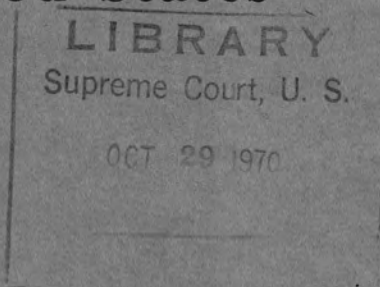


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

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:
UNITED STATES OF AMERICA, :
:
Petitioner, :
vs. :
JAMES A. WHITE, :
Respondent. :
-----X

Docket No. 13

Pt. 1

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C O N T E N T S

ARGUMENT OF

PAGE

Will R. Wilson, Esq.,
on behalf of the United States

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John L. Boeger, Esq.,
on behalf of Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES A. WHITE,

Respondent.

No. 13

Washington, D. C.,

Tuesday, October 20, 1970.

The above-entitled matter came on for argument at
11:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

WILL R. WILSON, ESQ.,
Assistant Attorney General
Counsel for Petitioner

JOHN L. BOEGER, ESQ.,
408 Olive Street,
St. Louis, Missouri
Counsel for Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The next case for argument is No. 13, United States vs. White.

You may proceed whenever you are ready, Mr. Wilson.

ARGUMENT OF WILL R. WILSON, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. WILSON: May it please the Court, this is a re-argument or second argument of this case and therefore I am going to assume that the Court is somewhat familiar with the case and point out that it involves a criminal conviction for the sale of heroin, the principal low point centered in the application of the Fourth Amendment to the investigatory process, which was an overhearing by radio without a warrant.

There are other issues. The first issue that the defendant stresses is whether the informant who made the purchase gave his consent to being equipped or wired with a radio for the purpose of transmitting the interview.

The second issue is whether there were in this investigatory process search and seizures which required a warrant where no warrant was issued and therefore go to the admissibility of the evidence contained.

The third issue concerns the trial procedure where the informant or purchaser did not himself testify and the case was made exclusively from the testimony of the investigatory agents who observed the transaction.

1 The fourth issue is the retroactivity of the Katz
2 case under Desist.

3 Now, to speak briefly to consent of the informant
4 or the purchaser or agent, the government's position is that
5 the whole course of conduct establishes an overwhelming basis
6 for the consent of the informant to have a radio placed on him
7 and to go through with the transaction.

8 Q This was a pocket radio of some kind?

9 A It is called a Kel radio. It is a thing that
10 goes --

11 Q A transmitter?

12 A A transmitter, and it is put on the chest
13 under the clothing so as to record -- I mean to pick up a con-
14 versation.

15 Q And then that conversation is carried outside
16 the building and recorded somewhere?

17 A In this situation most of the interviews oc-
18 curred in the home of the agent and the -- of the informant,
19 and two of the government agents were stationed across the
20 street. It will transmit for a mile or so.

21 Q Presumably they were sitting in a car with --

22 A I think --

23 Q -- where they were listening to it?

24 A I believe it was either a car or another room
25 or something. It was across the street from where the thing

1 occurred.

2 Now, going to the consent of the informant to follow
3 the procedure, he met agents at one place where they searched
4 him to determine that he was not -- he had no narcotics --
5 nearly all of these informants are themselves addicts that are
6 used by the investigatory body to make the purchase. They
7 searched him for narcotics, found that he had none on him, put
8 the radio on him, gave him money and then went with him to his
9 home where one of the informants hid in a closet in the
10 kitchen of the -- one of the government agents hid in a closet
11 of the kitchen and the other two were across the street.

12 There were four such meetings over the period of
13 roughly thirty days, in addition to a telephone conversation
14 that was overheard, and two conversations in a car and one in
15 a restaurant, some eight or nine transactions over a period of
16 thirty days, and our position is that any objective view of
17 this course of conduct would establish without question that
18 the informant did consent to the procedure and did cooperate
19 with it in the sense that consent is an element in a consensual
20 overhearing.

21 The informant's name was Harvey Jackson. He called
22 him on the telephone. In addition to that, he took the delivery
23 of several deliveries of heroin which he in turn turned over
24 to the government agents, and he collected from the government
25 agents \$1,000, \$1,350 and \$1,300, which he in turn paid over

1 at one time or another for the purchase of narcotics.

2 We say that this whole course of conduct establishes
3 that the informant, Harvey Jackson, did consent in a sense
4 that is material to the Fourth Amendment issue.

5 The defendant, in some of his arguments, attacks or
6 raises questions about the motivation of the informant for con-
7 senting, and we say that that is wholly immaterial as to why
8 he did it.

9 Now, going to the analysis of the facts, the law
10 point centers around the Fourth, Fifth, and Sixth Amendment
11 questions, and I want to give you -- to take a set of facts, a
12 typical set of facts and go through them and analyze them
13 against the contentions of those amendments.

14 Harvey Jackson met three government agents at 57th
15 and Outer Drive, where they searched him, installed the radio,
16 gave him the money and the group together went to Harvey
17 Jackson's home. One of the government agents hid in a closet
18 with the door cracked open where he could see and hear the
19 transaction that was about to take place. Two of them went
20 across the street.

21 The defendant, White, came in the backdoor, came
22 into the kitchen of the government informant, they sat down
23 together. There was a commercial transaction, that is an offer
24 and acceptance, a delivery of the merchandise and a payment
25 for it. Then the defendant got up and left. And after that,

1 Jackson turned the narcotics over to the government agent who
2 was in the closet.

3 Now, there is no Fifth Amendment problem in this
4 because this was the event, this was the crime itself, and
5 there is no confession or admission involved, there is nothing
6 that came from the lips of the defendant referring to past
7 events, and so there can't be a question of him testifying
8 against himself in this question, because in none of the proof
9 involved the introduction of any statements by the defendant
10 with reference to a past event. All of them are to a current
11 event which is a commercial transaction of the crime itself.

12 There is no Sixth Amendment question involved in
13 this because he was not under arrest at any time any of the
14 statements were made. There was nothing he said after
15 arrest that was introduced in evidence, and so there is no
16 question about him being entitled to counsel or to be furnished
17 counsel or anything like that.

18 So the only constitutional question, as I see it,
19 that could be involved are the questions of the Fourth Amend-
20 ment and that is was this an unreasonable search and seizure
21 without a warrant.

22 Now, first taking the factual situation, the nar-
23 cotics themselves, the existence of the narcotics, White sold
24 the narcotics to Jackson, the government's man. The voluntary
25 delivery to the government agent in his own kitchen generally,

1 or in his own automobile in another situation, after White
2 parted with both the title and possession of the narcotics,
3 he had no legal right to those narcotics at all, even as in a il-
4 legal transaction. Jackson could do anything he wanted to with
5 those narcotics. He could flush them down the toilet, throw
6 them out the window or give them to a government agent, and it
7 was none of White's business what Jackson did with those nar-
8 cotics. And so there was no seizure of the narcotics. They
9 were voluntarily delivered to the government by the man who
10 had bought them, and I don't see that there could be any
11 question about there being needed a warrant to get possession
12 of the narcotics coming out of this situation.

13 Now, let's pass to the agent in the closet. His
14 testimony was verbal. He was put on by direct examination and
15 by cross-examination. When defendant White went to another
16 man's house for a commercial transaction, he had no legal right
17 to say who was present or not present. The man who owned the
18 house the right to say that. And so consequently he had no
19 legal right to an expectation of privacy, that there wouldn't
20 be anybody else in this customer's house. The customer had a
21 right to bring anybody he wanted to in his house, and he had a
22 right to hide him in the closet if he wanted to.

23 There are many cases that hold that. To hold it
24 otherwise would be to make the event itself unprovable with
25 direct evidence, and there isn't any difference between a

1 witness sitting in a closet who eyeballs the transaction and
2 sees and hears the transaction and then testifies to it later
3 than a witness standing on a corner who sees an accident and
4 testifies about it, and that is not a search and seizure
5 problem. And so there is no question of there being a neces-
6 sity for a warrant to introduce the testimony of the eyeball
7 witness to the transaction.

8 Now, let's pass to the agents across the street,
9 which is really the arguable situation here, that we are
10 listening in on the radio by the consent and invitation of
11 Harvey Jackson.

12 Now, this is not an On Lee situation, where the
13 government used an old friend after indictment of the defend-
14 ant to extract an admission or confession of a past event.
15 The agents were listening in by radio. That is not this
16 situation.

17 Here the events were listening to the event itself
18 happen, to the crime being committed, in the consummation of
19 a commercial transaction. The commission of the crime itself
20 was not protected against direct proof by any legal expecta-
21 tion of privacy. Now, I think that is a fundamental statement.
22 You cannot go into the commission of a crime with the expecta-
23 tion of privacy, that you won't be observed or the proof
24 won't be offered.

25 Consider a bank robbery situation, where the bank

1 lobby is rigged with a secret camera and secret radio and
2 secret recorder to obtain good proof of the happening of the
3 bank robbery. Does this require a search warrant? Obviously
4 not. It would be wholly impractical to require the bank to
5 get a search warrant each day of its operation on the theory
6 that they might have a robbery that day, and there would be no
7 probable cause, among other things.

8 But the use of electronics to record the happening
9 of the crime in a bank robbery is not a search and seizure
10 situation, requiring a warrant. Does the bank robber have any
11 legal expectation of privacy which shields him from proof of
12 the event itself by any direct evidence, either electronically
13 recorded or otherwise? Obviously not.

14 Does a narcotics peddler, in making a sale, delivery
15 and collection of money have any greater legal right to ex-
16 pectation of privacy than the bank robber? Obviously not. He
17 should not. The gathering of the evidence of the event itself
18 with either camera or radio or any other electronic device
19 should not require a warrant in either situation.

20 The Fourth Amendment protects certain places and
21 certain relations and certain people. Let's look at the rela-
22 tionship between Harvey Jackson and defendant White. It was
23 that of a buyer and seller at a commercial transaction. It
24 was not a confidential relationship. It is not an old friend,
25 as in the China case, it was not a lawyer-client, not a

1 doctor-patient, not a priest-penitent, not a husband-wife, it
2 was not a relationship that would be protected in the sense
3 of a right of expectation of privacy. It was out of the re-
4 lationship, so that leaving aside the place altogether, the
5 Fourth Amendment wouldn't attach to that relationship of a
6 commercial transaction which is by law illegal.

7 Q That was also true in the Katz case. There
8 was no -- none of the recognized relationship of confidential-
9 ity, it was a gambler and the man with whom he was placing
10 bets, and that too was of the criminal commercial transaction
11 itself, was it not?

12 A That is correct, Your Honor.

13 Q Katz was using the telephone to place the bets
14 in Florida.

15 A I remember, he went into a public phone booth
16 and he shut the door.

17 Q Yes.

18 A Now, I feel like the Katz case is not in point
19 here for the reason that when he went into that phone booth
20 and paid his money for the phone call and shut the door, he
21 had a right of expectation to privacy. Now, that is not our
22 situation in this case.

23 In the Katz case, had he, for instance, not gone --
24 had it been on one of these phones that is out in the open
25 and he had gone up to the phone out in the open and made his

1 call and there had been an FBI agent standing beside him, he
2 wouldn't have been protected against the privacy of that, be-
3 cause he didn't expect to get any privacy. He expected to get
4 his privacy from the privacy of that phone booth.

5 Q In this case, we have a home, both the de-
6 fendant's home and the informer's home, and an automobile --

7 A Yes, sir.

8 Q -- and a restaurant. Those are the four.

9 A Yes. I will come to the telephone in a moment,
10 which is the most difficult problem, I believe, here.

11 Q In the Katz case, though, the defendant didn't
12 take anybody in the phone booth with him, did he?

13 A No, sir.

14 Q And here he always had somebody around?

15 A He took the man with him in the phone booth
16 and the man did not electronically listen in. He simply held
17 his ear up near the receiver while the informant was talking
18 to the defendant.

19 Q But the defendant there in Katz didn't know
20 anybody was listening to him.

21 A He did not.

22 Q He didn't take anybody in the phone booth or --

23 A Well, the essential difference is Katz is not
24 really a consensual case. There wasn't any consent to over-
25 hearing at all, and this is a consensual case, you see. And

1 the real --

2 Q I am very aware of that important difference,
3 but so far as electronic monitoring of the criminal offense
4 itself, that was true in Katz, as I remember it.

5 A And it is true --

6 Q The actual placing of the bets.

7 A Yes, sir.

8 Q Not a confession of something that happened in
9 the past.

10 A That's right. That's right. Perhaps my
11 statement was a little too broad on that.

12 Q The law which violated a secret.

13 A Yes, sir, and the man who was overhead was in
14 the place where he had a right of expectation to privacy under
15 the Katz decision. My statement about electronics was a
16 little too broad on that score.

17 Now, let's come to the telephone conversation where
18 the Court will recall Jackson, the government informant, went
19 to the telephone and called the defendant White for the pur-
20 pose of making a date to pay some money, and he took with him
21 a government agent who went into the phone booth with him and
22 listened by holding his ear up close to the telephone and he
23 listened to Jackson's end of the conversation, with the con-
24 sent of Jackson.

25 Now, that gets closer to a Fourth Amendment problem,

1 in my judgment, than anything else in the case at this junc-
2 ture. But again, it is a consent case, and if you take the
3 Rathbun case, which you remember is the telephone extension
4 case, where the man was listening on an extension of the
5 telephone instead of listening to the very telephone itself,
6 it will tell that that was not a warrant situation. And we
7 see here little difference in this case and the Rathbun case.

8 Again I point out that what the agent listened to
9 was not an admission or confession and so there is no Fifth
10 or Sixth Amendment, only a Fourth Amendment problem, and it
11 was not a wiretap, and it was not an uninvited ear because he
12 was invited by one party to the conversation.

13 And we see really no difference between, when you
14 get to looking at it, between that incident in the telephone
15 booth and the incident of the radio.

16 Now, there was a car, I believe, or two cars, and I
17 think they are substantially the same situation as the others.
18 The next is defendant White's home, where the agent went by
19 himself but equipped with a radio where government officers
20 could listen to the conversation in defendant White's home but,
21 again, we say that the Lewis case squarely holds that there is
22 no invasion of the privacy of the home when defendant con-
23 verts his home to commercial use by selling narcotics. That
24 is the square holding of the Lewis case; and, secondly, you
25 have got the consent element as far as electronics are concerned.

1 And the Lopez case supports a consensual recording,
2 and I see really no difference between a consensual recording
3 and a consensual radio which broadcasts somebody to somebody
4 else over here to record.

5 So, in summation of this point, we say there was no
6 violation of the confidential relationship to which the Fourth
7 Amendment could attach, and there was no violation of a pro-
8 tected place to which a Fourth Amendment could attach in all of
9 these situations.

10 Q Why is all of this relevant at all? Why is not
11 the Katz case relevant?

12 A Well, the circuit court reversed on the Katz
13 case.

14 Q I know, but how about its retroactivity?

15 A Oh, well, that point that -- and we urge it --
16 I would urge the Court not to decide the case on retroactivity
17 but on the importance of the law question.

18 Q Well, haven't we already decided that Katz is
19 not retroactive?

20 A Well, they contend not.

21 Q Well, how do you read Desist?

22 A I would read Desist as cutting off everything
23 back of the date on which Katz came down. Katz in effect
24 overruled two constitutional decisions. They have quite an
25 argument on that which --

1 Q Well, to get to the Katz point, we have to
2 overrule Desist, don't we?

3 A It depends on which way you take the points, I
4 suppose. You could decide the case either way, on either set
5 of points.

6 Q I don't know --

7 A If there was no need for a warrant, you don't
8 get to Desist. I don't know.

9 Now, I want to point out on this count that the
10 government has pending here some 22 cases, pending in this
11 Court, involving this type of point, this overhearing point,
12 in one way or another very close to the point being argued
13 here on the Fourth Amendment. And due to the importance of
14 law enforcement of getting this decided, we are not -- while
15 we urge the Desist point, we would --

16 Q Are any of the cases pending post-Katz cases?

17 A My associate says no. I am not --

18 Q They are all pre-Katz cases?

19 A I think that is correct.

20 Q And were any of them decided after Desist in
21 the court of appeals?

22 A I think some were decided after Desist.

23 Q You mean the court of appeals decided that
24 Katz is retroactive?

25 A If the Court please, we have somewhat of an

1 analysis of the 22 cases here, and with the Court's permission,
2 I can make an analysis and furnish the Court on that. I don't
3 have that information now.

4 Q Isn't it true that the time of the court of
5 appeals in this case decided as it did, Desist had not come
6 down?

7 A Yes, sir, this is before Desist, yes, sir.

8 Q Well, they didn't have any retroactivity ques-
9 tions --

10 A No, sir, they did not.

11 Q -- by decision of this Court?

12 A That's right.

13 Now, the third question involved is that the inform-
14 ant did not testify at the trial. This was raised in -- the
15 problem was discussed in a dissent by Judge Warren on one of
16 these cases, and it has been brought up before. But our po-
17 sition on that is the question of the tactics at the trial
18 and the use of witnesses is not a constitutional question,
19 that the necessity of obtaining a warrant and its constitu-
20 tionality must be determined at the time of the search, and
21 you don't know then whether or not who is going to testify, or
22 whether there will be any trial at all.

23 And so we say that this may be some other type of
24 law problem, but the question of whether a witness is used
25 isn't -- it can't be a factor in determining the

1 constitutionality of the search and the necessity for a warrant.

2 Thank you, sir.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney
4 General.

5 Mr. Boeger?

6 ARGUMENT OF JOHN L. BOEGER, ESQ.,

7 ON BEHALF OF RESPONDENT

8 MR. BOEGER: Mr. Chief Justice, may it please the
9 Court, the issue here is not just the legality of a search and
10 seizure. The issue, of course, is a combination of an illegal
11 search and seizure, and then the use of that evidence in a
12 federal criminal trial.

13 Q Would you spell out to be precisely where do
14 you think the search is and where is the seizure on the facts?

15 A Well, this would be while the -- well, let's
16 take the situation of the informant in the home --

17 Q Take the man in the closet first. There was a
18 man who was sitting in the closet listening with his ears and
19 not by any electronic devices.

20 A Well, of course, I think he seizes words, in
21 effect. Now, whether that is an unreasonable search and
22 seizure, that is a different question than what is involved
23 in the electronic eavesdropping cases. But I mean he actually
24 has the words.

25 Q Suppose he had been just a casual visitor

1 drinking beer with two of them, and went down and told the
2 United States Attorney or the Treasury Agents all about this?
3 Do you think he also would have been guilty of seizing, as
4 you put it, seizing these words?

5 A Yes. Again, it is a question of whether or
6 not it is unreasonable, but I think when someone looks with
7 their eyes at something in plain view, that a seizure -- and
8 then goes over and picks up the material, that is a seizure.
9 Of course, it is a question of whether seizing something in
10 plain view is an unreasonable search and seizure.

11 Q You don't need to go this far in this case, do
12 you?

13 A No, not in this case.

14 Q You're not -- there is no real issue about the
15 man in the closet, is there, in this case?

16 A No, we haven't argued that point --

17 Q But there is about the electronic, the radio
18 transmittal, is that true?

19 A That is the only -- as I understand it, this is
20 the only ruling by the court of appeals and, of course, the
21 only thing raised by the government in the petition for
22 certain and, of course, it is the only thing we brief.

23 Q Why don't you go on with each of them, one at
24 a time. It will help me if you make the distinction -- how
25 about then the occasion when they were in Jackson's home and

1 Jackson had the electronic transmitter somewhere on his person,
2 and transmitted out. Will you tell us what is the search and
3 what is the seizure; and, then, third, what is unreasonable
4 about it. Those would be the three issues, wouldn't they?

5 A I do not think there is a meaningful distinc-
6 tion between whether the overhearing occurred in the informant's
7 home or whether it occurred in the defendant's home. I think
8 the social interests and the policy reasons behind the Fourth
9 Amendment still requires and should require that there be
10 judicial control whenever an individual has an electronic de-
11 vice, a listening device on his person and then engages some-
12 one else in conversation.

13 Q You put your emphasis there on social interests
14 and follows it behind rather than the language, and which do
15 you think governs it?

16 A Well, of course, the language of the Fourth
17 Amendment --

18 Q It should have some incidental effect, shouldn't
19 it?

20 A It has -- that is the important thing. Of
21 course, all cases aren't as cut and dried as others and there-
22 fore -- for example, it is my contention, which actually doesn't
23 have to be made in this case, that actually the government
24 obtain warrants before they electronically eavesdrop doesn't
25 necessarily mean that this electronic surveillance should be

1 permitted. But this Court has indicated --

2 Q Electronic eavesdropping?

3 A Electronic eavesdropping. Of course, this
4 Court has indicated in Osborn, the Berger case, in the Katz
5 case, that if we are going to allow this search and seizure,
6 that it shouldn't be done without a warrant. I think there
7 are good reasons for not permitting the electronic surveil-
8 lance at all, even with a warrant, but apparently --

9 Q Do you mean constitutional reason or just good
10 reason, in your judgment?

11 A I think there is good constitutional reasons,
12 based upon the holding of this Court many years ago in the Boyd
13 case. In Boyd this Court held that the government could not
14 subpoena private papers of the individual. The Court treated
15 the case as a criminal case. I believe it was a customs
16 violation, a forfeiture case. The Court held that the govern-
17 ment couldn't even subpoena through judicial process these
18 private papers. ,

19 Now, the only distinction between that and the
20 electronic eavesdropping is that in one case the individual put
21 the -- his thoughts down on paper, whereas here, in the White
22 case, the individual spoke his thoughts.

23 Q Well, what would you suppose that the informer
24 himself was then invited to the defendant's home and the de-
25 fendant says something to him and records it on the informer's

1 brain, may the informer testify?

2 A Of course, this Court --

3 Q There is no electronics, no electronics in-
4 volved.

5 A Of course, that is what this Court held in the
6 Hoffa case, and --

7 Q Well, wouldn't your principle really reach
8 that?

9 A In my opinion it doesn't, but I think --

10 Q Isn't that really the heart of the matter,
11 whether the government may use an informer --

12 A No, because a person may be -- this Court has
13 held in --

14 Q Of course, the real expectation is that this
15 fellow was a friend, that is why he was willing to speak to
16 him and deal with him.

17 A And I would accept that he takes the risks that
18 this person might repeat what he said.

19 Q You mean it is not an invasion of his house,
20 if the government sends an informer in to --

21 A I think it is, but apparently this Court ruled
22 otherwise in Hoffa.

23 Q You just said that you accepted that.

24 A And Lewis.

25 Q You say it isn't a violation of the Fourth

1 Amendment for the informer to enter the defendant's house or
2 not?

3 A I think it is, but I think the Court has held
4 otherwise in Hoffa and Lewis.

5 Q Doesn't your position -- isn't that critical
6 to your position here?

7 A No, I don't think so, because I think the
8 electronic surveillance is then an addition to what intrusions
9 have already been made.

10 Q So the defendant -- the government doesn't in-
11 vade his privacy by sending an informer in the house, it isn't
12 until he records something on a receiver or transmits it that
13 the violation --

14 A For the purposes of this case, I will concede
15 that.

16 Q Even though you would say if the recorder
17 isn't working and nobody hears anything, even though he is
18 using it, he can go out and testify in court to it, I gather.

19 A Right. Of course, any time there is a Fourth
20 Amendment violation, you still have to prove taint. The govern-
21 ment, in its brief, ironically takes the position that elec-
22 tronic surveillance is very necessary in the fight against
23 crime, in federal and state law enforcement. But the ironic
24 part about it, when you start examining cases where the govern-
25 ment has had to admit that the electronic surveillance was

1 illegal, then when this Court has ordered hearings in lower
2 courts to determine taint, it always ends up or almost --
3 well, a large percentage of the time, they never use the
4 electronic surveillance, and this is even in situations where
5 defendants have been overheard discussing the case, discussing
6 facts concerning the allegations in the indictment.

7 Q Do you think you can prevail in this case with-
8 out getting into Desist, as Mr. Justice White --

9 A Yes, Your Honor. As I understand this Court's
10 holding in Desist, it was that Katz is prospective as to things
11 that Katz departed from in previous holdings. I don't think
12 the Seventh Circuit's holding -- and, of course, the Seventh
13 Circuit found in its en bank opinion that this was a Fourth
14 Amendment violation, regardless of whether they considered
15 Katz.

16 Now, it is pretty difficult, but maybe this case
17 needs to be -- we turn back the hands of time and have the
18 Court consider this case as the law was before Katz.

19 Q Do you mean in this argument that without Katz
20 you would prevail, despite --

21 A Yes. And, of course, the government relies on
22 Hoffa and Lewis and they don't want us to use Katz, but Hoffa
23 and Lewis were decided before these in this case. Also at the
24 time, of course, that the Seventh Circuit rendered its opinion,
25 Desist had not been handed down by this Court, therefore I

1 think more properly Linkletter should apply in this situation,
2 and Linkletter would apply Katz because the White case was on
3 direct appeal at the time Katz was decided. This isn't a
4 2255 situation coming up years later, this is something that
5 was objected to at trial and taken on up to the appellate
6 process.

7 We submit that this Court should not give its
8 judicial blessing to uncontrolled electronic eavesdropping by
9 the government. Nowhere in its brief does the government sug-
10 gest a reason why they have to electronically eavesdrop on
11 conversations without some judicial control. Certainly in this
12 case it went on for many days and apparently there is no argu-
13 ment that a judge wasn't available, which sometimes happens
14 on midnight searches in narcotics cases.

15 But if this Court should reverse this case, it is
16 going to permit the government to electronically eavesdrop on
17 conversations which the speaker thinks are private, that they
18 are not going to be electronically recorded or transmitted to
19 others; and of course since the government argues that they
20 should be able to do this, not only without a warrant but
21 without even probable cause but on rumor alone, I think the
22 chances of abuse are enormous.

23 It not only in our opinion would be a violation of
24 the victim's Fourth Amendment right, but it would be a sup-
25 pression of First Amendment rights of all citizens in these

1 United States.

2 Q Do you mean no eavesdropping can be constitu-
3 tionally indulged in to catch criminals? Is that what you
4 mean?

5 A In other words --

6 Q I am not talking about -- I am talking about --
7 your argument seems to be broad enough to say under the First
8 and these other amendments that it is unconstitutional to let
9 anybody testify against a defendant who heard him by eaves-
10 dropping.

11 A That is my opinion. I do think that the Court
12 in --

13 Q That is rather ancient practice, isn't it?

14 A Well, I think this Court has indicated in Katz
15 and in Osborn and Berger that they will permit it if there is
16 a judicial control, something like a warrant. Now, there have
17 been arguments made that it might be impossible to draft a
18 statute in such a way to get away from a general search for
19 evidence. I guess we will have to wait and see if and when a
20 case ever comes up on this new statute.

21 Q Well, suppose informant had a concealed tape
22 recorder in the kitchen. Is that eavesdropping?

23 A If the informant has a recorder --

24 Q Concealed in the kitchen, which recorded the
25 whole sale of the narcotics. Would the tape on that recorder

1 be any good?

2 A If assuming they put it in evidence at the
3 trial.

4 Q Well, why would it be inadmissible?

5 A Because again I think the Fourth Amendment re-
6 quires that before this type of evidence be permitted, that
7 they obtain a warrant. And, of course, in this case, you have
8 the additional problem of the informant not even testifying at
9 trial, and this is significant for two reasons.

10 First, of course, you are unable to cross-examine
11 the informant. But secondly, evidence was introduced in this
12 case which was hearsay. In other words, the agents overheard
13 conversations made by the defendant and the informant. The
14 agent testified to what he heard the informant say. Now, that
15 is clearly hearsay and certainly there is no way that you
16 could cross-examine the informant.

17 Q But you do agree that the recording wouldn't
18 be hearsay?

19 A It is not hearsay. I just think the Fourth
20 Amendment requires a warrant in that situation.

21 Q And it also requires a warrant for any over-
22 hearing?

23 A Electronic overhearing?

24 Q Of any kind.

25 A No, not --

1 Q You keep saying eavesdropping.

2 A Electronic eavesdropping.

3 Q Well, I mean neither the informant nor the de-

4 vice on him was under -- it was right there in front of him.

5 It wasn't eavesdropping. You have got to give it another name.

6 A No, that is the situation, of course --

7 Q You mean electronic surveillance?

8 A Electronic surveillance.

9 Q So you are getting back to Mr. Justice Black's

10 point to say any electronic surveillance, any evidence received

11 from that is automatically inadmissible?

12 A Unless there is a warrant.

13 Q Well, what you have -- I still don't understand

14 how you can defend your position without resting it on Katz.

15 And in order to rest it on Katz, you get rid of Desist.

16 A Well, for one thing --

17 Q The thing that Katz did was to say the Fourth

18 Amendment, the old concept that the Fourth Amendment pro-

19 tected just places was no good any more. What the Fourth

20 Amendment did was to protect people, not places, and from that

21 I would suppose you would argue that a person has a reasonable

22 expectation, irrespective of whether it is home, an office,

23 that he is not going to be bugged. Isn't that the guts of

24 your argument?

25 A Yes, Your Honor.

1 Q And how can you make it apart from Katz and
2 how can you making it without getting rid of Desist?

3 A I think if all the cases, all the decisions of
4 this Court prior to Katz are read that there is no case directly
5 in point with this case, therefore the Seventh Circuit's
6 opinion is not contrary to any previous decision of this case.
7 And for that reason, the Appellee, the Respondent in this
8 case, does not need Katz in order to prevail.

9 Now, we have another, I suppose the closest case,
10 is, of course, the On Lee case, which I don't know if the
11 government is arguing that On Lee is still good law or whether
12 they are not. Certainly On Lee was --

13 Q Well, the underlying argument is that Katz
14 overruled On Lee.

15 A Well, maybe it did and maybe it didn't. I do
16 know that Katz says that it overruled Goldman and the Olmstead
17 case. Mr. Justice Brennan, in his dissent in Lopez, said that
18 Goldman, Olmstead and On Lee should be overruled. Well, I
19 think it is certainly clear that Katz overruled Olmstead and
20 Goldman. It didn't specifically state in the opinion that
21 they are overruling On Lee.

22 I suppose this case presents that issue clearly.

23 Q As I understand it, you are saying that all
24 eavesdropping violates the Fourth Amendment.

25 A Electronic eavesdropping, Your Honor?

1 Q What?

2 A Do you mean --

3 Q I thought you said all eavesdropping. Why would
4 it be different if you said electronic and not electronic?

5 A My personal opinion is that the use of in-
6 formants, and certainly the use of informants quite often en-
7 tails coercion on that person, I think better practice would
8 be that there be a warrant before you take someone in to go in
9 and elicit statements from someone.

10 Q Say a man has been kidnapped, taken down into
11 the woods somewhere secretly. The only chance in the world
12 you have to convict him, the only possibility was that some
13 eavesdropper heard him commit the crime and saw it. Would you
14 say that was barred?

15 A Well --

16 Q And would keep him from being tried?

17 A No, but certainly that is not an informant type
18 of situation.

19 Q But I thought you said eavesdropping. I am
20 talking about eavesdropping.

21 A No, I am not taking the position --

22 Q Electronic or otherwise.

23 A I am not taking the position that all eaves-
24 dropping requires a warrant.

25 Q It has got to be electronic eavesdropping?

1 A Electronic eavesdropping.

2 Q Do you think the Constitution, written back
3 there at the time it was written, provided that electronic
4 eavesdropping should be barred but left it free for any other
5 kind of eavesdropping to be introduced?

6 A Well, of course, back then when it was written
7 they didn't, I guess, have such things as electronic bugs and
8 that might be the reason why it is not specifically stated in
9 the Fourth Amendment. Of course, there have been some dispute
10 in the past --

11 Q They didn't have any then, at the time they
12 wrote the Fourth Amendment.

13 A That's right. There actually has been some
14 dispute --

15 Q But for some unknown reason the same language
16 was used all the time, been there all the time, then was not
17 thought to cover any electronic eavesdropping, but now it does,
18 but these other eavesdropping can be used as evidence.

19 A This apparently is what this Court has held
20 certainly in --

21 Q Well, I am afraid you are right about that.

22 A Now, we submit that whether or not there was a
23 voluntary government agent, in other words whether or not the
24 informant consented to the placement of the bug on his person
25 is a legally significant issue. However, if this case is

1 reversed, it will permit the government to go out, coerce
2 people, to put the bug on their person, and then engage people
3 in conversation and record what they say. I think this would
4 be --

5 Q This has been the law for some years, hasn't
6 it?

7 A Yes, and apparently although the government
8 says this is necessary in their fight against crime, they
9 have been doing it for years and organized gambling is still
10 going --

11 Q Crime hasn't gone down, right?

12 A Apparently it is going up. I think, in the
13 long run, that the use of coerced informants, placing the bugs
14 on them, that this is going to be close to what George Orwell
15 wrote about in "1984," which is only 14 years away. I think it
16 will cause people to clam up. They aren't going to cooperate
17 with the police; probably people don't cooperate with the
18 police as much now as they used to. They are afraid of the
19 police. They are going to be afraid that everyone they are
20 talking to is bugged, and I --

21 Q They will be afraid to commit any crimes, afraid
22 the policeman would tell on them.

23 A I think we all want to go off the record every
24 once in a while.

25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Thank you.

2 (Whereupon, at 12:10 o'clock p.m., argument in the
3 above-entitled matter was concluded.)

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