THE ROLE OF REPUTATION IN ESTABLISHING PROBABLE CAUSE FOR ARREST AND SEARCH

The fourth amendment forbids "unreasonable searches and seizures" and requires that no warrant shall issue "but upon probable cause."[1] An arrest or a full-scale search of an individual without probable cause, performed with or without a warrant,[2] is illegal.[3] The problem in

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1 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. All the states have similar constitutional provisions. *See* 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 5 n.2 (1961).

2. Generally, an arrest or a search is constitutionally reasonable if made under the authority of a valid warrant. If the arrest or search is not made under a valid warrant, it must fit into one of the exceptions of the general rule.

Any peace officer may, without a warrant, arrest a person—

(a) For the commission of any felony or misdemeanor committed in his presence;

(b) When such person has committed a felony although not in the presence of the officer;

(c) When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it;

(d) When he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it;

(e) When he has received positive information by written, telegraphic, [teletypic, telephonic radio] or other authoritative source that another officer holds a warrant for such arrest;

[(f) When he has received such positive information broadcast from any recognized police or other governmental radio station, or teletype, as may afford him reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person has committed it;

(g) When he has reasonable cause to believe that such person is an escaped convict, or has violated a condition of parole from any prison, or has violated a condition of probation imposed by any court, or has violated any condition of a pardon granted by the executive.]

MICH. STAT. ANN. § 28.874 (1954).

A search without a warrant is reasonable if made:

(1) Incident to arrest;

(2) With consent; or

(3) In an emergency.

D. REISIG, SEARCHES AND SEIZURES HANDBOOK 17 (1968).

The Supreme Court has held that a search without a warrant is lawful even if it had been practical for the officer to obtain a warrant, if the search is reasonable. United States v. Rabinowitz, 339 U.S. 56 (1950). However recent decisions indicate that a search will be found unreasonable if the officer could have obtained a search warrant, and did not. *See* Mancusi v. DeForte, 392 U.S. 364 (1968); Katz v. United States, 389 U.S. 347 (1967).

3. Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886).

determining a lawful arrest or search lies in defining probable cause. Perhaps it is best described as existing ". . . when the facts and circumstances within the officer's knowledge, and of which he has 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."[4] Even this description lacks precision, but this may be a necessary consequence of its function of balancing conflicting community interests: protection of the community from antisocial acts versus protection of individual liberties.[5] Balancing these interests cannot be done usefully on an abstract, theoretical level. Pragmatic consideration of each point of conflict is necessary to determine probable cause.

Certain limits to this case study[6] are imposed by the types of probable cause determinations judicially reviewed. Judicial testing of probable cause, subsequent to arrest or search,[7] usually occurs when the accused argues the exclusionary rule[8] by contending that evidence obtained by an illegal search and seizure is inadmissible.[9] Further, in the majority of cases in which the rule is raised, the offense charged is possession of the evidence whose admission is contested.[10] The most prevalent cases of this type involve the possession of narcotics.[11]

The reputation of one suspected of illegal activity consists of evidence of past and concurrent criminal behavior, limited to the specific character trait in question.[12] Courts recognize that reputation is a

4. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

5. *Id.* at 176.

6. This case study exhausted all Supreme Court decisions and post-1955 state and federal court decisions in which reputation played a role.

7. When an officer seeks a warrant before taking action he must convince the granting magistrate that he has probable cause to so act. However, it is doubtful whether a serious consideration of probable cause is made at such a hearing. *See* L. TIFFANY, D. MCINTYRE, JR. & D. ROTENBERG, DETECTION OF CRIME 119-20 (1967) [hereinafter cited as TIFFANY, MCINTYRE & ROTENBERG]; LaFave & Remington, *Controlling the Police: The Judges Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 992 (1965).

8. *See* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. ILL. L. F. 255-56.

9. The exclusionary rule has been applied in the federal courts since implicitly stated in *Boyd v. United States*, 116 U.S. 616 (1886), and has been required for the states since *Mapp v. Ohio*, 367 U.S. 643 (1961). *See generally* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 62-86, 144-72 (1966).

10. The conclusion is based upon this case study. It is also supported by W. LAFAVE, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 298 (1965) [hereinafter cited as LAFAVE, ARREST].

11. *See, e.g.*, LAFAVE, ARREST 298; Note, 8 S. D. L. REV. 127, 134 (1963).

12. This case study revealed no decision in which the suspect's reputation was built upon a

reliable element of probable cause,[13] but it is uncertain what weight it is accorded. Prior behavior alone does not establish reasonable grounds to believe that the suspect is presently engaged in criminal conduct.[14] However, the reputation for past criminal conduct of one presently engaged in suspicious activity does lend credence to an inference that the current activity is criminal. Therefore, the issue is what weight can be properly attributed to a suspect's reputation in a probable cause determination.[15] Before the weight of reputation can be analyzed, elements which establish a reputation initially must be considered.

I. Reputation as a Reliable Factor in Establishing Probable Cause

The role of reputation in a probable cause determination establishes the suspect's prior weakness of character which led him to engage in criminal conduct. It is logical to assume that a person with an established character weakness is more likely to engage in subsequent criminal activity than one without such a flaw.[16] It can be inferred that if one with a reputation is engaged in suspicious activity, it is more probable that he is committing a crime than if one without a reputation is so engaged.

From this analysis, an important consideration is the degree of reliability with which a suspect's prior conduct establishes his weakness of character. Therefore, the question of what determines an individual's criminal reputation arises. There are three components which may

character trait not then under consideration. Limiting reputation to the suspected character trait is consistent with the evidentiary use of a defendant's reputation at trial. *See* C. McCormick, Evidence § 158 (1954).

13 Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). The prosecution is forbidden to initiate evidence of prior criminal behavior to show that the defendant possesses distasteful qualities and therefore is more likely to have committed the crime. Such evidence is not irrelevant but is highly prejudicial in the setting of a jury trial. C. McCormick, Evidence §§ 157, 158 (1954). However, at an earlier stage of arrest or search, the prejudicial element is eliminated and there is no reason to ignore the suspect's reputation.

14 Beck v. Ohio, 379 U.S. 89, 97 (1964). LaFave, Arrest 287.

15. A suspect's reputation is also pertinent in a "stop and frisk" situation, but that area is beyond the scope of this discussion since less than probable cause is sufficient to legalize such action. Terry v. Ohio, 392 U.S. 1 (1968). *See generally*, LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 Mich. L. Rev. 40 (1968).

16 Although the prosecution is not allowed to initiate evidence of the accused's bad character, *see* note 13, *supra*, such evidence is deemed *relevant* to show defendant "is a bad man and hence more likely to commit a crime." C. McCormick, Evidence § 158 (1954).

individually or in combination establish reputation: (1) previous arrest(s), (2) previous conviction(s), and (3) being "known" to engage in criminal conduct.[17]

A prior arrest is the least reliable type of reputation indicator relative to probable cause.[18] Under our system of justice, a man is not recognized guilty of a crime until convicted. It cannot be said that a prior arrest alone is indicative of any character weakness which makes it more probable that the suspect is presently committing a criminal offense. "At best, it only implies that police suspected the suspect of illegal activity at that time."[19]

Judicial decisions reveal that police attempt to use a suspect's prior arrest to establish probable cause, but courts afford little weight to this aspect.[20] In cases where the court concludes there is probable cause for police action, there are often additional circumstances sufficient in themselves to establish probable cause,[21] or the suspect's reputation is based on more information than prior arrests.[22]

If the suspect was not only arrested in the past, but also convicted, a more reliable reputation is established.[23] Courts specifically rely on such evidence in determining probable cause.[24] As far as establishing a weakness of character, a prior conviction is more reliable than a prior arrest. In the former case, a jury concluded that the suspect committed

17. *See, e.g.*, previous arrest(s)—Brinegar v. United States, 338 U.S. 160 (1949); United States v. Menser, 360 F.2d 199 (2d Cir. 1966); previous conviction(s)—United States v. Menser, 360 F.2d 199 (2d Cir. 1966); United States v. Castle, 213 F. Supp. 56 (D.D.C. 1962); being "known"—Schutz v. United States, 395 F.2d 225 (10th Cir. 1968).

18. *See* United States v. Menser, 360 F.2d 199, 203 (2d Cir. 1966).

19. *Id.* The Supreme Court once relied on, *inter alia*, the indictment of a suspect in finding probable cause. Brinegar v. United States, 338 U.S. 160, 170 (1949). This reliance is not inconsistent with the discussion of arrest because an indictment indicates something more than mere suspicion by an arresting officer.

20. *See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948); United States v. Menser, 360 F.2d 199 (2d Cir. 1966); United States v. Hernandez, 282 F. Supp. 272 (S.D.N.Y. 1968); People v. Scott, 259 Cal. App. 2d 268, 66 Cal. Rptr. 257 (1968).

21. *See, e.g.*, People v. Scott, 259 Cal. App. 2d 268, 66 Cal. Rptr. 257 (1968); People v. Morales, 259 Cal. App. 2d 290, 66 Cal. Rptr. 234 (1968), ___ Cal. 2d ___, ___ P.2d ___, ___ Cal. Rptr. ___, *cert. denied*, 393 U.S. 988 (1969); Cannon v. State, 235 Md. 133, 200 A.2d 919 (1964).

22. *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949); United States v. Soyka, 394 F.2d 443 (2d Cir. 1968); People v. Wickliff, 144 Cal. App. 2d 207, 300 P.2d 749 (1956).

23. United States v. Menser, 360 F.2d 199, 203 (2d Cir. 1966).

24. *See, e.g.*, United States v. Castle, 213 F. Supp. 56 (D.D.C. 1962); People v. Ortiz, 208 Cal.App. 2d 572, 25 Cal. Rptr. 327 (1962); People v. Perez, 189 Cal. App. 2d 529, 11 Cal. Rptr. 456 (1961); People v. Wickliff, 144 Cal. App.2d 207, 300 P.2d 749 (1956).

an illegal act or the suspect himself admitted it. Although the conviction does not conclusively establish a character flaw, it is strong evidence that such a flaw probably exists. This conclusion is particularly reliable if there is more than one conviction.[25] If, for example, the offense is an alleged narcotics violation, the suspect's previous narcotics convictions strongly indicate an established character flaw due to the addictive quality of drugs.

A possible limitation to this type of reputation evidence is the length of time since the suspect's last conviction. This is particularly true if there is only one conviction on his record. The longer an ex-convict avoids further criminal conduct, the less reliable is the conclusion that his character weakness is permanent.

The most difficult component of a reputation to evaluate is a peace officer's assertion that the accused is "known" to have engaged in criminal behavior of which he is now suspected. On one hand, this is less reliable than a previous conviction where the conclusion of a jury or the suspect's admission is on record. An assertion that the suspect is "known" is the mere conclusion of the accuser who is often biased. This is even less reliable than an arrest for there is no record of the suspect's alleged criminal behavior.

On the other hand, such an assertion by the police indicates recent regular habits of the suspect, while a conviction often has occurred months or years before current suspected criminal activity. Also, a conviction, and particularly a single conviction, does not have the habitual quality which being "known" connotes.[26] Therefore, a suspect's reputation among police officers for regular involvement in criminal conduct is the most reliable indicator of an established character weakness if the trustworthiness of the accuser's assertion is assured.

The difficulty is to insure the trustworthiness of an officer's assertion. Since prior convictions are part of the suspect's recorded history, the court is able to make an independent determination of reputation. However, mere allegation that the suspect is "known" provides the court no information with which it can consider the

25 See, e.g., Husty v. United States, 282 U.S. 694 (1930); United States v. Santiago, 327 F.2d 573 (2d Cir. 1964); United States v. Nicholas, 319 F.2d 697 (2d Cir. 1963); People v. Barcia, 187 Cal. App. 2d 93, 9 Cal. Rptr. 493 (1960).

26 A *long and recent* conviction record also indicates habitual criminal involvement. However, the presence in an officer's jurisdiction for any length of time of one with such a record probably would be noticed by the officer, and the suspect would then be "known".

suspect's past behavior. The Supreme Court in *Spinelli v. United States*[27] recently stated ". . . the allegation that Spinelli was 'known' to the affiant . . . as a gambler . . . is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."[28] The Court indicated that if the officer's conclusion that the suspect is "known" is given any weight at all, it must be accompanied by adequate supporting facts of the suspect's criminal behavior.[29] Such corroboration of the officer's assertion was not required prior to *Spinelli*,[30] but it is consistent with the constitutional requirement of independent judicial determination of probable cause for the initiation of police action.

The *Spinelli* court did not indicate the type of corroborating information required. The law officer's previous contact with or observation of the suspect should make the best evidence. For example, arresting officers often talk to the suspect who is a self-admitted addict.[31] Additionally, reports of the accused's past criminal conduct from other law enforcement agencies should also prove reliable if the behavior is specified.[32] Given this information from a reliable source, the court can determine whether the assertion of reputation is justifiable thus insuring that the suspect's privacy is not disturbed on the basis of an unsupported rumor of criminal connections.

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27. 393 U.S. 410 (1969).

28. *Id.* at 414.

29. The majority opinion, *Id.*, stated that the assertion of the suspect's reputation was a "bald and unilluminating assertion of suspicion" entitled to no consideration, and cited for support Nathanson v. United States, 290 U.S. 41, 46 (1933), wherein it was held that a search warrant was not issued upon probable cause because "It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts." Impliedly this means that if facts supporting the officer's assertion are presented, such assertion will be considered in the magistrate's determination of probable cause.

30. No cases have been found prior to *Spinelli* requiring corroboration of the officer's assertion, while many rely on the uncorroborated assertion, *e.g.*, Schutz v. United States, 395 F.2d 225 (10th Cir. 1968); Smith v. United States, 358 F.2d 833 (2d Cir. 1966); Pearson v. United States, 150 F.2d 219 (10th Cir. 1945); Towles v. State, 155 Conn. 516, 235 A.2d 639 (1967); Hundley v. State, 3 Md. App. 402, 239 A.2d 593 (1968); Foy v. State, ___ Nev. ___, 436 P.2d 811 (1968); Commonwealth v. Anderson, 208 Pa. Supp. 323, 222 A.2d 495 (1966).

31. Johnson v. Middlebrooks, 383 F.2d 386 (5th Cir. 1967). *See* Jones v. United States, 362 U.S. 257 (1960) (suspects had admitted to the use of drugs to the officers and had displayed needle marks as evidence of same); Carroll v. United States, 267 U.S. 132 (1924) (agents had previously arranged to purchase illegal liquor from the suspects); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960) (suspect had registered as an addict upon frequent crossings at the border); People v. Sayles, 140 Cal. App. 2d 657, 295 P.2d 579 (1956) (officers had previously interrogated the suspect who at that time was under the influence of narcotics).

32. *See, e.g.*, United States v. Ramos, 380 F.2d 717 (2d Cir. 1967); United States v. Tucker, 380 F.2d 206 (2d Cir. 1967).

II. Reputation's Role in the Factual Determination of Probable Cause

Theoretically, the requirements for probable cause for lawful arrests and searches differ. An arrest requires probable cause to believe that a crime has been or is being committed and that the subject is the perpetrator. On the other hand, a search requires probable cause to believe that a crime has been or is being committed and that fruits, instrumentalities or contraband of that crime are located at a certain location.[33] However, in most cases testing probable cause, the difference disappears because possession of the item for which a search is made is also the substantive crime.[34] In determining probable cause in instances for arrest or search, identical inferences are nevertheless drawn from the same facts.[35] Furthermore, there is no apparent difference in the probable cause test when peace officers act with a warrant or when they act without one.[36] Therefore, whether the police action is a warrantless arrest or search will not be considered as variables.

Reputation may be the critical factor in determining probable cause when the sufficiency of other surrounding facts and circumstances are evaluated. Once the suspect's reputation is established, the weight it is accorded in determining probable cause must be considered. Because reputation's role often fluctuates in importance, its role must be analyzed in the light of typical fact patterns which indicate unlawful activity.

Factors which serve to establish probable cause are: (A) observation and personal knowledge of law officers; (B) report of informant; and (C) dangerousness of the suspected offense.[37] Reputation is an element

33 *See* Tiffany, McIntyre & Rotenberg 107-08.

34 *See* text accompanying notes 8-11, *supra*. For example, when a narcotics suspect who was dealing with a pusher flees with a paper bag upon seeing police, there is probable cause to believe that the suspect is committing a crime (possession of narcotics). Alternatively, there is probable cause to believe that the suspect possesses evidence of the same crime.

35 LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth"*, 1966 U. Ill. L. Forum. 255-56.

36. The exceptions for obtaining a warrant are discussed in note 2, *supra*. None of the categories indicate a degree of probable cause different than employed when issuing a warrant. Rather, the exceptions are concerned with situations where the law officer must act quickly to protect himself, others, or evidence. Examples are the emergency search, search incident to arrest, and arrest of one committing a felony in the officer's presence. Some exceptions are made when the suspect's privacy is already sufficiently protected. Examples are consent searches or the existence of an arrest warrant for the suspect, but held by another officer.

37 *See* notes 41-80, *infra*.

of factor A alone. Thus, observation of suspicious activity plus knowledge of the suspect's bad reputation may produce probable cause for an arrest or search.[38] However, additional circumstances often are necessary to complete a probable cause determination if factor A is insufficient.[39] These additional circumstances characteristically involve factors B or C. Although reputation evidence is not an element of factors B or C, its importance bears directly upon the strength of the inference induced by the introduction of these factors.[40] For example, if factors B or C, or B and C in combination, do not provide probable cause, it may be necessary that factor A, including reputation, supply the remaining link to complete a probable cause determination. However, the presence of B and C usually minimize the necessity of reputation evidence because they, plus observations by the officer, establish a strong inference of criminal conduct.

Because of the varying requirements of reputation evidence to help establish probable cause, the functioning of reputation within factor A will be considered initially. Following will be a discussion of the extent to which reputation's importance is affected by the presence of factors B and C.

A. Observations and Personal Knowledge of Law Enforcement Authorities

An officer's suspicion that criminal activity is occurring is an insufficient basis for reacting against the suspect.[41] Suspicious conduct by the suspect is, however, an essential element of probable cause. There are three types of such conduct: (1) inherently suspicious; (2) inherently neutral, but suspicious when the observer is aware of the actor's reputation; and (3) inherently neutral, but suspicious due to its similarity to the known *modus operandi* of criminal activity.[42] Upon observing a suspect engaged in unusual activity, a law enforcer must connect that activity to a substantive crime if he is to establish probable cause.[43] The suspect's reputation aids in producing the necessary linkage, but its impact varies with each type of conduct.

38. Cannon v. State, 235 Md. 133, 200 A.2d 919 (1964).
39. *See* section II. A., *infra*.
40. *See* sections II. B. & C., *infra*.
41. Brinegar v. United States, 338 U.S. 160, 175 (1949).
42. *See* notes 44-58, *infra*.
43. Henze v. People, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545, 547 (1967).

1. Conduct Inherently Suspicious

This is conduct which any person with a background of general experience considers suspicious. A common example is when the suspect runs when he sees police. Although highly suspicious, flight alone does not create probable cause.[44] However, when the officer's knowledge of the fleeing suspect's reputation is added a stronger possibility of criminal activity exists.[45] Another example is when the suspect is spotted in the early morning under abnormal circumstances.[46] Knowledge of the suspect's reputation certainly makes it less likely that he is an honest citizen on his way home. Thus, police should be able to investigate. However, unless the suspect continues to act suspiciously,[47] or is found to possess suspicious items,[48] an arrest should not be executed.

2. Conduct Inherently Neutral, but Suspicious in Connection with Reputation

The suspect's conduct is neutral, but when viewed in light of his reputation, it becomes suspicious. For example, suppose a suspect drives a vehicle through an area renowned for its illegal liquor activity. Alone, such conduct appears innocent. However, when the driver has a reputation for bootlegging, an inference is made that an illegal act is being committed.[49] Consider that an accused occupies a dwelling with

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44 *See* United States v. Thomas, 250 F. Supp. 771 (S.D.N.Y. 1966).

45 A much stronger possibility, yes, but it is doubtful whether the inference created by these factors will be enough to establish probable cause without additional information. *See, e.g.*, Johnson v. Middlebrooks, 383 F.2d 386 (5th Cir. 1967) (suspect was seen in an area known for its narcotics activities, and he ran into a bathroom); United States v. Washington, 262 F. Supp. 122 (D.D.C. 1967) (suspect had been in conversation with a known user, and when running had dropped an envelope containing narcotics).

46 *See, e.g.*, People v. Reed, 260 Cal. App. 2d 882, 67 Cal. Rptr. 514 (1968) (suspect seen in a high crime area carrying a large commercial bag, which upon inspection was found to contain seven new dresses), Norfolk v. State, 4 Md. App. 52, 241 A.2d 189 (1968) (suspect seen on well-lit street at 4:15 A.M. with a screwdriver in his possession). In the former case probable cause was found, while in the latter it was not.

47 For example, when the suspect cannot adequately explain what he is doing. *See* LAFAVE, ARREST at 290.

48 These would be items the possession of which is not in itself criminal. *See, e.g.*, Trusty v. Oklahoma, 360 F.2d 173 (10th Cir. 1966) (suspect was in possession of another's credit card, and bank identification papers); People v. Reed, 260 Cal. App. 2d 882, 67 Cal. Rptr. 514 (1968) (suspect was in possession of seven new dresses in a large commercial bag); Norfolk v. State, 4 Md. App. 52, 241 A.2d 189 (1968) (suspect was in possession of a screwdriver).

49 *See, e.g.*, Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1924); Turner v. Camp, 123 F.2d 840 (5th Cir. 1941).

a number of unlisted telephones. Such circumstances are innocent, but when the suspect has a reputation for gambling, the inference is that he is operating a bookie operation.[50] Although the inference is drawn, it is clearly not strong enough to establish probable cause[51] without additional circumstances such as the suspicious nature of the vehicle or the furtive conduct of the suspect.[52]

In a type (2) situation, knowledge of the suspect's reputation is essential to draw the inference of illegal conduct. This situation differs from (1) where the inference is made from the conduct alone, while the reputation merely strengthens the inference. However, type (2) is similar to type (1) in that the inference is drawn solely from the suspect's reputation; his suspicious conduct alone is insufficient to establish probable cause.

3. Conduct Inherently Neutral, but Suspicious Due to Similarity to Modus Operandi

This type of activity is considered neutral if viewed by one with a background of general experience, but is recognized as the *modus operandi* of a particular criminal activity when viewed by an experienced police officer. Such a situation is likely to occur when dealing with narcotic activities. For example, it is a known practice of narcotic users to carry their narcotics in balloons or prophylactics so that it might be swallowed in time of danger destroying the evidence. When an experienced officer sees a suspect coughing into a handkerchief followed by a balloon popping out of the suspect's mouth, the inference is made that the suspect is committing an illegal act.[53] The fact that the officer knew the suspect to be an addict strengthens the

50. *See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948); People v. Fino, 14 N.Y.2d 160, 199 N.E.2d 151, 250 N.Y.S.2d 47 (1964).

51. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); McDonald v. United States, 335 U.S. 451 (1948); Pearson v. United States, 150 F.2d 219 (10th Cir. 1945); People v. Fino, 14 N.Y.2d 160, 199 N.E.2d 151, 250 N.Y.S.2d 47 (1964).

52. *See, e.g.*, Brinegar v. United States 338 U.S. 160 (1949) (suspect upon seeing the police was only stopped after a high speed chase); Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959) (in addition to the driver, the vehicle and its owners were all known to be engaged in bootlegging); Turner v. Camp, 123 F.2d 840 (5th Cir. 1941) (vehicle was carrying a suspicious looking lumber load); People v. Wickliff, 144 Cal. App. 2d 207, 300 P.2d 749 (1956) (on previous night suspect's companion had told police that they were getting narcotics on the next day for another person).

53. Foy v. State, ___ Nev. ___, 436 P.2d 811 (1968).

implications.[54] Another example is where the suspect is in a drugged condition indicated by glazed eyes and needle marks on his arms. There is a strong implication of criminal activity and, with the addition of the suspect's reputation, probable cause is assured.[55] Of less certain character is the suspect's association with known narcotics users and the officer's observation of a transaction among them. The inference of illegality is present without knowledge of the suspect's reputation, but it is doubtful whether it is sufficient to establish probable cause unless an added factor such as reputation is present.[56] Therefore, the third type of conduct is similar to (1) because an inference of illegality is made without reference to suspect's reputation, but the inference is much stronger than a type (1) inference. In fact, the inference standing alone might establish probable cause and the suspect's reputation would be unnecessary.[57] In any case, knowledge of the suspect's reputation in addition to type (3) conduct produces probable cause without additional circumstances.[58]

B. Report of Informant

An informant's tip that a suspect is engaged in criminal conduct, even though it does not represent an officer's personal knowledge, is recognized as an additional element to be considered in determining probable cause.[59] Before the informer's report can be relied upon, it must be established that it is trustworthy as determined by the two-pronged test of Aguilar v. Texas:[60] (1) there must be shown some indication that the informant is reliable, and (2) the tip itself should be detailed enough for the magistrate to make an independent determination of probable cause.[61] Further insurance of the trustworthiness of the informant's tip is gained if the law officers are able to corroborate the circumstances which indicate criminal

54 *Id* at 812. However in this situation there probably would have been probable cause even if the officer had not been aware of the suspect's reputation.

55 *See, e g*, People v. Contreras, 263 Cal. App. 315, 69 Cal. Rptr. 548 (1968); Cannon v. State, 235 Md 133, 200 A.2d 919 (1964).

56. *See, e g*, United States v. Tucker, 380 F.2d 206 (2d Cir. 1967); State v. Towles, 155 Conn. 516, 235 A 2d 639 (1967).

57 People v Contreras, 263 Cal. App. 2d 315, 69 Cal. Rptr. 548 (1968); State v. Cannon, 235 Md 133, 200 A.2d 919 (1964).

58 *See, e g*, United States v. Tucker, 380 F.2d 206 (2d Cir. 1967); Foy v. State, ____ Nev. ____, 436 P.2d 811 (1968).

59 Jones v. United States, 362 U.S. 257 (1960); Draper v. United States, 358 U.S. 307 (1959).

60 378 U S 108 (1964).

61 *Id* at 114-15.

conduct.[62] This is important if the informer's reliability is not proven. If the officer still has not established probable cause, he may resort to independent investigation which indicates criminal conduct[63] including discovery of the suspect's reputation.[64]

What is the role which reputation plays in a situation where the allegation of probable cause is based at least in part on an informant's tip? It seems that the informant's tip and the suspect's reputation each have the same function: to strengthen the inference that suspicious conduct is actually criminal conduct. However, the informer's information is entitled more weight because it is a specific allegation that the suspect is conducting criminal activities. To the contrary, reputation can be relied upon only by employing the "established weakness of character" rationale.[65] The informant's tip alone, if sufficiently corroborated by police, is enough to establish probable cause.[66] Therefore, knowledge of the suspect's reputation, although relevant, is unnecessary to establish probable cause[67] when a reliable informant gives information from his personal knowledge[68] and the circumstances indicating criminal activity are corroborated by the police.

When the reliability of the informer is substantiated, yet the second test of *Aguilar* is not met, additional independent information becomes crucial. Consequently, reputation becomes more important but still is not sufficient itself to produce probable cause.[69] If, in addition to reputation, the supplemental information is neutral and when viewed in light of the suspect's reputation the inference of criminal activity is slight, probable cause is not found.[70] If probable cause is to be found

62. Spinelli v. United States, 393 U.S. 410, 417 (1969).

63. *Id.* at 418.

64. *Id.* at 418-19 (by implication). If the officer had supported his allegation of the suspect's reputation, such a factor would have been relevant. *See* text accompanying notes 31-36, *supra*.

65. *See* section II, *supra*.

66. Draper v. United States, 358 U.S. 307 (1959).

67. *Compare* Smith v. United States, 358 F.2d 833 (D.C. Cir. 1966), and Hundley v. State, 3 Md. App. 402, 239 A.2d 593 (1968), *with* Draper v. United States, 358 U.S. 307 (1959).

68. 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 so 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.

Spinelli v. United States, 343 U.S. 410, 416 (1969).

69. *See, e.g.*, People v. Zabala, 217 Cal. App. 2d 550, 31 Cal. Rptr. 712 (1963); Commonwealth v. Rossetti, 349 Mass. 626, 211 N.E.2d 658 (1965).

70. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969) (suspect had been seen traveling

when the *Aguilar* test is not met there must be, in addition to knowledge of the suspect's reputation, information which is inherently suspicious.[71]

When the informant is anonymous or of unknown reliability, the officer's additional information is again crucial particularly if the informant's story is not corroborated. When comparing the cases involving a reliable informer if additional information is neutral so that little inference can be drawn, reputation still will not establish probable cause.[72] There must be suspicious conduct or circumstances from which the inference of criminal activity may be drawn.[73]

Reputation can be a less important element when police have a tip from an informer. If *Aguilar* is satisfied, reputation is probably unnecessary for a finding of probable cause. When *Aguilar* is not satisfied and the police must rely on additional information, reputation is not essential for inferential import to suspicious conduct. This is accomplished by the informant's allegation. However, since it does strengthen the inference of criminal conduct, it must not be ignored.

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into the state three times a week and going to an apartment which had two telephones listed under another's name), United States v. Menser, 360 F.2d 199 (2d Cir. 1966) (suspect owned an automobile under a pseudonym and had two unlisted telephones on his premises); People v. West, 237 Cal. App. 2d 801, 47 Cal. Rptr. 341 (1965) (utilities at the apartment where the alleged crime was being committed were registered in name of suspect's girl friend).

71 *See, e.g.*, Husty v. United States, 282 U.S. 694 (1930); Schutz v. United States, 395 F.2d 225 (10th Cir. 1968); United States v. Soyka, 394 F.2d 443 (2d Cir. 1968); Bailey v. United States, 386 F.2d 1 (5th Cir. 1967); People v. Perez, 189 Cal. App. 2d 526, 11 Cal. Rptr. 456 (1961). *See also* People v. Sayles, 140 Cal. App. 2d 657, 295 P.2d 579 (1956); State v. Medero, 95 N.J. Supp. 209, 230 A.2d 516 (1967).

72 *See, e.g.*, United States v. Hernandez, 282 F. Supp. 272 (S.D.N.Y. 1968).

73 *See, e.g.*, Bailey v. United States, 386 F.2d 1 (5th Cir. 1967) (entry of a known rendezvous point for persons crossing the border with illegal narcotics); Garcia v. United States, 381 F.2d 778 (9th Cir. 1967) (co-defendant agreed to buy heroin from the suspect for the police, and police saw him make such purchase from the suspect); Irby v. United States, 314 F.2d 251 (D.C. Cir. 1963) (officers saw known drug addicts gathered outside suspect's apartment); United States v. Castle, 213 F. Supp. 52 (D.C. Cir. 1962) (informant said that he had just bought narcotics from suspect, and narcotics were found on the informer's person); People v. Morales, 259 Cal. App. 2d 290, 66 Cal. Rptr. 234 (1968), ___ Cal. 2d ___, ___ P.2d ___, ___ Cal. Rptr. ___, *cert. denied*, 393 U.S. 988 (1969) (furtive conduct on the part of the suspect, and association with known addict who was found to have narcotics in his possession after leaving suspect's apartment); People v. Scott, 259 Cal. App. 2d 268, 66 Cal. Rptr. 257 (1968) (narcotics had been bought near suspect's apartment recently, and the purchaser was told that there would be more later at suspect's apartment); People v. Currier, 232 Cal. App. 2d 103, 42 Cal. Rptr. 562 (1965) (upon seeing the officers the suspect ran and made a throwing motion); People v. Garcia, 187 Cal. App. 2d 93, 9 Cal. Rptr. 493 (1960) (association with known addicts, and person who had just left suspect's apartment and purchased narcotics paraphernalia); Murray v. State, 236 Md. 375, 203 A.2d 908, *cert. denied*, 381 U.S. 940 (1964).

C. *Dangerousness of the Suspected Offense*[74]

Will the role of reputation in establishing probable cause vary with the dangerousness of the suspected offense? An answer depends upon whether probable cause is viewed as a fixed or variable test.[65] A fixed test provides that the same degree of probable cause is always required regardless of the dangerousness of the suspected offense.[76] Alternatively, the variable test holds that the degree of probable cause decreases as the dangerousness of the suspected offense increases.[77] If the fixed test is employed, the nature of the suspected offense is a constant in the probable cause equation because it has no effect on the role of reputation. However, if the variable probable cause test is employed, the importance of reputation varies directly with the dangerousness of the suspected offense.

The rationale underlying variable probable cause is that when a greater danger to the community is indicated, greater interference with individual liberties must be allowed.[78] Reputation then assumes greater import if only because the gap between suspicious conduct and probable cause is not as great.

The required degree of probable cause for a dangerous offense may be further reduced if the suspect has proven himself in the past to be dangerous. An individual is closely watched if his prior criminal behavior indicates a character weakness highly dangerous to the community such as convictions for rape, murder or carrying a deadly weapon.[79] If he engages in suspicious conduct, the police should act more quickly than if the suspect did not have such a reputation[80] in order to prevent a more likely danger to the community.

CONCLUSION

The amorphous nature of probable cause makes it difficult to state precisely the relative role of a suspect's reputation in establishing probable cause. Certainly reputation does not deserve as much weight

74. This discussion has a limited perspective because the cases cited are primarily concerned with crimes of the same nature—narcotics violations. *See* text accompanying notes 6-11, *supra*.

75. *See* LAFAVE, ARREST at 246.

76. *Id.*

77. *Id.*

78. *Id.*

79. *See, e.g.*, Commonwealth v. Ballou, 350 Mass. 751, 217 N.E.2d 187 (1966).

80. *See, e.g.*, People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783 (1968); Commonwealth v. Ballou, 350 Mass. 751, 217 N.E.2d 187 (1966).

as an informant's tip or personal observations of highly suggestive criminal conduct. Prior bad acts of a suspect, used in an evidentiary sense, are relevant to a probable cause determination only because it can be inferred that the suspect is one prone to engage in particular criminal conduct. The reputation cannot be considered as evidence that the suspect is actually presently engaging in illegal acts.

Reputation's primary function is simply to strengthen the inference that suspicious activity is illegal in order to establish the required degree of probable cause. Reputation fluctuates in importance depending on the type of conduct associated with the suspect and other surrounding circumstances. It is only a secondary element which may provide the needed degree of facts and circumstances which eventually can be termed probable cause. But its role is relegated to that of a secondary one only because reputation alone does not provide sufficient grounds for arrest or search. Reputation is material only when it is included with additional factors which then ultimately provide the needed link of constitutional requirements justifying the invasion of the privacy of an individual.