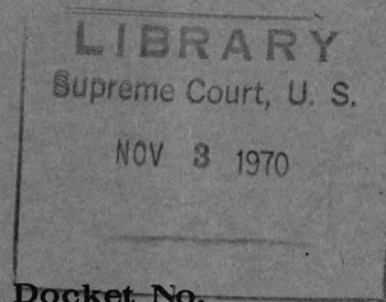


Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

UNITED STATES OF AMERICA,

Petitioners,

v.

JAMES A. WHITE,

Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES A. WHITE,

Respondent.

No. 13

Washington, D. C.,
Tuesday, October 20, 1970.

The above-entitled matter came on for reargument 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,
U. S. Department of Justice, Washington, D. C.
Counsel for the Petitioner.

JOHN L. BOERGER, ESQ., St. Louis, Mo.
Counsel for the Respondent.

C O N T E N T S

REARGUMENT OF

PAGE

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

3

Will R. Wilson, Esq.,
on behalf of Petitioner

4

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: Had you finished your
3 presentation-in-chief, Mr. Boerger?

4 MR. BOERGER: I--

5 MR. CHIEF JUSTICE BURGER: Are you saving the rest of
6 your time for rebuttal?

7 MR. BOERGER: No. I represent the Respondent. I just
8 have one--

9 MR. CHIEF JUSTICE BURGER: How much time? Let me take
10 a look at the notes here. You have got six minutes.

11 MR. BOERGER: Well, I just--really only have one short
12 comment, Your Honor.

13 REARGUMENT OF JOHN L. BOERGER, ESQ.,

14 ON BEHALF OF THE RESPONDENT

15 MR. BOERGER: Although the Government is apparently
16 stating that they are not urging that they be permitted to
17 use this type of electronic gub to obtain statements or con-
18 fessions of past events, I might point out to the Court that
19 the effect of a reversal here might permit just that, because
20 in the Sixth Circuit just very recently--in the Hoffa case--
21 they have taken the position that there was no constitutional
22 violations when the co-defendant was bugged one day prior to
23 the return of the indictment.

24 But that case has been submitted there now, but the
25 Government did take the position there that there was no

1 Fifth, Sixth, or Fourth Amendment violation.

2 Thank you.

3 MR. CHIEF JUSTICE BURGER: Mr. Attorney-General, you
4 have seven minutes.

5 REARGUMENT OF WILL R. WILSON, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. WILSON: May it please the Court, just a few
8 points in rebuttal.

9 One, counsel referred to some of this as being hearsay
10 and I think that that is not a proper application. Any direct
11 testimony of the words which constitute an event is not hearsay.
12 I don't think any hearsay is probably in this case at all.

13 The--perhaps the most difficult--one of the most diffi-
14 cult judicial tasks for a court of last resort is the balancing
15 of values which necessarily go into close constitutional
16 decisions.

17 Q Is what?

18 A Is the balancing of values which perhaps in
19 interpreting the Constitution--in that regard, I want to point
20 out that radio communication is increasingly a part of police
21 work. And that is particularly true in these narcotics cases.

22 A typical narcotics case involves an undercover agent
23 who makes contact. To make a purchase he goes to a street
24 corner, is picked up in a car by someone he doesn't know who
25 takes him around the city and they drive for, maybe, sometimes

1 maybe several hours while they try to throw off a tail; they
2 then go to an apartment he didn't know about, and there he
3 meets somebody that he never saw before and negotiates his
4 purchase. And usually they have to send out and get the
5 narcotics and bring it back, and the proper working of that
6 by the police desk requires radio communication.

7 It takes a squad of from 4 to 7 men to investigate
8 that situation and they have to have communication coming out
9 of the informant who is negotiating a sale.

10 Now, --

11 Q Sometimes it might have a matter of more than a
12 passing interest to the Government agencies to know whether
13 one of its men was in danger, too.

14 A That is exactly right, Your Honor, because this
15 is a very dangerous business and--and especially for the man
16 who is negotiating the purchase and they need that to insure
17 his safety.

18 In addition--help insure it--they need it for--to
19 permit the proper timing of the arrest and then they also need
20 it for--it is very valuable in following a car. You can--if an
21 informant has a radio on him they can follow the car at a much
22 greater distance. They don't have to get so close to it, in
23 order to do the tailing.

24 And it protects the potential defendant against the
25 informant. In this type of police work the person who negotiates

1 the sale is often an addict himself and is maybe not the most
2 reliable person in the world and one of the things that the
3 responsible officer wants to know is exactly what is happening
4 and not just a second-hand version of it from an informant who
5 purchases it and may not be too reliable.

6 And so it actually operates to help protect the--the
7 defendant himself against possible--

8 Q Mr. Attorney-General, what of the--position that
9 they never had an opportunity to cross-examine this man.

10 A Well,---

11 Q Is there any explanation in the record as to
12 why he wasn't secured?

13 A Except--the explanation in the record is that
14 they looked for him and couldn't find him.

15 Q I see.

16 A There is a dispute between us as to the diligence
17 and all that, but there is an explanation that they looked
18 for him and couldn't find him at the time of the trial.

19 We would wind up our presentation here by urging that
20 in considering of--seeing this situation, that we urge upon
21 the Court that you take into consideration the overall demands
22 of law-enforcement in this situation and if there is to be a
23 balancing of rights here as between the person under surveil-
24 lance or under suspicion, on the narcotics trail, in consider-
25 ing his rights vis-a-vis the Government in making that case,

1 to also balance against that the effects of the narcotic trade,
2 and, I would make a special appeal for the young people of
3 inner cities where--

4 Q Would all that make any difference? As part
5 of the constitutional question?

6 A It does not, Your Honor, except that you get to
7 this problem of--of a very difficult decision in a close case.

8 Q Do we ever get to a balancing until we find that
9 there is one right under the Constitution apparently on a
10 collision course with another right? How do you spell out
11 some right in conflict with the claimed right of the individual.
12 That is the only time we have to get to balancing, isn't it?

13 A Well, that is possibly true, and I was thinking
14 in terms of the overall effect of law-enforcement in the
15 narcotics trad--field, and the terrible effect upon the victims.

16 Q And I suppose if anyone were to suggest a listen-
17 er can't repeat the conversation he has heard, perhaps even a
18 First Amendment argument might be raised about that, an inhibi-
19 tion on the First Amendment rights to speak.

20 A We respectfully request that the decision be
21 reversed.

22 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney-
23 General. Thank you, Mr. Boerger. The case is submitted.

24 (Whereupon, at 11:42 o'clock a. m., the reargument
25 in the above-entitled matter was concluded.)