

# Supreme Court of the United States

October

TERM, ~~1969~~  
1970

Supreme Court, U. S.  
NOV 17 1969

In the Matter of:

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

Docket No. ~~46~~  
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Place Washington, D. C.  
Date November 10, 1969

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Respondent

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REBUTTAL:

Assistant U. S. Attorney General  
Will R. Wilson

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- - - -

IN THE SUPREME COURT OF THE UNITED STATES

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 4 UNITED STATES, )  
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 5                   Petitioner )  
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 6           vs )  
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 7 JAMES A. WHITE, )  
 )  
 8                   Respondent )  
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No. 3

Washington, D. C.  
Monday, November 10, 1969

The above-entitled matter came on for argument at  
12:35 o'clock p.m.

BEFORE:

- WARREN E. BURGER; Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

WILL R. WILSON,  
 Assistant Attorney General  
 Department of Justice  
 Washington, D. C.

JOHN L. BOEGER, ESQ.  
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 Counsel for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 46. The United States against White.

Mr. Attorney General

ORAL ARGUMENT BY WILL R. WILSON, ASSISTANT U. S. ATTORNEY GENERAL, ON BEHALF OF PETITIONER

MR. WILSON: Mr. Chief Justice and may it please the Court: This is a Fourth Amendment criminal case involving a conviction for the sale of heroin; reversed by the Circuit Court on the Katz case.

This was a narcotic agent wired with a cel radio without a search warrant. It involved the purchase, delivery, payment and sale of heroin. The informer who negotiated the purchase was not available to testify so the case was proved altogether out of Government Agents, one of whom hid in the closet; the others heard the -- some of the conversation over a cel radio. In all there were four kitchen meetings at the home of the informant, government agent-type; one in the Defendant's home; two in the informer's car; one in a restaurant.

The facts are that on December 9, 1965, informant Harvey Jackson met in his own kitchen Defendant White. At that time there was a narcotic agent hiding in a closet where he could see and hear the events in the kitchen and the informant had on him a cel radio which is a short-range radio. The



1 narcotics agent in the car a short distance away from the house  
2 listened to the conversation. At that time there was delivery  
3 of one ounce of heroin.

4 December 10th there was another such meeting at  
5 which the same set-up with the -- at which time the informant  
6 paid \$1,000 and agreed to purchase some additional heroin the  
7 next day.

8 On December the 14th the informant went to Defendant  
9 White's home, also with a radio on him and went in and paid the  
10 Defendant in his home and agreed to purchase two additional  
11 ounces. At that time a Government Agent was outside listening  
12 to the conversation.

13 On December 16th, '65 the informant's car -- the  
14 informant and Defendant drove for two hours with the informant  
15 having on him a cel radio and with agents of the Narcotic  
16 Bureau following the car and listening to the conversation.  
17 In that series of events the Defendant took the informant's car  
18 and let the informant out and went and met another man named  
19 Sam Minerva, who gave him heroin and then he picked up the  
20 informant again.

21 On December the 18th back in informant Jackson's  
22 kitchen in his home, with Jackson and White at the table, an  
23 agent in the closet; an agent outside listening to the radio,  
24 there was paid \$1,250 on the transaction by Jackson to White.

25 On December 29th, '65 White met the informant Jackson

1 -- agreed to meet him at Lake and Wells Street in Chicago; each  
2 drove his own car. White walked up to Jackson's car and de-  
3 livered the heroin with Jackson having on his radio and the  
4 agents listening from some distance.

5 On January 5th in informant Jackson's kitchen with the  
6 same set-up, Jackson paid White \$1,300. On January 8th, at a  
7 restaurant called the Alumina Restaurant, which the Defendant  
8 had some connection with, they met, discussed -- again with the  
9 radioon and narcotic agents outside of the restaurant listening  
10 to the conversation. They agreed to meet at Lake and Wells  
11 Street to purchase three things of heroin for \$2,500.

12 On January the 9th, White, the Defendant, drove up  
13 and stopped at State and Randolph Street where he was met by  
14 Minerva delivering the narcotics. At that time the agents  
15 closed in and made the arrest and the case was completed.

16 So, to recap: there were four meetings in the  
17 informant's kitchen; one meeting in the Defendant's home; two  
18 meetings in informant's car; one meeting at the Alumina Restaur-  
19 ant and in addition to that, an overhearing on the telephone,  
20 the very opposite of the Katz case, where the informant called  
21 the Defendant and permitted the agents to listen in on his end  
22 of the telephone through the same receiver:

23 ' Let's look first at what questions are not involved  
24 in this. We do not have any questions of the Fifth or Sixth  
25 Amendments because this is not the overhearing of conversations

1 about past events; the nature of admission of a confession.  
2 This is an overhearing of the actual transaction itself and  
3 there is no recitation relied on and put in evidence or involved  
4 here that would involve either the Fifth Amendment or Sixth  
5 Amendment questions in the sense of either testifying against  
6 himself as to past events, or the right to counsel.

7           And that, we think, is fairly clear if you consider  
8 the situation involving the normal condition of the bank lobby  
9 now, where there is a hidden camera and frequently-hidden radio  
10 or recording devices. The bank robber comes in and triggers the  
11 camera and the camera records the actual crime itself and the  
12 recording device or radio records the words used by the bank  
13 robber in committing the crime. I think no one would seriously  
14 contend that there was any constitutional question in the Fourth,  
15 Fifth or Sixth involved in that situation.

16           Here the radio was substantially the same thing; a  
17 broadcast of the crime itself being committed. The -- White's  
18 conversation and the words used against him in evidence were all  
19 a part of a contract and sale; a commercial transaction: the  
20 contract and sale of heroin. This is not a crime of violence  
21 or any other kind of crime, except a commercial transaction,  
22 that is by law made illegal.

23           And so the -- as far as the informant's kitchen and  
24 car is concerned, there is no trespass because they belonged to  
25 the informant, who invited the Defendant White to come there and

1 make the sale. And the restaurant was a public place and  
2 Defendant's home there was no trespass because the Defendant  
3 invited the informant to come to his home to make payment for  
4 the narcotics. All of that is pretty well governed by the  
5 Lewis case.

6 Now, that brings us to Katz, which, as you all know,  
7 is the bugging of the telephone booth situation. And it's  
8 discussions of the expectation of privacy which is involved in  
9 the central question concerned with in this situation. And so  
10 we ask ourselves, what legal expectations of privacy did the  
11 law afford to Defendant White when he went to informant Jackson's  
12 kitchen to sell narcotics. Certainly the law does not protect  
13 White against the other party to the transaction testifying.  
14 This is, as I said, a bargain and sale -- a contract, made  
15 partly in words; partly by the passage of money and partly by  
16 the passage of the narcotics, the delivery of the narcotics.

17 And whether it's civil or criminal, neither side can  
18 testify as to a contract, and in any type of case when the  
19 parties enter into a commercial transaction that is by law made  
20 criminal, either party can testify. So, White had no expectation  
21 of privacy. The other side of his contract wouldn't and  
22 couldn't testify to it, as he had a perfect legal right to do.

23 And then there is in this situation language which  
24 comes in that I think needs to be clarified somewhat, and that  
25 is this coming from some of the older cases, the question of



1 misplaced confidences between the seller of narcotics who is  
2 selling to a government agent.

3 I want to point out that this was an arms-length  
4 transaction; this isn't -- there wasn't any relationship of  
5 confidence between these people. It is not husband-wife;  
6 lawyer-client; doctor-patient; priest-penitent, or anything like  
7 that. This is a sale between strangers; an arms-length sale.  
8 And one of the risks that a man in the illegal business of  
9 selling narcotics takes is that some of his customers will turn  
10 out to be government agents and he knows that when he goes into  
11 the business. He runs that risk.

12 And so there isn't any misplaced confidence in this  
13 situation. And certainly the law was not to protect White  
14 against either the fact that it may turn out to be a government  
15 agent and that he may testify. And there is no breach of duty  
16 on the part of the informant in this situation --

17 Q The informant didn't testify; did he?

18 A No, sir; he didn't.

19 Q Do you see any distinction between that in  
20 regard to Lewis?

21 A Yes, sir; I do, Mr. Justice, in this: That  
22 it gets to the policy of the question raised by the former  
23 Chief Justice in his dissent in one of these cases and that is:  
24 can the Government use the recorded or secondary testimony, if  
25 you want to call it that, when the informant doesn't testify.

1 In this case we could not find the informer at the time and it  
2 becomes then, I guess, a policy question as to whether Government  
3 should or should not be able to use this testimony at this time.  
4 But it is not a constitutional question because the constitution-  
5 al right is determined as of the time of the search and not by  
6 development of the case.

7 Q I understand that you didn't put in all of the  
8 conversations.

9 A Mr. Justice, we will have to make a statement  
10 later, which we will make. I understood that they did put them  
11 all in, but I am not clear on that, so we will clear that up.

12 Q There might be a difference picks and chooses  
13 what they want to put in.

14 A Well --

15 Q Because if the man was testifying he would have  
16 to testify to everything.

17 A No, sir; he wouldn't --

18 Q He would under cross-examination.

19 A On cross-examination, but not direct examina-  
20 tion.

21 Q But there is no cross -- no possibility of  
22 cross-examination here.

23 A No possibility when he's not produced; that is  
24 correct.

25 Q And there is no way of finding out whether this

1 informant was a paid informant or not --

2 A Well --

3 Q -- and what his relationship was to the  
4 Government?

5 A He was acting for the Government over a con-  
6 siderable period of time here. Does the record show what he was  
7 paid?

8 Q Suppose we assume that he was paid, then what?

9 A But I say, we might --

10 Q Well, if he was on the stand he would be  
11 obliged to explain all of this; wouldn't he?

12 A Yes, sir; but you see --

13 Q But since he couldn't be found --

14 A -- that would go to the credibility of his  
15 testimony and we're not offering him. The credibility of his  
16 testimony is not an issue.

17 Q I see your point.

18 Q The Government didn't/<sup>deliberately</sup> decline to produce the  
19 conversations, did it?

20 A No, sir; they -- I read the record and there  
21 was no --

22 Q If you put in less than all of the record and  
23 the recording or the rest of the record was asked for, you did  
24 not refuse it?

25 A No, sir; we did not refuse it.

1           Now, as to the Agent hiding in the closet, I see no  
2 constitutional question in that at all. As to the cel radio  
3 which is the central question before the Court here; there is  
4 nothing sinister about a radio. The radio is a common part of  
5 our life now; used in all types of communication and it's good  
6 law enforcement technique. It increases the accuracy of proving  
7 the case; it helps protect the safety of the agent.

8           Now, one of the things that we are concerned with is  
9 in these narcotics purchases, it is a rather dangerous business  
10 for the agent and if he is in there and needs help the agents  
11 listening on the outside can determine that and can come in.  
12 It wasn't so long ago we lost an agent under those circumstances.  
13 It makes a better development of all aspects of the case.

14           Frequently on a proposed purchase of narcotics and  
15 the agent goes into an apartment or something, it turns out that  
16 he negotiates with them and they don't have it. They say, "You  
17 wait here and we'll send for it." They send for it and if the  
18 agents on the outside have been tuned to that conversation they  
19 can follow the man and get his source; take him where he's going  
20 for it. If they don't have that, they may make the arrest pre-  
21 maturely; their raids prematurely and they do not have a smooth  
22 development of the case using the cel radio.

23           And this is especially true in the business of follow-  
24 ing a car. It's difficult to follow a car in traffic if they do  
25 not have a radio communication. In trailing the car they have to



1 be closer to it. If they have got a radio communication with  
2 the informant from the car, they can drop back and have a great  
3 deal more success in following the car at a distance.

4           It protects the Defendant against false testimony.  
5 These narcotic agents, by the nature of things, they are usually  
6 addicts; they are not, perhaps the most reliable people in the  
7 world in many ways and this gives the Bureau of Narcotics a  
8 check and a protection of the agent himself in framing a Defen-  
9 dant when they can listen to the conversation and hear it all.

10           Now, taking the subject of these consensual overhear-  
11 ings direct, we take the flat position that a consensual over-  
12 hearing where one party to the conversation consents, it does  
13 not involve Fourth Amendment problems.

14           Just recently in the case of Frazier versus Cupp,  
15 which was a search and seizure case involving a duffel bag where  
16 two -- I believe it was a murder case -- had hidden the clothes  
17 that they wore at the time of the crime in a duffel bag, and one  
18 of the Defendants gave permission to the officers to search the  
19 duffel bag without a warrant. It was held that was a legal  
20 search and so, one of the parties having consented, the search  
21 was legal as to both of them and the clothes could be used in  
22 evidence against the nonconsenting party in that type of search.

23           Well, the same thing would apply to both ends of a  
24 telephone conversation or a radio conversation. Now, I really  
25 see no difference between the overheard telephone conversation

1 in this case and the overheard radio conversations. They were --  
2 if they are legal without a warrant under the Fourth Amendment  
3 because of the consent of one of the parties of the conversation.  
4 it seems to me it is the same thing. It's almost the exact  
5 opposite of the situation in the Katz case where the listening  
6 device was put in without the consent of either party and on the  
7 end of the person who was under trial.

8           Of course the Court is familiar with the Lopez case  
9 where an IRS Agent went into a bribe situation. I may say that  
10 the Government uses these cel radios in two main situations in  
11 the main. One is for narcotics cases and the second is for  
12 bribery cases and bribery is one of the central problems of the  
13 Government, as everybody knows.

14           Now, in the Lopez case an IRS Agent with a recording  
15 device went in -- I personally see no difference between a  
16 recording device and a cel radio, which puts it outside for notes  
17 or recording -- and it was held there an arms-length transaction;  
18 no confidential relationship between a Government Agent for the  
19 IRS and a taxpayer that there was no expectation of privacy in  
20 that situation.

21           And that brings us to On Lee, perhaps the earliest of  
22 these case. And On Lee, of course, has been greatly criticized  
23 and is vulnerable to criticism on the Fifth and Sixth Amendments  
24 and that is the obtaining by stealth of a confession or admission  
25 after the event which, in On Lee, as the Court remembers, the

1 narcotic agent went into the laundry and the agent stayed out-  
2 side after the case had been made and after indictment and it  
3 raises both Fifth and Sixth Amendment problems. It was upheld  
4 on the Fourth and my opinion was that it was correctly upheld on  
5 the Fourth. Again, consensual hearing is not a search and  
6 seizure situation.

7           The Defendant has raised questions about whether this  
8 is a true consensual case based upon the proof. The trial court  
9 found that informant Jackson did consent and we have covered  
10 that factual matter in extensive supplemental briefs.

11           Now, to reiterate the point raised a few minutes ago  
12 about the informant himself not testifying. Our position is that  
13 that is not a constitutional point. It might go to the weight  
14 of the evidence; it might go to some such problem as best  
15 evidence, but it doesn't go to the constitutionality of the  
16 search, because that must be determined as of the time of the  
17 search and not by subsequent practical developments in the trial  
18 itself.

19           Q       Could I ask you a question: what impact do you  
20 think this Court's decision in desist has on your position?

21           A       Well, we have desist as a second point. We  
22 urge are very hopeful of not reaching that, but we can prevail  
23 on our first Fourth Amendment. But we think this is a desist  
24 case if you pass that --

25           Q       That is a hurdle you've got to overcome here.

1 Desist as it stands is not retroactive.

2 A Yes, sir.

3 Q So that where do you go from there?

4 A Well, we feel that this is Katz. I don't know  
5 that I fully understand my way all around the desist laws, but  
6 if I understand it correctly, that is when the Court enunciates  
7 what amounts to new constitutional elements in the sense of  
8 overruling and accepting the position that as far as the officers  
9 are concerned, it applies only to their acts after they have full  
10 knowledge of the new law and that being true, we think that it  
11 should apply here and especially in the fact that this is such a  
12 widespread device and is used throughout law enforcement and  
13 it's been done in the belief that it is not a search warrant  
14 situation.

15 Q Do you think it's of considerably more signifi-  
16 cance that your department is a law enforcement department to  
17 know now what would happen in this case violating the constitu-  
18 tion, rather than simply to get this judgment affirmed on the  
19 basis of the nonretroactivity of the Katz case.

20 A That's correct, Your Honor. We sincerely hope  
21 that the Court can see its way to write on this point, rather  
22 than the desist point if possible, because it's one that's vital  
23 to the daily work of the law enforcement agencies; and the desist  
24 point is a matter of salvaging the case.

25 Q That's right.



1 MR. CHIEF JUSTICE BURGER: Mr. Boeger.

2 ORAL ARGUMENT BY JOHN L. BOEGER, ESQ.

3 ON BEHALF OF RESPONDENT

4 MR. BOEGER: Mr. Chief Justice and may it please the  
5 Court: United States versus James A. White is not a case of  
6 consensual eavesdropping. The record below and the Government's  
7 own statement of facts in its brief on the merits, do not sup-  
8 port the contention that there was consent by the informant in  
9 this case.

10 This issue was raised by Respondent in the Court of  
11 Appeals. The Court of Appeals specifically stated in their  
12 en banc opinion that they did not reach the issue of consent  
13 because they did not feel that it was material.

14 The Government in its petition for writ of certiorari,  
15 in their statement of facts, stated that the informant consented.  
16 In our position I call your attention to the fact that the record  
17 did not support consent -- voluntary consent. Interestingly  
18 enough, in their statement of facts -- in their brief on the  
19 merits, there is no claim that the informant voluntarily con-  
20 sented.

21 Now, Friday I received a reply brief where the Govern-  
22 ment argues that it would be fair for this Court to infer that  
23 the informant acted freely and voluntarily because he worked  
24 for the government for about eight days. The first day he  
25 worked was when the first situation of the electronic

1 eavesdropping took place.

2           The Government quotes from a District of Columbia  
3 District Court case, the United States versus Zorkin. I have  
4 no quarrel with that case; however, the only thing that case  
5 held was that if the informant hoped that there would be  
6 leniency if he cooperated this did not necessarily mean that he  
7 involuntarily consented. But the Court stated that if the  
8 Government promised leniency or if they went out and found a  
9 weak person or a vulnerable person and turned them into infor-  
10 mants they would restrain this use because the record would not  
11 support a finding of voluntary consent.

12           The Court went on to say that consent in these types  
13 of cases should be decided just like consent in any ordinary  
14 search and seizure case.

15           Now, the Government tries to excuse this failure to  
16 sustain its burden of proving consent by saying that the defense  
17 never raised the consent issue at trial. Well, I submit that it  
18 was raised at trial and that the Court rules because there was  
19 an objection to the evidence; there was a motion to strike all  
20 the evidence obtained by the eavesdropping. The Government cited  
21 a number of cases to the trial judge: On Lee, Lopez case and a  
22 number of Seventh Circuit cases. Every case cited was a  
23 situation where there was consent and the Trial Court then just  
24 stated that we've been through this before and overruled motion  
25 to strike.

1           We submit that it is the Government's burden whenever  
2 they rely upon consent to sustain the lawfulness of a search  
3 and seizure, that the burden is upon them to prove consent.  
4 This Court in Bumper versus North Carolina held, and I will just  
5 give a short quote: "When a prosecutor seeks to rely upon  
6 consent to justify the lawfulness of a search he has the burden  
7 of proving that the consent was, in fact, freely and voluntar-  
8 ily given." This Court further said that acquiescence is not  
9 sufficient consent.

10           Q       Well, we are talking about two rather different  
11 things, aren't we? The Bumper case involves a person whose  
12 alleged Fourth Amendment rights were violated. This  
13 consent to an entry and a search isn't <sup>a</sup> very critical issue, and  
14 one that was involved, as I said, in that case. This one in-  
15 volves a question of whether or not this person was or was not  
16 a government agent; doesn't it? A voluntary government agent.  
17 There is no question here -- no question is raised here about  
18 the violation of this absent witness's Fourth Amendment rights.

19           A       Well, of course, Bumper --

20           Q       The question here is whether or not he was a  
21 voluntary agent of the government; isn't that it?

22           A       Well, Bumper, of course involved the lady that  
23 looked --

24           Q       Yes, the mother -- I remember the facts quite  
25 clearly.

1           A       I think what's very important is if this case  
2 would be reversed it would allow the Government to coerce people  
3 to become informers; would allow them and give them authority  
4 to get people to put this type of bug and go in and talk to  
5 anybody on a -- well, just violate their privacy under the  
6 Fourth Amendment.

7           Q       You could make that same argument about any  
8 Treasury Agents or Narcotics Agents or any FBI Agent and argue  
9 that he had been threatened with being dismissed if he didn't  
10 carry out this order, if you can prevail on the argument you  
11 are making now.

12          A       Well, of course, since the informant didn't  
13 testify in this case, we don't know what happened. I think  
14 this is very important. In other words, if the informant had  
15 testified and there had been cross-examination maybe the record  
16 would have shown that he was a voluntary agent, that they didn't  
17 go out and say: "now if you don't go out and do this you are  
18 going to be charged with some particular crime." But the way  
19 the record is right now; the way the record stands, we don't  
20 know.

21          Q       Has any Court ever said that there has to be  
22 this kind of verified consent that you are talking about?

23          A       The consent that this Court --

24          Q       Has this Court ever said in any case or  
25 intimated that consent must jump these hurdles that you are

1 talking about?

2 A In a electronic eavesdropping case?

3 Q No.

4 A Lopez was the first agent. The On Lee case was  
5 a paid informant. Maybe in some of the other cases the point  
6 just wasn't raised.

7 Q What about General Wilson's point, that whether  
8 this man was voluntary or not, he did on eight separate times  
9 put one of these things in his pocket and agree to cooperate?

10 A Well, I'll agree that the record does sustain  
11 that he did it and that he knew about --

12 Q Well, as to your client's right; the  
13 Respondent's rights -- how are those being violated by the  
14 agent's rights being violated? I think that's the Government's  
15 position.

16 A Well, I believe that's right and --

17 Q Well, can you answer it?

18 A Well, I think the answer is that when there is  
19 a search and seizure and the Government attempts to sustain it  
20 because of this consent that --

21 Q You mean showed that Respondent consented to it?

22 A No; that the informant consented.

23 Q What difference does it make?

24 A I think if this isn't required of this Court  
25 and in this Opinion that it would give the Government authority



1 to coerce people to become informants and to bug who knows?

2 Q Well, let's assume that they are coerced  
3 informants. What, impact does that have on it if there is a  
4 faithful recording made of what transpired. Let's take your  
5 position for a moment.

6 A I think that wholesale eavesdropping by the  
7 Government could probably be one of the most serious problems  
8 of this country, because it could suppress First Amendment  
9 rights of all citizens; not just the Fourth Amendment rights of  
10 individual defendants.

11 Q I suppose your argument on voluntariness would  
12 also go to -- just in the event the Government just paid the  
13 informant -- no coercion, particularly, but there's a promise  
14 of benefit or gain.

15 A No, I think that might be a little different  
16 situation.

17 Q You think that a guilty plea rules out not  
18 only coercion but promise of benefit or gain? That destroys  
19 the voluntariness of the plea; doesn't it?

20 A You mean if the informant pled guilty but hadn't  
21 been sentenced yet?

22 Q No, ordinarily in a criminal case if you are  
23 examining the plea bargain, for example. That there is some  
24 promise of benefit, whether or not it would -- does it not have  
25 a lot to do with the voluntariness of the plea?

1           A       Yes, and I was under the impression that the law  
2 the way it stood now was that if a person entered a plea of  
3 guilty for the reason that he was promised a certain sentence,  
4 that this would be involuntary.

5           Q       Well, what about the informant. If the  
6 Government pays him enough he will do anything.

7           A       I think it might boil down to that.

8           Q       That's what I thought.

9           Q       Does it in any way affect the reliability of  
10 the evidence that you can suggest?

11          A       In this case, Your Honor, I think, of course,  
12 that the Government's reply brief on what an informant -- why  
13 he might be motivated to carry devices -- I think there may be  
14 cases in which the informant was pressured to such an extent as  
15 to deprive him of his free will.

16                 The failure of that informant to be on that witness  
17 stand and the failure of the Respondent Defense Counsel to  
18 cross-examine that person, is why we have this consent problem  
19 before the Court right now. So, I think that's a reliability  
20 problem.

21                 I think the Court should not do away with the right  
22 of cross-examination.

23                 I would like to bring out what I think is probably the  
24 most important thing of the entire case. The Government states  
25 -- gives a number of reasons why electronic eavesdropping is

1 important to them: protection for secret agents, a number of  
2 things. Oh, of course they could have protection for their  
3 agents and still not introduce the evidence at the trial. Of  
4 course, if they don't and they haven't used the evidence in any  
5 way, then it doesn't taint the conviction and so there's no  
6 problem. But, nowhere in the brief --

7 Q If they don't use it in any way they probably  
8 won't get a conviction.

9 A Well, that's possible, if they don't have the  
10 evidence.

11 Q Well, here they had evidence and they did use  
12 it.

13 A They did use it, and of course, it tainted the  
14 conviction.

15 Q The question here is whether or not it was  
16 a constitutionally valid use.

17 A I don't think there's any doubt but that --  
18 if the evidence was unlawfully obtained then of course, I think  
19 that does taint a conviction if it's used at all. I think  
20 under the Silverthorne Lumber case.

21 Q Well, tell me, Mr. Boeger, if this informant  
22 had appeared; had been cross-examined; would you concede then  
23 that this evidence was properly admitted?

24 A Oh, absolutely not. I think any time the  
25 Government uses an electronic device that they must get a

1 warrant. The government wants all people in the United States  
2 to trust their discretion -- agents all over the country --  
3 their discretion on who to bug; when to bug and why to bug  
4 them. They even say in their brief that they want to be able  
5 to do it without probable cause, so they do it on rumor. They  
6 give no reason in their brief of why they have to do this  
7 without getting judicial authority. There has to be and there  
8 should be some judicial control over wholesale eavesdropping.

9 Q What about Katz? Are you talking about today?  
10 Doesn't Katz take care of your problem on that statement?

11 A There is no doubt that I think that Katz takes  
12 care of my problem.

13 Q How do you mean -- that Katz means there has to  
14 be judicial authorization? In this situation?

15 A Yes.

16 Q You think Katz overruled Lopez and On Lee?  
17 That's what you are saying, I take it.

18 A I think Katz overrules On Lee, but it's factually  
19 a little different situation; on the facts it's not on all fours.

20 Q What is not? Katz is not?

21 A Katz isn't on all fours factually with On Lee.  
22 This case isn't on all fours with On Lee because in  
23 On Lee it was gone into previously; in On Lee there was consent;  
24 there was a paid informant.

25 Q Well, if you are right that Katz governs this

1 situation, what about Desist?

2 A Well, Desist is an attempt by the Government  
3 to have this Court apply a 1969 case -- apply it retroactively  
4 so that Katz, which is a 1967 case, can't be applied here.

5 Q What is the date of all these events?

6 A Desist is 1969.

7 Q No; the events in this case.

8 A Late '65 and early '66.

9 Q Does Desist say that Katz is inapplicable in  
10 anything prior to that decision?

11 A Well, it doesn't say everything; it says that  
12 to the extent that Katz departed from previous holdings of  
13 this Court it should be given wholly prospective application.

14 I submit that as far as this case is concerned, that  
15 the Seventh Circuit's judgment is not in conflict of any prior  
16 decision of this Court. And this is exactly what the Seventh  
17 Circuit en banc opinion states.

18 Q If I follow you, you want the benefit of Katz  
19 which came after your case, but not the benefit of Desist.

20 A But Desist came after the judgment in this case.  
21 Actually, Desist was -- relies upon the Stovall case. Stovall  
22 came after the bugging and after the trial of this case.  
23 Whereas the Linkletter case which/<sup>if</sup>the Court had followed  
24 Linkletter it would follow Linkletter here; the Katz case would  
25 apply because the White case was on direct appeal at the time of



1 this Court's decision in Katz.

2 The Government has stated that the informant was  
3 unavailable at trial. Well, in checking the record we see at  
4 Page 39 of the printed Appendix that the trial was in November  
5 1966. The agents testified that they looked at the informant's  
6 home in July and August; couldn't find him. They checked missing  
7 persons lists and the light company and then the question was  
8 asked: Did you go any other places and at Page 40 of the  
9 Appendix the agent said no; this is all the checking we did.

10 So, they didn't even check in September and October  
11 and parts of November to see if they could find the informant.

12 Respondent submits that there are additional reasons  
13 for affirming the Seventh Circuit's judgment and that's the  
14 exercise of this Court's supervisory powers. This conduct of  
15 the agents, we submit, was in violation of Illinois basic  
16 statutes. There had been an earlier case in the Illinois --  
17 by the Illinois State Supreme Court, the People versus Dixon,  
18 that had approved a telephone extension -- an agent listening  
19 on a telephone extension. However, I don't think that that  
20 case necessarily means that the type of bugging involved in  
21 White would have been legal.

22 And then in the People versus Kurth, another Illinois  
23 Supreme Court case which was decided before trial of this case,  
24 the Illinois Supreme Court said that our statute -- it's  
25 immaterial whether or not there is consent; it's illegal. So,

1 this isn't a Lopez situation because here the agent's conduct  
2 was unlawful; the agents knew that the Illinois Supreme Court  
3 had held that this bugging without a warrant or just bugging  
4 without consent, was illegal. They went ahead and did it  
5 anyway.

6 Q Could I ask you a question: let's assume that  
7 Katz -- that you can't rely on Katz here for one reason or  
8 another -- how do you distinguish this case from On Lee?

9 A On Lee, the secret informer was a paid infor-  
10 mant; the Court's Opinion does not say specifically whether --  
11 or that "we make a finding of consent," but I think in reading  
12 the Opinion --

13 Q Consent of what; of whom; for what?

14 A The informant. That there was consent by the  
15 informant.

16 Q That somehow or other your man -- your defend-  
17 ant, if the man who came into his office, the agent, had a bug  
18 planted on him; didn't know he had it at all, his right of  
19 privacy is being invaded in some way?

20 A I submit that would be the same as the  
21 Silverman case.

22 Q Is that what you are arguing?

23 A That's exactly.

24 Q And that's something that your Defendant --  
25 your client, could take advantage of; is that it?

1           A       In other words, there would be an actual  
2 intrusion into the constitutionally-protected area.

3           Q       The body of the agent; is that it?

4           A       Sir?

5           Q       Of the body of the agent. Whose privacy is  
6 being violated?

7           A       The Defendant's.

8           In other words --

9           Q       By reason of what?

10          A       A bug being in a constitutionally protected  
11 area without a warrant --

12          Q       But that has nothing to do as to whether the  
13 agent who had the bug on him knew -- that it was coercion to  
14 have it on him; knew that he had it on him or that's wholly  
15 irrelevant; isn't it?

16          A       Well, I think under Silverman if there is this  
17 invasion into the constitutionally protected area it's a  
18 violation of the Fourth Amendment. At the very least/<sup>if</sup>it's an  
19 actual intrusion -- it's certainly, under the supervisory  
20 powers of this Court that in Silverman they said it was not  
21 permissible to use that evidence.

22          Q       Your point, Mr. Boeger, is that if, in this  
23 hypothetical case the man is an agent only by reason that he is  
24 the unknown carrier of a microphone surreptitiously put there  
25 by another government agent that that's the equivalent of just

1 projecting a microphone or bug inside that room without the  
2 knowledge of anybody.

3 But, as I understand it, you don't go so far as to  
4 suggest that this case is that kind of a case when the record  
5 shows here that this man voluntarily, knowingly, had a micro-  
6 phone on over a period of several days. This question only is  
7 whether or not it was -- perhaps I was wrong using voluntarily  
8 and attributing it to you -- but at least knowingly --

9 A Knowingly -- I agree that he knew it.

10 Q So that it's not the hypothetical case we were  
11 talking about.

12 A Right.

13 Q But if the man had no bug at all, but merely  
14 he came and testified against the Defendant in this case, you  
15 wouldn't have had any argument to make to us; is that it?

16 A I would. I think that that would be the --

17 Q The Government shouldn't hire undercover agents  
18 to catch narcotics peddlers?

19 A I think the Government can hire undercover  
20 agents. All I ask is that just as this Court stated in Osborn;  
21 discussed in the Berger case, is that they go to a judge and  
22 let him decide whether or not it would be proper to use an  
23 electronic eavesdropping device.

24 Q I'm talking now about a man who goes in without  
25 the device. Are you suggesting that before they send an

1 undercover agent in in these circumstances, they must get a  
2 warrant to send that agent in, even if he carries no device?

3 A I don't think the Court needs to go that far in  
4 this case, but I -- but my own feeling -- in other words, it's  
5 also similar to the Lewis case, but in Lewis the Government ad-  
6 mitted that we did not put an informant into the house to see  
7 or hear anything. We were not eavesdropping at all. We just  
8 went in there to pick up a package and leave.

9 Q What do you have to say about the Attorney  
10 General's argument that this bugging device, as you call it,  
11 produces a much more accurate version of the conversation so  
12 that the undercover agents can't distort or invent some testi-  
13 mony.

14 A Well --

15 Q You have a recording now; you have a perfectly  
16 reliable reproduction of the conversation; don't you?

17 A Well, I think it's the same things as if some-  
18 body committed murder and the murder weapon is in the Defendant's  
19 home. They still must and should get a warrant before they  
20 break down the door and go in and get that murder weapon. Now,  
21 it may be that if they had that murder weapon and ran the bal-  
22 listic tests on it and the Defendant's fingerprints were on the  
23 gun and no one else, that that might be better evidence. That  
24 this Court has held on numerous occasions that they still must  
25 get judicial authority before they break down somebody's door.



1 Q No investigative functions in the sense that  
2 you have to have probably cause?

3 A Well, certainly I think that they can investi-  
4 gate.

5 Q But not without a warrant if you want to use an  
6 undercover agent?

7 A I think when you get to the point where they  
8 have a prospective defendant, certainly in this case they were  
9 eight days; so maybe along about -- somewhere along the line  
10 they thought they had their man. So, I think when they used an  
11 informant in this situation --

12 Q Well, somewhere along the line, after they had  
13 heard -- after they had listened over the radio.

14 A Well, I suppose they had some sort of investi-  
15 gation prior to that; I don't know.

16 Defense Counsel tried to cross-examine the agent  
17 regarding their relationship with the informant prior to the  
18 date of the first transaction and Defense Counsel wasn't allowed  
19 to go into that.

20 I think one of the comments by the trial judge was  
21 that the informant isn't on trial here.

22 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Boeger.  
23 Mr. Wilson, do you have anything further?

24 MR. WILSON: Just two points I want to speak to  
25 briefly. One of them is on the point that Mr. Justice Marshall

1 raised on the production of the witness to perform at the  
2 trial.

3 REBUTTAL ARGUMENT BY ASSISTANT U. S.

4 ATTORNEY GENERAL WILL R. WILSON, ON

5 BEHALF OF PETITIONER

6 MR. WILSON: If we are required to that and can only  
7 use the evidence when you have the informant there it puts a  
8 premium on having him there alive. And in this situation the  
9 best policy would be not to fix it where if the informant's  
10 gone you can't try the man, in my judgment.

11 And secondly, that it doesn't go to the constitution-  
12 ality of the search in the first place. And the other thing,  
13 on the -- I will address myself directly to the question of  
14 getting a search warrant in this situation.

15 If the type of radio communication is used right from  
16 the inception of the case, before you have a proper cause,  
17 frequently, and if you have to get a warrant before you use it,  
18 it will prevent the building of proper cause and secondly:  
19 in a rapidly developing narcotics sale the agent frequently  
20 doesn't know either the place or the people he's going to be  
21 negotiating with. He goes and meets somebody on the street  
22 corner, gets in the car and they take him clear across town to  
23 an apartment or something else and there the sale is consum-  
24 mated, so that we have to visit the place or either the people  
25 to be searched, why, it will make a very difficult situation.

1 Q General Wilson, what is -- what are the charac-  
2 teristics of a cel radio -- K-e-l, Kel radio, is it?

3 A It's a little, very small radio that will  
4 broadcast about three miles.

5 Q And is it accurate to say or to surmise that it  
6 could be used only in connection with a knowing informer.

7 A Yes, sir; I don't think there is any chance of  
8 inserting it on someone without their knowledge.

9 Q I was wondering about that.

10 A It's hidden usually around the chest somewhere,  
11 to pick up the language.

12 Q I suppose -- does he turn it on or off, or not;  
13 do you know?

14 A I think it stays on most of the time he's in  
15 there. I don't know whether he's got that -- I'll find that out.

16 In short, we will urge the Court that in the interest  
17 of balancing the values here -- you have got the value of the  
18 privacy, as raised in all of these opinions, as against the  
19 question of law enforcement; the security of the citizen; the  
20 sale of narcotics which is increasingly a difficult problem.

21 We would guess that the definition of privacy under  
22 the Fourth Amendment not be extended to this situation and that  
23 the law officers be continued to use these Kel radios for  
24 skillful development of these cases. It's a top problem in  
25 law enforcement. And so we would urge the Court to hold that

1 this is not a Fourth Amendment search requiring a warrant and  
2 proper cause. And that also if the Court reaches the point,  
3 that we not be required to produce the witness before we pro-  
4 duce the evidence in this situation, that is the informant.

5 Q Would you say that from now on you want us to  
6 say the Government does not have to get a warrant as suggested  
7 in Berger and Katz?

8 A No, sir; not at all. I said in this situation.  
9 We contend that Katz does not apply to this situation. These  
10 consensual hearings --

11 Q Well, you mean that as to narcotics cases?

12 A Well, yes.

13 Q How far do you want the Court --

14 A It's the principal place to apply it.

15 Q How far do you want us to go on this exception?

16 A Well, what we would like the Court to hold is  
17 that where there is conversation that is admission of the crime  
18 itself, as distinguished from confession or admission of past  
19 events, and that where one of the parties to the conversation  
20 consents to an overhearing by a government agent, that that is  
21 not a situation requiring a search warrant under the Fourth  
22 Amendment.

23 MR. CHIEF JUSTICE BURGER: Thank you. The case is  
24 submitted and thank you for your submissions, gentlemen.

25 (Whereupon, the argument in the above-entitled matter  
was adjourned at 1:30 o'clock p.m.)