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Marital Litigation: Impact of Title III of Omnibus Crime Control and Safe Streets Act of 1968: *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978)

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Marital Litigation: Impact of Title III of Omnibus Crime Control and Safe Streets Act of 1968

United States v. Rizzo, 583 F.2d 907 (7th Cir. 1978).

I. INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968¹ has had an unpredictable influence upon domestic relations litigation.² Title III regulates the ability to intercept and disclose the contents of wire or oral communications.³ It provides not only

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1. Omnibus Crime Control and Safe Streets Act of 1968, ch. 119, § 802, 82 Stat. 112 (codified at 18 U.S.C. §§ 2510-2520 (1976)).
 2. See *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976); *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974); *London v. London*, 420 F. Supp. 944 (S.D.N.Y. 1976); *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975); *Markham v. Markham*, 265 So.2d 59 (1st Dist. Ct. App. Fla. 1972), *aff'd*, 272 So.2d 813 (Fla. 1973); *In re Marriage of Lopp*, — Ind. —, 378 N.E.2d 414 (1978); *Berk v. Berk*, 95 Misc.2d 33, 406 N.Y.S.2d 247 (1978); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E.2d 347 (1976).
 3. 18 U.S.C. § 2511(1)(a)(c) and (d) (1976):
 - (1) Except as otherwise specifically provided in this chapter any person who—
 - (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
.....
 - (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or
 - (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
- shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

for criminal penalties,⁴ but also for civil damages,⁵ and prohibits admitting into evidence the fruits of illegal wire or oral interceptions.⁶

On various occasions, in response to claims by aggrieved partners, spouses who violated the plain language of Title III have asked the courts to imply an interspousal immunity from the penalties imposed by the statute. Differing views have been expressed by the circuit courts of appeal and state courts as to the existence of such an implied interspousal immunity. This note will discuss how the courts have viewed the purpose Congress sought to achieve in enacting Title III and the implications of these decisions on domestic relations disputes.

In *United States v. Rizzo*,⁷ the Seventh Circuit Court of Appeals affirmed the conviction of defendant, a licensed private investigator in Illinois, on thirteen counts of knowingly and unlawfully intercepting communications in violation of 18 U.S.C. § 2511. Rizzo was employed by persons to gather information in regard to suspected marital infidelities.⁸ During the course of his employment, Rizzo installed, or was assisted by the client-spouse in installing, electronic eavesdropping equipment in the home where one of the spouses resided or where both were residing together.⁹ The interceptions occurred with the knowledge and consent of the client-spouse. In his defense, Rizzo maintained that 18 U.S.C. § 2511 was inapplicable to electronic eavesdropping by spouses within the marital home¹⁰ and that derivatively, the private investigator shares the interspousal immunity of his client.

The court held that nothing in the legislative history of Title III suggested that its sanctions were not intended by Congress to cover third parties and in particular, private investigators.¹¹ However, the interesting aspect of the *Rizzo* opinion is the court's willingness to acquiesce in the Fifth Circuit Court of Appeal's interpretation of Title III in *Simpson v. Simpson*.¹²

4. *Id.*

5. 18 U.S.C. § 2520 (1976).

6. 18 U.S.C. § 2515 (1976).

7. 583 F.2d 907 (7th Cir. 1978).

8. Brief for Appellee at 3-13, *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978).

9. Brief for Appellant at 20-27, *United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978).

For example, Rizzo connected transmitting devices on telephone lines, in laundry rooms and in closets in close proximity to a telephone. At times, Rizzo did not do the actual installation himself, but gave instructions to the client on proper installation. *Id.*

10. 583 F.2d at 908.

11. *Id.* at 910.

12. 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

II. *SIMPSON* AND ITS PROGENY

In *Simpson*, the Fifth Circuit Court of Appeals faced the issue of whether use of electronic wiretapping equipment by the husband to intercept his wife's conversations with a third party from a telephone in the marital home was an indictable offense under Title III.¹³ The husband, entertaining suspicions as to his wife's faithfulness, attached a wiretapping device to phone lines within his home. He thereby intercepted "mildly compromising" conversations between his wife and another man. The husband-appellee disclosed the contents of the tape recordings to neighbors, family members, and his lawyer. Upon the advice of his lawyer, the wife agreed not to contest a divorce action. However the wife did initiate a civil action for damages stemming from these disclosures pursuant to section 2520,¹⁴ but the court held that this section was inapplicable: "The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts."¹⁵

The court did indicate that they were not without doubts about the result they had reached and limited the holding to the facts of the case. However, not all courts faced with a similar issue have heeded this caveat. Thus, *Simpson* has been relied upon to demonstrate the existence of an implied interspousal immunity from the provisions of Title III.

Three years after *Simpson*, the Second Circuit, in *Anonymous v. Anonymous*,¹⁶ ruled that "mere marital disputes . . . do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes . . ." ¹⁷ The wife sued her former husband

13. *Id.* at 804.

14. 18 U.S.C. § 2520 (1976):

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

15. 490 F.2d at 805.

16. 558 F.2d 677 (2d Cir. 1977).

17. *Id.* at 677.

for civil damages on the basis of recordings taken from an automatic telephone answering machine in the husband's home. The tapes included her conversations with the couple's daughter, who at the time was in the custody of the husband. Although the boundaries remain undefined, *Anonymous* seems to suggest that electronic surveillance is permissible in the context of marital litigation.

The use of tape recordings of telephone conversations between a mother and her children was also the subject of a recent decision in a New York state court. In *Berk v. Berk*,¹⁸ a child custody action, the court refused to condone the conduct of the father in taping the conversations, but at the same time held the recordings admissible as evidence in a custody determination:

[W]here custody is a paramount issue, the Court should consider the best interests of the children and, therefore, would want all of the information available to better assist the Court in making a determination. . . .

[W]here the custody of a child is at issue the strict rules of evidence need not be followed.¹⁹

Irrespective of the statement in *Berk* that the holding of the court should not be construed as supporting the use of wiretapping, the legal effect of the decision will be to open the doors to surveillance and invasion of privacy in a growing number of cases.

In a divorce and child custody proceeding similar to *Berk*, the Ohio Court of Common Pleas in *Beaber v. Beaber*²⁰ determined that evidence consisting of recorded telephone conversations between the wife and her paramour was admissible to impeach the wife's testimony. However, the factual circumstances of *Beaber* indicate a more significant intrusion than that which occurred in *Berk*, as *Beaber* involved not only the intrusion by the spouse, but also that of a third party. A detective agency which Mr. Beaber had employed to follow his wife provided electronic equipment and instructions to the husband so that he could tap the phone in the marital home. The intercepted conversations included those between the wife and children, as well as communications between the wife and an intimate acquaintance.

The *Simpson* doctrine was further extended in *London v. London*.²¹ The court dismissed, for failure to state a claim on which relief could be granted, the complaint of a wife against her

18. 95 Misc.2d 33, 406 N.Y.S.2d 247 (1978).

19. *Id.* at 34, 406 N.Y.S.2d at 248.

20. 41 Ohio Misc. 95, 322 N.E.2d 910 (1974). The court stated that "[t]o deny admission of these tapes would be to deny the defendant [husband] the only material, creditable evidence that he was able to obtain." *Id.* at 103-104, 322 N.E.2d at 915.

21. 420 F. Supp. 944 (S.D.N.Y. 1976).

former husband for interception of conversations between the wife and her daughter. In the language of the court:

The Court finds no significance in the fact that in *Simpson* the interception and recording took place in the marital home of the parties, whereas here it took place in the husband and children's home from which his wife had departed. What is important is that the *locus in quo* of the interception be a family home There is no apparent reason to distinguish between the interception of telephone calls in a marital home and interception in a parent-progeny home.²²

Thus, in *London*, the court took a step beyond any prior precedent which followed the *Simpson* doctrine. The court expressly extended the permissible area of interception beyond the marital home. Since *London* was an action for civil damages, as opposed to an action for child custody, the court did not attempt to justify its adoption of the interspousal immunity as being in the "best interests of the children."²³ Interestingly, the courts deciding *London*, *Beaber*, and *Anonymous* did not make an independent examination of the legislative history of Title III, but rather accepted the interpretation engrafted upon the statute by the *Simpson* court. Yet not all courts have construed Title III as did the *Simpson* court.

The most complete deviation from the result in the *Simpson* line of cases was effected by the Sixth Circuit. In *United States v. Jones*,²⁴ appellee Jones and his wife were not living together at the time of the interceptions in question. Mrs. Jones had been granted a restraining order to prohibit her husband from "coming about" her. Jones continued to pay rent on their home and also paid the telephone bills. On one occasion while babysitting, Jones placed a recording device on the telephone because he was suspicious of his wife's extramarital activities. The resultant recordings confirmed his suspicions, and Jones used the recordings to obtain a divorce.

Jones was charged with intercepting and using the contents of telephone conversations in violation of 18 U.S.C. §§ 2511(1)(a) and (d).²⁵ The indictment against Jones was dismissed by the United States District Court for the Eastern District of Tennessee.²⁶ The court, relying on *Simpson*, ruled that Title III was not intended to prohibit purely interspousal wiretaps placed on telephones in the marital home.²⁷ The Government appealed to the Sixth Circuit. The court concluded that "18 U.S.C. § 2511(1)(a) establishes a

22. *Id.* at 946-47 (emphasis in original).

23. 95 Misc.2d at 34, 406 N.Y.S.2d at 248.

24. 542 F.2d 661 (6th Cir. 1976).

25. See note 3 *supra*.

26. 542 F.2d at 663-64.

27. *Id.* at 663.

broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation."²⁸ The court, however, was not satisfied to complete its opinion with this broad prohibitory language. It went further to compromise its position by stating that "[e]ven if *Simpson* was correctly decided on its facts, this case is clearly distinguishable."²⁹ *Jones* thereafter was distinguished from *Simpson* because appellee Jones was indicted for a criminal rather than civil offense and because Jones's surveillance took place outside the marital home.³⁰

Other courts have been cautious in distinguishing *Simpson* factually rather than attacking the Fifth Circuit's rationale. In *Remington v. Remington*,³¹ for instance, the Federal District Court for the Eastern District of Pennsylvania addressed the question of whether the doctrine of interspousal immunity barred the plaintiff-husband from success in an action against his wife pursuant to section 2520.³² In deciding that Remington could recover damages from his wife, the court distinguished *Simpson* by stating that in this case, a private detective agency and a third party were involved in the installation of the wiretap. Additionally, the recordings were used by two law firms without the knowledge or consent of the husband: "[T]he Court is unable to conclude as a matter of law that the gross invasion of an individual's privacy by private detective agencies, law firms and other unknown persons, whether instigated by a spouse or not, is not included within the statutory proscription."³³

The serious nature of the invasion of privacy was also the concern of the Eighth Circuit in *White v. Weiss*.³⁴ Weiss, a private detective, furnished telephone wiretap recording equipment and assisted in its installation, although the wife accomplished the actual installation. For three and one-half months *all* incoming and outgoing calls were monitored,³⁵ some of these being disclosed to the detective agency. The Eighth Circuit found "no sound rationale or legal basis in the statute or in its legislative history to insulate a private detective from the reach of the civil penalties

28. *Id.* at 669.

29. *Id.* at 672.

30. *Id.* See also 4 N. KY. L. REV. 389, 395-96 (1977).

31. 393 F. Supp. 898 (E.D. Pa. 1975).

32. See note 3 *supra*.

33. *Id.* at 901.

34. 535 F.2d 1067 (8th Cir. 1976).

35. *Id.* at 1069. The wiretap intercepted and recorded Mr. White's conversations not only with his lover, but also with his attorney, business associates and the Internal Revenue Service. *Id.* at 1071.

contained in the statute [Title III]."³⁶ The court found it immaterial that the defendant did not personally connect the surveillance equipment, because Weiss accomplished the invasion of privacy by furnishing the equipment and personally directing its installation.

In still another interpretation of the scope of Title III, the North Carolina high court in *Rickenbaker v. Rickenbaker*,³⁷ considered whether all evidence gathered as a result of the interception of plaintiff's phone conversations by use of an extension was admissible at trial.³⁸ The evidence obtained from the sound activated recorder placed on the extension phone in defendant's closet was declared inadmissible. After examining the legislative history of Title III, the court interpreted the provision in a manner conflicting with that relied on in *Simpson*:

We do not agree with the 5th Circuit's patently doubtful conclusion that the legislative history of the statutes under consideration shows no direct indication that the statute was intended to reach domestic conflicts. The history of the act indicates a legislative intent that individuals be protected from invasions of their privacy by sophisticated surveillance devices.³⁹

Thus the North Carolina Supreme Court became one of few to clearly state its dissatisfaction with the *Simpson* holding.

III. LEGISLATIVE HISTORY

The purpose of the Omnibus Crime Control and Safe Street Act of 1968, as evidenced in Senate Report No. 1907, is to prohibit "all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation

36. *Id.* at 1071.

37. 290 N.C. 373, 226 S.E.2d 347 (1976).

38. Pertinent here is the extension telephone exception to Title III found in 18 U.S.C. § 2510(5)(a)(i) (1976):

'Electronic, mechanical, or other device' means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the *ordinary course of its business*

(emphasis added).

In *Rickenbaker*, § 2510(5)(a)(i) was found to be inapplicable because an extension telephone used without authorization or consent to record private conversations is not used in the ordinary course of business. 290 N.C. at 379, 226 S.E.2d at 350.

39. 209 N.C. at 381, 226 S.E.2d at 352.

of specified types of major crimes after obtaining a court order."⁴⁰ The Report then enumerates four exceptions to the Act's broad language, none of which are an exception based upon interspousal immunity.⁴¹ Even the *Simpson* court conceded that the plain language of the Act clearly reaches the action of *any* person who intercepts or attempts to intercept wire or oral communications.⁴²

The *Simpson* court suggested that the failure to provide for an interspousal electronic surveillance exception may be attributed to a lack of awareness on the part of Congress of the far-reaching implications of the broad language.⁴³ Such a suggestion fails to take into account statements made by investigators at the Congressional hearings and statements by Congressmen made during debate.

In 1965, Congress began its efforts to modernize the law of electronic surveillance. Congress took note that new technological developments made the use and abuse of electronic surveillance less difficult, thus jeopardizing the privacy of all communication. The Senate Judiciary Committee's report stated:

No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.⁴⁴

The Administrative Practice and Procedure Subcommittee of the Senate Judiciary Committee divided their hearings on electronic surveillance into six parts; four parts concerned government surveillance, another considered the activities of telephone companies, and one part dealt with private use of electronic surveillance

40. S. REP. NO. 1097, 90th Cong., 2d Sess. 27, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2113.

41. *Id.* at 27-28, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2113. The four exceptions include interceptions by: (1) employees of communications facilities in the ordinary course of business; (2) employees of the Federal Communications Commission (FCC) acting in the ordinary course of business; (3) government agents to protect the Nation against attack and (4) government agents to protect the "national security." *Id.*

42. 18 U.S.C. § 2511 (1976). "Person" is defined to mean any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation. 18 U.S.C. § 2510(6) (1976). *See Simpson v. Simpson*, 490 F.2d at 805, for a discussion of the plain language of Title III.

43. [W]e are of the opinion that Congress did not intend such a far-reaching result, one extending into areas normally left to states, those of the marital home and domestic conflicts. We reach this decision because Congress has not, in the statute, committee reports, legislative hearings, or reported debates indicated either its positive intent to reach so far or an awareness that it might be doing so.

490 F.2d at 805.

44. S. REP. NO. 1097, *supra* note 40, at 67, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2154.

devices. Senator Long, Chairman of the subcommittee, was obviously cognizant of the use of private surveillance when he identified the three "large areas" of nongovernmental snooping as: (1) industrial, (2) divorce cases, and (3) politics.⁴⁵ The legislative history also contained the personal views of Senators Dirksen, Hruska, Scott and Thurmond. These senators concluded that a "broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations."⁴⁶ Additionally, Richard Gerstein, the District Attorney of Dade County, Florida, testified that "it is routine procedure in *marital disagreements* and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones."⁴⁷

IV. SUPREME COURT STANDARDS

The legislative history of Title III must also be viewed in light of two Supreme Court decisions rendered the year prior to passage of the Omnibus Crime Control and Safe Streets Act. The Judiciary Committee report explicitly states⁴⁸ that Title III conforms to the standards set out in *Berger v. New York*,⁴⁹ and *Katz v. United States*.⁵⁰

Berger involved the constitutionality of a New York statute which permitted the installation of a recording device upon oath or affirmation of reasonable grounds to believe that evidence of a crime may be obtained. The Supreme Court was concerned with the danger to the privacy of the individual and the constitutional questions raised by the fourth and fifth amendments in the increasingly prevalent use of eavesdropping equipment. Although *Rizzo* involved interceptions of communications in the private sector, the concerns that the *Berger* Court expressed due to the growing use of surveillance devices by law enforcement officers are equally applicable in the privacy of one's home. In emphasizing the importance of privacy, the Court decided that "it is not asking

45. *Hearings on Invasion of Privacy Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 89th Cong., 2d Sess., pt. 5, at 2261 (1965-1966).

46. *Individual Views Messrs. Dirksen, Hruska, Scott and Thurmond on Titles I, II and III*, quoted in S. REP. NO. 1097, *supra* note 40, at 225, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2274.

47. *Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., pt. 2 at 1009 (1965-1966).

48. S. REP. NO. 1097, *supra* note 40, at 28, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2113.

49. 388 U.S. 41 (1967).

50. 389 U.S. 347 (1967).

too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. *Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.*⁵¹ The Court reaffirmed that a conversation was within fourth amendment protections, and therefore the use of electronic devices to capture a conversation was a search within the meaning of the amendment.⁵²

The underlying expectations of the person whose privacy was invaded by the use of an electronic listening and recording device were the primary concerns of the Court in *Katz*.⁵³ Similarly, these notions are embodied in the statutory language of 18 U.S.C. § 2510(2), relating to oral communications. Oral communications are defined as utterances "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."⁵⁴ Ultimately, the question in both fourth amendment and Title III cases becomes whether an individual has a justifiable expectation of privacy within the confines of one's own home. Justice Harlan, concurring in *Katz*, stated that "an enclosed telephone booth is an area where, like a home, . . . a person has a constitutionally protected reasonable expectation of privacy."⁵⁵

Katz established that advance authorization by a neutral and detached magistrate was a constitutionally required precondition to the type of surveillance undertaken by the government officers.⁵⁶ This concept is fundamental when reassessing what Congress was considering when drafting and adopting Title III following the *Katz* decision. In light of the rule in *Katz*, it is difficult to perceive that Congress would leave a wife or husband without any recourse when his or her privacy was invaded by a suspicious spouse. The information revealed by spousal surveillance into alleged marital infidelities has effects on an individual's life, potentially as severe as information acquired through surveillance by law enforcement officers.

Regarding the issue of federal pre-emption, in *Anonymous v.*

51. 388 U.S. at 63 (emphasis added).

52. *Id.* at 51.

53. 389 U.S. 347 (1967). *Katz's* end of a telephone conversation was overheard by FBI agents who had attached an electronic listening and recording device to the outside of a public telephone booth. At trial, evidence of the conversation was admitted and *Katz* was convicted of transmitting wagering information across state lines. *Id.* at 348.

54. 18 U.S.C. § 2510(2) (1976).

55. 389 U.S. at 360 (citations omitted).

56. *Id.* at 359.

Anonymous,⁵⁷ an action pursuant to 18 U.S.C. § 2511, the Second Circuit inferred that it was unwilling to award damages under Title III because a purely domestic conflict was a matter "clearly to be handled by the state courts."⁵⁸ When examining the legislative history of Title III, there is some evidence of Congressional reluctance to pre-empt state law:

Subparagraphs (c) and (d) [§ 2511] prohibit, in turn, the disclosure or the use of the contents of any intercepted communication by any person knowing or having reason to know the information was obtained through an interception in violation of this subsection. . . . There is no intent to pre-empt state law.⁵⁹

However, in *United States v. Marion*,⁶⁰ the Second Circuit explicitly rejected the argument that the admissibility of information obtained by eavesdropping must be judged according to the state wiretap statute, rather than the more stringent federal statute. The court stated that "whether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III."⁶¹ Thus it appears that the courts have not accepted less strict standards for wiretapping on the basis that state law is controlling.⁶²

V. ANALYSIS OF RIZZO

The intent of the *Rizzo* court was to avoid a conflict between the interpretations given Title III in *Jones* and *Simpson*. The court did so by relying on legislative history to the exclusion of relevant precedent. Based on an evaluation of the legislative history of Title III, the conclusion of the Seventh Circuit that *Rizzo*'s third party intrusion into the marital home constituted a violation of section 2511 appears to be sound. When a third party intentionally listens to conversations in violation of a legitimate expectation of privacy, there is an interference with a right protected under Title III.⁶³

However, in focusing entirely on the legislative history to the exclusion of case law from other jurisdictions, the *Rizzo* court

57. 558 F.2d 677 (2d Cir. 1977). For an explanation of the factual circumstances of the case, see text accompanying notes 16-17 *supra*.

58. *Id.* at 679.

59. S. REP. NO. 1097, *supra* note 40, at 93, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, at 2181.

60. 535 F.2d 697 (2d Cir. 1976). See also *People v. Jones*, 30 Cal. App. 852, 106 Cal. Rptr. 749 (1973) (state law on wiretapping pre-empted only if it conflicts with or is more permissive than federal law).

61. 535 F.2d at 702.

62. For an analysis of state law regarding interspousal immunity in tort, see Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. TOL. L. REV. 185, 190-97 (1975).

63. See note 3 *supra*.

omitted an important step in reasoning which would have provided valuable insight into the future success or failure of suits by spouses against their partners for wiretapping offenses. The court concluded that the private investigator had no derivative spousal electronic surveillance immunity without first deciding the intermediate question of whether there even exists electronic surveillance immunity in favor of the spouse from which an investigator's immunity could derive.

The fundamental distinction between *Rizzo* and *Simpson* is that in *Rizzo*, the court was dealing with surveillance by a third party, whereas in *Simpson* only the spouse was involved. This would appear to be a sufficient difference to justify the contrary results if there was fundamental agreement as to the underlying rationale in the two cases. The *Rizzo* court sought to mask the underlying conflict by restating *Simpson's* dicta that a different view would have been taken of "a third-party intrusion into the marital home."⁶⁴

The core philosophy in *Simpson* was that personal surveillance "is consistent with whatever expectations of privacy spouses might have vis-a-vis each other within the marital home."⁶⁵ This is in direct opposition to the language of *Jones*:

For purposes of the federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ. The end result is the same—the privacy of the unconsenting parties to the intercepted conversation has been invaded.⁶⁶

Perhaps if the *Rizzo* court would have analyzed *Rizzo's* surveillance from the perspective of an invasion of privacy, the legal community would have been given insight into the Seventh Circuit's view of Title III as it relates to marital litigation. By focusing on the right to privacy issue, it would have become apparent that *Jones* and *Simpson* represent very different philosophies. Had it done so, it could have selected one of these approaches and weighed *Rizzo's* actions accordingly. Rather, what the court achieved by evading the issue, is further confusion as to the applicability of Title III in marital litigation.

VI. CONCLUSION

The question remaining is whether the *Rizzo* decision forecloses any invocation of interspousal electronic surveillance immunity in the Seventh Circuit. At best, it can be said that the court did nothing to close the door to future invocation of such interspousal immunity. The court assumed, "without deciding, that

64. 490 F.2d at 809.

65. *Id.*

66. 542 F.2d at 670.

Simpson was correctly decided and yet affirm[ed] Rizzo's conviction.⁶⁷ Although seemingly to concede that the facts of this case demonstrated such disregard for the basic tenets of individual privacy that it was not a close case, the *Rizzo* court sensed some tension between its decision and *Simpson*.

A major problem caused by the court's assumption that *Simpson* was correctly decided is the impact of such an assumption on the Justice Department's decision to prosecute interspousal electronic surveillance cases. In determining the practicality of prosecuting a case based on a wiretap by a spouse, the Justice Department gives some credence to the attitude of the court toward such actions.⁶⁸

The fact that the *Rizzo* court expressly refused to choose between the interpretations given Title III in *Simpson* and *Jones*⁶⁹ vividly points out the need for a final judicial resolution of the marital surveillance issue. Such resolution is imperative to give the Justice Department an indication of the current judicial attitude, and importantly, to give each individual knowledge of the possible limitations of his or her right to privacy.

Karen Reimer '80

67. 583 F.2d at 909.

68. See Comment, *supra* note 62, at 211 n.105.

69. 583 F.2d at 909.