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Grand Jury Witness Has Standing as an Aggrieved Person and May Suppress Evidence Obtained as a Result of an Illegal Wiretap.

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the best interest doctrine in Texas, while the traditional view promulgated by the *Platt* court in 1944[75] seems to have fallen into further obscurity.

Despite the proper disposition of the imprisonment issue according to the satisfaction of the Texas statute dispensing with the consent of the natural parent in an adoption proceeding, the Beaumont court may have implied an attitude that other Texas courts will extend by ignoring the statutory guidelines of dispensing with parental consent completely and ruling solely on the interests of the child in an adoption proceeding.

Charles J. Bondurant

CRIMINAL LAW—TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968—FOURTH AMENDMENT—GRAND JURY WITNESS HAS STANDING AS AN AGGRIEVED PERSON AND MAY SUPPRESS EVIDENCE OBTAINED AS A RESULT OF AN ILLEGAL WIRETAP. *In re Grand Jury Proceedings, Harrisburg, Pennsylvania,* 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom., United States v. Egan,* — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972).

In January of 1971, an indictment was handed down by a federal grand jury naming six defendants in a conspiracy to kidnap a presidential advisor, Henry Kissinger. Sister Joques Egan was not indicted as a co-defendant, but rather was named as a co-conspirator. When called to testify before a federal grand jury, she invoked her fifth amendment rights and refused to testify. The government then served her counsel with an application for transactional immunity,[1] but Sister Egan renewed her refusal under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968[2] and the fourth amendment. Alleging the questions asked by the grand jury were based upon information derived from an illegal wiretap of her phone, Sister Egan asserted her right to remain silent and moved to suppress the evidence in accordance with the provisions as contained in 18 U.S.C. § 2515,[3] 18

75 Platt v. Moore, 183 S.W.2d 682, 685 (Tex. Civ. App.—Amarillo 1944, writ ref'd w.o.m.).

1 Transactional immunity gives absolute immunity from future prosecutions for the offenses to which the questioning relates. Use immunity only protects against the use of information divulged if action is brought against the witness. *See* Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); *In re* Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970).

2 18 U.S.C. §§ 2510-20 (1970).

3 18 U.S.C. § 2515 (1970) provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, *grand jury,* department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (emphasis added).

U.S.C. § 2518(10)(a),[4] and the fourth amendment.[5] Although it was not denied that illegal wiretaps were used, the government contended that a grand jury witness does not qualify as an "aggrieved person" as defined by 18 U.S.C. § 2510(11)[6] and therefore the remedy, as provided in 18 U.S.C. § 2515, is not available. The government further questioned the standing of a witness to challenge the lawfullness of the wiretap, and the validity of extending the exclusionary rule to grand jury proceedings. The district court held Sister Egan in contempt for her refusal to answer questions after transactional immunity had been offered. Held—*Reversed.* A witness before a grand jury qualifies as an "aggrieved person" and has standing to suppress the evidence obtained as a result of an illegal wiretap in violation of the witness' rights under the Crime Control and Safe Streets Act of 1968 and the fourth amendment.[7]

The exclusion of evidence obtained in violation of constitutional rights provided by the fourth amendment was originally applied only in federal courts.[8] Since its introduction, however, the separate facets of the exclusionary rule have been expanded in varying degrees. This has encompassed the type of evidence that may be excluded; the nature of the judicial proceeding where the rule may be invoked; and, finally, the standing of the individual seeking to suppress the evidence.[9]

Initially, evidence resulting from the use of a wiretap was held not to be within the purview of the exclusionary rule.[10] An Act of Congress,[11] coupled with a Supreme Court[12] decision, extended the rule to include the contents of a telephone conversation. This departure—that

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4 18 U.S.C. § 2518(10)(a) (1970) provides in part: "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom . . . ."

5 U.S. CONST. amend. IV:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

6 18 U.S.C. § 2510(11) (1970) states: " 'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

7 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263). In some cases cited as *In re* Egan.

8 Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

9 For historical treatment of the exclusionary rule see Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 NW. U.L. REV. 471 (1952); White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970); Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Note, 55 MICH. L. REV. 567 (1957).

10 Olmstead v. United States, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

11 47 U.S.C. § 605 (1970).

12 Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

evidence to be excluded need not be some tangible item that was obtained as the result of an actual illegal entry—is now a well established legal principle.[13]

The expansion of this exclusionary procedure beyond the confines of a federal court took almost fifty years. *Mapp v. Ohio*[14] marked the first expansion of the doctrine beyond a federal court and transformed a federal rule of procedure into a constitutional right that was applicable to state courts. The rule remained limited to court proceedings[15] until a congressional act expanded the rule to include grand jury proceedings.[16]

Standing, as a requirement to invoke the exclusionary rule, has also experienced a substantial expansion. Traditionally, standing had been afforded only to defendants who "have owned or possessed the seized property or to [those who] have had a substantial possesory [sic] interest in the premises searched."[17] *Jones v. United States*[18] served as a beacon to subsequent courts in the determination of standing, and decisions followed that invariably-relaxed the standing requirement.[19] A California state court went so far as to prohibit the use of any illegally obtained evidence whether or not the rights of the defendant had been violated.[20] The United States Supreme Court has not reached that point, but still restricts the right to invoke the exclusionary rule to those defendants whose rights have been violated.[21]

A new expansion of the exclusionary rule is now being tested as witnesses before grand juries are asserting their constitutional rights. Their primary reliance is upon Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2515 of this act expressly provides for the exclusion of any evidence derived from the interception of any wire or oral communication.[22] Included in this section is a specific reference to the exclusion of evidence before a grand jury.[23] The language of this act has given rise to conflicting interpretations among federal courts.

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13 *See, e.g.*, Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967); Berger v. New York, 388 U.S. 41, 87 S. Ct. 1873. 18 L. Ed.2d 1040 (1967); Silverman v. United States, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed.2d 734 (1961).

14 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed.2d 1081 (1961).

15 *See* West v. United States, 359 F.2d 50 (8th Cir. 1966); *accord*, Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956).

16 18 U.S.C. § 2515 (1970).

17 Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed.2d 697, 703 (1960).

18 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed.2d 697 (1960).

19 *See* Mancusi v. DeForte, 392 U.S. 364, 88 S. Ct. 2120, 20 L. Ed.2d 1154 (1968); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967).

20 People v. Martin, 290 P.2d 855, 857 (Cal. 1955).

21 Alderman v. United States, 394 U.S. 165, 172, 89 S. Ct. 961, 965, 22 L. Ed.2d 176, 186 (1969), held: "Coconspirators and codefendants have been accorded no special standing."

22 18 U.S.C. § 2515 (1970).

23 *Id.*

In 1969, a grand jury was investigating interstate travel to organize, promote, and encourage riots. Witnesses called before the grand jury contended that they were entitled to a hearing to ascertain the extent to which they had been the victims of electronic surveillance.[24] The court held:

> Clearly, existent standing rules do not give standing to raise search and seizure evidentiary issues to witnesses who are testifying before the grand jury. Such standing is normally arrived at when a person becomes the defendant to criminal or administrative penalty charges.[25]

Similar language can be found in recent appellate court holdings.[26] These cases all were based primarily upon the removal of standing by the granting of immunity and thereby eliminating any constitutional ground for the suppression of evidence.

> A witness before a grand jury lacks standing to challenge a statute on constitutional grounds unless the statute directly bears upon his privilege against self-incrimination.[27]

The concept that standing is directly related to self-incrimination, and the removal of the danger automatically removes the remedy, has been unequivocally refuted by other courts, as is evidenced by the instant case[28] and those that have followed its reasoning.[29]

In formulating its opinion in the instant case, the court recognized and discussed three main issues: First, whether a grand jury witness can be ordered to testify in light of 18 U.S.C. § 2515; secondly, whether this procedure for the suppression of evidence, as outlined in 18 U.S.C. § 2518(10)(a), is available to a grand jury witness; and finally, whether the violation of a witness' rights under the fourth amendment gives the witness the right to refuse to answer grand jury questions.[30]

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24 *In re* Shead, 302 F. Supp. 569 (N.D. Cal. 1969).

25 *Id.* at 571.

26 *See* Gelbard v. United States, 443 F.2d 837 (9th Cir. 1971), *cert. granted*, — U.S. —, 92 S. Ct. 529, 30 L. Ed.2d 540 (1972); Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935, 90 S. Ct. 2253, 26 L. Ed.2d 807 (1970); Dudley v. United States, 427 F.2d 1140 (5th Cir. 1970).

27 Gelbard v. United States, 443 F.2d 837 (9th Cir. 1971), *cert. granted*, — U.S. —, 92 S. Ct. 529, 30 L. Ed.2d 549 (1972) (No. 71-110).

28 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263).

29 *See In re* Evans, 9 Cr. L. Rep. 2464 (July 28, 1971), *petition for cert. filed*, 40 U.S.L.W. 3183 (U.S. Nov. 19, 1971) (No. 71-256). Case was decided in District of Columbia Court of Appeals and released for publication on September 1, 1971. It had not appeared in the Federal Reporter, Second Series, as of April 1, 1972. *In re* Grand Jury Investigations, 444 F.2d 499 (3d Cir. 1971).

30 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263).

Cognizant of the fact that the purpose of the Act was to protect the privacy of personal communications,[31] the majority of the court rested their decision upon the provisions contained in § 2515:[32]

> Section 2515 is an unequivocal bar to questioning one before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant and aimed at the witness, if the witness himself objects to the interrogation.[33]

To deprive the witness of the right of refusal would effect a violation of this congressional prohibition. Viewed in this light, the court found this section to be self-operative and independent of any standing requirement.

The standing of a grand jury witness under section 2518(10)(a) was not as strongly supported. The underpinning for this view was found in a footnote in *Alderman v. United States*[34] which equated this section with Rule 41(e) of the Federal Rules of Criminal Procedure.[35] Relying upon this piece of persuasive dictum as a guide, the court then cited a number of cases that purported to hold that Rule 41(e) was available to victims of illegal searches when such persons were not defendants.[36] From this point it was a small step to hold that a witness before a grand jury was entitled to suppress evidence under section 2518(10)(a).

The court finally stated that even in the absence of any statutory defense, Sister Egan had standing to suppress evidence under rights granted by the fourth amendment.[37] *Silverthorne Lumber Co. v. United States*[38] was viewed as precedent for the extension of the standing requirement to include a witness before a grand jury:

> Justice Holmes, writing for the Court, stated that grand jury witnesses may not constitutionally be held in contempt for failure to respond to a subpoena when the Government ". . . seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had."[39]

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31 Title III of the Omnibus Crime Control and Safe Streets Act of 1968 § 801(b), 82 Stat. 211. Material may also be found in the historical note for 18 U.S.C.A. § 2510 (1970).

32 Of the eight judges sitting, five rested the decision upon § 2515, two found standing in § 2518(10)(a), and three judges dissented.

33 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199, 202 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed. 2d 541 (1972) (No. 71-263).

34 394 U.S. 165, 175 n.9, 89 S. Ct. 961, 968 n.9, 22 L. Ed.2d 176, 188 n.9 (1969).

35 FED. R. CRIM. P. 41(e) provides in part: "Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained . . . ."

36 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263).

37 *Id.* at 210.

38 251 U.S. 385, 40 S. Ct. 382, 64 L. Ed. 319 (1920).

39 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199, 211 (3d Cir.

In reversing Sister Egan's contempt order, the majority has adopted the rationale that illegally obtained evidence should not be used in any manner at all.[40] Under this view, one co-conspirator whose rights have been violated has standing to suppress any evidence obtained as a result of that violation. This would give him the right to suppress that evidence in any proceeding against any third party.

Recognizing the dilatorious consequences of extending standing to non-defendants, the dissent began by discussing the harm to public interest:

> That paramount public interest outweighs considerations of witness privacy because the whole life of the community depends upon how well the institutions of justice perform their role of social lubricator.[41]

The dissent, however, did not rest solely upon the need for testimony of witnesses or upon the inconvenience to the judicial process. It recognized that the public interest must be subordinate to statute,[42] but found no such necessity to exist. The position was taken that the question of excluding evidence could only be raised if a witness was exercising a privilege.[43] It was the existence of such a privilege that was challenged.

Section 2515, which provides the heart for the majority opinion, was not viewed as being self-operative:

> This section applies to the contents and fruit of *every* interception, both lawful and unlawful, but it applies only if some other section of the chapter makes disclosure unlawful. Section 2515 is not self-operating.[44]

The catalyst which gives life to the proviso contained in section 2515 is found in 18 U.S.C. § 2511(1)(c).[45] In its interpretation of this section, the dissent was unable to separate the rights of the violator from those of the victim. If the party intercepting the communication was not permitted to disclose the contents, then the injured party would also be prevented.[46] To avoid this result the dissent regarded section 2515

1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed. 2d 541 (1972) (No. 71-263).

40 *Id.*

41 *Id.* at 222.

42 *Id.* at 222.

43 *Id.* at 225.

44 *Id.* at 225 (court's emphasis).

45 18 U.S.C. § 2511(1)(c) (1970) provides: "(1) Except as otherwise specifically provided in this chapter any person who . . . (c) wilfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication . . . shall be fined . . . ."

46 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263).

as applicable only where one of the recognized privileges was in danger of violation.[47]

> Short of a literal prohibitory reading which would apply § 2511(1)(c) to the victim as well as the interceptor, there is no language from which a witness privilege may be implied.[48]

Sister Egan enjoyed none of the traditional privileges and would therefore be prevented from the remedy provided in section 2515.

Although there was agreement that standing under 18 U.S.C. § 2518 (10)(a) was available only to those aggrieved persons as defined in 18 U.S.C. § 2510(11), conflict existed concerning the scope of that standing. The dissent agreed that the scope of standing under Rule 41(e) was the accepted standard to be applied,[49] but it rejected the majority opinion that courts have applied Rule 41(e) to individuals who were not even witnesses.[50]

The dissent refused to accept the contention that the Supreme Court had ever extended the exclusionary rule of the fourth amendment to anyone not a defendant,[51] and the interpretation of *Silverthorne Lumber Co. v. United States* was specifically criticized:

> Justice Holmes used the words which the majority opinion quotes, but the juice of their context has been squeezed from them, and the husks used as a premise for a syllogism he never contemplated.[52]

In the instant case reliance upon the same authority to support diametrically opposed positions has created an impasse. Interpretations of the statutes in issue are divergent; the one holding primarily upon case law, while the dissent stresses the Senate Reports and historical background. In rebuttal, the majority discredits the Senate Reports as ambiguous,[53] and the dissent strongly suggests that the case law has been misinterpreted by the majority.[54]

The problem is further complicated by the fact that a witness attempting to suppress evidence is a new phenomenon. Lacking authority directly upon the point in issue, courts faced with the problem have reached divergent results. A California district court presents one view:

> The constitutional exclusionary rule of illegally obtained evidence is based on the necessity for an effective deterrent to illegal police action. . . . It is a truism that the deterrent is strengthened by extending the exclusionary rule to the grand jury proceedings

47 *Id.* at 225.
48 *Id.* at 226.
49 *Id.* at 230.
50 *Id.* at 230.
51 *Id.* at 230.
52 *Id.* at 230.
53 *Id.* at 205.
54 *Id.* at 226-230.

> while they are in progress. However, this would be an unduly burdensome restriction on the administration of justice. . . .[55]

The Supreme Court, expressing a similar attitude, has viewed the grand jury as a body that should operate free from technical rules.[56]

Both opinions present well reasoned arguments for their positions, but the existing law is more accurately reflected by the dissent:

> If the majority opinion contained a citation to a single case in which a witness, *in the capacity of witness only*, was held to have standing to make a Rule 41(e) motion I would find more persuasive its effort to distinguish away the *Alderman* discussion.[57]

Alderman v. United States holds that to establish standing the co-defendant or co-conspirator must have suffered a violation of his constitutional rights.[58] The Court was not confronted with standing of a witness, nor were its remarks directed to that issue. It is this point that controls, for without precedent the extension of standing to a witness, as was done in this case, creates new case law.

The fact that Sister Egan was named as a co-conspirator was only treated in passing by the majority opinion. This, however, could serve as a basis for granting standing in light of *Alderman*. *Alderman* did make specific reference to co-conspirators. Thus it might be successfully argued that there is a need to prevent the intentional violation of one conspirator's rights to obtain evidence against the other conspirators. The status of the law now encourages the violation of a minor member's rights while the rights of the leaders remain protected.

When the Supreme Court rules on this case,[59] the controversy raised by cases of this nature should be resolved. As mentioned by the dissent, the interest of the public will have to be weighed against that of the individual and one will yield. The outcome of that struggle may have been foretold in the words of a former appellate court judge now the presiding Chief Justice of the Supreme Court, Mr. Chief Justice Burger:

> [T]he Suppression Doctrine is a manifestation of sterile indignation, and is essentially negative. It punishes society as a whole for the transgressions of a poorly trained or badly motivated policeman but does nothing to get at the heart of the problem.[60]

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55 *In re* Shead, 302 F. Supp. 569, 571 (N.D. Cal. 1969).

56 Costello v. United States, 350 U.S. 359, 362, 76 S. Ct. 406, 408, 100 L. Ed. 397, 402 (1956). "[T]he grand jury has convened as a body of laymen, free from technical rules . . . ."

57 *In re* Grand Jury Proceedings, Harrisburg, Pennsylvania, 450 F.2d 199, 230 (3d Cir. 1971), *cert. granted sub nom.*, United States v. Egan, — U.S. —, 92 S. Ct. 531, 30 L. Ed.2d 541 (1972) (No. 71-263) (emphasis added).

58 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed.2d 176 (1969).

59 The Supreme Court heard oral arguments on March 27, 1972.

60 Killough v. United States, 315 F.2d 241, 257 n.5 (D.C. Cir. 1962).