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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES KATZ, Defendant.	Commissioner's Docket No. 42 Case No. 129 No. 34715-CD OPPOSITION TO DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE AND FOR RETURN OF EVIDENCE; AND MEMORANDUM OF POINTS AND AUTHORITIES.

The United States of America opposes defendant CHARLES KATZ'S Motion for Suppression of Evidence and for Return of Evidence on the ground that he is not legally entitled to such relief. This Opposition is based on all of the records pertaining to the above entitled case which have been filed with the Court and on the attached Memorandum of Points and Authorities.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

For the purposes of this memorandum, and to assist the Court in its determination of the legal questions presented, we will set out the facts which we anticipate will be proven during the hearing on this motion.

It will be demonstrated that as the result of confidential information, the Federal Bureau of Investigation commenced visual surveillance of defendant CHARLES KATZ'S activities. Through surveillance and confidential information, it was determined that KATZ placed telephone calls from certain public telephone booths during set hours on an almost daily basis. From a check of the telephone company records, it was determined that some of these telephone calls were being placed to a telephone number in Massachusetts which was listed to an individual who was well known as a gambler to the Federal Bureau of Investigation.

On February 19, 1965, Special Agents of the Federal Bureau of Investigation observed KATZ as he left his residence. The agents who were in visual contact with KATZ signaled other agents who were waiting at the twin telephone booths normally used by KATZ. The Special Agents who were at the telephone booths attached to the outside of the telephone booths a microphone which lead to a tape recorder. At no time was there any penetration into the interior of the booth or indeed into the wall at all. Permission had previously been obtained from the telephone company to make such an attachment. As soon as KATZ left the vicinity of the telephone booth, Special Agents of the Federal Bureau of Investigation detached the microphone and wire recorder. This procedure was followed every day from February 19th to February 25th, 1965. A study of the tapes which were obtained revealed conversations having to do with the placing of bets and obtaining gambling information on the part of defendant KATZ.

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Special Agent Allan Frei rented a room adjacent to the residence of CHARLES KATZ on February 23, 1965. That day he listened without the assistance of electronic equipment to conversations emanating from KATZ'S room which he could hear through their common wall. Some of those conversations pertained to gambling and betting.

As a result of listening to the tapes and the conversations overheard by Special Agent Frei, the agents sought and obtained a search warrant to authorize a search of defendant KATZ'S residence for "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings". As a result of the search, certain items were taken from defendant KATZ'S room. They are set out in full in the Appendix to defendant KATZ'S Points and Authorities, and we will not repeat them here.

Defendant KATZ seeks the return of those items which were seized and for suppression of all conversations overheard by the Special Agents. We do not think he is entitled to that relief for the following reasons:

II. ELECTRONIC SURVEILLANCE OF THE TELEPHONE BOOTH USED BY DEFENDANT KATZ DID NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. There was no trespass or physical intrusion into a Constitutionally protected area.

Under the facts of this case, since there was no physical intrusion or trespass on property belonging to the defendant, it is respectfully submitted that the rationale of Goldman v. United States, 316 U.S. 129 (1942) should preclude suppression of the statements overheard in the telephone booth.

In that case, Federal agents placed a detectaphone against the outside wall of the defendant's office and overheard

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the conversations taking place within. The United States Supreme Court upheld the conviction and pointed out that there was no trespass or illegal intrusion into the defendant's office and therefore no illegal search and seizure. At page 135, the court said:

> "We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.
>
> "In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in Olmstead v. United States, 277 U.S. 438. They argue that the case may be distinguished. The suggested ground of distinction is that the Olmstead case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee, and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead case."

Olmstead v. United States, 277 U.S. 438 (1928), cited as the basis for the decision in Goldman, supra, was decided on the

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ground that no trespass took place within the property belonging to the defendant. On the other hand, in Silverman v. United States, 365 U.S. 505 (1961), the United States Supreme Court held that police officers did indeed violate the Fourth Amendment to the United States Constitution when they drove a spike mike into a party wall of defendant's house, coming in contact with a heating duct which turned the entire house into one large electronic receiver. At page 511 of its Opinion, the court distinguished the facts in Silverman, supra, from those in Olmstead, supra, using these words:

> "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."

Contrary to defendant's assertion, both Olmstead, supra, and Goldman, supra, do have vitality today. See Silverman v. United States, supra, at page 512, in which it was said: "We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch."

See also: Lopez v. United States, 373 U.S. 427 (1963), at pages 438-439:

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable

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government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., Olmstead v. United States, 277 U.S. 438; Goldman v. United States, 316 U.S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v. United States, supra."

People v. Benson, 336 F.2d 791 (9th Cir. 1964), pages 795 - 796;

Cullins v. Wainwright, 328 F.2d 481, 482 (5th Cir. 1964).

B. In any event, a public telephone booth is not a constitutionally protected area.

It should be noted that in all of the cases cited above, the question presented pertained to either the defendant's home or office and this appears to be the focal point of the Court. Basically, the Court is concerned with invasion of privacy that may reveal the secrets of the home or office. See the concurring Opinion of Justice Douglas in Silverman v. United States, 365 U.S. 505 (1961), at page 513, where he discusses the problem in terms of the "intimacies of the home". But in the case at bar, the microphones were attached to a public telephone booth. It would seem that a person who uses a public telephone booth knowingly runs a considerable risk that his conversation will be overheard by the public at large through the thin walls and door of the booth. The Southern District of New York had an opportunity to decide a case which was strikingly similar in its facts. See United States v. Borgese, 235 F.Supp. 286 (S.D. N.Y. 1964). In that case Federal agents placed a microphone inside a telephone booth and overheard conversations pertaining to gambling. In upholding the action of the agents against attack on Constitutional grounds, the Court said at page 294:

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"Nor does a public telephone booth seem to be a 'constitutionally protected area', the expression used in Lopez v. United States, above."

"The area in which privacy is guaranteed by the Fourth Amentment is essentially the 'houses of people, extended to include their offices'. . . ."

The rationale of Borgese, supra, may well be of assistance to this Court.

III. THE CONVERSATIONS EMANATING FROM DEFENDANT KATZ'S ROOM, WHICH WERE OVERHEARD BY A FEDERAL AGENT IN AN ADJOINING ROOM, WERE NOT CONSTITUTIONALLY PROTECTED.

As pointed out above, it is anticipated that evidence will demonstrate that Special Agent Frei took a room adjoining that of defendant KATZ and on February 23, 1965 overheard certain conversations without the use of electronic equipment. For the reasons stated above, we believe that Goldman v. United States, 316 U.S. 129 (1942) controls the instant situation. In addition, since no electronic equipment was used at all, it is doubtful that under any rational could it be considered that there was an illegal search and seizure. See United States v. Hester, 265 U.S. 57 (1924); Justice Burton's dissent: On Lee v. United States, 343 U.S. 747, 766-767 (1951).

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IV. THE SEARCH WARRANT UTILIZED IN THIS CASE WAS A VALID SEARCH WARRANT.

The search warrant stated with particularity the items to be seized: "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings."

In United States v. Clancy, 276 F.2d 617, 624 (7th Circuit 1960), reversed and remanded on other grounds, 365 U.S. 312 (1961), the Court upheld a search warrant containing similar language:

> "' * * * divers records, to wit books, memorandum, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *.'"

In considering the above language that Court said at page 629:

> "That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. Nuckols v. United States, 1938, 69 App. D.C. 120, 99 F.2d 353, 355, certiorari denied, Floratos v. United States, 305 U.S. 626, 59 S.Ct. 89, 83 L.Ed. 401; Merritt v. United States, 6 Cir., 1957, 249 F.2d 19; see also, Clay v. United States, 5 Cir., 1957, 246 F.2d 298, certiorari denied, 355 U.S. 863, 78 S.Ct. 96, 2 L.Ed. 2d 69.

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"In the Nuckols case, supra, a search warrant was held sufficient which commanded the seizure of ' * * * gaming tables, gambling devises, race horse slips, and gambling paraphernalia * * *.' The court said, 99 F.2d at page 355:

> 'In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods.'

And in Merritt v. United States, supra, 249 F.2d at page 20, the court approved affidavits for a search warrant, and the search warrant, where the affidavits described only ' * * * lottery tickets and other paraphernalia "which will indicate a numbers operation is being conducted on the premises."'"

The next problem with respect to the search is raised by the defendant's assertion that the items taken from him were mere evidence and thus suppressible. It is the Government's contention that while the items taken were evidence, they also were instrumentalities of a crime and thus could be properly seized and used against the defendant. In Marron v. United States, 275 U.S. 192 (1927), the Court held that certain books and records pertinent to a bootlegging business were rightfully seized. At page 199 the Court said:

> "And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the

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premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F. (2d) 146; Kirvin v. United States, supra; United States v. Kirschenblatt, supra. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Likewise, in Clancy v. United States, 276 F.2d 617 (7th Cir. 1960), books, records and papers pertaining to a bookmaking operation were held to be instrumentalities of the crime.

See also: United States v. $1,058.00 in United States Currency, 210 F. Supp 45, 51 (W.D. Pa. 1962), affirmed without discussion of the points pertinent to this case, 323 F.2d 211 (3rd Cir. 1963).

For the reasons mentioned in Clancy v. United States, supra, at page 630, we believe that Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944) is inapposite. In that case the Court found that certain books which had been seized were merely evidence of an intent to export certain items subsequent to the making of fraudulent statements to the Department of State. Thus the Court found that the books and records themselves were not instrumentalities of the crime.

Likewise, Gilbert v. United States, 291 F.2d 586 (9th Circuit 1961) has no application to this case, since the items seized in that case were merely checks and income tax returns -- not being instrumentalities of the crime charged, which was forgery. The Court pointed out at page 597 that if a conspiracy had been charged, then the items might well have been seized as

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instrumentalities of a crime.

In the case at bar, records seized were necessary to the defendant for him to carry on his business of betting. He has made such an admission to the Special Agents -- as will be demonstrated by testimony. Rather, this case appears to fall within the rule of Leahy v. United States, 272 F.2d 487 (9th Cir. 1959) where the Court said at page 491:

> " . . . The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed 231 (officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal enterprise.) Such were the records obtained in this case. The search was, therefore, a reasonable one. Harris v. United States, supra. . . .

For all of the above reasons, the Government respectfully submits that defendant KATZ'S motion should be denied.

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CERTIFICATE OF SERVICE BY MAIL

I, GERTRUDE JOAN McELLISTRIM state:

That I am a citizen of the United States and a resident of LOS ANGELES County, California; that my business address is 762 Post Office and Courthouse, Los Angeles 12, California; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That on MARCH 29, 1965, I deposited in the United States mails in the Post Office and Courthouse at 312 North Spring Street, Los Angeles 12, California, in an envelope bearing the requisite postage, a copy of:

OPPOSITION TO DEFENDANT'S MOTION FOR SUPPRESSION OF EVIDENCE AND FOR RETURN OF EVIDENCE; AND MEMORANDUM OF POINTS AND AUTHORITIES

addressed to: Burton Marks, Esquire
Attorney at Law
8447 Wilshire Blvd.
Beverly Hills, California

his last known address, at which place there is delivery service by the United States mails from the aforesaid Post Office and Courthouse.

This certificate is executed on March 29, 1965, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Gertrude Joan McEllistrim

GERTRUDE JOAN McELLISTRIM