No. 25-01081

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL MENDENHALL,

Plaintiff-Appellant,

v.

CITY AND COUNTY OF DENVER,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Colorado
No. 1:24-CV-00574-PAB-KAS
The Honorable Philip A. Brimmer

BRIEF OF CIVIL RIGHTS ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

Amici are civil rights attorneys who have represented individuals harmed in the course of government searches authorized by unreliable hearsay warrants.

Richard W. Hendrix is a partner at Finch McCranie LLP. He previously served as an Assistant United States Attorney for the Northern District of Georgia, and as Associate Independent Counsel for the investigation department of HUD.

Cary Hansel is the founder of Hansel Law, PC, a firm dedicated to protecting individual rights and liberties. Mr. Hansel has 25 years of experience representing clients in civil rights cases.

Keenan Saulter is the founder of Saulter Law, PC. Mr. Saulter is an experienced personal injury and civil rights lawyer, and has represented clients in high-profile police misconduct cases.

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[1] No counsel for any party authored this brief in whole or in part. No party, counsel for any party, or person other than *amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

Julia Rickert is a partner at Loevy & Loevy. She has represented wrongfully convicted individuals and others whose constitutional rights have been violated.

As civil rights attorneys, amici have an interest in the sound and fair administration of the criminal justice system, and in protecting individual rights and liberties from unconstitutional government intrusions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Michael Mendenhall brings this test case to challenge the Supreme Court holding in *Jones v. United States*, 362 U.S. 257 (1960), that Fourth Amendment search warrants may issue on the basis of hearsay. Amici are civil rights attorneys who have represented clients harmed by searches authorized by unreliable hearsay warrants.

Writing for himself in *Jones*, Justice Douglas warned of "an age where faceless informers have been reintroduced into our society in alarming ways." *Id.* at 273 (Douglas, J., dissenting in part). Today, confidential informants are ubiquitous throughout the criminal justice system. And under *Jones*, judges routinely authorize searches based on officer's second-hand accounts of informants' accusations.

Courts have long recognized that government searches of the home pose unique risks to individual liberty and safety. *See, e.g.*, *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). Those risks have only intensified in the modern era of drug-busting SWAT raids.[2] Eruptions of violence occur with alarming frequency, sometimes

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[2] *See generally* Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO Institute (July 17, 2006), https://tinyurl.com/5n747w8u.

inflicting grave bodily injury upon innocent parties, including children. And raids based on bad warrants endanger officers, too, as occupants caught unawares may use force to fend off the unknown intruders.[3]

This brief relates the stories of two cases that illustrate the real-world consequences of *Jones v. United States*. In the first case, a hearsay warrant based on the unsworn statements of a meth user authorized a raid that resulted in lacerations and burns to an infant's face and chest. In the second case, a detective relied upon (or possibly fabricated) an unidentifiable confidential informant to obtain a no-knock warrant that severely injured a 72-years old grandmother.

Without *Jones*, the warrants in these two cases likely never would have issued. As these cases demonstrate, the Fourth Amendment's oath requirement is not an empty formalism. It is a necessary check on government power, safeguarding the accuracy and reliability of warrants. The stakes of getting it wrong are too high. Search warrants should not issue on the basis of hearsay. *Jones* should be overruled.

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[3] *See, e.g.*, Zuri Davis, *A Father Defends His Daughter with a Shotgun When Cops Break Into the Wrong House*, Reason Magazine (Sept. 21, 2018) (officers attempting to serve warrant based on faulty information supplied by informant were injured by father who suspected intruders).

ARGUMENT

Jones Erodes Critical Safeguards Designed to Protect Individuals from Unwarranted Government Intrusions

Search warrants authorize government agents to invade an individual's private spaces and, if necessary, inflict violence—up to and including deadly force. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Warrants bestow extraordinary powers on law enforcement officers—powers that in other contexts would be considered inimical to our core constitutional values.

For that reason, the Fourth Amendment imposed strict requirements on the issuance of warrants. The well-known probable cause requirement sets the standard of proof needed to justify a warrant. And the lesser-known "Oath or affirmation" requirement prescribes the *method* for supplying that proof.

As originally understood, the oath requirement required sworn firsthand witness testimony.[4] This procedure provided judges with an opportunity to evaluate an informant's credibility and probe their

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[4] *See generally* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 Stan. L. Rev. 603 (2022).

account for inconsistencies or imprecisions—such as naming the wrong address for a search of a private home.[5]

Jones v. United States has sapped the oath requirement of its vitality. Under *Jones*, officers can go before a judge, swear the oath *themselves*, and repeat the unsworn accounts of confidential informants. Those informants face mixed incentives. They may have cut deals in exchange for information (deals of which the judge may be unaware), or they may supply false information to prosecute a private grudge.[6] And because judges never interact with the informants, there is little opportunity to test the accuracy of warrant applications. Meanwhile,

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[5] *See, e.g.*, *Stamps v. Hernandez*, 2010 WL 3713686, at *4 (N.D. Ill. Sept. 14, 2010) (warrant failed to specify which third-floor apartment should be targeted in drug raid, leading to breach of wrong apartment occupied by three children and their mother, despite confidential informant claiming no one lived there).

[6] In the infamous "Harding Street Raid," a woman having a disagreement with her neighbors informed police that their house contained machine guns and heroin. Acting on this false information, a police officer fabricated a story about confidential informant buying heroin at that address, which enabled him to obtain a no-knock search warrant. During the raid, the couple who lived in the house were killed and four police officers were injured. One officer was left permanently paralyzed by his injuries. *See* Cameron Langford, *Texas Woman Sentenced for 'Swatting' Calls That Led to Deadly Police Raid*, Courthouse News Service (June 8, 2021), https://tinyurl.com/27rs3asc; Matt Stevens and Elisha Brown, *F.B.I. to Investigate Houston Police Officers After Deadly Drug Raid*, N.Y. Times (Feb. 20, 2019), https://tinyurl.com/474se4jx; Jyesha Johnson, *Harding Street raid trial: Gerald Goines found guilty of murders in 2019 raid*, Fox 26 Houston (Sept. 26, 2024), https://tinyurl.com/dnpvs2yw.

the officers who compile hearsay warrants face pressure to act quickly—sometimes *too* quickly—and often are shielded from liability if something goes wrong.

The *Jones* decision has externalized the cost of unreliable search warrants onto private individuals. The result? A system lacking internal checks and balances—lacking, in a word, accountability. For some communities, the consequences of this shift have been devastating.[7] Government searches now involve a greater potential for violence than ever before, yet the procedures for obtaining a warrant have never been laxer.

Hearsay Warrants Thrust Blameless Individuals into the Crossfire of Law Enforcement's War on Crime

Jones ignored the history of the Fourth Amendment. In so doing, it charted a path contrary to modern principles of constitutional interpretation. As a result, hearsay warrants have hollowed out

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[7] A study conducted by the American Civil Liberties Union found that 42 percent of those people impacted by SWAT search warrant raids were black and 12 percent were Latino. ACLU, *War Comes Home: The Excessive Militarization of American Policing* (June 2014), at 36. Reporting by the New York Times found that of the 81 civilian deaths recorded in SWAT raids from 2010 through 2016, about half were members of minority groups. Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. Times (March 18, 2017), https://tinyurl.com/y2a2425z.

constitutional safeguards that the Framers perceived as necessary checks on governmental power. All true statements. But, too often, the analysis stops there. To understand the magnitude of this doctrinal error, courts must also look at the real-life consequences of *Jones*. As Amici have seen firsthand, *Jones* exacts a human toll.

The Case of Baby "Bou Bou" Bounkham Phonesavanh[8]

In the early hours of May 28, 2014, a SWAT team breached the side entrance of a single-story ranch house in Cornelia, Georgia. Two strokes of the battering ram splintered the door to the garage, where police believed a drug deal had gone down a few hours earlier.

Clearing a path, a deputy tossed in a flash-bang grenade, which exploded about three feet into the garage. A concussive boom shook the

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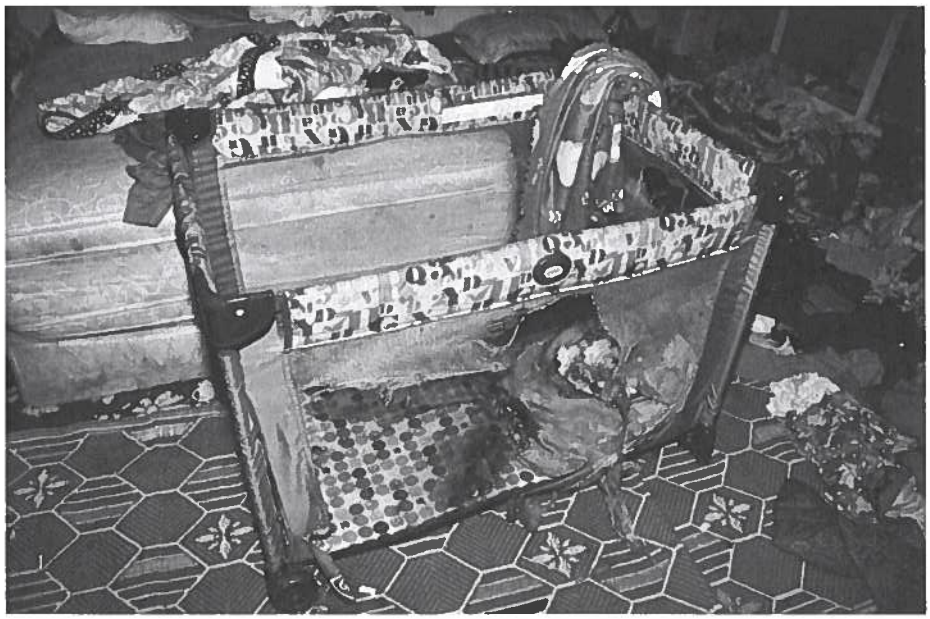
[8] The following account summarizes facts alleged in Plaintiff's Motion for Partial Summary Judgment as to Nikki Autry's Liability for Plaintiff's Damages and Brief in Support Thereof, *Bounkham Phonesavanh et al. (Plaintiffs) v. Nikki Autry et al. (Defendants)*, Case No. 2:15-CV-0024-RWS, N.D. Ga. (filed Sept. 22, 2015). The account also draws upon independent reporting of the incident, including, *e.g.*, Stephen Hiltner, *How a Grenade in a Playpen Led to an Investigative Project*, N.Y. Times (Mar. 18, 2017), https://tinyurl.com/5cbjsvt4; Anthony Zurcher, *Mother blasts police for burned baby*, BBC News (June 26, 2014), https://tinyurl.com/yvj3sfrj; Regina Graham, *Family of toddler severely injured when flash grenade detonated in his playpen during raid awarded $3.6 million settlement*, Daily Mail (Feb. 26, 2016), https://tinyurl.com/nhc5vcvk. Amicus Richard W. Hendrix represented Baby Bou Bou and the Phonesavanh family in civil proceedings following these events.

enclosed space. Officers clad in green Kevlar and carrying submachine guns burst inside, yelling out, "Sheriff's department, search warrant!"

Another deputy flicked on a flashlight and peered around. The light illuminated the singed netting of an infant's playpen. The flash-bang grenade had landed inside. Right next to 19-month old "Baby Bou Bou" Bounkham Phonesavanh.



Photograph by Georgia Bureau of Investigation.

At the time of the raid, the Phonesavanh family—Alecia Phonesavanh, her husband, and their four children, ranging in age from 1 to 7—had been staying in the garage because their home in Wisconsin had recently burned down. They had temporarily converted the garage into a bedroom. The house belonged to Mr. Phonesavanh's sister, who lived there with her boyfriend, her grandson and one of her sons.

The police were after her other son, Wanis Thonetheva, who had allegedly sold methamphetamine out of the garage to a confidential informant a few hours earlier. Wanis was not on the premises at the time of the raid.

How could this have happened? Months later, a grand jury convened to review the raid concluded that the "drug investigation that led to these events was hurried, sloppy, and unfortunately not in accordance with the best practices and procedures."[9] More specifically, "[m]uch of the problem in this tragic situation involved information and intelligence." *Id.* at 10.

The raid was authorized by a hearsay warrant. Nikki Autry, a sheriff's deputy attached to the narcotics unit, had turned a small-time methamphetamine user named James Alton Fry Jr., into a confidential informant. The night before the raid, agents sent Fry out to make drug buys. Fry learned of a meth dealer named Wanis Thonetheva. That

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[9] *Presentment, Report, and Findings of the Habersham County Grand Jury Regarding the Events Leading to the Serious Injury of Bounkham Phonesevanh* (Oct. 6, 2014 at 5, https://tinyurl.com/56enaakc (hereafter "Habersham Grand Jury Findings").

night, Fry, his wife, and his housemate—all meth dealers—drove to the Thonetheva house, where the alleged drug deal took place.

Deputy Autry immediately began drafting an application for a no-knock warrant application and affidavit. Autry's affidavit contained numerous inaccuracies. It stated that Mr. Fry had purchased the drugs, when in fact Fry's housemate had conducted the deal while Fry waited in the car. It described Mr. Fry as a "a true and reliable informant," though Deputy Autry had only turned him into a confidential informant on May 22, less than a week earlier. And the warrant application stated that "there is heavy traffic in and out of the residence," though Autry's surveillance had been minimal.

After midnight, Deputy Autry called county magistrate, James N. Butterworth, at his home. The judge put Deputy Autry under oath and reviewed the affidavit. Having no reason to doubt the deputy's account, he signed the warrant at 12:15 a.m.

At some point that night, Deputy Autry texted the informant's wife, Ms. Fry, "Did y'all see any signs of kids at wanis' *[sic]* house"? Ms. Fry replied: "Nothing except a mini van." Autry did not follow up on the

minivan tip, and told the SWAT team leader that there were no signs of children living at the premises.

As a result of the flash-bang grenade, Baby Bou Bou suffered lacerations and burns across his chest and face. He was placed in a medically induced coma, and underwent a series of reparative surgeries. The family has paid $1.6 million in medical bills.

In the aftermath, Deputy Nikki Autry surrendered her peace officer certification and resigned from law enforcement. Both federal and state investigations ensued. The Habersham County grand jury decided not to press charges. In its findings, it observed:

> [T]his tragedy can be attributed to well-intentioned people getting in too big a hurry, and not slowing down and taking enough time to consider the possible consequences of their actions. … [D]rug enforcement, like many other jobs, can unfortunately become routine and lead to complacency and lack of attention to detail. The difference in this type of work is that the consequences can be devastating to both citizens and law enforcement when things go wrong.[10]

A federal grand jury indicted Autry on charges of providing false information for a search warrant, but she was ultimately acquitted.

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[10] Habersham Grand Jury Findings at 6-7.

Too often, the families impacted by violent government searches lack remedies after the fact. Qualified immunity allows officers to escape civil liability,[11] and the good-faith doctrine means that courts will not exclude evidence obtained on the basis of a faulty warrant.[12]

That is why the Fourth Amendment imposed strict requirements that must be met *before* a warrant issues.[13] But the oath requirement has been eroded into a nub. An officer can wake up a judge at midnight, swear the oath themselves, and have a search warrant in hand 15 minutes later. As the Habersham County grand jury observed, complacency and lack of attention to detail can wreak devastating consequences.

The Case of Liveta Drummond[14]

On February 20, 2018, Liveta Drummond awoke to a "real hard banging," as if someone were trying to break in. It was coming from the

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[11] *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (granting qualified immunity in civil lawsuits to officers who seek warrants).
[12] *United States v. Leon*, 468 U.S. 897, 922-23 (1984).
[13] *See* Sacharoff, *supra* note 4, at 682 (arguing that "[t]he entire point of the warrant and oath requirements is to impose protections ex ante.").
[14] The following account summarizes facts alleged in Plaintiff's Opposition to Defendants' Motion for Summary Judgment, *Liveta Drummond (Plaintiff) v. Prince George's County, Maryland*, Case No. CAL20-17907, Cir. Ct. Prince George's Cnty.,

front door of her residence in Prince George County, Maryland, where Ms. Drummond, 72-years old, had lived for almost two decades. She approached the door and slid back the deadbolt. As she did, the door slammed open. Officers burst into her living room, sending Ms. Drummond stumbling 11 feet back into a bookcase.

"He [the breaching officer] pushed me down on the floor, which was not carpeted," Ms. Drummond would later recount in a deposition. "It was hard floor. And [he] say to stay there and don't move. That's what I did."

The noise awoke the whole house. Ms. Drummond, a mother of six, a grandmother, and (since 2022) a great-grandmother, shared the house with eight family members at the time. Ms. Drummond recalled:

> He [the breaching officer] asked if there's anybody else in the house. I told him, yes. So by that time, I think, all the people who were with him start coming in, and, you know, they start to get everybody out of bed. Even the little babies they got out of bed. The grandchildren. They got everybody out of bed while I was sitting on the floor.

Md. (filed May 30, 2023). Amicus Cary Hansel served as counsel for Ms. Drummond in this case.

Ms. Drummond needed assistance to get up. She was helped to a couch, where she stayed as the officers completed their search. Though she told the tactical medic accompanying the SWAT team that she was experiencing severe lower back pain, she initially refused any medical assistance from the police. But when her daughter arrived home from work, she saw that her mother couldn't stand on her own. The family called an ambulance. Paramedics wheeled Ms. Drummond out of her house. After an MRI, doctors at the hospital diagnosed her with a lumbar disc herniation.

For years later, Ms. Drummond experienced persistent lower back pain. Then the pain started radiating down her left leg—sciatica. Doctors attributed it to a pinched nerve from the back injury. Ms. Drummond tried to put into words what the injury had cost her: "[W]e have a community garden right opposite my house. And I used to have at least three beds in there. And because I couldn't do what I used to do, I had to give it up."

How did the police obtain a no-knock warrant—authorizing them to force entry without announcing themselves, a tactic that puts both

the occupants and officers at risk[15]—to search the home of a 72-year old grandmother living with eight family members, including children? The answer, as usual: It started with a hearsay warrant application.

The warrant authorizing the breach of Ms. Drummond's home was based on information supplied by a single confidential informant who was never brought before a judge. Attorneys for Ms. Drummond later came to believe that, in all likelihood, the informant never existed—that this "source" had been fabricated by the lead detective.

Certain facts from the investigation would support this inference. To start, the detective repeatedly conflated two street addresses: 4223 Cottage Terrace, where Ms. Drummond lived and where the police breached that night, and 4221 Cottage Terrace, which Ms. Drummond co-owned with her son. On the search warrant, the detective swore that "[t]he said confidential source of information furnished information to your Affiant [the detective] regarding the sale and distribution of marijuana from 4223 and 4221 Cottage Terrace...." But soon after, the

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[15] A New York Times investigation found that at least 81 civilians and 13 law enforcement officers were killed in "dynamic entry" raids from 2010 through 2016, with scores of others wounded. *See* reporting of Kevin Sack, *supra* note 7.

warrant began referring only to one address—in the singular: "The confidential source of information further relayed that the two males are using the ***said address***...." (emphasis added).

The detective had also sent officers to surveil 4221, the property Ms. Drummond co-owned with her son, Colin. There, officers observed three men leave the residence and enter a Nissan parked out front. The officers conducted a traffic stop and uncovered marijuana. The driver was Marlon Rankine, an acquaintance of Colin's. There was nothing tying the car to 4223 Cottage Terrace. The detective later claimed that Rankine told him that "4223 Cottage Terrace was his address," but the detective's efforts to verify this intel came up empty. "I did some research on different various websites that we use to try to, like, see if there's any bills in their names or anything like that. I didn't see any."

In testimony, the detective waffled on whether there was one address or two. Ms. Drummond's lawyer pressed him to explain why the police had raided 4223 Cottage Terrace when the only tangible evidence of illegal activity—the car search—pointed at 4221. He claimed the confidential informant had shown him an address in a text message from Rankine implicating an address (singular)—"I believe I did see

like an actual address being written out"—but admitted, "I can't recall whether it was 4221 or 4223."

> Q: But the text you saw only mentioned one address, right?
> A: Yeah. He's not going to write two address in a text message.
> Q: Right. And you don't recall which address it was; is that what you're telling me?
> A: Yeah, I don't. he feels like the stash house is, you know, basically one of those houses.
> Q: Okay. Did he tell you which one?
> A: No, I can't recall.

Ms. Drummond testified that she had never seen Marlon Rankine at her home at 4233 Cottage Terrace, and only distantly knew him as a friend her son played dominos with at his own house, at 4221 Cottage Terrace. And the search of Ms. Drummond's home, 4233 Cottage Terrace, did not turn up any evidence linking Rankine to that address.

Ms. Drummond's attorneys came to believe that the lead detective never had any evidence linking 4223 Cottage Terrace to illegal activity, and that he had probably lied about Rankine implicating 4223. It was "an afterthought added in" because Ms. Drummond co-owned 4221 and fully owned 4223 and he wanted to widen his search.

The detective also admitted that the informant told him he had never been inside either building—4221 or 4223—or witnessed any

individual at either residence in possession of a firearm, meaning that the informant, if he exists, most likely never told Defendant Ali that he believed there were any firearms at 4223 Cottage Terrace, which was one of the grounds the detective used to search that property.

The detective struggled to recall any information about the confidential informant. He claimed to know him "through me working on the street and stuff like that doing like, you know, drug and gang work," but could not say when they met, instead claiming that he doesn't "like to pinpoint when I met each informant" and vaguely claiming they had met "a little while before those two search warrants." Despite this, the detective claimed that he had been the one that had "developed" the informant.

The detective was also unwilling to share any details about the informant's criminal background or history with the department. The detective could not recall whether he had run the informant's criminal history check himself, though he acknowledged that it would have been standard procedure for someone at the department to do so. The detective would not disclose the age, race, or physical description of the informant, or even the location where they had met. He had difficulty

recounting any specific conversations with the informant, and had kept no records to memorialize the informant's existence or prove up the information allegedly provided.

Putting the informant—if they existed—in front of a judge would have highlighted the inconsistencies and ambiguities in the warrant. The judge could have asked the informant, under oath, whether he had ever been inside 4223 Cottage Terrace, and how recently, and why the informant believed there were firearms inside. The judge could have inquired about the informant's own criminal history and background. The informant, the officer seeking a warrant, and the judge each would actively participate in the warrant process. And the time and attention paid to that process would be commensurate with the gravity of the decision to authorize a dynamic-entry house raid.

Confidential informants are, of course, meant to be *confidential*. There are undoubtedly good reasons for this. Informants incur personal risk by cooperating with the police, and they may be less forthcoming if their identities could be later revealed. But protecting informants does not mean they need to be totally unknown, totally off-the-record, and unverifiable by anyone other than a single officer.

There is a balance to be struck, and the Fourth Amendment struck it by requiring an informant to appear before a judge. Courts have developed a robust, practical toolkit for preserving confidentiality in a variety of scenarios. Judges can examine witnesses in a closed courtroom. They can redact transcripts and recordings. They can file documents under seal. They can be selective about what questions *need* to be asked of the informant—and what questions can be left unasked.[16]

To be sure, requiring confidential informants to testify in front of a judge could turn some away from cooperating. As a result, it may take more time for police to gather the evidence needed to support a warrant, if one is supportable. That is by design. It *should* take longer.[17] It *should* be more difficult to authorize a raid of a private residence.

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[16] Informants can be questioned while still preserving confidentiality. *See, e.g.*, *People v. Hobbs*, 873 P.2d 1246 (Cal. 1994). In that case, the magistrate judge issuing the warrant examined the informant personally and filed a transcript and recording under seal. During trial, when a defendant sought to unseal that information to attack the warrant, the trial judge reviewed the materials in camera and determined that the defendant was not entitled to the sealed information or the identity of the confidential informant. The California Supreme Court held that the trial judge had "str[uck] a fair balance between the People's right to assert the informant's privilege and the defendant's discovery rights." *Id.* at 1259.

[17] According to one study, magistrates often spend a median of just over two minutes reviewing a warrant. Richard Van Duizend, L. Paul Sutton & Charlotte A. Carter, *The Search Warrant Process: Preconceptions, Perceptions, Practices* 26 (1985) (finding in one city that 10% of warrant applications received one minute or less of magistrate review).

If the only way for a judge to issue a warrant would be to rely on unsworn, unexamined hearsay, then the warrant should not issue. Under the Fourth Amendment, warrants should be well-founded and reliable—but not, in all cases, easily obtained. Returning to the original meaning of the Fourth Amendment's oath requirement would revive a much-needed safeguard against unjustified government-sanctioned intrusions of the home.

CONCLUSION

For the forgoing reasons, the Court take this opportunity to urge the Supreme Court to reconsider the holding of *Jones v. United States*.

Dated: June 5, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 29(a)(5) and 10th Cir. R. 29 because it contains fewer than 6,500 words.

2. This brief complies with the typeface and formatting requirements of Fed. R. App. P. 32(a)(5)-(6) and 10th Cir. R. 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook typeface.

Dated: June 5, 2025

Eli Barrish

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: June 5, 2025

Eli Barrish