Supreme Court of the United States

October Term, 1968

In the Matter of:

THOMAS R. KAISER

Petitioner

vs

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

Docket No. 62

Place Washington, D. C.

Date January 16, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Thomas R. Kaiser, Petitioner,	:	
against	:	No. 62
The People of the State of New York, Respondent.	:	

Washington, D. C.
Thursday, January 16, 1969

The above-entitled matter came on for argument at 12:50 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Of Counsel

APPEARANCES (Continued):

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State of New York
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Attorney for Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 62, Thomas R. Kaiser, Petitioner, versus New York.

Mr. Sabbatino.

ORAL ARGUMENT OF PETER L. F. SABBATINO, ESQ.

ON BEHALF OF PETITIONER

MR. SABBATINO: Mr. Chief Justice and other members of the Court.

Your Honors, I am going to ask the indulgence of the Court in this case in one particular matter.

The Petitioners here In forma pauperis and my law firm and myself personally appeared for the petitioners in the Court of Appeals in the State of New York In forma pauperis and also in the appellate division.

You will notice that on all the briefs there is the name of Henry J. Boitel as the writer of the briefs. He is sitting with me here. He has been in my office for 3-1/2 years but has been admitted only less than three years so that he is not a member of this bar.

I ask the indulgence of the court to save some time for rebuttal, for him to handle the rebuttal because he has been with this case from its very inception and in contact with the District Attorney in Nassau County and his assistants.

MR. CHIEF JUSTICE WARREN: You may be admitted for that purpose.

MR. SABBATINO: Thank you, your Honor.

Your Honor, the Petitioner herein was indicted with two others for attempted extortion, coercion, conspiracy to extort, and several assault and burglary counts.

The case was severed. The other two that were indicted handled their matters their own way. They weren't involved in the trial. The defendant was convicted and received a sentence of 1-1/2 to 7 years.

The facts aredeveloped in the brief, but if there are any particular facts that the Court would want me to refer to or if the Court desires I go into the facts, I shall be glad to do so although they are fully expounded in the briefs.

I will say this, your Honor, that the record showed that the conviction of the defendant hinged entirely upon two telephone wiretaps that he had. And a stipulation was entered into by the District Attorney's office of Nassau County and my office which reads as follows: And the original of it is filed with the Clerk of this Court.

"In aid of the Court, the attorneys for the Petitioner and the attorney for Respondent enter into the following stipulation concerning the factual background of the Petitioner's conviction:

"The indictment and conviction of the Petitioner were completely dependent upon evidence secured by the State of New York by means of the electronic interception of telephone

conversations to which the Petitioner was a party. The interceptions in question and the use of the evidence obtained thereby were without the authorization of either party to the said telephone conversations. The interceptions were made pursuant to an ex parte order issued by a County Court Judge of the State of New York under the authority of §§ 813-a of the New York State Code of Criminal Procedure. Independent of the evidence so obtained, the People of the STate of New York were possessed of nothing which implicated or tended to implicate the defendant in the crimes charged."

Q Is that in the record?

A Yes, that is part of the record.

The original of that stipulation is on file with the clerk of the Court.

Now my young assistant who reads all the cases of this court, and as I say who has written the briefs, all the briefs in this court, I simply shared the expense of the litigation with the Government doing my part in Government's, and I have here a list of the various issues which are discussed in the brief and which we submit should induce this court to reverse the conviction and declare the wiretap laws as in violation of constitutional provisions -- Federal Constitution.

We discuss Section 605 of the Federal Communications Act as being in violation of the right of privacy and is applicable to the State courts. Of course, since writing this

brief this Court has held that Section 605 applies to State Courts.

Then we discuss in the brief Section 605 ---

Q We have also held, though, the case to which you refer I think is Lee against Florida, and we have also held subsequent to that decision that that decision was not to be retroactive.

A That is in the Ford against Alaska.

Q Ford against Alaska.

A Yes, we discussed that in a reply brief.

Then we discussed Section 605 plus in connection with the Fourth and Fifth Amendments involving the right of privacy because as I shall point out later in the Lee against Florida case, the Court stated that it passed and reversed there based on the statute and did not reach the constitutional issue.

We, in our brief, raise the constitutional issues. We discussed the Fifth Amendment in the light of what we believe that what was done here can be viewed in the context of compulsory self-incrimination. I shall discuss that more fully later on.

Then we discussed the effect of the Ninth Amendment as involving in this case the right of privacy also and through the retainer by the people of rights not delegated by the -- under the Federal Constitution to the Federal Government.

We discuss the First Amendment as affecting the

serious inhibition that results in speech because of the possibility and knowledge that there is wiretapping.

Q Counsel, in the question in this case, doesn't the question in this case really come down to the warrant? Doesn't it center on the warrant that was ---

A Yes.

Q That was obtained and the question, the narrow question in this case, of whether the warrant authorized the search, the wiretapping, so as to immunize it from constitutional objection and the bearing of this Court's decision in Berger on this case. Aren't those the questions?

A We discussed that in the brief, your Honor. I shall come to that.

Of course, as the whole bar knows, this Court in the Berger case as Justice Fortas just pointed out, Section 813a made eavesdropping as expounded in Berger unconstitutional. Then we discussed later on the effect of Berger upon the facts in our case. Then we discuss the lack of probable cause in the case under the Fourth Amendment.

Then I shall discuss and we discuss in the brief more fully the general search as lacking in particularity in the warrant and so on, general search giving the various elements that this Court held in Berger to make what was done in Berger unconstitutional and also we discussed the warrants in here as being too broad and so on under the criteria set forth in

Berger. And then we also discuss and, of course, consideration, a confession point as being somewhat involved in view of the decision, the Miranda decision as affecting what took place at this trial and which disturbed the trial court a great deal but decided against it.

Q What do you understand to have been the essence of Judge Keating's holding, writing for the majority in the Court?

A Well, it is a hard opinion. It is a peculiar opinion. Judge Keating in one part held that Olmstead had not been reversed by what this Court had done in Berger. Judge Keating said that where a constitutional provision is involved, that the fact that a city is overruled should be more specific.

Of course, Justice Douglas in Berger had said that Olmstead had been reversed. Then after expounding his theory that this Court had not overruled Olmstead in the Berger decision, then he went on the theory, let us assume he said, that it does overrule Berger and he expounded a novel theory stating that the Court of Appeals had a right to list what it considered appropriate legal protection for our defendant.

And we argue and shall argue here as we argue in the brief that the criteria set down by Judge Keating do not comply with the requirements of the Fourth Amendment so that in his efforts to legislate judicially and to try to rehabilitate the statues, his effort is a complete failure.

So on either theory he said whether Olmstead was reversed or whether it wasn't, he voted to sustain the conviction.

Q Do you think I am wrong in suggesting that this opinion comes down to two holdings, one is that Berger did not cover wiretapping? to distinguish from ---

A That is right.

Q Bugging, and No. 2, if it does, why Berger ought not to be made retroactive.

Isn't that the essence of what he does?

A Well, I don't think the decision goes that far although in Judge Fuld's dissenting opinion he pointed out that the Court in the Grossman case, in the Court of Appeals, the Court had given retroactive effect to Berger and then since apparently the Court did not want to give retroactive activity effect to this case in a footnote the Court overruled its opinion in Grossman.

And Judge Fuld covers these interesting points in his dissenting opinion. Of course, it suits my purpose but as a lawyer I believe that Judge Fuld's opinion is a reasonable opinion and he points out that that is not equal justice where the Appellate Division or the Court of Appeals gives effect of retroactivity for one person and then denies it to Kaiser when he comes up there.

So, Judge Keating's opinion as far as I am concerned

from my limited experience in the Federal bar and this Court, Judge Keating's opinion determined nothing as far as this Court is concerned.

Section 1813a is still unconstitutional because the provisions which were found inadequate to protect a person under the Fourth Amendment, the provisions of 1813a were insufficient, did not comply with what this court held for the requirements of the Fourth Amendment.

And practically the entire statute, 1813a, applies to both bugging and wiretapping, the fact that there is no distinction between the two. So that if this Court was right and we say the Court was right in declaring 1813a void, unconstitutional, on its face, the same thing applies to the Kaiser case and the wiretapping situation.

As Judge Fuld said, the Court could not write a new statute. That is the function of the Court of Appeals. And even in the so-called inadequate new statute that the court judicially wrote, there would be no compliance even under those requirements with what this Court had held in the Berger case as protecting a defendant under the requirements of the Fourth Amendment.

But I am going ahead of my notes here.

Well, I refer to Lee against Florida where an incriminating conversation was tapped. Lee was convicted. This Court reversed it and held that wiretapping and the use of the

conversations obtained through wiretapping in violation of 605 was in violation of law and reversed.

If my memory serves me right, this Court used the language that you did not reach the constitutional issues and reversed merely because a statute of Congress was violated.

We argue, your Honors, that Section 605 which gave the defendant certain rights which were violated in his case because there wasn't any consent of either party, that right was a right he had which was entitled to protection under the Fourth Amendment and perhaps even under the Fifth Amendment.

In other words, once he had that right, this Court should give the defendant, the Petitioner Kaiser, the benefit of the protection of the Fourth Amendment. It was here an illegal search and seizure. And if this Court, as we urge you to do, reverses on the combined effect of the Fourth Amendment and perhaps the Fifth Amendment which I shall touch upon in a few minutes, if it reverses not only because 605 was violated but because his constitutional rights were invaded by virtue of the Fourth Amendment, then we have reached a constitutional argument and this case is one of first impression in this Court and the defendant should get the benefit of that, of what follows from that, and not be penalized after having reached this case if the Court adopts our point of view.

I appreciate that when it comes to interpreting constitutional provisions, lawyers disagree just as judges of

this Court in opinion after opinion have disagreed. But as attorneys for this petitioner we feel that this Court should hold and extend other decisions it has written, the legal doctrine based on the Fifth Amendment and other holdings that the seizure of telephone conversations was in a broad sense compulsory self-incrimination. And it comes under that category.

Now in Rochin against California this Court held that pumping a stomach was a form of compulsory self-incrimination and reversed. In Townsend against Sain this Court held that injecting a truth serum was a form of compulsory incrimination and reversed. In Lesire against the United States, an informer with a bug obtained information after indictment in a car. And this Court held that that was a form of compulsory self-incrimination.

I shall refer to it more fully a little later, but in a sense the warnings of Miranda I think should help us out because during the District Attorney's summation in this particular case he said that the Petitioner had made unqualified confessions.

This was in summation. Miranda had just been handed down.

After the summation, in chambers, the trial attorney, Mr. Bouse, had extended argument with the Court and the Court was disturbed and stated that in his opinion they were not

confessions, they were only statements. And in view of the fact of the importance that this Court gave in Miranda to what was being done by the police and others in connection with confessions, in the jury's mind, the jury must have felt since the prosecutor vigorously repeatedly in summation called those statements confessions adversely affected the rights of the defendant.

And I think that by a parity of reasoning what was done there in summation was just as harmful as what was done in Rochin against California, Townsend against Sain, Lesire (?) against the United States, and so on.

Q Mr. Sabbatino, you mentioned the fact you wanted to have some time for rebuttal. I just wondered if you knew that your time was going out.

A No, I have been looking at the Court and I didn't ---

Q You have only about nine minutes left.

You may proceed, but I was just wondering.

A I am going to try to leave five minutes for rebuttal.

Q Mr. Sabbatino, did I understand you to say that you proceeded In forma pauperis in the New York Court of Appeals?

A Yes, sir. In the New York Court of Appeals and in the Appellate Division. We are here without compensation,

your Honor.

Q But you proceeded In forma pauperis in both of those courts?

A Both of those courts and in the Court of Appeals. There is a lot of work a lawyer does, even though he gets free printing from the Government, photostating, trips to Washington and so on.

I want to say something about the First Amendment, your Honor. I think other writers on the subject, your Honor, have referred to the fact that the very existence and knowledge that there is wiretapping has an inhibiting effect on speech and it has an inhibiting effect not only of those that may be criminals but it has an inhibiting effect on all segments of the population.

That is bad for a free society. That is one of the evils of wiretapping. That is why the Government must find another solution to the so-called organized crime without destroying essentially the basic structure of our society.

I don't think our Government is going to plead guilty and permit the building of an autocratic society where the privacy in an American home will be destroyed through the extensive wiretapping that takes place, especially where you have the difficulty where the tapping is indiscriminate and the person cannot limit their tapping to what he believes may be evil because it seizes conversations of all others.

It is impossible. We haven't yet reached the stage where our Government should run the risk of building an autocracy. We can still destroy crime whether organized or disorganized through other means.

As I say, the 1813a is dead through the holding of this Court in Berger and it is dead in the Kaiser case. Berger dealt with bugging and Katz removed the necessity for trespass. Katz specifically, and Olmstead, and we believe Kaiser is the first wiretap case raising the constitutional issues which we raise.

Now, I haven't got time to answer fully the question that Judge Fortas raised about probable cause and so on although we discuss them fully in the brief and discuss how a warrant was a general search, general search, general search, no return provided, and so on. And I want to save the few minutes for my young assistant who has worked so hard on the briefs in this case.

MR. CHIEF JUSTICE WARREN: Very well.

Mr. Cahn.

ORAL ARGUMENT OF WILLIAM CAHN, ESQ.

ON BEHALF OF RESPONDENT

MR. CAHN: Mr. Chief Justice, if the Court pleases.

Although it is the contention of the people that the Fourth Amendment should not apply to the interception of telephonic communications, may I in light of Mr. Justice Fortas'

question and the possibility that this illustrious court will so hold, talk about first the retroactive effect of holding that the Fourth Amendment should apply.

It is our contention, of course, that retroactivity should not be afforded in this particular case. Here, as in other wiretapping cases ---

Q Retroactivity of what?

A The Fourth Amendment provisions enunciated in the Katz and Berger cases, Mr. Justice White.

Q Did these taps occur before Berger and before Katz?

A Well over a year before Berger.

Q Was the trial before Berger?

A Well, the trial ended a year before Berger.

Q Let us see. We overruled Olmstead as of when?

A In the Katz case, I believe.

Q And I guess it was Olmstead that was an explicit holding that the Fourth Amendment did not require?

A That is correct.

Q Are you saying that the overruling of Olmstead should not be made retroactive? Is that what you said?

A No.

Q That is what I can't quite understand.

A I am saying that the application of Katz and Berger holding that -- which seems to indicate that the

Fourth Amendment would apply to wiretapping should not be made retroactive.

In this particular case law enforcement justifiably and in good faith relied on court decisions and court precedent which indicated at that particular time that wiretapping was not controlled by provisions of the Fourth Amendment.

Q When did this wiretap take place?

A In 1964, your Honor.

Q When was the trial?

A In 1966. The trial ended in June of '66.

Q When was this court's decision in Berger?

A In '67.

Q Thank you.

A Although the Kaiser case was ended well over a year before the Berger case, we almost presumed Berger. In Kaiser before we intercepted the telephonic communications involved in this particular matter, we requested a court order. The request consisted of not only an affidavit but page upon page of sworn testimony before a judge of a court of record in our county.

It was on the basis of this testimony and the affidavit that the order permitting the office of District Attorney to intercept these telephonic communications was given.

In other words, as Mr. Justice Keating stated, we used the procedure of antecedent justification before a

magistrate which is the central theme of the Fourth Amendment. This is one reason why I believe that retroactivity should not be afforded.

Further, as it was stated in the Fuller case, the objective of deferrence would not be served by a retroactive adjudication nor remedy a defect in the fact-finding process.

Q Well, if you prevail on this point, is that the end of this case?

A I would say yes, your Honor.

Q Do you really have to depend on retroactivity? Let us suppose that New York did not have a statute. Let us suppose that when we ruled in Berger that the New York statute as drafted was unconstitutional, that that was wiped out. Suppose New York didnot have a special statute and suppose that as in this case an officer, here I think it was the Assistant District Attorney, went before a magistrate or a judge and made a showing which was elaborate and lengthy here as the record shows and pursuant to that he obtained a proper search warrant although here there is an issue as to whether the warrant was properly limited and required a return and so on.

But suppose he obtained the proper search warrant. Do you read Berger or any decision of this Court as saying that wiretap pursuant to a warrant would be constitutionally prohibited unless it is done pursuant to a state statute?

A No, I do not, your Honor. It is our contention,

No. 1, that the Fourth Amendment shouldn't apply ---

Q No, no, no. The Fourth Amendment does apply in this assumption on assumption that is involved in my question.

A Oh, I see.

Q But assume that the wiretapping would be unlawful unless the requirements of the Fourth Amendment were satisfied and assume there were not statutes and assume that the assistant, that a proper officer of the state made a proper showing and obtained a proper warrant that would satisfy the warrant requirements of the Fourth Amendment.

Now I suppose you would argue that you are home free and there is no constitutional objection to that and that would not involve the question of whether Berger is or is not retroactive.

A That is correct.

Speaking of home free, I don't believe we can solely rely on that. May I for a few moments speak about the application of Section 605, which I believe was fully disposed of insofar as the case of Lee against Florida is concerned.

But because of the importance of this particular matter, may I ask the Court to reconsider the retroactive provisions mentioned in Fuller against Alaska.

Here again, insofar as 605 is concerned, the people acted in good faith relying on Schwartz, and at that particular time Section 813 of the New York State Statutes. And here

again we went before the Court giving testimony before securing the order permitting us to intercept the telephonic communication. We relied on 34 years of experience at that particular time where Federal authorities would not impose the provisions of Section 605.

We suddenly were faced with Lee and the application of Fuller. What I am asking this Court to consider now in view of the case of Hamm versus Rock Hill which in my opinion and from that particular ---

Q Excuse me. You have already said that Lee and Florida was not retroactive?

A Correct, sir.

Q Well, what are you asking us to do, to reconsider for?

A I am asking that insofar as what was stated in Fuller that the doctrine enunciated in Stovall be applied to retroactivity rather than the time of trial which may have been prevented by defense maneuvering, by motions made by the defendant, by the impossibility at the time of getting a defendant into the jurisdiction.

Q What was the theory of post activity that we applied? It was not the Stovall theory?

A I believe it was the Johnson theory, your Honor, where you applied at the time of trial rather than at the time of the wiretap which insofar as my own particular county is

concerned is vital to us because we have a number of cases where wiretapping was used long before Berger and if we are thwarted by the Doctrine of Johnson rather than the Doctrine of Stovall, these cases I believe will fall by the wayside.

And I believe that under the circumstances ---

Q I don't understand. Didn't we say -- you quote in your brief -- maybe I had better get it -- perspective application of Lee supported by all the consideration as outlined in Stovall. And yet you say we didn't apply the Stovall Doctrine?

A That is correct, sir.

From my reading -- may I read further here? Retroactive application of Lee would overturn every state conviction obtained in good faith, reliance on Schwartz. Since this result is not required by the principle upon which Lee was decided or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.

This to me seems to indicate application of the Johnson theory rather than Stovall.

Q Well that is a little less retroactive even than Johnson because it says to trials in which the evidence is sought to be introduced after the date of Lee. The trial might have begun before the date of Lee.

A That is correct, sir.

Q It is your position that if the wiretap is made two years ago it can be used tomorrow in the trial?

A Yes, sir. I think we have relied on precedent and decisions enunciated by this Court here before.

Q You still think you can use it?

A I still would like to use it, your Honor. I think that where the law enforcement agency relied on the enunciations of this Court in good faith, that this evidence should be used as is indicated by Fuller. All I am asking is that it be extended.

Q Well, the point is that you are not being criticized for using the wiretap at all but why should we be able to use it at the hearing, at the trial tomorrow?

A Why?

Q Assuming you had a perfect right to tap, you don't now have a perfect right to use it. They are two different points, aren't they?

A The right to tap without the right to use is meaningless, your Honor. The evidence that was obtained as was enunciated so eloquently by my colleague, we thoroughly agree that were it not for the conversations received as a result of our interception of this telephonic communication, Kaiser could not have been convicted.

Now, if we had the right to tap that conversation

but did not have the right to use it in Court, we feel that a man who had been convicted of a very serious crime would have onegfree. And we obtained the information as a result of relying in good faith on the decisions of this Court heretofor.

Q Could you have convicted him without the actual conversations being used?

A No, sir. These conversations ---

Q And there weren't any punks that you could have used?

A No, sir.

These conversations were very explicit.

Q Tell me, Mr. Cahn, if you prevail on the first one on the retroactivity on Berger ---

A Then we don't reach the 605. I agree.

But I hesitate to leave an avenue open. And it was mentioned by my colleague ---

Q Well, now why don't we? Because I gather if we hold that Berger and Katz are not retroactive that only goes to the First, the Fourth Amendment question, doesn't it?

How does it reach the 605 question that prohibits use?

I believe that the Fuller case involves 605, but that is not my question. Even if you have prevailed that Katz and Berger are not retroactive and therefore that these taps were perfectly constitutional under Olmstead at the time they were

made?

A Yes.

Q You still face the difficulty under 605 of prohibition. That is prohibition against use.

Is that right?

A Yes.

Q For that then to prevail we have got to modify our holding in Fuller, is that it?

A No. I am asking that this Court modify the holding in fuller but holding Fuller would be sufficient to have this case sustained because ---

Q What do you mean by holding?

Oh, because the trial was before Lee in Florida?

A Yes, that is correct, sir.

Q Well, then why are you asking us to modify Fuller then? Because of some other cases?

A Because of public interest.

Q Of some other cases?

A Absolutely.

Q Oh, heavens, don't we have enough to do to decide here without deciding all the rest of your cases for you?

A In this particular decision and in reference ---

Q No, but seriously, Mr. Cahn, if you can prevail under Fuller, if you prevail on the Fourth Amendment point, I

honestly don't see why you should ask us now to review again what we held before.

A For the simple reason that I am offering to this Court an argument which I don't think was placed before the Court in Fuller and that is the doctrine enunciated in Hamm versus Rock Hill where the Court stated that the passing of the Civil Rights Law abated a state statute even though there was a conviction, even though there was an appeal. It abated.

And I am asking that since the passing of our Safe Streets Act which was passed a matter of days after Lee ---

Q You are just saying that 605, there isn't any 605, where there isn't any Fourth Amendment point?

A That is correct. There is no 605 because of the doctrine enunciated in Hamm versus Rock Hill. And again I don't think that ---

Q We don't have to reach that in this case?

A Pardon?

Q We certainly don't have to reach that in this case. That is some other case you are going to bring up here next year or in the spring?

A If it is not reached in these cases, those cases where wiretaps were used in cases involving organized crime, where court orders were obtained, and where delays ---

Q You mean they won't be tried?

A That is correct, sir.

Q Well, they will be if you have any confidence in the argument you are just making to us on the Hamm versus Rock Hill.

A But if the doctrine enunciated in the Fuller case is strictly adhered to by the lower court, I can't see how a judge can reach any other decision but to dismiss the case.

Q It would be an acquittal or something like that that you can't appeal from?

A That is correct, sir. There are cases in my own particular county.

Q Can't you appeal in your state on a motion to suppress or sustain, can't you appeal?

A Where there is no other possibility of conviction, yes, we can appeal but this isn't the question that would permit the state to go to the Federal Courts to appear before this illustrious Court because our own Court of Appeals would be bound your decision in Fuller.

Q You could certainly petition for certiorari from a decision like that, from a decision by your highest court in your state. You could bring the question here.

A Mr. Justice White, may I say that if this Court's ruling in Fuller is applied, they have clearly stated in my opinion that we will not make Lee against Florida applicable to cases ---

Q Yes, but Fuller didn't consider whether the

Safe Streets Act would have an impact on the 605 cases.

A I see why Mr. Justice White is suggesting that we bring the Rock Hill argument before the lower court and

Q Why not?

A And ask them in effect to overrule ---

Q Not overrule. You just have the court rule on what the impact of the new Federal law is.

A If that be true, I think there are approximately 20 cases involved and I feel that ---

Q Well, what would you do? Would you not try these cases just on account of Fuller if Section 605 had been repealed last month? Just outright repealed?

A We would still be faced with the question before our lower court, Mr. Justice White.

Q I know it, but I would suppose you would at least raise an argument.

A Oh, there is no question that we will. But I am presuming that the Court will be bound by your decision in Fuller, what we are asking and if it please the Court, if they don't want to consider Rock Hill arguments at this particular time ---

Q Do you want us to overrule Fuller?

A No, sir. Extend it.

Q You want to overrule Lee against Florida?

A No.

Q Why not?

Q You want to extend Fuller on a hypothetical case, on these 20?

A The extension of Fuller I don't believe can be classified as hypothetical.

Q I am talking about this case. Am I right that we can decide this without touching Fuller?

A Yes.

Q Why touch it?

A Without amending Fuller you mean?

Q Without touching it?

A Yes.

Q Well, why should we touch it?

A Because of the fact that I offered for this Court's consideration an argument and a precedent which I believe did not come before the Court in the Fuller case and that is the doctrine enunciated in the Rock Hill case. I am asking that in a case where this court decided that the Stovall doctrine be enunciated.

Apparently one of the Justices, I can't remember which one, was confused as to what doctrine applied in Fuller. But I think it apparent that the Johnson doctrine applies which limits retroactivity to cases which have already been tried. And those cases are waiting trial, perhaps awaiting the very decision of this court are going to be affected.

Q Tell me, Mr. Cahn, was 605 expressly repealed in the Safe Streets Act? I don't know.

A I would say so.

Q Well, I mean in terms. Did it say Section 605 is hereby repealed?

A I am informed, yes, that it did.

Therefore, it was our contention ---

Q I don't see --- I know that your brief said that it is no longer in force, having been repealed in June of '68 by an Act in Congress.

A Apparently Mr. Levine who wrote the brief informs me that the Safe Streets Act expressly repealed Section 605 which I believe abates it and should not even be applied.

May I proceed further now?

Q You were saying that Berger should not be retroactive, that 605 should be abated and then you hope that Lee against Florida, something drastic will happen to that. Is that correct?

A Well, the terminology of drastic or not, Mr. Justice Fortas, is beyond me. I don't see it as a drastic change.

Q To win your case, you have got to prevail on the first two points or one of the first two points?

A On retroactive, I believe insofar as the Fourth Amendment and 605 is concerned, yes.

Q You can just rely on Fuller against Alaska to win as far as 605 is concerned.

A Yes, sir.

Q That squarely supports your position.

A That is correct, sir. Maybe I was presumptuous to bring the Rock Hill argument before the court in this particular case for which I apologize. But I thought it important enough to bring it to the attention of this court because I don't think it was brought before the court in the Fuller case nor was the Stovall argument brought before the court in this particular case.

I think it was Justice Brennan who thought that Stovall did apply. There is a big difference. There is quite a difference, and an important difference insofar as my own particular county is concerned and that is why I presume to bring the argument before the court and I sincerely apologize.

I hesitate in view of what Mr. Justice Fortas stated to argue the application of the Fourth Amendment to wiretapping. There are those who believe that it was not clearly enunciated in Berger and Katz. I am one of the minority.

Berger and Katz were eavesdropping cases. I think this is the first time in this particular era that wiretapping, the interception of telephonic communications comes forth square before the court.

I just would like to take a few moments to express

the fact that if the personal theory were extremely -- were interpretated to its extreme, law enforcement would be placed in a position of terrible uncertainty.

The policeman who stands behind a bush to observe two people who seek the corner of a park believing themselves to be free and in complete privacy would not know whether he was to first run to get a court order, shadowing, the use of binoculars, the turning on of a flashlight in a dark place, the overhearing of conversations in a corner of a room would all be placed in an area of uncertainty which I believe places an undue burden on law enforcement.

One might ask if I do not accept the personal theory -- and mind you as a law enforcement officer I must obey the law as it is written and as it is interpreted by the courts.

Although the personal privacy theory which was expounded in Katz is accepted by the court, I suggest that there should be some touching, some connection, that the wiretapping, the personal privacy theory should not be extended therefore to wiretapping where there is no touching, where there is no contact whatsoever.

When there is no contact with a specific place ---

Q Well, this is really arguing that we ought to overrule Lee against Florida?

A No, sir, because again these particular cases did not involve wiretapping. They involved eavesdropping.

Q Lee involves the equivalent of wiretapping.

A Lee did not involve a tap; it involved an extension of a telephone.

Q The equivalent of wiretapping.

A If the court so believes, I don't think that that applies. But in any event, because of the position which the personal privacy theory would place on law enforcement and because of the undue harm in my opinion which it would cause as a result of placing law enforcement in such a position, I believe that the Fourth Amendment should not be applied to the interception of telephonic communications and as a result of the arguments heretofore mentioned, I think that people against Kaiser should be sustained.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Boitel.

REBUTTAL ARGUMENT OF HENRY J. BOITEL, ESQ.

ON BEHALF OF PETITTONER

MR. BOITEL: May it please the Court.

Toward the beginning of Mr. Sabbatino's argument, Mr. Justice Fortas asked whether there was just a simple narrow issue in this case. The fact is that there is not a simple narrow issue. There are no less than 12 separate, distinct reasons why the Petitioner's conviction must be reversed.

Eleven of those reasons have to do with statutory and constitutional prohibitions concerning wiretapping directly.

The twelfth has to do with the characterization of those wiretaps before a jury repeatedly and intentionally as absolute unqualified confessions.

Also, I believe it was Justice Fortas who asked about the effect of the unconstitutionality of Section 813a. In Berger, Mr. Justice Clark specifically held in his opinion he specifically stated that the statute being unconstitutional on its face, we need not look into the order, the probable cause or any of the other requirements, that the petition of Berger's conviction had to be reversed.

Now, the wiretapping aspects of the statute are exactly the same as the bugging aspects of the statute. To follow Mr. Justice Clark's rationale in the present case would definitely require the reversal of the petitioner's conviction.

There are two retroactivity aspects to this case. The first aspect is the 605 retroactivity argument. Granted, if Fuller against Alaska is to be applied strictly to the Petitioner Kaiser, then the 605 argument is not available to him.

But we suggest to this court that at least as to the Petitioner Kaiser, Fuller was inappropriately decided.

In the first place, the Petitioner Kaiser was before this court at the same time that Fuller was before this court. In fact, certiorari had been granted in Kaiser's case before certiorari had been granted in Fuller's case.

However, the court went on to decide Fuller summarily, without the benefit of full brief and oral argument. The supplemental reply brief in the case presently pending before this court, Desist against the United States, indicates that in fact the telegram situation which Fuller involved involved the subpoena which was not revealed to this court and that Section 605 specifically permits the subpoena of telegrams.

In that event, then on its facts, Fuller was inappropriately decided. But specifically getting down to the policy reasons why Fuller should not be applied to Kaiser, first, Fuller was predicated upon the concept of good faith on the part of prosecuted authorities.

This court in Benanti agsinst the United States had before it the exact same statute which is before the court in the present case. And in that case this court said that wiretapping by state authorities is criminal behavior.

When Mr. Cahn's office wiretapped in this case, it knew from Benanti that it was then and there engaged in a criminal act. I do not see how good faith can be predicated upon the knowing commission of a criminal act. District Attorney Hogan in his testimony before a Senate Subcommittee on the Judiciary testified that the District Attorneys of New York are waiting for Benanti to be overruled because we have in the past been committing criminal acts.

There was a motion made in the present case to

suppress the evidence, pre-trial. The judge in his opinion on that motion indicated his dissatisfaction with the due process requirements involved in wiretapping.

The trial judge in the present case indicated that he thought the Fourth and Fifth Amendments were violated by wiretapping but he felt himself bound by the decisions of higher courts.

For those reasons, we would specifically, we would respectfully urge that Fuller be overruled at least as far as the Petitioner Kaiser is concerned.

On the question of the retroactivity of Berger and Katz and that series of cases, in the first place, this court has not specifically passed on the question of wiretapping. If through this case this court holds wiretapping to be unconstitutional it will be a case of first impression.

Secondly, this court in applying the Berger and Katz rationales to this case would in effect be applying Mapp because Mapp is the case that determines what the exclusionary rule is concerning search and seizure.

All of the events in this case occurred after the decision in Mapp.

Q (Inaudible.) A holding that wiretapping, too, might comply with Fourth Amendment requirements?

A Actually there is no doubt in my mind that Berger and Katz in effect apply to wiretapping. Katz itself

was a case that involved a telephone booth. The analogy to go into a telephone booth and closing the door, et cetera, I don't see how logically one can distinguish wiretapping from bugging.

However, the fact is that this court has not specifically passed on the question of wiretapping and we have Mr. Cahn's office here very strongly urging this court that wiretapping is not unconstitutional so, of course, we must make that argument.

Thank you.

(Whereupon, at 1:45 p.m. the oral argument in the above-entitled matter was concluded.)