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Law And Tactics In Federal Criminal Cases. By Shadoan, et al., Coiner Publications, Ltd., Fairfax, Virginia, 1964. Pp. 317.

It is no mean task to undertake the defense of a criminal case. Some help, however, is forthcoming. *Law and Tactics in Federal Criminal Cases* not only shows counsel where to begin, but also how to proceed, and, what is most important, why. The authors "have tried to make the volume basic enough to be a guide to the novice and so authoritative as to be a valued reference to the experienced."[1] Without pretention (and perhaps unwittingly) they announce they have prepared a handbook,[2] but they do not try to hide the faults inherent in it. Fortunately, they are not numerous.

Because its scope is very broad, the book quite often is superficial. For example, the discussion of the constitutional and interpretive problems in the difficult area of search and seizure may give the reader the impression that a good starting point is presented but not more. Also to set out in approximately sixty pages the method of presenting "the insanity defense", including expositions on "Lay Testimony to Establish the Defense of Insanity", "Expert Testimony" (to do the same) and "Cross-Examination of Psychiatrist Called by United States", is too great an achievement for this sort of book.

In several instances, the answers to problems facing counsel seem too pat, too contrived, too simple. This is especially true of the author's suggestions on "Fact Investigation". One gets the impression that counsel need only follow certain standardized suggestions, and the truth will burst upon him: obey the "Standard Steps in Investigating Any Criminal Case" (beginning with "File of the Case" through "Street Investigation"), consult the "Checklist For Investigation of Common Crimes", look at the "Checklist For Investigating Various Defenses", wrap up all prior work with "Accident Reports, Maps and Weather Reports", and all is done. If the reader is impressed that some lead, some angle, some new twist, must have been missed, it is because the authors seems to have given him too tasteful a paregoric.

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1. P. iii. Chief Judge Roszel C. Thomsen of the U.S. District Court in Maryland has recognized this need and has prepared a checklist for counsel appointed to represent the indigent defendant. As a point for reference, *Law and Tactics* is heavily laden with opinions of the District and Circuit Courts for the District of Columbia, but there are many references to other courts' decisions, including, of course, the Supreme Court's.

2. Forms are provided for use on such matters as the Motion to Suppress Evidence, For Discovery and Inspection, For Issuance of a Subpoena Duces Tecum, For Ordinary Subpoena, For Production of Documents and Objects, For Subpoena to Testify, For Mental Examination, For Bill of Particulars, For Severance and For Separate Trial.

Ironically, the real virtues of this book lie in just such simplification. By following these suggestions, counsel will have gone a long way toward the discovery of truth and the presentation of a defense and by the seriatim listing of steps which should be taken, counsel is alerted to the disturbing problems.

Discussing *McDonald v. United States*,[3] which on the one hand, gave one co-defendant standing to object to the invasion of the other co-defendant's privacy if evidence obtained from such invasion "prejudiced" the objector, and *Jones v. United States*,[4] which, on the other, by dicta, repeated the "traditional dogma" (in the author's words) that the objector "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed against someone else,"[5] the authors state:

> "So long as unlawfully obtained evidence may be used, the police are encouraged to continue violations to secure such evidence. The 'fruit of the poisonous tree' doctrine expressly recognizes this. To deny the derivative standing concept would invite law enforcement officers to select one defendant to be a victim of unlawful procedure in the hope that information would be gained from him to convict others. The one defendant-victim could be allowed to go free without indictment in order to snare his contemporaries. Such a result is inconsistent with the purpose of suppressing any unlawfully secured evidence, and one may agree with Mr. Justice Holmes that 'such evidence shall not be used at all.'
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> "All the implications of this concept of derivative standing are not yet clear. However, it seems reasonable that a defendant with such standing should be permitted to join his co-defendant in a pretrial motion to suppress, even when it is impossible to predict before trial whether the evidence in question will be introduced against one or both defendants. A more serious question is whether a defendant can invoke this kind of derivative standing where the co-defendant with primary standing fails or refuses to raise the suppression issue. Similarly, a critical question arises when the potential co-defendant with standing is not even indicted."[6]

The authors also disapprove of what they recognize as a tendency to interpret *Draper v. United States*,[7] and *Jones v. United States*,[8] as meaning that "hearsay declarations alone are sufficient to establish

3. 335 U.S. 451 (1948).
4. 362 U.S. 257 (1960).
5. *Id.* at 261.
6. Pp. 40-41.
7. 358 U.S. 307 (1959), holding, in the authors' words, that an arrest without a warrant is justified where the only information indicating that the defendant had commited a crime was obtained from an informer.
8. 362 U.S. 257, at 269 (1960), holding, again in the authors' words, that a warrant could issue upon the basis of hearsay "so long as substantial basis for crediting the hearsay is presented."

probable cause."[9] They suggest that the real issue is how much corroboration is required and that:

> "[S]everal elements are needed before hearsay may be the primary basis of probable cause: (1) the officer who swears to the affidavit must personally know the informant; (2) the officer must be a member of a specialized squad and have sufficient experience to be able to make an informed assessment of the information; (3) the officer must swear that he personally believes the information given; (4) the information given by the informant must have been given within a reasonable time before the arrest; (5) the information given by the informant must relate to particular facts; (6) the informant must have been found to be reliable in his recent information; and (7) in addition, the officer must personally corroborate some elements of the informant's tip before an arrest may be made. Of all these factors, the reliability of the informant is probably the most important and certainly the most vulnerable to attack."[10]

But without knowledge of the informant, his reliability cannot be attacked; to bring matters to a head, counsel should consider whether the affiant, in applying for a warrant, may have misrepresented his basis for seeking it; if misrepresentation can properly be alleged, counsel then should move to suppress the evidence obtained by putting in issue the reliability of the informant. This strategy would force the government either to identify the informant or to claim privilege; and even privilege must give way "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ."[11]

In another example the authors suggest that Rule 41[12] entitles the defendant to a pretrial hearing on a motion to suppress a confession. "Since there is no distinction between tangible and intangible evidence when secured in violation of the Fourth Amendment, the procedure for suppressing both should be the same. Similarly, pretrial suppression should be equally available even though the ground for suppres-

9. P. 51.
10. *Id.*
11. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).
12. Rule 41(e), F.R. Crim. P. reads:

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

sion is not a constitutional one."[13] The advantages of pretrial suppression are obvious: greater discovery is effected, a sounder determination of the advisability of a guilty plea is made available, and it is in the interests of efficient administration to dispose of a motion to suppress tangible items and oral statements simultaneously. If the motion is not heard pretrial, prejudice can be avoided and the record preserved if, at trial, counsel approaches the bench, asks for a ruling that the prosecutor not mention the statement until its admissibility is determined, and, if the request is denied, move for mistrial, the motion being founded on the prior objection.

It is when they turn to the inadequacy of discovery techniques that the authors come to grips with what seems to be one of the most unfair aspects of the defense of the accused. Unlike discovery in civil cases, discovery in criminal cases under Rule 16 is confined to discovery of (a) tangible objects in the government's possession which are (b) necessary for the preparation of a defense.[14] There is no question of a *right* of discovery; defense counsel must argue *necessity,* and, even then, he is limited to discovering *tangible objects,* not, for example, statements not reduced to writing or admissions. Moreover, say the authors, discovery will be allowed only if the objects are not otherwise available to the defendant.[15] Furthermore, objects voluntarily given to the government by third persons are beyond the scope of Rule 16, even though they are material to the defense and otherwise unavailable to the defendant, and, even then, the defendant must show the method by which the government obtained possession.[16] Obviously, however, materiality to a defense often cannot be determined until the defendant has been afforded the right to inspect such objects; the obstacles are rendered even more formidable by circularity of reasoning.

Wider discovery than under Rule 16 is available under Rule 17(c),[17] enacted as a statutory implementation of the sixth amendment and resting upon a liberal policy for the subpoenaed production, inspection and use at trial of documents or other materials, admissible

13. P. 91.

14. Rule 16, F.R. Crim. P. reads:

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

15. P. 127, n. 10.

16. P. 130, nn.19–22, citing to the proposed amendment to Rule 16, which makes "possession, custody or control" by the government the only criteria.

17. Rule 17(c), F.R. Crim. P. reads:

(c) *For Production of Documentary Evidence and of Objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

as evidence, obtained by the government by solicitation or voluntarily handed over by third persons. The issuance of a subpoena, however, is discretionary, and good cause often must be shown, including that the documents are "evidentiary". In this connection the authors contend that impeachment materials, such as F.B.I. and police criminal records, photographs and line-up sheets, are evidentiary.[18]

The authors also note with approval a proposed amendment to Rule 16 which would delete the present requirement that a defendant have a possessory or proprietary interest in his confessions or admissions; the amendment specifically would entitle him to discover "written or recorded statements or confessions".[19] They also argue that a defendant should be allowed to see his grand jury testimony without first showing a "compelling necessity" therefor.[20]

Finally, the authors maintain that, in cases where there are multiple defendants, counsel for any one of them should be allowed to inquire whether one of them has made a statement, and, if there is one, to require its production, even if not made by his client, to determine whether its admission would be prejudicial to his client and thus whether a motion for severance should be made.[21]

The authors do not blanch at making arguments for greater protection of the defendant, and, in turn, for easing the job of defense counsel by putting him more on a par with the prosecution. If there is one thread pervading *Law and Tactics,* it is that parity is a necessity. Granted, it is not expressed in these terms, but one is impressed with defense counsel's onerous burdens, his need for assistance (available in large doses in this book) and the inherent rightness of achieving parity.

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18. P. 134.
19. P. 137.
20. P. 138.
21. P. 187.

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