

Supreme Court of the United States

In the Matter of:

Docket No. 8

WILLIAM SPINELLI,

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

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Place Washington, D. C.

Date October 17, 1968

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- x
4 William Spinelli, :
5 Petitioner, :
6 v. : No. 8
7 United States of America, :
8 Respondent. :
9 ----- x

10 Washington, D. C.
11 Thursday, October 17, 1968

12 The above-entitled matter came on for further argument
13 at 10 a.m.

14 BEFORE:

- 15 EARL WARREN, Chief Justice
- 16 HUGO L. BLACK, Associate Justice
- 17 WILLIAM O. DOUGLAS, Associate Justice
- 18 JOHN M. HARLAN, Associate Justice
- 19 WILLIAM J. BRENNAN, JR., Associate Justice
- 20 POTTER STEWART, Associate Justice
- 21 BYRON R. WHITE, Associate Justice
- 22 ABE FORTAS, Associate Justice
- 23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 (As heretofore noted.)

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: The first case is William
3 Spinelli versus United States of America.

4 Mr. Baris, you may continue

5 FURTHER ORAL ARGUMENT OF IRL B. BARIS

6 ON BEHALF OF PETITIONER

7 MR. BARIS: Mr. Chief Justice, and may it please the
8 Court, yesterday afternoon I was asked a question, I believe by
9 Mr. Justice Fortas. In the press of the recess I didn't get a
10 chance to finish. It related to the information which I feel
11 is necessary to be included in an affidavit for a search warrant
12 and with particular reference to the previous reliability of
13 informant.

14 I have here a handbook on the law of search and seizure
15 to be distinguished, of course, from the handbook by which we
16 are talking in this particular case. This is a legal handbook,
17 I would say. This was published very recently by the Government.

18 I note that on page 4, for instance, these are instruc-
19 tions to law enforcement officers as to what should be included in
20 an affidavit. They say specifically on page 4, "Where the inform-
21 ant is undisclosed, it is necessary to back up the other person's
22 trustworthiness by showing prior dealings with him which were
23 reliable to back up your belief that the information he is now
24 giving you is reliable."

25 At the end of the book there are several examples of what

1 should be included in affidavits. Three of them, I think, are
2 particularly noteworthy, because these examples are based upon
3 information by reliable informants. In the first one it says
4 informant has given me reliable information on narcotic sales
5 five times within the last four months.

6 Example No. 2 says informant has provided reliable
7 information about robberies on two occasions during the last
8 three months.

9 Example No. 3 says a reliable informant who has given
10 reliable information on narcotics offenses on three occasions
11 within the last two months.

12 I also would like to draw the Court's attention to the
13 various cases decided by this Court in which there have been
14 information supplied by informants. I think in each of those
15 cases where the search warrant has been sustained there is sub-
16 stantially more than was included in the affidavit that we have
17 in the instant case and in those in which the search warrant was
18 not sustained, we have a comparable situation.

19 For example, in the McCray Case, which was not a search
20 warrant case but an arrest without a search warrant, one of the
21 officers testified in support of his probable cause that he
22 received information from the undisclosed informant on 15 or 16
23 cases in the past which resulted in numerous arrests and convic-
24 tions. A second officer said he had received information from
25 his informant on 20 to 25 occasions.

1 In the Riggan Case, which was a per curiam decision of
2 this Court involving a search warrant and in which the search
3 warrant was held not to be good, it merely stated that informa-
4 tion from the sources believed to be reliable which I consider
5 to be very comparable to what we have here where they said "a
6 confidential reliable informant."

7 In the Ventresca Case, a search warrant case in which
8 the search warrant was approved, there was no informant involved,
9 but only Government investigators. I think the Government inves-
10 tigators are in a different category than an undisclosed inform-
11 ant.

12 In the Beck Case, not a search warrant, but in which
13 the arrest and the subsequent search was held to be invalid, the
14 officer had information, but there was nothing said in his testi-
15 mony concerning the credibility of the informant.

16 In the Aguilar Case, the search warrant or the applica-
17 tion said, "reliable information from a credible person," which
18 I think is practically what we have in this case. Again, the
19 search warrant was held to be not good.

20 In the Rugendorf Case, involving a search warrant, there
21 were three informants. As to each of them it says whom the FBI
22 had found to be reliable or who had furnished reliable informa-
23 tion to the FBI in the past or who had supplied the FBI with
24 reliable information in the past.

25 In the Kerr Case, not a search warrant case but involving

1 probable cause on an arrest, the informant had previously given
2 information leading to at least three arrests.

3 In the Jones Case, the second Jones Case at 362 U.S.,
4 the informant gave information on previous occasions which was
5 correct. That case was reversed on other grounds, although the
6 search warrant was sustained in that case.

7 In the Draper Case, which was relied upon heavily by
8 the majority opinion of the Court of Appeals in this case and
9 which is relied upon by the Government in their brief, there was
10 a special employee of the FBI who had been serving four to six
11 months and had previously given information which was found to be
12 reliable.

13 Upon the authority of those cases, it is my conclusion
14 that merely to say that the informant is a reliable confidential
15 informant does not satisfy the requirements of the probable
16 cause requirement of the Fourth Amendment.

17 In addition to the other reasons which we have alleged
18 and indicated in our brief and which we discussed yesterday, I
19 feel also that the search warrant here was improper because the
20 affidavit did not relate the time when the alleged informant
21 gave this information to the Government nor when he allegedly
22 obtained this information.

23 There is a case of the United States Court of Appeals
24 of the First Circuit, the Rosencranz Case cited in our brief,
25 which says that merely the use of the pretense is not sufficient

1 for these purposes.

2 Q What was the lapse of time here in this case?

3 A There was nothing said in the affidavit itself. I think
4 the cases hold that one must on appeal govern it by what is in
5 the affidavit. It merely said in the pretense that the Federal
6 Bureau of Investigation received information. At the hearing on
7 the motion to suppress, there was some testimony that the infor-
8 mation had been given in the early part of August.

9 It was no more specific than that. The search warrant
10 was applied for on the 18th of August and was executed on that
11 date.

12 We have also indicated two other points in our brief,
13 one with reference to the fact that more items were seized than
14 the search warrant required. The Court of Appeals seemed to
15 justify the seizure of a pencil sharpener, a radio, and adding
16 machine, a watch, eye glasses all under the general heading of
17 "gambling paraphernalia.

18 We feel that to allow a search or a seizure on the
19 ground of gambling paraphernalia makes it a general warrant and
20 is improper. In fact, we are in the anonymous situation that the
21 search warrant provided for the seizure of two telephones. They
22 seized five, and I suppose the Government's contention is that
23 two telephones are two telephones, but the other three telephones
24 were not telephones but gambling paraphernalia.

25 With reference to a final point that we have brought up

1 in our brief, that is, with reference to the execution of the
2 search warrant. The facts in this case are that immediately
3 after the agents received the search warrant, they apparently
4 went back to their office for a certain mechanical equipment and
5 walky-talkies apparently, and then went out to the scene of the
6 search. But instead of breaking into the premises or obtaining
7 entrance into the premises, they went to an apartment next door
8 and waited from 4:55 in the afternoon until 7:05 in the afternoon,
9 a period of two hours and ten minutes.

10 They, insofar as the record shows, did nothing during
11 that period of time except to wait and when the petitioner exited
12 from the subject apartment, they then came out of the apartment
13 next door and which was right across the hall, and immediately
14 placed the petitioner under arrest, and then by virtue of a key
15 which they obtained from his possession went into the subject
16 premises.

17 It is our belief that this is not forthwith execution
18 of a search warrant as is required by Rule 4, that "forthwith"
19 means under these circumstances immediately. We believe, of
20 course, there is the provision in Rule 4 that a search warrant
21 must be executed within a period of ten days after it is issued.
22 Otherwise, it loses its validity. But our position is that where
23 the officers have the search warrant, were at the premises, had
24 everything available to them for getting into the premises, includ-
25 ing the right under Section 3109 to break the doors, that they

1 have executed it forthwith.

2 The Court of Appeals decision has indicated that it was
3 incumbent upon petitioner to show some prejudice resulting from
4 this delay. We have found no case which directly is in point with
5 the particular proposition except as mentioned in the concurring
6 opinion of Judge Bazelon in the Mitchell Case, which we have
7 cited in our brief.

8 Q Do you claim that this delay indicates that the officers
9 are not relying on the search warrant, but on search and arrest?

10 A I don't know, Your Honor. They have not attempted to
11 justify it on that basis throughout this case. I think perhaps
12 they were giving themselves an opportunity to do so if the Govern-
13 ment decided to do that on the basis that the search warrant would
14 be held invalid.

15 I am merely speculating as to the Government's position.
16 Perhaps they were giving themselves an ace in the hole, so to
17 speak, that if the search warrant were declared to be invalid,
18 then they would have as an alternative the question of an arrest
19 and a search incidental to the arrest.

20 Q Did they make a return on the warrant?

21 A Yes, they did make a return on the warrant.

22 It is our position, therefore, that the search was not
23 executed forthwith and that the burden is not upon the petitioner
24 to show prejudice, because the burden is not on the petitioner to
25 show prejudice in incidents where, for instance, under the Wong

1 Sun Case, in which under Section 3109 where the defendant was not
2 required to show prejudice, because the officers failed to iden-
3 tify themselves before making the entry into the premises.

4 I have reserved the balance of my time for rebuttal,
5 if the Court please.

6 MR. CHIEF JUSTICE WARREN: Mr. Connolly?

7 ORAL ARGUMENT OF JOSEPH J. CONNOLLY

8 ON BEHALF OF RESPONDENT

9 MR. CONNOLLY: Mr. Chief Justice and may it please the
10 Court:

11 The issue in this case is whether the United States
12 Commissioner reasonably found on the fact contained in this affi-
13 davit that there was probable cause to search an apartment at 1108
14 Indian Circle Drive. Petitioner's argument proceeds by separat-
15 ing out each statement in the affidavit and showing wherein that
16 statement failed to supply certain information which also would
17 be relevant to the Commissioner's finding of probable cause.

18 By adding up the alleged deficiencies, petitioner con-
19 cludes that there was no probable cause.

20 But that analysis is not fully responsive to the ques-
21 tion here. The prior inquiry is not what the affidavit did not
22 contain, but what it did contain, whether there were enough facts
23 on which the Commissioner could make his own independent judgment
24 of the grounds for his search and whether that judgment on the
25 affidavit taken as a whole was reasonable.

1 Cause for reversal lies not on whether a judge on review
2 would not have issued the warrant because of absence of certain
3 particular information, but whether there was such a complete lack
4 of information that the Commissioner's apparent finding was nothing
5 more than a rubber stamp to the police.

6 Petitioner's counsel has discussed what the affidavit
7 did not contain, but I would like to set out briefly what it
8 did contain. It stated that the FBI had received information from
9 a confidential reliable informant that petitioner was operating
10 a handbook and accepting wagering information over two specified
11 telephone numbers, WYdown 400219 and WYdown 411036. It stated
12 that petitioner is known to Agent Binder and to other Federal
13 agents and to local police as a bookmaker and gambler. It also
14 showed the results of the agent's own investigation to corroborate
15 the information which had been received.

16 It said that the telephone company records showed that
17 both telephones specified by the informant were in operation and
18 that both of them were located in Apartment F at 1108 Indian
19 Circle Drive under the name of Grace Hagen. It showed the peti-
20 tioner had been under surveillance by the FBI during the three
21 weeks preceding the application of the warrant.

22 On the four consecutive business days he was followed.
23 He drove from Illinois into St. Louis in the early morning and
24 then roughly at the same time every afternoon he drove out to
25 Olivette, Missouri, a suburb some 30 minutes from downtown

1 St. Louis, and went to Apartment F, 1108 Indian Circle Drive, the
2 apartment which contained the two telephones.

3 This affidavit answered the Commissioner's hypothetical
4 question: What makes you think that bookmaking is going on in
5 Apartment F?

6 Agent Bender replied, because I received specific infor-
7 mation from a reliable informant about a bookmaking operation from
8 an individual whom I know to be a bookmaker, and because I veri-
9 fied that information by my own observation by the petitioner's
10 and my own information.

11 Q What was this about going to a place in another community
12 every morning and stopping at another place on the way back and
13 then going to his own apartment? What is there of an incrimi-
14 nating nature in that?

15 A Mr. Justice, the affidavit, first of all, didn't say
16 that the apartment at 1108 Indian Circle Drive was his apartment.
17 From the face of the affidavit, it appears that he lived in Illi-
18 nois, came over to St. Louis.

19 Q His apartment, whether he lived there or not, what is
20 there incriminating about that?

21 A The incriminating aspect of it, Mr. Chief Justice, is
22 that that apartment contained the two telephones specified by
23 the informant, that he was a known bookmaker and that a known
24 bookmaker making regular visits to an apartment with two tele-
25 phones itself provides some suspicion.

1 I am not saying that that kind of conduct, that
2 observed conduct by itself would be at all sufficient to satisfy
3 probable cause. But what it did do was it corroborated the infor-
4 mation which was received by the informant that he is carrying
5 on a handbook operation by reason or by the use of the two tele-
6 phones in this apartment, very much the way Draper's conduct in
7 the Draper Case corroborated the information.

8 Herferd said Draper would be coming in on the train
9 either one or two days, September 8 or September 9. Herferd
10 described the way Draper would be dressed and said he would be
11 carrying a tan zipper bag. When the second day that the agents
12 were waiting in the railroad station, a man came out fitting the
13 description that Herferd had given to Draper, walking hurriedly
14 and carrying the tan zipper bag.

15 The Court held that with all of the other information
16 that Herferd had given, corroborated by the agents' investigation,
17 there was probable cause to believe that the incriminating accu-
18 sation, i.e., that Draper was carrying narcotics, also would be
19 corroborated.

20 Q Is there anything incriminating about having two tele-
21 phones in an apartment?

22 A There is certainly nothing which would give probable
23 cause.

24 Q Don't you go back, then, to just simple fact that it
25 is alleged that a confidential informant had told the affiant

1 that this man was operating a bookmaking? Don't you get to that?
2 These others in and of themselves not being incriminating, don't
3 you get back to that one fact to support your affidavit?

4 A Mr. Chief Justice, the petition correctly points out
5 that the finding of probable cause does depend upon there being
6 adequate assurance of trustworthiness of the hearsay information.

7 In Jones v. The United States the Court held that a
8 valid affidavit may be issued on the basis of information supplied
9 by an unnamed person as long as there is a reasonable basis for
10 corroborating the hearsay.

11 In the Jones Case the Court found a reasonable basis
12 for corroborating the hearsay in the officer's statement that the
13 informant had previously given accurate information, that his
14 story was corroborated by other stories of information and that
15 the suspect was known by the police to be a user of narcotics.

16 Petitioner relies heavily on the Aguilar Case, the
17 subsequent case in which the Court considered the sufficiency of
18 the affidavit which presumed to rely on hearsay information. I
19 say "presumed to rely on hearsay information," because there is
20 a world of difference between this case and the Aguilar Case.

21 The Aguilar Case, in fact, did not tell us -- the affi-
22 davit in the Aguilar Case did not say exactly what information
23 had been received from the informant. The affidavit began that
24 the police officers have reason to believe and do believe that
25 Aguilar kept narcotics in his house. Then it went on to say that

1 the officers have received reliable information the credible
2 person and do believe that heroin, marijuana, barbituates and
3 other narcotics are being kept for sale at Aguilar's house.

4 Q In what sense is that different from your accusation
5 in this?

6 A It is critically different because there is nothing in
7 the Aguilar affidavit that says what information was given to the
8 police. It said that the officers say they have received reliable
9 information from a credible person and do believe. From all
10 that appears in the affidavit in Aguilar, it differed from the
11 defective affidavits in Nathanson and in Giordenello only in the
12 sense that the officer's own belief was supported to some extent
13 by the fact that they had received undisclosed information from
14 an unnamed person. That was the only real difference between the
15 affidavit in Aguilar and the defective documents in those two
16 cases.

17 Q Do you feel it would be pertinent upon the Government to
18 require them to show something in their affidavit as to the reason
19 for the belief that this was a confidential employee?

20 A Reliable informant?

21 Q Yes.

22 A No, Mr. Chief Justice, I don't believe it would be a
23 burden on the Government. The Court's approval in Aguilar of the
24 affidavit in Jones indicates that the test of Aguilar with respect
25 to the informant's general reliability may be satisfied by a

1 statement which says that the informant had provided information
2 on one previous occasion. That is not a great burden on the
3 Government, Mr. Chief Justice.

4 I think at this point I would like to point out that
5 the Government believes ---

6 Q As a matter of fact, the Government, according to that
7 article that counsel read, actually tells its people to do that,
8 doesn't it?

9 A Yes, it does.

10 Q Why don't you stay with it?

11 A Mr. Chief Justice, to go back to perhaps the source
12 of the statement in the handguide, legal search and seizure, is
13 that the requirement in Aguilar that there be some underlying cir-
14 cumstances to justify believing the informer was generally
15 reliable, I believe, is misconstrued by petitioner. There is
16 nothing in the Aguilar Case ---

17 Q You are talking about the Aguilar Case. I am talking
18 about your own bulletin that tells your people what they ought to
19 put in these search warrants.

20 A I will take off from my own bulletin. Suppose the
21 informer is not an informer with whom the agents had had any
22 prior dealings at all.

23 Q Couldn't he say that he is a businessman in the com-
24 munity who had a good reputation and was a resident and this man
25 has told him that this is true, he is investigated and he knows

1 that his word is reliable and so forth?

2 A They could put that in, Mr. Chief Justice, although I
3 think there rarely would be situations in which a businessman or
4 a bank president or someone like that would be getting informa-
5 tion about gambling. Suppose they just don't know?

6 Q Why do you say that, that a good citizen and a business-
7 man might not do such a thing? Suppose he had an apartment in
8 the same building and he didn't want gamblers to be in there and
9 he told the police that he knew there was a gambling operation
10 there? Would that be abnormal?

11 A No, Mr. Chief Justice.

12 Mr. Justice, I think there would be a very natural reser-
13 vation for the individual to place himself certainly in a position
14 where adverse action may be taken against him by the criminal
15 element. Mr. Chief Justice, I think you are absolutely correct
16 about the circumstances in which a citizen might see a bookmaking
17 operation going on next door and report it to the police in some
18 manner.

19 I was particularly thinking about the type of informa-
20 tion that was supplied in this case, which was really inside
21 information, business information, not the type of information
22 that one could pick up just by observation.

23 But again getting back to what this handbook says,
24 Aguilar does suggest that there must be some underlying circum-
25 stances in believing the informant's reliability.

1 Q I take it that you feel that the thrust of Aguilar is
2 only to verify or to support the trustworthiness of the informer
3 in the sense of his honesty?

4 A No, I certainly don't. I think that is petitioner's
5 position.

6 Q You say underlying circumstances to show that the
7 informer is reliable. I suppose an experienced police officer
8 who just knew or at least he thought was a very honest man, if
9 that is all that was necessary, you could just take a policeman's
10 statement that there was gambling at a certain address, period.
11 That wouldn't be sufficient, would it?

12 A I was going to go on to say that petitioner indicated
13 that he ---

14 Q So part of the Aguilar's test is not on the ---

15 A It is the reliability of the information.

16 Q Tell me what there is in this information that would
17 justify an inference that there was gambling going on. Let's
18 just assume that the trustworthiness that the informer has been
19 adequately proved by the police, think he is reliable and they
20 say he is reliable, but where are the facts that would justify
21 the inference that there was an illegal activity going on at a
22 certain address?

23 A The facts are that the information says that an illegal
24 business is being conducted through the use of two specific tele-
25 phones.

1 Q I know. But you know that that isn't enough just to
2 say Aguilar says he has to have the underlying circumstances in
3 which to deduce that there is gambling going on. What are those?
4 Two telephones?

5 Q Isn't it relevant circumstances that there are two
6 telephones among others?

7 Q Quite relevant, but from what facts do you deduce or
8 is it reasonable to conclude there is gambling going on at that
9 address?

10 A Because the informant has said that gambling is going
11 on through the use of two telephones, because the two telephones
12 are both in operation and are both at this address.

13 Q It is that statement about gambling?

14 A If the Justice is referring to the statement in Aguilar
15 which says that there must be some showing of the underlying cir-
16 cumstances on which the informant based his statement, is that
17 the part of Aguilar that the Justice is referring to?

18 Q I am talking about the part of Aguilar that refers
19 to the underlying circumstances, yes.

20 A We admit that there is nothing in this affidavit which
21 meets that particular requirement in the Aguilar formula. But
22 in response to your question, I would like to say two things:

23 In the first instance, Aguilar itself established the
24 basis for a material distinction between this case and Aguilar.
25 In footnote 1 of Aguilar, the Court said that where there is or

1 if the magistrate had been informed of the facts and the results
2 of the surveillance, that would be an entirely different case.

3 We think we have an entirely different case here. The
4 implication of that statement in footnote 1 ---

5 Q Do you think all that is necessary, then, is that the
6 police somehow support the veracity of the informer?

7 I think that is what you are arguing, that as long as
8 someone's information has been verified, that proves that he is
9 a reliable person and, therefore, we may accept his blank state-
10 ment that there is gambling going on without any reason or with-
11 out necessary explanation as to why he thought gambling was going
12 on?

13 A In the first place, that is what the footnote in Agui-
14 lar seems to say. It can be done, because in very, very few
15 situations -- I can't think of any right now -- can a surveil-
16 lance supply the deficiency which we are talking about right now.
17 That is, that the affidavit doesn't tell you how the informant
18 got his information. Nothing in your surveillance is going to
19 tell you how the informant got his information.

20 Q What is so difficult? There must be some practical
21 reason for the Government not saying in their affidavit, the
22 informant said he saw gambling, or some other circumstance?

23 A Mr. Justice White, there is nothing in Aguilar which
24 suggests that the only satisfactory showing of the underlying
25 circumstances in which the informant gained his information was

1 from personal observation.

2 Q I agree with that. Is there some reason why the Govern-
3 ment doesn't make the affidavit say what the source of the inform-
4 ant's information is?

5 A Just as in the cases in which the Government chooses
6 not to identify the informant by name, there is some risk that
7 the circumstances in which the informant gained his information
8 will serve to identify him and that there may be incriminations
9 against him.

10 To go on with our discussion, I would also like to
11 point out that the information in this case, that is, the intrin-
12 sic facts of the hearsay information, deserve some weight. They
13 are not really an empty vessel that are given probative value only
14 by the corroborating testimony.

15 The informant told the agents the type of gambling
16 activity petitioner was carrying on, the way it was being con-
17 ducted and specific telephone numbers being used.

18 From our reading of Aguilar, we believe that the pri-
19 mary concern which prompted the Court to require some of the
20 underlying circumstances surrounding the informant's acquisition
21 of his knowledge was the concern that an individual's unfounded
22 or ill-founded suspicion could be endowed with the appearance of
23 fact merely because that individual appeared in the affidavit as
24 a reliable informant rather than as the affiant himself.

25 We think that that risk is substantially reduced in

1 this case because the details of the information showed a working
2 familiarity with the way petitioner carried on his business. The
3 details greatly reduced the risk that the information was the
4 product of the informant's own suspicion.

5 Q Mr. Connolly, getting back to the factual circumstances
6 again, these premises were in a residential apartment house?

7 A They were in a two-story, eight-unit garden-type apart-
8 ment.

9 Q These premises were not actually used for residence
10 purposes?

11 A No, sir. It was petitioner's bookmaking operation.

12 Q There was no furniture in there even?

13 A There was a meager amount of furniture.

14 Q But no residential kind of furniture?

15 A That is correct.

16 Q Was that known to the police before they entered the
17 premises?

18 A It does not appear from the affidavit. My recollection
19 is that there is no testimony which shows that they knew that in
20 the case. They did conduct an investigation around the apartment
21 building. They made arrangements with the man who had the apart-
22 ment across the hall. But the record doesn't show exactly at the
23 time of his search what they knew.

24 Q Do you place any reliance on the fact that the Commis-
25 sioner and the Judge in the Court of Appeals held that this

1 affidavit did show probable cause?

2 A Yes, Mr. Justice. We certainly do. We think that the
3 policies which the Court announced in Ventresca are that where the
4 Commissioner can make an independent determination on the basis
5 of the facts in this affidavit, and that where his finding is
6 not clearly unreasonable the the finding of probable cause should
7 not be set aside, we place great emphasis on it.

8 Q I presume that you would agree that this is a question
9 of guilt or innocence of a man. It did show his guilt beyond a
10 reasonable doubt?

11 A Yes, Mr. Justice.

12 Q You say probable cause, that held by the Commissioner
13 and six experienced judges. Do you think this Court has any
14 better capacity to determine whether that shows probable cause?
15 We have authority to overrule them.

16 Is there anything to indicate that we are wiser than
17 they are in determining what is probable cause?

18 A Mr. Justice, the Court has consistently taken the posi-
19 tion that it is not the function of an appellate court to review
20 de novo the finding of probable cause. The Court has taken the
21 position that it will look to essentially the types of informa-
22 tion upon which a Commissioner reasonably can rely in making a
23 finding of probable cause.

24 Q It is our job to establish standards, isn't it?

25 A Yes, sir.

1 Q That is all there is to it. We are not reviewing any-
2 body. We are just saying whether the constitutional standards
3 are satisfied?

4 A We believe that the standards were met in this case
5 because the Commissioner relied upon types of information which
6 this Court has specifically approved.

7 Q Does the record show hoe experienced this affiant was,
8 this FBI agent? Was he an old-timer? Was he a new man?

9 A Mr. Justice, the record does not show exactly how many
10 years experience Agent Binder had. Agent Bradley, who was the
11 agent who dealt with the informant on a regular basis for two
12 years, was an FBI agent with 18 years' experience.

13 I am not sure from the circumstances whether Agent
14 Binder was the senior agent in the investigation. He certainly
15 seemed to be in charge of the operation. He may be more experi-
16 enced or he just might have had ---

17 Q What about the affiant?

18 A The affiant was Agent Binder.

X 19 Q Can it be escaped here, with us referring to the stand-
20 ards or anything else, that we are not overruling the judgment of
21 the Commissioners and the six Judges of the Courts on the question
22 of what is sufficient to show probable cause?

23 A I suppose that that would be the operation of the
24 Court's decision reversing the judgment of the Court of Appeals.

25 Q Mr. Connolly, I want to compliment you on your handling

1 of those questions.

2 May I call your attention to page 27 of the record.
3 That lists the Court's understanding of what the affidavit says.

4 Are you in agreement that that is a fair summary of
5 the affidavit insofar as it relates to the question of probable
6 cause?

7 A Mr. Justice, without quibbling with some details, I
8 take it you are talking about the listing at the bottom of page
9 27?

10 Q That's right.

11 A I am not quibbling with minor details in it. The
12 affidavit did not say that the apartment was not petitioner's
13 home, but it can reasonably be inferred we believe from the
14 affidavit that it was not his home. In order for it to be his
15 home, he somehow would have had to have gotten over to East St.
16 Louis, Illinois, in the morning and then to come back through
17 that way and the agents -- there is nothing in the affidavit to
18 indicate it.

19 Q The point of all this was apparently about the petition-
20 er's travel except for the purpose of showing that he went to
21 this apartment as if it were a place of work. Is that your infer-
22 ence from it?

23 A That's right, sir.

24 Q He would go there every morning as if he were employed?

25 A Yes, sir.

1 Q As if it were not his home?

2 A Yes, sir.

3 Q It is implied at least on page 5 of your brief that
4 whether or not they knew that that is anybody's residence, they
5 certainly knew it was not his residence because on the fourth
6 line on page 5 you say, in stating the facts, they saw him
7 depart in the late morning from his residence in East St. Louis,
8 Illinois, and drive to St. Louis, Missouri, and in the afternoon
9 enter an apartment building and so on?

10 A Yes, those are the facts, Mr. Justice. The only reason
11 I was hedging is that the affidavit picked him up not at his home,
12 but as he was starting across the east side of the bridge into
13 St. Louis in the morning. So I have in order to defend the affi-
14 davit to infer that the apartment F was not his home, but that
15 his home was where he came from in the morning, that is, in East
16 St. Louis, Illinois.

17 Q The references on page 5 of your brief, pages 58, 59,
18 70 and 71, that is the original record rather than the appendix?

19 A Yes, Mr. Justice.

20 If the Court please, I would like to try to tie up our
21 argument with respect to this affidavit and the trustworthiness
22 and hearsay by referring to the policies enunciated in this
23 Court by the Court in United States versus Ventresca.

24 The Court's opinion by Justice Goldberg, who was the
25 author of the opinion in Aguilar, stated that where the affidavit

1 sets out facts where the magistrate can make an independent
2 determination on the ground for search, the Court cannot set aside
3 the magistrate's finding of probable cause by interpreting the
4 affidavit in a hypertechnical rather than in a common sense
5 manner.

6 The Court recognized in Ventresca, as it did in Jones,
7 that the circumstances under which affidavits are normally drafted
8 by policemen in the mid-city of a criminal investigation without
9 assistance, that the affidavit is found to leave some questions
10 unanswered. The affidavit here does not answer all questions
11 which might have occurred to the Commissioner. He would have
12 been more confident if he had been told to the extent which the
13 informant had been provided information in the past. He may have
14 been curious as to whether the agents who have been able to deter-
15 mine the volume of calls or where there were other questions.

16 But the teaching of Ventresca is that the affidavit's
17 failure to supply certain facts is fatal only if it undermines
18 the reasonableness of the inferences which may be drawn from the
19 facts which the affidavit does -- or put another way, only if the
20 inferences rest too heavily on the officer's good faith rather
21 than the magistrate's own independent judgment.

22 The critical issue in this case is the trustworthiness
23 of the hearsay. The corroborating information in the affidavit
24 provided the basis on which the Commissioner could find the
25 hearsay trustworthy without relying on the agent's good faith.

1 The reasonableness of that finding is not undermined
2 by the defects which petitioner alleges. The Court in Ventresca
3 also cautioned that a grudging or negative attitude by reviewing
4 courts toward warrants will tend to discourage police officers
5 from submitting their evidence to a judicial officer before acting.

6 The concern which prompted that statement, I believe, is
7 illustrated by the facts of this case. We believe that Agent
8 Binder did have at least a reasonable option to decide whether to
9 go get a search warrant, or to go in on the basis of the informa-
10 tion he had without a warrant.

11 Q The affidavit here does show surveillance by the FBI?

12 A It does.

13 Q In Aguilar, there was no surveillance by the FBI shown
14 by the affidavits, is that right?

15 A The affidavit showed no surveillance.

16 Q The Court in footnote 1 to which you have referred did
17 emphasize that point?

18 A Yes, sir.

19 Q Suppose they have it under surveillance for a month and
20 you don't see a thing. Does that prove anything that they have
21 under surveillance?

22 A No, Mr. Chief Justice. I believe the footnote 1 in
23 Aguilar said that if the facts and results of such a surveillance
24 had been presented to the magistrate, it would have been a dif-
25 ferent case. Certainly insofar as any indication of illegal

1 activity, the existence of the surveillance, is not meaningful,
2 but in this case the existence of the surveillance is meaningful
3 particularly with reference to whether the informant is a reliable
4 informant.

5 We submit that the Commissioner was justified in rely-
6 ing on the fact that on the basis of the information which the
7 FBI received from the informant, they instituted a three-week
8 surveillance involving numerous agents. Certainly the FBI does
9 not act injudiciously with its time.

10 This is an indication of the credence which they placed
11 in this informant's information.

12 Q Mr. Connolly, I think you do read that this one agent
13 would say, namely, it says that the magistrate must be informed
14 of some of the circumstances from which the informant concluded
15 that the narcotics were where they were claimed to be?

16 A That's right, Mr. Justice.

17 Q Is it sufficient in that case? You claim that the
18 affidavit is good, that the informant is shown to be credible and
19 reliable?

20 A We think the affidavit is good on the basis of the poli-
21 cies of the entire line of cases in this area.

22 Q I take it that that is to be followed and be overruled?

23 A Yes.

24 Q Saying he was a reliable informer was just the same as
25 saying he was a banker or preacher?

1 A Mr. Justice, we believe the Commissioner found that the
2 hearsay information was trustworthy and that was the important
3 thing.

4 Q The Commissioner determined that the information came
5 from a reliable informant based on the oath of the officer?

6 A I don't think that that position -- if we took that
7 position, I don't believe we could square it with Aguilar.

8 Q You think Agruilar says something different? Do you
9 think it implies the Commissioner to ignore the oath of an officer
10 that his information came from a reliable source and go into
11 detail in order to prove the reliability of it?

12 A Mr. Justice, in the particular circumstances in which --
13 or the facts of Aguilar, that is a case in which the reliability
14 or the trustworthiness of the information could only be deter-
15 mined by two things: One, whether it came from a reliable person;
16 and two, the circumstances in which that person obtained the
17 information.

18 There was no other surveillance, there was no indication
19 of knowledge on the part of the agents and there was not anything
20 else.

21 Q Except that he said he knew him and he was a reliable
22 informant. Why isn't that as good as swearing he is a minister
23 of the gospel? Why do you have to go into detail than to say
24 any more than you know he is reliable, at least in a preliminary
25 thing like a search warrant?

1 A I think the Government would have difficulty maintaining
2 that position.

3 Q Do you think the Government would have difficulty main-
4 taining it before the Court or do you think it would have diffi-
5 culty maintaining it as a matter of common sense?

6 A We think certainly as a matter of common sense it is
7 something which we can find supportable in very, very many cases.
8 But the Giordenello-Aguilar line of cases does suggest that the
9 Court will require something more of the officers than merely
10 their statement.

11 Q An affidavit that the witness is reliable. Do you
12 think it would require something more than a swearing under oath
13 that the information came from a person that the FBI knows to be
14 reliable?

15 A Yes, Mr. Justice Black, at least in the circumstance
16 where there is nothing but the hearsay information which was the
17 particular facts of Aguilar. I am limiting it to that.

18 Q Was this all hearsay information?

19 A No, sir.

20 Q Was all of it hearsay? All the information given to
21 the Commissioner hearsay?

22 A Not in this case.

23 Q I am talking about this case. I am not talking about
24 Aguilar. I am talking about this case. It was not?

25 A No, it was not hearsay.

1 Thank you.

2 MR. CHIEF JUSTICE WARREN: Mr. Baris.

3 REBUTTAL ARGUMENT OF IRL B. BARIS

4 ON BEHALF OF PETITIONER

5 MR. BARIS: Mr. Chief Justice, and may it please the
6 Court:

7 I would like to say, first of all, with reference to
8 the question posed by Mr. Justice Black concerning the Commis-
9 sioner's acceptance of the affidavit as being sufficient, I believe
10 that if the Commissioner merely accepts what the affidavit says,
11 then he is becoming, as was indicated to use the language of the
12 Aguilar Case, a rubber stamp for the police.

13 Q Why would he be a rubber stamp? As a witness, he pre-
14 sents the facts and he accepts them.

15 A He is basing it upon a hearsay statement.

16 Q All of it hearsay?

17 A The information which came from the informant was hear-
18 say, Mr. Justice Black. The question about the reliability was
19 merely a conclusionary statement that he is a reliable informant.

20 Q Why can't you have a conclusionary statement in pro-
21 viding an affidavit to show probable cause? You have got to go
22 out and get every Justice to show everything in it like a trial?

23 A I read the Aguilar Case to mean that there must be some
24 underlying circumstances to show the reliability of the inform-
25 ant.

1 Q How much?

2 A I think an indication as in the handy guide of the
3 Government that the informant has given information on three
4 occasions over the past month to be satisfactory.

5 Q If this affidavit had said this information comes, this
6 same information, comes from an informant who we have had 20
7 successful experiences with in the last six months, would this
8 affidavit be all right?

9 A I think under those circumstances it would be all right,
10 Mr. Justice White. I cannot draw a line of distinction.

11 Q The only trouble in my mind is this just said reliable
12 informant.

13 A It was just a conclusion on the part of the affiant
14 that he was a reliable informant. He didn't say what he based
15 this question of reliability on. I think there must be some
16 indication, as was indicated in the McCray Case, where they jus-
17 tified probable cause by a number of arrests.

18 Q What about Draper?

19 A In Draper, with reference to reliability, the individual
20 was an employee of the Government who had been supplying reliable
21 information over a period of six months.

22 On that basis, the Court has held, and I will recog-
23 nize the propriety of that decision in that respect, that he was
24 a reliable informant. But the background of the informant was
25 included in the information that was given. Here it was not

1 included.

2 Q Do you think as far as you are concerned it would be
3 all right if a policeman made an affidavit saying that an
4 informant we have had reliable experience within the last year
5 for 50 times, said that a gambling was going on in a certain
6 period?

7 A With reference to the question of reliability, I would
8 think that that affidavit would be sustained by the cases that
9 we have.

10 Q So a warrant would issue on that affidavit?

11 A I would say that there must be more to corroborate
12 what the informant said. I have been discussing with you, if
13 you please, Your Honor, the question of the reliability of the
14 informant himself. I believe that contrary to what Mr. Connolly
15 said as far as my position is concerned, I think Aguilar says
16 more than just there must be substantiation of the reliability of
17 the informant.

18 I think there must be, in addition, substantiation of
19 the reliability of his information. I think that that is the
20 second thrust of the Aguilar Case.

21 In the hypothesis that you posed, there was nothing
22 indicating the corroboration of what he said. I feel also that
23 there was nothing to corroborate the conclusion on the part of
24 the informant in this particular instance that a handbook was being
25 operated. I don't think that the surveillance is sufficient.

1 Q What do you do about footnote 1 in Aguilar, No. 1, No.
2 2; I don't content, do you, that this is as clear a case for your
3 purposes as Aguilar? Aguilar is just a very brief statement
4 that confidential informer had furnished information and that is
5 all.

6 Here it is arguable in any way there was other informa-
7 tion. Do you take the position that this is as clear a case as
8 Aguilar?

9 A Yes, I do, not because I am an advocate in this position,
10 but I feel it for this reason: There is absolutely in this affi-
11 davit, as I read it, no corroboration whatsoever about the ulti-
12 mate conclusion of the informant that a handbook was being
13 operated.

14 Bear in mind that in Aguilar what we have is an allega-
15 tion by the informant of the Commission of a Federal offense,
16 the use of narcotics. The only thing that the informant said is
17 an allegation of the Commission of a state offense, the operation
18 of a handbook.

19 There are other elements to the Federal offense, trans-
20 travelling. The surveillance was not corroborative of anything
21 that the informant said. Getting back to footnote 1 of Aguilar,
22 if the surveillance were to include indications that the peti-
23 tioner had been followed and he was stopped or he stopped and he
24 met different people and money was seen to be exchanged and notes
25 were seen to be made and other information was dispensed, then

1 that surveillance would be corroborative of the Federal offense.
2 But I look at the surveillance indicated in this affidavit as
3 attempting to supply one element of a Federal offense, the inter-
4 state travel.

5 Q What actually happened here is stated by the Government
6 on page 4 of its brief. That was not set out in the affidavit.
7 But the Government says that what actually happened is that
8 agents in another apartment overheard a bookmaking operation being
9 conducted over the telephones in the apartment in question here.
10 They allege that this was not assisted by any mechanical amplifi-
11 cation. Somebody had very good ears in this.

12 A They said there were no carpets in the apartment.

13 Q Then thereafter they conducted a surveillance for
14 about three weeks. What the affidavit does here is to pick up
15 the point of surveillance and it talks about the interstate
16 features of petitioner's activities and it does surveillance in
17 the interstate activities, and then it has the information in it
18 about the telephones that may not be meaningful -- the reputa-
19 tion of the petitioner which may or may not be meaningful -- and
20 that is about the sum and substance of it.

21 But whatever that may add up to in one's mind, it cer-
22 tainly is a great deal more, I should think, than the naked alle-
23 gation and the naked statement of the search warrant in Aguilar.

24 A I compare Aguilar with this case on the basis of the
25 meat of the informant's information. The informant in Aguilar

1 and the informant here was the only indication of any illegal
2 conduct on the part of the defendant in each of those cases.

3 I would say that the other information about his travels
4 is certainly not illegal unless it is combined with other illegal
5 conduct. But we have a situation where what the informant said
6 was merely a state violation and did not supply all of the elements
7 of the alleged Federal offense.

8 The other elements of the alleged Federal offense came
9 in from this surveillance showing his interstate travel, but there
10 was nothing to tie those two in as part of a Federal offense,
11 and nothing to corroborate the surveillance, on the one hand, and
12 the informant's information, on the other hand.

13 They were completely disjointed.

14 Q It comes down, I suppose, to a question of how strict
15 the standards for probable cause in an affidavit must be under
16 the Constitution in order to justify the issuance of a search
17 warrant. But perhaps this case does present a problem that is
18 more difficult than Aguilar.

19 A Yes, I will agree with Your Honor on that. Also I believe
20 this case does involve an extension of the Aguilar rule, but in
21 my opinion, based on the Aguilar and other cases, this is a logi-
22 cal extension of the rule of the Aguilar Case.

23 Q Suppose a defendant had been put on trial and the Govern-
24 ment had put them on the stand and there had been a challenge to
25 his reliability and character. Could the Government had offered

1 particular instances of the past to show that he had been truth-
2 ful?

3 A I would think that on the question of the admissibility
4 of such evidence at the trial, it would not be admissible.

5 Q It would not be admissible, so that is not the way you
6 prove reliability. You prove it by a statement of somebody who
7 knows it?

8 A At the trial, if that became an issue, yes, sir. In
9 this instance, I might point out that the man who made the affi-
10 davit had not had any contact with this alleged reliable inform-
11 ant. His contact was with another agent who, in turn, communi-
12 cated.

13 Q What you have here is whether the Government, in order
14 to show probable cause when it has somebody that just testifies
15 that he believes this man to be of good character, is it neces-
16 sary for the Government to go further in the probable cause case
17 than it would in a trial case?

18 A I believe the Government is under that requirement. I
19 think on the issue of probable cause there is a more basic issue
20 than what appears at the trial.

21 Q The basic issue is guilt or innocence, isn't it?

22 A At the trial, it is, Your Honor, but I think in the
23 Commissioner's state the basic issue is one of probable cause.

24 (Whereupon, the above-entitled oral argument was con-
25 cluded.)