No. _____

In The
Supreme Court of the United States

TITUS THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the bottom has fallen out of the "totality of the circumstances" standard established by *Illinois v. Gates*, 462 U.S. 213 (1983) for evaluating the reliability of informants in the context of finding probable cause to issue a warrant and this court should conclude that merely placing an informant under oath is insufficient to find an informant reliable.

PARTIES TO THE PROCEEDING

Petitioner Titus Thompson is an adult resident of the United States incarcerated at the FCI Allenwood, Pennsylvania. He is serving a sentence of 262 months imprisonment.

Respondent is the United States of America, acting through the United States Department of Justice.

RELATED CASE

United States of America v. Turner, 2023 LEXIS U.S. App. 20674 (2d Cir., August 9, 2023); Docket Nos. 20-4054-cr, 21-1969-cr (CON).

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PETITION FOR A WRIT OF CERTIORARI

Titus Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Second Circuit, reported at 2023 U.S. App. LEXIS 20674, is reprinted in the Appendix (App.) at 1-14.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on August 9, 2023. Jurisdiction is involved pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> "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.

INTRODUCTION AND STATEMENT OF THE CASE

Pursuant to a search warrant**,** police officers searched the first and second floors of premises located at 89 Parkridge Avenue, Buffalo, New York. It was a property owned by the defendant, but he did not live there. On the premises, they found narcotics paraphernalia and prohibited firearms. The warrant authorizing the search was supported, almost exclusively, by information provided by an informant who had been arrested the very morning he provided information to the police; the informant was arrested as part of the same conspiracy involving the defendant and his premises. The informant was placed under oath before a magistrate judge and swore that he had a history of drug dealing with the defendant, that he had purchased cocaine from the defendant within the past ten days, and that he had seen firsthand drugs and firearms at 89 Parkridge Ave. within the past ten days. Police officers "verified information provided by [the informant] about the residents at 89 Parkridge." App. 6. The magistrate judge determined that under the totality of the circumstances, this was sufficient to support a finding of probable cause to search the first and second floors of Parkridge Ave.

When officers searched 89 Parkridge Ave., they found guns and narcotics paraphernalia. Mr. Thompson was tried and convicted by a jury on a series of counts involving unlawful possession of firearms and using and maintaining a drug-involved premise.[1] Thereafter, he was sentenced to a period of incarceration of 262 months imprisonment and three years' supervised release.

Prior to trial, the defendant moved to suppress the items seized from 89 Parkridge Ave., challenging the reliability of the informant's declaration in support of the search warrant. The motion was denied as the Court found that, under the totality of the circumstances, the informant's declaration was reliable. At the suppression hearing, the Magistrate Judge who signed the search warrant testified as did the officers who sought the warrant. The informant also testified at the hearing and at trial, offering variations of testimony wildly inconsistent with one another.

On appeal to the United States Court of Appeals for the Second Circuit, the petitioner argued that there

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[1] Mr. Thompson was convicted of the following counts: one count of conspiracy to commit firearms offenses, in violation of 18 U.S.C. Sections 371, 922(a)(3), 922(a)(6), 922(a)(1)(A), and 923(a); one count of unlawful dealing in firearms, in violation of 18 U.S.C. Sections 922(a)(1)(A), 923(a) and 924(a)(1)(D); one count of felon in possession of a firearm, in violation of 18 U.S.C. Sections 922(g)(1) and 924(a)(2); and, one count of using and maintaining a drug-involved premises in violation of 21 U.S.C. Section 856(a)(1). App. 3. He was acquitted of a separate count of possession of firearms in furtherance of drug trafficking activities in violation of 18 U.S.C. Section 924(1)(A)(i).

was an insufficient basis for the District Court to find that the information from the informant was reliable. The Second Circuit disagreed, concluding that the magistrate "had a substantial basis to find probable cause for the warrant." App. 5. But the Summary Order reaching this conclusion does little more than recite the legal standard for finding an informant reliable. The specific factors relied upon by the Circuit were the fact that informant was placed under oath in the presence of the magistrate, that he gave a description of the "appearance and structure of 89 Parkridge," and that he gave unspecified "details about Thompson." App. 6. The Circuit also credited the fact that a Bureau of Alcohol, Tobacco, Firearms and Explosives agent "verified information provided by [the informant] about the residents of 89 Parkridge. *Id.* The informant had been arrested the very morning the warrant for Mr. Thompson's building was sought for being part of the same conspiracy as that involving Mr. Thompson. The informant's apparent decision to instantaneously turn state's evidence raised no questions in the mind of the reviewing magistrate. The decision to provide a statement under oath, to appear before the magistrate, and nominal corroboration by reference to facts anyone in the neighborhood might have observed, were enough for the magistrate.

It should not be enough for this Court.

While informants and cooperating witnesses are a staple of law enforcement investigations, this Court has long recognized that the use of confidential informants presents special difficulties to magistrates

reviewing search warrants. How reliable are the reports such informants provide? Amanda Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship With Its Confidential Informants*, 34 Colum. J.L. & Soc. Probs. 301 (2001). The adoption of the totality of the circumstances standard for evaluating informants statements in support of a search of a residence pursuant to a warrant in *Illinois v. Gates*, 103 S.Ct. 2317 (1983) replaced the formulaic approach of the *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), permitting magistrates to evaluate an informant's credibility based on a flexible assessment of all the information presented to the magistrate at the time of a warrant application. What *Gates* did not do, and what this case invites the Court to do, is set a lower-limit on the reliability factors a magistrate must consider when evaluating the information offered by an informant. The petitioner asks this Court to reject what amounts to self-authentication as sufficient for a magistrate to rely on the report of an informant. A co-defendant's statement, even if taken under oath, hours after his arrest and without inquiry as to what transpired between the declarant and arresting officers is inherently suspect. More should be required than merely placing an informant under oath in the presence of a magistrate.

The *Aguilar-Spinelli* test for evaluating the reliability of an informant required a two-pronged inquiry to determine whether an informant's tip established sufficient probable cause to issue a search- or arrest-warrant. In *Aguilar*, the Court required a magistrate

to must be informed of both the circumstances informing the informant's allegations and the circumstances demonstrating the informant's credibility. *Aguilar*, 378 U.S. at 114. The prior determination has been referred to as the "basis-of-knowledge prong"; the latter has been referred to as the "veracity prong." Cathy E. Moore, *Supreme Court Review: Fourth Amendment – Totality of the Circumstances Approach to Probable Cause Based on Informant's Tips Illinois v. Gates, 103 S.Ct. 2317 (1983)*, 74 J. Crim. L. & Criminology 1249 (Winter, 1983). *Spinelli* expanded the *Aguilar* test to require a greater emphasis on corroboration of an informant's tip. *Spinelli*, 393 U.S. at 415.

Gates dispensed with this formulaic approach to evaluating an informant's reliability, substituting the "totality of the circumstances" test. *Gates*, 103 S.Ct. at 2332. Such a test was better suited to a Fourth Amendment analysis, was less likely to sow seeds of confusion among reviewing magistrates, some of who may not have legal training, and could encompass an evaluation of an informant's veracity, reliability and basis of knowledge, according to the Court in *Gates*. "[P]robable 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." *Id.*, at 2328.

Yet something more was contemplated than merely hauling an arrestee off the street, instantaneously turning him into a state's witness, and presenting him to a magistrate the very day of his arrest to discuss what may, or may not, be the criminal activities

of co-conspirators. And surely corroboration, though a factor in the totality of the circumstances, requires a more searching analysis than mere recitation of data potentially readily available to anyone living near the site of a potential search. Everyone may know a home is occupied by several families; this sheds no light on what those families may or not possess in their dwelling places. There must be a lower limit on what constitutes the reliability of an informant. Although this Court has not yet sculpted such a test, the need for one is obvious.

In the context of jury instructions, where jurors are charged with finding facts based on the testimony of informants, this Court recognizes that "informant testimony presents special credibility problems, and accordingly, careful instructions to the jury regarding credibility are appropriate. *Banks v. Dretke*, 540 U.S. 668, 701-02, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); *see also On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. [*918] 967, 96 L.Ed. 1270 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."). *United States v. Wiley*, 475 F.3d 908, 917-18, 2007 U.S. App. LEXIS 2518, *25-26. The petitioner here contends that a reviewing magistrate assessing whether to sign off on a search warrant faces the same "serious questions of credibility." *Gates* permits

magistrates to engage in an ad hoc assessment of reliability with no lower limit or guidance about what to do with an informant instantaneously turned by arresting officers into a state's witness before the informant has counsel or his own or has been presented for arraignment. The lack of any judicial oversight, or even any inquiry, as to what takes place in these fraught circumstances creates an intolerable risk that improper promises and pressures have been made by officers under the exigencies of rapidly unfolding events. No oath cures that defect for an informant himself facing criminal charges. Indeed, the incentive to lie is even greater. We tell jurors this when they evaluate the testimony of an informant. Yet we permit willful blindness about these very pressures when a magistrate decides whether or not to credit an informant's statements.

By way of example, the Connecticut Supreme Court requires special credibility instructions in cases where jailhouse informants testify "because such informants have 'a powerful incentive, fueled by self-interest, to implicate falsely the accused,' and, '[c]onsequently, [their] testimony . . . is inevitably suspect.' *State v. Patterson*, 276 Conn. 452, 469 (2005). A "classic jailhouse informant is a witness who has testified that the defendant has confessed to him or had made inculpatory statements to him while they were incarcerated together." *State v. Diaz*, 302 Conn. 93, 99 n.4 (2011).

The rule requiring a special credibility instruction has been extended in Connecticut to circumstances where an informant relays purported statements of a

defendant outside of prison in exchange for favorable treatment by the state. *State v. Jones*, 337 Conn. 486, 488 (2020). The reason for expansion of this rule is that the incentives an informant has to offer false information to benefit himself are obvious. These pressures are acute in the case of the newly arrested, especially when the arrestee has not yet even been presented in court or had the chance to consult with counsel.

There is no reason why the probable cause standard should be diluted at the commencement of the criminal process. Such a dilution obviously serves the interests of a "crime control" model of the criminal justice process. It does little to promote respect for the law among those accused, or likely to be accused, and it ignores a reality obvious to candid observers of the criminal justice process: placing a terrified and frightened individual under oath hours after his arrest and asking for him information about another involved in the same crime creates powerful incentives to lie. The Fourth Amendment simply deserves better.

REASONS FOR GRANTING THE PETITION

I. The Bottom Has Fallen Out Of The "Totality Of The Circumstances" Standard Established By *Illinois v. Gates*, 462 U.S. 213 (1983) For Evaluating The Reliability Of Informants In The Context Of Finding Probable Cause To Issue A Warrant; This Court Should Conclude That Merely Placing An Informant Under Oath Is Insufficient To Find The Informant Reliable

> "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. Am. IV.

The probable cause standard is undoubtedly flexible, fact-specific and driven by the particularities of the cases in which it is applied. Yet the interests the standard exists to protect are not ambiguous: the Fourth Amendment protects individuals against unreasonable searches and seizures. Permitting the standard to morph into a sweeping authorization for the state to search and seize the persons, houses, papers and effects of those whom the Amendment is intended to protect does damage to the fabric of constitutional guarantees on which we all depend. This fabric is especially vulnerable as regards the information

provided to law enforcement by informants who stand to benefit from the information provided to law enforcement. "For what shall it profit a man, if he shall gain the whole world, and lose his own soul?" *Gospel of Mark* 8:36. That depends on the sinner. As this Court recognizes when it comes to instructing jurors on the credulity of informants, the information of a person expecting or hoping to gain from the information they offer requires special scrutiny. Why do we relieve magistrates evaluating such information from a similar requirement to exercise caution?

This Court recognizes the special challenges the informant testimony poses for jurors. "[I]nformant testimony presents special credibility problems, and accordingly, careful instructions to the jury regarding credibility are appropriate. *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004); *see also On Lee v. United States*, 343 U.S. 747 (1952)." Magistrates are no less susceptible to being misled, especially where, as here, a rapidly evolving series of events leads to an early morning arrest of an informant for participating in a conspiracy with others, and, within hours of his arrest, whether he has consulted counsel or not, he appears before a magistrate ready, willing and able to swear an oath and damn another. Did the mere passage of several hours transform the informant from criminal co-conspirator into reliable informant? Or is it more likely that fear, and perhaps suggestions that appear to be threats or false promises by law enforcement, led the informant to vent the same antisocial instincts that yesterday inspired his criminal

conduct into today's equally corrosive decision to say whatever he could, truth be damned, to better his situation?

The *Aguilar/Spinelli* factors focused magistrates on the special credibility factors presented by informants. Yet a formulaic test was incapable of capturing the full range of factors magistrates need to consider when evaluating a warrant application. Hence, the replacement of discrete factors into a "totality of the circumstances" test in *Gates*. But *Gates* did not call for, and does not require, a magistrate to ignore the obvious credibility issues presented by an informant who decides to turn state's evidence moments after his arrest. The totality of the circumstances test is well-suited to evaluating a confidential informant not also involved in commission of the crime being investigated. Special credibility issues arise when the informant is a charged co-conspirator of the person targeted by a warrant.

The Second Circuit ignored the dynamic reality of the events in this case, seemingly mesmerized by the talismanic effect of an oath. A man who woke up in the morning at liberty to continue to engage in criminal conduct was suddenly deemed reliable after his arrest, an arrest that placed him in law enforcement custody presumably uncounseled and subject to the blandishment of law enforcement officers. The petitioner does not intend to minimize the impact of taking an oath on a witnesses; taking an oath is more than a hortatory exercise for most people, perhaps for most informants. But in the case of an informant with an expectation of

gain for his or her testimony this Court and other courts are quick to admonish fact finders to take special care in evaluating the informant's testimony. "[S]uch informants have a powerful incentive, fueled by self-interest, to implicate falsely the accused," and, "[c]onsequently, [their] testimony . . . is inevitably suspect." *State v. Patterson*, 276 Conn. 452, 469 (2005). This rule extends to any situation in which an informant stands to gain as a result of their testimony." *State v. Jones*, 337 Conn. 486, 488 (2020).

"[I]nformant testimony presents special credibility problems, and accordingly, careful instructions to the jury regarding credibility are appropriate. *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004); *see also On Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."). *United States v. Wiley*, 475 F.3d 908, 917-18 (7th Cir. 2007).

The petitioner here does not ask this Court to abandon the totality of the circumstances test in every case involving an informant. He asks merely that this Court harmonize its holding with respect to the special credibility jury instructions required in cases of using informants with an interest in the outcome with the factors a magistrate must consider in evaluating a search and/or arrest warrant. It simply makes no sense

to treat a disinterested informant who may have a powerful privacy interest in remaining confidential out of fear of potential reprisal in the same manner as a co-defendant, recently arrested, possibly without having the assistance of counsel in making a decision to cooperate.

A better course would be a requirement that any informant who has been arrested as part of the same conspiracy or circumstances as the potential target of a search or arrest warrant be subjected to an enhanced corroboration requirement, or, in the alternative, that the Court be required to hold a hearing at which the officers who placed the informant in custody and secured his cooperation be compelled to answer, under oath, and in an adversarial proceeding, what promises, suggestions or insinuations were directed at the informant to inspire him to cooperate with his captors. It is naïve to assume that somehow the effect of an arrest leads to a sudden embrace of something like candor.

The petitioner is mindful of this Court's reluctance to boutique style rules for the evaluation of warrant requests. In *Florida v. J.L.*, 529 U.S. 266 (1993), the Court rejected a request that special rule be created for the evaluation of anonymous tips in evaluating whether there was justification to stop a person reported to possess a firearm.

> Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious

> threat that armed criminals pose to public safety; *Terry*'s [*Terry v. Ohio*, 392 U.S. 1 (1968)] rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern. See 392 U.S. at 30. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. . . . As we clarified when we made indicia of reliability critical in *Adams* [*Adams v. Williams*, 407 U.S. 143 (1972)] and *White* [*Alabama v. White*, 496 U.S. 325 (1990)] the Fourth Amendment is not so easily satisfied. Cf. *Richards* v. *Wisconsin*, 520 U.S. 385, 393-94, 137 L.Ed.2d 615, 117 S.Ct. 1416 (1997) (rejecting a *per se* exception to the "knock and announce" rule for narcotics cases partly because "the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others," thus allowing the exception to swallow the rule).

J.L., 272-73.

The petitioner contends that the reliability of informants accused of participating in the very crime that is the target of investigators seeking a warrant

possesses very real dangers of unreliability, dangers that dwarf those posed by mere anonymous callers seeking to cause inconvenience for others.

II. A Writ of Certiorari is Warranted Under Rule 10(c)

Rule 10 of this Court's Rules cautions that a writ of certiorari is a matter of judicial discretion and will be granted for only the most compelling reasons. Rule 10(c) reads, in pertinent part, that the Court shall consider whether "a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." The petitioner submits that this Court's requirement is satisfied. This Court's jurisprudence counsel's fact finders to exercise caution when evaluating the statements of an informant who stands to benefit by his disclosures. This prudential requirement has disappeared from the factors a magistrate must consider in determining whether probable cause exists either to search a home or arrest someone. The dissonance is jarring and requires this Court's intervention.

CONCLUSION

The petitioner requests an order vacating his conviction with a remand to the District Court to reconsider its decision denying the petitioner's motion to suppress consistent with a ruling from this Court

requiring more than nominal "corroboration" of a co-conspirators self-serving declarations.

Respectfully submitted,

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