THE DEFENDER

Newsletter for CJA Panel Attorneys
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Uniontown Issue

Uniontown

Uniontown, Alabama is located in Perry County. According to U.S. Census statistics, the population is 65% Black. Only slightly above 50% of the residents have high school educations. The average per capita personal income is $11,157.

It is from this county that the federal government has indicted approximately 63 African-American defendants on drug charges. Two White Deputy Sheriffs from neighboring Marengo County are also charged.

Since all Panel Attorneys, and many non-Panel attorneys, have been appointed in these cases, this issue of THE DEFENDER is devoted to addressing some legal issues raised by these prosecutions.

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Discovery

The government contracted to have an outside service photocopy all documentary material. That copying was completed on June 16, 1997. If you have not picked up your set of materials, bring a hand truck. The documents fill four 11.5 x 10 x 18 in. size boxes.

You will probably find that most of the materials do not relate to your client's case. A lot of these papers are business and personal documents seized during the execution of search warrants. Also, included are old arrest reports regarding prior convictions of some defendants.

The most valuable discovery is contained in the affidavits for search warrants and wiretaps. Those were not released until late on the 16th. Make sure you have received those.

Soon to be available, are the approximately 620 90-minute cassette tapes of the wiretap recordings. Gloria Bedwell and I have agreed that my office will make a one set of copies. Any other defense lawyer may copy that set (subject to court approval for costs), or listen to the tapes at the Defender Office. The same is true for the wiretap logs, which are also to be produced at this office.

Motions

Judge Milling has currently set a pretrial motions deadline for June 30, 1997. Since the taped evidence and logs may not even be in the possession of this office until that date, counsel should consider moving the court to extend the time for the filing of pretrial motions.

Title III Wiretaps

This may be your first case involving Title III wiretaps. The authority for electronic surveillance (here by telephone lines) is pursuant to 18 U.S.C. §2510 et seq. These laws create procedures for the government to secure and carry out wiretaps with federal court approval.

The government's failure to properly obtain authority for the wiretaps, or failure to carry out that authority within the prescribed procedures, may be grounds to suppress part or all of the evidence seized.

A good treatise on this area of law is Carr, James G., THE LAW OF ELECTRONIC SURVEILLANCE, Clark Boardman (Supp. 9/96). There is a copy at the Defender Office.

An "aggrieved person" means "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." §2510 (11). Under Local Rule 16.13 (1) (I), and 18 U.S.C. §3504, if your client is an aggrieved person, the government must give you notice and "set forth the detailed circumstances thereof."

Therefore, all persons named in the wiretap warrants are aggrieved persons. Anyone else who was recorded on the wiretap tapes are aggrieved persons. Aggrieved persons have standing to challenge wiretap evidence.

Challenges to wiretap evidence may relate to the manner the wiretap was obtained or the methods used in utilizing the wiretap. For instance, there is currently a case in federal court in Boston in which the wiretap evidence is in danger of suppression. Agents did not tell the authorizing federal judge that they had key informants within the mafia crime family against which the wiretap was to be directed.

Wiretap affidavits must attest that other methods of investigation were unsuccessful and that therefore a wiretap is necessary. In the Boston case, if the agents withheld the fact that high-placed mafia figures were already cooperating, the warrant may be held to have been obtained under false means.

During the early 1970's, many federal wiretaps were disallowed when it was discovered that the United States Attorney General had improperly delegated authority to request wiretaps to an executive assistant. The steps necessary to secure a wiretap are listed in §2518.

After getting the wiretap, the government must comply with many procedures in carrying out the authorization. Those are contained in §§2518 and 2519. For instance, to protect the privacy of others, agents must engage in "minimization." This is the process of making sure that only pertinent conversations are listened to.

The agents have no business listening in on calls that do not involve the criminal activity named in the warrant. Exactly when the agents must stop listening is not spelled out specifically in the statute. The rules of minimization have been developed in caselaw.

The laws regarding electronic surveillance are complicated. Please feel free to contact this office to coordinate your research.

Search Warrants

Carefully compare the language of the affidavits supporting the Title III wiretaps and the affidavits supporting searches of homes, businesses, and records. You will probably find a number of inconsistencies.

Title III wiretaps require the affiant to state that all previous methods of investigation have been unsuccessful. Therefore, those affidavits contain a lot of language disparaging the quality of information possessed by the government. This includes language criticizing the reliability of government informants.

Yet, the same affiant cites those same informants as a basis to obtain search warrants on later dates, while omitting all references to their previously stated unreliability. Read these affidavits closely.

Jury Selection

The Southern District of Alabama is divided in two Divisions. The bulk of all cases are filed in the Southern Division. The Southern Division contains the two most populous and urban counties in the District, Mobile and Baldwin.

Perry and Marengo Counties are in the Northern Division. The Northern Division's population has a large rural, African-American percentage. A jury selected from venirepersons of the Northern Division will best represent the communities from which the Uniontown defendants come.

The Selma Courthouse is small. The Court may desire to have the case tried in Mobile with a district-wide panel selection, to have access to larger courtrooms. This is not in the interest of the defendants.

Counsel should consider challenging this procedure if it is applied.

Other Issues

These are a few issues raised by these cases. Counsel should also consider the propriety of filing a motion for a bill of particulars (what did the defendant do, and when?), a motion for severance (to remove the prejudice of a megatrial, to avoid *Bruton* problems, etc.), motions in limine, and other appropriate pleadings.

Reversible Errors

United States v. Carraway, 108 F.3d 745 (7th Cir.), cert. denied, 118 S.Ct. 228 (1997) (Firearms discovered with cocaine were not possessed in connection to drugs found).

United States v. Corona, 108 F.3d 565 (5th Cir. 1997) (Duplicitous sentences were not purely concurrent where each received a separate special assessment).

United States v. Gaydos, 108 F.3d 505 (3d Cir. 1997) (There was insufficient evidence that arson involved interstate commerce).

United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (Court cannot rely on need for mental health treatment in fashioning a consecutive sentence).

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) (There was insufficient proof of mail fraud without evidence of misrepresentation).

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997) (There lacked proof of bodily injury for enhancement).

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997) (To impose an upward role adjustment, the defendant must supervise at least one person).

Griffin v. United States, 109 F.3d 1217 (7th Cir. 1997) (Counsel's advice to dismiss appeal to file motion to reduce a sentence was prima facie evidence of ineffective assistance of counsel).

United States v. Kauffman, 109 F.3d 186 (3d Cir. 1997) (Failure to investigate insanity defense was ineffective assistance of counsel).

United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997) (Allowing testimony about bombing of federal building was prejudicial).

United States v. Landerman, 109 F.3d 1053 (5th Cir.), *modified*, 116 F.3d 119 (1997) (The defendant should have been allowed to question a witness about a pending state charge).

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997) (There lacked specific findings about ability to pay fine).

United States v. Paton, 110 F.3d 562 (8th Cir. 1997) (The government's breach of plea agreement was a ground for downward departure).

United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997) (Money that defendant legitimately spent as postal employee could not be counted toward fraud).

United States v. Bryson, 110 F.3d 575 (8th Cir. 1997) (Facts did not support upward adjustment for role).

United States v. Bancalari, 110 F.3d 1425 (9th Cir. 1997) (Instruction omitted the element of intent).

United States v. Fuentes-Barahona, 111 F.3d 651 (9th Cir. 1997) (Conviction occurring before effective date of guideline amendment was not considered as aggravated felony).

United States v. Cooke, 110 F.3d 1288 (7th Cir. 1997) (Jury instructions treating "carry" and "use" interchangeably were defective).

United States v. Rector, 111 F.3d 503 (7th Cir. 1997) (Counting state conviction, for same conduct, toward criminal history, was plain error).

United States v. Rosario, 111 F.3d 293 (2d Cir.), cert. denied, 1997 WL 562351 (1997) (A firearm was not used or carried in relation to drug trafficking).

United States v. Kohli, 110 F.3d 1475 (9th Cir. 1997) (There was insufficient evidence of the quantity of fraud attributed).

United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir. 1997) (Defendant's pretrial statements of acceptance justified reduction though case was tried).

United States v. Manges, 110 F.3d 1162 (5th Cir. 1997) (Conspiracy charge was barred by statute of limitations).

United States v. Zagari, 111 F.3d 307 (2d Cir. 1997) (1. Use of guidelines effective after conduct violated Ex Post Facto Clause; 2. There was no finding to support obstruction

enhancement).

United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997) (1. Second drug conspiracy prosecution was barred by double jeopardy; 2. Collateral estoppel barred false statement conviction, based upon drug ownership for which defendant had been previously acquitted).

United States v. DeMartino, 112 F.3d 75 (2d Cir. 1997) (Court was without authority to increase a sentence that was not mere clerical error).

United States v. Tsinhnahijinnie, 112 F.3d 988 (9th Cir. 1997) (A fatal variance between pleading and proof of date of offense).

United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997) (There was no proof that a defendant violated a judicial order during a course of fraud).

United States v. Jordan, 112 F.3d 14 (1st Cir.), cert. denied, 1997 WL 562297 (1997) (Charges should have been severed when a defendant wanted to testify regarding one count, but not others).

Lee v. United States, 113 F.3d 73 (7th Cir. 1997) (Facts did not support a plea for §924 (c) conviction).

United States v. Knox, 112 F.3d 802 (5th Cir.), *rehearing granted*, 120 F.3d 42 (1997) (A defendant was entrapped as matter of law).

United States v. Trazaska, 111 F.3d 1019 (2d Cir. 1997) (Defendant's statement to probation officer was inadmissible).

United States v. Barrett, 111 F.3d 947 (D.C.), cert. denied, 118 S.Ct. 176 (1997) (A defendant's misrepresentation to a court was not a material false statement).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997) (Insufficient evidence of drug quantities).

United States v. Mulinelli-Nava, 111 F.3d 983 (1st Cir. 1997) (Court limited cross examination regarding theory of defense).

United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) (Prehistoric skeletal remains are not a vulnerable victim) (I am not making this up).

Parretti v. United States, 122 F.3d 758 (9th Cir. 1997) (1. Arrest of foreign fugitive was without probable cause; 2. Detention of fugitive without bail violated due process).

Cover Story

Sunday, June 22, 1997 and Monday, June 23, 1997, the Mobile Register ran a two-part front page story on the high incidence of federal crack cocaine convictions in the Southern District of Alabama (SAL). Reporter Sam Hodges compiled statistics showing that per capita this district trailed only three others for federal drug convictions. The three exceeding SAL were the District of Columbia, Southern California, and the Virgin Islands.

Only 21% of the nation's drug cases involved crack cocaine. In SAL the percentage was 54%. Of those cases, 93% of the defendants were African-American.

Rethought

In April, I printed a section entitled "Thought." It read: "If the Sixth Commandment states, 'Thou shalt not kill,' how does it honor the Ten Commandments by placing them in an Alabama courtroom where death sentences are imposed?"

Assistant Federal Defender Timothy Day called me soon after. He is with the Fort Lauderdale office of the Southern District of Florida. To honor both, the Free Speech and Establishment Clauses, of the First Amendment, I am printing his response, verbatim:

"If we remove the Ten Commandments from the Alabama courtroom, both literally and figuratively, how will we ever know death sentences are wrong or to put it differently, when we remove God from the equation how will we know truth or value or..."

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