1968 Term

Supreme Court of the United States

1967

In the Matter of:

Willie Israel Alderman, et al.	Docket No. 133 (of 1967)
Petitioners,	
v.	
United States of America	
Respondent	

(Reargument)

Place Washington, D. C.

Date October 14, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

sdor

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

Willie Israel Alderman, et al., Petitioners,	:	
v.	:	No. 133
United States of America, Respondent	:	

Washington, D. C.
Monday, October 14, 1968

The above-entitled matter came on for argument at 10:33 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 Petitioners

ERWIN GRISWOLD, Esq.,
Solicitor General
Washington, D. C.

Counsel for Respondent

C O N T E N T S

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P R O C E E D I N G S

MR.CHIEF JUSTICE WARREN: No. 133of the October Term, 1967, Willie Israel Alderman, et al, Petitioners, versus United States of America.

THE CLERK: Counsel are present.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.
THE SOLICITOR GENERAL
ON BEHALF OF RESPONDENT

MR. GRISWOLD: Mr. Chief Justice, this case is here on re-argument, having been previously presented to the Court last May on a motion made by the Government to modify an order of the Court which the Court entered in January of this year.

The case began as an indictment for conspiracy to transmit in interstate commerce communications concerning threats designed to injure one Robert Sunshine of Denver, Colorado.

There were originally four defendants. One was acquited and is not here. The other three defendants appealed to the United States Court of Appeals for the 10th Circuit. One of them, a man named Kolod has since died, and now the case involve the two Messrs. Alderman and Alderisio.

At the trial of the case, Defendant Kolod who is no longer here sought to introduce evidence about illegal surveillance at the Desert Inn in Las Vegas. The material was submitted to the Trial Court in camera and it was held they

relevant and evidence with respect to them could not be introduced.

Thereafter, while the case was pending before the 10th Circuit Court of Appeals, the Government disclosed that it had additional files relating the conversations overheard at the Desert Inn. The case was remanded to the District Court to examine this material in camera and that Court found nothing admissible in the additional material.

Thereafter, the 10th Circuit affirmed the conviction. A petition for a writ of certiorari was filed here and was denied in October 1967.

I should make it plain that these earlier disclosures of surveillance material are not now involved, since Kolod has died, and they related only to him. There is nothing now before the Court relating to the electronics surveillance material which was considered by the courts below. We now have a wholly new problem.

I mention that background partly to avoid misunderstanding and partly because that issue, whether considered by the Court in camera, was the issue which was presented by the petition for certiorari which this Court decided in October 1967.

Following the denial of the petition for certiorari, counsel for Alderman and Alderisio filed a petition for rehearing in which they asserted that they had reason to believe that

there was additional surveillance involving the defendant Alderisio.

In response to that Mr. Spritzer, Acting Solicitor General, filed a paper with the Court in which he said that pursuant to the Government's policy, it had been determined that there was nothing which was arguably relevant with respect to the prosecution.

Q Did that infer that there was additional surveillance?

A The Court so understood it. The fact was that there was additional surveillance. I am trying to develop the chronology by which the case came along. Mr. Spritzer's statement simply was that the Department had determined that there was nothing which was arguably relevant.

It was on the basis of that that the Court entered its order in January of this year remanding the case to the District Court for an adversary hearing, and the Government by that time had conceded that there was additional results of electronic surveillance.

It was following that order of the Court that the present motion was filed which is a motion to modify the order of the Court. In that motion, we accept without question of any sort this Court's decision that the petitioners here are entitled to the independent determination of a court. We urge, however, that this should be done in the first instance by the Judge in camera, with the Judge then being free to order such

further proceedings as he may deem necessary or appropriate as a result of his examination.

This is the procedure I would point out which was followed in this case with respect to the Kolod surveillance at Las Vegas. This was directly approved by the Court below, and this Court denied certiorari.

The 7th Circuit, the Battaglia Case, which is now pending before this Court on a writ of certiorari has sustained such a procedure.

Q Mr. Solicitor General, one must wonder why it takes as long as it took the Department of Justice to find out what bugging of this kind went on through its department. Why do we have to go through three different proceedings in three different courts to have the Government admit that there was a certain amount of it in one proceeding and deny that there was anything wrong, and then admit there was more of it in the second proceeding, and then still more in the third proceeding.

A Mr. Chief Justice, I am distressed myself. All I can say at any time when it has become known to me that there has been such action, prompt disclosure has been made.

This is a problem which was brewing for a long time. There are clear orders of the Attorney General/effective in 1965 that it should not be done except in National security matters which is a question involved in the next two cases, which is not involved here.

There is no question of National security in the Alderman and Alderisio cases. I have found nothing in my tenure in the Department of Justice to indicate that that order of 1965 has in any way been violated. I am hoping we are slowly getting to the place where this will recede into the background.

It first became apparent in this Court some time over two years ago in the case of Black against the United States where the then Solicitor General filed a memorandum which disclosed electronic surveillance. At that time the Attorney General had established a committee in the Department of Justice to review every case where it was found and to make a determination as to whether there was anything which was arguably relevant and to make disclosure in cases where there was anything arguably relevant. This is the procedure which the Court has found to be inadequate, that the Department cannot itself make that determination, and this we accept without question.

The only issue is whether disclosure must be made either in public or to the defendant and his counsel under protective orders, or whether it is appropriate in these cases to make disclosure first to the District Judge.

I find myself with some feeling that we have made this matter more difficult than it need be. I don't want to minimize the difficulties. This has been a very worrisome problem for a long time.

But actually there are a sizable number of situations where the procedure is established that determinations of relevancy may be made by the District Judge in camera.

One which goes back quite a long way is the materials which need be disclosed in response to a subpoena duces tecum. A party may be a little concerned, thinking that certain items are not covered by the subpoena but not wanting to be in contempt of court and having it found out later that he didn't turn in something which turned out to be relevant, and it has long been the practice that in such a case a party may submit an item to the Court for the Court to determine whether it is within the scope of the subpoena.

In the areas of discovery under Rule 16 of the Federal Rules of Criminal Procedure this Court has specifically authorized a procedure under which the material is shown to the District Judge in camera, and the Judge determines whether it is relevant or not.

There is a case in which the Government will file a brief in opposition today. I had hoped that I would have the printed brief here now, but the Government Printing Office has not delivered it. I have just made a proof of it available to Mr. Williams, and it is only illustrative; it is not a major matter. But it was a case involving a bank robbery.

The counsel for the defendant, proceeding under the Brady decision of this Court held that exculpatory material of

of the Government must be disclosed by the defense.

The Government turned over a substantial amount of material to the Court stating in its brief that much of it was not relevant to this matter. The Court examined it, turned part of it over to the defense and refused to turn over the other parts saying that they were in no way relevant, and the identity of the persons whom the Government had interviewed would not be disclosed to the defense.

We are there filing our brief in opposition in support of the decision of the Second Ciruit of which that is an appropriate proceeding.

Similarly, under the Jencks statute, it is similarly provided that the United States shall deliver by the statute, deliver a statement for the inspection of the Court in camera and upon such such delivery the Court shall excise such portions of such statement which do not relate to the subject matter of the testimony of the witness and deliver the balance to the defense.

Q Mr. Solicitor General, is there any significancy in the distinction that here we are dealing with something that the Government obtained illegally, and that in none of those other instances that is true?

A I think there is probably some distinction. I am not trying to suggest that any of these are conclusive. I am trying to say that there are a number of situations where the

determination is made by the Judge in camera without an adversary and I think that there are arguments which lead to the conclusion that that should be the procedure for review.

Q For example, there is no issue comparable to the deterrent issue which gets involved in this situation, is there?

A No, sir, I don't believe there is on any of them. On the other hand, there is no issue in those particular cases with respect to the protection of third parties as there is in the fourth of these that I was going to present, which is the matter of testimony before grand juries, which in some ways has a good deal of parallel with this.

Q Is there anything comparable in the Fourth Amendment in search and seizure where the Court has said before we turn these things back, we will take a look at them and see whether they are material or not and not provide the same information?

A No, Mr. Chief Justice, unless we get to the problem of standing, to which I am going to turn in a moment. The Court may say the persons seeking to have this material suppressed have no standing to do so, in which case it will not be turned back.

The matter of access to grand jury testimony has a mild parallel with what is involved here. There the rule was for a long, long time that there could be no access to grand jury testimony. It was secret. The proceedings of grand juries

were secret.

The Court has broken that down in the Dennis case and other decisions. But in the process it recognized that it was not appropriate simply to turn over the minutes of the Grand Jury to the defendants. The Court has explicitly decided that the District Judge should examine the minutes of the Grand Jury and should not turn over testimony in the minutes which is not relevant to the particular issue with which the defense is concerned at the time, and has specifically referred to the fact that the necessity of protecting not only other witnesses, but also third parties whose names might have been mentioned in the Grand Jury proceedings, but who perhaps were not indicted for one reason or another, and that isdone by the Judge ex parte.

It also seems to me that perhaps we have considered the problem in too broad a way, and in that respect, I found some passages in Mr. William's brief which seem to me to be quite relevant.

On page 5 of his brief he says, "If the FBI had ransacked petitioner Alderisio's home and taken his private papers without warrant or other process, could it decline to produce them in Court?" This seems to narrow the contention to his, which would be specifically Alderisio's own conversations. If we narrow this to the portions of conversations to which Alderisio was a party on one side or the other, we have

already considered a considerable part of the material.

Q Do you mean to say that you would agree that a transcript of such a conversation should be turned over to the defendant?

A I am not saying that. I am trying to narrow the issues to that. I would still like to have some ground to stand on to say that even in such cases it may be appropriate for the Judge to say that it is irrelevant, but if the contention is limited simply to Alderisio's own conversation, the problem is a good deal easier.

Q Do you read Mr. William's brief as indicating that he is arguing only for such conversations?

A I don't regard him as bound by that statement. I just noticed that as I was reading it. There are other passages to which I shall refer which seem to me to be a parallel to that.

Similarly, on pages 16 and 17 of his brief he refers to the proceedings in the local court, I believe in the Black case, and at the bottom of page 16 and at the top of page 17, he says, "Based upon further probing and further argument, the Court made some limited excision princially of material in the AirTel memorandum which had a live informant source."

Now, I would simply point out that in that case some part of it has been held to be irrelevant, and I don't regard that as of great importance.

On page 22 of his brief, the last paragraph at the bottom of the page, "The arrant gossip rationale is quickly disposed of if we consider that the petitioners themselves either heard or made the scandalous references to third parties uttered while they were present."

That seems to narrow the contention to conversations of which the defendants here were parties on one side or the other.

This gets me to the issue of standing which was raised in the order setting the case down for rehearing. That problem presents some difficulties and embarrassment for counsel who are representing the Government in cases of this sort. I think the difficulty and embarrassment of Mr. Alexander, who was appearing in the District Court, are apparent on pages 14 and 15.

The problem is that if you could only disclose this material you could show how utterly irrelevant it is, but if you disclose it, you have defeated the whole objective of trying not to disclose it.

I think it can be said that we have made rightly or wrongly a sort of compromise in this case. We have made what amounts to a partial disclosure.

I had a good deal of concern before we went that far, but I thought we had to.

In the footnote at the bottom of page 2 of our brief,

we have stated our undstanding of the situation here which is, one, that there were no overhearings whatever of Mr. Alderman. There is no information with respect to Mr. Alderman, and that with respect to Mr. Alderisio, we have in effect disclosed the places where the overhearing was. They were overheard on premises which were not his but were business establishments owned by associates of his or firms that employed him, and where he did not have desk space.

Similarly, in another case which is pending before the Court on petition for certiorari, we have disclosed the approximate times of the overhearings in an effort to show that they could not have been relevant.

With respect to Alderman, whose conversations were not heard and whose premises were not affected, it is our position that he has no standing to object to the evidence to the failure to disclose with respect to conversations of Alderisio.

Q Would any statements made by Alerisio at that particular time be admissible against Alderman in a conspiracy case?

A I think not, Mr. Chief Justice.

Q Why not?

A The only question in this case is whether there is anything here which led to other evidence, whether any evidence was used against Alderman was the fruit of the poisonous tree. Our position is, even though it was illegal with respect to Alderisio, even though there must be disclosure with

respect to Alderisio, Alderman has no standing to raise that question.

Q Even though that may have produced the evidence.

A Even though that may have produced the evidence that was admissible against Alderman.

Q What authority do you have for that?

A Wong Sun would be the closest case, at 371 U.S. I think to some extent it is inherent in the Jones case, which refers to the person aggrieved. Alderman is not aggrieved by violation of the Fourth Amendment, if that is what they were, with respect to other persons.

Q Even though they are co-conspirators?

A Even though they are co-conspirators, yes. That is, in effect, Wong Sun.

Q What would you say with respect to Alderisio when third party conversations take place?

A It would be our position that if there was a third party conversation when Alderisio was not present, he would have no standing in this case.

Q What about conversations where he was present?

A That gets harder. I think there we might say that he has standing, but we still have the issue of relevancy which we contend should be determined by the District Judge in camera.

Q What is the foundation for that standing in that

situation?

A His presence, I suppose.

Q His presence?

A I don't think there is very much foundation. I don't know where the crime is. I don't know just exactly what the basis of standing is. It seems to shift and he road from time to time. I find it difficult to say that if the conversation was overheard at a time when he was present that he has no standing. If I am wrong about that, I shall not be sorry.

Q Mr. Solicitor General, when the Court entered its order, it was on the premises that the conversations of Alderisio, with which you were concerned, were conversations conducted by a Government agency at his place of business. From the footnote that you referred us to in your brief, if it were established at the hearing that if, in fact, what you represented now that it was not at his place of business, if that were established as a fact, what is left of this case?

A That it was not his place of business?

Q Yes.

A I would think it would greatly reduce the scope of his claim to have standing.

Q What is left of his claim for standing?

A If there are conversations of his, and to get back to the question raised by Mr. Justice Harlan, if there were

conversations made while he was present, certainly if there were conversations of his he would have standing. If there were conversations made while he was present, I find it difficult ---

Q Suppose the above conversations were on the street, involving himself, conversation in which he participated, and other conversations where he was present. Would we have any problem here?

A It is not clear to me in the case where he was present but did not participate.

Q Suppose the whole bugging occurred of a conversation which took place on a street corner.

A Then it is only a violation of the Fourth Amendment, if it comes within the Katz Rule in some way or another. And I find a little difficulty in findingthat the Katz Rule applies to a conversation on the street corner.

Q If you could establish as a fact what you say in your footnote that the places where the conversations were overheard were not his places of business, but business establishments owned by associates or his firms, and Alderisio himself did not have office space in the subject premises -- isn't this pretty much the same situation as if, in fact, the overheard conversations had taken place on the street corner?

A No, sir, I don't think so, Mr. Justice. When you are in a room you are somewhat closer to the situation in Katz, and you have some thing that you will not hear ---

Q It would be like the telephone.

A It would be closer to a telephone booth.

The one point to which I have not referred is simply why are we concerned, and that, of course, relates to conversations of third persons and in particular conversations which were heard when Alderisio was not present, where we think they are entitled to some protection.

MR. CHIEF JUSTICE WARREN: Mr. Williams.

ORAL ARGUMENT OF EDWARD BENNETT WILLIAMS, ESQ.

ON BEHALF OF PETITIONERS

MR. WILLIAMS: Mr. Chief Justice, may it please the Court, from the briefs that have been filed in this case and from the oral agrument of last term, we can begin a consideration of the issues raised by the Court from the premises that the petitioner Alderisio's constitutional rights under the Fourth Amendment have been violated by Federal agents when they employed electronic surveillance equipment to overhear his private conversations.

Q Did he make this argument whether or not the place where they were overheard were his premises?

A Yes, sir.

Q Do you think that has any bearing on the scope of it?

A No, sir, I do not, and I propose to develop that fully. I think so long as he has a proprietary interest in the premises that were electronically monitored, he has clear standing to

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move to suppress---

Q I am assuming the Government was able to establish he has no proprietary interest in the premises?

A Whether he had a proprietary interest or not, I believe it is immaterial with respect to his own conversations. I believe it is material with respect to conversations of others when he was not present.

Q So, the question of standing becomes very important?

A Yes, sir.

Q As to the scope of what he is entitled to depending on whether or not he had an interest in the premises. Is that it?

A Yes, sir; and I must say to footnote Your Honor's observation, I was surprised -- and I use the word surprised consciously as an understatement -- to hear the Solicitor General say Alderisio had no standing with respect to monitoring premises in which he had a proprietary interest when he himself was not present because in the very brief filed by the Government at page 21 of the Government's brief, they say, "In our memorandum filed last Term, we assumed that a criminal defendant would have standing to challenge unconstitutional electronic surveillance if (1) he was a participant in conversations overheard in this manner or (2) although not a participant, the overhearing occurred in premises owned by him or in which he had some other interest at the time.

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We adhere to this position."

If the Court please, what is the Government saying here? It says we have the logs, memoranda and records resulting from this illicit electronic surveillance, and we are not going to give them back to the victim of this electronic surveillance. Rather, we are proposing a procedure by which we make a confession to the Trial Judge of the nature, the time, the place and the fruits of our transgression and let the District Court evaluate that confession and determine in camera ex-parte what is arguably relevant to the pending prosecution. What is the reason for which they had advanced this procedure?

They say in the case at bar because these logs, memoranda and records may contain arrant gossip without claim to truth and injurious to third persons.

So, we say then to the Government as the logical next question, "Well, what about those logs, records and memoranda that are obviously and patently and palpably not injurious to third persons, and what does the Government say to that?

What I suggest to the Court is a rather cavalier and bizarre disregard for consistency.

They say, "The practical problem is that neither the Government nor the Court can ever know with certainty when disclosure to the defendant of an overheard conversation might be harmful to other participants in the conversation."

I say mutatis mutandis. How can the Judge know whether the failure to disclose the logs, memoranda and records of the conversations might be harmful to the defendant in the vindication of his constitutional rights?

They go on to say at page 15: "There are decisions where even the disclosure of a conversation that is innocuous on its face can prejudice third-party defendants."

I say mutatis mutandis. I say there are conversations which are perfectly innocuous on their fact which may be lethal in suggesting leads to evidence gathered by law enforcement evidence for presentation to the Grand Jury and for subsequent presentation to the Trial Court.

They say at page 15, "The experience of the Department of Justice in reviewing cases involving electronic surveillance to determine when disclosure must be made has indicated that because the factual sitatuions are so varied, it is almost impossible to draw a general rule of disclosure that can be applied to a broad class of cases and will avoid the possibility of injury to third persons."

To that we say Amen and it is impossible to draw a rule of demarcation that will avoid through an ex-parte system -- that will avoid injury to the defendant in the vindication of his constitutional rights under the Fourth Amendment.

The only safe course, says the Government at page 15, we submit, is to decline to order disclosure whenever it is clear

that nothing in the material is arguably relevant to the prosecution.

We say, if the Court please, the the only safe course, when we are talking about the vindication of consititutional rights and when conceivably the Trial Judge cannot make this determination in camera ex parte without the aid of the defendant and his counsel, is to make these conversations, which have been illegally seized, available to the defendant and his counsel.

We say, if the Court please, the the Constitution, the law and the basic rules of fair play require the disclosure of these materials to the victim of the search.

If the Court please, as was pointed out earlier this morning, it could not reasonably be argued by the Government that if there had been a search of the defendant's premises, a ransacking of his premises and a seizure of his papers and records and letters, it could not reasonably be argued by the Government that those materials which were seized from him should not be returned to him, but rather, should be handed up to a District Court Judge to determine whether any of them had arguable relevance to the pending prosecution.

We say, if the Court please, that the same basic principle applies with respect to conversations which are protected within the Fourth Amendment.

Q It is not quite that easy because what you are

talking about in the case before us, at least one aspect of it, relates to conversations between two strangers, let us say, who happen to be on the premises of the defendant, and those two strangers may have had a reasonable expectation that there conversation would be private, and they have a kind of interest in this.

So, it is much more complex and subtle, it would seem to me, and a case where the Government would unlawfully seize letters or documents belonging to the defendant.

I wonder really if the issue between you and the Solicitor General does not relate to technique -- what is the proper technique as to balance between these. It would seem to be obviously competing values or determining whether or not the material is relevant to the prosecution or the defendants

A May I address myself to the question I understand Your Honor has raised. To concretize it, in the case of the premises where the defendants premises are electronically monitored and the monitor picks up conversations of A and B when the defendant is not present, the question is what is the defendant's standing to get those conversation. I suggest there are competing social interests and there are competing legal interests.

What are they? On the one hand we have a defendant charged with a criminal offense who is seeking to vindicate

a constitutional right. We have a situation here where the Government has violated his Fourth Amendment right by invading his premises in which he has a proprietary interest.

As a result of that invasion, they have reached certain benefits, they have gathered certain fruits, they have gathered certain evidence against him, and they say you have no standing because it was not your conversation.

On the other hand, you have the competing social value of the two persons who thought they were talking privately, maybe even against the defendant himself.

Now what is their right? We are weighing a common law right of privacy of these people against the constitutional right of the defendant. What can be involved in that common law right. It may be a pecuniary interest.

I am sure the Court would agree it should be subordinated to the defendant's constitutional right and the right to privacy can be safeguarded effectively, I submit to the Court, in so far as protective orders can be fashioned and ordered by the Trial Judge to protect those third persons from unnecessary disclosure.

It has been our experience that, if the Court please, if every one of the hearings which have been conducted as a result of an illicit electronic surveillance, the defendant himself has asked for protective orders because he does not want to proliferate the Government's order and invade his

privacy. And so, too, can protective orders be fashioned to protect as far as possible the right for protection from further damage as far as third persons are concerned.

Q In a sense, that is what we are talking about here in one of these protective orders. In order to achieve one of these protective orders, is it necessary to give the Court the power to examine the logs in camera and to suppress them? For example, A and B, in the situation you are talking about, in the way that you put it, if A and B were talking about bumping off the defendant, I think that is the kind of a situation that people will think about in connection with cases of these types.

Shouldn't there be some mechanism by which the Court can examine that log in camera? To me that is rare. I don't know anything about this.

A Your Honor, I think you have pinpointed the situation that may constitute one-tenth of one hundred percent of the cases. I think even in those cases the rights of the participants in the conversations can be effectively safeguarded. If, in fact, we have a realization of the bizarre hypothesis that two talking about eliminating the proprietor, then the Government, I suggest to the Court, has the choice of providing those persons with the same sort of protection that it provides to material witnesses in many cases where these interests are at stake, or alternatively, if it does not wish to do that and

wants to exhault their rights over and above the interests of the sovereignty to go forward with the prosecution they can dismiss the prosecution.

But I suggest to Your Honor that it is not practical, it is not feasible, it is not practical for a Trial Judge sitting in camera to make a determination as to whether any of the logs, memoranda or materials resulting from the electronic surveillance were used by the Government in developing leads.

I want to give the Court just one illustration of that and it is cited in our brief. We have a case where there is a boiler plate indictment for income tax evasion charging the defendant in the typical language with evading taxes for a given year. The only thing they ever change in those indictments are the year and the amounts of money.

Unlike the Jencks Act materials, if you please, unlike Grand Jury testimony, if the Court please, when we talk about a Trial Judge looking at the logs, memoranda and records of an electronics surveillance, we are talking about packing cases filled with materials, not sheaves of paper. We are asking a Trial Judge to do the super human task of ~~juxtapositioning~~ packing cases of electronically monitored conversations against the skeletal averments of a criminal indictment, using the wildest flights of his powers of imagination, as suggested by the Solicitor General, to determine whether the Government seized any of those and developed leads.

Here is a case where the Trial Judge spent four weeks reading the documents. They were voluminous. They were so voluminous that he had to delegate the job to another judge who he had read them, and they came up with the answer that there was nothing relevant.

When the trial came on, the conversation which they submitted was arguably relevant to the conversation that turned out to be the origin of a lethal chain of proof. What is the conversation? "How are you. You are coming on the TWA? I will put you in to the Sands. I will get ahold of Cliff. I will call him right now. Charlie won't be there. His wife is being operated on. I will have a room there for you and your wife. You are going to stay through Sunday? Okay, buddy."

Now I suggest to the Court that no Trial Judge sitting before trial or after he had heard all of the proof in a three-week trial could have determined in camera ex parte that that was, as it turned out to be, the origin of a line of proof that was devastating.

What is more, if this Court please, when this Court and other courts design to deter lawless law enforcement, we find more sophisticated methods are devised to countervail the rules of disclosure. For example, when the Jencks decision came down and when the Jencks statute was subsequently enacted by the Congress, we found well-motivated law enforcement over zealous in the pursuit of their duties who found ways to put

on paper in narrative form statements that were not susceptible to turn-over under Jencks.

When the Dennis case came down and Grand Jury testimony was ordered to be turned over to the defense after the direct testimony, we found and are finding across the country well-meaning, able, zealous and competent prosecutors who seek to avoid this advantage to the defendant having Grand Jury minutes no longer transcribed.

Now, in this instance, when we have a Kolod rule, what has happened and what can happen? It isn't any longer necessary, if the Court please, to make logs, memoranda or records of an electronic monitored conversation. We cite in our brief a situation where the agent in charge of the investigation monitored the premises of the suspect 24 hours a day. He listened to the conversations each day, and if he saw anything in those conversations which he believed to be of interest to him, he would telephone to another field office the information gleaned, and he would ask field operators to run down those leads. The basis of the lead would be ascribed to a confidential informant protected from disclosure by McCray against Illinois and a lead would be developed and a trial would be created and there would be nothing of a written nature to turn over to the Trial Judge for an in camera ex parte examination to determine whether or not there had been a fruitful violation of defendant's rights.

So, I suggest to the Court that it is not possible for a defendant to vindicate his constitutional rights in the area of electronic surveillance without an adversary hearing, a full open adversary hearing and without a disclosure to him of the nature of the surveillance and the time and place of the surveillance and the fruits of the surveillance.

Q I am still puzzled a little bit by what seemed to concern Justice Fortas' question to you, given the case of a conversation between A and B on the premises of C, and C is the defendant in the subsequent criminal prosecution. You suggested in your answer that C's right was a Fourth Amendment right, a constitutional right, whereas the right of A and B was something less. I think you characterized it as a common law right to privacy.

A I think I can explain that.

Q Take the Katz case, for example. I assume that telephone booth was the property of the telephone company, so it is Fourth Amendment right, I suppose, that was violated. As to Katz, however, this Court held rightly or wrongly that he had not a common law right but a Fourth Amendment right on those premises.

A I would like to answer both questions. I don't think the telephone company had any right because they leased that telephone booth to Katz, and it was his privacy that was

invaded. On the other, I said that C's constitutional rights were invaded. A and B's constitutional rights have already been invaded just as C's.

But when we come to the question posed by the Government as to whether A and B's conversation should be made available to C, the defendant, then, in that case as between A, B and C, we are not talking about constitutional rights. We are then talking about a right to privacy which they have against him with respect to conversations which have already been seized unconstitutionally.

I say that their right to privacy as against C, must be subordinated to vindicate his Fourth Amendment rights. I am not here to denigrate that A and B's constitutional rights have been invaded. That is an accomplished fact, Fortunately, they are not defendants. The differenceis that this is the post-indictment stage.

Q We are talking about sanctions and protections to repair the two violations of the Fourth Amendment.

A That is right, The difference in the cases, Your Honor, is that C is a defendant in a criminal proceeding who has a right not to be convicted by illegally obtained evidence.

In the case that you hypthosized A and C are not defendants. In this frame of reference, I say that in the hierarchy of values, the Court should place A and B's rights subordinate to C. If A and B were indicted, and they were

seeking the vindication of their constitutional rights, I would have a different answer for them, but I stand by what I said earlier, sir, having taken as the fact the unconstitutional invasion of all three, that is, between A and B and C, and we are talking about a common law right to privacy, A and B against C, and that can be safeguarded in so far as practical for the vindication of C's rights by a protective order that inhibits both C and his counsel from making unnecessary disclosure of the contents of that conversation.

Q Just in a word, what is the violation of A and B's constitutional rights?

A In a word, Your Honor, the Government illegally and unconstitutionally listened to conversations which they believed were being privately held and has been said in Silverman against the United States.

Q It is a Katz sort of case?

A Katz, Silverman, Wong Sun and Irvine.

Q Is that subject to C's consent?

A No, sir, not by C's consent.

Q If C suggested to the Government that A and B were going to have a conversation, and they come and listen, even though A and B participate?

A If I understand your question, are you asking whether C could give consent to the Government to electronically monitor A and B's conversation without notifying them that

their privacy was being invaded? I would say no, it must be where the parties to the conversation cannot reasonably foresee that they are going to be overheard in the normal course of things.

Now, with respect to the problem of standing that has been raised here, it is our contention, and I have, I think, articulated that in response to Mr. Justice Fortas' question, that Alderisio has standing with respect to conversations heard on his premises, notwithstanding the fact that he was not present.

I read page 21 of the Solicotor's brief as a concession of that position. I think a concession of this sort is necessary for the simple reason that if we are to make the fruits of an unconstitutional invasion of one's premises admissible, it follows clearly we must make the conversation seized on Alderisios premises inadmissible against him.

Q The fact is,it was not Alderisio's premises or any premises he had an interest in. Then I gather you would limit his right to the tapes of the conversations to which he was a party or conversations where he was not present?

A To answer your questions as sharply as it was posed, Your Honor, yes, I would take that position, and I underscore that section of your question which said in which he had no interest.

Q For myself at least the Government has introduced

something here which I did not know was an issue in the case, namely, that these were not Alderisio's premises. Certainly, the original order was written on the premises. All this bugging took place at the business premises of Alderisio in Chicago.

A As we developed the question of standing through the morning here, Your Honor, it is ultimately our position that a person agreeing within the purview of an electronic surveillance and Rule 41 is one against whom the search is directed whether it is identified or unidentified at the time of the search.

Q I know, but still I want to be clear about this. If the fact is that these conversations with Alderisio that were illegally bugged were conversations on premises not his own, then you would limit your demand, I gather, not his own or which he had no interest to conversations of his own or conversations in his present; is that right?

A That is right, Your Honor, subject to one qualification which I am going to develop. I think that a co-defendant stands in the shoes of his co-defendant with respect to this right. A co-conspirator stands in the shoes of his co-conspirator with respect to this right. So

So in the case, for example, of Alderman, against whom the Government says it conducted no surveillance and whose premises it says it did not invade, we nonetheless say,

if the Court please, that since this was an indictment in conspiracy and since the Government took the procedural advantages that flow from the conspiracy case, namely, the imputation of the acts and declarations of Alderisio to Alderman and Alderman to Alderisio, and the unindicted conspirators to each, and since it takes the partnership theories and lays all of the duties of the partnership on each of the co-conspirators.

We say then that when you take that theory to the limits of its logic, you have to give them the rights of partners, also.

Q Let take and expand on the position of the courts.

A I would except for the use of adverbs.

Q The Fourth Amendment right across the board.

A I suggest the time has come when the concept of standing must be expanded if we are going to fashion a rule that will deter electronic surveillance because I suggest that the rule for which the Government contend is now archaic.

Q I think I must have misunderstood you a moment ago. Did you say any person against whom electronic surveillance is directed has standing? Do you take a position as broad as that? Do you say if there were unlawful electronic surveillances directed against A that he has standing even though he may be a total stranger to the conversations and the premises and no co-defendant or co-conspirator is involved?

A If neither his conversation is not heard or his

premises are not invaded, if he is not the subject matter of the conversation and if he is not a co-defendant with one whose conversations, premises or privacy were invaded, then I say he does not have standing.

Q You inserted one word ingredient. You inserted,"If he is the subject of the conversation, even though it is between total strangers, then he is entitled to disclosure."

A Yes.

Q So that is another ingredient?

A That is another ingredient, and I think that is the ingredient on which we part company with the Government in this proceeding, as I understand their briefs.

I see that my time is up with respect to this case. The next case set is Ivanov. I hope to develop the question of standing fully in that companion case to this. So, I will defer, with the Court's indulgence, by discussion of standing until that case is called.

[Oral argument was concluded at 11:30 a.m.]
