In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

vs

VING KAHN and
MINNIE KAHN,

Respondents.

No. 72-1328

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December 11, 1973

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	
v.	No. 72-1328
IRVING KAHN and MINNIE KAHN, Respondents.	

Washington, D. C.,

Tuesday, December 11, 1973

The above-entitled matter came on for argument at 2:45 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

MISS ANNA R. LAVIN, 53 West Jackson Boulevard, Chicago, Illinois 60604; for the Respondents.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Andrew L. Frey, Esq., for the Petitioner	3
In rebuttal	42
Miss Anna R. Lavin, for the Respondents	25

[Second day - pg. 15]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1328, United States against Irving Kahn and Minnie Kahn.

Mr. Frey.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to review a judgment of a divided panel of the United States Court of Appeals for the Seventh Circuit, suppressing certain telephone conversations which were recorded during the course of a court-authorized wire interception of respondent's telephones pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

After a thorough investigation, the results of which are detailed in an affidavit that was submitted in support of the wire interception application, and is set forth at pages 9 through 20 of the Appendix, Federal law enforcement agents developed probable cause to believe that Irving Kahn and an associate, one Jacobs, were involved in conducting illegal gambling enterprises in violation of Illinois and of federal law.

This information included detailed statements of

three reliable informants which were checked and verified in various ways, including examination of telephone records.

Since it was concluded that sufficient evidence to prove the offense and to illuminate its full nature and extent, including the identify of any confederates, could not be procured by conventional investigative techniques, an application was made to Judge Campbell, of the District Court for the Northern District of Illinois, for an order authorizing interception of wire communication on the Kahn and Jacobs home telephones.

This order was issued by Judge Campbell on March 20th, 1970. In the order he made the following findings, and this is at page 21 of the Appendix, he found, first, that there is probable cause to believe that Irving Kahn, Jake Jacobs, and others as yet unknown, have committed and are committirg offenses involving ghe use of interstate telephone communication facilities for the transmission of bets and betting offenses.

He secondly found that there was probable cause to believe that particular wire communications of Irving Kahn, Jake Jacobs, and unknown others, concerning these offenses will be obtained through the interception, authorization for which is applied for.

He found that normal investigative procedures reasonably appeared unlikely to succeed.

Finally he found that there was probable cause to believe that the telephones in the Kahn household had been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above-described offenses.

Therefore he issued an order which authorized the Federal Bureau of Investigation to intercept wire communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from the Kahn household telephone.

Now, he provided that such interception would not automatically terminate with the first conversation that was intercepted, but that it shall continue -- and this, I am reading on page 23 of the Appendix -- until communications are intercepted which reveal the manner in which Irving Kahn, Jake Jacobs, and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of bets and betting information and in aid of a racketeering enterprise, and which reveal the identities of their confederates, their places of operation, and the nature of the conspiracy involved therein.

Judge Campbell authorized this interception to continue for a period of fifteen days. He directed, as the statute requires, that efforts be made to minimize the interception of conversations not relating to the offenses

under investigation, and he provided for five-day status reports by the attorney applying for the order.

Now, pursuant to this authorization, conversations over the Kahn household telephones were intercepted for five days, beginning on the evening of March 20th. The results are spelled out in the interim status report, at page 26 of the Appendix.

They included on Saturday, March 21st, the first full day of the interception, fifty telephone calls, approximately, involving the placing of bets amounting to about fifteen thousand dollars. They involve conversations between Irving Kahn in Arizona and Minne Kahn at the Kahn home in Chicago, in which gambling activities and losses were discussed.

These conversations provided the interstate component of the charges under 18 USC 1952. They involved also, on that same day, conversations between Mrs. Kahn and known gambling figures advising of the number of bets placed, the amounts of these bets, the identity of the bettors.

Two days later, on Monday, the --

QUESTION: Now, the interstate conversations between Mr. Kahn and Mrs. Kahn were, you say, related to wagering?

MR. FREY: Related to wagering.

QUESTION: But was one a bettor and the other a bookmaker, or what?

MR. FREY: You mean Mr. or Mrs. Kahn?

QUESTION: Yes. Or what --

MR. FREY: They were related to the conduct of the -- what turned out to be the Kahn family gambling enterprise.

Now, I don't know that I'm in a position to disclose here the actual content of the conversations beyond what's in the record, but --

QUESTION: And the record shows what was the content, relating to wagering, is that all it says?

MR. FREY: It was relating to wagering. I think if there were some problem as to whether these were sufficient to establish the jurisdictional element of the substance of offense charged, that would have to be taken up at a later stage of the proceeding.

QUESTION: The conversations,however, were simply related to wagering, it's not -- the record doesn't show that there was an offense committed during these conversations.

MR. FREY: Well, it is an offense to use facilities --

QUESTION: Can't you talk about wagering on interstate?

MR. FREY: Well, it is an offense, under 1084, which they were not charged under, to transmit wagering information over interstate --

QUESTION: Right.

MR. FREY: -- lines, such as the latest Las Vegas line on a game or something like that. It is an offense under 1952, which the Kahns were charged under, --

QUESTION: Yes.

MR. FREY: -- to use any facility in interstate commerce with the intent to -- and then one of the things is: otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on of any unlawful activity, which was defined as --

QUESTION: Well, does the record show that these conversations clearly came within that statutory language?

MR. FREY: Well, there has been no challenge to date that these conversations didn't come. I assume that a motion could be made to dismiss the indictment at some subsequent point, but --

QUESTION: We're not at that stage; that's not involved in it.

MR. FREY: We're not at that stage, no.

QUESTION: I see. All right.

QUESTION: Mr. Frey, were the conversations between Mrs. Kahn and, I think you referred to them as

gambling figures; were those intrastate? Does the record show?

MR. FREY: As far as I know, those were intrastate.

QUESTION: All right.

MR. FREY: Now, when Mr. Kahn returned from Arizona to Chicago, on Monday he had further conversations with known gambling figures regarding the results of the weekend's wagering activities.

In view of the success of the interception in achieving the purposes for which it was sought, it was discontinued after five days, rather than continuing for the fifteen days which Judge Campbell had authorized it.

With the evidence thus procured, Irving and Minnie Kahn were both indicted for violation of 18 USC 1952.

They moved to suppress the evidence procured by the wire interception, and the District Court granted the suppression motion, first of all, as to conversations between Irving and Minnie on marital privilege grounds; secondly as to all conversations of Minnie's, because the interception was not authorized by Judge Campbell's order in the view of the District Court; thirdly as to all conversations in which Irving did not participate on the same grounds.

On the government's appeal, the Court of Appeals

reversed on the marital privilege, holding that it affirmed the suppression of all conversations of Minnie Kahn on the ground that she was not a person unknown, within the meaning of Judge Campbell's order.

In so doing, the Court construed the statutory requirement for identification of a person if known in the application and in the order, to require the naming of any known user of the phone, whose complicity in the offense might have been discoverable by careful investigation. It found that the government had not proved that Minnie Kahn was not such a person.

This evidentiary finding by the Court of Appeals was made without any record having been developed on the subject and, indeed, I suggest that the affidavit of the FBI agent, at the top of page 11 of the Appendix, indicates that the belief of the investigating officials at the time was that if Irving Kahn was not there the bets would be routed through Jake Jacobs. So there is some question about the correctness of the Court of Appeals' conclusion in this regard.

The Court of Appeals also construed Judge Campbell's order to authorize only the interception of conversations of Irving Kahn -- in other words, he had to participate in all the conversations and the other party had to be a person unknown.

It considered this construction of the statute in order to comport with a policy of protecting individual privacy and to avoid making interception authorizations a virtual general warrant, as it put it. Judge Stevens dissented.

Now, we submit that Minnie Kahn was a person unknown within the meaning of both the statute and the order, and that the interception of her conversations regarding the illegal gambling enterprise was lawful and proper and produced evidence fully usable in the criminal prosecutions.

In order to remove any possible confusion, I'd like to begin by indicating what this case does not involve. It does not involve the general facial constitutionality of Title III, the wire interception provisions of the Omnibus Crime Control Act.

These, by the way, have been uniformly upheld by the lower courts, were challenged, with the exception of one subsequently reversed District Court opinion in Philadelphia.

Secondly, it does not involve any finding that the government in fact knew that Minnie Kahn was involved in the illegal enterprise, and that she was in fact a target of this government investigation, but the government failed to name her in the application. No such finding was

involved.

QUESTION: I think I understand that you're defending her.

MR. FREY: Yes, there is no finding in this case, there is no contention to this point, that the government actually knew Minnie Kahn to be involved in this gambling enterprise, and,for reasons that escape me as far as motive, declined to name her in the application for the wire interception.

It's not like the situation that you spoke of in Coolidge, where they knew perfectly well they were going to intercept criminal conversations of hers, and didn't name her in the authorization.

QUESTION: Well, do you suggest that the government had probable cause to know that two people, A and B, were using a phone for illegal activities, and they got a warrant for A, to intercept A's conversations; they could not intercept B's conversations, except those with A. Is that what you're suggesting?

MR. FREY: Well, I'm not suggesting that. If the case arose where that was a problem, I would be prepared to argue that the -- although I think that that is analogous with the position that the "plain view" discussion of Coolidge, which was joined in by four Justices, took. That is, if the government knew and had as a target A and B,

and it only named A and it didn't name B, although B was a target of the investigation and they had probable cause.

QUESTION: So the government in these cases just doesn't get authorization to listen to conversations on the phone just because it knows a phone is being used for illegal purposes doesn't mean it can listen to all the conversations on that phone.

MR. FREY: Oh, absolutely, it can if it has a court order authorizing it to intercept conversations over that phone, if it's met the probable cause requirements of the statute. It doesn't have to name a soul if it doesn't know anyone.

QUESTION: Well, if it doesn't, what difference does it make if it does?

MR. FREY: Well, that's an interesting question, and I might also --

QUESTION: Well, that's what's involved in this case, isn't it?

MR. FREY: No, I don't believe it's involved in this case, Justice White, because here there was not a situation where the government knew that Minnie Kahn was involved.

QUESTION: Well, I know, but even if it did.

MR. FREY: Well, it would be our contention that even if the government did, it could still at least

intercept Irving's conversations with her.

QUESTION: But you might have a more difficult case, that's all you're saying, isn't it?

MR. FREY: It might be a more difficult case, although I would be prepared to argue that the interception --

QUESTION: But you don't need to argue it here, that's your only point.

MR. FREY: That's correct, Mr. Justice Stewart, yes.

Now, finally, there is no allegation that there was a failure to minimize here. That is, there was no claim made to date that the government improperly listened to innocent conversations. We are talking here about the interception of conversations about a criminal enterprise.

I'd like first to dispose of Judge Campbell's order.

MR. CHIEF JUSTICE BURGER: We will resume at that point, at ten o'clock.

MR. FREY: Thank you.

[Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Wednesday, December 12, 1973.]

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 72-1328
IRVING KAHN and MINNIE KAHN, Respondents,	:	

Washington, D. C.,

Wednesday, December 12, 1973.

The above-entitled matter was resumed for argument at 10:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Frey, I think you have about fifteen minutes remaining. You may proceed.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER [Resumed]

MR. FREY: Mr. Chief Justice, and may it please the Court:

I think I was about to start, yesterday, with a discussion of Judge Campbell's order authorizing the wire interception in this case.

The Court of Appeals read the order as though it was limited to the interception of conversations of Irving Kahn with persons unknown, that is, only conversations between Irving and persons unknown. In fact, the order read "conversations of Irving Kahn and others as yet unknown". We submit that it's clear, as Judge Stevens indicated in his dissent, that that would authorize the interception of all the conversations that are in issue in this case.

QUESTION: I take it you mean by that that if some sort of meeting were held in his home, in Kahn's home, and other members of the organization handling it were present, their use of the phone would be covered by this authorization.

MR. FREY: Yes, certainly. Any conversations

over those phones relating to the gambling offenses would be covered by the order.

This is a standard form of language that wire interception orders almost routinely contain, where there's not any special restriction that's intended to be imposed on the scope of the interception.

QUESTION: Would you think that the warrant in the authorization would be adequate if there were persons then known to the government who were working as part of this group with Kahn, and yet not identified in the warrant, but if they came to his house and used the phone?

MR. FREY: Well, let me begin by saying that as a constitutional matter I think there is no requirement of identifying the person, so long as the conversations are identified with sufficient particularity.

Now, Justice White was touching on this question yesterday, whether, as a statutory matter, Congress intended some sanction or suppression to result from such a lapse on the government's part.

Now, I think that the consequence of saying that after the interception has been completed and a prosecution is brought, and these are frequently highly complex prosecutions, with numerous defendants, involving a far-reaching conspiracy, the government should not be put to the proof of showing, with respect to every conversation, that

it didn't somewhere, somehow have probable cause that somebody could dredge up on the basis of which they might have anticipated intercepting the conversations of some individual. So I think it would be our position that as long as you name the primary target of the investigation, whose zone of privacy you're expecting to intrude upon -- which in this case would be Irving Kahn and his household telephone -- that that should suffice. And that then all unlawful conversations over the phone can be intercepted.

Now, the statute is quite clear, and the Court of Appeals, in referring to the statute, did not fully quote it in discussing this "if known" problem. Section 2518(1) provides that the order, or the application for the wire interception order shall contain certain information.

In subsection (b)(iv) it requires that the government indicate "the identity of the person, if known, committing the offense and whose conversations are to be intercepted."

Now, two things emerge from this provision with, we submit, indisputable clarity.

The first is that it concerns persons, if known, to be committing the offense, and not just persons who are known in some other broader or vaguer sense.

The second is that the statute contemplates circumstances in which no one may be known and therefore

no one need be named, yet, nevertheless, the government may apply for and obtain from a judge an order authorizing a wire interception.

That might be the case, say, if you had a cigar store or a pool hall where you knew gambling or drug business was being conducted over a telephone, but you did not know the identity of the persons involved.

QUESTION: Would you say that was by negative implication --

MR. FREY: I would say, yes.

QUESTION: -- from (4)(a)?

MR. FREY: Yes.

QUESTION: The "if known" contains a negative implication that if --

MR. FREY: If no one is known, no one need be named.

QUESTION: -- if no one is known it would still be permissible?

MR. FREY: Yes, I think it does.

QUESTION: You have to get there by a negative implication, don't you?

MR. FREY: Well, we begin with there being no constitutional requirement for this identification, and then we look to see whether the statute has imposed requirements in addition to those that would be required for

a conventional search warrant. And the requirement should be read, at most, to require what it specifically says.

QUESTION: Mr. Frey, is there any significance in the omission of "committing the offense" in --

MR. FREY: In subsection (4)?

QUESTION: Yes, in subsection (4), where -- the distinction is between Roman numeral (iv) in (b).

MR. FREY: We believe that cannot be read to have any significance, because the only source of information for the judge's order, which that subsection deals with, is the application that's been submitted to him. If we're not required to identify in the application other known persons whose conversations may be intercepted, then --

QUESTION: Well, then you're suggesting that it ought also be read into Arabic (4) what's in Roman (iv), committing the offense?

MR. FREY: Yes, we would suggest that, and it seems to us logically inescapable to do that.

Now, none of the underlying concerns, I think, in a case of this sort is the difficulty of the possibility that conversations --

QUESTION: Well, is there anything in the legislative history that might explain the omission in Arabic (4)?

MR. FREY: The legislative history on this is very,

very limited. These provisions, the "if known" provisions were not in the original bill, they were in Professor Blakey's version, and he was counsel to the committee, and as the bill emerged from committee it contained the "if known" provisions --

QUESTION: Just as they are now?

MR. FREY: -- as they are now; and there was an explanation, which was the typical recitation of what they provide with a cite of a case called West v. Cavell, which dealt with arrest warrants and not with search warrants. Which is a little difficult to understand, why it was even referred to.

Now, there is a legitimate concern with the problem of intercepting innocent conversations and conversations of innocent persons who may be in the household, or who otherwise may be calling in or out from the intercepted telephone. But I think it's clear that Congress anticipated that this was inevitable and that indeed any wire interception must necessarily entail some limited degree of interception of innocent persons or innocent conversations.

I'd like to give some examples of some typical conversations, which I think will make this clear.

First of all, we have -- the phone rings and, let's say, Mrs. Kahn picks up the phone and says Hello. Now,

at this point the question is, should the people monitoring simply turn the recording off right away because it's not Irving Kahn?

Well, I think the answer to that is quite clear, because the next -- and the answer is clearly no, they can't turn it off at that point because the next words may be, "Is Irving at home?" "Yes, I'll put him right on the phone."

Now, if they can listen past the "hello", past the time that Minnie Kahn gets on the phone, the next question may be, or the next statement may be, "I'd like to bet five hundred dollars on the Bears. What's the spread?" And she may say, "Well, five points, but you owe us a thousand dollars and we can't take any more bets from you."

Well, since they have to be allowed to hear this far into the conversation, once this has been monitored and lawfully monitored, there's no policy, either constitutionally or statutory,that could possibly be served by saying, well, they heard it but they can't use it in evidence, they can't use it to prove the offense, because they didn't name Minnie in the order.

QUESTION: Suppose, Mr. Frey, that the person who answered the phone is not Mrs. Kahn and totally and truly unknown at that time when it is recorded on the tape, and later, by some extraneous evidence, some independent

evidence, they are able to link that conversation, perhaps through the other party, and identify the speaker. You, I take it, would think that telephone conversation would be admissible in evidence, then?

MR. FREY: I think there's no doubt of that, and, with the exception of this Court, every court has held that where the main target is one of the parties to the conversation, that conversation can be intercepted.

QUESTION: By "this Court", you mean the Seventh Circuit?

MR. FREY: The Seventh Circuit, I beg your pardon, yes.

Here we have two categories of conversations, the conversations between Irving and Minnie, as to which I can't understand any basis for excluding those, so long as they deal with the illegal gambling enterprise, since Irving was named in the order, he was the person whose zone of privacy was being lawfully invaded pursuant to this warrant, he did conduct conversations about the gambling enterprise, I can see no basis for suppressing those.

Now, similarly, with respect to the conversations between Minnie and third parties, where she was transmitting gambling information or taking bets in violation of State law, there, too, they were properly on the phone, they properly heard these conversations, and they had to, as you

can see from the examples that I've cited, I think there is no basis then or no justification of policy reason for excluding them.

I see my time is running short. I think that I'd just like to make one or two more comments and then save the balance of my time.

The Court of Appeals suggested that somehow the government should have conducted a further investigation of Mrs. Kahn, which they thought might have disclosed her complicity in the illegal enterprise. We suggest, and we've argued this at some length in our brief, that this does not serve Mrs. Kahn's privacy interest, does not serve any privacy interest that the Fourth Amendment is designed to protect, since, whether or not the investigation disclosed her complicity, the interception of her conversations could still take place.

Finally, on the standing point, which we also avert to in the last section of our brief, I'd simply like to cite Alderman -- footnote 9 in Justice White's opinion in Alderman. There is a discussion of the standing problem, and there is a reference to the legislative history, which is at page 91 of the Senate Report, Report 1097, and it was quite clear there that the normal Fourth Amendment constitutional standing rule was intended to be adopted in these wire interception cases, and under

that rule we think it's clear here that any defect that may have existed was purely personal to Minne Kahn, and Irving Kahn should have no standing to raise the issue.

If there are no questions at this time, I'd like to reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: All right, Mr. Frey.

Miss Lavin.

ORAL ARGUMENT OF MISS ANNA R. LAVIN,

ON BEHALF OF THE RESPONDENTS

MISS LAVIN: Mr. Chief Justice, and may it please the Court:

I don't know that I entirely understood the latter part of counsel's argument relative to standing. The statute itself provides standing for any person aggrieved, and I think that is conclusive on who has standing.

Along with that I would like to contest part of what the government has stated that this Title III case does not involve.

It does here, contrary to what he said, have a minimization issue. That was not ruled on in the court below as not necessary, perhaps. It was somewhat ruled upon by virtue of this case. The sufficiency of the affidavit and the application are not finally settled.

It also has an issue of proper or improper

authorization. In that regard, the government indicated that we have all the normal papers. We got none of the affidavits to determine if this was one of the so-called Lindenbaum cases.

This case was decided in the District Court in November of 1971. The leading Robinson case, referring to the Lindenbaum affidavits, was some six months later.

So those are battles that we have yet to fight. And I make reference to this only because the government has indicated that we got all the customary papers.

Again, and this might have been a misstatement, he said that the indictment had been dismissed. On the contrary, the evidence has been suppressed but the indictment continues to be viable.

The trial court merely suppressed the evidence that Minnie Kahn had, on or about March 21st, 1970, and particularly some conversation she had with Irving Kahn on that date; he was in Arizona, she was in Skokie, Illinois. This was, at the trial court level, suppressed principally upon the husband-and-wife privilege.

Secondly, it was suppressed on the ground that Minnie, though a known person, was not named in the authorization order. Particularly the trial court found, and this is at page 52 of the Appellant's Appendix in the Court of Appeals, any conversations exclusively between

the defendant Irving Kahn and his wife Minnie Kahn are privileged communications, and thereby suppressed. The motion of the defendant Minnie Kahn to suppress her intercepted conversations is granted, as they were not authorized by Judge Campbell's order. The motion of the defendant Irving Kahn to suppress intercepted conversations to or from his home is also granted to the extent that he did not personally participate in such conversations.

Now, these three are the bases of the government's appeal from the trial court.

Now, we would refer the Court to the decision of the Court of Appeals. There we had three separate decisions, the majority holding that the non-Irving communications were not authorized. One judge agreed with the trial court, that the Minnie-Irving conversations were privileged and recognized as such by the statute as privilege and should have been excluded.

Neither the tapes nor the report said, that was delivered to the trial court, was any part of this record -- I meant to the authorizing court, was any part of the record at the trial court level, nor at the Court of Appeals level.

Mr. Justice Stewart asked yesterday about that. The answer to your question is, the report about which you asked was filed in this Court for the first time. There is

nothing in the record to even suggest the content of the marital conversations.

And in this posture and with due recognition that this is, I believe, the first Title III case before this Court, we have the further recognition that will be followed by more sophisticated arguments on Title III, we do see in this case a basic constitutional issue.

If, as the government urges, we were to equate Title III conversations with the Fourteenth Amendment -- the Fourth Amendment, this Court has to decide whether a conversation is the equivalent of a place to be searched or whether those conversations are an incident or an element of the person.

The government's argument tends to ask you to equate a telephone with the premises to be searched.

We submit, on the other hand, that a telephone conversation is the property of the person not of the phone, of the person whose thoughts, whose ideas, whose reactions are reflected by that conversation.

We submit that a telephone is not a premises, it's not an enclave, it's not a curtilage, the phone retains no property, it's only the wiretap that retains the personal utterances.

In that respect we think there is also a quality of the Fifth Amendment in this case, because the goal of

the wiretap is the securing of incriminating statements of persons named in the order. They don't listen for innocent conversations and accidentally come across evidence or instrumentalities of crime.

QUESTION: What would you have to say about the question I put to Mr. Frey, if -- I'll change it a little bit: Suppose Mr. Kahn hired one of the people who was in his organization to come and work at his house, someone not named in the authorization or the order, and his conversations with people placing bets are overheard; admissible or not admissible?

MISS LAVIN: Not admissible.

QUESTION: And why?

MISS LAVIN: Our position is that -- and this would take us, of course, to the application and to the affidavit, which we reach later; and that is that Mr. Kahn at the time of this conversation was off the premises.

Now, let us assume he is on the premises and someone else takes over the phone and enough is heard accidentally, in that case, to determine that someone else is now involved with him in the gambling operation. But, under the circumstances in this case, where he is not on the premises, then the information secured would not be admissible because it had not been pursuant to the order nor had it been -- nor had any order been obtained on

probable cause.

But we have to look at that in the posture of this case.

The LaGorga case that the government adverts to is, I think, fairly applicable here. In that case two of the principals were known to visit a certain health club, an order issued and it said: You may listen in on the phone at the health club, but you may only listen when one or both of the known persons are on the premises and when one or the other of the known persons is involved in the conversation.

In other words, I think the important distinction here is Mr. Kahn's being off the premises.

If I may just finish up the thought I suggest, and that is that this is an invasion of the person, I would also suggest the Congress understood this to be an invasion of the person when it specifically excluded any privileged conversations.

Now, of course, privileged conversations do not refer to premises, they refer only to people.

Now, I would like to go, if the Court please, to the persons unknown and whether Minnie Kahn can be brought within the shelter of "persons unknown".

I'm going to refer you first, if I may, to the affidavit which is found at page 9 of the Appendix before

this Court.

At 3a they state this: "There is probable cause for a belief that Irving Kahn and Jake Jacobs have been and are now committing an offense involving the use of telephone communication facilities in interstate commerce with intent to carry on the offense of wagering on sports events in violation of" Illinois law.

Then, on the next page, the affidavit says: "There is probable cause to believe that telephone numbers" and the numbers at the Kahn residence and telephone numbers at the Jacobs residence "are being used and will be used in carrying out the offenses in paragraph 3a", which I just read.

The affidavit continues, in effect defining how this operation is run by Kahn and how it is run by Jacobs. No one else is adverted to as being a part of this operation. The only persons who are referred to thereafter are bettors and linesmen -- I don't mean linesmen in the sense of football.

So, eventually, without another word being said about parties unknown, we come to the last paragraph on page 20, where the request is made: "It is requested that this intercept not terminate", et cetera, to "reveal the manner in which Irving Kahn, Jake Jacobs, and others yet unknown participate in the illegal use of interstate telephone

facilities."

QUESTION: Where are you reading from, did you say?

MISS LAVIN: That's on page 20.

QUESTION: Page 20 of the Appendix -- I don't see it.

MISS LAVIN: Starting at the bottom of 19 on to 20.

The only persons who could fit into that description, I submit, are the bettors and the linesmen, who are adverted to in the earlier part of the affidavit.

Now, I think the government --

QUESTION: You've gone just a little too fast for me there.

MISS LAVIN: Yes, sir.

QUESTION: And at the top of page 20, are you telling us that the words "and others as yet unknown participate in the illegal use of the interstate facilities" and so forth excludes anyone in the Kahn house?

MISS LAVIN: Nobody is mentioned in the entire affidavit from the Kahn house. The only person --

QUESTION: Well, Mr. Kahn is mentioned, isn't he?

MISS LAVIN: Mr. Kahn, yes.

QUESTION: Yes.

MISS LAVIN: Yes, he's mentioned.

QUESTION: It's his house and his telephone.

MISS LAVIN: That's right.

QUESTION: And the allegations are, in the affidavit, that he's the man who's conducting this illegal enterprise.

MISS LAVIN: That's right.

QUESTION: And then there's the blanket phrase "and all other persons unknown"; and of course that assumes, in part at least, that a great many people, and possible then to be identified, are going to be calling in.

MISS LAVIN: Calling in, that's right.

QUESTION: Yes, these are the bettors.

MISS LAVIN: The bettors, yes.

QUESTION: But do you say it excludes his confederates in the conspiracy if they call in, to talk about the details?

MISS LAVIN: Oh, no, indeed I do not. No, I certainly don't mean if his confederates in the conspiracy call in, that they would be excluded. But --

QUESTION: Do you say it excludes his helpers who come to his house to answer the phone?

MISS LAVIN: And I say if he's on the premises and they pick up a call of that nature, that it shows itself to be a part of the conspiracy, that would be permissible.

QUESTION: The evidence would be admissible.

MISS LAVIN: Yes, sir.

QUESTION: But not Mrs. Kahn.

MISS LAVIN: Not Mrs. Kahn, in the posture of this case.

QUESTION: How do you distinguish Mrs. Kahn from one of his other helpers?

MISS LAVIN: Well, I think we can do that from the record. Knowing of course, and starting with the predicate that not one word was said about Mrs. Kahn in any of the affidavits.

The government recognized in its argument the elimination of Mrs. Kahn from any probable cause. It then argues in this fashion, and this is at page 26 of its brief in chief: "Since Mr. Kahn could hardly be assumed to be invariably at home and available, someone would be expected on occasion to receive calls relating to the business on those telephones."

But that is belied by the Appendix, which states at page 11, in the first paragraph: "Kahn's bettors contact either Kahn or Jacobs and place their bets. When Kahn is out of town or vacationing all bettors will call Jacobs, and vice-versa".

QUESTION: I understand the government's position to be that they knew Mrs. Kahn was there, they were aware that there was a Mrs. Kahn, but they were not aware that she was in their syndicate.

MISS LAVIN: That is the government's position and --

QUESTION: What's wrong with that position?

MISS LAVIN: Well, we submit to the Court that it does not satisfy the statute, that it's a contortion or a distortion of the words on the requirements for securing of an order.

The statute --

QUESTION: You mean the --

QUESTION: Do you say that the order would have to include the wife and all of the children? Assume it was a family with sixteen children, it would have to include all of them?

MISS LAVIN: No, sir, but by exclusion it's indicated that there's no probable grounds or probable cause to listen in to their private conversations.

QUESTION: I don't follow you.

MISS LAVIN: Well, Your Honor, the --

QUESTION: Just the word "unknown" -- sure, she's known, anybody "known", all they have to do is pick up the telephone book.

MISS LAVIN: And the argument of the government is the identity of the person,if known, whose communications are to be intercepted, as the statute reads.

QUESTION: The government assumed that what she'd

be talking about over the phone would be ordering food, and any gossip.

MISS LAVIN: Yes.

QUESTION: But, lo and behold, they found out it was something else. But they didn't know that when they got this indictment.

MISS LAVIN: When they got the order, they didn't, yes, sir.

QUESTION: I meant the search warrant.

MISS LAVIN: But should they have been listening to her ordering meat, I submit that they should not have.

QUESTION: Well, I thought that the order said that. The order said you should not listen to other matters.

MISS LAVIN: That's right. That's right, but --

QUESTION: So when the order was issued, she wasn't affected at all, was she?

MISS LAVIN: That's right.

QUESTION: Unless she was in the conspiracy.

MISS LAVIN: It appears that she was handling some gambling business, that's right. But they had no basis for listening to her.

The government argues that this should be excused. I submit it should not. But they say it should be excused, because they can get one of these orders without naming anybody. Well, that means that they don't know anybody

to name.

I think the wording of the five requirements is beyond question. You can say the name of the person if known. They don't say the name of the person if known to be in the gambling business; they say the name of the person if known.

And I suggest that it's a distortion of the plain words of the statute, to amend it to say you have to name the person if you know -- only you don't have to name him if you don't know if he's in the business.

The requirements of that statute, both the name of the person if known and the four other requirements, are mandatory conditions. They're set forth in the statute, we think, to meet the precision and discrimination discussed by this Court in Katz, where this Court said that under sufficiently precise and discriminate circumstances a federal court may empower a government agency to employ a concealed electronic device for the narrow and particularized purpose of ascertaining the truth of the allegations of a detailed factual affidavit alleging the commission of a particular offense.

If any of those requirements are omitted, the warrant itself loses -- or, rather, the order itself loses precision and the discrimination that is required by this Court under Katz.

Also you don't have the other requirement of Katz, the narrow and particularized purpose, nor are you looking here for the truth of the allegations as to whether or not Katz is running a betting operation on his premises.

This listening indiscriminately to the conversations of the children and of the wife would not lead to the end that is indicated as the purpose under the Katz case.

The government, in its argument in its brief -- both the brief and in its argument here, relies in great measure on the "plain view" doctrine that this Court discussed in the Coolidge case.

As this Court found in that case, it said that the doctrine was not applicable to a search of a particular Pontiac automobile, which stood plainly in the driveway. We suggest that should also apply here, where the search centered on Minnie Kahn, and Minnie Kahn and her two children were known occupants of the premises.

In Coolidge, you said: The "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Well, we submit to the Court that if you can't extend from one object to another, then we don't think you can extend from Irving Kahn to Minnie Kahn.

I also would take up with the Court the matter of notice.

In our fourth point in our brief we complain about the secrecy of these court-authorized interception proceedings. Most particularly we complained about having no access to files to determine, in this case, what notice and inventory was served on Minnie Kahn, which we think would have been a recognition that Minnie Kahn was within the scope of the authorizing letter.

The government says that Minnie wasn't mentioned in the order and therefore notice and inventory need only be served upon her in the court's discretion.

We take that, of course, to admit that Minnie didn't in fact get any notice even though it was her conversations, principally, not Irving's, on that phone that the government intends to use to prove the case here. And even though the government asks this Court to unsuppress that evidence, it seems to us that this is kind of a latterday explanation that a known person, though not known to be in the gambling business, was definitely a person to whom this notice was required.

The government excuses this in a way. It says Minnie Kahn received the notice sent to Irving.

Now, that's a little bit off the record, but I'm willing to assume the validity of that representation.

All the cases of which we are aware indicate that this notice is made by Registered Mail, and for the purpose of this we will assume that Minnie received the mail. But the government asks the Court further to assume, first, that Minnie opened the mail or that Irving is presumed to have told Minnie what was in the letter from the government.

I think that's untenable, that while wives do not invariably open husband's mail, and husbands do not tell wives they're having trouble with the government until they're forced to do it.

The Ianelli case, on which the government relies, has no force here. In that case the other persons were actually unknown persons, unknown at the time they put in the wiretap. This is a person using the phone to the exclusion of the named person.

We would then refer the Court to the Third Circuit Eastman case, at 465 Fed 2d. There a suppression order issued and it was affirmed for failure to give the statutory notice. In that case they relied principally on this Court's decision in Berger, which cast down a New York eavesdropping statute for failure to provide for the giving of notice.

In this case, though the bulk of the conversations were Minnie's, the government would have us read this statute that notice needn't be given to Minnie, from whom

the property was taken. We suggest to the Court that that does not equate with the Fourth Amendment, even if it does equate with the literal reading of 2518(8)(d).

If that section can be so narrowly construed that the person from whom the telephone calls were taken need not be given notice, then it doesn't meet the requirements of this Court's decision in Berger, and under such a construction we would submit that the statute is unconstitutional.

I see that my time is going, and I would just like to refer the Court to the government-cited case of United States vs. LaGorga, at 365 Fed 2d -- or, rather, Fed Supp.

It gives us a background against which the legislature intended Title III to be considered. And in speaking of the privacy insured by the Fourth Amendment, it said that privacy can be bridged by a search warrant under conditions set out in the amendment, for actually the wiretapping permitted by the Omnibus Crime Control Act is severely limited, and the Act actually permits -- actually prohibits far more wiretapping than it permits.

I submit, then, to the Court in closing, that wiretapping and any expansion on the order should be given a negative rather than a positive reception, and should be countenanced only in circumstances that clearly warrant it;

and this is not such a case.

We urge the Court to affirm the decision of the Seventh Circuit.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Frey, do you have anything further?

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: A few things, Mr. Chief Justice.

First of all, of course, I'd like to point out that there's no Fifth Amendment problem in this case, since there was no compelled statement or testimony of any sort.

Secondly, with respect to the LaGorga case, the health club case that counsel adverted to, public phones, phones in public places are different from phones in a private home.

The Katz case involved a public phone. There was, indeed, an amendment proposed to Congress to this bill and which was recommended by the Justice Department, but which was never voted on or adopted, which, in the case of public phones, would have permitted only the interception of conversations of the named party.

For obvious reasons you would have no basis for expecting to receive any information relating to the investigation from conversations on a public phone, except

by those of the named party.

That is not at all true in this situation where you are intercepting conversations over a private phone.

Frequently in these cases, they are organized crime cases, you're dealing with sophisticated conspiracies, it's not uncommon, particularly in narcotics cases, to have two quite innocent people start a conversation and in the middle of the conversation, all of a sudden, you have two completely different people who are on the phone talking in code about narcotic transactions.

In this case, indeed some of the conversations were in Yiddish between Irving and Minnie Kahn.

With respect to what's in the record and what isn't in the record, that is a little confusing. The record in the wire interception authorization proceeding, which is technically a civil proceeding, was sealed and it did go up to the Court of Appeals, and technically the tapes of the recordings were part of the record; in fact, I think neither the District Court nor the Court of Appeals listened to any of the conversations or relied upon the content of any of the conversations, the specific content, in reaching its decision.

Now, the notice issue which counsel discussed is of course not before this Court, it was not involved in the grant of certiorari. Moreover, it's clear that the District

Court has discretion to require notice, service of the inventory notice, except to the named party. Here the named party was Irving Kahn, he received service of the notice. There was no defect in that regard.

And finally, with respect to the standing point, it is true that the statute defines a person aggrieved quite broadly for standing purposes; but we've indicated in our brief our position, and we think this is supported by the discussion in Alderman, that the target of the interception, the person whose phone is being intercepted, is conferred broad standing for the purpose of challenging the legality of the entry onto his telephone line, just as the homeowner is conferred broad standing for the purpose of challenging the entry into his house. If something illegal inside his house or on the line is done that only affects another person, he should be granted standing to challenge it.

Therefore, we submit that the judgment of the Court of Appeals should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Frey.

Thank you, Miss Lavin.

The case is submitted.

[Whereupon, at 10:43 a.m., the case was submitted.]