

St. John's Law Review

Volume 47
Number 2 *Volume 47, December 1972, Number*
2

Article 12

Authorization of Wiretaps (United States v. Pisacano)

St. John's Law Review

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such language should be scrupulously avoided. On the other hand, a constitutionally permissible search of all airline passengers may be a desirable result. A decision which upholds the constitutionality of such searches should stress the limited nature of the invasion of privacy. Surveys have shown that most airline passengers, the class victim of weapons searches, welcome them. Passengers feel that the minor inconvenience of the search is outweighed by the assurance of a safe flight.²⁰⁸ By employing a true balancing test which carefully considers the consequences to the individual victims of a search as well as the public danger, courts will not only achieve a desirable result but also a satisfactory legal theory for reaching that result.

AUTHORIZATION OF WIRETAPS

United States v. Pisacano

Title III of the Omnibus Crime Control and Safe Streets Act of 1968²⁰⁹ legalized, within narrowly defined limits,²¹⁰ wiretapping by federal and state authorities in investigating certain types of crimes.²¹¹ Drawn to comply with constitutional standards enunciated in *Berger v. New York*²¹² and *Katz v. United States*,²¹³ it provides that authorization for the interception of wire or oral communications must be granted by a federal judge of competent jurisdiction upon an application authorized by "[t]he Attorney General, or any Assistant Attorney General specifically designated by the Attorney General."²¹⁴ According

²⁰⁸ See N.Y. Times, Aug. 30, 1972, at 73, col. 7.

²⁰⁹ Pub. L. No. 90-351, 82 Stat. 197, 211-223 (partially codified at 18 U.S.C. §§ 2510-20 (1970)) [hereinafter Title III].

²¹⁰ See 18 U.S.C. § 2516, 2518(1)-(8) (1970).

²¹¹ All crimes to which Title III is applicable are listed at 18 U.S.C. § 2516(1)(a)-(g) (1971).

²¹² 388 U.S. 41 (1967).

In *Berger*, a New York statute permitting eavesdropping was declared invalid for want of "adequate judicial supervision or protective procedure." *Id.* at 60. Specifically, the Court objected to the following facts: (1) the warrant required no particularity as to the specific crime being investigated or anticipated; (2) prolonged eavesdropping would be "equivalent to a series of intrusions . . . pursuant to a single showing of probable cause;" (3) no termination date for the authorization was required; (4) there was no requirement for notice as is present in conventional warrants.

²¹³ 389 U.S. 347 (1967).

Katz suggested that "[a] duly authorized magistrate . . . could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." *Id.* at 353 (emphasis added). The "limited search and seizure" referred to was eavesdropping with the use of an electronic device placed on the top of a public telephone booth regularly used by the defendant.

That the drafters of Title III had the *Berger* and *Katz* decisions in mind is reflected in the accompanying Senate report: "Title III was drafted to meet these [constitutional] standards and to conform with *Katz v. United States*. . . ." S. REP. No. 1097, 90th Cong., 2d Sess., 2 U.S. CODE CONG. AND AD. NEWS, 2153 (1968).

²¹⁴ 18 U.S.C. § 2516(1) (1970).

to 28 U.S.C. section 510, meanwhile, the Attorney General may occasionally delegate duties to "any other officer, employee, or agency of the Department of Justice."²¹⁵

The degree to which the Attorney General's duties under the wiretap statute may be delegated under 28 U.S.C. section 510 without rendering invalid applications for authorization for interception of wire or oral communications in accordance with Title III has been the subject of a considerable amount of discussion in recent cases.²¹⁶ Those cases include *United States v. Pisacano*²¹⁷ where three wiretap authorizations were at issue.

In *Pisacano*, the defendants were the subject of a four-count indictment returned by a grand jury in the Southern District of New York. The defendants pleaded guilty to count one, which charged a conspiracy to violate statutes dealing with interstate racketeering enterprises, with the understanding that the other counts, involving substantive offenses under these sections, would be dismissed on the date of sentencing. Before the date of sentencing, counsel for two of the defendants applied for a postponement. This application was denied. At the time of sentencing, counsel once again moved to postpone sentencing and also moved for permission to withdraw the guilty pleas pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.²¹⁸ These motions were denied and relatively light sentences were imposed.²¹⁹ On appeal to the Second Circuit Court of Appeals, the defen-

²¹⁵ 28 U.S.C. § 510 (1966). This section reads in full:

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

²¹⁶ See, e.g., *United States v. Robinson*, 40 U.S.L.W. 2454 (5th Cir. Jan. 12, 1972); *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972); *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972); *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972); *United States v. Consiglio*, 342 F. Supp. 556 (D. Conn. 1972); *United States v. Narducci*, 341 F. Supp. 1107 (E.D. Pa. 1972); *United States v. Casale*, 341 F. Supp. 374 (M.D. Pa. 1972); *United States v. Doolittle*, 341 F. Supp. 163 (M.D. Ga. 1972); *United States v. D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972); *United States v. Baldassari*, 338 F. Supp. 904 (M.D. Pa. 1972); *United States v. Cihal*, 336 F. Supp. 261 (W.D. Pa. 1971); *United States v. La Gorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971).

²¹⁷ 459 F.2d 259 (2d Cir. 1972).

²¹⁸ FED. R. CRIM. P. 32(d) reads as follows:

A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

The discretionary nature of the judge's response to a motion under Rule 32(d) has been established and reaffirmed in many cases. See note 220 *infra*.

²¹⁹ 18 U.S.C. § 1084 (1961), prohibiting knowing use of wire communication facilities in transmission of wagering information, provides a maximum penalty of \$10,000 fine and/or two years imprisonment. 18 U.S.C. § 1952 (1965), prohibiting interstate or foreign

dants contended that the denial of their motions to withdraw the guilty pleas was an abuse of the judge's discretion.²²⁰

Chief Judge Friendly, in affirming the order denying defendant's motion to withdraw his guilty plea, found present none of the grounds which normally constitute abuse of the trial court's discretion such as to permit an appellate court to overturn such an order.²²¹

The applications to postpone sentencing were made ostensibly to give the defendants' counsel time to explore the possible ramifications of the Fifth Circuit decision in *United States v. Robinson*,²²² decided

travel or commerce in furtherance of unlawful activity, provides a maximum penalty of \$10,000 fine and/or five years imprisonment. The actual sentences imposed for conspiracy to commit these violations were a \$250 fine and two years probation for one defendant and three year sentences for the other two defendants, of which four months were to be spent in "jail-type" institutions, the balance of the sentences to be suspended and each defendant subsequently placed on two years probation.

²²⁰ There is virtual unanimity among the circuits that the granting of permission to withdraw a plea is discretionary with the trial court. *See, e.g.,* *United States v. Rawlins*, 440 F.2d 1043 (8th Cir. 1971); *United States v. Spragg*, 439 F.2d 800 (5th Cir. 1971); *United States v. Lombardo*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971), *citing* *United States v. Hughes*, 325 F.2d 789, 792 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964); *United States ex rel. Scott v. Mancusi*, 429 F.2d 104 (2d Cir.), *cert. denied*, 402 U.S. 909 (1970); *Hanson v. Mathews*, 424 F.2d 1205 (7th Cir.), *cert. denied*, 397 U.S. 1057 (1970); *Everett v. United States*, 336 F.2d 979 (D.C. Cir. 1964).

A guilty plea must be a "knowing, intelligent act done with sufficient awareness of relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). The trial judge has a responsibility for ensuring that such is the case. *FED. R. CRIM. P.* 11.

Although "[t]here is no requirement that a district court enumerate all the rights which are waived by a plea of guilty in order to determine if it is voluntarily and intelligently made," *Taylor v. United States*, 452 F.2d 646, 648 (5th Cir. 1971) (footnotes omitted), nevertheless "[i]t is the duty of a Federal judge to thoroughly investigate the circumstances under which [the guilty plea] is made." *United States v. Lester*, 247 F.2d 496, 499 (2d Cir. 1957).

Among the consequences of which the defendant must be aware is ineligibility for parole. *Bye v. United States*, 435 F.2d 177 (2d Cir. 1970). *See* Second Circuit Note, 46 *SR. JOHN'S L. REV.* 502 (1972) and cases cited therein.

Misleading statements by the government, measured by the reasonableness of the construction placed on them by the defendant, may preclude awareness of circumstances and consequences requisite for the guilty plea. *See United States v. Lester*, 247 F.2d 496, 501 (2d Cir. 1957). Likewise, extreme inadequacy or absence of counsel (unless expressly waived) may also invalidate a guilty plea. *Woodall v. Neil*, 444 F.2d 92 (6th Cir. 1971); *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Kadwell v. United States*, 315 F.2d 667 (9th Cir. 1963); *Poole v. United States*, 250 F.2d 396 (D.C. Cir. 1957); *United States ex rel. Feeley v. Ragen*, 166 F.2d 976 (7th Cir. 1948).

Acceptance of a guilty plea, or a refusal to allow withdrawal of a guilty plea, under circumstances such as these would possibly constitute an abuse of discretion.

²²¹ Chief Judge Friendly stated that it would be an abuse of discretion for a judge to refuse to allow withdrawal of a plea (1) if the prosecutor intentionally remained silent, knowing that the case against the defendants rested mainly on inadmissible evidence, or (2) if the guilty pleas were vitiated by non-compliance with Rule 11 of the Federal Rules of Criminal Procedure, or (3) "if, on the facts before him, a conviction thereon could not survive a collateral attack." However, he felt that none of those circumstances were present in this case.

²²² 468 F.2d 189 (1972).

after the pleas of guilty in *Pisacano* were announced but prior to the date of the sentence.²²³

In *Robinson*, the designation of the Assistant Attorney General to authorize the application for the wiretap was made by the Executive Assistant to the Attorney General of the United States, while 18 U.S.C. section 2516(1) mandates that such designation be done by the Attorney General himself. The Government sought to justify this by referring to 28 U.S.C. section 510.²²⁴ The *Robinson* court rejected this contention on the ground that since section 510 was already in effect when section 2516(1) was enacted, the specific language of the latter statute must have been intended to operate as a limit on section 510 with regard to authorization for wiretaps.²²⁵

Of the three wiretap authorizations at issue in *Pisacano*, two were approved by the Attorney General himself, one by an initialed memorandum, and the other by specific telephone authorizations. As to the third, the Executive Assistant affixed the Attorney General's initials. Chief Judge Friendly indicated that this satisfied Congress' intent, in that "the Attorney General assumed full responsibility for what was done even if he did not act himself in every case."²²⁶ He concluded that "the Justice Department's procedures were very likely consistent with the mandate of section 2516(1)"²²⁷ in that "that procedure does . . . ensure that the responsible official be reasonably identifiable."²²⁸

In addition, Chief Judge Friendly stated, "[w]e are . . . not at all convinced that if this case had gone to trial and the court had refused to suppress evidence obtained by the wiretaps, we would have reversed."²²⁹ Although dictum, the Chief Judge here strongly indicates

²²³ The announcement of the *Pisacano* defendants' intention to plead guilty was made on January 5, 1972. *Robinson* was decided on January 12. The date of sentence in *Pisacano* was scheduled to be February 15. 459 F.2d at 261.

²²⁴ See note 215 *supra*.

²²⁵ Further, the legislative history of Title III clearly envisions the responsibility for authorizing wiretaps resting on an identifiable individual. S. REP. NO. 1097, 90th Cong., 2d Sess., 2 U.S. CODE CONG. AND AD. NEWS, 2185, 2189 (1968). It was held by the *Robinson* court that the "congressional scheme was severely undercut" by the procedure used, particularly in view of the additional fact that Deputy Assistant Attorney General subscribed the Assistant's name on the letters authorizing the application for the wiretaps in question.

The *Robinson* court concluded that "[s]ince the evidence used to convict these defendants . . . eventuated from these improperly authorized wiretaps, it follows that such evidence ought to have been suppressed," 468 F.2d at 194, and since "without the evidence which must be suppressed, there is nothing in the record on which the convictions may stand," *id.*, the judgments of conviction must be reversed.

²²⁶ 459 F.2d at 263.

²²⁷ *Id.* at 264 n.5.

²²⁸ *Id.*

²²⁹ *Id.* at 264.

that the Second Circuit does not consider the procedures used by the Justice Department to be inconsistent with the mandates of Title III.

Lest it be inferred that there is an irreconcilable split between the Second and Fifth Circuits, it should be pointed out that even the *Robinson* court noted that "direct authorization (by the Executive Assistant) would have ensured that the application was deemed warranted in this particular case and was not 'routinely' made by the Assistant Attorney General's deputy, 'in conformity with the standard procedure.'"²³⁰

The cases in which this issue has arisen have shown a myriad of possible factual and procedural situations.²³¹ Hard and fast rules are

²³⁰ 468 F.2d at 193. Justice Clark writing the opinion in *Robinson*, apparently perceived conflicting expressions of congressional intent with regard to Title III. On the one hand, there is the intent that responsibility for authorizing wiretaps be fixed on an identifiable individual. S. REP. NO. 1097, 90th Cong., 2d Sess., 2 U.S. CODE CONG. AND AD. NEWS, 2185, 2189 (1968), and, on the other, that such matters be handled by a "publicly responsible official subject on the political process" (*id.* at 2185, interpreted to mean "an individual appointed by the President and confirmed by the Senate." 468 F.2d at 192). Thus, Justice Clark suggests that direct authorization by the Executive Assistant would have satisfied the intent that responsibility be fixed and traceable to an identifiable individual. However, whether such authorization would satisfy the second intent would only be decided if this factual situation actually arose and Justice Clark indicates that it should not: "[i]f the load on [the Attorney General] is to be lessened, such relief must come from Congress." *Id.* at 194.

²³¹ See cases cited *supra* note 216. In a majority of the cases, this issue arose in the context of a pre-trial motion to suppress evidence: *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972); *United States v. Consiglio*, 342 F. Supp. 556 (D. Conn. 1972); *United States v. Casale*, 341 F. Supp. 374 (M.D. Pa. 1972); *United States v. Doolittle*, 341 F. Supp. 163 (M.D. Ga. 1972); *United States v. D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States v. Baldassari*, 338 F. Supp. 904 (M.D. Pa. 1972); *United States v. Cihal*, 336 F. Supp. 261 (W.D. Pa. 1971). In *United States v. Robinson*, 40 U.S.L.W. 2454 (5th Cir. Jan. 12, 1972) and *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), it arose in a motion to overturn a conviction. In *Pisacano*, it arose in a motion to withdraw guilty pleas. In *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972), it arose in a post-trial motion to suppress evidence pursuant to 18 U.S.C. § 2518(10). Finally, there are instances where the reported opinion does not indicate the procedural context in which the issue arose: *United States v. Narducci*, 341 F. Supp. 1107 (E.D. Pa. 1972); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972); *United States v. La Gorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971).

In every non-Second Circuit case in which the Executive Assistant subscribed the Attorney General's initials to the delegation of authority to approve wiretap applications to an Assistant Attorney General, it was ruled that evidence so derived could not be used: *United States v. Robinson*, 468 F.2d 189 (1972); *United States v. Narducci*, 341 F. Supp. 1107 (E.D. Pa. 1972); *United States v. Baldassari*, 338 F. Supp. 904 (M.D. Pa. 1972); *United States v. Cihal*, 336 F. Supp. 261 (W.D. Pa. 1971).

The *Pisacano* decision has been followed within the Second Circuit with regard to situations in which the Attorney General's initials to the delegation of authority were subscribed by his Executive Assistant: *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972); *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972). In *Mainello*, however, it is noted that, "[w]ere it not for the recent Second Circuit decisions in this area, it might have been successfully argued that the . . . application authorized by Lindenbaum [the Executive Assistant] was defective." 345 F.2d at 880 n.66. The question was made moot in

not easily derived where such a variety of possible situations exist, and it may be that varying factual situations will give rise to varying results even within a particular court. Nevertheless, the letter and spirit of the Omnibus Crime Control and Safe Streets Act appears to have been more closely followed by the Fifth Circuit in *Robinson* than by the Second Circuit in *Pisacano*.

The doctrine of separation of powers provides the judiciary with an essential role: to identify, prevent, and correct abuses of laws mandated by Congress. In performing this role, its attitude should be one of vigilance, rather than acquiescence. Every case decided outside of the Second Circuit in which the Executive Assistant subscribed the Attorney General's initials to the authorization to approve a wiretap application has read literally the requirement that an "Assistant Attorney General [be] specifically designated by the Attorney General."²³² This requirement is not satisfied when such designation of an Assistant Attorney General is made, not by the Attorney General himself, but by his Executive Assistant affixing his initials.²³³ In holding to the contrary, the Second Circuit has taken a unique position, and one of dubious validity.

GRAND JURY'S RIGHT TO DEMAND HANDWRITING EXEMPLARS

United States v. Doe (Schwartz)

The fourth amendment protects individuals against unwarranted intrusions by the government into their private lives and personal

that case by the conclusion that defendant's guilt was established on the basis of evidence obtained through wiretaps authorized by the Attorney General himself. *Id.*

Nearly all of the cases in which the Attorney General himself initialed the memorandum delegating to the Assistant Attorney General authority to approve wiretap applications held that the evidence so derived was not obtained in violation of Congressional mandate and could therefore be used: *Pisacano*; *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972); *United States v. Mainello*, 345 F. Supp. 863 (E.D.N.Y. 1972); *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972); *United States v. Consiglio*, 342 F. Supp. 556 (D. Conn. 1972) (citing *Pisacano* as "laying down the rule of the law to be followed in this Circuit on such matters," *Id.* at 558); *United States v. Doolittle*, 341 F. Supp. 163 (M.D. Ga. 1972); *United States v. D'Amato*, 340 F. Supp. 1020 (E.D. Pa. 1972); *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States v. La Gorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. Cantor*, 328 F. Supp. 561 (E.D. Pa. 1971).

The lone exception was *United States v. Casale*, 341 F. Supp. 374 (M.D. Pa. 1972), in which it was held that the signing of the Assistant Attorney General's name to the application for a court order to wiretap by the Assistant's Deputy violated the procedure mandated by § 2516(1), and that the memorandum designating the Assistant Attorney General to authorize the particular application would not suffice to satisfactorily authorize the application itself.

In *United States v. Aquino*, 338 F. Supp. 1080 (E.D. Mich. 1972), there were two memoranda at issue, one initialed by the Attorney General, the other by the Executive Assistant. As to each the court followed the majority rulings outlined above.

²³² 18 U.S.C. § 2516(1).

²³³ See note 230 *supra*.