

1961

## Injunction to Prevent Divulgence of Evidence Obtained by Wiretaps in State Criminal Prosecutions

Allen L. Graves

*University of Nebraska College of Law*, [algraves@mindspring.com](mailto:algraves@mindspring.com)

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### Recommended Citation

Allen L. Graves, *Injunction to Prevent Divulgence of Evidence Obtained by Wiretaps in State Criminal Prosecutions*, 40 Neb. L. Rev. 529 (1961)

Available at: <https://digitalcommons.unl.edu/nlr/vol40/iss3/9>

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Notes

## INJUNCTION TO PREVENT DIVULGENCE OF EVIDENCE OBTAINED BY WIRETAPS IN STATE CRIMINAL PROSECUTIONS

Officers of the State of New York, in compliance with the Constitution<sup>1</sup> and statutes<sup>2</sup> of that state, but in direct violation of a federal statute,<sup>3</sup> tapped a telephone belonging to a person suspected of certain felonies, intending to use the evidence obtained thereby against the suspect in a prospective state criminal prosecution. After having been indicted by a State Grand Jury, the accused began an action in Federal District Court for an injunction to enjoin a State District Attorney, a municipal Police Commissioner, and others, from divulging the existence or contents of the conversations overheard, as well as the introduction of all evidence resulting from such wiretaps, in the accused's trial. That court denied the injunction.<sup>4</sup> Pending an appeal to the Court of Appeals, the accused moved for a stay so as to halt proceedings in the state courts and preserve the status quo between the parties until final adjudication of his appeal. This relief was granted,<sup>5</sup> but upon consideration of

<sup>1</sup> N.Y. CONST. art. 1, § 12 provides:

"The right of the people to be secure against unreasonable interception of telephone . . . communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained . . . ."

<sup>2</sup> N.Y. CODE OF CR. PROC. § 813(a) provides:

"An ex parte order for the interception, overhearing or recording of . . . telephonic communications may be issued . . . upon oath or affirmation . . . that there is reasonable ground to believe that evidence of crime may be thus obtained . . . ."

<sup>3</sup> The Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958) provides:

". . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, or contents . . . or meaning of such intercepted communication to any person . . . ."

<sup>4</sup> *Pugach v. Sullivan*, 180 F. Supp. 66 (S.D. N.Y. 1960). Cf. *Bolger v. United States*, 189 F. Supp. 237 (S.D. N.Y. 1960), which is probably distinguishable on the basis that the requested injunction was directed at federal officers who had violated federal rules and procedures.

<sup>5</sup> *Pugach v. Dollinger*, 275 F.2d 503 (2d Cir. 1960) (Madden, J., dissenting).

the appeal by the full court sitting en banc, the decision of the District Court was affirmed.<sup>6</sup> The stay previously granted was continued, however, pending application by the accused to the United States Supreme Court for certiorari.<sup>7</sup> The denial of the injunction has been just recently affirmed in a per curiam decision.<sup>8</sup>

The judgment of the Court of Appeals<sup>9</sup> is in accordance with the principles of law ordinarily thought to be applicable in like cases. These principles have been enunciated by the Supreme Court in a series of rather well-known cases which may be classified, for the purposes of this note, into two analagous fact situations—the illegal search and seizure cases and the wiretap cases.

In essence, that Court has held inadmissible in federal prosecutions such evidence as has been obtained by either an illegal search and seizure<sup>10</sup> or an illegal wiretap,<sup>11</sup> regardless of whether federal<sup>12</sup> or state<sup>13</sup> officers secured the evidence. The Court has also held that it makes no difference whether the calls intercepted were interstate or intrastate in character,<sup>14</sup> and has extended the prohibition to exclude not only the communications themselves, but all information and evidence gained as the result of a wiretap.<sup>15</sup>

Where the evidence is to be used in state prosecutions, and was obtained by state officers, the Court has held, however, that its admittance may not be enjoined by federal courts in the illegal wiretap situation,<sup>16</sup> nor will it be sufficient grounds for reversing

<sup>6</sup> *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. 1960) (Clark, J., dissenting).

<sup>7</sup> *Pugach v. Dollinger*, 280 F.2d 521 (2d Cir. 1960), *cert. granted*, 363 U.S. 836 (1960), *aff'd per curiam*, 81 Sup. Ct. 650 (1961).

<sup>8</sup> *Pugach v. Dollinger*, 81 Sup. Ct. 650 (1961).

<sup>9</sup> *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. 1960) (Clark, J., dissenting).

<sup>10</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>11</sup> *Nardone v. United States*, 302 U.S. 397 (1937). This case, however, was decided after passage of the Federal Communications Act, 47 U.S.C. § 605 (1934). In *Olmsted v. United States*, 277 U.S. 438 (1928), it had been held, four Justices dissenting, that the Fourth and Fifth Amendments would not be violated by the admission in a federal prosecution of evidence obtained by federal officers in a wiretap. This case has never been overruled, and remains the law. See *Annots.*, 53 A.L.R. 1472 (1928) and 66 A.L.R. 376 (1930).

<sup>12</sup> *Nardone v. United States*, 302 U.S. 397 (1937).

<sup>13</sup> *Benanti v. United States*, 355 U.S. 96 (1957).

<sup>14</sup> *Weiss v. United States*, 308 U.S. 321 (1939).

<sup>15</sup> *Nardone v. United States*, 308 U.S. 338 (1939).

<sup>16</sup> *Stefanelli v. Minard*, 342 U.S. 117 (1951). The Court said that to hold otherwise would be to adversely affect the proper balance between the

a conviction in the illegal search and seizure situation.<sup>17</sup> In cases of illegal wiretapping the Court has indicated that use of the evidence is largely a matter of state discretion.<sup>18</sup> The only major exception to the foregoing rules arises where coercive physical violence is used in conducting an illegal search and seizure. Here, if the Court's conscience is sufficiently "shocked," it will upset a conviction obtained through use of of illegally secured evidence.<sup>19</sup> This exception to the rule is, however, quite narrow, and the Court has ruled in effect that its conscience is not sufficiently "shocked" where there is no coercive violence, regardless of how serious the invasion of privacy might be.<sup>20</sup>

From the foregoing discussion of the basic principles of law applicable to the illegal search and seizure and wiretap cases, it would seem likely that the Supreme Court, under the doctrine of stare decisis, would deem itself bound to affirm the Court of Appeals in its refusal to grant injunctive relief to the petitioner.

It is submitted, however, that this case presented the Court a situation somewhat different from any it had yet considered. Here there had been a consistent pattern of federal law violation,<sup>21</sup> not just an isolated instance as was the case in *Stefanelli v. Minard*.<sup>22</sup> Further, the Court was here asked to prevent a federal law violation before it had occurred, since under the federal statute involved divulgence itself is expressly prohibited. In the present case there has not yet been a divulgence injurious to the accused.

state and federal courts. See also *Voci v. Storb*, 235 F.2d 48 (3rd Cir. 1956) and *Pugach v. Sullivan*, 180 F. Supp. 66 (S.D. N.Y. 1960).

<sup>17</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949) (four Justices dissenting).

<sup>18</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952). Here the Court ruled that Congress did not intend the Federal Communications Act, 47 U.S.C. § 605 (1934), to impose the federal exclusionary rule of evidence on state courts, and said that the states were free to make and apply their own rules of evidence to the subject matter.

<sup>19</sup> See, e.g., *Rochin v. California*, 342 U.S. 165 (1952), where state officers forcibly caused a suspect's stomach to be pumped in recovering evidence he had been able to swallow despite their violent attempts to refrain him from doing so.

<sup>20</sup> *Irvine v. California*, 347 U.S. 128 (1954). Here a clandestine microphone was placed in the bedroom of a married suspect for a period of twenty days, all that transpired therein during that period being overheard by state officers.

<sup>21</sup> *Brown*, *The Great Wiretapping Debate and the Crisis in Law Enforcement*, 6 N.Y.L.F. 265 (1960), where it is stated that in 1952, for instance, there were 480 orders issued for wiretaps in New York City alone.

<sup>22</sup> *Stefanelli v. Minard*, 342 U.S. 117 (1951). See also Judge Clark's dissent in *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. 1960).

This element distinguishes the present case from all previous cases since all have, without exception, presented situations where the violations had already taken place.<sup>23</sup> In addition the present case is different from all other cases except *Stefanelli*, which has been distinguished above,<sup>24</sup> in that in every other instance the petitioner had been convicted before appealing to the Supreme Court. Such is not the case here. The petitioner in the present case had yet to be tried. It might also be observed that this case comes directly within the language of Mr. Justice Frankfurter's majority opinion in *Wolf v. Colorado*,<sup>25</sup> where he wrote: ". . . we have no hesitation in saying that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."<sup>26</sup> Here it is abundantly clear that the State of New York has indeed affirmatively sanctioned "such police incursion into privacy." On that basis, Justice Frankfurter's language, in conjunction with the distinctions outlined above, would seem to present a strong case in favor of the accused.

In addition to the possibilities already mentioned, the present case presents yet another. If the accused is convicted through the use of the illegally obtained evidence the law is clear that his conviction will not be subject to reversal on appeal under either state<sup>27</sup> or federal<sup>28</sup> law.

Failure, therefore, to grant the requested injunction will actually work an irreparable injury upon him if he is subsequently convicted, while it is true that he may have a civil cause of action

<sup>23</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952). The same was true in *Wolf v. Colorado*, 338 U.S. 25 (1949) (four Justices dissenting), and *Stefanelli v. Minard*, 342 U.S. 177 (1951). In the latter the only illegal act was the search itself, and although the Court was asked to grant an injunction to prevent the admission of the evidence, such as is the case here, it could not prevent the illegal act itself, as that act consisted solely of the search, and had already taken place. In that case divulgence was not an illegal act in and of itself. Here wiretapping and divulgence are, under the federal statute, two separate and distinct acts which are equally prohibited, and although the wiretap itself has already taken place, injurious divulgence has not, and may be prevented by injunctive relief. In the present case divulgence in and of itself is an illegal act.

<sup>24</sup> See note 23, *supra*.

<sup>25</sup> *Wolf v. Colorado*, 338 U.S. 25, 28 (1949) (four Justices dissenting).

<sup>26</sup> U.S. CONST. amend. XIV, § 1.

<sup>27</sup> *People v. Variano*, 5 N.Y.2d 391, 157 N.E.2d 857, 185 N.Y.S.2d 1 (1959) and *People v. Broady*, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959).

<sup>28</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952).

for damages.<sup>29</sup> This can hardly be deemed adequate, and there is no doubt as to the state's intention to use the evidence, if such use is not enjoined,<sup>30</sup> despite criminal sanctions possible under the federal statute which would be violated.<sup>31</sup> Thus the Court might also base an opinion favorable to the petitioner upon language found in a case involving alleged encroachments by a state upon the freedoms of speech, press and religion.<sup>32</sup> It was said there that the federal Supremacy Clause should be used as a basis for the intervention by federal courts in state prosecutions in ". . . exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. . . ." The *Pugach* case would seem to have presented just such a situation, but the United States Supreme Court held otherwise,<sup>33</sup> stating only that the decision was being based on *Schwartz v. Texas*,<sup>34</sup> and *Stefanelli v. Minard*.<sup>35</sup> A vigorous dissent by Mr. Justice Douglas, concurred in by Mr. Chief Justice Warren, stated that since the *Benanti* case,<sup>36</sup> *Schwartz* "stands alone as an aberration from the otherwise vigorous enforcement this court has given to the congressional policy embodied in 47 U.S.C. § 605. \* \* \* Yet today a majority of this Court summarily holds that *Schwartz v. State of Texas* . . . is still the law, and petitioner is left only with the consoling knowledge that Congress *meant* to protect the privacy of his telephone conversations, while the benefits of the congressional indictment are denied him."<sup>37</sup> As for *Stefanelli*, Mr. Justice Douglas says "*Here the thrust of the relief is only to enjoin the use of wire-tap evidence, not to enjoin the action itself. Hence there is no bar*

<sup>29</sup> *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947).

<sup>30</sup> *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. 1960) (Clark, J., dissenting).

<sup>31</sup> The Federal Communications Act, 68 Stat. 30 (1954), 47 U.S.C. § 501 (1958) provides:

"Any person who . . . does . . . any act . . . in this chapter prohibited or declared to be unlawful . . . shall, upon conviction thereof, be punished . . . by a fine of not more than \$10,000 or by imprisonment for a term not exceeding one year, or both. . . ."

In actuality only one successful prosecution, *United States v. Gris*, 247 F.2d 860 (2d Cir. 1957), has been found which was based upon this section.

<sup>32</sup> *Douglas v. Jeannette*, 319 U.S. 157, 163 (1943).

<sup>33</sup> *Pugach v. Dollinger*, 81 Sup. Ct. 650 (1961).

<sup>34</sup> 344 U.S. 199 (1952). Mr. Justice Brennan, concurring in the result in *Pugach v. Dollinger*, 81 Sup. Ct. 650 (1961), excluded the *Schwartz* case as a basis for affirming the lower courts in *Pugach*.

<sup>35</sup> 342 U.S. 117 (1951). See also note 34, *supra*.

<sup>36</sup> 355 U.S. 96 (1957).

<sup>37</sup> *Pugach v. Dollinger*, 81 Sup. Ct. 650, 650-51 (1961).

to the action."<sup>38</sup> In conclusion, he observes that "The privacy of the individual, history assures us, can never be protected where its violation by state officers meets with reward rather than punishment."<sup>39</sup>

*Allen L. Graves, '62*