In the

# Supreme Court of the United States

FRANK R. SCOTT, and
BURNIS L. THURMON,

Petitioners,

v.

THE UNITED STATES,

Respondent.

No. 76-6767

C. 4



Washington, D. C.
March 1, 1978

Pages 1 thru 42



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| v. | : | No. 76-6767 |
| UNITED STATES, Respondent. | : | |

Washington, D. C.

Wednesday, March 1, 1978

The above-entitled matter came on for argument at 2:42 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 P. STEVENS, Associate Justice

APPEARANCES:

JOHN A. SHORTER, JR., ESQ., 508 - 5th Street, N.W., Washington, D. C. 20001, for the Petitioners.

RICHARD A. ALLEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-6767, Scott and Thurmon against United States.

Mr. Shorter.

ORAL ARGUMENT OF JOHN A. SHORTER, JR., ESQ.

ON BEHALF OF THE PETITIONER

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

The minimization provision of Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968 provides that every order and extension thereof, authorizing electronic surveillance, shall contain a provision that the authorization to intercept shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

QUESTION: I think the Court will question counsel to address the problem of standing, is that correct?

MR. SHORTER: Yes. There are three questions, really, before the Court in this appeal. The first one is the meaning and interpretation and construction of the minimization provision of the Federal wiretap statutes.

We feel that, specifically, the question is whether the court below determined the correct standard and properly applied it to the conduct of the wiretap in this case. Related questions are also implicated. One is as to the scope of the

remedy to be applied in the event of a violation of the minimization requirement, and that is whether full or partial suppression of the fruits of the wiretap are to be mandated.

And thirdly, whether Petitioner Scott has standing to assert the violation. The standing question relates only to Petitioner Scott, within the framework of the facts of this case.

There is a related petition for writ of cert also arising from the Circuit Court opinion in this case and that is the petition for Chloe Daviage. And, of course, her situation on the question of standing is the same as that of the Petitioner Scott. The question of standing was fully brief in Ms. Daviage's petition, in her brief as amicus. And we, of course, have fully researched and briefed the point of standing in our brief.

I would say that, insofar as standing, we think that the question was adequately and correctly answered by the D.C. Circuit Court of Appeals in the Bellosi case, which was also an appeal from a wiretap ruling of the District Court. And, similarly, in the early opinion of the Court of Appeals in this case referred to as "Scott I." The direct appeal in this case is from what is referred to throughout the briefs of the parties as "Scott II."

In Scott I, the Circuit Court fully addressed the question of standing, and it determined that, under the court's interpretation of the related provisions of Title 3, Petitioner Scott clearly had standing to assert the violation of the

minimization requirement.

We feel that that was a correct analysis, the court's analysis of the question was a correct one, and certainly the court's conclusion, we feel, is amply justified by the language of the statute which identifies "aggrieved person" as one whose conversations are intercepted over the wiretap, and secondly, one against whom the interception is directed. On both points, Petitioner Scott qualifies.

Petitioner Scott was identified in the application for the wiretap, that is, the affidavit of the Bureau of Narcotics and Dangerous Drugs agent who applied for the wiretap as being one of the principal targets. Though the order that was entered by the court in response to this application did not identify Scott particularly as one of the subjects, the order said that the wiretap was authorized to intercept the conversations of Bernis Thurmon, Alphonso Lee, and others.

And, of course, for one to determine who the others might be, insofar as what the record would show at that point, there were nine persons identified in the application as being the principal offenders. Scott was certainly a principal target of the investigation.

QUESTION: Perhaps you are coming to this, but let me put it to you now. Once it is determined from listening that approximately one-third of the calls relate to narcotics traffic, doesn't that give some impetus to continuing surveillance?

MR. SHORTER: The entire question of minimization is a very difficult one. It cannot be resolved, we feel, by reference to percentages of narcotic-related calls.

QUESTION: Why not? If one-third of the conversations relate to illegal traffic in narcotics, how can it not bear on the continued surveillance?

MR. SHORTER: We feel that the question of minimization is related to a number of factors, the least one of which we would urge would be the percentage of narcotic-related calls. For instance, it would seriously relate to who might use the phone, whether or not there has been developed over the course of the wiretap a pattern of clearly innocent calls between certain people who talk on the phone.

QUESTION: You say percentages aren't important, but what percentage of the total calls here do you regard as unrelated to narcotics?

MR. SHORTER: We cannot undertake an identification in the District Court or in the Court of Appeals of a percentile breakdown.

QUESTION: Do you challenge the Government's analysis of it?

MR. SHORTER: What we relied on was the testimony of the agent who supervised the wiretaps, that the perception of the agents who were listening to the wiretap and the reports that were made to him and reports that he, in turn, forwarded to

the attorney in charge of the wiretaps, that roughly 40% of the calls were narcotic-related. This was his testimony in a motion to suppress hearing that was held in the District Court in April of 1971. Judge Waddy, the judge who presided at that particular hearing, adopted that finding. And, as a matter of fact, he made it the basis of the ruling that he ultimately entered suppressing the wiretaps

Though there was testimony that 40% of the calls were narcotic-related, 60% of the calls were not. There was no effort, absolutely no effort made on the part of any of the agents conducting the wiretaps to minimize the interception of any telephone calls.

QUESTION: How would you go about minimizing that, Mr. Shorter? Once you found out that 40% were clearly narcotics-related, 39% were so ambiguous they couldn't tell. How do you minimize from there on?

MR. SHORTER: Well, when we say that some of the calls were so ambiguous that you couldn't tell what they related to, we think that's a determination that was made by Mr. Kellog, our adversary in the case.

The agents who compiled daily records and reports of the calls that were being made over the telephone, using their own judgment, using their own instinct, referring to the logs of the calls that they created at the time that the calls were made, passing the information along to Mr. Cooper, the supervising

agent. Mr. Cooper was reviewing their logs. He was reviewing their reports. And, as the reports were going in, some days it would be three out of six calls were narcotic-related. Some days it would be three out of nineteen calls. So that at the end, when we total up the number of calls that were intercepted, and, incidentally, all of the calls on this particular telephone were intercepted over a 30-day period, with no effort, no phone call ever being not recorded and not heard by the agents. When it got to the end of the line, there was some compilation that Officer -- that Mr. Cooper testified to, and that was, "Well, our conclusion was that 40% of the calls were narcotics-related."

That was not the issue in the case. It wasn't a matter of percentages, although the percentages were important because a majority of the calls were not related, according to the judgment of the agent, to the narcotic enterprise. They were not narcotic-related conversations.

Now, there were instances of calls being made over the phone which were challenged in the District Court as being subject to some reasonable effort at minimization.

The statute, the statute that we are talking about, we submit, creates an affirmative duty on the part of the agents to conduct the wiretap -- and this is the language of the statute: "To conduct the wiretap in a way as to minimize the interception of calls not related to the criminal enterprise." That's what the statute says, so the statute creates a

responsibility on the United States Attorney or the assistant who is supervising the tap, the supervising agent and the agents who are actually doing the intercepting. But, even above that, it creates a responsibility --

QUESTION: Mr. Shorter, the statute doesn't say they have to eliminate calls not related to criminal enterprise.

MR. SHORTER: No, it says it shall minimize.

QUESTION: But it doesn't use the words "not related to criminal enterprise," "not otherwise subject to interception." And they are subject to interception because the court authorized it.

MR. SHORTER: All calls are not subject to interception.

QUESTION: All of them during the 30-day period. It gets a little circular, doesn't it?

MR. SHORTER: It seems to be that way, but clearly we are going to use as our starting point what this Court said in Berger and what this Court said in Katz, but also use as our starting point the overriding and compelling interest of privacy that must govern any approach to questions of wiretapping. This is an intrusion. And the whole purpose of the statute is to limit the intrusion.

QUESTION: Well, it is also to authorize intrusion.

MR. SHORTER: It authorizes an intrusion on a very particularized and a very limited basis, and for very limited

reasons. And the reasons are to gather evidence of criminality. That, it seems to me, is the purpose for which the wiretap is authorized. The wiretap is not authorized --

QUESTION: And they listen for a while and they find that almost one out of every two calls has some evidence of criminality in it. When are they supposed to stop listening?

MR. SHORTER: Well, it's a judgment that has to be formed by the officers who are conducting the wiretap. First of all, they must have a design and a desire to follow the law. In this case, the court found that there was no purpose on the part of the agents, that their intercepting every call was done wilfully and was done in violation of the order, simply because the supervising agent did not clearly instruct the agents as to what their responsibilities were.

QUESTION: Yes, he told them not to listen to lawyer-client calls, doctor-patient calls and priest-penitent calls.

MR. SHORTER: Yes, obviously privileged.

QUESTION: What else should he have told them?

MR. SHORTER: He should have told them that in the instance -- well, after looking at the telephone calls between Geneva Thurmon and her mother that proceeded for several days --

QUESTION: Some of which contained reference to criminal activity.

MR. SHORTER: No, it didn't.

QUESTION: The Government says they did. It said

two or three of them referred to --

MR. SHORTER: That is an error, because the only thing the Government can say about any of the conversations between Geneva Jenkins and her mother was that in one of the conversations, the second conversation, Mrs. -- the mother said to Geneva, "Al called." She also said something about a person named "Reds" called. In response to a question that Geneva's mother asked about Bernis Thurmon, the man that she was living with, "Where is Bernis?" and she said that "Bernis is out taking care of business." That's the gist of what the Government points to in saying --

QUESTION: Didn't she say that, "We don't talk about business on the phone," too?

MR. SHORTER: Well, that's the mother in a later conversation, when the mother said, "Geneva, I have something very important to tell you." This is another conversation. It doesn't have anything to do with this conversation about Bernis out taking care of business, which is what Geneva said to her mother when her mother said, "Where is Bernis?" This is her common law husband. Just like any mother-in-law would say, "Where's your husband?" "He's out taking care of business," whatever that may be. But that is not a narcotic-related conversation.

And the conversation that you are now referring to was a later conversation, where the mother was saying to Geneva,

"There is something important that I want to say to you." All the conversations are deeply personal. This is a mother talking to her daughter, urging her daughter to leave the man that she is living with, "Bring your clothes," and as the conversations go on the personal nature of them becomes quite obvious. The mother says to Geneva, "There is something I want to talk to you about." Now, who knows what it is about. I would submit that it was something personal. Geneva said, "Well, what is it?" and the mother said, "Well, it is something about business and I don't want to talk about business over the telephone."

Agent Cooper, during the first hearing, admitted that the agents had no reason to believe, no suspicion that the mother was involved in any narcotics-related activity, that this was clearly what it obviously was, a mother calling, talking to her daughter, having bantering kinds of conversations about family matters and other personal matters.

Later, in the hearing that took place a couple of years later, after the Court of Appeals had reversed Judge Waddy for the first time, his testimony took a slightly different view. And that was that after reading the transcript of the seven Geneva-Mother telephone calls, he believed that there was a basis for a suspicion that the mother knew something about the narcotic enterprise, which I would submit is not a basis to intercept conversations between even a person accused of crime

and their mother, which is what it amounted to.

There was a call that Geneva made to, I believe, an abortion clinic. The agents justified intercepting that call because they didn't know who she was going to talk to when she called there. It didn't occur to them, perhaps, that this might be strictly a confidential, personal, medical matter, but they intercepted the call and justified it on the grounds that well, she might have been calling over there making some inquiry about narcotics. The pattern of the calls in this transcript was that Geneva Jenkins did not call people about narcotics, to place orders for narcotics or solicit customers for narcotics. She received calls that were made to the phone for her husband. That was the pattern. The clear pattern in this case, after examining the transcript, was that there were certain periods during the day, particularly at night, I believe, from midnight until 6:00 in the morning, when I think over the 30-day period there might have been an average of maybe one call per day from those particular hours. And the question was put to the officer: "Well, didn't you consider cutting off the wiretap, minimizing the intrusion at least during the nighttime period?" And it never occurred to them.

Another thing that was pointed out, every call that was made from that phone, whether it be for the time if Mr. Thurmon wanted to know what time of day it was, what the weather was, these calls were without any qualification totally

intercepted.

QUESTION: Of course, it's almost impossible to minimize a call for the weather because by the time you finish getting the report, it would take you that long to pull the plug out, wouldn't it?

MR. SHORTER: No, that's not correct.

QUESTION: Mr. Shorter, you must be aware that there have been cases where conversations, innocent on their surface, were conversations in code related to illegal activity. That's a familiar phenomenon in this business, isn't it?

MR. SHORTER: Right. And there came a time, and the officers testified to it, where after listening to the calls between Bernis and some of the other alleged co-conspirators, they got to know the code that these individuals were using fairly well. Like, one of the guys would always call and say, "Put me on Third Street," or "Put me on Fourth Street," or "Meet me on Fifth Street." He would always use a numerical reference to a street. He wasn't arranging for any meeting at Fifth Street, he was telling Bernis that he wanted five units of narcotics. This was commonly known to the agents.

QUESTIONS: Yes, but new codes are constantly evolving, are they not, and it takes quite a bit of listening before they can identify a pattern.

MR. SHORTER: Right. I would agree that that's so, but these people using this telephone were wedded to their own

endemic kind of language. Most of the agents in this case had participated in an earlier wiretap that had occurred in the District of Columbia during the summer, the preceding summer. So, they were familiar with the street language in the District of Columbia. They were also familiar, by reason of having tapped a telephone involving some Spanish people, Spanish-speaking people,within the year preceding their utilizing this tap, with what the codes were. There was no problem about identifying the language in the code that was used by the people in this case.

That, of course, is not what our argument about minimization deals with. We say this, that when a person became identified as an alleged co-conspirator, first of all, we have to remember the scope of the operation that this wiretap revealed. Despite what was set forth in the affidavits, the operation in this case was a retail distribution setup. When I say retail, it was purely a local distribution by one person and two lieutenants, of small units of narcotics to people who would either resell them or use them. In this case, it became very questionable because some of the people who were ultimately charged were drug users and they bought in small amounts. That was the scope of the enterprise in this case. And after a period of time, the same people were calling, day in and day out, ordering small quantities of narcotics. The Government had every justification in intercepting calls between the people

who were identified as ordering narcotics over the telephone and they were justified in intercepting the conversations of new people, until such time as they would get some understanding of what these people might be calling about.

What we complain about is clearly set forth, that in the management of this wiretap the supervision was not precise, it was not correct --

QUESTION: Do you believe it was inefficient?

MR. SHORTER: It was inefficient, yes.

QUESTION: Is that enough?

MR. SHORTER: No, that is not enough?

QUESTION: Well, what else do you have?

MR. SHORTER: What you have is that not only was the supervision inefficient, but the activities of the agent was not self-correcting in terms of that inefficiency. The agents just ran an open wiretap in this case. They seized every conversation, without regard to the minimization requirement.

QUESTION: Every conversation.

MR. SHORTER: Every conversation, except for when the wiretap was broken or was attached to the wrong telephone. Their instructions about lawyer-client conversations were this. This is what Agent Cooper, Supervisor, said: "If there is a conversation between an attorney -- If somebody at that phone calls a lawyer, listen to the conversation and learn whether they are talking about a pending case. Listen to the conversation,

then report the conversation to Mr. Sullivan," who was the supervising attorney. Then Mr. Sullivan would decide what to do next. And it got very fuzzy then. Fortunately, there were no attorney-client conversations, no attorney conversations intercepted over the telephone. But the conversation to the abortion clinic was intercepted. The telephone call from the bank to Mr. Thurmon was intercepted. The calls relating to the time, the weather --

QUESTION: How did the time and weather hurt? And whom did it hurt?

MR. SHORTER: It conceivably did not hurt anyone --

QUESTION: Conceivably -- It didn't.

MR. SHORTER: It did not hurt anyone, certainly. It is only indicative of the fact that the agents decided to intercept everything.

QUESTION: The agents wasted my tax money. That's all I see on that one.

MR. SHORTER: But the realization was -- I think it was sensed by the agents that perhaps they should have exercised some caution. They should have implemented some plan of minimization. Because when they were asked as to why they seized the conversations about weather, time and whatever, the officer's answer was: "Well, we listened to the conversation because we were afraid that right at the end of the conversation they would dial someone else and start a narcotics conversation."

That was their justification. Not, "These conversations don't hurt anyone." They offered another reason which was totally false.

QUESTION: Don't you think that's a reasonable explanation, Mr. Shorter?

MR. SHORTER: No, not when you have a pin register device. They had a touchtone decoder, that at the time that the telephone number was dialed -- assume this is the touch-tone -- and every plunk of every number that the caller makes the number flashes on a board that's sitting right before the person who is running the intercept. He can see "TI-4-2525," as fast as the man dials it, in front of him.

QUESTION: What I am getting at is this, Mr. Shorter: Is it not also a pattern in cases of this kind, over the years, that the first five, seven, ten minutes of the conversation is about the weather or cooking recipes or going fishing and then it turns to a discussion of narcotics orders, either in coded terms or in open terms? Isn't that a common pattern?

MR. SHORTER: In the management of some wiretaps, yes.

QUESTION: And must not the agent on that wiretap take into account that while they are talking about the weather, or something else, that if he listens long enough they will be moving to the main topic of the narcotics business?

MR. SHORTER: Yes, this frequently happens, but we

are speaking about a mandated part of the statute that requires minimization. What does minimization mean? It does not mean that the agent cannot intercept telephone calls. It doesn't mean that at all. It doesn't mean that agents must be eliminate certain calls. It means that the agents have to be responsive to the invasion of privacy that's taking place and fashion in good faith -- that's the key here -- fashion in good faith some approach to the wiretapping that's going to take place. It's encumbent upon the supervising agent, the supervising attorney and the agents to formulate some plan as to how the wiretap is going to be managed.

There are illustrations throughout the case that show that agents and officers and attorneys, supervising attorneys, who are sensitive to the invasion that's going to take place do, in good faith, fashion such plans. And the plan consists of something more than if a lawyer gets on the phone, listen to his conversation and report it. And it consists of something more than saying if there is a doctor-patient conversation don't record that, or if a priest calls and the caller wants to make a confession over the telephone, don't record that.

I am speaking about something that is more practical, more meaningful, something more workable than just that kind of a direction to the agent. The law requires it and the law requires that the agents, the Government agents, formulate some reasonable approach to the wiretapping that they are about to do.

And that means in this particular case some analysis, an early analysis, of the telephone calls between Geneva and her mother, and particularly other phone calls between Geneva and people that she was talking with. She had a conversation with a woman, I believe, called "Gloria's mother." Purely a very banal conversation, but the transcript of this case reflects that when Agent Cooper was asked about whether any thought was given to minimizing -- that is reducing -- the interception of the calls between Geneva and her mother, his answer was -- he was asked to articulate it in terms of the guideline, this attorney-client guideline -- he said, "Well, the guidelines that we received, and as we applied them to the case, did not have anything to do with frivolous conversations. It dealt with attorney-client conversations." So, his answer, in effect, was, "Whatever Geneva and her mother were talking about, that was frivolous, so it's all right if we intercept that. Our guidelines concerned themselves with attorney-client relationships, doctor-patient, and that kind of conversation."

MR. CHIEF JUSTICE BURGER: Your time is up, Mr. Shorter.

Mr. Allen.

ORAL ARGUMENT OF RICHARD A. ALLEN, ESQ.

ON BEHALF OF THE RESPONDENT

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

Mr. Shorter, today, is engaged in a discussion of the particular interceptions in this case that is not reflected in either of the briefs of the case. But, in any event, Mr. Shorter has suggested, it seemed to me, in his argument, a standard of what the Government should have done that reflects exactly what the Government did in this case. As I understood his argument, he said that when you are listening to a conversation which involves a known party to the conspiracy the Government has reason to listen to it. Then he went on to say -- and by the way, I would emphasize this. The record in this case reflects that every conversation that was intercepted one of the parties to the conversation was either Petitioner Thurmon or his girl friend, Geneva Jenkins, who is a co-defendant in this case, and both known participants in the conspiracy.

Mr. Shorter went on to suggest that, indeed, when a conversation takes place between a known participant and a stranger to the agents it is reasonable for the agents to listen to that conversation. It seems to me that if you want to get into an analysis of each particular call that concession would cover about 95% of them, including the calls he mentioned in his argument.

QUESTION: Do you agree that every call was intercepted?

MR. ALLEN: Yes, Your Honor, except for a short period of time when the agents apparently hooked up to the wrong phone and we don't know how many calls were made.

QUESTION: Well, does that seem to support his argument that there was no discretionary --

MR. ALLEN: No, Your Honor, I believe it does not.

QUESTION: I mean with every single call.

MR. ALLEN: That's right, but I think all it reflects is that it was reasonable to intercept every single call.

QUESTION: Why?

MR. ALLEN: Well, for a number of reasons. Among other things, the agents at the time and after the fact it seems to be true that 40% were clearly narcotic-related.

QUESTION: Well, after the fact doesn't help me, because if you take a baseball bat and crack a man's head and look in it and find dope that justifies cracking his skull.

MR. ALLEN: Well, Your Honor, we are not engaged in that kind of an analysis. We are trying to decide --

QUESTION: My point is the statute says use some discretion, right?

MR. ALLEN: That's correct, Your Honor.

QUESTION: And here they used none.

MR. ALLEN: Your Honor, here they intercepted every

call.

QUESTION: Well, doesn't that tend to say that no discretion was used?

MR. ALLEN: No, Mr. Justice Marshall, I don't think it does. There is a fundamental logical fallacy in that conclusion, which the District Court engaged in. In other words, consider the simplest case where all that is intercepted is one call and it is a clearly narcotics-related call. Now, would you say in that case that that evidenced that the agent hadn't used any discretion?

QUESTION: That has nothing to do with my question. It's not one call here.

MR. ALLEN: There are 384 calls.

QUESTION: That's a lot different from one.

MR. ALLEN: All of which our analysis indicates --

QUESTION: All of which had to do with dope like the weather.

MR. ALLEN: No, Your Honor, not all of which had to do with, but all of which were reasonably intercepted on the anticipation that they might have something to do with dope.

QUESTION: So the weather one might be a frameup or something?

MR. ALLEN: Well, the weather calls stand by themselves, and as I understand it there were very few of those, perhaps five or six. There were perhaps twenty calls to find

out what time it was, which is about a five-minute call and the agent has barely time to turn off the machine. The weather calls are, again, very short calls, and it is our position that the agents were not unreasonable in concluding that listening to a very short weather call where, by the time he takes off the headphones and turns off the machine the call is going to be over, the agents, it seems to us, are reasonable in concluding that the --

QUESTION: My question involved hitting the switch.

MR. ALLEN: All right, even turning off the recorder. By the time they reach over and turn off the recorder the call is over.

QUESTION: Well, why in the world, did they put this provision in the statute?

MR. ALLEN: They put the provision in the statute -- and we don't for a moment belittle the importance of this provision -- they put the provision in the statute to accommodate very important individual interest in privacy. Listening to a recorded weather call that anyone can listen to simply does not infringe upon anyone's privacy, Your Honor.

QUESTION: Well, why does the statute say that? The statute doesn't say that, does it?

MR. ALLEN: The statute didn't purport to enumerate all of the infinite circumstances in which -- infinite kinds of calls which an agent might --

QUESTION: Do you think we should?

MR. ALLEN: No, Your Honor, I think we have to look and see whether the conduct of the agents was reasonable and whether it violated the kinds of things the statute was designed to --

QUESTION: And do you think that where you turn a listening device on 24 hours a day for 30 days that that's okay?

MR. ALLEN: It is okay, Your Honor, if all of the calls that came through and they were listening to they had reasonable grounds to listen to.

QUESTION: Did you tell us that every call intercepted involved on one end of the line one or the other of the two defendants in the case?

MR. ALLEN: That is correct. Either Bernis Thurmon, the Petitioner, or his girld friend who is a co-defendant.

QUESTION: Isn't it usual when you tap somebody's phone that most of the time you hear him?

MR. ALLEN: That's correct, Your Honor, and when you hear him you have greater reason to listen to his conversation or some greater portion of it than you do when you listen to his ten-year-old daughter.

QUESTION: Yet, in the case that we heard several years ago the evidence showed that there were numerous calls to the tapped number where the person answering the phone was not the person residing in that place, but someone else there

taking orders for narcotics.

QUESTION: I think that case was the man's wife. In Chicago?

MR. ALLEN: I don't recall the case right off hand.

QUESTION: When it is a business enterprise, as the narcotics business is, it would not be unusual to have some relief in answering the phone to take orders.

MR. ALLEN: That's right. It seems to us that that is something that an agent can reasonably take into account. But in any event, in this case, the agents in the beginning knew that Petitioner Thurmon was the target of the tap. And, after a few days, they knew that his girl friend was taking orders for him.

The principal issue in this case, as we have been discussing, is whether the agent violated the minimization requirements in Judge Smith's orders.

Now, as I understand Petitioner's argument, their argument is essentially as follows. That the minimization requirement of the statute imposes a two-pronged test, both of which must be met before any interception is lawful. The first prong is, according to the Petitioners, that the agents engage in what they call "good faith" efforts at minimization. The second prong is that the interceptions be objectively reasonable. Although they also assert that the interceptions in this case were not objectively reasonable, they have relied almost

exclusively on the argument that there were no good faith efforts in this case to minimize.

Our response to their argument about good faith efforts is two-fold. We have two independent responses. Our first position is a legal position that the alleged good faith or lack of good faith, subjective good faith of the agents conducting an interception, is not a determining factor in deciding whether they have complied with the statute and the minimization orders.

Our second position is a factual position, that is, that the record in this case simply does not support the claim that the agents in this case had bad faith or subjectively intended to violate the provisions of Judge Smith's orders, including the minimization provision.

Now, the first issue, which is a legal issue, has importance beyond the facts of this case and should be discussed first, if not principally. The legal question, as I suggested to Mr. Justice Marshall, it seems to us, can, perhaps, best be put in focus by considering the simplest case. You have agents who obtain a court order to intercept conversations, based on probable cause that John Smith, the owner of the telephone, the subscriber to the telephone, is engaging in his narcotics business over that telephone. And they obtain a court order and the court order provides, pursuant to the statute, that the interception should be conducted in such a way as to minimize

the interception of conversations not otherwise subject to the statute.

The order, say, is for five days and during that period there is one call that comes over the phone, and that's a call from John Smith and he starts right off talking about his narcotics business and they listen to it and they intercept it.

Now, suppose later on, there is a suppression hearing and the agent testifies that his supervisor instructed him to listen to everything that came over the line. Now, as I understand Petitioner's position, they would contend that the interception of that call, which we would submit is clearly reasonable, is nevertheless unlawful because the agent who intercepted it would probably have intercepted some other call that was never made, in different circumstances.

Now, it is our central position that there is simply no basis in the statute, or in general principles of search and seizure law, for that position. We can't see any basis for arguing that that agent in my example failed, in the words of the statute, quote, "To minimize the interception of communications not otherwise subject to interception."

QUESTION: But, Mr. Allen, supposing the judge's order had left out any command to minimize and said go ahead and intercept everything. And then they had only intercepted one and it had been proper. Would that have been a proper --

MR. ALLEN: No, Your Honor, I don't think it would

because the statute provides as one of the grounds for suppression the allegation that the order is defective on his face. And in your hypothetical the order would be defective on its face. In other words, the interception that resulted from that order would have resulted from defective order.

QUESTION: Can you give me an example of a violation of a minimization order written in the words of the statute that would result in suppression?

MR. ALLEN: Yes. Suppose, for instance, the agents have an order to investigate my John Smith example. And he is out one night and he has a twelve-year-old babysitter and she makes a call to her boy friend and the agents have no reason to believe that she has anything to do or any knowledge of the operation, but nevertheless, out of curiosity, intercept the call. And, by happenstance, the babysitter says, "Well, you know, my boss, Mr. Smith, left some narcotics over here." We would admit that in that circumstance it was unreasonable for the agent to listen to the conversation and the evidence that happened to develop from it ought to be suppressed.

QUESTION: In other words, you are applying a sort of probable cause test that when the babysitter is calling her boyfriend there is no probable cause, in quotation marks, to believe that they are going to talk about narcotics. Is that it, something like that?

MR. ALLEN: I wouldn't use the words probable cause.

QUESTION: Well, I put it in quotation marks.

MR. ALLEN: Well, I would prefer to use the words: they had no reasonable expectation that the conversation would be relevant.

As I say, our position is, fundamentally, that good faith and lack of good faith cannot be a relevant consideration. It is true under the statute and it is true as a general matter of Fourth Amendment law.

QUESTION: But suppose the twelve-year-old had called an abortion clinic. And before you answer that, you know, this woman did here. She's a little over twelve.

MR. ALLEN: If the twelve-year-old in my example had called an abortion clinic the agent would have improperly intercepted.

QUESTION: But Geneva Jenkins who is co-defendant and participant in the conspiracy had made a call to some organization that had never come up in the tap before. I suggest that it was not unreasonable for the agents to listen.

MR. ALLEN: Why couldn't the statute say that if you file the proper papers you can get a tap on any person's wire for everything?

MR. ALLEN: If the statute said that, I think it would be unconstitutional, Your Honor.

QUESTION: And if they did it, would it be equally as unconstitutional?

MR. ALLEN: No doubt about it.

QUESTION: Well, isn't that what happened in this case?

MR. ALLEN: No, Your Honor, in this case --

QUESTION: They listened to everything. I thought you said that.

MR. ALLEN: They listened to everything in circumstances that made listening to everything reasonable.

QUESTION: But they listened to everything.

MR. ALLEN: That's correct, Your Honor, in circumstances that made it reasonable.

QUESTION: They were guilty people, is that the reason?

MR. ALLEN: No, no, Your Honor, the reason was that the conversations they were listening to were either narcotics-related or by someone who was involved in the conspiracy, and they were either narcotics-related or they were sufficiently ambiguous to give the agent some reason.

Let me give you an example. Agent Cooper, who was the primary witness in the suppression hearing, testified that he conducted this interception on the same basis that he conducted another interception recently. And he said that, for instance, in that interception, we had a case where two people -- a woman talking over the phone would always call her friend and when she called the particular friend she would always talk

about her illness. Well, after a time or two of that, we stopped intercepting that kind of conversation. I mean we had developed reasons to believe that the interception of that conversation wouldn't help our investigation. It seems to me that that is the reasonable way to go about it.

QUESTION: The agent says, "And one time we heard him talk to a guy who said he was his lawyer, and we didn't listen any more. We found out he wasn't his lawyer, he was his pusher." So now we are going to listen to lawyers, too?

MR. ALLEN: In this case, it was clear the one thing they weren't going to listen to --

QUESTION: Why didn't they tell the judge that? They didn't tell the judge that when they got the warrant. They got the order and they didn't tell the judge that. Did they tell the judge they were going to hear everything, that they were going to listen to every conversation?

MR. ALLEN: They told the judge. Implicitly, they told the judge when they applied for the order that they wanted an order to intercept conversations that contained information about the narcotics conspiracy. Implicitly, they told the judge they would act reasonably, which, in our view, they did.

QUESTION: Mr. Allen, let me go back to your twelve-year-old babysitter. Would you say they should not listen to the first conversation of the babysitter. Your example of the illness by the other person, they listened two or three times

and decided they had identified the pattern.

MR. ALLEN: Well, it would depend on the circumstances. As a general presumption, it seems to me, that a conversation between a twelve-year-old babysitter and her thirteen-year-old boyfriend, it seems to me, although there may be circumstances to the contrary that that kind of conversation is not going to be relevant.

QUESTION: Maybe they have the twelve-year-old answer the phone and they develop a pattern, have the twelve-year-old answer the phone, talk for a couple of minutes and then turn the phone over to the parents who are going to talk about drugs. How are you going to avoid that sort of thing if you say as soon as you hear a minute of juvenile conversation we turn it off?

MR. ALLEN: It would depend on the circumstances. I think in some circumstances, it would be reasonable to listen to a juvenile's conversation.

QUESTION: What about a thirty-two-year-old baby-sitter?

MR. ALLEN: The thirty-two-year-old babysitter, in this case, was a participant --

QUESTION: No, I mean in the case you are talking about.

MR. ALLEN: Oh, a thirty-two-year-old babysitter. Well, it would depend. If you knew the babysitter and you knew

she had no knowledge of the conspiracy, then probably I'd turn it off, although there may be circumstances in which you can listen to it.

QUESTION: More and more you convince me that Congress should not have put that in the statute, but just let you go.

MR. ALLEN: The minimization requirement?

QUESTION: Yes. But the trouble is Congress did put it in.

MR. ALLEN: Well, some of the judges on the Court of Appeals and Mr. Justice Brennan and Mr. Justice Marshall have expressed concern that if our position that the proper standard should be objective reasonableness were adopted there would be a danger that interceptions would then be validated by what they turn up. We submit that that concern is certainly understandable, but that it doesn't accurately reflect our position or the analysis that the Court of Appeals engaged in in this case. It doesn't reflect our position because, as I was stating to Mr. Justice Stevens, our position is simply that the reasonableness of interceptions has to be based on what is going on at the time, and if it is unreasonable for an agent to listen to conversations in view of all of the sensory inputs on him, then if by chance it turns up evidence, it is our position that that evidence should be suppressed. And that, essentially, is the analysis that the Court of Appeals engaged in in this case. And, essentially, it is no different from any analysis where

the courts try to decide, for example, whether a policeman was justified in arresting someone or stopping and frisking someone on the basis of circumstances at the time, even though that person may wind up to have contraband or weapons on him.

Apart from our legal position,--

QUESTION: As to stand, are you going to rely on your brief?

MR. ALLEN: Essentially, Your Honor, we will rely on our brief as it is standing, unless the Court has any questions about it.

Apart from our legal position, our factual response to the Petitioner's claim about lack of good faith efforts is that the record simply doesn't support the claim that the agent here acted in bad faith or intended to ignore their minimization obligations.

We have cited in our brief the testimony of Agent Cooper, to the effect that he was aware of the minimization requirement, that he instructed his agents with respect to them, that he never instructed his agents to listen to every call, and that if they had heard calls that appeared to be unlikely to relate to the investigation, they would have turned them off. And I won't burden the Court with recitations of the transcript. But I would only point out that the Petitioner's claim to the contrary and the District Court's finding to the contrary is based on a logical fallacy, that is, it is based on testimony

that doesn't logically support the conclusion.

For example, again to take the simple example of the case where over the period of the intercept only one conversation was intercepted and it happens to be reasonable to intercept it because it is clearly crime-related, suppose the agent in that case, in a suppression hearing, has been asked repeatedly, as Agent Cooper was asked in this case, "Well, did you ever make any efforts to minimize the interception of conversations? Did you ever consider your minimization obligation? Can you point to any instance in which you exercised discretion that resulted in the non-recordation as a discretionary matter as to what was overheard?"

If the agent in my example had given negative answers to that question, that wouldn't reflect that he was operating in bad faith. It would only reflect that he intercepted the only call that came over the line. And that is, essentially, the basis for the Petitioner's claim on bad faith and the basis for the District Court's analysis.

If the Court accepts our position that the proper standard is objective reasonableness, the question remains whether the interceptions in this case were objectively reasonable. In their brief, the Petitioners don't seriously challenge the Court of Appeals' conclusion that it was objectively reasonable to intercept all of the calls in this case. And they don't point -- at least in their brief -- to any calls that

shouldn't have been intercepted or any reasons as to why they shouldn't have been intercepted.

But the Court may be interested in the question, more generally -- of general considerations that apply to determining whether interceptions are reasonable or not reasonable.

And, at the outset, I want to stress again that it is not our intent to belittle the importance of the statutory minimization requirements. We recognize that they are designed to serve and accommodate important individual interests in privacy. But how those interests can best be implemented in each particular case often poses some very difficult problems.

Now, the Court of Appeals started with the proposition that seems clearly correct to us, that the very nature of interceptions that are authorized and limited by the statute requires monitoring agents to listen to at least some portion of every call before they can make any judgment as to the likelihood that the call is going to be relevant or irrelevant. Now, how much of the call may then be reasonably intercepted depends on a wide variety of circumstances, including what the agents know about the callers, the scope of the criminal enterprise, the degree of coded language employed in the call, and so forth. And many of those considerations can be applied only after the agents have been able to develop some patterns among the calls.

Now, the Courts of Appeals have developed a number

of relevant factors, including those I've just mentioned, but it would be impossible to enumerate an exhaustive list. In some kinds of cases, it may be possible for agents to develop more or less formal procedures or guidelines with respect to how they are going to go about an intercept. For example, in a gambling case, if they have reason to believe that John Smith is conducting a gambling business from a certain telephone, from his residential phone, but has three small children or three teenage children, it may be possible for the agent to develop guidelines that say don't listen to the calls of the children, but listen to the calls of John Smith. Because in a gambling case, most of those kinds of calls are simply calls where the caller calls in and places a bet, right off the bat. They go right to the business.

In other kinds of cases, like narcotics, particularly in narcotics conspiracies where there are many unknown participants and where one caller is always a known participant, it is much more difficult for the agent to establish guidelines, and they may have to rely on an ad hoc judgment about the calls they are listening to.

This case, I think, reflects that narcotics conspiracies present some unique difficulties to agents conducting interceptions under the statute. In narcotics conspiracies, at least like this case, it is very typical that the beginning portion of the conversation is largely ambiguous or irrelevant

and then the participants may refer to a suit of clothes which means a delivery of narcotics. And so it is much more difficult in this kind of case for an agent to decide with any great degree of certainty what kind of conversation they are listening to or to apply any formal procedures with respect to when to turn them off.

With respect to the additional issues in this case concerning the scope of the suppression remedy, and the standing of Petitioner Scott, we rely primarily on the arguments we have addressed in the brief.

I would only emphasize here our response to the Petitioner's argument that if, as we contend, the statute only requires the suppression of conversations that should not have been intercepted because they are irrelevant, then agents will not be deterred from listening to every conversation. That argument, it seems to us, to misconceive the traditional purpose of the exclusionary rule which is not to punish police but rather to remove their incentive to commit unlawful acts.

Our position is fully consistent with that traditional purpose. Any interception that should not have been intercepted should be suppressed, thereby removing the agent's incentive to intercept communications in violation of the minimization requirement. But, beyond that, there is even less reason or need in this context to expand the suppression remedy, because this statute, unlike most Fourth Amendment contexts, imposes

significant affirmative sanctions on officers who violate their statutory obligations in bad faith, civil and criminal sanctions.

QUESTION: There is a way to read this statute, Mr. Allen, as a question by my brother Stevens a while ago indicated, that would make it both semantically meaningless, as well as you -- as practically meaningless. Because the statute says "imposes an obligation to conduct the surveillance in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." And all the communications are otherwise subject to interception under this chapter, under the court order.

MR. ALLEN: Arguably, Your Honor, although the statute specifically exempts, I believe, privileged conversations.

QUESTION: Yes, everything except evidentiary privileged conversations.

MR. ALLEN: That is a possible way to read the statute, Your Honor.

QUESTION: Grammatically, that is the way to read it, isn't it?

MR. ALLEN: That is correct. We wouldn't rely on that reading. It seems to us that the purpose of the statute read as a whole is to authorize only certain kinds of interceptions of certain kinds of conversations, and that was probably what the minimization provision was referring to; that is, if you receive an authorization to intercept, to obtain

narcotics conversations, it seems to us the statute probably meant that you weren't supposed to receive -- that you were supposed to make reasonable efforts to minimize the interception of non-relevant conversations.

QUESTION: Mr. Allen, do you rely at all on an argument, I don't know if it has been made or not, that your investigating people are going to be potential defendants in a criminal trial, presumably they may come up with some kind of an alibi defense, or they may come up with stories that would try to explain ambiguous transactions, and even though a particular conversation is not crime-related it may give you information in the nature of a diary, or something about the trial that would help you at the trial?

MR. ALLEN: We would contend, Your Honor, that the authorization under a court order extends to the interception of communications for the purpose of developing evidence relevant to the investigation.

QUESTION: Including impeaching evidence, potentially impeaching evidence?

MR. ALLEN: I should think so, Your Honor, although I would want to think about that a little longer.

QUESTION: Possible defense in a criminal trial, such as an alibi. If he says, "I was visiting my mother at 2:00 o'clock Tuesday afternoon." And you can say, "As a matter of fact, you were on the telephone talking to your butcher."

MR. ALLEN: In certain circumstances, that might be reasonable, although I wouldn't want to take it too far because if you took it too far you could intercept everything.

QUESTION: Exactly.

You don't know what a person is going to say by way of an alibi until the trial begins.

MR. ALLEN: That's right. But we wouldn't contend that the statute should be construed to let us intercept everything for any reason, only for reasonable reasons.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:43 o'clock, p.m., the case in the above-entitled matter was submitted.)