IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 35

CHARLES KATZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

Introductory Statement

The purpose of this Brief is to reply to certain contentions and arguments made by the Respondent herein. The Statement of Jurisdiction, Questions Presented, Constitutional Provisions Involved, Statement of the Case, Statement of the Facts, and Argument, respectively, set forth in the opening Brief for Petitioner are incorporated herein and made a part hereof by reference.

Argument in Reply

On page 14 of its Brief, in referring to Petitioner's position herein, Respondent states:

> ". . . It is apparent, as petitioner recognizes, that if *Goldman* is approved, that case is controlling au-

> thority 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."

It is obvious that in making this statement Respondent has misinterpreted the argument advanced by Petitioner and the law applicable to the facts of this case.

Petitioner does *not* contend that if *Goldman* v. *United States,* 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, is approved, that the search of the telephone booth was lawful. Quite the contrary, it is absolutely clear that there was *no* legal justification for the search.

In *Ker* v. *California,* 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726, this Court held that a search is lawful only if (1) it is conducted pursuant to a valid search warrant or (2) if no warrant was obtained, it was incident to a lawful arrest. Since the Federal Agents in this case had no search warrant when they intercepted Petitioner's telephone calls and since no arrest was made of Petitioner until after all of the monitoring had been completed,[1] the search was patently unconstitutional.[2]

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[1] While California law seems to permit a search incident to lawful arrest, even though the search preceded the arrest (see e.g., *People* v. *Torres,* 56 C.2d 864, 17 Cal. Rptr. 495; *People* v. *Simon,* 45 C.2d 645, 290 P.2d 531), the federal rule which applies in this case, requires the search to follow the arrest. (See e.g., *Mosco* v. *United States,* 9th Cir. 1962, 301 F.2d 180.) In fact, this Court's pronouncements in *Ker* v. *California, supra,* and *Stoner* v. *California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed.2d 856, may have invalidated the California rule.

[2] It is also important to note that the conduct of the Federal Agents in this case was in violation of California statutory law,

Respondent's statement that Petitioner "had no proprietary interest in those premises [the phone booth]" is repudiated by the fact that Petitioner spent a considerable sum in the form of toll money while using the booth. Certainly this entitled him to some "proprietary interest", to the extent it is necessary to speak in terms of "proprietary interest" at all.

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i.e., Penal Code §653j (set forth below). It is respectfully submitted that evidence obtained in violation of this statute could not be used in a federal prosecution. *Elkins* v. *United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed.2d 1669 (in which the "silver platter" doctrine was repudiated). Penal Code §653j provides:

> "(a) Every person or his authorized agent not a party to the communication who, intentionally and without the consent of any party to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records a confidential communication, whether such communication is carried on among such parties in the presence of one another or by means of a telegraph, telephone or other device, except a radio, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment.
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> (b) The term 'person' includes an individual, business association, partnership, corporation, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof, whether federal, state, or local, but excludes an individual known by all parties to a confidential communication to be overhearing or recording such communication or an individual acting under the direction of a party to the confidential communication.
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> (c) The term 'confidential communication' includes any communication carried on in such circumstances as may reasonably indicate that the parties to such communication desire it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.
>
> (d) Except as proof in a suit or prosecution for violation of this section, no evidence obtained as a result of eavesdrop-

Respondent cites *Hester* v. *United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898, for the proposition that an open field is not a constitutionally protected area. It is true that this statement was made by the Court in *Hester.* It is respectfully submitted, however, that the statement was neither necessary for the decision in that case, nor does it comport with the view that the fundamental purpose of the Fourth Amendment is to protect the individual's right to privacy. It is Petitioner's position that the true test of the Fourth Amendment's protection is whether "the average reasonable man [would] believe that the person whose conversation had been intercepted intended and desired his conversation to be private." (Brief for Petitioner, p. 13.) Under this test, if two persons believed that an uninhabited open field was the safest and most

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ping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative or other proceeding.

(e) This section shall not apply to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the overhearing is for the purpose of construction, maintenance, conduct or operation of the services and facilities of such public utility, or to the normal use of the services and facilities furnished by such public utility pursuant to its tariffs.

(f) This section shall not be construed to repeal Sections 591, 593(b), 619, 621, 640, 653h or 653i of this code or to render lawful any act which is unlawful under any of those sections.

(g) This section does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.

(h) Nothing in this section shall be construed as prohibiting law enforcement officers from doing that which they are otherwise authorized by law to do. (Added Stats. 1963, c. 1886, p. 3871, § 1.)"

private place to conduct a conversation, that conversation should be afforded constitutional protection.[3]

It should also be noted that Respondent's statement that "The right 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" (Brief for the Respondent, p. 15) misinterprets the purport of the Fourth Amendment. It is not the right to be free from visual scrutiny which the Fourth Amendment protects, but rather the right to have one's private oral communications free from interception.

Conclusion

Based on the arguments contained in this Brief and the Opening Brief for Petitioner, Petitioner respectfully prays that the judgment be reversed.

Respectfully submitted,

BURTON MARKS
HARVEY A. SCHNEIDER
Attorneys for Petitioner

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[3] It is also most significant to note that the definition of "confidential communication" as contained in the California eavesdropping statute (Penal Code §653j(c), Footnote 2) is very similar to the test for privacy proposed by Petitioner herein.