THE COPLON CASE: WIRETAPPING, STATE SECRETS, AND NATIONAL SECURITY*

No evidence obtained by wiretapping is admissible in the federal criminal prosecution of a party to a tapped conversation.[1] Once an accused shows that his wires were tapped by the Government,[2] the judge must order a hearing out of the jury's presence.[3] Here the prosecution has the burden of proving that none of the evidence it will introduce for conviction comes directly or indirectly

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* United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950).

1. Nardone v. United States, 302 U.S. 379 (1937); Nardone v. United States, 308 U.S. 338 (1939); Weiss v. United States, 308 U.S. 321 (1939).

A defendant's right not to be convicted on the basis of wiretap evidence is not constitutional. Olmstead v. United States, 277 U.S. 438 (1928). Evidence secured by this device may not be introduced at trial solely by reason of § 605 of the Federal Communications Act as interpreted in the two *Nardone* cases, *supra*. 48 STAT. 1103 (1934), 47 U.S.C. § 605 (Supp. 1946). That section provides: "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . ." Since the *Nardone* cases, the Supreme Court has refused to extend the wiretapping prohibition to the logical limits of those decisions, apparently because of the adverse effect such an extension might have upon the Government's investigations of national security cases. In Goldman v. United States, 316 U.S. 129 (1942), the Court held that Government use of a detectaphone—an instrument in an adjoining room which can "hear" through stone walls—to listen in on a telephone conversation, did not come within the wiretap ban. The Court reached a similar result in Goldstein v. United States, 316 U.S. 114 (1942), where the Government had used actual wiretaps to induce a confession. But the taps were not of a conversation to which the *defendant* had been a party. See Rosenzweig, *The Law of Wiretapping*, 32 CORN. L.Q. 514, 545 (1947); Note, 29 VA. L. REV. 116 (1942); 17 TUL. L. REV. 129 (1942); 40 MICH. L. REV. 1238 (1942). See, generally, Rosenzweig, *The Law of Wiretapping*, 32 CORN. L. Q. 514, 33 CORN. L.Q. 73 (1947); Note, 53 HARV. L. REV. 863 (1940).

2. The accused must make out a *prima facie* case that the Government has intercepted his telephone communications. Nardone v. United States, 308 U.S. 338 (1939); United States v. Goldstein, 120 F. 2d 485 (2d Cir. 1941), *aff'd*, 316 U.S. 114 (1942); United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950).

3. Determining the admissibility of evidence is the function of the trial judge, without aid of the jury, even when admissibility in law depends upon the determination of incidental facts. Tooisgah v. United States, 137 F. 2d 713 (10th Cir. 1943); 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940). *See* McNabb v. United States, 318 U.S. 332, 338 n.5 (1942).

This rule has been consistently applied to wiretapping cases. *See* Nardone v. United States, 308 U.S. 338, 341-2 (1939); United States v. Goldstein, 120 F.2d 485, 487 (2d Cir. 1941) *aff'd on other grounds*, 316 U.S. 114 (1942); United States v. Bonanzi, 94 F.2d 570 (2d Cir. 1938); United States v. Coplon, 88 F. Supp. 921 (S.D.N.Y. 1950).

from the wiretapping.[4] Evidence not proven untainted will be suppressed from the accused's criminal trial.[5]

When the United States brought her to trial for attempting to pass Government secrets to a Russian agent,[6] Judith Coplon proved, on a motion to suppress, that the FBI had tapped her home and office telephones.[7] Under normal procedure, the prosecution should then have produced all its wiretap records and trial evidence for scrutiny and comparison by the defense and judge.[8] In the *Coplon* case, however, some of the "tap" records were withheld from the defense on the ground that disclosure would be inimical to national security.[9] These "secret" taps were examined by the trial judge alone.[10] On the basis of all the records—including those which the defense could not see or argue about —and on the basis of oral testimony introduced at the hearing, the judge de-

4. The language of the second *Nardone* decision leaves the precise nature of the prosecution's burden in doubt: "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed. Once that is established . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had independent origin." 308 U.S. 338, 341 (1939).

But the second circuit, interpreting this language in United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941) *aff'd,* 316 U.S. 114 (1942), noted 55 HARV. L. REV. 141 (1941), decided that the final burden of refuting the defendant's charge must rest with the Government. It based its decision on an analogy to the "doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so. . . ." The court also felt that the final burden should be placed on the prosecution because the prosecution necessarily has full knowledge of how its evidence was secured. On review, the Supreme Court affirmed the second circuit's decision but was careful not to affirm the rulings on the burden of proof. Goldstein v. United States, 316 U.S. 114 (1942). See Rosenzweig, *supra* note 1, at 539. The second circuit's ruling was, nevertheless, followed at the Coplon wiretap hearing. 88 F. Supp. 921 (S.D.N.Y. 1950), *rev'd,* 185 F. 2d 629 (2d Cir. 1950).

5. Nardone v. United States, 308 U.S. 338 (1939) *passim.*

6. United States v. Coplon, 88 F. Supp. 910 (S.D.N.Y. 1949). Miss Coplon was prosecuted for violation of 62 STAT. 736, 737, 795 (1948), 18 U.S.C. §§ 793, 794, 2071 (1950).

7. United States v. Coplon, 88 F. Supp. 921, 924 (S.D.N.Y. 1950).

8. *E.g.,* United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940).

9. The records withheld from the defendant on security grounds were of these types: (1) original recording discs; (2) handwritten notes or "logs" made by the monitors while they were monitoring; and (3) letters prepared in the New York office of the FBI and sent to the Washington office, summarizing the original records of certain taps which the FBI had destroyed before trial. United States v. Coplon, 185 F.2d 629, 636-7 (2d Cir. 1950).

See 8 WIGMORE, EVIDENCE § 2378 (3d ed. 1940) for the proposition that genuine state secrets are the basis of a Government privilege against disclosure. On the status of this privilege in the United States today, see Note, *Government Privilege Against Disclosure of Official Documents,* 58 YALE L.J. 993 (1949).

10. United States v. Coplon, 185 F.2d 629, 636, 637 (2d Cir. 1950).

cided that none of the Government's trial evidence stemmed from wiretapping.[11]

On appeal from Miss Coplon's subsequent conviction, the Second Circuit Court of Appeals held that the judge's failure to disclose all the taps to the defendant violated the Sixth Amendment.[12] The court refused to examine the secret taps and review the trial judge's determination that they had not led to any of the prosecution's evidence.[13] Instead, the appellate court reasoned as follows. To meet its burden of proof, the Government had to produce all its wiretaps at the preliminary hearing. These, in turn, were only substitutes for the monitors who heard and recorded the conversations. "If the prosecution had not had the records and had been obliged to rely upon the testimony of the 'monitors,' it would certainly have been constitutionally necessary under the Sixth Amendment to examine them openly and in court. . . ."[14] Since the testimony of the monitors would have to be open to the defendant, the records which were substitutes for that testimony also had to be disclosed to the defendant.

The court's premise, however, does not support its conclusion. True, if the monitors' testimony were necessary, the Sixth Amendment's right to confrontation—which is nothing more than the hearsay rule[15]—might[16] have required

11. United States v. Coplon, 88 F. Supp. 921 (S.D.N.Y. 1950).

12. United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950). Judge Learned Hand wrote the court's opinion. The decision apparently requires disclosure of all the tap records enumerated in note 9 *supra*.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his own favor, and to have the Assistance of Counsel for his defense."

Judge Hand did not specify which clause of the Sixth Amendment was violated. He said only that if the testimony of the monitors had been necessary, they would have had to be examined "openly and in court." See text at note 14 *infra*. Such a requirement can be implied only from the "public trial" clause or the "confrontation" clause. The former, however, has never been interpreted to mean anything more than that the public shall not be denied physical access to the courtroom. It is not concerned with the defendant's right to disclosure of the case against him. *E.g.*, Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944). See also Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381 (1932). In her brief on appeal, Miss Coplon complained only of non-disclosure to her and her attorney. Brief for Defendant, pp. 33-6, 45-7, United States v. Coplon, 185 F.2d 629 (2d Cir. 1950). Similarly, in his opinion Judge Hand seems to be concerned solely with the right of the defense to examine the wiretap records, regardless of whether the public was admitted. Therefore the court was probably relying on the "confrontation" provision.

13. United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).

14. *Id.* at 637.

15. See note 17 *infra*.

16. It is not clear whether the strict procedural provisions of the Sixth Amendment apply to a preliminary hearing on the admissibility of evidence. This precise point

that they be examined in the defendant's presence. That right is designed to give criminal defendants an opportunity to test the completeness, accuracy, and honesty of witnesses' accounts by cross-examination, *i.e.*, "by the direct and

has never been decided, but a body of precedent exists for the proposition that the Amendment does not apply to proceedings whose purpose is not to inquire into the guilt or innocence of the accused. In the following situations, various procedural requirements of the Amendment have been held inapplicable to proceedings related to a criminal prosecution but not part of the trial proper:

(1) Right to confrontation of a witness giving testimony before the grand jury. Wilson v. United States, 221 U.S. 361, 375 (1911); Counselman v. Hitchcock, 142 U.S. 547 (1892); Gilmore v. United States, 129 F.2d 199 (10th Cir. 1942).

(2) Habeas corpus proceeding. Burgess v. King, 130 F.2d 761 (8th Cir. 1942).

(3) Extradition proceeding. *Ex parte* La Mantia, 206 Fed. 330 (S.D.N.Y. 1913).

(4) Preliminary hearing before a United States Commissioner on probable cause for arrest. Burall v. Johnston, 53 F. Supp. 126 (D.C. Cal. 1943).

(5) Proceeding to remove an accused from district where arrested to district where crime committed. United States, *ex rel.* Hughes v. Gault, 271 U.S. 142 (1926).

(6) Motion for a speedy trial. United States *ex rel.* Coleman v. Cox, 47 F.2d 988 (5th Cir. 1931).

(7) Arraignment. Ruden v. Welch, 159 F.2d 493 (4th Cir. 1947) (no right to counsel when plea of not guilty); but *cf.* Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942) (plea of guilty; opposite holding).

(8) Appellate court proceeding. Dowdell v. United States, 221 U.S. 325 (1911) (defendant's right of confrontation not violated when judge and clerk of court, in accordance with order of appellate court, fill in procedural omissions in record); Schwab v. Berggren, 143 U.S. 442 (1892) (defendant's right of confrontation does not include right to be present at oral argument in appellate court).

(9) Motion to correct sentence and judgment. Nivens v. United States, 139 F.2d 226 (5th Cir. 1943).

This strict construction of the Sixth Amendment is based on the words "criminal prosecution" found in the language of the Amendment as opposed to the words "criminal case" found in the Fifth Amendment. See Gilmore v. United States, 129 F.2d 199 (10th Cir. 1942), *cert. denied,* 317 U.S. 631 (1942).

Moreover, even assuming that some clauses of the Sixth Amendment would be applicable to a preliminary hearing on the admissibility of evidence, it is unclear that the confrontation clause would apply. The clause refers only to "witnesses against" the accused. This has been interpreted to mean that only those witnesses whose testimony goes to the jury are witnesses within the meaning of the Amendment. For example, in the following cases the right to confrontation was not violated where the testimony of the witnesses did not go to the jury. Dear Check Quong v. United States, 160 F. 2d 251 (D.C. Cir. 1947) (informer not produced at trial); Curtis v. Rives, 123 F.2d 936 (D.C. Cir. 1931) (witnesses named in police report not called to the stand to testify); Aycock v. United States, 62 F.2d 612 (9th Cir. 1932) (witnesses named in indictment not called to testify); Goldsby v. United States, 160 U.S. 70 (1895) (defendant not afforded the benefit of a preliminary hearing and of confronting the witnesses who would normally be called at the hearing); McDonald v. Hudspeth, 129 F.2d 196 (10th Cir. 1942) (same); United States v. Johnson, 129 F.2d 954 (3d Cir. 1942), *aff'd,* 318 U.S. 189, 37 ILL. L. REV. 453 (1943) (defendant has no right to be present when jury is not); FED. RULES CRIM. PROC., Rule 12(b)(4) (judge authorized to consider affidavits in preliminary hearing on a motion). Since in a wiretap hearing the monitors' testimony would never come before the jury, it is questionable whether they would be "witnesses against" the accused within the meaning of the Sixth Amendment.

personal putting of questions and obtaining immediate answers."[17] But in the *Coplon* case there was no need and no attempt to test the accuracy of the wiretap documents. These documents, being actual recordings or summaries of the original recordings made on the spot, were more accurate than the memories of the monitors.[18] The trial judge had no occasion to state on what basis these documents were admitted, but in all probability they were admissible as regular business entries.[19] And once the court had determined, without objection from the defendant, that these documents were competent in lieu of direct testimony, the confrontation requirement was satisfied.

What Miss Coplon actually wanted was disclosure of the withheld records for use in contesting the Government's proof that its evidence did not stem from wiretapping. If she had seen these records, she might have used them as the basis for oral argument to the judge that the prohibited link was present. Furthermore, the prosecution called a number of witnesses whose testimony tended to establish the independent origin of the evidence.[20] Disclosure of the with-

17. 5 WIGMORE, EVIDENCE, § 1395 (3d ed. 1940): "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

". . .

"[T]his secondary advantage [enabling the judge and jury to see the witness' deportment while testifying] is a result accidentally associated with the process of confrontation whose original and fundamental object is the opponent's cross-examination."

"[Confrontation] intends to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits. . . ." Dowdell v. United States, 221 U.S. 325, 330 (1911).

18. The second circuit accepted the fact that the wiretaps were competent as substitutes for the monitors. United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950). See United States v. Goldstein, 120 F.2d 485 (2d Cir. 1941), *aff'd*, 316 U.S. 114 (1942).

19. The federal business entry statute is 62 STAT. 945 (1945), 28 U.S.C. § 1732 (Supp. II 1946). United States v. Leathers, 135 F.2d 507 (2d Cir. 1943), held that this statute, as applied to criminal trials, does not violate the Sixth Amendment.

20. The main emphasis of the hearing was not on the question of whether the taps led to any of the prosecutions' evidence; rather, it was on whether the Government's knowledge of the facts came from an independent source, although the identical information may have been obtained through wiretapping. For example, one of the questions was the source of the Government's information regarding Miss Coplon's trips to New York. The Government admitted that the FBI had learned of her contemplated trips through telephonic interceptions. But it contended that the FBI had also learned of these contemplated trips from an independent source. To prove this the Government called Miss Coplon's superior in the Department of Justice, William E. Foley, who testified that prior to each trip Miss Coplon asked his permission to leave work early in order to go to New York. Mr. Foley relayed this information to the FBI in each instance. United States v. Coplon, 88 F. Supp. 921 (S.D.N.Y. 1950).

held documents might have made defendant's cross-examination of these witnesses more effective.

Miss Coplon's demand that the privileged documents be divulged is analogous to an attempt on the part of a defendant to obtain for possible introduction in evidence a document in the possession of the prosecution which the prosecution refuses to surrender on the ground that it is privileged and therefore inadmissible. A number of cases have held that if such document is "importantly relevant" to the defense, the Government has abandoned the privilege by choosing to prosecute.[21] Thereupon, the Government must surrender the document for introduction by the defendant. But the defendant is not allowed to see the document until the trial judge has determined that it is "importantly relevant." An accused is thus denied an opportunity to dispute the judge's conclusion with any specificity, because he never sees any document which is held to be irrelevant.[22] The second circuit sought to distinguish these cases as merely "deny [ing] to one party the possible advantage of evidence in the possession of his adversary," whereas in *Coplon* one party is introducing "evidence in support of his position which the other party is forbidden to see."[23] The distinction does not hold up. For one thing, even assuming that the distinction can be made, it may be equally important to the defendant whether he is prevented from seeing documents which may be crucial to his defence or documents which are being introduced against him by the other party. But no real distinction exists. In neither situation can the Government proceed with the prosecution unless it shows the judge all the documents demanded—in the one case, all those which the defendant asserts are relevant to his defense; in the other, all its taps of the defendant's wires. Then the judge determines in the first case, whether the documents are relevant to the defense, or, in the second, whether the taps led

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The origin of the "independent source" rule was the statement in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), per Holmes, J.: "This [a provision forbidding the acquisition of evidence in a certain way] does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it. . . ." This statement was quoted with approval in Nardone v. United States, 308 U.S. 388, 341 (1939). See also the statement of Judge Reeves in the Washington *Coplon* case: "The very fact that the Government (if it be a fact and apparently it is) obtained the identical information wrongfully, would not destroy or taint evidence otherwise lawfully and properly acquired. . . ." United States v. Coplon, 91 F. Supp. 867, 869 (D.C.D.C. 1950). *Accord,* United States v. Weiss, 34 F. Supp. 99 (S.D.N.Y. 1940).

21. *E.g.,* United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. DeNormand, 149 F.2d 622 (2d Cir. 1945); United States v. Simonds, 148 F.2d 177 (2d Cir. 1945); United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944); United States v. Krulewitch, 145 F.2d 76 (2d Cir. 1944); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

22. See cases cited in note 21 *supra,* and Judge L. Hand's discussion of those cases in United States v. Coplon, 185 F. 2d 629, 639 (2d Cir. 1950). Of course, the trial judge's determination of relevancy is subject to review by an appellate court.

23. *Id.* at 639.

to the evidence which the Government intends to introduce at trial. In both situations the Government is introducing "evidence in support of its position."[24]

In determining whether the Government's evidence stems from allegedly secret wiretaps, a trial court should adopt the following procedure. It should distinguish between disclosure to the defendant and to the general public, in order to avoid prejudicing a defendant, disclosure to whom would do no harm because he was already a party to the tapped conversations. Thus the court should first face the question whether the taps could be disclosed to the general public without affecting national security. If they could, the court should order disclosure to both the defendant and the public. If they could not, then the court should go on to decide whether disclosure could at least be made to the defendant and his attorney.[25] Such disclosure should be made unless the Government can prove to the court: (a) that disclosure to the defendant and his attorney would adversely affect national security, and (b) that the documents would be of no help to the defendant in refuting the Government's claims. In

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24. Judge L. Hand cited United States v. Andolschek, 142 F. 2d 503 (2d Cir. 1944) as controlling the *Coplon* situation. In that case the court "held that, when the Government chose to prosecute an individual for a crime, it was not free to deny him the right to meet the case against him by introducing relevant documents [in the possession of the Government] otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defence. To that we adhere." United States v. Coplon, 185 F. 2d 629, 638 (2d Cir. 1950). In the *Andolschek* situation, the question of relevancy is decided by the trial court without disclosure to the accused. See text at note 22 *supra*.

In applying the *Andolschek* doctrine to the *Coplon* case, Judge Hand said: "[W]e can see no significant distinction between introducing evidence against an accused which he is not allowed to see [the *Coplon* case], and denying him the right to put in evidence on his own behalf [the relevant Government documents in the *Andolschek* case]." *Id.* at 638.

In the *Andolschek* type of situation, however, the only documents which must be disclosed to the defendant are those which the court finds relevant to his defense. The fact that *all* the requested documents must be shown to the judge for his relevancy determination, and in this sense are "relevant" to that determination, does not require that they be disclosed to the defendant.

In the *Coplon* case the court, by citing *Andolschek* to support its holding that all the wiretap records must be disclosed to the defendant, apparently assumed that all those records were "relevant." But in only one sense can it be said that all the taps were relevant, *i.e.*, the Government had to show all of them to the judge so that he could determine whether any of them might help the defendant prove that the Government's evidence stemmed from wiretapping. And this is the very type of relevancy which in the *Andolschek* situation does not require disclosure to the defendant. It would follow from *Andolschek* that only those taps need be disclosed which the court decides might help the defendant contest the Government's contentions.

25. See United States *ex rel.* Touhy v. Ragen, 71 Sup. Ct. 416, 419 n. 5 (1951), for an instance in which the Government was willing to disclose a privileged document to the defendant and his attorney but not to the public.

the *Coplon* case, the second circuit should have instructed the trial court to follow this procedure on remand.[26]

A procedure of this sort would afford adequate protection to a defendant. It is designed to keep from him only irrelevant documents whose disclosure to him would harm national security. The crucial factors of relevancy and the need for security would be passed upon by at least two courts.

26. The second circuit reversed and remanded on two grounds in addition to non-disclosure of the secret taps: (1) that the Government had illegally arrested and searched Miss Coplon; and (2) that the trial court had not allowed the defense sufficient opportunity to inquire into whether the "confidential informant" who had first set the Government on the trail of Miss Coplon was himself a "wiretapper." United States v. Coplon, 185 F.2d 629 (2d Cir. 1950).

In determining whether he would disclose the allegedly secret taps, Judge Ryan seems to have followed in large part the procedure suggested above. But he failed to distinguish between disclosure to the defense and to the general public. If he had made this distinction, he might have permitted disclosure to Miss Coplon and her attorney, since she was already a party to all the tapped conversations.

The second circuit's holding that failure to disclose the secret taps to the defendant violated the Sixth Amendment may result on remand in disclosure to the public as well, if the Government chooses to continue the prosecution. For if that Amendment applies to the wiretap hearing, then the "public trial" provision would seem to require that the public be admitted to the courtroom. See cases cited in note 12 *supra*. See also the discussion in *In re* Oliver, 333 U.S. 257, 271-2 (1947). And if the public is present at the hearing, it will hear cross-examination of the Government's witnesses and oral argument by defendant's counsel. This cross-examination and argument may be based in part on the taps withheld from the defendant at the first hearing.