Docket Number _____

IN THE SUPREME COURT OF THE UNITED STATES

ARLANDIS SHY, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

I. Whether the district court clearly erred by failing to properly instruct the jury, in violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which denied Defendant Shy his rights to Due Process and a fair trial under the Fifth and Sixth Amendments to the U.S. Constitution?

II. Whether the district court clearly erred by admitting Defendant Shy's Facebook record, obtained by a search warrant that was not supported by probable cause, violating Shy's right against unreasonable searches under the Fourth Amendment to the U.S. Constitution?

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Citation of the Records, Opinions, and Orders Entered in the Case

A Judgment and Commitment of Sentence, 10/13/19, *U.S. v. Shy,* Eastern District Court of Michigan Case No. 15–cr–20652, Record Document 1514.

B Opinion Affirming Conviction, 7/5/22, *U.S. v. Shy,* 6th Cir. Case No. 19–2281, Doc. 75–2.

C Order Granting Motion for Rehearing and Amending the July 5, 2022 Opinion, *U.S. v. Shy,* 6th Cir. Case No.19–2281, Doc. 86–1, 7/28/22.

D 6th Superseding Indictment excerpt, *U.S. v. Shy,* Eastern District Court of Michigan Case No. 15–cr–20652, Record Document 812.

E Verdict Form, 8/28/18, *U.S. v. Shy,* Eastern District Court of Michigan Case No. 15–cr–20652, Record Document 1168

F Order Vacating Conviction, 7/30/19, *U.S. v. Shy,* Eastern District Court of Michigan Case No. 15–cr–20652, Record Document 1465

G Affidavit for the Warrant, 10/7/16, *U.S. v. Shy,* Eastern District Court of Michigan Case No. 15–cr–20652, Record Document 1081–1.

H Motion to Suppress Facebook Evidence, 6/22/18, *U.S. v. Shy,* Eastern District Court of Michigan Case No.15–cr–20652, Record Document 1081.

I Opinion Denying Motion to Suppress, 7/10/18, Trial Transcript excerpt, *U.S. v. Shy,* Eastern District Court of Michigan Case No.15–cr–20652, Record Document 1125.

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Statement of Jurisdiction

Appellate jurisdiction in this case was vested in the Sixth Circuit Court of Appeals upon the filing of a Notice of Appeal on October 31, 2019—after the Judgment and Commitment (Appendix A, pp. A2–A8) was entered on October 31, 2019—by virtue of 28 U.S.C. §1291, which grants the U.S. Circuit Court of Appeals jurisdiction to review all final decisions in the District Courts.

Petitioner seeks review of the Sixth Circuit Court of Appeals Opinion dated July 5, 2022, affirming Petitioner's conviction and sentence. (Appendix B – 6th Cir. Opinion, *U.S. v. Shy*, Case No. 19–2281 (6th Cir. July 5, 2022), unpublished opinion, pp. A10–A55).

Petitioner filed a motion for rehearing on July 18, 2022, which the Sixth Circuit granted in an Order dated July 28, 2022. (Appendix C – Order, pp. A57–A58). Petitioner also seeks review of the Sixth Circuit July 28, 2022 Order amending the July 5, 2022 Opinion.

This Petition for Writ of Certiorari is filed within 90 days of the July 28amended Order, as required by U.S. Supreme Court Rule 13(3).

This Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

Constitutional Provisions and Statutes

Amendments to the U.S. Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Codes

28 U.S.C. §1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin

Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

18 U.S.C. § 1962(d):

It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963(a):

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

> (1) any interest the person has acquired or maintained in violation of section 1962;
> (2) any—
>
> > (A) interest in;
> > (B) security of;
> > (C) claim against; or
> > (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 . . . .

18 U.S.C. § 1963(d):

(d)

> (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—
>
> > (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with

respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

18 U.S.C. § 3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

21 U.S.C. § 860(a):

Any person who violates section 841(a)(1) of this title or section 856 of this title by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is (except as provided in subsection (b)) subject to (1) twice the maximum punishment authorized by section 841(b) of this title; and (2) at least twice any term of supervised release authorized by section 841(b) of this title for a first offense. A fine up to twice that authorized by section

841(b) of this title may be imposed in addition to any term of imprisonment authorized by this subsection. Except to the extent a greater minimum sentence is otherwise provided by section 841(b) of this title, a person shall be sentenced under this subsection to a term of imprisonment of not less than one year. The mandatory minimum sentencing provisions of this paragraph shall not apply to offenses involving 5 grams or less of marihuana.

28 U.S.C.§ 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Statement of the Case

Subject matter jurisdiction in this case was vested in the United States District Court for the Eastern District of Michigan upon the filing of an Indictment on January 3, 2018, naming the United States of America as Plaintiff and Petitioner as Defendant by virtue of 18 U.S.C. § 3231, which grants original jurisdiction to the District Court over all offenses against the laws of the United States.

Defendant Shy was charged with 11 criminal counts involving racketeering conspiracy; murder in aid of racketeering; use of a firearm in furtherance of a crime of violence causing death; attempted murder in aid of racketeering against three victims; assault with a dangerous weapon in aid of racketeering against three

victims; use and carry of a firearm during, and in relation to, a crime of violence; and, possession of a firearm in furtherance of a crime of violence. (Appendix D – 6th Sup. Indict. excerpt, R. 812, pp. A61–A73).

The evidence at trial showed that the 21 co-defendants had varying degrees of association since growing up in Detroit from the mid 1990s. (Tr. Trans., R. 1122, Pg ID 10769-776). Co-defendant Anthony Lovejoy, who cooperated with the government, met Shy later than the other co-defendants, around 2004–2005. *Id.* at 10773, 10875-876. Shy was a local rapper who made rap videos in a studio with the Hard Work Entertainment record label. (Tr. Trans., R. 1119, Pg ID 10302).

In 1995–1996, there had been a group known as "Ruthless Claim" that later became the Seven Mile Bloods (SMB) in 2005, the group of Co-defendants that was the subject of the RICO charges. (Trial Trans., R. 1122, Pg ID 10792-793, 10808-809). Shy was not a founding member of SMB or the Ruthless Claim. *Id.* at 10808-809. SMB was associated with the east side of Detroit known as the "red zone," but it was not certain who gave it that name. (Tr. Trans., R. 1127, Pg ID 11696).

At trial, the government presented evidence about SMB being a RICO enterprise and the 118 overt acts listed in the Information.

After the trial, which lasted from June 19, 2018 to August 28, 2018, the jury found Shy guilty of the RICO Conspiracy and possessing a firearm in the furtherance of a crime of violence. (Appendix E – Verdict Form, pp. A75, A79). However, that firearm conviction was later dismissed pursuant to *United States v. Davis*, 139 S. Ct. 2319, 2329-30 (2019). (Appendix F – Order, p. A83).

The jury unanimously reached the following verdicts:

1. Shy did not commit or cause to be committed, or aid and abet in the commission of, the first-degree murder of Dvante Roberts on or about May 8, 2015.
2. Shy did not commit or cause to be committed, or aid and abet in the commission of, the attempted murder (assault with intent to murder) of Marquis Wicker, Darrio Roberts, or Jesse Ritchie on or about May 8,2015.
3. Shy did not murder Dvante Roberts in aid of racketeering on or about May 8, 2015.
4. Shy did not use a firearm during and in relation to a crime of violence causing death, namely the May 8, 2015 murder of Dvante Roberts in aid of racketeering.
5. Shy did not attempt to murder Marquis Wicker in aid of racketeering on or about May 8, 2015.
6. Shy did not attempt to murder Darrio Roberts in aid of racketeering on or about May 8, 2015.
7. Shy did not attempt to murder Jesse Ritchie in aid of racketeering on or about May 8, 2015.
8. And Shy did not use and carry a firearm during and in relation to a crime of violence, namely the May 8, 2015 attempted murder of Marquis Wicker, Darrio Roberts, or Jesse Ritchie in aid of racketeering. [App. E – Verdict, pp. A76–A78.]

In order to enhance Shy's sentence, the jury was also asked to make the factual finding that from July 14, 2014 through September 26, 2015, Shy conspired with another conspirator to assault rival gang claimants with intent to commit murder. (App. E – Verdict, p. A76). But no specific event, rival gang claimant, victim, or co-conspirator was identified in the verdict form. *Id*.

Shy also argues that the government lacked probable cause in its application for the search warrant for the substance of his Facebook account. The government was able to introduce a prejudicial video of Shy holding a pistol, while smoking a large marijuana cigar known as a "blunt." In that video he was explaining that he was smoking "Neff," a member of another street gang who had been shot.

Argument for Allowance of the Writ

Shy argues that a United States Sixth Circuit Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, the sentencing enhancement instruction used at the jury trial did not comply with this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in violation of the Fifth and Sixth Amendments to the U.S. Constitution, and the district court admitted evidence at trial obtained in violation of the Fourth Amendment to the U.S. Constitution with a search warrant lacking in probable cause.

"At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476–477 (2000) (citations omitted).

I. The district court clearly erred by failing to properly instruct the jury, in violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which denied Defendant Shy his rights to Due Process and a fair trial under the Fifth and Sixth Amendments to the U.S. Constitution.

Issue preservation.

Before trial, Shy objected to the special jury instruction. (Conf. Trans., R. 1416, Pg ID 18668, 18673-676).

Standard of Review.

The correctness of jury instructions is a question of law, which this Court reviews de novo. *Jones v. Federated Fin. Reserve Corp*., 144 F.3d 961, 966 (6th Cir. 1998).

Argument.

Jury instructions are considered "as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision." *Pivnick v White*, 552 F3d 479, 486 (6th Cir. 2009) (citation omitted).

Shy's conviction for violating 18 U.S.C. § 1962(d) ordinarily carries a twenty-year maximum sentence. If the jury finds beyond a reasonable doubt that the RICO violation was based on a predicate racketeering act that imposes a maximum sentence of life, then the maximum RICO penalty is enhanced and becomes life. 18 U.S.C. § 1963(d). Based on the insufficient instruction, the jury found an unidentified predicate racketeering act, and Shy was sentenced to 220 months, less than the base statutory penalty of 20 years under 18 U.S.C. § 1963(a).

The jury answered "yes" to the following question on the verdict form:

> Did defendant ARLANDIS SHY, between July 14,2014 through September 26, 2015, conspire with another conspirator to assault rival gang members with intent to commit murder? [App. E – Verdict, R. 1168, p. A76.]

But Shy was found not guilty of all of the remaining underlying substantive counts of predicate racketeering acts.

The sentence enhancement instruction given at trial did not require the jury to find specific acts for, and the elements of, a conspiracy to commit assault with intent to murder in violation of Michigan law, which violates *Apprendi's* mandate that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). That includes finding what event, victim, or act established the conspiracy to commit assault with intent to murder in violation of Michigan law.

"[T]he Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense … be made by a jury on the basis of proof beyond a reasonable doubt." *Id.* at 469.

"Since *Winship*, [the U.S. Supreme Court has] made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Id.* at 484 (citation omitted).

"It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490 (citations omitted).

"[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494. "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." *Id.* at 494 n.19 (citation omitted).

JUSTICE SCALIA concurred in full with the majority opinion in *Apprendi*:

> [A]uthority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact—of whatever sort, including the fact of a prior conviction—the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact— such as a fine that is proportional to the value of stolen goods—that fact is also an element. [*Apprendi*, 530 U.S. at 501 (SCALIA, J., concurring).]

Shy argues that the special enhancing jury instruction question was insufficient and inaccurate because it did not require identification of a specific predicate racketeering act, which violated his rights to due process and having the jury accurately instructed under the Fifth and Sixth Amendments to the U.S. Constitution. The instruction was overbroad and vague, allowing the jury to find him guilty based on the voluminous, non-criminal, other bad acts conduct presented at trial without identifying a specific act, date, victim, location, or event that made him guilty for the RICO count but also not guilty of the underlying substantive offenses. The inconsistency in the jury's verdict supports a finding that the jury was confused, the instruction was inaccurate, and Shy was enhanced on an insufficient jury instruction.

"It is fundamental Constitutional law that no one may be convicted of a crime absent proof beyond a reasonable doubt of every fact necessary to constitute that crime." *Glenn v. Dallman*, 686 F.2d 418, 420-21 (6th Cir. 1982) (citation omitted).

In a jury trial, the court's instructions are the only means of assuring that the state establishes every element of the crime. *Id.* at 421. Even in habeas cases, the failure of a state court to instruct on an element of a crime is an exception to the stringent bar to habeas relief. *Id.*

An example of such a case is the Sixth Circuit Court of Appeals' decision in *Berrier v. Egeler*, 583 F.2d 515 (1978), where a state court's instructions failed to place the burden of proof of an essential element of a crime on the state. *Glenn*, 686 F.2d at 421. That failure was held to be plain error that was not harmless beyond a reasonable doubt. *Berrier*, 583 F.2d at 522. Other courts of appeal have reached similar conclusions where federal trial courts failed to instruct on essential elements of federal crimes. *Glenn*, 686 F.2d at 421.

The Sixth Circuit disagreed with Shy's argument as follows:

> Even assuming the jury should have identified the exact acts supporting the conviction, any error is harmless. Start with Shy. Shy was sentenced to 220 months—less than twenty years. "Because the district court did not sentence [Shy] to a term of more than twenty years on the RICO counts, *Apprendi* is not triggered." *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); see also *United States v. Osborne*, 673 F.3d 508, 512 (6th Cir. 2012) ("*Apprendi* is not triggered where the defendant receives a term of imprisonment within the statutory maximum that would have applied even without the enhancing factor." (citation omitted)). [App. B – 6th Cir. Opinion, 7/5/22, *U.S. v. Shy*, p. A22.]

But that argument ignores the fact that other courts of appeal have noted that such errors are not made harmless merely because there is overwhelming evidence that the government carried its burden had the jury been properly

instructed. *United States v. King*, 521 F.2d 61, 63 (10th Cir. 1975) (overruled on other grounds by *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir. 1988)).

Also, the decision in *United States v. Osborne*, 673 F.3d 508 (6th Cir. 2012), cited by the Sixth Circuit, involved plain error analysis. *Id*. at 513. The defendant in *Osborne* argued that the district court should have instructed the jury that the proximity-to-a-school enhancement component of 21 U.S.C. § 860(a) was an element of the offense, that is, for distributing crack and powder cocaine within 1,000 feet of a school. *Id*. at 510–11. The *Osborne* court found that it was an element of the offense, which enhanced the defendant's sentence by a factor of two. *Id*. at 511–513.

The *Osborne* panel went on to address the fact that the defendant's sentence did not technically violate *Apprendi*:

> True, this sentence did not violate *Apprendi*. Osborne's sentence fell within the range already provided by § 841(b)(1), and "*Apprendi* is not triggered where the defendant receives a term of imprisonment within the statutory maximum that would have applied even without the enhancing factor." **But that shows only that the district court chose not to utilize the discretion § 860 gave it**. . . . (Emphasis added.) [*Osborne*, 673 F.3d at 512 (citation omitted).]

The *Osborne* panel held that the district court erred and should have instructed the jury to find whether the defendant committed the offense within 1000 feet of a school. *Id*. at 513. However, the error did not establish plain-error under the facts of that case. *Id*. But the issue was preserved in this case and the error was not harmless.

The failure to instruct a jury on an essential element is error because it deprives the defendant of the right "to have the jury told what crimes he is actually

being tried for and what the essential elements of these crimes are." *United States v. Natale*, 526 F.2d 1160, 1167 (2nd Cir. 1975) (citation omitted).

In this case, the jury's inconsistent verdict was evident in their finding that Shy was not guilty, as a principal or aider and abettor, of murder or attempted murder, but inexplicably the jury found him guilty for conspiring with another conspirator to assault rival gang members with intent to commit murder. (App. E – Verdict, p. A76).

The only explanation is that the jury did not understand what elements the government had to establish to enhance Shy's sentence. They found Shy not guilty of the substantive underlying VICAR counts; however. they found that he conspired to commit assault with intent to commit murder even though the jury also found that he did not aid or abet anyone to commit assault with intent to murder or attempted murder.

There was no requirement in the instruction or verdict form that the jury identify exactly what acts supported the conspiracy conviction. What fact, incident, date of an incident, naming of a victim, or identification of a location of an event did the instructions require? None.

The instruction allowed the jury to convict on non-criminal speech that was published on Shy's Facebook account. For instance, since he was shown to have flashed hand signals demeaning a rival gang, the jury could have found that that constituted a conspiracy to attempt murder. Similarly, if he ended a rap lyric with "42K" as simple puffing in a rap song against rival gangs (the Defendants' rap

videos were admitted at trial), that did not support an agreement to conspire to assault with intent to murder or adopt all prior acts of the SMB Co-defendants in the alleged enterprise. The instruction failed to specify the necessary elements, facts, or specific overt acts, victims, and events that needed to be found by the jury for the sentencing enhancement.

II. The district court clearly erred by admitting Defendant Shy's Facebook record, obtained by a search warrant that was not supported by probable cause, violating Shy's right against unreasonable searches under the Fourth Amendment to the U.S. Constitution.

Issue preservation.

Defendant Shy preserved this issue by filing a motion to suppress (Appendix H – Motion, *U.S. v. Shy,* Eastern District Court of Michigan, pp. A111–A118), and by objection on the record. (Tr. Trans., R. 118, Pg ID 10167).

The district court denied the motion for reasons stated on the record during the trial. (Appendix I – Trial Trans., pp. A123–A126).

Standard of review.

In reviewing a district court's denial of a motion to suppress evidence, this Court reviews the district court's findings of fact for clear error and its conclusions of law de novo. *United States v. Jenkins*, 124 F.3d 768, 771-72 (6th Cir. 1997) (citation omitted). This Court considers the evidence in the light most favorable to the district court's decision. *Id.* at 772.

Argument.

Shy argues that the government lacked probable cause in its application for the search warrant for his Facebook account, and that the prejudicial photographs obtained from his account should have been suppressed at trial.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV. In determining whether an affidavit establishes probable cause,

> the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. [*Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) (internal quotation marks and alterations omitted).]

To justify a search, the circumstances must indicate why evidence of illegal activity will be found "in a particular place." There must be a "nexus between the place to be searched and the evidence sought." *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998).

At best, the defense understands that the government's application lists the following evidence to support probable cause for Shy's Facebook account information:

> 1. The government generally alleges that Shy is a member of SMB simply because he was present at the memorial service of an SMB member. [Appendix G – Affidavit for Warrant, *U.S. v. Shy,* Eastern District Court of Michigan, p. A94, ¶ 24.]

2. The government obtained arrest warrants for Shy and the other codefendants, and the government obtained search warrants "for residences where some" of the codefendants resided. *Id.* at A96, ¶ 27. It is not indicated in the application whether or not there was a warrant for Shy's residence. The government obtained evidence from those searches, but the government does not indicate the significance of any evidence found and whether it had a connection to Shy. *Id.*

3. Shy is generally accused of being a Facebook friend with a person named David Daniels, allegedly an SMB member, but Daniels was not named in the Indictments. *Id.* at A103–A104, ¶ 48(a).

Everything else in the application and affidavit supporting the warrant against Shy is boilerplate language that discusses Agent-affiant Shawn Horvath's limited experience, training, and generally alleged information obtained by investigation without any direct link to Shy, nor any description of what the evidence obtained was.

In this case, the government's application did not provide a sufficient nexus between Shy's Facebook account and the SMB. There are generalizations in the application that imply a connection, but there is nothing specific.

For instance, the government states that they conducted surveillance on the memorial service of Devon McClure, an alleged SMB member. (App. G – Aff. for Warrant, pp. A94–A95, ¶ 24). Shy was present at the memorial service but the government does not explain why it designated Shy as a member at that time. *Id.*

The government also mentions obtaining search warrants "for residences where some" of the arrested defendants resided. *Id.* at A96, ¶ 27. However, it is not indicated whether or not there was a warrant for Shy's residence. The government obtained evidence from those searches, but the government did not describe the

evidence found, where it was found, and whether it had a connection to Shy. *Id.* That was no evidence in the application linking Shy to SMB, nor does it link Shy's Facebook account to SMB or its members.

Finally, the government generally accused Shy of being a Facebook friend with a David Daniels, who allegedly was a SMB member, but Daniels was not named in the indictment. *Id.* at A103–A104, ¶ 48(a). The government also does not identify how it is that Daniels is a member SMB, or how being a Facebook friend with Daniels provides probable cause that evidence of a crime involving SMB and Shy would be found on his account.

The government alleged that Daniels was a Facebook friend with other members of SMB and that he was seen in photographs with SMB members. *Id.* However, it was not explained how that made him an SMB member nor is there any allegation that Daniels was ever in photographs with Shy on Facebook, in the government's cell phone data seizures, or the government's residence searches and seizures. There was also no allegation that Shy was connected by photographs with SMB members during any of the government's searches and seizures. The government's application and affidavit did not establish probable cause for a search warrant to obtain Shy's Facebook account information.

The trial court decided Shy's motion to suppress the Facebook evidence in the midst of the tenth day of trial, after having heard additional evidence obtained from Shy's Facebook account. (App. I - Tr. Trans., pp. A123–A124). The court found

probable cause for the warrant and even if probable cause was lacking, it held that the government relied on the warrant in good faith. *Id*. at A125–A126.

The district court relied in part on reference to the "Block Day" memorial for SMB member Devon McClure. *Id*. at A125. The court referenced the part of the warrant application about the night of the memorial, when the FBI saw SMB members and Shy arrive at the Crazy Horse club. *Id*. "That night two SMB members, Arthur and Arnold, were arrested after a high-speed car chase, in possession of a loaded firearm." *Id*. But there was no evidence in the application that Shy had anything to do with that high-speed chase and the loaded firearm.

The court also relied on the limited fact alleged that Shy was a Facebook friend with SMB member David Daniels, which the defense addressed earlier as lacking in evidence to support probable cause.

The Sixth Circuit relied on the good-faith exception without deciding whether or not the warrant was supported by probable cause:

> According to Shy, the government's search warrant was not supported by probable cause. But even if that's true (and we have our doubts), the district court properly denied Shy's motion to suppress. As the Supreme Court has long recognized, the exclusionary rule does not apply when the evidence at issue was "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." [App. B – 6th Cir. Opinion, 7/5/22, *U.S. v. Shy*, pp. A48–A49 (citation omitted).]

"When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347, 94 L. Ed. 2d 364, 107 S. Ct. 1160 (1987). Courts should not, however,

suppress "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant." *United States v. Leon*, 468 U.S. 897, 922, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984). But this good-faith exception to the exclusionary rule does not apply in all circumstances. The *Leon* case describes four situations where an officer's reliance on an invalid warrant cannot be considered objectively reasonable:

> (1) When the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia or probable cause that a belief in its existence is objectively unreasonable; and (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid. [*Id.* at 914-15.]

In this case, the good faith exception does not apply because the affidavit is so lacking in probable cause that a belief in its existence is objectively unreasonable. However, the Sixth Circuit disagreed:

> True, the good-faith exception doesn't apply to warrants supported by affidavits that are "bare bones"—that "merely state[] suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge."
>
> But the 31-page affidavit that supports the warrant here easily surpasses this low bar. It recounts the existence of SMB, the gang's interstate drug-trafficking efforts, its members (including Shy), Shy's related criminal history, and how Shy has been observed associating with SMB members at a local strip club. It also explains that Shy is "friends" with SMB members on Facebook, discusses how Facebook is used as a communication tool between SMB members, and describes the information the government is seeking. Simply put, the affidavit supporting the warrant here is a far cry from "bare bones." Thus, the good-faith exception applies, and the district court properly denied Shy's motion to suppress. [App. B – 6th Cir. Opinion, *U.S. v. Shy*, p. A49 (citations omitted).]

The defense argues that the circumstantial associations mentioned by the Sixth Circuit are insufficient to meet even the "low bar." In fact, they are merely suspicions or conclusions without "underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *Id.*

In *United States v. Hove*, 848 F.2d 137 (9th Cir. 1988), a police officer found evidence leading him to suspect that the defendant was sending threatening letters to her ex-husband and planting pipe bombs under his car. *Id*. at 138-139. The officer learned that the defendant and ex-husband's child stayed with the defendant's father at his residence. *Id*. at 139. The officer obtained a warrant to search the defendant's father's residence after submitting an affidavit to the magistrate. *Id*. at 139. However, the officer failed to provide any nexus between the residence and illegal activity. *Id*. at 139-40.

The Ninth Circuit in *Hove* held that "reasonable judges could not disagree over whether probable cause existed to search the [residence] because the affidavit offered no information as to why the police wanted to search this residence." *Id*. at 139-140. The Ninth Circuit found that

> [t]he affidavit does not link this location to the defendant and it does not offer an explanation of why the police believed they may find incriminating evidence there; the affidavit simply lists the … address as a location to be searched. It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched. [*Hove*, 848 F.2d at 140.]

In this case, it was objectively unreasonable for the police to believe that the application and affidavit in support of the Facebook search warrant provided

sufficient probable cause to obtain Shy's account information. At the time, there was no nexus between Shy's Facebook account and SMB or any criminal activity explained in the application or affidavit.

As discussed earlier, the government only alleged that Shy was at an SMB member's memorial service—and not at his funeral, which they could not establish. Shy was also alleged to be a friend on Facebook to David Daniels, an alleged member of SMB. However, the government does not explain how Daniels is a member of the SMB except that he is friends on Facebook with SMB members and Shy.

These associations do not establish probable cause to search every Facebook friend of an SMB member. There must be more, and in this case, there was insufficient probable cause to obtain a warrant.

Conclusion

For the reasons stated above, Petitioner moves this Honorable Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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