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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 35

CHARLES KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 222–231) is reported at 369 F. 2d 130.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1966. The petition for a writ of certiorari was filed on December 22, 1966, and was granted on March 13, 1967 (R. 232–233). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This Court limited its grant of certiorari to questions 1 and 2 of the petition which read as follows (R. 232–233):

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.

The Court also directed both sides to "brief and present oral argument on the holding in *Frank* v. *United States,* 347 F. 2d 486, as it may affect this case" (R. 233).

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of California, petitioner was convicted on all counts of an eight-count indictment charging him, as one engaged in the business of wagering, with making telephone calls on eight different occasions transmitting wagering infor-

mation between Los Angeles and Miami and Los Angeles and Boston (18 U.S.C. 1084). On June 21, 1965, petitioner was sentenced to pay a $300 fine (R. 213–214). The court of appeals affirmed (R. 222–231).

The evidence showed that on February 4, 1965, F.B.I. agents commenced visual surveillance of petitioner (R. 102). Over a period of about two weeks, they observed him make telephone calls from a particular row of telephone booths on Sunset Boulevard in Los Angeles (R. 112) during fixed hours and on an almost daily basis (R. 28). A check revealed that some of the calls were to a number in Massachusetts listed in the name of an individual known as a gambler.[1] Every day from February 19 through February 25, 1965, F.B.I. agents placed a recording device on top of the bank of phone booths from which petitioner made his calls (R. 103). Connected to the recorder were two microphones, which were taped to the outside of two of the booths.[2] None of the equipment (the recorder, the microphones and the fastenings) penetrated the booths (R. 103). Each day, as petitioner approached a certain spot about a block and a half away from the telephones, agents in a radio car surveilling petitioner signaled other agents near the booths, who then attached and activated the recorder and microphones. After petitioner departed,

[1] The F.B.I. investigation of the number which petitioner dialed is recounted in an affidavit filed by F.B.I. Agent Barron to support the issuance of the search warrant for petitioner's room (R. 12–14).

[2] The third booth was placed out of order with the consent of the telephone company (R. 112).

the device was removed (R. 106, 112).[3] Tape recordings of petitioner's end of the conversations were obtained on all days except February 22, when the recorder malfunctioned (R. 108), and these recordings were admitted into evidence at trial (R. 104–105, 107, 109, 116). All of the calls that were recorded involved the placing of bets and the receipt of wagering information (see R. 117–118, 163–174).

On February 25, petitioner was arrested by F.B.I. agents on the street after telephoning from one of the booths (R. 119). He was present later that day when F.B.I. agents conducted a search of his room pursuant to a warrant issued by a United States Commissioner (R. 11–12, 146). At that time and on the following morning when the agents came back to return two personal items which they had seized, petitioner (who had been warned of his rights (R. 120)) made statements to the effect that he had been in the wagering business for thirty years (R. 149, 151, 153–154). He also stated, in response to a remark by one of the agents, that "[i]f you had not bet interstate we wouldn't be involved in this matter": "Well, I cannot bet locally because the local bookmakers will not pay off" (R. 149).

SUMMARY OF ARGUMENT

I

After affirmance of his conviction on appeal (but prior to the filing of a petition for a writ of certiorari)

[3] Despite these precautions, on one occasion a person entered the vacant booth while petitioner was making a call. Although the unknown person's voice was perforce recorded, the recording was never played back (R. 113).

petitioner testified before a federal grand jury, pursuant to a grant of immunity, concerning the matters involved in this case. This does not render his conviction moot. The decision in *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), which held that the compelling of testimony pursuant to an immunity statute during the pendency of an appeal required reversal of the conviction, should be disapproved. Neither the language nor the purpose of the immunity statute at issue (47 U.S.C. 409(*l*)) requires that an immunity extend retrospectively to a conviction pending on appeal or certiorari. Affirmance of a conviction on appeal, or the denial of a petition for a writ of certiorari, cannot be deemed a "penalty" within the meaning of the immunity statute. The short of it is that the "penalty" was imposed by the original sentence prior to the grant of immunity. The legislative history of the immunity statute unmistakably shows that its purpose was to grant immunity, in accord with the scope of the constitutional privilege against self-incrimination, only as to *future* prosecutions.

II

The admission into evidence of recordings of petitioner's end of telephone conversations, obtained by F.B.I. agents placing a recorder and microphones on top and on the sides of the row of public telephone booths from which petitioner made calls, did not infringe the Fourth Amendment. No trespass or physical invasion of the booths was committed under *Goldman* v. *United States,* 316 U.S. 129, and *Silverman*

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v. *United States,* 365 U.S. 505, by the placing of the electronic device. Moreover, apart from any question of trespass, the row of public telephone booths from which petitioner made calls was not within the traditional concept of a "constitutionally protected area." Booths on a public street bear little resemblance to areas where the right of privacy has been held to inhere (*e.g.,* a home, office, hotel room or private car).

But even if the test of trespass, as exemplified by *Goldman,* is discarded, and even if this Court holds further that public booths of the kind involved in this case are entitled to some measure of protection under the Fourth Amendment, the question would remain: In the instant circumstances, was the search unreasonable?

In response, we stress these considerations. A row of public telephone booths, if "protected" at all, is not entitled to the same degree of protection as a home. As a result of extended investigation prior to the conduct of the surveillance at issue, the agents had strong "probable cause" to believe that petitioner was making his calls in order to obtain and transmit gambling information. The conversations which they monitored were themselves the essence of the federal crime under investigation. Finally, thorough precautions were taken to insulate the conversations of other members of the public from intrusion.

III

The search warrant for petitioner's premises was properly issued and executed. Assuming the validity of the agents' action in employing the recording device,

the affidavit for the warrant—which contained, *inter alia,* a summary of the evidence thus obtained—clearly established probable cause for believing that petitioner had engaged in illegal gambling and that his room harbored the instruments and records for carrying on such business. Moreover, the warrant described the items to be taken with sufficient particularity. The items authorized to be seized and admitted in evidence, consisting mainly of petitioner's gambling records and data used in conjunction with the placing of bets, were instrumentalities of the crime of interstate gambling.

ARGUMENT

I

PETITIONER'S TESTIMONY BEFORE A FEDERAL GRAND JURY UNDER A GRANT OF IMMUNITY, AFTER AFFIRMANCE OF HIS CONVICTION ON APPEAL BUT PRIOR TO THE FILING OF A PETITION FOR A WRIT OF CERTIORARI, DOES NOT REQUIRE VACATION OF THE CONVICTION

Before proceeding to a discussion of the search and seizure issues raised by the petition for a writ of certiorari, it is necessary to deal with a threshold jurisdictional question arising from the fact that after his conviction petitioner testified before a federal grand jury concerning the matters involved in this case pursuant to a grant of immunity. The question involves the correctness of the holding in *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), a matter specifically included in this Court's grant of certiorari in the present case.

On June 22, 1966, after his conviction in this case, petitioner was brought before a grand jury in the

United States District Court for the Southern District of Florida which was investigating unlawful interstate wagering. After having claimed the privilege against self-incrimination with respect to questions about telephone calls from Los Angeles to Miami in February 1965 (in part the subject matter of the present conviction), petitioner was informed by the government and the court that, if he did answer questions, he would gain immunity from prosecution pursuant to 47 U.S.C. 409(*l*). Petitioner nevertheless refused to answer and was adjudicated in civil contempt. However, on November 30, 1966, after the affirmance of the judgment in this case by the Ninth Circuit, but before the petition for a writ of certiorari was filed, petitioner did testify, under a grant of immunity, before another grand jury in the Southern District of Florida. His testimony covered, *inter alia,* the conversations which formed the basis of the present indictment.

The statute under which petitioner was granted immunity, Section 409 of the Communications Act, 66 Stat. 722, 47 U.S.C. 409(*l*), provides:

> No person shall be excused from attending and testifying or from producing books, papers, schedules or charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this chapter, or of any amendments thereto, on the ground or for the reason that the testimony or

> evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but 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.

In *Frank* v. *United States,* 347 F. 2d 486 (C.A.D.C.), this statute was held to render moot a conviction pending on appeal where, after conviction, the defendant gave testimony concerning matters included in the charges pursuant to a grant of immunity. The court there was of the view that affirmance of the conviction would be a "penalty" within the meaning of the statute. While recognizing that, even so, it was not necessary to read the statute with literal exactitude, the court of appeals, without examining the legislative background of the statute, stated that it had no reason to decide that the Congressional intent or purpose was "other than to permit an exchange of a particular conviction * * * for the larger benefit believed to reside in compelling his self-accusatory testimony." 347 F. 2d at 491. This interpretation, in our view, is contrary to the language, legislative history, and policy of the statute.

The immunity provision at issue here was enacted as part of the Communications Act of 1934, 48 Stat.

1064, 1097, 47 U.S.C. 409(i).[4] The legislative history of the Act contains no pertinent discussion of the immunity section, but indicates that its source was the so-called "Compulsory Testimony Act", part of the Interstate Commerce Act of 1893, 27 Stat. 443, 49 U.S.C. 46, from which it was taken practically verbatim. See Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 8301, 73d Cong., 2d Sess., p. 97; See also S. Rep. No. 781, 73d Cong., 2d Sess., p. 10; H. Rep. No. 1850, 73d Cong., 2d Sess., p. 8. That statute, sustained in *Brown* v. *Walker,* 161 U.S. 591 has, through the years, been the model for a host of similar statutes in other fields, many in almost identical language (of which the Act in question is one). See Note, *The Federal Witness Immunity Acts,* 72 Yale L.J. 1568, 1611–1612 (1963) (listing statutes). The Compulsory Testimony Act was passed in response to the decision of this Court in *Counselman* v. *Hitchcock,* 142 U.S. 547, which had held a predecessor enactment unconstitutional for failing to protect a witness from future prosecution based on leads obtained from the compelled testimony. In *Counselman* the Court had declared (142 U.S. at 585–586):

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution *after* he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of

[4] A 1952 amendment to section 409, 66 Stat. 721, 722, relettered the various subsections so as to make the immunity provision subsection (1) instead of (i). No substantive change was effected.

> the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against *future* prosecution for the offense to which the question relates. * * * [Emphasis added.]

Senator Cullom, who introduced the bill which became the Compulsory Testimony Act some sixteen days after the *Counselman* decision, stated that the bill was designed to "[follow] the line of the Supreme Court" in the *Counselman* case. 23 Cong. Rec. 6333. During the debate Congressman Wise stated (24 Cong. Rec. 503):

> The bill provides that where a witness is examined touching any violation of the act known as "the interstate commerce act", he shall not *thereafter be prosecuted* for any offense committed by him in connection with the subject about which he is examined. [Emphasis added.]

This legislative history demonstrates that the immunity provision here in question was not intended to benefit criminals by causing them to be given immunity for past crimes for which they have already been convicted and sentenced.

On the contrary, provisions of this type are designed to provide the essential substitute for the privilege against self-incrimination. *Brown* v. *United States,* 359 U.S. 41, 44–46; *Heike* v. *United States,* 227 U.S. 131, 142; *Brown* v. *Walker,* 161 U.S. 591. Evidence which was in existence before a witness is even called upon to testify, and which has already been found

sufficient to convict, has obviously been obtained without any encroachment on the Fifth Amendment. Thus, where a defendant is given immunity after he has been convicted there is no reason, under the Fifth Amendment, why the immunity should relate back to the conviction. See *Reina* v. *United States,* 364 U.S. 507, 513–514; *In re Bando,* 20 F.R.D. 610, 615 (S.D.N.Y.), reversed on other grounds *sub nom. United States* v. *Miranti,* 253 F. 2d 135 (C.A. 2); *United States* v. *Romero,* 249 F. 2d 371, 375 (C.A. 2); *United States* v. *Gernie,* 252 F. 2d 664 (C.A. 2), certiorari denied, 356 U.S. 968.

Nor do we believe that affirmance of the conviction can be deemed a "penalty" within the literal terms of the statute. The penalty was fixed by the district court at the time of conviction, *i.e.,* before any immunity had been granted. If a case is pending on appeal when a defendant testifies under a grant of immunity, the court of appeals may decide whether the penalty stands or falls, but it does not itself impose a penalty. Where as here the conviction has already been affirmed by the court of appeals before the immunity attaches, the penalty is even farther removed from the immunity. This Court held, in *Reina* v. *United States,* 364 U.S. 507, 513 that a prisoner serving a sentence was not justified in refusing to testify under the federal narcotics immunity statute, 18 U.S.C. 1406, "unless he first received a 'general pardon or amnesty' covering the unserved portion of his sentence." In rejecting the contention, this Court stated (364 U.S. at 514):

> Some language in *Brown* v. *Walker,* 161 U.S., at 601, to which petitioner refers, compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion nor elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions. * * *

In our view the situation here is no different from the situation in *Reina.* See also, *Piemonte* v. *United States,* 367 U.S. 556.

II

THE OVERHEARING OF PETITIONER'S TELEPHONE CONVERSATIONS DID NOT, IN THE CIRCUMSTANCES OF THIS CASE, VIOLATE THE FOURTH AMENDMENT

A. In *Goldman* v. *United States,* 316 U.S. 129, 134–135, this Court sustained the admissibility of evidence obtained by a detectaphone placed by federal agents, stationed in an adjoining office, against the dividing wall of the defendant's office. The Court relied on the fact that, while a prior trespass had been made into the defendant's premises for the purpose of installing another listening device which did not work, no trespass had occurred in the use of the detectaphone. The *Goldman* decision (with a modification not here pertinent) has been deemed to stand for the proposition that a trespass, either of an eavesdropper or an eavesdropping device, is necessary to constitute a violation of the Fourth Amendment.[5] *E.g., United States*

[5] *Silverman* v. *United States,* 365 U.S. 505, modified the trespass test slightly to prohibit surveillance accompanied by "physical invasion" of the surveilled premises (*id.,* at 510), even if not a technical trespass. However, we are not here concerned with that distinction.

v. *Pardo-Bolland,* 348 F. 2d 316 (C.A. 2), certiorari denied, 382 U.S. 944; *Anspach* v. *United States,* 305 F. 2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Jones* v. *United States,* 339 F. 2d 419 (C.A. 5), certiorari denied, 381 U.S. 915. It is apparent, as petitioner recognizes, that if *Goldman* is approved, that case is controlling authority that the surveillance here was lawful, since no trespass into the area surveilled was committed by the placing of the electronic device on the outside of the row of public telephone booths which petitioner frequented. Petitioner, moreover, had no proprietary interest in those premises.

We recognize, however, that the *Goldman* decision has been criticized as not providing an adequate means of dealing with the problems arising from the use of electronic equipment such as the "parabolic microphone which can pick up a conversation three hundred yards away," *Silverman* v. *United States,* 365 U.S. 505, 508; *Lopez* v. *United States,* 373 U.S. 427, 468 n. 16 (Brennan, J., dissenting), and that the Court may therefore wish to reconsider the validity of the *Goldman* decision. But assuming that *Goldman* should be modified where electronic surveillance is used to overhear conversations taking place within a "constitutionally protected area" see, *e.g., Silverman* v. *United States,* 305 U.S. 505, 510,[6] we question whether a pub-

[6] We note, however, that not all observations of matters occurring in a "constitutionally protected area" are prohibited by the Fourth Amendment. In *United States* v. *Lee,* 274 U.S. 559, Mr. Justice Brandeis, writing for a unanimous Court, found no illegal search where cases of liquor were observed in plain view on the open deck of a boat, even though a searchlight had been used to illuminate the deck. Similarly, in

lic telephone booth on a public street is a "constitutionally protected area."

To date, the Court has held that the following are constitutionally protected areas: a house, *Weeks* v. *United States,* 232 U.S. 383; an office, *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385; a store, *Amos* v. *United States,* 255 U.S. 313; a hotel room, *United States* v. *Jeffers,* 342 U.S. 48; a private automobile, *Henry* v. *United States,* 361 U.S. 98; and a warehouse, *See* v. *City of Seattle,* No. 180, O.T. 1966, decided June 5, 1967. On the other hand, the Court has suggested that a visiting room in a jail is not a protected area, *Lanza* v. *New York,* 370 U.S. 139, 141–144, and it has held that an open field is not a protected area. *Hester* v. *United States,* 265 U.S. 57, 59.

The rights of privacy reflected in the guarantees of the Fourth Amendment must be measured in terms of the reasonable expectations of a person in a given location that he is free from scrutiny. Thus a field and a public street are normally not places where a man may legitimately anticipate that he will not be observed. *Hester* v. *United States,* 265 U.S. 57, 59; see *Lopez* v. *United States,* 373 U.S. 427, 466 n. 12 (Brennan, J., dissenting).

A row of public telephone booths, we submit, is not significantly different. Although the occupant is alone

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McDonald v. *United States*, 335 U.S. 451, the Court appearently found no illegal search in the observations made by police officers who peeked through an open transom. *Id.* at 455 and 458. Thus, petitioner did not, and could not, object to the testimony of Agent Frei concerning what he overheard by the "naked ear" while lawfully in the hotel room immediately next door to petitioner's room (R. 133–134).

in a booth, he is normally visible to persons outside it since portions of such booths are constructed of glass or other transparent material. In addition the booth, even when the door is closed, is not designed to be soundproof but merely to shut out sufficient sound to enable the parties to hear each other with comparative ease. A person speaking with normal voice may readily be overheard by a person in an adjacent booth. Petitioner, by choosing to place calls transmitting wagering information from the row of public telephone booths on a main avenue (Sunset Boulevard) in Los Angeles rather than from his own premises, voluntarily ran the risk that his words might be overheard by someone in the adjoining booth.[7] There is little basis for suggesting that the degree of privacy which petitioner could reasonably expect to enjoy in the booths was comparable to that which he could expect (and demand) in his home. See *Smayda* v. *United States,* 352 F. 2d 251, 254–256 (C.A. 9), certiorari denied, 382 U.S. 981. Indeed, there is no evidence that petitioner ceased speaking on the occasion when another person entered the adjacent booth to make a call. Under these circumstances he cannot claim that he is constitutionally protected from overhearing, regardless of the means by which it was accomplished.

The latest district court to consider the question has held that a single public telephone booth is not a protected area. *United States* v. *Borgese,* 235 F. Supp. 286, 294 (S.D.N.Y.). But see *United States* v. *Stone,*

[7] He apparently hoped to reduce the chances of the calls being traced back to him, since there would be no record that he was the caller.

232 F. Supp. 396 (N.D. Tex.) and *United States* v. *Madison,* 32 L.W. 2243 (D.C. Ct. Gen. Sess.). A row of booths, because of the greater possibility of being overheard, is obviously a less "private" location than a single, isolated booth. Cf. Greenberg, *Electronic Surveillance of Public Telephone Booths,* 41 Los Angeles Bar Bull. 490, 522 (1966).

B. But even if the row of telephone booths from which petitioner placed his calls is deemed to be entitled to some degree of protection under the Fourth Amendment and this Court determines to overrule *Goldman,* we submit that in the particular circumstances of this case the search was not "unreasonable."

Those who have criticized *Goldman* for leaving electronic surveillance outside "the pale of the Fourth Amendment" have not suggested that the application of the principles of that Amendment to electronic surveillance would, or should, result in the exclusion of all evidence obtained by such means. See *Lopez* v. *United States,* 373 U.S. 427, 464, n. 11, and accompanying text (Brennan, J., dissenting); *Goldman* v. *United States,* 316 U.S. 129, 140, n. 6 (Murphy, J., dissenting). "The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Carroll* v. *United States,* 267 U.S. 132, 147. The determination of reasonableness depends ultimately "upon the facts and circumstances of each case." *Cooper* v. *California,* 386 U.S. 58, 59; see *United States* v. *Rabinowitz,* 339 U.S. 56, 64; *Rios* v. *United States,* 364 U.S. 253.

Even if a public telephone booth is deemed to be a constitutionally protected area, we submit that the

standards to be applied in determining the reasonableness of the search here involved should not be as strict as those that would apply to the search of a private house. The concept that the standards of reasonableness may vary depending upon the type of constitutionally protected area involved is not novel. In *Carroll* v. *United States,* 267 U.S. 132, this Court recognized that different standards are to be applied in determining the reasonableness of the search of an automobile than are used in determining the reasonableness of the search of a house. See *Preston* v. *United States,* 376 U.S. 364, 366; compare *Silverman* v. *United States,* 365 U.S. 505. In *See* v. *City of Seattle*, No. 180, O.T. 1966, decided June 5, 1967, this Court indicated that the search of a business premises involves a different standard of reasonableness than the search of a private home. See also *Davis* v. *United States,* 328 U.S. 582. In addition, the Court has indicated that when the premises involved are being used to carry on an unlawful business, the extent of its protection under the Fourth Amendment may be somewhat diminished. See *Lewis* v. *United States,* 385 U.S. 206, 211.

We of course agree that normally the strictest protections should apply to a man's home, which has often been likened to a castle for the purposes of the Fourth Amendment. *E.g., Weeks* v. *United States,* 232 U.S. 383, 389–391; *Silverman* v. *United States,* 365 U.S. 505, 511–512. However, the interest of any individual in a public telephone booth, if protected at all, is so transitory and so limited that it need not be accorded all of the sanctity of a home. As noted

above, the occupant of a public telephone booth normally runs the risk that he may be overheard by people in adjoining booths and is almost always amenable to visual surveillance. Thus, while we assume that the facts and circumstances of this case would not have justified the warrantless search of petitioner's home, we submit that they were sufficient to justify the electronic surveillance of petitioner in a public phone booth which he used for the exclusive purpose of carrying on his illegal gambling operation, even though the agents did not have a warrant.[8]

In determining the reasonableness of the search which took place in this case, we believe it appro-

[8] Although apparently recognizing that the standards of reasonableness may vary depending upon the nature of the premises (Pet. Br. 13), petitioner does not consider the significance of the absence of a warrant. As set forth above, we believe that the occupant's interest in a public telephone booth is so limited that a warrant should not be deemed to be a prerequisite to a valid search where the agents have probable cause to believe that a crime is being committed by the occupant of the booth. Moreover, in view of the fact that the agents here had reason to believe that their actions were valid under the existing law as set forth in *Goldman*, the government should not be penalized because the agents did not endeavor to obtain a warrant which they reasonably believed to be unnecessary.

Similarly, since the use of listening devices such as that approved in *Goldman* is involved in other cases presently pending on appeal, see *e.g.*, *United States* v. *Desist*, Docket No. 30849 (C.A. 2) argued January 19, 1967 (in which conversations among conspirators relating to the illegal importation of over two hundred pounds of heroin were overheard by use of a detectaphone in an adjoining hotel room), the government would argue that if *Goldman* is to be overruled, the decision should not be retroactive. *Stovall* v. *Denno*, 388 U.S. 293; *Linkletter* v. *Walker*, 381 U.S. 618; *Tehan* v. *Shott*, 382 U.S. 406; *Johnson* v. *New Jersey*, 384 U.S. 719.

priate for the Court to consider the strength of the probable cause which the agents had to believe that petitioner was using the phone booth to carry on his illegal activity and the precautions taken to limit the scope of the surveillance. Cf. *United States* v. *Ventresca,* 380 U.S. 102, 106; *Jones* v. *United States,* 362 U.S. 257, 270. Here the agents did not utilize the recorder and microphones with respect to petitioner until after confidential information and personal observation of his activities over a period of two weeks had established a strong probability that he was using the telephone in question to place interstate calls transmitting gambling information (R. 12–14, 102, 112). The fixed times and almost daily nature of the calls (R. 28) indicated that petitioner was not using the telephone to make calls unrelated to his gambling business, as proved to be the case. The agents also took steps to ensure that no member of the public, apart from petitioner, using the telephones would have his conversation transcribed. The recorder was attached and activated a short time before petitioner entered the booths and was removed immediately after he departed. On the occasion when a member of the public occupied one of the booths while petitioner was in the other making a call, the unknown person's conversation, although recorded, was never played back (R. 113).

Finally, it should be noted that the surveillance involved here was not undertaken to discover "mere evidence" in the form of admissions of past criminal activities. Rather, all of the conversations which were overheard involved the receipt of wagering informa-

tion and the placing of bets in violation of 18 U.S.C. 1084. Thus, the conversations which were overheard were the very means and instrumentalities by which petitioner's crimes were committed.

In summary, we conclude that even if the telephone booth is deemed to be a protected area and this Court is disposed to abandon the trespass test of *Goldman* and hold that all electronic surveillance of conversations taking place within a constitutionally protected area must meet the standards of the Fourth Amendment, those standards were met in this case. The search at issue was based on ample probable cause, was carefully circumscribed, and involved only a public phone booth in which a crime was then and there being committed. The approval by this Court of the careful law enforcement efforts found in this case will not jeopardize the privacy of "the citizen who has given no good cause for believing he is engaged in [illegal] activity" *Brinegar* v. *United States,* 338 U.S. 160, 177.[9]

III

THERE WAS NO DEFECT IN THE WARRANT AUTHORIZING A SEARCH OF PETITIONER'S PREMISES

On February 25, 1965, the date of petitioner's arrest, F.B.I. agents obtained a warrant authorizing them to search petitioner's premises for "bookmaking records, wagering paraphernalia, including but not limited to,

[9] The Department of Justice has taken steps to insure that the use of electronic eavesdropping by federal law enforcement officials will be carefully controlled. On June 16, 1967, the Attorney General sent a memorandum to the heads of all executive departments and agencies setting forth rules governing the use of such equipment.

bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, [and] telephone address listings . . . designed and intended for use as the means of committing criminal offenses in violation of [18 U.S.C. 1084]" (R. 11). The warrant was issued by a United States Commissioner on the basis of an affidavit from one John Robert Barron, an F.B.I. agent involved in the investigation of petitioner. The affidavit, which appears at R. 12–14, set forth that Barron had received information in October 1964 from "confidential informants (who in the past have furnished reliable information) that a New York bookmaker was in the Los Angeles area operating a sports book" (R. 12); that surveillance of this bookmaker's activities had established that petitioner was one of his associates; and that investigation had disclosed that petitioner (whose address had been ascertained) had, during the period from February 4 to February 25, 1965, been in contact with known gamblers. The affidavit also recited that a reliable confidential informant had informed the affiant that petitioner made long distance telephone calls from pay phones in the morning and evening hours; that the affiant and another agent had personally witnessed petitioner make telephone calls on February 10 and 11 to a number in Boston, which investigation established to be the number in an apartment used by two well known gambling figures (who were named); and that recordings of petitioner's end of telephone conversations, obtained on all days but one between February 19 and February 24, 1965, revealed that petitioner, on each of these occasions,

called a number out of state and "received the basketball line and made wagers" (R. 13). The affidavit further set forth that F.B.I. agent Frei, on February 23, 1965, had occupied the room adjacent to petitioner and had overheard him "engage in approximately 15 telephone conversations with unknown persons, indicating he was making sports bets" (R. 14).

The search was conducted between the hours of 11:00 a.m. and 1:35 p.m. on February 25 (R. 146). Petitioner, who had been arrested, was present in the room during part of this time (R. 148). The items seized were taken from three separate sources—a "dark blue plastic brief case", a "blue National Airlines bag on [the] floor of [the] east closet" and the contents "from [a] desk drawer" (R. 14–15).[10] Principal among the items seized were approximately 150 pages recording past collegiate basketball games, which petitioner used to make predictions on the outcome of future games and to place bets accordingly (see R. 149, 153–154). These records were introduced in evidence at petitioner's trial (R. 147; see R. 149, 151).

At a pre-trial hearing on a motion to suppress evidence (R. 27–80), the judge ordered some of the items which were taken returned to petitioner on the grounds that they were immaterial to the charge against him or were "mere evidence" (R. 74–77).[11]

[10] A list of the items seized appears at pages 14–16 of the Record.

[11] Although the record is somewhat sketchy, it appears that the court found all the itms listed on the return at R. 14 to have been properly seized (R. 74). The government indicated that it would return a newspaper clipping and a registration

The agents, on the day following the search, also brought back two items, a nail file and key chain (R. 154), which they had mistakenly seized.

If the recordings of petitioner's phone calls are deemed invalid, there would be no retrial of petitioner in light of his subsequent testimony under a grant of immunity. We therefore discuss the issues raised by the petition as to the legality of the search warrant on the assumption that the electronic surveillance was permissible.

A. THE WARRANT WAS FOUNDED ON PROBABLE CAUSE

On that assumption, *i.e.*, that the recordings did not violate petitioner's rights under the Fourth Amendment, there clearly was probable cause for the issuance of the search warrant. The facts properly before the United States Commissioner were more than adequate to establish probable cause to believe that petitioner had committed offenses under 18 U.S.C. 1084 and that records and paraphernalia pertaining to his gambling activities would be found in

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card issued to petitioner by the Las Vegas Police Department (R. 74–75) (items 1 and 2 from National Airlines bag at R. 15) and that it had "no objection" to returning two rolls of quarters (R. 76) (item 2 from desk drawer at R. 15). Two telephone slips or records of telephone calls (items 5 and 6 from desk drawer at R. 15) were ordered returned because they were not the best evidence (R. 76); a piece of hotel stationery with notations was ordered returned as "mere evidence" (R. 76) (item 10 from desk drawer at R. 16); and the government stated that a National Airlines ticket which had been seized had already been returned (R. 77) (item 12 from desk drawer at R. 16). All other items were held to have been properly taken (R. 77).

his room. See *United States* v. *Ventresca,* 380 U.S. 102; *Jaben* v. *United States,* 381 U.S. 214.

B. THE WARRANT SUFFICIENTLY SPECIFIED THE ITEMS TO BE SEIZED AND WAS NOT A "GENERAL" WARRANT

The warrant described the objects of the search as follows (R. 11):

> * * * 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, [and] telephone address listings.

The claim that this description was not sufficiently specific runs afoul of this Court's recent admonition against "hypertechnical" interpretation of warrants. See *United States* v. *Ventresca,* 380 U.S. 102, 109. The warrant plainly did not authorize a general exploration of all of petitioner's effects. It restricted the quest to items related directly to petitioner's activities as an interstate gambler. The fact that the warrant, in the main, listed described categories of things to be seized, rather than individual objects, did not render it invalid. Categorization was inevitable in view of the fact that petitioner's particular method of keeping records could not be determined in advance. Similarly phrased warrants have been uniformly sustained. *E.g., United States* v. *Clancy,* 276 F. 2d 617 (C.A. 7), reversed on other grounds, 365 U.S. 312;[12] *Nuchols* v. *United States,* 99 F. 2d 353, 355 (C.A. D.C.), certiorari denied *sub nom. Floratos*

[12] The warrant there, from which the court of appeals quoted (R. 229 n. 5, 369 F. 2d at 134 n. 5), was in all relevant respects indistinguishable from that in the present case.

v. *United States,* 305 U.S. 626; see also *Steele* v. *United States No. 1,* 267 U.S. 498, 504.[13]

C. THE WARRANT DID NOT AUTHORIZE A SEARCH FOR "MERE EVIDENCE"

The warrant specifically limited the items seizable to those "which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084" (R. 11). The principal items taken and introduced into evidence—petitioner's records of prior basketball contests—were clearly instrumentalities of the crime, as was shown by his own admission that he could not continue gambling without them (R. 149). Other papers taken and also introduced, consisting of "owe sheets" showing amounts won, lost and owing on prior and outstanding bets (see R. 176, 186), were business records and as such also instrumentalities of the crime. *Marron* v. *United States,* 275 U.S. 192; *Leahy* v. *United States,* 272 F. 2d 487 (C.A. 9). The fact that the agents also seized several items that were either "mere evidence" [14] or unrelated to the crime does not

[13] Greater specificity might be required where the items to be seized are such as to come within the protection of the First Amendment. Compare *Stanford* v. *Texas*, 379 U.S. 476, 485–486. As the Court noted in *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 "The authority * * * under the warrants issued in this case, broadly to seize 'obscene * * * publications,' poses problems not raised by the warrants to seize 'gambling implements.'"

[14] The prohibition against seizing "mere evidence" is not a requirement of the Fourth Amendment (*Warden* v. *Hayden*, 387 U.S. 294), although searches under Rule 41, Federal Rules of Criminal Procedure, are limited to fruits and instrumentalities of a crime. Hence even if some "mere evidence" was seized, there would be no reason under the Constitution to exclude, for that reason, other items properly seized under the warrant.

render inadmissible the lawfully seized items. There is no suggestion that the agents ransacked the premises or conducted a search that went beyond their legitimate aim of uncovering the means and instrumentalities used by petitioner to conduct his gambling business. See, generally, *Kremen* v. *United States,* 353 U.S. 346.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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