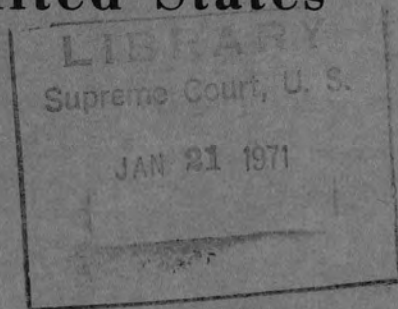


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 136

HAROLD WHITELEY,  
Petitioner,

vs.

WARDEN OF WYOMING STATE PENITENTIARY,  
Respondent.

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Place Washington, D. C.

Date January 13, 1971

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C O N T E N T S

ARGUMENT OF

PAGE

William J. Knudsen, Jr., Esq.,  
on behalf of Petitioner

2

Jack Speight, Esq.,  
on behalf of Respondent

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William J. Knudsen, Jr., Esq.,  
on behalf of Petitioner - Rebuttal

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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HAROLD WHITELEY, :  
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Petitioner, :  
:  
vs. : No. 136  
:  
WARDEN OF WYOMING STATE PENITENTIARY, :  
:  
Respondent. :  
:  
-----:

Washington, D. C.,  
Wednesday, January 13, 1971.

The above-entitled matter came on for argument at  
10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HENRY BLACKMUN, Associate Justice

APPEARANCES:

WILLIAM J. KNUDSEN, JR., ESQ.,  
Portland, Oregon  
Counsel for Petitioner  
  
JACK SPEIGHT, ESQ.,  
Assistant Attorney General of Wyoming  
Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in the first case today, No. 136, Whiteley vs. Warden of Wyoming State Penitentiary.

Mr. Knudsen, you may proceed whenever you're ready.

ARGUMENT OF WILLIAM J. KNUDSEN, JR., ESQ.,

ON BEHALF OF PETITIONER

MR. KNUDSEN: Thank you, sir. Mr. Chief Justice and may it please the Court. This is a habeous corpus proceeding which started in the United States District Court in Wyoming in November 1967, where petitioner's claims were rejected. On appeal to the Court of Appeals for the Tenth Circuit, the lower court's decision was affirmed.

The pertinent history of the state court proceedings begins with Whiteley's arrest in November 1964 and his being charged with two counts, breaking and entering and being an habitual criminal. Petitioner was tried in Carbon County, Wyoming by a jury in May 1965 and convicted on both counts. He was sentenced to one to ten years on the first count and for life imprisonment on the second, both counts to run concurrently.

Whiteley appealed this conviction to the Supreme Court of Wyoming which affirmed the judgment below. In the United States District Court below, the parties stipulated to try the case on both the record and the trial court in these original criminal proceedings No. 2885, and on the record on



1 appeal to the Supreme Court of Wyoming.

2 The issue before this Court is whether probable cause  
3 existed for petitioner's arrest. If not, the search incident  
4 to his arrest was illegal and invalid and the fruits thereof  
5 could not be used at his trial as they were.

6 Q When was he tried originally?

7 A He was tried in May 1965, Your Honor.

8 The pertinent facts are as follows: On November 23,  
9 1964, several business establishments were broken into in the  
10 small town of Saratoga, Wyoming. The next day the sheriff of  
11 Carbon County, acting on a tip from an unnamed and unidentified  
12 informant, executed a complaint or affidavit on the basis of  
13 which an arrest warrant was sought and was issued.

14 With the Court's permission, I would like to read  
15 the pertinent parts of this complaint since petitioner's case  
16 in large part was based on the two alleged defects contained  
17 therein. This complaint appears on page four of our brief.

18 Q Mr. Knudsen, you say "based in large part,"  
19 isn't it based entirely on --

20 A Well, Your Honor, three courts below have sur-  
21 prised me by ruling that there was probable cause for a warrant-  
22 less arrest, and I would like to address that question in a  
23 moment, sir.

24 Q You are --

25 A I think the case rises or falls on this affidavit,

1 but the Supreme Court of Wyoming and the United States District  
2 Court for Wyoming in the Tenth Circuit have all argued that  
3 this was a warrantless arrest based on probable cause.

4 Q Their position is that it doesn't make any dif-  
5 ference whether the affidavit is defective?

6 A They didn't seem to discuss it, Your Honor, and  
7 I take it that they felt that it was defective and that there  
8 were other grounds for the warrantless arrest.

9 Q I just want to be sure of your position. Your  
10 position is that even if there were no affidavit which was de-  
11 fective, if the affidavit didn't exist, that still you would  
12 have a case here?

13 A No, we would not. You see, Your Honor, first we  
14 have the affidavit which was defective, and then we had the  
15 warrant of arrest which I say was defective because the affi-  
16 davit was defective. This warrant of arrest was put on a state-  
17 wide broadcast for all law enforcement agencies requesting them  
18 to arrest Whiteley on sight.

19 Q I know what the facts are.

20 A Yes.

21 Q You are setting up a string of dominos and I  
22 think your theory is that one tips the whole group.

23 A Yes, you might --

24 Q I am asking, suppose your case were such factu-  
25 ally that there never was an affidavit, then would you be here?

1           A     Yes, I probably would because I say the warrant-  
2     less arrest lacked probable cause and --

3           Q     I take it you will expand on this, and this is  
4     what I am interested in.

5           A     Yes, sir, I hope to.

6           Q     All right.

7           A     The affidavit on behalf of the arrest warrant  
8     reads as follows:

9           "I, C. W. Ogburn, do solemnly swear that on or about  
10    the 23rd day of November, A.D., 1964, in the County of Carbon  
11    and the State of Wyoming, the said Harold Whiteley and Jack  
12    Daley, defendants, did then and there unlawfully break and  
13    enter a locked and sealed building \* \* \*" --

14          Q     That is the Rustic Tavern?

15          A     Pardon?

16          Q     That is the Rustic Tavern or Rustic Lodge?

17          A     Yes.

18          Q     All right.

19          A     --"contrary to the form of the statute in such  
20    case made and provided against the peace and dignity of the  
21    State of Wyoming."

22                Now, that is the affidavit. Now, the warrant of  
23    arrest was issued and a state-wide broadcast made to all law  
24    enforcement agencies on the basis of this arrest warrant and  
25    nothing else. That very night petitioner was arrested by

1 police officers of the City of Laramie, which is the largest  
2 city in the adjoining county, Albany County, and they arrested  
3 Whiteley with a deputy sheriff of Albany County. And now we  
4 come to what I think is the crux of the case.

5 This arrest was made solely on the basis of the state-  
6 wide broadcast. Neither the Laramie police nor the Albany  
7 County deputy sheriff had any reason to arrest Whiteley other  
8 than the broadcast, and the reason that this is so important  
9 is that these three courts below have previously passed on this  
10 very issue, namely the Wyoming Supreme Court, the U.S. District  
11 Court, and the Tenth Circuit Court of Appeals, and each court  
12 has made what I consider the same error, that despite the fact  
13 that an arrest warrant had been used, the arrest was valid as  
14 a warrantless arrest on the ground that the arresting officers  
15 had probable cause, and they find this probable cause because  
16 they were told by another law enforcement agency to arrest him.

17 Now, I think this must be emphasized. The arresting  
18 officers had no independent knowledge of any facts concerning  
19 the crime, therefore I submit that the key question before  
20 this Court is not whether an arrest based on an invalid arrest  
21 warrant may still be valid if sufficient probable cause exists  
22 to support a warrantless arrest; rather, the crucial issue  
23 here is whether an arrest based on an invalid arrest warrant  
24 and without any independent ground on the part of the  
25 arresting officer to support a warrantless arrest is valid.



1 And I submit --

2 Q Would you make that argument if -- is Ogburn the  
3 sheriff of --

4 A Of Carbon County.

5 Q -- Carbon County?

6 A Yes.

7 Q If Ogburn in fact had probable cause independent  
8 of this warrant -- lay aside the warrant -- if Ogburn had no  
9 warrant at all but had information which would constitute prob-  
10 able cause for the arrest, would you say then Ogburn could  
11 arrest him personally?

12 A I guess --

13 Q I guess the answer to that must be yes?

14 A I guess the answer is yes. I kind of lean, Your  
15 Honor, to the rule that if you seek out an arrest warrant and  
16 you don't do it properly, all bets are off, that is the end of  
17 it. But I know the lower courts in this country have held  
18 that if the arrest warrant is invalid but there still remains  
19 probable cause for a warrantless arrest, it is good.

20 Q I will go back to my hypothetical. If in fact  
21 Sheriff Ogburn had probable cause to make an arrest personally,  
22 do you say he could not delegate that to someone via the state-  
23 wide radio network of the police?

24 A No, I do not. If he had probable cause, he cer-  
25 tainly could delegate that.

1           Q     But your point is that even if he had probable  
2 cause for an arrest without a warrant, having once sought a  
3 warrant then it stands or falls on the technical infirmities of  
4 that warrant?

5           A     I go beyond that, Your Honor. I say that but I  
6 also say that he did not have probable cause.

7           Q     You make both arguments?

8           A     Yes. I say that he did not have probable cause.  
9 Now, I say another way of putting it --

10          Q     Suppose the officer had seen it at the place at  
11 the time the burglary or whatever it was was being committed,  
12 seen him run out, arrested him and also had a warrant, would  
13 you say that he could arrest him on this probable cause?

14          A     Yes, I think under those circumstances, yes, if  
15 he had actually seen him, yes, sir.

16          Q     So that is an issue in each case, I suppose?

17          A     Your Honor, here there is no information whatso-  
18 ever other than this anonymous tip, we have no underlying cir-  
19 cumstances -- I am coming now to the affidavit -- there are no  
20 underlying circumstances to show that Whiteley had anything to  
21 do with the crime -- Spinelli and Giordenello -- and secondly  
22 there are no underlying facts set forth to show that the in-  
23 reliable. In fact, Ogburn didn't even show that there was an  
24 informant in the affidavit. It was only at the trial when  
25 defense counsel asked him how he got this information, he said

1 "I got it from a tip," and then the defense counsel didn't  
2 follow it up and it remained that way. So an unidentified in-  
3 formant gave him this information, it does not appear in the  
4 affidavit that there was an informant, but this appears at the  
5 trial. He was unidentified. There is no statement about his  
6 reliability in the affidavit or anywhere else, for that  
7 matter, in the record, and the underlying facts with respect to  
8 the crime under Aguilar, Giordenello and Spinelli do not exist.

9 Q Did the petitioner ask for the disclosure of  
10 the informant's name?

11 A No, he did not, Your Honor. I don't know why.  
12 This was tried several years before I came to Wyoming, and I do  
13 not know.

14 Q I suppose one practical reason is that the in-  
15 formation having turned out to be correct, he didn't -- it  
16 didn't occur to him that it was very useful to challenge it?

17 A I think that might have been a tactic, but --

18 Q Was he represented by counsel at the trial?

19 A Yes, sir, assigned counsel. I submit, Your  
20 Honors, that another way of putting this is whether an invalid  
21 arrest warrant can be validated by airing it on a broadcast to  
22 other law enforcement agencies. I think the case is that  
23 simple. I think that the courts below have gotten confused,  
24 starting out with the Wyoming Supreme Court, which held that  
25 this was a good warrantless arrest because the police officer

1 in Laramie had been told to arrest him by the Sheriff of Carbon  
2 County, and I do not see how an arrest warrant that is bad can  
3 be validated by putting it on the air. There is absolutely  
4 nothing -- and I want to make this very clear to the Court --  
5 there is nothing in the record to show that there is any prob-  
6 able cause here that the sheriff had which he did not disclose  
7 to the magistrate. The record is barren on the point.

8 Q Is there any dispute that the original arresting  
9 officer who issued the broadcast could not have arrested him?

10 A I feel, Your Honor -- in fact I say that in my  
11 brief -- that Ogburn, who was the affiant, could not have  
12 arrested him on the basis of his information because it was  
13 based on an unidentified informant not proven to be reliable.

14 Q Do you go so far as to say whoever acted on that  
15 broadcast had no more right than he had?

16 A Exactly, Your Honor. In fact, it is kind of  
17 like Mr. Blackmun's domino theory. I don't want to ascribe  
18 that to you, sir, but since the affidavit was bad, the arrest  
19 warrant was bad -- anything done pursuant to that arrest warrant  
20 was bad by anyone, including Ogburn, and I think this is the  
21 case.

22 If the Court has no more questions, I would like to  
23 reserve the rest of my time for rebuttal.

24 Q Yes, let me ask another fact question. With  
25 what was the defendant charged?



1           A     He was charged with breaking and entering and  
2 the violation of the habitual criminal statute in Wyoming.

3           Q     Well, let's be a little more specific. He was  
4 charged with breaking and entering what?

5           A     He was charged with breaking and entering  
6 Shively's Hardware Store.

7           Q     And the original affidavit had nothing to do  
8 with Shively's Hardware Store?

9           A     Yes, but I don't make an issue of that, Your  
10 Honor.

11          Q     Maybe we do.

12          A     Oh.

13          Q     Because he was charged with something different  
14 than the affidavit had to do with.

15          A     Yes. I did not because I felt that both affi-  
16 davits were equally defective. The first one had to do with  
17 another man's store across the street, and the second one  
18 which had to do with Shively's Hardware. I think they are  
19 equally defective.

20          Q     Was there a second affidavit? Wasn't it the  
21 formal charge --

22          A     No, it was an affidavit after he was arrested,  
23 at least I am pretty sure it was an affidavit, which was made  
24 after the arrest, and this was the basis for the further pro-  
25 ceedings.

1 Q But it is necessarily your position, however,  
2 that despite this difference in the accusatory affidavit orig-  
3 inally having to do with the Rustic Tavern, I think it was --

4 A Yes.

5 Q -- and the charge which was breaking and enter-  
6 ing Shively's Hardware Store, still falls as one of the  
7 dominos?

8 A Yes, Your Honor.

9 Q What was the search that followed from the ar-  
10 rest?

11 A The search was of Whiteley's car. He was put in  
12 the police car behind his car and they searched the trunk and  
13 the inside of the car and found incriminating evidence. I do  
14 not say that the search was invalid, Your Honor.

15 Q What was it they found?

16 A Sir?

17 Q What did they find?

18 A They found burglar's tools and they found coins.  
19 Shively was a collector of old coins, and they found many of  
20 these coins in the car and --

21 Q That had been in the hardware store?

22 A That had been in the hardware store, yes, Your  
23 Honor,

24 Q No doubt about that?

25 A No doubt about it, Your Honor.

1 Q Did he testify?

2 A Whiteley?

3 Q The defendant.

4 A Yes, he testified and he said that he had not  
5 done it, that his compatriot had had the car the night before  
6 and he didn't know what had happened. His comatriot said they  
7 both had done it.

8 Q Somebody just put them in his car?

9 A That is what he said, Your Honor.

10 Q His co-defendant testified adversely to him,  
11 didn't he?

12 A Yes, Your Honor, he did, and Whiteley --

13 Q He said that they had done the robbery together?

14 A Yes, Your Honor, he did. A moment ago I said I  
15 didn't make any contention about the search. If the arrest was  
16 lawful, I do not make any contention about the search.

17 Q Don't you have to contend that the search is  
18 unlawful here?

19 A No, Your Honor, we feel that the arrest was un-  
20 lawful and as a consequence the search was unlawful because the  
21 arrest was unlawful.

22 Q Well, that is what I mean.

23 A Yes.

24 Q That is what I mean.

25 A Yes.

1 Q You mean it is really the fruit of an unlawful  
2 arrest.

3 A Yes, Your Honor, yes. But if the --

4 Q The arrest itself, I suppose, was cured, any  
5 defect in the arrest itself -- let's assume there had been no  
6 search and no seizure, only what you say was an invalid arrest,  
7 and then he was brought to trial and sufficient evidence was  
8 brought out to convict him, you certainly couldn't get the  
9 conviction set aside.

10 A Well, first of all, I would say that Daley's  
11 testimony is the fruit of a poisonous tree, that was the co-  
12 defendant.

13 Q Yes.

14 A And that would certainly be enough to reverse  
15 this case. But if they convicted him solely on other informa-  
16 tion, other data that they found at the scene, and not on  
17 Daley's testimony and not on anything they found in the car,  
18 then I would say this case would not be --

19 Q But they did put in evidence what they found in  
20 the car?

21 A They certainly did, Your Honor.

22 Q There is no room for a harmless error claim?

23 A Your Honor, with the burglary tools, with the  
24 coins which came from Shively's Hardware, with Daley testifying,  
25 I think that this case falls in the Aguilar, Spinelli, Mapp.



1 et cetera cases that there was absolutely no harmless error  
2 here. When the jury was faced with these facts, the coins  
3 which Shively had been saving for years, and Daley said this  
4 fellow sitting here committed the crime with me, I don't think  
5 we can find that, Your Honor.

6 Q Did he plead?

7 A I presume he pleaded. He was not tried with  
8 Whitely.

9 MR. CHIEF JUSTICE BURGER: Mr. Speight?

10 ARGUMENT OF JACK SPEIGHT, ESQ.,

11 ON BEHALF OF RESPONDENT

12 MR. SPEIGHT: Mr. Chief Justice, and may it please  
13 the Court. I would like to direct myself to several questions  
14 the Court has raised before I go into discussion of my aspect  
15 of the case.

16 I might add that my good friend, the counsel here,  
17 and I, he at the law school and I in the Attorney General's  
18 office, have been fighting this for four years. We started  
19 with it first at the federal court level and have taken it  
20 right through and we have lost issues along the way and now we  
21 are down to the real nub, and we do have a great familiarity  
22 with this case, as does this Court obviously, by its questions.

23 But I would like to spend a moment on Justice  
24 Blackmun's question, because I think he puts the finger right  
25 on the case.

1           We have consistently argued from all levels of the  
2 courts that we can care less about that arrest warrant, that it  
3 is quite immaterial to our proposition. What we are talking  
4 about is whether or not there was probable cause to make the  
5 arrest and/or the search. Judge Kerr, the federal district  
6 judge, bought the argument. The Tenth Circuit, Judge Hickey,  
7 writing the opinion, bought the argument, and now we are here  
8 at this court.

9           And Justice Blackmun, this is the key question as far  
10 as the state is concerned, whether or not there was probable  
11 cause. We think it is quite immaterial whether or not there  
12 was a defective arrest warrant. And we go one step further.

13           I think you again diagnosed the case right on point  
14 when you say there were two complaints and arrest warrants  
15 issued, one for the burglary of the Rustic Bar, and the other,  
16 which he was actually tried on, the arrest of the hardware  
17 store.

18           Now, in Wyoming, we currently have adopted the  
19 Criminal Rules of Procedure, which are patterned after the  
20 federal rules. But at this time in Wyoming we were operating  
21 under some old statutes that are not unique or different  
22 throughout the country, they are quite similar to many other  
23 states, and it is simply this, that a complaint is filed  
24 usually by a law enforcement officer; based upon that complaint,  
25 an arrest or search warrant is issued. The arrest is made and

1 information is filed which is in lieu of a grand jury hearing.  
2 At a preliminary hearing probable cause is determined and the  
3 sequence is immediately.

4 Whiteley was arrested on the 24th, that evening. On  
5 the 25th, the next morning, the arrest warrant and the criminal  
6 complaint were filed against him, the information was filed and  
7 a preliminary hearing was held before a magistrate in Rollins,  
8 Wyoming to determine whether or not there was probable cause.  
9 With probable cause being found, it was set for trial, and  
10 again the jury found that there was probable cause beyond a  
11 reasonable doubt that he committed the crime.

12 Q When was the car searched, before or after?

13 A The search was taken on the 24th, sir. It was  
14 -- the facts were --

15 Q Is there anything in the record at the time that  
16 the search was made other than the broadcast that the arrest-  
17 ing officer had to operate on?

18 A Excuse me, sir, I am not sure I understand the  
19 question.

20 Q Did the arresting officer and the search have  
21 anything to substantiate it at the time the search was made  
22 other than the broadcast?

23 A No, sir, there wasn't, and --

24 Q How is that search legal?

25 A Sir?

1 Q How is that search legal?

2 A Well, based on the probable cause concept.

3 Q What you are saying in effect is that the arrest  
4 on a police broadcast is in itself probable cause?

5 A Yes, it is, Your Honor --

6 Q No matter what the underlying circumstances  
7 were at the time with respect to the law enforcement agencies  
8 who wanted this man picked up?

9 A I think you're absolutely correct.

10 Q That is what the proposition is, isn't it?

11 A Yes. In fact --

12 Q Is that the critical proposition here, that the  
13 arresting officer hears over the radio that he is supposed to  
14 arrest a man, he can arrest him?

15 A That is not the critical proposition, Justice  
16 White. The critical proposition is whether or not there was  
17 probable cause.

18 Q Somewhere in the police department?

19 A Yes. And the probable cause existed, as the  
20 record bears it out, that --

21 Q Well, what was it?

22 A Well, simply the fact that the particulars de-  
23 tailed in the police broadcast that they were looking for a  
24 man, we described the man, we are looking for a car, we  
25 describe the car, we are looking for certain --



1 Q So you are saying that the probable cause was  
2 that contained in the police broadcast and that is all the ar-  
3 resting officer needed?

4 A Right. Right.

5 Q Now, let's assume that the officer who put out  
6 the broadcast himself had no probable cause to put it out.

7 A Yes.

8 Q Let's just assume that.

9 A Yes.

10 Q Yet you would say that they could bootstrap  
11 themselves --

12 A I couldn't say that in good conscience because  
13 that just --

14 Q All right. Then you concede that there must be  
15 probable cause in the police department that put out the broad-  
16 cast?

17 A No. I am saying, if it please the Court, and  
18 this reflects upon one of the questions, that Chuck Ogburn,  
19 the sheriff, had probable cause. He was the one who put out  
20 the broadcast.

21 Q All right. You saying that you concede that he  
22 has to have it?

23 A Yes.

24 Q All right. What was it? What was his probable  
25 cause?

1           A     The probable cause was the information that he  
2 had that Whiteley had committed the crime or that he felt he  
3 had committed the crime.

4           Q     Well, Ogburn didn't see him commit the crime?

5           A     No.

6           Q     And all he had was a telephone tip or --

7           A     No, this is where the record is void, Your  
8 Honor, and this is the --

9           Q     The record is what?

10          A     Void of this type of information.

11          Q     I know, but -- go on.

12          A     And this is our argument. You see, we have  
13 acted on reliance on Draper and other decisions of this Court  
14 that you can make a warrantless arrest if you have probable  
15 cause. Now at this late date --

16          Q     There is no doubt about that.

17          Q     But you have to have facts which show there is  
18 probable cause, and what are the facts that Ogburn had which  
19 this record discloses from which we may make the inference  
20 that they had probable cause?

21          A     May I --

22          Q     Ogburn, I am talking about?

23          A     May I cite --

24          Q     Yes, I wish you would.

25          Q     That is what the case is all about.

1           A     Record 17, which is the Laramie Police Depart-  
2     ment Bulletin, Record 31 --

3           Q     Now, wait a minute.   What --

4           A     Record 17.

5           Q     Is this the broadcast bulletin?

6           A     No, this is what was posted at the Laramie  
7     Police Department bulletin --

8           Q     I am not that familiar with your state.   The  
9     arrest was made in that county?

10          A     Carbon County.

11          Q     And this is Laramie, this is --

12          A     Carbon County.

13          Q     This is not Ogburn's county, is it?

14          A     No, sir.   Ogburn's county was Carbon County.

15          Q     Was Carbon?

16          A     Yes, sir.

17          Q     I see.   All right.

18          A     Now, I might be confusing the Court.   Let us  
19     start on page --

20          Q     I certainly am getting confused.

21          A     Let's start on page 31.   This was the original  
22     instrument that got the whole thing in the process, this was  
23     the original state item 881.   This was issued by the sheriff's  
24     office at Rawlins and the pertinent part is that paragraph.

25          Q     What page now?

1 A Page 31, sir.

2 Q This is the broadcast?

3 A Yes.

4 Q This doesn't have probable cause in it.

5 A Well --

6 Q What you just said in response to this colloquy,  
7 because I thought in answer to my question you said that the  
8 test of the validity of this arrest was the fact that the  
9 arresting authorities in -- what is the county?

10 A Albany County.

11 Q -- Albany County, acting on this police broad-  
12 cast, that was the probable cause and that it didn't make any  
13 difference so far as the validity of that arrest is concerned  
14 what the state of the affairs was in the county where the crime  
15 was committed. In other words, it makes no difference on your  
16 theory whether there is any probable cause in police officer  
17 Ogburn to arrest him or not.

18 A This was a fact determination made by the  
19 Wyoming Supreme Court and has been substantiated throughout.  
20 The Laramie law enforcement officers had probable cause to  
21 make the arrest, not only that but they had the duty to make  
22 the arrest. So to answer your question, yes, that is correct,  
23 sir.

24 Q But now you say to my brother White that you do  
25 think that there must be something in the way of probable

1 cause on the part of the authorities who issued the broadcast.

2 A I didn't make the original case to the Wyoming  
3 Supreme Court, although this is in the record, and I don't  
4 know what the Wyoming Supreme Court based its theories on ex-  
5 cept what they write. What they write --

6 Q We really aren't concerned what --

7 A I know.

8 Q --their theory was. We want to know what the  
9 facts are.

10 A I know.

11 Q Just hold it a minute now. What was the prob-  
12 able cause that Sheriff Ogburn had on which he could have  
13 arrested this man that he saw driving down the street, that is  
14 what we want to know.

15 A In this the record is devoid, sir.

16 Q Well, did he have the information that he in-  
17 cluded in the arrest warrant, in the application?

18 A Yes.

19 Q He had that, didn't he?

20 A Yes, and he had the information that appears  
21 in state Item 881.

22 Q Is that probable cause?

23 A This I don't know.

24 Q You don't know? I mean you know what was in  
25 the complaint, don't you?



1 A Yes, sir, I do.

2 Q Did that amount to probable cause to arrest?

3 A In my feeling, it did, sir.

4 Q Even though all it really amounts to is he had  
5 word from an unidentified informant that this defendant did  
6 the job, that is all there was, isn't it?

7 A Yes, that is correct.

8 Q Was this about a man in a car?

9 A Yes, it was, sir.

10 Q How far was he away?

11 A At that time how far was the petitioner, the  
12 defendant away from the --

13 Q Yes.

14 A They didn't know. They knew he was in the  
15 Saratoga, Wyoming or Laramie, Wyoming area, which is about  
16 fifty miles apart.

17 Q This was information that was sent out by the  
18 sheriff?

19 A Yes, sir.

20 Q Does the record show where he got his informa-  
21 tion?

22 A No, it doesn't, sir. No, it doesn't.

23 Q And the defendant did not ask to cross-examine  
24 and undertake to find out where he got the information?

25 A No, he did not.

1 Q Well, it showed probable cause.

2 A It is the state's burden. It is the state's  
3 burden, there is no question about that.

4 Q Suppose the broadcast had asked for John Whiteley  
5 and they really wanted Harold Whiteley and they searched John  
6 Whiteley's car and find this evidence, would you say that was  
7 a good search?

8 A No, I wouldn't.

9 Q Well, it came out over the broadcast?

10 A Well, that doesn't make it good. That might  
11 give a law enforcement officer a defense in a civil suit on  
12 false arrest but that doesn't necessarily make it good. The  
13 reason in this case that we not only name the defendant, we  
14 gave a description of his height, his tattoo marks, the law  
15 enforcement officer said, and it is in the record, that we  
16 knew what Whiteley looked like, one of the arresting officers  
17 -- so they knew who they were looking for.

18 Q Mr. Speight, doesn't the case come down to  
19 this, that if Sheriff Ogburn had probable cause to arrest, he  
20 can authorize anybody in the United States to make the arrest?  
21 If he didn't have probable cause, he hasn't any authority to  
22 give to anybody?

23 A That's correct, Your Honor.

24 Q That is the way it adds up.

25 A And I am somewhat apologetic because I don't

1 feel I have answered possibly your question or Mr. Justice  
2 White's question.

3 Q Well, I agree with the import of the Chief  
4 Justice's question, that we really are interested in what  
5 probable cause Ogburn had, and if the record doesn't show  
6 probable cause for his putting out the broadcast, what are we  
7 to do?

8 A Well, we have got to make a determination and  
9 the state feels that there is probable cause in the record,  
10 and you read it in light of the cases of this Court.

11 Q We seem to be interested in everything here ex-  
12 cept whether he is guilty.

13 A Well, there is no question in my mind about  
14 that, Mr. Justice Black. I think you have got your finger  
15 right on it. Now, if I can go one step further, Justice  
16 White, I may be of some assistance to you in terms of the  
17 probable cause. I would like to offer the Court an alterna-  
18 tive, and this is in the area of the --

19 Q I thought we were interested in the Fourth  
20 Amendment?

21 A Yes, we are, Mr. Justice Harlan, but I strongly  
22 feel that the Fourth Amendment is not an absolute amendment,  
23 it has some limitations based on reasonableness.

24 Q Yes.

25 A Now, on the case of Chambers vs. Maroney which

1 was written after the state's brief was submitted, after the  
2 state's brief was submitted, this was a moving vehicle, they  
3 stopped the moving vehicle, they got out, they placed the de-  
4 fendant and his accomplice in the backseat of the police car,  
5 because it was parked right behind the moving vehicle --

6 Q You know that Chambers made it very expressed  
7 that although you might not need a warrant to search a car,  
8 you did need probable cause?

9 A Yes, sir.

10 Q And we get back again to what --

11 A To the key question.

12 Q -- probable cause is that any officer had.

13 A Well, Mr. Justice White, in analyzing this  
14 case, I have looked at a case of this Court where there was  
15 not probable cause. That was the Beck case. And I feel that  
16 we had a better record than they had in Beck, and based on  
17 that I feel we had probable cause in this record and only this  
18 Court on an independent determination of the record can  
19 justify whether or not I am correct.

20 Q Well, will you try to tell us in a nutshell  
21 how and why Sheriff Ogburn could have arrested this man  
22 Whiteley if the sheriff, on looking out the window of his  
23 office, saw Whiteley standing on the street corner, that is  
24 after Whiteley got the information that he received for the  
25 application for a warrant? You have to say that Ogburn could

1 have gone out on the street corner and arrested him. Now, what  
2 is the basis for that?

3 A Well, unfortunately in probable cause cases the  
4 issue usually isn't raised until they are somewhere down the  
5 road beyond the trial level or beyond any evidentiary hearing  
6 level. Now, I know things beyond the record which we can't go  
7 into today that in my own mind at least that there was probable  
8 cause. But over and above that, what is in the record, the  
9 record is that a person told Sheriff Ogburn that he had -- that  
10 he believed Whiteley made the burglary, performed the burglary.  
11 There was a general rash of burglaries in the area, small  
12 counties being what they are, there are not many suspects that  
13 you have to key in on. You can usually eliminate it down to  
14 one or two and in this case they eliminated it down to one or  
15 two. And of course, as Justice Black said, there was the  
16 counter man, there were his fingerprints. There were his ac-  
17 complice's words in the record, all before the illegally seized  
18 evidence was introduced in the testimony, and it is a totality  
19 of circumstances, as the Draper case said, probability that  
20 there was probable cause. An RPM standard could be applied to  
21 this case and the law enforcement officer could make the  
22 arrest, so --

23 Q Is it your position that if he wanted to chal-  
24 lenge the informant, that it was the burden of Whiteley at the  
25 time of trial to insist upon the production of that informant?



1 A Absolutely.

2 Q You say that he waived that right by not moving?

3 A Yes, sir.

4 Q Even though it is a constitutional issue?

5 A Yes, sir. Now, this again gets us into a whole  
6 new realm of jurisprudence of what can be waived and what can-  
7 not, but at this late date it certainly puts a handicap on law  
8 enforcement and those arguing on behalf of law enforcement to  
9 reconstruct something that we don't have an opportunity to make  
10 an evidentiary record on. If this Court is inclined in this  
11 area, give us one shot at an evidentiary record back in federal  
12 court and we will get Chuck Ogburn on the stand, we will get  
13 Judge Castle, the J.P., on the stand, and then we will develop  
14 a record as to whether or not what went through the minds --

15 Q Well, is that any more -- if you lost this case,  
16 you could still proceed against him, I suppose.

17 A Yes, sir, there are several --

18 Q How long a trial was this?

19 A It was about --

20 Q Was it about an hour?

21 A No, sir, Mr. Justice White, it was about a day,  
22 a little over a day's trial. And I might add again, with very  
23 competent counsel at the trial level. The facts have changed.  
24 The laws have changed since '64. This is really what we are  
25 talking about.

1           When we get into the final analysis, we sat through a  
2 fascinating argument yesterday on the civil liability of the  
3 law enforcement officer, and I think this is what we have got  
4 to keep our eye on. If we are going to protect the rights of  
5 the individual, which is imperative that we do, that we not  
6 isolate an arrest, because when we look at the whole spectrum  
7 of criminal law, we're talking beyond the arrest, we're talk-  
8 ing of preliminary hearing, we're talking of trial, and with  
9 the edicts of this Court in the last few years, due process is  
10 provided the defendant and we can't isolate the arrest from the  
11 trial, at least I can't in my reasoning.

12           And if we feel that people are being arbitrary, the  
13 law enforcement officer being arbitrary, in the final analysis  
14 when single court liability suits are filed against false  
15 arrest, this will make the real result.

16           Q     Well, I take it you would be making the same  
17 argument here if Ogburn had heard about some burglaries and  
18 said well there are only two people in this whole area that I  
19 suspect of this crime --

20           A     No.

21           Q     -- and so I am going to put out a broadcast to  
22 arrest them both?

23           A     No.

24           Q     Well, why wouldn't you? And they arrested them  
25 and he was dead-right. They found in his car the evidence and

1 they convicted him.

2 A I think probable cause means a little more than  
3 a gut suspicion, if you will, sir, that so and so --

4 Q Yes, but what you told us is not much different  
5 than the hypothetical question.

6 A It is not much but in my mind --

7 Q Well, how much different?

8 A A quantum, enough to --

9 Q What you told us was it was a small county, you  
10 isolate, you can put your finger on two or three people and  
11 the thing looked as though it was one of them and someone  
12 called up and said this is the guy and so you arrested him, put  
13 out a broadcast to have him arrested. That is what you told us.

14 A My question would be what more is really needed,  
15 and I guess that is why we are here.

16 Q Well, what if Mr. Ogburn's deputies comes to him  
17 and says there has been a robbery here at this tavern and I  
18 think there are only two fellows in town that can really have  
19 done it, and Ogburn says I agree with you, arrest them?

20 A Well, this may be deviating a little, but I hope  
21 we haven't gotten to this point that we can -- that we have  
22 tied the hands of law enforcement officers so we can't go in  
23 and make investigative type discussions.

24 Q Well, I would hope so, too.

25 A What the --

1 Q What you really have, Mr. Counsel, is a burglary.  
2 Was it committed at night?

3 A Yes, sir.

4 Q What time?

5 A After 10:00 o'clock.

6 Q The sheriff of the county gets hold of informa-  
7 tion that causes him to know that some man, whose name he knew,  
8 had tattoo marks on him, was there and he sends out a notice  
9 -- that goes out and then the man in the automobile gets ar-  
10 rested. The question is whether the sheriff gets that informa-  
11 tion is probable cause enough so that you can convict a man --  
12 if it not only is said to be probable cause but they find the  
13 things that were stolen in the vehicle.

14 A That's correct, sir.

15 Q You don't need any more for probable cause than  
16 an anonymous telephone call?

17 A Well, it depends on what was in the car, Mr.  
18 Justice.

19 Q If it is anonymous, I am not too interested per-  
20 sonally, but the sheriff that doesn't know who is telling him  
21 that, and gives him not a right to investigate, not a right to  
22 do a whole lot of things, but give him the right to arrest and  
23 search on an anonymous call.

24 A Well, I think the hypothetical goes beyond that.  
25 It can be an anonymous call to the sheriff, Harold Whiteley

1 just did something. The sheriff --

2 Q Well, how about this case, so far as I know he  
3 is anonymous.

4 A That's right. That's right, it is.

5 Q And I fear that that is not enough to me for  
6 probable cause. There might be an insane person, it might be  
7 a criminal, it might be a twice-convicted perjurer and not a --  
8 I am not talking about the right to investigate, I am talking  
9 about the right to pick the man up off the street and search  
10 his car. Do you say that is the probable cause sufficient for  
11 an arrest?

12 A No, I don't. I am saying the record that is  
13 before this Court, I am convinced in my own mind, after reading  
14 the record, that there was probable cause.

15 Q Is that based on the fact that they found the  
16 coins?

17 A No, no, that is --

18 Q That his fingerprints came about?

19 A No.

20 Q What is it?

21 A No, that is beyond -- when you detain a man with  
22 in a particular area, the type of car he was driving or what  
23 would be in the trunk of that car, that to me is probable cause.

24 Q Suppose you forget the "anonymous" for a moment,  
25 and what you have is you know from what you find that it wasn't



1 an insane man, a crazy man or a fool, but it was given by some-  
2 body who knew about the car and they go and find the very  
3 things that were stolen. Does that make any difference?

4 A Yes, it certainly does, and the sheriff's objec-  
5 tive analysis and unfortunately at this point our record is  
6 devoid of this. But we can speculate from the record that  
7 this is what happened, yes, sir.

8 Q When you were before Judge Kerr in the federal  
9 court on the habeas corpus proceeding, was there any question  
10 raised about the identity of the informants, an occasion to go  
11 into that?

12 A No, there wasn't, sir.

13 Q You say now that you would like an opportunity  
14 at least to go back before Judge Kerr and have the sheriff tell  
15 you that the informant was a man whom he trusted and who gave  
16 him detailed information and now put that in the record.

17 A If I can address myself to this point, when we  
18 were in Judge Kerr's court, Mr. Chief Justice, we had six  
19 issues before us. Of the six, I think -- and both counsel and  
20 I put this somewhere down the priority scale -- we were more  
21 concerned with being tried for double jeopardy and several  
22 other legal issues which we spent great time in oral argument  
23 on. Secondly, there was a limitation of time and we were  
24 acting in reliance upon lower court decisions and upon this  
25 Court's decision as to probable cause. And Judge Kerr bought

1 this, he put it in a specific finding in his record, in which  
2 he does a nice job at, on page 81. Judge Hickey picks this up  
3 on page 91 of his appellate brief, and if there was error in-  
4 volved here, it was on the state acting in reliance upon prior  
5 Supreme Court decisions that we felt in our mind was probable  
6 cause.

7 If this would have been the only issue before Judge  
8 Kerr and this would have sunk or floated our law suit, I can  
9 guarantee you we would have developed the record at that stage.  
10 But quite frankly I didn't feel that it was that important of  
11 an issue, of some other issues that had been in this case.

12 Q Was your sheriff elected?

13 A Yes, he is, sir.

14 Q Does he have a bond?

15 A Yes, he does, sir.

16 If there are no further questions, I thank the Court  
17 for their attention.

18 ARGUMENT OF WILLIAM J. KNUDSEN, JR., ESQ.

19 ON BEHALF OF PETITIONER - REBUTTAL

20 MR. KNUDSEN: May it please the Court --

21 Q Mr. Knusden, I observe in the record that this  
22 man had served six penitentiary sentences for various things  
23 and that his prior convictions are what led to a life sentence  
24 as a habitual criminal.

25 A Yes.

1 Q I suppose as a practical matter that explains  
2 why the case is here.

3 A I think so, Your Honor. We in the defender aid  
4 program like to get involved in knotty questions, but we don't  
5 take merely academic questions. If Whiteley had been released  
6 two years ago or so, I don't think we would be here today, but  
7 it is mandatory -- a life sentence is mandatory in Wyoming if  
8 you are convicted as an habitual criminal.

9 Q And how many convictions does that take? How  
10 many --

11 A I think it takes three, Your Honor.

12 Q Three?

13 A Three. He had more than three.

14 May I proceed, Your Honor?

15 Q Yes.

16 A I would like to make a couple of points here. I  
17 think in the heat of argument my good friend, Jack Speight,  
18 said something which is not completely accurate on the finger-  
19 prints. On page 54 of the appendix Ogburn was asked if he had  
20 taken any fingerprints and he said no, he couldn't get any  
21 fingerprints of any kind, and I just think that was one of the  
22 things made in the heat of battle.

23 I would like to address myself to the Draper point,  
24 if I may. There is absolutely nothing in the record to show  
25 that -- anything, except that there was a tip. There was

1 nothing in the record to show that the tipster told Ogburn that  
2 he saw -- that he recognized the man with a tattoo on his arm,  
3 and so on. All he had is that the tipster told him Whiteley  
4 did it, and I submit to the Court, in the absence of this in-  
5 formation, the absence of this in the record, I think we must  
6 make the assumption that then Ogburn said, well, I know  
7 Whiteley well, he is six feet tall, he is 47 years old, et  
8 cetera, et cetera, and he put this out.

9 Now, as I say, I am making an assumption, but I think  
10 the other assumption is equally bad to say that the tipster  
11 gave him this information about Whiteley. We don't know, and I  
12 say they had the burden of proof, and therefore they haven't  
13 proven it.

14 Q Well, Mr. Speight argued, among other things,  
15 that when this issue was up, it was not challenged and that  
16 therefore you have waived the infirmities in probable cause  
17 by not pursuing. Now, this is not my -- I am not advancing  
18 that, I am asking you to respond to that argument, that you  
19 have waived that --

20 A I don't think there was a way. You mean in the  
21 original proceeding, No. 2885, once the attorney for Whiteley  
22 said how did you get this information, and he said I got it  
23 from a tipster, he should have pursued it.

24 Q Right.

25 A Each attorney practices differently. I think I

1 would have pursued it. In fact, I would have probably filed a  
2 motion to suppress in the first place. But once this occurred,  
3 I would have gone into it to find out where he got it, who the  
4 informant was, asked the court to make him tell us who the in-  
5 formant was, was he reliable, et cetera, et cetera. This did  
6 not occur.

7 Q The absence of a motion to suppress has deprived  
8 the trial court right from the beginning of an opportunity to  
9 pass on this question at the time when it could have been  
10 passed on.

11 A Yes, Your Honor, but I think that if a lawyer  
12 does fail to move to suppress, that he perhaps can raise this  
13 at the trial level with the court's permission. I know some  
14 courts -- I was an assistant U.S. attorney at one time, and on  
15 occasion I would have fixed when the judge would permit this  
16 at a trial when no motion to suppress had been made. And I  
17 think here it could have been raised at the trial if the court  
18 permitted, and he permitted the question was how did you get  
19 the information; I got it from a tip, and then the whole thing  
20 died and they --

21 Q Well, was there any objection to the evidence  
22 at the trial?

23 A Yes, there was an objection to the evidence, yes,  
24 on the grounds that it was an illegal search and seizure.

25 Q And I gather under Wyoming procedure this may be



1 raised by objection to the evidence at the trial even though no  
2 motion to suppress is made before the trial?

3 A I believe so, Your Honor. The rules were  
4 changed and I actually never tried any cases in Wyoming, but  
5 there was no objection by the county attorney to the objection  
6 by the defense attorney.

7 Q In other words, opposition to the objection was  
8 not made on the ground that no motion to suppress had been  
9 made before the trial?

10 A Right, Your Honor.

11 Q And once he said -- once he brought out that it  
12 was from a tip, he had negative personal knowledge on the part  
13 of the officer?

14 A Once he asked him if it came out by a tip, the  
15 matter was just dropped, nothing --

16 Q I know, but isn't that enough? Isn't that  
17 enough for the defense to have --

18 A I think so, Your Honor. I think at that point  
19 the county attorney in that --

20 Q Would you have gone ahead and built the state's  
21 case for them?

22 A If I had been the county attorney then I would  
23 have certainly proven that it was a reliable informant, et  
24 cetera.

25 I would like to say just on this Draper question

1 that -- I have set it forth in my reply brief, but two things  
2 about Draper. One, Draper was a reliable informant. We had a  
3 reliable informant there. We do not have that here, and I  
4 think for that reason Draper falls. Secondly, in the Spinelli  
5 case, Mr. Justice Harlan says, and I am quoting from page 11,  
6 that it is especially important that the tip describe the  
7 accused criminal activity in sufficient detail so the magistrate  
8 may know that he is relying on something more substantial than  
9 a casual rumor circulated in the underworld or an accusation  
10 based merely on an individual general reputation.

11 I really think we have got a reputation case here  
12 because everybody in Wyoming knew that Whiteley had four or  
13 five convictions, and I think that is what done him in.

14 Q Don't you think somebody had told the sheriff  
15 something about him?

16 A Oh, yes. I don't say the sheriff was perjuring  
17 himself. I am sure somebody told the sheriff maybe Whiteley  
18 was in Saratoga. I think that would be enough in Saratoga, a  
19 small town of 2,000 people. If a burglary occurred and  
20 Whiteley was there, that might be plenty. In fact, I don't  
21 know, but I would assume that is just what happened. And then  
22 I would turn my back and say let's see, Ogburn -- Whiteley is  
23 six feet tall, has a tattoo on his left arm, graying hair, et  
24 cetera, et cetera, and he put this out on the radio broadcast.

25 Q And he may have added, you will find the stolen

1 coins and property in the trunk of the car.

2 A I am sure that that was added, Your Honor.

3 One final point: We stipulated to the record in  
4 this case in the lower court, admittedly there are other ques-  
5 tions. This question always was in the case. We had questions  
6 of exhaustion of the state remedies and so on, and Judge Kerr  
7 was more interested in those. But this question was in the  
8 case and he adopted the Wyoming Supreme Court attitude or de-  
9 cision on it, and so did the Tenth Circuit. But if this  
10 Court should feel that a reversal is proper, I do not think it  
11 should be sent back to the district court to have another  
12 hearing. We had an opportunity to have a hearing, we stipulated  
13 to the facts, Whiteley has been in jail since November 24,  
14 1964. I think that he should have been dismissed in 1965 at  
15 the trial under a motion to suppress, and I don't think we  
16 should send this back when a man's liberty has been handled  
17 this way over these many years.

18 Q Well, if you win you -- the case will just be  
19 reversed, wouldn't it?

20 A In my opinion, Your Honor, if this case is re-  
21 versed and sent back to Rawlins, the county attorney will have  
22 to see what evidence he has. As far as I know, the only evi-  
23 dence he has is the goods, the fruits that he found in the car  
24 and Daley's testimony.

25 Q Well, I gather the forum anyway, if you prevail.

1 would be to send it back to the district court to give the  
2 state an opportunity to give him another trial or else release  
3 him. Isn't that it?

4 A Well, I think it should be sent back to the  
5 district court and the district court should be ordered to  
6 order a new trial in the state court. I don't --

7 Q Ordinarily I think the point is this is federal  
8 habeas, isn't it? Back to the district court with the instruc-  
9 tion to the district court to give the state a reasonable op-  
10 portunity, thirty or sixty days, whatever it is, to give him a  
11 new trial or else release him.

12 A Oh, to give him a new trial or release him, yes,  
13 but I don't think we should rehash all the facts in the  
14 district court again, Your Honor. As far as if we go back  
15 ultimately to Rawlins, to the Carbon County court, I think the  
16 county attorney has two things, what he found in the car and  
17 Daley. I think they are both fruits of the poisonous tree and  
18 I think he would have to dismiss.

19 Thank you, Your Honor.

20 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
21 The case is submitted.

22 (Whereupon, at 11:00 o'clock a.m., argument in the  
23 above-entitled matter was concluded.)

24 - - -

25