UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN RE: SEARCH WARRANT

Case No. 6:05-MC-168-Orl-31JGG

ORDER

This matter comes before the Court on the United States' Appeal of a Magistrate Judge's Order Denying Search Warrant Pursuant to 18 U.S.C. § 2703(a) ("Section 2703(a)").[1] The question presented is whether this Court may issue a search warrant seeking the production of electronic evidence pursuant to Section 2703(a) in a non-terrorism-related case where that warrant will then be directed to an internet service provider in another judicial district.[2]

I. Issues

A. The Pertinent Statutes and Rules

The question presented here requires the Court to examine the language of Section 2703(a) and Federal Rule of Criminal Procedure 41 ("Rule 41"), as well as the language of Sections 219 and 220 of the Patriot Act.

1) Section 2703(a)

Prior to the enactment of the Uniting and Strengthening America by Providing Appropriate

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[1] The United States sought the warrant in connection with an investigation relating to child pornography. At present, this case is under seal.

[2] Such warrants will be referred to as "out-of-district warrants." Inasmuch as the United States seeks a warrant under the provisions of Section 2703(a), any time this Order refers to a "warrant," that language is limited to warrants sought pursuant to the provisions of Section 2703(a).

Tools Required to Intercept and Obstruct Terrorism Act of 2001, PL 107-56 (HR 3162) (the "Patriot Act"), Section 2703(a) provided, in relevant part:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued *under* the Rules of Criminal Procedure or equivalent State warrant.

18 U.S.C. § 2703 (1998), (*amended by* PL 107-56 (HR 3162), 2001) (emphasis supplied). Section 220 of the Patriot Act amended Section 2703(a) so that it now states:

> A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued *using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense* under investigation or equivalent State warrant.[3]

18 U.S.C. § 2703(a) (emphasis supplied). The change is twofold. First, warrants now must be issued "using the procedures described in the Rules of Criminal Procedure," whereas previously they had to be issued "under" those Rules. Second, Congress added language permitting the warrant to be issued "by a court with jurisdiction over the offense."[4]

2) Federal Rule of Criminal Procedure 41

Rule 41, which governs the issuance of search warrants, provides in part:

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[3] Section 220 of the Patriot Act amended Section 2703 in its entirety by, *inter alia*, "striking 'under the Federal Rules of Criminal Procedure' every place it appears and inserting 'using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation.'" PL 107-56 (HR 3162).

[4] Section 2703(a), the search warrant provision for Chapter 121 of Title 18, is entitled "Stored Wire and Electronic Communications and Transactional Records Access," and is clearly a general provision related to all investigations of federal crimes involving such records, whether terrorism-related or not.

> Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:
>
> > (1) a magistrate judge with authority in the district - or if none is reasonably available, a judge of a state court of record in the district - has authority to issue a warrant to search for and seize a person or property located within the district;
> >
> > (2) a magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed . . . .

Fed. R. Crim. P. 41(b). Section 219 ("Single-Jurisdiction Search Warrants for Terrorism") of the Patriot Act amended Rule 41 by:

> inserting after "executed" the following: "and (3) in an investigation of domestic terrorism or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district."[5]

PL 107-56 (HR 3162).

It is this statutory background, and questions about the purpose and effect of the language used, that has given rise to the question at issue here regarding the propriety of a Magistrate Judge issuing an out-of-district warrant under Section 2703(a) in a non-terrorism-related investigation.

B. Magistrate Judge's Reasoning

In denying the out-of-district warrant, the Magistrate Judge relied on his opinion in *In re Search Warrant*, 362 F. Supp. 2d 1298 (M.D. Fla. 2003), which also denied an out-of-district warrant. In that case, the court determined that the words "using the procedures described in the Federal Rules of

[5] The text of Section 219 refers to "Rule 41(a)," but given the specific location at which the relevant language is to be inserted, it appears that it was intended to refer to section 41(b), particularly because the word "executed" does not appear in section 41(a).

[Criminal] Procedure," (*see* 18 U.S.C. § 2703(a)), "do not authorize warrants to seize out of district property in non-terrorism cases," and concluded that, to the contrary, "the procedures under [Federal Rule of Criminal Procedure] 41 limit out-of-district warrants to terrorism cases." *Id*. at 1302. The court also determined that it was unnecessary to review legislative history because the language of the statute is clear, and the "plain language of the statute expresses legislative intent to limit out-of-district authority to cases involving terrorism." *Id*.

However, "in order to aid review on appeal," the court examined the pertinent legislative history. *Id*. at 1303. The court compared modifications to pertinent federal statutes and rules implemented by the Patriot Act, and determined that

> [i]n consecutive sections of the final enacted version of the [Patriot Act] (Sections 219 and 220), Congress simultaneously amended Fed. R. Cr. P. 41 to expand court authority to issue warrants for property outside the district in terrorism cases, and amended 18 U.S.C. § 2703 to require Courts to issue warrants for electronic communications using the procedures describe (sic) in the Federal Rules of Criminal Procedure. Because Section 220 expressly directs adherence to the Federal Rules of Criminal Procedure, it would be implausible to read Fed. R. Cr. P. 41(b) in a manner that ignores the express restrictions imposed by Congress in the preceding section (i.e., in Section 219, which granted out-of-district authority only in terrorism cases).[6]

In re Search Warrant, 362 F. Supp. 2d at 1303-1304. The court then concluded that: (1) the heading to Section 220 of the Patriot Act ("Nationwide Service of Search Warrants for Electronic Evidence") (hereinafter, "Section 220") did not mention nationwide service of warrants in non-terrorism cases; (2) the text of Section 220 does not authorize out-of-district search warrants in non-terrorism investigations; (3) Section 220 did not expand the government's right to obtain warrants to seize out-

[6] The court noted that the modification of the language in Section 2703 appeared "to be designed to better accommodate the issuance of warrants in state courts that do not issue warrants 'under' the federal rules," and that this change in language "cannot be read as an expansion of the Court's authority to issue out-of-district warrants." *In re Search Warrant*, 362 F. Supp. 2d at 1304 n.4.

of-district property in all types of criminal investigations; and (4) if Congress had intended to create such a dramatic expansion of the power of the district courts, it would have expressly done so. *Id*. at 1304.

C. The United States' Arguments On Appeal

In its appeal of the denial of the application for an out-of-district warrant, the United States makes a number of arguments, which may be summarized as follows: (1) the statute makes "jurisdiction over the offense," not the location of the digital information, the basis for judicial authority to issue a warrant; (2) it would be a waste of resources to require judges, prosecutors and agents in another district to become involved in the case just to procure a warrant for property located in that other district; (3) the changes in the language to Section 2703 only addressed the procedural provisions regarding the issuance of the warrant, and therefore do not incorporate Rule 41(b) which deals with judicial authority; (5) the language "by a court with jurisdiction over the offense under investigation" clearly gives warrants issued pursuant to Section 2703 extra-district reach, and Rule 41(b)(3) does not take away this authority because by its terms Rule 41 does not modify any statute regulating the issuance of search warrants; (6) the legislative history reveals several things,[7] including: (a) references to terrorism are by way of example, not by way of limitation, and, indeed, there is no language of limitation in the pertinent statutes; (b) the pertinent statutes treat general warrants and terrorism warrants separately while allowing both to reach outside the district of issuance; (c) the section analysis for Section 220 notes that it permits a single court having jurisdiction over the offense

[7] Interestingly, the United States asserts that the statute "unambiguously" supports its position (which is unambiguously contrary to the Magistrate Judge's opinion), yet also asserts that the Court must examine the legislative history of the statute to ascertain its meaning and purpose.

to issue a search warrant for email that would be valid anywhere in the United States; and (d) whereas Section 219 by its terms is limited to terrorism, there is no such reference or limitation to terrorism in Section 220.

II. Legal Analysis - Whether the Patriot Act Permits the Issuance of Out-of-District Warrants Under Section 2703(a) in All Criminal Cases, or Only in Terrorism-Related Cases

A. Standard of Review for Statutory Language

"In determining the scope of a statute, [courts] look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (internal citations and quotation omitted); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *U.S. v. Grigsby*, 111 F.3d 806, 816 (11th Cir. 1997). "If the language of the statute is unambiguous, [the court's] analysis ordinarily comes to an end. " *U.S. v. Kirkland*, 12 F.3d 199, 202 (11th Cir. 1994).

Courts should only depart from the official text of the statute if that text is ambiguous or otherwise unclear. *Jones v. Metro. Atlanta Rapid Transit Auth.*, 681 F.2d 1376, 1379 (11th Cir. 1982); *Am. Trucking Ass'ns, Inc. v. I.C.C.*, 659 F.2d 452, 459 (5th Cir. 1981). It is only when the statutory language is unclear that courts resort to reviewing legislative history, *Grigsby*, 111 F.3d at 816, and even then, a review of the legislative history of a statute is only justified when the statute is "inescapably ambiguous." *U.S. v. Garcia*, 718 F.2d 1528, 1533 (11th Cir. 1983).[8] Where statutory

[8] "The one circumstance in which a court may properly look beyond the plain language of a statute is where giving effect to the language used by Congress would lead to a truly absurd result." *Glazner v. Glazner*, 347 F.3d 1212, 1215 (11th Cir. 2003); *see also U.S. v. Turkette*, 452

language is vague, courts should interpret the words in light of the legislative history and of the "particular evils" at which the statute was aimed. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940). Further, when interpreting a statute, courts should look not to a single sentence or phrase, but to the provisions of the whole law and to its object and policy, *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 285 (1956), and should interpret the statute in a manner so as to further Congress' objectives, not to produce results at odds with the purposes underlying the statute. *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 57 (1983); *see also S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (courts should interpret text of statute so as to carry out in particular cases the generally expressed legislative policy).

B. Section 2703(a) - "A Court with Jurisdiction Over the Offense"

The language of Section 2703(a) is fairly clear, except for the phrase, "a court with jurisdiction over the offense."[9] This phrase is not given a precise legal definition, and Congress gives no indication as to the type of jurisdiction -- subject matter, personal, territorial, or otherwise -- that is intended.[10]

Under 18 U.S.C. section 3231 ("Section 3231"), federal district courts have original subject matter jurisdiction over all violations of federal law. *See* 18 U.S.C. § 3231 ("district courts of the

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U.S. 576, 580 (1981) ("absurd results are to be avoided and internal inconsistencies in the statute must be dealt with"). This principle, however, is rarely relied upon "because the result produced by the plain meaning canon must be truly absurd before this principle trumps it." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997).

[9] The Court rejects the assertions made by both the United States here and the Magistrate Judge in *In re Search Warrant* that the statutory language is unambiguous. Although the Court ultimately comes to a determination regarding the meaning of this language, by no means is it clearly, unambiguously or precisely written.

[10] "Jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." *U.S. v. Cotton*, 535 U.S. 625, 630 (2002).

United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States"); *U.S. v. Bryson*, 14 Fed. Appx. 316, 317 (6th Cir. 2001) (Section 3231 gives federal courts exclusive jurisdiction over violations of federal law); *Hugi v. U.S.*, 164 F.3d 378, 380 (7th Cir. 1999) (subject-matter jurisdiction in every federal criminal prosecution comes from Section 3231); *Hill v. U.S.*, 2005 WL 1513134 (D.D.C. June 22, 2005) ("all district courts have jurisdiction over violations of federal laws"). Stopping the analysis here and assuming that Congress intended "jurisdiction" to mean "subject matter jurisdiction," however, would render the pertinent language irrelevant. *All* federal district courts have subject matter jurisdiction over violations of federal law, and thus to read the word "jurisdiction" as simply meaning "subject matter jurisdiction" would render that language superfluous because there would be no need for Congress to restate the obvious. Therefore, the Court cannot simply end the analysis here, because it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (courts are "reluctant to treat statutory terms as surplusage in any setting") (internal citations and quotations omitted). Congress must have meant something when it used this language, and thus the Court must determine that intended meaning.

There are two additional types of jurisdiction which federal district courts have over violations of federal law. First, federal district courts have territorial jurisdiction over those crimes that occur in their district. *See U.S. v. Schiefen*, 139 F.3d 638, 639 (8th Cir. 1998) (because federal district court had exclusive jurisdiction over federal crime under Section 3231, and conduct occurred in district, jurisdiction and venue were appropriate in that district); *Rector v. U.S.*, 9 F.3d 113 (7th Cir. 1993) (unpublished table decision); *U.S. v. Davis*, 666 F.2d 195, 199 (5th Cir. 1982) (if government shows by

preponderance of the evidence that crime was committed in trial district, territorial jurisdiction is established); *U.S. v. Grossman*, 400 F.2d 951, 953 (4th Cir. 1968) (it is a "jurisdictional imperative" that offense be committed in state and district of indictment); *U.S. v. Luton*, 486 F.2d 1021, 1022 (5th Cir. 1973)[11] ("Both venue and territorial jurisdiction of a federal district court in criminal cases depend on some part of the criminal activity having occurred within its territory.").[12] Second, a district court has personal jurisdiction over any person appearing before it. *U.S. v. Kuehnoel*, 187 F.3d 649 (9th Cir. 1999) (unpublished table decision); *U.S. v. Zammiello*, 432 F.2d 72 (9th Cir. 1970). *See also Watson v. U.S.*, 2000 WL 680325 at *2 (N.D. Ill. April 25, 2000) (defendant's violation of federal statute in judicial district brought him within personal jurisdiction of district court for that district).

It thus seems appropriate to conclude that Congress intended "jurisdiction" to mean something akin to territorial jurisdiction. This conclusion is supported by the legislative history of the Patriot Act, which indicates that the statutory modifications enacted by the Patriot Act would change surveillance and intelligence procedures for all types of criminal investigations, not just terrorism cases, (*see* 147 Cong. Rec. S10990-02 at S10991, 107th Congress, 1st Session, October 25, 2001, *available at* 2001 WL 1297566), and also states that Section 220 of the Patriot Act permits a single court having

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[11] All decisions of the Fifth Circuit issued prior to October 1, 1981, are binding precedent on courts within the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[12] Article III, section 2, clause 3 states that, "[t]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ." U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI. This right is also guaranteed by Rule 18 of the Federal Rules of Criminal Procedure. *U.S. v. White*, 611 F.2d 531, 534 (5th Cir. 1980); Fed. R. Crim. P. 18. *See U.S. v. Anderson*, 328 U.S. 699, 705-706 (1946) (place where criminal act is done determines jurisdiction).

jurisdiction over the offense to issue a search warrant for email that would be valid anywhere in the United States. (*See* 147 Cong. Rec. H7159-03 at H7197-98, 107th Congress, 1st Session, October 23, 2001, *available at* 2001 WL 1266413). This conclusion also makes sense given the practical realities of procuring a warrant for an out-of-district search. As the United States suggests, it makes little sense to require the government, once it has opened an investigation into an alleged federal crime in the district where that crime allegedly occurred, to have to look to the courts, prosecutors and agents in another district where certain evidence may be found in order to procure a warrant for a search in that other district. Instead, as a matter of judicial and prosecutorial efficiency,[13] it is practical to permit the federal district court for the district where the federal crime allegedly occurred to oversee both the prosecution and the investigation (including the issuance of warrants) thereof.[14]

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[13] Commentators have suggested that one reason for the language of Section 220 of the Patriot Act was to relieve the burden placed on the federal courts in districts such as the Eastern District of Virginia, where AOL is located, and the Northern District of California, where Yahoo is located. *See* Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens*, 72 Geo. Wash. L. Rev. 1375, 1454 (Aug. 2004) ("The effect of the change was to shift the responsibility for issuance of the order from the court where the service provider is located to the court with jurisdiction over the offense being investigated; prior to passage of the USA Patriot Act, a disproportionate number of such orders were issued in the Eastern District of Virginia, where AOL is located."); Franklin E. Fink, *The Name Behind the Screenname: Handling Information Requests Relating to Electronic Communications*, 19 No. 11 Computer & Internet Law 1, 6-7 (Nov. 2002) ("This provision was intended to relieve the burden on district courts in which major communications providers are located, such as the Northern District of California and Eastern District of Virginia."). This is most likely the reason for the special provision for out-of-district warrants for certain electronic communications, such as emails, under Section 220 in all criminal cases, when Section 219 seems to limit (via Rule 41(b)(3)) out-of-district warrants to terrorism cases.

[14] Permitting the district court where the crime allegedly occurred to issue an out-of-district warrant for evidence located in another district results in no prejudice to the rights of the defendant, particularly where that defendant is unaware of the investigation. The only person conceivably being inconvenienced is the third party that owns the out-of-district property subject to the search warrant, but as a practical matter, such inconvenience is *de minimis* and, as the United States suggested, such third parties rarely, if ever, seek to contest such warrants.

Thus, it seems that when Congress amended Section 2703(a) via Section 220 of the Patriot Act, and added the language "a court with jurisdiction over the offense," Congress intended to confer authority on the federal district court for the district where the alleged crime occurred to issue warrants that would be valid in every other judicial district. Otherwise, one would have to conclude that Congress added this superfluous language with no practical effect. Accordingly, the Court concludes that Section 2703(a) permits a district court to issue out-of-district warrants.

C. Rule 41

Section 2703 does not, however, stand on its own. Rather, Section 2703 requires "a court with jurisdiction over the offense" to reference and abide by the procedures of the Federal Rules of Criminal Procedure which, in this case, is Rule 41. Thus the Court must turn to Rule 41, keeping in mind the restrictions that Rule 41(b) imposes on the authority of Magistrate Judges to issue warrants.

The United States argues that the language in Section 2703(a) regarding "the procedures" only refers to sections such as 41(d) and (e), which detail, respectively, the process for obtaining and issuing warrants, not to section 41(b). This assertion is eminently reasonable and congruent with the expanded authority of the court with jurisdiction over the offense. First, the title of subsection (b) is "Authority to Issue a Warrant," and neither that title nor the text of the subsection discuss the procedure by which a search warrant is to be issued. Instead, that subsection serves only to limit the authority of a Magistrate Judge to issue a warrant to three distinct circumstances.[15] Second, this interpretation gives meaning to the change in the language of Section 2703 from "under" the Federal Rules of Criminal Procedure to "using the procedures described in" those Rules. Whereas "under" would indicate a

[15] The limitations on authority in Rule 41(b) would also be inconsistent with the authority expressly granted by the statute to the court with jurisdiction over the offense.

broader reading, such that a warrant would be subject to all provisions of Rule 41 (including subsection (b)), the "using the procedures" language seems more focused solely on the actual procedural aspects (obtaining and issuing) of search warrants.

Section 2703(a) and Rule 41 may thus be reconciled as follows: (1) Section 2703(a) provides that the federal district court where the alleged crime occurred may issue out-of-district warrants; (2) the prosecutor and the court must look to Rule 41 subsections (d) and (e) for the procedures to be followed in obtaining and issuing that warrant; and (3) subsection (b) of Rule 41, because it is not procedural, does not impair the ability of a district court to issue out-of-district warrants under Section 2703(a).[16] Therefore, the restrictions imposed by Rule 41(b), particularly subsection (b)(3)'s limitation on out-of-district warrants to terrorism investigations, do not limit the effect of the language in Section 2703(a), and thus the Court finds that district courts may issue out-of-district warrants under Section 2703(a), using the procedures described in Rule 41 subsections (d) and (e), in non-terrorism-related cases.[17]

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[16] This same conclusion may also be reached by an alternate path. Subsection (a) of Rule 41 provides that Rule 41 "does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances." Fed. R. Crim. P. 41(a). Thus, by its own terms, Rule 41 cannot impair the authority or jurisdiction of a federal district court to issue out-of-district warrants under Section 2703(a). Moreover, as Rule 41 is a rule of procedure, it cannot trump the operative effect of a federal statute.

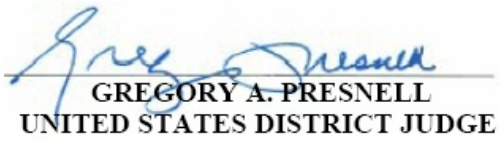
[17] This case involves an alleged violation of 18 U.S.C. section 2252A ("Section 2252A"), which provides that a person violates federal law when that person, *inter alia*, mails, transports, receives, distributes, reproduces or possesses child pornography, or material containing child pornography, that was mailed, shipped or transported in interstate or foreign commerce by any means, including by computer. 18 U.S.C. § 2252A(a). Section 2252A is part of chapter 110 ("Sexual Exploitation and Other Abuse of Children"), which does not contain a specific jurisdictional clause. The application for the warrant and its supporting affidavits state that the individual under investigation possesses such material at a residence located in the Middle District of Florida and that evidence of a violation of Section 2252A may also be found on an internet computer server located in another judicial district. Clearly, this Court has subject

III. Conclusion

For the reasons stated herein, the Court finds that out-of-district warrants may be issued in non-terrorism-related investigations under Section 2703 as amended by Section 220 of the Patriot Act, and that the issuance of such warrants is not restricted by the language of Rule 41(b). Accordingly, it is

ORDERED THAT the Magistrate Judge's denial of the out-of-district warrant to search for property held by Yahoo, Inc., located in Sunnyvale, California, is REVERSED. This matter is remanded to the Magistrate Judge with instructions to issue the appropriate warrant.

DONE and **ORDERED** in Chambers, Orlando, Florida on December 23, 2005.



GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

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matter jurisdiction over the offense in question under Section 3231 and territorial jurisdiction over the offense inasmuch as the offense allegedly occurred in this district.