

The Burger Court Opinion Writing Database

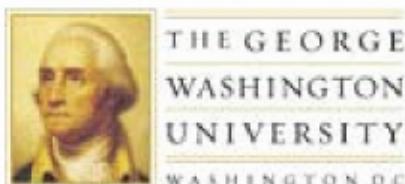
United States v. Giordano

416 U.S. 505 (1974)

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

April 9, 1974

Re: No. 72-1057 - United States v. Giordano

Dear Byron:

I will await some dissenting views before I give you
a comprehensive response in the above.

Regards,

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

May 7, 1974

Re: No. 72-1057 - U.S. v. Giordano, et al

Dear Byron:

Your opinion has persuaded me that the Court is correct on Parts I, II and III but that Lewis seems correct on Part IV so I will join on that basis.

Regards,

W. B.

Mr. Justice White

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-1057 AND 72-1319

Circuit

3-15

United States, Petitioner, } On Writ of Certiorari to
72-1057 *v.* } the United States Court
Dominic Nicholas Giordano } of Appeals for the Fourth
et al. } Circuit.

United States, Petitioner, } On Writ of Certiorari to
72-1319 *v.* } the United States Court
Umberto Jose Chavez et al } of Appeals for the Ninth
 } Circuit

[March --- 1974]

MR. JUSTICE DOUGLAS, concurring in 72-1057 *United States v. Giordano*, and concurring in part and dissenting in part in 72-1319, *United States v. Chavez*

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control Act of 1968, which imposes express limitations on the use of electronic surveillance. It finds that suppression is mandated for violation which occurred in *United States v. Giordano*, 72-1057, in which decision I concur, but that suppression of evidence seized through the use of electronic surveillance is not warranted by the violation which occurred in *United States v. Chavez*, 72-1319. I dissent from the latter holding

1

Title III permits electronic surveillance to be employed only pursuant to a court order. It requires, *inter alia*, that a federal trial attorney desiring to apply to the District Court for such a wiretap order must first

To: The Chief Justice
... Justice Brennan
... Justice Stewart
... Justice Marshall
... Justice Black
... Justice White
... Justice Powell
... Justice Rehnquist
... Justice O'Connor
... Justice Souter
... Justice Breyer

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 72-1057 AND 72-1319

United States, Petitioner, } On Writ of Certiorari to: 3-26
72-1057 v. } the United States Court
Dominic Nicholas Giordano } of Appeals for the Fourth
et al. } Circuit.

United States, Petitioner, } On Writ of Certiorari to
72-1319 v. } the United States Court
Umberto Jose Chavez et al. } of Appeals for the Ninth
Circuit.

[March — 1974]

MR. JUSTICE DOUGLAS, joining in 72-1057, *United States v. Giordano*, and concurring in part and dissenting in part in 72-1319, *United States v. Chavez*.

The Court deals with two different Justice Department violations of Title III of the Omnibus Crime Control Act of 1968, which imposes express limitations on the use of electronic surveillance. In *United States v. Giordano*, 72-1057, the Court correctly finds that the violation of 18 U. S. C. 2516 (1) is a violation of a statutory requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." The Court also properly finds that a violation of such a statutory requirement mandates suppression of the evidence seized by the unlawful interception. I join the opinion of the Court in *Giordano*. The same violation of § 2516 (1) is also involved in the Fernandez wiretap in *United States v. Chavez*, 72-1319, and I therefore concur in the Court's suppression of the evidence seized in that wiretap. In *Chavez*, however, the Court finds that suppression is not warranted for

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. March 27, 1974

RE: No. 72-1057 - United States v. Giordano
No. 72-1319 - United States v. Chavez

Dear Bill:

Please join me.

Sincerely,

(Signature)

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. March 27, 1974

RE: No. 72-1057 United States v. Giordano

Dear Byron:

I agree.

Sincerely,

Bill

Mr. Justice White
cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 26, 1974

No. 72-1057, U. S. v. Giordano

Dear Byron,

I am glad to join your opinion for
the Court in this case.

Sincerely yours,

P. S.
1/

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 26, 1974

No. 72-1057, U. S. v. Giordano
No. 72-1319, U. S. v. Chavez

Dear Bill,

Please add my name to your separate opinion in these cases.

Sincerely yours,

P.S.
P.

Mr. Justice Douglas

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1057

United States, Petitioner,
v.
Dominic Nicholas Giordano et al. } On Writ of Certiorari to
the United States Court of Appeals for the Fourth Circuit.

March -- 1974

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U. S. C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether if not evidence obtained as a result of such surveillance under a wiretap order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C. § 2516 (1)¹ conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap

¹ This and other relevant provisions of the statute are contained in the Appendix to this opinion.

Part IV Rewritten (p. 23)

Dr. J. D. White.

2nd DRAFT

Circulated:

SUPREME COURT OF THE UNITED STATES

Recirculated: 4-12-

No. 72-1057

United States, Petitioner,
v.
Dominic Nicholas Giordano et al. } On Writ of Certiorari to
the United States Court of Appeals for the Fourth Circuit.

March - 1974¹

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U.S.C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U.S.C. § 2516 (1)¹ conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap

¹ This and other relevant provisions of the statute are contained in the Appendix to this opinion.

stylistic

Op 11. 1d, 26, 27

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

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES Circulated: _____

No. 72-1057

Recirculated: 5-1

United States, Petitioner, } On Writ of Certiorari to
v. } the United States Court
Dominic Nicholas Giordano } of Appeals for the Fourth
et al. } Circuit.

[March --, 1974]

MR. JUSTICE WHITE delivered the opinion of the Court.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 211-225, 18 U. S. C. §§ 2510-2520, prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses. The Court must here determine whether the Government sufficiently complied with the required application procedures in this case and whether, if not, evidence obtained as a result of such surveillance, under a court order based on the applications, is admissible at the criminal trial of those whose conversations were overheard. In particular, we must decide whether the provision of 18 U. S. C. § 2516 (1)¹ conferring power on the "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses permits the Attorney General's Executive Assistant to validly authorize a wiretap

¹ This and other relevant provisions of the statute are contained in the Appendix to this opinion.

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

CHAMBERS OF
JUSTICE BYRON R WHITE

May 20, 1974

MEMORANDUM FOR THE CONFERENCE

Re: Cases held for No. 72-1057, United States v. Giordano
and No. 72-1319, United States v. Chavez

I. Each of the following cases raises a claim based on the issue decided in Giordano:

- (1) No. 71-1410, Pisacano v. United States ne^o 6
- (2) No. 72-158, Becker v. United States ne^o 1
- (3) Nos. 72-1729, Simons v. United States } ne^o 6
72-6992, Favano v. United States }
73-13, Romanello v. United States)
- (4) No. 72-1320, United States v. King
- (5) No. 72-1475, United States v. Roberts
- (6) No. 72-1476, United States v. Mantello

(1) In Pisacano v. United States, No. 71-1410, petitioners pled guilty to conspiracy to violate 18 U.S.C. §§ 1952, 1084, and subsequently moved to withdraw their pleas, prior to the imposition of sentence, see F. R. Cr. P. 32(d), after becoming aware of the CA 5 panel decision in United States v. Robinson, 468 F. 2d 189, indicating that about the time the wiretap evidence gathered against them had

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 27, 1974

Re: No. 72-1057 -- United States v. Giordano
No. 72-1319 -- United States v. Chavez

Dear Bill:

Please join me.

Sincerely,

T.M.

T. M.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 1, 1974

Re: No. 72-1057 - U. S. v. Giordano

Dear Byron:

I find myself about where Lewis Powell is. I am in accord with Parts I, II and III of your opinion, but am not in accord with Part IV. I, therefore, shall probably join Lewis in his forthcoming dissent.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 10, 1974

Re: No. 72-1057 - U. S. v. Giordano

Dear Lewis:

If you will permit me, I would like to join your
opinion circulated April 8.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20530

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1974

No. 72-1057 United States v. Giordano

Dear Byron:

I will join in Parts I, II and III of your fine opinion in the above case but will dissent from Part IV.

Part IV, as you have written it, would exclude from evidence communications intercepted under the November 6 Extension Order as well as those intercepted under the original October 16 Order. The application for the Extension was approved personally by the Attorney General and is therefore not marred by the authorization defect found in the original Order. The application for the Extension incorporated by reference the allegation and affidavits of the original application, information not tainted by any constitutional or statutory violation and in my view clearly sufficient to show both probable cause and satisfaction of the statutory criteria for interception. I find no basis for concluding that the November 6 Extension Order was necessarily tainted because it also contained allegations derived from the illegal tap.

I had hoped that we could, on a principled basis, avoid extending the disastrous consequences of the blundering in the Attorney General's office beyond the October 16 wiretap. I still believe that this is the proper course and that we should remand for the trial court to determine whether the untainted allegations in the application for the extension did in fact suffice. I will circulate as soon as I have an opportunity to write my dissent.

Sincerely,



Mr. Justice White

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice ^{John} _{W.} ^{Con} _{Stevens}
Mr. Justice ^{William} _{Rehnquist}
Mr. Justice ^{William} _{White}
Mr. Justice ^{Thurgood} _{Marshall}
Mr. Justice ^{Warren} _{W.} ^{W.} _{Brennan}
Mr. Justice ^{Clarence} _{Titus} Th _{Black}
Mr. Justice ^{John} _{Paul} ^{Con} _{Ginsburg}
Mr. Justice ^{Stephen} _{W.} ^{W.} _{Stevens}
Mr. Justice ^{Thurgood} _{Marshall}
Mr. Justice ^{Warren} _{W.} ^{W.} _{Brennan}
Mr. Justice ^{Clarence} _{Titus} Th _{Black}
Mr. Justice ^{John} _{Paul} ^{Con} _{Ginsburg}

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1057

7/18/74

United States, Petitioner, } On Writ of Certiorari to the United States Court
v. } of Appeals for the Fourth
Dominic Nicholas Giordano } Circuit.
et al.

[April —, 1974]

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II, and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion, stated in Part IV of its opinion, that evidence obtained under the two "pen register" ¹ extension orders and under the November 6 extension of the interception order must also be suppressed.

These are the pertinent facts. On October 8, 1970, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen

¹A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court 340 F. Supp. 1033, 1038-1041 (Md. 1972).

BP 9-12

2nd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No 72-1057

Circulated:

United States, Petitioner, } On Writ of Certiorari to Recirculated APR 23 1974
 } the United States Court
Dominic Nicholas Giordano } of Appeals for the Fourth
et al. } Circuit.

[April -- 1974]

Mr. Justice Powell concerning warrantless intercepting in part.

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of one application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion stated in Part IV of its opinion that evidence obtained under the two "pen register" extension orders under the November 8, 1973, order of the same judge must also be suppressed.

These are the pertinent facts. On October 8, 1973, the Chief Judge of the United States District Court for the District of Maryland authorized the use of a pen

A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility which records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court 340 F. Supp. 1033, 1038-1041 (Md. 1972).

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 72-1057

Circulated:

United States, Petitioner, } On Writ of Certiorari to the United States Court
v. } of Appeals for the Fourth
Dominic Nicholas Giordano } Circuit.
et al.

[April —, 1974]

Mr. JUSTICE POWELL with whom Mr. JUSTICE BLACKMUN and Mr. JUSTICE REHNQUIST join concurring in part and dissenting in part

I agree with the majority that the authorization by the Executive Assistant to the Attorney General of the application for the October 16 interception order contravened 18 U. S. C. § 2516 (1) and that the statutory remedy is suppression of all evidence derived from interceptions made under that order. I therefore join Parts I, II and III of the opinion of the Court. For the reasons stated below, however, I dissent from the Court's conclusion, stated in Part IV of its opinion, that evidence obtained under the two "pen register" ¹ extension orders and under the November 6 extension of the interception order must also be suppressed.

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¹A pen register is a mechanical device attached to a given telephone line and usually installed at a central telephone facility. It records on a paper tape all numbers dialed from that line. It does not identify the telephone numbers from which incoming calls originated, nor does it reveal whether any call, either incoming or outgoing, was completed. Its use does not involve any monitoring of telephone conversations. The mechanical complexities of a pen register are explicated in the opinion of the District Court (349 F. Supp. 1033, 1038-1041 (Md. 1972)).

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 15, 1974

Re: No. 72-1057 - United States v. Giordano

Dear Lewis:

Please join me in your concurring and dissenting opinion in this case.

Sincerely,

W

Mr. Justice Powell

Copies to the Conference