

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

Cr. 1967 - 115

FREDERICO RANDACCIO,

Defendant.

STATE OF NEW YORK)
 : SS
COUNTY OF ERIE)

FRANK G. RAICHE, being duly sworn, deposes and says:

I am an attorney and counselor-at-law duly admitted to practice in the courts of the State of New York and I am a member of the Bar of this court. As counsel for Lipsitz, Green, Fahringer, Roll, Schuller & James, I argued the appeal in the United States Court of Appeals for the Second Circuit on behalf of the defendant Randaccio from the judgment of conviction entered in this court on December 11, 1967. The Court of Appeals affirmed the conviction on July 30, 1968. Upon petition for writ of certiorari to review the judgment of the Court of Appeals the United States Supreme Court vacated the judgment of the Court of Appeals and remanded the above case to this court for hearing.

While the hearing which was held on August 27 and August 28, 1969 was concerned primarily with the question of whether the evidence resulting in the conviction of the defendant Randaccio was "tainted" as a result of illegal electronic eavesdropping, the evidence developed on the hearing, both oral

and documentary, in my opinion more appropriately justifies a new trial in the furtherance of justice and on newly discovered evidence. This is what I had in mind when I said to the Court at 111*:

"Could I make a statement so that I don't sail under false colors and mislead anybody inadvertently? I believe when all this is put together and we make out a case, to which this hearing is primarily directed, in the course of so doing, if evidence is developed, legal and competent evidence, which falls within the realm of newly discovered evidence, and certainly most of this is newly discovered, and that evidence buttresses the alibi claimed and alluded to on the trial, we are not foreclosed from making a motion for a new trial on such grounds, using this evidence."

The Court replied to me as follows:

"That was obvious when you were talking about 'Don't these constitute business records kept in the usual course of business?' It was quite apparent to me what your point was. You can make any point you wish, of course." (111)

The Court will recall that the only evidence connecting the defendant Randaccio with the conspiracies charged in the indictment was the testimony of the defendant Calabrese who said that he met with the defendants Randaccio, Cino and Natarrelli at the home of the last named on the evening of February 5, 1965. As the Court of Appeals put it, "Calabrese's testimony indicated that Randaccio arrived at Natarrelli's prior to about 8:30 or 9:00 P. M." It developed upon the trial that the home of a friend of the defendant Randaccio was under electronic surveillance and that he was heard to enter upon such friend's premises at 7:50 in the evening. It was argued by the Government that the defendant might have left these premises after his arrival without those monitoring the eavesdropping device hearing him do so. It is submitted that the evidence developed

* Numbers in parenthesis throughout the affidavit refer to stenographic minutes of hearing held on August 27 and August 28, 1969.

upon the hearing, including that showing a pattern of conduct on the part of the defendant Randaccio together with evidence demonstrating the expertise and acuteness of the monitors (special employees of the FBI) strongly negatives such inference and that if such evidence had been available to the defendant so that it could have been before the jury a different outcome of the case would have resulted. The evidence developed for the first time upon the hearing shows that the very purpose of the eavesdropping was to ascertain and know Randaccio's whereabouts at all times and to enable the Government to be informed concerning his "goings and comings" (63).

THE EVIDENCE DEVELOPED UPON THE HEARING ON REMAND

The evidence developed at the hearing on remand held on August 27 and August 28, 1969 established the fact that the defendant Randaccio had been under the constant surveillance of the FBI from at least sometime in 1961 until sometime late in 1965. This surveillance included electronic eavesdropping at various places where the defendant was in the habit of going. Among these places was the home of one Darlene Crann at 51 Essex Street in the City of Buffalo. Clair V. Wambold, a special employee of the FBI who on the evening of February 5, 1965* was one of the special employees monitoring the eavesdropping device placed at the above address (106), testified that the purpose of the surveillance, including eavesdropping, was "knowing where he (Randaccio) was at a particular time" (63). He said that the surveillance and the eavesdropping were conducted so that the FBI could know "about his goings and comings, his doings and his activities" (63). Mr. Wambold said

* The evening in question.

that it was his "particular undertaking above all things in this investigation" to know when Randaccio "came and left" the premises at 51 Essex Street (63). The witness said that that was what he "set out to do" (63). He said that he accurately recorded this information (63). Importantly, Mr. Warbold said, and Exhibit A confirmed him in his statement, that he noticed that Randaccio "followed a pattern" in visiting this place (64). Mr. Warbold said that Randaccio "would come around at seven or eight and stay until a little after midnight, as a rule" (64). He repeated that he got to know Randaccio's "pattern of conduct in that regard" (64). Obviously, Randaccio followed this pattern on the evening of February 5, 1965 when it is claimed by the uncorroborated, discredited accomplice witness that he was elsewhere hatching a conspiracy at eight-thirty or nine o'clock in the evening. See Exhibit A, Vol. 25, for the date February 5, 1965 (106).

Exhibit A, Vol. 25, the log for the date February 5, 1965, takes on added significance and becomes more probative in the light of the testimony of the special employees of the FBI, particularly that of Mr. Warbold who was monitoring the eavesdropping equipment at the critical time. He was asked if he had had "the slightest indication" or "anything to make you (him) think" that Randaccio had left the premises between 7:50 and 12 o'clock when he went off duty, he would have recorded it (109). Any claim that Randaccio might have left without Mr. Warbold's knowing it not only impugns the efficiency, the competence and the expertise of the FBI but defies reality. Mr. Warbold said that "experience enables you fellows (the special employee monitors) to listen more accurately and hear better than the rest of us would" when a radio or television is turned on (60). On the subject of acquired expertise and ability to hear, [redacted] was stoutly corroborated by special employee [redacted] (58).

Important it is to note that at 12:34 o'clock on the morning of February 6, 1965 the log reads "FR believed out. DG moving around, washes a couple of dishes or glasses, etc.". Everyone of the special employees monitoring the eavesdropping device at 51 Essex Street who was asked about it said that whenever there was even a belief that FR had left the premises such fact would be noted (see, for example, 109, 110). Despite the fact that the monitors could hear the cat meow and the dog bark above the television as well as doors opening and closing and despite the fact that Mr. Wambold, the special employee, had no belief that Randaccio left the premises (67) the jury, on the fragmentary evidence before it, was allowed to find beyond a reasonable doubt that he did. Conclusive on the subject would be the fact that when Randaccio did leave early in the morning of February 6, 1965, he was heard to do. The following testimony of Mr. Wambold pertaining to the log for the early morning reads in part as follows:

- "Q. Well, it appears from the exhibit that Mr. Walsh overheard the conversation around 12:16 when Randaccio was beginning to leave, that is on the early morning of the 6th, right?
- A. According to Mr. Walsh's log, yes.
- Q. He could hear him apparently through the television, right?
- A. It so states there.
- Q. Could hear him mumbling?
- A. That is what it says.
- Q. These logs are claimed by you to be made in the ordinary course of business, and it is the ordinary course of the business you were then engaged in to make them, right?
- A. Yes, sir." (68, 69)

Special employee Richard R. Walsh, who on occasions heard Randaccio leave, testified to such occasions in part as follows:

"Q. Well, did you record the fact that Mr. Randaccio said goodnight?

A. Yes.

** ** *

"Q. Did those things relate to the investigation?

A. Yes.

Q. Because you wanted to know where he was and what he was doing, right?

A. I wanted to furnish that information on the log.

Q. Yes. So one of the purposes was to enable you to tell where he was, what he was doing?

A. Yes." (33, 34)

So it is clear from the log and from the testimony of the special employees that Randaccio was heard to come to 51 Essex Street at 7:50 in the evening on February 5, 1965 and heard at 24 minutes after midnight when Darlene Grann asked if he was going to call her in the morning, as he was preparing to leave. At 12:24 the log reports "FR believed out." Furthermore, as special employee Wambold testified:

"Q. These logs are for the intended purpose of reliance thereon by the FBI, aren't they, and the Government?

A. Yes, sir.

Q. For accuracy and correctness?

A. Yes, sir.

Q. And the truth of what they reflect?

A. Yes, sir." (70).

I have had an analysis made of the logs which were turned over and it is reported that such analysis shows that Randaccio customarily spent his Friday nights* at 51 Essex Street.

* February 5, 1965 was a Friday night.

The analysis of the logs show that he was there 122 Friday nights during the period that the place was under electronic surveillance. The logs show that he usually stayed until midnight or shortly thereafter. I consider the fact that he was following a pattern of conduct on the night when it is claimed he was at Natarolli's house to be important. This fact could not have been established until the evidence was obtained on the hearings on August 27 and August 28, 1969. Likewise, the evidence of the ability of the monitors to hear above the television sound the movements in the house and the entrances upon and the departures from the premises could not be established before the evidence was developed upon the hearing.

Upon the trial the Government did not admit the illegality of the eavesdropping in question (see transcript of trial record, 1917 et seq.). In an attempt to meet the situation presented at the trial and doing the best he could with logs for the limited period only available to him trial counsel entered into a stipulation which, in the light of the newly discovered evidence, did not give the defendant the full advantage of the circumstances. The stipulation does not reveal the fact that the alibi witnesses were special employees of the FBI nor the fact that Randaccio was heard mumbling above the television shortly after 12:00 o'clock, when his friend asked him "Are you going to call me in the morning?". Importantly, the stipulation does not reveal the fact that after this statement the special agent recorded the following, "FR believed out". Without attempting to reiterate earlier portions of this affidavit, I call attention to the fact that the stipulation did not reveal the fact that the whole purpose of the eavesdropping was to know where Randaccio was at a particular time and that such eavesdropping was conducted so that the FBI

would know "about his goings and comings, his doings and his activities" (63). The jury was completely uninformed that there existed a record made in the ordinary course of business of the FBI from which it could infer that Randaccio was elsewhere at the time Calabrese places him at a conference nine-tenths of a mile away in which it is claimed the conspiracy was hatched.

The evidence that Randaccio was following a pattern of conduct with respect to his presence at 51 Essex Street from early in the evening until shortly after midnight in the form of FBI logs, and the fact that the electronic surveillance, including that at 51 Essex Street, was to enable the FBI to know where Randaccio was at a particular time and to be informed "about his goings and comings, his doings and his activities" rather than merely for the purpose of overhearing conversations which might be of interest to the Government, was first developed upon the hearings on August 27 and August 28, 1969. It was at these hearings that the Government conceded the trespassory and illegal character of the eavesdropping. The evidence thus far alluded to in this affidavit is, in my opinion, so material that it will probably produce a different verdict if a new trial is granted. The evidence particularly referred to is not cumulative only but independently probative of the fact that Randaccio was elsewhere at the time the alleged conspiracies were being formed.

This affidavit is made by me and not by the defendant because the defendant is, as I am informed and believe, incarcerated in a Federal prison in a state remote from the county in which I live and have my office. Furthermore, it is I who have examined the logs on which great reliance is placed

on this action for a new trial and it is I who examined the witnesses, including the special employees of the FBI who testified at the hearings held on August 27 and August 28, 1969.

Frank G. Reichle
Frank G. Reichle

Sworn to before me this
3rd day of October, 1969.

Helen B. Gerser

HELEN B. GERSER
Notary Public, State of New York
Qualified in Erie County
Commission Expires March 30, 1971

State of New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

FREDERICO BANDACCIO,

Defendant.

COPY

NOTICE OF MOTION
AND AFFIDAVIT

Dated....., N. Y.,
19.....
County of..... on the
day of....., 19.....
entered in the office of the Clerk of the
Court of.....
of which the within is a copy, duly grant-
ed in the within entitled action, on the
day of....., 19.....
19.....

Attorneys for
Office and Post Office Address
ONE NIAGARA SQUARE
BUFFALO, NEW YORK 14202
PHONE 856-8400

To
Attorney for.....

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES

Attorneys for Defendant

Office and Post Office Address
ONE NIAGARA SQUARE
BUFFALO, NEW YORK 14202
PHONE 856-8400

Due and personal service of the within

is admitted this..... day of....., 19.....

Attorney for.....

(AFFIDAVIT OF SERVICE BY MAIL)

STATE OF NEW YORK }
COUNTY OF } ss.

....., being duly sworn, deposes and says that he
the attorney..... for the above named here
That on the day of 19....., he served the within
upon
the attorney..... for the above named
by depositing a true copy of the same securely enclosed in a postpaid wrapper in the Post-Office—a Branch Post-Office
—a Post-Office Box regularly maintained by the United States Government at
in said County of directed to said attorney..... for the
at N. Y., that being the address within the State designated by h..... for the
purpose upon the preceding papers in this action, or the place where he..... then kept an office between which place
there then was and now is a regular communication by mail.

Deponent is over the age of years.
Sworn to before me, this.....
day of 19.....

Notary Public, Erie County, N. Y.

Commissioner of Deeds, Buffalo, N. Y.

(AFFIDAVIT OF PERSONAL SERVICE)

STATE OF NEW YORK }
COUNTY OF } ss.
OF

..... being duly sworn, deposes and says that he served the within
upon the following named
at the following times and places, viz.:
..... on 19..... at
..... on 19..... at
..... on 19..... at

by delivering to and leaving with personally a true copy thereof, and deponent further says
he knew the person..... so served to be the same person..... mentioned and described in the said
as therein, and that at the times of making such services deponent was over twenty-
years of age and that said defendant at the time of service was not actively engaged in military service.
Sworn to before.....

(Mount Clipping in Space Below)

FBI Tapes Prove Alibi, Mafia Chief Claims

An alleged Buffalo Mafia figure now serving a 20-year term applied for a new trial Tuesday in Federal Court because the record of FBI eavesdropping on him reportedly shows he was elsewhere when the plans were made for the crime.

Frederick G. Randaccio, 61, named in 1963 Senate hearings as this area's No. 2 Cosa Nostra figure, was convicted in 1967 of conspiracy with four others to commit two California robberies.

His attorney, Frank G. Raichle, submitted Tuesday that he has found new evidence after examining the recordings of FBI electronic surveillances, turned over to him last August by order of the U. S. Supreme Court.

The logs recorded sounds picked up by a hidden microphone at 51 Essex St., where Randaccio visited a woman on 122 Friday nights during the surveillance, Mr. Raichle said.

The attorney contends that the only evidence linking Randaccio with the conspiracy was an informer's testimony that Randaccio met with others at the

home of a co-defendant, Pasquale Naterelli, 58, of 80 Manchester Pl., the evening of Friday, Feb. 5, 1963.

But the logs showed that Randaccio "was heard to enter upon such friend's premises at 7:50 PM" on Essex St., Mr. Raichle states.

"It was argued by the government that the defendant might have left these premises after his arrival without those monitoring the eavesdropping device hearing him," the attorney states.

The FBI agents said they did not hear Randaccio leave until the next morning, "despite the fact that the monitors could hear the cat meow and the dog bark above the television as well as doors opening and closing," Mr. Raichle states.

(Indicate page, name of newspaper, city and state.)

13
BUFFALO EVENING NEWS
BUFFALO, N.Y.

Date:

Edition:

Author: Complete

Editor: Financial

Title:

Character:

or

Classification:

Submitting Office: Buffalo

Being Investigated

SAC, Buffalo (92-174)

12-4-69

Director, FBI (92-3972)

FRED G. RANDACCIO, ET AL.
AR - HOBBS ACT

Reurlet of 10-10-69.

Advise by return mail the status of the disclosure hearings concerning Randaccio and Natarelli, including a summary of any pertinent, available information.

Also advise concerning the status and any pertinent information as to the motion filed in U. S. District Court, a copy of which was forwarded to the Bureau by relet.

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MAILED 21
DEC 4 - 1969
COMM-FBI

REC-77 92-3972 - 425

10 DEC 5 1969

- Tolson _____
- DeLoach _____
- Walters _____
- Mohr _____
- Bishop _____
- Casper _____
- Callahan _____
- Conrad _____
- Felt _____
- Gale _____
- Rosen _____
- Sullivan _____
- Tavel _____
- Soyars _____
- Tele. Room _____
- Holmes _____
- Gandy _____

CLG:bjs
(4)

59 DEC 9 1969

MAIL ROOM TELETYPE UNIT

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (92-3972)

FROM : SAC, BUFFALO (92-174) (P)

SUBJECT: FRED G. RANDACCIO
ET AL
AR - HOBBS ACT
(OO: BUFFALO)

DATE: 12/8/69

ST
BP

Re Bureau letter, 12/4/69.

Enclosed for the Bureau is one xeroxed copy of a "Memorandum in Opposition to Defendant's Motion For a New Trial" submitted to the United States District Court, Buffalo, N.Y., by the Government.

As the Bureau was previously advised by Buffalo airtel dated 9/4/69, the disclosure hearings relative to captioned individual were held in United States District Court, Buffalo, on 8/27/69 and 8/28/69. These disclosure hearings were concluded on the latter date. Motion by Defense Attorneys for a new trial was submitted to the Bureau by Buffalo airtel dated 10/10/69.

[Redacted] to United States District Judge JOHN O. HENDERSON, the trial judge in this matter, advised on 12/8/69 that no decision relative to the disclosure hearings has been made by the judge as of this date. [Redacted] advised that it is contemplated that a decision will be rendered during the month of December, 1969 and that this decision has been delayed pending receipt of the trial record currently in the possession of the United States Supreme Court. He stated that a request has been made for the trial record and that it is expected they will be forwarded to United States District Court, Buffalo, within the immediate future.

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- 1 - Bureau (Enc -
 - 1 - Buffalo
- GRM:ceb
(2)

ENCLOSURE ATTACHED

REC-87

EX-117

92-3972-426

DEC 9 1969



DEC 18 1969

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

42



ENCLOSURE

92-3972-426

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

v.

FREDERICO G. RANDACCIO

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Indictment No. 1967-115

MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR A NEW TRIAL

STATEMENT

The trial of FREDERICO G. RANDACCIO on charges of violating 18 U.S.C. 1951 and 371 commenced on October 26, 1967, in United States District Court, Buffalo, New York. Approximately ten days prior to the commencement of the trial, the Government turned over to counsel for Defendant FREDERICO G. RANDACCIO copies of all the transcripts of all conversations which were monitored during the month of February 1965, in the apartment of Darlene Grann, 51 Essex Street, Buffalo, New York. This would include the electronic surveillance log which shows that FREDERICO G. RANDACCIO was overheard at Darlene Grann's apartment at 7:50 p.m. on the evening of February 5, 1965, the night of the meeting at Natarelli's house between FREDERICO G. RANDACCIO, Pasquale Natarelli, Stephen Cino and Pascal Calabrese.

The electronic eavesdropping device at Darlene Grann's apartment at 51 Essex Street, Buffalo, New York, was monitored during the evening of February 5, 1965, by Clair V. Wambold, a special employee of the Federal Bureau of Investigation. Mr. Wambold went off duty at midnight that evening, and Richard R. Walsh, another special employee of the Federal Bureau of Investigation, assumed the duty of monitoring the device at Darlene Grann's apartment.

On November 9, 1967, counsel for FREDERICO G. RANDACCIO, Herald P. Fahringer, Jr., examined Clair V. Wambold and Richard R. Walsh under oath, outside of the Court, concerning their monitoring activities of Darlene Grann's apartment. Those depositions are attached to this memorandum

as Exhibits (A) and (B). From a reading of those depositions Mr. Fahringer established from his examination of Mr. Wambold and Mr. Walsh that:

- (1) in February 1965, monitoring electronic eavesdropping equipment was their full-time duty;
- (2) they had performed this type of work for some period of time;
- (3) they heard footsteps on the stairs leading to Darlene Grann's apartment on occasions;
- (4) they heard the door to Darlene Grann's apartment open and close on occasions;
- (5) they heard movement in Darlene Grann's apartment on occasions;
- (6) they heard the cat in Darlene Grann's apartment on occasions;
- (7) they heard water running in the bathroom of Darlene Grann's apartment on occasions;
- (8) from experience, when the television was on loud, they were sometimes able to hear movement of persons within the apartment;
- (9) throughout the month of February 1965, there were a number of incidents reflected in the logs, while the television was on loud, that they were able to hear FREDERICO G. RANDACCIO talking to Darlene Grann; and
- (10) if they had any reason to believe that someone left the apartment while they were monitoring, an entry would be made in the log that, "I believe they have left."

Thereafter, a stipulation was entered into between counsel for FREDERICO G. RANDACCIO and the Government. This stipulation was transmitted to the jury in the following form:

The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place /Natarelli's address/. At 7:50 P.M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises.

The United States Court of Appeals for the Second Circuit, in commenting on the alibi defense supposedly raised by the February 5, 1965, log stated:

. . . The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p.m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. (United States v. Caci, (2nd Cir. 1968), 401 F. 2d 664, 670).

On March 24, 1969, the Supreme Court of the United States in the Giordano case remanded this case for further proceedings. The question to be resolved on remand is whether the evidence against FREDERICO G. RANDACCIO grew out of his illegally overheard conversations or conversations occurring on his premises. Counsel for the Defendant, FREDERICO G. RANDACCIO, in the hearing which was held on August 27 and 28, 1969, and in his motion papers sworn to on October 3, 1969, indicated that in his opinion the evidence developed at the hearing, both oral and documentary, more appropriately justifies a new trial on newly discovered evidence, and not as the result of any of the evidence being "tainted" as a result of illegal electronic eavesdropping. Therefore, it is the Government's position that the question of "taint" is now resolved. That is, no evidence against FREDERICO G. RANDACCIO grew out of his illegally overheard conversations or conversations occurring on his premises.

A motion for a new trial on grounds of newly discovered evidence must meet the following requirements:

- (1) it must appear from motion that evidence relied on is, in fact, "newly discovered evidence", that is, discovered after trial;
- (2) motion must allege facts from which the Court may infer diligence on part of movant;
- (3) evidence relied on must not be merely cumulative or impeaching;
- (4) must be material to issue involved; and
- (5) must be such as, on new trial, will probably produce acquittal.

Pitt v. United States (C.A. Alaska 1959), 263 F. 2d 808, cert. denied, 79 S. Ct. 1438, 360 U.S. 919, 3 L. Ed. 2d 1535, reh. denied, 80 S. Ct. 48, 361 U.S. 857, 4 L. Ed. 2d 97; United States v. On Lee (C.A. N.Y. 1953), 201 F. 2d 722, cert. denied, 73 S. Ct. 798, 345 U.S. 936, 97 L. Ed. 1364.

It is clear that the information relied upon by counsel for FREDERICO G. RANDACCIO does not meet the requirements of "newly discovered evidence". The electronic surveillance logs from Darlene Grann's apartment for February 5 and 6, 1965, as well as the rest of February 1965, were provided to counsel for FREDERICO G. RANDACCIO prior to the trial. Counsel had the opportunity to examine Mr. Wambold and Mr. Walsh under oath on November 9, 1967. At that time, counsel for FREDERICO G. RANDACCIO developed the same information from Mr. Wambold and Mr. Walsh as was developed in the hearing of August 27 and 28, 1969. Also, counsel for FREDERICO G. RANDACCIO in his papers emphasizes that the electronic surveillance logs from Darlene Grann's apartment from 1961 to 1965 established a pattern of conduct on the part of FREDERICO G. RANDACCIO as to the time of his usual arrival and