# Supreme Court of the United States



**In the Matter of:**

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LeFRANC, JEAN NEBBIA, AND ANTHONY SUTERA,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

**Docket No.** 12



**Place** Washington, D. C.

**Date** November 12, 1968

**ALDERSON REPORTING COMPANY, INC.**

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C O N T E N T S



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LeFRANC, JEAN NEBBIA, AND ANTHONY SUTERA,

Petitioners;

vs. No. 12

UNITED STATES OF AMERICA,

Respondent.

Washington, D. C.
Tuesday, November 12, 1968

The above-entitled matter came on for argument at 10:20 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Counsel for the respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 12, Samuel Desist, Frank Dioguardi, Jean Claude LeFranc, Jean Nebbia, and Anthony Sutera, petitioners, versus the United States of America.

Mr. Glasser?

MR. GLASSER: May I introduce my colleague, Mr. Markowitz.

MR. CHIEF JUSTICE WARREN: Yes.

ORAL ARGUMENT OF ABRAHAM GLASSER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. GLASSER: Mr. Chief Justice and Associate Justices, the certiorari here is to review a judgment of the Second Circuit which confirmed a narcotic conviction, a rather notable narcotic conviction, as I think Your Honors know.

It involved the largest shipment of pure heroin ever captured in this country, familiarly known as the French deep freeze case. The narcotic was brought over and secreted in a hollowed-out deep freeze structure.

Our petitioners all have very heavy jail sentences. The shortest sentence is 10 years, and that is Sutera. Dioguardi has 15 years, Desist has 18 years, and the two French defendants have 20 years with a $5,000 fine.

I am purposely emphasizing these sentences at the outset, and another factor which I will mention in a moment, for reasons I will mention momentarily.

These men have now served -- Nebbia and LeFranc have been sitting in jail since about the end of December of 1965, the year that this situation was broken open, so they are in now nearly three years, and the others -- that is, Dioguardi, Sutera and Desist -- were out on bail for a while, and then they have been in for a little over two years.

The Government has the heroin. This heroin was not marketed. The Government has the batch, and the Government now has been paid out by these men a certain amount of jail service.

I am mentioning that because we all know that in the briefing over the question of retroactivity of Katz in this case, the Government has expressed concern that there would be something alarming to the sense of law enforcement in giving this type of defendant the benefit of a case like the Katz case on retroactivity.

So I am saying that it isn't altogether a dead loss in realistic, down-to-earth, day-to-day law enforcement policy terms. The Government has the heroin, and the men have already served a good bit of jail time.

Q Was none of this stuff marketed at all?

A No. In fact, Your Honor, the deep freeze -- this is according to the Government theory of the case -- was received in the hands of a fellow named Conder, an Army Warrant Officer in Georgia. He, according to Government theory, was

told one night to unpack it, and he had it unpacked, and in suitcases, and felt very gingerly about it and wanted to be rid of it and he was rid of it because the police came and got it.

None of the defendants who are the petitioners here are shown to have had any contact with this heroin. Conder, of course, says that Desist supplied him with the deep freeze and then hollowed it out. It isn't even definite that Desist hollowed out the deep freeze, but except for that contact of Desist with the alleged preparation of the structure, this isn't even a possession case, incidentally. It is not that that matters at this stage, but it may be of interest.

Q When you say none of these petitioners had any contact with this heroin, I suppose you mean physical contact.

A Physical contact?

Q And you don't mean contact in arranging for it or anything of that kind.

A I go further, although I didn't wish to interrupt. I would go further, and this is all under the proofs. We are talking about what the proofs show.

The proofs show not only no contact, but the proofs don't even tie in these people with the heroin except circumstantial evidence, that Conder said that Desist gave him money to bring the deep freeze over, and Conder claiming he didn't know it was heroin, so there is no proof or no tie-in there.

Q Now you are arguing to us a sufficiency of the evidence.

A Not really. I am arguing the atmosphere of the case in case you leave these fellows go, that you shouldn't feel too badly about it if you apply Katz.

Q Well, $9 million worth of heroin is quite a sizable project, as you might realize. But what I was asking you was this: You said that these defendants had no contact with the heroin. You meant by that, I assume, the physical contact and you did not mean that this was a Louisville versus Kentucky case, and there was no evidence in the case?

A This is not a Louisville versus Kentucky case. If it had been that, you would have had a brief from me on it, because I think I briefed nearly everything else in this case.

Shall I continue?

Q As a matter of interest, the Chief Justice said $9 million. I read somewhere that the value of this was $100 million.

A That figure I have read also. That depends on how they cut it up, and so on.

If I may continue, there are, of course, the other aspects of this case. We all had the impression about the aspect which caused the grant of certiorari, and that was the electronic monitoring.

We all have the impression that by far the forefront issue in this case is the electronic issue, and the issue of retroactivity of Katz.

Now I would like to say something that I hope won't startle anyone. It startled me a little when I finally realized it, which was, frankly, just a few days ago, after I read the Court's Fuller versus Alaska decision, and felt dismay at the sudden sinking of our chances in our case, but the dismay, as sometimes happens, provoked me to re-think the whole situation very hard.

I suddenly saw this, and I would like to convey this to the Court: We don't need in this case a ruling that Katz is retroactive. All we need -- and I believe we are entitled to it on correct law -- what we need is a ruling that Katz declared pre-existing law. Katz didn't make new law.

I have read Katz again very carefully the last few days, and, in fact, I put in another brief last Friday which is called the Joint Supplemental Reply Brief, which I trust Your Honors have received.

That brief is largely devoted to arguing that Katz did not make new law, but that Katz merely gave expression to pre-existing Fourth Amendment law. If that analysis is correct, this analysis I have just offered -- if that is correct, there is no retroactivity problem here at all. It becomes like the situation in Stovall where Mr. Justice Fortas in his

separate opinion in Stovall noted that he would not reach the retroactivity issue, but he would treat the issue as one of due process. It was pre-existing due process.

We are not making new law that requires a decision on retroactivity. We are applying the law as it existed.

I would invite Your Honors to focus especially on a re-reading of Katz when you undertake your own deliberation in this case. Read Katz closely to see whether I am not right; that it is not a retroactivity decision at all.

Q I suppose the position that you are urging would be that Katz was always the law and was consistent with the decisions of this Court.

A I see Your Honor is smiling, and I am not smiling in mutuality, because I have a very pleasant thing to say. I have excellent authority, I almost said for the notion, n-o-t-i-o-n -- for the position that Katz was always the law.

Mr. Chief Justice, in the Butanka argument, as reported in the Criminal Law Reporter a few weeks ago, the Solicitor General said something about what the men in Katz did, the agents did, that it was legal at the time that they did it, and Your Honors said if that were so, wouldn't we have abided by the precedent?

Anyway, Your Honor was apparently suggesting to the Solicitor General there that what Katz says is what the law always was.

Now, there are other reasons why we don't believe or we do not stand or fall -- our fate does not depend upon the question of retroactivity or prospectivity of Katz. There is a whole other half of this case.

We contend that what the Government did, or what the narcotics agents did -- by the way, it was done at the Waldorf-Astoria Hotel. At that hotel in December of 1965, narcotics agents installed an electronic type of listening device in a room adjoining a room occupied by petitioner Nebbia. Then over the next couple of days, the agents heard various things which were testified to at the trial, and which, if believed, were damaging.

Now the agents say that they put their bug in their own room rather than in Nebbia's room, and they didn't penetrate Nebbia's enclosure in any way; that they laid the microphone or listening device at the bottom of the door of their own room where there was a small aperture, and beyond that door was an air space of a few inches, and then a door to Nebbia's room.

It was a typical double-door arrangement. They said it was completely non-trespassory, a non-physically intrusive type of monitoring.

This is only the second time I have ever argued before this Court, and the last time was more than 20 years ago. I don't know the amenities. Am I permitted to hand up photos to

the Clerk?

Q You may hand them to the Clerk.

A There are some photos here which are Government exhibits showing the way this was done. One of those shows a towel draped over something. What it was draped over, as the testimony shows, was the microphone.

Q Were these exhibits in court?

A Yes. I have something else that wasn't in court which I hope Your Honors will look at, but that is a general publication.

I might mention that right now, as a matter of fact -- there was intense dispute at the trial, and even more intense dispute at the appeal as to whether the agents had told the truth as to how they put in this listening device. However, at the trial, at the pre-trial motion to suppress, the District Judge ruled that he believed the agents and there was no trespass and no illegality of any kind in monitoring.

Then on the appeal, in re-studying the whole thing for the appeal, we saw that where was more, that there was just not smoke, but fire. We felt that we were discerning suspicious items in the record that really required further scrutiny.

Q Except haven't you left out the fact that on the motion to suppress before Judge Palmieri, the Judge himself went up to the Waldorf-Astoria and they reinstalled the listening device, and recontructed the whole thing and he saw it with

his own eyes, and he spent two or three days canvassing all of this?

A I did leave that out, and I am sorry. But, of course, we don't think that that matters. We don't think that that hurts our case, that Judge Palmieri did that, because we think the agents didn't show Judge Palmieri what they had done the preceding December.

Q We are hardly in a position to decide whether you are right or wrong about that. That has been decided against you, has it not?

A Yes, it has, but we have briefed it here in a way that we think entitles us to have this Court consider it on review.

Now, I was saying when we got to appeal time in this case, in the Court of Appeals, we went out and we hired for the first time electronic consultants, and we hired the one that, after inquiring, we thought was the best one in the country.

The Government has disparaged this man's qualifications, and his name is Bernard Spindel. I have here, if the Court would wish to receive them, three issues of a Life magazine article about a year ago, or rather, two years ago, featuring Spindel as the top, Number 1, electronic expert in the country. The article is interesting anyway, and I don't know whether the Court would wish to have it, but if they do, I would like to hand these to the Clerk also.

Q Is that in the record?

A This is not in the record.

Q Then we will hear from the Government on that before we accept it.

A I will give the Government a copy.

Our point in offering something like this, and my point in arguing it, is that there is not much doubt in my mind that one of the reasons we didn't get more credence to our demonstrations of dubious truthfulness on the part of the agents was that our electronic expert was not credited as being an expert.

It seems to me there was just a bit of -- I don't mean to use an impertinent term -- but a bit of stubborness about conceding that a fellow with a flamboyant style like that, and a flamboyant place in society, could be an authentic, scientific expert, which we maintain he is.

Q Mr. Glasser, may I ask you, are you arguing to us the credibility of those witnesses as against the finding of the courts below?

A I am arguing the credibility of the narcotic agent witnesses in the motion to suppress hearing, and I am arguing that to this Court because we consider that the indications are overwhelming that the agents could not have been telling the truth.

In the Schipani review procedure there is always open the duty and the possibility of new appellant scrutiny

where there has been trespassory eavesdropping. If it hadn't been for these prior decisions, and the Department of Justice's own very gracious program which was started during Mr. Justice Marshall's time -- I see he is not on the bench -- if it hadn't been for Schipani, we would have very faint hope of interesting this Court in this point.

But with Schipani in the picture, we think it would be perfectly normal and right and necessary for the Court to hear us in that argument, and determine whether our argument has carried any persuasion.

Q On evidence that is not in the record? You want us to decide on evidence that is not in the record?

A We would be content -- we made a motion and filed affidavits in the Circuit Court of Appeals during the pendency of the appeal asking them to pick up the Schipani test. Schipani had come down in December of 1966.

We were arguing before the Court of Appeals during the months of January, February, and March, and we were bombarding them with motions and affidavits, asking them to entertain a Schipani review.

Q Wasn't Schipani a case where the Government came forward and said, "Yes, frankly, this is illegal bugging"?

A The Government acknowledged illegal bugging.

Q Here the finding of illegal buggins is against you, unless we are going to re-try the case.

A I guess I have to really call a spade a spade, then. You see, we think the narcotics agents must have deceived the Department of Justice. We are sure that the Department of Justice is not in complicity with anything wrong here; we are positive of that. I am not just saying that to be diplomatic. We are convinced of that.

But we do think there has not been, or we think the presumption of official irregularity is not justified here. On the showing we have made, I think --

Q On the Findings of Fact here, assuming that we accept those, there is nothing to your bugging claim, is there?

A Nothing to our claim?

Q That this was a trespassory intrusion.

A If you accept the findings of the Judge, there is nothing to this, of course. We are asking that the Court apply the Schipani and general Fourth Amendment scrutiny powers that the Court brought into operation in those cases during the second half of 1966, and where the Department of Justice has been cooperating with the Court.

I might at this point interject that there is President Johnson's order of June 30, 1965. There have been references to such an order in papers filed by the Solicitor General's office in this Court, in a number of certiorari situations, reference to the President's order as having called upon the entire Federal establishment to review whether they have

been engaging in any illegal electronic activity. That is about, so far as one can determine from the Government's descriptions of the President's order, what that order contained.

Now, we have been trying for a long time to get the content of that order. The Government has still not told us the content of that order. We think if there was a Presidential order which was disobeyed by narcotic agents, that they were acting ultra vires, and that there couldn't be a more classic instance of violation of due process of law than to be under process which has no law in it whatever, that is a usurpational subordination of the Federal branch, invading privacy, violating not only the Fourth Amendment, but due process of law.

We hope that this Court will see fit to ask the Solicitor General to disclose the contents of the President's order.

Now there, again, off the record, I have a copy of what purports to be the President's order. I have had it since last December. I want to be frank with the Court. I don't know if I am allowed to have it. It reads to me as if it has perfect similitude, it is authentic. I know Government writing, and I have been in the Executive Branch as a writer, and it sounds real.

Now, if the actual order is like this one that I have, there will be another brief filed, still another brief filed in this case by us.

Q I don't think that I quite understand. What is this order that you are talking about?

A President Johnson is said by the Solicitor General in the Black memorandum and the Schipani memorandum, and one other memorandum filed in this Court, in which the Solicitor General is working out his own approach in connection with monitoring -- he said there is a Presdential order of June 1965 addressed to the entire Federal establishment calling us all to different standards of conduct in connection with electronic monitoring.

There are a few other clues, and one clue is that the President really only wanted it done where national security was at stake, and he only wanted it done with advance permission and approval in each instance from the Attorney General, and he didn't want any wiretapping, apparently, at all.

Q What is the significance of all of this?

A The significance is that the President's order is June 30, 1965, and the bugging in our case is December 1965. The significance would be that the bugging disobeyed the President's order.

Q And if it did?

A It is usurpational, and we would practically tender a Federalist Paper on that point.

Q What do you mean; usurpation of what?

A Executive power of the United States vested in

a President. The President has that Executive power, and none of his subordinates has it except as it is delegated. When they exercise the power to see that the laws are faithfully executed, and the power to enforce the laws in the President's name, and in any enforcement action which the President has strictly for bidden them to take, aren't they usurpers? I don't want to call names.

Q I am trying to understand that. This is an argument independent of your Fourth Amendment argument.

A Oh, yes; entirely so. It has been pretty heavily briefed. I am sorry I keep talking bout it, and I am aware of my time. I would like to save my remaining five minutes for rebuttal, if I may.

Q You may.

ORAL ARGUMENT OF FRANCIS X. BEYTAGH, JR., ESQ.

ON BEHALF OF THE RESPONDENT

MR. BEYTAGH: Mr. Chief Justice, and may it please the Court: I am a bit surprised to learn that petitioners don't feel that the retroactivity of Katz is a question involved here. We have thought in our brief, and in the petitioners' briefs heretofore -- this question has been brief extensively -- this question has been briefed extensively and we have thought that this was the central issue involved in the case. I still think it is.

As I understand it, petitioners' contention is that

Katz somehow decided this question. I don't quite know whether that is what he means or whether he simply is saying that the law always was that way, and in the light of some suggestions made from this end of the bench, it seems to me that is fairly close to the accepted common law theory, which the Court in Linkletter and subsequent decisions found it was not bound to follow.

Well, it seems to me that that doesn't advance the inquiry here very far because the question is whether this is one of those situations in which the approach taken in Linkletter and Stovall, and Johnson and Tehan, and several other cases, should be followed; that is, that a decision changing a constitutional rule of criminal procedure should not, for a variety of considerations, be given retroactive effect to prior cases.

Q There is another way of looking at this case, isn't there? In cases like Linkletter, and that whole area, the police knew what they were doing was a constitutional violation, under Wolf against Colorado. They knew it was wrong, and the question was whether the sanction of evidentiary exclusion should be applied.

Here it is at least arguable, is it not, that the policemen who relied in good faith upon their understanding of the state of the law were not guilty of a constitutional violation at all, because, after all, the Constitution makes

illegal and illegitimate only unreasonable searches and seizures, and policemen who in good faith were relying on Goldman against the United States, and their understanding of Silverman against the United States in their conduct of electronic surveillance -- that arguably at least is not an unreasonable search or seizure, isn't that correct?

A That is correct, Your Honor.

Q That is an argument available to you in this case that was not available to the Government in the cases like Linkletter. Perhaps it was available in Tehan. It was not available in Linkletter; isn't that correct?

A As I am sure Your Honor is aware, and this is what you really refer to, the Court has not had this fact in subsequent cases, holding decisions not to be retroactive, that in the Linkletter situation the law enforcement officials in the light of Wolf knew what they were doing, and State officials were wrong, and they went ahead and did it and the Court nonetheless found that case --

Q Analyzed as I have tried to suggest in my question, it isn't a question of retroactivity. It is a question of whether or not there was a constitutional violation in this case.

A Yes, Your Honor.

Q Now, if the policemen did this tomorrow, they would do what they did in the light of the Katz decision, and

their reasonableness and their conduct would have to be constitutionally measured against the standard of the Katz decision. But this surveillance took place long before Katz was decided, and since the Constitution talks about unreasonable searches and seizures, it is arguable that we are not talking here about retroactivity at all, but we are talking about whether or not there was a constitutional violation at all; isn't that correct?

A Yes, Your Honor, but the reason we ahven't pressed that argument at length is that it seemed to us that the Katz opinion itself suggested that it was not sufficient, and, therefore, we haven't felt that we could press that argument here.

Q And Stovall suggested that this Court is constitutionally charged with the duty of deciding cases. The policemen acted in the light of the state of the law.

A I understand.

Q I thought you were conceding in your brief that if Linkletter applied, this case would have to be reversed.

A That is not our understanding of the situation. This is not consistent with the approach in that case.

Q I thought you simply said if Katz was retroactive, which is saying something different --

A Yes, sir.

Q I would like to hear you distinguish Linkletter.

A I am not sure in what respect it would be in my interest to distinguish.

Q I am not sure, either.

A The only point of distinction that is suggested by petitioners is that in Linkletter the Court held Mapp to be partially retroactive; that is, the Court held that the Mapp decision would be applicable to cases on direct review at the time that Mapp was decided, but not on collateral.

Now, as the Court itself pointed out, in the Johnson opinion and again in the Stovall opinion, those decisions were made "without discussion" and they were made in per curiam decisions without consideration or an opportunity to evaluate and weigh these arguments, so we don't get really very much out of that point.

It seems to me that the Court has moved beyond that in the evolution and development of this doctrine of non-retroactivity and inappropriate circumstances. Beyond that I can't see any point of distinction with Linkletter, and it seems to me that that point is not --

Q The petition for certiorari in this case was pending at the time that Katz was decided.

A That is right, Your Honor.

Q What bearing, if any, on the issue in this case does the recent decision of the Court in the Alaska case have?

A It seems to me that it has a pretty direct

bearing. I think that we have in our briefs developed a sound argument, if you follow the analysis that we do, and not the alternative analysis that you suggest, for holding the Katz decision not to be retroactive.

It seems to us that the decision in Fuller, which held as Your Honors know, Lee versus Florida, non-retroactive, is awfully close to the situation that we have here. I have not had an opportunity to study this Joint Supplemental Reply Brief that was filed over the week end, but as I understand it from a quick reading, there is some discussion there. They do admit that the Florida decision may cause them some difficulty, and the suggestion is, because the statute was involved and not the Fourth Amendment, and because it was a telegram and not a telephone, that somehow this makes the difference.

It seems to me that what the Court said in Fuller was that all of the considerations that have been developed in the previous cases are applicable in this situation. The purpose is to enforce Federal law. The purpose is delineated in the Linkletter opinion of the Fourth Amendment exclusionary rule, and, of course, Katz is a Fourth Amendment case and develops an exclusionary rule itself, to deter police from acting in an unconstitutional manner.

It is clear that if that is the purpose, that purpose can't be served by retroactively invalidating convictions that have been based upon evidence obtained which, under the

new rule, would have been inadmissible.

So I think that the Fuller case is quite pertinent, and I think all of the analysis applied there is applicable here. It seems to me that that confirms the approach that we have suggested be taken to the retroactivity question.

Q Except, again, if you concede any validity in the theory I suggested by my question, you have an a fortiori case from Fuller, because in Fuller the police authorities knew what they were doing, and it was violative of an explicit Federal statute. Isn't that correct?

A That is correct.

Q Whereas, here, by hypothesis, the law enforcement agents, their conduct was measured by their knowledge of the existing case law, and they did not, therefore, I assume, knowingly violate the law, but in contrast with Fuller against Alaska.

A The problem for me, quite honestly, is that Schwartz was on the books, and it may be said that they also could be charged with having knowledge of that, so I am not sure.

Q What is that?

A The Schwartz case was also on the books.

Q But I am not thinking about that. We are talking about wrongdoing by the agents and the sanctioning of it. In the Fuller case, I assume there was no knowing law violation

of a Federal statute. In this case, by contrast, I suppose we have to assume that the agents were acting in accord with their knowledge of the existing law, which was expressed in Goldman and Silverman, and so on.

A I think adding to that point, as we pointed out in our brief, although petitioners appear to dispute it, I don't know how they have the information, and I frankly don't have the information, but it is not altogether clear if the agents had known what the law was going to be, that they would not have been able to get a warrant.

They followed, as far as we can tell, and in the concurrent findings of both courts below, it seems to me refute the suggestion made that this Court ought to somehow seek to overturn these findings and this evidence.

The courts below both found that the installation was made without physical intrusion into a constitutionally protected area, under the Goldman and Silverman distinction.

Now, it seems to us that the reason the agents went about doing it that way was because of the very reason that they were trying to comply with the law as they understood it. Whether they could have gotten a warrant or not had they known that Katz was going to be decided and required a warrant, I don't know.

We point out in our brief, there is a case called Pardo-Bolland versus the United States, decided by the Second

Circuit, in which certiorari was denied in this court just prior to the installation at the Waldorf in this case. That case involved virtually an identical installation, a microphone adjacent to an opening in a door between hotel rooms, but not at all penetrating into or under the door.

It seems to us, as I indicated earlier, that all of the considerations that the Court has developed applicable in deciding whether a case should be retroactively applied or not are pertinent here.

I discussed the purpose. We discussed briefly the question of reliance. It seems to me it is quite clear that the agents here did rely, and that other agents have relied on the Goldman and Silverman distinction. Katz now requires that they get a warrant.

If we accept the findings that the installation here was not trespassory, it seems to me that it was lawful under the law that existed and because they relied upon that law and because other agents in similar installations have obviously relied on it, there is every reason to maintain that that factor argues in favor of non-retroactivity.

Q Could I ask you a question, Mr. Beytagh?

If your view as to Stovall prospectivity is accepted, does that leave any vitality to Linkletter and Johnson?

A I am not quite sure that I understand the question.

Q As I understand, what you are arguing here is the Stovall rule, which says that if a rule is made, and a new rule is made, it is to be applied only perspectively, that is, to cases arising after the decision, namely, that the man to whom it is applied has had a lucky constitutional chance. What room does that leave for the Linkletter type of retroactivity, meeting cut-off dates or Johnson-type retroactivity at the time of the trial, beginning before the decision?

A I think that it leaves very little room, Your Honor.

Q That is what I understood you to say. I understood the thrust of your retroactivity argument really was that in the developing of this new doctrine, and, of course, everybody would recognize it as a new doctrine, beginning with Linkletter and following through to Johnson and Stovall, that really where the Court had come out on this thing in its last expression was that new rules are to be perspective only in the sense of applying only to cases arising after the rules were announced.

Am I wrong about that?

A I just question whether those cases are precisely accurate. Our view of STovall is that at the time of the conduct, as compared with the time of the decision, any conduct occurring thereafter would apply.

In the DeStafano case, which involved non-retroactivity of jury trials, the Court necessarily related that to trials

commenced, but the only way that you can --

Q What you really are saying, as I understand it, is that on your submission, the Katz rule would apply only to actual buggings after the date that Katz was decided.

A That is correct.

Q And for that reason, I gather you come out with an affirmative view, and you say these petitioners are not entitled to the Katz rule, and only Katz was entitled to that.

A Yes, Your Honor. Katz and, of course, any people bugged subsequent to Katz.

Q But Katz gets the benefit of the rule which was laid down for the first time, according to the Government's position, and Katz laid down the rule. You say that new rule should apply to buggings after the date?

A That is entirely consistent with Stovall and reflective of what Stovall suggested about the reasons.

Q That is exactly the way I understood your position. My question to you is: Doesn't that overrule Linkletter? This is a Fourth Amendment case.

A I am not sure it overrules Linkletter.

Q What vitality does it leave in it? Maybe it shouldn't have any more vitality, but I don't see how you can escape the conclusion that as far as the Fourth Amendment cases are concerned, if your view in this case is settled, as to Linkletter I don't know what vitality it has.

A I take it that you mean vitality in respect of making a distinction. I think it still has vitality in respect of deciding that as a general matter, Fourth Amendment decisions are not necessarily applicable.

Q I suppose maybe the answer is that Linkletter and Johnson both, because I think this would apply not only to the Fourth Amendment but to the Fifth Amendment, and to the extent that those cases gave the benefit of the new rules to litigants whose cases were on direct review, as a practical matter, there aren't any more cases on direct review.

A I think as a practical matter, it is doubtful that there are any.

Q So the question here is, shall we adopt the same rule that we adopted for Linkletter and Johnson, or shall we, rather, this being a new rule on your submission, should we adopt the tests we laid down in Stovall?

A That is correct, although Johnson is much closer to Stovall and Tehan in the second case than Linkletter. Johnson moved beyond that, and made it the date of the commencement of the trial, and Stovall was on the conduct of it.

Q This is a Fifth Amendment case, isn't it?

A I don't think so.

Q The man's own words were picked up.

A That is correct, but it seems to me that there is no compulsion involved here. It has been suggested that

somehow this is involuntary confession, and we don't quite understand that. I don't know that he was compelled to do anything.

I would like to turn just for a moment to the repeated references to the President's directive of June 30, 1965. Petitioner has referred to this repeatedly, and the only reason that it has not been made public is that it was specifically indicated by the White House that it should be an internal Government matter and kept confidential.

All of us who have worked with these theories of cases, Schipani, and Black, and whatever in this case, and the Attorney General in promulgating the directives that he has promulgated, are completely familiar with what the directive says and what it requires.

In the main it discusses wiretapping, and it discusses electronic surveillance only in a short and passing way, and it simply directs that the Attorney General and the other agencies be assured that the Federal Government and all of its agencies are acting in compliance with existing law. We have acted consistently on that basis.

We have informed the Court in any situations involving trespassory bugging, and it seems to us that the whole thing is much ado about nothing. It seems to me inconceivable that the Attorney General and the Solicitor General, or the Department of Justice, or indeed the whole Federal law enforcement establishment, would have acted all of this time inconsistently

and in conflict with a Presidential directive. It is simply not so, and I don't know what else really could be said about it.

I would like to turn to several of the arguments made by petitioner that are really subsidiary in nature. One of them he views as a very important argument and he says that even if you hold Katz to be non-retroactive, so that Katz does not apply to his case, the bugging here was in violation of existing law.

We don't quite understand that. He seeks to get something out of the Osborn case. The Osborn case, in the first place, was decided after the bugging occurred here, but more importantly, in Osborn all we understand the Court to have done was to say it was unnecessary to wrestle with the question of whether Lopez was still good law because in the Osborn situation there was judicial sanction for the recording which, as Your Honors recall, was what was involved there, of a conversation engaged in by the defendant and another person.

So it seems to me that Osborn doesn't advance the inquiry anyway. He suggested that Silverman decided this. In that case, the Court specifically refused to consider the question of whether Goldman and Olmstead was still good law and found it unnecessary to do so because it found a physical intrusion there, and the Court, as Your Honors know, concluded that it would not extend Goldman even by a fraction of an inch.

But it seems to us that it is quite clear that the

Court was still talking in terms of this trespassing distinction.

Now, further, it seems to me an indication that the law that existed prior to Katz was as we say it was. All of the lower courts understood it to be this way, and we have cited a number of Court of Appeals decisions which seek to apply this distinction, and we cited them, and there are many more.

In these, the Court denied certiorari. All of this occurred during the time prior to Katz. But in the Berger case itself, in which the Court decided that New York's eavesdropping stitute was not sufficiently precise and definite to be upheld constitutionally, the Court there said, in its opinion, or repeatedly referred to trespassory intrusions, and that it could not allow a statute that was that broad and that sweeping and that ill-defined to be a basis for sanctioning trespassory intrusions into constitutionally protected areas.

That was written six months before Katz, and it seems to us that it reflected the Court's view and notion of existing law at that time. I can't understand why the Court would say that in Berger if that wasn't its understanding of the law. So it seems to me that petitioners are off base when they suggest that the activity engaged in here was somehow unlawful, and that pre-existing law back to some point in time that I am not clear about already had preceded the Katz decision.

There are a variety of subsidiary issues that petitioners have raised. I the main, I should like to leave them to our discussion in the brief, but I would like to make passing mention of some of them because it seems to us, in the light of the Court's granting certiorari without limit, we have an obligation to respond to them.

Petitioner suggests that the remand hearing here was inadequate. As the Court will recall, after the Schipani procedure which the Government here did follow contrary to petitioners' intimations, there was discovered several other instances of electronic activity. One related to one of the petitioners which occurred in Miami some four years before the bugging here, and he was not the subject of the surveillance but he was overheard in a Miami restaurant.

The conspiracy here was not formed until several months before the heroin was discovered and the petitioners were arrested, and this conversation had absolutely nothing to do with the matters involved here, and it was wholly irrelevant.

The only other instance was in Columbus, Georgia, when they were following these people around, because they were trying to make this transfer. There was an attempt to put a radio transmitter in a rented car. The thing didn't work and they heard absolutely nothing.

The reman hearing was limited to those two issues. However, the Judge did allow petitioners to put on several

witnesses. Those witnesses testified in various ways of some kind of bad tings that were happening down there in Columbus, but when they were cross-examined, they backed off and finally the Court determined that they simply weren't credible.

There are other questions that he raises. He says at least two of the petitioners, although he challenges the sufficiency of the evidence generally, particularly as to two, Mr. Gioguardi and Mr. Sutera, the evidence was wholly inadequate. Well, it seems to us again that this is a matter for the lower courts to resolve.

Findings of fact here concurred in by both courts are that the evidence was adequate. These people were involved in a conspiracy. They engaged in an extensive conversation in a restaurant in New York that was overheard not electronically but overheard by agents sitting in a bar, in which the clear intent was that they were to receive the narcotics directly or to be agents for those people that were receiving the narcotics.

It seems to us that that is a matter for the Court and jury to resolve, and they resolved it against the petitioners and it should not be resolved up here.

There is a question raised as to the adequacy of how the tape was translated. I am running out of time, and I will simply mention these questions in passing and respectfully request the Court to refer to our brief.

It seems to us that there the Court gave petitioners more than enough opportunity to insure that an adequate translation was made, and there was no need to have, as they have suggested now, a simultaneous translater that somehow was listening to it, and reading it to the jury. The tapes were in French.

Q Mr. Beytagh, would this case be materially affected by our decision in Haldeman and Ilderese? I am now talking about the non-Waldorf-Astoria bugging.

A As we pointed out in our brief, there were some logs involved here, and the logs were turned over to the Judge and the Judge looked at all of them and the Government suggested that only parts of the logs related to Mr. Dioguardi applied, any of his conversations, and the Government Exhibit 103 was turned over to the petitioners.

The Court made a specific finding that that contained all, and the only overhearing that occurred during this time, that was given to the petitioners, and it was found to be wholly irrelevant, and there is a finding of fact.

Q Does petitioners' counsel challenge what you have just said?

A I don't think so. They haven't up to now, Your Honor.

Q Every record or recording that involved this petitioner's own voice was turned over to defense counsel?

A No, the tapes were scrubbed.

Q But any record that was left, the transcript?

A Any record that was left that contained any information that either was identified as including Mr. Dioguardi, or it was questionable about whether it did or not, was turned over to them.

Q No determination was made that, "Yes, it involves his voice, but what was said was irrelevant, so we won't turn it over to them"?

A No, Your Honor. The determination first was made that under the approach the Government was then following, that there was nothing in here that needed to be turned over. The Court of Appeals was not satisfied by that submission.

The Court asked the Government to be more explicit, and the Government indicated these two instances, and then the Court of Appeals remanded it for this hearing. The hearing was conducted, at which time the Government turned over everything to the Judge, and suggested to him that this one exhibit contained all of the material, and he made a finding to that effect, and it proved to be wholly immaterial and irrelevant.

Q This all had to do with surveillance that took place down in Florida several years ago.

A It was about four years before. It was in November of 1962.

Q Some years before the commencement of this

conspiracy, and it was in a restaurant down in Florida.

A It was in a restaurant called Casa Maria Restaurant, in which the subject of the surveillance was a man named Ricci, and the man Dioguardi apparently frequented this restaurant.

Q He didn't have any proprietary interest in the restaurant?

A Not so far as I know. The finding of fact, as Your Honors know, was not printed as an appendix in this case, so it is a little difficult to make references, but in the appendix to the petition which was filed, the judge on page 45a, in Appendix B, made this finding:

> "After en camera examination, the Court finds that Exhibit 103 truly comprises all of these portions of Government Exhibits 100 and 102 in which any defendant in this case was a participant or a possible participant. The Court orders Government Exhibits 100 and 102 sealed for appellate review. There is no relevant connection between any of the remaining material and any of the defendants or the prosecution of any issues in this hearing."

This is Finding No. 9.

I see my time is up.

Your Honors, for the reasons stated, we submit that the convictions in this case should be upheld and the decision affirmed.

Q Could I ask you, what year was this case tried?

A The case was tried in 1966, from June 15 to July 11, I believe, in 1966. The facts occurred in December of 1965 and there was indictment and the trial came on in June of 1966.

Q What page did you read from there?

A I was reading, Your Honor, from the only place that I know of that the findings of fact of the District Judge are reprinted. They are in the petition for certiorari, page 45a, which includes the District Judge's opinions and findings of fact and conclusions on this remand hearing.

MR. CHIEF JUSTICE WARREN: Mr. Glasser?

REBUTTAL ORAL ARGUMENT OF ABRAHAM GLASSER, ESQ.

ON BEHALF OF PETITIONERS

MR. GLASSER: The call-out problem in our case would exist only in relation to the Florida bugging. We agree with the Government that there is no real issue on Florida.

But there is a very severe issue, we say, in connection with an allegedly abortive additional bugging in Georgia. I haven't spoken of that today, but we briefed it pretty completely, and I would ask the Court to watch for that item, since there was some mention here about the call-out problem, which I think is before the Court.

Q They didn't make any tapes at all, or get any recordings, did they, in that second incident to which you refer?

A The agent who ran it said he didn't get the tape, and I think one other agent who was in the car with him said that they didn't get any effective, audible result. But again, we had a very hard, pushing hearing in which I, for one, came away feeling that I was entitled to make a strong appellate point against the credibility of those agents on that issue, too.

Indeed, on that issue above all, they were crawling all over that part of Georgia, and they were there by the score, and they were not hesitating to bug. They were bugging all over the country, and we can't prove they are bugging in Europe, but these fellows live with bugs. It is incredible that they didn't have more than one. They must have bugged these people.

I will drop that point because it has been thoroughly briefed. Our whole submission is sufficiently stated in the briefs.

Now, on Fuller, again may I say something that is a bit abrupt. We think that this Court should withdraw its action in Fuller on the ground that certiorari there was improperly granted, and I would like to say why. We have covered it thoroughly in our last brief.

Fuller involved a telegram, we all know that, but back of that telegram was a subpoena. The police in Fuller were not defiant or willful toward existing law. The police in Fuller went to the Alaska communications body, whatever it is

called, and got voluntary relinquishment of the telegram pursuant to a Federal regulation, and also got a subpoena.

Now, the exact details of that whole subpoena picture I don't know for sure myself, because I haven't seen the Fuller record, but I have been guided through it in consultation closely with one of the Fuller certiorari counsel. I have the page number. This is covered in our last brief.

If there was a subpoena in Fuller for that telegram, how can Your Honors reach the question in Fuller of a violation of 605, because the very first sentence of 605 provides for subpoenaes.

Fuller is a pretty drastic decision, and to render a drastic decision like Fuller on a record that may not stand up under scholarly criticism one of these days, I think, would be something that the Court would wish to think about.

Q What did the Alaska court hold?

A They never touched this problem that I am talking about now. They touched the 605 problem, but they didn't touch the problem of subpoena pursuant to 605.

Q What did the Alaska court hold respecting a 605 violation of Fuller?

A They held, let me think -- they held that 605 does not apply to States. They adopted the basic Schwartz line.

I have here a copy of the Alaska opinion. I don't suppose Your Honor wants to see it right this minute.

Q I can find it.

A I am sorry that my recollection is fuzzy on that. I am pretty sure it was what I said, the Schwartz approach.

Now, on pre-Katz versus what the law was or what it became -- my time has expired. I am sorry.

Mr. Markowitz asked me if he could argue for five minutes.

MR. CHIEF JUSTICE WARREN: Your time is up. I am sorry.

MR. GLASSER: Thank you.

(Whereupon, at 11:45 a.m. the above-entitled oral argument was concluded.)