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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES KATZ, Defendant.	Misc. 1209 Commissioner's Docket No. 42 Case No. 129 NOTICE OF MOTION TO SUPPRESS EVIDENCE AND FOR RETURN OF EVIDENCE (EXHIBITS AND POINTS AND AUTHORITIES IN SUPPORT THEREOF)

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO UNITED STATES OF AMERICA AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on the 22 day of March, 1965, at 2:00 P.M. or as soon thereafter as counsel may be heard in the courtroom of Judge Charles H. Carr at the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, a motion will be made, and is hereby made for the following relief:

1) That all papers, records, documents and other property seized by the Government on February 25, 1965 from the home of the defendant Charles Katz pursuant to search warrant be returned to the defendant. (A copy of said search warrant and what is presumed to be the affidavit of Special Agent for the FBI, John Robert Barron, and inventory is attached hereto as an exhibit); and

2) That any and all of the aforesaid documents, records, papers and other property so seized be suppressed and that the

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United States District Attorney be restrained from using any documents or other papers aforesaid upon the trial or otherwise, or any information directly or indirectly attained therefrom, or by means thereof; and

3) That all of the said property so unlawfully seized be returned forthwith to the defendant; and

4) That all property taken from the person of the defendant on the date of his arrest, to wit, February 25, 1965, be similarly suppressed and returned forthwith to the defendant; and

PLEASE TAKE FURTHER NOTICE that at the aforesaid date and time, further motions will be made with respect to the suppression of evidence obtained pursuant to invalid searches and seizures on February 19, 20, 21, 23 and 24 of conversations had by the defendant within public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276, which said conversations were tape recorded by having microphones taped to the outside of said phone booths.

AND FURTHER motion will be made to suppress evidence of any conversations heard by Special Agent Allen F. Frei of the Federal Bureau of Investigation overheard on February 23, 1965 or any other date while said special agent occupied Room 123 of the Sunset Towers West, which is adjacent to defendant's room 122, all of which aforesaid evidence and conversations were seized and obtained from the defendant in violation of Amendment Four to the United States Constitution.

This motion will be based upon all the files, records, affidavits and inventory contained in the 1965 Commissioner's Docket No. 42 (Case No. 129); upon such evidence which shall be produced at the time of the hearing of said motion and upon the points and authorities submitted herewith and said motions will be based generally upon the following grounds:

1) That any conversations of the defendant overheard by special agents of the FBI were obtained by a direct violation of the defendant's right to privacy and without warrant, and were therefore unlawful "searches and seizures" in violation of the defendant's rights under the Fourth Amendment to the United States.

2) That any arrest or search warrant issued upon the information obtained through the use of illegally obtained evidence is illegal and void.

3) That the search warrant obtained was not obtained upon any probable cause and was void.

4) That the search warrant was a general search warrant and void.

5) That the search warrant was intended and used for the purpose of obtaining evidence and being an "evidentiary search warrant" is void.

DATED: March 8, 1965.

Respectfully submitted,

BURTON MARKS

POINTS AND AUTHORITIES

1) THE UNLAWFUL OBTAINING OF EVIDENCE THROUGH THE AID OF LISTENING DEVICES (THE UNLAWFUL INVASION).

It is submitted that whatever vitality Olmstead vs. U.S., 277 U.S. 438, 72 Law Ed. 944, had in prior years, it is now a "dead letter" case in that electronic eavesdropping will not be countenanced by the United States Supreme Court as a violation of the Fourth Amendment. See Silverman vs. U.S., 365 U.S. 505, 5 Law Ed. 2d 734 and dissenting opinion.

Lopez vs. U.S., 373 U.S. 427, 10 Law Ed. 2d 462 (with special reference to the dissents of Justices Brennan, Douglas and Goldberg).

In 1963, the Ninth Circuit in People of the State of California vs. Hurst, 325 Fed. 2d 891, cited with approval Brock vs. U.S., 223 Fed. 2d 681 as follows:

> "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment." (325 Fed. 2d 898).

Surely a man has as much right to ~~be~~ be let alone in a private telephone booth as in his own home. Although the affidavit of agent Barron does not indicate how the conversations were overheard from the adjoining room to the defendant's apartment, it is submitted that evidence at the time of the motion will show that these conversations were also overheard through electronic eavesdropping.

It is quite obvious that if the conversations overheard and electronically recorded by special agents of the FBI were obtained in violation of the Fourth Amendment, that that evidence could not be used to establish "probable cause" for an arrest or

a search warrant, since such warrants would be the "fruit of the poisonous tree."

Obviously, when an illegal search and seizure has been made and conducted and the same is shown by evidence, the burden of proof shifts to the Government to show probable cause for such search and seizure sufficient to justify the same. (U.S. vs. Paroutian, 299 Fed. 2d 486).

2) THE SEARCH WARRANT WAS VOID FOR TWO REASONS:

(A) IT WAS AN EVIDENTIARY SEARCH WARRANT, AND

(B) IT WAS A GENERAL SEARCH WARRANT, BOTH OF WHICH ARE PROHIBITED BY THE FOURTH AMENDMENT.

A) A search warrant which authorizes a search for evidence is illegal; it violates both the Fourth and Fifth Amendments to the United States Constitution.

The constitutional law is unerringly to the effect that a search for evidence violates these constitutional rights. (See Harris vs. U.S., 331 U.S. 145, 154, especially where as here the items specified in the search warrant are not the "fruits or instrumentalities" of the crimes of using the wires or violation of the Internal Revenue Code.

Recently the court of Appeals for the Ninth Circuit in Gilbert vs. U.S., 291 Fed. 2d 586, 596 (1961), ruled:

"We think we must recognize and respect ' . . . the distinction between merely evidentiary materials, on the one hand which may not be seized . . .' "

And searches for instrumentalities, contraband, etc., citing Harris vs. U.S., and the court held illegally seized material obtained during a lawful search, because conducted as incident to a lawful arrest, but which were evidentiary in character.

In Boyd vs. U.S., 116 U.S. 16, 29 Law Ed. 746, the court

pointed out the distinction between judicial process to seize property such as stolen goods, articles upon which duty is owed to the Government, articles seized on attachment to satisfy a debt, and the case there at bar, namely, to produce "the invoice of the 29 cases" as to which the Government claimed duty was owed and which it wanted forfeited, held:

> "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, for that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Cambden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forceable and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (See also Gouled vs. U.S. 255 U.S. 298; Carrol vs. U.S., 267 U.S. 132; Lefkowitz vs. U.S., 285 U.S. 452; U.S. vs. Rebinowitz, 339 U.S. 56; Adel vs. U.S., 362 U.S. 217; Woo Lai Chun vs. U.S., 274 Fed. 2d 708 (Ninth Circuit, 1960).)

B) The "general search warrant."

A mere glance at the permissive scope of the search warrant and the inventory of matters and materials taken from the

home of the defendant dispels any doubt that the search was not only "evidentiary" in nature, but that the warrant was a "general" search warrant and condemned. (See Stanford vs. Texas, 13 Law Ed. 2d 431 (January 18, 1965).)

> "The requirement that warrants shall particularly describe the things 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." Marron vs. U.S., 275 U.S. 192, 196, 72 Law Ed. 2d 231 as cited in Stanford vs. Texas, supra. at page 437.

It is also submitted that upon seizure of items not specifically described in the warrant, assuming it were not too general, the entire search must be declared invalid since the validly seized items cannot be severed from the invalidly seized items. See Marcus vs. Search Warrants, 367 U.S. 717, 6 Law Ed. 2d 1127.

Respectfully submitted,

BURTON MARKS