ACCOMPLICE ACCUSATIONS IN THE CRIMINAL PROCESS: THE APPLICATION OF SIXTH AMENDMENT TESTS FOR THE RELIABILITY OF HEARSAY EVIDENCE TO PROBABLE CAUSE DETERMINATIONS

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> By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent. Nor did they provide that only the innocent may appeal to those safeguards. They knew too well that the successful prosecution of the guilty does not require jeopardy to the innocent. . . . The progress is too easy from police action unscrutinized by judicial authorization to the police state.†

INTRODUCTION

The recent publicity generated by federal undercover investigations has focused primarily upon the propriety of governmental conduct which creates or induces crimes that would not otherwise occur.[1] The role of

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† United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

1. One of the last summations of the heavily publicized federal cocaine distribution case against industrialist John DeLorean, which was based primarily upon the testimony of a co-conspirator and federal undercover agents and resulted in the defendant's acquittal by the jury, is "Taking the Sting Out," Washington Post, at 27, Sept. 17, 1984 (nat'l weekly ed.). As revealed in that account, a number of jurors voted for acquittal because they believed that the conduct of the government agents and informant improperly created the drug conspiracy. The jurors were instructed to acquit DeLorean: "1) if the idea for the crime came from the creative acts of government agents or informers; 2) if the agents then induced the defendant into the crime; and 3) if the defendant had not been ready and willing to commit the crime before he was induced to do so." *Id.*

For a more detailed discussion of the entrapment defense, see United States v. Wolffs, government informants who themselves have been implicated in criminal activity and, in effect, agree to become the accomplices of the investigative targets in further crimes has received significant attention in many cases.[2]

A practical justification for such an investigative technique, recognized and affirmed by reviewing courts,[3] is that no one understands more about a particular crime than participants in that crime; the most knowledgeable potential sources of information and, at later stages of the criminal process, evidence concerning the complicity of a subject are his accomplices or co-conspirators in crime.[4]

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594 F.2d 77, 79-81 (5th Cir. 1979); United States v. Watson, 489 F.2d 504 (3d Cir. 1973). Both MODEL PENAL CODE § 2.13(1)(b) and several states allow an acquittal based primarily upon the criminality or impropriety of police conduct which induces the criminal behavior of the defendant. *See, e.g.*, People v. Barraza, 23 Cal. 3d 675, 591 P.2d 947, 153 Cal. Rptr. 459 (1979); State v. Taylor, 599 P.2d 496 (Utah 1979); People v. LaBate, 122 Mich. App. 644, 332 N.W.2d 555 (1983).

Five members of the Supreme Court in Hampton v. United States, 425 U.S. 484 (1976), would accept the argument that in some circumstances government involvement in the crime charged could be so high that it bars prosecution under the Due Process clause. *Id.* at 491, 493, 495. *See also* United States v. Twigg, 588 F.2d 373 (3d Cir. 1978).

2. Although the DeLorean case did involve the activities and testimony of a government informant/co-conspirator (Hoffman), the admission by a federal agent that DeLorean indeed had been targeted beforehand by the government proved particularly damaging to the government. *See Taking the Sting Out, supra* note 1.

The ABSCAM decisions better illustrate the role and importance of accomplices-turned-informants, particularly in their discussion of the legal effect of the activities of one Weinberg. For a general discussion of the bribery — Hobbs Act ABSCAM cases, see United States v. Myers, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 2437 (1983); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982) (en banc), *cert. denied*, 457 U.S. 1106 (1982).

A more recent case involving the activities and testimony of an accomplice-informant which generated some public concern was the federal criminal action against United States District Judge Harry Claiborne. An initial trial on seven counts charging Judge Claiborne with bribery, obstruction of justice, and tax fraud resulted in a mistrial. The Justice Department then decided to dismiss four of the seven charges requiring reliance upon the testimony of Joe Conforte, a Nevada brothel operator who had claimed that he paid bribes to Judge Claiborne. *See* Berger, *U.S. Drops Charges of Bribery It Placed Against U.S. Judge*, N.Y. Times, June 28, 1984, § 1, at 16, col. 1.

3. *See, e.g., Meyers* and *Jannotti, supra* note 2. *See also* United States v. Russell, 411 U.S. 423 (1972) (testimony of undercover narcotics agent).

4. In United States v. Dyman, 739 F.2d 762 (2d Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 969 (1985), the Second Circuit rejected contentions by appellants that the involvement by a government informant was so great that it amouned to outrageous conduct in violation of due process or, in the alternative, that such conduct amounted to entrapment: "Although the government's extensive involvement [in the crime] requires careful scrutiny, the use of informants such as Sprenz is often a necessary tool of law enforcement." *Id.* at 769.

In *Dyman*, an appeal from a bank burglary conviction, the government's key witness was the F.B.I. informant, Sprenz, an electronics expert with a criminal record of numerous bank burglaries. While acting as an informant, Sprenz helped plan the bank robbery, select

Insufficient attention, however, has been paid to the post-investigative role of accomplices who, while in custody, agree to cooperate with the government in its prosecution of others. Courts must develop a principled approach to the use of hearsay statements by such accomplices to protect the liberty of persons not yet convicted of crimes. This Article will focus upon the most frequently recurring contexts in the criminal process within which courts have struggled — unsuccessfully — to develop a consistent rule of law governing the treatment by the judiciary of accomplice testimony: the warrant and preliminary hearing stages, at which the courts first confirm the legitimacy of the criminal targeting of a particular person, and allow restraints on his liberty and invasions of his privacy;[5] and the trial itself, at which a report of the accomplice accusation, in the absence of live testimony by the accomplice, often becomes central to the government's case.[6]

This Article will first explore the central question concerning accomplice accusations: their reliability. Next, the Article will analyze the history and define the current status of accomplice accusations as trial

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participants in the robbery, steal a necessary getaway vehicle, disable the bank's alarm system, and act as a look-out, 739 F.2d 765-66. *See also* United States v. Massa, 740 F.2d 629, 633, 637, 639 (8th Cir. 1984).

5. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

> The Fourth Amendment cannot be translated into a general constitutional "right of privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. . . . [T]he Fourth Amendment protects people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 350-51. *See also* FED. R. CIV. P. 4, 5.1; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Christie, *Government Surveillance and Individual Freedom*, 47 N.Y.U.L. REV. 871 (1972).

As Justice White's concurring opinion in Spinelli v. United States, 393 U.S. 410 (1969), makes clear, a warrant should not be issued by a judicial officer based upon the hearsay affidavit of an investigator "absent good cause for crediting that hearsay." *Id.* at 424 (White, J., concurring). As a general matter the same probable cause standard which governs the issuance of warrants also governs the bindover decision at a preliminary hearing. *See, e.g.*, Rideout v. Superior Court, 67 Cal. 2d 471, 432 P.2d 197, 62 Cal. Rptr. 581 (1967); Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980).

6. *See* United States v. Carvalho, 742 F.2d 146, 148-50 (4th Cir. 1984); Smith v. Wainwright, 741 F.2d 1248, 1251-54 (11th Cir. 1984); United States v. McCall, 740 F.2d 1331, 1337-42 (4th Cir. 1984) (and cases cited); United States v. Massa, 740 F.2d 629, 637 (8th Cir. 1984); FED. R. EVID. 804(b)(3).

A related question recently was disposed of by the Supreme Court in Maine v. Moulton, No. 84-786 (Dec. 10, 1985). In *Moulton*, the Court held that the state's use at trial of tape-recorded statements made by defendant in a meeting with defendant's accomplice, who was acting as a police informant, violated defendant's sixth amendment right to assistance of counsel.

evidence under the confrontation clause of the sixth amendment, and under federal hearsay rules. The Article will then examine the less developed and more ambiguous judicial treatment of accomplice accusations when used to support a search or arrest warrant or pretrial detention under the fourth amendment.

Finally, this Article will compare sixth and fourth amendment analyses of hearsay accomplice accusations in the wake of *Illinois v. Gates*,[7] which was recently reaffirmed in *Massachusetts v. Upton*.[8] The Article will conclude, summarizing post-*Gates* appellate decisions,[9] that the judiciary, perhaps burdened by the exclusionary rule,[10] has not fashioned a consistently viable use, within the bounds of precedent and logic, of accomplice accusations in our criminal process. Statements by accomplices, deemed unreliable under the more rigorously codified and interpreted standards of the hearsay rule and confrontation clause, are insufficient alone to support a citizen's arrest and detention under the fourth amendment.[11]

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7. 462 U.S. 213 (1983). *See infra* notes 244-62 and accompanying text for a discussion of *Gates*. *See also* Cerruti, *The Demise of the Aguilar-Spinelli Rule: A Case of Faulty Reception*, 61 DEN. L.J. 431 (1984).

8. ___ U.S. ___, 104 S. Ct. 2085 (1984). The court in *Upton* made clear that its *Gates* decision was intended to repeal, not merely modify, the Aguilar-Spinelli rule. On remand, the Supreme Judicial Court of Massachusetts reaffirmed its earlier decision under state constitutional law. The court repudiated the *Gates* standard, and asserted that the Massachusetts constitution required a higher standard for determining probable cause than did the fourth amendment. Commonwealth v. Upton, 394 Mass. 363, ___, 476 N.E.2d 548, 550 (Mass. 1985).

9. *See infra* notes 332-82 and accompanying text. *See also* United States v. Chermaly, 741 F.2d 1346, 1353 (11th Cir. 1984); Government of Virgin Islands v. Williams, 739 F.2d 936, 939 (3d Cir. 1984); United States v. Williams, 737 F.2d 735, 738 (8th Cir. 1984).

10. *See* W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). The Supreme Court has recently recognized a "good faith" exception to the fourth amendment-based exclusionary rule first established in Weeks v. United States, 232 U.S. 383 (1914). United States v. Leon, 104 S. Ct. 3405 (1984). *See* Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551 (1984).

11. This Article confronts and challenges in a specific context two basic premises regarding the fourth amendment probable cause standard: (1) generally, the determination of probable cause is distinct from the determination of the admissibility at trial of hearsay evidence, employing different standards, and (2) a magistrate determining probable cause to issue a warrant should not be bound by any "inflexible" codifications of that standard.

The premise of this Article is that, while sixth and fourth amendment standards indeed differ, each shares a core concern: that unreliable hearsay not be admitted into evidence against a criminal defendant, and not be allowed alone to support an arrest or search warrant. The evaluation of hearsay evidence as reliable or unreliable should not differ depending upon the context, although the existence of corroboration may alter the initial evaluation of unreliability in either context.

Additionally, when a substantial body of caselaw exists regarding the reliability of

I. Identifying the Common Question of Reliability

When an accomplice agrees to cooperate with, and later testify for, the government prior to targeted criminal activity, as in the more publicized "sting" cases,[12] the opportunity for government monitoring of the accomplice's reports is substantial enough that rarely will the prosecutor, and later the court or jury, be asked to rely upon or assess the credibility of the accomplice without corroboration. Moreover, the accomplice will be aware of the investigators' attempts to corroborate and thus have less flexibility in the tailoring of his statement.[13] While his motive to prevaricate may remain in question, the informant's awareness of government supervision of his conduct may support a presumption of truthfulness in particular cases.

However, when the agreement between the government and the accomplice is not reached until after the targeted crime has occurred, statements by the accomplice to investigators, given while the accomplice is in custody or jeopardy, describe prior, unmonitored, largely uncorroborated events. The criminal process through court decision, legislation, and constitutional protection has long been ambivalent toward the handling of such evidence.[14] Statements by an accomplice confessing his own guilt and

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hearsay evidence for confrontation clause and evidentiary purposes, that body of law should be available to and limit the discretion of a magistrate at the warrant stage. "The liberties of the American citizen depend upon the existence of established and known Rules of law limiting the authority and discretion of men wielding the power of government," SOURCES OF OUR LIBERTIES 1 (R. Perry, ed. 1959).

12. *See* cases cited *supra* note 2.

13. Thus the existence of police corroboration of an accomplice's hearsay statement often is dispositive of its reliability. Arguably, accomplice hearsay used to support a search warrant may be inherently more credible than the same hearsay used to support an arrest warrant, at least when the source of the hearsay knows the purpose for which his information is to be used. The failure of police to discover evidence of crime during a search would discredit the source, so it generally would not be in his interest to provide false information to support the search in the first place. Unlike a search, an arrest or detention is not self-corroborating, so an accomplice would not have an inherent motive to be truthful when his information is to be used to support an arrest.

14. *Compare* United States v. Bailey, 581 F.2d 341 (3d Cir. 1978) (accomplice's in-custody confession inculpating accused held inadmissible under Rule 804(b)(3), because statement was made in exchange for dismissal of one count of indictment against declarant); United States v. Oliver, 626 F.2d 254 (2d Cir. 1980) (accomplice's in-custody confession inculpating accused, although voluntary, lacked requisite trustworthiness for admission under Rule 804(b)(3), because declarant was of low intelligence and agents told him that he was facing long-term prison sentence, and his cooperation would be made known to United States Attorney with view to gaining leniency); United States v. Riley, 657 F.2d 1377 (8th Cir. 1981) (declarant's in-custody statement implicating accused held inadmissible under Rule 804(b)(3), because under circumstances she might have perceived her confession as being in her best interests rather than against her interests), *with* United

at the same time implicating the subject often are the most critical data that investigators receive: such statements arguably are at once the most informative, but potentially the least reliable, sources of information.[15]

As reflected in Justice White's opinion dissenting from the denial of certiorari in *Murphy v. Kentucky*,[16] a number of states maintain statutes or constitutional provisions prohibiting a guilty verdict based upon the uncorroborated but cross-examined testimony of an accomplice.[17] Such testimony, in effect, has been determined to be insufficient as a matter of law, regardless of its persuasiveness to a jury, to prove guilt beyond a

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States v. Rueda, 549 F.2d 865 (2d Cir. 1977) (in-custody accusation by accomplice in drug smuggling operation sufficient to establish probable cause to arrest accused when combined with corroboration of innocent details in accomplice's statement); United States v. Di Stefano, 555 F.2d 1094 (2d Cir. 1977) (in-custody statement by accomplice-participant in bank robbery naming accused as driver of getaway car, combined with corroboration of innocent details of accomplice's story sufficient to support finding of probable cause).

In reaching its decision, the court in *Rueda* reversed the district court, which had held that the accomplice's accusation was unreliable in the absence of substantial corroboration, because the accomplice's reliability was previously untested. The appellate court noted that a confessed participant in a crime was "no informant in the usual sense," 549 F.2d at 869 (citing United States v. Miley, 513 F.2d 1191, 1204 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975)), and thus prior reliability need not be shown. 549 F.2d at 869. The court in *Di Stefano* cited *Rueda* as authority for accepting the accomplice's story as reliable, despite his lack of a track record. 555 F.2d at 1100. The meager corroboration of innocent details in *Di Stefano* consisted of statements by witnesses that the driver of the getaway car, like the accused, was a woman, and that the accomplice and the accused were friends. 555 F.2d at 1101.

15. *See* Bruton v. United States, 391 U.S. 123, 141 (1968) (White, J., dissenting), quoted *infra* note 164. Wigmore summed up the recognized lack of credibility of accomplices as follows:

> The reasons which had led to this distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself . . . [b]ut he can escape the consequences of his acknowledgment, if the prosecuting authorities choose to release him, provided he helps to secure the conviction of his partner in crime.

7 J. WIGMORE, EVIDENCE 2057 (J. Chadbourn rev. 1978).

16. ____ U.S. ____, 104 S. Ct. 1427 (1984). *Murphy* involved the issue of whether a state's repeal of such a statute requiring corroboration of accomplice testimony could be effective retroactively.

17. According to Justice White, 15 states in addition to Kentucky have statutes precluding a felony conviction based solely upon accomplice testimony, ____ U.S. ____, 104 S. Ct. at 1428 (White, J., dissenting). For example, the Georgia statute provides as follows:

> Number of witnesses required generally; exceptions; effect of corroboration.
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> The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including . . . felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness. . . .

GA. CODE ANN. 24-4-8 (1982).

reasonable doubt.[18] These rules of constitutional construction are related in part to the much earlier common law rules of evidence which prohibited the introduction into evidence of the testimony of convicted felons.[19]

While today convicted or confessed felons, in general, and accomplices, in particular, are deemed competent sources of evidence for the courts, the prevailing rule is that such evidence should be received and evaluated with caution.[20] Thus, the inherent unreliability of accomplice accusations is an acknowledged tenet of our jurisprudence.[21]

A. The Relevance of Accomplice Accusations Introduced Through Hypotheticals

Consider two hypotheticals.

Suppose X is reported to be a professional con artist. With two prior arrests, one adverse civil judgment, but no convictions, X has been under investigation by federal authorities for fraud and securities violations during the past five years. As he is preparing to leave the country, X is arrested and charged with defrauding investors in an off-shore mutual fund by misrepresenting the assets of that fund and converting the invested capital to his own use. Investigators believe they have a solid but not overwhelming case against X.

Following his arrest, X is questioned by investigators regarding the possible complicity in the fraud of Y, a prominent industrialist who is the majority stockholder in several public corporations, and is active in the

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18. *See* Government of Virgin Islands v. Civil, 591 F.2d 255, 260 (3d Cir. 1979).

19. This disqualification apparently stemmed from the belief that one confessing his own guilt and accusing another should be subject to the same common-law disqualification that applied to witnesses who had been convicted of a crime. *See* 2 J. WIGMORE, EVIDENCE 526 (J. Chadbourn rev. 1978). This theory gradually lost support as critics pointed out that the accomplice usually has not yet been convicted when he gives his testimony.

20. *See generally* Annot., 17 A.L.R. FED. 249 (circuit-by-circuit review describing which circuits require cautionary instructions). The Supreme Court has stated that it is "the better practice for courts to caution juries against too much reliance upon the testimony of accomplices." Holmgren v. United States, 217 U.S. 509, 523-24 (1910); *see also* Caminetti v. United States, 242 U.S. 470 (1917). In no case, however, has the Court indicated whether the omission of such an instruction might require a reversal.

21. 6 C. MCCORMICK, EVIDENCE 61 (E. Cleary 3d ed. 1984). In particular, accomplice statements are generally deemed unreliable when the accomplice gives it to police while he is in custody: "An accomplice is generally a person who could have been charged with the same offense as the person he testifies against, either a principal or accessory," Government of Virgin Islands v. Torres, 476 F.2d 486, 490 (3d Cir. 1973), and the term "accomplice" includes "co-conspirators," Government of Virgin Islands v. Civil, 591 F.2d 255, 259 (3d Cir. 1979). *But see* United States v. Gibbs, 739 F.2d 838 (3d Cir. 1984) (en banc) (hearsay statement by co-conspirator made during course of conspiracy to third party not unreliable), *cert. denied*, ____ U.S. ____, 105 S. Ct. 779 (1985).

leveraged acquisitions field. Y also has been a major contributor to several successful political campaigns. Public records and private complaints reveal that Y has invested heavily in the mutual fund shares promoted by X and resold most of those shares at a profit to third parties.

Eventually, X provides a written statement to investigators confessing his intent to defraud and narrating the origin and development of the scheme. After suggestive questioning by investigators, X indicates that Y was involved in the plan from the beginning, having agreed to use his position to lend credence to the securities and to profit from their distribution. As a first offender, X negotiates a deal with the prosecutor. In exchange for an eventual recommendation for leniency by the prosecutor, he agrees to attempt to gain evidence tending to corroborate the complicity of Y. Fearing for his safety, however, X declines to testify publicly under oath against Y.

The government is unable to gain subsequent corroboration of Y's knowing participation in the fraudulent scheme, but does confirm that Y has been an acquaintance of X and has profited from the purchase and resale of the securities. Several investigators are personally convinced by subjective factors that X's accusation against Y, implicating Y in a conspiracy to defraud, is reliable. Executive branch officials then must decide how much significance to attribute to X's accusation against Y, and what consequences to Y should follow.[22]

Suppose, as an alternative hypothetical, that two men wearing masks rob a bank. The first man, A, is captured by police while fleeing from the bank. The second robber escapes. Recovered with A are the pistol apparently used during the robbery and some of the money taken during the robbery. A admits his guilt but declines to identify his accomplice.

Police soon discover that A has three prior armed robbery convictions, and has spent most of the last 15 years in prison. They also discover that the pistol recovered with A was used in several prior robberies committed by a robbery gang then under investigation. When police confront A with the foregoing information, including the possibility of a life sentence as a habitual offender, A quickly agrees to provide a written confession and names B, one of A's former prison acquaintances recently paroled, as his accomplice.

Upon further checking, police confirm that B also has a prior record and, although recently released from prison, was incarcerated at the time

22. *Cf.* United States v. Kelly, 569 F.2d 928 (5th Cir. 1978), *cert. denied*, 439 U.S. 829 (1978). Although the author of this Article was a Justice Department attorney at the time the *Kelly* case was litigated, he was not formally assigned to that case.

that A's earlier robberies occurred. Although A has identified B's mugshot and his street name, bankteller reports of the second robber describe a man who is six inches shorter than B. Although fingerprint and other scientific testing might eventually corroborate A's accusation, the results of such testing, if conducted, would not likely be available for several weeks at the earliest. Like X, A has declined to testify publicly against his alleged accomplice.[23]

With respect to each hypothetical, the critical issue for the criminal process is the reliability of the written, in-custody statement by the accomplice, constituting both a confession and an accusation. The courts may be called upon to resolve the following questions arising at different stages of the criminal process: Are the respective statements of A and X sufficient to support the issuance of a search or arrest warrant for Y or B?[24] Are the statements sufficient to support a grand jury indictment of Y or B?[25] Are the statements admissible at a subsequent trial of Y or B if the source is unavailable?[26] Are the statements sufficient evidence to support a guilty verdict of Y or B if they are substantially uncorroborated?[27] It can be seen from the two contrasting hypotheticals, which are intended to represent a substantial number of criminal cases, that an evaluation of the truthfulness of accomplice accusations is central to the entire criminal process.

Because the answers given by courts to the above questions often appear to be straightforward applications of disparate rules of law which have origins in precedent, the questions can be identified as profoundly political; they are barometers of the degree of separation between the executive and judicial branches of government, and of the balancing our legal system engages in between individual liberty and the need to protect

23. *Cf.* United States v. Bizzard, 615 F.2d 1080 (5th Cir. 1980), *aff'd*, 674 F.2d 1382 (11th Cir.), *cert. denied*, 459 U.S. 973 (1982); United States v. Coughlin, 514 F.2d 904 (2d Cir. 1975); United States v. Trice, 476 F.2d 89 (9th Cir.), *cert. denied*, 414 U.S. 843 (1973); United States v. Kubitsky, 469 F.2d 1253 (1st Cir. 1972), *cert. denied*, 411 U.S. 908 (1973). One of the authors of this Article served as court-appointed attorney for the defendant in *Bizzard*.

24. *See, e.g.*, United States v. Di Stefano, 555 F.2d 1094 (2d Cir. 1977).

25. *Compare* Costello v. United States, 350 U.S. 359 (1956) (government agent may give sworn testimony as to statements made by others), *with* United States v. Hodge, 496 F.2d 87 (5th Cir. 1974) (total reliance upon "informal unsworn hearsay from the mouth of the prosecutor . . . is interdicted by the Fifth Amendment").

Grand jury indictments are required for federal felony prosecutions, FED. R. CRIM. P. 7(a), and for felony prosecutions in 20 states. *See* Y. KAMISAR, W. LAFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 1016 (5th ed. 1976).

26. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[02] (1984).

27. *See supra* note 17.

society.[28]

The complication with respect to judicial treatment of custodial accomplice accusations is the result of conflicting psychological premises: on the one hand, a person is not likely to provide a statement contrary to his penal interest if the statement is false;[29] on the other, a person in custody may be willing to promote his self-interest by implicating an innocent person, even in a manner lacking foundation, particularly if he also thereby protects a guilty confederate.[30]

In the first hypothetical, when most of Y's activities are known but not obviously criminal, the major problem for the government — and ultimately for the criminal process — is not identifying the accomplice, but determining, by a subjective evaluation of *mens rea*,[31] whether Y indeed committed a crime. In a white collar criminal investigation, where the target is thought to be a respectable member of the community, investigators would perceive greater risk to themselves in initiating proceedings by filing a formal complaint and seeking an arrest warrant based upon X's uncorroborated accusation. X's potential unreliability should be recognized as a barrier to direct government challenge at the preliminary stage.

Instead, the government could present X's accusation to a grand jury. If the grand jury chose to indict, even when acting upon a government recommendation, its intervention would substantially immunize prosecutors from undue criticism. Moreover, the prosecutor would never have to make a probable cause showing to a judicial officer.[32] At the subsequent trial of Y, the government presumably would be happy to rely upon the live testimony of X, an educated, highly motivated, apparently credible witness with no prior record whose testimony had not been cross-examined at a preliminary hearing. In that case, no sixth amendment confrontation clause or hearsay issue would arise, and the jury would have difficulty choosing between the credibility of X and Y.[33]

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28. *See* Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Representation Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76 (1983); Ponsoldt, *The Ideological Shaping of the Federal Judiciary*, N.Y. Times, editorial page, Sept. 6, 1984.

29. *See infra* notes 42-59 and accompanying text.

30. *See infra* notes 173-92 and accompanying text.

31. *See* 18 U.S.C. 2314; United States v. Gullett, 713 F.2d 1203 (6th Cir. 1983); United States v. Gallo, 543 F.2d 361 (D.C. Cir. 1976).

32. FED. R. CRIM. P. 5, 9; Gerstein v. Pugh, 420 U.S. 103, at 117 n.19 (1975). *But see* Hawkins v. Superior Court, 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978).

33. The jury's credibility choice would be effectively unreviewable, since the courts must "make all inferences and credibility choices in support of the jury verdict," United States v. Alonso, 740 F.2d 862, 872 (11th Cir. 1984). *See generally* M. FRANKEL, THE SEARCH FOR TRUTH: AN UMPIREAL VIEW, 123 U. PA. L. REV. 1031 (1975).

In the second hypothetical, investigators should have less reason to hesitate to use A's accusation as a basis for obtaining an arrest warrant for B. That same accusation, when reported by an investigator and combined with evidence of B's prior record, likely would support subsequent probable cause findings by a magistrate and grand jury.[34] The issue would not be whether B's ambiguous conduct was criminal, but whether B indeed was the person who committed an obviously violent crime. Since A may not be viewed as a credible live witness at B's trial, the government might seek to render A unavailable as a government witness.[35] The crucial and often dispositive question then to be resolved would be whether A's prior statement would be admissible against B.[36]

Thus, the accusation by the accomplice is central to judicial decision-making in both hypotheticals — a white collar case in which the dispositive question of the target's intent and knowledge is difficult to ascertain, and a violent crime in which the identity of the perpetrator is more susceptible to corroboration by independent evidence. If consistency under a rule of law is desirable, hearsay accusations should be uniformly treated and carry with them somewhat similar consequences. Because much more attention has been paid to the admissibility at trial of out-of-court statements, there have developed relatively uniform rules of evidence assessing their reliability which, as will be discussed below, often determine admissibility. The governing approach is that potentially unreliable hearsay evidence, the reliability of which cannot be sufficiently assessed by a jury, should not be submitted to a jury at all.[37]

On the other hand, relatively little attention has been paid to codifying the probable cause standard governing the deprivation of a citizen's privacy or liberty under the fourth amendment. Consequently, there are virtually no uniform standards for probable cause;[38] the governing ap-

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34. *See* United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973), discussed *infra* note 299.

35. Under FED. R. EVID. 804(c), a witness is "unavailable" if, *inter alia*, he asserts his fifth amendment privilege, refuses to testify despite a court order to do so, experiences memory loss, or is physically absent and not located by the prosecutor. *See also* Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

36. *See infra* note 173 and cases cited therein.

37. *See* FED. R. EVID. 804(b)(3), Advisory Committee Notes; 4 J. WEINSTEIN, EVIDENCE ¶ 804(b)(3)[03], at 804-10-3.

38. *See* Brinegar v. United States, 338 U.S. 160 (1949):

> Probable cause exists where the facts and circumstances within their [arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person to be arrested].

Id. at 175-76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925). *See* Kamisar, proach does suggest, however, that evidence giving rise to an inference that a citizen has engaged in criminal activity by definition is required to be more reliable than not.[39] Unfortunately, in practice, particularly with reference to accomplice accusations, relevant hearsay evidence that is not sufficiently reliable to be considered by a jury is deemed reliable enough to support the arrest and detention of, and the filing of formal charges against, a suspect.[40]

The difference in treatment largely results from the fact that virtually all accomplice accusations, notwithstanding traditional analysis,[41] are comprised of both a confession, amounting to a presumptively reliable statement against penal interest, and a potentially unreliable custodial accusation of another person. Therefore, the basis for accepting accomplice accusations "against penal interest" to support probable cause determinations deserves the same scrutiny it has received to support admissibility.

B. Developing Theory Regarding the Supposed Reliability of Declarations Against Interest

The generally accepted rationale for labelling a declaration against interest, such as a confession, as sufficiently trustworthy for admission at trial or to support the issuance of a warrant is that a reasonable man would not have made such a statement unless he believed it to be true.[42] In other words, since there is no apparent gain to the declarant, truthfulness is the only available motive for the statement. If one accepts this rationale, it follows that one cannot rely substantially on such a statement if there are other apparent motives for the declarant to have made the statement. However, in many cases involving the admissibility of hearsay statements, even when reasonable alternative motives can be shown for the making of

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supra note 10, at 551.

39. *But see* MODEL PRE-ARRAIGNMENT CODE § 120.1, Comment, and Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964). *See also* People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449 (1970).

40. *See supra* note 14. *Compare* cases cited *infra* note 173 *with* Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981); United States v. Moreno, 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978); United States v. Mark Polus, 516 F.2d 1290 (1st Cir.), *cert. denied*, 423 U.S. 895 (1975); *and* United States v. Mendoza, 441 F.2d 1107 (9th Cir. 1971).

41. *See infra* notes 44-51 and accompanying text.

42. Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 480-81 (1929) ("sufficient guarantee of trustworthiness is found in the circumstance that the fact stated is consciously against the interest of the declarant"); Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1, 8 (1944) (statement unfavorable to declarant's interest has high probability of trustworthiness).

declarations against interest, courts traditionally have ignored these alternative explanations, labelled the declarations against interest, and held them sufficiently trustworthy to warrant their consideration by a jury.[43] Thus, statements that are facially against the interest of the declarant, but are not actually against his interest, nevertheless have been admitted into evidence.[44]

Under such a formalistic approach to the hearsay rule, the traditional common law requirements for categorization of a statement as a declaration against interest have been: (1) that the declarant must be unavailable; (2) that the statement had to be against either the declarant's pecuniary or proprietary interest; (3) that the facts necessary to make such statement must have been immediately cognizable to the declarant personally; (4) that there must have been no probable motive to falsify the facts.[45] Under common law principles, each of these requirements had to be met for a hearsay statement to qualify for admission under the declaration against interest exception. However, the requirements over the years have been modified in varying degrees.

1. The Declarant Had to be Unavailable

At common law, the declarant had to be dead to be considered unavailable.[46] However, this requirement has given way to various other forms of unavailability, including mental incapacity[47] and a refusal of the declarant to testify based on his fifth amendment privilege against self-incrimination.[48] The Model Code[49] and Uniform Rules[50] no longer require that the declarant of a hearsay statement against interest be unavailable at

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43. Jefferson, *supra* note 42, at 44-47 (statements appearing on their face to be against interest of declarant have been routinely admitted under "prima facie" test — test has not, however, been as widely adopted among jurisdictions within United States as in United Kingdom and other Commonwealth countries).

44. *Id.*

45. *Id.* at 1.

46. *Id.* at 2. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES ¶ 804(b)(3)[02], at 804-95 (1977) [hereinafter cited as 4 J. WEINSTEIN].

47. 5 J. WIGMORE, EVIDENCE 1456 (3d ed. 1940) (insanity now widely accepted form of unavailability for declarations against interest hearsay exception).

48. *Id. See also* United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981) (declarant's refusal to testify based on privilege against self-incrimination sufficient to make declarant unavailable for purposes of declaration against penal interest hearsay exception).

49. MODEL CODE OF EVIDENCE, Rule 509(a) (1942).

50. UNIFORM RULES OF EVIDENCE 63(10) (1953).

all, and there is a fairly reasonable basis for that position.[51] Some commentators have suggested that if a declaration against interest is as reliable as, for example, a spontaneous utterance, which has no unavailability requirement for admission, there should by analogy be no unavailability requirement for the admission of declarations against interest.[52] Despite these arguments, however, the Federal Rules of Evidence have retained the unavailability requirement for admission of a declaration against interest.[53] As will be discussed below, in criminal cases there is also a substantial basis for requiring that the declarant be unavailable to satisfy the confrontation clause.[54]

2. The Statement Traditionally Had to be Against Pecuniary or Proprietary Interest

(a) Was the statement consciously made against the declarant's interest?

Since the traditional rationale for attributing a high degree of trustworthiness to declarations against interest rests upon the declarant's recognition that the statement actually is against his interest, the declarant's failure to recognize this would seem to preclude a finding of the inherent trustworthiness of the statement.[55] To the extent this premise is ignored, statements that were not consciously against the declarant's interest at the time the statements were made will be admitted into evidence when in fact there is no established basis for the reliability of these statements.[56]

To rectify this problem, various jurisdictions have applied one of several methods for determining whether the statement under review was consciously against the declarant's interest at the time the statement was

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51. Morgan, *supra* note 35, at 451.

> Theoretically the cause of unavailability should be immaterial, and there is a strong argument for not requiring unavailability, for a declaration carrying the guarantee of a really disserving statement is quite as likely to be true as testimony given after controversy has arisen, and if the declarant is available, he may be brought in for a cross examination.

Id. at 475.

52. Jefferson, *supra* note 42, at 6 (declarations against interest are high quality evidence and like spontaneous utterances should be admissible without showing of unavailability of declarant).

53. FED. R. EVID. 804(b).

54. *See* Ohio v. Roberts, 448 U.S. 56 (1980) (although when traditional indicia of reliability are present there is no absolute constitutional requirement of declarant's unavailability, government must at least show good faith effort to locate declarant and get him to appear in court to testify).

55. Morgan, *supra* note 42, at 480-81.

56. Jefferson, *supra* note 42, at 6.

made. The traditional approach is the so-called objective standard: if a reasonable man would have believed the statement to have been against his pecuniary or proprietary interest, the statement will be deemed reliable.[57] Other jurisdictions have sought to employ a subjective standard, by attempting to review the circumstances surrounding the making of the statement to determine whether the declarant actually believed that the statement would expose him to civil liability. This approach has been widely used in scrutinizing statements made against the declarant's penal interest for confrontation clause purposes.[58] The majority of commentators agree that the ideal test for determining whether a particular hearsay statement was consciously made against the declarant's interest would be to employ an objective standard, and then allow the party opposing the introduction of the statement to demonstrate that the statement was not consciously made against interest.[59]

(b) Statements against penal interest also included as a hearsay exception

Traditionally, statements had to be against pecuniary or proprietary interest to be admissible under the declaration against interest hearsay exception.[60] About midway through the twentieth century, this common

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57. *Id.* at 22 (traditional common law rationale for objective standard was that, since circumstances surrounding making of declaration seldom give any indication of actual state of mind of declarant, it would seem that if a reasonable man would believe that declaration is against his interest, finding that declarant probably believed declaration to be against his interest is justified).

58. *See, e.g.,* United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (where declarant had not been convicted, and transcript disclosed that he decided to speak to prosecutor and grand jury after he had been granted immunity, circumstances indicate that declarant did not believe statement to be against his penal interest). *See also* Gibson v. United States, 434 U.S. 959 (1977) (hearsay statement of prosecution witness would not be admissible at new trial as declaration against interest, since declarant had motive to lie in order to impress probation officer with her rehabilitation).

59. *See* Jefferson, *supra* note 42, at 22-23 ("Perhaps a better statement would be that if a reasonable man would have had the belief, the declaration will be received unless there is a finding that the declarant did not believe the declaration to be against interest"); Comment, *Declarations Against Interest — Rules of Admissibility*, 62 NW. U.L. REV. 934, 942 (1968) ("it appears that the search for truth would be better served by a rule which would admit a declaration which a reasonable man would not make unless true, unless counsel opposing admission can demonstrate to the judge by a preponderance of evidence that the particular declarant was probably lying"). Note also the "Strict Scrutiny with Corroboration" test which emphasizes the same approach in Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1213 (1978) (objective test facially applied to declaration and if surrounding circumstances would seem to corroborate apparent disservingness of statement, then statement should be admitted).

60. Jefferson, *supra* note 42, at 29.

law distinction between penal and proprietary or pecuniary interest began to give way in response to widespread criticism.[61] Many courts rejected the common law rule and began admitting hearsay declarations against penal interest into evidence at trial.[62]

The determination whether a hearsay statement was practically against the pecuniary, proprietary or penal interest of the declarant has been the critical issue in determining whether a statement is admissible. This problem is compounded when dealing with collateral statements against interest rather than non-collateral statements, since collateral statements have traditionally been perceived as somewhat less credible.[63]

More often than not, statements sought to be admitted under the statements against interest hearsay exception contain self-serving as well as disserving components. Various tests have been fashioned to determine whether these "mixed" statements can then properly be characterized as truly against the declarant's interest. The traditional test developed by the courts for determining the disservingness of the overall statement is the "prima facie test," which provides that if the statement in isolation appears to be primarily against the declarant's interest, the entire statement should be admitted.[64] This was the approach of the English common law courts,

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61. Note the dissenting opinion of Mr. Justice Holmes in Donnelly v. United States, 228 U.S. 243, 277 (1913) (Holmes, J., dissenting), which criticized the refusal by the majority to find that an exculpatory declaration against penal interest should have been admitted at trial:

> The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime . . . the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . .

See also Jefferson, *supra* note 42, at 39 (since penal interest is as important as proprietary interest, declarations against penal interest should be equally admissible under hearsay exception).

62. State v. Voges, 197 Minn. 85, 266 N.W. 265 (1936); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923). *See also* Van Pelt, *The Standard of Reliability for Declarations Against Penal Interest in Missouri*, 48 MO. L. REV. 801 (1983). The author discusses Missouri's change in position regarding its recent allowance for the admission of declarations against penal interest proffered by defendants in criminal prosecutions. Within this discussion, the author also notes the development of FED. R. CRIM. P. 804(b)(3), and the gradual acceptance of exculpatory declarations against penal interest in several states.

63. Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 Calif. L. Rev. 1189, 1201 (1978).

64. Jefferson, *supra* note 42, at 44 ("it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it") (quoting Taylor v. Wilham, 3 Ch. D. 605 (1875)).

but it has been largely rejected by American jurisdictions.[65] The rationale for this overwhelming rejection in the United States is that the use of the "prima facie test" often leads to confusion regarding the admission of self-serving statements taken out of context and disguised as disserving statements.[66] For example, a statement by a tenant that he had paid his rent is disserving if entered to show that the declarant is the tenant rather than the true owner of the property in a land title dispute case. However, this same statement would be seen as self-serving if it was profferred to show that the rent was paid in a dispossesory action against the declarant for failure to pay rent.

A similar approach, perhaps differing only in the terminology used, has been to admit the statement into evidence if the disserving portion of the statement clearly "predominates" over the self-serving portions. This theory is based on the notion that the disserving statement is indicative of the declarant's trustworthy state of mind, and therefore the disserving portion colors the self-serving portion as reliable, too.[67] The difficulty of determining which portion predominates is compounded when applying this method to collateral inculpatory statements, including custodial accomplice confessions-accusations. In these statements, the part of the overall statement that appears to be against the interest of the declarant (the confession) is separable from the portion of the statement that implicates another in criminal activity (the accusation). Thus, even if the disserving portion of the statement would seem to predominate over the inculpatory portion, the statement generally will not be admitted unless the accusation is so closely connected to the confession as to be considered equally trustworthy.[68] This has been the majority position in the United States for quite some time.[69]

Some commentators have expressed doubt with respect to whether the disserving portion of the statement is a good indication of the "trustworthy state of mind" of the declarant. For example, one writer has suggested that rather than admitting the entire statement, only the disserving portions

65. *Id.* at 46.

66. *Id.* at 47-49.

67. 5 J. WIGMORE, EVIDENCE 1361 (Chadbourn rev. 1974) (disserving portion indicates trustworthy state of mind).

68. The Model Code urged this approach by including a specific provision making admissible "a declaration against interest and such additional parts thereof, including matter incorporated by reference, as the judge finds so closely connected with the declaration against interest as to be equally trustworthy." MODEL CODE OF EVIDENCE Rule 509(2) (1942).

69. 4 J. WEINSTEIN ¶ 804(b)(3)[02], at 804-101.

should be admitted, even if the disserving portions seem to predominate.[70] Others have taken a similar view: if a statement has a double aspect to it, the admissibility of the declaration should depend upon whether it is being offered in a disserving or self-serving light.[71] For example, the amount of income entered by an individual on his income tax forms may be considered disserving since it exposes the individual to tax liability; yet that same figure may be considered self-serving if it is offered into evidence in a wrongful death action by the taxpayer's survivor to show the full value of the taxpayer's life. Under this test, it is the present cause of action or nature of the case that will determine whether the statement was against interest, and not the circumstances surrounding the making of the statement. A custodial confession-accusation, when offered against a co-defendant, would never be deemed presented in a disserving light.

3. Requirement That the Facts Necessary to Make Such a Statement Must Have Been Immediately Cognizable to the Declarant

The use of the declaration against interest hearsay exception has always required that the facts necessary to make such a statement must have been immediately cognizable to the declarant personally.[72] Such a

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70. Jefferson, *supra* note 42:

> The better view seems to admit a disserving statement even though the declaration contains more numerous self-serving statements. An account book of an agent may contain entries of receipt of money for his principal which are disserving. It may also contain entries of payments made by the agent on behalf of his principal which are self-serving entries. It has been held that the disserving entries are admissible to prove the disserving facts stated, although, on the whole, the account shows a balance in favor of the agent.

Id. at 50. *See also* C. McCORMICK, EVIDENCE 279 (2d ed. 1972). McCormick summarizes three methods of handling declarations containing both self-serving and disserving facts, which can also be employed in dealing with statements containing disserving and neutral facts:

> First, admit the entire declaration because part is disserving and hence by a kind of contagion of truthfulness, all will be trustworthy. Second, compare the strength of the self-serving interest and the disserving interest in making the statement as a whole, and admit it all if the disserving interest predominates, and exclude it all if the self-serving interest is greater. Third, admit the disserving parts of the declaration, and exclude the self-serving facts. The third solution seems the most realistic method of adjusting admissibility to trustworthiness, where the serving and disserving parts can be severed.

Id. at 677.

71. MODEL CODE OF EVIDENCE Rule 509, comment b (1942).

72. 5 J. WIGMORE, EVIDENCE 1471 (Chadbourn rev. 1974); C. McCORMICK, EVIDENCE 276, at 670 (2d ed. 1972) ("The declarant, as in the case of hearsay exceptions generally, must so far as appears have had the opportunity to observe the facts as witness

rule has been acknowledged by the federal courts,[73] and is incorporated within rule 602 of the Federal Rules of Evidence.[74] Although it may seem that accomplice accusations would always satisfy this requirement, there may be cases, such as the first hypothetical described in this Article, in which a white collar criminal is not actually certain of the mental state or knowledge of his alleged accomplice.

4. Requirement That There Must Have Been No Probable Motive to Falsify the Facts

Many cases have held that there must be no apparent motive to misrepresent or falsify the facts declared for a statement to qualify under the declaration against interest hearsay exception.[75] Other commentators have taken the view that this additional requirement merely refers to a declaration of facts having the double aspect of being both self-serving and disserving.[76] Under this second approach, the assertion that a declarant has a motive to falsify would merely indicate the preponderantly self-serving character of the statement. A motive to misrepresent would therefore prevent the declaration from being considered against interest, since the motive to misrepresent would be deemed to undercut the allegedly disserving nature of the statement.[77] Courts that rigidly apply this requirement could never allow the admission of a custodial accomplice accusation.

II. An Overview of Legal Standards Governing the Admissibility of Accomplice Accusations Under the Confrontation Clause and Federal Rules of Evidence

A. The Case Law Development of Confrontation Clause Protections Against Unreliable Hearsay Evidence

The sixth amendment provides:

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must have").

73. *See, e.g.*, Gichner v. Antonio Troiano Tile & Marble Co., 410 F.2d 238, 241-42 (D.C. Cir. 1969) ("must concern a matter of which the declarant was personally cognizant").

74. FED. R. EVID. 602; United States v. Lang, 589 F.2d 92, 98 (2d Cir. 1978) (error to have admitted declaration of dealer in counterfeit notes that he had supplied counterfeit notes to defendant through defendant's girlfriend where statement also acknowledged that declarant had never met defendant and, accordingly, he could not have had personal knowledge of defendant's involvement).

75. Jefferson, *supra* note 42, at 52.

76. 5 J. WIGMORE, EVIDENCE 1464 (Chadbourn rev. 1974).

77. *Id.*

> In all criminal prosecutions the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[78]

The Confrontation Clause, neatly tucked away within the sixth amendment, is but one of several constitutional protections designed to insure that every criminal defendant is accorded a fair trial. But what exactly does the right "to be confronted with the witnesses against him" mean? In addressing this question, Justice Harlan once said:

> [T]he Confrontation Clause comes to use on faded parchment. History seems to give us very little insight into the intended scope of the Sixth Amendment Confrontation Clause. . . . Simply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial. Since, however, an extrajudicial declarant is no less a "witness," the clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony.[79]

Justice Harlan concluded that neither extreme was satisfactory. So, as with the meaning of most constitutional provisions, the answer was to materialize gradually through a case by case progression.[80]

One of the earliest Supreme Court decisions addressing a criminal defendant's right to be confronted by the witnesses against him was *Mattox v. United States*.[81] In *Mattox*, the testimony of two State witnesses was admitted at the defendant's second murder trial by allowing their testimony to be read from the transcripts of the first trial. This testimony by transcript, which constituted the strongest evidence against the defendant, was necessitated by the untimely deaths of both witnesses prior to the second trial.[82] The defendant objected, stating that this introduction of transcript testimony violated his sixth amendment right to be confronted with the witnesses against him at his second trial.[83]

The Court stated that the essence of the protection provided by the Confrontation Clause is

78. U.S. CONST. amend. VI (emphasis added).
79. California v. Green, 399 U.S. 149, 173-75 (1970).
80. *Id.* at 175.
81. 156 U.S. 237 (1895).
82. *Id.* at 240.
83. *Id.* at 242.

> [t]o prevent dispositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and shifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness. . . [B]ut general rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.[84]

The Court concluded that since both witnesses had been present at the first trial, and both had been fully cross-examined, the defendant's constitutional right to be confronted by the witnesses against him was not violated.[85] In so holding, the Court stated that a technical adherence to the letter of the Constitution, one that would require the exclusion of the transcript testimony, was not warranted, especially where, as here, it would produce a manifest failure of justice. Moreover, the Court stated that under some circumstances evidence might be admitted absent any opportunity to cross-examine whatsoever. As an example, the Court cited the universally recognized admission of dying declarations.[86]

In *Pointer v. Texas*[87] the Confrontation Clause was incorporated by the fourteenth amendment and made obligatory on the states.[88] In *Pointer*, the preliminary hearing transcript of a robbery victim's testimony was read at the defendant's trial, because the victim had moved to California.[89] The Texas courts held that the defendant's presence at the preliminary hearing, albeit without counsel, and the opportunity to cross-examine the witnesses against him at the preliminary hearing, was sufficient to safeguard his confrontation rights.[90]

In reversing the conviction, the Supreme Court emphasized the importance of giving a defendant a meaningful opportunity to cross-examine the witnesses against him:

> It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to

84. *Id.*
85. *Id.* at 250.
86. *Id.*
87. 380 U.S. 400 (1965).
88. *Id.* at 403.
89. *Id.* at 401.
90. *Id.* at 407.

> confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.[91]

Although the Court acknowledged that exceptions existed that would enable the State to introduce evidence without an opportunity for cross-examination,[92] the Court concluded that no such exception existed here where the lack of counsel at the preliminary hearing deprived the defendant of a meaningful opportunity to cross-examine his accuser.[93]

In *Douglas v. Alabama*,[94] the defendant was charged with assault with intent to commit murder. At the defendant's trial, the State called as a witness the defendant's alleged accomplice, who had been separately tried and convicted. Because his appeal was pending, the accomplice invoked his privilege against self-incrimination and refused to answer the prosecutor's questions.[95] The State was permitted, over the defendant's objection, to refresh the witness' memory by reading his signed confession naming the defendant as the man who fired the weapon involved in the assault.[96] Although this confession was never formally introduced, it was read in its entirety in the presence of the jury.[97] The defendant was given no opportunity to cross-examine his alleged accomplice because the witness continued to assert his privilege of silence. The defendant was convicted but appealed.[98]

The Supreme Court held that the defendant's inability to cross-examine the alleged accomplice about the allegations of the confession was

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91. *Id.* at 404.

> Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases. This Court. . . referred to the right of confrontation as "[o]ne of the fundamental guarantees of life and liberty," and "a right long deemed so essential. . . that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not all the states comprising the Union."

Id. (citing Kirby v. United States, 174 U.S. 47, 55-56 (1899)).

92. The Court referred to the exceptions mentioned in *Mattox, i.e.*, dying declarations and the testimony of a deceased witness who had testified at a former trial. 380 U.S. at 407.

93. The Court suggested that if the defendant had been properly represented at the preliminary hearing including an opportunity to cross-examine the witness, a different result might follow. 380 U.S. at 407. This dictum was confirmed in Ohio v. Roberts, 448 U.S. 56 (1980). *See supra* note 54 and accompanying text.

94. 380 U.S. 415 (1965).

95. *Id.* at 417.

96. *Id.*

97. *Id.*

98. *Id.*

a violation of the Confrontation Clause.[99] Despite the fact that the confession and its allegations implicating the defendant were never formally introduced, the Court pointed out that "[t]he Solicitor's reading [of the accomplice's confession] may well have been the equivalent in the jury's mind of testimony that [the accomplice] in fact made the statement; and [the accomplice's] reliance upon the privilege created a situation in which the jury might improperly infer . . . that the statement . . .was true."[100] Under those circumstances, the Court held that the opportunity to cross-examine the alleged accomplice was essential to enable the defendant to rebut any improper inferences drawn from the reading of the confession.

In *Bruton v. United States*[101] the defendant, Bruton, and alleged accomplice, Evans, were charged with armed postal robbery. At their joint trial, the State called a postal inspector who testified that Evans had orally confessed to him and named Bruton as a co-participant in the crime.[102] Although the defendant was permitted to cross-examine the postal inspector, he was unable to cross-examine his alleged accomplice, Evans, who refused to testify. In a procedure authorized by the Supreme Court in *Delli Paoli v. United States*,[103] the trial court instructed the jury that Evans' confession was inadmissible hearsay as to his co-defendant Bruton, and had to be disregarded in determining Bruton's guilt or innocence. Both men were convicted.[104]

In reversing Bruton's conviction, the Supreme Court explicitly overruled *Delli Paoli*, holding that jury instructions could not, in all circumstances, cure the prejudicial effects of exposing the jury to evidence inadmissible as to one of the co-defendants.[105] The Court reasoned that "[b]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."[106] Thus, as in *Douglas*, the defendant's confrontation rights were violated by his inability to cross-

99. *Id.* at 423.
100. *Id.* at 419.
101. 391 U.S. 123 (1968).
102. *Id.* at 124.
103. 352 U.S. 232 (1957). The basic premise of *Delli Paoli* was that juries could be trusted to follow sufficiently clear jury instructions to disregard a confessor's extrajudicial statement implicating his co-defendant.
104. 391 U.S. at 125.
105. *Id.* at 126.
106. *Id.*

examine his alleged accomplice in order to rebut the allegations in the accomplice's confession.

In *California v. Green*,[107] the key witness was one Porter, a juvenile, who had been arrested by an undercover police officer for selling marijuana. At the defendant's preliminary hearing, Porter named the defendant as his supplier.[108] At that hearing, Porter's testimony was unshaken despite a vigorous cross-examination by the defendant's counsel. At the defendant's trial, however, Porter claimed that drug use rendered him unable to remember how he had obtained the marijuana.[109] The prosecutor, in order to refresh the witness' memory, read excerpts from Porter's preliminary hearing testimony which were admitted as substantive evidence against the defendant under California's prior inconsistent statement rule.[110] Although the defendant's counsel was able once again to cross-examine Porter, he was unable to undermine the impact on the jury of the prior inconsistent statements. The defendant was convicted.[111]

The California District Court of Appeal, however, reversed the conviction, holding that the admission of Porter's prior inconsistent statements as substantive evidence violated the defendant's right to confront the witnesses against him.[112] The California Supreme Court affirmed, reasoning that a belated opportunity to cross-examine a declarant as to his prior statements is not an adequate substitute for the opportunity to cross-examine the declarant at the time the statements are made. Therefore, the California courts held that the Confrontation Clause required the exclusion of the preliminary hearing testimony.[113]

The Supreme Court reinstated the conviction and held that when the hearsay declarant is present at trial and subject to full and effective cross-examination, the Confrontation Clause does not require the exclusion of prior inconsistent statements made by that declarant.[114] Although effective cross-examination with respect to such prior statements might be comprised to some extent by subsequent re-examination, the Court concluded that the relevant question was whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.[115] The

107. 399 U.S. 149 (1970).
108. *Id.* at 151.
109. *Id.* at 151-52.
110. *Id.* The rule is codified at CAL. EVID. CODE 1235 (West 1966).
111. 399 U.S. at 153.
112. *Id.*
113. *Id.*
114. *Id.* at 164.
115. *Id.* at 161.

Court responded that "neither evidence nor reason convinces us that contemporaneous cross-examination before the ultimate trier of fact is so much more effective than subsequent examination that it must be made the touchstone of the Confrontation Clause."[116]

The Court noted that the primary concern of the Confrontation Clause is cases in which hearsay statements are admitted at trial when the hearsay declarant is unavailable for cross-examination;[117] such was not the case in *Green*.[118] The Court pointed out that in these cases the evidence is usually offered as an exception to the hearsay rule, and is said to bear special indicia of reliability justifying its admission despite the denial of the defendant's literal right to confrontation.[119] However, the Court warned,

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.[120]

Significantly, the Court did not rule out the possibility that some hearsay exceptions might satisfy the Confrontation Clause. Because the declarant in *Green* was present and subjected to cross-examination, the Court was not called upon to "map out a theory" of what hearsay exceptions might qualify.[121]

In *Dutton v. Evans*,[122] the Supreme Court for the first time allowed the introduction of hearsay evidence in a case in which the defendant had no opportunity to cross-examine the declarant at any stage of the prosecution (i.e., neither at a preliminary hearing, nor at a previous trial). In *Dutton* the defendant, Evans, along with two accomplices, Truett and

116. *Id.* (footnote omitted).

117. *Id.*

118. *Id.* In *Green*, the state's witness, Melvin Porter, was present at trial and subject to cross-examination by the defense. *Id.* at 151.

119. *Id.* The Court stated that "[t]hese situations have arisen through application of a number of traditional 'exceptions' to the hearsay rule . . . usually on the theory that the evidence possesses other indicia of 'reliability' and is incapable of being admitted . . . in any way that will secure confrontation with the declarant." *Id.* at 161-62 (footnote omitted).

120. *Id.* at 155-56.

121. *Id.* at 162.

122. 400 U.S. 74 (1970).

Williams, was charged with the murder of three police officers.[123] Shaw, a witness for the prosecution, testified as to statements made by Williams which implicated Evans in the murder.[124] It was this testimony that Evans claimed violated his right to confront the witnesses against him because Williams himself was not present at the trial to be cross-examined.[125] Nevertheless, the hearsay statement was admitted under Georgia's co-conspirator exception to the hearsay rule; the state rule, unlike the federal version, allowed statements by co-conspirators to be used against fellow conspirators even if they were made during the concealment phase of the conspiracy.[126]

On appeal, the Supreme Court held that the mere fact that Georgia's hearsay exception was broader than the federal rule did not render it in violation of the Confrontation Clause.[127] Instead, it turned to the question whether this particular hearsay exception met constitutional confrontation standards.[128] The Court focused on the fact that the circumstances under

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123. *Id.* at 76. Evans was tried separately. Twenty witnesses, including Truett, testified for the prosecution. Truett described at length Evans' participation in the murders. *Id.* at 77.

124. *Id.* at 77-78. These statements were made while Shaw and Williams were fellow inmates at a federal penitentiary. *Id.*

125. The Court noted that the defendant himself could have subpoenaed Williams but his attorney chose not to. *Id.* at 88 n.19. Query whether this would satisfy the defendant's "opportunity to cross-examine the witnesses against him."

126. *Id.* at 81. *See* GA. CODE ANN. 38-306 (1954). Under Georgia law, the statement in question was admissible under a Georgia statutory hearsay exception that allowed into evidence a statement made during the coverup phase of the conspiracy that implicated another co-conspirator. The Court held that this Georgia hearsay exception was not inconsistent with the confrontation clause.

Many cases since Dutton v. Evans, 400 U.S. 74, 98 (1970), have dealt with the issue whether statements made by co-conspirators during the furtherance of the conspiracy are admissible at trial. In United States v. Gibbs, 703 F.2d 683 (3d Cir. 1983), *reh'g en banc*, 739 F.2d 838 (1984) (affirming conviction), a prosecution for conspiracy to smuggle marijuana, the government's main evidence against defendant Jack Gibbs was a hearsay statement made by one of the accused conspirators that "Jake is going to buy the pot." The government caused this hearsay statement to be admitted at Gibbs' trial under federal rule 801(d)(3)(E)(1) (hearsay exception for a statement made by a co-conspirator in the furtherance of the conspiracy), and Gibbs was subsequently convicted.

On appeal, the Third Circuit found that, even though the hearsay statement was endowed with certain indicia of reliability (such as being made against penal interest since it was made in furtherance of conspiracy), unlike *Dutton*, the statement was not peripheral to the government's main case and unlike *Ohio v. Roberts*, 448 U.S. 56 (1980), *see infra* notes 133-56 and accompanying text, the declarant was not shown to be unavailable. Gibbs' conviction was subsequently vacated by the panel, but then reinstated by the *en banc* court, 739 F.2d 838 (1984), because the defendant's confrontation clause claim was ultimately deemed untimely.

127. 400 U.S. at 83.

128. *Id.* at 79.

which the statement was made might ensure that it was an accurate representation of Evans' involvement.[129] Specifically, Williams' statement was spontaneous and against his penal interest: the Court concluded that the circumstances went "*beyond* showing that Williams had no apparent reason to lie. . . ."[130] For these reasons,[131] the Court held that Evans was not deprived of his right of confrontation by the admission of this statement and the absence of Williams at trial.[132]

The Supreme Court squarely addressed the constitutional relationship between the Confrontation Clause and exceptions to the hearsay rule in *Ohio v. Roberts*.[133] In *Roberts* the defendant was charged with check forgery and possession of stolen credit cards.[134] At the defendant's preliminary hearing, the defense counsel called the victim's daughter Anita in order to establish that she had given the defendant permission to use both the check book and credit cards.[135] Despite a lengthy examination which included many leading questions, Anita unequivocally denied having given such permission.[136] Shortly after the preliminary hearing, Anita ran away from home. Despite the issuance of several subpoenas, Anita did not appear at the defendant's trial.[137] After the defendant took the stand to testify that Anita had given him permission to use her parents' checks and credit cards, the prosecutor introduced the preliminary hearing transcripts of the witness' testimony which directly contradicted the defendant's alibi.[138] The defendant was convicted on all counts.[139] The Ohio Court of Appeals reversed, and the Ohio Supreme Court affirmed the reversal, sustaining his Confrontation Clause objection.[140] The United States Supreme Court granted certiorari "to consider once again the

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129. *Id.* at 89.

130. *Id.* (emphasis added). In addition, the Court noted that the possibility that cross-examination of Williams would have shown the statement to be unreliable was virtually nonexistent. *Id.*

131. The Court also looked to the fact that the statement itself warned the jury against giving it undue weight; that Williams' actual knowledge of the facts of the crime had been established conclusively; and that the possibility that the statement was based on "faulty recollection" was remote. *Id.* at 88-89.

132. *Id.* at 90.

133. 448 U.S. 56 (1980).

134. *Id.* at 58.

135. *Id.*

136. *Id.*

137. *Id.* at 59.

138. *Id.* This was authorized by OHIO REV. CODE ANN. § 2945.49 (1975), which permits the use of preliminary hearing testimony when a witness cannot be produced at trial. *Id.*

139. 488 U.S. at 60.

140. *Id.* at 60-61.

relationship between the Confrontation Clause and the hearsay rule with its many exceptions."[141]

The Court began its analysis by noting that a literal reading of the Confrontation Clause would require the exclusion of any statement made by a declarant not present at trial upon the objection of counsel.[142] A literal reading would exclude virtually all hearsay, a result which was not intended by the clause.[143] The Court interpreted the Confrontation Clause as expressing a preference for face-to-face confrontation at trial in order to secure the primary interest of the right of cross-examination.[144] The Court then articulated a two-prong test for determining which hearsay exceptions might be employed absent the opportunity to cross-examine the declarant, while remaining consistent with the Confrontation Clause.[145] First, the Court noted that the sixth amendment establishes a "rule of necessity" which requires the prosecution to either produce the declarant or demonstrate his unavailability.[146] Second, if the declarant is shown to be unavailable, the hearsay statement is admissible if it is marked with such trustworthiness that it satisfies the underlying goals of face-to-face confrontation without confrontation in fact.[147] The first prong is satisfied by a showing of good faith effort to locate the missing declarant. The second prong is satisfied when indicia of reliability form a satisfactory basis for the trier of fact to evaluate the truth of the declarant's statement.[148]

In applying this test to the facts of *Roberts*, the Court found that Anita's unavailability was adequately established by the testimony of her mother that no one knew her whereabouts.[149] The Court did not require the State to conduct an exhaustive search. The second prong presented a more difficult question: Was Anita's preliminary hearing testimony sufficiently reliable to dispense with face-to-face confrontation at the defendant's subsequent trial?[150] The Court concluded that the accouterments of the preliminary hearing afforded the necessary guarantees of trustworthiness, because defense counsel was given an adequate opportunity to examine the

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141. *Id.* at 62.
142. *Id.* at 63.
143. *Id.*
144. *Id.*
145. *Id.* at 65.
146. *Id.*
147. *Id.*
148. *Id.* The Court noted that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them" would meet constitutional requirements. *Id.* at 66.
149. *Id.* at 75.
150. *Id.* at 68.

witness and failed to use that opportunity.[151]

To summarize, the historical development of the Confrontation Clause can be separated into three stages. In the early stage, beginning with *Mattox* and continuing through *Bruton*, the touchstone of compliance was in affording the defendant an opportunity to conduct meaningful cross-examination of the declarant at some juncture in the proceedings.[152] The transitional stage is represented by *Green* and *Dutton*. During this period, it was suggested that reliable hearsay might be admitted without the opportunity to cross-examine the declarant.[153] The modern stage was initiated by *Roberts*, which created the test by which the confrontation clause determines what hearsay is reliable enough to allow us to forego the safeguards of cross-examination.[154] As will be described below, the courts have consistently held that custodial hearsay statements by an accomplice are presumptively unreliable, and, therefore, their admission violates the rule of *Ohio v. Roberts*.[155] Hearsay statements by a conspirator during the course of the conspiracy, on the other hand, have received ambivalent treatment under the sixth amendment.[156]

B. *The Development of Rule 804(b)(3)*

Traditionally, declarations against penal interest were not considered hearsay exceptions as were declarations against pecuniary or proprietary interest.[157] Before the enactment of Rule 804(b)(3),[158] many jurisdictions did not allow declarations against penal interest to be used in either an inculpatory or exculpatory manner,[159] even though the practice of disal-

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151. *Id.* at 73. The Court was not willing to go so far as it did in *Green* in suggesting that the mere opportunity to cross-examine was sufficient. *Id.* at 70. The Court did, however, find that the defense counsel's examination of the witness at the preliminary hearing closely approximated a true cross-examination, and satisfied the test. *Id.* at 70-71.

152. *See supra* notes 81-106 and accompanying text.

153. *See supra* notes 107-32 and accompanying text.

154. *See supra* notes 133-51 and accompanying text.

155. 448 U.S. 56 (1980). *See infra* notes 176-209 and accompanying text.

156. *See, e.g.*, United States v. Gibbs, 739 F.2d 838 (3d Cir. 1984) (*en banc*) (out-of-court statements properly admitted under conspirator exception to hearsay rule).

157. Comment, *Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1203 (1978).

158. FED. R. EVID. 804(b)(3). For an exhaustive legislative history of the new rule, *see generally* Tague, *Perils of the Rulemaking Process: The Development, Application and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981) (author criticizes closed rulemaking process that is unduly influenced, in his opinion, by political concerns).

159. Comment, *supra* note 157, at 1203. *See also* Park v. Huff, 493 F.2d 923, 932 n.17, *rev'd on reh'g*, 506 F.2d 849 (5th Cir. 1974) (en banc).

lowing them had come under criticism for quite some time.[160]

In 1969, after *Bruton v. United States*[161] but before *Dutton v. Evans*,[162] the United States House of Representatives drew up the first proposed draft of what is now Rule 804(b)(3). The committee notes accompanying the 1969 draft indicate that Rule 804(b)(3) was not intended to apply to accomplice accusations.[163] The notes refer to Justice White's now famous dissent in *Bruton*, in which he stated that he would not have reversed Bruton's conviction, which was partially based upon an accomplice accusation, because it would be more than obvious to a juror that such statements are inherently untrustworthy; he concluded that the trial court's instructions should have been adequate for the jury to assign the proper probative weight to the statement.[164]

Additionally, the language of the draft itself clearly prohibited accomplice accusations: "[T]his example does not include a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused."[165]

The final sentence was dropped from Rule 804(b)(3) in 1971,[166] but reinserted by the House in its final draft in 1973.[167] The Senate found this reinsertion of the final sentence to Rule 804(b)(3) unacceptable,[168] and the conference committee adopted the Senate's version of Rule 804(b)(3)

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160. *See, e.g.*, Donnelly v. United States, 228 U.S. 243, 278 (1913) (Holmes, J., dissenting). Justice Holmes criticized the majority for not finding error in the trial court's refusal to allow an exculpatory declaration against penal interest into evidence.

161. 391 U.S. 123 (1968).

162. 400 U.S. 74 (1970).

163. *See* PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE DISTRICT COURTS AND MAGISTRATES, *advisory committee note*, 46 F.R.D. 161, 386 (1969) (PROPOSED FED. R. EVID. 804(b)(4).

164. *Id.* Justice White stated that:

> [D]ue to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable . . . . Because I have no doubt that serious-minded and responsible men are able to shut their minds to unreliable information when exercising their judgment, I reject the assumption of the majority that giving instructions to a jury to disregard a codefendant's confession is an empty gesture.

391 U.S. at 141-43 (White, J., dissenting).

165. PROPOSED FED. R. EVID. 804(b)(4) (1969), 46 F.R.D. 161, 378 (1969). The rule was renumbered later as 804(b)(3).

166. *See* Tague, *supra* note 9, at 1191, text and n.9.

167. *Id.* at 1191, text and n.15.

168. *Id.* at 1191, text and n.16.

which did not contain the final sentence of the 1969 draft.[169]

At least one commentator has suggested that the Senate's resistance to the omitted language was based purely on political pressures, and not on any congressional evaluation of the substance of the provision.[170] Others have suggested that this language was not included in Congress' final draft of 804(b)(3) because Congress was reluctant to codify existing constitutional principles, not because Congress intended to allow accomplice accusations into evidence in criminal trials.[171] At least one other commentator, however, has suggested that the legislative history of Rule 804(b)(3) is so ambiguous on this issue that there is no clear indictation what the conference committee had in mind when it eliminated this original language.[172]

C. *Application of Rule 804(b)(3) Today*

Because of the ambiguities in the development and final draft of Rule 804(b)(3), the federal courts have developed a combination of confrontation clause and hearsay exception rules for scrutinizing a hearsay statement under 804(b)(3). This conjugated confrontation clause-hearsay exception test has resulted in a large number of hearsay declarations not being admitted at trial, even though the literal wording of 804(b)(3) would seem to have allowed admission under this exception. This is especially true when the statement is an accomplice accusation.[173] These statements

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169. *Id.* at 1191, text and n.17.

170. *Id.* at 1193 ("In a statement before the House Subcommittee on Criminal Justice, Charles R. Halpern and George T. Frampton, representing the Washington Council of Lawyers, argued that the committee's revision . . . was motivated not by a view that inculpatory statements were reliable but rather by political pressures.") (footnote omitted). *See also Proposed Rules of Evidence: Hearings on H.R. 5463 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 180 (1973) (statement of Charles R. Halpern and George T. Frampton).

171. *See* Tague, *supra* note 158, at 1193 (Conference Committee justified adoption of Senate's version on ground that it should not attempt to codify constitutional principles on this issue). *See also* United States v. Sarmiento-Perez, 633 F.2d 1092, 1095 (5th Cir. 1981), and United States v. Alvarez, 584 F.2d 694, 700 (5th Cir. 1978), cases in which the United States Court of Appeals for the Fifth Circuit took notice of Congress's reluctance to codify constitutional principles in this area.

172. Comment, *supra* note 157, at 1198.

173. *See, e.g.*, United States v. Riley, 657 F.2d 1377, 1383-85 (8th Cir. 1981), *cert. denied*, 456 U.S. 1111 (1983); United States v. Palumbo, 639 F.2d 123, 127-28 (3d Cir.), *cert. denied*, 454 U.S. 819 (1981); United States v. Sarmiento-Perez, 633 F.2d 1092, 1102-03 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982); United States v. Oliver, 626 F.2d 254, 261-63 (2d Cir. 1980); United States v. Love, 592 F.2d 1022, 1025-26 (8th Cir. 1979); United States v. Lilley, 581 F.2d 182, 187-88 (8th Cir. 1978). These cases held that statements of an accomplice that implicated the accused and were made in response to custodial interrogation were inherently unreliable and inadmissible under Rule 804(b)(3).

traditionally have been viewed with great suspicion.[174] They are the type of statements in which the declarant often may have strong motives to falsify or exaggerate the role of his codefendant in order to transfer some of the blame from himself to the accused.[175]

Due to the obvious inherent unreliability of accomplice accusations, the federal courts generally have found these statements to be outside the declaration against penal interest hearsay exception of Rule 804(b)(3).[176] For example, in *United States v. Sarmiento-Perez*,[177] the United States Court of Appeals for the Fifth Circuit developed the landmark standard for consideration of accomplice accusations. The defendant, Sarmiento-Perez, was convicted of one count of conspiring to possess cocaine with intent to distribute[178] and two counts of distribution of cocaine.[179] The government's case-in-chief consisted of limited circumstantial surveillance evidence obtained by federal agents, and a custodial confession by codefendant Aguilar.[180] The confession implicated Aguilar and a confederate in the smuggling scheme and named Sarmiento-Perez as the source of the cocaine.[181]

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174. *See, e.g.*, Dutton v. Evans, 400 U.S. 74, 98 (1970) (Harlan, J., concurring) (confession of accomplice resulting from formal police interrogation is unreliable; should not be used against accused as evidence of guilt).

175. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 141-42 (1968) (White, J., dissenting) (there are obvious motives to falsify or exaggerate role of accomplice in custodial confession of codefendant).

176. *See supra* note 173; *see also* 5 J. WIGMORE, EVIDENCE 2056 (3d ed. 1940). The testimony of one accomplice against another has traditionally been viewed as inherently unreliable. As early as the seventeenth and eighteenth centuries in England, accomplices were competent to testify against each other at trial; however, judges were often required to specially instruct juries that the uncorroborated testimony of an accomplice alone is not sufficient for conviction, because of the obvious possible motives for falsification or exaggeration, such as conditional clemency.

In nearly half the jurisdictions in the United States, a statute has turned this cautionary practice into a strict rule of law. *See, e.g.*, CAL. PEN. CODE § 1111 (West 1970) (accomplice's testimony not sufficient "unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof"); GA. CODE ANN. § 24-4-8 (1982):

> The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason.

177. 633 F.2d 1092 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982).

178. 21 U.S.C. 846.

179. 21 U.S.C. 841(a)(1).

180. 633 F.2d at 1097 n.3.

181. *Id.*

Aguilar was tried separately, and was called by the government as a witness against Sarmiento-Perez.[182] Aguilar thereupon exercised his privilege against self-incrimination, and was found by the trial court to be "unavailable" as a witness.[183] Over the defendant's objection, a transcript of Aguilar's custodial confession was then read into evidence on the ground that the confession qualified under Rule 804(b)(3) as a declaration against penal interest.[184] Sarmiento-Perez was subsequently convicted on all counts.[185]

On appeal, the Fifth Circuit reversed the defendants' convictions.[186] The court found that the inculpatory custodial confession made by Aguilar was inherently unreliable, since it did not contain any of the indicia of reliability that would render it admissible under Rule 804(b)(3).[187] The court went on to hold that, since the confession did not qualify under the declaration against penal interest hearsay exception of Rule 804(b)(3), it was unnecessary to consider whether the introduction of the confession also violated the defendant's sixth amendment right to confrontation.[188]

In reviewing the custodial confession at issue in *Sarmiento-Perez*, the Fifth Circuit noted several factors indicating the unreliability of Aguilar's confession. The court discussed Aguilar's possible motives for falsification, and the natural desire to curry favor with the police authorities by implicating others.[189] The court also noted that the enmity generated in a conspiracy gone awry and the desire for revenge were also possible motives for Aguilar's implication of Sarmiento-Perez.[190] The court considered the most significant factor to be that Aguilar was allowed to plead guilty to only one of the five counts for which he was originally charged.[191] Beyond

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182. *Id.* at 1097.
183. *Id.* at 1093.
184. *Id.*
185. *Id.* at 1096.
186. *Id.* at 1105.
187. *Id.* at 1104.
188. *Id.* at 1105.
189. *Id.* at 1102.
190. *Id.*
191. Note also that the court's holding in *Sarmiento-Perez* was in part based on the decision of the United States Court of Appeals for the Fifth Circuit in United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978), which established a two-prong test for determining the trustworthiness of a statement under 804(b)(3). Under *Alvarez*, for a statement to qualify under the declaration against penal interest hearsay exception of 804(b)(3), the government must establish: (1) the trustworthiness of the in-court witness; and (2) the reliability of the out-of-court declaration. *Id.* at 701. In establishing this test, the court noted that "this construction fully corresponds to the court's directive in *Dutton v. Evans* . . . and will thus avoid the constitutional difficulties that Congress acknowledged but deferred to judicial resolution." *Id.* The court noted that without this interpretation the

the court's assessment of the particular facts of *Sarmiento-Perez*, the court found that accomplice accusations are inherently unreliable, and cannot lie within the intended scope of Rule 804(b)(3).[192]

In *United States v. Riley*,[193] the Eighth Circuit held that an accomplice's custodial statement implicating the defendant, although it appeared to be against the declarant's penal interest, was inherently unreliable and not admissible under Rule 804(b)(3). In *Riley*, the defendant Riley was convicted of violating the Mann Act,[194] which prohibits the interstate transportation of a minor for purposes of prostitution. The teenage girls that Riley was alleged to have so transported implicated Riley in their confessions to police after being charged with prostitution.[195] As in *Sarmiento-Perez*, the court in *Riley* noted that accomplice accusations can be self-serving, and, therefore, are inherently

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declaration against interest exception could swallow the coconspirator exception, since most of the things conspirator A might say that could incriminate conspirator B could also *tend* to incriminate A, because such a remark could indicate that A had an insider's knowledge of crime; after analyzing trustworthiness in the particular case, the court found the statement could not be admitted. *Id.* at 701.

192. *Sarmiento-Perez*, 633 F.2d at 1102-03.

> The unreliability of the confession in this case is predicated upon circumstances that inhere in the making of virtually every custodial confession. It is for this reason that such statements have traditionally been viewed with "special suspicion." *Bruton v. United States*; 391 U.S. 123, 141, 88 S.Ct. 1620, 1631, 20 L.Ed.2d 476 (1968) (White, J., dissenting). *See* Advisory Committee Notes to Fed. R. Evid. 804(b)(3); 4 Weinstein's Evidence ¶ 804(b)(3)[03] at 804-139, -110, -111 & n.32.
>
> For those same reasons, third-party *custodial* confessions, when offered to inculpate a criminal defendant, lack those "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970), are thus inherently untrustworthy in the eyes of the sixth amendment, *see Ohio v. Roberts*, ____ U.S. at ____, 100 S.Ct. at 2539, and cannot for that reason lie within the intended scope of the hearsay exception for statements against penal interest. *See Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965).

Id. In reaching this conclusion, the court alluded to Justice White's dissent in Bruton v. United States; *see supra* note 164.

193. 657 F.2d 1377 (8th Cir. 1981), *cert. denied*, 459 U.S. 1111 (1983).

194. 18 U.S.C. § 2423(a) provides in part:

> Any person who transports, finances in whole or part the transportation of, or otherwise causes or facilitates, the movement of any minor in interstate or foreign commerce or within the District of Columbia or any territory or other possession of the United States, with the intent —
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> (1) that such minor engage in prostitution;
>
> . . . .
>
> shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

195. 657 F.2d at 1379.

unreliable.[196] The court discussed several possible explanations for the girls' implication of Riley other than the truth. Among these factors, the *Riley* court found that (1) they were in custody when the confessions were made (citing *Sarmiento-Perez*); (2) the prostitution charges were far less serious than the Mann Act charges against Riley; and (3) one of the girls had been told that a prostitution conviction could jeopardize the custody of her child, and that it was in fact in her interest to confess to the prostitution charges and implicate Riley on the more serious Mann Act violation.[197] Based on these factors, the *Riley* court held that the confession of one of the girls used to convict Riley did not fit within the Rule 804(b)(3) hearsay exception, and reversed Riley's conviction.[198]

Another case in which a court found an accomplice accusation to fall outside of the Rule 804(b)(3) hearsay exception was *Olson v. Green.*[199] *Olson* involved a federal habeas corpus review of the defendant's Minnesota convictions for the first degree murders of a mother and her two children.[200] Olson was found guilty of setting fire to the victims' apartment after he had tied two of them to the bed posts.[201]

Link, the accomplice who drove the getaway car, confessed to police after her arrest on murder charges. Link testified at her own trial that she was told by Olson that he only wanted to burn some clothes and wanted no one hurt.[202] However, her post-arrest statements deeply implicated Olson in the murders, while absolving her of knowing complicity.[203]

In spite of a court order to testify, Link refused to do so; her confession was admitted at trial over Olson's objection, under the Minnesota analogue of Rule 804(b)(3).[204] On federal habeas corpus review, the United States Court of Appeals for the Eighth Circuit held that the admission of Link's confession at Olson's trial violated Olson's sixth amendment confrontation rights under the rule of *Ohio v. Roberts.*[205] The court in *Olson* noted: "United States Supreme Court decisions as well as decisions from the courts of appeals indicate that custodial statements implicating a third person do not fall within a firmly rooted hearsay exception."[206]

196. *Id.* at 1384.
197. *Id.*
198. *Id.* at 1385.
199. 668 F.2d 421 (8th Cir. 1982).
200. *Id.* at 422-23.
201. *Id.* at 423.
202. *Id.* at 425.
203. *Id.* at 426.
204. MINN. R. EVID. 804(b)(3) is identical to FED. R. EVID. 804(b)(3).
205. 448 U.S. 56 (1980).
206. 668 F.2d 421, 427-28.

Unlike the Fifth Circuit's decision in *Sarmiento-Perez* and the decision in *Riley*, the court in *Olson* took the next logical step: since an accomplice accusation did not fall within a traditional hearsay exception, and since the statement therefore bore no indicia of reliability, the introduction of the accusation must, under *Dutton* and *Roberts*, have violated the confrontation clause. Unfortunately for Olson, however, the court also found the confrontation clause violation to have been harmless beyond a reasonable doubt.[207]

Sarmiento-Perez, Riley and *Olson* are not isolated cases; they are representative of the general principle articulated in federal and state courts that inculpatory custodial confessions are so inherently unreliable that they cannot fall within a traditional hearsay exception such as a declaration against interest.[208] However, even if a state court could find these confessions to fall within a state's declaration against penal interest hearsay exception, the introduction of such statements would still violate present confrontation clause standards.[209]

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207. *Id.* at 430.

208. *See supra* note 173; *see also* State v. Parris, 30 Wash. App. 268, 633 P.2d 914 (1981) (inculpatory custodial confession inherently unreliable and inadmissible under Washington's declaration against penal interest hearsay exception); People v. Bresnie, 118 Misc. 2d 390, 466 N.Y.S.2d 979 (1983) (inculpatory custodial confessions traditionally suspect and inherently untrustworthy).

The type of sixth amendment scrutiny exemplified by *Sarmiento-Perez, Riley* and *Olson* has not necessarily predominated in closely related cases involving statements made by one coconspirator implicating another, or in situations involving inculpatory statements of unindicted accomplices. *See, e.g.*, United States v. Katsougrakis, 715 F.2d 769 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 704 (1984) (in prosecution for mail fraud, conspiracy to commit arson, and use of explosive to destroy commercial building, men paid to start fire were trapped inside building and badly burned; government's witness visited one burned man in hospital who, by nodding head, indicated that defendant paid him to start fire). Although the *Katsougrakis* court paid lip service to general guiding principles for determining whether the statement was sufficiently disserving to be considered against penal interest, it noted that the nodding declarant may have been aware of his proximity to death, and may not have believed that statement would subject him to criminal liability. The nodding declarant died shortly after he made the hearsay "nod" to the witness.

209. *See, e.g., Olson*, 668 F.2d at 428.

> Thus, although Link's statements may have qualified for admission under Minnesota's penal-interest exception to the hearsay rule, this alone does not guarantee a sufficient degree of reliability for confrontation clause purposes. Moreover, Link's statements to police do not carry the particularized guarantees of trustworthiness that will satisfy confrontation clause requirements.

Id.

III. Custodial Accomplice Acusations as the Basis of Probable Cause

A. Traditional Probable Cause Requirements Under the Fourth Amendment

The fourth amendment of the United States Constitution provides that "[n]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ."[210] This provision was designed to prevent the issuance of warrants on "vague or doubtful bases of fact," and emphasizes "the purpose to protect against all general searches" and arrests.[211]

Since the early days of the Republic, the notion of probable cause has remained fairly uniform. Chief Justice Marshall observed that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion."[212] Recent cases generally have held that a showing of a probability that the evidence sought will be found at a particular location is a sufficient basis for probable cause.[213] There need not, however, be a prima facie showing of criminal conduct; the Supreme Court has gone so far as to hold that affidavits of probable cause generally are tested by less rigorous standards than those governing admissibility of evidence in criminal cases.[214] In addition, judges should review a magistrate's finding of probable cause in a common sense rather than a hypertechnical manner.[215]

A search or arrest may be carried out by police officials without a warrant, but the standard of "reasonableness" for warrantless searches is theoretically higher than that which must be shown when a warrant is first obtained.[216]

The determination of probable cause for a warrant must be made by a neutral and detached judicial official.[217] A magistrate cannot rely only on

210. U.S. Const. amend. IV.

211. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

212. Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813).

213. *See, e.g.,* Beck v. Ohio, 379 U.S. 89, 96 (1964).

214. McCray v. Illinois, 386 U.S. 300, 311 (1967) (evidence inadmissible at trial due to failure to disclose informant's identity still proper for showing of probable cause to issue warrant).

215. United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

216. The reasons for this rule go to the very foundation of the fourth amendment. Any standard allowing policemen to make warrantless searches on the same evidence as necessary for a search with a warrant would discourage warrants being sought and "would reduce the [Fourth] Amendment to a nullity." Johnson v. United States, 333 U.S. 10, 14 (1948).

217.

conclusions and suspicions of policemen seeking a warrant, but must be provided with adequate facts to make an independent probable cause determination.[218] For example, in *Nathanson v. United States*,[219] a search warrant was issued upon an officer's sworn allegation that he "has cause to suspect and does believe" that intoxicating liquor could be found at the defendant's home.[220] Finding that the affidavit "went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts," the Supreme Court developed the following rule: "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."[221] Furthermore, the information in the affidavit for a warrant may be based on hearsay, thereby not reflecting the personal observations of the affiant, if the magistrate is informed of some of the underlying circumstances which provide a substantial basis for a finding of probable cause;[222] for example, information from which the police informant concluded that evidence of criminal activity could be found at a particular location.[223]

In 1964, the Supreme Court sought to standardize the requirements for probable cause based on an informant's hearsay statements in *Aguilar v. Texas*.[224] In *Aguilar*, the defendant was charged with possession of heroin.[225] At his trial, Aguilar moved to suppress the heroin from evidence on the ground that the heroin was the fruit of an illegal search. He contended that there was not a sufficient showing of probable cause made to the magistrate for the search warrant to have issued.[226] The trial court

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

Id. at 13, 14. *See also* Aguilar v. Texas, 378 U.S. 108, 110 (1964) (determinations of magistrates preferred over those of officers).

218. Nathanson v. United States, 290 U.S. 41, 46 (1933). *See also* Girandello v. United States, 357 U.S. 480, 486 (1958) (magistrate should not unquestioningly accept conclusion but should evaluate persuasiveness of facts).

219. 290 U.S. 41 (1933).

220. *Id.* at 44.

221. *Id.* at 47.

222. Jones v. United States, 362 U.S. 257, 269-71 (1960).

223. Rugendorf v. United States, 376 U.S. 528 (1964).

224. 378 U.S. 108 (1964).

225. *Id.* at 109-10.

226. *Id.* at 110. In order to obtain a search warrant for Aguilar's home, the officers

denied Aguilar's motion and allowed the heroin into evidence.[227] Aguilar was subsequently convicted.[228]

On certiorari to the United States Supreme Court, the Court held that when an affidavit for a search warrant is based on the hearsay statements of a police informant, the informant's "credibility" or the "reliability of his information" must be established.[229] The Court went on to note that neither of these requirements had been satisfied by the information set out in the affidavit for the warrant; therefore, no showing of probable cause supported issuance of the warrant.[230] Aguilar's conviction was subsequently reversed and remanded for further proceedings.[231]

This "credibility or reliability" standard of *Aguilar* was further developed in *Spinelli v. United States*.[232] Spinelli was charged with travelling across state lines with the intention of conducting gambling activities in Missouri,[233] in violation of a Missouri gambling statute.[234] The Federal Bureau of Investigation (FBI) had Spinelli under surveillance for five days prior to its application for the search warrant; during this time, FBI agents claimed to have observed him on several occasions crossing a bridge from East St. Louis, Illinois, and entering an apartment in St. Louis, Missouri.[235] The FBI also learned from the telephone company that Spinelli had two telephones registered under a different name in his St.

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submitted an affidavit which, in relevant part, recited that: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates 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." *Id.* at 109.

227. *Id.* at 110.

228. *Id.*

229. *Id.* at 114.

230. *Id.* at 115-16.

231. *Id.* at 116.

232. 393 U.S. 410 (1969).

233. Crossing state lines for the purpose of gambling is regulated by 18 U.S.C. § 1952 (1982). The relevant portion of § 1952 reads:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate . . . commerce . . . with intent to —
>
> . . . .
>
> (3) otherwise promote, manage, establish, carry on . . . any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States . . . .

234. Mo. Rev. Stat. § 563.360 (1959).

235. 393 U.S. at 413.

Louis apartment.[236] In its affidavit for a warrant to search Spinelli's apartment, the FBI noted these facts, and also that confidential informants had told the FBI that Spinelli was taking bets and disseminating wagering information over the telephone registered to Spinelli.[237] The affiants also stated that they personally knew of Spinelli's reputation as a gambler and bookmaker.[238]

A search warrant was issued and gambling records and other evidence of Spinelli's gambling activities were seized. The district court denied Spinelli's motion to suppress on the ground that Spinelli lacked the proper standing to claim a fourth amendment violation.[239] Spinelli was subsequently convicted.[240]

On direct appeal, the United States Court of Appeals for the Eighth Circuit found that Spinelli did have proper standing, and reversed Spinelli's conviction. However, after an en banc rehearing, the Eighth Circuit affirmed the conviction by a six to two vote.[241]

On certiorari, the United States Supreme Court found that both the panel and en banc decisions of the Eighth Circuit had attempted to apply the "credibility or reliability" standard of *Aguilar v. Texas* to the facts in Spinelli's case, yet had reached opposite conclusions.[242] The Court noted that the consideration of an informant's credibility or the reliability of his information could not be consistently applied within the traditional "totality of the circumstances" context used by the Eighth Circuit in Spinelli's appeal: "We believe that the 'totality of the circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis."[243]

Articulating a more consistent standard for judicial determinations of probable cause, the Supreme Court held that an affidavit for a warrant based on hearsay must set out facts sufficient to show the magistrate: (1) the veracity or credibility of the hearsay informant, and (2) the basis of the informant's knowledge of the defendant's suspected criminal activities.[244] In applying this two-pronged analysis to the facts of *Spinelli*, the Supreme

236. *Id.* at 413-14.
237. *Id.* at 414.
238. *Id.*
239. *Id.* at 412.
240. *Id.* at 411.
241. 382 F.2d 871 (8th Cir. 1967), *rev'd*, 393 U.S. 410 (1983).
242. 393 U.S. at 412.
243. *Id.* at 415.
244. *Id.*

Court found that the FBI's affidavit had failed to show the issuing magistrate facts sufficient for him to have found probable cause for the search warrant to have issued, since neither the credibility of the informant nor the basis of his knowledge were set out in the affidavit for the warrant.[245]

B. The Resurrection of the Totality of the Circumstances Approach in Probable Cause Determinations

The Aguilar-Spinelli two-pronged test for judicial review of a magistrate's determination of probable cause was substantially repudiated in the spring of 1983 in *Illinois v. Gates*.[246] In *Gates*, the Bloomingdale, Illinois Police Department received an anonymous letter stating that Lance and Sue Gates, husband and wife and residents of Bloomingdale, Illinois, were engaged in a continuing series of illegal drug sale transactions. The letter also stated that Sue Gates would drive the Gateses' car from Bloomingdale, Illinois, to Florida, leave the car, and fly back; several days later, Lance Gates would fly to Florida, load a quantity of drugs into the trunk, and drive back to Bloomingdale. The letter also stated that the Gateses kept thousands of dollars worth of drugs in their home.[247]

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245. *Id.* at 416.

> Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was reliable, he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that *Aguilar*'s other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information — it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Id. (citation omitted).

246. 462 U.S. 213 (1983).

247. The anonymous letter received by the Bloomingdale, Illinois, Police Department read as follows:

> This letter is to inform you that you have a couple in your town who strictly make their living on selling drugs. They are Sue and Lance Gates, they live on Greenway, off Bloomingdale Rd. . . . Sue his wife drives their car to Florida, where she leaves it to be loaded up with drugs, then Lance flys down and drives it back. Sue flys back after she drops the car off in Florida. May 3 she is driving down

The Bloomingdale Police Department pursued the tip, and learned that a reservation had been made for a flight from O'Hare International Airport to West Palm Beach, Florida, in the name of one L. Gates. The Drug Enforcement Agency (DEA) was contacted and provided surveillance of the Gateses' activities in Florida and on their trip back to Illinois.[248]

Based on the anonymous tip and its subsequent corroboration, the Bloomingdale Police obtained a search warrant for the Gateses' car and house.[249] Upon their return to Bloomingdale, the trunk of the Gateses' car and the basement of their house were searched; substantial quantities of marijuana, weapons and other contraband were found.[250]

At a pretrial hearing, an Illinois Circuit Court granted the Gateses' motion to suppress the evidence based on a claim of lack of probable cause for issuance of the search warrant.[251] The ruling of the Illinois Circuit Court was affirmed by both the Illinois Court of Appeal[252] and the Illinois Supreme Court.[253]

On certiorari, the United States Supreme Court reversed, holding that the police had made a sufficient showing of probable cause for the search warrant to have issued.[254] Writing for the majority, Justice Rehnquist stated that the Aguilar-Spinelli test was too inflexible for every possible situation that may give rise to a substantial inference or suspicion of criminal activity and must, therefore, be replaced with the pre-Aguilar "totality of the circumstances" approach.[255]

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there again and Lance will be flying down in a few days to drive it back. At the time Lance drives the car back he has the trunk loaded with over $100,000.00 in drugs. Presently they have over $100,000.00 worth of drugs in their basement.

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

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

Lance & Susan Gates
Greenway
in Condominiums

Id. at 225.

248. *Id.* at 225-26.

249. *Id.* at 226.

250. *Id.* at 227.

251. *Id.*

252. 82 Ill. App. 3d 749, 403 N.E.2d 77 (1980).

253. 85 Ill. 2d 376, 423 N.E.2d 887 (1981).

254. 462 U.S. 213.

255. *Id.* at 232.

As these comments illustrate, probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in

The facts of *Gates* were significantly different than those in other major probable cause cases. Unlike the facts in cases such as *Aguilar, Spinelli* and *Draper v. United States*,[256] in *Gates* the identity of the informant was not known to the police seeking the warrant. Thus, the police certainly could neither vouch for the informant's credibility, nor give the issuing magistrate any factual basis for him to determine the informant's credibility. However, the police corroboration and suspicious nature of the Gateses' actions convinced the majority in *Gates* that a strong suspicion of criminal activity existed. The Supreme Court was thus faced with the choice of either expanding the Aguilar-Spinelli test to allow for the establishment of the credibility prong by independent police corroboration of an anonymous tip, or replacing the Aguilar-Spinelli test with some other standard for probable cause determinations. The *Gates* Court chose the latter approach. However, because of the ambiguities inherent in applying the totality of the circumstances test, it is arguable whether there exists sufficient flexibility in *Gates* for state and federal courts to find that *Gates* was an extension, and not a complete repudiation, of the Aguilar-Spinelli test.[257]

The first and most obvious problem that a trial or appellate court might have in working with *Gates* is that "totality of the circumstances" is essentially standardless. It gives neither the police nor magistrates any guidance in determining the sufficiency of a hearsay affidavit for probable cause.[258] To the extent that courts seek a consistent approach to probable cause determinations, they either will have to develop new tests for the sufficiency of certain categories of hearsay evidence to establish probable cause, or continue to rely on the fundamentally sound legal analysis underlying the Aguilar-Spinelli approach.

> many shapes and sizes from many different types of persons. As we said in *Adams v. Williams*, 407 U.S. 143, 147: "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation."

Id.

256. 358 U.S. 307 (1959).

257. Since the Court in *Gates* held that factors such as the "veracity" of the informant and the basis of his knowledge are still critical considerations in probable cause determinations, 462 U.S. at 233, it seems that under any approach the Court might choose to take, probable cause cannot be found without addressing each of these factors. This seems to indicate that the Supreme Court in *Gates* is attempting to modify the Aguilar-Spinelli approach rather than overrule it.

258. The basis for the Court's decision in *Spinelli* was that the traditional "totality of the circumstances" approach to probable cause determinations was too vague to give either magistrates or reviewing courts any consistent standard by which to judge probable cause determinations. 393 U.S. at 415.

The second major problem evident in *Gates* is the majority's contention that a deficiency in one of the *Spinelli* prongs can be cured by a strong showing of the other.[259] A question comes to mind: can probable cause stem from an informant's tip, supported strongly by facts supplied by police which demonstrate the informant's knowledge, if the informer is a convicted perjurer? The answer apparently would be no, since the poor credibility of the informant casts great doubt on his tip no matter how strong the basis of his knowledge is shown to be. Thus, rather than allowing for one prong to cure another, common sense dictates that a weak showing of one prong detracts from the reliability of the other.

Common sense would also dictate that a tip from an informant of extremely trustworthy character cannot satisfy the mandates of probable cause if the basis of his knowledge is not shown and so that the magistrate can make an independent determination of probable cause. In this situation, the magistrate would have to rely on the conclusory allegations of criminal activity made by the informant. Since, even under the pre-*Aguilar* "totality of the circumstances" approach, a magistrate cannot rely on the conclusory allegations of a presumptively trustworthy policeman,[260] it would make no sense to assume that the magistrate could rely on the uncorroborated, conclusory allegations of a police informant.[261]

Because the Aguilar-Spinelli test is a well structured articulation of a common sense approach, *Gates* most likely will be read by many federal and state courts as allowing a finding of probable cause in an anonymous tip situation when the credibility-veracity prong of *Spinelli* is established by independent police corroboration of certain aspects of the tip, and when the basis of knowledge prong has also been established.[262] In these situations,

259. 462 U.S. at 233. This statement by the majority in *Gates* implies that the Aguilar-Spinelli approach has not been abandoned, but only modified. Both prongs must still be necessary if the strength of one can cure the weakness of the other.

260. *See, e.g.*, Girandello v. United States, 357 U.S. 480, 486 (1958).

261. *See Gates*, 462 U.S. at 287-88 (Brennan, J., dissenting).

> It also should be emphasized that cases such as *Nathanson v. United States* . . . directly contradict the Court's suggestion . . . that a strong showing on one prong of the *Aguilar* test should compensate for a deficient showing on the other. If the conclusory allegations of a presumptively reliable police officer are insufficient to establish probable cause, there is no conceivable reason why the conclusory allegations of an anonymous informant should not be insufficient as well. Moreover, contrary to the Court's implicit suggestion, *Aguilar* and *Spinelli* do not stand as an insuperable barrier to the use of even anonymous informants' tips to establish probable cause. . . . It is no justification for rejecting them outright that some courts may have employed an overly technical version of the *Aguilar-Spinelli* standards.

Id. (citations omitted).

262. In Draper v. United States, 358 U.S. 307 (1959), the United States Supreme

however, if the probable cause requirement is to continue to have meaning, the police corroboration itself, independent of the tip, would have to indicate a high probability of criminal conduct by the suspect. The corroborating factors should arise from observation of the suspect's acts before the tip may give rise to a showing of probable cause. Thus, to the extent this rationale is followed, *Gates* could have been read as an expansion, and not a repudiation, of the Aguilar-Spinelli analysis. In the wake of *Upton*, however, there is no doubt that the Supreme Court intended in *Gates* to repudiate the legal analysis of *Spinelli*. As indicated above, the courts will have to develop alternative tests for probable cause if fourth amendment litigation is to remain principled. However, tests for the reliability of hearsay evidence already exist, as discussed in the previous section.

C. Hearsay Accomplice Statements Under Fourth Amendment Scrutiny

1. Pre-*Gates* Treatment of Declarations Against Penal Interest as a

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Court found that a tip which by itself could not demonstrate probable cause for a warrant to issue could provide a sufficient basis for a probable cause determination if it was corroborated by independent police investigation. *Draper* involved a police informant who notified police authorities that Draper would arrive at the Denver train station on September 8 or 9, and would be carrying a briefcase containing a large quantity of heroin. The informant also described in great detail the clothes that Draper would be wearing, and noted that he would be walking through the train station at a fast pace. Draper appeared at the train station in the exact clothing the tip stated he would, and also walked through the train station at a fast pace. *Id.* at 309-10. The police arrested him at the train station, without securing a warrant, and found heroin in his briefcase. *Id.*

Draper was convicted; the Supreme Court held that the extensive corroboration of the informant's tip provided a sufficient basis for probable cause for the arrest even without a warrant. *Id.* at 313-14.

In *Spinelli*, where the Supreme Court refined the two-pronged analysis developed in *Aguilar*, the Court specifically alluded to *Draper* and noted that *Draper* would still pass muster under the *Spinelli* two-pronged analysis since the credibility of the informant had been independently established by facts known to the police at the time of the arrest, and the basis of knowledge of the informant had been established by police corroboration of the tip. 393 U.S. at 417-18.

The Supreme Court in *Gates* failed to consider whether police corroboration could establish the *Spinelli* credibility-veracity prong as well as the basis of knowledge prong. The Court concluded the *Aguilar-Spinelli* test was too rigid, since the credibility-veracity prong could not have been established under the *Gates* situation. However, in his concurring opinion in *Gates*, Mr. Justice White agreed that probable cause was sufficiently demonstrated for the warrant to have issued, but he considered the case under the *Spinelli* two-pronged analysis, and thought both prongs were established by police corroboration of the anonymous tip. Mr. Justice White, therefore, expressly rejected the majority's "overruling" of the Aguilar-Spinelli analysis. 462 U.S. at 272-74 (White, J., concurring).

Basis for Showing an Informant's Credibility in Probable Cause

(a) Determinations

As noted earlier, traditional fourth amendment analysis of statements characterized as made against penal interest has been generally standardless. Problems have arisen when a magistrate or reviewing court has found that a hearsay statement appears to have been made against the informant's penal interest and then, with no further consideration of the circumstances surrounding the statement, has attributed substantial reliability to that statement. A classic example of this type of superficial treatment can be seen in *United States v. Harris*.[263]

Harris involved a prosecution for possession of non-tax-paid liquor in violation of 26 U.S.C. 5205(a)(2). Federal agents obtained a warrant to search Harris's house with an affidavit based on statements of police informants who claimed to have recently purchased illegal liquor from Harris at his home.[264] Upon a search of Harris's home, illegal liquor was discovered, and Harris was convicted.[265]

The United States Court of Appeals for the Sixth Circuit reversed Harris's conviction[266] on the ground that the informant's affidavit failed to satisfy either prong of *Aguilar*.[267] On certiorari, the United States Supreme Court reversed the Court of Appeals and reinstated Harris's conviction, holding that sufficient facts had been set out in the affidavit for

263. 403 U.S. 573 (1971).

264. The affidavit for the warrant to search Harris's house contained the following:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, and for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding known as and utilized as the "dance hall," and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

403 U.S. at 575-76.

265. *Id.* at 576.

266. 412 F.2d 796 (6th Cir. 1969), *rev'd*, 403 U.S. 573 (1971).

267. *Id.* at 797-98.

the warrant to satisfy both prongs of *Aguilar*.[268] The Court held that the basis of the informant's knowledge that the whiskey was being kept at a particular location could be ascertained from his allegation that he had purchased illegal whiskey from Harris at his home.[269] The Court also held that the issuing magistrate could have found the credibility of the informant to have been established since his statement subjected him to criminal liability.[270]

Rather than examining the underlying circumstances surrounding the making of the statement or considering the possible motives for the informant to have falsified or exaggerated the information, the Court held that, since the informant's statement facially appeared to have subjected him to criminal liability, it was reliable.[271] In addition, the Supreme Court held without elaboration that the inadmissibility of the informant's statements at trial should not detract from their reliability since Confrontation Clause standards were more strict than standards for determination of probable cause.[272]

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268. 403 U.S. at 577.
269. *Id.* at 579-80.
270. *Id.* at 583-84.
271. *Id.* at 584.

> Quite apart from the affiant's own knowledge of respondent's activities, there was an additional reason for crediting the informant's tip. Here the warrant's affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased "illicit whiskey." These statements were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code. Section 5205(a)(2), Title 26, United States Code, proscribes the sale, purchase, or possession of unstamped liquor.
>
> 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.

Id. at 583-85.

272. *Id.* at 582-84.

> Trials are necessarily surrounded with evidentiary rules "developed to safeguard men from dubious and unjust convictions." . . . But before the trial we deal only with probabilities that "are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." . . . More important, the issue in warrant proceedings is not guilt beyond a

The plurality opinion in *Harris* was faulty in several respects. The Court began by analogizing the facts of *Harris* to those of *Jones v. United States*[273] to justify the conclusion that the reliability of the informant had been properly established. In *Jones*, police informants stated that they had bought heroin from Jones on several occasions at his apartment, and that Jones always kept a supply of heroin on hand at the apartment. They also described the exact location in the apartment where the heroin was kept. The affidavit for the warrant also set out that the informants were known drug addicts and that they had displayed needle marks on their arms to substantiate this. In addition, the affidavit further stated that the informants had supplied reliable information to the narcotics squad on several prior occasions.[274] Based on the hearsay statements of the informants, the Supreme Court found the affidavit to have sufficiently shown probable cause for the search warrant to have issued, and upheld Jones's conviction.[275]

In *Harris*, the Supreme Court held that the credibility prong was satisfied, since the informants' statements facially could be characterized as against their penal interest, and since the Supreme Court in *Aguilar* cited *Jones* as allowing the credibility prong of *Aguilar* to be established by a showing that an informant's tip was against his penal interest.[276] Unlike the affidavit in *Harris*, however, the affidavit in *Jones* set out facts upon which the issuing magistrate could have made an independent determination of the informant's reliability, without relying on the statement being against penal interest: the affidavit stated that the hearsay informant had supplied the affiants with reliable information on several prior occasions.[277] Thus, even under the Aguilar-Spinelli test, the veracity or credibility of the undisclosed informants in *Jones* could have been shown without having to characterize the statements as against their penal interest. However, in *Harris*, the only statements regarding the informant's credibility other

> reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. . . . Whether or not *Donnelly* is to survive as a rule of evidence in federal trials, it should not be extended to warrant proceedings to prevent magistrates from crediting, in all circumstances, statements of a declarant containing admissions of criminal conduct. As for *Bruton*, that case rested on the Confrontation Clause of the Sixth Amendment which seems inappropriate to *ex parte* search warrant proceeding under the Fourth Amendment.

Id. (citations omitted).

273. 362 U.S. 257 (1960).

274. *Id.* at 268-69.

275. *Id.* at 271-73.

276. 403 U.S. at 578-79.

277. 362 U.S. at 268-69.

than those characterized by the Court as made against penal interest, were those by the affiant that he believed the informant to have been a "prudent person." The Court's analogizing *Harris* to *Jones* to justify the conclusion that the veracity-credibility prong of *Aguilar* could be established only with statements made against penal interest was, therefore, inappropriate.

The second defect in the Supreme Court's analysis in *Harris* was its conclusion that the statement made by the informant could properly be characterized as one made against his penal interest. As pointed out by the dissent in *Harris*, the fact that the hearsay declarant was a police informant not in custody would support an assumption that the declarant in no way believed that the statement made to the police would have exposed him to any sort of criminal liability.[278] Without a conscious and immediate belief on the part of the informant that his statement might expose him to criminal liability, his statement could not properly be characterized as one made against his penal interest and could not, therefore, be deemed reliable on that basis.[279]

The plurality's decision in *Harris* also was faulty in a more fundamental way. It relied upon the arguable difference between fourth amendment and sixth amendment protections as a basis for implying that a lower threshold is required to characterize a disserving hearsay statement as reliable. However, the concept of reliability — central to decisionmaking regarding a citizen's liberty interest — does not itself have a constitutional foundation; rather, its foundation is in logic and legal reasoning.[280] The

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278. 403 U.S. at 595.

> Secondly, the rationale for this exception to the hearsay rule is that the fact that the declaration was against the speaker's self-interest tends to indicate that its substance is accurate. 5 J. Wigmore, Evidence 1457 (3d ed. 1940). But, where the declarant is also a police informant it seems at least as plausible to assume, without further enlightenment either as to the Government's general practice or as to the particular facts of this case, that the declarant-confidant at least believed he would receive absolution from prosecution for his confessed crime in return for his statement. (This, of course, would not be an objection where the declarant is not also the informant. See *Spinelli*, 393 U.S. at 425 (White, J., concurring).) Thus, some showing that the informant did not possess illusions of immunity might well be essential.

Id. at 595.

279. For a statement to be deemed reliable, the declarant must have believed the statement to have actually subjected him to either civil or criminal liability. The superficial treatment of the statements deemed reliable in *Harris* flatly ignores this reasoning. The apparent motives for falsification and exaggeration on the part of the informant in *Harris* were quite obvious, and it is not at all apparent from the affidavit that the informant believed the statement in any way to have subjected him to either civil or criminal liability.

280. 403 U.S. at 584 (fact that hearsay statement barred from admission at trial by confrontation clause limitations should not preclude its being considered reliable for search warrant proceedings).

meaning of reliability should not depend upon the constitutional context in which the issue arises, particularly where the statement in question must be more reliable than not to trigger an adverse finding against the defendant.

The reliability of a statement made against penal interest is grounded in the theory that the statement was consciously known to be disserving to the declarant when made or, as discussed above, was sought to be used in litigation.[281] The degree of reliability that may be attributed to such statements is directly proportional to the degree of disservingness of the statement: the less disserving, the more alternative explanations arise for the making of the statement other than truth.[282] Thus, if a statement appears to be clearly disserving, under the declaration against interest analysis, it may be deemed reliable. If the statement appears to be clearly self-serving, no reliability can be attributed to it because it simply is not against the interest of the declarant.

The plurality in *Harris* seems to be implying that in "mixed" hearsay statements — that is, statements containing both disserving and self-serving aspects — the disserving portion must predominate over the self-serving portion in sixth amendment cases; however, in fourth amendment cases, any disservingness will establish reliability, even if the self-serving portion clearly predominates.[283] This reasoning contradicts the traditional rationale for finding reliability in these hearsay exceptions, since the central indicator of reliability of such statements is that they are disserving.[284] The fact that a statement may be viewed as self-serving offers alternative explanations for the making of the statement other than its truth.[285]

The present-day inapplicability of the Supreme Court's reasoning in *Harris* is also apparent from the opinion itself. The authority cited by the

281. *See supra* Section IB.

282. *See id.* (statement will be deemed reliable when no motive for making false statement is apparent).

283. *See supra* note 271.

284. *See* Morgan, *supra* note 42, at 480-81; Jefferson, *supra* note 42, at 8; 4 J. WEINSTEIN, *supra* note 37, at ¶ 804(b)(2)[02] at 804-96; Comment, at 1189 (traditional rationale for crediting disserving statement is that no alternative explanation for making of statement is apparent).

285. The majority position in the United States is that mixed hearsay statements are deemed reliable only if the disserving portion clearly predominates over the self-serving portion. 4 J. WEINSTEIN, *supra* note 37, at ¶ 804(b)(3)[02] at 804-101.

Some commentators have suggested that in mixed hearsay statements only the disserving portions should be credited, and the self-serving portions should be found inherently untrustworthy. *See* Jefferson, *supra* note 42, at 50. Others have stated that only when the disserving aspects of a hearsay statement clearly predominate over the self-serving aspect can a trustworthy state of mind be attributed to the declarant and his statement. 5 J. WIGMORE, EVIDENCE 1361 (3d ed. 1940).

Court for the proposition that a statement against penal interest may be viewed as inadequate for admission at trial, yet perfectly reliable for probable cause determinations, is *Brinegar v. United States*.[286] *Brinegar* involved a case in which the defendant's own admission against penal interest formed the basis for a warrantless search of his vehicle.[287] At that time, the rules of evidence prohibited the introduction of such an admission against penal interest into evidence against Brinegar. The Supreme Court held, however, that even if the admission against penal interest was inadmissible hearsay, it was still reliable enough to form the basis of probable cause for the search of Brinegar's car.[288] Thus, the Court developed the proposition that although hearsay evidence was not admissible at trial, it should not be precluded from consideration as reliable evidence for a probable cause determination.[289]

The Supreme Court in *Harris* expressly cited this principle from *Brinegar* as the basis for its decision.[290] At the time *Harris* was decided, the Federal Rules of Evidence still prohibited the introduction of declarations against penal interest at trial.[291] Therefore, using *Brinegar* as logical precedent for *Harris* would have made sense if the hearsay statement in *Harris* had been as disserving as that in *Brinegar*. This, however, was not the case. The hearsay statement in *Harris* was, unlike that in *Brinegar*, a

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286. 338 U.S. 160 (1949).

287. *Brinegar* involved a prosecution for importing intoxicating liquor into Oklahoma from Missouri in violation of the federal statute, which forbids such importation contrary to the laws of any state. The policemen who conducted the warrantless search were parked next to a highway near the state line. They saw Brinegar speed past them in his car, with the back seemingly overloaded in the trunk area. They pulled over the car and one of the policemen, who knew Brinegar and had arrested him on two occasions during the preceding six months for the illegal importation of liquor from Missouri into Oklahoma, asked Brinegar how much liquor he had in the car. The officer testified that Brinegar's response was "not too much" or "not so much," and that he later admitted that he had twelve cases in the car. The policemen then searched Brinegar's car without a warrant, and liquor was discovered. Brinegar moved to suppress the liquor as the fruit of an illegal search, since he claimed that the police did not have probable cause for the search. On certiorari, the United States Supreme Court held that, although Brinegar's statements were hearsay and not admissible at trial, they nonetheless could be deemed reliable as against Brinegar's penal interest. 338 U.S. at 161-65.

288. *Id.* at 165.

289. *Id.* at 174-75.

290. The Court in *Harris* cited *Brinegar* for the proposition that confrontation clause and probable cause standards for consideration of hearsay evidence greatly vary, stating that "[s]uch evidence would rarely be admissible at trial, but the Court took pains to emphasize the very different functions of criminal trials and preliminary determinations of probable cause." 403 U.S. at 582-83.

291. For a discussion of the evolution of Rule 804(b)(3), *see supra* text accompanying notes 157-72.

mixed statement in which the self-serving portion could easily be seen to have predominated as in the case of accomplice accusations.

Since the enactment of the new Federal Rules of Evidence, which now admit some declarations against penal interest, the statements found by the Supreme Court to have been inadmissible hearsay in *Brinegar* would be admissible today.[292] The hearsay statement in *Harris*, however, might not be deemed admissible so readily, since it is not nearly as disserving and not, therefore, as reliable.

Under the modern federal hearsay exception for statements made against penal interest, the fact that a statement facially appearing as one made against penal interest is found inadmissible because of its clearly self-serving character should, even under the rationale of *Brinegar*, indicate its lack of probative value for a probable cause determination.[293] Since the Federal Rules of Evidence and many states' rules of evidence now permit certain declarations against interest to be considered as exceptions to the hearsay rules, the fact that a statement facially appearing to be against penal interest is deemed to be inherently unreliable, or at least not reliable enough to qualify under this hearsay exception, should indicate its lack of reliability even for probable cause determinations.[294] Since these hearsay exceptions allow admission of statements against penal interest which are deemed to be reliable, the fact that they are not admissible under the hearsay exception is a strong indication of unreliability.

Notwithstanding the Supreme Court's deficient analysis, *Harris* has become a shorthand way for the federal courts to find probable cause when common sense would dictate otherwise. Even after the enactment of the new Federal Rules of Evidence, the general tendency by the federal courts has been to use a statement by an informant to justify a finding of probable cause if the informant's hearsay statement could be facially characterized as one against penal interest.

For example, in *United States v. Carmichael*,[295] the hearsay state-

292. These statements would be admissible as a declaration against penal interest under 804(b)(3) or simply as a confession, and would not violate confrontation clause standards under Dutton v. Evans, 400 U.S. 74 (1970), *supra* notes 273-75 and accompanying text, or Ohio v. Roberts, 448 U.S. 56 (1980), *supra* notes 133-37 and accompanying text.

293. *See* United States v. Riley, 657 F.2d 1377 (8th Cir. 1981), *cert. denied*, 459 U.S. 1111 (1983); United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982) (hearsay statement of accomplice implicating accused made in response to custodial interrogation considered inherently unreliable and does not fit within statement against penal interest hearsay exception of 804(b)(3)).

294. *See* United States v. Kolodziej, 712 F.2d 975 (5th Cir. 1983).

295. 489 F.2d 983 (7th Cir. 1973).

ments of two unidentified police informants were found to have been made against the informants' penal interests, and were deemed to be reliable.[296] One of the informants turned out to be a codefendant who was never indicted for any of the offenses involved in the case.[297] The second informant turned out to have been the defendant himself, and his status as an informant was really via recitation of what the first informant-codefendant had told the police regarding the defendant's statements to him.[298] Thus, there was really only one informant: the codefendant who was noted by the affiants as a "reliable" source who had provided reliable information in the past.[299] The United States Court of Appeals for the Seventh Circuit found that the credibility-veracity prong of *Spinelli* had been satisfied because the informants' statements were made against their penal interests, but remanded on the ground that the district court minimally should have given the defendant the opportunity to present impeachment evidence at the suppression hearing regarding the unreliability of the informant-codefendant.

The Seventh Circuit applied the holding in *Carmichael* to a subse-

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296. *Id.* at 985.

297. *Id.*

298. *Id.*

299. *Carmichael* involved a prosecution for possession of checks stolen from the United States mail. 489 F.2d 983 (7th Cir. 1973). Three codefendants, including T.W. Allen and John Doe, were arrested in connection with possession of the stolen checks; however, only Carmichael was indicted.

An arrest warrant was issued based on an affidavit submitted by a Secret Service agent who claimed to have received information from a reliable source, whose prior information had led to the arrest and conviction of six other people, that T.W. Allen, Robert E. Carmichael and John Doe had in their possession numerous checks which were stolen from the mail.

As the court noted, T.W. Allen turned out to be the confidential informant, whose reliability was established by imputing the supposed reliability of Carmichael's declaration against penal interest to him. Thus, the declaration against penal interest used to overcome the veracity prong of *Spinelli* was not even a statement by the informant, but was the alleged declaration of the defendant himself. 489 F.2d at 984-87. The imputation of reliability from the defendant's alleged declaration against penal interest to the undisclosed informant in this case is the most extreme example of an absurd extrapolation of reliability vis-a-vis a declaration against penal interest.

It is also interesting to note here that the court in *Carmichael* alluded to the proposed federal rule 804(b)(4) declaration against interest hearsay exception, to justify its presumption of reliability of the informant's statement. At the time *Carmichael* was decided, however, the final sentence of then rule 804(b)(4) stated that a statement by one codefendant implicating another cannot fall within this exception, which was the case in *Carmichael.*

The court did, however, find merit in defendant's argument that the district court erred in not allowing him to challenge the informant's [Allen's] reliability at the suppression hearing, and remanded for a hearing on such impeachment evidence.

quent probable cause case in *United States v. DeCesaro.*[300] *DeCesaro* involved a prosecution for conducting an illegal gambling business in violation of federal law.[301] Based on an FBI agent's affidavit, a federal magistrate authorized a wiretap of defendants' phonelines. Incriminating information was subsequently obtained from the wiretap, and defendant DeCesaro was arrested.[302]

At his suppression hearing, DeCesaro claimed that the affidavit for the wiretap order failed to have sufficiently set out probable cause for the wiretap order to have issued.[303] The affidavit for the wiretap order set out the statements of six unidentified informants, all of whom claimed to have placed bets with the defendant. The court held that not only was *Spinelli*'s basis of knowledge prong satisfied, but also that the veracity and credibility of the informants were also established, since these statements admitted criminal conduct by the informants in having placed bets with DeCesaro.[304]

As in *Carmichael*, which *DeCesaro* expressly followed, the Seventh Circuit established the informants' credibility after a topical evaluation of their statements as against their penal interests, without any consideration of the circumstances surrounding the making of those statements. This type of superficial treatment of hearsay statements for probable cause determinations, however, is not unique to the Seventh Circuit.

Armour v. Salisbury[305] was a federal habeas corpus action for a state prisoner; defendant Armour was convicted on separate counts of possession and sale of marijuana in violation of Ohio laws. At the pre-trial suppression hearing, defendant Armour claimed that the marijuana obtained in the search by the police was the fruit of an illegal search, as there was no probable cause shown for the warrant to have issued.[306]

The affidavit upon which the warrant was issued was based on the statements of an unidentified police informant who was allegedly "reliable," and who claimed that Armour had recently sold him marijuana at Armour's apartment.[307] The affidavit neglected to mention, however, that the undisclosed informant was one Glen Allen Vance, who had been arrested for marijuana possession several hours before he made the

300. 502 F.2d 604 (7th Cir. 1974).
301. 18 U.S.C. 1955 (1970).
302. 502 F.2d at 604-05.
303. *Id.*
304. *Id.* at 607.
305. 492 F.2d 1032 (6th Cir. 1974).
306. *Id.* at 1034.
307. *Id.*

statements to the police which implicated Armour.[308] The affidavit also failed to mention that upon Vance's release from police custody on the possession charge, the police gave Vance a marked twenty dollar bill, instructed him to go to Armour's apartment, purchase marijuana from him, and immediately return to police headquarters with the marijuana.[309]

Several hours after Vance should have returned to police headquarters, police found Vance in Armour's apartment with a half-filled bag of marijuana; Vance admitted consuming the missing marijuana after his release from police custody.[310] At the time Vance implicated Armour for selling him the marijuana, Vance was, according to police, in a drugged stupor.[311]

At Armour's trial, Vance was called as witness for the state. Vance claimed, however, that he had not purchased the marijuana from Armour.[312] Armour was subsequently convicted, and on appeal the United State Court of Appeals for the Sixth Circuit affirmed: the court ignored the circumstances surrounding the making of Vance's statement and the omission of material information by the police; it found Vance's statement implicating Armour to have been reliable, since Vance's statement that he had bought marijuana from Armour on a previous occasion was deemed to be against his penal interest.[313]

Not all probable cause cases, however, have blindly followed *Harris*. In *United States v. Martin*,[314] the United States Court of Appeals for the Fifth Circuit held that a custodial statement implicating both the declarant and an accomplice in criminal activity, standing alone, was not sufficient to show probable cause to support issuance of a search warrant.[315] Defendant John Martin's brother Jeffrey volunteered information to an investigating FBI agent that his brother had robbed the Atlantic Federal Savings and Loan Association in Boca Raton, Florida. Jeffrey also implicated John Kral and Ismael Rodriguez in the robbery.[316] Upon interrogation, Kral and Rodriguez both gave the FBI signed statements implicating themselves and John Martin in the bank robbery.[317] An arrest

308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.* at 1035.
312. *Id.* However, Armour was found with the marked twenty-dollar bill in his possession at the time of his arrest.
313. *Id.* at 1035-36.
314. 615 F.2d 218 (5th Cir. 1980).
315. *Id.* at 325.
316. *Id.* at 321.
317. The affidavit for the arrest warrant presented by FBI Special Agent Kizer

warrant was issued pursuant to an affidavit based on Kral's and Rodriguez's statements. Martin subsequently was arrested and convicted of bank robbery in violation of 18 U.S.C. § 2113 (a).[318]

On appeal, Martin claimed that the district court had erred in denying his motion to suppress evidence obtained by the FBI from him upon his arrest, on the ground that there was not a sufficient showing of probable cause made to the federal magistrate to support issuance of the warrant. Specifically, the claim of error alleged that the affidavit for the warrant failed to set out facts sufficient to establish the credibility of Kral and Rodriguez.[319] In response, the government argued that Kral's reliability had been properly established in the affidavit for the warrant, since Kral's

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provided:

> On October 24, 1978, JEFFREY MARTIN, 4713 N.W. 2d Avenue, Apartment 407, Boca Raton, Florida, advised Detective JOHN MARINELLO of the Boca Raton, Florida, Police Department that his brother, JOHN MARTIN, had committed the robbery of the Atlantic Federal Savings and Loan Association, 166 N.W. 51st Street, Boca Raton, Florida and that JOHN KRAL and ISMAEL RODRIQUEZ, associates of JOHN MARTIN, had first-hand knowledge of the robbery.
>
> On October 24, 1978, JOHN KRAL, who lives at 4350 N.E. 1st Avenue, Boca Raton, Florida, and is an associate of JOHN MARTIN, advised in a signed statement furnished to Agents of the Federal Bureau of Investigation that on June 14, 1978, JOHN MARTIN came to his home shortly before 10:00 a.m. and had in his possession a brown paper bag full of banded money. KRAL further advised that ISMAEL RODRIQUEZ, another associate, came to KRAL's house at about the same time and discussed a bank robbery with JOHN MARTIN. In addition, MARTIN has mentioned that he intended to rob a bank similar to the two banks in the Boca Teeca Plaza.
>
> On October 24, 1978, ISMAEL RODRIQUEZ, who lives at 470 N.E. 47th Street, and is an associate of JOHN MARTIN, furnished in a signed statement to a Special Agent of the Federal Bureau of Investigation, that on the evening of June 13, 1978, JOHN MARTIN stated he intended to rob the Atlantic Federal Savings and Loan on the following morning. On the morning of June 14, 1978, RODRIQUEZ met JOHN MARTIN behind the Boca Teeca Plaza and MARTIN instructed RODRIQUEZ to wait for him on his motorcycle while MARTIN robbed the bank. RODRIQUEZ waited for 10 to 15 minutes and when MARTIN did not return, he met MARTIN at the house of JOHN KRAL. Then MARTIN went into the bedroom of KRAL's house where he dumped the money on the bed and counted it. RODRIQUEZ and MARTIN discussed the robbery in the presence of JOHN KRAL.
>
> On October 24, 1978, ISMAEL RODRIQUEZ was shown a copy of a surveillance photograph of the unknown subject taken at the time of the robbery of the Atlantic Federal Savings and Loan on June 14, 1978, and he positively identified this individual as being JOHN MARTIN.

Id. at 321 n.3.

318. *Id.* at 320.

319. *Id.* at 321.

statement was made against his penal interest.[320]

Following earlier Fifth Circuit probable cause cases, the court held that, standing alone, a declaration against penal interest is insufficient to establish the credibility of a hearsay declarant.[321] The court also noted that, although Rodriguez admitted that he had been a party to the conspiracy, the FBI sought him out and initiated the "interview," and that Rodriguez testified at trial that he had been given immunity from prosecution.[322] Thus, because under similar situations the Fifth Circuit had found accomplice accusations to be inherently unreliable under sixth amendment scrutiny, such an accomplice accusation was also inherently unreliable for a probable cause determination:

> Under these circumstances, there exists a danger that the informant sought to implicate another in order to curry the favor of the police and perhaps gain immunity for himself. While such motivations do "not eliminate the residual risk and opprobrium of having admitted criminal conduct," *United States v. Harris, supra*, 91 S.Ct. at 2082, they certainly make the declaration less reliable. *Cf. United States v. Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (excluding statement against penal interest under Fed. R. Evid. 804(b)(3) because declarant had been granted immunity from prosecution and because pressures from the prosecution and grand jury made it his "best interest" to make the statement). Thus, under *Ashley*, Rodriguez' statement against penal interest, although it is entitled to some weight, cannot alone establish his reliability under *Aguilar*.[323]

The court in *Martin* did find, however, that the informants' tips properly corroborated each other, and that such corroboration together with eyewitness descriptions of the robber was sufficient to establish the reliability of the informants.[324]

Although the former case law of the Fifth Circuit is precedent for decisions of the new Eleventh Circuit, the Eleventh Circuit has abandoned

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320. *Id.* at 325.

321. *Id.* at 325-26. The court here cited United States v. Harris, 403 U.S. 573 (1971), and United States v. Ashley, 569 F.2d 975 (5th Cir. 1978), as both standing for the proposition that, although a declaration against penal interest of an unidentified informant may in certain cases substantially contribute to the establishment of an informant's credibility in a probable cause determination, it can never alone satisfy the credibility-veracity prong of the Aguilar-Spinelli test.

322. 615 F.2d at 325.

323. *Id.* at 325-26 (footnote omitted).

324. *Id.* Martin also challenged the affidavit for the warrant claiming that the FBI deliberately omitted material information from the affidavit and his arrest should therefore have been deemed illegal because of a lack of probable cause. The court found that Martin failed to prove a reckless disregard of the facts or a showing of bad faith by the FBI agents to support his claim that the issuance of the warrant was improper. *Id.* at 327-29.

the rationale developed by the Fifth Circuit in *Martin*. It has joined the other federal circuits in using hearsay statements apparently made against the penal interest of the declarant to establish the credibility of the declarant-informant in a probable cause determination. For example, in *United States v. Bizzard*,[325] the United States Court of Appeals for the Eleventh Circuit held that although a hearsay statement may be considered inherently unreliable and inadmissible under sixth amendment scrutiny, this should not preclude its use to establish the credibility of the informant for a probable cause showing.[326]

In *Bizzard*, two men robbed a bank in Savannah, Georgia. One of the two was apprehended by police authorities almost immediately after the robbery, and made a full confession implicating Bizzard as his accomplice. Based on this confession, police authorities obtained an arrest warrant for Bizzard. Bizzard was subsequently apprehended and successfully prosecuted for aggravated bank robbery.[327]

On appeal, Bizzard claimed, *inter alia*, "that his statement and fingerprints taken at the time of arrest should have been suppressed because the affidavit supporting the arrest warrant was based on unreliable hearsay information."[328] Bizzard claimed that the affidavit was based on an accomplice accusation, and that similar evidence has been found to be inherently unreliable for sixth amendment purposes;[329] therefore, *Martin* required that the same statement should be viewed as untrustworthy, and insufficient to establish the informant's credibility for the warrant to have issued. However, the court elected not to follow *Martin*. It found instead that although the custodial confession implicating the accomplice and Bizzard may not be admissible at trial, it may still be considered reliable and proper for a probable cause determination; therefore, the court affirmed the district court's decision.[330]

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325. 674 F.2d 1382 (11th Cir. 1982).

326. *Id.* at 1388.

327. *Id.* at 1384.

328. *Id.* at 1387-88.

329. In United States v. Sarmiento-Perez, 633 F.2d at 1093, the Fifth Circuit held that custodial confession made by one accomplice implicating another was so inherently unreliable that not only did the statement not pass muster for admission into evidence under the Confrontation Clause, but the statement could not even be made to fit within the ambit of rule 804(b)(3).

330. Citing no authority, the court in *Bizzard* held: "The standard for using hearsay to determine probable cause of warrant purposes and that for determining admissibility of hearsay evidence are substantially different." 674 F.2d at 1388.

2. Federal Court Development of Probable Cause Standards After *Illinois v. Gates*

As noted earlier,[331] the Supreme Court's decision in *Illinois v. Gates* was sufficiently vague and flexible for the federal circuits to find substantial leeway in developing their own criteria for review of probable cause determinations. If it was the intent of the majority in *Gates* to spark a rethinking of how judges should determine whether an affidavit for a warrant has properly set out facts sufficient to show probable cause, it has succeeded. Because the "totality of the circumstances" approach suggested by *Gates* is so amorphous, the courts have been forced to examine the underlying rationale for the Supreme Court's earlier development of the *Spinelli* prongs to fashion their own tests. An alternative, suggested by this Article, would be for the courts to adopt preexisting analyses of the reliability of hearsay statements as an essential ingredient of any "totality of circumstances" test.

In *United States v. Sorrells*,[332] the United States Court of Appeals for the Eleventh Circuit faced for the first time a probable cause challenge to the propriety of a search warrant under the newly developed standards of *Gates*. *Sorrells* involved a prosecution of two codefendants, Sorrells and Bartley, on charges of conspiring to transfer illegal firearms[333] and various other offenses of possessing, transferring, and aiding and abetting the possession and transfer of automatic weapons, firearms and silencers.[334] The affidavit supporting the search warrant was based largely on the hearsay statements of a paid informant.[335] The informant was hired by the Bureau of Alcohol, Tobacco and Firearms to infiltrate the defendants' suspected automatic weapons and bomb manufacturing operation.[336] A search warrant was issued, and guns and bombs were seized from one of the defendant's home and car. Sorrells was subsequently convicted.[337]

Citing *Gates*, the Eleventh Circuit held that "although it is no longer necessary to treat and analyze each prong of *Aguilar* as a separate entity,"[338] and although the court must now "look to the affidavit as a whole,"[339] the Aguilar-Spinelli standards must still be followed if there is

331. *See supra* notes 257-62 and accompanying text.
332. 714 F.2d 1522 (11th Cir. 1983).
333. 18 U.S.C. § 371 (1982).
334. 26 U.S.C. §§ 5861(d) & (e) (1982).
335. 714 F.2d at 1522.
336. This paid informant was referred to by the affiant for the warrant as Peacock. *Id.* at 1526-27.
337. *Id.* at 1525-26.
338. *Id.* at 1528.
339. *Id.*

to be a meaningful standard to insure consistent probable cause determinations:

> We do not however, recommend or endorse omissions in the affidavit of the informant's credibility or reliability. The test in *Aguilar* has served many useful purposes aside from insuring that the constitutional rights of citizens be respected. It has given to law enforcement officers, prosecuting attorneys and the courts a straightforward test for resolving disputes over the issuance of a warrant. We do not view *Gates* as an endorsement of slovenly or careless law enforcement work. Such work will continue to produce problems for the prosecution, the defense and the courts engaged in a case by case analysis rather than a repair to certain and definite rules. The Court in *Gates* stated that *Aguilar* has provided guidance in determining the existence of probable cause and it is not anticipated that departure from these guidelines will be looked upon with favor.[340]

However, even under the Eleventh Circuit's reliance on the Aguilar-Spinelli analysis, the court found that both prongs of *Spinelli* had been satisfied, and affirmed the appellant's convictions.[341]

In addition to *Sorrells*, several other cases have found the Aguilar-Spinelli standards fundamental to consistent and sensible probable cause determinations, and have refused to discard them in favor of the standardless totality of the circumstances analysis. For example, in *United States v. Freitas*,[342] the United States Court of Appeals for the Ninth Circuit also retained the Aguilar-Spinelli analysis for probable cause determination after the Supreme Court handed down *Gates*.

Freitas involved a prosecution of two codefendants for conspiracy to distribute cocaine[343] and possession of cocaine with intent to distribute.[344] Confidential informants allegedly told FBI agents that codefendants Freitas and Buster were running a cocaine smuggling operation through their furniture importation and sales business. Acting on the tip, the FBI kept Freitas and Buster under surveillance for several months. During this time they observed behavior which in itself did not indicate criminal activity, yet, tainted by the tip, appeared suspicious.[345] Buster and Freitas were arrested without a warrant while making a furniture delivery. Their

340. *Id.* at 1528-29.
341. *Id.* at 1529.
342. 716 F.2d 1216 (9th Cir. 1983).
343. The charge was pursuant to 21 U.S.C. § 846 (1982).
344. The pertinent statute is 21 U.S.C. § 841(a)(1) (1982).
345. After the FBI received this tip, their surveillance of Freitas' furniture importation activities revealed that Freitas had received two shipments of "furniture" from Peru in 1979. 716 F.2d at 1219. The surveillance also showed Buster and Freitas making deliveries to and from their warehouse in a fairly suspicious manner. *Id.*

van was searched and over six pounds of cocaine were discovered.[346] The district court denied the defendants' motions to suppress the cocaine, and they were subsequently convicted.[347]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed, and held that since the police informants' basis of knowledge of Freitas' smuggling operation was not known to the FBI, and since the FBI failed to obtain a warrant for Freitas' and Buster's arrest,[348] there was no probable cause apparent to the FBI agents to make the arrest.[349]

In its motion for a rehearing, the government contended that since the time of the Ninth Circuit's original decision in *Freitas*, the United States Supreme Court had changed the standard of probable cause in *Gates*; under the *Gates* standard, the government argued probable cause was apparent for the warrantless arrest to have taken place.[350] In response, the Eleventh Circuit relied on two points to support their decision. First, *Gates* still allows "magistrates [to] remain perfectly free to exact such assurances as they deem necessary . . .in making probable cause determinations."[351] Second, *Gates* stated that "veracity," "reliability" and "basis of knowledge" are still highly relevant factors in determining probable cause.[352] Therefore, under the facts of *Freitas*, there was not sufficient probable cause to have supported the warrantless arrests.[353]

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346. *Id.* at 1218.

347. *Id.*

348. The court noted that it was questionable whether these same facts would have been sufficient to show probable cause for an arrest warrant. However, it held that requirements for probable cause for warrantless arrests are much stricter than for obtaining warrants. *Id.* at 1224.

349. The court reversed Buster's conviction, and remanded to the district court for a determination whether Freitas had the proper standing to contest the fourth amendment violation. *Id.* at 1218.

350. *Id.*

351. 716 F.2d at 1225 (quoting *Gates*, 462 U.S. at 240).

352. 716 F.2d at 1225 (quoting *Gates*, 462 U.S. at 230).

353. The "veracity," "reliability" and "basis of knowledge" of this informant are all highly relevant in determining the value of his report, *Gates*, 103 S.Ct. at 2327, but according to the *Gates* court, the *Aguilar-Spinelli* test has been applied in an unduly rigid fashion when considering whether an informant's report has been sufficiently corroborated to establish an adequate foundation for relying upon the report in a probable cause determination, *see id.* at 2330 & n.9; *id.* at 2331 n.10. We have not in fact applied the "prongs" of the *Aguilar-Spinelli* test in an unyielding fashion. Rather, after examination, we found that the number and type of details known to FBI agents were not enough to show that the second source's tip should be credited. The details were less specific than those held sufficient to demonstrate reliability in *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959), or, for that matter, in *Gates*. *See* 103 S.Ct. at 2325-26. Had the agents known something about the basis upon which the source made his report, they might properly have credited it, but they did not have such knowledge.

In *In re Young*,[354] the United States Court of Appeals for the Eighth Circuit recognized that *Gates* called for a more flexible standard for probable cause determinations. However, when an affidavit supporting a warrant is based on the hearsay statements of an unidentified informant, the informant's credibility and basis of knowledge must still be set out in the affidavit for a proper showing of probable cause.[355]

Young involved a preindictment seizure of Young's business records for presentment to a grand jury.[356] Young moved to have his records returned to him.[357] The district court denied Young's motion, but on appeal the Eighth Circuit held that since the affidavit supporting the search warrant for the seizure of Young's records was based on the hearsay statements of an unidentified informant whose credibility and veracity were not set out in the affidavit, there was not a sufficient showing of probable cause for the warrant to have issued.[358] Apparently, the rationale of the *Young* court was that *Gates* did not overrule *Spinelli*, but instead directed judges to find *Spinelli*'s prongs "within the totality of the circumstances" of the case.[359]

3. The Reevaluation of Declarations Against Penal Interest as a Basis for Establishing the Credibility of a Hearsay Informant in

716 F.2d at 1225.

354. 716 F.2d 493 (8th Cir. 1983).

355. *Id.* at 501-02.

356. Young was suspected by the FBI of using his bail bond business to illegally appropriate premiums for his own use. *Id.* at 494.

357. *Id.* at 494. The motion was pursuant to FED. R. CRIM. P. 41(e), which provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. . . . If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing . . . after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

358. 716 F.2d at 501.

359. The affidavit fails to set forth any reason for believing this hearsay. Applying the totality of the circumstances test of *Illinois v. Gates, supra*, it is apparent that the affidavit does not establish the reliability of the hearsay information. Moreover, even if the hearsay is true and Young did actually make the statement, the affidavit gives no reason to believe that there was anything dishonest or improper in Young's remark. It may well be that the cash did not have to be reported, just as Young allegedly said. Thus, the remark reported in the affidavit does not provide "a substantial basis for determining the existence of probable cause." . . . Obviously, in the absence of any basis for this belief (and none was given), the statement appears to be pure speculation that cannot satisfy the requirements of the Constitution.

Id.

Probable Cause Determinations

Cases such as *Sorrells, Freitas* and *Young* exemplify the manner in which the federal circuits have had to reevaluate the underlying reasons behind the development of the Aguilar-Spinelli analysis after *Illinois v. Gates*. This reevaluation has not been limited to identifying general principles upon which the courts will rely for probable cause determinations; also relevant are the categories of evidence that will be considered sufficient to show the existence of these general factors. The most striking example of this "new direction" to date has been the Fifth Circuit's decision in *United States v. Kolodziej*.[360]

After obtaining a search warrant on January 14, 1981, DEA agents and agents of the Texas Department of Public Safety Narcotics Service entered the residence of Jody Caddell while she was weighing and packaging one and one-half pounds of cocaine.[361] She was pregnant and alone at the time with her two year old child. Jody Caddell claimed that the police then told her that either she cooperate with them or her child would have to be placed with the state child welfare authorities. The government claimed that the arresting officer merely told her that if she was taken into custody, her child would have to be placed with the state child welfare agency only until another family member could come for the child.[362] Jody Caddell agreed to cooperate with the police and was not taken into custody. Instead, the police waited with her at her home until her husband Loren, who had been arrested at his place of business, arrived.[363] Both of the Caddells then agreed to cooperate with the police. They named Kolodziej as their drug supplier. [364] Acting on instructions from the police, Jody Caddell telephoned Kolodziej and elicited self-incriminating statements from him.[365]

Based on the Caddells' implication of Kolodziej and the statements made by Kolodziej over the phone, the police obtained an arrest warrant for Kolodziej.[366] Upon his arrest at his home, the police made a quick "safety" search and discovered a film can filled with marijuana.[367] Based on the

360. 706 F.2d 590, *rev'd on reh'g*, 712 F.2d 975 (5th Cir. 1983).
361. 706 F.2d at 592.
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. The search made of Kolodziej's home at the time of his arrest was claimed by the government to have been a proper cursory safety search. The court found that, because the arresting officers encountered no serious threat of danger, there were no exigent circumstances excusing the requirement of a search warrant. Therefore, it held that the marijuana

marijuana found at Kolodziej's home, the custodial statements made by the Caddells, and the custodial statements of a codefendant, Mitchell, a search warrant was obtained for Kolodziej's home, car and truck; fifteen to twenty pounds of marijuana, a .357 magnum pistol, a quantity of quaaludes and $61,000 in cash were discovered.[368] Kolodziej was charged with possession of cocaine with intent to distribute, and with conspiracy to possess cocaine and marijuana with intent to distribute.[369]

At the pre-trial suppression hearing, the district court found that Jody Caddell's cooperation with the police was "coerced and induced by the threat to take her children from her,"[370] and suppressed the recorded phone conversations between Jody Caddell and Kolodziej.[371] The district court also found that the search warrant was not supported by probable cause, and suppressed all the evidence discovered from the search of Kolodziej's home.[372]

The government appealed, and the Fifth Circuit held that the affidavit for the warrant failed to provide the magistrate with any specific facts or circumstances which would indicate how the codefendant, Mitchell, came to know where the money was kept, or that it was earned in illicit drug transactions.[373] The court also noted that the affidavit was silent on the question of where the narcotics were located, and did not indicate a basis for the declarant's knowledge.[374] The court did note, however, that the

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was properly suppressed by the district court from either admission as evidence at trial or from being mentioned in the affidavit for the search warrant later obtained for Kolodziej's car and home. *Id.* at 595-97.

368. *Id.* at 592.

369. The charges were pursuant to 21 U.S.C. §§ 841(a) & 846 (1982).

370. 706 F.2d at 592.

371. *Id.* 18 U.S.C. § 2511(2)(c) requires that for such recordings to be admissible in evidence at least one of the parties to the conversation must "voluntarily consent" to the recording. Since Jody Caddell was found not to have consented "voluntarily," the evidence from the phone conversation was suppressed from evidence at trial and from consideration for probable cause for the search and arrest warrants to have issued.

372. 706 F.2d at 592.

373. *Id.* at 599.

374. *Id.* The full text of the affidavit is as follows:

> On January 23, 1981, S/A Fred B. Thomas and Dept. of Public Safety Investigator Troy Braswell initiated an investigation into the narcotics trafficking of Clement Kolodziej. On January 24, 1981, this investigation resulted in the seizure of approximately 24 ounces of cocaine, approximately 100 pounds of marihuana, a quantity of Methaqualone tablets, and the seizure of $6,160.00. The investigation further resulted in the arrest of Loren Caddell, Jody Caddell, and Donnie Mitchell. Post arrest statements individually made by all of the above defendants each corroborating the other, revealed that Clement Kolodziej is a resident of San Marcos, Texas, and he has been their major source of supply for cocaine, marihuana, and methaqualones for the past year. Further statements

government argued persuasively that the reliability of the informants had been established, since the tips corroborated each other and the statements appeared to be against the informants' penal interest.[375]

Two days after the Fifth Circuit's decision in *Kolodziej*, the Supreme Court decided *Gates*. The government thereupon moved for a rehearing,[376] claiming that under the new totality of the circumstances approach developed by the Supreme Court in *Gates* the district court's finding of no probable cause should be reversed.[377]

On rehearing, the Fifth Circuit noted that under *Gates*, both of the *Spinelli* prongs no longer need be independently established; a deficiency in one prong "may be compensated for . . . by a strong showing as to the other, or by some other indicia of reliability."[378] The court also noted that, as in their earlier decision in *Kolodziej*, the tips set out in the affidavit were nothing more than mere conclusions that the defendant had engaged in criminal conduct.[379] The court did, however, state that since under *Gates* a deficiency in one prong may be compensated for by a strong showing in the

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made by the cooperating co-conspirators reveal that approximately $500,000 and $1,000,000 cash U.S. currency had been paid to Kolodziej as payment for narcotics supplied by Kolodziej. Cooperating co-conspirator Donnie Mitchell stated to S/A Thomas and Investigator Braswell that Clement Kolodziej kept large sums of U.S. Currency in the trunk of his 1979 BMW license number 1981 Texas, UCY 307, and in safety deposit boxes. These funds were proceeds from the narcotic transactions and were maintained in the vehicle and safety deposit box to avoid detection by law enforcement officials.

On February 13, 1981, the above information was presented to the Federal Grand Jury, Western District of Texas, Austin Division, Austin, Texas. Indictments were returned against defendants Clement Kolodziej, Loren Caddell and Jody Caddell. Donnie Mitchell is an unindicted co-conspirator.

On February 17, 1981, S/A Fred B. Thomas, accompanied by DPS Narcotics Investigator Troy Braswell, DPS Investigator Charles Goforth, DPS Investigator Jess Hooper, San Marcos Police Dept. Officer Paul Bataglia went to the residence of Clement Kolodziej, located at 1614 Mockingbird Drive, San Marcos, Hays County, Texas, armed with arrest warrant for Kolodziej. At the time of the execution of the arrest warrant, DPS Investigator Troy Braswell personally observed a quantity of marihuana on the kitchen counter of the residence within the reach and control of Kolodziej.

712 F.2d at 976 n.3.

375. The affidavit does not contain an affirmative allegation that any of the three informants was known to be reliable, as *Aguilar*'s second prong requires, but reliability can be inferred from the fact that the tips corroborated one another, and were against the informants' penal interests. *See U.S. v. Martin*, 615 F.2d at 325-27; *Williams v. Maggio*, 5 Cir. 1982, 679 F.2d 381, 391.

706 F.2d at 599 n.5.

376. 712 F.2d 975 (5th Cir. 1983).

377. *Id.* at 976.

378. *Id.* at 977 (quoting *Gates*, 462 U.S. at 233).

379. 712 F.2d at 977.

other, if the government had made a strong showing of the informants' credibility, probable cause might be found to have been set out in the affidavit.[380]

The government argued that, under the totality of the circumstances, the court should infer reliability from the fact that the tips corroborated one another and were against the informants' penal interests.[381] The court, however, found that substantial corroboration was lacking.[382] Furthermore, while the statements facially appeared to be against the penal interests of the informants, in view of the totality of the circumstances surrounding the making of those statements, the statements may not have been truly made against the informant's interest:

> [W]hile the statements were against the informants' penal interests, this Court has held that tips made to curry favor with the police, although they "do not eliminate the residual risk and opprobrium of having admitted criminal conduct, they certainly make the declaration less reliable." *United States v. Martin,* 5 Cir. 1980, 615 F.2d 318, 326. *Cf. United States v. Gonzalez,* 5 Cir. 1977, 559 F.2d 1271, 1273 in which this Court approved the trial court's exclusion of a statement against penal interest under Fed. R. Evid. 804(b)(3) because the declarant had been granted immunity, and because pressure from the prosecution made it in his best interest to speak. Consequently, we find that the affidavit's deficiency in having failed to set forth a factual basis for crediting the informant's conclusion was not compensated for by a strong showing of reliability. Probable cause did not exist, therefore, to search the defendant's home, automobile, and truck.[383]

Thus, the court utilized *Gates* as the rationale for looking beyond the facial "against penal interest" characterization of an accomplice accusation to make a determination, consistent with sixth amendment precedent, that accusations were not sufficiently reliable under the circumstances of the case.

Conclusion

The fundamental liberty and privacy interests served by the fourth amendment warrant requirement necessarily are related to the protections of the Confrontation Clause, although judicial enforcement of those interests occurs at different stages of the criminal process. Both protections

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380. *Id.*

381. *Id.* at 977-78.

382. *Id.* at 978.

383. *Id.* at 978. Unlike the holding in the original appellate decision in Kolodziej, on rehearing the court examined the circumstances surrounding the making of the statements which facially appeared to have been made against the informants' penal interests.

are essential in balancing the role of government in regulating society against the freedom of the individual from government oppression. This Article has been based upon a simple premise: categories of evidence deemed so inherently unreliable that they cannot be submitted to a jury for its evaluation of a criminal defendant's guilt or innocence of crime are too unreliable, as a matter of logic and constitutional principle, to support the government's invasion of the privacy and liberty interests of a person at pretrial stages of the process.

The Supreme Court's holding in *Gates* and *Upton* could be construed as a suggestion that magistrates should no longer be required to apply judicially recognized codifications of evidentiary reliability before issuing warrants. If so construed, the decisions represent an important and misguided change in the balancing between government power and individual liberty: unless further refined, *Gates* would amount to a repudiation of provisions of the Bill of Rights designed to limit government power.[384]

However, with respect to at least one category of hearsay evidence — accomplice accusations — there is hope that the courts will continue to impose some degree of restraint upon the discretion of issuing magistrates, even while invoking the "totality of circumstances." For the first time since the Supreme Court's decision in *United States v. Harris*,[385] a federal circuit court of appeals in *Kolodziej* has applied sixth amendment scrutiny to a fourth amendment probable cause review of an accomplice's declaration against penal interest.[386] In fact, the Fifth Circuit's analysis was

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384. J. SKOLNICK, JUSTICE WITHOUT TRIAL 229 (2d ed. 1975).

> Antagonism between the police and the judiciary is perhaps an inevitable outcome, therefore, of the different interests residing in the police as a specialized agency and the judiciary as a representative of wider community interest. Constitutional guarantees of due process of law do make the working life and conditions of the police more difficult. But if such guarantees did not exist, the police would of course engage in activities promoting self-serving ends, as does any agency when offered such freedom in a situation of conflicting goals. Every administrative agency tends to support policies permitting it to present itself favorably. Regulative bodies restricting such policies are inevitably viewed with hostility by the regulated. Indeed, when some hostility does not exist, the regulators may be assumed to have been "captured" by the regulated. If the police could, in this sense, "capture" the judiciary, the resulting system would truly be suggestive of a "police state."

Id.

385. 385. 403 U.S. 573 (1971).

386. In United States v. Martin, 615 F.2d 318 (5th Cir. 1980), an earlier Fifth Circuit case, although the court noted that standing alone a declaration against penal interest is insufficient to establish the credibility prong of *Spinelli*, the court found the credibility prong to have been established by corroboration of the tip. Thus, the Fifth Circuit criticism of using a declaration against penal interest to establish the credibility of a hearsay informant was dictum.

prompted by the directives of the Supreme Court in *Gates* to subordinate hypertechnicalities to common sense judgments, based on the facts of each case. Whereas under pre-*Gates* review of an informant's custodial hearsay statements, the Fifth Circuit in *Kolodziej* found the statements to be reliable as made against penal interest, under *Gates*'s "totality of the circumstances" scrutiny, the same statements were found not to be made against the informants' penal interests at all.

To the extent that reviewing courts follow cases such as *Sorrells, Freitas* and *Young*, the important factors of reliability, veracity and basis of knowledge — all necessary for consistent and sensible probable cause review — will not be abandoned when reviewing the sufficiency of accomplice statements to support a warrant. To the extent that courts follow the lead of the Fifth Circuit in *Kolodziej*, factors such as reliability, veracity and basis of knowledge also will not be found to exist for fourth amendment scrutiny when sixth amendment analysis would dictate the same result.

Kolodziej represents a significant break from traditional post-*Harris* treatment of accomplice accusations. If *Kolodziej* is a barometer of how *Gates* will affect judicial scrutiny of statements facially appearing as made against penal interest, the nonsensical disparity in treatment of accomplice accusations under the sixth and fourth amendments may soon cease to exist.

In *Kolodziej*, however, the Fifth Circuit in part based its decision to affirm the district court's finding of lack of probable cause on its position that the facts surrounding the making of the hearsay statement demonstrated a substantial doubt that the statement could even be characterized as one truly made against penal interest.