INDEX

AUTHORITIES CITED

63996—27——1

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 493

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl, and Francis Richard Brown, Petitioners

v.

UNITED STATES OF AMERICA

No. 532

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, Edward Erickson, William P. Smith, David Trotsky, Louis O. Gilliam, Clyde Thompson, and Bernard Ward, Petitioners

v.

UNITED STATES OF AMERICA

No. 533

EDWARD H. MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE LOWER COURTS

Three opinions were rendered by the District Court. The first, upon motions to strike pleas in

abatement (No. 493, R. 102), is reported in 7 F. (2d) 756; the second, upon demurrers to the indictment (No. 493, R. 125), is reported in 5 F. (2d) 712; and the third, upon petition to quash search warrant, to return property, and to suppress evidence (No. 493, R. 223), is reported in 7 F. (2d) 760. The opinions of the Circuit Court of Appeals (No. 493, R. 757; No. 532, R. 575; No. 533, *id.*), are reported in 19 F. (2d) at pages 842 and 850, respectively.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered May 9, 1927 (No. 493, R. 780; No. 532, R. 596; No. 533, *id.*), and rehearings denied July 18, 1927 (No. 493, R. 781; No. 532, R. 597; No. 533, *id.*). The petition for certiorari in No. 493 was filed August 30, 1927, and those in Nos. 532 and 533 September 9, 1927. Jurisdiction to issue the writs applied for is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the defendants in a criminal prosecution in a Federal court are denied rights guaranteed to them by the Fourth and Fifth Amendments to the Constitution of the United States by the admission in evidence, over their objection, of the testimony of Federal officers as to telephone conversations, incriminatory of the defendants, overheard

by said officers through the "tapping" by them of the wires leading to the defendants' telephones.

2. Whether Federal prohibition officers whose longhand notes of telephone conversations overheard by them had been typewritten by a stenographer and verified by said officers were properly permitted by the District Court, over the defendants' objections, to testify as to such conversations after examining said transcript before answering questions propounded to them by counsel for the Government.

STATEMENT

The petitioners in these three cases, together with seventy-one other named defendants, were indicted in the District Court of the United States for the Western District of Washington in four counts, the first and second counts charging separate conspiracies to violate the National Prohibition Act and the third and fourth charging separate conspiracies to violate the Tariff Act of 1922. (No. 493, R. 1–44; No. 532, *id.;* No. 533, *id.*) At the trial the third and fourth counts were dismissed on motion of the Government. (No. 493, R. 248; No. 532, R. 285; No. 533, *id.*) Petitioners were convicted upon Counts I and II (No. 493, R. 250–254; No. 532, R. 45–49; No. 533, *id.*), and were sentenced on each count to imprisonment in the McNeil Island Penitentiary, the sentences to run consecutively in some instances and concurrently in the others (No. 493, R. 259–268; No. 532, R. 49–62; No. 533, *id.*). Two

writs of error were thereupon sued out from the Circuit Court of Appeals, twelve of the convicted defendants joining in one, docketed in the appellate court as No. 5006, and nine joining in the other, docketed in that court, with a record somewhat differently made up, as No. 5016. The cases were heard together by the Circuit Court of Appeals, which on May 9, 1927, handed down its judgment in each case affirming the judgment of the District Court (No. 493, R. 780; No. 532, R. 596; No. 533, *id.*), and on July 18, 1927, denied a petition for rehearing filed in each case (No. 493, R. 781; No. 532, R. 597; No. 533, *id.*). Edward H. McInnis, one of the plaintiffs in error in Case No. 5006 in the court below, has filed a separate petition for certiorari, docketed in this Court as No. 533, the record in which is identical with that in No. 532.

In applying to this Court for a writ of certiorari, the petitioners in No. 493 (No. 5016 in the lower court) rely upon but one ground: That the admission in evidence, over their objection of testimony of Federal prohibition officers as to telephone conversations, incriminating petitioners, overheard by said officers through the "tapping" of the wires leading to petitioners' telephones, was repugnant to the Fourth and Fifth Amendments to the Constitution of the United States.

The same point is made by the petitioners in Nos. 532 and 533 (No. 5006 in the court below), who additionally urge that the Federal prohibition officers, whose notes of such telephone conversations

overheard by them had been typewritten by a stenographer and verified by said officers, were erroneously permitted, over the defendants' objections, to testify as to such conversations after examining said transcript and before answering questions propounded to them by counsel for the Government.

The scope of the conspiracies charged in the indictment and the manner in which the evidence relating to the telephone conversations was obtained, preserved, and testified to by the witnesses, are fairly stated on pages 2 to 6 of the petition in No. 532.

ARGUMENT

I

THE EVIDENCE OBTAINED THROUGH THE "TAPPING" OF THE TELEPHONE WIRES WAS NOT INADMISSIBLE UNDER THE FOURTH AND FIFTH AMENDMENTS

The Fourth Amendment provides:

> 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.

The provision of the Fifth Amendment involved reads:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The "tapping" of the wires leading to the defendants' telephones was done by Federal prohibition agent Fryant, who formerly had been a lineman employed by different telephone companies. The "taps" were run to a room in the Henry Building, where Fryant and other Federal prohibition agents listened to and made notes of telephone conversations by and between the defendants. (No. 493, R. 433–434, 518–519, 527, 590, 615, 633–640.) The testimony of these agents as to what was said in the conversations thus overheard by them was admitted at the trial as to the particular defendant talking whose voice had been recognized by the witness. (No. 493, R. 436–437.) In support of their contention that the admission of this testimony, over objection made and exception noted, was in violation of the Fourth and Fifth Amendments, petitioners rely upon the decisions of this Court in the following cases:

Ex parte Jackson, 96 U. S. 727.
Boyd v. *United States,* 116 U. S. 616.
Weeks v. *United States,* 232 U. S. 383.
Silverthorne Lumber Co. v. *United States,* 251 U. S. 385.
Gouled v. *United States,* 255 U. S. 298.
Agnello v. *United States,* 269 U. S. 20.
Byars v. *United States,* 273 U. S. 28.

It is submitted that none of these cases has any application to a situation such as that involved in the instant case. In *Ex parte Jackson,* the first case cited, Jackson was convicted of violating Section 3894 of the Revised Statutes by depositing in the

mail a circular concerning a lottery offering prizes. Upon his commitment to jail for failure to pay the fine imposed he applied to this Court for a writ of habeas corpus, asserting that Section 3894 was unconstitutional. Following a hearing on a rule to show cause why the writ should not issue, this Court, in discussing the powers of Congress to prescribe regulations as to what shall constitute mail matter, said (pp. 732–733):

> In their enforcement, a distinction is to be made between different kinds of mail matter,—between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of

> officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

In *Boyd* v. *United States* the Government filed a libel to forfeit certain imported merchandise on the ground that it had been fraudulently entered. Upon its motion the District Court, pursuant to Section 5 of the Act of 1874, issued an order upon the claimants to produce the invoice of a previous importation which the Government desired to introduce in evidence. The order was complied with by the claimants under protest that the statute was unconstitutional, and the invoice was received in evidence over their objection that they could not constitutionally be required to furnish evidence to be used against them in a forfeiture case. Judgment went for the Government and upon its affirmance by the Circuit Court, the claimants brought the case to this Court upon writ of error. Holding that the effect of the statute was to compel the claimants to produce their private papers to establish a forfeiture of their property, this Court declared the statute unconstitutional as in substance and effect authorizing an unreasonable search and seizure within the prohibition of the Fourth Amendment.

In *Weeks* v. *United States* the conviction of the plaintiff in error of using the mails for the

portation of lottery coupons, in violation of Section 213 of the Criminal Code, was set aside by this Court on the ground that such conviction had resulted, in part at least, from the admission in evidence of papers seized in Weeks' home by a United States Marshal without a search warrant, and that the use of such evidence was in violation of the Fourth and Fifth Amendments.

In the *Silverthorne Lumber Company case,* books and papers of that corporation, seized by Federal officers without a search warrant, were returned to the company after copies had been made of parts desired by the Government for use in a proposed prosecution of the company and its officers. The Government thereupon procured subpœnas directing the company and its officers to produce the originals before the grand jury. Upon their refusal to do so they were adjudged in contempt of court. The judgment was set aside by this Court on the ground that the original seizure without warrant was in violation of the Fourth Amendment and that the protection afforded by that constitutional provision would be nullified if the information gained by such unlawful search and seizure could be used as the basis for a subpœna requiring the production of the same books and papers.

In *Gouled* v. *United States* a representative of the Government visited the office of the defendant in the guise of paying a friendly call, and in the defendant's absence seized and carried away certain papers which were later introduced in evidence

against the defendant in a prosecution resulting in his conviction and sentence. Declaring that the search and seizure thus surreptitiously made was as fully prohibited by the Fourth Amendment as though effected by force or coercion, this Court reversed the judgment.

In the *Agnello case,* Federal officers having placed Agnello and others under arrest in the home of one Alba for an offense against the Harrison Drug Act there committed within the view of said officers, went to the home of Agnello, and, searching the same without a warrant, found and seized a can of cocaine. The article thus seized was subsequently received in evidence, over the objection of the defendants, in a prosecution of Agnello and others for conspiracy to violate the Federal Act. Following a conviction and its affirmance by a Circuit Court of Appeals, this Court, upon a writ of certiorari granted, held that the evidence in question had been obtained in violation of the Fourth Amendment and that its use against Agnello was repugnant to the Fifth Amendment.

Byars v. *United States* was a prosecution for having in possession counterfeit strip stamps in violation of Federal statute. At the trial the Government offered in evidence certain strip stamps which had been seized in a search of the defendant's premises under a search warrant issued by a State judge. An objection by the defendant to this evidence, on the ground that the stamps had been obtained by an unlawful search and seizure, was overruled and

he was convicted. Upon writ of certiorari to review the judgment of a Circuit Court of Appeals affirming the conviction, this Court held that the search warrant was clearly invalid under the Fourth Amendment and laws of the United States, and that said Amendment and laws applied, notwithstanding that the search and seizure were made under a State warrant, because, as appeared from the evidence, a Federal prohibition agent participated in the execution of the warrant. The judgment was accordingly reversed.

From the foregoing brief statement of the decisions of this Court cited by petitioners it is obvious that the Court was in every case dealing with a search of "houses," or with a search or seizure of "papers" or "effects," all matters clearly coming within the scope of the Fourth Amendment. In the instant case the wire tapping was effected without any invasion of or entry upon any premises owned or occupied by the petitioners. It can not be said, therefore, to have violated the provision of the Amendment with respect to the search of "houses," and it certainly did not constitute a search or seizure of "persons," "papers," or "effects." Petitioners seek, however, to bring the case within the effect of the above-quoted language of this Court in *Ex parte Jackson*. They argue that if, as there held, the secrecy of a letter or sealed package in the mail may not, consistently with the Fourth Amendment, be invaded by the postal authorities, then upon the same principle the

secrecy of a communication by telephone may not be invaded by any officer of the Government. But the two things are in no way analogous. What was said in the *Jackson case* was specifically grounded by this Court upon what it termed "the constitutional * * * right of the people to be secure in their papers against unreasonable searches and seizures." A message transmitted by telephone is in no sense a "paper." It is a verbal communication, and if such a thing as the search and seizure of a verbal communication were possible there is no constitutional inhibition against it, whether it be regarded as reasonable or unreasonable. The fallacy of petitioners' argument is made clear by the following illustrations:

Suppose a Federal officer assigned to watch the home of a person suspected of a Federal offense should from his position in the street overhear incriminating statements emanating from the house, made either in the course of a conversation between persons there present or by some one using a telephone. Could it reasonably be contended that the testimony of the officer as to what he had heard would be inadmissible under the Fourth and Fifth Amendments against the persons making such statements?

Suppose an agent of the Government, having entered the home of another without his knowledge or consent, thereby committing a trespass, takes down the receiver of a telephone therein and overhears incriminating statements by other parties on

the line. Would the persons making such statements be heard to complain in a subsequent prosecution against them that the testimony of the Government agent as to what he had heard them say would violate their rights under the said constitutional amendments?

Suppose a Federal officer or agent joins a band of conspirators and from day to day listens to their conversations in their homes or elsewhere. Would the constitutional amendments in question render his testimony regarding such statements inadmissible against the persons making them?

The situation in the present case presents a complete analogy to each of the foregoing suppositions. It is small wonder, then, that petitioners admit that they can find no direct authority on the point they urge. Their attempt to enlarge the doctrine of the decided cases so as to bring within the scope of the Fourth and Fifth Amendments an alleged unreasonable search and seizure of voice transmissions and testimony regarding the same is so devoid of merit as to be unworthy of serious consideration.

In the petition filed in Case No. 533, the petitioner McInnis advances an additional argument based upon a statute of the State of Washington, making it a misdemeanor to "intercept or read or in any manner interrupt or delay the sending of a message over a telephone or telegraph line." Taking the position that the wire tapping by the Federal agents and their listening to the telephone

cations sent over the tapped wires by the petitioners constituted a search and seizure of such communications, he contends that these acts of the agents violated the State statute and accordingly rendered such search and seizure "unreasonable" within the meaning of the Fourth Amendment. If, however, as we have hereinbefore endeavored to show, no search or seizure contemplated by the Fourth Amendment was involved in what was done by the Federal agents, the question of whether their acts were reasonable or unreasonable is wholly immaterial.

II

THE FEDERAL AGENTS WERE PROPERLY ALLOWED TO REFER TO THE TRANSCRIPT OF THEIR NOTES OF TELEPHONE CONVERSATIONS OVERHEARD BY THEM

From June 8th to July 12, 1924, the telephone conversations heard over the tapped wires were taken down verbatim in shorthand by Mrs. Whitney, wife of one of the agents, who received the names of the persons talking from one or another of the agents who were also listening to such conversations and who recognized the voices. Where none of the agents recognized the voice Mrs. Whitney headed her notes with the word "Voice," or put in the name as it came in the body of the conversation. (No. 493, R. 664–667; No. 532, R. 422–425.) Testimony as to these telephone conversations where the voice was not recognized was, however, ruled out by the court. (No. 532, R. 427.)

After July 12, 1924, the agents listening to the telephone conversations in question made such longhand notes as they could while the conversations were going on, and immediately after the conversations ceased extended their original notes from memory of what they had heard. These notes were turned over at the end of the day to Mrs. Whitney, who made a typewritten copy thereof, which the agents examined and corrected. A final copy was then made by Mrs. Whitney, which the agents checked with their recollection of the conversations, all of this being done within two or three days of the time the conversations were heard. (No. 493, R. 489–490, 493–496, 500, 502, 520; No. 532, R. 282–284, 368.) The final typewritten copies were later bound into a volume, comprising over 700 pages, which was introduced at the trial as Government Exhibit No. 91. When called upon at the trial to testify as to a particular telephone conversation overheard by him, the witness would refer to Exhibit No. 91, and after closing the book would answer the question propounded. In each instance the witness testified that his answer was based upon his independent recollection and that he had referred to the book only to refresh his memory. (No. 493, R. 449, 452, 525, 542; No. 532, R. 271, 282.) Objections by counsel for the defendants that such testimony was incompetent because the witnesses were not using the book to refresh their memories, but were merely repeating what they had just read

in the book, and that the memoranda in the book were not made by the witnesses themselves but by another, were overruled. (No. 493, R. 511, 543–544; No. 532, R. 270, 284.) This action of the District Court, upheld by the Circuit Court of Appeals, is now assigned by petitioners as a ground for the allowance by this Court of a writ of certiorari.

It is well established in the law of evidence that a witness who has no present recollection of the facts as to which he is called upon to testify may be permitted, for the purpose of refreshing his memory, to refer to a memorandum of such facts, whether the memorandum was made by himself or by another, provided the witness saw the memorandum when the facts were clear in his recollection and at that time knew it to be correct.

> Wigmore, 2d Ed., Vol. 2, Sec. 747.
>
> *Breese* v. *United States* (C. C. A., 4th), 106 Fed. 680, 683.
>
> *Goodfriend* v. *United States* (C. C. A., 9th), 294 Fed. 148, 152–153.
>
> *Du Pont de Nemours & Co.* v. *Tomlinson* (C. C. A., 4th), 296 Fed. 634, 639–640.

The rule was applied in *Grunberg* v. *United States,* 145 Fed. 81, where the Circuit Court of Appeals for the First Circuit, in overruling a contention that the District Court had erroneously allowed a witness to refresh his recollection by examination of a ledger, said (p. 96):

> The law in Massachusetts on this topic, which is correctly represented by Greenleaf's

Evidence (section 436), is accepted in *Putnam* v. *United States,* 162 U. S. 687, 694. In the case at bar the invoice books and ledger were offered simply for the purpose of refreshing the recollection of the witnesses. So far as the method of making the entries, the time when they were made, and the use of copies are concerned, there is a broad distinction between entries which are themselves evidence and entries which are used only for the purpose of refreshing recollection. The rules as to the former are more strict in every particular. With reference to the use of the invoice copybooks and the ledger in question, the rules as laid down by Greenleaf, and as practiced in the federal courts, are stated simply and correctly in Chase's Stephen's Digest of the Law of Evidence (2d Ed. 1898) 341 as follows:

"A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct."

This contains everything essential to the use of entries for the purpose referred to. They are equally sufficient whether original, or whether, in the event of the original being destroyed or unreachable, a copy is used.

> The rules fix no relative dates arbitrarily, although, of course, there may be extreme instances, like that of the 20 months in *Maxwell* v. *Wilkinson,* 113 U. S. 656, 658, where, under peculiar circumstances, the intervening length of time is too great to permit the trial court, even in its discretion, to allow any attempt to refresh the recollection of the witness. The rules were laid down very broadly in *Insurance Company* v. *Weides,* 14 Wall. 375, 380. There a copy was allowed to be used for the purpose of refreshing the memory of a witness, and the general proposition was stated broadly, as follows:
>
> "If, at the time when an entry of character, quantities, or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness."

And the statement of the rule as given by Greenleaf (1 Greenl. Ev., Section 436) was approvingly quoted by this Court in *Putnam* v. *United States,* 162 U. S. 687, 694, as follows:

> Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum or entry in a book, and may be compelled to do so if the writing is presented in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the

> facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence: for if inadmissible in itself as for want of a stamp, it may be still referred to by the witness.

The situation here comes squarely within the rule as stated by the foregoing authorities. Here the witnesses testified that the memorandum to which they referred had been examined by them within a short period after the facts stated therein had come to their knowledge and that upon such examination they knew the memorandum to be correct. The number of telephone conversations overheard by said witnesses was so great that it was naturally beyond their power in most instances to recall the names of the parties, or the time, or even the substance of the conversations, without some aid to their recollection. The case was, therefore, eminently one for permitting the witnesses to refer to the memorandum thus shown to be correct. To hold that the testimony so given was not available to the Government would be to afford the defendants an avenue of escape from the consequences of their acts solely because of the magnitude of their illegal operations. It is submitted that no such result is contemplated by the applicable rules of evidence.

CONCLUSION

Petitioners' convictions of the conspiracies charged are supported by ample evidence properly received. The constitutional question raised by them is wholly wanting in substance, and the case presents no other question of sufficient general importance to justify the allowance of the writs of certiorari prayed. The petitions should therefore be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
JOHN J. BYRNE, *Attorney.*

SEPTEMBER, 1927.

○