

# The Burger Court Opinion Writing Database

*United States v. Harris*

403 U.S. 573 (June 28, 1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

May 12, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 30 - U. S. v. Harris

MEMORANDUM TO THE CONFERENCE:

I will submit a dissent in the above case which may have some appeal for those who voted at Conference to reverse.

If someone writes a dissent more to my liking than my own, I will gladly yield.

Regards,

WJD

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

From: The Chief Justice

Circulated: MAY 25 1971

First Circulation Recirculated: \_\_\_\_\_

No. 30 -- United States v. Roosevelt Hudson Harris

MR. CHIEF JUSTICE BURGER, dissenting.

Today, more than in any prior case in this area of the law, the Court ignores the sound admonition of United States v. Ventresca, 380 U.S. 102, decided in 1965:

[A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. *Id.*, at 108.

Today the Court, while seeming to accept what was said and held in Ventresca, actually abandons the commonsense approach and takes a further step backward toward "technical aspects of elaborate specificity . . . [of] common law pleadings." Ventresca, supra. This step can only make more difficult the legitimate efforts of law enforcement officials of both state and local governments. <sup>1/</sup> Moreover, it will have

1/

Although the Court's opinion is couched in terms of federal officers and magistrates, it is far too late in the day to suggest that the applicable standards will be any different when applied to the states through the Fourteenth Amendment. See Ker v. California, 374 U.S. 23 (1963).

Supreme Court of the United States  
Washington, D. C. 20543

June 8, 1971

CHAMBERS OF  
CHIEF JUSTICE

No. 30 - United States v. Roosevelt Hudson Harris

MEMORANDUM TO THE CONFERENCE:

In light of the changed voting I have converted my dissent into an opinion for the Court. Because of varying rationales I have compartmentalized the opinion.

Regards,

WB

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

Circulated: JUN 8 1971

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[June —, 1971]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity.

In 1967 a federal tax investigator and a local constable entered the premises of respondent Harris, pursuant to a search warrant issued by a federal magistrate, and seized jugs of whiskey upon which the federal tax had not been paid. The warrant had been issued solely on the basis of the investigator's affidavit, which recited the following:

"Roosevelt Harris has had a reputation with me for over four years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life [sic] and property should their name be revealed. I have

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 10, 1971

No. 30 -- U. S. v. Harris

MEMORANDUM TO THE CONFERENCE:

Although I do not presently intend to circulate further, I have made the following four minor corrections in the present circulation:

- (1) - The last word on p. 9 should be "Title", rather than "Chapter."
- (2) - Line 28, p. 10 should read "and has been partially rejected"
- (3) - Line 36, p. 10 should read "should not be extended to warrant proceedings to prevent magistrates . . ."
- (4) - Line 1, p. 11 should read "from crediting, in all circumstances, statements of a declarant . . ."

Regards,

WZB

Supreme Court of the United States  
Washington, D. C. 20543

June 17, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

No. 30. - United States v. Harris

MEMORANDUM TO THE CONFERENCE:

I have concluded to make an additional change in the above opinion, as to Part II which represents the views of Justices Black, Blackmun and myself.

(1)-I will strike the final two sentences of Part II.

(2)-I will add to what then becomes the final sentence the following:

"and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

Since Justices Black and Blackmun would overrule Spinelli outright, I suspect they will find this change acceptable.

Regards,

WRB

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

3rd DRAFT

From: The Chief Justice

Circulated:

No. 30.—OCTOBER TERM, 1970

Recirculated: JUN 17 1971

United States, Petitioner, v. Roosevelt Hudson Harris. } On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit.

[June —, 1971]

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK and MR. JUSTICE BLACKMUN join.

We granted certiorari in this case to consider the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity.

In 1967 a federal tax investigator and a local constable entered the premises of respondent Harris, pursuant to a search warrant issued by a federal magistrate, and seized jugs of whiskey upon which the federal tax had not been paid. The warrant had been issued solely on the basis of the investigator's affidavit, which recited the following:

"Roosevelt Harris has had a reputation with me for over four years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their life [sic] and property should their name be revealed. I have

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES *From: Black, J.*

No. 30.—OCTOBER TERM, 1970

Circulated: JUN - 2 1971

Recirculated:

United States, Petitioner, *v.* Roosevelt Hudson Harris. } On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit.

[June —, 1971]

MR. JUSTICE BLACK, dissenting.

While I agree wholeheartedly with the opinion of THE CHIEF JUSTICE which distinguishes this case from *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), I would go further and overrule those two cases and wipe their holdings from the books for the reasons, among others, set forth in the dissent of Mr. Justice Clark in *Aguilar*, which I joined, and my dissent in *Spinelli*.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 30.—OCTOBER TERM, 1970 *Circulated:*

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

Recirculated

JUN - 9 1971

[June —, 1971]

MR. JUSTICE BLACK, concurring.

While I join the opinion of THE CHIEF JUSTICE which distinguishes this case from *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), I would go further and overrule those two cases and wipe their holdings from the books for the reasons, among others, set forth in the dissent of Mr. Justice Clark in *Aguilar*, which I joined, and my dissent in *Spinelli*.

B

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

From: Harlan, J.

**SUPREME COURT OF THE UNITED STATES** MAY 5 1971  
Circulated

No. 30.—OCTOBER TERM, 1970 Recirculated:

United States, Petitioner, v. Roosevelt Hudson Harris. } On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit.

[May —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We brought this case here, 397 U. S. 905 (1970), because it raises important questions as to how our decisions in *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), apply where magistrates are faced with the task of assessing the probable credibility of unidentified informants to law (who) have not previously supplied accurate information to law enforcement officers, and where such informants purport to describe criminal activity of which they have personal knowledge.

I

On June 17, 1967, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service swore to an affidavit before the local federal magistrate<sup>1</sup> in which he stated that he had reason to believe that non-tax-paid liquor was being concealed in a de-

<sup>1</sup> At the time the search here involved was executed, the officer charged with issuing the warrant was formally denominated as a United States Commissioner. Current statutes now describe them as United States Magistrates, *e. g.*, 28 U. S. C. § 631 (Supp. V. 1969). The latter term will be employed throughout this opinion.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas ✓  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 30.—OCTOBER TERM, 1970

Harlan, J. Circulated MAY 26 1971

Recirculated: \_\_\_\_\_

United States, Petitioner, } On Writ of Certiorari to the  
v. Roosevelt Hudson Harris. } United States Court of  
Appeals for the Sixth  
Circuit.

[June —, 1971]

Memorandum of MR. JUSTICE HARLAN to the Conference.

Before we leave this phase of the case a further matter should be addressed in the interest of completeness. While neither of the parties has raised the point, we note that the confidant, in providing the agent with information relative to respondent's alleged criminal activity, stated that he himself had purchased—and, presumably, possessed—illicit liquor. Whether the informant knew this or not, such conduct is illegal under federal law. 26 U. S. C. § 5205 (a)(2). Conceivably, then, it might be argued, by analogizing this statement in the affidavit to those falling within the exception to the hearsay rule for "declarations against interest," that this circumstance might properly have been relied upon by the magistrate to credit the informant's assertions.

Had this argument been pressed upon us, grave difficulties would attend our acceptance of it. First, the analogy to the hearsay exception would be rather tenuous. The federal rule, although it is often criticized, is that declarations against penal interest do not fall within this exception. *Donnelly v. United States*, 228 U. S. 243 (1913). Moreover, because it has been thought that such statements should be relied upon by factfinders only when necessity justifies it, the rule universally requires a showing that the declarant cannot be produced personally before the trier of fact. McCormick, Evidence

Dear John  
Dear Paul  
Dear Tom  
W  
W

*stylistic changes only*  
pp. 1, 2, 4, 9, 10, 14

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

3rd DRAFT

From: Harlan, J.

**SUPREME COURT OF THE UNITED STATES**

*Circulated:*

**MAY 11 1971**

No. 30.—OCTOBER TERM, 1970

Recirculated

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[May —, 1971]

MR. JUSTICE HARLAN delivered the opinion of the Court.

We brought this case here, 397 U. S. 905 (1970), because it raises important questions as to how our decisions in *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), apply where magistrates in issuing search warrants are faced with the task of assessing the probable credibility of unidentified informants who purport to describe criminal activity of which they have personal knowledge, and where it does not appear that such informants have previously supplied accurate information to law enforcement officers.

I

On June 17, 1967, a special investigator for the Alcohol and Tobacco Tax Division of the Internal Revenue Service swore to an affidavit before the local federal magistrate<sup>1</sup> in which he stated that he had reason to believe that non-tax-paid liquor was being concealed in a de-

<sup>1</sup> At the time the search here involved was executed, the officer charged with issuing the warrant was formally denominated as a United States Commissioner. Current statutes now describe them as United States Magistrates, *e. g.*, 28 U. S. C. § 631 (Supp. V, 1969). The latter term will be employed throughout this opinion.

May 24, 1971

Re: No. 30 - United States v. Harris

Dear Byron:

I have given a lot of thought to the point you raised the other day, and have come to the conclusion that I could not vote to override the "credibility" challenge on that ground. On the other hand, I think you are quite right in suggesting that sua sponte notice should be taken of the point in the opinion.

I enclose a proposed addition to my opinion (to be inserted at the end of Part II, bottom of p. 10), and would welcome any suggestions from you, should my proposal ring any bells with you. If it does not, I shall recirculate the opinion with this emendation, assuming that you will then write separately, which will probably turn the case around.

Meanwhile, I shall await your further word.

Sincerely,

J.M.H

Mr. Justice White

May 26, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 30 - United States v. HARRIS

Dear Brethren:

The attached memorandum is in response to the point raised by Brother White in the memorandum which he has circulated, and which was preceded by oral discussions between him and me. I assume that the future course of this case will await discussion of the matter at our forthcoming Conference on Thursday.

Sincerely,

J. M. H.

P.S.: My discussions with Brother White and the preparation of our respective memoranda preceded the circulation yesterday of the Clerk Justice's opinion.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

F. W. Harlan, J.  
Circulated MAY 26 1971

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[June —, 1971]

Memorandum of MR. JUSTICE HARLAN to the Conference.

Before we leave this phase of the case a further matter should be addressed in the interest of completeness. While neither of the parties has raised the point, we note that the confidant, in providing the agent with information relative to respondent's alleged criminal activity, stated that he himself had purchased—and, presumably, possessed—illicit liquor. Whether the informant knew this or not, such conduct is illegal under federal law. 26 U. S. C. § 5205 (a)(2). Conceivably, then, it might be argued, by analogizing this statement in the affidavit to those falling within the exception to the hearsay rule for "declarations against interest," that this circumstance might properly have been relied upon by the magistrate to credit the informant's assertions.

Had this argument been pressed upon us, grave difficulties would attend our acceptance of it. First, the analogy to the hearsay exception would be rather tenuous. The federal rule, although it is often criticized, is that declarations against penal interest do not fall within this exception. *Donnelly v. United States*, 228 U. S. 243 (1913). Moreover, because it has been thought that such statements should be relied upon by factfinders only when necessity justifies it, the rule universally requires a showing that the declarant cannot be produced personally before the trier of fact, McCormick, Evidence

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

2nd DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated JUN 15 1971

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[June —, 1971]

MR. JUSTICE HARLAN, dissenting.

This case presents the question of how our decisions in *Aguilar v. Texas*, 378 U. S. 108 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), apply where magistrates in issuing search warrants are faced with the task of assessing the probable credibility of unidentified informants who purport to describe criminal activity of which they have personal knowledge, and where it does not appear that such informants have previously supplied accurate information to law enforcement officers.

I cannot agree that the affidavit here at issue provided a sufficient basis for an independent determination, by a neutral judicial officer, that probable cause existed. Accordingly, I would affirm the judgment of the Court of Appeals. Five members of this Court, however, for four separately expressed reasons, have concluded that the judgment below must be reversed. Some of the theories employed by those voting to reverse are wholly unlike any of the grounds urged by the Government.

I

Where, as in this case, the affiant states under oath that he has been informed of the existence of certain criminal activity, but has not observed that activity himself, a magistrate in discharging his duty to make an independent assessment of probable cause can properly issue a

WD

May 7, 1971

RE: No. 30 - United States v. Harris

Dear John:

I am with you in the above, but I have a question about the full paragraph at the bottom of page 9. As I read what you say there, the magistrate might find the informant's story credible if "the informant is somehow beholden to the affiant." Suppose the informant is in the pay of the affiant and gets his pay only for his information. I should think this would be a situation where one might doubt rather than accept an informant's story. Do I misread you?

Sincerely,

Mr. Justice Harlan

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 16, 1971

RE: No. 30 - United States v. Harris

Dear John:

Please join me in your dissent in  
the above.

Sincerely,



W. J. B. Jr.

Mr. Justice Harlan

cc: The Conference

Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: MAY 17 1971

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[May —, 1971]

MR. JUSTICE STEWART, dissenting.

I think the magistrate in this case properly granted the Government's request for a search warrant, based on the information presented to him in the affidavit. He was not required to presume, in the absence of any evidence at all, that the informant was a "person prone to fabricate," and without such a presumption the affidavit was more than adequately convincing of the existence of probable cause for the search. Given the affidavit's very considerable factual detail, it is farfetched to suggest that by upholding the validity of the warrant we might "open the door to the acceptance of little more than florid affidavits."

While striking down the warrant in this case, the opinion of the Court purports to "reaffirm what we said in the *Spinelli* case two Terms ago as to the broad considerations that should govern magistrates and reviewing courts in assessing affidavits for probable cause, 393 U. S., at 419." *Ante*, at —. In *Spinelli*, the Court struck down a search warrant while at the same time asserting that there was "no retreat from the established propositions that . . . affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois*, 386 U. S. 300, 311 (1967) . . . and that [a magistrate's]

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 8, 1971

No. 30 - U.S. v. Harris

Dear Chief,

I should appreciate your adding the following at the foot of your opinion for the Court in this case:

"MR. JUSTICE STEWART joins in Part I of the Court's opinion and in the judgment."

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 26, 1971

MEMORANDUM TO THE CONFERENCE

Re: No. 30 - United States v. Harris

I voted with John Harlan in this case and agree with his opinion as far as it goes. However, another aspect of the case, not argued by the parties, concerns me and if that issue is to be reached and decided, my tentative vote would be to reverse, contrary to John's result.

John and I have discussed the matter. The attached poses and briefly canvasses one side of the issue. It sounds more certain than I am. I understand John will circulate contrary views.

I note that since John and I talked, the Chief Justice has circulated a dissent and flushes the issue on p. 5, n. 2 of his circulation.

  
B.R.W.

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
~~Mr.~~ Justice Brennan  
Mr. Justice Stewart  
Mr. Justice Marshall  
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: White, J.

Circulated: 5/26/71

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to  
v. } the United States Court  
Roosevelt Hudson Harris. } of Appeals for the Sixth  
Circuit.

[June —, 1971]

Memorandum of MR. JUSTICE WHITE.

This is another case challenging a conviction obtained on probative, reliable evidence—more than sufficient to sustain guilt—on grounds that there was less than probable cause to justify the search producing the critical evidence. Here the vice is claimed to be an inadequate affidavit supporting a search warrant obtained by federal officers. I am constrained to sustain the magistrate, having concluded that the face of the affidavit reveals sufficient basis for issuance of the warrant.

If a warrant affidavit recites statements that the declarant-informant and another have committed a crime and that the latter, to the personal knowledge of the declarant, has the fruits hidden at his home, I would sustain the issuance of warrants for the arrest of the confederate and search of his property. A search warrant should also issue where, as in this case, the declarant, whose statements the officers included in their warrant application, admits recurring and recent purchases of an article on identified premises where possession, sale, or purchase of that article is prohibited by law.

Here the warrant affidavit recited extrajudicial statements of a declarant, who feared for his life and safety if his identity was revealed, that over the past two years he had many times and recently purchased "illicit whis-

June 9, 1971

Re: No. 30 - United States v. Harris

Dear Chief:

Please add at the foot of your opinion in this case the following:

Mr. Justice White agrees with Part III of the Court's opinion and has concluded that the affidavit, considered as a whole, was sufficient to support issuance of the warrant. He therefore concurs in the judgment of reversal.

Sincerely,

B. R. W.

The Chief Justice

cc: Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 19, 1971

Re: No. 30 - United States v. Harris

Dear John:

Please join me.

Sincerely



T.M.

Mr. Justice Harlan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 18, 1971

Re: No. 30 - United States v. Harris

Dear John:

Please join me in your dissent.

Sincerely,

  
T.M.

Mr. Justice Harlan

cc: The Conference

Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall

## 1st DRAFT

From: Blackmun, J.

## SUPREME COURT OF THE UNITED STATES

Circulated: 6/16/71

No. 30.—OCTOBER TERM, 1970

Recirculated:

United States, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of  
Roosevelt Hudson Harris. } Appeals for the Sixth  
Circuit.

[June —, 1971]

MR. JUSTICE BLACKMUN, concurring.

I join the opinion and judgment of the Court, but I add a personal comment in order to make very clear my posture as to *Spinelli v. United States*, 393 U. S. 410 (1969), cited in several places in the Court's opinion. I was a member of the 6-2 majority of the United States Court of Appeals for the Eighth Circuit in *Spinelli v. United States*, 382 F. 2d 871 (1967), which this Court by a 5-3 vote reversed, with the pivotal Justice concluding his concurring opinion, 393 U. S., at 429, by the observation that, "Pending full-scale reconsideration of that case [*Draper v. United States*, 358 U. S. 307 (1959)], on the one hand, or of the *Nathanson-Aguilar* cases on the other, I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an evenly divided Court." Obviously, I then felt that the Court of Appeals had correctly decided the case. Nothing this Court said in *Spinelli* convinced me to the contrary. I continue to feel today that *Spinelli* at this level was wrongly decided and, like MR. JUSTICE BLACK, I would overrule it.