ORIGINAL

In the

Supreme Court of the United States

LAWRENCE DALIA,

PETITIONER

V.

UNITED STATES

No. 77-1722

Washington, D. C.
January 9, 1979
January 10, 1979

Pages 1 thru 51

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IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE DALIA,

Petitioner

v. : No. 77-1722

UNITED STATES

Tuesday, January 9, 1979

Washington, D.C.

The above-entitled matter came on for argument at 2:28 o'clock p.m. on Tuesday, January 9 and was continued to 10:04 o'clock a.m. on Wednesday, January 10, 1979

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

LOUIS A. RUPRECHT, ESQ., 1180 Raymond Boulevard, Newark, New Jersey 07102 For Petitioner

ANDREW L. FREY, Deputy Solicitor General, United States Department of Justice, Washington, D.C. For Respondent

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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 Number 77-1722, Lawrence Dalia versus the United States.

Mr. Ruprecht, you may proceed whenever you are ready.

ORAL ARGUMENT OF LOUIS A. RUPRECHT, ESQ.,

ON BEHALF OF PETITIONER

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

I think a brief review of the facts would be in order in this case. The Petitioner was convicted of a receiving offense and a conspiracy to receive goods in interstate commerce which had been stolen.

The hijacking which formed the basis for the theft offense occurred on April 3rd, 1973 and several men were caught with the stolen goods in their possession, the Petitioner not included, on April 5th, 1973.

During this very period of time, the Petition had been the subject and was still being the subject of a very intense electronic surveillance by the Government because on March 14th, 1973, the Government had obtained a Title III order from Judge Lacey in the District of New Jersey permitting the Government to intercept all telephone communications on two of his business telephones in Linden, New Jersey.

So for 20 days, up until April 3rd, I believe, or

April 4th, 1973, the Government was actively overhearing these business conversations.

At the conclusion of that 20-day period, the Government came back and obtained another order renewing for another 20 days telephone taps on the two business telephones but this time also secured an order permitting electronic surveillance of office conversations that would be taking place in an enclosed office in the northwesterly corner of Mr. Dalia's building.

There was nothing in that order of authorization and nothing in the application therefor which gave any hint as to how the Government intended to install this listening device if one was to be installed and indeed, Judge Lacey asked no questions and the strike force attorney who made the application gave no informal information in that regard.

On the night of April 5th, 1973, three FBI agents opened a window of the building, walked down a corridor and in a process of a time of about two or three hours, installed a listening device in the ceiling of Mr. Dalia's office.

At that point in time it was activated and for 20 days, all office conversations were overheard and recorded as well as the office telephones.

On about April 27th, the Government went back and made another application to continue the electronic surveillance and got another 20-day order for both the office

conversations as well as the two telephones.

The upshot of all this was that as a result of the electronic surveillance there were over 5,000 telephone calls intercepted and recorded, over 1,000 separately-designated office conversations overheard and recorded and over 1,500 tape reel hours of overheard conversations.

I bring this to the Court's attention because I think it is significant when it is coupled with the underlying complaint that the Petitioner has with respect to this case. And that is the activity of the Government in conducting the breaking and entering without any court authorization, without any advisement to the court, indeed, without any statutory authorization.

QUESTION: Mr. Ruprecht, the breaking and entering was not necessarily in order to overhear the telephone conversations, was it?

MR. RUPRECHT: That is correct.

QUESTION: Nor was it in fact connected with the tap on the telephones.

MR. RUPRECHT: As far as we know, that interception was done privately at the telephone business office.

QUESTION: Outside -- you mean outside the office.

MR. RUPRECHT: That apparently is the usual routine on telephone interception. In this case, however, the Government apparently knew in advance and when I use the term "the

government," I mean the FBI agents and presumably the strike force attorney knew in advance that a break and an entry was to be accomplished.

This was not, however, passed on to the court who was overseeing the Title III --

QUESTION: How could the court not know that there would have to be a trespass?

MR. RUPRECHT: I think that --

QUESTION: How else could you get into a person's private office except by trespassing?

MR. RUPRECHT: Mr. Justice Marshall, I think that is easily answered and I think that it is the argument that the Government makes which is most easily answered.

QUESTION: I am waiting.

MR. RUPRECHT: In this case it is easily conceivable that the government could have effected electronic surveillance by placing an instrument or a recording device on a windowsill outside, on the window itself --

QUESTION: Is it a sill mic?

MR. RUPRECHT: Pardon?

QUESTION: A sill microphone?

MR. RUPRECHT: Or even a spike microphone such as was used in Silverman against the United States.

QUESTION: Well, when you say "could have," do you mean physically they could have?

MR. RUPRECHT: There is not a record below to show whether or not that would have been possible. What I am suggesting, though, is, certainly a judge looking at this application would not necessarily have to conclude that these are about to commit a breaking and entry any more --

QUESTION: Wouldn't you assume that if you told the average person, "I am going to put something in Joe Bloke's office which he will not know is there," that the average person would realize that there was about to be a trespass?

MR. RUPRECHT: If you put it that way but that is not the way this was put. This was not put in the application that we are going to install it in his office.

Rather, they asked for the right to intercept the conversations which were occurring in that office and any judge who was up on his law dealing with electronic surveillance would have read Silverman against the United States and known that their surveillance was accomplished without entering that Petitioner's office, that in Goldman against the United States electronic surveillance was accomplished by using a detecto-phone against a partywall.

And indeed, in Katz against the United States, electronic surveillance was accomplished without a direct physical intrusion --

QUESTION: Into the telephone booth.

MR. RUPRECHT: It was apparently placed on the

outside of the telephone booth.

QUESTION: That is not this case.

MR. RUPRECHT: That is not this case but what I think is important to recognize, it does not necessarily follow from intercepting oral communications that a break and entry is the only way to accomplish that result.

In Silverman and Katz and in Goldman which has now I think been overruled, the present rule of this court would be that you would need a warrant for any of that kind of thing, would it not?

MR. RUPRECHT: I would suggest that yes, there would have to be a warrant in a Goldman-type of situation where there is no physical intrusion clearly but still there is an electronic acquisition of what would be private conversations.

QUESTION: So what you are seeking to protect against here by your argument is not the constitutional invasion of privacy but simply the intrusion on the property rights?

MR. RUPRECHT: That is exactly right, Mr. Justice Rehnquist. I think that the type of intrusion we are talking about here is a peculiarly sensitive one. It is the most intrusive way, I believe, law enforcement officers can enter into one's life. That is, to physically commit a break and entry into a person's home or office. Certainly it is the

type of intrusion that is susceptible to the greatest abuse.

It is the type of intrusion that for example in this case could have and did result in some type of a search because the officers in the very limited evidentiary hearing I was permitted on the part of one of three officers who broke in admitted that the first step was for the officers to fan out and search the entire building for what he termed -- and perhaps rightfully so -- safety reasons.

Naturally, officers are going to be concerned lest there is someone else in the building --

QUESTION: Before we get to the after-effect, how was the entry accomplished here?

MR. RUPRECHT: The first entry was made through what the officers in an affidavit said was an open window. By that they mean, presumably, it was open after they opened it.

The next entry that was performed was on May 16th when the listening device was removed and there they said they pried open the window and they indicated at the evidentiary hearing it was the same window in both instances but --

QUESTION: Well, in the second instance, was the window in fact locked?

MR. RUPRECHT: In the second instance I know that the window was locked but that specifically was not mentioned in the --

QUESTION: Well, but you mean when you said that it had been pried open, the implication is that, pried is that it was locked.

MR. RUPRECHT: Yes, that would be what I would think would be a fair inference from the --

QUESTION: And the corollary would be that it was open on the original entry.

MR. RUPRECHT: I think that is what the officer meant that -- what I think he meant was it was unlocked the first time and therefore they opened it and the second time it was locked and they, in effect, jimmied it open.

QUESTION: Well, the first would permit of two alternatives, would it not? Either that it was wide open or that it was unlocked and easily opened?

MR. RUPRECHT: It may have but I do not think that it would change the circumstances one iota.

QUESTION: You say it is still a breaking and entering?

MR. RUPRECHT: It would still be a breaking and entering and one thing that is --

QUESTION: I take it you think even if they got in with a passkey through a door, that would still be a breaking and entering.

MR. RUPRECHT: It would still be a breaking and entry but there is, I think, something less repugnant about

that and it is less repugnant when an officer chooses to make his entry for installation of listening devices, as done in Ford, through a strategem or a ruse, in that case of a bomb scare. Or perhaps through the use of an informant who might be lawfully on the premises but while there secrete a listening device, any of these methods are less intrusive, less repugnant, less obnoxious and something that, I believe, are more easily tolerated.

QUESTION: What if you had a warrant -- what you have here plus a warrant to enter the premises by any means possible for a search, in other words, a typical search warrant, and they went through the usual procedures of searching, 3109, identified themselves but no answer, no one is in the premises and then they proceed to make an entry, by any process you want to hypothesize and they look around for papers and they find some things that they want but also before they leave, they install the listening device, what would you think about that?

MR. RUPRECHT: In my view, the search would be perfectly appropriate and if --

QUESTION: And the seizure, too?

MR. RUPRECHT: And the seizure if they were --

QUESTION: If they had a warrant.

MR. RUPRECHT: If they had a lawful search warrant. However, installation of the device and the use of a search

warrant as a guise for entry in order to install listening devices I think would be unsound and illegal.

There is no warrant for installing listening devices through the use of a search warrant as your mode of entry. A search warrant is for a particular purpose, to search and sieze property.

I am mindful of the recent case of New York Telephone. However, that was a very limited type of intrusion, the use of a pen register which was permitted under the Rule 41 as a search.

This is something much more, to permit a breaking and entry for the purpose of installing a listening device is simply not a search and seizure and cannot fairly be considered to come within Rule 41 and so I would suggest that that would not be appropriate. The bottom line -- I'm sorry --

QUESTION: You used the term, breaking and entering several times. Is that solely a question to be determined by state property law? It occurs to me that for instance an officer conceivably could break and enter and search and seize and if the court were to find exigent circumstances there would be no constitutional violation.

MR. RUPRECHT: I suppose, Mr. Justice Rehnquist, that my use of the term, break and entry really is perjorative and intentionally so, I suppose but if this court were to say that this is a justified entry, then that is the end of the use

of the term, break and entry.

QUESTION: But there is nothing in the Constitution that prohibits breaking and entering as such. You have the Fourth Amendment that protects against unreasonable searches and seizures.

MR. RUPRECHT: And the Fourth Amendment, I would suggest, clearly makes illegal what was done in this case because before a police officer may lawfully break and enter, if we use that term, in order to execute a valid search warrant he must have made an appropriate showing before a magistrate.

There must have been a showing of necessity and he must in advance of his entry have been told what he can do. All of this was missing.

QUESTION: So you are saying that this is a Fourth Amendment violation, simplistically.

MR. RUPRECHT: This is clearly a Fourth Amendment violation because none of this was present and in fact I think that the brief of the Government almost concedes that. The Government seems to concede in its brief -- and in fact at page 16 it indicates that lawfulness should be judged by subsequent evaluation of the reasonableness of the agent's actions.

Well, this would fly in the face of a host of Fourth Amendment cases which say that the reasonableness must be judged in advance. There must be antecedent --

QUESTION: Fruits -- you can't judge it -- fruits,

in other words.

MR. RUPRECHT: I'm sorry, Mr. --

QUESTION: You cannot judge the validity of the search by the fruits.

MR. RUPRECHT: Exactly right and there must be direction to the agents who are to execute the work as they go on their way. You never look at the search after it is over and say, well, even though they did not get what they should have gotten from the Magistrate, they could have --

QUESTION: You never answered my brother Rehnquist and I still do not see how you get a search out of this.

MR. RUPRECHT: I would tend to agree. My --

QUESTION: But if you do get a search, how do you get the Fourth Amendment?

MR. RUPRECHT: My Fourth Amendment --

QUESTION: If you do get the Fourth Amendment, how do you get the objection to breaking and entering?

MR. RUPRECHT: My Fourth Amendment argument would only come in place if there was first a determination made that the officers should have gotten a search warrant because this is a search. I do not concede that.

QUESTION: And then if it is not a search, he does not need a warrant.

MR. RUPRECHT: No, he cannot even enter.

QUESTION: Well, what provision of the Constitution

says that an officer cannot enter without knocking?

MR. RUPRECHT: There is certainly no right on the part of any police officer to come in without knocking.

QUESTION: Is there anything that prevents him from -- any right that an individual has that prevents a police officer from breaking his door down?

MR. RUPRECHT: Yes and that is one that can be found through implication in the Fourth Amendment that says the right of the people to be secure in their homes. They have that right and it can only be lost once in advance once a magistrate gives them the right to do so.

QUESTION: Can you give me any case law to help me a little?

MR. RUPRECHT: I would suggest that any case where officers have failed to get a search warrant in advance of their entry and have found the results of that search suppressed stands for that proposition.

QUESTION: How would you characterize Judge Lacey's order? What label would you put on it?

MR. RUPRECHT: Certainly it was totally neutral in its terms with respect to what the officers might do and I would use the term "deficient" in this respect: If this Court were to find that in the abstract -- and I don't concede this point -- that in the abstract officers may conduct surreptitious entries or break and entries to install listening devices,

then that must be governed by Fourth Amendment standards and the order permitting them to do so must be founded upon facts submitted to the magistrate as to the need for this type of entry and he must then direct exactly what they may do and how many times they may do it, who has the right to do it.

QUESTION: From where do you draw that?

MR. RUPRECHT: From all those Fourth Amendment cases which say there must be a particularity --

QUESTION: Not from a statute, though?

MR. RUPRECHT: No, rather from case law that indicates that there must be particularities in the search warrant itself which directs the executing officer as to the location, that directs him as to what is to be seized.

There must be a particularity. There must be a certain time frame over which it must be executed on and none of this was touched. Again, I don't mean by this argument to suggest that I concede there is a right on the part of the Government to this.

QUESTION: You argue, as I understand it, in part two of your brief that even if the Congress had specifically authorized this conduct, that it would be invalid.

MR. RUPRECHT: That is correct and that is the Constitutional argument, that a search such as this is inherently unreasonable.

QUESTION: So that Congress could never authorize it.

MR. RUPRECHT: That is my suggestion and point two in the brief. I think that the Constitutional argument perhaps is unnecessary to even arrive at because the point one in the brief directs itself to the statutory interpretation of Title III and I think that, really, this is a case of statutory construction.

QUESTION: This is the counterpart in this situation of 3109?

MR. RUPRECHT: Well, 3109, really, I don't think is all that analagous.

QUESTION: Obviously it can't apply here.

MR. RUPRECHT: Yes.

QUESTION: It couldn't very well require that first they knock on the door and announce who they are and why they are coming .

MR. RUPRECHT: Yes, 3109 is simply a reflection of the realities of the situation in that there are --

QUESTION: Well, 3109 is the Congressional limitation upon the execution of a search warrant.

MR. RUPRECHT: That is exactly right but I don't see how that can assist you --

QUESTION: No, I do not suggest that it does. What I am asking is, you are arguing that Title III also constitutes a Congressional regulation of the execution.

MR. RUPRECHT: Exactly and certainly in something

as important as a surreptitious entry, one would expect and one ought to demand that there be some specific legislative approval before that is ready for --

QUESTION: Now, what specifically in Title III do you think provides this regulation?

MR. RUPRECHT: There is absolutely nothing in Title III that shows that the Congress intended to permit breakings and entries or surreptitious entries to install listening devices. The statute is totally silent and the several cases that have come up involving this issue seem to have only one thing that they are in agreement on and that is that there is nothing in Title III on the issue. It seems to be an important area that Congress simply decided not to write in because they --

QUESTION: Well, now, how do we write it in?

MR. RUPRECHT: Certainly I think it should not be written in. I do not believe that --

QUESTION: Perhaps I do not follow you, then.

MR. RUPRECHT: I do not think that this Court should write into Title III a right on the part of law enforcement officers to conduct surreptitious entries when Congress has not seen fit to enact such a right. That must come from Congress and Congress has not done so.

I think it would be --

QUESTION: This is because it is silent it is forbidden, then?

MR. RUPRECHT: I think so and I do not think that a court would have the right to give that to the police, or would have the right to say, "You may commit breakings and entries" any more than a court would have the right on its own to permit someone to conduct a break and entry, not to seize property but perhaps to look at it and then discuss it with police officers later on.

QUESTION: The argument is that it is in the statute by necessary implication.

MR. RUPRECHT: The Government would argue that it is there by necessary implication and I think the response to that is that it is not necessary to imply that; only if you say or adopt the Government's argument that this is something so vital to law enforcement that things will come to a halt without it.

QUESTION: So inherently, at least sometimes necessary to the interception of oral communication, as a factual matter.

MR. RUPRECHT: I will agree with that. I am sure that there will be some times that the Government would be stymied, that there would be some attempt at electronic surveillance that would fail but for a break and an entrance.

QUESTION: And the argument, as you well know of course is that when Congress authorized within the limitations of the statute the interception of oral communications it

necessarily authorized whatever was necessary to make those oral interceptions.

MR. RUPRECHT: Well, Congress --

QUESTION: And that factually -- this is a factual matter, quite apart from the needs of law enforcement or anything else, this is a factual matter that at least sometimes and probably most of the time a surreptitious breaking and entering is necessary to make an oral interception.

MR. RUPRECHT: Certainly Congress did not put that in writing.

QUESTION: No, it did not.

MR. RUPRECHT: And although it was extremely explicit with respect to many important items, it said nothing about that and it silenced --

QUESTION: Did not Congress assume that it would be done without the knowledge of the person involved?

MR. RUPRECHT: I think -- well, without the knowledge, yes. But not necessarily --

QUESTION: There is no question.

QUESTION: There is no question about that, is there?

MR. RUPRECHT: I will agree with that, Mr. Justice Marshall.

QUESTION: Do you think they just had in mind a directional microphone that could penetrate a window or

something like that?

MR. RUPRECHT: I am sure that there would be some people who were thinking along those lines but I think that its absence can only be explained because there was no consensus that would give that kind of thing to the drafters of the legislation.

QUESTION: When I put the hypothetical to you before about entering by force the unoccupied property or premises under a warrant, you said they could seize anything they found but they could not leave a microphone there.

Now, instead of leaving a microphone, let's carry the hypothetical perhaps rather extensively and they leave one of their men who can take shorthand notes or who has a recording machine which he can hold in his hand or just listen, any one of those three and he hears the conversations and there are buildings in which this would not be impossible . The man could do this without being detected.

What would you say about the information he acquires? Is that admissible or that subject to suppression?

MR. RUPRECHT: I would think not. The stationing of the police officer secretly in a house is perhaps the one intrusion that is even worse than the break-in and entry.

QUESTION: Let us say it is an office or a warehouse, then, if it will make you any more comfortable.

MR. RUPRECHT: I do not think that there would be

any warrant for that. I do not think that there would be any right on the part of the --

QUESTION: In other words, what that officer heard in the room next to where he was stationed could not be admitted in evidence?

MR. RUPRECHT: I believe that is correct.

QUESTION: Mr. Ruprecht, a moment ago you answered my brother Brennan's question about Section 3109 being a limitation on the authority of the law enforcement officer to execute a search warrant. I take it if that were not present, an officer could break and enter in order to serve a search warrant?

MR. RUPRECHT: No, I think that there have been cases that indicate 3109 is really a codification of common law principles and these exceptions of exigencies developed through the common law in 30 --

QUESTION: Well, then, what about the arrest warrant, if you want to talk about the common law?

Here is a warrant for the arrest of a specific person because there is probable cause to believe he has committed a crime and the officer finds that he is in his house and may he break in without any notice?

MR. RUPRECHT: Yes, I believe the cases are that he can forcibly enter.

QUESTION: Why may he do that?

MR. RUPRECHT: I think that --

QUESTION: There is nothing in the warrant that indicates that he may do so.

MR. RUPRECHT: I think probably because the execution of an arrest warrant is something that is so fleeting in time, so brief and demands the presence of the person in order to even be effective, there simply is not the danger that is associated with a search warrant or in this case --

QUESTION: Well, I know but you could always have a boiler plate and a search warrant and say if it is necessary to break into the house, break into the house. But it has never been required. If the officer finds on the spot that it is necessary to break in to execute the warrant he may do so. In the case of arrest.

MR. RUPRECHT: Yes. And I think that the only explanation for that is because the nature of that intrusion associated with an arrest is necessarily less or usually less than that associated with a search and especially that associated with electronic surveillance.

QUESTION: I take it that the government is arguing here that the same inferences are logical and reasonable under Judge Lacey's order as the ones you have just been discussing with Mr. Justice White on an arrest warrant.

MR. RUPRECHT: Yes, that is so.

QUESTION: It is like the mounted police, you get

your man wherever you can find him.

MR. RUPRECHT: Except what the Government seems to concede is that there is some type of Fourth Amendment protection surrounding this and yet the Government would also have to concede that Fourth Amendment protections were not available here with respect to the entry because there was never any type of antecedent justification for the entry.

There was never a record made before Judge Lacey as to why this was necessary and indeed, Judge Lacey's so-called "finding" some four years or almost four years after the fact in his opinion that a break and entry was the safest and most expeditious way of conducting this electronic surveillance is bereft of any factual support because there was never, even during the evidentiary hearings, any testimony that showed this was necessary.

There was never a showing that there was true exigency in the sense that a place had to be broken into for implanting an electronic listening device.

QUESTION: Going back to 3109 for a minute, is it your view that if 3109 had not been enacted that what it now provides would nevertheless be the law?

MR. RUPRECHT: Yes, I believe that is true. I do not think --

QUESTION: On search warrants.

MR. RUPRECHT: Yes, on search warrants. I do not

think 3109 really added anything that was not already there.

QUESTION: It would be constitutional -- a constitutionally-required search --

MR. RUPRECHT: Yes.

QUESTION: Well, that has to do with the authority, your second point.

QUESTION: I am not talking about the limitation but if you could read it both as a limitation on the agents' method of executing a warrant and also the authority to break in which might not otherwise exist, I take it you take the position that even apart from 3109 the officer would have the authority to conduct a break-in in order to execute a search warrant.

MR. RUPRECHT: Under some circumstances. If he was faced with a situation of imminent destruction of evidence or if he --

QUESTION: No, no, there is no requirement of imminent destruction of evidence in 3109.

MR. RUPRECHT: Not in 3109 but there is another --

QUESTION: Well, I am asking you, did 3109 enlarge the authority of the federal officer in any way?

MR. RUPRECHT: I think now; 3109 is a curious statute in that it has been interpreted as --

QUESTION: You are saying that without 3109 they could have broken in without exigent circumstances?

MR. RUPRECHT: Not without exigent circumstances.

QUESTION: Well, there is nothing in 3109 that requires exigent circumstances.

MR. RUPRECHT: That is correct. They do not use the term. They rather talk in terms of the threat to the officer's safety and there is another provision in there but they do not use the term "exigent circumstances" and yet --

QUESTION: There is nothing about threat to the officer's safety in here, either.

MR. RUPRECHT: I think the fleeing of a suspect they are --

QUESTION: No, the only thing is, they do not open the door.

QUESTION: It is just the case law that is evolving.

QUESTION: You announce the authority and if you get no response you can break in.

MR. RUPRECHT: Yes.

QUESTION: And you have conceded that if you knocked at the door with a search warrant and there was no answer and they either knew or suspected there was no one home, they could validly break in and make the search. You have conceded that much.

MR. RUPRECHT: Yes. That is right.

QUESTION: And you don't think 3109 added to the authority of the federal officer -- if that is true, then

why do you make a statute? You make a big argument in your brief about needing statutory authority for this break-in. I do not understand. It seems to me you are --

MR. RUPRECHT: Because in the rules of federal criminal procedure we have Rule 41 which authorizes search warrants and that is the authority for issuing them but there is no authority anywhere for issuing warrants to commit break-ins to install listening devices.

MR. CHIEF JUSTICE BURGER: Thank you.

We will hear you in the morning at 10:00 o'clock.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned, to reconvene at 10:00 o'clock a.m., Wednesday, January 10, 1979.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will now hear arguments in Dalia against the United States.

Mr. Frey, you may proceed.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE UNITED STATES

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

Petitioner has presented three separate grounds in support of his contention that the agents' surreptitious entry into this unoccupied business premises for the purpose of planting the listening devices that were necessary to carry

out the court-authorized eavesdropping was unlawful and requires suppression of the intercepted conversation.

First, although he did not put it first in his brief but I think he has continued to maintain the position, he contends that such surreptitious entries are absolutely barred by the Fourth Amendment regardless of the existence of any Congressional authorization for them or the presence of any court order authorizing them.

Second, he contends that even if such entries could be carried out consistently with the Fourth Amendment, Congress has either prohibited or failed to authorize them in Title III or elsewhere.

Third, he contends that even if there is no Constitutional or statutory barrier to such entries, the agents' action in this case was unlawful because of their failure to procure from the District Court an express authorization of the entries that were necessary to carry out the Court's Title III order.

Now, before I begin the argument, I think there is a factual background that came up slightly yesterday and there is some misconception around as to the question of the need to make trespassory entries for purposes of planting the listening devices in connection with eavesdropping orders. There is language in the Berger opinion of this Court ten years ago which I think was still several decades before its time in

terms of talking about electronic beams from outside and what we called in our brief the "Buck Rogers kind of equipment."

As matters stand today, there are very, very few cases if any of surveillance of interior areas where that kind of equipment is useful as a practical matter.

Similarly, the martini olive transmitter and so on is virtually never used in these cases because radio transmitters are not used because they are easily detected by a scanner that you can buy at Radio Shack for a few dollars and so that in the normal case when you are talking about a Title III eaves dropping order of an office or some interior area, you are talking about the need for some kind of what was viewed as a trespassory entry prior to Katz.

Now, we have been advised by the FBI that in perhaps slightly fewer than 10 per cent of the cases, the spike mike through the wall kind of approach is available and that was normally the cases where the FBI is able to gain control of the adjoining space, for instance if it is a hotel room and they can rent the adjoining hotel room or an office and they can rent the adjoining office but in all other cases, some kind of a physical entry of an agent into the premises together with a fairly extended period of time is necessary because this is a wire installation.

It is not a matter of putting a radio transmitter in but of installing something and running wires out to a

receiver is necessary.

Now, they do use ruses in a certain proportion of the cases but the vast majority of the cases are entries such as occurred in this case.

QUESTION: Mr. Frey, you have described what the practical situation is today. How much of that was explained to Congress during the hearings on Title III?

MR. FREY: Well, we have cited in our brief about 12 to 14 illustrative instances of testimony before Congress about how surveillances were conducted and it was clear to Congress that trespassory entries of the kind that occurred in this case would be frequently necessary.

QUESTION: The Senate Report does not mention that subject at all. It does mention the cases in which the spike mike was used and some of the other cases where there was no entry but there is nothing in the Senate Report that I could see where they discussed anything like what you have just described. I am aware of the fact that there are references in the hearings that you described.

MR. FREY: Our argument there, there are references in the hearings. There are references in the debates. There are references in the President's Commission report which was relied on heavily by Congress and of course Berger itself which was --

QUESTION: Do any of those references indicate

that in even the majority of the cases there was a need for surreptitious entry? They do refer to the need on occasion. They also recite cases which indicate that frequently it could have been done without a surreptitious entry so how do we -- in other words, I am just wondering about the state of knowledge of the Congress with respect to this.

MR. FREY: I think that to some extent we must speculate about what individual members of Congress expected. However, I will get to the point that there is evidence, I think, in the Senate Report itself that Congress intended to allow the installation of eavesdropping devices of the kind that we have in this case.

QUESTION: Yes but does that evidence in the Senate Report also go to the point of surreptitious entry? That is it.

MR. FREY: Well --

QUESTION: It would be very hard to put it in there with the man's consent.

MR. FREY: No, I think it is clear but there is talk and Mr. Ruprecht suggested yesterday that there might be many ways you might insinuate a confederate or an informant in. Well, that simply is not practical. You might use a ruse but what I am suggesting is the kind of ruse that you need is one that gives you access to the man's office for a couple of hours.

QUESTION: I understand that. The point that interested me was that the Senate Report relies very heavily on

this Court's previously-decided cases which included the use of a mike on the outside of a telephone booth, a spike mike, and they may not have focused on this problem is all I am suggesting because of the emphasis on the cases in the report.

MR. FREY: Well, I can't cite you at the moment any particular place in the legislative history where there is a statement that reflects Congress' understanding of the facts as I have told you this morning but I think it is clear that they knew and there is absolutely no place in the legislative history that suggests that they intended to prohibit surreptitious entries of the kind that occurred in Berger.

Let me pass for the moment the broad constitutional contention of Petitioners because I think that is sufficiently insubstantial that I should get on to other more important questions.

In terms of the question of the existence, if any is necessary, of statutory authority for a surreptitious entry to install a listening device, now, I believe that on close analysis the answer to this question is fairly clear and it is as we are arguing it but the Sixth and Ninth Circuits have concluded that there is no power in the federal judiciary to authorize eavesdropping that entails surreptitious entry into private premises and these decisions have caused grave concern for the Department of Justice so they have rendered it virtually impossible for the Government to use the authority

conferred by Title III to intercept oral communications in the effort to combat organized crime in the states within those circuits.

Now, in considering the question of statutory authority, I think we should first look at Title III itself and consider three possible conclusions that might be reached about the effect of that enactment.

The first, which is what I understand Petitioner's argument to be is that Title III prohibits surreptitious entries into private premises to install listening devices.

The second, which we would contend is on the other side, is that Title III is itself a source of authority for such entries.

The third possible conclusion is that Title III neither confers nor withdraws authority so that the source of authority, if any specific source is necessary, must be sought elsewhere.

Now, with regard to Petitioner's proposition -- and I think the conclusion of at least the Ninth Circuit and the Sixth Circuit did give more consideration to alternatives, the Title III failure to contain express provisions regulating the authorization of trespassory entries to plant listening devices reflects a Congressional purpose for at least a Congressional accomplishment of the end of banning or withdrawing authority for such entries.

Now, we submit that there is no basis for the Court to impute to Congress such bizarre and self-defeating action. After all, while Title III was designed in part to protect the citizenry from unconstitutional invasions of communicational privacy as well as from nongovernmental invasions of communicational privacy, it was indisputably also intended within Constitutional limits to enable law enforcement officers to use electronic surveillance to combat organized crime and what was the case that Congress was studying most closely in its effort to design a constitutionally-acceptable system to enable law enforcement officers to conduct electronic surveillance?

That case was Berger against New York.

And what was it that the officers did in Berger that Congress, we submit, plainly sought to allow in future cases? They surreptitiously entered a business office to plant a listening device.

QUESTION: Mr. Frey, at that point, would your argument be the same if the surreptitious entry was into a private residence as distinguished from a business office?

MR. FREY: Well, we would reach the same conclusion but it is possible that the Court would view the issues -- I mean, we do not deny that there is some more sensitivity in entering a private home than there is in entering a business office although both are protected by the Warrant Clause of

the Fourth Amendment but I think we would ultimately come to the same position.

Now, is it reasonable to conclude that Congress, while on the one hand trying to legalize law enforcement eavesdropping in circumstances like the Berger case, on the other hand sub silencio concluded that surreptitious entries such as were made in Berger were so offensive that they ought not be permitted?

It is that implausible premise that Petitioner asked this Court to adopt and that underlies the Sixth and the Ninth Circuit decisions in Finazzo and Santora.

Now, I'll just come back and mention that while the legislative history is not as clear as we would like, there is no question that Congress was repeatedly told that the kind of eavesdropping in Berger and that it was studying would often or usually involve surreptitious physical entry to the premises where the conversations are to take place.

Now, it nevertheless decided to authorize interceptions of oral communications without restriction as to the places where such communications could be intercepted.

And in fact we quote a statement by Senator Tydings in our brief at page 38 in which he describes a fact situation very much like Berger and he was one of the principal sponsors of the bill and states his view that it is offensive that this Mafia-figure or organized crime figure whom he was talking

about could not be convicted and that the purpose of the bill was to facilitate or legalize under appropriate controls the kind of entry to plant a listening device that occurred in this case.

Now, Petitioner stresses what he perceives to be the Congressional silence on the subject of surreptitious entries as evidence that it did not intend to permit them for Title III searches. Congress was not utterly silent.

The Senate Report, in describing what the Legislation generally set out to accomplish, and it is stated at page 40 of our brief, said: "Legislation meeting the Constitutional standards set out in the decisions --" referring to Katz and Berger -- "and granting law enforcement officers the authority to tap telephone wires and --" and this is the key language -- "install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order which is the purpose of Title III of S917 --" and then they list the groups that have endorsed that legislation.

So while the statements do not proliferate on the subject we take that as a clear statement of the Congressional intent to authorize this.

Now, we submit that Congress did not --

QUESTION: That statement you read does not say much more than the statute, does it? Unless I missed something.

MR. FREY: Well, I do not think the statute talks about installing.

QUESTION: Would you read that again? Sorry to take up the time of my colleagues but I think I missed something.

MR. FREY: The statement says that in describing the -- I will just take a little bit of it out of order -- in describing what is the nature or purpose of Title III, the statement says, "Granting law enforcement officers the authority to tap telephone wires and install electronic surveillance devices in the investigation of major crimes and upon obtaining a court order."

QUESTION: Obviously if you are going to have electronic bugging something has to be installed.

MR. FREY: Well, no, no, not if they were thinking of -- if they were thinking, as --

QUESTION: Even a spike mike has to be installed.

MR. FREY: Well, yes but the suggestion has been made in, for instance, in the opinion in Finazzo that often you do not have -- you drop the transmitter in the martini, you use the parabolic mike from a distance, many --

QUESTION: Well, putting the olive in the martini is an installation of the olive into the drink.

MR. FREY: Well, then, I do not think that is the sense of --

QUESTION: In other words, "Install" is the only word. That is the word I --

MR. FREY: I think that is the significant word and that is the word that I am calling to the Court's attention here, yes.

QUESTION: All right.

QUESTION: Mr. Frey, just before we leave that, of course, that does not mention the surreptitious entry and I was wondering, in Berger itself I know it was a listening device in an office but does the record in that case tell us whether it was just installed surreptitiously or by a ruse?

MR. FREY: I -- I --

QUESTION: You cannot tell from the opinion.

MR. FREY: I think it was installed surreptitiously. We have checked the record and I am advised that it was installed surreptitiously and that there was no separate entry order at least in the first two bugs in Berger and the statute of course contained no express entry provision.

QUESTION: Is there anything in the legislative history that shows that Congress knew that the device had been installed surreptitiously as opposed to by ruse?

MR. FREY: I am not aware of any.

QUESTION: I am not aware of any, I am just inquiring.

MR. FREY: Now, it is our argument that Congress

did not dwell on the subject of surreptitious entries because it simply did not suspect there was any serious problem.

Nothing in any prior decision of this Court had sounded any alarm on this particular subject and of course, Rule 41 governing conventional searches itself says nothing about express separate entry authorization.

We think that Congress assumed that, having authorized the search itself under detailed provisions satisfying what it understood the Fourth Amendment to require it was thereby authorizing the implementation of the search by the means that were reasonably necessary to do so.

Now, at this point I would like to make our position as to the statutory source of authority clear because in reading over our brief and preparing for the arugment I am afraid it may state the matter in a fashion that is subject to misinterpretation.

In part II of our brief we were addressing the contention of Petitioner and the conclusion of the Sixth and Ninth Circuits that Title III does not itself authorize entries to plant listening devices and that accordingly, such entries may not occur. We showed convincingly, I hope, that if that premise was correct, the conclusion was not correct because Rule 41 provides the power to authorize trespassory entries if one must look elsewhere than Title III for such power.

Now, we did not mean by this argument to suggest

Title III is not itself a source of authority. We believe that it is but we recognize that there are two ways to look at the entry that took place here. The first, which several courts have adopted, is to view it as an incident of the search authorized by the Title III orders.

So viewed -- and we believe this is the best view of it, Title III itself supplies the authority for the entry to carry out the search just as Rule 41 implicitly authorizes the entry to accomplish a conventional search.

On the other hand, several courts have concluded that the entry entails a wholly separate invasion of a distinct constitutionally-protected interest rather than an intrusion ancillary to the electronic surveillance with which Title III is concerned.

Under that view, one could perhaps reasonably contend that Title III supplies no authority for the entry but conclusion does not resolve the injury in Petitioner's favor rather, as we say in our brief, Rule 41 supplies the authority for distinct trespassory intrusions of the kind that Petitioner by hypothesis finds present here.

Now, unless the Court has further questions on the statutory issue, I will pass on now to the question of the need for an express entry provision.

QUESTION: Mr. Frey, what if in the course of execution of a warrant such as was upheld by the Third Circuit

here, an officer were to wander into the bedroom and go through the dresser drawers and find some stuff in there and seek to later offer that into evidence. Do you think that would be admissible?

MR. FREY: No. Indeed, I will come to that in the next portion of my argument discussing the --

QUESTION: Anything in plain view would be admissible if you are right, that it had been lawfully --

MR. FREY: In the course of doing what is reasonably necessary to carry out the Court's Title III order anything that comes into plain view would be admissible.

QUESTION: If you were lawfully present there, as you submit he is.

MR. FREY: If you were lawfully present.

QUESTION: Then anything in plain view would be admissible.

MR. FREY: Yes, Your Honor.

QUESTION: Mr. Frey, before you proceed I just want to identify one problem and you may come to it later in your argument.

Do you view Section 3109 as changing the law that preexisted this statute? Maybe you are going to cover that later.

MR. FREY: Well, when you view Section 3109 as imposing a restriction on the manner in which the police may

execute search warrants of houses and we believe that it applies only to occupied premises.

QUESTION: You don't view the statute as enlarging the officers' authority?

MR. FREY: We don't and we think that the statute, after all, was originally adopted as part of a package of laws in the 3100 series, most of which is now incorporated in Rule 41 so that our understanding is that Rule 41 conveyed to magistrates the authority to authorize searches and to officers the authority to carry out such searches and 3109 passed a special rule in accordance with the common law rule and perhaps constitutionally required. I think that is an issue that is not clearly settled regarding --

QUESTION: You are not suggesting that it is settled, either?

MR. FREY: No, we are not suggesting that it is settled and it was the subject of a division of opinions in Ker.

QUESTION: It was a division in Ker.

MR. FREY: Yes.

QUESTION: But Miller was certainly not a constitutional issue.

MR. FREY: But we think --

QUESTION: Was it?

MR. FREY: No, I think you said in Ker that Miller

was a supervisory power opinion but it was urged, too, that there was a constitutional underpinning. But for purposes of this case I do not think it is necessary for the Court to consider whether 3109 is constitutional or statutory because we think it plain that 3109 does not apply to this kind of --

QUESTION: I understand. It just goes to the question of whether there might be need for statutory authorization. That is the only relevance of it and I am not expressing a view of it but --

MR. FREY: Well, the question that I have argued so far, that there is statutory authorization, is an argument that no statutory authorization is needed as well.

QUESTION: Correct.

MR. FREY: And that depends on how the Court views the relationship of the trespassory entry to the search that was authorized by a court order and depending on how it is viewed you may not --

QUESTION: To continue on with the statutory point, what would be wrong with the judge asking, "How are you going about this?"

MR. FREY: Nothing.

QUESTION: Whether you knock the man's door down or not?

MR. FREY: Pardon?

QUESTION: Are you going to knock the man's door

down?

MR. FREY: There would be nothing wrong with the judge inquiring into it and the --

QUESTION: Well, what about requiring the judge to do that to just see how far you are going?

MR. FREY: In our view, it is --

QUESTION: Because as we understand it, the judge did not say anything. Am I right?

MR. FREY: I am saying, Mr. Justice Marshall, in our view it is good policy --

QUESTION: I see.

MR. FREY: -- for us to go to the Magistrate, explain to him -- or judge in the case of a Title III order -- explain to him how we are going to carry out the entry and obtain in the Title III order an express authorization. That is now the Department policy and regardless of the outcome of this case we will continue that policy because --

QUESTION: Did not Judge Higgenbotham say in his opinion something to the effect that it would be prudent to disclose to the judge from whome the warrant is sought that they take this step, give this explanation?

MR. FREY: There is no -- he said that and we agree with that but the fact that we may have been imprudent in this case is not a basis for overturning Mr. Dalia's conviction.

Now, turning to the question of whether there was a need for an express entry authorization in the eavesdropping order, there is of course no such requirement contained visible in Title III and we suggest that the issue is purely a constitutional one.

Now, I want to begin my discussion of this point by making clear that we are not suggesting that no warrant at all is necessary for a surreptitious trespassory entry into an office or home. Of course our argument is that the warrant issued by Judge Lacey in this case authorizing the interception of oral communications in Petitioner's enclosed office conferred the requisite authority for the entry that was made.

Cases like Silverman and Katz thus do not help Petitioner at all since they involve no warrant of any kind.

Now, it is undisputed that the Court Title III order in this case met all the stated requirements of the warrant clause of the Fourth Amendment. It was sought under oath. Probable cause was shown and the order particularly described the place to be searched which is of special relevance here and also the things to be seized.

The entry was a necessary aspect of the execution of the Court's order but in our view it was implicitly authorized in the same way, as I have said before, that any entry necessary to institute a conventional search is implicitly authorized by a Rule 41 warrant.

Now, in making our argument we are also not contending -- and this gets to Justice Rehnquist's point -- that the Title III order alone suffices to give the agents an unlimited license to do as they please in executing the order.

Just as with the conventional search the agents must act reasonably in the means they select to implement the Title III order and the reasonableness of their actions is subject to postsearch judicial inquiry. Here that inquiry occurred and both lower courts found that the surreptitious entry was in fact reasonable and necessary to execute the eavesdrop order.

Now, as I pointed out earlier the vast majority of eavesdropping of enclosed interior locations will require a physical trespass. The situation is not materially different from that of a conventional search.

Now, often a single conventional search can involve an intrusion into several arguably distinct privacy interests yet the satisfaction of the expressed requirements of the warrant clause is normally considered sufficient.

Now, let me give you the hypothetical of a warrant to search the second floor rear room of a house. In the course of executing that warrant which particularly describes the place to be searched, the officers may hypothetically at least have a choice of entering the front or the back door, walking through the livingroom or the diningroom or some other rooms

where there are arguably distinct privacy interests yet I am aware of no case which suggests that they have to get a separate warrant or that the Magistrate expressly has to describe how they do it and that is not to say that they do not have to do it reasonably when they go into the premises and they cannot go into other bedrooms that are not on the way to the bedroom that they are authorized to search.

Now, let me come back to a point that Mr. Justice White made yesterday which I think is a very powerful point in our favor on this issue and that is the effect of arrest warrants on the authorization of entries.

I think the law generally is, at least in the lower courts -- and there is some suggestion implicitly in this court, although I assume the question is open to re-examination -- that an arrest warrant would authorize the officers to enter the home of the person named in the warrant on at least, say, probable cause to believe that the person is present in order to carry out the arrest.

Now, this is a very parallel situation to the present situation. Indeed, logically, our case is, I think, stronger because in the case of an arrest warrant there is a very substantial chance that the individual will be in a public place or alternatively, that when you knock at his door or ring his bell he will come to the door and no entry will be necessary.

Nevertheless, the state of the law in the lower courts at least is clear that the arrest warrant authorizes the entry and I may mention another factor that makes our case much stronger. We have a description in our Title III order of the location, the entry into which is being challenged here. An arrest warrant would contain no description.

So it is difficult to see, if the Court rules against us in this case, how it can be squared with the present doctrine that an arrest warrant appears to justify an entry into the suspect's premises.

Now, finally, just to make one other point. The Court is free, it has the power, as Justice Marshall suggested, to ask the officers, "What are you going to do? How are you going to do it?" to consider restrictions that are deemed wise to impose on the manner of executing the search and I think this true with conventional searches as well as with the Title III search and the existence of this power, it seems to me, alleviates greatly any concern about the the agents barging --

QUESTION: You are going a little beyond power. I am suggesting that he be required to do it.

MR. FREY: Well --

QUESTION: And you would not object to that, would you?

MR. FREY: Well, we would object to your doing it

by deciding this case against us but otherwise we would not object to it.

QUESTION: You mean, it would be all right if we put it in the footnote?

MR. FREY: Well, we would not object to your expressing the view if you felt so, as the Chief Justice pointed out, the Court of Appeals did in this case and several others have done. Judge Gerfein did it, I think, in --

QUESTION: Well, you said in your view --

MR. FREY: It is a good idea and we think it would be prudent for the Government to --

QUESTION: You said it is now the rule.

MR. FREY: I --

QUESTION: That now the present rule is that you do explain to the judge.

MR. FREY: Well, we note -- we are not clear that except in the exercise of the court's supervisory power over the district judge's granting the Title III orders it is possible that the court could say that we want the judge, in issuing an order, to address himself to this problem and to put a provision regulating the manner of entry in the Title III order. It is possible that you can do it.

QUESTION: I misunderstood you. I thought you said that it was the rule of the department as of now.

MR. FREY: Well, it is the department's policy to

obtain an express authorization from the court for each entry that is made to install or to maintain or to replace --

QUESTION: But there is no requirement that they tell the court how they are going to make entry.

MR. FREY: Well, I think it is our -- we are talking about surreptitious entries, now.

QUESTION: Yes, sir.

MR. FREY: I am not sure exactly how we do it but I think in practice the judge is made aware of how we are planning to do it.

QUESTION: But it was not in this case.

MR. FREY: No but this case was before the adoption of the policy. We adopted the policy after the D.C. Circuit's decision in Ford called to our attention the difficulties.

QUESTION: Well, where would I find that part of the --

MR. FREY: You would find it in our brief. We discuss it in our brief and I think --

QUESTION: I missed it.

MR. FREY: -- it is at page 56 of our brief.

QUESTION: Mr. Frey, we heard a case yesterday argued-- I do not know whether you were here or not -- saying -- in which the criminal defendants claimed that violation of a regulation issued by an executive department required exclusion

of evidence even though neither the Constitution nor the statute required it. I take it that you are not suggesting that you would be satisfied with a decision by this Court saying that a departure from departmental policy that you have referred to would require exclusion.

MR. FREY: We would be very unhappy with that, I would think, Mr. Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 10:35 o'clock a.m. the case was submitted.]

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