[University of Michigan Journal of Law Reform](https://repository.law.umich.edu/mjlr)

Volume 4 | Issue 3

1971

Title VI - Depositions

Peter A. Kelly
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Criminal Law Commons, Evidence Commons, and the Legislation Commons

Recommended Citation

Peter A. Kelly, *Title VI - Depositions*, 4 U. Mich. J. L. Reform 597 (1971).
Available at: https://repository.law.umich.edu/mjlr/vol4/iss3/14

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

TITLE VI – DEPOSITIONS

I. INTRODUCTION

Title VI[1] expands Rule 15 of the Federal Rules of Criminal Procedure[2] to permit the Government to depose its witnesses in certain limited classes of cases. Previously only the defendant had been accorded this right.[3] Upon the motion of either party at any time after a criminal indictment or information has been filed, the court may order that the testimony of the party's witnesses be taken by deposition if "due to exceptional circumstances it is in the interest of justice" that such testimony be taken and preserved. Such exceptional circumstances were intended by Congress to include the existence of a substantial risk that the witness will die, become seriously ill, be killed or injured, hide or leave the jurisdiction, be kidnapped, bribed or improperly influenced.[4] A motion by the Government must contain a certification by the Attorney General or his designee that the proceeding for which the deposition is taken is directed against a person believed to have participated in an organized criminal activity.[5]

The authorization for prosecution depositions marks a significant change in federal criminal procedure. In 1946 the Advisory Committee for the Federal Rules of Criminal Procedure drafted a similar proposal which was rejected by the Supreme Court. A

---

[1] Organized Crime Control Act of 1970, 18 U.S.C.A. § 3503 (Supp. 1971).

[2] FED. R. CRIM. P. 15.

[3] FED. R. CRIM. P. 15 states, in pertinent part:

> If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

The district court decides as a matter of discretion when a deposition is necessary to prevent a "failure of justice." *See In re* Russo, 19 F.R.D. 278 (E.D.N.Y. 1956), *aff'd sub nom.* Russo v. United States 241 F.2d 285 (2d Cir.), *cert. denied,* 355 U.S. 816 (1957).

[4] S. REP. No. 91-617, 91st Cong., 1st Sess. 151 (1969), (hereinafter cited as SENATE REPORT). Any argument that this language is overbroad in that it fails to announce specific criteria for the granting of such a motion does not appear to be well founded. *Compare* FED. R. CRIM. P. 33, which allows the court to grant a new trial to defendants "if required in the interest of justice." The Supreme Court has allowed district and appellate courts full discretion in interpreting this provision, and has declined to review any of the cases challenging such discretion. *See* cases compiled in FED. R. CRIM. P., 18 U.S.C.A Rule 33, n.50 (1961).

[5] 18 U.S.C.A. § 3503(a) (Supp. 1971).

member of the Advisory Committee later suggested that the Court's action was perhaps taken out of "a feeling that the government could better afford to lose a few cases than make even a gesture which might be interpreted as favoring a trial on a paper record."[6] However, in committee hearings and deliberations on the Organized Crime Control Act, Congress determined that the Government must be allowed to exercise this authority in order to secure a more satisfactory conviction rate of organized crime operatives. Although police generally solve about fifty percent of all homicide cases, the Senate Committee on the Judiciary pointed out that only a "handful" of the average of twenty known Chicago gangland killings per year for the past fifty years have been solved, and concluded that "[t]his is an intolerable degree of immunity from legal accountability."[7] Moreover, statistical analysis by the FBI shows that members of organized crime have obtained dismissals or acquittals of charges against them at a rate more than twice that for ordinary offenders.[8] This study also indicated that 17.6 percent of these defendants had obtained acquittals or dismissals of cases against them five or more times each.[9] In accounting for this dismal record of convictions against organized crime leaders, Congress found that the defendant's "most effective weapon" in preventing a conviction is tampering with evidence in the hands or mouths of witnesses.[10] Where a key Government witness balks at the last minute, the prosecution may be forced to dismiss the case, with the defendant possibly gaining permanent immunity under the double jeopardy provision of the fifth amendment.[11] Thus, the primary purpose of title VI, as stated by the Senate Committee on the Judiciary, is to remove the

---

[6] *Hearings on S. 30 Before the Subcomm. on Crim. Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 464 (1969), *quoting* Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 218 (1956).

[7] SENATE REPORT 41.

[8] *Id.* 42. Of course, one can argue that this result does not necessarily stem solely from the difficulty of finding willing witnesses to testify against organized crime figures. It is certainly arguable that some of the other reasons may include the ability of such defendants to procure more competent counsel and the possibility that prosecutors may be more willing to seek indictments against such figures on inadequately supported charges.

[9] SENATE REPORT 42.

[10] *Id.* 60-61. This is probably the most effective weapon for *any* criminal defendant. Congress found, however, that the ability to discourage Government witnesses from testifying was particularly pronounced among organized crime figures because of the resources and organization at their disposal. Among other difficulties noted in obtaining evidence against such defendants were the general lack of incentive among members of the public to report instances of organized criminal activity not directly affecting them, and the difficulty of obtaining meaningful documentary evidence in such cases. *Id.* 44.

[11] *See* Downum v. United States, 372 U.S. 734 (1963), holding that where a jury was sworn, impaneled, and then discharged on the Government's motion due to absence of a prosecution witness over defendant's objection, the impaneling of a second jury two days later—at which time the Government had procured its witness—constituted double jeopardy.

chief incentive to tamper with witnesses or their testimony, and to prevent criminal prosecutions involving organized crime from being thwarted through such means as murder, assault, intimidation or bribery of Government witnesses.[12]

II. CONSTITUTIONAL CONSIDERATIONS

At the outset an argument can be raised that title VI may be constitutionally infirm because of vagueness. The basis for the argument is that nowhere in the Act are the terms "organized crime" or "organized criminal activity" defined.[13] Thus the decision whether a defendant may reasonably be suspected of having engaged in an "organized criminal activity" will depend on the district courts' interpretation of that term. The proscription against vague and indefinite laws reflects a fear that without adequate specificity defendants would not be sufficiently apprised of wrongful acts, and the law would not be susceptible to intelligent interpretation by juries and courts.[14] However, in title VI, the term "organized criminal activity" is not made the basis for imposition of a penalty.[15] Moreover, the Supreme Court has recognized the impracticability of drafting precise statutes touching all aspects of criminal laws, and has repeatedly upheld the constitutionality of statutes couched in broad terms.[16]

[12] SENATE REPORT 60-61. In testimony given in support of title VI, New York County District Attorney Frank Hogan cited the case of one Peter LaTempa who died from poisoning while in jail in New York on January 12, 1945. LaTempa had been scheduled to testify for the State at the murder trial of Vito Genovese and four co-defendants. At the trial, held in 1946, the court directed acquittal for lack of evidence. *Id.* 62.

[13] This intentional omission apparently stems from congressional unwillingness to have effective enforcement of title VI hamstrung by a definition which may prove too restrictive in practice. Senator McClellan, co-sponsor of the original bill, S. 30, 91st Cong., 1st Sess. (1969), noted that "organized crime" is not a precise and operative legal concept, calling it "a functional concept like 'white-collar crime,' serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances." McClellan, *The Organized Crime Control Act*, 46 NOTRE DAME LAW. 55, 61 (1970).

[14] *See* Baggett v. Bullitt, 377 U.S. 360 (1964).

[15] A certification by the Attorney General that the defendant is one believed to have participated in an organized criminal activity merely has the effect of permitting deposition of selected *prosecution* witnesses. *See* text accompanying note 26 *infra* for a discussion of constitutional standards governing the use of depositions at trial of any criminal defendant. Since title VI conforms to these standards, it would be difficult for a defendant to claim violation of due process rights on the ground that he was wrongfully certified as one believed to have participated in an organized criminal activity.

[16] *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945) (language of Criminal Code, 18 U.S.C. § 242 (1964), making it a crime for a person acting under color of law to subject any inhabitants to the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States," held sufficiently definite); Jordan v. DeGeorge, 341 U.S. 223 (1951) (phrase, "any crime involving moral turpitude" as used in federal legislation respecting grounds for deportation of aliens held sufficiently definite); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (phrase, "any offensive, derisive, or annoying word," used in criminal statute directed against utterance, held sufficiently definite).

Title VI, in allowing depositions of unavailable witnesses to be used at trial, has been criticized on the ground that it violates the defendant's sixth amendment right to confront witnesses against him.[17] The Supreme Court has traditionally held, however, that prior testimony of an unavailable witness is not a violation of the confrontation clause.[18] In a recent interpretation of the confrontation clause, the Court indicated that the prosecution must show only an unsuccessful "good faith effort" to locate its witness to justify its claim that such witness is "unavailable."[19] Moreover, in the recent decision of *California v. Green,*[20] the Court allowed the introduction of testimony taken at a preliminary hearing, where full cross-examination had been allowed, to show inconsistent statements made by the state's witness at the subsequent trial. Although not necessary to its holding, the Court discussed whether such testimony would have been constitutionally admissible if the witness had not been present at the trial. In concluding that it would, the Court felt it significant that the testimony at the preliminary hearing had "been given under circumstances closely approximating those that surround the typical trial."[21] Mr. Justice White, writing for the majority in this 7-1 decision, noted that such "circumstances" included the witness being under oath, the proceedings being conducted before a judicial tribunal equipped to provide a judicial record of the proceedings, and the defendant being represented by counsel, with a full opportunity for cross-examination.[22]

Finally, in *Dutton v. Evans*[23] the Court held that the admission of the testimony of a prosecution witness in a murder trial as to a statement made by the defendant's alleged accomplice while in custody after the crime, did not violate defendant's right to confrontation. The accomplice did not appear at the trial. Although a majority of the Court could not agree on an opinion, the Court's

---

[17] *See*, Pointer v. Texas, 380 U.S. 400 (1965). Admission into evidence of a transcript of testimony taken at a preliminary hearing at which accused lacked counsel, and therefore was unable to cross-examine the witness, was a denial of his right to confrontation.

[18] *Id.* at 407; Mattox v. United States, 156 U.S. 237 (1895) (upheld use of recorded testimony of two witnesses at first trial who had died prior to second trial).

[19] *See* Barber v. Page, 390 U.S. 719 (1968) (where state used transcript of a witness' statement taken at a preliminary hearing as principal evidence against the accused, his right of confrontation was violated where there was no showing that the state had made a good faith effort to secure the presence of the witness, then in prison 225 miles away in another state, at trial).

[20] 399 U.S. 149 (1970).

[21] *Id.* at 165.

[22] *Id.* According to Mr. Justice Harlan, "[T]he Confrontation Clause of the Sixth Amendment reaches no farther than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial." *Id.* at 174 (concurring opinion) (emphasis added).

[23] 400 U.S. 74 (1970).

decision[24] expressed the view that the defendant's right of confrontation was not violated under the circumstances of the case, particularly since the accomplice's statement was not "crucial" or "devastating" in view of the other evidence.[25] Mr. Justice Harlan, concurring in the result, expressed the view that the trial, conducted in a Georgia court, should be governed by due process standards of fairness under the fourteenth amendment and concluded that these had been met.[26]

When considered together, *Green* and *Evans* may be construed as standing for the propositions that a defendant's rights under the confrontation clause are not violated where (1) a deposition taken under circumstances "closely approximating those that surround the typical trial"[27] is used by the Government to impeach a witness' prior testimony, or in the case of a witness who is unavailable at trial; and (2) the admission of testimony concerning statements made against the defendant by one not present at trial, is determined to be not "crucial" or "devastating" in view of the other evidence. Thus it appears that the requirements of the confrontation clause may be satisfied by standards far less rigorous than an absolute right of the defendant to confront all prosecution witnesses at his trial. While a criminal defendant believed to have participated in organized criminal activity may well object to the deposition of prosecution witnesses prior to trial on the ground that this would reveal his trial strategy, such objection presents no constitutional bar to the proceedings. Moreover, this objection should be somewhat muted when it is kept in mind that the deposed witnesses will normally be crucial to the government's case, and their depositions, usually taken well in advance of trial, may result in a substantial revelation of the Government's case against the defendant. Additionally, since title VI becomes operative only *after* the filing of a criminal indictment or information,[28] the only possible use for such depositions is in connection with trial proceedings.

Against this backdrop of the Supreme Court's interpretation of the confrontation clause, title VI appears to provide adequate procedural safeguards to preserve defendants' sixth amendment rights. First, as has been noted, the Government's motion for deposition must contain the Attorney General's certification that the defendant in the criminal action is a person believed to have

[24] The opinion was written by Justice Stewart, joined by Chief Justice Burger, and Justices White and Blackmun.

[25] 400 U.S. at 87.

[26] 400 U.S. at 93-100.

[27] 399 U.S. 149, 165 (1970).

[28] 18 U.S.C.A. § 3503(a) (Supp. 1971).

participated in an organized criminal activity.[29] This provision should act as a check against any tendency for the Government to begin taking depositions routinely under the authority of title VI. The moving party must then serve reasonable written notice of the time and place of the taking of the deposition, along with the identity of the deponent, to every other party.[30] All defendants not in custody[31] have the right to attend the examination, and the test for waiver of this right is intended to be the same as that for waiver of presence of the defendant at trial.[32] The court is expressly required to advise a defendant without counsel of his rights, and to assign counsel to represent him unless the defendant is able to retain counsel of his choice.[33] Title VI seeks to further guarantee the defendant's right to confrontation at the examination by requiring the Government to pay necessary travel and subsistence expenses of the defendant and his attorney for attendance in all cases where the deposition is taken on Government initiative, or where the defendant appears unable to bear the expense of taking a deposition.[34] All depositions are to be taken and filed in the manner prescribed for civil actions.[35] In addition, it is expressly provided that no party defendant may be deposed without his consent, and that the scope of examination and cross-examination shall be the same as would be allowed in the trial itself.[36] Title VI further protects the defendant's due process rights by requiring the Government to make available to the defendant at the taking of the deposition any statement of the

[29] *See* text accompanying note 5 *supra*. Although it is not clear what criteria the Attorney General must meet in determining whether to make such a certification, it is apparent that the courts must insure that a defendant's fifth amendment due process rights—with their implicit core of fairness—are not abridged. It is possible that a lower standard than "probable cause" will be allowed to justify such certification. But this exercise of discretion must at least be governed by standards which are relevant to the purpose of this provision. *See* Stack v. Boyle, 342 U.S. 1 (1951). *Cf.* Terry v. Ohio, 392 U.S. 1 (1968), where a police officer's "justifiable suspicion" that the defendant was planning an armed robbery of a store warranted his stopping and searching the defendant for concealed weapons.

[30] 18 U.S.C.A. § 3503(b) (Supp. 1971).

[31] As to defendants in custody, the Act provides that "[t]he officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination." 18 U.S.C.A. § 3503(b) (Supp. 1971).

[32] SENATE REPORT 151. *See* in this regard Diaz v. United States, 223 U.S. 442 (1912), where the voluntary absence of a defendant at a portion of the trial, coupled with his express consent that it should proceed in the presence of his counsel, was held to constitute waiver of his right of confrontation. For *dicta* equating voluntary absence with waiver, *see* Parker v. United States, 184 F.2d 488, 489 (4th Cir. 1950); Kanner v. United States, 34 F.2d 863 (7th Cir. 1929).

[33] 18 U.S.C.A. § 3503(c) (Supp. 1971).

[34] *Id.*

[35] *See* FED. R. CIV. P. 30, 31.

[36] 18 U.S.C.A. § 3503(d) (Supp. 1971).

witness being deposed which is in the possession of the Government and which it would be required to make available to the defendant if the witness were testifying at trial.[37]

The use at trial or any hearing of all or part of any depositions taken in accordance with these provisions is limited to the cases where it appears: that the witness is dead, that the witness is out of the country (unless it appears that such absence was procured by the party offering the deposition), that the witness is unable to attend because of illness, that the witness refuses in the trial or hearing to testify concerning the subject of the deposition offered, or that the party offering the deposition has been unable to secure the presence of the witness by subpoena.[38] Further, consistent with the Supreme Court's decision in *California v. Green,* a deposition properly taken may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.[39] Objections to receiving a deposition or part of a deposition in evidence may be made as provided in civil actions.[40]

III. CONCLUSION

Title VI represents a balanced, constitutionally sound attempt by Congress to remedy effectively what it has found to be a serious impediment to the administration of justice in criminal proceedings brought against participants in organized criminal activities; namely, the possibility that such persons might attempt to subvert the legal process through such means as murder, assault, intimidation, bribery and other unlawful acts directed against prosecution witnesses.[41] Although the failure to anywhere

[37] *Id.* § 3503(e). *See* FED. R. CRIM. P. 16. For purposes of a motion to produce documentary evidence for inspection, it need only appear that the evidence is relevant, competent and outside of any exclusionary rule; and it is not sufficient basis for denial of such motion that the trial judge might have, in exercise of his discretion, excluded the evidence without thereby committing reversible error, since the question on application for order to produce is one of admissibility under the traditional canons of evidence. Gordon v. United States, 344 U.S. 414, 420 (1953).

[38] 18 U.S.C.A. § 3503(f) (Supp. 1971).

[39] *Id.*

[40] 18 U.S.C.A. § 3503(g) (Supp. 1971). *See* FED. R. CIV. P. 32. The overruling of such an objection can be made the basis for a petition for immediate review by mandamus. *In re* United States, 348 F.2d 624 (C.A. Puerto Rico 1965).

[41] SENATE REPORT 60-61. Also in this regard, then-Senator Tydings, in testimony before the Senate Subcommittee based in part on his experience as a U.S. Attorney in Maryland, said:

> Unimplicated witnesses have been, and are now, regularly bribed, threatened, or murdered. Scores of cases have been lost because key witnesses turned up in rivers in concrete boots. Victims have been crushed—James Bond like—along with their automobiles by hydraulic machines in syndicate-owned junkyards.

Hearings on S. 30 Before the Subcomm. on Crim. Laws and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 161 (1969).

define the terms "organized crime" and "organized criminal activity" renders the scope of title VI more ambiguous than might be desired, the Act nevertheless provides some guidance. The restrictions allowing depositions to be taken and used only when "due to exceptional circumstances it is in the interest of justice,"[42] and only under certain specified conditions should minimize the possibility of abuse of this authority by the Government. Moreover, Congress has expressly admonished that depositions are not to be taken routinely.[43]

---

[42] 18 U.S.C.A. § 3503(a) (Supp. 1971).

[43] H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 49 (1970).