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Eavesdropping -- Transmitting to the Uninvited Recipient

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EAVESDROPPING—TRANSMITTING TO THE UNINVITED RECIPIENT

The defendant, suspected of practicing medicine without a license, performed an internal examination on an employee of the witness. At trial the witness, a private detective, testified as to the conversation he overheard by means of a radio transmitter concealed in the employee's purse. On appeal, *held*, conviction reversed: Testimony obtained by means of a secret eavesdropping device which transmits the defendant's conversation to an uninvited recipient not within the defendant's premises is inadmissable under the fourth amendment to the United States Constitution.[1] *Hajdu v. State*, 189 So.2d 230 (Fla. 3d Dist. 1966).

The right to privacy has not been clearly established as an independent constitutional guarantee.[2] Therefore, insofar as an electronic eavesdropping device involves that right alone, there is no basis for the exclusion of evidence resulting from its use. Objection may properly be made, however, based on the admonitions of other definite constitutional provisos, notably the fourth amendment.

The fourth amendment exclusionary rule precludes admission of any evidence secured as a result of an illegal search and seizure.[3] However, a dramatic limitation was placed on that prohibition in *Olmstead v. United States*,[4] when the Supreme Court refused to include wiretapping within its purview. The majority reasoned that there could be neither a "search" without a trespass,[5] *i.e.*, a physical intrusion, nor a "seizure" without

1. The fourth amendment of the United States Constitution and section 22 of the Declaration of Rights of the Florida Constitution are the same in meaning and almost identical in wording.

2. It has been asserted that Griswold v. Connecticut, 381 U.S. 479 (1965) does establish such a right. The exact holding, however, is weakened by the unusual number of concurring opinions. *See* note 32 *infra*.

3. Boyd v. United States, 116 U.S. 616 (1886), was the first Supreme Court case to recognize the *Entick* doctrine, in which Lord Camden repudiated the government's inherent right to intrude upon the privacy of an individual. Entick v. Carrington, 19 Howell, St. Tr. 1029, 1066 (1765).

Weeks v. United States, 232 U.S. 383 (1914), reaffirmed *Boyd* and went on to declare the fruits of an illegal search inadmissible. Later this holding was made binding upon the states. Mapp v. Ohio, 367 U.S. 643 (1961).

For a full discussion of the fourth amendment, *see* Harper, *Mr. Justice Rutledge and the Fourth Amendment*, 18 U. MIAMI L. REV. 48 (1965).

4. 277 U.S. 438 (1928).

5. Neither the cases we have cited nor any of the many Federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person or . . . his tangible material effects or an actual physical invasion of his house . . . *Id.* at 466.

In Goldman v. United States, 316 U.S. 129 (1942), the Supreme Court applied the *Olmstead* test and refused to exclude evidence obtained by means of a detectaphone that had been placed against the *outside* wall of the defendant's hotel room. The rationale was that there had been no trespass. *See* Justice Murphy's dissent in *Goldman*, at 136, 138.

Silverman v. United States, 365 U.S. 505 (1961), held for the first time that evidence obtained by electronic eavesdropping (a "spike-mike") was violative of the fourth

securement of a material object.[6] Justice Brandeis articulated the minority position in his dissent. He argued that the *right to privacy* should not depend upon technicalities:

> The framers of the Constitution conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion upon the privacy of the individual, *whatever the means employed*, must be deemed a violation of the Fourth Amendment.[7]

Thus, a philosophical dichotomy emerged: while the right to privacy retained the requirements of trespass and seizure, an influential minority insisted that the Court's sole concern should be limited to "whether the privacy of the home was invaded."[8]

In 1934 a wiretapping policy was codified by section 605 of the Federal Communications Act.[9] Its purpose was well stated by Justice Murphy:

> [C]ongress sought to protect society at large against the evils of wiretapping and kindred unauthorized intrusions into private intercourse conducted by means of the modern media of communication, telephone, telegraph, and radio. To that end the statute prohibits not only the interception and the divulgence of private messages without the consent of the sender, but also the use of information so acquired . . . .[10]

In *Benanti v. United States*[11] the Supreme Court asserted that the federal statute should not be contradicted by state legislation. However, the statute is limited to "interstate or foreign communication by wire or radio";[12]

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amendment. Nevertheless, while abandoning the requirement of a technical trespass, the Court still clung tenaciously to the need for some physical intrusion. It has been asserted that *Silverman* made the continued authority of *Goldman* questionable. *See* note, 75 HARV. L. REV. 184 (1961).

6. Suspecting Olmstead of conspiring to violate the National Prohibition Act, federal agents monitored his phone calls by means of several taps. Thus, neither defendant's *person* nor his tangible *property* was seized. Olmstead v. United States, 277 U.S. 438, 464 (1928). The obvious problem is that no material object is taken in most eavesdropping cases. Rather, it is conversation, an intangible, that is seized.

An inroad was made when courts began to treat spoken and written words similarly. Wong Sun v. United States, 371 U.S. 471 (1963), held that incriminating statements *could* be illegally seized.

7. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

8. Silverman v. United States, 365 U.S. 505, 513, (1961) (concurring opinion of Douglas, J.).

9. 47 U.S.C. § 605 (1934).

10. Goldstein v. United States, 316 U.S. 114, 125 (1942) (dissenting opinion).

11. 355 U.S. 96, 105-106 (1957).

> [K]eeping in mind . . . the public policy underlying Section 605 . . . we find that Congress . . . did not mean to allow state legislation which would contradict that section and that policy . . . .

12. 47 U.S.C. § 605.

therefore, the states may apply their own law[13] to locally control the wide range of secret "bugging" devices loosely incorporated within the term "eavesdropping."[14]

Like most states,[15] Florida has enacted a statute to regulate wiretapping. Section 822.10 of the Florida Statutes provides for the punishment of anyone who "taps or connects . . . by wire or any other means whatsoever, to or with any telegraph or telephone line so as to hear . . . any message going over said line . . . ."[16] With regard to interceptions implemented by other bugging techniques not involving a telegraph or telephone line, the legislature has remained silent. Aligned with the majority, Florida courts exclude evidence resulting from such general intrusions only where an eavesdropping device has actually violated a constitutional provision.[17]

In *Gomien v. State*[18] a former police officer was convicted for accepting unauthorized compensation. The Florida Third District Court of Appeals upheld the admitted transcript of a conversation secretly obtained because the witness who testified was the one who caused the conversation to be recorded after he had been invited onto the defendant's premises. When directly confronted with the question of whether the recording constituted an illegal search and seizure, the court stated that the query had already been answered adverse to the defendant in *Lopez v. United States*.[19]

In *Lopez* the defendant attempted to bribe an internal revenue agent who had entered Lopez' office by invitation and secretly recorded the con-

13. *See* Ker v. California, 374 U.S. 23 (1963); *But see* People v. Goldfarb, 34 Misc. 2d 866, 229 N.Y.S.2d 620 (Ct. Gen. Sess. 1962).

14. Eavesdropping and wiretapping are often used interchangeably. However, while the former term encompasses surveillance practices in general, wiretapping shall be limited here as a special type of eavesdropping involving the telephone, telegraph or radio.

15. Most states have limited their legislation to the regulation of wiretapping; however, a few include eavesdropping as well. CAL. PEN. CODE §§ 640, 653(h), 653(i), 653(j) (as amended 1965); ILL. REV. STAT. ch. 38 §§ 14-1 to 14-7 (Smith-Hurd 1960); LA. REV. STAT. §§ 14.322 (1950); MD. ANN. CODE, art. 35, §§ 92-99, art. 27, §§ 125A-125D (1957); MASS. ANN. LAWS ch. 272, §§ 99-102 (Supp. 1959); NEV. REV. STAT. §§ 707.320, 200.610-200.690 (1959); N.Y. CODE CRIM. PROC. §§ 813a, 813b (1957); N.Y. PEN. LAW §§ 738-745 (Mckinney 1944); ORE. REV. STAT. §§ 141.720, 165.505 (1959).

States that have made no statutory provisions for either eavesdropping or wiretapping are: Indiana, Minnesota, Mississippi, Missouri, New Hampshire, Texas, Vermont, and West Virginia.

16. FLA. STAT. § 822.10 (1965).

17. *E.g.*, Griffith v. State, 111 So.2d 282 (Fla. 1st Dist. 1959).

For a full discussion of the positions taken by the respective states, *see* Runft, *The Electronic Eavesdropping Threat to the Right of Privacy: Can the States Help?* 3 IDAHO L. REV. 13, 42, 56 (1966); Note, 27 MONT. L. REV. 173, 186 (1966). *See generally* Comment, *Wiretapping: The State Law*, 51 J. CRIM. L. C. & P. S. 534, 536-540 (1961); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240 (1964).

18. 172 So.2d 511 (Fla. 3d Dist. 1965).

19. 373 U.S. 427 (1963).

versation in which he was a participant. The resulting transcript was later introduced to corroborate the agent's testimony. Circumventing the constitutional objection, the Court held that the evidence merely substantiated a private communication to which the defendant had voluntarily consented.

The holding in *Lopez v. United States* remains controlling: the mere use of an electronic eavesdropping device is not legally objectionable; the law insists "only that the device not be planted by an unlawful physical invasion of a constitutionally protected area."[20]

In the instant case, the state relied primarily upon *Gomien v. State* which the Third District Court of Appeals quickly distinguished. The court noted that in *Gomien* the witness had entered the defendant's premises by invitation and had recorded a transcript of dubious authenticity, whereas here no similar permission was granted to the detective. Nor was there a transcript involved.[21] It was added, however, that if a recording *had* resulted from that same device, it *would* have been admissible after proper authentication.[22]

The state's reliance upon *Gomien* was clearly misplaced for there was little disagreement that the "invited" witness could testify. The *crucial* question posed in the instant case and left untouched by *Gomien* was whether an *un*invited recipient *outside the premises* could testify as to what he overheard via an electronic eavesdropper. It is surprising that the state did not emphasize *On Lee v. United States*[23] which affirmatively answered that very question. There the government sent an ex-employee of the defendant, now turned informer, to the defendant's laundry business equipped with a secret recorder. The employee induced On Lee to make several incriminating statements which were overheard by an agent outside the building. At trial the agent's testimony was held admissible since it was thought that the absence of a trespass placed the situation outside the prohibition of the search and seizure clause. The facts in the instant case are almost identical, yet the results reached by the Supreme Court of the United States and the Florida Third District Court of Appeals are diametrically opposed.

It may be validly asserted that the Supreme Court, if afforded the opportunity, would overrule *On Lee*,[24] and that the result attained by the

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20. *Id.* at 438-39.

21. Hajdu v. State, 189 So.2d 230, 233 (Fla. 3d Dist. 1966).

22. *Id.* at 234.

23. 343 U.S. 747 (1952).

24. In Lopez v. United States, 373 U.S. 427 (1963), Chief Justice Warren went so far as to concur separately "lest *Lopez* would be interpreted as reaffirming *sub silentio*" the decision in *On Lee*. *Id.* at 441.

Justices Brennan, Douglas and Goldberg went further by dissenting sharply. They

third district is a progressive one. Nevertheless, the reasoning employed by the third district in extending the boundaries of the fourth amendment is neither responsive to existing law nor definitive in its creation of precedent. The court first purported to delineate boundaries by citing search and seizure cases in which evidence had been excluded.[25] Each, however, involved a definite trespass.[26] Conversely, in the instant case, the mere introduction of the instrument into the defendant's house was not a trespass. This conclusion was buttressed by the court itself when it noted that a properly authenticated transcript resulting from that device would have been admissible,[27] since the instrument was on the person of an invitee, *i.e.*, the witness' employee. Thus, the inescapable fact remains that there was no trespass under the present facts and, at least in that respect, the court proceeded to overstep its own boundaries.

It is submitted that the same result could have been reached in any one of four ways, not entirely at variance with the present opinion and more consistent with Florida and federal precedent. First, the Florida courts could recognize that, although a trespass in its traditional form will not exist in most eavesdropping cases, the use of *any* device which transports or otherwise extends a private communication to an uninvited recipient *does* trespass upon the rights of that individual. Usurpation upon privacy, which is an existing but intangible right, *does* constitute a "material" taking, notwithstanding the absence of a strictly "material" object. In substance then, such a device facilitates an unwarranted search and seizure and the result, whether in the form of transcript or testimony, should be excluded as violative of the fourth amendment.

As alternatives, emphasis could be placed upon the fifth and sixth amendments, both of which are compatible with the fourth.[28] The recent decision of *Miranda v. Arizona*[29] raises a number of questions yet to be adequately answered. Often the accused's private statements are elicited by means which deprive him of an opportunity to use his privilege against self-incrimination. It may be predicted that any evidence uncovered as

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contended that *Lopez* was an erroneous decision and that it is "rationally indistinguishable" from *On Lee*. *Id.* at 447.

Compare Justice Douglas' concurring opinion in *Goldman*, 316 U.S. 129 (1942), with his dissent in *On Lee*. In the latter he made a complete reversal in philosophy, stating:

> Mr. Justice Brandeis in his dissent in *Olmstead* espoused the cause of privacy—the right to be left alone. What he wrote is an historic statement of that point of view. I cannot improve on it. *On Lee v. United States*, *Id.* at 762-63.

25. Clinton v. Virginia, 377 U.S. 158 (1964) (microphone used by police officers in the defendant's premises); Silverman v. United States, 365 U.S. 505 (1961); Gouled v. United States, 255 U.S. 298 (1921) (defendant's papers removed by uninvited party while defendant was gone); United States v. Stone, 232 F. Supp. 396 (N.D. Tex. 1964) (microphone hidden in telephone booth recorded defendant's private conversation).

26. Clinton v. Virginia, 377 U.S. 158 (1964).

27. Hajdu v. State, 189 So.2d 230, 234 (Fla. 3d Dist. 1966).

28. *See* Massiah v. United States, 377 U.S. 201 (1964); United States v. Lefkowitz, 285 U.S. 452 (1932); Gouled v. United States, 255 U.S. 298 (1921); Brock v. United States, 223 F.2d 681 (5th Cir. 1955).

29. 384 U.S. 436, (1966).

a result of the government's use of these statements will now be excluded by *Miranda*. Certainly this newest exclusionary principle *should* apply to private statements unwittingly made in the presence of an electronic eavesdropper. In such a case the defendant is clearly incriminating himself without having been informed of his right to remain silent and without having received the benefit of counsel, as guaranteed by the fifth and sixth amendments, respectively.[30]

Finally, the courts might choose to unequivocally establish a right of privacy in Florida independent of the fourth amendment. Almost four decades ago Justice Brandeis implied that such a path was preferable.[31] In the light of logic and recent decisions by this nation's highest court,[32] this latter route is both tenable and timely.

> Electrical information devices for universal, tyrannical womb-to-womb surveillance are causing a very serious dilemma between our claim to privacy and the community's need to know. The older, traditional ideas of private, isolated thoughts and actions . . . are very seriously threatened by new methods of instantaneous electric information retrieval . . . . [R]emedial control . . . must be exerted. . . . What's that buzzzzzzzzzzzzzzzzzzzzing?[33]

SANDRA ROTHENBERG

COMMENT BY PROSECUTOR ON DEFENDANT'S FAILURE TO TESTIFY AT PRELIMINARY HEARING

The defendant was tried and convicted of aggravated assault. At the trial he took the stand to testify in his own behalf. During the course of his cross-examination the prosecuting attorney elicited that the defendant had not testified at the preliminary hearing. On appeal to the Supreme Court of Florida, *held*, decision of the district court quashed: it is not error for a prosecutor on cross-examination to interrogate the defendant

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30. Among the noteworthy statements arising from *Miranda* are these:

> [W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . . *Id.* at 1626.
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Id* at 1628.

For a discussion of *Miranda* and its impact on the law, *see* Taran, *The New Right—Fifth Amendment Right to Counsel*, 20 U. MIAMI L. REV. 893 (1966).

31. Olmstead v. United States, 277 U.S. 438, 478 (1928).

32. Griswold v. Connecticut, 381 U.S. 479 (1965), is one of numerous recent cases dealing with the right of privacy. Although the holding is inexact with regard to that right, it is noteworthy that six members of the United States Supreme Court found that such a right *existed. See generally*, 64 MICH. L. REV. 219, 229 (1965).

33. MCLUHAN, THE MEDIUM IS THE MASSAGE 12 (1967).