NEW MEXICO LAW REVIEW

Volume 40
Issue 2 *Spring*

Spring 2010

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TRUTH OR CONSEQUENCES: SELF-INCRIMINATING STATEMENTS AND INFORMANT VERACITY

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INTRODUCTION

Law enforcement today relies heavily on the flourishing industry of informants for prosecution of virtually all types of crimes.[1] Prosecutors rely on 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.[2] In evaluating search warrant applications, the magistrate or judge must determine whether an informant's statements contribute to a finding of probable cause. In making this determination, courts must have a reason to credit the information presented.[3] Courts making probable cause determinations often use an informant's admission of criminal activity as a key factor supporting the reliability of the informant's tip.[4] They do so despite the fact that criminal convictions or other criminal activity can be used in other contexts to attack a witness's credibility.[5] This article examines the ways in which courts analyze, or fail to analyze, whether such statements against interest 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 Rule 804(b)(3), the federal evidentiary rule allowing the admission of statements against penal interest at trial. According to the rationale contained in Rule 804(b)(3), statements against penal interest are admissible because a reasonable person in the declarant's position would not make a statement contrary to his or her penal inter-

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* Associate Professor of Lawyering Skills, Seattle University School of Law. The author wishes to thank her wonderful colleagues, and particularly Professors John Mitchell and Anne Enquist for their mentoring generally and for their helpful feedback on this article more specifically. I also wish to thank Susan Sweeney, Jane Muhlstein, and Mary Przekop, who provided excellent research assistance with this project.

1. *See* ROBERT M. BLOOM, RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM 158 (2002) (quoting former FBI Director William Webster as stating that "[t]he informant is the single most important tool in law enforcement"); 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) (noting that informants are used for investigating a wide variety of crimes, and are particularly important for policing "invisible crimes," in which there is no victim or the victim is unlikely to go to the police).

2. Studies of search warrant applications from cities such as San Diego, Atlanta, Boston, and Cleveland showed that between eighty and ninety-two percent of search warrants relied at least in part on information from a confidential informant. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 657 & nn.56–57 (2004); *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3, at 98–99 (4th ed. 2004) ("Indeed, it seems likely that a majority of the appellate decisions involving a probable cause issue are concerned with information obtained from informants.").

3. As discussed in Part I.B, *infra*, there are two different approaches taken by the courts when evaluating tips from confidential informants. The analysis I propose here is applicable under either test.

4. *See infra* Part I.D (discussing the courts' theoretical justifications for using statements against interest in this way).

5. For example, FED. R. EVID. 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,

> [O]ne 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).

est unless he or she believed the statement to be true.[6] As explained below, however, when courts talk about an informant's statements against interest as contained in a search warrant application, they do not subject the informant's statements to the kind of rigorous analysis required under the evidence rule.[7] 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 interest should be analyzed differently from the admissibility of a statement against interest at trial,[8] courts need to scrutinize the informant's statements more carefully than they currently do.[9]

Although informants play an important role within law enforcement,[10] 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,[11] courts should instead more carefully scrutinize the statements and 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.[12] For only in limited circumstances do an informant's statements against interest actually support the informant's veracity.

Part I of this article provides background on the historical and current constitutional analysis of search warrants based on informant information. Part I.A provides some background on use of criminal informants by law enforcement, including the serious societal consequences that come from overreliance on informants. Part I.B provides an overview of the various tests the courts have used to analyze search warrants based on an informant's tip, while Part I.C focuses more specifically on courts' analysis of an informant's veracity. Part I.D then details the

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6. FED. R. EVID. 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 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. *See* FED. R. EVID. 804(b).

7. *See infra* note 72 and accompanying text.

8. *See infra* Part II.C.

9. *See infra* Part III.A.

10. 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 2, at 676–77, 697–703; Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563 (1999); and Zimmerman, *supra* note 2, at 87–89 & nn.20–36.

11. As discussed in Part III.A below, courts fail to adequately scrutinize whether or not an informant's statement is actually against her interest when she makes it.

12. *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).

theoretical justifications offered by courts for using an informant's statements against interest 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. In fact, although the rationale seems to rely on rational actor theory, it actually runs directly contrary to that theory. Furthermore, recent U.S. Supreme Court jurisprudence on the Sixth Amendment's Confrontation Clause questions the reliability of statements against penal interest. Part II.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 Part II.C, 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. These proposed safeguards would help courts determine whether the informant's statement against interest supports the informant's veracity or whether it, on the contrary, suggests that the informant 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 the rest of the informant's tip is likely to be reliable. Specifically, Part III recommends that, before a court relies on a statement against interest as supporting an informant's veracity, the court must make three determinations: (1) the information is sufficiently detailed as to suggest current criminal activity that provides the police with new information against the informant; (2) a nexus exists between the crime to which the informant confessed and the criminal activity that is the subject of the warrant; and (3) a reasonable informant would have perceived her statements as highly incriminating. Part III concludes with some examples of how the framework would apply to previous cases, as well as responses to potential objections to this framework.

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. Section A provides some background on criminal informant usage in law enforcement. Section B discusses the evolution of the two major tests used by the courts for this analysis. Section C focuses more specifically on how the courts have evaluated an informant's veracity. Section D then explains the various theories the courts use to justify supporting an informant's veracity with statements against the informant's interest.

A. Use of Confidential Criminal Informants by Law Enforcement

Most informants are themselves criminals who provide information about someone else's alleged criminal activity in exchange for money or leniency for the in-

formant's own crimes.[13] 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.[14] This system of providing leniency for cooperation has a tremendous potential for abuse.[15] Criminal informants frequently continue to engage in illegal activity, often believing they have governmental authority to do so.[16]

Furthermore, even though courts generally express skepticism about the reliability of criminal informants,[17] 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.[18] This implicit preference can have a number of negative societal consequences. It can shift law enforcement efforts toward high-crime, low-income areas;[19] place significant law enforcement power in the hands of criminals;[20] and undermine the transparency of the judicial system "by shifting ultimate decisions about liability away from prosecutors to police."[21]

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13. Natapoff, *supra* note 2, at 652–54. The focus of this article is on "criminal informants" (i.e., informants who are in some way involved in criminal behavior and provide information to the police at an early stage of investigation, whether or not they later testify at trial), 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. LAFAVE, *supra* note 2, at 98. 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 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 between types of informants, 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).

14. *See* Natapoff, *supra* note 2, at 653 ("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."); Zimmerman, *supra* note 1, at 90–99 (detailing crimes committed by informants, including murder, bombing, and various types of other violent crimes).

15. *See, e.g.*, Natapoff, *supra* note 2, at 664 n.85.

16. Schreiber, *supra* note 13, at 319; *see also* Zimmerman, *supra* note 1, at 83 (noting informants' felonious activities, committed with the knowledge and even assent of police and prosecutors).

17. *See, e.g.*, State v. Smith, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993) (discussing the need for more stringent scrutiny of warrants based on information from criminal informants than from citizen informants); State v. Ibarra, 812 P.2d 114, 117 (Wash. Ct. App. 1991) (noting that the state has a 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 "merely a casual rumor or . . . colored by self-interest").

18. 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. United States v. Harris, 403 U.S. 573, 595 (1971) (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." *See id.*

19. *See* Natapoff, *supra* note 2, at 673 & n.133 (suggesting, for example, that the concentration of drug-related arrests and other law enforcement activity in Black communities stems in part from an overreliance by law enforcement on confidential informants).

20. *See id.* at 674 ("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.").

21. *See id.*

When these criminal informants are unreliable, it can also lead to false arrests and criminal prosecutions based on perjury.[22] The use of criminal informants can lead to the targeting and even conviction of potentially innocent people who have the misfortune to come into contact in some way with the criminal informant.[23] For example, researchers at the Innocence Project at Cardozo Law School found that false testimony by a government informant contributed to 21 percent of wrongful convictions studied.[24] Furthermore, a lack of informant reliability furthers the public's cynicism toward law enforcement and the judicial system generally.[25] These negative societal consequences suggest that courts should carefully scrutinize information from criminal informants.

B. Evolving Standards Evaluating Informants' Tips Generally

Historically, when criminal informants provided information that was used in a search warrant application, the courts used a two-pronged inquiry to evaluate the warrant application, often referred to as the *Aguilar-Spinelli* test.[26] 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.[27] 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.[28]

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.[29] Fourth Amendment protection requires that reasonable inferences from

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22. *See* Zimmerman, *supra* note 1, at 83.

23. *See* Natapoff, *supra* note 2, at 664 n.85.

24. 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).

25. Paul G. Hawthorne, Note, *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 COURTHOUSE: THE ROLE OF INFORMANTS IN WRONGFUL CONVICTIONS, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 73 (Saundra D. Westervelt & John A. Humphrey eds., 2001)).

26. Aguilar v. Texas, 378 U.S. 108 (1964), *overruled by* Illinois v. Gates, 462 U.S. 213, 238 (1983); Spinelli v. United States, 393 U.S. 410 (1969), *overruled by Gates*, 462 U.S. at 238. 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 13.

27. *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.").

28. *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 in Part I.C, the courts consider statements against interest when evaluating the informant's veracity, so this article focuses on the veracity prong of the test.

29. *See, e.g.*, 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 on Nathanson v. United States, 290 U.S. 41 (1933) and Giordenello v. United States, 357 U.S. 480 (1958)). Those previous decisions

the evidence presented "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."[30] A deficiency in the showing under either prong can be remedied through police corroboration of some of the information provided.[31]

In 1983, however, the U.S. 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.[32] 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."[33] 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.[34]

The Supreme Court in *Gates* nevertheless emphasized that the veracity of the informant is still "highly relevant" in determining whether a search warrant was properly issued.[35] The *Gates* Court specifically noted that its decision "in no way abandon[s] *Spinelli*'s concern for the trustworthiness of informers."[36] Professor

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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 letting the fellow officer seek the warrant. *Id.* at 114 n.4; *see also Spinelli*, 393 U.S. at 424 (White, J., concurring) ("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.").

30. *Aguilar*, 378 U.S. at 111 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)); *see also Gates*, 462 U.S. at 287 (Brennan, J., 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.").

31. 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. *See Use 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.

32. *Gates*, 462 U.S. at 230, 234. 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.

33. *Id.* at 230.

34. *Id.* 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); 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); Hawthorne, *supra* note 25, at 335 (characterizing *Gates* as "an act of complete disregard for Fourth Amendment protection"); 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).

35. *See Gates*, 462 U.S. at 230, 233 (the informant's basis of knowledge and veracity are "relevant considerations in the totality-of-the-circumstances analysis").

36. *Id.* at 239 n.11.

LaFave also noted that "courts should continue to place considerable reliance upon" the informant's veracity and basis of knowledge, even after *Gates*.[37] Because the informant's reliability is still "highly relevant" under *Gates*, the analysis proposed in this article applies under either the *Gates* or *Aguilar-Spinelli* tests.

Although the analysis proposed in this article applies in jurisdictions that use the "totality of the circumstances" approach from *Gates*, it is particularly crucial for those states that have reaffirmed use of *Aguilar-Spinelli* on state law grounds.[38] Most of the state courts that have rejected the *Gates* approach have stressed the critical importance of showing an informant's veracity.[39] For example, the Washington Supreme Court noted that "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."[40] 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

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37. LAFAVE, *supra* note 2, at 112.

38. 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. Jones, 706 P.2d 317 (Alaska 1985); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985); State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989); People v. Griminger, 524 N.E.2d 409 (N.Y. 1988); State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989); State v. Jackson, 688 P.2d 136 (Wash. 1984) (en banc). 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 U.S. 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 VT. R. CRIM. P. 41(c)). Additionally, the *Aguilar-Spinelli* standard was codified in Section 133.545(4) of the Oregon Revised Statutes, 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). 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* State v. Myers 570 N.W.2d 70, 73 (Iowa 1997) (pursuant to Section 808.3 of the Annotated Iowa Code, if the informant has not provided reliable information on previous occasions, the court must find that the informant or information appears credible); People v. Hawkins, 668 N.W.2d 602, 610 n.3 (Mich. 2003) (construing MICH. COMP. LAWS ANN. § 780.653(3) (West 2004)). 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, 89–90 (Mont. 2000), *overruled in part by* State v. Barnaby, 142 P.3d 809, 818–19 (Mont. 2006) (overruling *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, Note, 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, 317 (2000).

39. *See,* e.g., *Jones*, 706 P.2d at 322 (The 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); *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." (internal quotation omitted)). The courts have offered other critiques of *Gates*, which are generally beyond the scope of this article.

40. *Jackson*, 688 P.2d at 142; *see also Gates*, 462 U.S. at 277 (Brennan, J., dissenting) (Because informants, unlike police officers, are not presumptively reliable, special care must be taken in crediting hearsay from informants); Moylan, *supra* note 26, 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.'").

whether an informant's statements against interest really do contribute to a finding of veracity.[41]

C. 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, or the information provided, is reliable.[42] Commentators describe this two-faceted approach to satisfying the veracity prong as involving a "credibility spur" and a "reliability spur."[43] The "credibility spur" deals with the "inherent and ongoing characteristics [of the speaker] as a person—his reputation and demonstrated history of honesty and integrity."[44] 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.[45] Such a "track record of reliability reasonably supports an inference that the informant is presently telling the truth."[46] 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 can evaluate the informant's "full batting average" rather than just the informant's successes.[47]

The "reliability spur," on the other hand, focuses on the *information*. The court examines the particular circumstances under which the information at issue was furnished to see if those circumstances demonstrate the trustworthiness of that

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41. 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.

42. Aguilar v. Texas, 378 U.S. 108, 114–15 (1964) (holding that an affidavit must contain "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'") (citation omitted); *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.

43. *See,* e.g., LAFAVE, *supra* note 2, at 100, 131; Moylan, *supra* note 13, at 754, 765.

44. Moylan, *supra* note 13, at 757.

45. 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 also* McCray v. Illinois, 386 U.S. 300, 303–04 (1967) (concluding that "no doubt" informant was sufficiently credible when he had provided accurate information between fifteen and twenty-five 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); State v. Moon, 841 S.W.2d 336, 339 (Tenn. Crim. App. 1992); Commonwealth v. Brown, 581 N.E.2d 505, 507 (Mass. App. Ct. 1991); State v. Mejia, 766 P.2d 454, 457 (Wash. 1989) (en banc).

46. *Lair*, 630 P.2d at 430.

47. *See* Moylan, *supra* note 13, 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.

information.[48] Statements against interest fall within the "reliability spur," in that they use the surrounding circumstances to suggest that the information is reliable.[49] The courts sometimes look to additional factors in finding the reliability spur satisfied as well,[50] but statements against interest are often crucial.[51]

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

The seminal case on statements against interest in the context of probable cause determinations, *United States v. Harris*, was decided only two years after *Spinelli*.[52] 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.[53] In so doing, the Court offered two pri-

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48. *See* Moylan, *supra* note 13, 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.'" (quoting Thompson v. State, 298 A.2d 458 (Md. Ct. Spec. App. 1973))).

49. *See* LAFAVE, *supra* note 2, at 131.

50. 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, 420 (Wash. Ct. App. 1984) (concluding that veracity was established when unnamed informant testified before court, offered detailed information, and provided statements against penal interest); State v. O'Connor, 692 P.2d 208, 213 (Wash. Ct. App. 1984) (concluding that veracity prong was 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.

51. *See, e.g.*, Commonwealth v. Alvarez, 661 N.E.2d 1293, 1299 (Mass. 1996) ("The veracity prong has been met where, as here, there is a statement against penal interest made by an identified informant."); State v. Mannhalt, 658 P.2d 15, 18 (Wash. Ct. App. 1983) (holding that the veracity prong was satisfied because informant testified before magistrate and made statements against penal interest).

52. 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 interest 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.

53. *Harris*, 403 U.S. at 583. In *Harris*, the police sought and obtained a search warrant for premises suspected of containing whiskey 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. But the affidavit did indicate that the investigator knew that the defendant had a reputation for trafficking in illegal whiskey, including a previous seizure of illegal whiskey from a residence under the defendant's control. *Id.* at 575. In finding that the magistrate appropriately issued a search warrant based on this

mary reasons in support of its conclusion that statements against interest should be a significant positive factor toward satisfying the veracity prong.[54] 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.[55] 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.[56] Each of these reasons will be discussed in more detail below.

1. Admitting Criminal Activity Is Inherently Risky

The *Harris* Court relied heavily on 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."[57] 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.[58]

The *Harris* opinion contains some broad language,[59] but it also makes clear that statements against interest do not *always* suggest that the information is reliable: "Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another."[60] Although the Court failed to articulate a clear standard for determining when courts should use an informant's statements against interest to support a reliability determination, the statements in *Harris* were clearly against the informant's penal interest.[61] "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."[62]

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.[63] Later courts have stressed this reasoning in concluding that statements against interest contribute to a finding 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 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.

54. 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).

55. *Id.* at 583.

56. *Id.* at 584.

57. *Id.* at 583.

58. *Id.* at 575.

59. *See, e.g.*, *id.* at 583–84 ("People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. . . . That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct.").

60. *Id.* at 584 (considering the length of time involved in the admissions and the specificity of the information related to the premises to be indicia of reliability in that case).

61. *See id.* at 580.

62. *Id.* 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.

63. *Id.*

veracity.[64] 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."[65]

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 interest at trial.[66] Specifically, Rule 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 the declarant's position would not have made the statement unless believing it to be true."[67] 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."[68] Thus, both the *Harris* Court's reasoning and the rationale contained in Rule 804(b)(3) indicate that if someone makes a statement against her legal interest, and at the moment of making that statement understands that the consequences of the statement are against her interest, then the statement must be true.[69] In other words, as applied to an informant's situation, the informant would not have made the statement against 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 consider-

64. *See, e.g.*, Ivanoff v. State, 9 P.3d 294, 299–300 (Alaska Ct. App. 2000) (discussing this rationale but declining to apply it because the crime admitted was not serious); 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. Barker, 114 N.M. 589, 591–92, 844 P.2d 839, 841–42 (Ct. App. 1992); People v. Calise, 682 N.Y.S.2d 149, 152 (N.Y. App. Div. 1998); State v. Ward, 580 N.W.2d 67, 71–72 (Minn. Ct. App. 1998); State v. Lair, 630 P.2d 427, 430 (Wash. 1981).

65. This language originally came from LAFAVE, *supra* note 2, at 139. It has been quoted in many cases. *See, e.g.*, 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, 1999-NMCA-107, ¶ 20, 987 P.2d 409, 417; 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 "critical evidence" against the informant. *See infra* Part III.A.

66. FED. R. EVID. 804(b)(3).

67. *Id.* When Rule 804(b)(3) was enacted in 1975, it codified the common law allowing the admission of statements against pecuniary or proprietary interest, but it departed significantly from common law by making statements against penal interest 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). Another commentator notes that 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. Christopher B. Mueller, *Tales Out of School—Spillover Confessions and Against-Interest Statements Naming Others*, 55 U. MIAMI L. REV. 929, 942 (2001).

68. Cronan, *supra* note 67, 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) (Stevens, J., plurality opinion) (explaining that unlike many other hearsay exceptions, the exception for statements against penal interest "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)).

69. *See* Cronan, *supra* note 67, at 14.

ing a statement when determining whether probable cause exists.[70] 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 own admissions. Admissions of crime . . . carry their own indicia of credibility—*sufficient at least to support a finding of probable cause to search*."[71]

The Court later more explicitly distinguished between the admissibility of statements against penal interest at trial and their use in search warrant proceedings evaluating the existence of probable cause. In particular, it noted, "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."[72] Therefore, an informant's admission that he had bought illegal whiskey on the defendant's property created probable cause to justify the search in *Harris*.[73]

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.[74] However, a few courts have at least mentioned the fact that the informant's statements against penal interest do not need to be admissible at trial in order to be considered for a probable cause determination.[75]

II. FLAWS IN COURTS' CURRENT USE OF STATEMENTS AGAINST INTEREST WHEN ASSESSING THE RELIABILITY OF THE INFORMANT'S INFORMATION

Although these two rationales have surface appeal, the first rationale about the inherent risks of admitting to criminal activity does not hold up to closer scrutiny. As explained in Part II.A below, the courts are incorrect in treating the statements as inherently reliable. Furthermore, even when an informant's statement against

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70. United States v. Harris, 403 U.S. 573, 584 (1971). When *Harris* was decided, statements against penal interest 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 interest are without value and per se inadmissible had been widely criticized. *See Harris*, 403 U.S. at 584.

71. *Id.* at 583 (emphasis added).

72. *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.").

73. *Harris*, 403 U.S. at 584.

74. 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, 837 N.E.2d 1042, 1048–49 (Ind. Ct. App. 2005); Lovett v. Commonwealth, 103 S.W.3d 72, 78–79 (Ky. 2003); State v. Ward, 580 N.W.2d 67, 70–72 (Minn. Ct. App. 1998); People v. Calise, 682 N.Y.S.2d 149, 152 (N.Y. App. Div. 1998).

75. 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. . . ."); State v. Barker, 114 N.M. 589, 593, 844 P.2d 839, 843 (Ct. App. 1992) ("[W]e 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. . . ."); *see also* State v. Garberding, 801 P.2d 583, 585–86 (Mont. 1990) (quoting *Harris,* 403 U.S. at 584, 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.'").

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 Part II.B below. However, for the reasons explained in Part II.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 interest at trial.

A. Statements Against Interest Are Not Necessarily Inherently Reliable

Although *Harris* and its progeny stress the inherent risk of admitting to criminal conduct, in fact, that theoretical justification for the reliability of an informant's statements against interest is inherently flawed. Furthermore, recent U.S. Supreme Court jurisprudence shows that statements against penal interest may actually be inherently unreliable.

1. Rational Actor Theory Does Not Actually Support the Reliability of Statements Against Penal Interest

At first blush, both the *Harris* Court's reasoning and the Rule 804(b)(3) justification seem logical, and the *Harris* majority framed it as an issue of common sense.[76] Again, both of these sources justify the reliability of a statement against an individual's penal interest 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.[77] But this analysis rests on more than just common sense—it "rests on a behavioral approach to law that mirrors 'rational actor theory.'"[78] 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 that theory.[79]

Rational actor theory rests on three premises: methodological individualism, instrumental rationality, and self-interest maximization.[80] 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

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76. *Harris*, 403 U.S. at 583.

77. *See supra* Part I.D.1.

78. Cronan, *supra* note 67, at 2. For a more general discussion of rational 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 rational actor theory in all contexts. *See* Cronan, *supra* note 67, 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 the 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.

79. *See* Cronan, *supra* note 67, at 14. Cronan argues that the rationale for the reliability of statements against interest 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 Rule 804(b)(3) rests on rational actor theory, rational actor theory actually directly contradicts the rationale behind the reliability of statements against penal interest. *See infra* notes 85–89 and accompanying text.

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

the behavior of individuals and are best explained in terms of human behavior.[81] Similarly, the justification for the reliability of statements against interest premises the operation of the social structure (the criminal justice 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 interest. Instrumental rationality, also called utility maximization, is the "claim that [people] try to achieve their goals in the most effective manner."[82] Similarly, the rationale behind the reliability of statements against interest assumes that the declarant is aware of the consequences of acting and that those consequences shape her decision to make a statement against interest.[83] Under the evidentiary rule, for example, courts require that at the time the statement was made, the declarant perceived the statement to be against the declarant's interest.[84] The theory of reliability for statements against penal interest, 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 interest 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-interest.[85] Rational actor theory posits that each person possesses a relatively stable set of preferences, which are rank-ordered, and that each person tries to maximize her individual satisfaction as defined by her preference list.[86] Yet the theory behind the reliability of statements against interest suggests that the person making such a statement deliberately makes it knowing that it runs *contrary* to her own interest.[87] According to rational actor theory, however, people do not act against their own interests, so if a person perceived a statement to be contrary to her own interest, the person would not make the statement.[88] When someone does act consciously against her own inter-

81. *Id.*

82. *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 67, at 15 (noting that the 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 DENV. 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.").

83. *See* Cronan, *supra* note 67, at 13–14.

84. *Id.* at 13. Cronan also notes that courts impose a reasonable person standard when evaluating the admissibility of a statement against penal interest, so that the court requires that the statement must be against the interest "from the perspective of a rational actor." *Id.*

85. Rubin, *supra* note 80, at 1715–16; *see also* Cronan, *supra* note 67, at 14–15.

86. *See* Rubin, *supra* note 80, at 1714; *see also* Cronan, *supra* note 67, at 14–15.

87. Cronan, *supra* note 67, 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.").

88. *Id.* at 2 ("A rational actor who truly perceived a declaration to be contrary to his interests would not have made the statement.").

ests, then the rationale behind the reliability of the statement fails, because she would have ceased to act reasonably.[89]

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 interest. Or second, the rational actor could have concluded that the statement only *seems* to be against his or her penal interest, but the statement is in fact consistent with his or her penal interest. 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 Interest Can Suggest that the Speaker Decided Some Other Interest Was More Important

When a speaker prioritizes some other interest ahead of her penal interest, the theory for the reliability of the statement against interest no longer applies. For example, an informant who makes a statement against penal interest while incriminating someone else may be 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 the speaker would say something self-incriminating while giving the police a significant quantity of information against someone else, in order to obtain revenge. In doing so, he would be able to encourage the police to pursue 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 Interest

Additionally, an informant may conclude that a "confession" is actually in his or her penal interest when police use aggressive or coercive interrogation tactics in questioning the informant.[90] A number of scholars have written about the problems of coerced false confessions,[91] and many commentators consider the problem of false confessions to be the greatest threat to the reliability of statements against penal interest.[92] 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 her "situation, though unjust, is

89. *Id.* at 3.

90. *See, e.g.*, Ofshe & Leo, *supra* note 82, at 1060–61, 1077 (discussing how false confessions often result from interrogators stressing, whether indirectly or directly, the systemic benefits of confessing and 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.

91. *See, e.g.*, 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); 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). 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 82, at 983.

92. Cronan, *supra* note 67, at 19–20.

hopeless and will only be improved by confessing."[93] The more heavy-handed the interrogator is in communicating "an expectation of significant differential punishment outcomes for silence and confession," the more likely it becomes that a confession will result, regardless of whether the individual confessing is actually guilty or innocent.[94] Whether the suspect is innocent or guilty, the key is that the tactic suggests that the individual will receive a benefit for confessing.[95] 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 interest, which undermines the courts' reasoning about the reliability of informants' statements against interest.

Moreover, 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 interest actually will help them because the statements will not be held against them. The dissent in *Harris* noted this risk.[96] 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."[97] The dissent pointed to a lack of information about government practices or the particular facts regarding the *Harris* informant's expectations, and it noted that in future cases, "some showing that the informant did not possess illusions of immunity might well be essential."[98]

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.[99]

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93. Ofshe & Leo, *supra* note 82, 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.*

94. *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.*

95. *See id.* at 985–86.

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

97. *Id.*

98. *Id.* Similarly, the advisory committee notes from the adoption of Rule 804(b)(3) reflected this concern by warning against allowing statements made to a grand jury to qualify for admission as statements against penal interest, because such statements may really just be an attempt to gain favor with the authorities. Cronan, *supra* note 67, at 19 (citing FED. R. EVID. 804(b)(3) advisory committee's note to subdivision (b), exception (3)); *see also infra* Part III.C.4 (discussing informants' motivations for making statements directly to the police).

99. Mueller, *supra* note 67, at 940–41.

When criminal informants make statements against their own penal interest, they do 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.[100] "Even if the speaker is scrupulously honest, human nature inclines us toward minimizing personal blame and maximizing that of others."[101] A criminal informant is already unlikely to be a scrupulously honest person. Furthermore, an informant by definition gives information about someone else and thus always has a motive to minimize personal culpability and maximize the culpability of the person the informant is accusing. Thus, rational actors in this situation may well make apparently self-incriminatory statements without real fear that the statements would be used against them as they shift blame to someone else.

An informant may therefore make a statement that is apparently against his or her interest for a variety of reasons, as discussed above. Any of these motives could undermine the reliability of the informant's statement itself. Courts would therefore not be justified in concluding that the statement against interest necessarily contributes to a finding of the informant's veracity.

2. The Recent Confrontation Clause Jurisprudence of the U.S. Supreme Court Questions the Reliability of Statements Against Penal Interest

Caselaw 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 interest, rather than against it."[102]

The U.S. 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 interest. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses against him.[103] 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.[104]

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100. 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 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.

101. Mueller, *supra* note 67, at 941.

102. Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409, 2424–25 (2005).

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

104. Confrontation Clause analysis applies to the admissibility of out-of-court statements during trial. *See* Crawford v. Washington, 541 U.S. 36, 40 (2004). 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* United States v. Harris, 403 U.S. 573, 584 (1971) ("[T]he 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. 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.[105]

Applying this framework, the Supreme Court in 1999 unanimously decided the Confrontation Clause was violated by the admission of a codefendant's entire confession, which contained both statements incriminating the defendant and inculpatory statements against the codefendant's own penal interest.[106] Although the Court's decision was unanimous, there were several different opinions and rationales in the case.[107] 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 interest.[108]

More specifically, the plurality opinion emphasized the inherent unreliability of an accomplice's statement that incriminates himself and his codefendant.[109] The plurality further noted that "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.[110] 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 interest, 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

105. Mueller, *supra* note 67, at 942–43; *see also Crawford*, 541 U.S. at 40, 42, 60 (discussing the framework from Ohio v. Roberts, 448 U.S. 56 (1980)).

106. Lilly v. Virginia, 527 U.S. 116, 142 (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. *See* Mueller, *supra* note 67, at 943–44.

107. 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, a jurisdictional question, and the ultimate conclusion that the Confrontation Clause had been violated. *Lilly*, 527 U.S. at 119. 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, 140–49.

108. Mueller, *supra* note 67, at 943–44 (noting that the 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 a case-by-case approach).

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

110. Mueller, *supra* note 67, at 945 (citing *Lilly*, 527 U.S. at 137).

> 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. . . .;[111]

In light of these difficulties, as well as a reassessment of the historical underpinnings of the Confrontation Clause, the U.S. Supreme Court in its 2004 *Crawford* decision replaced the balancing test for assessing reliability with a focus on whether or not the statement was testimonial.[112] 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.[113] 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."[114]

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 search warrant applications because such applications are necessarily ex parte. 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.[115] Even so, 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 interest 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 views on the inherent unreliability of accomplice "confessions" that implicate someone else, undermine the *Harris* Court's reasoning that an informant's statements against penal interest are *necessarily* likely to be reliable.

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111. Crawford v. Washington*,* 541 U.S. 36, 63 (2004) (citations omitted).

112. Capra, *supra* note 102, 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.*

113. *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.").

114. *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.").

115. *See supra* note 104 (regarding the inapplicability of the Confrontation Clause to proceedings regarding the issuance of a search warrant).

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

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 interest is itself reliable (i.e., if the informant's statement accurately describes the informant's own criminal involvement), that does not necessarily suggest that statements incriminating *someone else* should also be seen as likely to be true.

In the evidentiary context of Rule 804(b)(3), the Supreme Court pointed out the fallacy involved in drawing this inference from a person's statement against penal interest to the reliability of the other information in the same narrative.[116] In *Williamson v. United States*, the Court concluded that Rule 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.[117] 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-inculpatory parts."[118] Yet this is precisely the inference that courts draw from an informant's statement against interest—because the informant has made a particular statement that incriminates himself, the rest of the narrative is more likely to be true.[119]

The *Williamson* Court 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 merely attempts to shift blame or curry favor with authorities.[120] As one commentator has noted, human nature inclines even the most honest speaker toward minimizing personal blame for wrongful acts and directing that blame toward others who are also involved.[121] The *Williamson* Court thus noted that when part of a confession is actually exculpatory, then the rationale behind Rule 804(b)(3)—that someone would not make a state-

116. Williamson v. United States, 512 U.S. 594 (1994).

117. *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 67, at 934 ("At the very least, *Williamson* . . . blocked [use of Rule 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.").

118. *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.

119. *See supra* note 48 (statements against interest 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 interest as "an additional reason for crediting the informant's tip" as a whole, rather than just for believing the informant's self-incriminating statement).

120. *Williamson*, 512 U.S. at 603–04 ("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)).

121. Mueller, *supra* note 67, at 941.

ment against interest unless it was true—no longer applies with any real force.[122] 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."[123]

These problems of shifting blame 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 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.[124] A criminal informant 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 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.[125]

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 interest can only relate to the speaker's conduct, even though statements describing a co-conspirator's criminal activity can be against the speaker's own interests because of accomplice liability principles.[126] As described above, however, when informants make self-incriminating statements in the context of describing someone else's criminal activity, rational informants will likely believe that this information will not be used against them.[127] Furthermore, although *Williamson* failed to adequately delineate which statements will qualify for admission under the decision's attempted bright-line rule,[128] this lack of clarity within the evidentiary context does not matter because the courts have correctly refused to incorporate the evidentiary standards under Rule 804(b)(3) when deciding what constitutes a statement against interest within the context of an informant's narrative.[129] These challenges do not undermine the validity of the Court's

122. *Williamson*, 512 U.S. at 600.

123. *Id.* at 601 (internal quotation omitted).

124. *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 interest).

125. *See infra* Part III.C.4.

126. *See* Mueller, *supra* note 67, at 936–40.

127. *See supra* Part II.A.1.b (rational actors making statements against interest will likely conclude that statements will not be held against them). So even if accomplice liability rules mean that more of an informant's narrative is treated as self-incriminating, the informant will still likely conclude that providing information against others is the best way to avoid or minimize the informant's own liability. *See* Mueller, *supra* note 67, at 940–41 (regarding the incentive to seek the best possible deal by providing information against someone else).

128. *See* Mueller, *supra* note 67, at 933–34 (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) and observing that it is not clear that the court really adopted a "narrow view" of how much of a statement really qualifies for the statements against interest exception to the bar on the admission of hearsay).

129. 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 infra*

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 interest.

C. When Properly Scrutinized, Statements Against Interest 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 interest therefore *never* suggest the reliability of the informant's information.[130] That conclusion goes too far, however, for three reasons.

First, and most important, is the fact that the tip is used for analyzing probable cause rather than guilt beyond a reasonable doubt. When a statement against penal interest is admitted at trial, the fact-finder considers the statement when deciding the defendant's guilt beyond a reasonable doubt. But a magistrate faced with a search warrant application applies 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.[131] For example, the *Harris* Court concluded that the informant's admission that he had bought illegal whiskey on the defendant's property supported a finding of probable cause to justify a search of the defendant's property for evidence of illegal whiskey.[132] 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, 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 and whether the defendant is guilty beyond a reasonable doubt.

The significance of this context is somewhat counterintuitive. For example, the *Harris* dissenters were troubled by the majority's more permissive attitude toward statements against interest in the constitutional analysis of probable cause determinations than the attitude toward such statements when considering their admissibility at trial.[133] 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."[134] The dissent's reasoning initially seems 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, the *Harris* majority's approach

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Part III (detailing how courts should use an informant's statement against interest when considering whether the statement supports a probable cause determination).

130. In fact, Cronan argues for the elimination of statements against penal interest from Rule 804(b)(3), so that the rule would be limited to statements against proprietary or pecuniary interest. Cronan, *supra* note 67, at 28–29.

131. United States v. Harris, 403 U.S. 573, 584 (1971); *see also supra* Part I.D.2.

132. *Harris*, 403 U.S. at 584.

133. *See id.* at 594 (Harlan, J., dissenting).

134. *Id.*

is correct 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 admission of criminal activity connected with a particular location can contribute to probable cause to believe that a search will yield evidence of criminal activity at that location.[135]

Second, a judge rather than a jury considers the informant's statement against interest in the probable cause context. When a statement against interest is admitted at trial, the jury can then consider it in determining a defendant's guilt, and 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 ultimately evaluate the significance of the statement. Judges are better equipped than juries to evaluate the reliability and utility of hearsay information such as a statement against interest.[136]

Third, 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 because an informant's tip inherently focuses the police on someone else's criminal activity.[137] For example, one common type of false confession involves someone falsely incriminating himself out of a desire to protect the "real culprit."[138] But an informant's tip does not focus the police on his or her admission of guilt; it instead directs the police toward 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.[139] Even when an informant includes a statement against her own penal interest when giving the police a tip, she is unlikely to do so for any of the reasons listed above involving voluntary false confessions. Therefore the informant's statement may be more reliable than statements against penal interest given by non-informants in other contexts.

Again, context is key. Courts considering statements against interest in an informant's tip should be very careful to avoid over-emphasizing the reliability of

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135. *See infra* Part III.B (regarding a necessary nexus between the informant's admission of criminal activity and the target of the investigation).

136. *See, e.g.*, 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:28, at 193–94 (3d ed. 2007).

137. Cronan argues that the sociological and psychological research into false confessions provides further support for his thesis that statements against penal interest are not inherently reliable, and therefore should not be admitted at trial. Cronan, *supra* note 67, at nn.98–124 and related texts. Thus, Cronan may be right to argue that statements against penal interest should not be admitted in a criminal trial, but the different context of using statements against interest discussed in this article indicates that the statements may retain some value in supporting a probable cause determination.

138. Cronan, *supra* note 67, 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).

139. *See* Cronan, *supra* note 67, at 20–21, nn.102–09 and accompanying text (discussing "voluntary false confessions").

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.

III. PROPOSED SAFEGUARDS TO ENSURE STATEMENTS AGAINST INTEREST SUGGEST RELIABILITY RATHER THAN UNRELIABILITY IN A PARTICULAR SITUATION

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.[140] First, the courts must scrutinize the informant's statements to ensure that they really are against the informant's penal interest.[141] 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.[142]

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 that was confessed and the criminal activity that is the subject of the warrant.[143] Such a nexus is necessary to counter the usual presumption that criminal activity undermines rather than supports an individual's credibility.[144]

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 reasonable fear of

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140. 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.

141. None of the states discussed in this article have adequately emphasized the need to ensure that a statement really is against the informant's interest. *See infra* Part III.A.

142. 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 infra* Part III.A.

143. 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 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(c), at 531 (1st ed. 1978)); State v. Barker, 114 N.M. 589, 592, 593, 844 P.2d 839, 842, 843 (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 statement was against his interest 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.*

144. *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.").

prosecution for the informant if the information proves wrong.[145] This part of the test looks at whether an informant has an incentive to provide accurate information and a real disincentive for providing inaccurate information, either guesses or lies.[146] When the court can find such a reasonable fear of prosecution for providing false information, then the informant's statement against interest contributes favorably to a veracity determination in support of the issuance of a search warrant. The concluding section responds to potential objections to the use of this test and provides illustrations of how use of this test would differ from current law.

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

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 it really is specific enough to be against the informant's interest. The statement at issue in *Harris*, for example, was clearly against the informant's interest because "it could readily warrant a prosecution and could sustain a conviction against the informant himself."[147] Furthermore, the courts use statements against penal interest in this context because the substance of the comments suggests they would not be made lightly.[148] 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.[149]

Although the courts have appropriately rejected application of the evidentiary standards to this analysis,[150] 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 interest. For example, courts sometimes assert that an informant made a statement against interest, but the reader cannot verify that the statement truly was against the informant's interest because the opinion contains no detail about what that statement might have

145. 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; Commonwealth v. Melendez, 551 N.E.2d 514, 516 (Mass. 1990); *Barker*, 114 N.M. at 592–93, 844 P.2d at 842–43; People v. Cassella, 531 N.Y.S.2d 639, 641 (N.Y. App. Div. 1988).

146. The circumstances should suggest that the informant would reasonably 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).

147. United States v. Harris, 403 U.S. 573, 575, 580 (1971) (The informant told the 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.).

148. *See supra* Part I.D.1.

149. 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. FED. R. EVID. 804(b)(3).

150. *See supra* note 129 and Part II.C for the discussion of why the evidentiary standards should not control in this context.

been.[151] In other cases, the courts assert that the informants made statements against interest, but the information contained in the case about the informants' statements are not actually against the informants' interest at all.[152] In order to scrutinize an informant's statement appropriately, courts should ensure that the statement against interest is detailed enough (1) to actually implicate the informant and (2) to provide specific information that could be used against the informant.[153]

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.[154] 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.[155] Similarly, the conduct that the informant admits to must have actually been against the law at the time of the informant's statement.[156] On the other hand, when informants offer significant details about their own activities that truly are illegal, this step of the analysis should

151. *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). In other cases, the courts assert without further analysis that the informants made statements against interest, but the statements are only found in the fact section of the opinion, so the reader has to put the pieces together to verify that the statements really are against the informants' interest and to see how the statements fit into the overall analysis of the tip. *See., e.g.,* State v. Merkt, 102 P.3d 828, 830–32 (Wash. Ct. App. 2004).

152. *See, e.g.*, State v. Steinzig, 1999-NMCA-107, ¶ 3, 987 P.2d 409, 413 (one of the two informants only implicated the other informant and others, not herself); State v. Thein, 957 P.2d 1261, 1262, 1266 (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).

153. 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 interest; 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 itself. *See infra* Part III.C.

154. People v. Johnson, 488 N.E.2d 439, 443–44 (N.Y. 1985) (holding that the informant merely implicated defendants and correctly rejecting 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).

155. State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (affirming court of appeals' conclusion that information was not sufficiently against interest when informant talked about being present when someone else is purchasing cocaine, because that is not a crime); State v. Barker, 144 N.M. 589, 592, 844 P.2d 839, 842 (Ct. App. 1992) ("[S]imply admitting to observation of a criminal transaction does not constitute an admission against penal interest."). Courts often overlook this detail. *See, e.g., Steinzig*, 1999-NMCA-107, ¶¶ 3, 18–23, 987 P.2d at 413, 416–17 (failing to note that one of the two informants only implicated the other informant and others, not herself); State v. Moon, 841 S.W.2d 336, 337–38 (Tenn. Crim. App. 1992) (invalidating affidavit on other grounds when the affidavit only made a conclusory assertion that the informant had made a statement against interest and stated only that the informant said he saw drugs being used and sold while he was present at the defendant's residence, without admitting his own involvement).

156. *See* 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 interest because that conduct was, at the time, arguably not against the law).

be satisfied.[157] For example, in a drug case, the informant might admit to involvement in purchasing drugs from particular locations at particular times.[158]

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.[159] If the informant simply confirms what the police already knew, then 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."[160]

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,[161] or when identifying what he had done with contraband from a specific transaction.[162] The informant might instead provide information about criminal activity that would otherwise have gone undetected.[163] The statements must also suggest specific and recent criminal activity by the informant, because vague admissions about past wrongdoing would not support a criminal

157. *See, e.g.*, 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 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.); Commonwealth v. Parapar, 534 N.E.2d 1167, 1169–70 (Mass. 1989) ("The informant's statement against penal interest directly inculpated him in three trafficking offenses [and] a possible conspiracy offense. . . .").

158. State v. Kapsalis, 859 P.2d 1157, 1160 (Or. Ct. App. 1993) (The 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) (The informant described in detail ongoing drug sales, involving three people, multiple locations, and amounts sold on a daily basis.).

159. *See, e.g.*, State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *3, *10 (Tenn. Crim. App. Apr. 15, 2003) (The 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.); State v. Brown, No. 35083-I-II, 2007 WL 3195199, at *4 (Wash. Ct. App. Oct. 31, 2007) (The informant implicated himself in numerous crimes, without knowing which crimes the police might pursue, exposing himself to potentially significant criminal charges.).

160. LaFave, *supra* note 2, at § 3.3, 16 (Supp. 2009–2010) (quoting United States v. Olson, 408 F.3d 366, 371 (7th Cir. 2005)).

161. *See* State v. Bianchi, 761 P.2d 127, 131 (Alaska Ct. App. 1988) (upholding warrant when a named informant identified one source and gave detailed information about her transactions with that source); State v. Steinzig, 1999-NMCA-107, ¶ 3, 987 P.2d 409, 413 (The 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, 588 (N.Y. App. Div. 2006) (The 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 interest.).

162. *See* Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (upholding warrant when the informant confessed to committing ten burglaries, and identified seven locations, including the defendant's, where stolen property from those burglaries were fenced); State v. Ramon, No. 08-0151, 2009 WL 139541, at *1, *3 (Iowa Ct. App. Jan. 22, 2009) (upholding warrant when informant admitted to committing several burglaries and providing stolen items to defendant in exchange for drugs; relying in part on informant's detailed information, including naming particular stolen items, which went beyond what was public knowledge).

163. Fields v. State, No. 13A01-0808-CR-398, 2009 WL 606298, at *4 (Ind. Ct. App. Mar. 9, 2009) (The informant's statements exposed her to risk of multiple counts of dealing drugs, and she admitted to behavior that would otherwise likely have gone undetected.).

prosecution against the informant,[164] nor would they be otherwise likely to be held against the informant.[165]

When an informant makes multiple statements that might be against his or her interest, the court should scrutinize each one separately, and at least one statement must be sufficiently detailed to give the police usable information against the informant. For example, in *State v. Barker*, a New Mexico case, the court analyzed three arguable statements against penal interest.[166] The first two statements were too general, as the informant admitted he had "purchased and used marihuana [sic] in the past" and had been 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.[167] But the third admission was 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. Thus, the information was detailed enough to provide the police with meaningful ammunition against the informant.[168]

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

Second, before finding that a statement against penal interest 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 than to support it.[169] 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.[170]

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164. State v. Jones, 706 P.2d 317, 325–26 (Alaska 1985) (holding that vague admissions about past purchases would not support prosecution and therefore do not constitute statements against penal interest); State v. King, No. 20490-1-III, 2002 WL 31303556, at *5 (Wash. Ct. App. Oct. 15, 2002) (concluding that confidential informant's statements that he had purchased and used marijuana regularly for several years were not sufficiently against his penal interest 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.").

165. 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 interest to establish [veracity]."); State v. Fosie, No. 32913-1-II, 2006 WL 2054452, at *4 (Wash. Ct. App. July 25, 2006) (finding vague admissions of marijuana use weigh against rather than in favor of the informant's veracity).

166. *See* State v. Barker, 114 N.M. 589, 592, 844 P.2d 839, 842 (Ct. App. 1992).

167. *See id.* The court refused to rely on these two statements because there was no nexus between the criminal activity admitted to in those statements and the target of warrant. *Id.*; *see also infra* Part III.B (discussing the nexus analysis). The court failed to note that these two statements are also not sufficiently detailed to provide meaningful ammunition against the defendant.

168. However, the *Barker* court held that the statement was insufficient to provide probable cause. 114 N.M. at 593–94, 844 P.2d at 843–44. In reaching that conclusion, the court correctly relied on the absence of other surrounding factors, such as the informant being named or police corroboration, that would have subjected the informant to penal liability in the context of the case. *See id.*; *see also infra* Part III.C.

169. *See, e.g.,* State v. Moon, 841 S.W.2d 336, 339–40 (Tenn. Crim. App. 1992).

170. *See* LAFAVE, *supra* note 2, at 143; *see also* Fosie, 2006 WL 2054452, at *4 (finding that 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

If the informant admits criminal activity that is connected to the investigation, on the other hand, the information is more likely to be reliable for these purposes,[171] at least when using the probable cause standard for a search warrant rather than the "beyond a reasonable doubt" standard for a criminal conviction.[172] 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.[173] 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,[174] 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.

This "nexus" requirement would be satisfied if, for example, the informant admits to having previously possessed contraband and then disposed of it at the locations that are the subject of the warrant.[175] Furthermore, a nexus can be established when an informant performs controlled buys from the person targeted in the warrant.[176] Similarly, a nexus exists when an informant who is caught possessing contraband identifies the source from whom he or she received the contraband.[177] However, the informant must identify the particular source from this transaction; it

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whether the defendant was operating a marijuana grow operation." *Id.* The informant did not seem to have admitted purchasing or receiving marijuana from the defendant's operation, so the informant failed to create a clear nexus between his own criminal activity and the activity that was the subject of the warrant. *See id.*

171. *Compare* State v. Lewis, No. M2005-02052-CCA-R3-CD, 2006 WL 2380614, at *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. Mar. 8, 2007) (informant's statement against penal interest did not support credibility determination, "as the informant never tied his statement against interest to the defendant's alleged criminal enterprise").

172. *See* People v. Collins, 828 N.Y.S.2d 587, 588 (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). For a discussion of the difference between using a statement against interest in connection with determining probable cause rather than to establish guilt beyond a reasonable doubt, see Part I.D, *supra*.

173. *See supra* Parts I.D.2, II.C (regarding using statements to determine probable cause versus their admissibility at trial).

174. *Harris*, 403 U.S. at 584.

175. *See* Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (finding a nexus when the informant gave information about locations, including the defendant's house, where he had fenced stolen property).

176. State v. Blasio, Nos. A-8476, A-8478, 2004 WL 1197311, at *2 (Alaska Ct. App. June 2, 2004) (finding a 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).

177. *See* 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); *see also* Watford v. State, No. A-8022, 2002 WL 31016675, at *2 (Alaska Ct. App. Sept. 11, 2002) (nexus established when paid informant's 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). However, the identified source has to be from the specific transaction. *See* State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (noting that 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").

should not be sufficient for the informant to generally name many alleged sources from whom he or she has received contraband in the past.[178] A list of names of those from whom the informant has acquired contraband "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."[179]

Again, the court must carefully scrutinize every statement made by the informant that appears to be against his or her interest to see whether or not it satisfies this step. For example, the *Barker* court scrutinized several statements by the informant for a nexus between the informant's admitted criminal activities and the defendant's alleged criminal activities.[180] The court properly concluded that there was no nexus between the subject of the investigation, the defendant's selling of marijuana, and the confidential informant's admission to being a drug user or to "purchas[ing] and using marihuana [sic] in the past."[181] The court also correctly concluded that there was in fact a nexus between the informant's statement that he had been to the defendant's home in the past and purchased drugs while there.[182] The court then properly went on to consider whether that statement indicated that the informant would have a reasonable fear of prosecution,[183] which is discussed in the next section.

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 circumstances surrounding the making of those statements, 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 in-

178. 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 161–62 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 quotations omitted)); State v. Marney, No. W2002-02648-CCA-R3-CD, 2003 WL 23100338, at *5 (Tenn. Crim. App. Dec. 31, 2003) (expressing reservations about relying solely on statements against penal interest to establish the veracity prong, but finding 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); LAFAVE, *supra* note 2, at 140–41.

179. *Bianchi*, 761 P.2d at 131.

180. State v. Barker, 114 N.M. 589, 592, 844 P.2d 839, 842 (Ct. App. 1992).

181. *Id.*

182. *Id.* The court also concluded that 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.* In other words, that statement by the informant was insufficient because it was not truly a statement against interest, as explained in Part III.A of this article.

183. *Id.* at 593.

formant's information.[184] 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.[185]

A few courts require that a reasonable informant perceived the admissions to be incriminating in the context in which they were made, considering the circumstances surrounding the making of the statement against interest.[186] However, none of the courts that have used 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 assume that the informant has useful information to provide, rather than adequately considering the incentives for an informant to provide a tip based on lies or guesses and hope the tip pans out when the informant does not actually know information that is useful for the police.[187]

Although the language used by these courts suggests that the test should be subjective, focusing on whether the particular informant would actually have perceived his or her statements as incriminating,[188] 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. 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. If a reasonable informant would have believed the statement was highly incriminating, that inference supports the reliability of the information presented.[189] Additionally, 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).[190]

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184. *See supra* Part I.C.

185. *See supra* Part II.B (discussing Williamson v. United States, 512 U.S. 594 (1994)).

186. *See, e.g.*, Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) (asking "whether the informant would have perceived his remarks as highly incriminating" (quoting 1 W. LAFAVE, SEARCH AND SEIZURE § 3.3(c), at 531 (1st ed. 1978))); Commonwealth v. Melendez, 551 N.E.2d 514, 516 (Mass. 1990) (relying also on LaFave in concluding that the informant must have a reasonable fear of prosecution at the time that the statement was made and in noting that a threat of police retaliation can create an informant's reasonable fear); 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.").

187. 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).

188. *See, e.g.*, *O'Connor*, 692 P.2d at 215 (The 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.").

189. *See supra* Part I.C (regarding the distinction between the credibility of the informant as a person and the reliability of his or her information).

190. *See, e.g.*, Erlinder, *supra* note 34, 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.").

Obviously, the circumstances in which informants make statements will vary tremendously from case to case, and the courts using this suggested analysis will have great flexibility to consider the facts and circumstances of each case.[191] 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, each of which is discussed below in turn:

(1) Did the informant testify before the magistrate, even anonymously?

(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. 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.[192] Thus, despite the list's non-exhaustive nature, the use of such a list should be helpful in guiding police actions and later court review.[193]

In any event, 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.[194] 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.

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191. 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. Jones, 706 P.2d 317, 324 (Alaska 1985); People v. Griminger, 524 N.E.2d 409, 411–12 (N.Y. 1988); State v. Jackson, 688 P.2d 136, 141 (Wash. 1984).

192. *Compare* Elerson v. State, 732 P.2d 192, 194 (Alaska Ct. App. 1987) ("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. Apr. 10, 2002) (finding the statements by one informant not to be against penal interest in part because police had not shown the informant was prosecuted for the underlying event).

193. *See generally* Hirokawa, *supra* note 38 (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).

194. *See, e.g.*, *Jones*, 706 P.2d at 326, n.12 ("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."); *see also supra* notes 29, 30, 47, and accompanying text (discussing the importance of the magistrate in reviewing the information presented). Although the courts fail to consistently require full disclosure of the relevant circumstances, that more general problem is beyond the scope of this article.

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.[195] Even when an informant testifies anonymously, the magistrate has the opportunity to observe the informant's demeanor and assess his or her credibility first-hand.[196] Furthermore, when the informant testifies, the magistrate then has the opportunity to ask the informant questions, which helps ensure that the magistrate has sufficient information to perform a full and independent assessment of probable cause.[197] Thus, when an informant testifies, the magistrate is in a better position to evaluate whether all of the informant's information is reliable, including how an informant's statements against interest fit into this analysis.[198] 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.[199]

Finally, encouraging more informants to testify by making that an explicit factor favoring veracity would facilitate more transparency in police-informant dealings.[200] When an informant testifies during a probable cause hearing, it becomes particularly appropriate for a reviewing court to give deference to the magistrate's determinations, including the magistrate's determination about whether the informant's self-incriminating statements contribute to a finding of veracity. A reviewing court should always give deference to a magistrate's determination of probable cause.[201] But when the magistrate has the ability to view the informant and evaluate his or her credibility first-hand, that deference is even more signifi-

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195. Although most other jurisdictions do not seem to consider this factor, Washington cases 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. Mannhalt, 658 P.2d 15, 18 (Wash. Ct. App. 1983) ("The informant also appeared before the court to testify under oath, and made statements against his penal interest. These are substantial positive factors in evaluating his credibility."); 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.").

196. *See, e.g.*, State v. Patterson, 679 P.2d 416, 420 (Wash. Ct. App. 1984) (noting, when a juvenile testified anonymously before the magistrate, 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 quotations omitted)).

197. *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, a magistrate requires [detailed information]."); *see also* Moylan, *supra* note 13, at 743 (describing the importance of the magistrate's access to information).

198. *See also* Natapoff, *supra* note 2, 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).

199. Furthermore, one author reasoned that the oath itself served as a "trustworthiness device" contributing to the credibility of the source. *See* Moylan, *supra* note 13, at 751 (referring to the oath contained in an affidavit, although the same analysis would apply to an oath administered before a witness testifies).

200. *See* Natapoff, *supra* note 2, 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.").

201. That is true under *Aguilar-Spinelli* and under *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)).

cant because appellate courts generally give deference to a lower court's credibility determination.[202] A magistrate can more easily evaluate the informant's credibility by seeing the informant testify live than if the informant's information only appears in an affidavit.

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 interest is whether the informant's identity is known and/or disclosed.[203] 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 interest are reliable.[204] 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.[205] 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 with great skepticism.[206]

Several courts have concluded that disclosure of a named informant's identity supports the veracity of an informant's statements against penal interest.[207] Implicit in some of these cases is the idea that named informants are unlikely to be protected "stool pigeons."[208] These "named" informants should not expect that the

202. *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) (Marshall, J., dissenting) ("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.").

203. 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. *See* 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. *See* State v. Pelster, 21 P.3d 106, 110 (Or. Ct. App. 2001) ("Because the information in the affidavit upon which we rely is provided by *named* informants and the police, the test to be applied is a 'totality of the circumstances' test."). 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. LAWS § 780.653 (1988).

204. *See infra* notes 207–13 and accompanying text.

205. *See infra* notes 216–18 and accompanying text.

206. *See infra* notes 214–16 and accompanying text.

207. *See, e.g.*, State v. Meyer, 99 P.3d 185, 190–91 (Mont. 2004) (relying in part on the fact that informant's name, address, and social security number were known to police); State v. Steinzig, 1999-NMCA-107, ¶ 19, 987 P.2d 409, 416–17 (citing *O'Connor*, 692 P.2d at 213) (noting that a named informant has a greater incentive to provide good information because "he or she is subject to unfavorable consequences for providing false or inaccurate information to a greater degree than an unnamed or anonymous individual"); State v. O'Connor, 692 P.2d 208, 213 (Washington. Ct. App. 1984) (noting that the naming of an informant supports a finding of veracity, particularly when the informant has made statements against interest) (citing Merrick v. State, 389 A.2d 328 (Md. 1978)).

208. *See O'Connor*, 692 P.2d at 213 ("[T]he 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. . . ."); *see also* LAFAVE, *supra* note 2, at 136.

police would ignore their admissions of criminal activity. So statements against penal interest by a named informant can provide some contribution to a finding of veracity.[209] Furthermore, named informants may even risk civil liability[210] or criminal charges for false reporting if their information proves to be inaccurate.[211]

Courts should be careful, however, to avoid overreliance 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 this person 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.[212] 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,[213] or that she would have a fear of prosecution that would contribute to a finding of reliability for the informant's statements against interest.

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."[214] 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.[215]

In the middle of the spectrum, when the police—but not the magistrate—know of the informant's identity, there should only be a slight inference favoring the reliability of the informant's narrative, including any statements against interest.[216] "The specter of an anonymous troublemaker persists in instances where the in-

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209. *O'Connor*, 692 P.2d at 213 (quoting 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.3(c), at 526–27 (1st ed. 1978)).

210. State v. Carlile, 619 P.2d 1280, 1282 (Or. 1980).

211. *See, e.g.*, Fields v. State, No. 13A01-0808-CR-398, 2009 WL 606298, at *3–4 (Ind. Ct. App. Mar. 9, 2009) (discussing the potential for a 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) (holding that the fact that the informant was identified is "a strong indicator of reliability because [the informant] may be held accountable for false accusations.").

212. State v. Rodriguez, 769 P.2d 309, 312 (Wash. Ct. App. 1989) (quoting 1 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.4(a) at 726–27 (2d ed. 1987)).

213. 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, 548 (Wash. Ct. App. 1978) and note 13, *supra*.

214. Commonwealth v. Allen, 549 N.E.2d 430, 433 (Mass. 1990) (finding that admission by a truly anonymous informant, whose identity was not even known to the police, to purchasing drugs from the defendant 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 and citations omitted).

215. *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.").

216. *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).

formant is known to the police but not to the judge."[217] 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.[218] Thus, the extent to which the informant's identity is known can play some role regarding 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 interest would in fact be against his or her interest "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."[219]

When someone makes a statement against his or her interest 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 have a motive to lie to his listener."[220] When a speaker does not know that the listener 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."[221] 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.'"[222] 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.[223] In such circumstances, the court could infer that the statement against interest may enhance the reliability of the speaker's overall narrative.

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217. 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) (finding that "anonymity of a citizen informant may be one factor for finding *no showing of reliability*" because of concerns over anonymous troublemakers) (citation and internal quotation marks omitted).

218. *See* LAFAVE, *supra* note 2, at 139–40.

219. State v. Alvarez, 776 P.2d 1283, 1286 (Or. 1989).

220. State v. Lair, 630 P.2d 427, 430 (Wash. 1981) (citing United States v. Harris, 403 U.S. 573, 583–84).

221. 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) (observing that a speaker who did not suspect the listener was a police informant "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 "[a]n 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").

222. Moylan, *supra* note 13, at 764 (noting that 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) (refusing 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 *Morusty* court found that although the statement was technically against the speaker's interest, "he did not make it knowingly to a law enforcement officer or with any knowledge that it might be used against him directly or that he might be punished if it were false." *Id.* at 313.

223. *See* Moylan, *supra* note 13, at 764–65 (discussing the reasoning in Thompson v. State, 298 A.2d 458 (Md. App. 1973)).

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.[224] This tendency applies even outside the investigatory context, to conversations with trusted friends.[225] Thus, statements made to a trusted friend or someone else whose opinion the informant would value, implicating someone else as well as the speaker, should be viewed with caution.[226] 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 to 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 veracity the fact that the informant was under arrest when he or she made statements against interest.[227] 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."[228] 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.[229]

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

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224. *See* Mueller, *supra* note 67, at 941 ("[H]uman nature inclines us toward minimizing personal blame and maximizing that of others.").

225. *Id.*

226. *See* Wilson v. State, 82 P.3d 783, 785–86 (Alaska Ct. App. 2003) (concluding that 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).

227. *See, e.g.*, State v. Steinzig, 1999-NMCA-107, ¶¶ 19–20, 987 P.2d 409, 416–17 (relying in part on the fact that the informants had been arrested for criminal activity); State v. Olin, No. 35397-1-II, 2008 WL 933503, at *3 (Wash. Ct. App. Apr. 8, 2008) ("[T]he reliability of admissions against penal interest may be greater in post-arrest situations because the arrestee risks disfavor with the prosecution if he lies.").

228. LAFAVE, *supra* note 2, at 139. Professor LaFave elaborates that the inference of reliability comes from "the 'clearly apprehended threat of dire police retaliation should he not produce accurately.'" *Id.* at 139–40 (quoting Moylan, *supra* note 13, 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." (citation omitted)). 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 in notes 210, 211, 245, 246, and accompanying text.

229. *See, e.g.*, State v. Blasio, Nos. A-8476, A-8478, 2004 WL 1197311, at *3 (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, 1103–04 (Wash. 1978) (finding that a favorable sentencing recommendation on a drug charge in exchange for information on higher-ups provided a "strong motive . . . to be accurate" and favored reliability of the information presented).

informant to take a guess about others who might be involved in criminal activity.[230] In other words, the courts are right about an informant's incentive to provide good information to get a benefit such as leniency, but these benefits create a similar incentive even when the informant has no useful information. The literature on false confessions demonstrates the power of those potential incentives in producing inaccurate information.[231] Thus, when an informant does not have good information to provide, the informant has an incentive to offer rumors or guesses about criminal activities of others and hope that the information turns out to be accurate.

Therefore, courts should create disincentives for providing false information, rather than focusing on possible benefits from providing useful information, to minimize informants' incentives to guess or lie.[232] More specifically, when an informant who is under arrest provides a tip to the police, the court should evaluate the number of times the informant has provided information, the severity of the informant's crime, and the extent to which the informant seeking a deal would skew the reliability of the informant's information.

First, inaccurate information is more likely to be held against first-time informants than those with ongoing relationships with the police. Informants are more likely to expect negative consequences for providing inaccurate information when they have not yet developed an ongoing relationship that would lead them to expect immunity for their own admissions.[233] Thus, 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 the informant may have a reasonable fear of providing inaccurate information.[234]

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230. *See* Zimmerman, *supra* note 1, at 100–01 ("Informants have come to expect rewards from handlers. These expectations are satisfied in a variety of forms depending upon the circumstances and demands of the parties. A prisoner may seek better conditions in prison, or some benefit to a third party. An informant who faces pending charges may seek favorable consideration when charged, sentenced, or released. Other informants may simply seek cash payments or gifts.") (citations omitted). Furthermore, the system does not adequately control the provision of these rewards, in that prosecutors and police have nearly unlimited discretion in providing these rewards. *Id.* at 102. Because of the lack of controls on the rewards offered, informants have a motive to "maximize the benefit at any cost," including guessing about someone else's criminal activity based on rumors. *Id.* Police and prosecutors probably do not intend to create this incentive for passing along lies or guesses, but they "are not instructed as to when rewards may be too enticing or counter-productive." *Id.*

231. 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. *See* Ofshe & Leo, *supra* note 82, at 985 ("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."); *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).

232. *See supra* Part III.C.

233. The courts tend to imply rather than make explicit the connection between the fact that an informant is providing information for the first time and the risk of negative consequences for providing negative information. *See, e.g.*, Commonwealth v. Muse, 702 N.E.2d 388, 390 (Mass. Ct. App. 1998) (noting 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); People v. Rodriguez, 420 N.E.2d 946, 949–50 (N.Y. 1981) (finding that an affidavit sufficiently established reliability of informant who had never before given information to police, in part because of the risk of negative consequences if the informant provides inaccurate information to the police).

234. *See, e.g.*, *Rodriguez*, 420 N.E. 2d at 949–50.

On the other hand, 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.[235] 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,[236] 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 be no reason for the court to infer that the informant had a motive to provide accurate information.[237]

Ideally, the magistrate should require disclosure of information related to the relationship between the informant and the police.[238] 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.[239] The magistrate should therefore require disclosure of enough information about the facts and circumstances to make the analysis meaningful, without creating a "hyper-technical" requirement.[240]

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

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235. Clark v. State, 704 P.2d 799, 805 (Alaska Ct. App. 1985) (finding informant's statements about buying and using marijuana were not enough to satisfy the veracity prong in part 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.*; *see also* Commonwealth v. Melendez, 551 N.E.2d 514, 517 (Mass. 1990) ("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." (citations omitted)).

236. *See supra* notes 45–47 and accompanying text.

237. *See, e.g.*, People v. Casella, 531 N.Y.S.2d 639, 641–42 (N.Y. App. Div. 1988) (concluding that informant who was under arrest for participation in credit card fraud, but who did not have a track record of providing good information, "was seeking to gain favor with the police on his own behalf by implicating the defendant as a supplier of the fraudulent credit cards, and accordingly cast doubt on the informant's reliability").

238. *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); *see also supra* notes 29, 30, and 190 regarding the importance of full disclosure to the magistrate.

239. *See Clark*, 704 P.2d at 804–05. In *Clark,* the magistrate was given a conclusory statement about past reliability that far overstated the informant's history. *Id.* at 804 (concluding that the affidavit provided insufficient information for the magistrate to rely on the informant's track record). Later in the opinion, the court noted that the magistrate was not given other relevant information about the informant, such as his name or that he was on probation. *See id.* at 801, 805. The court then noted that the facts suggested that the informant was developing a protected "stool pigeon" relationship with the police; that relationship would make it unlikely that the informant would have anything to fear from admitting his own criminal conduct. *Id.*

240. *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.").

first place.[241] 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.[242] 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 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.[243] 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.[244] So when the informant offers the police information

241. Commonwealth v. Muse, 702 N.E.2d 388, 390 (Mass. Ct. App. 1998) (concluding that because the informant was caught with jewelry from burglarizing a residence, 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); 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."); State v. Weaver, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *10 (Tenn. Crim. App. Apr. 15, 2003) (informant was caught in possession of more than fifty pounds of marijuana, so the amount may have suggested he was in significant trouble already).

242. The courts in Indiana, for example, have concluded that statements which would otherwise be against an informant's penal interest should not be treated as actually being against the informant's interest 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).

243. *See, e.g.*, State v. Jones, 706 P.2d 317, 326 (Alaska 1985) (holding that the 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 United States v. Harris, 403 U.S. 573, 595 (1971) (Harlan, J., dissenting))); Richards v. State, Nos. A-7846, 4554, 2002 WL 531051, at *3 (Alaska Ct. App. Apr. 10, 2002) (holding that an 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); People v. Cassella, 531 N.Y.S.2d 639, 641 (N.Y. App. Div. 1988) (holding that an informant's statements against interest regarding his involvement in a credit card scheme were insufficient to establish his reliability when his statements implicating someone else in the scheme were apparently an attempt to curry favor).

244. 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; 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

about criminal activity unrelated to his own, then neither the fact that the informant is under arrest nor the fact that he has made self-incriminating statements 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 Part III.B.

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.[245] 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.[246] Finally, although the court should generally inquire about whether or not the 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.[247]

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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 the police, probably just 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.

245. *See, e.g.*, State v. Estorga, 803 P.2d 813, 817 (Wash. Ct. App. 1991) (finding 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 growing marijuana was lessened by the fact that he was implicating the others involved in the same crime, and the existence of the deal provided him with the motivation to produce that accurate information.

246. *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) (noting that participation in plea bargaining does not render informant inherently unreliable, especially when other indications of veracity included enough detail to the police to expose the informant to prosecution for making a false report to a law enforcement officer); *Estorga*, 803 P.2d at 817 (noting the existence of a 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).

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

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.[248] 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 provides 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.[249] The police must corroborate more than innocent details for the corroboration to be meaningful.[250] But when the police can corroborate a significant portion of the informant's narrative[251] or the specific details that are against the informant's interest,[252] then it is acceptable for the court to conclude that the warrant should be issued. In fact, when a magistrate declines to issue a search

248. 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; the courts generally fail to distinguish between the two approaches. *See, e.g.*, State v. Steinzig, 1999-NMCA-107, ¶¶ 21–24, 987 P.2d 409, 417. 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.

249. *See, e.g.*, Watford v. State, No. A-8022, 2002 WL 31016675, at *2–3 (Alaska Ct. App. Sept. 11, 2002) (concluding that general statements from a paid informant about his drug use did not satisfy the veracity prong of *Aguilar-Spinelli* because the circumstances did not suggest that the informant would fear statements being used against him, but upholding the warrant's issuance because police corroborated the informant's statements through a controlled buy and verification of other details provided by the informant); State v. Lair, 630 P.2d 427, 430–31 (Wash. 1981) (suggesting that neither the first informant's detailed statements against penal interest nor the second informant's conclusory corroboration would have been sufficient alone, but together, they suggested the reliability of the information presented).

250. *See, e.g.*, 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."); State v. Jones, 706 P.2d 317, 325 (Alaska 1985) (finding corroboration inadequate when police merely confirmed that the defendant lived in the apartment identified by the informant). 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 34, 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.

251. *See, e.g.*, *Steinzig*, 1999-NMCA-107, ¶¶ 21–23, 987 P.2d at 417 (upholding warrant in part because 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 note 252 below. Corroboration was also important in *Clark v. State*, 704 P.2d 799 (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.* at 804–05. In a footnote, the court correctly noted that corroboration of "innocent" details can sometimes contribute to a finding of veracity, and refocused the inquiry onto the issue of probable cause and whether the corroborated details made the defendant's alleged behavior seem more suspicious. *See id.* at 804 n.4.

252. *See, e.g.*, *Steinzig*, 1999-NMCA-107, ¶¶ 21–23, 987 P.2d at 417 (upholding warrant in part because the two informants, questioned separately, gave nearly identical accounts of where they received counterfeit money; their accounts corroborated one another).

warrant because the informant's veracity has not been established, the police should not stop investigating, but could instead seek additional corroboration to bolster their case.[253]

D. Responses to Potential Objections to the Proposed Framework and Illustrations of How the Framework Would Apply

The sections above focus on explaining the test and how it would apply; this section focuses instead on responding to potential objections to the idea of this test. First, some may object that the complexity of the framework is inconsistent with the *Gates* emphasis on the totality of the circumstances. 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*.[254] 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.[255] In fact, the only law review article dealing with how police departments train officers to comply with *Gates* concludes that "police departments strongly prefer that their officers work within a framework of articulable standards."[256]

Second, 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. 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."[257] The police officer's affidavit said that the confidential informant made four admissions: (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

253. *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 Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 567 (1984)).

254. State v. Reesman, 10 P.3d 83, 89 (Mont. 2000), *overruled* in part by State v. Barnaby, 142 P.3d 809, 818–19 (Mont. 2006) (overruling *Reesman* to the extent that independent police work was no longer recognized as the only method of corroboration under the totality of the circumstances test).

255. *See* Hirokawa, *supra* note 38, at 296. It is 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. *See id.* at 319–20.

256. *Id.* at 296. Hirokawa's article focuses in particular on how police academies in Georgia teach officers how to comply with both *Aguilar-Spinelli* and *Gates*. *See id.* at 319–27. Georgia has formally adopted *Gates*, but that state's caselaw 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.

257. 114 N.M. 589, 593–94, 844 P.2d 839, 843–44 (Ct. App. 1992).

residence from the defendant at some time in the past.[258] In finding the affidavit 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."[259] For instance, the affidavit did not provide any "specific or 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."[260] Additionally, the confidential informant was not named in the affidavit.[261] The court concluded as follows:

> 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.[262]

Finally, some may object that either the test would not make any real difference, or that it would make too much of a difference by leading courts to strike down too many warrants. In fact, 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.

In some circumstances, 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, in *State v. Bianchi*, the court correctly upheld the lower court's use of information from an informant who had made statements against interest, but the court's reasoning could have been improved using the test described above.[263] The court in *Bianchi* correctly concluded that the informant had made statements against her own penal interest, although it could have analyzed those statements in more detail to support that conclusion.[264] The court then correctly

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258. *Id.* at 591–92, 844 P.2d at 841–42. 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 592, 844 P.2d at 842. The third statement, although demonstrating a nexus with the criminal activity under investigation, was not a statement against penal interest because the conduct involved was not criminal. *Id.* Only the fourth statement was against the informant's penal interest and contained a sufficient nexus to the relevant activity to be considered for purposes of establishing veracity. *Id.*

259. *Id.* at 593, 844 P.2d at 843.

260. *Id.* (distinguishing United States v. Harris, 403 U.S. 572, 575 (1971), where the "affidavit stated that the informant had purchased illicit whiskey from residence described, for a period exceeding two years, most recently within two weeks").

261. *Id.* ("[I]f an informant's name is not disclosed, this makes it much more likely that he is a 'protected police stool-pigeon.'" (citing 1 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 3.3(c) at 647 (2d ed. 1987))).

262. *Id.* at 844.

263. 761 P.2d 127, 131–32 (Alaska Ct. App. 1988) (holding that it was legal error to invalidate the warrant simply because the affidavit did not indicate whether the informant had made a deal with the police). The court in *Bianchi* remanded the case to the trial court for factual findings regarding the defendant's other theories that would have allowed upholding of the suppression of the evidence against him. *See id.* at 129, 131–32. But the appellate court's thorough analysis of the sufficiency of the informant's statements suggests that those other grounds were likely unrelated to the issuance of the search warrant. *See id.* at 130–32.

264. *See id.* at 130–31. The court supported its conclusion that informant Genevieve Olson had made statements against her penal interest by noting Olson's admission of selling marijuana to a different informant. *Id.* Olson had actually made several more detailed statements against her interest 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 defendant. *See id.* at 130. The court did, however, note positively that the informant's

noted the nexus between the informant's self-incriminating statements and the crime at issue in the search warrant.[265] 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.[266] 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,[267] she did not have an ongoing relationship with the police that would have given her reason to think that false information would not be held against her.[268]

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 statements 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 interest.[269] In fact, one informant said he observed methamphetamine being manufactured by others,[270] while another stated that her boyfriend had been involved in receiving stolen property.[271] However, merely being present while others commit a crime is not itself a crime.[272] Thus, the informants' statements did not contain admissions of their own criminal activity, as required by step one 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.[273]

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statements included detailed information about her past purchases of contraband from defendant, including amounts, prices, and at least some dates. *Id.* at 130–31. The level of detail included by the informant helps make those statements meaningfully against her interest, as discussed in Part III.A above.

265. *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 the importance of specificity to the analysis:

> Olson did not supply 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.

266. *See id.* at 128.

267. *Id.* at 128, 131 (finding that the police had sufficient evidence to charge the informant with illegally selling alcohol and marijuana, and that it was 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.

268. *Id.* ("[T]he 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.")

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

270. *Id.* (The informant told the police he saw defendant Lloyd "carrying the ingredients used in making the drugs from a camper behind [defendant] Parvey's house.").

271. *Id.* at *7.

272. *E.g.,* State v. Barker, 114 N.M. 589, 592, 844 P.2d 839, 842 (Ct. App. 1992) ("[S]imply admitting to observation of [criminal activity] does not constitute an admission against penal interest.").

273. *See Parvey*, 2004 WL 244972, at *7 (relying on the fact that statements were made while both informants were in custody, and after one informant had been given *Miranda* warnings). The court also relied in part on police corroboration, but the opinion does not give enough detail about that corroboration to know

Similarly, the result reached in *State v. Burke* should have been different under the test described above.[274] 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 step two of the test described in this article.[275] 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."[276] But there was no nexus between the statements about his own prior use of drugs and the premises targeted in the search warrant because the informant never admitted to purchasing drugs from the defendant.[277] The mere fact that the informant had previously used drugs does not make it more probable that there was a methamphetamine lab at the target location.[278] Although the police corroborated details that the informant had provided about the descriptions of the individuals involved and their cars,[279] those details only showed that the informant was familiar with the people he was accusing, not that he actually knew that those individuals were engaged in illegal activity.[280] Additionally, the informant's bargain with police to avoid being booked into jail in exchange for his tip[281] gave him an incentive to pass along rumors or guesses; although he could lose the benefit of the deal by providing inaccurate information, he could not hope to get the deal without providing information. Finally, because of the general nature of his statements about his own activities, the informant's statements did not put himself at risk for further consequences, as required by step three of the test described above.[282] Therefore, use of this test would change the result in cases that currently uphold search warrants based only on vague state-

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when or how it occurred. *See id.* (stating merely that "[t]he police independently verified that many of the items [the informants] described were in fact reported stolen").

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

275. *See id.* at *4.

276. *Id.*

277. *Compare id.* with Barker, 114 N.M. at 592, 844 P.2d at 842 (concluding that there was no nexus between informant's admission to using marijuana in the past and the investigation into the defendant's selling of marijuana generally, but that there was a nexus between the investigation and statements that the informant had purchased marijuana from the defendant while on the property during prior visits). There was a nexus between the premises and the informant's statement in *Burke* that he had been present at the property during two methamphetamine "cooks" in the previous week. 2004 WL 1045968 at *4. But that statement fails step one of the test described above, in that the statement is not against the informant's interests, because it is not illegal to be present when criminal activity is occurring. *See supra* note 155.

278. 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. *Burke*, No. 52234-5-I, 2004 WL 1045968, at *4. 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. *Id.* at *1.

279. *Id.*

280. *State v. Steinzig*, 1999-NMCA-107, ¶¶ 21–23, 987 P.2d at 417, also involved corroboration of innocent details, which seems similar to the corroboration in *Burke*. But *Burke* is actually significantly different because in *Steinzig*, two informants gave nearly identical accounts of the defendant's criminal activity, and these accounts corroborated one another. *See id.* When none of the corroboration goes beyond innocent details, it should not be sufficient.

281. *Burke*, 2004 WL 1045968 at *4.

282. *See id.* (The 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 (e.g., the informant was unnamed and apparently did not testify before the magistrate). *See id.* Furthermore, the police corroborated only innocent details like the ownership

ments about an informant's criminal activities coupled with rumors or guesses about the criminal activities of others.

IV. CONCLUSION

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 is truly against the informant's interest; (2) a nexus exists between the informant's admitted crime and the subject of the search warrant; and (3) the surrounding circumstances 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.

Ultimately, the framework described in this article should help courts more carefully scrutinize when a statement truly is against an informant's penal interest and when such a statement actually contributes 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 overreliance on criminal informants.

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of the house and the vehicles driven by the participants, *see id.*, but those details only suggested familiarity with the people involved, not that those individuals were engaged in criminal activity.