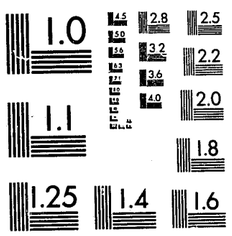

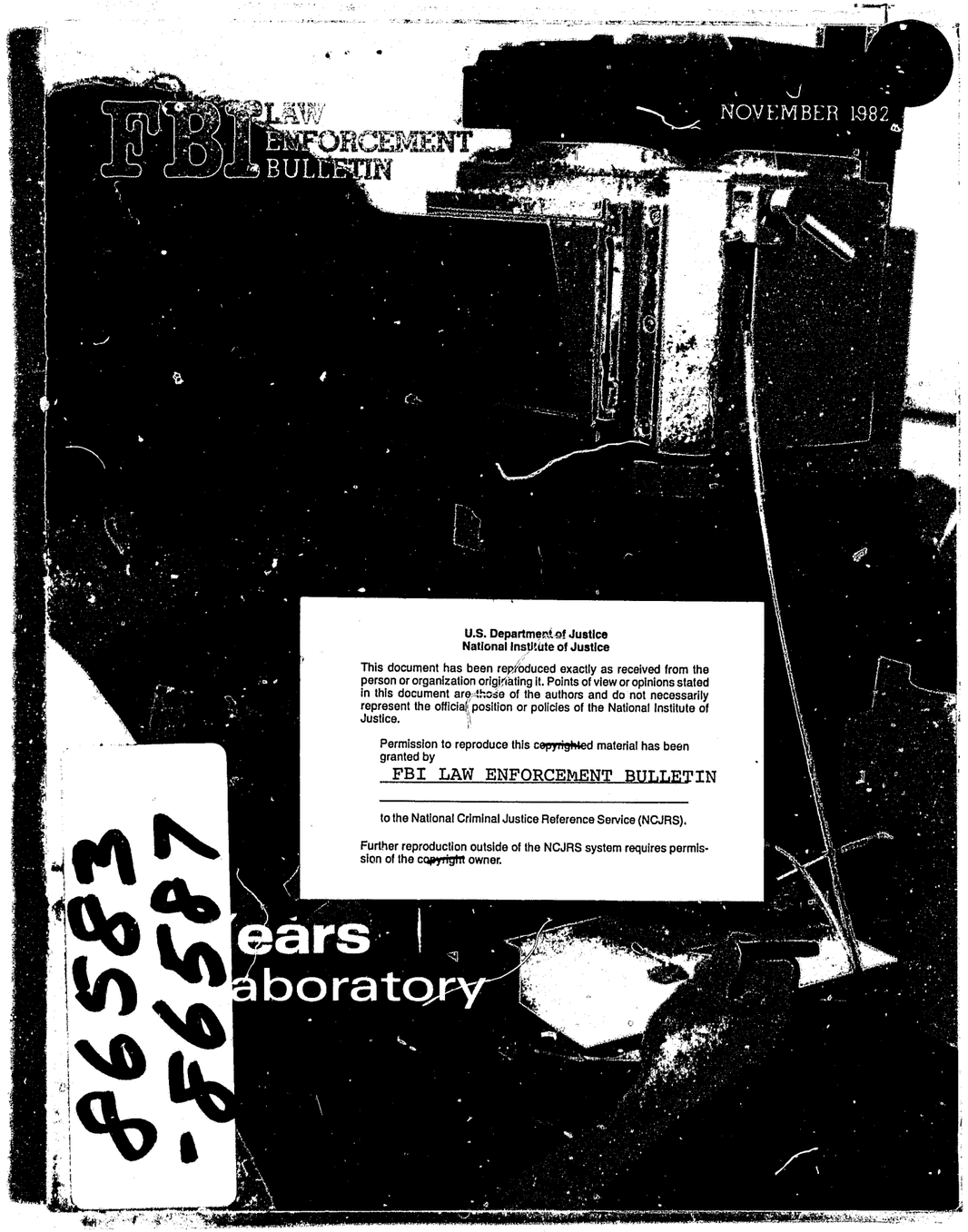

FBI LAW ENFORCEMENT BULLETIN

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The FBI Laboratory marks its 50th year of distinguished scientific assistance to law enforcement, as noted in the Director's Message on p. 1.

Federal Bureau of Investigation
United States Department of Justice
Washington, D.C. 20535

William H. Webster, Director

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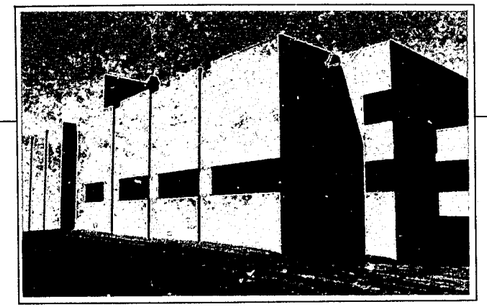

Director's Message

In 1932, 50 years ago this month, the FBI Laboratory was established with one examiner and one microscope. Today, the Laboratory has grown to 119 Special Agents, 309 support personnel, and an equipment inventory of $12.5 million. From a beginning of 963 forensic science examinations in 1934 (the first year statistics were maintained), the Laboratory conducted more than 51,000 examinations in 1942, and has about doubled this number every decade, reaching more than 910,000 examinations the past fiscal year.

FBI Laboratory services, including both examinations and testimony in support of the findings, are available without cost to Federal agencies and military tribunals in criminal and civil matters and to all State, county, and municipal law enforcement agencies in this country in connection with criminal cases.

As the value of forensic science became apparent to the law enforcement community, larger police departments established local crime laboratories. The number of these laboratories was rapidly expanded in the past decade and a half as a result of funding provided by the "Omnibus Crime Control and Safe Streets Act of 1968." Then, in 1973, individual State and local crime laboratory directors requested the FBI to take a more direct and active role in the areas of training and research. In 1974, the FBI began offering specialized scientific courses for State and local crime laboratory personnel at the FBI Academy. In fiscal 1981, more than 1,300 personnel were thus trained.

The need for forensic science research was recognized by the American Society of Crime Laboratory Directors in their recommendation for a laboratory building at the FBI Academy for this purpose. In June 1981, this building was dedicated, with 7,000 square feet of its space devoted to research facilities used by a permanent FBI Laboratory research staff, research personnel representing academic institutions, and others from specialized areas of forensic science. The Forensic Science Research and Training Center has as research goals: (1) To develop new and reliable methods in forensic science, (2) to develop new methods to overcome problems in forensic science, and (3) to apply current technology to forensic science. This training and research, given proper funding and support, can assist the Nation's criminal justice system by improving the competency of crime laboratory personnel and reducing State and local law enforcement reliance on Federal laboratories for routine case examinations.

From a beginning devoted to proving the worth of forensic science analysis to both the public and the police profession, the FBI Laboratory has moved on to research and training. This has been a vindication of both the worth of forensic science and our system of service to local government.

These achievements make our anniversary an occasion for translating pride into rededication.

William H. Webster
Director
November 1, 1982

"The extent of criminal involvement of outlaw motorcycle gang members is extensive, and the behavioral nature of the group is complex."

a good front, becomes outwardly friendly, and feigns repentance and remorse. Officers experienced with gang members of this personality style know, however, that this friendly disposition is only a temporary first impression.

Motorcycle gangs are particularly attractive to persons exhibiting some of the tendencies discussed above—they are mutually supportive. To the sociopathic gang member, violence is exciting and easy, since he feels no anxiety or guilt for what he has done. The group, in turn, needs his muscle to establish and maintain its reputation and to support and enforce criminal activities. The group meets his needs in turn for his daring. Since the sociopathic personality style is frequently encountered in outlaw gangs, officers who handle gang investigations have learned to use extreme caution with the members.

Gang Women

A final important aspect of gang investigations and an aid to an understanding of gang behavior is the role of women and their association with the gang. Although women are usually not gang members, they perform an important function in many gang-related crimes. Initially attracted because of the excitement gang life offers, many women are later held involuntarily or stay out of fear.[54] They may be the "property" of one member only or used by several gang members. The female role is that of a servant. Women are looked upon as objects to be used for sexual, criminal, or personal purposes. The women who allow themselves to remain in this role seem to be best characterized as inadequate personality types. They have relatively poor judgment, not because they do not care but because they are inept. Gang women feel guilty for failing to live up to the expectations of others; they are also less reactive to pressure than their male associates. They seem to internalize life's pressures rather than blaming others. Consequently, gang women are attracted to the dominant personalities of some gang members and are easily used by them. Because of fear and a relatively low level of self-esteem, and often simply because of no place to go, the gang "old lady" or "mama" feels unable to break away. Instead, she develops a strong dependency. Not unlike some battered women, she may even accept responsibility for being abused and may feel guilty for not living up to a gang member's expectations.

For many gang women, sex becomes a means to establish intimacy. The need for affection and self-esteem is strong, and exploitive sexual relations with male members and associates become confused with affection.

It is, in part, because of these behavioral dynamics that officers investigating gang activities often have difficulty developing gang women as informants. Fear and the need to depend upon gang men produces a loyalty that is difficult to overcome. Investigators often find gang women most helpful with information when their associations with gang members weaken and loyalties shift. Unfortunately, information received then is often outdated.

Conclusion

The extent of criminal involvement of outlaw motorcycle gang members is extensive, and the behavioral nature of the group is complex. There is no easy path to dealing with the criminal activities of these groups. Any law enforcement officer who has investigated crimes by outlaw motorcycle gang members knows the lengthy plodding effort these complex cases require. Techniques that are, however, essential in gang investigations include the development by a gang investigator of an understanding of the group's "culture" and the ability to apply knowledge of gang personality types and behavior characteristics for the purpose of more effective information-gathering from gang members. **FBI**

Footnotes

[37] Randal Montgomery, "The Outlaw Motorcycle Subculture," *Canadian Journal of Criminology and Corrections*, vol. 18, No. 4, October 1976, p. 332.

[38] Although the term "subculture" will be used throughout this article to refer to customs and beliefs of outlaw motorcycle gangs, a more specific term "contraculture" seems appropriate. See J. Milton Yinger, "Contraculture and Subculture," *American Sociological Review*, vol. 25, No. 5, October 1960, p. 628. In a contraculture, the value conflict with society is central. Outlaw gangs are contracultural groups in the sense they appear as "subsocieties" with emergent norms in conflict with society.

[39] *Royal Canadian Mounted Police Gazette*, vol. 42, No. 10, 1980, p. 37.

[40] Edwin H. Sutherland, *Principles of Criminology* (Philadelphia: J. B. Lippincott, 1947), p. 6.

[41] Walter B. Miller, "Lower Class Culture as a Generating Milieu of Gang Delinquency," *Journal of Social Issues*, vol. 14, No. 3, 1958, p. 8.

[42] Wethern and Colnett, supra note 20, p. 63.

[43] P. Overholtz, untitled, *In the Wind 6*, No. 6, (Burbank, Calif.: Palsano Publications, 1981).

[44] Wethern and Colnett, supra note 20, p. 108.

[45] Ross, supra note 1.

[46] Bonnie H. Erickson, "Secret Societies and Social Structure," *Social Forces*, vol. 60, No. 1, September 1981, p. 188.

[47] Wethern and Colnett, supra note 20, p. 336.

[48] Montgomery, supra note 37, p. 336.

[49] Robert J. Howell, I Reed Payne, and Allan V. Roe, "Differences Among Behavioral Variables, Personality Characteristics and Personality Scores of Tattooed and Nontattooed Prison Inmates," *Journal of Research in Crime and Delinquency*, vol. 8, No. 1, January 1971, p. 37.

[50] Montgomery, supra note 37, p. 336.

[51] *RCMP Gazette*, supra note 39, p. 21.

[52] Thomas Strentz and Conrad Hassel, "The Sociopath—A Criminal Enigma," *Journal of Police Science and Administration*, vol. 6, No. 2, January 1978, p. 135.

[53] Burke Watson, "Kill All the Kids," *Houston Chronicle*, Houston, Tex., July 31, 1980.

[54] *RCMP Gazette*, supra note 39, p. 18.

PROBABLE CAUSE: INFORMANT INFORMATION (Part I)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

The language of the fourth amendment is clear in requiring that warrants be issued only upon a showing of probable cause.[1] And while it has been said that "in dealing with probable cause . . . we deal with . . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act,"[2] the drafting of the probable cause affidavit, especially when the information comes from informants and other secondhand sources, is one of the most technical and complex aspects of the law confronting a law enforcement officer. That perhaps the majority of appellate court decisions involving the question of probable cause deal with information from informants,[3] attests to both the extensive use of informant information in establishing probable cause and the intricacies of the law in this area. This article will address the principles of probable cause with respect to employing information from third parties and will provide a framework for drafting a warrant affidavit that will be free from successful defense attack.

The Road to *Aguilar*

The major Supreme Court case concerning the use of secondhand (hearsay) information in establishing probable cause is a 1964 decision, *Aguilar* v. *Texas*.[4] Four prior cases, *Nathanson* v. *United States*,[5] *Giordenello* v. *United States*,[6] *Draper* v. *United States*,[7] and *Jones* v. *United States*,[8] set the stage for *Aguilar*.

The 1933 case of *Nathanson* v. *United States*[9] established the principle that merely stating that one has "cause to suspect and does believe that certain merchandise" is at a particular location is not enough to establish probable cause; the facts upon which that belief are based must be set forth. Twenty-five years later, in *Giordenello* v. *United States*,[10] the Supreme Court ruled that simply leaving out the "suspect" and "believe" language of *Nathanson* and substituting a declarative proposition therefor does not constitutionally fare any better. Thus, a complaint filed for an arrest warrant which merely stated that "Veto Giordenello did receive, conceal, . . . narcotics drugs" was found to be conclusory and constitutionally deficient; personal knowledge on the part of the officer-affiant is not to be presumed.

Explicitly left open by the Court in *Giordenello* was the question of whether probable cause could ever be based solely on hearsay information. A partial answer to this question was furnished in the next two cases. In *Draper* v. *United States*,[11] decided in 1959, a year after *Giordenello*, the Supreme Court held that probable cause could be based upon information received through an informant if it were substantially verified by an officer's personal observations. In 1960, another step was taken. In *Jones* v. *United States*,[12] the Court held that an informant's information could establish probable cause if there existed a "substantial basis for crediting it." The substantial basis in *Jones* consisted of the following facts:

1) The informant had "given information on previous occasion . . . which was correct";

Special Agent McGuiness

2) The same information, regarding the subjects' illicit trafficking in narcotics had been given to affiant "by other sources of information"; and
3) Both subjects had previously admitted to the use of narcotic drugs and displayed needle marks as evidence of same.

In 1964, the Court took the final step in *Aguilar* v. *Texas*.[13] Two Houston police officers, seeking a search warrant to search defendant's house for narcotics, filed an affidavit which read as follows:

"Affiants have received *reliable information from a credible person* and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." [14] (emphasis added)

While the Supreme Court found this affidavit to be constitutionally defective, since it again merely set forth the conclusions of the officer, the Court held that a warrant could be issued on the basis of hearsay information alone if the magistrate were informed of:

1) "[S]ome of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were," and
2) "[S]ome of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " [15]

This has come to be known as the *Aguilar* two-pronged test.[16] It applies to all cases involving the use of hearsay information in establishing probable cause, whether it be probable cause to search, as in *Aguilar,* or probable cause to arrest.[17]

The First Prong: "Basis of Knowledge"

The first prong of the test, the informant's "basis of knowledge,"[18] calls for the officer explaining *how* the informant knows the information reported. Without this, it will not be known whether the source merely suspected the information tendered, perhaps gathering it from a rumor circulating in the area, or whether the information is based upon his personal knowledge or the personal knowledge of others.[19] Satisfying this part of the test usually takes the form of a statement that "informant saw . . ." or "was told . . ." the information furnished. Chart 1 shows how the statement from the informant in *Aguilar* could have been drafted to satisfy the first part of the test. The first paragraph of this statement in chart 1 standing alone is generally found to be sufficient. The bracketed material can be substituted for an exact date. This may help to protect the identity of an informant. As long as the period selected keeps the information from being attacked on grounds of staleness,[20] such statements are not invalid and have been present in affidavits that were favorably reviewed by the Supreme Court.[21] It appears to be a good idea for the officer to place the date he received the information in the affidavit, since some courts are less inclined to find information stale where the officer has endeavored to act upon the information as soon as received.[22]

Chart 1

Language to Show Basis of Knowledge of Informant

On January 1, 1960, affiant was advised by a confidential source that on December 31, 1959 [or within the past 3 days], source *saw* heroin packaged for sale at 509 Pinckney Street, Houston, Tex.

Source further advised that the circumstances under which source saw this heroin were that Nick Aguilar, who source knows from previous contact to reside at such address, offered source the heroin for purchase. Aguilar told source that what was offered was in fact heroin.

The second paragraph of the statement in chart 1 further details the circumstances under which the informant saw the evidence and how the informant concluded that it was in fact narcotics. This paragraph also indicates that the person who offered the narcotics lives there, thus eliminating any question that the offeror may have been a casual visitor to the premises, taking the narcotics with him when he left. Indicating that *Aguilar* told the informant that the substance was narcotics eliminates a defense attack that the statement "saw narcotics" is conclusory.[23] Besides a statement from the seller establishing that the substance is narcotics, this fact may be shown by: 1) Evidence that the informant has a familiarity with narcotics; [24] 2) observations by the informant consistent with the use or preparation of narcotics; [25] and 3) actual purchase and testing of the substance.[26]

Merely stating that an informant has "personal knowledge" of an event, without detailing the fact that he saw or observed certain events, should be avoided. Courts have held that such assertions are conclusory and legally insufficient.[27]

In the absence of a showing as to how the informant gathered his information, the first prong of the test may be satisfied if the information is otherwise highly detailed, the idea being that detailed information implies personal knowledge. This principle was established in *Spinelli* v. *United States*.[28] Regarding this, the Court in *Spinelli* stated:

> "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's generally reputation." [29]

The *Spinelli* Court made reference to the earlier case of *Draper* v. *United States* [30] as an example of a detailed tip that meets the basis of knowledge prong:

> "While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. *A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.*" [31] (emphasis added)

Thus, it is not necessary that the words informant "saw," *"was told,"* etc., be in the affidavit. If the tip is otherwise very detailed, a magistrate may reasonably infer that there exists personal knowledge of the events in question.

Besides employing a very detailed tip as a substitute for stating that the informant "saw," "was told," etc., another exception has been recognized, although there is not much authority on the point. In *United States* v. *Sellers,*[32] a Federal appellate court was confronted with an affidavit which stated that an informant had given "reliable information in more than one hundred instances in matters of investigation." In this instance, however, the affidavit did not recite how he obtained his information. The court found that this was not indispensible to a probable cause finding:

> "(C)ommon sense impells (sic) the conclusion that when a confidential informer is shown to be unusually reliable, the magistrate may place added credibility in such information in the affidavit as reveals the precise source of the informer's knowlege.

"'. . . when a confidential informer is shown to be unusually reliable, the magistrate may place added credibility in such information in the affidavit as reveals the precise source of the informer's knowledge.'"

"'. . . an affidavit need not set forth facts of a named person's prior history as a reliable informant when the informant is a citizen/neighbor eyewitness with no apparent ulterior motive for providing false information.'"

> The affidavit before us here recites that the informant had furnished reliable information on more than one hundred occasions. In cases where the affidavit presents such cogent assertions of reliability the quantum of underlying circumstances which reveal the source of the informer's knowledge necessary to sustain the affidavit is clearly less than in cases where the indicia of former reliability is less dramatic. In sum, either of the two objective standards from which the magistrate is to judge the worth of the hearsay may support, although it may not displace, the other."[33]

The Second Prong: "Veracity"

The second part of the *Aguilar* test, which has sometimes been termed the "veracity" prong,[34] is what distinguishes an officer-affiant's own observations from those of a person not appearing before the magistrate. With respect to the latter, the officer must establish that there is a basis for believing that the information is true.

It should be noted that this second prong is not limited solely to the "criminal informant," *i.e.,* those bartering and bargaining on the information with law enforcement authorities, but to any hearsay information. In this regard, four distinct classes of persons furnishing hearsay evidence have been recognized by the courts, with each being treated a little differently in terms of the veracity requirement.

The "Trustworthy Source"

The first category might be termed the "trustworthy source." This category consists of law enforcement officers, victims, or witnesses to a crime. A year after *Aguilar,* the Supreme Court decided two cases in which warrants were applied for by law enforcement officers whose probable cause was based in part upon information from other sources. The first case, *United States* v. *Ventresca,*[35] involved a search warrant sought by an officer based upon his own observations and those of fellow officers. No information was set forth in the affidavit to demonstrate the veracity of the other officers. The Court did not find this to be of consequence: "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." Therefore, law enforcement officers are presumed to be truthful and no further showing of veracity need be made, beyond the fact that the individual is a law enforcement officer.

The second case, *Jaben* v. *United States,*[36] dealt with information from private citizens. A special agent of the Internal Revenue Service (IRS) filed a complaint for an arrest warrant alleging a criminal violation of the IRS Code. Probable cause was based in part upon the agent's interviews with third persons with whom the taxpayer did business and who had knowledge of his financial condition. The defendant challenged the probable cause for the warrant on the basis that the veracity of the sources was not established. The Court answered this contention as follows:

> "[U]nlike narcotics informants, for example, whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us."[37]

Although the Supreme Court did not say that evidence of veracity is never necessary when the person furnishing the information is not the typical "criminal informant," the lower courts considering this problem have consistently found a victim-witness's information to meet the veracity test at least where the victim or witness is identified.[38] Since a victim or witness to the commission of a crime must be identified if the matter proceeds to trial,[39] identifying the victim-witness in the affidavit is not a grave imposition. While different bases for recognizing this have been stated, *United States* v. *Gagnon*[40] reflects the general view of the courts:

> "We have long subscribed to the rule that an affidavit need not set forth facts of a named person's prior history as a reliable informant when the informant is a citizen/neighbor eyewitness with no apparent ulterior motive for providing false information."[41]

Further support for crediting the report of a victim or witness is found in the famous car search case of *Chambers* v. *Maroney.*[42] *Chambers* involved the armed robbery of a gasoline service station. The probable cause for arresting the defendants and for searching the car in which they were found was based upon a description of the robbers and their car from the victim and two teen-aged eyewitnesses. The Court, without addressing the veracity question, merely stated as follows: "Having talked to the two teen-age observers and to the victim . . ., the police had ample cause to stop a blue compact station wagon carrying four men and to arrest the occupants. . . ." It could be argued, of course, that seeing the car and the persons fitting the tip corroborated the hearsay report, thus making it a different case than where the tip is alone the basis for probable cause.

The "Criminal Informant"

The second class of hearsay is that from the so-called "criminal informant." A precise definition is difficult. The following definition, though, seems to hit the mark:

> "He is likely to be a person in the underworld or a person on its periphery; in its confidence, or so much 'a part of the scenery' . . . that this person is in a particularly good position to know the story of a crime committed, the story of criminal business done, being transacted or proposed for the future. . . ."[43]

There is a motive in furnishing the information, whether it be money, favorable treatment on pending or future criminal charges, repayment for past favorable treatment, revenge, or other considerations. Criminal informants therefore are an inherently suspect class, and evidence of veracity must be contained in the affidavit. The usual way in which to establish an informant's veracity is on the basis of his or her past performance, *i.e.,* a prior "track record" for furnishing information which was confirmed as being true.

Illustrative of this is the case of *McCray* v. *Illinois.*[44] At a hearing on the issue of probable cause to arrest, an officer testified that an informant over the course of a year supplied him with information regarding narcotics activity on some 15 or 16 occasions which proved to be correct and which resulted in numerous arrests and convictions. On cross-examination, he even named the persons who were convicted as a result of the information. The Court had no trouble in concluding that the officer met the burden of establishing "why (he) thought the information was credible."

The *McCray* case, however, raises several questions with respect to demonstrating an informant's veracity. Is it a sufficient showing of veracity if:

1) The affidavit merely states that prior information from the informant has been "correct" or "accurate" without adding that it resulted in arrests and convictions?
2) The information has not led to convictions but to the recovery of property, evidence, or fugitives?
3) The specific names of the parties having been arrested and convicted through the informant's information are not disclosed?
4) The information has resulted only in arrests and not convictions?
5) There is only one past instance of reliability to the informant's credit?
6) The previous instances of reliability were with respect to violations different from those which the informant is now reporting on?
7) Instances of an informant's previous unreliability are not set forth?

The Supreme Court has never specifically addressed the above questions. However, they have been considered by lower Federal and State courts.

"Informant Has Been Reliable In Past" Language

The courts are split on whether statements such as the informant has been "reliable in the past,"[45] or that prior information has proved to be "correct,"[46] "reliable,"[47] or "true,"[48] are sufficient.[49] These statements are not unlike "reliable information from a credible person" and "reliable informant," which were found insufficient in *Aguilar* and *Spinelli.* Therefore, it is the better practice to set forth the nature and results of the informant's past performance. Otherwise the officer runs the risk that his affidavit will be judged conclusory.

". . . another method of establishing the veracity of the informant has been recognized, namely, where his information amounts to a statement against his penal interest."

Nature of the Informant's Past Performance

Is information leading to arrests and convictions the only type of past performance to be considered in assessing the veracity of a source, or may information resulting in the recovery of evidence or property, or the location of fugitives, be considered? The courts have had no trouble in upholding past performances relating to recoveries and fugitives.[50] Indeed, such information is generally deemed more worthwhile in assessing veracity than the assertion that prior information has resulted in convictions.[51] In setting forth "recovery" or "located" information, the nature of the informant's past performance is more explicitly brought to light. In fact, it may be argued that the "convictions" language is conclusory. A conviction is the end product; it does not disclose what the informant did to bring this about. To relate fully an informant's participation in a case, however, may be very difficult without the description being overly long, unclear, and involved. It also may tend to reveal more about the informant's identity than the officer desires. These two considerations perhaps explain the universal acceptance of the "convictions" language.[52] Moreover, unlike the officer in *McCray,* who detailed the names of the parties arrested and convicted, the courts have not insisted upon such detail, undoubtedly due to a concern about revealing the identity of informants.[53] Nevertheless, it would be worthwhile to state in the affidavit[54] that the lack of specific details is due to this consideration. Where the particulars can be set forth readily and easily, this should be done.

In instances where information has not resulted in recoveries or convictions and the specific details of the information cannot be set forth for one reason or another, it would seem the better course to at least state that the information related to the criminal activities of others and that it was of significant value.[55] Language for this purpose is contained in chart 2, item 3. However, caution must be exercised in employing statements of this nature since they are an easy target of a challenge as being conclusory.

Chart 2

Language to "Qualify" an Informant

Informant has on [number] previous occasions since [date], the last previous occasion being [date], provided information [SEE BELOW FOR SPECIFIC LANGUAGE]. Further details as to the specific cases involved would tend to disclose the informant's identity. The identity of this informant should be kept confidential because disclosure of informant's identity would impair his future usefulness to law enforcement and endanger his life.

Specific Language to Be Inserted Above

1. CONVICTIONS
   "which has resulted in [number] convictions."
2. EVIDENCE OF CRIMINAL ACTIVITY OR LOCATION OF FUGITIVE
   "which has resulted in the recovery of [or location and arrest of] [describe property and/or dollar value, or name of fugitive, where applicable, or where such would identify informant, use generic term, such as fruits, instrumentalities, contraband, evidence of a crime or fugitive]."
3. SIMPLY ACCURATE INFORMATION
   "concerning the criminal activities of others which information was not available to the public, and which was confirmed as being true and accurate by independent investigation by this Department, and was considered as material in the investigation to which the information pertained."
4. ARRESTS
   "which has resulted in [number] arrests. Probable cause in each instance was found by a magistrate or grand jury."

Where Applicable, The Following Addition is Useful

"Informant has never provided information which proved to be incorrect."

Arrests vs. Convictions

Is it sufficient that the informant's prior performance has simply led to arrests or must there also be convictions? To begin with, the term "arrests" is ambiguous. If it means that the informant's report led to the location of a fugitive for whom probable cause already existed, it would be better to detail this information because the specific nature of the past performance is thereby described. If it means only that a person was arrested based in part on the informant's information, this report means little.[56] If the fact of an "arrest" or "arrests" standing alone is sufficient, then an officer would only have to make an arrest based on a first-time informant's unverified information, and the informant's veracity would be established for future cases. Thus, while a number of appellate decisions specify that the "arrests" language is sufficient,[57] it is subject to question. If convictions for one reason or another have not resulted from the arrests, language to indicate that the arrests have been upheld on probable cause grounds (as where corroboration of the informant's tip was done) should be added to the "arrests" statement (see chart 2, item 4).[58]

Number of Prior Instances of Reliability

There is no reported decision holding that there must be a specific number of prior instances of reliability before the informant's veracity is established.[59] Moreover, no case has been located which requires that the previous reliability of the informant relate to the same type of criminal violation on which the informant is currently reporting.[60] Such a requirement would result in an informant who has given reliable information concerning narcotics matters not being considered credible concerning personal crime matters. While it might be worthwhile to add to an affidavit that the informant has supplied reliable information in the same type of violation in the past, thus bolstering the informant's veracity, it is not indispensible in establishing veracity.

Setting Forth Informant's Entire Track Record

However, not unreasonable is the notion that an informant's entire track record should be described, his successes as well as his failures, in order that the magistrate may properly assess the informant's reliability.[61] While this does not appear to have been a requirement in any jurisdiction in the past, a recent California Supreme Court case, *People* v. *Kurland,*[62] requires this. Since there is logic to this argument and because it is reasonable to believe defense attorneys, armed with the *Kurland* decision, will henceforth take this position in other jurisdictions, it would be worthwhile for the officer-affiant to add to his affidavit that the informant has never provided information which proved to be incorrect, where such is the case.

Veracity—Another Approach

Typically, previous reliability is the only way available to establish the veracity of the informant. As Judge Moylan of the Maryland Court of Special Appeals has pointed out:

> "The character of the informant as a truthspeaker could hypothetically be established in a number of ways. A lie detector test or truth serum would certainly have a bearing on the question. If the informant was once awarded a Boy Scout medal for trustworthiness or if he happened to be a prince of the church, those facts would be unquestionably relevant on the issue. Testimonials from friends, neighbors, and business associates as to his reputation for 'truth and veracity' would be highly relevant. As a practical matter, however, 'stool pigeons' are neither Boy Scouts, princes of the church, nor recipients of testimonials. With the typical confidential police informant, we have recourse only to his 'track record' of past performances."[63]

However, another method of establishing the veracity of the informant has been recognized, namely, where his information amounts to a statement against his penal interest. This was established by the 1971 Supreme Court case of *United States* v. *Harris.*[64] A search warrant was issued based upon a first-time informant's report that he purchased illicit whiskey at the defendant's premises "for a period of more than two years, and most recently within the past two weeks." Some information concerning the defendant's criminal background was also included. A prosecution against the defendant-seller resulted after the whiskey was recovered from his premises. The defendant contended that the warrant did not establish probable cause because the informant, never having supplied reliable information before, could not have met the veracity test of *Aguilar.* However, purchasing illicit whiskey was also a crime, and as the Chief Justice explained, this was a sufficient basis for crediting the purchaser-informant's tip:

> "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. 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, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search."[65]

The Court, finding the informant's accusation to be a declaration against interest, held that it provided a constitutionally sufficient basis upon which a finding of probable cause could be made when coupled with the officer's knowledge of the defendant's background.

". . . there is an unwritten rule of probable cause that 'where there is opportunity for inquiry and investigation, inquiry and investigation should be made.'"

Four of the Justices expressed the view that the informant's statement in itself established probable cause without any information from the affiant regarding defendant's background. It appears that 7 of the 12 Federal appellate courts have likewise adopted the view that a statement against interest in itself satisfies the veracity prong of *Aguilar.*[66] This method of satisfying the veracity requirement is particularly helpful in situations in which an accused identifies his accomplices. Where it is obvious that he is the source of the information, naming him will carry no further opprobrium and will add to the credibility of his report.

Naming the Criminal Informant

In the typical case, a criminal informant's identity is not revealed. If, rather than keeping the informant's identity anonymous, he is named in the affidavit, will this in itself be a sufficient basis for crediting his information? The cases addressing this issue have concluded that simply naming the criminal informant is not enough to establish his veracity.[67] However, to quote one court, "it is one factor which may be weighed in determining the sufficiency of an affidavit."[68]

"Good-Citizen" Informant

Besides the trustworthy source and the criminal informant, a third type of source has been recognized, namely, the unidentified "good-citizen" informant. The good-citizen informant is similar to the victim-witness to a crime in that he does not have an ulterior motive in furnishing the information but, unlike the victim-witness, usually has not seen a crime take place. The informant's identity, therefore, need not be disclosed to the defense.[69] This person has usually seen evidence of the crime at some place or has learned of the commission of the crime from the suspect and wishes to report this information to law enforcement authorities. He is willing to disclose his identity to the authorities, but otherwise wishes to remain anonymous. Illustrative is the case of *United States* v. *Unger,*[70] decided by the U.S. Court of Appeals for the Seventh Circuit. An individual, while working at his occupation in the basement of an apartment building, observed a cache of weapons through an opening in an enclosed locker. He furnished this information to the police, who applied for a search warrant and ultimately seized the weapons. The search warrant did not name the citizen but set out his observations and how he happened to come upon the information, namely, through working at his occupation. The defendant contended that the veracity of the source was not established, and therefore, the affidavit did not satisfy the probable cause requirement. The court noted that it was apparent from the affidavit that the individual furnishing the information was not a typical criminal informant who was part of the criminal element since he gathered his information while pursuing his employment. The court concluded that the affidavit was sufficient since the informant's veracity could "be deduced from the content of the complaint."

In order to avoid contentions that an individual furnishing information is a criminal informant, thus requiring a greater showing of veracity, it would be advantageous for an officer to disclose in as much detail as possible: (1) How the "citizen-informant" acquired the information reported (as was done in *Unger*); (2) a statement that the information was not received for monetary payment or for past or future favorable treatment on criminal charges; and (3) background information concerning the citizen, namely, the lack of a criminal record, the holding of a responsible job, the owning of a home, the fact that he is supporting a family, etc.[71]

The Anonymous Source

The last category of informants is the anonymous source. This source is not only unidentified in the affidavit but is also unknown to the law enforcement authorities. The only way to establish the veracity of his information is through corroboration. The corroboration must be extensive, almost to the point of constituting probable cause in itself.[72] Corroboration, moreover, is the elixir for curing all hearsay information which fails to meet the *Aguilar* two-pronged test. Even where the informant's report itself satisfies *Aguilar,* there is an unwritten rule of probable cause that "where there is opportunity for inquiry and investigation, inquiry and investigation should be made."[73] Therefore, unless time is of the essence, investigation should always be undertaken in an effort to corroborate an informant's tip. The subject of corroboration will be developed in the conclusion of this article. **FBI**

(Continued next month)

Footnotes

[1] U.S. Const. amend. IV reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] *Brinegar* v. *United States,* 338 U.S. 160 (1949).

[3] 1 W. LaFave, Search and Seizure § 3.3, at 500.

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

[5] 290 U.S. 41 (1933).

[6] 357 U.S. 480 (1958).

[7] 358 U.S. 307 (1959).

[8] 362 U.S. 257 (1960).

[9] *Supra* note 5.

[10] *Supra* note 6.

[11] *Supra* note 7.

[12] *Supra* note 8.

[13] *Supra* note 4.

[14] *Id.* at 109.

[15] *Id.* at 114.

[16] *Spinelli* v. *United States,* 393 U.S. 410, 413 (1969).

[17] *Id.* at 417, n. 5.

[18] This term "basis of knowledge" was apparently coined by Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals in a thoughtful article on this subject. *See* Moylan, *Hearsay and Probable Cause. An Aguilar and Spinelli Primer,* 25 Mercer L. Rev. 741, 765 (1974).

[19] *Supra* note 16, at 416.

[20] *See, e.g., United States* v. *Dauphinee,* 538 F.2d 1, 5 (1st Cir. 1976). On the subject of staleness *see generally* Mascolo, *The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness,* 43 Conn. B.J. 189 (1969); Comment, *A Fresh Look at Stale Probable Cause: Examining the Timeliness Requirement of the Fourth Amendment,* 59 Iowa L. Rev. 1308 (1974); Annot., 100 A. L. R. 2d 525 (1950).

[21] *United States* v. *Harris,* 403 U.S. 573 (1971); *Rugendorf* v. *United States,* 376 U.S. 528 (1964).

[22] *See, e.g., State* v. *Kasold,* 110 Ariz. 563, 521 P.2d 995 (1974).

[23] *Compare United States* v. *House,* 604 F.2d 1135, 1142 (6th Cir. 1979), *cert. denied,* 445 U.S. 931 (1980), *with People* v. *Jackson,* 21 Ill. App. 3d 326, 315 N.E.2d 204 (1974).

[24] *United States* v. *Carter,* 498 F.2d 83 (D.C. Cir. 1974) (per curiam).

[25] *State* v. *Chapman,* 24 N.C. App. 462, 211 S.E.2d 489 (1975).

[26] *State* v. *Hayward,* 18 Or. App. 128, 523 P.2d 1278 (1974).

[27] *See, e.g., United States* v. *Long,* 439 F.2d 628 (D.C. Cir. 1971).

[28] *Supra* note 16.

[29] *Supra* note 16, at 416.

[30] *Supra* note 7.

[31] *Supra* note 16, at 416–17.

[32] 483 F.2d. 37 (5th Cir. 1973), *cert. denied,* 417 U.S. 908 (1974).

[33] *Id.* at 41.

[34] The term "veracity" was also apparently coined by Judge Moylan. *Supra* note 18, at 755.

[35] 380 U.S. 102 (1965).

[36] 381 U.S. 214 (1965).

[37] *Id.* at 224.

[38] *United States* v. *Burke,* 517 F.2d 377, 380–81 (2d Cir. 1975); *United States* v. *Bell,* 457 F.2d 1231, 1238 (5th Cir. 1972); *United States* v. *Swihart,* 554 F.2d 264, 269 (6th Cir. 1977); *McCreary* v. *Sigler,* 406 F.2d 1264, 1269 (8th Cir.), *cert. denied,* 395 U.S. 984 (1969); *United States* v. *Easter,* 552 F.2d 230 (8th Cir.), *cert. denied,* 434 U.S. 844 (1977); *United States* v. *Federbush,* 625 F.2d 246, 252 (9th Cir. 1980); *United States* v. *Mahler,* 442 F.2d 1172, 1174–75 (9th Cir.), *cert. denied,* 404 U.S. 993 (1971); *United States* v. *Gagnon,* 635 F.2d 766 (10th Cir. 1980), *cert. denied,* 101 S.Ct. 3008; *United States* v. *McCoy,* 478 F.2d 176, 179 (10th Cir.), *cert. denied,* 414 U.S. 828 (1973).

[39] *Roviaro* v. *United States,* 353 U.S. 53 (1957).

[40] 635 F.2d 766 (10th Cir. 1980), *cert. denied,* 101 S.Ct. 3008.

[41] *Id.* at 768.

[42] 399 U.S. 42 (1970).

[43] M. Harney & J. Cross, The Informer in Law Enforcement 40 (2d ed. 1968).

[44] 386 U.S. 300 (1967).

[45] *Compare Jones* v. *Crause,* 447 F.2d 1395 (10th Cir. 1971), *cert. denied,* 405 U.S. 1018 (1972), *with Akins* v. *State,* 572 S.W.2d 140 (Ark. 1978).

[46] *Compare United States* v. *Guinn,* 454 F.2d 29 (5th Cir.), *cert. denied,* 407 U.S. 911 (1972), *with Galgano* v. *State,* 147 Ga. App. 284, 248 S.E. 2d 548 (1978).

[47] *Compare Tittle* v. *State,* 539 P.2d 422 (Okla. Crim. App. 1975), *with State* v. *Graddy,* 55 Ohio St.2d 132, 378 N.E.2d 723 (1978).

[48] *Compare State* v. *Caldwell,* 25 N.C. App. 269, 212 S.E.2d 669 (1975), *with People* v. *Parker,* 42 Ill.2d 42, 245 N.E.2d 487 (1969).

[49] This split in the lower courts is no doubt due in part to the fact that in three pre-*Aguilar* cases, the previous reliability of the informants was shown in somewhat conclusory terms, without criticism by the Court. However, all these cases involved additional corroboration by the affiant. *Jones* v. *United States, supra* note 8 ("information . . . on previous occasion . . . was correct"); *Draper* v. *United States, supra* note 7 (previous information was "accurate and reliable"); *Rugendorf* v. *United States, supra* note 21 ("informant . . . has furnished reliable information . . . in the past").

[50] *See, e.g., United States* v. *Anderson,* 500 F.2d 1311 (5th Cir. 1974); *United States* v. *Hood,* 422 F.2d 737 (7th Cir.), *cert. denied,* 400 U.S. 820 (1970).

[51] *Supra* note 3, at 511.

[52] *Id.* at 509.

[53] *See State* v. *Joseph,* 114 R.I. 596, 337 A.2d 523 (1975).

[54] *People* v. *Kurland,* 168 Cal. Rptr. 667, 618 P.2d 213, 225 n. 12 (1980), *cert. denied,* 451 U.S. 987 (1981).

[55] *See People* v. *Montoya,* 538 P.2d 1332 (Colo. 1975) (en banc).

[56] *See supra* note 18, at 759.

[57] *State* v. *Kerr,* 44 Ohio St.2d 163, 339 N.E.2d 641 (1975), *cert. denied,* 426 U.S. 936 (1976); *State* v. *White,* 10 Wash. App. 273, 518 P.2d 245 (1974).

[58] *See People* v. *Dumas,* 9 Cal.3d 871, 109 Cal. Rptr. 304, 512 P.2d 1208, 1211–12 (1973).

[59] *See generally supra* note 3, at 509.

[60] *See, e.g., United States* v. *House, supra* note 23; *United States* v. *Shipstead,* 433 F.2d 368 (9th Cir. 1970).

[61] *Supra* note 18, at 759.

[62] *Supra* note 54.

[63] *Supra* note 18, at 756.

[64] 403 U.S. 573 (1971).

[65] *Id.* at 583–84.

[66] *United States* v. *Principe,* 449 F.2d 1135, 1137 (1st Cir. 1974); *Armour* v. *Salisbury,* 492 F.2d 1032, 1035–36 (6th Cir. 1974); *United States* v. *Rosenbarger,* 536 F.2d 715, 719 (6th Cir. 1976). *cert. denied,* 431 U.S. 965 (1977); *United States* v. *Spach,* 518 F.2d 866, 870 (7th Cir. 1975); *United States* v. *Carmichael,* 489 F.2d 983, 986 (7th Cir. 1973) (en banc); *United States* v. *Golay,* 502 F.2d 182 (8th Cir. 1974); *United States* v. *Jabara,* 618 F.2d 1319, 1323 (9th Cir.), *cert. denied,* 449 U.S. 856 (1980); *United States* v. *Hampton,* 633 F.2d 927 929 (10th Cir. 1980), *cert. denied,* 449 U.S. 1128 (1981); *United States* v. *Davis,* 617 F.2d 677, 693 (D.C. Cir. 1979), *cert. denied,* 445 U.S. 967 (1980). The rule in the fifth circuit is unclear; *compare United States* v. *Martin,* 615 F.2d 318, 325 (5th Cir. 1980), *with United States* v. *Gorel,* 622 F.2d 100, 104 (5th Cir. 1979).

[67] *United States* v. *Martin,* 615 F.2d 318, 325 n. 9 (5th Cir. 1980); *United States* v. *Spach,* 518 F.2d 866 (7th Cir. 1975); *McCreary* v. *Sigler,* 406 F.2d 1264, 1268 (8th Cir.), *cert. denied,* 395 U.S. 984 (1969).

[68] *United States* v. *Spach,* 518 F.2d 866, 870 (7th Cir. 1975).

[69] *Supra* note 39.

[70] 469 F.2d 1283 (7th Cir. 1972), *cert. denied,* 411 U.S. 920 (1973).

[71] *See Wetherby* v. *State,* 482 S.W.2d 852 (Tex. Crim. App. 1972).

[72] *See generally supra* note 3, § 3.4 at 596–97. An example of an anonymous tip ripening into probable cause is found in *United States* v. *Horton,* 488 F.2d 374 (5th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).

[73] *Filer* v. *Smith,* 96 Mich. 347, 55 N.W. 999 (Mich. 1893).

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