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IN THE

SUPREME COURT OF THE UNITED STATES

Term, 19.....

No. .....

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

No. .....

JULIUS A. WOLF, PETITIONER,

v.

THE PEOPLE OF THE STATE OF COLORADO,
RESPONDENT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO, AND BRIEF IN SUPPORT THEREOF.

Petitioner seeks review of two separate judgments of the Supreme Court of Colorado rendered in companion cases

presenting identical Constitutional questions. The titles of the cases below were:

Julius A. Wolf and A. H. Montgomery v. The People of the State of Colorado, No. 15666

and

Julius A. Wolf, Charles H. Fulton and Betty Fulton v. The People of the State of Colorado, No. 15670.

Neither case has been officially reported.

Hereinafter for the sake of brevity, the former will be referred to as the Wolf-Montgomery case, and the latter as the Wolf-Fulton case.

All page references are to the Wolf-Montgomery record. Folio references are to the record in the Wolf-Fulton case.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

Jurisdiction exists by virtue of Sec. 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (Chapter 229, 43 Stat. 936).

The Supreme Court of the State of Colorado, being the highest court of law and equity in said State, has rendered its final judgment and decision in these causes wherein a right, privilege and immunity under the Constitution of the United States has been specially set up and claimed by petitioner, to-wit, freedom from unreasonable search and seizure by virtue of the Fourth and Fourteenth Amendments of the Constitution of the United States.

DATES OF JUDGMENTS.

Wolf-Montgomery Case.

The Court rendered its judgment November 3, 1947 (R. 84). The petition for rehearing was denied December 8, 1947 (R. 95).

Wolf-Fulton Case.

Judgment was entered November 24, 1947 (folios 1420-23). Petition for rehearing was denied December 15, 1947 (folio 1441).

STATEMENT OF THE CASE.

Petitioner, Julius A. Wolf, and one, A. H. Montgomery, were charged by information filed in the District Court of the City and County of Denver with conspiracy to perform an abortion on one, Mildred Cairo (R. 1). In another case petitioner and one, Charles Fulton, and one, Betty Fulton, were charged with conspiracy to commit an abortion (folios 1-6). Neither Montgomery nor the Fultons join in this petition. The names of the alleged co-conspirators are mentioned for the purpose of identifying the two cases.

The cases were tried separately and separate writs of error sued out from the Colorado Supreme Court, but were argued together, and while separate opinions were written, the opinion on the constitutional question in the Wolf-Montgomery case was adopted by reference as the opinion in the Wolf-Fulton case (folio 1430). The constitutional question which we are seeking to review by certiorari is the same in both cases. It appears from the record in both cases that investigators and officers of the district attorney's office, some of whom were attorneys at law, without a search warrant or order of Court entered the private office of petitioner, who is a duly licensed and qualified practicing physician, put him under arrest and seized his private books and records (R. 18-26). The books and records contained the names, addresses, and telephone numbers of his patients (R. 20). These books were taken from the doctor's office and were thoroughly examined by the district attorney's officers, and the patients, all women whose names and addresses appeared in said books, were brought to the district attorney's office and interrogated as to the purpose of their visit to the doctor and as to what ailment they were suffering from (R. 23-24).

As a result of the information obtained from the books so seized, followed up by an inquisition of the patients, an information was filed against petitioner. At the time of the trial the investigators and officers of the district attorney's office gave testimony as to how they obtained the books (R. 18-26). The chief investigator testified that he instructed three of the attaches of the district attorney's office, two of whom were attorneys, to arrest petitioner (R. 17). He or-

dered them to go to the doctor's office and obtain the records (R. 18). The deputy district attorney testified that he went to the office of Dr. Wolf and saw the book marked Exhibit "A" that was on the table in the office and that he picked it up at the direction of the chief investigator (R. 19). The book was in the doctor's consultation room. He picked up the book, looked through the book, and it was his conclusion that the book contained the names of patients (R. 20). He had no search warrant or other order (R. 23). The investigator for the District Attorney testified (R. 21-24):

> "At the time we were instructed to pick up any evidence that might be pertinent to the case (R. 21).
>
> "When we went to Dr. Wolf's office we had no knowledge of Mildred Cairo. Never knew such a person existed. Went to Wolf's office to get his records and to arrest him. After we got to the District Attorney's office we looked through the record and looked up the names of the people in there. We found the name of Mildred Cairo. Then we contacted Mildred Cairo. We made an appointment to see her as a result of the knowledge which we obtained from the book. Then she came to our office and she told us all about it. Then we looked up names of other patients in this book. I don't know how many other names we looked up, possibly ten. We looked at every name in the book. Some names had an address, and some names a telephone number. We didn't know what these people were suffering from. We knew they were patients. They were women. We went out and contacted these people and went to find out for what purpose they went to Dr. Wolf. We didn't contact all of them. We only contacted those where there were prices stated. We contacted these people and made them come to the District Attorney's office. We didn't know what was the matter with them until they came. The only information we had so far as Miss Cairo was concerned came from the book. The same with all other cases, except Miss Martin's.
>
> "We got about ten or twelve women in altogether. The information was filed against Dr. Wolf

on the information that the District Attorney had from the books" (R. 23-24).

When these facts were developed, a motion was made to quash the information and to instruct the jury to return a verdict of not guilty for the reason that the information was based wholly upon testimony and evidence that was obtained in violation of the constitution of the state and in violation of the Fourth and Fifth Amendments of the Constitution of the United States (R. 27-28). The motion was overruled and the objection to the books as evidence was likewise overruled (R. 29). The same books were used as evidence in the companion case, Wolf-Fulton (folios 594-601). In that case petitioner likewise filed a motion to suppress the illegally obtained evidence. It stated that the books were wrongfully seized in violation of the constitution of the state of Colorado and the Fourth and Fifth Amendments of the Constitution of the United States (folios 37-38). The same facts were developed with respect to search and seizure of the books as in the Montgomery case (folios 594-672). At the trial the motion was overruled (folio 91). Petitioner was convicted in both cases, separate writs of error were sued out from the Supreme Court and the convictions affirmed (R. 84; folios 1420-23).

MANNER IN WHICH THE CONSTITUTIONAL QUESTION WAS RAISED IN WOLF-MONTGOMERY CASE.

At the trial a motion was interposed to quash the information and for a directed verdict of not guilty because it appeared that the information was based wholly upon evidence that was obtained from the petitioner in violation of the constitution of the State, and also of the Fourth and Fifth Amendments of the Constitution of the United States (R. 27-28). In the motion for a new trial, it was alleged that the books were taken without a search warrant or other process of law in violation of the rights of petitioner under the Fourth Amendment of the Constitution of the United States (R. 66-68) and the same point was raised in the assignments of error filed in the Supreme Court (R. 73-74). Prior to the oral argument in the Supreme Court of the State, leave was asked to file a supplemental assignment

of error that the search and seizure of the books of the petitioner was in violation of the Fourteenth Amendment of the Constitution of the United States (R. 83). The purpose of this supplemental assignment of error was to guard against any possible technical objection as to the particular constitutional amendment involved. As already noted, the motions in the trial court and the assignments of error specifically invoked the protection of the search and seizure clause of the United States Constitution. The Fourth Amendment rather than the Fourteenth was invoked. It is submitted that as a matter of substance, it makes no difference which particular amendment was set forth as long as it was made clear to the Court that petitioner was claiming immunity from unreasonable search and seizure guaranteed by the United States Constitution. To cure any technical defect, we submitted the additional assignment of error setting forth the Fourteenth Amendment.

WOLF-FULTON CASE.

Petitioner filed a motion to suppress the evidence on the ground that the search and seizure of the books was in violation of the Fourth and Fifth Amendments of the Constitution of the United States (folios 33-45). The same claim was made in the motion for a new trial (folios 1236-1239) and in the assignment of error filed in the Supreme Court (folios 1349-1352). Also, a motion for leave to file a supplemental assignment of error was filed setting forth that the seizure of the books was in violation of the Fourteenth Amendment of the Constitution of the United States (folios 1409-1412). The attorney general in opposition filed objections to this supplemental assignment of error on the ground that the assignment had already been covered in previous assignments (folios 1413-1415).

REASON RELIED ON FOR ALLOWANCE OF CERTIORARI.

The Colorado Supreme Court has decided a federal question of substance not heretofore determined by this Court.

The evidence used to convict petitioner was obtained by state officers by means of an unlawful search and seizure.

The convictions of petitioner by the use of such evidence deprived him of his liberty and property without due process of law contrary to the provisions of the Fourth and Fourteenth Amendments of the Constitution of the United States. The judgments of the Colorado Supreme Court sustaining the convictions decided an important question of federal law which has heretofore not been determined by this Court, to-wit: Whether the protection of the Fourth Amendment against unreasonable search and seizure has been made effective against state action by virtue of the Fourteenth Amendment.

QUESTION PRESENTED.

The sole question presented is whether the Fourth and Fourteenth Amendments of the Constitution of the United States protect a person from an unreasonable search and seizure by state officials.

SPECIFICATION OF ERRORS.

The Colorado Supreme Court erred:

1. In affirming the convictions of petitioner.

2. In holding that the evidence procured by an unlawful search and seizure was admissible against petitioner.

3. In failing to hold that such search and seizure and the use of evidence so obtained deprived petitioner of the protection of the Fourth and Fourteenth Amendments to the Constitution of the United States.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

We incorporate herein the statement of the case contained in the petition for certiorari.

This Court has held that the Fourth Amendment, like all other amendments, which constitute the federal Bill of Rights, has no application to the state governments. *National Safe Dep. Co. v. Illinois,* 232 U. S. 58. That decision was made without any consideration of the impact of the Fourteenth Amendment upon the Bill of Rights. The most recent pronouncement on this question is set forth in *Adamson v. People of California,* —— U. S. ——, 67 S. Ct. 1672. In

that case it was contended that the provisions of the Fifth Amendment against testimonial compulsion in a criminal case was made effective against state action by virtue of the Fourteenth Amendment. This contention was rejected, but in the decision of this Court it was said:

> "The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the federal Bill of Rights under its protection. That contention was made and rejected in Palko v. Connecticut, 302 U. S. 319, 323, 58 S. Ct. 149, 150, 82 L. Ed. 288. It was rejected with citation of the cases excluding several of the rights protected by the Bill of Rights, against infringement by the National Government. Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution. Palko held that such provisions of the Bill of Rights as were '*implicit in the concept of ordered liberty,*' 302 U. S. at page 325; 58 S. Ct. at pages 151, 152, became secure from state interference by the clause. But it held nothing more" (Page 1676). (Italics added.)

In *Palko v. Connecticut,* 302 U. S. 319, 323, which was apparently approved in the *Adamson* case, supra, this Court indicated the proper rule for determining the applicability of specific immunities of the Bill of Rights to state governments:

> "On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress * * * or the like freedom of the press * * *, or the free exercise of religion * * * or the right of peaceable assembly without which speech would be unduly trammeled * * * or the right of one accused of crime to the benefit of counsel * * *. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept

> of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

Speaking of the due-process clause, this Court in *Herbert v. State of Louisiana,* 272 U. S. 312, 316, said:

> "The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' "

In *Twining v. New Jersey,* 211 U. S. 78, 101, this Court said:

> "The words 'due process of law' were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

It remains to be considered whether the right of privacy guaranteed by the Fourth Amendment is a right "implicit in the concept of ordered liberty." The historic *Boyd* case, 116 U. S. 616, shows plainly enough that there can be no ordered liberty and men cannot be free where the government is vested with arbitrary power to conduct general raids and searches. It was the objection to general warrants and writs of assistance issued by the British government which led to the resistance by the colonies to the oppression of the mother country. We quote from the *Boyd* case:

> "The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty

> of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Boyd v. United States,* 116 U. S. 616, 625.

In *Harris v. United States,* —— U. S. ——, 67 S. Ct. 1098, 1103, it was stated:

> "The dangers to fundamental personal rights and interests resulting from excesses of law-enforcement officials committed during the course of criminal investigations are not illusory."

In Mr. Justice Frankfurter's dissenting opinion in that case, concurred in by Mr. Justice Murphy and Mr. Justice Rutledge, it was said:

> "If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society" (Page 1106).
>
> "This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought, or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justify-

ing document was an illicit ration book, tomorrow it may be some suspect piece of literature" (Page 1107).

And in the dissenting opinion of Mr. Justice Murphy in which Mr. Justice Frankfurter and Mr. Justice Rutledge join, it was said:

> "To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purpose of despotic power, but those methods cannot abide the pure atmosphere of a free society" (Page 1117).
>
> "But freedom from unreasonable search and seizure is one of the cardinal rights of free men under our Constitution. That freedom belongs to all men, including those who may be guilty of some crime. The public policy underlying the constitutional guarantee of that freedom is so great as to outweigh the desirability of convicting those whose crime has been revealed through an unlawful invasion of their right of privacy. Lawless methods of law enforcement are frequently effective in uncovering crime, especially where tyranny reigns, but they are not to be countenanced under our form of government. It is not a novel principle of our constitutional system that a few criminals should go free rather than that the freedom and liberty of all citizens be jeopardized" (Page 1118).

Mr. Justice Jackson in his dissenting opinion stated:

> "Of course, this, like each of our constitutional guaranties, often may afford a shelter for criminals. But the forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self respect" (Page 1120).

In *Olmstead v. United States,* 277 U. S. 438, 478, Mr. Justice Brandeis in a dissenting opinion said:

> "The protection guaranteed by the amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the

> pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, *the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." (Italics ours.)

In the *Olmstead* case, *supra,* there was disagreement among the Justices as to whether there could be a search and seizure with respect to something intangible, but there was no division of the Court as to the purpose and historical background of the Fourth Amendment.

In a dissenting opinion in *Goldman v. United States,* 316 U. S. 129, 142, Mr. Justice Murphy speaking of the Fourth Amendment said:

> "The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadeqaute for the period in which we live."

General raids and exploratory searches for evidence are a handy weapon for despotic governments. Such odious practices were used to suppress free speech and free press.

The struggle against search and seizure went hand in hand with the struggle for freedom of the press. See Chafee, *Freedom of Speech,* Ch. VI. Long before the American revolution, the security of the English home against unwarranted entry by the King's officers had become a firmly established principle in English constitutional law, as evidenced by the historic words uttered by Lord Chatham:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the King of England can not enter; all his forces dare not cross the threshold of that ruined tenement."

The importance of this doctrine in the English common law is pointed out in 2 *Story on the Constitution,* page 648:

> "This provision [against unreasonable search and seizure] seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more than the affirmance of a great constitutional doctrine of the common law, and its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America upon the subject of general warrants almost upon the eve of the American revolution."

And Stimson in *The Law of Federal and State Constitutions,* page 46, states:

> "It [rule against search and seizure] is, of course, closely connected with the right of a person not to be compelled to give self-criminating evidence, but it has a far broader historical connection, with the general objection of the Englishman to inquisitions, visitatorial expeditions by king or Crown officer, going straight back, indeed, to the great clause of Magna Carta."

The right of free speech and free press is an inherent right of every citizen of the United States. See *Hague v. Committee for Industrial Organization,* 307 U. S. 496. The Fourth Amendment is a necessary implementation of the basic democratic right of free speech, without which it cannot exist.

The search and seizure involved in these cases was general and exploratory, specifically designed to obtain evidence, and not contraband or the fruits or means of crime. *(United States v. Lefkowitz,* 285 U. S. 452; cf. *Harris v. United States,* supra.) Moreover, the information that was obtained from this exploratory search was used by officers of the state acting under color of authority to force female patients of a practicing physician to disclose the intimate details of their private lives (R. 24). In this respect the general raid conducted in this case was more odious than any recorded in the history of American Jurisprudence. (Cf. *People v. Martin,* 382 Ill. 192; 46 N. E. (2d) 997; *People v. Schmoll,* 383 Ill. 280; 48 N. E. (2d) 993.

In the early days of common law when it became necessary to inquire into the physical condition of a woman prisoner a writ *De Ventre Inspiciendo* was directed to a discreet matron. (1 *Blackstone Comm.* 456). We do not believe that even in a police state, male law-enforcement officers would be authorized to conduct a forced inquisition into the intimate affairs of a sinning woman. One of the women patients was threatened with a ride in the police patrol "wagon" unless she "cooperated" with the district attorney (folio 872). She was held in the district attorney's office for two hours until she agreed to cooperate (folio 875). So the search in these cases had all the obnoxious features of the general search for evidence, but was in addition shockingly indecent, and wholly repugnant to decent standards of civilization. The essential privacy of the physician-patient relationship is noted in the dissenting opinion of Mr. Justice Butler in the *Olmstead* case, *supra:*

> "* * * communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife" (Page 487 of 277 U. S.),

and also in the dissenting opinion of Mr. Justice Murphy in *Goldman v. United States, supra,*

> "If the method and habits of the people in 1787 with respect to the conduct of their private business had been what they are today, is it possible to think that the framers of the Bill of Rights would have been any less solicitous of the privacy of transactions conducted in the office of a lawyer, a doctor, or a man of business, than they were of a person's papers and effects?" (Pages 138, 139 of 316 U. S.).

The Supreme Court of Colorado in its opinion stated:

> "It seems superfluous to add that nothing here or heretofore said by us and nothing contained in any of the numerous decisions of other jurisdictions in support of the rule in the Massantonio case, justifies unlawful searches or seizures. In line with such jurisdictions we have condemned them in the strongest terms and pointed out the proper remedy" (R. 87, 88).

In the case referred to by the Supreme Court, *Massantonio v. People,* 77 Colo. 392; 236 P. 1019, the Court said:

> "The parties aggrieved should be left to independent action to protect their constitutional rights, and obtain redress for their infringement, and if in such a proceeding error is committed, it should be determined in some appropriate method of review upon its own record, and not collaterally on appeal from a judgment of conviction in a criminal case in which the seized property was used as evidence" (Page 399).

The Colorado Supreme Court in that case severely condemns the conduct of law enforcement officers perpetrating unlawful searches and seizures:

> "Every officer making an unconstitutional search, and every officer advising or conniving at such conduct is a law violator and a violator of his oath of office and should be held to accountability" (Page 400).

Thus the Colorado Court very severely excoriates the conduct of officers who conduct searches without search war-

rants, yet it sanctions the use of evidence wrongfully obtained in violation of the Constitution. The Colorado Court was moved by the plea of necessity. The criminal code could not be enforced unless evidence was used, no matter how obtained, it was said. As to this plea of necessity, this Court in the case of *United States v. Michael DiRe* decided January 5, 1948 (—— U. S. ——; 68 S. Ct. 222, 229) said:

> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrest and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

It is submitted that a writ of certiorari be issued in both cases so that the important question here involved may be fully presented and argued before this Court.

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