

INTRODUCTION

In the 1960s and 1970s, the Federal Bureau of Investigation (FBI) systematically infringed upon the constitutional rights of many political groups under an expansive operation called the Counterintelligence Program, or COINTELPRO. This program used wiretaps, infiltration, and other disruption techniques to interfere with otherwise lawful political association and speech. These efforts targeted mostly fringe political groups, notably the Social Workers Party, Communist Party USA, the Black Panther Party (BPP), and the Ku Klux Klan. Most of what we now know about COINTELPRO is from the Congressional investigation conducted years later. In 1976, the United States Senate Select Committee on Intelligence published the Church Committee's findings decrying COINTELPRO as a shameful infringement on the rights of citizens.

ACLU Nebraska submits this amicus brief to describe the workings of COINTELPRO because it is clear Edward Poindexter was targeted by the FBI, thus raising questions about whether his conviction was part of the FBI's illegal efforts to neutralize political activists. Under COINTELPRO, leaders of targeted groups were arrested and convicted of serious crimes. We now know that in some convictions, the activists were innocent. They have been freed with newly revealed exculpatory evidence that was previously deliberately withheld by the government. Poindexter's case has many parallels to the other COINTELPRO cases. Due to the similarities, this Court should consider to what extent COINTELPRO may have played a role in this case.

ARGUMENT

I. Background of COINTELPRO

In 1956, the FBI began a program designed to investigate and disrupt the activities of the Communist Party. This Counterintelligence Program (“COINTELPRO”) was originally justified by the FBI as a necessary tool to combat domestic communism. *See*, Select Comm. to Study Governmental Operations with respect to Intelligence Activities (Church Committee), *Final Report, Book II: Intelligence Activities and the Rights of Americans*, Sen. Rpt. 94-755 at 66-67 (Apr. 26, 1976). However, beginning in the early 1960s, the FBI gradually expanded COINTELPRO to target other groups such as the Socialist Workers Party, student peace activists, and Black Nationalist groups. *Id.* at 86-89. These groups, broadly described by the Senate’s Church Committee as “domestic dissent,” were targeted at a time in this nation’s history when the civil rights and antiwar movements were at their height, and both violent and non-violent protests were becoming more common. *Id.* at 67-68.

The COINTELPRO operation of interest here is the Black Nationalist operation, which targeted African-American activist groups. The COINTELPRO Black Nationalist operation began as a directive to monitor racial demonstrations and meetings as well as general race relations in urban areas. However, it soon developed into a concentrated effort to evaluate the programs and membership of those groups and to determine their “propensity for violence and civil disorder.” *Id.* at 71. The strategy of the program was to neutralize the “Black Nationalist” groups through a program of disruption and fomenting distrust among members, particularly by targeting the leaders of these groups. *Id.* at 87. The program was expanded in 1968, with 5 stated goals: 1) prevent the

formation of a militant coalition; 2) prevent the rise of a black “messiah”; 3) prevent violence by neutralizing “potential troublemakers”; 4) discredit black nationalist groups with the mainstream black and white communities; and 5) prevent the recruitment of new, young members. *Id.* at 87-88.

As the Black Panther Party rose to national prominence, it became the focus of the Black Nationalist COINTELPRO and the FBI instructed its field offices to develop measures to cripple the party. *Id.* By 1971, the FBI had approved COINTELPRO operations inside 379 Black Nationalist groups. The Church Committee found these operations “utilized dangerous and unsavory techniques which gave rise to the risk of death and often disregarded the personal rights and dignity of the victims.” *Id.* at 88.

COINTELPRO used a variety of techniques to accomplish its goals. The primary implement in the COINTELPRO toolbox was the informant: a person employed by the FBI who infiltrates a targeted group and reports back on its activities. The FBI’s informants were faced with few restrictions as to what they could monitor and report back; generally, the only taboo topics were those that were legally privileged, incidental to an employment relationship, or normal campus activities. *Id.* at 74. It was noted that the field offices rarely imposed additional limitations, and on occasion ignored the general restrictions. *Id.* As a result, the FBI was able to gather a great deal of information regarding the personal lives and lawful political activities of many American citizens. *Id.* As part of its Black Nationalist program, the FBI utilized “listening posts” in the black communities. These listening posts were informants in predominantly black areas, attended public meetings, and gathered information on “extremists.” *Id.* at 75.

Another tactic used by the FBI was to utilize local police networks as a tool for

gathering intelligence information to supplement its own informant network. The FBI was chosen as a repository for intelligence data gathered by local police intelligence networks. *Id.* at 78. Local police often worked hand-in-hand with FBI agents in intelligence-gathering operations. When it was decided that the FBI could no longer develop informants in certain situations, the FBI tapped local police to develop its informant network. *Id.* Finally, the FBI rarely questioned the methods used or conclusions reached by local police, causing its intelligence files to be filled with unreliable information. *Id.*

In 1976, the Church Committee published the findings of its investigation into domestic intelligence activities for the United States Senate. The Committee made several findings, which can be summarized in six broad categories. First, the committee found that the FBI and other intelligence agencies ignored both statutes and the Constitution, and improperly concealed its illegal activities. *Id.* at 137. Second, the committee found that domestic intelligence activities were too broad in scope, targeting individuals that were not suspected of crimes and gathering information about activity not related to any legitimate government interest. *Id.* at 165. Third, the intelligence agencies made excessive use of techniques such as informants, which were so intrusive as to violate the constitutional rights of both targeted individuals and their associates. *Id.* at 183. Fourth, Congress found that covert action programs were used to disrupt and discredit lawful political activities, using tactics that were “abhorrent in a free and decent society.” *Id.* at 211. Fifth, the report demonstrated that domestic intelligence information was used for the political gain of the agencies and administrations. *Id.* at 225. Finally, Congress found that proper measures for the control and accountability of intelligence

operations were not taken by the legislative and executive authorities. *Id.* at 265.

The Church Committee further declared that COINTELPRO was a violation of several constitutional rights, including the rights of privacy, free association, and freedom of assembly. There is no question that COINTELPRO was one of the worst abuses of law enforcement power in American history. In recognition of this, the Socialist Workers Party was awarded a sizable damage claim in recognition of the systematic violation of the group's rights by COINTELPRO. *Social Workers Party v. United States*, 642 F. Supp. 1357 (S.D.N.Y. 1986). Historians and scholars have also documented how COINTELPRO was a politically-motivated operation that systematically infringed upon the rights of American citizens and specifically targeted black leaders. See, e.g., *Last Man Standing: The Tragedy and Triumph of Geronimo Pratt* by Jack Olsen (2000) (Pratt was framed by the FBI and incarcerated for 27 years; see *infra* page 5); *Still Black, Still Strong: Survivors of the US War Against Black Revolutionaries* by Jim Fletcher, et al. (1993); and *Liberation, Imagination and the Black Panther Party: A New Look at the Panthers and Their Legacy* by Kathleen Cleaver and George Katsiaficas (2001).

II. COINTELPRO and Black Leaders: Three Case Studies

The effects of COINTELPRO in specific situations are hard to uncover due to the secrecy of the program. For example, the names of informants and agents, as well as information gathered for law enforcement purposes under COINTELPRO can be redacted under the Freedom of Information Act (FOIA). *Jones v. Federal Bureau of Investigation*, 41 F.3d 238 (6th Cir. 1994). In *Jones v. FBI*, Harlrel Jones was a former Black Nationalist leader who sought to compel the release of documents related to COINTELPRO investigations of him and his party, Afro Set. His claims were dismissed

because the documents requested were protected by FOIA exemptions., demonstrating the difficulty in trying to prove COINTELPRO involvement in criminal investigations.

Jones's investigation into the FBI's targeting of Afro Set was initiated after he was convicted of second degree murder, and later released on writ of habeas corpus. The facts of that case are eerily similar to the case at bar. On August 7, 1970, there was a shooting of two men resulting in one death. The shooting was apparently in retaliation for the killing of an Afro Set member by a security guard. Relying primarily on the testimony of Robert Perry, an FBI informant and Afro Set member who was offered leniency in exchange for testimony, Jones was convicted of having conspired with the actual killers. *Jones v. Jago*, 428 F. Supp. 405 (N.D. Ohio 1977). Victor Harvey, a juvenile and participant in the shootings, made sworn statements that Jones had not called for the shootings, nor had he provided weapons, as the State had contended. *Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978). But Harvey's key evidence and evidence that witness Perry was actually an FBI informant who was involved with the crime were both withheld by the State during Jones' original trial. Based on the State's misconduct in hiding exculpatory evidence, the court found sufficient grounds to grant habeas corpus relief. *Jones*, 428 F. Supp 405, *affd.* 575 F.2d 1164. Jones was finally exonerated and freed in 1979.

Another case parallel to the case at bar is that of Elmer Pratt, a member of the Black Panther Party. Pratt was convicted of a 1968 murder of a woman and the shooting of her husband during a robbery. Pratt's conviction was based almost entirely on the testimony of a single witness, Julius Butler. *In re Pratt*, 69 Cal. App. 4th 1294, 82 Cal. Rptr. 2d 260 (1999). Butler had been a deputy sheriff prior to joining the BPP, and

sometime between the incident and Pratt's arrest, he became an FBI informant even though he had been convicted of several felonies. After becoming an informant, Butler's felony convictions were reduced to misdemeanors, parts of his record were expunged, and he was given probation without jail time for the felonies. However, much of this information was withheld from the defense by prosecutors. The court found that this cast such doubt as to the credibility of the State's key witness as to justify the grant of habeas corpus relief. 69 Cal. App. 4th at 1312, 82 Cal. Rptr. 2d at 271.

Finally, this same pattern resulted in the successful habeas corpus petition of Black Panther leader Dhoruba bin Wahad (formerly Richard Moore) after he spent 20 years in prison on falsified evidence. Wahad was a leader of the New York chapter of the Black Panther Party from 1968 to 1971. In 1973, he was convicted in New York State for the 1971 attempted murder of two New York City police officers, and sentenced to 25 years in prison. The evidence against him was based on an FBI informant who lied under oath. Wahad was released from custody in 1990, though his subsequent civil lawsuits for damages were unsuccessful. See generally *Wahad v. City of New York*, 813 F. Supp. 224 (S.D.N.Y. 1993) and *Wahad v. FBI*, 994 F. Supp. 237 (S.D.N.Y. 1998).

Each of these cases offer a similar pattern with elements that fit the COINTELPRO mold. In each case, the defendant was charged with a murder, based on the testimony of an FBI informant. The informant was either expressly under a leniency deal or there is evidence of such a deal. Exculpatory evidence was withheld in each instance. This pattern appears to be symptomatic of COINTELPRO-era prosecutions of Black Nationalist leaders.

III. COINTELPRO and Edward Poindexter

It is clearly established that Edward Poindexter and the Omaha chapter of the BPP/NCCF was targeted by COINTELPRO prior to the events of August, 1970. The FBI already had a file on Poindexter, containing references to his political activities. As early as 1968, the FBI records indicate an active "harassment campaign" against Omaha BPP members. (T69, T73) In addition, there were active disruption efforts occurring in Omaha. Among other active efforts, one memo reported "Omaha is planning Counter Intelligence Program to disrupt sale of the BPP newspaper." (T43) A faked anonymous letter was sent to exacerbate an existing rift between Poindexter and the national organization. (T45, T68) The effort succeeded, and the BPP cut its ties to the Omaha NCCF.

Thus we know COINTELPRO was active in Omaha and was targeting Poindexter. This targeting did not end after the isolation of the Omaha NCCF. Swanson was in charge of the Omaha Police Department Intelligence Division at the time. He testified that the Intelligence Division amassed a file of the NCCF's publications as part of their surveillance. (E151, Vol. III, 86) Swanson also testified that it was part of his job to gather evidence about the NCCF. (*Id.* at 89) Swanson also suggested that as the NCCF advocated violent killing of police officers so it was natural to arrest members of the NCCF when such a killing occurred. (*Id.* at 106) However, he acknowledged that the BPP's platform did not advocate killing. (*Id.* at 125) Finally, Swanson described how the police gathered information about the activities of the BPP/NCCF through surveillance, infiltration of BPP events, and use of informers. (*Id.* at 126) Swanson admitted his surveillance made him familiar with who Poindexter was. (E134, 36-37)

Placed in context with what is known about COINTELPRO, Swanson's testimony

verifies the Omaha Police Department was engaging in COINTELPRO activity on behalf of the FBI. First, the Intelligence Division was gathering information on the Black Panther Party, a known target of COINTELPRO. See *Book II*, Sen. Rpt. 94-755 at 72. Second, the use of informants for gathering information was the main COINTELPRO tool. Third, the FBI records with false disruption letters prove there were active efforts to neutralize Poindexter.

Poindexter's original trial reflected COINTELPRO bias on the part of the prosecuting attorneys, as they introduced inflammatory newsletters and other Black Panther materials. The written materials introduced by the prosecution were clearly protected by the First Amendment yet were calculated to inflame the jury's emotions against the defendants. This Court already acknowledged such material was irrelevant in Poindexter's direct appeal. *State v. Rice and Poindexter*, 188 Neb. 728, 750 (1972) The prosecution's decision to include the exhibits—despite their inflammatory and irrelevant nature—is indicia the state was targeting Poindexter precisely because of the unpopular sentiments expressed in the exhibits as an outgrowth of the COINTELPRO program. While the zeal of prosecutors in the early 1970's before Congress had fully uncovered the depths of COINTELPRO's illegality could be excused as a symptom of the times, it is of concern that at Poindexter's 2007 evidentiary hearing, the state repeated the same effort to color the case against Poindexter by re-introducing the issue of the BPP's political work. There is simply no explanation for a modern prosecutor to return to the issue of Poindexter's political work—unless Poindexter continues to be a target of retaliation for his First Amendment activities of almost forty years ago.

Finally, there is similarity between Poindexter's situation and the *Jones, Pratt* and

Wahad cases above. First, Poindexter was convicted primarily on the testimony of Duane Peak. While it is not known whether Peak was an FBI or Omaha Police informant, there are facts that suggest that his testimony may have been in exchange for leniency. Most notable is that he was charged in the murder as a juvenile and not an adult, and thus received an extremely light sentence. Second, key exculpatory evidence (the actual 911 tape) was kept away from the defense in Poindexter's case. Memos between the FBI and OPD indicate a clear plan to deliberately avoid doing any testing on the tape for voice identification. In October, 1970, one such memo said "Omaha PD advised that...any use of tapes of this call might be prejudicial to the police murder trial against two accomplices of Peak and, therefore, has advised that he wishes no use of this tape until after the murder trials of Peak and the two accomplices have been completed." (T48) Yet the police understood the importance of the 911 tape, calling it the "most important present tangible evidence in possession of police" (T176), which led to the police seeking private testing of the tape again without informing defense counsel. (T59, T66) Such misconduct replicates the COINTELPRO pattern in *Jones, Pratt* and *Wahad*.

The facts in this case bear too close a resemblance to the illegal activities that resulted in wrongful convictions of other black activists. We urge this Court to bear these historical facts in mind while weighing the evidence in this case, particularly in regard to the plausibility of the government's evidence and in evaluating the amount of misconduct demonstrated by police and prosecutors.

CONCLUSION

The FBI's COINTELPRO operations violated the civil liberties of American citizens. This program has been condemned by the United States Senate and the Federal

Judiciary. It is demonstrably clear that prior to the August, 1970 bombing, Edward Poindexter and the Omaha NCCF were COINTELPRO targets. Given the deliberate withholding of key evidence such as the 911 tape and the reliance on a single juvenile witness, Poindexter's prosecution appears to have been a continuance of COINTELPRO. This was clearly a politically-motivated prosecution of a black leader. Amicus Curiae urges the Court to consider COINTELPRO's involvement in this case, starting with the initial decision to focus on Poindexter for his lawful participation in BPP/NCCF activities and ending with the government's misconduct throughout the prosecution of Poindexter.

Respectfully submitted this _____ day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify I served a copy of the above and foregoing brief upon all parties of record by hand delivery of same on this _____ day of September, 2008, addressed to:

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