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Omnibus Crime Control and Safe Streets Act of 1968-Grand Jury Witness Standing To Suppress Illegally Obtained Evidence

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Court's statement in *Thirty-Seven Photographs* that Congress may prohibit importation of obscene matter for private use, this restriction on the right to possess obscene material amounted to only dictum because the defendant admitted that the pictures were intended for commercial publication. Moreover, the Court's position did not represent the views of the majority on this issue—four Justices vigorously dissented,[69] and Mr. Justice Harlan's deciding vote remained noncommittal.[70] Assuming on the foregoing five bases that there is constitutional protection for the possession and use of obscene material,[71] the scope of this right is severely restricted by the instant decisions. The Court has quelled all speculation that the concept of privacy includes some forms of commercial distribution. Instead, the Court has thrust all commercial activity into the forbidden realm of public action, which may be proscribed by federal and state regulation. What remains of the right to possess and receive obscene material probably includes noncommercial mailing among consenting adults, interstate transportation of a restricted number[72] of obscene materials by private conveyance or common carrier, and importation of obscene materials for private purposes.

Omnibus Crime Control and Safe Streets Act of 1968—Grand Jury Witness Standing To Snppress Illegally Obtained Evidence

I. INTRODUCTION

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] attempts to regulate the use of electronic surveillance and wiretap

69. Note 39 *supra* and accompanying text.

70. *See* Memoirs v. Massachusetts, 383 U.S. 413, 456-58 (1966) (Harlan, J., dissenting) (advocated greater restriction on federal obscenity regulation than on state actions).

71. Of course this protected area is not immune from attack when legitimate state interests are present. *See* United States v. Darnell, 316 F.2d 813 (2d Cir.), *cert. denied*, 375 U.S. 916 (1963) (private correspondence in which obscene letters were written to unwilling recipient); Thomas v. United States, 262 F.2d 844 (6th Cir. 1959) (noncommercial mailing of obscene materials to a minor). *But see* Andrews v. United States, 162 U.S. 420 (1896) (private letter to willing recipient —postmaster used fictitious name).

72. *See* 18 U.S.C. § 1465 (1964) which also states: "The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications . . . shall create a presumption that such publications are intended for sale or distribution . . . ."

1. Pub. L. No. 90-351, tit. III, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-20 (1970)).

within fourth amendment guidelines developed by the judiciary.[2] If evidence has been obtained in violation of the Act, the Act prohibits its introduction into judicial, legislative, and administrative proceedings.[3] As recent courts of appeals cases indicate, however, one primary question has arisen concerning the operation of this exclusionary rule in the specific context of a grand jury proceeding: May a grand jury witness challenge the admissibility of evidence obtained in violation of the Crime Control Act?

In two of these cases, *In re Egan*[4] and *In re Evans*,[5] grand jury witnesses were held in contempt by the lower court because they refused to answer questions that allegedly were based on evidence obtained through an illegal wiretap.[6] The witnesses argued that section 2511(1)(c) of the Crime Control Act makes the disclosure of a communication intercepted in violation of the Act unlawful[7] and that section 2515 specifically prohibits a jury from receiving into evidence communications whose disclosure is unlawful under the Act and evidence based upon those communications.[8] Furthermore, each witness claimed to be an aggrieved person[9] who consequently had standing under section

2. With the utilization of electronic surveillance by law enforcement officials, courts were faced with the problem of applying the fourth amendment prohibition against unreasonable searches and seizures to this information-gathering technique. *See* 28 OHIO ST. L.J. 527 (1967). Title III of the Crime Control Act was drafted to conform to the preexisting fourth amendment guidelines. S. REP. NO. 1097, 90th Cong., 2d Sess. 28 (1968). Title III was found constitutional in United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970). Although the Act reaches private wiretapping, its thrust is clearly against abuse of electronic surveillance by law enforcement officials.

3. 18 U.S.C. §§ 2511(1)(c), 2515 (1970).

4. 450 F.2d 199 (3d Cir. 1971).

5. No. 71-1499 (D.C. Cir., July 23, 1971).

6. Egan originally had refused to testify on fifth amendment grounds. She, like Evans, was granted transactional immunity under the 1968 Crime Control Act, 18 U.S.C. § 2514 (1970) (repealed effective Dec. 15, 1974). Egan then refused to testify as a matter of conscience and on the grounds that the questions were based on evidence obtained in violation of the fourth amendment and the 1968 Crime Control Act.

7. 18 U.S.C. § 2511(1)(c) (1970) provides that "(1) Except as otherwise specifically provided in this chapter any person who—

. . . .

(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; . . .

shall be fined not more than $10,000 or imprisoned not more than five years, or both."

8. "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or authority of the United States, a State, of a political subdivision thereof if the disclosure of that information would be in violation of this chapter." *Id.* § 2515.

9. An "aggrieved person" is one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *Id.* § 2510(11).

2518(10)(a)[10] to suppress the evidence. Although that section permits aggrieved persons to move in certain proceedings to suppress the contents of a communication intercepted in violation of the Act or evidence based on that communication, a grand jury proceeding is not specifically included.

On appeal, the *Egan* and *Evans* cases were decided in favor of the grand jury witnesses. Faced with substantially the same issue, however, two other circuits did not allow grand jury witnesses to move to suppress similar evidence.[11] An examination of all these cases reveals that the issue is novel. There is no precedent that conclusively determines a grand jury witness's common-law right to suppress illegally obtained evidence, and there are no Supreme Court opinions deciding this question under the Crime Control Act.[12] Moreover, the courts of appeals are not only divided on this issue, but those that have reached the same conclusion have done so on different grounds.[13] Therefore, this comment will explore the questions raised by these recent cases and attempt to determine the right of grand jury witnesses to seek suppression of evidence under the Crime Control Act.

II. GRAND JURY WITNESS STANDING TO SUPPRESS

To ascertain whether a grand jury witness may challenge the admissibility of evidence obtained in violation of the Crime Control Act, the initial step is to examine any limitations on the prohibition of section 2515 against receiving such evidence. If the application of section 2515 is limited, then the limitations must be explored to determine whether they permit the suppression of evidence within a grand jury proceeding

10. "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
(i) the communication was unlawfully intercepted;
(ii) the order of authorization or approval under which it was intercepted is unsufficient on its face; or
(iii) the interception was not made in conformity with the order of authorization or approval." *Id.* § 2518(10)(a).

11. Bacon v. United States, 446 F.2d 667 (9th Cir. 1971); United States v. Gelbard, 443 F.2d 837 (9th Cir. 1971); Dudley v. Unitd States, 427 F.2d 1140 (5th Cir. 1970); Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970).

12. *See* notes 37-44 *infra* and accompanying text.

13. *Compare In re* Egan, 450 F.2d 199 (3d Cir. 1971) (relying on § 2515 of the Crime Control Act), *with In re* Evans, No. 71-1499 (D.C. Cir., July 23, 1971) (relying on § 2518(10)(a) of the Act).

and, further, whether a motion to suppress may be made by a witness in this kind of proceeding.[14]

A. Does Section 2518(10)(a) Limit Section 2515?

On its face, section 2515 specifically prohibits a grand jury from receiving evidence based on communications intercepted in violation of the Act and does not indicate that there are any limitations on that prohibition. If there are none, then a situation such as that in *Egan* and *Evans*, in which the witness simply refuses to answer questions based exclusively on illegally obtained evidence, is easily resolved in favor of the witness. With an unlimited statutory prohibition against the witness's testimony, the court cannot seek through a contempt judgment to force the witness to violate the statute. This reasoning was employed by the Third Circuit in vacating the contempt judgment against witness Egan.[15]

If the section 2515 prohibition is assumed to be absolute, however, a question arises about the significance of section 2518(10)(a), which permits aggrieved persons to move to suppress evidence. Clearly this section defines a procedure for enforcing the prohibition of section 2515. The availability of this device only to aggrieved persons implies that the use of the procedure is withheld from all other individuals. The section 2515 prohibition, however, is concerned solely with the character of the evidence, not with the status of persons seeking to suppress that evidence. By limiting the availability of the motion to suppress, the statute tacitly acknowledges that some evidence may be freely introduced while non-aggrieved parties, aware of the illegal character of the evidence, stand by helplessly. This creates the anomalous result of the statute's implicitly permitting the introduction of evidence that elsewhere it has explicitly prohibited, a result especially difficult to understand since one of the

14. These are 2 related, but logically independent, arguments. Thus the standing of a grand jury witness to suppress evidence can be attacked on the ground that such standing is excluded from grand jury proceedings per se in the Crime Control Act. Secondly, standing can be attacked on the ground that the nature of mere witnesses, who are persons that are neither present nor potential parties in a judicial proceeding, is such as to preclude them from claiming standing under the Act. Since witnesses Egan and Evans were both granted transactional immunity, they fit within this narrow definition of "witness."

15. 450 F.2d at 209-10. Although the opinion of the court was much broader in scope, the majority concurred only in that part of the opinion that disposed of the case on this narrow ground.

stated purposes of the Act is to vindicate the integrity of the courts.[16]

Commenting on the relationship between these two sections, the Senate Report on the Crime Control Act states that section 2515

> must, of course, be read in the light of Section 2518(10)(a) . . . which defines the class entitled to make a motion to suppress. . . .
>
> . . . .
>
> [Section 2518(10)(a)] provides that any aggrieved persons, as defined in section 2510(11), . . . may make a motion to suppress. . . . This provision must be read in connection with sections 2515 and 2517 . . . which it limits.[17]

Thus, although the legislative intent is not made explicit in the statute, Congress seems to have intended that section 2515 exclude only evidence that can be suppressed under section 2518(10)(a) and not operate as an absolute prohibition against receiving any illegally obtained evidence.

A similar construction can dispose of the problem raised by section 2511(1)(c), which makes disclosure of the contents of illegally intercepted communications a federal crime. Thus, testimony that is admitted because a motion to suppress has not been made might nevertheless expose the testifying witness to criminal liability. Addressing this question in a concurring opinion, one member of the Second Circuit suggested that once a court compels testimony based on illegally obtained communications, the witness is thereby relieved of any criminal liability.[18] What remains unclear, however, is whether merely the judicial setting of the proceedings is sufficient to exonerate the witness from prosecution or whether the witness must specifically object to the questions in order to secure this type of protection. More importantly, this position leads to the questionable result of permitting a court legally to compel an individual to aid in the commission of an illegal act. This position is neither logical nor designed to encourage respect for the law.

A more satisfactory answer begins with the observation that the evidence prohibited by section 2515 is the same evidence whose disclosure is made illegal under section 2511(1)(c). If Congress intended section 2515 to exclude only evidence that has been suppressed under sec-

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16. The preamble to the Crime Control Act, Pub. L. No. 90-351, tit. III, § 801(b), 82 Stat. 211 (1968), states: "In order to protect effectively the privacy of wire and oral communications, to protect the integrity of the court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings."

17. S. REP. No. 1097, *supra* note 2, at 96, 106.

18. United States *ex rel.* Rosado v. Flood, 394 F.2d 139, 142 (2d Cir. 1968) (Lumbard, C.J., concurring).

tion 2518(10)(a), then the assumption must be made that Congress also intended that disclosure of unsuppressed evidence within the proceeding in question would not violate section 2511(1)(c). As in the case of section 2515, the above interpretation does extreme violence to the precise language of section 2511(1)(c). This reading, however, is the only one that at once gives effect to the intent of the legislature and makes sense out of the seemingly inconsistent provisions of the statute.

B. Does Section 2518(10)(a) Apply to a Grand Jury Proceeding?

If section 2518(10)(a) limits section 2515, then a grand jury witness may not challenge the admissibility of evidence unless he has standing under section 2518(10)(a). The initial question, then, is whether section 2518(10)(a) permits the suppression of evidence within the context of a grand jury proceeding. The statute is ambiguous since section 2515 specifically refers to grand jury proceedings while section 2518(10)(a) does not.[19] In the *Evans* case, the Government argued that the omission of any specific reference to grand juries indicates that Congress did not intend to give anyone standing within the context of a grand jury proceeding.[20] In support of this position, the Government has observed that the Act elsewhere distinguishes between parties and nonparties[21] and that section 2518(10)(a) lists only proceedings in which there are parties. The Senate Report on the Act further explains that

> because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally there is no limitation on the character of evidence that may be presented to a grand jury which is enforceable by an individual. [*Blue v. United States*, 384 U.S. 251 (1965).] There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.[22]

Although the Report unequivocally states that Congress did not

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19. 18 U.S.C. § 2518(10)(a) (1970) grants standing "in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof . . . ."

20. Brief for Appellee at 13, *In re* Evans, No. 71-1499 (D.C. Cir., June 23, 1971).

21. 18 U.S.C. § 2518(9) (1970) provides that no intercepted communication can be entered into evidence "in any trial hearing, or other proceeding in a Federal or State court" unless each *party* is provided with the court order authorizing the interception and the accompanying application under which the interception was authorized at least 10 days before commencement of the proceeding. Thus it can be argued that since prior notice is required to be given only to parties, the statute envisions only parties moving to suppress evidence. According to this view, §§ 2518(9) and 2518(10)(a) omit grand juries from their respective lists of proceedings precisely because no one is a party to a grand jury proceeding.

22. S. REP. NO. 1097, *supra* note 2, at 106.

envision a motion to suppress in a grand jury proceeding, the reasons given for that position do not support the Senate's conclusions. First, the citation to *Blue v. United States*[23] is inappropriate. In that case, Blue sought to quash an indictment on the ground that the prosecution, prior to the indictment, had secured statements from him in violation of his fifth amendment rights. Blue was neither attempting to suppress evidence in a grand jury proceeding, nor did he claim that the tainted evidence had been presented to the grand jury. Indeed, Blue merely argued that since he could assert his fifth amendment right to suppress evidence at a trial, the indictment should be quashed. The Supreme Court ruled that while Blue could suppress tainted evidence at a subsequent trial, he could not have the indictment dismissed.[24] Secondly, the Report's reference to the general rule that an individual normally may invoke no limitations on the receiving of evidence by a grand jury is seemingly inaccurate. The courts, in fact, have recognized the following privileges that a witness may invoke to withhold evidence from a grand jury: the attorney-client privilege,[25] the husband-wife privilege,[26] the fifth amendment privilege,[27] and a first amendment privilege protecting a newsman's sources.[28]

The Senate Report's position on the propriety of a motion to suppress in a grand jury proceeding, therefore, apparently rests on an erroneous view of the state of the law prior to the Act. Since the Report indicates an intention to preserve a rule of law that was, in fact, not the existing rule, no weight should be given to this portion of the Report unless its position is clearly supported by the language of the Act itself. Section 2515 of the Act, however, clearly prohibits the receiving of illegal evidence by a grand jury, and although section 2518(10)(a) does not specifically refer to grand juries, the language of this provision[29] could easily be said to include a grand jury investigation. Moreover, the party-nonparty distinction relied on by the Government is not mentioned

23. 384 U.S. 251 (1965).

24. *Id.* at 255.

25. United States v. Judson, 322 F.2d 460 (9th Cir. 1963).

26. Blau v. United States, 340 U.S. 332 (1951).

27. United States v. Monia, 317 U.S. 424 (1943).

28. Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971). *See generally* Comment, *The Rights of a Witness Before a Grand Jury*, 1967 DUKE L.J. 97, 121-22.

29. *See* note 19 *supra*. The words "trial, hearing, or proceeding" are pivotal.

anywhere in these two sections.[30] Finally, by prohibiting a grand jury from receiving tainted evidence but simultaneously withholding the procedural means for excluding that evidence, the state would make courts powerless to prevent illegal acts from being committed as part of the proceeding. Thus, both the language and the policy of the Act support the view that illegally obtained evidence may be suppressed in a grand jury proceeding.

The Organized Crime Control Act of 1970[31] approves this reading. Section 3504[32] of that Act regulates litigation concerning the source of evidence obtained through electronic surveillance and specifically applies to challenges of evidence in a grand jury proceeding. Since nothing in the section or its legislative history[33] indicates that it alters or supercedes section 2518(10)(a) of the Omnibus Crime Control Act, section 3504 presupposes that section 2518(10)(a) applies to a grand jury proceeding.

C. *Does Section 2518(10)(a) Give Standing to Grand Jury Witnesses?*

If section 2518(10)(a) does not totally exclude grand juries from the proceedings in which evidence may be suppressed, then the final question is whether that section allows grand jury witnesses to move to suppress. Section 2518(10)(a) requires only that the movant to be an aggrieved person, a requirement that would not seem to exclude witnesses preemptorily. Even though the Senate Report on the Act suggests that only parties to a proceeding are given standing to suppress evidence,[34] the party-nonparty distinction was not incorporated into the relevant sections of the statute and, therefore, should not be invoked to alter the statutory language.

The Senate Report does indicate, however, that the statute was drafted in accordance with fourth amendment guidelines established by the Supreme Court.[35] Section 2515 and 2518(10)(a) are essentially a

30. The analogy to the language of § 2518(9) is inappropriate. That section requires that parties be properly notified if an intercepted communication is to be introduced into evidence. It requires notification regardless whether any of the parties has standing as an aggrieved person to suppress illegally obtained evidence under 2518(10)(a). In other words, § 2518(9) has nothing to do with exclusion of evidence or standing to suppress. It merely creates a specific right of notice for the exclusive benefit of parties. But the creation of a right for parties certainly does not imply that all other rights, such as the right to suppress evidence, are denied to nonparties. Since § 2518(10)(a) does not speak in terms of parties, but of aggrieved persons, it is not immediately apparent that the statute intended to deny standing to nonparties.

31. Pub. L. No. 91-452, 84 Stat. 935 (1970) (codified in scattered sections of 18 U.S.C.).

32. 18 U.S.C. § 3504 (1970).

33. H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970).

34. Note 21 *supra* and accompanying text.

35. Note 2 *supra* and accompanying text.

codification of the exclusionary rule that gives aggrieved persons standing to suppress evidence obtained in violation of their fourth amendment rights. Since "aggrieved person" is a term borrowed from the fourth amendment exclusionary rule,[36] a finding that courts have denied standing to grand jury witnesses under that rule would lend strong support to the argument that the statutory exclusionary rule is subject to the same interpretation.

1. *The Silverthorne Case.—Silverthorne Lumber Co. v. United States*[37] is the only decision that speaks directly to the question of a grand jury witness's standing to suppress evidence under the fourth amendment exclusionary rule.[38] In that case, appellant was the victim of an unconstitutional search and seizure and had petitioned successfully to have the seized evidence returned to him. At a subsequent grand jury investigation, after appellant had been indicted on one charge, the Government sought by subpoena to reacquire the evidence that had been returned to appellant. Appellant refused to produce the evidence and was cited for contempt. The Supreme Court reversed the contempt judgment and held that appellant had standing to withhold evidence from a grand jury when the Government had no right to receive that evidence.[39] *Silverthorne* seems to stand for the proposition that a grand jury witness who is an aggrieved person has the right to challenge the source of evidence in a grand jury proceeding. Opponents of this view, however, insist that the factual situation in *Silverthorne* raises questions about the precedential value of the holding. The Government has contended that the evidence in *Silverthorne* had already been adjudged illegal in a prior and independent proceeding and that the Court simply ruled that the use of this evidence was barred in a subsequent grand jury investigation.[40] The Government also has pointed out that appellant Silverthorne, unlike

36. FED. R. CRIM. P. 41(e) (fourth amendment exclusionary rule).

37. 251 U.S. 385 (1920).

38. The Supreme Court has ruled that a stranger to the proceeding may move before indictment for return of property which has been illegally seized. Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931). One may not move to quash an indictment on the ground that the grand jury received evidenee obtained in violation of the fifth amendment. Blue v. United States, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 251 (1958); Costello v. United States, 350 U.S. 359 (1956). Several circuit courts of appeals have ruled against grand jury witness standing to suppress. Cases cited note 11 *supra*; United States *ex rel.* Rosado v. Flood, 394 F.2d 139, 142 (2d Cir. 1968).

39. 251 U.S. at 39.

40. Brief for Appellee at 10, *In re* Evans, No. 71-1499 (D.C. Cir., July 23, 1971). The Senate Report of the Crime Control Act explicitly approves this limited application of § 2515's prohibition to grand jury proceedings. Note 22 *supra* and accompanying text.

witnesses Egan and Evans,[41] was not immune from prosecution.[42] The first of these arguments misses the point of the exclusionary rule. In determining whether an individual has standing to challenge the admissibility of evidence, the issue whether that evidence has been previously or may be subsequently found to be illegal is irrelevant. The only pertinent question is whether, assuming that the evidence was illegally acquired, an individual has the right to keep that illegal evidence from the grand jury. The second argument raises questions about the purpose of the exlusionary rule and its relationship to the fifth amendment right against self-incrimination.[43] *Silverthorne* does not suggest, however, that appellant's indictment or lack of immunity was a relevant consideration.[44]

2. *Nature of the Fourth Amendment Exclusionary Rule.*—If the facts of *Silverthorne* are felt to raise strong doubts about its actual holding, then there is no Supreme Court case that decides the precise issue of grand jury witness standing to challenge. Thus, assuming that *Silverthorne* is not controlling, the issue whether a grand jury witness's standing to challenge evidence can be inferred from case law involving the fourth amendment exclusionary rule remains to be decided. The admissibility of evidence at common law was determined by its inherent probative value, rather than by the circumstances surrounding its acquisition.[45] When faced with the task of enforcing the fourth amendment prohibition against unreasonable searches and seizures, however, the Supreme Court ruled that evidence obtained in violation of the Constitution is inadmissible and may be suppressed by an aggrieved person.[46]

Case law reveals three possible justifications for this exclusionary rule. One explanation is that the rule is meant to safeguard an aggrieved person's fifth amendment right against self-incrimination. Accordingly, a grand jury witness who is not in danger of prosecution should not have the right to withhold or suppress evidence. This view of the purpose of the exclusionary rule receives only indirect support in the cases[47] and no

41. Both had been granted transactional immunity under § 2514 of the Crime Control Act. Note 6 *supra.*

42. Brief for Appellee at 10, *In re* Evans, No. 71-1499 (D.C. Cir., July 23, 1971).

43. *See* notes 47-48 *infra* and accompanying text.

44. The reasoning of *Silverthorne* has been reaffirmed recently by the Supreme Court. Harrison v. United States, 392 U.S. 219, 222 (1968).

45. Comment, *The Applicability of the Exclusionary Rule to Civil Cases*, 19 BAYLOR L. REV. 263 (1967).

46. The exclusionary rule was first suggested in dictum in Boyd v. United States, 116 U.S. 616 (1886). It became law in federal courts through the decision in Weeks v. Unitd States, 232 U.S. 383 (1914).

47. 116 U.S. at 616 (dictum).

support whatsoever from the articulation of the rule in the Federal Rules of Criminal Procedure.[48]

A second explanation for the exclusionary rule is that it is required by the fourth amendment. Thus, since one does not have standing to assert the constitutional rights of another, only aggrieved persons may invoke the rule.[49] The difficulty with this explanation is that the violation of the aggrieved person's constitutional right—the unreasonable search and seizure—already has occurred prior to the invocation of the rule. Suppression may be considered a remedy available to the aggrieved person to vindicate his fourth amendment right. If so, that remedy is nevertheless not a right arising out of the fourth amendment, but a privilege created by the courts.[50]

Thus, the third explanation for the exclusionary rule is that it is a creation of the courts based on policy considerations. One of these considerations is the moral argument that courts should not associate themselves with illegal acts.[51] In light of this reasoning, however, why the privilege to exclude illegal evidence should be limited to aggrieved persons is unclear. A more fundamental reason for the exclusionary rule is to deter law enforcement officials from obtaining evidence in violation of the fourth amendment.[52] Again, this justification suggests that standing to invoke the rule should not be limited. Since the rule in based on policy determinations regarding the public's interest in deterring fourth amendment violations, however, limitations imposed by policy determinations regarding the public's interest in admitting evidence, even if illegally obtained, are also applicable.

3. *Policy Considerations Regarding Grand Jury Witness Standing.*—Arguments opposing standing for witnesses fall into two categories. The first concerns administrative matters. The thrust of this argument is that witness standing will place an intolerable burden on the government by forcing it to "prove the negative" every time a witness

48. *See* FED. R. CRIM. P. 41(e).

49. Jones v. United States, 362 U.S. 257, 261 (1960).

50. Alderman v. United States, 394 U.S. 165, 175 (1969); People v. Cahan, 44 Cal. 2d 434, 439-41, 282 P.2d 905, 908-10 (1955). No equivalent of the exclusionary rule exists in England or Canada to protect corresponding rights. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669 (1970).

51. *E.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968); Elkins v. United States, 364 U.S. 206, 222-24 (1960); Weeks v. United States, 232 U.S. 383, 394 (1914).

52. *E.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 413 (1966); Elkins v. United States, 364 U.S. 206, 217 (1960). Other remedies directed against offending law enforcement officials have failed to deter violations. Linkletter v. Walker, 381 U.S. 618, 636 (1965); Elkins v. United States, 364 U.S. 206, 217 (1960); Irvine v. California, 347 U.S. 128, 152 (1951) (Douglas, J., dissenting). For a critical study of the exclusionary rule as a deterrent see Oaks, *supra* note 50.

alleges that evidence was illegally obtained.[53] In fact, however, even if witness standing were granted, the government's burden would remain affirmative in nature: to demonstrate that there is some lawful basis for the evidence, and not to prove that it was not obtained illegally. Furthermore, this argument is aimed against the exclusionary rule itself, not witness standing. Given that there are now at least some individuals with standing to move to suppress, the government must develop techniques for meeting these challenges. These same techniques would be available for answering challenges by grand jury witnesses.

Another aspect of the argument regarding administrative problems is that witness standing will place an intolerable burden on the courts by greatly increasing the need for hearings to determine the admissibility of evidence.[54] The hidden premise in this argument is that the exclusionary rule will prove ineffective as a deterrent. The only compelling justification for the rule's existence, however, is that it will take away a prime motivation for illegal searches and seizures—the conviction of criminals on the basis of unlawfully acquired evidence. If this reasoning is correct, then there obviously will be no significant additional administrative burden. On the other hand, if the exclusionary rule proves not to be an effective deterrent, then it should be eliminated as a rule of evidence. This conclusion follows not because of the increased administrative burden, but, more fundamentally, because the rule would then lack its chief *raison d'etre*. Since the exclusionary rule is designed specifically to eliminate the prime motivation for the illegal acquisition of evidence, it is not unreasonable to assume its deterrent effect and place the burden of proving the contrary on its attackers.

The second group of arguments is advanced by people concerned about the possible subversion of justice that might result from granting witness standing. Proponents of this position maintain that in criminal cases the public has an interest in convicting lawbreakers and that the use of the exclusionary rule, which tends to exclude reliable, albeit illegal, evidence, should be limited severely.[55] Of course, the general observation can be made that the more the exclusionary rule is limited, the less deterrent effect it will have. Accordingly, the less the deterrent effect of the rule, the less justification there is for its existence at all. More significant, however, is the fact that those who would introduce illegally obtained evidence are also lawbreakers. Consequently, whatever interest

53. No. 71-1499 at 33-34 (Wilkey, J., dissenting).
54. The procedure is codified in 18 U.S.C. § 3504 (1970).
55. 450 F.2d at 222 (Gibbons, J., dissenting).

the public has in securing convictions through constitutional violations is outweighed by the resulting jeopardization of the very rights that the fourth amendment and the exclusionary rule were intended to secure.

The final argument is that if witness standing is granted in a grand jury proceeding, then it logically must be granted in criminals trials. That conceivably would enable a witness to suppress evidence necessary to an individual's defense and thereby possibly violate a defendant's sixth amendment right to compel witnesses to testify.[56] A defendant does not have an absolute right to a witness' testimony, however, since the witness may assert several privileges[57] that may effectively suppress evidence necessary to a defense. The question, once again, is one of policy: does the value of the potential deterrent to unlawful police action, which is present in permitting a witness to suppress evidence, outweigh the possible harm to a defendant? If a liberal interpretation of the standing requirement is successful in deterring violations of the fourth amendment or of the Crime Control Act, then a reasonable argument can be made that this result is more desirable than permitting an individual to exploit the violation of another's constitutional rights.

III. CONCLUSION

The primary purpose of the foregoing discussion has been to raise the various questions and problems implicit in the issue whether a grand jury witness has standing to challenge evidence under the Omnibus Crime Control and Safe Street Act of 1968. The attempt to resolve some of these questions reveals that a grand jury witness cannot rely solely on section 2515 to withhold testimony, but must have standing to suppress the evidence under section 2518(10)(a). The latter section does not prohibit suppression of evidence in a grand jury proceeding, but neither the statute nor prior case law states definitively that a witness before a grand jury does have standing. If *Silverthorne* can be distinguished from the *Egan* and *Evans* cases on its facts, then policy considerations must be weighed to determine whether witness standing is justified. This process suggests that grand jury witnesses who are aggrieved persons should have the right to challenge the source of evidence under both the fourth

56. No. 71-1499 at 52-53 (Wilkey, J., dissenting); 450 F.2d at 223 (Gibbons, J., dissenting).

57. *See* notes 24-26 *supra*; 8 J. WIGMORE, EVIDENCE 69 (McNaughton rev. 1961).

58. California has abolished the standing requirement for suppressing evidence under the exclusionary rule. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

amendment exclusionary rule and its statutory counterpart in the Crime Control Act.

The policy arguments favoring grand jury witness standing under the Act can be applied to the broader area of the fourth amendment exclusionary rule. The rule is not a requirement of the fourth amendment, but was created to deter fourth amendment violations. Standing requirements which serve to restrict the invocation of the rule increase the likelihood that illegally obtained evidence will be admitted, thereby undercutting the acknowledged purpose of the rule. Therefore, to realize fully the deterrent effect of the exclusionary rule, better policy indicates that the right to suppress should be extended beyond its present limits to nonaggrieved parties so that the requirement of standing is eliminated altogether.