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Criminal Law -- Federal Courts -- Appealability of Order Suppressing and Returning Evidence

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language that leads three Courts of Appeals to decide that it has not said so and three that it has." Another point raised by the dissent is that Congress has included the additional crimes in question here in other statutes. Section 2314 of Title 18, U. S. C.,[31] which deals with the transportation of stolen goods, securities, monies, or articles used in counterfeiting, expressly provides for false or fraudulent pretenses, representations, or promises.

In view of the authorities which apparently can be relied upon for support of either of the divergent views, possible arguments in favor of one view or the other must ultimately resolve themselves into differences of opinion on the concept of the judicial function of which the Supreme Court is final arbiter. Clearly, the decision has resolved the conflict and possibly the decision will effect the result which the Congress would have chosen had it finally passed on this issue. The Supreme Court, however, may have overlooked the language of Mr. Justice Holmes in *McBoyle v. United States*,[32] which involved an interpretation of the same statute:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies or upon the speculation that if the legislature had thought of it, very likely, broader words would have been used."

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Criminal Law—Federal Courts—Appealability of Order Suppressing and Returning Evidence

In *United States v. Ponder*,[1] election officials were indicted for election fraud. Fourteen months earlier the District Court had ordered certain election ballots, books, and returns impounded on application of the U. S. District Attorney. After the indictment, and before trial, the defendants moved for the return and suppression of evidence of the im-

[31] 48 STAT. 794 (1934), as amended, 18 U. S. C. § 2314 (1952), as amended, 18 U. S. C. A. § 2314 (Supp. 1956); See also 37 Stat. 670, as amended, 18 U. S. C. § 659 (1952) (stealing and embezzlement).

[32] 283 U. S. 25 (1931).

[1] 238 F. 2d 825 (4th Cir. 1956).

pounded materials. The motion was granted and the government appealed. On appeal, the defendants interposed a motion to dismiss on the ground that the order of suppression was merely a mesne order in the criminal action, without appealable finality. The Court of Appeals held that the order was a final decision and reviewable by virtue of section 1291, title 28, United States Code. The Court stated that the test of whether an application for apeal is interlocutory or final, in cases where the application is filed in the form of a motion in the cause, is its essential character and the circumstances under which it is made. The Court held the order to be independent and appealable because the title and terms of the impounding order and the public character of the materials in question indicated its individuality. Further, the order dissolved the pound and had the effect of dismissing the indictment, other factors relevant to appealability.[2]

A final order may be reviewed by way of immediate appeal or writ of error, but in the absence of statute, an interlocutory order may not be so reviewed.[3] The purpose underlying the requirement of finality is to avoid piecemeal litigation and the delays caused by interlocutory appeals.[4] For the purpose of determining whether an order is final or interlocutory, a distinction is made between proceedings incidental or ancillary to a criminal action, in which case it is considered interlocutory and non-appealable, and independent proceedngs, in which case it is deemed final and appealable.[5]

Where application for the suppression or return of evidence wrongfully seized is made in a plenary proceeding, *i.e.,* a proceeding neither ancillary to nor directly affecting the pending prosecution, its independent character has been said to be obvious, the appealability of a decree rendered therein being unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution.[6] Where an application for return of papers or other property is made by motion or other summary proceeding, for instance, because the person in possession is an officer of the court, its essential character and the circumstances under which it is made will determine whether it is

[2] Section 3731, title 28, United States Code Annotated provides that an order dismissing an indictment is appealable. In the principal case, the Court equated the suppression of the evidence essential to the prosecution with dismissal of the indictment.

[3] See 2 AM. JUR., *Appeal and Error,* § 21; Toland v. Sprague, 12 Pet. 300, 332 (U. S. 1938).

[4] See Catlin v. United States, 324 U. S. 229, 233 (1945); Lewis v. E. I. du Pont de Nemours & Co., 183 F. 2d 29 (5th Cir. 1950); State v. Bass, 153 Tenn. 162, 281 S. W. 936 (1926).

[5] United States v. Wallace & Tiernan Co., 336 U. S. 793 (1949); Cogen v. United States, 278 U. S. 221 (1929).

[6] Cogen v. United States *supra* note 5.

an independent proceeding or merely a step in the trial of a criminal case.[7]

One of the most important factors in determining the appealability of an order denying or granting a motion for the suppression or return of evidence is the pendency of a criminal action in which such evidence is to be used. Where the application for the suppression or return of evidence is made *before* an information or indictment against the applicant, the proceeding has been held to be independent and the resulting order final and appealable.[8] On the other hand, it is generally held not appealable where, at the time the application was filed, a criminal action against the applicant was undisposed of and pending in the same court.[9] The time at which the application is filed, rather than the time at which it is passed upon by the court, has been held to be controlling in determining the character of the proceeding.[10] Where the motion for suppression and return is made before indictment and ruled on after indictment, the court in *United States v. Poller*,[11] reasoned that, conceivably, it might be held that the proceeding became merged in the indictment, but the result would be to make the appealability of the order depend upon the diligence of the prosecution of the proceeding, or of the judge in deciding it, either of which is an unsatisfactory test. The court concluded that it seems more reasonable to use the time of its first initiation as the test.[12]

[7] *Ibid.*

[8] Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931), (reversing United States v. Gowen, 40 F. 2d 593 (2d Cir. 1930); Cogen v. United States, 278 U. S. 221 (1929); Perlman v. United States, 247 U. S. 7 (1918); Weldon v. United States, 196 F. 2d 874 (9th Cir. 1952); United States v. Rosenwasser, 145 F. 2d 1015 (9th Cir. 1944); Davis v. United States, 138 F. 2d 406 (5th Cir. 1943), *cert. denied*, 321 U. S. 775 (1944); Cheng Wai v. United States, 125 F. 2d 915 (2d Cir. 1942); Turner v. Camp, 123 F. 2d 840 (5th Cir. 1941); Re Sana Laboratories, Inc., 115 F. 2d 717 (3d Cir. 1940), *cert. denied* sub nom. Sana Laboratories, Inc. v. United States, 312 U. S. 688 (1941); Re Cudahy Packing Co., 104 F. 2d 658 (2d Cir. 1939); United States v. Edelson, 83 F. 2d 404 (2d Cir. 1936); Re Milburne, 77 F. 2d 310 (2d Cir. 1935); United States v. Poller, 43 F. 2d 911 (2d Cir. 1930).

[9] Cogen v. United States, 278 U. S. 221 (1929); United States v. Rosenwasser, 145 F. 2d 1015 (2d Cir. 1944); United States v. Kelley, 105 F. 2d 912 (2d Cir. 1939); United States v. Sheehan, 57 F. 2d 759 (D. C. Cir. 1932); United States v. Poller, 43 F. 2d 911 (2d Cir. 1930); Jacobs v. United States, 8 F. 2d 981 (9th Cir. 1925); United States v. Bronde, 299 Fed. 332 (D. C. Cir. 1924); United States v. Mattingly, 285 Fed. 922 (D. C. Cir. 1922); United States v. Marquette, 270 Fed. 214 (9th Cir. 1921); United States v. Maresca, 266 Fed. 713 (D. C. Cir. 1920); Coastline Lumber and Supply Co. v. United States, 259 Fed. 847 (2d Cir. 1919).

[10] Cogen v. United States, 278 U. S. 221 (1929); Re Sana Laboratories, Inc., 115 F. 2d 717 (3d Cir. 1940), *cert. denied* sub. nom. Sana Laboratories, Inc. v. United States, 312 U. S. 688 (1941); United States v. Poller, 43 F. 2d 911 (2d Cir. 1930).

[11] 43 F. 2d 911 (2d Cir. 1930).

[12] See also Cheng Wai v. United States, 125 F. 2d 915 (2d Cir. 1942); In Re Sana Laboratories, Inc., 115 F. 2d 717 (3d Cir. 1940), *cert. denied* sub nom. Sana Laboratories, Inc. v. United States, 312 U. S. 688 (1941). But cf. United States

Another test for determining whether an order denying or granting a motion for suppression and return is appealable, was developed in *United States v. Cefaratti,*[13] in which after indictment, the defendant made a pretrial motion to suppress evidence which was granted. Before appeal, the government dismissed the indictment. The D. C. Circuit held the order granting the motion appealable because it was a *final* order within the meaning of section 1291, title 28, United States Code. The court said that an order that does not terminate an action, but is, on the contrary, made in the course of an action, has the finality that is required for appeal under the code governing appellate jurisdiction of Courts of Appeals, if (1) it has a final and irreparable effect on the rights of the parties, being a final disposition of a claimed right; (2) it is too important to be denied review; and (3) the claimed right is not an ingredient of the cause of action and does not require consideration with it.[14] A vigourous dissent urged that the court should not widen the ambit for appeals by the government in criminal cases unless there is specific statutory authority for so doing and that there was none here. Further, the dissent reasoned that since the motion was made after indictment, the order should be interlocutory and not independent.

This decision was followed in *United States v. Stephenson,*[15] even though the government did not dismiss the indictment before appealing. But the D. C. Circuit again held the order appealable because of the presence of the three requirements stated above in the *Cefaratti* case. Again in 1956, this same court followed the rule in *United States v. Carroll,*[16] and held that appeal would lie by the government from the grant of a motion to suppress evidence seized from the persons of the defendants when they were arrested even though indictments against the defendants were still pending, when at least with respect to two counts of the indictment, without the suppressed evidence, the prosecution could not succeed. The defendants challenged the jurisdiction of the court to hear the appeal, and the court held that an order which does not terminate an action, has the finality required in section 1291, title 28 United States Code for appeal if (1), (2), and (3) above are present.

In *United States v. Rosenwasser,*[17] it was urged that when the government appeals from an order directing the suppression or return of evidence, a dismissal of the appeal might forever deprive the government

v. Williams, 227 F. 2d 149 (4th Cir. 1955); Nelson v. United States, 208 F. 2d 505 (D. C. Cir. 1953); United States v. Mattingly, 285 Fed. 922 (D. C. Cir. 1922).

[13] 202 F. 2d 13 (D. C. Cir. 1952).

[14] See Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1950); Swift & Co. v. Compania Caribe, 339 U. S. 684 (1948).

[15] 223 F. 2d 336 (D. C. Cir. 1955).

[16] 234 F. 2d 679 (D. C. Cir. 1956).

[17] 145 F. 2d 1015 (9th Cir. 1944).

of questioning the suppression rule because of the government's limited appellate rights in a criminal case. But the 9th Circuit pointed out that this position of the government is no less favorable than in the usual case of an adverse ruling on a point of evidence during a criminal trial, from which ruling the government would have no immediate, and possibly no future right of appeal.

On the other hand, the lack of power in the state to appeal was held, in *State v. Fleckinger,*[18] to entitle the state to certiorari to test the validity of the lower court's action ordering the return of lottery paraphernalia alleged to have been illegally and unlawfully seized without a warrant, and to prohibit the return of such paraphernalia, so that the state might use it in evidence in the pending prosecution. This line of reasoning seems to be similar to that in the *Cefaratti, Stephenson,* and *Carroll* cases.

Where the motion to suppress and return is made by a stranger to the criminal action or to the intended suit, the order granting or denying his motion is final as to him, for unless he can sue out a writ of error, he would be remediless. But where one is a party to a criminal action pending, and petitions for the return of property that has been seized and which is to be used in evidence upon the trial of the criminal action, the ruling upon his petition has been held to be upon an intervening matter, and is not a final decision.[19] The court in the *Ponder* case said that where a stranger makes the motion, the order is final. But it is difficult to see how the 4th Circuit could use this as an illustration of the individuality of the motion in that case. There it was said that because the materials in question were public records, and because North Carolina would have locus standi before the court to inquire of the future use or disposition of them, and because some of the records had been returned upon the application of public officials this case is akin to those applying the rule that when a stranger to the litigation makes the motion, it is considered final and appealable. In this case, the applicant was not a stranger, but was one of the defendants. Even if there were other applications for the suppression and return made by a stranger to the criminal action, the ruling on the motion is final and appealable only as to him because he is remediless unless he can sue out a writ of error, while the parties to the litigation could wait until a final determination of the case pending.

The court in the principal case also suggests the title and terms of the impounding order as being among the "circumstances" indicating

[18] 152 La. 337, 93 So. 115 (1922).

[19] Cogen v. United States, 278 U. S. 221 (1929); United States v. Rosenwasser, 145 F. 2d 1015 (9th Cir. 1944); United States v. Maresca, 266 Fed. 713 (D. C. Cir. 1920); Coastline Lumber & Supply Co. v. United States, 259 Fed. 847 (2d Cir. 1919).

the independent character of the motion to suppress and return the impounded materials. But the court in *Coastline Lumber & Supply Co. v. United States,*[20] in which the defendant suggested that the title of his petition indicated its independent character, rejected this contention and said that the material consideration is whether the demand was made in the criminal action or an independent proceeding. A defendant (and the Government?) cannot make an interlocutory order final by the choice of any particular form of words in its title.

The court in the *Ponder* case also distinguished *United States v. Williams,*[21] in which the same circuit in 1953 held the order for suppression and return of illicit whiskey not to be final, but a part of the pending criminal prosecution. In that case, the motion to suppress and return was made before the finding of the indictment, and was ruled on after the indictment was brought. But the court said that the time of making the motion and bringing the indictment is not the sole criterion for deciding whether the motion is plenary or interlocutory. It was held interlocutory because the test is whether the order is one of permanent "general outlawry" against all use of documents involved, and since its purpose was merely to prevent their use in a particular criminal proceeding then pending, it was interlocutory and not appealable.

Granting the distinction that in the *Williams* case the materials were private property and in the principal case they are public records, does not the fact that they were public materials make it more evident that the motion here was part of the criminal case? The defendants did not want the materials back, they no longer held the public office, and wasn't the purpose of their motion merely to prevent the use of the materials in the particular criminal proceeding then pending? Also, how could this be a "general outlawry" against all use of the documents involved when the court itself said that they were papers to which every citizen of the State would be entitled to reasonable access?

The court in the *Ponder* case further stated that the order was appealable by virtue of section 3731, title 28, United States Code Annotated which provides for appeal by the government in the Court of Appeals. ". . . From a decision or judgment (of the district court) setting aside or dismissing any indictment . . . except where a direct appeal to the Supreme Court. . . ." is permitted. Although the indictment here was not dismissed, the court said that the order immobilized further prosecution on the indictment, and had the effect of dismissing the indictment and that there is no reason to insist on the formality of dismissing it before allowing appeal under the section.

The 4th Circuit's position on this point is disturbing. Aside from

[20] 259 Fed. 847 (2d Cir. 1919).
[21] 227 F. 2d 149 (4th Cir. 1955).

the government's limited appellate rights in criminal cases, some circuits and the United States Supreme Court have gone to great lengths in curbing the tendency to widen the ambit for appeals by the government in criminal cases. In *United States v. Mattingly*[22] and *Nelson v. United States*,[23] the D. C. Circuit held an order entered on a motion to suppress and return to be interlocutory even though the order was made before indictment and ruled on after indictment was brought. This view was impliedly affirmed by the United States Supreme Court when it was noted, "after indictment and before trial, an order denying a defendant's motion to suppress is not final and not appealable. We follow that view because it serves the strong policy against piecemeal appeals. These considerations of policy are especially compelling in the administration of criminal justice. An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal."[24]

Also, in *United States v. Janitz*,[25] a motion to suppress after the indictment had been brought, was sustained, and the government went to trial and acknowledged that it did not have enough evidence to establish the charges of illicit manufacture of alcoholic beverages. The defendant's motion for judgment of acquittal was denied. But seeking a way to provide for an appellate review of the ruling upon the suppression of evidence, the judge entered an order of dismissal of the indictment and the government appealed. The question raised was whether the district court's order was a judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment. The 3rd Circuit held it was none of these since the defendants made no attack on the indictment. The government's case failed because it had no evidence to support it, and the court said that this was not the kind of judgment to which the Criminal Appeals statute is directed.

The 4th Circuit in the principal case cited the *Cefaratti, Stephenson,* and *Carroll* cases, discussed above, and *United States v. Bianco*,[26] as authority from other circuits in allowing the government to appeal an

[22] 285 Fed. 922 (D. C. Cir. 1922).
[23] 208 F. 2d 505 (D. C. Cir. 1953).
[24] Cobbledick v. United States, 309 U. S. 323, 327 (1940). See also Swift & Co. v. Compania Caribe, 339 U. S. 684 (1950); Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541 (1948).
[25] 161 F. 2d 19 (3d Cir. 1947).
[26] 189 F. 2d 716 (3d Cir. 1951).

order suppressing the evidence. In the latter case, the petition to suppress and return seized lottery materials was filed—as a separate proceeding—and the order denying the petition was entered, *before* return of any indictment, clearly making it an independent proceeding, and clearly distinguishing it from the principal case. The other three cases, all from the D. C. Circuit, held that an order which does not terminate an action but is, on the contrary, made in the course of an action, has the finality that is required for appellate review under the federal judiciary code section governing appellate jurisdiction of Courts of Appeals, if (1) it has a final and irreparable effect on the rights of the parties, being a final disposition of a claimed right; (2) it is too important to be denied review; and (3) claimed right is not an ingredient of the cause of action and does not require consideration with it.

The authority of these cases seems questionable inasmuch as these cases rely on case law and not statute.[27] At common law, and today in the absence of statutes, only a final judgment may be reviewed by way of appeal and writ of error.[28] Does the fact that without the evidence the prosecution could not continue, make an otherwise interlocutory order a final one? Is the fact that the question is too important to be denied review sufficient to turn an interlocutory order into a final one? And thirdly, who would deny that the claimed right here (that evidence is inadmissible in the pending criminal prosecution) is not an ingredient of the cause of action and does not require consideration with it?

As to the 4th Circuit's position on appealability by virtue of section 3731, title 28, United States Code Annotated, the court in the *Janitz* case thought it necessary to appellate review that it go through the "formality" of dismissing the indictment.

Although it seems unjust to require the government to wait until a time when review of a suppressing order would be useless, such a defect is largely the result of the policy which seeks efficient litigation.[29] Resolution of the dilemma should come not from the judiciary but from the legislature, which promotes that policy. In addition, the courts have consistently guarded against an extension to the government of the right to appeal from an adverse ruling in a criminal case unless there is *specific* statutory sanction for it.[30]

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[27] See note 13 *supra.*
[28] See note 2 *supra.*
[29] Cobbledick v. United States, 309 U. S. 323 (1940).
[30] United States v. Banges, 144 U. S. 310 (1892).