

The Burger Court Opinion Writing Database

United States v. White

401 U.S. 745 (1971)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

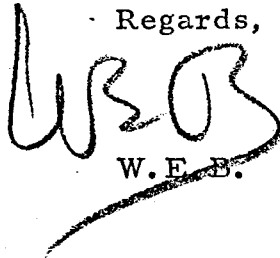
December 4, 1969

Re: No. 46 - U. S. v. White

Dear Byron:

Please join me in your opinion.

Regards,



W. E. B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 3, 1969

Dear Byron:

Re: No. 46 - United States v. James A. White.

Please note at the end of your opinion that
"MR. JUSTICE BLACK, while adhering to his views
expressed in Linkletter v. Walker, 381 U. S. 614, 640
(1965), concurs in the judgment of the Court for the
reasons set forth in his dissent in Katz v. United
States, 389 U. S. 347, 364 (1967)."

Sincerely,



H. L. B.

Mr. Justice White

cc: Members of the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

1

SUPREME COURT OF THE UNITED STATES

No. 46.—OCTOBER TERM, 1969: Douglas, J.

dated: 12/1/69

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
James A. White. } Appeals for the Seventh
Circuit.

[November —, 1969]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Berger v. New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, viz.: there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz v. United States*, 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches, and seizures." *Id.*, at 359.

As a result of *Berger* and of *Katz* both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

There were prior decisions representing an opposed view. In *On Lee v. United States*, 343 U. S. 747, an undercover agent with a radio transmitter concealed on his person interviewed the defendant whose words were heard over a radio receiver by another agent down the

3U

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 46.—OCTOBER TERM, 1969

Circulated: 12/3/69

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
James A. White. } Appeals for the Seventh
Circuit.

[December —, 1969]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Berger v. New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, viz.: there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz v. United States*, 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches, and seizures." *Id.*, at 359.

As a result of *Berger* and of *Katz* both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

There were prior decisions representing an opposed view. In *On Lee v. United States*, 343 U. S. 747, an undercover agent with a radio transmitter concealed on his person interviewed the defendant whose words were heard over a radio receiver by another agent down the

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall

pl

SUPREME COURT OF THE UNITED STATES

No. 46.—OCTOBER TERM, 1969

From: Department of Justice

United States, Petitioner,
v.
James A. White.

On Writ of Certiorari to the
United States Court of
Appeals for the Seventh
Circuit.

Circulated:
Recirculated: 1-13

[January —, 1970]

MR. JUSTICE DOUGLAS, dissenting.

We held in *Berger v. New York*, 388 U. S. 41, that wiretapping is a search and seizure within the meaning of the Fourth Amendment and therefore must meet its requirements, viz.: there must be a prior showing of probable cause, the warrant authorizing the wiretap must particularly describe "the place to be searched and the persons or things to be seized," and that it may not have the breadth, generality, and long life of the general warrant against which the Fourth Amendment was aimed.

In *Katz v. United States*, 389 U. S. 347, we held that an electronic device, used without trespass onto any given enclosure (there a telephone booth), was a search for which a Fourth Amendment warrant was needed. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches, and seizures." *Id.*, at 359.

MR. JUSTICE HARLAN, in a thorough and painstaking analysis has shown that, as a result of *Berger* and of *Katz*, both wiretapping and electronic surveillance through a "bug" or other device are now covered by the Fourth Amendment.

There were prior decisions representing an opposed view. In *On Lee v. United States*, 343 U. S. 747, an undercover agent with a radio transmitter concealed on his person interviewed the defendant whose words were heard over a radio receiver by another agent down the

December 1, 1969

Re: No. 46 - United States v. White

Dear Byron:

I regret to find myself unable to join your per curiam, and in due course intend to circulate a dissenting opinion, going both to the retroactivity issue and to the merits.

Sincerely,

J. M. H.

Mr. Justice White

U.S. Supreme Court
The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: Mr. Justice Black
Mr. Justice Douglas
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist
Mr. Chief Justice Marshall

SUPREME COURT OF THE UNITED STATES Justice Harlan, J.
JAN 13 1970

No. 46.—OCTOBER TERM, 1969

Circulated: _____

Recirculated: _____

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
James A. White. } Appeals for the Seventh
Circuit.

[January —, 1970]

MR. JUSTICE HARLAN, dissenting.

This case challenges the continuing viability of *On Lee v. United States*, 343 U. S. 747 (1952), wherein this Court sustained a narcotics conviction based, as this one is, primarily on the testimony of government agents that was the product of electronically monitored conversations between a government informer and the defendant which were passed on to the government agents by means of a transmitting device concealed on the person of the informer.¹

This testimony was admitted at trial presumably on the authority of *On Lee*, and *Lopez v. United States*, 373 U. S. 427 (1963). A panel of the Court of Appeals for the Seventh Circuit reversed, reasoning from this Court's decision in *Katz v. United States*, 389 U. S. 347 (1967), wherein we held unconstitutional the electronic surveillance of conversations from a public telephone booth, in the absence of a search warrant issued upon probable cause. Subsequently, on January 7, 1969, that court, sitting *en banc*, confirmed the panel's reversal by a divided vote. 405 F. 2d 838. Later, on March 24, 1969, this Court in *Desist v. United States*, 394 U. S. 244, held that *Katz* should be deemed applicable only to cases where the Government's actions post-dated our

¹ In the case at hand agents were also surreptitiously placed in respondent's home at various times. No testimony by these agents was offered at trial.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 1, 1969

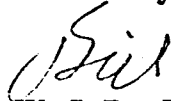
RE: No. 46 - United States v. White

Dear Byron:

Will you please add the following at the foot of your per curiam in the above. Thanks.

Mr. Justice Brennan is of the view that Katz v. United States overruled On Lee v. United States but concurs in the reversal on the authority of Desist v. United States.

Sincerely,


W. J. B. Jr.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 2, 1969

No. 46, United States v. White

Dear Byron,

I am glad to join the Per Curiam you have prepared in this case, although I would be quite willing to go further and clearly indicate that Katz did not overrule On Lee.

Sincerely yours,

OS
/

Mr. Justice White

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
✓ Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Fortas
Mr. Justice Marshall

1

SUPREME COURT OF THE UNITED STATES

From: White, J.

No. 46.—OCTOBER TERM, 1969

Circulated: 11-29-69

Recirculated: _____

United States, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
James A. White. } Appeals for the Seventh
Circuit.

[December —, 1969]

PER CURIAM.

Respondent was convicted for trafficking in narcotics in violation of 26 U. S. C. § 4705 (a) and 21 U. S. C. § 174. At his trial there was admitted in evidence the testimony of government agents relating conversations between respondent and a government informer overheard by means of a radio transmitter concealed on the person of the informer. The conversations took place in petitioner's home, automobile, and place of business and in the informer's home and automobile. The informer did not testify at the trial. A majority of the Court of Appeals sitting en banc reversed the conviction. 405 F. 2d 838 (C. A. 7th Cir. 1969). The use of electronic devices to overhear respondent's conversations with the informer was deemed to invade what the Court of Appeals considered to be respondent's justifiable expectations of privacy and to violate the Fourth Amendment as interpreted and applied in *Katz v. United States*, 389 U. S. 347 (1967). Hence the agents' testimony, the fruit of the violation, was inadmissible.

We reverse on the authority of *On Lee v. United States*, 343 U. S. 747 (1952). In that case a conversation between the defendant and a government agent was transmitted by an electronic device hidden on the body of the agent. Other agents with a receiving device overheard the conversations and testified to their contents

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS