IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 35

CHARLES KATZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

There were no reports of the trial court's decision.

The decision of the Court of Appeals for the Ninth Circuit has been reported at 369 F. 2d 130.

Jurisdiction

The judgment of the Court of Appeals was entered November 17, 1966. On March 13, 1967, certiorari was granted (87 S. Ct. 1021).

The jurisdiction of this Court is invoked pursuant to 28 USCA §1257 (3).

Questions Presented

1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

   A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

   B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

2. Whether the search warrant used by the Federal Officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant.

3. In what manner does the holding in *Frank* v. *United States,* 347 F. 2d 486 affect this case.

Constitutional Provisions Involved

Fourth Amendment, Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of the Case

On March 17, 1965, an eight-count indictment was filed against Petitioner, Charles Katz. Each count of the indictment charged a violation of Title 18, U.S.C., §1084 [interstate transmission of bets and wagers and information assisting in the placing of bets and wagers]. Each of said counts involved violations of §1084 on different dates or at different times on the same date. (Tr. 3-5.)[1]

Prior to the trial of the within matter, Petitioner filed a Motion to Suppress Evidence and for Return of Evidence, which motion was denied. Subsequently, Petitioner moved to dismiss the indictment, pursuant to Rule 12 of

[1] Page references are to the printed Transcript of Record.

the Federal Rules of Criminal Procedure, which motion was also denied.

Thereafter, Petitioner entered a plea of not guilty, and a trial by court, the Honorable Jesse Curtis, Judge Presiding, was held. On May 20, 1965, the court found Petitioner guilty on all counts as charged. Petitioner's motions for a new trial and for a judgment of acquittal were denied; whereupon, Petitioner was fined the sum of $300.00. (Tr. 1-2; 213-215.)

On November 17, 1966, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of conviction. (Tr. 222-231.)

On March 13, 1967, this Court granted a Petition for Writ of Certiorari. On May 22, 1967, the Petitioner's Motion to Proceed in Forma Pauperis was granted. (Tr. 232-233.)

Statement of the Facts

On February 4, 1965, agents of the Federal Bureau of Investigation commenced surveillance activities with respect to Petitioner. (Tr. 102.) This activity continued until February 25, 1965. In fact, Petitioner's activities only during the period from February 19 through February 25 formed the basis of the indictment in the instant case. (Tr. 3-5.)

On February 19, 1965, Agent Barron of the FBI observed Petitioner entering one of three phone booths located on the 8200 block of Sunset Boulevard in Los Angeles. On this date, Petitioner appeared to be making a telephone call and remained in the booth for approximately ten

minutes. Petitioner's conversation was overheard and recorded [and later transcribed] by means of a tape recorder which was placed on top of the middle booth. (Tr. 103.) One of the three booths was placed out of order by the FBI with the consent of the telephone company. (Tr. 112.) The recorder microphone was taped onto the booth and no part of the microphone physically penetrated the telephone booths. (Tr. 103-104.) The microphone was activated when Petitioner was a block away from the booth. (Tr. 106; 113.) The microphone was deactivated after Petitioner left the booth. (Tr. 106.) Apparently, anybody could use the booth while the recording equipment was operative; in fact, on February 23, 1965, a stranger did use the booth and his conversation was recorded. (Tr. 113-114.)

The admission into evidence of any of the conversations [recordings and transcripts] obtained by means of the tape recorder was objected to (Tr. 104; 107; 116); however, all of the transcripts made from the tape recordings were admitted into evidence. (Tr. 105; 116.)

On February 20, 1965, through February 25, 1965, inclusive, Petitioner was observed using the same phone booths and the agents of the FBI followed the same procedure of recording and transcribing his telephone conversations, although no tape recording was obtained on February 22, 1965, due to mechanical difficulties. (Tr. 114.) Petitioner was arrested immediately after leaving the telephone booth on February 25, 1965. (Tr. 115.)

A representative of the telephone company [the custodian of the records] testified that calls were placed on some of the dates in question to Boston, Massachusetts. (Tr. 123.)

FBI Agent La Rue was present when Petitioner was arrested. (Tr. 146.) Petitioner's apartment was searched pursuant to a warrant. Petitioner's objections that the evidence which was seized pursuant to the warrant was procured by means of an illegal taping of Petitioner's telephone calls and that the warrant under which the items were seized was too general and the search was exploratory, were overruled. (Tr. 147.) Agent La Rue testified that Petitioner told him that he had done nothing else other than handicap for the past 30 years. (Tr. 149.) Petitioner did not, however, say he had been betting for 30 years; in fact, Petitioner may have only said that he had been a handicapper for that length of time, and the word "handicap" appeared in the Agent's report. (Tr. 150-151.)

ARGUMENT

I.

Introduction

When the Petition for Writ of Certiorari was filed herein, counsel for Petitioner intended and hoped that this case would provide the vehicle for a re-examination by this Court of the dichotomy that had been permitted to develop in the area of the Fourth Amendment's proscription against unreasonable searches and seizures. This dichotomy had been caused primarily by two decisions of this Court—*Goldman* v. *United States,* 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, and *Silverman* v. *United States,* 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed.2d 734, and cases interpreting these two decisions. It was also the intention of

counsel, if the Writ were granted, to bring before this Court the whole subject of eavesdropping, particularly eavesdropping accomplished by the use of electronic and mechanical apparatus.[2] In this regard, counsel intended to examine the historical background of eavesdropping, the judicial decisions relating thereto, the effect of recent technological advancements and whether, in fact, electronic eavesdropping is an indispensable tool of law enforcement officers.

In *Berger* v. *New York,* 388 U.S. 41, 87 S. Ct. ——, 18 L. Ed.2d 1040, this Court, in striking down the New York permissive eavesdropping statute, greatly simplified the task of counsel herein by discussing in some detail the entire topic of electronic eavesdropping and particularly the subject matters set forth in the preceding paragraph hereof. No useful purpose would be served in reiterating this discussion. Accordingly, the portion of this brief relating to the subject of electronic eavesdropping will be directed solely to the *Goldman-Silverman* dichotomy and the ramifications thereof.

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[2] The use of the word "eavesdropping" is not intended as a word of art and includes the subject of "wiretapping", *i.e.*, electronic interception of telephone or telegraph messages.

II.

Whether Evidence Obtained by Attaching an Electronic Listening and Recording Device to the Top of a Public Telephone Booth Used and Occupied by the Petitioner Is Obtained in Violation of the Fourth Amendment to the United States Constitution.

A. Whether a Public Telephone Booth Is a Constitutionally Protected Area So That Evidence Obtained by Attaching an Electronic Listening Recording Device to the Top of Such a Booth Is Obtained in Violation of the Right to Privacy of the User of the Booth.

B. Whether Physical Penetration of a Constitutionally Protected Area Is Necessary Before a Search and Seizure Can Be Said to Be Violative of the Fourth Amendment to the United States Constitution.

In *Goldman, supra,* the Federal law enforcement officers placed a detectaphone against the wall of a room which the defendant was occupying. This Court held that the conversations that were intercepted by use of this device were admissible and that no Fourth Amendment violation had occurred. The basis of the Court's decision was that the action by the agents did not constitute a physical trespass into the area occupied by the defendant. A strong dissent was filed by Mr. Justice Murphy wherein he stressed the fact that the primary inquiry under the Fourth Amendment should be whether an individual's right to privacy had been invaded, not whether a physical trespass had occurred.

On Lee v. *United States,* 343 U.S. 747, 72 S. Ct. 967, 96 L. Ed. 1270, followed *Goldman* and is really significant only

for the reason that Mr. Justice Douglas, in his dissenting opinion, admitted that he had erred in voting with the majority in *Goldman.* (343 U.S. 747, 762.)

In *Silverman* v. *United States, supra,* the Court unanimously held that evidence procured by penetrating a spike mike through the wall of petitioner's home so that it touched the heating ducts therein was inadmissible. In *Silverman,* this Court chose not to re-examine *Olmstead* v. *United States,* 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944,[3] or *Goldman* v. *United States, supra,* deciding rather to base its decision on the fact that there had been "an actual intrusion into a constitutionally protected area." (365 U.S. 505, 512.) The following significant language also appeared in *Silverman*:

> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.*" (Citations omitted.) (365 U.S. 505, 511.) (Emphasis added.)

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[3] In *Olmstead,* which preceded *Goldman,* the Court held admissible evidence obtained by a wire tap. The decision was based on a literal interpretation of the Fourth Amendment, *i.e.,* that a wire tap was neither a search nor a seizure. (277 U.S. 438, 464.)

After *Silverman,* much confusion existed as to whether this Court had abandoned the physical trespass test enunciated in *Goldman* or whether *Silverman* represented the new philosophy of the Court. The confusion was to some extent caused by the statement in *Silverman* that "We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch." (365 U.S. 505, 512.)

The confusion was deepened by the subsequent decision in *Lopez* v. *United States,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed.2d 462, wherein the Court was unwilling to reconcile the apparent conflict between *Goldman* and *Silverman.* In one breath the Court spoke in terms of "privacy" (373 U.S. at p. 438), while in the next breath it talked about an "unlawful physical invasion" (373 U.S. at p. 439). The only language to be found in *Lopez* which even resembles an attempt at reconciliation is the following:

> "It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." (373 U.S. 427, 438-439.)

That the lower courts continue to be preoccupied with the physical trespass test can be discerned by reading such cases as *Cullins* v. *Wainwright,* 328 Fed. 2d 481 (5th Cir. 1964). In this case, the law enforcement officers lowered a microphone down an airshaft which was entirely surrounded by the interior wall of the apartment in which the defendant resided. The microphone was wired to a recording and listening device operated by the officers. The information intercepted was used in an affidavit in support of a search warrant and a subsequent search and

seizure was made of gambling paraphernalia. The Court held that an illegal search and seizure had occurred, since the facts of the case were more closely analogous to *Silverman* than *Goldman.*

In a sense, the foregoing brief dissertation concerning the judicial development of the law of search and seizure in the eavesdropping area is of academic importance only. Whatever doubts that may have once existed, it is now clear that the recent decisions of this Court unequivocally indicate that the primary concern of the Fourth Amendment is the protection of the individual's right to privacy. This was clearly expressed in *Warden, Maryland Penitentiary* v. *Hayden,* 387 U.S. 294, 87 S. Ct. ——, 18 L. Ed.2d 782, and reaffirmed in *Berger* v. *New York, supra,* and *Camara* v. *Municipal Court,* 387 U.S. 523, 87 S. Ct. ——, 18 L. Ed.2d 930. In *Warden,* this Court stated:

> ". . . We have recognized that the principal object of the Fourth Amendment is the *protection of privacy* rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See Jones v. United States, 362 U.S. 257, 266; Silverman v. United States, 365 U.S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform . . . ." (18 L. Ed.2d 782, 790.) (Emphasis added.)

See also *Griswold* v. *Connecticut,* 381 U.S. 79, 85 S. Ct. 1678, 14 L. Ed.2d 510.

Assuming the undeniable premise that the primary concern of the Fourth Amendment is the individual's right

to privacy, it can at once be seen that the inquiry as to whether or not a physical trespass has occurred is no longer relevant in discussing a search and seizure issue and, to the extent that *Goldman* v. *United States, supra,* stands for such a proposition, it must be overruled. If there has been an actual invasion or an attempt to intrude into a constitutionally protected area, a person's right to privacy has been violated and the fact that there was or was not physical penetration of that area is irrelevant. The crucial inquiry as applied to the instant case is, therefore, whether a public telephone booth is a constitutionally protected area so that an interception of Petitioner's calls while an occupant thereof constituted an invasion of his constitutionally protected right to privacy.

Before discussing this question, it must first be observed that there can be no real doubt that Petitioner herein has the requisite standing to attack the alleged constitutional infringement, since he has been "indisputably affected by it." *Berger* v. *New York,* 18 L. Ed.2d 1040, 1050; see also *Jones* v. *United States, supra.*

This Court has apparently never had the occasion to pass on the issue of whether a public telephone booth is a constitutionally protected area. Nor has this Court delineated with specificity the test for determining whether a particular area is constitutionally protected. Perhaps *Lanza* v. *United States,* 370 U.S. 139, 82 S. Ct. 1218, 8 L. Ed.2d 384, represents the closest that this Court has come to discussing this subject. In *Lanza,* wherein it was held that a public jail was not a constitutionally protected area, the Court stated:

> "Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment pro-

> tection, it is obvious that a jail shares none of the *attributes of privacy* of a home, an automobile, an office, or hotel room." (370 U.S. 139, 143.) (Emphasis added.)

When the now discredited physical trespass theory is abandoned in favor of one stressing the right to privacy, it is possible to suggest a workable test to be employed in determining whether or not a specific area is protected by the Fourth Amendment. This test merely turns on the answer to the question: "Does the area in question have the 'attributes of privacy?'" (*Lanza* v. *New York, supra*) or, said in another way, "Would the average reasonable man believe that the person whose conversation had been intercepted intended and desired his conversation to be private?" Under this test the degree of privacy afforded by a facility would be one criterion in determining the degree of privacy protected. For example, a conversation held in a telephone booth having a door would be entitled to more privacy, and thus more constitutional protection, than a conversation held in an open booth in a crowded building or area.

When examined in light of this proposed test, there is little room for doubt that a public telephone booth with a door [as in the instant case] is and should be a constitutionally protected area. In using the booth, a person, in return for paying a set toll, expects and intends his conversation to be unmonitored and private and further expects to be in complete control of the degree of privacy his conversation will have. Since the protection of the Fourth Amendment has been held by this Court to include a business office (*Gouled* v. *United States,* 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647), a store (*Davis* v. *United States,*

328 U.S. 582, 66 S. Ct. 1256, 90 L. Ed. 1453), a hotel room (*United States* v. *Jeffers,* 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59), an automobile (*Henry* v. *United States,* 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed.2d 134), and an occupied taxicab (*Rios* v. *United States,* 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed.2d 1688), it would be unreasonable to suggest that any less protection should be afforded to the user of a closed door public telephone booth. Surely he has the same right to exclusive control and use as does the taxicab occupant.

Several lower courts have had the occasion to pass on the issue herein presented. In *United States* v. *Borgese,* 235 Fed. Supp. 286 (S.D.N.Y. 1964) the court held that a public telephone booth was not a constitutionally protected area. However, in *United States* v. *Stone,* 232 Fed. Supp. 396 (N.D. Tex. 1964) and *United States* v. *Madison,* 32 U.S.L. Week 2243 (D.C. Ct. Gen. Sess. 1963) a contrary, and it is submitted correct, decision was reached. Because of the excellent manner in which the Court in *Stone* analyzed the matter, this Court's indulgence is desired in setting forth in some detail a portion of that decision:

> "Going back to the founding of this country it is clear that individual privacy was one of the strongest single influences that guided the founders of this country in the establishment of a new nation and the adoption of the Bill of Rights.
>
> "Privacy of a protected area was invaded only by an actual physical intrusion. But today electronic devices without physical presence enables an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass.
>
> "But fundamental rights protected by the Bill of Rights cannot become outdated by technological de-

velopments. Sustaining this position the Supreme Court stated in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, at page 387, 47 S. Ct. 114, at page 118, 71 L. Ed. 303 (1926):

" 'while the meaning of the constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise.'

"In the light of technological improvements it is clear that an electronic device placed in a protected area by government agents without the knowledge of the defendant and transmitting a telephone conversation of defendant is as much a physical trespass and violation of the right to privacy as is the making of an unlawful physical entry, and overhearing the conversation under such circumstances is a violation of the Fourth Amendment.

"With respect to whether the admission of evidence secured through an electronic device also violates the Fifth Amendment, Judge Washington in a dissenting opinion in Silverman, 275 F.2d 179 reasoned that:

" 'eavesdropping of the kind which occurred here * * * does violate * * * our fundamental concept of ordered liberty, as embodied in the due process clauses of the Fifth and Fourteenth Amendments.' [Silverman v. United States, 107 U.S. App. D.C. 144, 275 F.2d 173.]

"In the recent case of Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed.2d 653, Justice Brennan ap-

proved the following statements in Boyd v. United States, supra, that

"'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony * * * to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of [the Fourth and Fifth Amendments].' and in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081, 84 A.L.R.2d 933 that

"'We find that as to the Federal Government the Fourth and Fifth Amendments * * * do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] * * * only after years of struggle'. Bram v. United States, 1897, 168 U.S. 532, 543-544 [18 S. Ct. 183, 187, 42 L. Ed. 568].

"It is clear that the use of defendant's conversation in a criminal case under the circumstances in this case is within the condemnation of the Fifth as well as the Fourth Amendment . . . ." (232 Fed. Supp. 396, 399-400.)

In *Berger* v. *New York, supra,* this Court elaborated upon certain factors which might turn an otherwise valid search into an illegal one. Two of these factors were the imprecise and indiscriminate monitoring of conversations and prolonged or a series of monitorings. Both of these factors were present in the instant case. Not only was the surveillance of the Petitioner conducted over a period of three weeks [although activities during only a one week period formed the basis of the indictment], but a conversation, and therefore the privacy, of a complete stranger

was intercepted. (Tr. 113-114.) Thus, even assuming arguendo [although vehemently denying] that a public telephone booth is not a constitutionally protected area, the search in this case was unreasonable under the Fourth Amendment in any event, since not even the protections of the statute in *Berger, supra,* were present in this case.

III.

Whether the Search Warrant Used by the Federal Officers in the Instant Case Violated the Fourth Amendment to the United States Constitution in That Said Warrant Was (a) Not Founded on Probable Cause; (b) an Evidentiary Search Warrant; and (c) a General Search Warrant.

Before examining in some detail the nature of the search warrant involved in the instant case, one very significant point must be mentioned. The affidavit for search warrant involved herein (Tr. 12-14) specifically states:

> "On February 19, 20, 21, 23 and 24, 1965, Charles Katz was observed by me and fellow Special Agents to enter either one of two public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276.
>
> "From these booths Charles Katz made daily station to station telephone calls to Boston, Massachusetts, telephone number 884-1733. His conversations were recorded by taping microphones on the outside of the phone booths daily. I have listened to the recordings of his conversations and in his conversations he daily received the basketball line and made wagers with the person using the telephone number he was calling.

> "On February 23 and 24, 1965, Charles Katz from the described booths called Miami Beach telephone number JE 4-0976 and on February 24, 1965, he made sports bets on the Duquesne and Temple basketball games to a party on the Miami number. He used the following language, 'Give me Temple 10½ for a nickel and give me Duquesne 7½ for a nickel.'
>
> "From my experience in investigating violations of the Federal Gambling Statutes I am aware that the above language construed the placing of bets."

It must be conceded by Respondent that a substantial portion of the information recited in the agent's affidavit in support of the search warrant was obtained by him through the use of an electronic eavesdropping device. It is patently clear that if, as is contended by Petitioner, the information was obtained in violation of the Fourth Amendment, such information could not be utilized to establish "probable cause" for the search warrant. This necessarily follows since the warrant would be the "fruits of the poisonous tree." *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319. Assuming that the information was obtained in violation of the Fourth Amendment and if the affidavit was not sufficient for "probable cause" absent such information, the warrant must be declared invalid and all evidence seized thereby must be held inadmissible.

Assuming arguendo that the affidavit was sufficient for "probable cause," it remains to be seen whether the warrant itself was valid. The warrant authorized a search for the following:

> ". . . bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, ..." (Tr. 11.)

It is respectfully submitted that the foregoing language of the warrant authorized a search for evidence in violation of Rule 41, Fed. Rules Crim. Proc.

It may be contended that a contrary conclusion is dictated by this Court's recent decision in *Warden, Maryland Penitentiary* v. *Hayden, supra,* wherein it was held that the fact that "mere evidence" was seized by the authorities during an otherwise valid arrest and search did not make the evidence seized inadmissible. If, in fact, *Warden* does dictate this conclusion, a further discussion of the subject would seem unnecessary. It is because Petitioner contends that the decision in *Warden* did not foreclose the issue here under discussion that further inquiry into the question will be made.

Counsel for Petitioner have had the occasion to discuss between themselves and their colleagues the meaning and applicability of *Warden,* both as to the law of search and seizure in general and to the facts of this case in particular. Some of these colleagues have adopted the position that the *Warden* decision means that evidentiary items may now be seized under a search warrant as long as these items are specifically listed in the warrant. If, in fact, this is the true meaning of *Warden,* counsel for Petitioner herein respectfully submit that the decision is irreconcilable with Rule 41, Fed. Rules Crim. Proc.

Although the Fourth Amendment would seem to sanction an evidentiary search if the items to be seized are particularly described (*Warden* v. *Hayden, supra*), Rule 41 contains no such permission or authority. Thus, by enacting Rule 41 Congress obviously intended to and did make the scope of a search pursuant to a search warrant more restrictive than that permitted by the Constitution, at least insofar as the Federal Courts are concerned. It might be remembered that similar action was taken by Congress after this Court's decision in *Olmstead* v. *United States, supra.* Although *Olmstead* held wire tap evidence admissible under the Fourth Amendment, Congress enacted Title 47 U.S.C. §605 which made wire tapping an illegal activity. Subsequently, this Court in the *Nardone* Cases, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314, and 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307, held that wire tap evidence was inadmissible in Federal prosecutions.

Irrespective of the validity of the foregoing analysis, it is respectfully submitted that *Warden* is distinguishable from the instant case. First, *Warden* involved a warrantless search [whereas a search warrant is involved herein] and therefore, the provisions of Rule 41 did not apply. Second, *Warden* involved a situation where the search was made while the officers were in "hot pursuit" of a suspected criminal. If the holding in *Warden* is held applicable to the instant case, this Court will be required to declare that the expression of Congress in Rule 41 is too narrow a construction of Fourth Amendment rights and that Rule 41 is somehow invalid. Further, this Court will be required to overrule all prior cases holding that a general or evidentiary search warrant is invalid. It is respectfully submitted that the Court should do neither. Additionally, to

apply the rationale of *Warden* to this case would be to totally and completely disregard that portion of the Fourth Amendment which provides:

> ". . . And no warrants shall issue but upon reasonable cause, supported by oath or affirmation, and *particularly describing* the place to be searched and the persons or things to be seized." (Emphasis added.)

Fed. Rules Crim. Proc., Rule 41 provides in its pertinent parts as follows:

> "(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property:
>
> "(1) Stolen or embezzled in violation of the laws of the United States; or
>
> "(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense."

It is significant to note that nowhere does Rule 41 authorize a search for evidentiary matter. Either *Warden* must be held inapplicable to the warrant involved in this case or Rule 41 must fall.

Further, if *Warden* is held to validate the warrant involved in this case, all prior decisions of this Court striking down general and exploratory searches under the guise of a search warrant must be overruled. See, e.g., *Marron* v. *United States,* 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231; *Stanford* v. *United States,* 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed.2d 431; *Boyd* v. *United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *Gouled* v. *United States, supra;* and

Aguilar v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723. The following language set forth in *Marron* and cited in *Stanford* could not possibly be considered good law if *Warden* applies to the warrant involved herein:

> "The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." (375 U.S. 192, 196.)

Interestingly enough, the above-quoted language was cited with approval in *Berger* v. *New York, supra,* at p. 1052.

If, as is contended by Petitioner, the warrant involved in this case is to be governed by the long standing rules of law that have been enunciated by this Court [see decisions cited in preceding paragraph], then the provisions of this warrant must be further examined to determine whether or not they comport with these rules of law.

There can be little doubt that the warrant involved in this case authorized a search in violation of Rule 41 and the above cited cases. None of the items specified in the warrant were contraband or instrumentalities of the crime herein involved. Additionally, the warrant contained no specifics; rather, it was directed at items which customarily are found in the possession of gamblers or bookmakers. Further, the warrant was also directed at items which are commonly in the possession of every citizen of this country [*e.g.,* money, telephones, telephone address listings, etc.]. As such, it was a general warrant which au-

thorized a search for non-specified evidence. Such a warrant violates both the Fourth and Fifth Amendments to the United States Constitution.

Even if the warrant involved in the instant case could by some stretch of the imagination be held to be sufficiently specific, it is clear that the items seized by the officers went far beyond whatever specificity is contained in the warrant. A look at the inventory of the items seized (Tr. 14-16) discloses that numerous items were seized which were not described in the warrant and which were not contraband [e.g., 148 yellow, legal size sheets of lined paper; 1 copy 1964 Inside Football; newspaper clippings captioned "College Basketball Standings"; registration card issued by Las Vegas Police Department, #A-44612; newspaper clipping starting with "The expert: . . . " and ending with "games"; sheet of white, heavy paper with red handwriting; large brown envelope containing 7 copies of Sports Journal; copy of Basketball Year Book 1965]. Since the officers exceeded the authority granted to them in the warrant, it is respectfully submitted that the entire search must be invalidated, for the reason that the validly seized items cannot be severed from the invalidly seized items. The mass seizure of a person's private papers and property is offensive to the Fourth Amendment. *Marcus* v. *Property Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed.2d 1127.

IV.

If the Holding in Frank v. United States, 347 F.2d 846, Is Applicable to the Instant Case, Then Petitioner Is Entitled to a Reversal of His Conviction and This Proceeding Would Be Rendered Moot.[4]

After Petitioner's conviction in the instant case, and while the matter was pending on appeal in the Court of Appeals, Petitioner was subpoenaed before the Federal Grand Jury at Miami, Florida. Petitioner was granted immunity in connection with his testimony before the Grand Jury pursuant to Title 47 United States Code §409(1). Whereupon, Petitioner was questioned before the Grand Jury concerning the same subject matter which formed the basis of his conviction in the instant case. When Petitioner refused to answer any of the questions propounded to him before the Grand Jury, he was committed to the custody of the United States Marshal by Chief United States District Judge David W. Dyer until he complied with the order from the Court directing him to answer the questions propounded. This commitment, which was made on June 24, 1966, was stayed until June 27, 1966, pending application for a stay to the United States Court of Appeals for the Fifth Circuit.

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[4] The facts presented in connection with this argument were basically taken from the STIPULATION OF FACTS which was executed by Petitioner's counsel and counsel for the Government in connection with the Motion for Remand. If the facts as recited by Petitioner are incorrect in any substantial particular, Petitioner respectfully requests the Government to set forth the correct facts, all of which are in its possession.

On June 27, 1966, Circuit Judge J. Minor Wisdom stayed the order of commitment until the regularly constituted panel of the United States Court of Appeals for the Fifth Circuit had an opportunity to consider a motion for a stay. On July 7, 1966, the regularly constituted panel of the said Court of Appeals dissolved the aforesaid temporary stay and denied the Petitioner's motion for stay of commitment. On July 8, 1966, Chief United States District Court Judge David W. Dyer entered an order directing the United States Marshal to forthwith take into custody and incarcerate Petitioner in accordance with the order previously made on June 24, 1966. On July 9, 1966, Petitioner was taken into custody by the United States Marshal and incarcerated in the Dade County Jail, Dade County, Florida.

After Petitioner had served some time in jail, the particular Grand Jury before which Petitioner had been called to testify dissolved. Consequently, Petitioner was released from jail. *Shillitani* v. *United States,* 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed.2d 622.

Subsequently, a new Grand Jury was formed and Petitioner was again subpoenaed to appear before it. On this occasion, the previous grant of immunity still appertaining, Petitioner answered the questions propounded to him.

After he had testified before the Grand Jury as aforesaid, and on or about September 26, 1966, Petitioner, by and through his counsel, moved the Ninth Circuit Court to remand the within matter to the District Court for the purpose of permitting Petitioner to move for a new trial on the ground of newly discovered evidence. The newly discovered evidence related to Petitioner having testified before the Grand Jury, after having been granted immunity as aforesaid. It was and is Petitioner's contention that, by

so testifying after having been granted immunity, a reversal of his conviction was mandatory. A copy of Petitioner's NOTICE OF MOTION AND MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE; AFFIDAVIT AND POINTS AND AUTHORITIES is attached hereto as Appendix "A".

On September 30, 1966, the United States Court of Appeals for the Ninth Circuit issued its order requesting "that each side file at or before the time set for hearing the argument, *i.e.,* October 7, 1966, such affidavits, transcripts (if any there be), (1) to establish whether or not appellant was convicted with respect to the matter about which the testimony was subsequently compelled; and (2) of any further proceedings (if any there be) by any party in Frank v. United States, 347 F.2d 486, subsequent to July 30, 1965." A copy of this order is attached hereto as Appendix "B".

October 7, 1966, the Court of Appeals for the Ninth Circuit issued its order denying Petitioner's Motion for Remand. A copy of this order is attached hereto as Appendix "C".

Insofar as the issue raised by the preceding facts is concerned, this case is identical to the case of *Frank* v. *United States,* 347 F.2d 486, *supra.* In *Frank,* the Court, quoting from the Government's Reply Brief, set out the facts as follows:

> " 'After appellant Angelone was tried, convicted and sentenced, he was called upon to testify before a Grand Jury. The Grand Jury was investigating other crimes and the crime in the instant case so far as the facts concerned other suspects. Appellant Angelone refused

to testify on grounds of self-incrimination. He was compelled to testify under the immunity statute, 47 U.S.C. 409(L).'"

Based on the foregoing facts, the defendant Angelone contended that his conviction had been mooted and was required to be set aside. The Circuit Court so held. It is respectfully submitted that the same holding is required in the instant case wherein the facts which gave rise to the application of the *Frank* doctrine are undisputed and identical to those in *Frank*.

The statute under which Petitioner herein was granted immunity (48 Stat. 1097 (1934), 47 U.S.C. §409(L) (1958)) provides in its pertinent parts as follows:

> "No individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

Applying this statute to the facts before it, the Court in *Frank* stated:

> "[5] Under this language Angelone may not be 'subjected' to any penalty * * * for or on account of any transaction, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify * * *. Therefore he may not be penalized in the present case since, as we are now advised, his compelled testimony concerned matters

related to his conviction which is here on appeal. The United States points out, however, that the conviction had already occurred, and that the immunity statute does not apply to any penalty that may result from his appealed conviction because such penalty cannot be attributable to his testimony as given before the grand jury. We think this is too narrow a construction of the immunity statute and is inconsistent with the 'Policies of the Privilege' as most recently described by the Supreme Court. Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed.2d 678.

"[6] While we are not bound to construe literally the language of immunity if to do so would run counter to the intent or purpose of Congress, we have no reason to decide that that intent or purpose was other than to permit an exchange of a particular conviction, such as Angelone's, for the larger benefit believed to reside in compelling his self-accusatory testimony. Congress has not sought to enable the government to obtain both such compelled testimony and a conviction related thereto which is either not yet obtained or if obtained is pending on appeal. Congress left the choice to the executive officials administering the criminal law, subject to District Court approval. Compelling one to give testimony which, except for the grant of immunity, is self-incriminating sacrifices the power to penalize the person granted the immunity if he has been convicted with respect to the matters about which the testimony is compelled and his appeal from the conviction is pending when such testimony is given. It probably will not be questioned that should such a conviction be reversed the intervening immunity would

preclude a subsequent re-trial. But if the conviction is affirmed, the appellant is 'subjected to * * * penalty' not only by the previous conviction but by the subsequent affirmance.

". . . .

"To repeat, the government may not convict a person and then, pending his appeal, compel him to give self-accusatory testimony relating to the matters involved in the conviction. Any other construction of the statute would lead to such potential abuse as to preclude such construction if it may reasonably be avoided consistently with the Congressional purpose. Our construction and application of the statute we think coincides with that purpose. Piemonte v. United States, 367 U.S. 556, 81 S. Ct. 1720, 6 L. Ed.2d 1028, is not to the contrary. No appeal from the conviction was there pending. Moreover, the case involved contempt of court for refusing to obey the court's order. No question as to the possible mooting of the previous conviction was presented or decided." (347 F.2d 486, 490-91.)

If the rationale in *Frank* is correct, then a reversal of Petitioner's conviction is required. A contrary result would in effect permit the law enforcement officers to reap the benefits of the immunity statute [i.e., Petitioner's testimony] without suffering the corresponding detriment [i.e., the inability to use the testimony against the Petitioner].

If, contrary to the suggestion by the Court in *Frank,* Petitioner's Grand Jury testimony could be used against him on a re-trial of the instant conviction, the immunity statute would indeed be rendered meaningless and Peti-

tioner would certainly suffer a "penalty" by being deprived of his Fifth Amendment rights. Petitioner seriously doubts that the Government would ever adopt such a position. It would be anomalous to hold that any less a "penalty" is imposed upon a person granted immunity if his conviction is affirmed on appeal. The obvious intent and purpose of the immunity statute is to afford to the defendant a *quid pro quo* for relinquishing his Fifth Amendment rights. The defendant would be deprived of his *quid pro quo* if he is forced to waive this right without deriving any benefit therefrom.

Further, if *Frank* is not upheld, the Government would be given a very unfair advantage for the following reason. Not only will the Government have its conviction affirmed on appeal, but the Government will also be able to derive the benefit of the defendant's testimony before the Grand Jury [immunity having been given while the case was on appeal], which testimony would not have been available in the trial court unless the Government gave the defendant immunity, thereby forsaking prosecution of him. In effect, if *Frank* is overturned, the Government will, proverbially speaking, "have its cake and eat it too."

Conclusion

It is respectfully submitted that the holding of the Court in *Frank* v. *United States* requires an automatic reversal of Petitioner's conviction herein. Nevertheless, because of the extreme importance of the Fourth Amendment issues presented by this case, Petitioner herein respectfully prays the Court to make a determination on these issues.

Respectfully submitted,

MARKS & SCHNEIDER
BURTON MARKS
HARVEY A. SCHNEIDER

Counsel for Petitioner

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 20648

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

—v.—

CHARLES KATZ,
Defendant and Appellant.

Notice of Motion and Motion for Remand for the Purpose of Moving for a New Trial on the Ground of Newly Discovered Evidence; Affidavit and Points and Authorities

BURTON MARKS
8447 Wilshire Boulevard
Suite 217
Beverly Hills, California
(213) 653-4141
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 20648

UNITED STATES OF AMERICA,
Plaintiff and Respondent,

—v.—

CHARLES KATZ,
Defendant and Appellant.

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1) NOTICE OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

2) MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

3) AFFIDAVIT OF BURTON MARKS IN SUPPORT OF THE MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE;

4) POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

NOTICE OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

TO THE UNITED STATES OF AMERICA, PLAINTIFF AND RESPONDENT, AND ITS ATTORNEY MANUEL L. REAL:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the Defendant and Appellant CHARLES KATZ by and through the undersigned will bring the following motion for remand for the purpose of moving for a new trial based on the ground of newly discovered evidence on for hearing before the above entitled Court in the United States Courthouse, 312 N. Spring Street, Los Angeles, California on Friday, October 7, 1966, at 9:30 a.m., or as soon thereafter as counsel can be heard.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks
Attorney for Appellant

MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

Defendant and Appellant CHARLES KATZ moves for an order granting his motion for remand for the purpose of moving for a new trial based on the ground of newly discovered evidence for the reasons set forth in the Affidavit of Burton Marks and Points and Authorities in Support of Motion attached hereto.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks
Attorney for Appellant

AFFIDAVIT OF BURTON MARKS IN SUPPORT OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL BASED ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, Burton Marks, depose and say:

I am an attorney at law duly licensed to practice in the State of California and before the United States District Court, this Honorable Court and the Supreme Court of the State of California and am the attorney for Appellant CHARLES KATZ.

That I am informed and believe and thereon state that Appellant CHARLES KATZ subsequent to his conviction in the United States District Court, was granted immunity by the United States Department of Justice pursuant to the provisions of Title 47, United States Code, Section 409(1) so that he could testify in a Federal trial in the State of Florida. (A letter advising the Court of this fact was previously sent September 9, 1966.)

It is the opinion of this Affiant, based on the case of *Frank* v. *U.S.*, 347 Fed 2d 486, (C.A., B.C., 1965) that the fact that Mr. Katz was granted immunity constitutes newly discovered evidence which materially affects the Appellant's rights in this case and the pending appeal.

It is respectfully requested that this Court remand the within case to the United States District Court for the purpose of that court reviewing evidence relative to this grant of immunity.

SEPTEMBER 26, 1966

/s/ BURTON MARKS
Burton Marks

BURTON MARKS being first sworn under oath, presents that he has subscribed to the above Affidavit and does state that the information therein is true and correct.

/s/ BURTON MARKS
Burton Marks

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 26TH DAY
OF SEPTEMBER, 1966

/s/ LINDA BERRY
Notary Public in and for
Los Angeles County

My commission expires:

November 4, 1968

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REMAND FOR THE PURPOSE OF MOVING FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

I

Motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C.A., RULE 33

II

The purpose of the above cited Rule 33 is to permit the hearing of the motion for new trial on the ground of newly discovered evidence, although an appeal is pending, is to expedite the proceedings in that the granting of such motion can be made only upon a remand of the case to the trial court.

Rakes v. *U.S.*, C.C.A., Va. (1947), 163 Fed 2d 771.

III

The conviction of a defendant who testifies, after having been given immunity by the government pursuant to Title 47, U.S.C. §409(1), must be reversed and the defendant cannot be penalized or punished for that conviction.

Frank v. *U.S.*, 347 Fed 2d 486 (1965)

Respectfully submitted,

/s/ BURTON MARKS
Burton Marks

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is 8447 Wilshire Boulevard, Beverly Hills, California. On September 26, 1966, I served the within Notice of Motion and Motion for Remand for the Purpose of Moving for a New Trial on the Ground of Newly Discovered Evidence; Affidavit of Burton Marks and Points and Authorities in Support Thereof, on the Respondent in said action by placing a true copy thereof enclosed in a sealed envelope and postage fully prepaid, in the United States mail at Beverly Hills, California, addressed as follows:

United States Attorney
312 N. Spring Street
Los Angeles, California
Attn: Mike Balaban, Esq.

/s/ LINDA MORGAN
Linda Morgan

SUBSCRIBED AND SWORN TO
BEFORE ME THIS 26TH DAY
OF SEPTEMBER, 1966.

/s/ HARVEY A. SCHNEIDER
Harvey A. Schneider
Notary Public in and for the
County of Los Angeles

My commission expires:

March 9, 1969

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20,648

CHARLES KATZ,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Order

Before: CHAMBERS and BARNES, Circuit Judges; and POWELL, District Judge.

In view of the motion to remand, filed by appellant, we request that each side file at or before the time set for hearing the argument, i.e., October 7, 1966, such affidavits, transcripts of testimony, or certified copies of necessary documents (if any there be), (1) to establish whether or not appellant was convicted with respect to the matter about which the testimony was subsequently compelled; and (2) of any further proceedings (if any there be) by any party in *Frank* v. *United States,* 347 F.2d 486, subsequent to July 30, 1965.

Dated: September 30, 1966
Los Angeles, California

RICHARD H. CHAMBERS
STANLEY N. BARNES
Circuit Judges
CHARLES L. POWELL
District Judge

[Stamp—Filed Sep. 30, 1966—Stanley N. Barnes per LR]

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20648

CHARLES KATZ,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Order on Motion

Before: CHAMBERS and BARNES, Circuit Judges; and POWELL, District Judge.

Upon consideration thereof and good cause appearing therefor IT IS ORDERED that the motion of appellant for remand, coming on for hearing with the cause on merits, be, and the same hereby is denied.

RICHARD H. CHAMBERS
STANLEY N. BARNES
CHARLES L. POWELL
U. S. Judges

[Stamp—Filed Oct. 7, 1966—Wm. B. Luck, Clerk]