

To: Richard G. Denzer

From: Peter J. McQuillen

Re: May an independent pre-trial appeal lie from an interlocutory order granting or denying an application for the suppression of evidence illegally seized?

The federal rule on appealability of suppression orders is discussed in United States v. Koenig (5th Cir. 1961, appeal pending) 290 F2d 166, 168-9: "The appealability of an order suppressing evidence depends ....upon whether it is 'final'. Orders in an incidental ancillary proceeding to a criminal action are interlocutory and non-appealable; orders in independent plenary proceedings are final and appealable....The crucial factor in deciding whether a suppression order is issued in an independent proceeding or is merely a step in the trial of a case, is the pendency of a criminal action in which the evidence sought to be suppressed may be used. If there is no criminal proceeding pending, a motion for suppression of evidence and the return of such (evidential) property is an independent civil suit. But at what stage does a criminal proceeding begin? The courts of appeal have reached various answers."

In United States v. Heath (9th Cir. 1958) 260 F2d 623,631 the court said: Orders to suppress evidence pursuant to motions made subsequent to indictment are not appealable under the general authority of 28 U. S. C. A. §1291. Carroll v. United States, 354 U. S. 394,... And it has been held that the added factor of dismissal of the indictment, because of the suppression order, does not result in appealability. United States v. Janitz, 3 Cir. 161 F2d 19; ....But see United States v. Ponder, 4 Cir. 238 F2d 825....where appellate jurisdiction was accepted under 18 U. S. C. A. §3731, in order to reverse. However, the general rule may not be held applicable should the dismissal of indictment after grant of motion to suppress be viewed as a plea in abatement."

Prior to Mapp, 24 states excluded or partially excluded evidence obtained by illegal seizure. See Elkins v. United States

(1960) 364 U. S. 206, Appendix; Wolf v. Colorado (1949) 338 U. S. 25, Appendix; Annotation: 50 A. L. R. 2d 533. Of these, 21 viewed a ruling on a motion to suppress as interlocutory and not appealable by the prosecution or the defendant. Two states (Michigan and South Dakota) permitted <sup>an</sup> appeal, with leave, to both the prosecution and the defendant. One state (Kentucky) permits an appeal, as of right, to the prosecution. However, since August 1, 1961, Illinois permits an appeal, as of right, to the prosecution only.

The following comments are relevant:

DELAWARE: Sibbley v. State 102 A2 702 (1954)

An information was filed in the Court of Common Pleas. A motion was then filed in the Superior Court seeking orders to suppress the evidence by the search, under the provisions of 11 Del. C. §2310. The motion was denied. The instant appeal was taken to the Supreme Court of Delaware. The court held that a motion under §2310 is a special plenary proceeding, a determination of which is an appealable final judgment: "The result is unfortunate, but we see no escape from the conclusion that [§2310] created a special proceeding, independent of any pending criminal cause.... We have said that the result is unfortunate. This is so because the existence of the statutory remedy will frequently result in serious delays in law enforcement--a persistent evil in American Criminal practice so well recognized as to need no elaboration here. The law of search and seizure abounds with close questions of law and of fact. The provisions of §2310 may, at the option of the defendant, be availed of to require a determination by this Court, in advance of trial, of any such question involving an alleged illegal search of a 'house or place.' Moreover, the temptation to one charged with crime to exhaust the resources of delay by specious claims of illegality will often be irresistible. The case before us supplies an example.... No dilatory tactics appear. The defendants were entirely within their rights in following the course they did. Yet the result is nearly a year's delay in the trial of a

misdemeanor under the gambling laws. We fully realize the importance of a vigilant protection of the fundamental right of any accused to be arrested and tried in strict accordance with law. But we fail to see why this right may not be enforced by the court in which the prosecution is had under appropriate rules requiring the filing of a timely motion in the proceeding itself. If failure to file a preliminary motion is excusable, the point may be raised at the trial....In this manner the defendant's rights would be adequately protected, and unreasonable delay avoided." (at 705)

Shortly after this decision, (on April 26, 1955), §2310 was repealed "in order to eliminate the unavoidable delays caused by separate proceedings...to suppress evidence in criminal cases pending in the lower courts" In re Spring (1956 Del.) 120A 2d 558, 559.

ILLINOIS: People v. Moore and §747 statute

People v. Moore (1951) 102N. E. 2d 146, 149: under the law of Illinois the State may not appeal from the order so far as it merely suppresses the search warrant. But State may appeal that part of an order directing the return of "contraband." This part of the order is civil rather than criminal in nature. There is no right to appeal the suppression part of the order.

Ill. Rev. Stat. Ch. 38 §747, As amended as of August 1, 1961  
Exceptions may be taken in criminal cases, and bills of exceptions shall be signed and sealed by the judge and entered of record, and error may be assigned thereon as in civil cases. All motions for new trial and in arrest of judgment shall be made in writing: Provided, that in no criminal case shall the People be allowed a new trial. The People may sue out writs of error to review any order or judgment quashing or setting aside an indictment or information. The People may sue out interlocutory writs of error to review any order or judgment quashing an arrest or a search warrant or suppressing evidence entered preliminary to trial. Provided that no interlocutory writ of error may be sued out by the People from any order or judgment

suppressing any confession. The defendant or defendants shall not be held in jail or to bail during the pendency of any writ of error sued out by the People, but the time during which a writ of error is pending from an order or judgment quashing a warrant or suppressing evidence shall not be counted for the purposes of determining whether an accused is entitled to discharge under Section 18. Laws 1961 H. B. No. 1219 §1. As amended Aug. 1, 1961.

MARYLAND: State v. Barshach

In State v. Barshach (1951) 80 A.2d 32, 33, the State appealed an order quashing a search warrant. The court dismissed the appeal because no final judgment was entered in the case: "The granting of the motion was no more final than would be any other ruling excluding testimony at a trial."

OKLAHOMA: Linde v. State (1946) 175 P2d 370, 375.

"Defendant had the right to file a motion to suppress the evidence and thus test the legality of the search warrant and in case of an adverse ruling and a conviction he had the right to appeal to this court, and any error in the ruling as to the legality of the search warrant could then have been corrected. This has always been the procedure followed....By the filing of the motion of intervention, and appealing therefrom, the original case against the defendant has not been tried and no final judgment or order has been rendered thereon, from which an appeal can be taken to this court. Such a procedure as this would make a farce of the statute, and delay trials of the main issue....[Attempted appeal dismissed]."

RHODE ISLAND: State v. Paradis (1941) 18A 2d 342, 344-345:

"That the petitioners will be put to the expense and inconvenience of defending themselves in trials under indictments that may later prove to have been vitiated by error is not an uncommon incident of criminal prosecutions. That is a burden which all must bear under our system of judicial procedure. If we were to allow certiorari on this ground, the requests for this writ would certainly

be the rule rather than the exception, and there would be little left of the well-established principle of our appellate procedure that this court will not review a cause piecemeal."

SOUTH DAKOTA: Code § 34.4103

§ 34.4103 appeals from intermediate orders as matter of judicial discretion. As to any intermediate order made before trial, as to which an appeal is not allowed as a matter of right, either the state or the defendant may be permitted to appeal to the Supreme Court not as a matter of right, but of sound judicial discretion, such appeal to be allowed by the Supreme Court only when the court considers that the ends of justice will be served by the determination of the questions involved without awaiting the final determination of the action....

TENNESSEE: State v. Bass (1926) 281 SW 936, 938-939

"It is generally held, in both federal and state courts that follow the exclusion rule, that a determination of the question as to whether the property was unlawfully seized, and an order to restore the property, is interlocutory and not appealable....Such an order is but a step in the progress of the case, not final but essentially interlocutory, and not reviewable, except upon appeal after final judgment in the case wherein the interlocutory order was entered. The reason for the rule [is] to avoid delay incident to multiplied appeals...."

WASHINGTON: State v. Johnson (1928) 273 P. 532 and State v. Studer (1928) 270 P. 430, 431

State v. Johnson: The state is given the right to appeal from an order which in effect abates or determines the action or discontinues the same. However, an order suppressing evidence is not appealable because it "amounts to nothing more than a ruling that, if certain testimony be offered by the state, it will be rejected. It amounts to the same thing as a ruling of the court during the progress of the trial."

State v. Studer: There is nothing in the record indicating that the order of suppression in effect abates or determines the action or discontinues the same, "save only as the notice of appeal indicates that it is the opinion of the prosecuting attorney that he cannot succeed in obtaining a conviction in the absence of the evidence which has been suppressed. This we think will not do. The effect of such evidence or the effect of the lack of it might be something upon which the minds of reasonable men might well differ. One prosecutor might feel justified in proceeding with the trial without the suppressed evidence; another might be doubtful; and another might be convinced that to so proceed would be useless. The result would be that whether or not an appeal would lie would have to be determined wholly from the mental attitude of the prosecutor in each particular case, which would lead to utter confusion. Moreover, and still more important, the suppression of evidence prior to trial is the equivalent of the rejection of evidence offered at the trial."

APPENDIX

<u>STATE</u>	<u>PROSECUTION</u>	<u>DEFENDANT</u>	<u>REMARKS</u>
Alabama	No	No	Ala. Code, Tit. 7, §§754, 764; Tit. 15, §§367, 370, 389; <u>Sparks v. State</u> (1960) 119 So. 2d 596; <u>State v. Martin</u> (1943) 10 So. 2d 671.
California	No	No	Calif. Penal Code, §§1237, 1237.1466; §§995, 999a; * <u>People v. Valenti</u> (1957) 316 P. 2d 633; <u>Badillo v. Superior Court</u> (1956) 294 P. 2d 23; <u>People v. Justice Court</u> (1960) 8 Cal. Rptr. 176.
Delaware	No	No	<u>Sibbley v. State</u> (1954) 102 A. 2d 702; <u>In re Spring</u> (1956) 120 A. 2d 558, 559; cf. <u>State v. Superior Court</u> (1958) 141 A. 2d 468.
Florida	No	No	Fla. Stat. §§924.06, 924.07; <u>Wells v. State</u> (1949) 38 So. 2d 464; <u>Whidden v. State</u> (1947) 32 So. 2d 577; <u>Robertson v. State</u> (1927) 114 So. 534.
Idaho	No	No	Idaho Code §§10-2803, 10-2804, 10-701; <u>State v. McNichols</u> (1941) 115 P. 2d 104; <u>State v. McClurg</u> (1931) 300 P. 398.
Illinois	Yes as of 8/1/61	No	Ill. Rev. Stat. Ch. 38, 747 as amended by Laws 1961, eff. 8/1/61; <u>People v. Moore</u> (1951) 102 NE 2d 146; <u>People v. Ross</u> (1951) 101 NE 2d 11.
Indiana	No	No	Burns' Indiana Stat. Ann. §§9-2301, 9-2304, 9-2306; <u>McSwain v. State</u> (1929) 167 NE 568; <u>Desho v. State</u> (1957) 145 NE 2d 429; <u>Bozovichar v. State</u> (1952) 103 NE 2d 680; <u>State v. Gardner</u> (1954) 122 NE 2d 77; <u>Schaff v. State</u> (1943) 49 NE 2d 539, 542.
Kentucky	Yes	No	Criminal Code Practice §§ 156, 335; <u>Commonwealth v. Bailey</u> (1953) 259 SW 2d 49; <u>Commonwealth v. House</u> (1932) 53 SW 2d 188; <u>Young v. Russell</u> (1960) 332 SW 2d 629; <u>Helton v. Commonwealth</u> (1958) 317 SW 2d 497; <u>Commonwealth v. Bushong</u> (1922) 228 SW 2d 459.

\* People v. Keenan (1961) 361 P. 2d 587:

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Maryland	No	No	Md. Ann. Code Art 5, §§12, 13; <u>State v. Barshach</u> (1951) 80 A. 2d 32; <u>Pearlman v. State</u> (1961) 172 A. 2d 395; <u>State v. Harman</u> (1952) 86 A. 2d 397; <u>State v. Fisher</u> (1954) 104 A. 2d 403; <u>State v. Jones</u> (1944) 34 A. 2d 77.
Michigan	Yes, with leave	Yes, with leave	<u>People v. Gonzales</u> (1957) 84 NW 2d 753; but see <u>People v. Rau</u> (1922) 190 NW 243; <u>People v. Johnson</u> 356 Mich. 619.
Mississippi	No	No	Miss. Code §§1153, 1945; <u>Lang v. State</u> (1960) 119 So. 2d 608; <u>State v. Carrero</u> (1957) 94 So. 2d 911; <u>State v. Sisk</u> (1950) 46 So. 2d 191; <u>State v. McDowell</u> (1894) 17 So. 213.
Missouri	No	No	Missouri Statutes §§547.070, 547.200, 547.210; <u>State v. Terril</u> (1957) 303 SW 2d 26; <u>State v. Hunter</u> (1946) 198 SW 2d 544.
Montana	No	No	Montana Code §§94-8103, 94-8104, 94-8108; <u>State v. McCluskey</u> (1951) 229 P. 2d 169.
North Carolina	No	No	N. C. Gen. Stat. §§15-179, 15-180; <u>State v. Inman</u> (1944) 31 SE 2d 641; <u>State v. Biades</u> (1936) 182 SE 714
Oklahoma	No	No	Okla. Stat. §§1051, 1053; <u>State v. Thomason</u> (1959) 345 P. 2d 908; <u>Linde v. State</u> (1946) 175 P. 2d 370; <u>Hughe v. State</u> (1946) 172 P. 2d 435; <u>Settle v. State</u> (1925) 238 P. 499; <u>Moran v. State</u> (1958) 333 P. 2d 318.
Oregon	No	No	O. R. S. §§ 138.040, 138.060
Rhode Island	No	No	R. Is. Gen. Laws §§12-22-1 et seq.; <u>State v. Paradis</u> (1941) 18 A. 2d 342.
South Dakota	Yes, with leave	Yes, with leave	S. D. Code §34.4103; <u>State v. Davis</u> (1957) 86 NW 2d 17; <u>State v. Zachte</u> (1943) 12 NW 2d 372; <u>State v. Lane</u> (1957) 82 NW 2d 286.

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Tennessee	No	No	T. C. A. §§40-3401 et seq.; <u>McGee v. State</u> (1960) 340 SW 2d 904; <u>State v. Odom</u> (1956) 292 SW 2d 23; <u>State v. Bass</u> (1926) 281 SW 936; <u>Cogburn v. State</u> (1955) 281 SW 2d 38; <u>Helton v. State</u> (1952) 250 SW 2d 540.
Texas	No	No	Texas Constitution Art. 5, §26; Code of Criminal Procedure Articles 812, 813; <u>Dewberry v. State</u> (1955) 283 SW 2d 399.
Washington	No	No	<u>State v. Johnson</u> (1929) 273 P. 532; <u>State v. Studer</u> (1928) 270 P. 430; <u>State v. Thorne</u> (1951) 234 P. 2d 528.
West Virginia	No	No	West Virginia Code (1961) apparently refers to the appealability of a "final judgment": but see <u>Ex parte Bornee</u> (1915) 85 SE 529.
Wisconsin	No	No	Wisc. Stat. Ann. Title 46, Chapter 958; <u>State v. Flanagan</u> (1946) 25 NW 2d 111; <u>State v. McNitt</u> (1943) 11 NW 2d 671.
Wyoming	No	No	Wyoming Stat. §§7-287 et seq.; <u>State v. Ginther</u> (1938) 77 P. 2d 803.

Note: This survey was based upon an examination of the statutes and case law relating to appeals. Court rules were not available in many instances. In some states alternative methods of review (such as certiorari, mandamus or prohibition) may be possible, although it is not immediately clear from an examination of the statutes or case law.