

Supreme Court of the United States

OCTOBER TERM, 1970

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APR 9 1971

In the Matter of:

UNITED STATES OF AMERICA,

Petitioner,

vs.

ROOSEVELT HUDSON HARRIS,

Respondent.

Docket No.

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Place Washington, D. C.

Date March 23, 1971

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C O N T E N T S

ARGUMENT OF

PAGE

Beatrice Rosenberg, Esq.,
on behalf of Petitioner

2

Steven M. Umin, Esq.,
on behalf of Respondent

19

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

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4 UNITED STATES OF AMERICA, :

5 Petitioner, :

6 vs. :

No. 30

7 ROOSEVELT HUDSON HARRIS, :

8 Respondent. :

9 - - - - -
10 Washington, D. C.,

11 Tuesday, March 23, 1971.

12 The above-entitled matter came on for argument at
13 2:00 o'clock p.m.

14 BEFORE:

15 WARREN E. BURGER, 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
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

20 APPEARANCES:

21 BEATRICE ROSENBERG, ESQ.,
22 Criminal Division, Department of Justice
Counsel for Petitioner23 STEVEN M. UMIN, ESQ.,
24 Washington, D. C.
Counsel for Respondent

25 - - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 30, United States vs. Harris.

Miss Rosenberg, you may proceed whenever you are ready.

ARGUMENT OF BEATRICE ROSENBERG, ESQ.,

ON BEHALF OF PETITIONER

MISS ROSENBERG: Mr. Chief Justice, and may it please the Court. This case is here on petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit, and it presents what has become a perennial problem of the kind of information you need to get a search warrant and how courts and magistrates -- magistrates and courts, I should say -- should interpret them.

The particular aspect of the question which this case present is what law enforcement officers are supposed to do when they get information from someone who has not given information in the past and who is unwilling to let his name be used but who nevertheless gives information which a responsible law enforcement officer feels he cannot ignore.

Q Is it clear and do we know in this case that the informant had not given information in the past?

A Well, we don't know except that considering the many, many cases in which reliability is placed on the fact "I have now received information from an informant who has

1 given information in the past." It is hard to believe that if
2 he had an investigator would not have said so.

3 Q Well, it is not necessarily hard for me to be-
4 lieve that.

5 A Pardon?

6 Q Do you think it follows from what we do know in
7 the record in this case that we have here clearly an informant
8 who had not given information in the past?

9 A Yes, because -- he may have been an extremely
10 careless operator, I don't know, but the fact is that as one
11 goes through the cases, particularly since Spinelli, but since
12 McCray vs. Illinois, there is case after case in which it is
13 almost a formula, "I have received information from an in-
14 formant who has in the past been proved reliable," sometimes
15 with the added statement of "he has given specific information
16 about instances," but it is hard to believe that particularly a
17 federal investigator who had had information in the past from
18 this informant would not have so stated if in fact he had done
19 so. And certainly at least we have to take this case, since
20 he did not claim to have had information in the past, as repre-
21 senting the situation of an informer who had not given informa-
22 tion in the past.

23 Q And here I gather the affidavit identifies the
24 informant as a person, does it not?

25 A As a person, yes.

1 Q Sometimes the informant is an electronic sur-
2 veillance bug, isn't he?

3 A I don't think that is any problem here, not from
4 the looks of the affidavit.

5 Q Well, the detective is an informant, he examined
6 him and got an affidavit from him under oath as to what he
7 encountered.

8 A I was just about to say that. And the particu-
9 lar problem comes here in relation to someone who had some
10 connection with the defendant because he purchased liquor for
11 him. But the problem, as the brief in this case shows, can
12 come about in all kinds of ways. The problem of the first in-
13 formant is a very important problem in law enforcement because
14 it can come at the one end from a completely responsible
15 eminent citizen who happens to witness a crime. It came from
16 ordinary citizens who simply feel they have seen something
17 that causes them to make reports. Police get information --
18 pardon?

19 Q I just wondered, what is this having found this
20 person to be a prudent person, what is that?

21 A Well, Your Honor, I think in context it means
22 credible. The court says you pay no attention to it at all,
23 but it seems to me the opinion below in that respect, in that
24 little respect, in the example of how not to read search
25 warrants, and I don't know whether that is colloquialism or

1 not. Obviously this is not a master of the English language
2 as we get from "I have received information from a person
3 who fears for their life and property." He wouldn't get an "A"
4 in English. But I don't know that that is the question. I
5 think when it is read in context, "I have interviewed this
6 person and found him to be proven," that means I found him in
7 my judgment to be somebody whom I trust.

8 Q That is the same as saying --

9 A Well, I don't think he is saying reliable. I
10 think he is saying I offer you my judgment that this is a person
11 whom I can trust and that gets us to this problem, one gets
12 information from a person who has not given information in the
13 past.

14 Now, the one thing that is clear about this affidavit
15 on page 4 of the government's brief is that the informant is
16 talking from personal knowledge. What he has said is this
17 person has personal knowledge -- and I am quoting -- "of and
18 has purchase illicit whiskey from within the residence
19 described for a period of more than two years, and most recently
20 within the past two weeks, has knowledge of a person who
21 purchased illicit whiskey within the past two days from the
22 house, has personal knowledge that the illicit whiskey is con-
23 sumed by purchasers in the outbuilding known as and utilized as
24 the 'dance hall,' and has seen Roosevelt Harris go to the other
25 outbuilding, located about 50 yards from the residence, on

1 numerous occasions, to obtain the whiskey for this person and
2 other persons."

3 So that this case is clearly distinguishable from most
4 of the situations that have come before this Court where we do
5 not know the basis of the informant's knowledge, and we do. It
6 is personal knowledge, and true the personal knowledge stopped
7 at two weeks before the day, but that this is not still in-
8 formation is alleged -- I think it appears anyway from the
9 nature of the business -- but the fact that he knows, the
10 informant knows somebody who bought whiskey two days before
11 the date of the affidavit. I take it the only importance of
12 that is to show that the business is still going on, not just
13 a presumption but that information adds that.

14 Q The only problem that they ought to see is the
15 informer in the case?

16 A That's right.

17 Q That is the only issue?

18 A That is the only issue in the case. I take it
19 that the informer had given his own information in his own
20 affidavit by name, and it would not be hearsay, it would be his
21 own affidavit, is no question that the search warrant could
22 have been issued on that.

23 Now the question is should it be different when the
24 informer is afraid or unwilling or for some reason will not
25 make the affidavit to the magistrate but is willing to make

1 this sworn statement to the investigator. Now, this isn't --

2 Q Well, an informer wouldn't make a sworn affi-
3 davit --

4 A No, a sworn verbal statement is what it said.

5 Q I swear that --

6 A What it says is -- has given under a sworn verbal
7 statement the following information -- let's assume it is not
8 sworn, I think that is not the issue. The informer is willing
9 to give specific information but is unwilling to make a sworn
10 affidavit to be presented to the magistrate. This is a situa-
11 tion which does arise, it is frequent, the court has recognized
12 time and again that informers who must reveal themselves will
13 not talk, so that this is a practical situation in which the
14 law enforcement agencies must deal with, and the question is
15 what do they do about it.

16 Now, opponent says when you get this kind of informa-
17 tion, you go out and make a buy, but you will notice that the
18 affidavit does say on page 4 that "Roosevelt Harris has had a
19 reputation for over 4 years as being a trafficker...and over
20 this period I have received numerous information from all types
21 of persons as to his activities. Constable Howard Johnson
22 located a sizable stash of illicit whiskey in an abandoned
23 house under Harris' control during this period of time," and so
24 on.

25 But the fact that for four years they had known about

1 this and haven't been able to make a buy suggests to me that
2 it isn't quite that simple. There is any case in which you
3 can go and corroborate an informer's information by making a
4 buy or an equivalent. And of course there are many situations
5 when you have first informants where that is impossible. You
6 get word from a hotel maid that there is a gun under somebody's
7 bed and he may be gone tomorrow, this is something one has to
8 act on. And when you get word from an accomplice, which is
9 the situation in several recent cases, that the diamond that
10 he stole is about to be sold to a Mr. X down the street, you
11 have got to act.

12 Q Well, surely this isn't that kind of a case?

13 A No, this isn't that kind of a case.

14 Q This was over a period of four years that this
15 man had been --

16 A Yes, but in a period of four years they have not
17 been able to make a buy. All I am saying is that they had not
18 -- it isn't that simple to say, well, go out and make a buy and
19 corroborate the informant. Obviously for some reason this is
20 not an easy case -- this has not been an easy defendant.

21 Q This was in the Eastern District of Kentucky.
22 In what town or village or city, do you know?

23 A I think it is -- I don't remember.

24 Q I suppose it is a very small community, it
25 might be hard for a law enforcement officer or his agent to

1 make a buy because I suppose it would be presumed that every-
2 body knew everybody else in that community and so forth.

3 A Right.

4 Q Is that your point, that --

5 A I don't know. I know nothing more about this
6 case than appears in the record. There are two things that
7 appear in the record, one that they had the information over
8 four years and acted apparently the day they got somebody who
9 had personal knowledge so that I assume they hadn't been able
10 to do it very easily before and the other thing that appears
11 is that the statement that the informant says he fears for his
12 life. Those are the two things that appear aggressive.

13 The fact is, however, that there are then lots of
14 situations -- not this case, but there are certainly many in
15 the list that have to be considered beyond just this case as
16 to what does one do about first information where either be-
17 cause of time or circumstances corroboration -- you can't have
18 a long investigation for corroboration.

19 And one of the first things I think one has to ask
20 himself with regard to this question is what would be the
21 motive for an informant to lie. I understand that an informant
22 might have a motive -- it seems to me two motives. One is if
23 he is an accomplice or somebody involved, is arrested, he wants
24 to do something for himself. If I give information to the
25 police maybe they will go easy. And the other is a grudge

1 against a particular person.

2 Neither of those, it seems to me, involves a motive
3 to lie, particularly in the nature of a search warrant, because
4 you are not going to accomplish anything for the police and
5 therefore for betterment of yourself, or you are not really
6 going to get the man you have a grudge against in jail if you
7 send the police off on a wild goose chase.

8 So the informant, by a grudge, or by wanting to
9 better himself, has a motive to give correct information and
10 probably wouldn't do it unless he had some motive of that kind,
11 assuming he is not the good citizen but the person involved in
12 criminality in some form or other. But I have been trying to see
13 what benefits he would gain for himself by lying and I frankly
14 have not been able to think of any.

15 But assuming that even so we need some determination
16 as to the honesty of the informant. The question is how do you
17 get it if you can't for some reason have a further investigation
18 or a further surveillance, and you do it at one end or the
19 other, either what do you know about the person who gives you
20 information or what do you know about the person informed
21 against.

22 Now in some cases, I take it -- not this one -- in
23 some cases, I take it, you can say I have received information
24 from a respectable citizen who had absolutely no motive to lie,
25 that he has personal knowledge that such and such occurred. It

1 seems to me something a magistrate could properly give weight
2 to in determining whether to believe an informant who accord-
3 ing to reports speaks not on hearsay but on personal knowledge.

4 Now, one just has to bear in mind in that situation
5 that the more you describe the informant the more you tend to
6 identify him. If an investigator says I got this information
7 from a hotel maid who was there at nine o'clock in the morning
8 or something like that, he is identifying -- it isn't very hard
9 for anybody who wanted to to find out who that hotel maid is.

10 Nevertheless I do think that in some situations an
11 investigator could probably say I have received a report from
12 a citizen who had absolutely no motive to lie who is well
13 regarded in the community. The investigator here did about
14 all I guess he thought he could do. He said I have inter-
15 viewed this person, received his statement under oath, and I
16 am giving you my judgment that he is a credible person.

17 Q Did the officer have the informant's name?

18 A Did he?

19 Q Yes.

20 A I don't know, Your Honor. It doesn't appear from
21 the record.

22 Q Would it make any difference in your approach if
23 the informant, the first time informant, refused to give his
24 name to the officers?

25 A Yes, I think it would. I think that these are

1 all nuances that we have to consider. I think it would be
2 more specific, that's right, it would strengthen this affidavit
3 at that end if the officer said this man gave me his name and
4 address and a sworn written statement. He didn't do that here.
5 He gave him a sworn oral statement but he would not identify
6 himself. This is -- these are all things to be weighed and I
7 don't give a great deal of weight to what was said about the
8 informant here because there isn't much, it is just that we
9 do have a judgment of the officer that I tell you -- I on my
10 oath tell you, Mr. Magistrate, that this is a credible person.

11 Now, we have a system of permanent magistrates or
12 upgrading magistrates, they are going to know the investiga-
13 tors in their region. It seems to me something they have a
14 right to consider.

15 Q They are going to do what? I missed that, Miss
16 Rosenberg.

17 A They are going to know, I think, probably
18 better than the commissioners do now, certainly in the ones
19 where you have full-time magistrates, are going to know the
20 character of the investigators who regularly come before them,
21 and it seems to me that this is something they have a right to
22 consider, whether as long as they could swing thing -- I don't
23 have to decide, don't have to ask the court to decide -- yes,
24 Mr. Justice?

25 Q In this particular case, it worries me, if I

1 understand you correctly, they have known for four years that
2 this guy was in the bootleg business and I would assume the
3 only way they could know that is from people bringing them
4 information.

5 A Yes, because the --

6 Q Why did it take them four years to get a
7 "reliable informant"?

8 A The information might be, you know, from the
9 neighbors who saw people come. I don't know the reason but --

10 Q I wonder why he was more reliable than all of
11 the others?

12 A Well, this is the one who was willing to say I
13 have personal knowledge. I don't know what else they had.
14 Unfortunately it is true that people have reputations, I guess
15 in much bigger crimes than this, Mr. Justice, but a lot of
16 things we know that we can't prove, and that brings me to the
17 second and what I think is the more important part of how do
18 you believe the informant in this case, and that is the state-
19 ment that we have heard about this man for four years and we
20 found -- and once we found whiskey in an abandoned house under
21 his control. And I at least in the situation we have here
22 where the informant speaks from personal knowledge, we are not
23 dealing with a very informant like Spinelli, we are dealing
24 in a situation here where the informant speaks from personal
25 knowledge and the question is should we believe him or not.

1 In that situation I do ask this Court to modify the language
2 of Spinelli to the effect that reputation is really a matter
3 of bold suspicion having no weight whatsoever.

4 This Court said as long ago as 164 United States
5 that good reputation can make the difference between innocence
6 and guilt in the trial of a case. And prior decisions of the
7 Court have said that reputation is something you can consider
8 in probable cause. And actually in the trial of the case --

9 Q What language expressly in Spinelli is it that
10 you find yourself uncomfortable with?

11 A The fact that defendant there had a reputation
12 as a gambler was "a broad and unilluminating assertion of
13 suspicion that is entitled to no weight in appraising the
14 validity of the magistrate's decision to issue a warrant."
15 This is contrary to Brinegar, to Jones, to Rugendorf. As I
16 say, it is contrary to the old Edgington case about good
17 character and really we keep bad reputation out of a trial, not
18 because it is irrelevant but because too much weight could be
19 attached to it through a jury.

20 And so it seems to me that at least in a situation
21 here, as I say, there they were dealing with an informer who
22 speaks through personal knowledge, certainly at least in that
23 situation, and the question is merely can we act on this per-
24 sonal knowledge even though we don't know this man, and we
25 haven't dealt with him before. You consider the fact that the

1 person he is informing against has been the subject of a lot
2 of suspicion. And if I have to narrow it beyond that, I guess
3 it is particularly true in fields like liquor and narcotics,
4 where reputations are generally -- have some backing. Cer-
5 tainly it is true that it is possible for somebody to have the
6 name without the game, but it is extremely unlikely with rela-
7 tion to premises where liquor is sold, and therefore when you
8 get, as I say, not a very kind of suspicion, not a tick, but
9 an informant who at least to the officer is willing to make
10 statements under oath, then it seems to me whether you -- and
11 the issue is, as Mr. Justice White said at the beginning, you
12 believe your informant, you have the fact, which is what this
13 case presents, that as far as I can see he would have no
14 motive to lie even if it is assumed he had got into trouble
15 when he talked to the police, it would still do him no good
16 unless the information he gave was -- turned out to be lies.
17 If he sends the police on a wild goose chase, that doesn't
18 help him.

19 Secondly, the officer is willing to swear that he has
20 examined the man and found him a credible person; and,
21 thirdly, the person informed against is someone who has had
22 this reputation. I take it they were trying to get and
23 could not really get a way of checking the information.

24 Now, let's not forget that this isn't guilt or innocence.
25 This is simply a presentation to the magistrate for authority

1 to go in and look at the premises to see whether this reputa-
2 tion and the informant's information together are accurate,
3 whether there is in fact illegal activity concealed here.

4 Q Miss Rosenberg, I think the trouble with it not
5 being guilt or innocence, I understand that in moonshine
6 cases if you move a motion to suppress, you have had it.

7 A Well, that is true, Your Honor, but the fact
8 remains that they didn't find the whiskey and that is the end
9 of that for the government.

10 Q But the fact that you find it doesn't validate
11 the warrant.

12 A No, the fact that you find it doesn't validate
13 the warrant. What I am saying is that even if we assume that
14 this informer had some motive which might conceivably -- had
15 some reason why he was willing to talk to police, and
16 apparently a lot of people weren't, the fact is that he would
17 have no motivation to give false information. He had every-
18 thing to gain by giving accurate information, if he hopes to
19 gain anything, than by giving false information.

20 Q I suppose you would probably say, wouldn't you,
21 that an informant tells people that liquor is in a certain
22 place, there it is, and if they go there they will find it,
23 they go there and they find it, it wouldn't be easy to con-
24 vince you, would it, that the informant was not worthy of
25 belief?

1 A No. Unfortunately, the magistrate who has to
2 issue the warrant just doesn't have that --

3 Q They don't have to try the guilt or reputation
4 for truth and veracity of all the witnesses in a search warrant
5 case, do they?

6 A No, Your Honor. I think there is no question
7 that if this informant had given them an affidavit, this case
8 wouldn't be here. The point is that you do go to the man who
9 is unwilling to give his name to the magistrate, and the
10 question is how much more in the face of that, what do we need
11 to corroborate it, and I say that this corroboration can come
12 in different ways.

13 I take it if you could really say to the magistrate
14 this information comes to me from a leading citizen of the
15 town, who has absolutely no motivation to falsify, then it
16 wouldn't matter whether the person informed against had a bad
17 reputation or not.

18 Q Wouldn't it be to go out and get two or three
19 witnesses who would swear to the magistrate that these people
20 have a general reputation for being truthful, for telling the
21 truth?

22 A I take it --

23 Q That is so, isn't it?

24 A Well, it gets awfully complicated because if
25 there is a motive, if there is a real interest in keeping the

1 identity of the informer secret -- and this Court has recog-
2 nized that time and again -- then you can't get people to
3 swear to his reliability because that would reveal him im-
4 mediately.

5 There is a real movement on in this country to up-
6 grade police investigations.

7 Q To do what?

8 A To upgrade. But it seems to me in relation to
9 this matter of warrants that those who must deal with the
10 police and sort of train them must make them understand what
11 this is about.

12 Now, I think it is possible to make law enforcement
13 agencies generally understand that you can't barge in without
14 a warrant, that you can't barge in on just reputation, because
15 that is not enough. I am not disputing that the police some-
16 times find this very exasperating, you know they want to act
17 in a hurry, but I think here are principles which can be ex-
18 plained and understood.

19 But I think that if we try to lay down rules that are
20 contrary to normal experience of law enforcement officers,
21 then law becomes to them something sort of archaic, a series
22 of rigid rules that they don't understand. And I truthfully
23 believe that to say to an alcoholic and tax investigating
24 officer that when he gets an informant, the fact that he has
25 sort of heard rumors about this place, to put it as vague as

1 that for four years, is something that is entitled to no weight
2 whatsoever. It is just contrary to life as he understands it
3 and something that is going to make -- that becomes a rule
4 that to him does not seem to accord with experience. And I
5 think that it is in the long run to the interest of good law
6 enforcement that we uphold reasonable judgments. And I think
7 in this case where the officer had information on personal
8 knowledge which he thought came from a credible person, but
9 which also coincided with a lot of other unspecific informa-
10 tion that he had been acquiring over four years, it was proper
11 him to ask for a search warrant, proper for the magistrate to
12 give it.

13 MR. CHIEF JUSTICE BURGER: Thank you, Miss Rosenberg.

14 Mr. Umin, you may proceed.

15 ARGUMENT OF STEVEN M. UMIN, ESQ.,

16 ON BEHALF OF RESPONDENT

17 MR. UMIN: Mr. Chief Justice and may it please the
18 Court. The search that took place here and the circumstances
19 that gave rise to it, took place in Middlesboro, Kentucky, in a
20 little shack alleged to contain alcohol on which the tax was
21 not paid, but in fact the --

22 Q This was in the City of Middlesboro?

23 A To the best of my knowledge it was. It was on
24 Dansbury Avenue in Middlesboro. Now I have seen pictures of
25 the place, which are in the record. To what extent Middlesboro

1 is a big city or not is something I am not familiar with.

2 The circumstances however are paralleled by similar
3 circumstances in every metropolitan area and indeed now
4 suburban areas that I am sure this Court is all too familiar
5 with, the circumstances in which a law enforcement officer,
6 familiar with some reputation of a particular suspect, becomes
7 on a given day possessed of information not devised of his own
8 observation but from the say-so of a layman that an illegal
9 stimulent is harbored in a given house. That to be sure
10 happens probably hundreds of times a day in the metropolis of
11 this country with respect to narcotics.

12 The decision in this case will therefore affect those
13 cases greatly as well as it will the pursuit of the illegal
14 whiskey in the back woods.

15 I think we can say on this record that this is a
16 case in which an officer got possession of information from
17 someone not another law enforcemtn officer, and not from his
18 own observations, to the effect that there was an illegal
19 stimulent in this case, non-tax paid whiskey on someone's
20 premises.

21 The record doesn't show a number of things. It
22 doesn't show with any great clarity that this was a first-
23 time informant or indeed even someone who may have been unre-
24 liable in the past. To be sure, this Court has counseled that
25 magistrates interpret search warrants, affidavits for search

1 warrants in the light of common sense. The government here
2 would have common sense suggest first that prudent means re-
3 liable, perhaps not credible but reliable, and secondly --

4 Q Suppose the case was up for trial before a
5 jury and they put on this same informant, would it be up to
6 the government to prove that he had a good character for
7 truth and veracity?

8 A No, it certainly wouldn't, Your Honor.

9 Q Suppose this affidavit for the application of a
10 search warrant had indeed used the term "reliable, trust-
11 worthy" --

12 A Yes, Your Honor. That of course is not this
13 case, although I think it would be insufficient under this
14 Court's standards in Aguilar. Aguilar was precisely that sort
15 of case.

16 Q Then you are not standing on the word imprudent?

17 A No, I am certainly not. In fact, I would plan
18 to assume though not concede that this is a first-time in-
19 formant for purposes of the argument I would want to make.

20 Q But he was reliable?

21 A Of course not, Your Honor. There is nothing in
22 this record to suggest that.

23 Q Do you suggest that prudent negates the idea of
24 reliability?

25 A I wouldn't suggest that it negates it, but --

1 particularly the informant context. It may well bear a strong
2 inference of unreliability. A reliable --

3 Q Let me hear that again.

4 A In the informant context the word prudent may
5 bear a strong inference of unreliability. A prudent narcotics
6 informer may really be one who makes educated guesses about who
7 it is in the community who may well have a bottle of illegal
8 liquor on his premises because he is being paid for the number
9 of people he actually turns up. Having seen Roosevelt Harris
10 at a party, he said, at which illegal liquor was served, he
11 would take a guess that Roosevelt Harris may have a bottle of
12 liquor in his house. It may be perfectly prudent for him
13 under those circumstances to suggest to an officer a list of
14 thirty or forty people for whom search warrants may be obtained,
15 but one such person is Roosevelt Harris.

16 Now if it turns out that in 29 cases the liquor is
17 in fact found, the informant would subsequently be found re-
18 liable. But it is that one case that we are concerned about,
19 and in proving narcotics or liquor informants may well be in-
20 clined to take a guess just on the chance that it will turn
21 up reward or payment or whatever it is, encourages him to con-
22 tinue as an informant, something of course that this record
23 says absolutely nothing about.

24 Q Would that same argument not apply if the man
25 was on trial and you summoned a jury and the jury was before

1 you and you were trying his guilt or innocence?

2 A Of course, in the jury --

3 Q And you put him up for his witness?

4 A It indeed would but in the jury context there is
5 a thought --

6 Q Well does the jury have a right to assume he is
7 a man of bad character?

8 A No, I wouldn't --

9 Q No?

10 A The jury may have a right to --

11 Q In the preliminary proceeding of getting a
12 search warrant?

13 A Excuse me, Your Honor, I'm sorry.

14 Q It would in a preliminary proceeding of getting
15 a search warrant but not in the actual trial --

16 A No, I wouldn't suggest that the magistrate
17 should necessarily presume unreliability in this case. I
18 suggest simply that the inference of reliability, knowing what
19 is known about informants, particularly in the stimulent con-
20 text, is not compelling at all from the word prudence. Pru-
21 dence may suggest, as the Court of Appeals suggested, that a
22 man is circumspect. It may suggest that he is very good at
23 taking educated guesses, and that it would be sensible for
24 him to do that. I don't suggest that unreliability is compelled
25 either, but that the inferences are equally balanced and a jury

1 could well begin without any notion of what prudence meant or
2 with a notion that it meant reliable or unreliable.

3 Q The word prudent in the context of this state-
4 ment may have a connection with the fact that the informant
5 feared for his life or property and he was being very prudent --

6 A Certainly.

7 Q -- in not revealing his name and so on. It seems
8 that it could well be related to the preceeding sentence in the
9 paragraph, doesn't it?

10 A That certainly --

11 Q It has nothing to do with reliability or not.

12 A That is the point. I mean the context of the
13 affidavit and the context of informant behavior generally lends
14 to the word prudence so many connotations that it is difficult
15 even to settle on a meaning; even more important than settling
16 on a meaning is coming up with some basis for magistrates to
17 assess whether that judgment of prudence is correct. How can
18 a magistrate know what the word prudent means in an affidavit,
19 what it implies about the judgment made if there are no, in
20 fact, circumstances stated in the affidavit to substantiate
21 the meaning of prudence in this context? That after all is
22 the function that this Court has historically attributed to
23 the magistrate.

24 The check before the search upon the probaility that
25 the search is warranted, the check upon a judgment that a man

1 is reliable. The magistrate in this case would have to first
2 define prudence in a way that would allow the determination of
3 reliability and, second, speculate in the dark as to whether
4 this man was properly determined to be reliable or prudent
5 or whichever was settled upon by the officer in question.

6 Q Getting away from the nuances of prudent for a
7 moment, what significance do you contribute (a) to the
8 specificity of the allegations made in the affidavit as to
9 what the informant told him and, second, to the allegation
10 that the agent himself had gone to the extent of getting the
11 informant to put his information under oath?

12 A As to the details, Your Honor, I think there is
13 very little you can attribute to that in this context. The
14 details in no sense resemble the details in Draper, which were
15 details predictive in nature. In that case it could be said
16 that when details given by an informant were subsequently
17 confirmed by an agent, therefore they had a chance in that
18 case not to eventuate it, the informant became more credible
19 because the information predicted was in fact confirmed to be
20 true and indeed the informant -- the likelihood that the in-
21 formant was giving personal information was increased by the
22 nature of the details in Draper.

23 There was virtually no real detail in this affidavit
24 at all. The details given pertains to the relationship among
25 buildings on a given residence in an at best medium size town,

1 probably observable detail, but suggests no particular knowledge
2 on the part of the informant or any particular credibility.
3 Indeed it should be noted that as to that detail the investi-
4 gator in this case didn't even go so far, as this record
5 shows, to confirm that before applying for the warrant.

6 So the confirmation aspect of Draper is wholly out
7 of the case and the personal observation aspect of Draper is
8 likewise not here. The critical point is though nothing in
9 this case, as decided by the Sixth Circuit, impairs law enforce-
10 ment at all or certainly not to any degree sufficient to out-
11 weigh the interest of individual security. That after all is
12 the test under the Fourth Amendment, is a search reasonable;
13 reasonable involves balance, and this Court has expressed that
14 test in *Camara* and in *Terry* as the balancing of the need to
15 search against the enormity of the invasion.

16 In this case, a number of alternative opportunities
17 were presented to the officer. Even if it were true that a
18 buy had been difficult to make in four years, a fact which
19 itself would undermine, it seems to me, the merit of the
20 notion that this affidavit created probable cause. Even if
21 that were true, that wasn't the only technique available. Such
22 a buy to be sure would be constitutional, as would the pro-
23 cedure established by *United States vs. Lewis*, in which the
24 buy is not made by the informant at all but by a government
25 agent who calls the premises and sees if he can make a buy

1 there.

2 In Lewis, the government agent actually went to the
3 premises and made the buy, came back a second time and made
4 another buy, and had evidence available for trial. But even
5 if the buy were not possible, in the course of the conversa-
6 tion, as Mr. Justice Douglas suggested in his dissent in Lewis,
7 in the course of the conversation about the buy the homeowner
8 alleged to have illegal whiskey on his premises might well say
9 something to substantiate probable cause. "Who are you? I
10 have never heard of you before. How do I know that you are
11 not a cop?"

12 That kind of conversation with a government agent
13 who has received information that there is illegal liquor at
14 a certain place might well -- and I would suggest in many in-
15 stances would -- enhance the probable cause that he could
16 present to a magistrate in an affidavit. So it is not simply
17 the question of whether a buy was available, an available
18 technique, a buy by the informant or buy by the government
19 agent, but whether other investigative techniques in this case,
20 such as a mere phone call, would not have in fact turned up
21 enough strongly indicative evidence of involvement in the
22 traffic of illegal alcohol as to warrant a proper affidavit in
23 this case.

24 I don't even suggest that there aren't cases in which
25 that kind of further investigation may not be possible. The

1 Americans For Law Enforcement filed an amicus curiae brief
2 presented here a case in which in the course of that brief
3 in which a cash register was stolen from a grocery store and
4 the cashier in the grocery store, a young employee, some days
5 later observed the cash register in somebody's house and hears
6 the owner of that house boast that he stole it. Well, that
7 is not a situation in which law enforcement can make a buy or
8 can make phone calls to see whether they can make a buy. And
9 so the police officer in the real life case by Americans for
10 Law Enforcement ran around the neighborhood and asked the
11 neighbors of the informant, is he liable, is he credible, what
12 was his reputation, checked with the police to see whether he
13 had a criminal record or not, checked his employer to see
14 whether the employee would have any motivation in that case
15 to lie or fabricate or distort, a factor just as strong as
16 lying in the formation of affidavits.

17 Having gone through that process, the officer could
18 at least have presented an affidavit to a magistrate. The
19 notion that he has done his best to clear the reputation of
20 this informant for truth and veracity in that environment.

21 Q Could I ask you a question here?

22 A Yes, Your Honor.

23 Q I have trouble with your argument for this
24 reason: I understand you to agree that the government had a
25 case against a man like this and put an informant on the stand,

1 he testified, yes, he saw him sell the liquor, and the jury
2 would have convicted him, the judge wouldn't be called on to
3 set aside, would he, necessarily?

4 A No, Your Honor, he would --

5 Q But here is a case where the only question is
6 getting up some evidence, there is not near so much at stake as
7 the guilt or innocence, and you are claiming that in the pre-
8 liminary proceedings to get a search warrant the evidence must
9 be stronger than the evidence to convict a man of a crime.

10 A Not at all, Your Honor. I don't believe that is
11 the essence of my claim. First of all --

12 Q Isn't it? Suppose that the government simply
13 put this informant on the stand and it did not put on any
14 evidence to show that he was truthful and trustworthy in the
15 community, and the jury went on and convicted him, is there
16 any reason why that couldn't stand?

17 A Certainly if the defense has done any effective
18 job at impeaching the credibility of that witness, an oppor-
19 tunity they had at the trial but not before the magistrate,
20 that conviction can stand, Your Honor.

21 Q That is what you are exacting, is an opportunity
22 -- is getting a search warrant, a higher burden on the govern-
23 ment than would be imposed on them to convict the defendant.

24 A I really don't believe that is implicit in the
25 argument, Your Honor.

1 Q For one thing, this informer is not before the
2 magistrate.

3 A That is certainly true and even in such a cir-
4 cumstance when an informant is named in an affidavit, one of
5 the functions of naming him in the affidavit --

6 Q That is the argument you are making. You are
7 not making it on the ground that --

8 A No, but I mean what the magistrate has in that
9 case is the power to call the informant before him and cross-
10 examine him.

11 Q I understood that the hearsay rule with refer-
12 ence to trial, I didn't understand that there was any well-
13 established hearsay rule in connection with people who testi-
14 fied to get the search warrant.

15 A Indeed the very opposite is true. Hearsay is
16 permissible in a warrant affidavit of this kind, but it is for
17 that very reason that magistrates -- and this Court has in-
18 sisted upon some assessment of the reliability of the person
19 conveying the hearsay. It is because the magistrate will be
20 satisfied by evidence that would not be competent at a trial
21 that you want some assurance that the person conveying the
22 hearsay is not conveying a mere fabrication. That assurance
23 need not be given in the form of cross-examination. It need
24 not be given in the form of disclosing his name so that the
25 magistrate can call him before him and cross-examine him. But

1 it should appear in the affidavit that the stretch that it is
2 reasonably possible for law enforcement to take, to confirm
3 the reliability of the person giving the hearsay, have been
4 taken and continue to substantiate that the informant's
5 credibility stands up.

6 Q They don't have to confirm that witness when he
7 is before the jury trying a man as to his guilt or innocence.

8 A That is always left to the defendant, Your
9 Honor.

10 Q But this alleged affidavit that this unknown
11 person gave to the agent, what kind of affidavit was it, that
12 John Doe swears something?

13 A Your Honor, the record doesn't support the no-
14 tion that there was an affidavit given by the unknown person.
15 It supports only the notion that a verbal statement was given
16 described in this affidavit was sworn. There was not even an
17 affidavit from this informant.

18 Q But how can you make an unnamed person make a
19 sworn statement?

20 A That is the real problem presumably the govern-
21 ment relies upon to the extent it does rely upon a sworn
22 statement which to some extent today it does not. The effect
23 of swearing somebody in would be to inhibit the chances of
24 falsification by threatening an informant with perjury or
25 prosecution under some other false statement statute. Obviously

1 the function of inhibition in this setting where you don't
2 know who the person is and only the affiant does, there is no
3 evidence of any other present at the swearing in would be
4 virtually nil.

5 Q I guess there is some effort on the part of the
6 informant to the best he could be sure that the fellow was
7 telling the truth.

8 A It shows some effort but --

9 Q It may not be effective but it shows some effort.

10 A Certainly. The search warrant does not issue as
11 a prize for effort. It does issue when probable cause is
12 established and probable cause is established when there is a
13 reasonable basis for a magistrate to infer that an informant
14 is credible. Merely swearing him in does not provide a reason-
15 able basis in these circumstances and there are so many alter-
16 natives available to an affiant in these circumstances without
17 disclosing the informant's name which would buttress reliabil-
18 ity.

19 Q You say then it would be better if the officer
20 had actually taken a written affidavit from the informant and
21 said to the magistrate I have a written and signed affidavit
22 from the informant?

23 A I think that would come very close to suf-
24 ficiency. The magistrate could simply then call for it and
25 see if he wished and see who it was.

1 Q Well, he might say I won't furnish the affidavit
2 because he is afraid.

3 A It could be submitted to the court under seal.
4 That would be very weak under those circumstances, I would
5 think for the court's knowledge alone, and from that point on
6 without disclosure to the rest of the world.

7 Q The affidavit's reading would be to clarify the
8 officer's case.

9 A Only because the affidavit enabled called the
10 informant into an in-camera session altogether would it go to
11 the informant's reliability, Your Honor.

12 Of course it is not this case. There is no affidavit
13 or sworn statement here.

14 Q But apparently they do orally swear to --

15 A Yes, for whatever that may mean, in Middlesboro,
16 Kentucky or anywhere else. I have on many occasions myself
17 said I have sworn on a stack of bibles and I had no notion at
18 the time that I was threatened with perjury or threatened
19 with anything that seriously buttressed by reliability. I hope
20 that it does prompt to tell the truth, but I don't think that
21 kind of thing which on this record, by swearing, does much to
22 buttress anyone's reliability.

23 Given the alternatives that are available to law
24 enforcement in a circumstance like this involving minimal law
25 enforcement impingement and indeed alternatives that are

1 commonly used throughout the country, the suggestion that this
2 Court ought to put its imprimatur upon a confirmation of re-
3 liability amounting to no more than the use of an ambiguous
4 term in an affidavit is a suggestion in effect that this Court
5 can sign over to the police the security of persons and
6 their houses, not simply the security of persons in their
7 houses at the discretion of the police, but in the discretion
8 of the police acting upon an inarticulate hunch.

9 This Court has said it is faced against an inarticu-
10 late hunch even if an officer in an emergency, and from that
11 point on in every affidavit case this Court has ever con-
12 sidered, and this case amounts to no more than an inarticulate
13 hunch after an interview that someone may be giving reliable
14 information about a person who mysteriously has been known to
15 be in the business of trafficking in illegal alcohol for four
16 years but about whom no better information appears to have
17 been obtained, and whom in this may be some difficulty in
18 making any buy at all to confirm that he is in fact engaged in
19 that traffic. Under these circumstances I suggest that an
20 affirmance of the Sixth Circuit's decision would do nothing
21 to impair effective law enforcement and a reversal would do
22 enormous damage to the protections of the Fourth Amendment
23 that this Court has jealously guarded over the years.

24 Thank you.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Umin.

1 Mr. Umin, you acted at the Court's request and by
2 appointment by the Court. We thank you for your assistance to
3 the defendant and to this Court.

4 MR. UMIN: It was a pleasure to do so, Your Honor.

5 MR. CHIEF JUSTICE BURGER: Thank you, Miss Rosenberg.
6 The case is submitted.

7 [Whereupon, at 3:00 o'clock p.m., argument in the
8 above-entitled matter was concluded.]

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