In the

Supreme Court of the United States

JEROME FRANKS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

No. 77-5176

Washington, D. C.
February 27, 1978

Pages 1 thru 31

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Monday, February 27, 1978

The above-entitled matter came on for argument at 11:47 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, JR., Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

DONALD W. HUNTLEY, ESQ., Assistant Public Defender, Legal Department, E. I. du Pont de Nemours & Co., Wilmington, Delaware 19898, for the Petitioner.

HARRISON F. TURNER, ESQ., Deputy Attorney General of Delaware, Department of Justice, American-International Bldg., Wilmington, Delaware 19801, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-5176, Franks against Delaware.

Mr. Huntley.

ORAL ARGUMENT OF DONALD W. HUNTLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HUNTLEY: Mr. Chief Justice, and may it please the Court:

The issue that is presented in the Franks case is one that has troubled the Court for a good length of time, and that is, very simply, what is to be done if a search is conducted pursuant to a search warrant and the affidavit supporting that search warrant just isn't true.

QUESTION: Is there not then the related question that flows from that, if there is enough in the warrant which is true, to support the search, that's the next question, isn't it?

MR. HUNTLEY: Yes, that's true. It would seem that a warrant should be able to stand on those facts that are in it, even in the event that there are misstatements within the warrant.

We would all like to believe that the police in the United States simply don't use false affidavits to obtain a search warrant. In the present case, however, the Petitioner wanted the opportunity to show at trial that certain

misstatements were made in the application for a search warrant and the affidavit supporting that application.

We submit that the remedy, when the issue comes up, is to first allow the defendant the opportunity to make such a showing. And if he does show that in fact the misstatements were made in the search warrant application, then the resulting evidence ought to be excluded.

QUESTION: Mr. Huntley, I've read the colloquy between Judge Bush and trial counsel in the Delaware Trial Court and I gather what trial counsel sought to contest was the affiant's representation as to what had been told him by two other people. Is that correct?

MR. HUNTLEY: Not entirely, Your Honor.

QUESTION: In what respect is that incorrect?

MR. HUNTLEY: The contested allegations in the search warrant affidavit were, very simply, whether certain conversations took place at all. Now, in the absence of those conversations taking place, the defendant was prepared to show further that the representations that were behind what allegations were made were erroneous. But the basic issue was the existence or nonexistence of certain arguments, of certain conversations between the affiant officer and two witnesses.

QUESTION: And he wanted to show that they had not had any conversations with the affiant and the affiant had said they had.

MR. HUNTLEY: Exactly.

The Respondent has argued that if misstatements are shown and these are material, that their remedy of exclusion is, very simply, too harsh. The State of Delaware has suggested the benefit of the exclusionary rule's deterrent effect is far outweighed by the societal interests in preserving the integrity of orderly criminal law enforcement.

We disagree that the remedy of exclusion is too harsh. Certainly, in the case of a substantial misstatement on the part of an affiant, civil prosecution for damages, if they could be assessed, certainly wouldn't be a remedy that would be too harsh for --

QUESTION: Let me follow up on my brother Rehnquist's question. I am not sure I understood your answer.

Suppose an officer makes an affidavit that he has been told by a reliable informant that such and such is the case, representing what the affiant has told him or that the informers told him that certain facts were true. Now, are you suggesting that the search warrant should be upset and suppression should follow if, one, the officer who made the affidavit never had any such conversations at all, or it is admitted that he had the conversation with the informant and the informant did tell him that, but what the informant did tell him was false?

MR. HUNTLEY: The situation that we have in the present case is the first, that is the --

QUESTION: Are you even addressing the latter?

MR. HUNTLEY: Yes, I think we can very well.

QUESTION: I don't want you to, or anything, but you don't think that's involved in this case?

MR. HUNTLEY: To a certain extent it is involved in this case, because we don't have the benefit of the witnesses that the defendant sought to present.

QUESTION: Are you submitting that you should be able to attack the warrant, based on the false statements of the informant?

MR. HUNTLEY: There are two considerations --

QUESTION: Yes or no.

MR. HUNTLEY: In some circumstances yes. The considerations that should go into the determination of the exclusion of evidence, it seems to me, are dictated by two factors. First, the fundamental reason for exclusion itself is one of deterrence. As Mr. Justice White observed in the Stone v. Powell case, "When law enforcement officers have acted mistakenly, but in good faith, on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. We should in all circumstances keep in mind what the effect is likely to be in the exclusion of evidence."

Now, turning to the particular situation that Mr. Justice White was addressing, the primary consideration

should be whether there will be a substantial deterrent effect in the exclusion of any particular piece of evidence. To carry this a step further, we need to concentrate on the reasonableness of the assumption of the affiant. If, in fact, the evidence that he relies on was false, but he had a reasonable basis for believing it to be true, certainly we aren't going to have any significant benefits from the exclusion of that particular evidence.

QUESTION: But that would be an issue that could be litigated in a suppression hearing, I take it, under the rule you are contending for, the reasonable expectations of the affiant.

MR. HUNTLEY: That's right.

QUESTION: Then would this apply to an arrest warrant as well as a search warrant?

MR. HUNTLEY: That particular situation isn't in front of us, but I should think that, yes, the same considerations would apply. The Constitution in the cases of searches and seizures requires that the search be reasonable, or prohibits unreasonable searches and seizures.

QUESTION: How do you distinguish this case from Calandra, then, where we said that the fact that suppressible testimony that had been given before the grand jury didn't void the ultimate indictment rendered by the grand jury?

MR. HUNTLEY: The considerations involved there were

that the differences in procedures before the grand jury and the actual trial were so great as to warrant a distinction and permit the use of the evidence by the grand jury, even though it wouldn't be admissible at trial, if I understand the cases correctly.

We would suggest that the culpability of the misstatements is a very important consideration that is central to the issues that we have here.

QUESTION: Tell me this, Mr. Huntley, is there something more than the statement on page 16 of the Appendix by defense counsel as to his offer of proof, as to what he would prove if the hearing were granted?

The statement is, "Your Honor, I intend to produce" -- a certain man -- "who I believe will give information that will intend to impeach the information," and then it goes on further, "to the fact that it was never given and as such there may have been a rather material misrepresentation."

Now, do you depend on more than that to have alerted the court to what you were going to prove?

MR. HUNTLEY: No. This is as far as a trial counsel is allowed to proceed in the presentation of evidence.

QUESTION: Well, he said a little something additionally at the bottom of page 16. "They will testify that neither one of them to the best of their knowledge gave this information to either of the affiants contained in this

affidavit."

MR. HUNTLEY: That's true, but what I meant by the fact that they went no further was that --

QUESTION: There is nothing in writing?

MR. HUNTLEY: There were no affidavits presented by the proposed witnesses.

QUESTION: But, at least, those are clear statements that in his opinion the affiant was making a misstatement anyway, and maybe lying.

MR. HUNTLEY: Exactly.

QUESTION: I mean knowingly lying.

MR. HUNTLEY: That's right.

QUESTION: And the Supreme Court of Delaware said, in effect, "You can't impeach the warrant for any reason whatever."

MR. HUNTLEY: That's true. So there was no basis, after the initial magistrate's ruling on the validity of the warrant, to show that the warrant was false. And this is the decision that we appeal here.

We think that in consideration of this question the categories of culpability should be given very careful consideration by the Court. While here we sought to show that there were specific misstatements, that is, plain inaccuracies that should have been known by the police officer, we don't have the actual benefit of the testimony here. And the actual

testimony, of course, should have -- could have shown anything from a complete fabrication to a simple misunderstanding or innocent error on the part of the officer.

The categories of misstatements have been broken down into four sections, ranging from completely innocent misstatements to negligent misstatements, reckless misstatements or, in a worse case, wilful misstatements.

QUESTION: Mr. Huntley, neither you nor your opposition has cited Rugendorf v. United States, although the United States in its amicus brief does. Will you have some comments on that after lunch?

MR. HUNTLEY: Very well.

QUESTION: Because I think this is an obstacle for you in this case, that these inquiries from the bench have brought into focus, as to whether the misstatements here are of sufficient integrity to escape the ruling in Rugendorf.

MR. HUNTLEY: I will consider that.

The categories that we suggest deserve consideration for possible exclusion of evidence are the three categories that we feel warrant that particular remedy, that is, those misrepresentations that have a degree of malfeasance on the part of the officer.

Those categories that we set forth before that contain some malfeasance are those that involve either --

MR. CHIEF JUSTICE BURGER: We will resume there at

1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock, noon, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: You may resume, counsel.

ORAL ARGUMENT OF DONALD W. HUNTLEY, ESQ. (Resumed)

ON BEHALF OF THE PETITIONER

MR. HUNTLEY: Mr. Chief Justice, and may it please the Court:

Before the luncheon recess, Mr. Justice Rehnquist inquired about the relation between the present case and the situation that was treated by the Court in the Rugendorf case.

The distinctions between the present situation and the Rugendorf case, I think, are quite clear and quite significant. In Rugendorf, there were two allegations for the inaccuracy or the inappropriateness of the search warrant affidavit.

The first was that the affiant didn't have probable cause to make his allegations because he was merely reporting the testimony of another, and that since this informant's testimony by way of the officer wouldn't be presentable at trial, that it shouldn't provide probable cause in that situation.

Our current case is distinguished by the fact that we are concerned about the occurrence or non-occurrence of the conversation itself and not the admissibility of the officer's reporting of that conversation at trial.

QUESTION: In a way, you are drawing a distinction between double-hearsay and hearsay, aren't you, among other things?

MR. HUNTLEY: I imagine so, yes.

QUESTION: I just think that the Rugendorf case represents a significant hurdle for you to get over, but I am surprised that neither of you cited it and it was up to the SG in his amicus brief to bring it up, but then --

MR. HUNTLEY: Well, we do believe that is the primary consideration in the distinction between the two cases. Then too, in the Rugendorf case, the factual inaccuracies were first of a minor nature and, secondly, were the inaccuracies made by the informant and not the affiant. And we believe this is a very important consideration here.

QUESTION: If enough accurate information is found in the affidavit, you conceded at the outset of your argument, that renders inaccuracies irrelevant.

MR. HUNTLEY: I believe that justice would dictate that result, yes. In the present situation, however, the allegations that we are dealing with went to the very heart of the content of the search warrant affidavit.

QUESTION: Would that alter the basic proposition that you have now agreed to twice, that if there is unchallenged material in the application for a warrant which would sustain probable cause, then everything else is irrelevant?

MR. HUNTLEY: We would concede that. I would argue in this case though that that wasn't the situation, that the only allegations in the search warrant affidavit are related,

specifically, to the evidence that was found and the likelihood of the evidence being in the defendant's apartment.

I have pointed out to the Court what we feel are the basic considerations in excluding evidence obtained pursuant to a search warrant where the affidavit was false. And that is that the evidence should be excluded only when first there is some reasonable chance that such exclusion could deter the misstatements in the future and, secondly, that the misstatements were unreasonable, within the specific wording of the Constitution.

If, for example, the basis for the affiant misstatement was inaccurate, but at the same time he reasonably believed them to be accurate and there were no courses of inquiry that he should have pursued as a reasonable man should have pursued, then clearly his conduct was reasonable and at the same time no deterrent effect can be made by excluding evidence based on reasonable conduct.

We would also like to explore the specific circumstances under which the defendant should be allowed to make a showing of inaccurate statements in the search warrant. Both the amicus United States, as well as the Respondent, have suggested that a preliminary showing of some kind be required, possibly to the extent of requiring affidavit evidence before this is submitted for a suppression hearing and the defendant given the opportunity to show these inaccuracies.

The most frequently advanced argument for this is that it would prevent time-consuming and frivolous exercises at court in search of misstatements when there is no reasonable belief that misstatements actually exist.

We suggest that this is not a reasonable apprehension. I, personally, don't have extensive experience in criminal practice, but I rely on the judgment of those of our colleagues that have made a detailed study of this. For example, Professor Graneau, in his treatment of this subject, points out that 60 to 90% of all defendants plead guilty, usually without a prior motion to suppress. Second, most searches are conducted without warrants, and the defendants in these cases now have full opportunity to file a suppression motion. Third, even in those few cases involving warrants, defendants can obtain a suppression hearing of limited scope, simply by asserting that the warrant's execution was unlawful, hence, permitting defendants to controvert warrants would increase the present number of suppression hearings only insignificantly and merely add to the length of some hearings already granted.

QUESTION: Of course, you are talking about kind of a spectrum and a balance one way or the other, aren't you here? While one could have a rule that the -- once the magistrate has issued a warrant, the warrant requirement is satisfied, even though a court were later to determine that the facts alleged in the warrant didn't satisfy probable cause, Aguilar and

Spinelli hold otherwise.

Or you could have a rule that the court can determine probable cause that the magistrate's findings as to credibility, factual credibility, will be upheld.

You want a third rule that says the magistrate's determination in neither case will be upheld. It will be subject to re-examination by a court.

You are talking about this would be an incremental deterrent value, not something that is an absolute right under the Constitution, aren't you?

MR. HUNTLEY: That's right, but it seems to me that the deterrent value is much more applicable to the present situation than a review of the sufficiency of the search warrant.

QUESTION: But your argument is a constitutional argument, --

MR. HUNTLEY: Yes, Your Honor.

QUESTION: -- i.e., that a warrant is issued on false information is not a kind of a warrant that the Fourth Amendment allows.

MR. HUNTLEY: Exactly.

QUESTION: And yet you, yourself, say that where the information is false, that the officer didn't have any reason to believe it was false, it complies with the Fourth Amendment.

MR. HUNTLEY: Yes, I would so submit.

QUESTION: Not because it says probable cause?

MR. HUNTLEY: The probable cause lies with the affiant. And from our standpoint if the affiant had reasonable basis to believe his allegations, this satisfies the constitutional requirement. We can't, in all circumstances, require that the affiant be absolutely correct. As Mr. Chief Justice Burger has pointed out, it is unreasonable to require that degree of care on the part of the average constable.

QUESTION: We had a case argued only last week where had a warrant been obtained and was obtainable, there being time, nevertheless, there would have been great pressure to recite the necessary material, and it would be most unlikely that there would be a perfect affidavit for a warrant at any time. Is that not so?

MR. HUNTLEY: That's possible.

We would suggest that if a defendant were denied the opportunity, as a matter of right, to challenge the authenticity and the accuracy of the search warrant allegations, there would be two very undesirable consequences that would flow from this.

QUESTION: I didn't realize you were suggesting that any time a person comes and makes an allegation that the affidavits contain some inaccurate information that you should be allowed to put on your proof. Don't you have to also, as you suggest, indicate that the officer knew it was wrong?

MR. HUNTLEY: Yes, certainly, the proof that is

required is that the officer's conduct was unreasonable.

QUESTION: But does your allegation that gives rise to your right to discovery or hearing have to be any more than just an allegation?

MR. HUNTLEY: We submit that if it were anything different than just an allegation that we would come up against the situation that was held satisfactory in the Carmichael case.

QUESTION: In every case, you just make the allegation, whether you have any basis whatsoever, and you can put the officer on the stand and cross-examine him. Is that it?

MR. HUNTLEY: Yes, I believe that the defendant should be allowed that right. If he has reason to suspect --

QUESTION: Well, what reason? That's what I want to know. What reason? And does he have to say what the reason is before he can get a hearing on it?

MR. HUNTLEY: The fact of the matter is that in most criminal situations there is no opportunity for discovery and it is very unlikely that the defendant will be as fortunate as he was in this case and have a specific basis.

QUESTION: So the question remains, does all he have to do is make the allegation and then a hearing?

MR. HUNTLEY: I think for satisfactory fulfillment of the constitutional requirements the defendant is by right entitled to the opportunity to present such evidence as he may have.

QUESTION: I know, but if he has got any why doesn't he present it? You mean he wants to just cross-examine --

MR. HUNTLEY: In view of the ex parte nature of the initial proceeding in granting the search warrant, I think --

QUESTION: Also, if you are going to do this, I suppose you have another leg up on getting the names of informants.

MR. HUNTLEY: This is a separate issue, not involved in this present situation. Short of getting the identity of informants, the defendant could,at the very least, inquire into the circumstances surrounding the affiant's alleged information, and make other inquiries that would test the credibility of his having an actual informant or whether the informant gave the information --

QUESTION: Of course, the magistrate is entitled to do that when he issues the warrant, and for all you know he did.

MR. HUNTLEY: That's very possible but this was in an ex parte proceeding --

QUESTION: I know, but nevertheless the magistrate can cross-examine and have all testimony he wants, and if he has any doubts about it he doesn't issue a warrant, that's all.

MR. HUNTLEY: Well, it is gratifying to have some authority vested in the magistrate, but our judicial tradition in this country is that the issues are best discussed in an

adversary proceeding.

QUESTION: One of our cases says that the purpose of the warrant -- I think it is the McDonald case -- is to interpose between the police authorities and the defendant the neutral magistrate. It doesn't say the whole court system.

MR. HUNTLEY: Well, this Court has considered the role of the magistrate in similar situations regarding the sufficiency of the allegations, and has felt that the review of the sufficiency of the allegations in the search warrant affidavit is appropriate at a suppression hearing.

QUESTION: Well, may that not be because as the Court said in Chabrick v. City of Tampa, "A magistrate need not be one trained in the law."

MR. HUNTLEY: That's a possibility. Hopefully, they have the highest degree of competence possible. But it seems much more basic to have a review of factual matters through an adversary proceeding.

QUESTION: You can't have an adversary proceeding before you get the warrant. That's impossible.

MR. HUNTLEY: Of course. That's unreasonable. This would just invite the destruction.

QUESTION: If it is a dope case, it is impossible.

MR. HUNTLEY: Yes.

QUESTION: When counsel made this rather speculative, indeed highly speculative, proffer, why couldn't he have

presented, by affidavits, exactly what he proposed to present to the court ultimately?

MR. HUNTLEY: In the present case, this would have been possible if he had recognized the necessity for a preliminary showing. However, in this particular case, he did have the evidence available and felt possibly that it would be an undue imposition on the time of the presiding judge to first review the sufficiency of this preliminary showing and then, subsequently, hear the witnesses besides.

QUESTION: Well, as it turned out, he had to do both. On your theory -- on your claim, he would have to do both. He has considered it preliminarily here, and now you are here saying that you want him to conduct the full adversary hearing.

MR. HUNTLEY: That's right.

QUESTION: Now, what if the judge had said, in response to this proffer, "I have considered the points which you say you may possibly be able to prove, and even if you prove them all there is enough remaining here to support probable cause, and your motion is, therefore, denied."

MR. HUNTLEY: With that I would feel would be a final adjudication of the matter. The judge certainly would have resolved the doubts in favor of the defendant, and there would clearly have been a thorough review of the validity of the search warrant.

We think that if the preliminary showing would require

-- would be required that we would have a two-fold problem. First, the allegations for the invalidity of the search warrant would become as cursory as they were in Carmichael. And, secondly, I think that we would see a movement on the part of the police officers to disguise their informants, and even when they do have probable cause for an affidavit couch it in such terms so that the credibility of this information couldn't be checked by the defendant.

We have a system of justice that systematically eliminated many of the legal fictions that we had in the English common law and statutory law. We submit that the requirement of a special preliminary showing, inconsistent with the routine handling of search warrant affidavits, would foster the presentation of new legal fiction, and we don't believe that this would be helpful in the administration of justice.

We ask that the judgment of the Delaware Supreme Court be reversed, and that this Court confirm two basic corollaries to the Fourth Amendment. First, that a defendant has the unfettered right to show at a suppression hearing that an affidavit was false. And secondly, that the evidence resulting from a search be excluded whenever the search was based on a false affidavit that a reasonable man would not have believed to be true.

If there are no further questions, we thank the Court.

MR. CHIEF JUSTICE BURGER: Mr. Turner.

ORAL ARGUMENT OF HARRISON F. TURNER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. TURNER: Mr. Chief Justice, and may it please the Court:

Initially, I'd like to present to the Court the idea that the exclusionary rule of the Fourth Amendment should not be extended to this case. I would like to discuss Mapp v. Ohio which was the case which made the Fourth Amendment exclusionary rule applicable to the States. It is to be noted that Mapp was a search without a warrant. The articles seized were contraband, the very subject of the charge. And I think this is important. They were testimonial in nature. And there appeared to be no alternative remedy for the invasion except a deterrent suppression of the evidence.

In Stone v. Powell, this Court had occasion to analyze Mapp's application to the exclusionary rule to be founded on, one, the prevention of introduction of evidence where introduction is tantamount to a coerced confession, two, a deterrence of Fourth Amendment violations and, three, judicial integrity.

This case is markedly distinguishable. The items seized were not testimonial or communicative. Let's look at what was seized. Items of clothing. Now, the charges were burglary, rape, kidnapping. These items of clothing had

nothing to do with any of the elements of the crime.

So, I submit there is no Fifth Amendment overtone in this particular case. In every other case that I have researched, I find that Fifth Amendment overtones, or Sixth Amendment, are applicable. Therefore, as this Court has stated in Calandra, and I believe in Janis, the exclusionary rule is a judicially created remedy, designed to safeguard Fourth Amendment rights, generally, through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

Accepting this then, for this Court to intervene in this case, I submit, would be contrary to federalism. In allowing the state courts, without a constitutional -- a U.S. constitutional point -- to come before this Court it would be unjust for this Court to interfere, as Justice Clark stated in Kerr v. California and Mapp v. Ohio. We followed Boyd v. U.S. which held the Fourth Amendment, implemented by the Self-incrimination Clause of the Fifth, forbids the Federal Government to convict a man of a crime by using testimony or papers obtained from him.

Now, let me point out here that the Respondent in 1950 adopted the exclusionary rule of Weeks, and that is so noted in Elkins v. U.S. as one of the states that had adopted the exclusionary rule by means of case law, Ricards v. State, 77 A.2d 199, 1950. This is prior to Mapp.

Now, our Supreme Court -- Delaware Supreme Court -- in passing on this matter, thought there was no constitutional violation.

I submit that the Supreme Court of Delaware should be confirmed.

The next point. The application of the defendant for a hearing. The Court has discussed it rather thoroughly. They know what it amounts to. I submit it was merely highly speculative and not a grounds for conducting a hearing.

QUESTION: But that certainly indicated that he anticipated putting on the testimony of informers who would deny that they had any conversations like that at all.

MR. TURNER: When you say "informers," sir -- They were named witnesses.

QUESTION: Well, he would put on witnesses who would claim they didn't have the conversations with --

MR. TURNER: That's what he wanted to do, Your Honor, no question about it. That's what he wanted to do, but --

QUESTION: What if he had prepared an informal offer of proof to which was attached affidavits of the witnesses?

MR. TURNER: That's a different proposition.

QUESTION: Why would that be different than terms of the four corners rule?

MR. TURNER: Well, Rule 41(c) of the Delaware Criminal Rule specifies on suppression of evidence that the motion will be

by affidavit -- supported by affidavit, I should say. It specifies all this.

QUESTION: Would you say that if he had made a formal offer of proof, supported by affidavits of the witnesses who say, "We never had any conversation with the officer whatsoever."

Now, suppose he had made that sort of a submission; then, let's suppose the Delaware Court had still said, "It doesn't make any difference what your submission is, you may not attack the face of the warrant."

MR. TURNER: The Delaware Court would have been wrong in that case.

QUESTION: Constitutionally wrong?

MR. TURNER: Constitutionally --

QUESTION: That's what the issue is here. Is it constitutional or not for a state to deny a chance to attack the --

MR. TURNER: I would say it is not constitutionally wrong unless the Court considers -- and the only out would be judicial integrity, it would appear to me, in that case.

QUESTION: Well, you still say that Delaware, constitutionally, could say, "We are just not going to allow any kind of an attack on the warrant, even if there are affidavits that the affiant officer committed perjury."

MR. TURNER: Yes, Your Honor.

QUESTION: Certainly, that's what the Supreme Court of Delaware said, wasn't it? Didn't the Supreme Court of Delaware take that position?

MR. TURNER: Yes, Your Honor.

QUESTION: Well, that is the four corners rule.

MR. TURNER: That's correct.

Now, I would like to compare the Mapp rule with the deterrent that's already built into this situation. Calandra said, I believe, that only in the most efficacious cases would the exclusionary rule be applied. I submit that this is not one. The situation here is you have a deterrent of a perjury charge, a criminal charge. The deterrent rule, exclusion of evidence, punishes who? It punishes society. That had nothing to do with it. The perjury rule goes right to the heart of the individual involved.

Now, you say, "Well, if we exclude the trial, that might deter." I submit that the police officer who would lie under oath is not one who is going to be deterred by exclusion of evidence at trial. He has demonstrated that he is really not interested in enforcing the law. He is sort of interested in violating it.

QUESTION: Well, counsel, I think you are undoubtedly aware of those arguments that have been advanced to the Court on a number of occasions in briefs to no avail. They have persuaded some members of the Court, not a majority.

MR. TURNER: I come then to the last area in which I submit that the evidence submitted or tendered in evidence, the articles of clothing submitted were harmless beyond a reasonable doubt. The items that were introduced consisted of clothing which, in effect, were identification. We had in addition to that two statements made by the defendant, not admitting guilt but admitting it as identification --

QUESTION: Was this argument made to the Delaware Supreme Court?

MR. TURNER: The harmless area? Yes, Your Honor. They didn't get to it.

QUESTION: They didn't need to get to it.

MR. TURNER: It was made.

QUESTION: We don't ordinarily get to it either, unless the lower court got to it.

MR. TURNER: That I can't answer.

QUESTION: Well, you are entitled to urge us to support the judgment on any ground that was urged in the court below, but many times we don't take the invitation.

MR. TURNER: Thank you.

I submit then, under those circumstances, that the evidence as submitted there was harmless beyond a reasonable doubt because -- and briefly -- the defendant made two statements prior to trial admitting that he was a participant. The defense counsel's opening statement denied participation but

rather raised the defense of consent. The victim positively identified the defendant at trial. She had had an opportunity for an hour and a half to be with him, fifteen minutes of which were in daylight condition. And lastly, when the defendant took the stand, himself, the first question he was asked was if he had had intercourse with the victim on that day. His answer was yes.

QUESTION: But Mr. Turner, what about the knife?

MR. TURNER: The identification of the knife, Your Honor, was objected to by defense counsel as not being a positive identification. He couldn't have said truer words. It was not. What the victim said --

QUESTION: Didn't he also object to it on the ground that it had been seized pursuant to the warrant? Hadn't the knife also been seized pursuant to the warrant?

MR. TURNER: Yes, Your Honor.

QUESTION: And didn't he also object on that ground as well as the other?

MR. TURNER: Not clearly, but he did object that it was not the --

QUESTION: He made a motion to suppress and that would have included the knife.

MR. TURNER: Yes, Your Honor, it would have.

What I am talking about is before the jury -- This motion was not before the jury. My point is that the jury was

impressed by defense counsel's motion, which brought emphatically to their attention that the knife had never been identified as the knife. What the victim said was that it was of that length, had one smooth edge and one sharp edge, and that was like the knife. There was no positive identification of the knife. That is the position of the Respondent in this matter.

If there are no questions, that concludes my argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Huntley, do you have anything further?

QUESTION: Could I ask General Turner a question?

Do I understand you are not relying on the Rugendorf case in any way?

MR. TURNER: Rugendorf, no sir.

QUESTION: May I ask why?

MR. TURNER: Well, frankly, I didn't think I needed to, Your Honor.

QUESTION: It has some interesting parallels, has it not?

MR. TURNER: I suppose I didn't go to Rugendorf to start with because the first statement was the hearing had been granted. They assumed it was correct. I think that probably steered me off. I apologize.

REBUTTAL ORAL ARGUMENT OF DONALD W. HUNTLEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HUNTLEY: I would merely like to take issue with Colonel Turner's characterization of the present question as an extension of the exclusionary rule.

We submit that the exclusion of evidence that was not only based on a false affidavit, but an unreasonably false affidavit, is more basic to the exclusion of evidence that resulted from an insufficient affidavit, in some respects.

And we further submit that the constitutional purpose would be best served by the exclusion of all evidence that was so introduced.

MR. CHIEF JUSTICE BURGER: Very well.

The case is submitted.

(Whereupon, at 1:33 o'clock, p.m, the case in the above-entitled matter was submitted.)