 1985) (informant merely implicated defendants; court rejected state's argument that the information in the affidavit constituted an admission by the confidential informant of criminal possession of a revolver or criminal facilitation).

[141] State v. Barker, 844 P.2d 839, 842 (N.M. Ct. App. 1992) ("simply admitting to observation of a criminal transaction does not constitute an admission against penal interest"); State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (court of appeals had concluded that information was not sufficiently against interests when informant talked about being present when someone else is purchasing cocaine, because that is not a crime). *See also* State v. Moon, 841 S.W.2d 336, 337 (Tenn. Crim. App. 1992) (court invalidates affidavit on other grounds, but fails to note that the affidavit only contains a conclusory assertion that the informant made a statement against interests, while the affidavit itself merely says that the informant said he was present at the defendant's residence and saw drugs being used and sold, without admitting his own involvement); Steinzig, 987 P.2d at 413 (court fails to note that one of the two informants only implicated the other informant and others, not herself).

[142] Clark v. State, 704 P.2d 799, 805 (Alaska Ct. App. 1985) (reasoning that although the informant admitted to purchasing and consuming a small amount of marijuana, the admission was not against penal interests because that conduct was, at the time, arguably not against the law).

[143] Commonwealth v. Parapar, 534 N.E.2d 1167, 1169-70 (Mass. 1989) (informant's "statement against penal interest directly inculpated him in three trafficking offenses [and] a possible conspiracy offense"); State v. Blasio, Nos. A-8476, A-8478, 2004 WL 1197311, at *3 (Alaska Ct. App. June 2, 2004) (named informants admitted dealing drugs for defendant and gave lots of detailed information about the arrangements between them, including the process through which they arranged the purchase, the prices they paid, the amounts they bought, and a detailed description of the runner); State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *10 (Tenn. Crim. App. April 15, 2003) (court found the informant's statement to be against his interest when he implicated himself in drug delivery by providing information about who he was taking the drugs to, where they were, what he was going to get in return, and how the rest of the transaction was supposed to work); State v. Marney, No. W2002-02648-CCA-R3-CD, 2003 WL 23100338, at *1 (Tenn. Crim. App. Dec. 31, 2003) (informant admitted purchasing

Second, the informant's statement against interest must provide the police with information that actually could be held against the informant, rather than information that would be useless to the police. These details should give the police more information to use against the confidential informant than they had without the admissions.[144] For example, the informant would provide sufficient detail as part of this step when identifying the particular source from which he obtained contraband that police knew he possessed,[145] or when identifying what he had done with contraband from a specific transaction.[146] The statements must also suggest specific

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marijuana from a specific person at a particular residence on a particular date; although the court did not analyze this issue, the case shows that the informant provided sufficient details about the transaction to satisfy this step of the analysis); State v. Kapsalis, 859 P.2d 1157, 1160 (Or. Ct. App. 1993) (informant provided details of where and how he made several purchases of drugs over a three week period); Trevino v. State, No. 07-07-0296-CR, 2008 WL 2116921, at *2 (Tex. App. May 20, 2008) (informant described in detail ongoing drug sales, involving three people, multiple locations, and amounts sold on a daily basis); Fields v. State, No. 13A01-0808-CR-398, 2009 WL 606298, at *4 (Ind. Ct. App. Mar. 9, 2009) (informant's statements exposed her to risk of multiple counts of dealing drugs and admitted to behavior that would otherwise likely have gone undetected).

[144] If the informant simply confirms what the police already knew, the informant's statement would not be particularly valuable, and therefore there would be little assurance of its reliability. But "if the informant's implication of another person at the same time exposed the informant as more culpable than originally suspected, there is good reason to accept the informant's assertions as trustworthy." 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 14 (Supp. 2008-2009). *See also* State v. Brown, No. 35083-I-II, 2007 WL 3195199, at *4 (Wash. Ct. App. Oct. 31, 2007) (informant implicated himself in numerous crimes, without knowing which crimes the police might pursue, exposing himself to potentially significant criminal charges); Weaver, 2003 WL 1877107 at *3, 10 (informant was caught with fifty pounds of marijuana, but he then provided officers with a number of details about the drug delivery transaction, details that went far beyond evidence of possession). Some courts discuss level of detail in the informant's statement in terms of whether it suggests a reasonable fear of prosecution. *See, e.g.,* Watford v. State, No. A-8022, 2002 WL 31016675, at *2 (Alaska Ct. App. Sept. 11, 2002). It is analytically cleaner, however, to use level of detail to determine whether the informant's statement really is against his or her interests; reasonable fear of prosecution should involve an analysis of the circumstances surrounding the informant making his statement rather than on the words of the statement itslef. *See infra* Part III(A).

[145] State v. Bianchi, 761 P.2d 127, 131 (Alaska Ct. App. 1988) (warrant upheld when named informant Olson identified one source and gave detailed information about her transactions with that source); State v. Steinzig, 987 P.2d 409, 413 (N.M. Ct. App. 1999) (informants identified source from which they received counterfeit currency, including the counterfeit $100 bill that informants had when they were apprehended); People v. Collins, 828 N.Y.S.2d 587 (N.Y. App. Div. 2006) (informant's statement that he had purchased crack cocaine from the defendant several times at the location to be searched, including the night before the warrant was issued, was sufficient to constitute a statement against penal interests).

[146] Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (warrant upheld when informant confessed to committing ten burglaries, and he identified seven locations, including the defendant's, where stolen property from those burglaries were fenced); State v. Ramon, No. 08-151, 2009 WL 139541, at *3 (Iowa Ct. App. Jan. 22, 2009) (warrant upheld when informant admitted to committing several burglaries and providing stolen items to defendant in exchange for drugs; court relied in part on informant's detailed information, including naming particular stolen items, that went beyond what was public knowledge).

and recent criminal activity by the informant, because vague admissions about past wrongdoing would not support a criminal prosecution against the informant,[147] nor would they be otherwise likely to be held against the informant.[148] When an informant makes multiple statements that might be against his or her interests, the court should scrutinize each one separately,[149] and at least one statement must be sufficiently detailed to give the police usable information against the informant.

B. Step Two: There Must Be a Nexus Between the Information Provided and the Criminal Activity that is the Subject of Warrant

Second, before finding that a statement against penal interests adds significantly to the reliability of the information presented, the court should require a nexus between the crime that the informant admits to and the criminal activity that is the subject of the warrant. Criminal activity and criminal convictions are usually admissible to impeach a witness's veracity, rather

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[147] State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (vague admissions about past purchases would not support prosecution and therefore do not constitute statements against penal interests); State v. King, No. 20490-1-III, 2002 WL 31303556, at *5 (Wash. Ct. App. Oct. 15, 2002) (court correctly concluded that confidential informant's statements that he had purchased and used marijuana regularly for several years were not sufficiently against his penal interests because "the lack of specificity as to time and place would make it difficult to use the statement against him or her in a future criminal prosecution.").

[148] People v. Burks, 521 N.Y.S.2d 718, 719-20 (N.Y. App. Div. 1987) ("The statement by the informant that he had, on some unspecified past occasions, purchased cocaine was not likely to be used against him" and therefore was not sufficiently contrary to the informant's penal interests to establish veracity); People v. Johnson, 488 N.E.2d 439, 443 (N.Y. 1985) (court rejected the state's argument that the information in the affidavit constituted an admission by the confidential informant of criminal possession of a revolver because the state relied solely on trial evidence to suggest the informant's possession of the revolver; the court also rejected the state's argument that the informant's statement about helping others trade a rifle for a revolver admitted criminal facilitation because the weapons trade happened a few months before the robbery and murder at issue in the case, and there was no evidence in the affidavit to suggest that the informant had any idea at that time that the others were planning specific future crimes); State v. Fosie, No. 32913-1-II, 2006 WL 2054452, at *4 (Wash. Ct. App. July 25, 2006) (previous convictions for marijuana use, and vague admissions of marijuana use generally, weigh against rather than in favor of the informant's veracity).

[149] For example, the facts section of one case quoted an affidavit containing three arguable statements against penal interest, and the court did not analyze the statements separately. *See* State v. Barker, 844 P.2d 839, 841 (N.M. Ct. App. 1992). The first two statements, however, were too general, as the informant "admitted to . . . purchasing and using marihuana in the past" and being inside the defendant's residence at various times when drugs were being sold; neither of these statements provided usable information for the police about the informant's criminal activities. *See id.* But the third admission would be sufficient to pass this stage of the analysis because it gave some specific details of a transaction when the informant admitted to purchasing drugs in the past from that location from a particular person. *See id.*

than to support it.[150] And if, for example, someone confessed to a burglary and then announced that someone else had committed a murder, the burglary confession would not make it more likely that the information about the murder was true.[151] But if the informant admits criminal activity that is connected to the investigation, the information is more likely to be reliable for these purposes, at least when using the probable cause standard for a search warrant rather than the "beyond a reasonable doubt" standard for a criminal conviction.[152] Although there will still be the risk that the informant is attempting to shift blame to an accomplice, it is at least likely that the accomplice named by the informant really will be involved to some degree in the criminal activity under investigation.[153]

For example, this "nexus" requirement would be satisfied when an informant who is caught possessing contraband identifies the source from which he or she received the

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[150] *See, e.g.,* State v. Moon, 841 S.W.2d 336, 339-40 (Tenn. Crim. App. 1992).

[151] *See* LAFAVE, *supra* note 2, at 143. *See also* Fosie, 2006 WL 2054452, at *4 (informant's admission of marijuana use and past marijuana-related convictions weigh against, rather than support, the informant's veracity). The *Fosie* court implicitly applied a nexus requirement when it noted that although the informant's admission of current marijuana use may be intrinsically reliable, "that fact is not relevant to whether the defendant was operating a marijuana grow operation." *Id.*

[152] *Compare* State v. Lewis, No. M2005-02052-CCA-R3-CD, 2006 WL 2380614, *7 (Tenn. Crim. App. Aug. 16, 2006) (informant's detailed account of his participation in counterfeiting operation was sufficiently reliable because it "was directly related to the criminal activity, premises, and person targeted by the search warrant") with State v. Petty, No. M2006-00705-CCA-R3-CD, 2007 WL 749638, at *4 (Tenn. Crim. App. March 8, 2007) (informant's statement against penal interests did not support credibility determination, "as the informant never tied his statement against interest to the defendant's alleged criminal enterprise"). *See also* People v. Collins, 828 N.Y.S.2d 587 (N.Y. App. Div. 2006) (informant's tip "was both thorough and specific concerning defendant's drug operations at the location sought to be searched"). The *Collins* court's discussion of the detail about the premises to be searched echoes the *Harris* court's reasoning that when an informant names a particular location as the site of criminal activity, that statement contributes to a finding of probable cause to believe that the location will have evidence of criminal activity. United States v. Harris, 403 U.S. 573, 584 (1971). *See also supra*, section I(C)(2), regarding the difference between using a statement against interest in connection with determining probable cause rather than to establish guilt beyond a reasonable doubt.

[153] *See supra* Part I(C)(2) and Part II(C) (regarding using statements to determine probable cause versus their admissibility at trial). Because the magistrate must decide whether probable cause exists to believe that a crime occurred and that evidence of the crime would be found on the premises to be searched, *Harris*, 403 U.S. at 584, a magistrate should be less concerned than a judge at trial about potential blame-shifting among those involved in the criminal enterprise because the premises should contain evidence of the crime regardless of the details of the roles played by the various individuals involved in the crime.

contraband.[154] However, this informant must identify the particular source from this transaction; it should not be sufficient for the informant to generally name many alleged sources from whom he or she has received contraband in the past.[155] Similarly, if the informant admits to having previously possessed contraband and then disposed of it at the locations that are the subject of the warrant, then a nexus would be established.[156] Furthermore, a nexus can be established when an informant performs controlled buys from the person targeted in the warrant.[157] Again, the court must carefully scrutinize every statement made by the informant that appears to be against his or her interests to see whether or not it satisfies this step.[158]

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[154] State v. Bianchi, 761 P.2d 127, 131 (Alaska Ct. App. 1988) (by naming her source, the informant's statements were closely related to the criminal activity for which probable cause to arrest or search was being established); Watford v. State, No. A-8022, 2002 WL 31016675, at *2 (Alaska Ct. App. Sept. 11, 2002) (nexus established when paid informants' statements against penal interest were that he had purchased drugs from defendant on many occasions, and investigators were trying to establish that defendant was involved in drug trade); State v. Steinzig, 987 P.2d 409, 413 (N.M. Ct. App. 1999) (although court does not analyze the nexus issue, the facts show that there was a nexus between the subject of the investigation (counterfeiting) and the information provided (that informants got the fake money from defendant at his residence)). However, the identified source has to be from the specific transaction. Jones, 706 P.2d at 325 (if the informant had been arrested on drug charges unrelated to the current information, then informant "would hardly view the statements that he had purchased cocaine in the past from Jones as increasing his exposure to criminal sanctions.").

[155] Merely identifying sources from previous transactions, without any more specific details about those previous transactions, would be insufficient to satisfy the first step of the test explained above. *See supra* notes 147-48 and accompanying text. *See also* Jones, 706 P.2d at 326 ("B.V. may have recently been arrested for possession of drugs when he admitted to purchases from various sources in the recent past. Such a generalized and unfocused set of allegations might well be nothing more than a series of falsehoods involving the names of several persons he has heard it rumored use or sell narcotics, for he could well anticipate that if the police act upon the information they will likely discover narcotics at some of the identified premises.") (internal quotation omitted); State v. Marney, No. W2002-02648-CCA-R3-CD, 2003 WL 23100338, at *5 (Tenn. Crim. App. Dec. 31, 2003) (although the court expressed reservations about relying solely on statements against penal interests to establish the veracity prong, the court found a nexus when the "informant's statement is an admission of criminal conduct which implicates the targeted premises" and therefore indicates the veracity of the statement). *See also* LAFAVE, *supra* note 2, at 140-41.

[156] Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (informant gave information about locations, including the defendant's house, where he had fenced stolen property); State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *10 (Tenn. Crim. App. April 15, 2003) (found nexus between the statements against interest regarding informant's involvement in drug transport, the targeted premises, and the defendant because informant told police who was supposed to receive the drugs and where the deal was supposed to happen).

[157] State v. Blasio, Nos. A-8476, A-8478, 2004 WL 1197311, at *2 (Alaska Ct. App. June 2, 2004) (nexus between investigation into Blasio's heroin dealing and named informants' statements because informants agreed to act as middlemen for Blasio and perform controlled buys for police).

[158] For example, a New Mexico court looked at three separate statements made by the informant, rejecting all three on different grounds. State v. Barker, 844 P.2d 839, 842 (N.M. Ct. App. 1992). First, there was no nexus between the subject of the investigation, defendant's selling of marijuana, and the confidential informant's admission to

C. Step Three: A Reasonable Informant Would Perceive Her Remarks as Highly Incriminating

The first two steps of the proposed inquiry relate to the statements themselves, whether they are sufficiently detailed and whether they relate to the criminal activity that is the subject of the warrant. But courts should also consider the surrounding circumstances in which those statements were made, in order to determine whether one can validly infer not only that the statement against interest is itself true but also that the rest of the informant's narrative is also likely to be true as well. As discussed above, statements against interest fall within the "reliability spur" of the veracity prong, in that they help show the trustworthiness of the informant's information.[159] It is therefore necessary to consider the circumstances in which the informant's self-incriminating statements were made, in order to determine whether they can contribute to the reliability of the informant's information as a whole, overcoming the *Williamson* objection about that inference discussed above.

A few courts talk about a similar issue, often relying on an earlier edition of Professor LaFave's treatise on search and seizure, require that a reasonable informant would have perceived the admissions to be highly incriminating in the context in which they were made, considering the circumstances surrounding the making of the statement against interest.[160]

"purchasing and using marihuana in the past." *Id.* Although there was a nexus between investigation into the defendant's dealing and the confidential informant's statements of being present in the house and observing purchases of marijuana, "simply admitting to observation of a criminal transaction does not constitute a statement against penal interest." *Id.* As for the confidential informant's statement that he had purchased drugs from defendant in the past at the defendant's home, it satisfies nexus test, but the informant would not have had a reasonable fear that this statement would be used against him. *See id.* at 842, 843.

[159] *See supra* Part I(B).

[160] *See, e.g.,* Elerson, 732 P.2d at 194 (quoting LAFAVE in asking "whether the informant would have perceived his remarks as highly incriminating."); Commonwealth v. Melendez, 551 N.E.2d 514, 516 (Mass. 1990) (same). *See also* State v. O'Connor, 692 P.2d 208, 215 (Wash. Ct. App. 1984) ("Significantly, this statement was given following *Miranda* warnings, thus establishing the arrestee/informant's awareness that his statements could be used against him in a criminal prosecution. We contrast this situation with those situations where an informant's statement is ambiguous or made under circumstances not necessarily indicating the potential for self-incrimination or criminal prosecution."). Although the language used by these courts suggest that the test should be subjective,

However, none of the courts to use this analysis have given enough guidance on exactly what circumstances should be considered or how they should be viewed. And as explained below, the courts tend to focus too much on whether the informant has a motivation to provide "good" information, assuming that the informant has such information; the courts fail to adequately consider the incentives for an informant who lacks definitive information but who may nonetheless provide a tip based on lies or guesses and hope that tip pans out.[161]

Obviously, the circumstances in which informants make statements will vary tremendously from case to case, and the courts under this analysis will have great flexibility to consider the facts and circumstances of each case.[162] No particular combination of factors should be required to satisfy this step, but in analyzing whether a reasonable informant would believe that his or her statements were in fact highly incriminating, the courts should consider the following factors:

1. Did the informant testify before the magistrate, even anonymously?

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focusing on whether the particular informant would actually have perceived his or her statements as incriminating, the court should also look at the matter objectively, asking whether a reasonable person in the informant's shoes would have reasonably feared adverse consequences for providing incorrect information. First, the informant's statement against interest is used to support the reliability of the informant's information, not the inherent credibility of the informant as a person, and if a reasonable informant would have believed the statement was highly incriminating, that inference supports the reliability of the information presented. *See supra* Part I(B) (regarding the distinction between the credibility of the informant as a person and the reliability of his or her information). Second, the reviewing court's assessment of the situation is systemically more important than that of the particular informant (or the police officer putting the informant's statements to the court). *See, e.g.,* Erlinder, *supra* note 31, at 74 ("[J]udicial 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."). But these standards would help bring some level of clarity to the analysis. *See* Hirokawa, *supra* note 33, at 319-20 (easier for police trainees to understand and apply rules than a more nebulous totality-of-the-circumstances analysis, and courts may in fact require police to meet standards or rules even when courts formally apply the totality of the circumstances test).

[161] The more likely scenario is an informant who passes along rumors or guesses, hoping (without knowing) that they are true. But an informant could conceivably pass along information knowing of its falsity, for example knowingly incriminating someone who was not involved in a particular enterprise but against whom there would likely be circumstantial evidence (e.g. a roommate or significant other of someone who had committed a crime).

[162] Even under *Aguilar-Spinelli*, courts do not have to rely on overly rigid rules, but instead should analyze the unique facts of the particular case. *See, e.g.,* State v. Jackson, 688 P.2d 136, 141 (Wash. 1984); State v. Jones, 706 P.2d 317, 324 (Alaska 1985); People v. Griminger, 524 N.E.2d 409, 411-12 (N.Y. 1988).

2. Was the informant's identity known, at least by the police, or disclosed in the affidavit?

3. To whom did the informant make the statement originally?

4. How did the informant come to the attention of the police, and what was the informant's situation when he or she made statements against interest?

5. Did the police corroborate any of the information provided?

This list, while not intended to be exhaustive, covers some of the most common factors influencing reliability.[163] In any event, however, the magistrate must be provided with a full disclosure of the relevant circumstances, so that the magistrate can more carefully examine the significance of the informant's self-incriminating statements in the context of the case at hand.[164] And in balancing these factors, the magistrate should focus on whether the informant would have a reasonable fear that providing inaccurate information would be held against him or her.

(1) Testifying Before the Magistrate Supports a Veracity Determination

The most powerful circumstance favoring the reliability of the informant's narrative, albeit an unusual circumstance, occurs when an informant testifies before the magistrate.[165]

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[163] Courts should, of course, consider other factors that arise in the context of particular cases as needed, but those other factors should provide some firm evidence of reliability. For example, although it should not be a significant factor in the reviewing court's analysis, the court might rely in part on the fact that the informant was later prosecuted for the offenses to which he had confessed. *Compare* Elerson, 732 P.2d at 194 ("Additionally, it is not disputed that the informant knew his remarks were incriminating. In fact, the informant in this case was arrested and charged with the offenses to which he had confessed. We find that the informant's statement is credible as a statement against penal interest.") with Richards v. State, Nos. A-7846, 4554, 2002 WL 531051, at *3 (Alaska Ct. App. April 10, 2002) (the statements by one informant were a year and a half old, and the time lag suggests that the statements were not used against that informant). Thus, even though the list above is not intended to be exhaustive of all the factors that may influence a court's decision, the use of such a list should be helpful in guiding police actions and later court review. *See generally* Hirokawa, *supra* note 33 (discussing the preference in Georgia police departments for teaching Fourth Amendment law to officers using specific and articulable standards, and detailing how several Georgia law enforcement agencies rely on *Aguilar-Spinelli* or create their own analytical framework when teaching officers how to deal with confidential informants).

[164] *See, e.g.,* State v. Jones, 706 P.2d 317, 326 n.12 (Alaska 1985) ("In our view, unless we require that the affidavit supply the magistrate with the underlying facts and circumstances of an informant's statement, there is no principled way for a magistrate to assess an informant's remarks in context.").

[165] Although most other jurisdictions do not seem to consider this factor, Washington cases quite rightly note that when the informant testifies before the magistrate, that creates a significant positive factor under the veracity prong. *See, e.g.,* State v. Hett, 644 P.2d 1187, 1189 (Wash. Ct. App. 1982) ("Larry Lawley's appearance before the judicial officer provides a strong basis on which to appraise his reliability.").

Even when an informant testifies anonymously, the magistrate has the opportunity to observe the informant's demeanor and assess his credibility first-hand.[166] Furthermore, when the informant testifies, the magistrate then has the opportunity to ask the informant questions, which furthers the goal of ensuring that the magistrate has sufficient information to perform a full and independent assessment of probable cause.[167] Thus, when an informant testifies, the magistrate is in a better position to evaluate whether all of the informant's information is credible, including how an informant's statements against interests fit into this analysis.[168] Additionally, testifying under oath increases the informant's risk of negative consequences from offering incorrect information because doing so opens the informant to liability for perjury.[169] Finally, encouraging more informants to testify by making that an explicit factor favoring veracity would facilitate more transparency in police-informant dealings.[170] When an informant testifies during a probable cause hearing, it becomes particularly appropriate for a reviewing court to give

[166] *See, e.g.,* State v. Patterson*,* 679 P.2d 416, 420 (Wash. Ct. App. 1984) (juvenile testified anonymously before magistrate, and the court noted that "A willingness to testify bolsters an informant's credibility, and where he actually appears and testifies under oath before the judicial officer issuing the warrant, an even stronger basis on which to appraise reliability is established.") (internal quotation omitted).

[167] *See* State v. Jackson, 688 P.2d 136, 139 (Wash. 1984) ("Underlying the *Aguilar*-Spinelli test is the basic belief that the determination of probable cause to issue a warrant must be made by a magistrate, not law enforcement officers who seek warrants." To perform this function, rather than just serving as a rubber stamp for law enforcement, magistrates need detailed information). *See also* Moylan, *supra* note 2, at 743 (describing the importance of the magistrate's access to information).

[168] *See also* Natapoff, *supra* note 1, at 699-700 (suggesting that before an informant's testimony is admitted at trial, the court should hold a "reliability" hearing, analogous to a *Daubert* hearing for assessing the reliability of scientific information) (citing George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 52-53 (2000)).

[169] Furthermore, one author reasoned that the oath itself served as a "trustworthiness device" contributing to the credibility of the source. Moylan, *supra* note 2, at 751 (referring to the oath contained in an affidavit, although the same analysis would apply to an oath administered before a witness testifies).

[170] *See* Natapoff, *supra* note 1, at 659 ("[T]he least transparent and therefore most problematic informant arrangement occurs where the informant is "flipped" by a law enforcement agent at the moment of initial confrontation and potential arrest. The mutual promises of the agent and suspect at that moment are shrouded in secrecy and if that particular informant never makes it to court, so they will remain.").

deference to the magistrate's determinations,[171] including the magistrate's determination about whether the informant's self-incriminating statements contributes to a finding of veracity.

(2) Named informants should be treated as more likely to be reliable than unnamed informants.

A less significant, but still useful, factor for enhancing the reliability of an informant's statement against interests is whether the informant's identity is known and/or disclosed.[172] This factor actually involves three different situations, although courts do not always adequately distinguish among them. First, when an informant's identity is known to the police and disclosed to the magistrate, the "naming" of the informant can support the likelihood that the informant's statements against interests are reliable.[173] Second, when the informant's identity is known to the police but is not disclosed to the magistrate, courts are justified in drawing a slight inference in favor of the reliability of the "known informant's" statements against interest.[174]

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[171] A reviewing court should always give deference to a magistrate's determination of probable cause, under *Aguilar-Spinelli* or *Gates*. *See, e.g.,* Illinois v. Gates, 462 U.S. 213, 236 (1983) ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'") (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)); State v. Vickers, 59 P.3d 58, 67 (Wash. 2002) (a reviewing court "generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense," applying *Aguilar-Spinelli*). But when the magistrate has the ability to view the informant and evaluate his or her credibility first-hand, that deference is even more significant because appellate courts generally give deference to a lower court's credibility determination. *See, e.g.,* Miller v. Fenton, 474 U.S. 104, 114 (1985) ("When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight."); Arizona v. Washington, 434 U.S. 497, 519-20 n. 1 (1978) ("It is a truism that . . . on review appropriate deference must be given to the trial court's opportunity to judge the credibility of the witnesses.").

[172] Some states analyze information from named versus unnamed informants significantly differently. For example, the Oregon statute codifying *Aguilar-Spinelli* only applies to information from unnamed informants. State v. Farrar, 786 P.2d 161, 171 (Or. 1990). When the informant is named, Oregon courts abandon *Aguilar-Spinelli* in favor of a "totality of the circumstances" analysis. State v. Black, 721 P.2d 842, 846 (Or. Ct. App. 1986). A Michigan statute requires that affidavits demonstrate a named informant's basis of knowledge only, but for unnamed informants, the affidavit must demonstrate "that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." Mich. Comp. L.§ 780.653.

[173] *See, e.g.,* State v. O'Connor, 692 P.2d 208, 210, 213-14 (Wash. Ct. App. 1984) (informant's identity was known to the police and disclosed to the magistrate).

[174] *See, e.g.,* State v. King, No. 20490-1-III, 2002 WL 31303556, at *3 (Wash. Ct. App. Oct. 15, 2002) (requiring a heightened showing of credibility if either the police or the magistrate do not know the informant's identity). *See also* People v. Burks, 521 N.Y.S.2d 718 (N.Y. App. Div. 1987) (statement of unnamed "informant that he had, on some unspecified past occasions, purchased cocaine from the defendant was not likely to be used against him. Thus,

Finally, in the situation of a "truly anonymous informant," in which the informant's identity is unknown to both the police and the magistrate, the courts should view the informant's statements against interest very skeptically.[175]

Several courts generally conclude that disclosure of a named informant's identity supports the veracity of an informant's statements against penal interests.[176] Implicit in some of these cases is the idea that named informants are unlikely to be protected "stool pigeons".[177] These "named" informants "do not have reason to believe that their admissions of criminal activity will be ignored by the police," so when an informant is named, his statements against penal interest can provide some contribution to a finding of veracity.[178] Furthermore, named informants may even risk civil liability[179] or criminal charges for false reporting if their information proves to be inaccurate.[180]

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the statement was not sufficiently contrary to the informant's penal interests to establish reliability.") (internal citation omitted).

[175] *See, e.g.,* Commonwealth v. Allen, 549 N.E.2d 430, 433 (Mass. 1990) (involving a truly anonymous informant, no inference of reliability for his or her statements against interests).

[176] *See, e.g.,* State v. O'Connor*,* 692 P.2d 208, 213 (Wash. Ct. App. 1984) (court notes that the naming of an informant supports a finding of veracity, particularly when the informant has made statements against interest) (citing with approval Merrick v. State, 389 A.2d 328 (Md. 1978)); State v. Steinzig, 987 P.2d 409, 416-17 (N.M. Ct. App. 1999) (citing *O'Connor* among other cases for the idea that a named informant has a greater incentive to provide good information because he or she faces worse consequences for providing bad information than an anonymous or unnamed individual); State v. Estorga, 803 P.2d 813, 817 (Wash. Ct. App. 1991) (citing *O'Connor* regarding the known identity of informant favoring reliability); State v. Merkt, 102 P.3d 828, 832 (Wash. Ct. App. 2004) (two named informants; court points out that this supports reliability determination); Commonwealth v. Littig, No. 04-0373, 2005 WL 2740588, at *3 (Mass. Dist. Ct. May 11, 2005) ("Beth's statements regarding her own purchases [of drugs] also support her reliability where her identity and address were known to police.").

[177] *See* O'Connor, 692 P.2d at 213 ("the identification of the informant making an admission against penal interest makes him inherently more reliable than the unnamed police 'stool pigeon' because the identified informant has reason to suspect that his admission may be used against him") (discussing this analysis from Merrick v. State, 389 A.2d 328 (Md. 1978)); *see also* LAFAVE, *supra* note 2, at 136.

[178] O'Connor, 692 P.2d at 213 (quoting 1 W. LAFAVE, SEARCH AND SEIZURE § 3.3 at 526-27 (1978)).

[179] State v. Carlile, 619 P.2d 1280, 1282 (Or. 1980).

[180] *See, e.g.,* Fields v. State, No. 13A01-0808-CR-398, 2009 WL 606298, at *4 (Ind. Ct. App. Mar. 9, 2009), (discussing the potential consequences for providing false information in terms of a potential false reporting charge and harsher treatment in the prosecutor's handling of the charges for which the informant was already arrested); State v. Olin, No. 35397-1-II, 2008 WL 933503, at *3 (Wash. Ct. App. Apr. 8, 2008) (the fact that the informant was

Courts should be careful, however, to avoid over-reliance on the idea that a named informant's statements would be held against her. "[I]f the person giving the information to the police is identified by name but it appears that the person was a participant in the crime under investigation or has been implicated in another crime and is acting in the hope of gaining leniency," then the use of the informant's name does not necessarily suggest that the informant has a reasonable fear of prosecution.[181] Thus, just because an informant is named in the affidavit, it does not necessarily follow that he or she is a "citizen informant" providing information out of the goodness of her heart,[182] or that she would have a fear of prosecution that would contribute to a finding of reliability for the informant's statements against interests.

On the other hand, it seems fairly clear that a statement against interest by a truly anonymous informant, one whose identity is unknown to the police or the magistrate, does not contribute at all to a finding of the informant's veracity: "Because an anonymous informant has nothing to fear by disclosing participation in illegal activities, a statement against penal interest by such an informant cannot be said to be a sign of reliability."[183] In such a situation, the informant has no reasonable fear of prosecution, so a key component supporting the reliability of the statement against interest is missing.[184]

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identified is "a strong indicator of reliability because [the informant] may be held accountable for false accusations.").

[181] State v. Rodriguez, 769 P.2d 309, 312 (Wash. Ct. App. 1989) (quoting 1 W. LAFAVE at 726-27).

[182] For the distinction between different types of people who provide information in different situations, and the resulting scrutiny of their statements, see the discussion in State v. Northness, 582 P.2d 546, 555 (Wash. Ct. App. 1978). *See also* note 2, *supra*.

[183] Commonwealth v. Allen, 549 N.E.2d 430, 433 (Mass. 1990) (truly anonymous informant, whose identity was not even known to the police, admitted purchasing drugs from the defendant, but court found that admission did not satisfy the veracity prong). *See also* Florida v. J.L., 529 U.S. 266, 270 (2000) ("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, an anonymous tip alone seldom demonstrates the informant's . . . veracity") (internal quotation omitted).

[184] *See* Commonwealth v. Melendez, 551 N.E.2d 514, 517 n.4 (Mass. 1990) ("Without any indication whether the [police officer] affiant actually knew the informant's identity, it is impossible to conclude that the informant had any reasonable fear of prosecution.").

In the middle of the spectrum, when the police but not the magistrate knows of the informant's identity, there should only be a slight inference favoring the reliability of the informant's narrative, including his statements against interests.[185] "The specter of an anonymous troublemaker persists in instances where the informant is known to the police but not to the judge."[186] But because the identity of the informant is known to the police, there remains some risk that the informant will be subject to adverse consequences for failure to provide accurate information.[187] Courts should therefore scrutinize the extent to which the informant's identity is known in determining the reliability of the informant's narrative.

(3) Analyze the Speaker's Incentives When a Statement is Made to Someone Other Than a Police Officer.

Yet another factor that can suggest the reliability of the informant's narrative involves the audience for the informant's self-incriminating statements. An informant's statement against interests would in fact be against his interests "regardless of whether it is made to a judge, to a police officer, or to a neighbor over the back fence. Its character is not altered by a change in interlocutors although . . . its indicia of reliability may."[188]

When someone makes a statement against his or her interests to a private party, not to a police officer, the courts should scrutinize the speaker's likely motives or incentives in making such a statement. "One way of answering this question is to inquire whether an informant would

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[185] *See, e.g.,* State v. King, No. 20490-1-III, 2002 WL 31303556, at *3 (Wash. Ct. App. Oct. 15, 2002) ("a heightened showing of credibility may be required if the informant's identity is unknown either to the police or to the magistrate.") (emphasis added).

[186] State v. Fosie, No. 32913-1-II, 2006 WL 2054452, at *3 (Wash. Ct. App. July 25, 2006). *See also* State v. Ibarra, 812 P.2d 114, 117 (Wash. Ct. App. 1991) ("anonymity of a citizen informant may be one factor for finding *no showing of reliability*" because of concerns over anonymous troublemakers) (emphasis in original).

[187] *See* LAFAVE, *supra* note 2, at 139.

[188] State v. Alvarez, 776 P.2d 1283, 1286 (Or. 1989).

have a motive to lie to his listener."[189] When a speaker does not know that his audience is an agent of the police, the speaker is unlikely to be "tailoring the admissions to avoid prosecution or to curry favor with the police."[190] Furthermore, admissions of criminal activity that are made during a conversation between a criminal seller and a criminal buyer "provide a circumstantial guarantee of informational 'reliability.'"[191] For example, when a drug seller tells a potential buyer that he does not currently have enough drugs to satisfy the buyer's request but he can get them from a particular source, and the buyer turns out to be an informant, the seller's narrative should be treated as reliable because the seller would have no reason to mislead the potential buyer.[192] In such circumstances, the court could infer that the statement against interest may enhance the reliability of the speaker's overall narrative.

On the other hand, some circumstances could suggest that the speaker is more likely to be minimizing her own role in illicit activity and enhancing someone else's role.[193] This tendency applies even outside the investigatory context, to conversations with trusted friends.[194] Thus, statements made to a trusted friend or someone else whose opinion the informant would value,

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[189] State v. Lair, 630 P.2d 427, 430-31 (Wash. 1981).

[190] State v. Chezem, 865 P.2d 1307, 1311 (Or. Ct. App. 1993). *See also* State v. Young, 816 P.2d 612, 617 (Or. Ct. App. 1991) (because speaker did not suspect the listener was a police informant, the speaker "presumably was not tailoring his statements to curry favor with the police or to avoid prosecution."). *Accord* Crawford v. Washington, 541 U.S. 36, 51 (2004) (noting, while discussing the Sixth Amendment Confrontation Clause, that "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").

[191] Moylan, *supra* note 2, at 764 (in such circumstances, "conspiratorial brotherhood and a desire for illicit profit would militate against exchanging false information."). *But see* People v. Morusty, 600 N.Y.S.2d 311, 313 (N.Y. App. Div. 1993) (court refused to find veracity based on a statement made by an unnamed speaker to a named listener who in turn told the informant about the statement; the court found that although the statement was technically against the speaker's interests, "he did not make the statement knowingly to a law enforcement officer or with any knowledge that it might be used against him or that he might be further punished if it were false.").

[192] Moylan, *supra* note 2, at 764-65 (describing with approval the reasoning in *Thompson v. State*, 298 A.2d 458 (Md. App. 1973)).

[193] Mueller, *supra* note 90, at 941 (general human nature to minimize our own blameworthiness at another's expense).

[194] *Id.*

implicating someone else as well as the speaker, should be viewed with caution.[195] Again, in such situations, the courts should look to the speaker's motivations about the entire narrative given the particular audience at hand; when the speaker may have a reason to be less than truthful to the particular listener, then the court should not rely on the speaker's narrative, including any self-incriminating statements.

(4) For Statements Made to the Police, Consider Possible Incentives to Guess or Pass along Rumors.

When the speaker makes the self-incriminating statement directly to the police, however, the analysis is both more complicated and more crucial. Several cases cite as a favorable factor for an informant's credibility the fact that the informant was under arrest when he or she made statements against interest.[196] In doing so, they often rely on a quotation from Professor LaFave: "one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys."[197] These cases often further stress the benefit that the informant will receive, often in the form of leniency for his or her own criminal activities, as a positive factor favoring the reliability of the informant's statements.[198]

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[195] *See* Wilson v. State, 82 P.3d 783 (Alaska Ct. App. 2003) (statements against interest made privately to a good friend could not support informant's veracity because the speaker would expect the friend to keep the statements private and would have no reason to suspect adverse legal consequences from making the statements).

[196] *See, e.g.,* State v. Olin, No. 35397-1-II, 2008 WL 933503, at *3 (Wash. Ct. App. Apr. 8, 2008) ("the reliability of admissions against penal interest may be greater in post-arrest situations because the arrestee risks disfavor with the prosecution if he lies"); State v. Steinzig, 987 P.2d 409, 416-17 (N.M. Ct. App. 1999) (relies in part on the fact that the informants had been arrested for criminal activity).

[197] LAFAVE, *supra* note 2, at 139-40. Professor LaFave elaborates that the inference of reliability comes from "the 'clearly apprehended threat of dire police retaliation should he not produce accurately'." *Id.* (quoting Moylan, *supra* note 2, at 762). Courts sometimes rely on this language without making clear what sort of retaliation the police would likely engage in. *See, e.g.,* Commonwealth v. Melendez, 551 N.E.2d 514, 516 (Mass. 1990) ("statements may be more credible if there is a threat of police retaliation for giving false information"). Although the language of "police retaliation" may suggest visceral or immediate consequences, courts probably are actually referring either to prosecution for making a false statement or to loss of any deal that the informant had arranged, as discussed below.

[198] *See, e.g.,* State v. Blasio, Nos. A-8476, A-8478, 2004 WL 1197311, at *2 (Alaska Ct. App. June 2, 2004) ("Because [the informants] had already admitted . . . that they were dealing heroin and because they were bargaining information for favorable treatment, it is reasonable to believe that [they] would want to avoid misleading [the officer] with inaccurate information."); State v. Bean, 572 P.2d 1102, 1103, 1104 (Wash. 1978) (favorable

However, the fact that an informant is under arrest does not necessarily indicate a motive to provide good information; it may just as easily suggest a motive for the informant to take a guess about others who might be involved in criminal activity.[199] In other words, if a potential informant has useful information for the police about the criminal activities of others, the offer of a benefit to the informant may provide an incentive for the informant to provide that information, but courts fail to adequately consider the incentive created when the informant does not have useful information to provide. In such situations, the informant may well have the incentive to offer rumors or guesses about criminal activities of others and hope that the information turns out to be accurate.[200]

Therefore, courts should focus not on the positive incentive for the informant to provide good information, such as the expected benefit that the informant would receive, but instead on whether the circumstances suggest a disincentive for providing false information, which would counter the inherent incentive to guess or lie to receive the benefit of leniency.[201] More specifically, when an informant who is under arrest provides a tip to the police, the court should evaluate how the informant came to the attention of the police, the severity of the informant's

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sentencing recommendation on drug charge in exchange for information on higher-ups provided a "strong motive . . . to be accurate" and favored reliability of the information presented).

[199] *See* Zimmerman, *supra* note 1, at 99-102 (detailing the various types of rewards informants can hope to gain for providing information, and noting the lack of controls on the rewards offered; the combination of these two factors "instills not only the desire and need for more rewards in the informant, but also establishes the systemic support for the informant to maximize the benefit at any cost.") (emphasis added). The lack of control over informant benefits, coupled with the courts' failure to carefully scrutinize informants' statements against interest, suggests that informants in the current system often have an incentive to provide educated guesses, or even outright lies, about criminal activity.

[200] In fact, false confessions often flow from the interrogation practice of offering a benefit for confessing that will not be available if the individual does not provide information. "An interrogator strives to neutralize the person's resistance by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs. . . . An interrogator's goal is to lead the suspect to conclude that confessing is rational and appropriate. . . . The techniques used to accomplish these manipulations are so effective that if misused they can result in decisions to confess from the guilty and innocent alike." Ofshe & Leo, *supra* note 74, at 985. *See also id.* at 1060-88 (discussing various types of pressure involving systemic benefits for confession and threats of systemic consequences for non-confession, leading to false confessions).

[201] *See supra* the beginning of Part III(C).

crime, and the extent to which the informant seeking a deal would skew the reliability of the informant's information.

First, the court should analyze whether the facts suggest an ongoing relationship between the informant and the police, or whether they indicate that the informant is providing information for the first time.[202] If the facts and circumstances suggest that the informant had previously been a police informant, or was developing a "stool pigeon" relationship, then the mere fact that an informant was under arrest would not suggest that the informant would reasonably fear that inaccurate information would be held against him.[203] Of course, if the informant had provided other useful information to the police in the past, then the court could rely on the informant's track record for establishing veracity,[204] and the court would not need to analyze the significance of the informant's statements against interest. But when the informant is clearly hoping to get a benefit from the police, but has not yet established a track record of good information, then there would not be reason for the court to infer that the informant had a motive to provide accurate

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[202] Ideally, the magistrate should require disclosure of information related to the relationship between the informant and the police. *See* Zimmerman, *supra* note 1, at 146 (explaining why prosecutors cannot be counted on to regulate informants' behavior because they have incentives to use and rely on informants without scrutinizing the conduct of the informants). Rather than being a "hyper-technical" requirement, however, this requirement should be treated like any other part of the analysis, so that the magistrate should require disclosure of enough information to make the analysis meaningful, but that analysis can come from the facts and circumstances. *See, e.g.,* Illinois v. Gates, 462 U.S. 213, 287 (1983) (Brennan, J., dissenting) ("Once a magistrate has determined that he has information before him that he can reasonably say has been obtained in a reliable way by a credible person, he has ample room to use his common sense and to apply a practical, nontechnical conception of probable cause.").

[203] Clark v. State, 704 P.2d 799, 805 (Alaska Ct. App. 1985) (informant's statements about buying and using marijuana were not enough to satisfy the veracity prong because they were made as part of a developing "stool pigeon" relationship, which courts view with extra suspicion). Although the court in *Clark* did not explicitly conclude that the informant lacked a reasonable fear of prosecution, that is clearly the thrust of the analysis. *See id.* In *Clark,* the magistrate did not receive relevant information about the informant, such as his name or that he was on probation; instead, the magistrate was given a conclusory statement about past reliability that far overstated the informant's history, and the police corroboration was minimal. *Id.* Where the police are trying to develop an ongoing relationship with the informant, there may be a greater incentive for the affidavit to obscure negative facts about the informant. *See also* Commonwealth v. Melendez, 551 N.E.2d 514, 516-17 (Mass. 1990) (informant's uncorroborated confession was unaccompanied by physical evidence or any other circumstances that suggested a likelihood of prosecution; "One might infer in a case like this that the informant was a 'protected stool pigeon' whose inaccuracies or indiscretions are tolerated on a continuing basis in exchange for information. In such a case, he would have little to fear from giving false information.") (internal citation omitted).

[204] *See supra* Part I(B).

information.[205] On the other hand, when the facts indicate that the informant was caught red handed while committing a crime, and nothing else suggests that the informant had previously developed a relationship with the police, then that suggests that the informant does not expect immunity based on an ongoing relationship, and therefore the informant could expect negative consequences for providing inaccurate information.[206]

A second relevant consideration would be the severity of the crime in which the informant had been implicated. If the informant is involved in serious trouble, the informant would have a reasonable fear that his false statements would be used against him, because the police would likely be interested in prosecuting him in the first place.[207] On the other hand, if the informant was already in serious trouble with the police, then he or she would have a greater incentive to pass along guesses or rumors, hoping that the information proved true.[208] Therefore, the nexus requirement discussed above becomes even more important: if the informant provides information about others involved in the same criminal activity that the informant has been

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[205] *See, e.g.*, State v. Jones, 706 P.2d 317, 325-26 (the affidavit contained insufficient surrounding circumstances to establish the informant's credibility: "B.V. could be a protected police informant, whose statements are not inherently reliable because he does not need to fear the threat of prosecution.").

[206] *See, e.g.,* Commonwealth v. Muse, 702 N.E.2d 388, 390 (Mass. Ct. App. 1998) (court noted that the informant was not a regular paid informant, in connection with the court's analysis of the informant seeking a potential plea agreement regarding his own criminal activity, implying that the leniency would be conditioned on providing accurate information rather than on an ongoing relationship).

[207] People v. Rodriguez*,* 420 N.E.2d 946, 950 (N.Y. 1981) ("In custody on serious charges, Garcia made his statement to assist his captors in uncovering the crime of another. He knew that the police would act upon it. He must also have known that sending the police on a fruitless errand would avail him of little, for this sport, too, could as easily become part of his record. Hence, he had every reason to tell all and tell it truthfully."); Commonwealth v. Muse, 702 N.E.2d 388, 390 (Mass. Ct. App. 1998) (informant was caught with jewelry from burglarizing a residence, and he could reasonably have thought that his confession to that burglary would have been used against him in the larceny case, so there was reasonable fear that his statements could be used against him); State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *10 (Tenn. Crim. App. April 15, 2003) (informant was caught in possession of more than 50 pounds of marijuana, so the amount may have suggested he was in significant trouble already).

[208] The courts in Indiana, for example, have concluded that statements which would otherwise be against an informant's penal interests should not be treated as actually being against the informant's interests when the informant was in such serious trouble that any punishment for false reporting would be negligible in comparison with the charges he or she was already facing. *See, e.g.,* Hirshey v. State, 852 N.E.2d 1008, 1013 (Ind. Ct. App. 2006) (discussing previous cases).

implicated in, then there is a greater reason to credit the truthfulness of the information than if the informant provides information about unrelated criminal activity, which could merely be an informant's guess or a rumor that the informant heard. Thus, because the factor related to the severity of the informant's crime can cut either way, it is not likely to be decisive for either outcome, but it is something that the courts could consider when evaluating the totality of the circumstances surrounding the making of the informant's statement.

Third, the existence of a deal should not be fatal to a finding of reliability. Several courts suggest that the existence of a deal must always undercut the reliability of the informant's statement.[209] It is true that when the informant's information relates to criminal activity that is unconnected to his or her own criminal activity, then the informant may have a strong incentive to pass along rumor and innuendo, hoping that it is accurate.[210] So when the informant offers the

[209] *See, e.g.,* State v. Jones, 706 P.2d 317, 326 (Alaska 1985) (rationale for using an informant's statements against interest favorably does not apply in a case in which the government informant expects immunity from prosecution in return for his statements, citing *Harris* dissent); People v. Cassella, 531 N.Y.S.2d 639, 641 (N.Y. App. Div. 1988) (informant seeking to gain favor with police to avoid charges based on his own involvement in a credit card scheme undercut by implicating the defendant as a supplier of fraudulent credit cards; this attempt to curry favor cast doubt on the informant's reliability); Richards v. State, Nos. A-7846, 4554, 2002 WL 531051, at *3 (Alaska Ct. App. April 10, 2002) (officer's failure to rule out a possible deal for the informant as consideration for statements implicating the defendant provided no basis to use the statements as favoring the reliability of the informant's narrative, and may suggest that the informant was merely seeking to shift blame). Still other courts note the fact that the informant was seeking a deal without clearly indicating which way that cuts. *See, e.g.* Weaver, 2003 WL 1877107 (does not analyze reasonable fear of prosecution at all, but the court notes that the informant (Chaney) only provided the information after being told by police that he should talk to them if he wanted to show the judge or jury in his case that he was willing to cooperate.).

[210] For example, in *State v. Burke*, No. 52234-5-I, 2004 WL 1045968, at *1 (Wash. Ct. App. May 10, 2004),the informant was detained on outstanding warrants, and in exchange for the police agreeing to forgo immediately booking him into jail on those warrants, he provided information about the location of a methamphetamine lab. The informant also disclosed his own nearly ten-year history of methamphetamine use. *Id.* at *4. The court relied heavily on the informant's statements about his own methamphetamine use, concluding that "a reasonable person in the [informant's] position would be unlikely to admit such heavy involvement in illicit drugs unless the statements were true." *Id.* But given the lack of a nexus between the statements about his own prior use of drugs and the premises targeted in the search warrant, the fact that the informant had previously used drugs does not make it more probable that there was a methamphetamine lab at the target location. And although the informant also said that he had been present at the target house while methamphetamine manufacturing was going on, he apparently did not admit any involvement in that manufacturing or any other specific illegal activity on that day. *See id.* Thus, although the court concluded that the informant's statements "provide some indicia of reliability," closer scrutiny reveals that the informant may well have cobbled together his tip out of information about methamphetamine manufacturing that he knew from his own previous activities and a rumor he had heard about the targeted premises having a methamphetamine lab. *Burke* thus illustrates the situation when an informant, seeking to get a benefit from

police information about criminal activity unrelated to his own, then neither the fact that he is under arrest nor the fact that he has made incriminating statements against himself should support a finding of reliability. But that problem can be cured by requiring a nexus between the informant's admitted criminal activity and the subject of the search warrant, as discussed in section III(B) *supra*.

On the other hand, if the information provided as part of a deal simply implicates other people involved in the criminal activity for which the informant is in custody, then the informant would not need to offer guesses or speculation because he or she would very likely know who else was involved in the criminal activity.[211] Therefore, the existence of a potential deal would not undercut the reliability of the informant's information because the circumstances would suggest that the informant would be providing accurate information rather than guesswork or rumors.[212] Finally, although the court should generally inquire about whether or not the

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the police, passes on rumor or innuendo to the police along with generic information about his own criminal activity without much risk to himself if the information proves to be false; it also illustrates the common failure of courts to actually scrutinize the extent to which statements that sound somewhat self-incriminating actually do contribute to a veracity finding.

[211] *See, e.g.,* State v. Estorga, 803 P.2d 813, 817 (Wash. Ct. App. 1991) (informant had "a strong motivation . . . to be truthful" when providing information about the source from which he had obtained amphetamine and marijuana earlier on the day of his arrest). The informant in *Estorga* had been arrested for possession of drugs and had entered into a formal "Agreement of "Understanding" that allowed the informant to escape prosecution for possession of contraband and for his role in the production of that contraband in exchange for initial information about the drug production operation and future testimony against the others involved, if necessary. *Id.* at 816. The defendant in *Estorga* had argued that the informant's statements against interest did not support veracity because he did not have any reasonable fear that false statements would have been held against him, because if he provided false information about the source from whom he had obtained drugs, the police would not have enough evidence to prosecute him for his own role in the marijuana growing operation. *Id.* The court in *Estorga* correctly rejected the defendant's argument, albeit with somewhat incorrect reasoning. The court correctly noted that if the informant's statements about the drug production operation proved to be inaccurate, he could have been charged and prosecuted for possession of the contraband seized earlier in the day. *Id.* at 817. But the court should also have noted that the risk of the informant fabricating incorrect information about the grow information was lessened by the fact that he was implicating the others involved in the same criminal operation that he was, and the existence of the deal provided him with the motivation to produce that accurate information. *See id.*

[212] *See, e.g.,* United States v. Olson, 408 F.3d 366, 371 (7th Cir. 2005) ("A motive to curry favor . . . does not necessarily render an informant unreliable. Indeed, even informants attempting to strike a bargain with the police have a strong incentive to provide accurate and specific information rather than false information about a defendant's illegal activity.") (internal quotation and alterations omitted); State v. Davis, 575 A.2d 4, 6 (N.H. 1990) (participation in plea bargaining does not render informant inherently unreliable, especially when other indications

informant received or expected a deal, the lack of such information should not always be fatal on appeal, so long as the surrounding circumstances available to the magistrate allow the magistrate to analyze this issue.[213]

(5) Consider Whether the Police Have Corroborated Significant Information.

Finally, the court should consider whether the police corroborated any of the informant's statements, because if other statements were corroborated, then the informant's narrative as a whole is more likely to be true.[214] The concept of corroboration is somewhat different than the other four factors described above, in that the other four factors above suggest that the informant's statement could be used against him or her, but corroboration is an independent way of crediting the information provided by the informant. However, courts often use corroboration to supplement a veracity determination involving an informant's statements against interest.[215]

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of veracity included enough detail to the police to expose the informant to prosecution for making a false report to a law enforcement officer). *See also* State v. Estorga, 803 P.2d 813 (Wash. Ct. App. 1991) (existence of deal provided strong incentive for truthfulness, because informant could have been prosecuted for the crime for which he was originally apprehended if his information had proved false).

[213] *See* State v. Bianchi, 761 P.2d 127, 131 (Alaska Ct. App. 1988) (disavowance of a "deal" was not automatically fatal to veracity finding when informant was reported to be a drug dealer who was caught in the act of dealing and when the affidavit does not suggest that she had a continuing relationship with the police).

[214] Most courts do not make clear whether the corroboration specifically satisfies the veracity prong of *Aguilar-Spinelli* or whether it provides an independent way of authorizing the issuance of the search warrant, while still other courts do not clearly distinguish between the two approaches. *See* e.g. State v. Steinzig, 987 P.2d 409, 417 (N.M. Ct. App. 1999). For purposes of this article, however, that distinction is unimportant, because either way, the ultimate question for the court reviewing a search warrant application is whether there is probable cause to believe that a crime has been committed and that issuance of a search warrant will lead to the discovery of evidence of that crime, United States v. Harris, 403 U.S. 573, 584 (1971), and proper corroboration makes a positive answer to that question more likely.

[215] *See, e.g.,* Watford v. State, No. A-8022, 2002 WL 31016675, at *2, 3 (Alaska Ct. App. Sept. 11, 2002) (appellate court concluded that general statements from paid informant about the informant's drug use did not satisfy veracity prong of *Aguilar-Spinelli* because the circumstances did not suggest that informant would fear statements being used against him, but warrant's issuance upheld because police corroborated informant's statements through a controlled buy and verification of other details provided by informant); State v. Lair, 630 P.2d 427 (Wash. 1981) (conclusory statement of a second informant corroborated the more detailed statement of a first informant who made a statement against penal interests; the court suggested that neither the first informant's statements against penal interests nor the conclusory corroboration would have been sufficient alone, but together, they suggested the reliability of the information presented).

The police must corroborate more than innocent details for the corroboration to be meaningful.[216] But when the police can corroborate a significant portion of the informant's narrative[217] or the specific details that are against the informant's interests,[218] then it is acceptable for the court to conclude that the warrant should be issued.[219] In fact, when a magistrate declines to issue a search warrant because the informant's veracity has not been established, the police should not stop their investigation, but often could instead go back to seek additional corroboration to bolster their case.[220]

IV. Conclusion

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[216] *See*, e.g., State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (corroboration inadequate when police merely confirmed that the defendant lived in the apartment identified by the informant, implying that the corroboration must be more extensive or of more important details). *See also* 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."). Professor Erlinder argued that the treatment of corroboration in *Florida v. J.L.* would lead the courts to use a "standard for evaluating the reliability of . . . informants in probable cause cases . . . [that] will probably approximate that required by the *Aguilar/Spinelli* test." Erlinder, *supra* note 33, at 70. But it does not appear that courts have taken that approach, and courts still seem to rely on corroboration in upholding the sufficiency of informants' tips.

[217] *See, e.g.,* Steinzig, 987 P.2d at 417 (police investigation corroborated informant's details about the defendant's telephone number, address, vehicle, and business). Although those details are all innocent, and therefore may have been insufficient for some courts to find adequate corroboration, the New Mexico Court of Appeals correctly concluded that this investigation did contribute to the appropriateness of the search warrant's issuance. This level of detail suggested that the informant who had incriminated himself could reasonably have believed that he would be prosecuted for providing false information or at least for his own activities, should his report of the defendant's criminal activity prove to be false. Additionally, there was another type of corroboration in *Steinzig*, as discussed in the note below.

[218] *See, e.g., id.* (two informants, questioned separately, gave nearly identical accounts of where they received counterfeit money; their accounts corroborated one another).

[219] *See* Clark v. State, 704 P.2d 799, 805 (Alaska Ct. App. 1985). In *Clark*, the Alaska Court of Appeals correctly found "insignificant" police corroboration of the informant's information about where the defendant worked and where the informant's own grandfather lived. *Id.* In a footnote, the court went on to note that corroboration of "innocent" details can sometimes contribute to a finding of veracity, and refocusing the inquiry onto the probable cause inquiry and whether the details corroborated make the defendant's alleged behavior seem more suspicious. *See id.* at n. 4.

[220] *See, e.g.,* State v. Jackson, 688 P.2d 136, 142-43 (Wash. 1984) ("Moreover, even if a tip, standing alone or partially corroborated, does fall short of probable cause it still has a place in law enforcement, it still may contribute to the solution of the crime, by prompting a police investigation, or further investigatory work that does establish that requisite probable cause.") (citing Y. Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 567 (1984)).

According to the analytical framework discussed above, before relying on an informant's supposed statement against interest in establishing veracity, the court should first conclude that three things have been established: (1) the statement should truly be against the informant's interests; (2) a nexus should exist between the informant's admitted crime and the subject of the search warrant; and (3) circumstances should suggest that a reasonable informant would fear prosecution for providing unreliable information. For that last step of the analysis, no single factor should be dispositive. Although this test may sound complicated to apply, it should be fairly straightforward to courts used to the facts and circumstances analysis always involved in probable cause determinations. And the courts will still be able to uphold a number of warrants, albeit with better reasoning, while striking down warrants that are issued in situations that fail to suggest the reliability of the informant's information.

The test should not be too hard for courts to apply, as some courts have issued decisions where the court's reasoning has been very consistent with the approach recommended by this article, even if they have not formalized the test articulated here. For example, in *State v. Barker*, the New Mexico Court of Appeals correctly concluded that the affidavit failed to provide sufficient information about the surrounding circumstances to "show that the informant would have had a reasonable fear of prosecution at the time he made the statement."[221] The police officer's affidavit said that the confidential informant admitted to (1) purchasing and using marijuana in the past, (2) being a drug user, (3) being present at the defendant's residence recently while the defendant sold marijuana, and (4) having purchased marijuana at the defendant's residence from the defendant at some time in the past.[222] In finding the affidavit

[221] 844 P.2d 839, 843-44 (N.M. Ct. App. 1992).

[222] *Id.* at 841, 842. As discussed earlier in the article, the court found that there was no nexus between the current investigations and the informant's first statements about past use of drugs or the second statement about being a drug user. *Id.* at 842. The third statement, although demonstrating a nexus with the criminal activity under

deficient, the court noted that the affidavit did not explain "the surrounding circumstances of the informant's admissions, which would serve to show why they were trustworthy."[223] For instance, the affidavit did not provide any "specific and detailed facts surrounding the informant's admissions, such as when or how often he purchased drugs from the defendant or the nature of the drugs."[224] Additionally, the confidential informant was not named in the affidavit.[225] The court concluded, "We simply do not know how far the informant's statement, that he had purchased drugs from defendant at this location in the past, subjected him to penal liability in the context of this case. And without such a showing in the affidavit, or without corroboration of the information, we are reluctant to find that it has the requisite reliability."[226]

Use of the test described in this article could help courts articulate their reasoning more clearly, even when the court would reach the same result. For example, *State v. Bianchi*[227] is a case where the court correctly upheld the issuance of the search warrant but where the court's reasoning could have been improved using the test described above. The court in *Bianchi* correctly concluded that the informant had made statements against her own penal interests, although it could have analyzed those statements in more detail to support that conclusion.[228]

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investigation, was not a statement against penal interests because the conduct involved was not criminal. *Id.* Thus, the court found that only the fourth statement was against the informant's criminal interests and contained a sufficient nexus to the relevant activity, such that it mattered for purposes of establishing veracity. *Id.*

[223] *Id*.

[224] *Id.* In making this observation, the court distinguished *Harris*, 403 U.S. at 575 ("affidavit stated that the informant had purchased illicit whiskey from residence described, for a period exceeding two years, most recently within two weeks."). Barker, 844 P.2d at 842.

[225] *Id.* at 843 (citing other sources that suggested that when an informant is not named, that increases the risk that the informant is a "protected police stool-pigeon.")

[226] *Id.* at 844.

[227] 761 P.2d 127, 131 (Alaska Ct. App. 1988).

[228] *See id.* at 128-29, 130 (the court supported its conclusion that informant Genevieve Olson had made statements against her penal interests by noting Olson's admission of selling marijuana to a different informant; Olson had actually made several more detailed statements against her interests when she admitted to purchasing or accepting marijuana from the defendant to sell to others and when she gave details about various transactions with the

The court then correctly noted the nexus between the informant's self-incriminating statements and the crime at issue in the search warrant.[229] Furthermore, although the court did not explicitly address whether the informant would have had reasonably believed that her statements were highly incriminating, several factors suggest that part of the test was met as well. First, the informant was named in the affidavit.[230] Second, the circumstances through which she came to the attention of the police suggest that, although she was seeking a benefit in exchange for her information,[231] the circumstances through which she came to the attention of the police did not suggest that she had any ongoing relationship with the police that would have given her reason to think that false information would not be held against her.[232]

On the other hand, use of the test described in this article would lead the court to strike down search warrants in which the informant's statement(s) against interest did not really contribute to the informant's veracity. For example, in *State v. Parvey*, the Washington Court of Appeals erroneously concluded that two informants had made statements against their

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defendant). The court did, however, note positively that the informant's statements included detailed information about her past purchases of contraband from defendant, including amounts, prices, and at least some dates. *Id.* at 129, 131. The level of detail included by the informant helps make those statements meaningfully against her interests, as discussed in Part III(A) above.

[229] *Id.* at 131 (stressing that informant Olson named the defendant as the single source from whom she received large quantities of drugs and provided details of her transactions with the defendant). In fact, the court emphasized that the analysis would have been different if she had merely provided "a list of names of people from whom she had acquired contraband on prior occasions. Such a generalized and unfocused set of allegations might well be nothing more than a series of falsehoods if the informant is simply relating rumors that she had heard in the community, and relying on the law of averages for the hope that one or more of the leads she gives will pan out." *Id.*

[230] *See id*. at 128.

[231] *See id.* at 128, 131 (the police apparently had sufficient evidence to charge her with illegally selling alcohol and marijuana, and it is a reasonable inference that Olson hoped for leniency based on the information she provided, although the warrant did not discuss the possible existence of a formal leniency arrangement). The Alaska Court of Appeals therefore correctly concluded that "the trial court erred to the extent that it concluded that a disaffirmance of a 'deal' was a condition prerequisite to validate an affidavit." *Id.* at 131.

[232] *Id.* (the "affidavit in this case makes it clear that Olson was rumored to be a drug dealer and was in fact "caught in the act." Furthermore, reading the affidavit reasonably, it appears that Olson did not have a continuing relationship with the police wherein she had provided information in return for past favors.")

interests.[233] In fact, one informant said he observed methamphetamine being manufactured by others,[234] while another stated that her boyfriend had been involved in receiving stolen property,[235] but merely being present while others commit a crime is not itself a crime.[236] Thus, the informants' statements did not contain admissions of their own criminal activity, as required by Part A of the test described above. And because the informants' statements did not actually implicate themselves in criminal activity, the fact that the informants were under arrest when they made their statements should be immaterial.[237]

Similarly, the result reached in *State v. Burke* should have been different under the test described above.[238] In that case, the court failed to impose a nexus requirement between the informant's statements about his own criminal activity and the activity that was the subject of the search warrant, as required by Part B of the test described in this article.[239] The court relied heavily on the informant's statements about his own methamphetamine use, concluding that "a reasonable person in the [informant's] position would be unlikely to admit such heavy involvement in illicit drugs unless the statements were true." *Id.* But given the lack of a nexus

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[233] Nos. 19587-2-III, 19663-1-III, 2002 WL 244972, at *7 (Wash. Ct. App. Feb. 21, 2002).

[234] *See id.* (informant Holder told police he saw defendant Lloyd "carrying the ingredients used in making the drugs from a camper behind [defendant] Parvey's house"). *See also id.* at *1 (informant Holder also implicated Lloyd and Parvey in trafficking stolen property and receiving drugs, but did not admit his own role in any of these activities).

[235] *Id.* at *7 (informant Stolz "admitted that her boyfriend . . . had received large amounts of stolen property from different people").

[236] *See, e.g.,* State v. Barker, 844 P.2d 839, 842 (N.M. Ct. App. 1992) ("simply admitting to observation of [criminal activity] does not constitute an admission against penal interest").

[237] *See* Parvey, 2004 WL 244972, at *7 (relying on the fact that statements were made while both informants were in custody, after being given *Miranda* warnings). The court also relies on police corroboration in part, but the opinion is not sufficiently detailed about what information was corroborated but does not give enough detail about that corroboration to know when or how it occurred. *See id.* at *7 (the opinion merely says "The police independently verified that many of the items Ms. Stolz and Mr. Holder described were in fact reported stolen").

[238] No. 52234-5-I, 2004 WL 1045968, at *1 (Wash. Ct. App. May 10, 2004).

[239] The court relied heavily on the informant's statements about his ten-year history of using methamphetamine, concluding that "a reasonable person in the [informant's] position would be unlikely to admit such heavy involvement in illicit drugs unless the statements were true." *Id.* at *4.

between the statements about his own prior use of drugs and the premises targeted in the search warrant, the fact that the informant had previously used drugs does not make it more probable that there was a methamphetamine lab at the target location.[240] Finally, because of the general nature of his statements about his own activities, and because of the benefit the informant sought from the police in exchange for his information, the informant had every incentive to pass along rumor or innuendo without having a reasonable fear that incorrect information would be held against him, as required by Part C of the test described above.[241]

Ultimately, the framework described in this article should help courts more carefully scrutinize when a statement truly is against an informant's penal interests and when such a statement truly does contribute to the expectation that the rest of the informant's narrative is likely to be credible. The test is sufficiently flexible to allow for courts to analyze the facts and circumstances of each case, whether applying *Aguilar-Spinelli* or *Gates*. Police should therefore be sufficiently able to continue to investigate criminal activity, but the public should be protected against some of the abuses that can come with over-reliance on criminal informants.

[240] The informant never admitted to receiving methamphetamine specifically from the premises that were the target of the search warrant; he simply admitted to being present at the location when methamphetamine was being manufactured. *See id.* And the police did not have any other evidence about the informant's methamphetamine use; he came to the attention of the police because he had been stopped for other outstanding warrants. *See id.* at *1.

[241] *See id.* (informant provided information in exchange for not being booked into jail immediately on outstanding warrants). The opinion lacks any suggestion that other factors were present that could support a reasonable fear of prosecution (the informant was unnamed and apparently did not testify before the magistrate). *See id.* Furthermore, the police corroborated only innocent details like the ownership of the house and the vehicles driven by the participants, *see id.*, but those details suggested only familiarity with the people involved, not that those individuals were engaged in criminal activity.