In the

Supreme Court of the United States

United States Of America,	)	
	)	
Petitioner,	)	
	)	
V.	)	No. 75-212
	)	
Thomas W. Donovan, et al.,	)	
	)	
Respondents.	)	
	)	

Washington, D. C.
October 13, 1976

Pages 1 thru 50

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UNITED STATES OF AMERICA,

Petitioner,

v. No. 75-212

THOMAS W. DONOVAN, et al.,

Respondents.

Washington, D. C.,

Wednesday, October 13, 1976.

The above-entitled matter came on for argument at 1:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

BERNARD A. BERKMAN, ESQ., Berkman, Gordon, Kancelbaum and Levy, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113; on behalf of Respondents Merlo and Lauer.

CARMEN A. POLICY, ESQ., 424 City Centre One, P. O. Box 837, Youngstown, Ohio 44501; on behalf of Respondent Buzzacco.

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 BURGER: We will hear arguments next in No. 212, United States against Donovan.

Mr. Frey, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on the government's petition for writ of certiorari to the United STates Court of Appeals for the Sixth Circuit, which affirmed an order of the district court suppressing certain evidence obtained during wire interceptions as to the five respondents in this case.

There are two separate issues, one of which relates to three of the respondents, and concerns the obligations of the government to identify certain persons in the application, and of the court to identify them in the order authorizing the wire interception.

The second concerns the obligation of the government to supply names to the district court for purposes of discretionary service of inventory notice after an interception has terminated.

And underlying both these issues, assuming the government did not live up to its responsibilities under the statute, is the question whether suppression of the evidence

is an appropriate remedy.

In November 1972, a federal district judge in Cleveland authorized the interception of wire communications relating to gambling offenses over four telephones. The application for this authorization was supported by an extensive affidavit, which takes up 48 pages of the Appendix in this Court.

The principal targets of the investigation were three suspected bookmakers, Kotoch, Spaganlo and Florea. And both the application and the court order named them, as well as three other individuals,who were expected to be overheard during the interceptions, discussing the gambling enterprises.

Several weeks after the termination of the initial interception, application was made to the court for authorization for an extension of the interception on two of the four original phones, and also for monitoring of a third phone.

The application and order named two new persons and deleted the names of three individuals who had been identified in the first go-round.

Respondents Donovan, Robbins and Buzzacco were not specifically identified in either the application or order, the original or extension.

The district court, in the suppression hearing, upon review of various items of information in the government's possession at the time the renewal application was filed,

determined that there was, in fact, probable cause to believe that these respondents would be overheard discussing illegal gambling conversations during the second interception. And because they had not been identified in the application and order, the district court suppressed their conversation from use in evidence against them. The Court of Appeals affirmed.

Now, as to respondents Merlo and Lauer, there is no question about the initial propriety of the overhearing of their conversations. However, after the interception was completed, the government supplied the authorizing judge with the names of 37 persons who had been identified as being overheard during the surveillance.

Service of inventories on these persons was ordered by the court and was carried out.

Subsequently, the government realized that it had omitted to inform the judge of the identities of two other persons, and it obtained an amended order and served additional inventories.

However, Merlo and Lauer were not named to the judge, and did not receive a service of inventory. They were, thereafter, indicted; and after the indictment they, as well as all the other defendants, were given access to the orders, the application, and the transcripts of the intercepted conversations. Everybody had access at the same time.

The district court ordered suppression of the inter-

cepted conversations of Merlo and Lauer because of the government's failure to supply their names to the judge, so that the judge could determine whether discretionary notice of the taps should be served upon them.

The Court of Appeals affirmed.

Neither court below found that the failure to supply the names for inventory purposes was anything other than inadvertent. Or that these respondents did not in fact know, long before they were indicted, that they had been overheard, or that there was any prejudice to them as a result of delay in official notification of the overhearings.

Decision of the Court of Appeals stands, rather, for an absolute rule requiring suppression, regardless of lack of governmental misconduct or prejudice to the defense.

Now, of the two issues before the Court, the one concerning the identification of persons in the application and order is by far the most important to the future administration of the Act, and it is to that issue that I plan to devote the bulk of my argument.

The inventory issue was less important. It is now the government's policy, even though we don't believe the Act compels us to do so, to su-ply the supervising judge with the names of all overheard persons as to whom we believe there is any reasonable prospect of indictment.

Perhaps the approach of the Court of Appeals for the

Ninth Circuit, which suggested that rather than submitting specific names we should submit categories of persons who had been overheard, is a better policy, would be more helpful to the district court in exercising its discretion, and we would have no objection to following any reasonable policy that the district courts determine would be useful to them in this area.

QUESTION: As to the inventory notice?

MR. FREY: As to the inventory notice, that's right.

However, whatever the rules may be, suppression of the evidence is an inappropriate and unauthorized response in these cases, and it's on that point that I want to make a few brief observations before I turn to the identification question.

First of all, Section 2518(10)(a), which is the suppression provision, and which is set forth, I believe, at page 5a of the Appendix to our brief -- authorized the district courts to suppress on one of three grounds: that the communication was unlawfully intercepted; that the order of authorization or approval is insufficient on its face; or that the interception was not made in conformity with the order.

Now, none of these three grounds is applicable to a post-intercept failure to comply with the procedures that follow. And it's our argument that you cannot suppress under the statute for a failure to comply with post-intercept procedures.

Now, I point out in this connection that where Congress wished to exclude evidence for post-intercept defects, it specifically so provided. For example, Section 2518(8)(a), which is not in the Appendix, concerns the sealing, and it provides that after the interception is terminated, the tapes must be turned over promptly to the district court for sealing. And it further provides that the absence of the seal called for in that section, or a satisfactory explanation for the absence, means that the evidence is to be excluded.

That is a specific exclusionary rule dealing with a post-intercept failure.

Similarly, and more directly in point in this case, Section 2518(9) of the statute. That is the provision that sets forth the congressional requirement of notice antecedent to the admission of evidence in a case. That is, notice to the defendant of the fact that he's been intercepted.

That provision says that the contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence, or otherwise disclosed, unless each party, not less than ten days before the trial, hearing or proceeding, has been furnished with a copy of the court order, accompanying application, et cetera.

That is, Congress has said what is necessary. Respondents Merlo and Lauer have gotten the information that's necessary. It's still more than ten days before their trial.

We think there's no ground, therefore, for excluding it.

QUESTION: And this never did go to trial, that is to a district court trial?

MR. FREY: Not as to these respondents. They were severed.

One final point. In discussing the Giordano-Chavez analysis here, of course the courts have focused on the question of centrality.

Now, we don't deny that the inventory notice concept is a central part of the statute; but that, to us, doesn't answer the question that must be answered before determining whether to suppress. And that is, whether the particular kind of defect in the procedures is itself so central to the statute. That is, here, whether the fact that only 39 people rather than 41 people were named is so central to the statute, in the absence of prejudice to the defendants, that suppression is an appropriate remedy. We say it clearly is not.

Now, turning to the naming issue: The Court of appeals held that the government's obligation to identify extends to all persons whom the government has probable cause to believe it will overhear talking over the monitored telephones about the criminal activities under investigation.

We submit that the language and structure of the Act, its legislative history, and substantial policy considerations dictate a much narrower interpretation of that requirement.

I'd like to begin by saying a word about the dictum in Kahn, because several Courts of Appeals that have examined this question have really stopped their inquiry after they looked at the dictum in Kahn.

Kahn was a very different case. Kahn concerned the question of who, among the people whose phone was being monitored, had to be named in the order. And Kahn held that only where you had probable cause did you have to name somebody whose phone was being intercepted. Kahn did not concern the question of your responsibilities to name people who were calling in to the intercepted phone from phones that are not themselves being monitored. It wasn't briefed, it wasn't argued, it wasn't necessary to the court's decision, and I don't think a fair reading of the Kahn dictum suggests that the issue is in any way foreclosed.

QUESTION: But, Mr. Frey, in Kahn, Mrs. Kahn's phone wasn't being monitored.

MR. FREY: Oh, yes, it was.

QUESTION: It was Mr. Kahn's phone, the phone was listed -- Minnie Kahn was calling in, he was away, and of course she was at home.

MR. FREY: Well, actually, she was at home, but the point of our position is that --

QUESTION: The daughter, too, as I remember it.

MR. FREY: Well, that's right. And what we're saying

is that the naming obligation extends to people who are users of the telephone that's being intercepted, in the case of a telephone --

QUESTION: Well, weren't these people users of the telephone?

MR. FREY: Certainly. The Kahn family --

QUESTION: No, I mean in the case we've got before us.

MR. FREY: No, they were not. Their telephones were not being monitored. They were calling in from outside.

QUESTION: But they were using -- they were communicating over the phone being monitored, just as Mrs. Kahn was.

MR. FREY: Well, yes, but the difference --

QUESTION: Is the difference on which instrument you use, is that the point?

MR. FREY: The difference is on which end of the phone. That is, when --

QUESTION: Does the statute draw that distinction?

MR. FREY: I think it does, yes. And I intend to --

QUESTION: Well, I'm sorry, I shouldn't have --

MR. FREY: -- get to that.

All right, let me --

QUESTION: Mr. Frey, just to make one more point clear, Mr. Kahn was away from wherever it was that the phone was, and Mrs. Kahn was the one that was home. He was not in the

place where the --

MR. FREY: But it was -- it was the phone of the family. That is, these phones were the phones of the Kahn family, and --

QUESTION: Found to be the Kahn household.

MR. FREY: It was the Kahn household telephone, and our position would be that it's not unreasonable to require the government to identify those people whose phone is being intercepted. And I think the statute focuses, as I will get to in just a moment, on whose telephone is being intercepted. That's the person that Congress was talking about in the statute.

Now, Section 2518(1)(b) says that the application must state, quote, "the identity of the person, if known, committing the offense and whose communications are to be intercepted".

Now, we submit that in this case that requirement was fully met when the application named Kotosh, Spaganlo and Florea. These were the targets, these were the persons who were expected to be overheard talking from the phones that were being monitored about the illegal activities.

Now, the first thing to note, as I've stressed, is the singular word "the person" in the statute. Now, in the New York statute, which was the model for this particular provision in the federal statute, and which is quoted, cited at Berger, in the opinion in Berger, the New York statute

provided the person or persons had to be identified. Congress dropped "or persons" out of the federal statute, only "the person" need be identified.

And we think that the congressional notion was that there would be one target in these cases, that it would be the target's phone that would be monitored, and that that was the person who should be named, if that person was known.

The critical distinction, and it's one we believe is clearly built into the statute, and it's one we urge the Court to recognize in its decision, is between the users of the telephone that is being monitored on the one hand, and all other persons throughout the world who may converse from unmonitored phones on the other hand.

The naming requirement applies to the former, in our view, and not to the latter.

Now, there is internal evidence in the statute, I think, that supports this quite clearly. If you will look at page 2a of the Appendix to our brief, and 3a, we set forth there subsection 2518(3), which talks about what the judge must find in determining to issue an authorization.

Now, subsection (a) says that the judge must find that "there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense".

Subsection (d), which ties in with this, says that --

and I am going to edit it slightly -- "there is probable cause for belief that the facilities from which, or the place where, the wire communications are to be intercepted", that those facilities"are being used or about to be used in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

Now, the "such person" that Congress was talking about there was the individual who has committed the offense. The structure of this statute ties a particular individual, a particular telephone, a particular offense; and we think that that is further reinforced by subsection (4), which deals with what the contents of the court authorizing order shall include.

QUESTION: Mr. Frey, you briefed that -- it's in your brief -- that somebody who regularly uses the phone, they should be named.

MR. FREY: Well, that's right. I think if we expect to overhear -- that is, if, let's say, as may have been the case in this case, one of the targets uses his girl friend's telephone to receive bets or line information, or something like that, we would agree that that may be a case where he should be named. But that's because he is a user of the phone that's being intercepted.

QUESTION: So you're putting it not on the person, but the instrument, the phone?

MR. FREY: We think that the identification requirement

is tied to the instrument, and to the people who are likely to be using that instrument and not to everybody in the world. And I'll get, in a little bit, to some of the practical reasons for that.

QUESTION: Yes, but, counsel, you're talking about "everybody in the world", there's no claim you have to name everybody, it's only those who are believed to be committing the offense.

MR. FREY: Well, I understand, but that could be -- I'm not suggesting that we have to --

QUESTION: Well, it would be limited to those that the government has reason to believe are committing the offense.

MR. FREY: But, when I'm talking about everybody in the world, I am making a distinction between the users of the phone -- I mean, I understand that probable cause is a requirement, in any event; if we don't have probable cause, we don't have to name --

QUESTION: Let me make it specific. Supposing in the Kahn case, the government had known, which they did not, in advance that Minnie Kahn was a partner in the gambling venture. You said she would not have had to be named.

MR. FREY: No, I think we would say that she should have been named.

You can argue about whether when you name --

QUESTION: Tell me this, just so I understand, why would you concede that?

MR. FREY: Because it was her telephone that was being monitored. The tap was put on --

QUESTION: By her telephone, you mean she was a regular user of the phone? It was not listed in her name.

MR. FREY: Yes, but what we expected when we overheard -- assuming we had probable cause, we would have expected to overhear her engaging in criminal conversations from that phone, rather than calling in from an outside -- in the Kahn case there was another person, a lay-off bookie in Indiana, --

QUESTION: Right.

MR. FREY: -- who was one of the people who was in this "rest of the world" category that I'm talking about, and there was no briefing or argument in Kahn, he was not indicted, and there was no question as to whether he should have been named; although, arguably, there was probable cause to name him.

But we think that he is in a different position from Mrs. Kahn.

QUESTION: Well, let me just be sure I understand. Why do you concede she would be properly named? Is it because she lived there or she was a regular user of the phone?

MR. FREY: Because she's a user of the phone. Because we -- because, on the hypothetical, we have probable cause to

believe that we will overhear her engaging in conversations about the criminal activity from the phone that's being monitored.

QUESTION: Now, what in the statute talks about the "from the phone"? That's what you -- you seem to emphasize which instrument is used.

MR. FREY: Well, the statute says the person. Arguably, --

QUESTION: Yes, but you've just conceded that it can be two persons.

MR. FREY: Well, I -- for purposes of our construction, I mean, in another case, the question of what would happen if we named only one of two people, which is an issue, for instance, in the Doolittle case, where there was Doolittle, who was the principal target, and then there was a fellow named Sanders, who was an employee of Doolittle's, who worked in Doolittle's club. That poses different questions that aren't presented here.

Our policy normally now is to name such persons.

QUESTION: All right. But we're trying to -- I'm trying to understand what you think the statute means. And I think you've conceded that the singular aspect of it is really not controlling.

MR. FREY: Well, it's -- I'm suggesting that the Court could conclude that it's not absolutely controlling; but

I still think it's very significant, because the statute ties the person to the facility that's being intercepted.

In subsection (4), at the concluding paragraph, at 2518(4), it says that "An order authorizing the interception of a wire or oral communication shall ... direct that a communication common carrier ... furnish necessary assistance." If you look at page 4a -- "to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord ... is according the person whose communications are to be intercepted."

Now, the telephone company --

QUESTION: I don't take it to be -- maybe I'm confused, but I take your argument to be that the government can't anticipate, and Congress didn't intend that the government anticipate,everyone who is going to make a call to a monitored phone.

MR. FREY: Well, but there are problems with that, of that nature.

QUESTION: Unless you have probable cause with respect to certain persons, to believe that they are regularly communicating with the primary monitored phone.

MR. FREY: Well, Mr. Chief Justice, our first position is wholly aside from practical considerations, which we think are substantial and which I will get to if I have time; the question is, What does the statute require us to do?

Now, our position is that the statute focuses on the person whose telephone is being intercepted. Now, here, the person whose communications are to be intercepted here, the telephone company was not providing services to Donovan or Buzzacco or Robbins in this case, of a kind that would be interrupted, of a kind for which you would need a court order, court assistance, to direct their facilitation. The telephone company was providing the services to Kotosh, to Spaganlo, to Florea, for the persons whose telephones were being intercepted.

So that this distinction between callers-in from outside and callers-out from the monitored phone is, I think, built into the statute.

It is also, I believe, built into the -- reflected in the legislative history.

For instance, in the Senate Report, which is the principal document in the legislative history, where they talk about the inventory notice provision, the report says at page 105: through its operation, that is the inventory notice provision, all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress, et cetera.

Now, again, the concept that Congress had, and perhaps it was unsophisticated in terms of the reality of investigations that are taking place, but the concept that

Congress had was that there would be one target, and if we knew who that target was, as we normally would, that target would be named.

QUESTION: But the inventory provision says "persons", with an "s".

MR. FREY: Well, --

QUESTION: 2518(8)(d) does. The inventory provision, "to the persons named in the order."

MR. FREY: Well, it's perfectly clear that in practice more than one person is ordinarily named. What we are inquiring into here is the obligation to in fact name people who are -- who we have probable cause to believe will be calling in from outside phones. And I just don't think that that obligation is contained in the statute, or was ever intended by Congress.

Now, I'd just like to say a word or two about the policy consideration, because the broad interpretation of the Court of Appeals accomplishes very little by way of protecting against unjustified intrusions into the privacy of persons who may be overheard.

The statutory scheme does not limit the scope of permissible court-authorized overhearings in terms of the identities of the persons who may be overheard, but rather in terms of the kinds of conversations that may be overheard. Persons who are not previously know to be involved in the criminal enterprise may be overheard, nevertheless, as Kahn

plainly demonstrates.

On the other hand, overhearings of all innocent conversations, even those of the named target, are supposed to be minimized.

So the primary interest os these respondents would not have gained, in any significant respect, they would not have gained one ounce of additional protection had they been named in the order, as they claim they should have been. This is not a great honor to be named in an order of this sort.

The Court of Appeals broad naming requirement not only doesn't accomplish anything in terms of protecting the privacy interests that Congress was legitimately concerned with when it enacted Title III, but it also imposes significant administrative burdens on the government in preparing applications, significant burdens on the court in weighing and approving them, all to no useful purpose.

QUESTION: Let me just ask: Why do you suppose Congress put in any naming requirement?

MR. FREY: Well, Congress explained why they did it, at page 101 of the Senate Report. Congress said -- they listed the requirements contained in subparagraph (b) of 2518(1), and they said "each of these requirements reflects the constitutional command of particularization." And they cited Berger.

And Berger had this to say about the naming requirement: They said -- and the court said, at page 59 of the

opinion in Berger, 388 U.S.:

"It is true that the statute requires the naming of 'the person or persons whose communications ... are to be overheard or recorded ...' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized."

And in Kahn again the Court recognized that there is not -- Congress was wrong, there is not a constitutional obligation to name --

QUESTION: But the point is they wanted to identify the person whose constitutionally protected privacy is to be invaded. And you're saying that the owner of the phone has such a privacy interest, but the other person, the person on the other end of the line has no such privacy interest.

MR. FREY: Well, I'm not suggesting that he has no such privacy interest. What I'm suggesting is that the naming requirement -- after all, the naming requirement is not tied to the kinds of conversations that can be overheard, or the extent of the permissible overhearing.

QUESTION: Well, what I'm trying to understand is why does the reason apply to one and not to the other? That's the heart of my question, I guess.

MR. FREY: Well, I -- well, the reason why it shouldn't is a practical reason. I mean, it's several practical reasons.

You have a case like this, which is a complex gambling conspiracy case, with people actually all over the country transmitting line information, laying off bets. You overheard many, many persons, it's a fast-moving investigation, and then you're telling the government that it has to engage in what essentially is a quite metaphysical evaluation of all the information in its possession, so that it can tell the district court that it has or hasn't probable cause to believe that it will overhear certain persons, and when it tells the district court that, what is the district court to do with that information?

If it has no probable -- if the government has no probable cause, if the district court disagrees with the government, then it strikes the name from the order, and then we can overhear that person as a person unknown.

So it gives the person no protection to be stricken from the order; it does nothing, except it adds a lot of work for the district court.

And if we name someone who is in a borderline case, and we will be forced to a policy of over-inclusion if we lose this case, we will be naming some people who will not be overheard, and then, when a suppression motion comes about, and the intercept order and application are opened up, these people will have, in effect, defamatory information, unsupported by the actual result of the tap, made public, that they were

suspected by the government of participating in criminal gambling enterprises, narcotics, and so on.

So, even in terms of -- I mean, the naming just does not serve a substantial interest of the individual, nor does it further the policy of the Act.

And I think I had better reserve the balance of my time.

QUESTION: Mr. Frey, let me ask you one question. Do you have any doubt that Congress could have drafted a statute that provided only for the naming, upon a showing of probable cause, of the owner of the phone, in view of United States v. White?

MR. FREY: I don't have any problem with it, I don't think they had to provide for the naming of anyone.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Berkman.

ORAL ARGUMENT OF BERNARD A. BERKMAN, ESQ.,

ON BEHALF OF RESPONDENTS MERLO AND LAUER

MR. BERKMAN: Mr. Chief Justice, may it please the Court:

My colleague, Mr. Policy, and I represent five defendants in a gambling indictment, whose telephone conversations were intercepted by the government for use as evidence at their trial.

The district court suppressed these intercepts,

because they were obtained in violation of Title III of the Omnibus Crime Control Act of 1968. My clients, Mr. Merlo and Mr. Lauer, because they never received inventory notice of the intercepts, as required by 18 United States Code, Section 2518 (8)(d), which I shall refer to as (8)(d) of the Act.

And Mr. Policy's clients, because they were not identified in the application for authorization for the tap, even thought they were known to the government, as required by 18 United States Code Section 2518(1)(b)(4), which, if I hae occasion to refer to again, will be as (1)(b)(4).

Both of these suppressions were affirmed by the Sixth Circuit Court of Appeals, and I intend to urge, in my portion of the argument, that the suppression of wiretap evidence against my clients was appropriate, proper and necessary because of the government's violation of Title III (8)(d).

And after that, my colleague will argue for affirmance of the suppression as to his clients, because of the government's Title III violation of (1)(b)(4).

It seems to me that at the outset it is important to identify a couple of facts, which have become obscured or muddied as a result of the briefs and the dissenting opinion in the Court of Appeals below.

One of the things that I think must be clarified is that there never was any actual notice to defendants Merlo and

Lauer.

The trial court who heard the evidence and had an opportunity to observe the demeanor of the witnesses made a specific finding, that no inventory notice was ever served upon Marlo and Lauer, nor did they receive notice in any other way, and that finding by the trial court was commented upon by the Sixth Circuit Court of Appeals, and the majority opinion took the view that 37 other people were notified would at least give these defendants the feeling that they had not been intercepted, because they had failed to receive any inventory notice, as required by Section (8)(d).

So that so far as this case is concerned, it is clear that this is not a situation in which only a technical violation, the failure to serve an inventory notice, was -- occurred in the record, but, in fact, up until the time they were indicted, some eleven months later, and until they actually received the information as a result of their discovery applications, they had no such actual notice.

QUESTION: What was the reasoning of the Court of Appeals that your clients would know that 37 other people had been intercepted, but that they would have received no notices themselves, so they would assume they hadn't been intercepted?

MR. BERKMAN: Well, the Court of Appeals, with respect to the majority, did not take such a position, but the -- I'm sorry, the majority opinion did comment on the

finding by the trial court that they had not received actual notice, and further speculated in their opinion that far from the suggestion that because 37 other people had been notified, somehow, by word of mouth, they must have had actual notice in some way of the interception, said that it is ambiguous and that it is just as likely that because the others had received actual notice and they had not, that they were entitled to assume that they were not intercepted.

QUESTION: Well, how did the Court of Appeals think that they had learned of the receipt of actual notice by the other 37 people?

MR. BERKMAN: Well, I think they were just refuting an argument that had been made by the government, that somehow or other, through the grapevine or whatever, they must have received notice, because 37 other people had received inventory notices.

QUESTION: Isn't it just as reasonable to assume, if they had received that kind of notice by the grapevine, they would have received notice of the fact that they had been overheard?

MR. BERKMAN: Well, that is the argument that was being refuted by the Court of Appeals as to the government's argument. That is what the government argued, and the Court of Appeals decided that the finding by the trial court, that there was in fact no actual notice in this case, was sound.

And that is the basis upon which they did so.

The second fact that I think needs to be dealt with here --

QUESTION: On actual notice, now, you mean the formal notice contemplated by the statute?

MR. BERKMAN: No, I'm going beyond that.

It is clear there is the -- there is no question whatever, Your Honor, that no inventory notice was ever served upon these people. Never.

The first information that they received came in the process after -- after they were indicted and after discovery proceedings were instituted.

The question that was on the table, so to speak, so far as the Court of Appeals was concerned and the trial court, was whether or not, in conceding that they had received no inventory notice as required by the statute, whether they had received actual notice that might somehow serve to mitigate the violation of the statute.

And in dealing with that problem, --

QUESTION: That is, from one of their friends?

MR. BERKMAN: Yes. Or colleagues.

And that problem was what the Court was addressing when they concluded that no actual notice had been shown on this record. Neither any inventory notice.

The second fact that I believe needs to be dealt with

is the question of when it was that Mr. Merlo and Mr. Lauer's identity were known to the government sufficient to cause them to be required to serve an inventory notice, upon these particular defendants.

And I believe, in the dissenting opinion of the Court of Appeals, that judge indicated that somehow or other that information did not come until August -- about two months, two or three months prior to the time that the second inventory, adding a couple more people, was actually filed.

I believe that that represents a misreading of the record, with all due respect.

QUESTION: Well, isn't that what the testimony was, that the time was placed as the late summer of 1973, perhaps late August?

MR. BERKMAN: That does appear; Mr. Gale, a Special Agent for the FBI, did so testify. And in the next few lines it becomes abundantly clear that the reason that he -- the question was put as to when he became cognizant of the fact that these people were identified, not only as individuals who had been on the telephone but also individuals who were perhaps involved in the crime that they were investigating.

The reason that he became aware of it in August of 1973 was because of the fact that he had just been assigned that case, at that time, and he conceded, in the next couple of pages -- and this appears at approximately 160 to 165 of the Appendix --

he conceded that the -- that in fact, by January the 13th, a physical search and seizure was made of the premises on which Mr. Lauer and Mr. Merlo were found. That is a part of the probable cause that was assigned in that affidavit in support of that warrant. The telephone information which had been obtained was employed. That at that time physical evidence was seized, which was going to be introduced, and some very critical admissions were obtained from Mr. Merlo and Lauer with respect to the fact that they were the people who were on the telephone.

And that they were the people who had rented the telephone in another name.

And he conceded, I think quite honestly, that as of that time and certainly by the 18th of January, all of the reports of the raid, all of the evidence seized, all of the reports of the admissions of these people, were in the hands of responsible people in the government, particularly FBI agents who were working with the strike force.

And so it seems to me that there is no way to read this record except to find that at least by January the 18th the government had full knowledge of the identity and participation of these two individuals.

And yet, from then until December -- from January to December, and after the time of indictment, these people were never served with inventory notice, nor received notice of any

kind. And that's what the record suggests.

And so I think that when the Court in the Sixth Circuit, the dissenting judge found that there was no knowledge until August, I think he wasn't reading the rest of the record, and I think it's very clear that -- and I think Mr. Gales makes clear -- that the reason that he just learned about it was because he was a young lawyer who had just been assigned to the case. And that the government did have this information.

In addition to that, there is some talk about the inadvertence of the failure to serve inventory notice upon Mr. Merlo and Mr. Lauer, and I think that there is nothing in the record to indicate that the failure to do so was inadvertent.

One of the difficulties of attempting to find out from the government, so far as the defendants' standpoint is concerned, as to the reasons for what occurred, is of course that all of the facts are within the control of the government.

What we know from the record is that from January the 13th or January the 18th of 1973 until December, there was never any notice. That when they combed the record in September of 1973, to find other people, they found a couple of other people, but did not identify Merlo and Lauer.

And it seems to me that the best face that can be put upon this record is to suggest that as a result of sloppiness, as a result of negligence of the government, these two people were not identified. That's the best fact that can

be put on it.

It seems to me, under those circumstances, to allow an absolute and total failure to perform the duties that are required under (8)(d) of the statute puts a burden upon the defense, in terms of finding out why it was that it was not done, which I think Congress never intended with the strict responsibilities that are necessary in implementing the limitation provisions of the Act.

QUESTION: You are not taking the position that there was bad faith demonstrated by this record, then, I take it?

MR. BERKMAN: I can't say that there was bad faith. It seems to me that there certainly was a complete and total failure, which is unexplained by the government, and which, I think, must be explained on the basis of, at least, negligence or sloppy performance.

QUESTION: But you would say that if there was negligence, then it should follow that suppression is in order?

MR. BERKMAN: That's one of the branches of our position, Your Honor.

The other branch would be to say that if we read Giordano and Chavez correctly, that if we are dealing with a central issue or a central subject of the Act, which was designed to limit the inappropriate use of interception of communications, as we think this clearly is, that under that

case, as explained by Chavez, whether or not the government has been guilty of any wrongdoing, either negligent or deliberate, that because of its centrality and because of the importance involved in making sure that the government follows, in a strict way, every limitation that has been put upon them by the statute, that, regardless of any wrongdoing or negligence by the government, that suppression would be an appropriate and necessary remedy.

So our positions are two-pronged, in that direction.

QUESTION: Mr. Berkman, how do you meet the government's argument that there -- that the references to post-interception conduct -- there are a couple of specific references, but they don't apply to this situation?

MR. BERKMAN: Yes. It seems to me to be quite clear, if we analyze the statute itself, and if we analyze the legislative history of the statute, that because of the necessity of surreptitious entry or surreptitious search and seizure, as that term is applied to wiretaps, it is impossible to give the advance notice that the invasion of the client's privacy -- the invasion of the defendant's privacy is involved.

As a consequence, the post-intercept procedures have been clearly set out to make sure that ultimately disclosure of these secret intrusions is made, and to be made in a reasonable time thereafter, not immediately necessarily but at a reasonable time thereafter.

It seems to me that in the government's discussion of the whole problem of suprression there was no mention at all of Section 2515, which very clearly indicates that suppression is appropriate when there has been a violation of this chapter. It seems to me that that and the legislative history surrounding that, which is reported in detail in the Gelbard decision, make quite clear that it was important, so far as the government was concerned, -- so far as Congress was concerned, to make sure that a number of remedies were available, in the event that there was a violation of the limitations of the Act.

Criminal provisions were provided, 2511; civil -- a civil suit was provided, 2520; and, if you review the legislative history, it makes clear that that, coupled with the requirement that the government not be able to use the fruits of its violations, makes very clear that that was the intent of Congress.

QUESTION: Mr. Berkman, --

MR. BERKMAN: Yes, sir?

QUESTION: -- help me on one point. As I understand your argument, if the government does what it did in this case, and they overhear the testimony of an unknown criminal, he can be prosecuted on the basis of that information; but if they overhear the conversation of a known criminal, they can't use it?

MR. BERKMAN: It is my understanding that the words

"if known" in the statute indicate either that the individual is known who was intercepted, or that he is known to be involved in the criminal activity.

QUESTION: That's what I said. Well, if it's not known, --

MR. BERKMAN: Yes, sir.

QUESTION: -- and he's a very clever man, then you can use that.

MR. BERKMAN: So the statute --

QUESTION: But if he's stupid and he's known, you can't use it.

MR. BERKMAN: Well, --

QUESTION: Yes. That's what you said.

MR. BERKMAN: Persons who are overheard but not known --

QUESTION: Right.

MR. BERKMAN: -- come within another section of (8)(d) rather than the one to which the Court is referring.

It seems to me that what the statute says, in (8)(d), is that anybody who is overheard and known has got to receive an inventory. Anybody who is overheard and not known must have that information at least transmitted to the court, so it can exercise its discretion in the interest of justice, to make a determination as to whether or not to require an inventory. And the failure in this case, Your Honor, is that there was no

such information transmitted to the court, so that the court could exercise its discretion to make a determination as to whether persons who were overheard but not known, which is the category into which my clients fall, whether or not those persons should have been issued an inventory notice in the interest of justice.

QUESTION: Do you admit that they weren't known? That your clients weren't known?

MR. BERKMAN: We think they were known as early as January --

QUESTION: I thought you said they were, and you spent about five minutes explaining it.

MR. BERKMAN: Yes, Your Honor.

We think that these people were known at least by January of 1973. We are not making the contention that they were known at the time of the application for an authorization for the interception. But we do claim that since January of 1973, until the time that they actually discovered the information, after they were indicted, they were entitled to that inventory information, and that they never received it.

That is our position.

MR. CHIEF JUSTICE BURGER: Mr. Berkman, your time is running short, and you haven't covered all your --

MR. BERKMAN: We would like to -- I would like to just make one other observation, and that is this: That with

respect to the exclusionary rule, getting back to Mr. Justice Stevens' question -- getting back to the exclusionary rule, although there are specific provisions in 2518(8)(a) regarding sealing, which do express an exclusionary rule, and 2518(9), the ten-day notice provision, it seems to me to be quite clear that 2515 provides the exclusionary rule on a statutory basis for all of the other violations of the chapter.

And, furthermore, with respect to 2518(9), I think it's important to note that the Congress, when it required a showing of prejudice, was able to draft such language and use it in 2518(9).

The balance of my time I would like to reserve for my colleague to argue the question under (1)(b)(4).

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Policy.

ORAL ARGUMENT OF CARMEN A. POLICY, ESQ.,

ON BEHALF OF RESPONDENT BUZZACCO

MR. POLICY: Mr. Chief Justice, if it please the Court:

I shall address myself to the issue of identification, as it relates to the respondents Dominic Buzzacco and Robbins.

QUESTION: Could I ask you about that? Suppose there's an application to tap or to intercept conversations of Jones's phone -- over Jones's phone, and there's probable cause to believe Jones is engaged in some conspiracy. There

is also probable cause to believe that he is engaged in a criminal conspiracy with Brown. But Brown isn't named. But there's no probable cause to believe that he's engaged in a conspiracy with Smith.

Now, over the -- when the tap goes in, they hear conversations with both of these other people, both Brown and Smith. Now, is it your position that Brown's conversations are excludable and Smith's are admissible?

MR. POLICY: That's exactly our position, Justice White.

QUESTION: And Smith -- I just want to make sure, Smith's conversation, the unknown person, is -- are admissible against an indictment in a criminal case against him.

MR. POLICY: Assuming no probable cause existed, --

QUESTION: Right.

MR. POLICY: -- and they did not anticipate the interception of his conversations. That's exactly our position, sir.

QUESTION: And there doesn't seem to be any argument about that, in the cases, that the conversations between the target and Smith are admissible against them both?

MR. POLICY: I believe that's correct, Your Honor.

Your Honor, I might say that there's no question but that the government had probable cause, that these three respondents were in fact engaging in this type of activity

that was under investigation, and that their conversations would in fact be intercepted. And they had this knowledge prior to the application of December, December 26, 1972, when the government applied for an extension of the original wiretap.

It's our position that failure to list these known individuals in said application for the extension was in fact a statutory violation of 2518(1)(b)(4), which, in fact, resulted in an additional violation of 2518(4)(a), which requires the judge, of course, to list the identity of the person, if known, whose communications are to be intercepted.

We can in no way accept the government's position that the statute in question was designed to cover the patron of a telephone company, and was designed to cover only the conversation of that patron, or the man they know to use that particular phone, located at that particular service.

QUESTION: Would you please tell me why a known criminal is entitled to more protection than an unknown criminal?

MR. POLICY: Mr. Justice Marshall, one might say that when the government is seeking a course of search and seizure, which this is, they were searching and seizing the conversations of Buzzacco, Donovan and Robbins, and they have probable cause to believe that these men will be intercepted, and they are violating the law, they have such an obligation of at

least naming them, by way of statute and by way of --

QUESTION: And that would go to a man who is calling from Paris?

MR. POLICY: If they had the probable cause to believe that he would be calling.

QUESTION: Or Kenya, Africa?

MR. POLICY: If they sought to bring him within the process of the laws of the United States.

QUESTION: Any place in the world?

MR. POLICY: I believe so, sir.

QUESTION: If he's a known criminal.

MR. POLICY: If they have probable cause to believe that he was engaging in this activity.

QUESTION: So the best way to get the protection of our government is to be known as a criminal?

MR. POLICY: Quite the contrary, sir. I compare this to a situation where the police would accidentally come upon a man, in the course of a lawful search or a lawful arrest, and find him in the commission of a crime; in that situation they had no foreknowledge of his involvement, or the fact that they would come upon him in the commission of this crime. But this doesn't relieve them of the obligation to elicit a search warrant or an arrest warrant for the individuals that they have fore knowledge of, in terms of their search and arrest.

QUESTION: Do you mean that anybody that writes a

letter to the government and says, "I am a bookmaker", he then is protected from then on?

MR. POLICY: Quite the contrary, sir. What I think he's doing is saying to the government, "Here, I'm giving you some probable cause for you to go ahead and solicit a court and show a court that you're following due process and the statute, and bug my phone."

QUESTION: But if you send that letter and they don't name you, and they intercept your message, you go free.

MR. POLICY: So long as the --

QUESTION: So long as you send the letter?

MR. POLICY: Well, Your Honor, I think it would have to be somewhat more descriptive than "I'm a bookmaker".

QUESTION: Well, yes, I guess you'd have to send it by Certified Mail.

[Laughter.]

QUESTION: Do I understand you correctly as saying that the test is whether, at the time, the government had probable cause to believe that a particular person, who is not named, was involved in the criminal activity?

MR. POLICY: That's correct, Mr. Chief Justice.

QUESTION: Whether he was a well-known or totally unknown person before that, it would make no difference; it's probable cause that is the key, is that right?

MR. POLICY: That is correct, sir.

Probable cause that that particular individual --

QUESTION: At that time.

MR. POLICY: -- at that time, at the time that they were seeking the application to be approved, was in fact probably engaging in this type of activity, and his conversation would be intercepted.

Both of those keys.

And I feel that the reading of Kahn tell us, and logic would dictate, that where Minnie Kahn, in fact known prior to the application being sought to have been engaging in this activity, and probably using her husband's phone, I feel that this honorable Court would have gone further on the decision and would have stated that the statute would have required her being listed in said application.

I feel, Mr. Chief Justice and Justices, that we have a definite statutory violation here, and when we look to Giordano, we are told that a statutory violation shall result in suppression when it hits that central aspect of the statute, and when it hits an aspect of the statute which was designed by Congress to limit the use of this tool.

Now, I submit that in Berger and Katz, two of the key cases in this situation, the courts were concerned with interjecting in between law enforcement and its use of this wiretapping tool some judicial restraint, or at least judicial review. And I feel this is obvious in Congress' intent.

And by allowing the government to come forward and go to a district court judge without providing him with the information as to the identity of those people, that it has probable cause to believe will be intercepted and are probably committing this crime, they are bypassing -- utilitizing their own judgment in terms of that decision-making process, and taking away what Berger, Katz and Congress had intended to be some judicial review.

I further submit, Mr. Chief Justice and Mr. Justices, that there is a practical effect to not being named in this particular application. As we read on in the Section 2518 -- I believe it's (8) requires inventory notice to be served upon all those named in the application.

Now, this is regardless of whether or not the application is denied.

By placing this man's name, who is a suspect on whom probable cause exists, in the application, he is guaranteed receipt of the inventory notice, and is not subjected to the arbitrariness or to the discretionary activity that could go into effect otherwise.

I submit that if an innocent man were the subject of an investigation, he would prefer to know this, even thought he's exonerated, rather than have the entire process kept secret throughout, and only in the hands and only in the files of the government.

I would say, further, that recognizing the existence of Chavez, and comparing it to the doctrine of Giordano, we certainly have a situation with the identification issue, which is closer to suppression than the Chavez situation.

I would even submit to this honorable Court that the identification issue is as key and as central as the Giordano issue. Because here we're dealing with the situation that goes to the merits of the probable cause aspects of these applications.

Here we're getting again to the heart of what Berger, Katz and Congress had sought in the form of judicial review, judicial restraint.

QUESTION: Well, you refer to Berger and Katz, those are constitutional cases. You don't have any doubt, from reading that footnote 15 in Kahn, do you, that what you're saying is a statutory requirement is not a constitutional requirement?

MR. POLICY: Without addressing myself to whether or not it's a constitutional requirement, I submit that the statute in question, Your Honor, has been based upon the rulings of Berger and Katz; and I'm submitting that the reference in Berger that was made by Mr. Frey, at page 59, relating to the naming of a person as being the requirement, was a reference that the government, in effect, or the State of New York was attempting to say, "Look, we have a naming require-

ment, that should be enough to save the statute."

I think it was the State of New York's opinion at that point, an effort at that point to say, "This is such an important key issue, this naming requirement, it's there, the statute should survive."

Whereas, I believe this honorable Court indicated that that wasn't, in and of itself, enough.

QUESTION: Well, but then you're not arguing that this is a constitutionally required rule that you're contending for here?

MR. POLICY: I would submit that, as a secondary argument, it would be a constitutionally required rule to have a man who the government knows in advance will be searched, whose conversations will be seized, named in an application for a warrant for a wiretap. And that the failure, te failure to go so far as to simply name this individual, and provide the aspects of probable cause to the judicial officer who would review same, would be actually a violation of constitutional standards, as well as a violation of the statutory standard.

QUESTION: Well, don't you think that Kahn language is quite to the contrary?

MR. POLICY: Your Honor, as I recall the Kahn language, I felt that Kahn was saying, and did say, that the requirement was statutory, or the fact that she was not known, there was no probable cause to know that she was committing these

offenses, therefore, a statutory violation did not come into effect, and I believe that this covered the constitutional aspect and did not allow it to come into play.

I would submit that in Kahn again, had the government known of Mrs. Kahn's identity and the fact that she engaged in this illegal activity, statutory and constitutional considerations would have come into play.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Frey, do you have anything further?

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: I have a couple of things, Your Honor.

First of all, I want to come back to a point that was apparently troubling you, Mr. Justice Stevens, about why Congress would want to make a distinction between the people whose phone was being monitored and the people calling in from outside.

One of the important reasons is that the impact of a wire interception differs greatly on the people whose phone is being intercepted, whose every conversation is subject to being overheard, and the people who may occasionally, once or twice during the course of a surveillance that involves several hundred telephone calls being listened to, may be overheard.

There is a much greater impact upon the person whose

phone is being intercepted, and for that reason it's logical for Congress to have made the distinction that we submit it did make.

QUESTION: Doesn't the distinction tend to disappear as the second person's use of the phone becomes more and more regular and frequent?

MR. FREY: Yes. I mean, if we had a case where the primary target of our investigation was somebody who we knew, every day, was calling in from outside, you might have an issue. But these -- Donovan, Buzzacco, Robbins were very tangentially --

QUESTION: Well, or a case where you're trying to prove the five-man crime, and you know all five people use the same phone over and over again. Wouldn't you there -- even there you wouldn't say you had to name more than one?

MR. FREY: Well, I would first say that you didn't have to name more than one; but second I would say that if you did have to name more than one, if they all five use the phone that was being monitored, you might have to name them. but the people with whom they were doing business, the people from Las Vegas sending them the line information, would not have to be named, even though we expected to overhear them.

Now, as far as the point that Mr. Policy was just making, we don't need, either under the Constitution or under

the statute, probable cause as to any person in order to have the interception, all we need is probable cause to believe that an offense is being committed, and that this telephone is being used, and that conversations relating thereto will be intercepted.

There can be no person, the statute doesn't require us to name a person if we don't know one, it's neither a constitutional or a statutory requirement, and it's plainly, I think, for that reason, not central.

QUESTION: But on the reverse side of that, as soon as you do have probable cause, then you should name him, should you not, under the statute?

MR. FREY: Well, the statute requires us to identify, yes. We concede that we have to identify a person whose phone is being tapped.

QUESTION: No, no. After the phone is -- the tap is on, and then some calls are coming in, as soon as it appears that this man is calling and saying "Who's going to win the third race tomorrow afternoon?" because it's all fixed, and you get repeated calls; have you not then probable cause to believe that person --

MR. FREY: Well, we may have probable cause, but it's our contention that we don't have to name him. We certainly wouldn't have to name him unless we sought a renewal application.

QUESTION: Well, no, but you can't even name him, because you may not know his name. But don't you have to take some steps to identify him then, under the statute?

MR. FREY: No, I don't -- I even think Kahn said we didn't have to investigate to find out. That would be terribly burdensome in these investigations. We couldn't do it. We have too many people. We would be spending all our time on something that's really a total irrelevancy to the administration of the Act.

I'm not saying that the naming of the target is an irrelevancy, the naming of --

QUESTION: Well, is it irrelevant if you ultimately -- if you then go ahead and indict him?

MR. FREY: Well, it's not -- it's not irrelevant to him that he's been overheard, and that evidence will be introduced against him. And of course the conversations are not irrelevant to the trial.

But in terms of the privacy concerns that Title III is concerned with, since we can overheard, as Justice Marshall pointed out, people of whom we have no suspicion, the privacy concerns are not -- it's not relevant to protecting people's privacy. And if it's not relevant for that reason, we say it's not central to the Act, and the Court should not go out of its way to construe the statute to impose what is an administratively burdensom requirement, which will make life also very

difficult for judges who already have 46-page applications to read over, and will have 146-page applications, if we have to show all the probable cause we have with the far-flung conspiracy, as to every person around the country.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you,gentlemen.

The case is submitted.

[Whereupon, at 2:04 o'clock, p.m., the case in the above-entitled matter was submitted.]

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