

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA §
VS. § **CRIM. NO** [REDACTED]
[REDACTED] §

MOTION TO SUPPRESS WIRETAP EVIDENCE

TO THE HONORABLE UNITED STATES DISTRICT COURT:

INTO COURT comes [REDACTED] through his undersigned counsel, and respectfully moves this Honorable Court pursuant to 18 U.S.C. §2518 (10) (a) to suppress wiretap evidence, and would show as follows:

I.

This case involved the application for, and use of, wiretaps on three different telephones. On two of the numbers ([REDACTED]), the 30-day periods of surveillance were extended twice. Those phones were continually monitored between March 4, 1997 and May 30, 1997. A third phone ([REDACTED]) was monitored between May 16, 1997 and May 30, 1997.

II.

This motion is directed at all wiretap evidence seized after the filing of the first 10-day report to the Court. Because the defendant believes the violations stated below are both individually and cumulatively grounds for suppression, the defendant reurges suppression of evidence seized following each 10-day report, each extension to the original applications, and the original application for [REDACTED]. The reasons for suppression in each case are misrepresentations made by the government in the 10-day

reports, extensions to the original applications, and the original application for ([REDACTED] [REDACTED]). The misrepresentations were used to bolster the number of alleged pertinent calls¹, to convince the Court that there was a continued need for wiretap surveillance. This motion is made pursuant to Franks v. Delaware, 438 U.S. 154 (1978); United States v. Luna, 525 F.2d 4, 8 (6th Cir.), cert. denied, 424 U.S. 965 (1975).

III.

Each 10-day report listed a total number of off-hook events, a total number of pertinent calls, and a total number of minimized calls for each phone monitored during that time. A survey of the logs, provided by the government, established that there was little relationship between the calls listed as pertinent in the logs and the calls transcribed and given to counsel. In other words, sometimes, calls have been transcribed that were not listed as pertinent on the log. Additionally, there are calls counted as pertinent in the 10-day reports that were not transcribed. The defendant believes this establishes two facts. First, that the agents' record keeping was inaccurate. Second, and more important, the number of pertinent calls was inflated.

IV.

What the summaries below mean is that the government inflated the number of pertinent calls it reported from 80 to 125, an increase of 64%. This is significant because there were so few pertinent calls during the periods of surveillance. Eighty pertinent calls out of 9168 off-hook events is .87%. Although most of those events were conversations, even assuming that only half were conversations, that establishes pertinent calls were less

¹ The term "pertinent call" does not appear in 18 U.S.C. §2510 et seq. However, minimization requires that only calls that relate to the purpose of the wiretap (in this case drug transactions) may be monitored.

than 2% of all conversations. The reports disguised the fact that the wiretaps were ineffective during the three months they were in place. This was done at the expense of the privacy of those whose conversations were not effectively minimized.

V.

Supporting this motion are the following instances of inflating the number of pertinent calls, by the government: On page 3 of the first 10-day report for ██████████, it was represented to the Court that a monitored conversation between Daryl ██████ and an unknown male “could contain coded references to a vehicle with a secret compartment.” Reviewing the transcript, there is no objective interpretation of that conversation in which a listener could conclude the speakers were discussing a secret compartment.

VI.

Also on page 3, it stated, “Another caller asks Darryl if he thinks it will be today.” The implication was that the discussion was about a drug delivery. The report neglected to inform the Court that the speakers were discussing Daryl’s truck, and whether Daryl could provide a door for the caller’s vehicle.

VII.

On pages four and five, the report listed two conversations between Tommy and Pat. Although there was a mention of money (no quantity), the call also discussed someone’s operation and other irrelevant matters. The report’s use of quotes about “the people” and “the party” was meant to imply coded language where clearly none existed.

VIII.

The report referred to 13 pertinent calls during that period. Transcripts were provided for only 11. One call, not mentioned in the report, but counted as pertinent, was about a dog with worms. Another was about selling a car. In all, there were only two

conversations in which the agent could have speculated that anything pertinent was discussed. The first, was when Daryl referred to a man that “lost seven.” The second, discussed whether George was scared. Therefore, out of 460 off-hook events², only two were actually pertinent calls during those ten days, or 0.4%. Even if only half of those off-hook events were conversations that would mean 0.8% were pertinent.

IX.

The first 10-day report for 334-628-6470 listed 16 pertinent calls. Transcripts were provided for all calls. Five of those calls could not reasonably be deemed pertinent. They did not even contain allegedly coded drug references. Eleven pertinent³ calls out of 460 off-hook events means there were only 2% pertinent calls. Even if only half the events were conversations, only 4% were pertinent.

X.

In the second 10-day report of [REDACTED], it was stated that Tommy [REDACTED] received many pages from different numbers. This information could have been obtained by a pen register and did nothing to support the efficacy of the wiretap. On page 3, Daryl talked to an unknown male about an abandoned vehicle that belonged to Daryl, and how to go claim it. That was irrelevant to the drug investigation.

XI.

On page 4, the report tried to place some mystery on the definition of an “interior.” It is clear that the parties were referring to parts comprising the inside of a car. On the

² Off-hook events refer to instances where the monitored phone rang or the phone was taken off-hook. The majority of off-hook events appear to have resulted in conversations.

³ The defendant does not concede these “pertinent calls” involved discussions of drug activity. However, for purposes of minimization, the agents could have monitored those calls in good faith.

transcript provided, there was no reference to anyone losing seven kilograms of cocaine, not even in code. The report speculated that an unidentified male was talking about a murder-for-hire when he uses the word “hit.” There was nothing else in the conversation to support this. Further, he then immediately used the word “hit” to mean “call” (“I just hit you”). Only one conversation, in which Tommy and Pat mentioned an undetermined amount of money, could have objectively been called pertinent. This means only one of the 426 off-hook events was pertinent, or 0.2%. Even if only half of the off-hook events were not actual conversations, only 0.4% would have been pertinent.

XII.

On page 4 of the report, it listed 684 off-hook events and nine pertinent calls for [REDACTED]. Only seven transcripts were provided, one being a call in which Cedric [REDACTED] called someone that was not home. Therefore, there was only evidence of six pertinent calls or 0.8% of the total off-hook events. If only half of those events were conversations, 1.8% would have been pertinent.

XIII.

In the third 10-day report for [REDACTED], it claimed 10 of the 530 off-hook events were pertinent calls. Only one was even speculatively pertinent. It mentioned a dually pick up truck potentially for sale in Uniontown. The case agent claimed this was relevant because George [REDACTED] was in California looking for a dually to drive back to Alabama. However, it made little sense that if [REDACTED] were already in California that he would want a truck in Alabama.

XIV.

Absent that call, there was nothing pertinent during that period. Darryl’s arrest did not involve drugs. Daryl’s girlfriend’s conversation with Deputy Breckenridge was not

pertinent because she obviously did not know who Breckenridge was. Daryl's conversation with the unknown male was clearly about cars, not drugs. Therefore, only one conversation could have charitably been described as pertinent. One, out of 602 off-hook events, is 0.2%. If only half the events were conversations, there would have been 0.4% pertinent calls.

XV.

The first 10-day report on the first extension to the wiretap for [REDACTED], discussed five calls that the agent alleged were pertinent. Although the report listed 10 pertinent calls out of 530 off-hook events, there were no transcripts supporting this figure. The logs listed 10 calls as pertinent, but two had no remarks, and three were calls in which the caller was unable to contact the person they called. Five calls out of 530 events is 0.9%. Even if only half of the events were conversations, pertinent calls were 1.8%.

XVI.

In that same report, regarding [REDACTED], there were eight transcripts of pertinent calls and two where Cedric [REDACTED] did not reach the person he was calling. If eight of the 625 off-hook events were pertinent calls that was 1.2%. If half were conversations, that is 2.4%.

XVII.

In the second 10-day report on the first extension to the wiretap, regarding [REDACTED], it listed five pertinent calls out of 396 off-hook events. The report only discussed four calls, and neither the logs nor the transcripts supported a fifth pertinent call. Therefore, 1% were pertinent. If only half the events were conversations, then 2% were pertinent.

XVIII.

That same report listed 12 pertinent calls for [REDACTED] out of 630 off-hook

events. That was 1.9%, or 3.8% if only half were conversations.

XIX.

The third 10-day report on the first extension of the wiretap, regarding [REDACTED], listed one pertinent call and 343 off-hook events. That was 0.2% pertinent calls, or 0.4% if only half were conversations.

XX.

That same report listed three pertinent calls out of 407 off-hook events for [REDACTED]. That was 0.7%, or 1.4% if only half were conversations.

XXI.

The first 10-day report on the second extension of the wiretap, regarding [REDACTED], listed one pertinent call out of 434 off-hook events. That meant pertinent calls were 0.2%, or 0.4% if only half the events were conversations.

XXII.

The same report, regarding [REDACTED], listed three pertinent calls out of 349 off-hook events. Pertinent calls were 0.8%, or 1.6% if only half the events were conversations.

XXIII.

The second 10-day report on the second extension of the wiretap, [REDACTED], listed two pertinent calls out of 368 off-hook events. There were no transcripts and only one log entry to support this. Assuming one pertinent call, then pertinent calls were 0.2% of total events, or 0.4% if only half were actual conversations.

XXIV.

The same report for [REDACTED], listed one pertinent call out of 390 off-hook events. Pertinent calls were 0.2% of off-hook events, or 0.4% if only half were

conversations.

XXV.

The third 10-day report on the second extension of the wiretap, [REDACTED], listed five pertinent calls out of 453 off-hook events. There were two transcripts. One was Tommy telling an unidentified male he would call him back. The log showed one other call marked as pertinent. Therefore, there were only two pertinent calls, or 0.4%. If only half were conversations that would have been 0.8%.

XXVI.

The same report for [REDACTED], listed two pertinent calls out of 416 off-hook events. There were no transcripts. The log reflected only one pertinent call, or 0.2% of off-hook events. If only half the events were conversations, it would have been 0.4%.

XXVII.

The first 10-day report on the only application for a wiretap for [REDACTED], listed 15 pertinent calls out of 385 off-hook events. The report described two calls as dealing with allegedly stolen auto parts. Those were not pertinent to the investigation. Thirteen pertinent calls were 3% of off-hook events, or 6% if only half were conversations.

XXVIII.

The second 10-day report for [REDACTED], listed four pertinent calls out of 280 off-hook events. That was 1% of the off-hook events, or 2% if only half were conversations. The third 10-day report had no pertinent calls out of 139 off-hook events.

XXIX.

The above information evidences a pattern of inflation of pertinent calls in order to influence the Court to continue surveillance. The Fourth Amendment requires that a neutral and detached authority be interposed between the police and the public. Johnson v. United

States, 333 U.S. 10, 14 (1948). The Supreme Court has condemned the indiscriminate use of electronic eavesdropping. Berger v. State of New York, 388 U.S. 41, 58 (1967) (Disapproving of wiretap extensions without sufficient factual support, and without adequate judicial supervision).

Protection from unsupervised wiretaps "...is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America." Berger, supra, at 63. Here, the Court was prevented from supervising the surveillance because of the misrepresentations made by the government in its 10-day reports. This Court should suppress the wiretap evidence and all fruits thereof.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been furnished to the following:

Ms. Gloria Bedwell
Assistant United States Attorney
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All Co-counsel, on this the 18th day of July, 1997.

Alexander Bunin