No. _____

In the

United States Supreme Court

Fharis Denane Smith

Petitioner

v.

United States of America,

Respondent

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

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Appendix

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Table of Contents

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Case No. 21-1457

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FHARIS DENANE SMITH,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

OPINION

Before: GUY, MOORE, and CLAY, Circuit Judges.

GUY, J., announced the judgment and delivered the opinion of the court as to the issue discussed in Part III, in which MOORE and CLAY, JJ., joined. CLAY, J. (pp. 21–32), delivered a separate opinion concurring in Part III of the lead opinion, and delivered the opinion of the court, in which MOORE, J., joined, as to the issues discussed in Parts A and B, of his opinion. MOORE, J. (pp. 33–36), delivered a separate opinion concurring in part and in the judgment of the lead opinion.

RALPH B. GUY, JR., Circuit Judge. This case presents two questions. First, may the police, armed with a warrant, search the digital contents of a cell phone for evidence about a fatal shooting when the warrant affidavit recounts (among other facts) that a "known" informant and "multiple" anonymous sources reported the names of two gunmen who "fired guns at the deceased" and the cell phone that is searched belongs to one of the alleged shooters? Second, we must decide whether evidence about a defendant's welfare benefits application is improper evidence of prior "bad acts" under Federal Rule of Evidence 404(b). In the end, we affirm the district court's judgment.

I.

A.

On April 18, 2020, police officers with the City of Kalamazoo were tasked with locating and arresting defendant Fharis Smith on an outstanding warrant. (R. 91, PgID 603, 601, 624-25, 627). At around 4:00 p.m., officers observed Smith drive a white vehicle to a gas station. (*Id.*, PgID 603, 667-68). A green sport-utility vehicle arrived and parked near Smith. (*Id.*, PgID 669). Smith walked to the passenger side of the green vehicle, opened the door, leaned into the vehicle for "[j]ust a few seconds," and then leaned back out of the vehicle and talked for a moment with the driver. (*Id.*, PgID 670). Although the undercover officer watching Smith from inside the store did not see drugs or money exchange hands, the officer suspected a drug transaction had occurred based upon her training and experience. (*Id.*, PgID 667, 671, 684). When other officers arrived to arrest Smith, they saw Smith alone in the white vehicle sitting in the driver's seat. (*Id.*, PgID 604). The officers suspected he was concealing or retrieving a firearm when they saw him reach down near his feet. (*Id.*, 604-05).

The officers arrested Smith and found $2,340 in Smith's pants pocket and a loaded, semi-automatic pistol between Smith's feet. (*Id.*, PgID 605, 610). In the vehicle, officers also found four rounds of ammunition, 2.61 grams of methamphetamine, a digital scale with white residue, and two cell phones. (*Id.*, PgID 629-30, 697; PgID 632-34, 636). During the arrest, one of the cell phones rang and Smith asked to answer it, but the officers did not permit him to do so. (*Id.*, PgID 615-16, 639).

That evening, a detective with Kalamazoo police sought a warrant to search Smith's two cell phones. (R. 44-2, PgID 146-47). In the supporting affidavit, the detective stated that he was

investigating a shooting that occurred on April 11, 2020, at a specific address in Kalamazoo where three victims were shot, one of whom was killed. (*Id.*, PgID 146).

The detective's affidavit further provided the following information: (1) "*a source who is known* but who has requested anonymity at this time" told Kalamazoo police "that both Dauntrell Walker and Fharis Smith were present at the scene of the shooting and that they both fired guns at the deceased"; (2) "*multiple sources advised*" Kalamazoo police that Walker and Smith "had been present at, and involved in, this shooting"; (3) "[i]nvestigators also received information that a person who had been shooting at [the deceased] may also have sustained *a gun-shot wound* during the incident"; (4) Walker and Smith "are known by [the detective] to be involved in weapon possession and violent acts within the City of Kalamazoo on a historical and an ongoing basis"; (5) when "Walker and Smith were arrested by Kalamazoo [police]" on April 18, 2020, "both were in possession of loaded firearms" and "Smith was also in possession of two mobile communication devices"; and (6) on Walker's lower back, there was "a fresh wound" that was "consistent with a *gunshot wound*." (*Id.*, PgID 147 (emphasis added)). The affidavit noted: "These facts corroborate the information given by the source who has requested anonymity." *Id.*

Having been an officer for fifteen years, the detective explained in the affidavit that he "knows through training and experience that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime and that they will document criminal activity through photographs, text messages, and other electronic data contained within and accessed by such devices." (*Id.*, PgID 146-47). The detective also stated that he has "employed facts obtained from such devices in the successful prosecution of violent criminals." *Id.*

Accordingly, the detective's affidavit stated that he believed a search of Smith's cell phones would yield evidence "about who was at the scene and how events unfolded" and could also "show whether Smith possessed a firearm or communicated with anyone about his involvement" in the shooting. (*Id.*, PgID 147). A state court judge found probable cause for the search and issued a search warrant. (*Id.*, PgID 145).

On one of Smith's phones, officers found text messages involving drug dealing activity. (R. 92, PgID 732-36, 832-40). In one message exchange on the day of Smith's arrest, Smith and another individual arranged to meet that day at a gas station. The other individual stated, "[I] will be there in about 10 to 15 minutes . . . driving a green truck and . . . need $100 worth." The individual also sent messages with travel updates.

Smith moved to suppress the text messages on the basis that the search warrant was issued without probable cause. After oral argument, Smith's motion was denied because, as the district court explained, "the warrant was lawfully issued" by the state court judge and, even if it was not, the officers could rely on the warrant in good faith under *United States v. Leon*, 468 U.S. 897 (1984). At Smith's trial for drug and firearm convictions, the messages were admitted into evidence.

B.

At trial, Smith sought to preclude testimony from a welfare benefits specialist with the Michigan Department of Health and Human Services. The government proffered that it planned to call the specialist to introduce into evidence a welfare benefits application Smith submitted roughly three months before he was arrested—claiming that "he was unemployed, had no assets, [and had] no money in the bank." (R. 91, PgID 505, 691). The government also explained that

the specialist would testify that Smith never reported a change in his circumstances, even though he was under a continuing obligation to do so under the terms of the application. *Id*.

Before the specialist testified, Smith "objected on equal protection grounds" and also argued that the testimony is "irrelevant." (*Id.*, PgID 505, 689-91). The government responded that the testimony supports the inference that the $2,340 found in Smith's pocket when he was arrested was not from lawful employment. (*Id.*, PgID 505-06, 691-92). The district court agreed and overruled Smith's objection, reasoning that the specialist's testimony "is relevant to the issue of the source of the money." (*Id.*, PgID 506-507, 692). Consistent with the government's proffer, the specialist testified at trial and Smith's welfare application was admitted into evidence without further objection from Smith.

The jury found Smith guilty of the three crimes charged in the indictment: (1) felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1) and 924(a)(2); (2) possession with intent to distribute methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(C); and (3) possession of a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c)(1)(A)(i). The district court sentenced Smith to a total of 138 months in prison and three years of supervised release.

This appeal followed.

II.

Cell Phone Search. Before the government may search a cell phone, "a warrant is generally required . . ., even when a cell phone is seized incident to arrest." *Riley v. California*, 573 U.S. 373, 401 (2014). "In the absence of a warrant, [the] search is reasonable only if it falls within a specific exception to the warrant requirement." *Id.* at 382; *see also id.* at 391, 401-02 (identifying "exigent circumstances" as an exception that could apply). Here, the government does not contest that a search warrant was required.

A valid warrant under the Fourth Amendment "require[s] only three things": (1) it must be issued by a "neutral, disinterested" magistrate or judge; (2) "those seeking the warrant must demonstrate to the magistrate [or judge] their probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction' for a particular offense"; and (3) the warrant "must particularly describe the 'things to be seized,' as well as the place to be searched." *Dalia v. United States*, 441 U.S. 238, 255 (1979) (cleaned up). It is only the probable-cause requirement that Smith contends is not satisfied here.

There is probable cause for a search when "the totality of the circumstances" presented in a warrant affidavit would lead a "person of reasonable caution" to believe there is a "fair probability" that "contraband or evidence of a crime" will be found in a particular place. *Florida v. Harris*, 568 U.S. 237, 243-44 (2013) (cleaned up); *see also Illinois v. Gates*, 462 U.S. 213, 238 (1983). In other words, there must be a probable cause "nexus between the place to be searched and the evidence sought." *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (en banc) (citation omitted); *see also Wyoming v. Houghton*, 526 U.S. 295, 302 (1999); *Warden v. Hayden*, 387 U.S. 294, 307 (1967).

The probable cause inquiry requires a "flexible, all-things-considered approach"—"turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Harris*, 568 U.S. at 243 (citation omitted). It is a "practical, nontechnical" question based on "common-sense conclusions about human behavior." *Gates*, 462 U.S. at 230-31 (citations omitted). "Probable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)).

When we review the denial of a motion to suppress evidence, we "must consider the evidence in the light most favorable to the government." *United States v. Erwin*, 155 F.3d 818,

822 (6th Cir. 1998) (en banc); *accord United States v. Winters*, 782 F.3d 289, 295 (6th Cir. 2015). Our duty as "a reviewing court is simply to ensure that the [issuing judge] had a 'substantial basis for concluding' that probable cause existed." *Gates*, 462 U.S. at 238-39 (cleaned up). The Supreme Court has "emphasized that courts should pay 'great deference' to [the issuing] judge's determination of probable cause," in contrast to probable cause determinations in "the warrantless searches and seizures . . . considered in *Ornelas v. United States*, 517 U.S. 690 (1996)." *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1169 (2017) (quoting *Gates*, 462 U.S. at 236).

Because the state judge found probable cause to issue a search warrant, we "do not write on a blank slate" and we are "not permitted to attempt a de novo review of probable cause." *United States v. Christian*, 925 F.3d 305, 311-12 (6th Cir. 2019) (en banc) (cleaned up) (quoting *United States v. Tagg*, 886 F.3d 579, 586 (6th Cir. 2018)). Instead, we may "overturn [the issuing judge's] decision only 'if the [judge] arbitrarily exercised his or her authority.'" *Id.* (quoting *United States v. Brown*, 732 F.3d 569, 573 (6th Cir. 2013)).

A.

In arguing that the warrant affidavit did not show probable cause to search his cell phones for evidence related to the April 11 shooting, Smith's contention is twofold: The affidavit does not contain sufficient information corroborating the statements from the known informant and the multiple anonymous informants, and the affidavit does not provide a nexus between his cell phones and the shooting. (Appellant Br. 24-26).

Corroboration. As for the corroboration required, "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report," but the Supreme Court has instructed that these considerations are not "entirely separate and independent requirements to be rigidly exacted in every case." *Gates*, 462 U.S. at 230. Rather, "a deficiency

in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Id.* at 233; *see also United States v. Hines*, 885 F.3d 919, 925 (6th Cir. 2018); *United States v. Miller*, 314 F.3d 265, 268 (6th Cir. 2002). Probable cause indeed can be founded on informants' tips of "many shapes and sizes from many different types of persons." *Gates*, 462 U.S. at 232.

Here, the affidavit recounted information from a "known" (albeit unnamed) informant, as well as other anonymous informants. "[T]here is no requirement that an informant be named either in the affidavit or the search warrant." *United States v. Jackson*, 470 F.3d 299, 308 (6th Cir. 2006). "A person known to the affiant officer, even though not named in the affidavit, is not 'an anonymous informant' in the sense referred to in cases where the identity of the informant is known to no one." *United States v. May*, 399 F.3d 817, 825 (6th Cir. 2005). Thus, in this case, "the statements of [the one] informant, whose identity was known to the police and who would be subject to prosecution for making a false report, are thus entitled to far greater weight than those of an anonymous source." *United States v. Dyer*, 580 F.3d 386, 391 (6th Cir. 2009) (quoting *May*, 580 F.3d at 824-25).

This court's en banc decision in *Allen* also made clear that "police need not always independently corroborate a [confidential informant]'s information." *United States v. Smith*, 510 F.3d 641, 652-53 (6th Cir. 2007) (citing *United States v. Allen*, 211 F.3d 970, 972, 974 (6th Cir. 2000) (en banc)); *see, e.g.*, *Brown*, 732 F.3d at 574; *United States v. McCraven*, 401 F.3d 693, 698 (6th Cir. 2005). "So long as an issuing judge is 'informed of some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible, or his information reliable,' an affidavit is sufficient to support a finding of probable

cause." *May*, 399 F.3d at 824 (quoting *Aguilar v. Texas*, 378 U.S. 108, 114 (1964)); *see also Gates*, 462 U.S. at 244-45.

"The additional evidence substantiating an informant's reliability . . . may be any set of facts that support the accuracy of the information supplied by the informant," including an officer's first-hand observations or investigation, other confidential informants providing the same information, or the informant's reliability in prior investigations. *May*, 399 F.3d at 824 (discussing *Jones v. United States*, 362 U.S. 257, 271-72 (1960)). And while "not dispositive, a defendant's criminal history is also relevant to the probable cause inquiry" and serves as "other indica of reliability for the informant's tip." *Dyer*, 580 F.3d at 393 (citations omitted); *see also Christian*, 925 F.3d at 311; *Hines*, 885 F.3d at 926.

In this case, the government argues that three forms of information in the warrant affidavit corroborate the known informant's statement (also in the affidavit) that Smith and Walker "were present at the scene of the shooting and that they both fired guns at the deceased." (R. 44-2, PgID 147). First, "multiple sources" reported the same information to Kalamazoo police officers, *id.*, indicating that the tip is likely accurate. *Jones*, 362 U.S. at 269, 271; *Christian*, 925 F.3d at 311; *United States v. Crawford*, 943 F.3d 297, 307 (6th Cir. 2019); *United States v. Artez*, 389 F.3d 1106, 1114 (10th Cir. 2004) ("A tip from a second informant can also help corroborate information from a confidential informant.").

Second, investigators received information that one of the alleged shooters may have sustained a gunshot wound. Later police learned that information was likely credible because, when police arrested Walker seven days after the shooting occurred, police *personally* observed a "fresh" gunshot wound on Walker's lower back. (R. 44-2, PgID 147). This was also independent police corroboration. And when "an informant is right about some things, he is more probably

right about other facts, including the claim regarding [the suspects'] illegal activity." *Gates*, 462 U.S. at 244 (citation omitted); *accord Hines*, 885 F.3d at 925.

Third, both Smith and Walker possessed loaded guns when they were arrested, and the detective *personally* knew both suspects "to be involved in weapon possession and violent acts within the City of Kalamazoo on a historical and an ongoing basis." (R. 44-2, PgID 147). These facts "made the charge against [Smith and Walker] much less subject to scepticism than would be such a charge against one without such a history." *Jones*, 362 U.S. at 271; *see also Christian*, 925 F.3d at 311; *May*, 399 F.3d at 824.

Put all the circumstances together and it would no doubt seem that "'corroboration through [these] other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay'" of the informants' information. *Gates*, 462 U.S. at 244-45 (cleaned up) (quoting *Jones*, 362 U.S. at 269, 271).

Smith's argument to the contrary is thin. He merely criticizes the fact that the affidavit does not name the confidential informant or state that the individual personally witnessed the shooting. (Appellant Br. 25). But "we have not required informants personally to observe contraband or criminal activity before a court may find probable cause based on an informant's statement," *Crawford*, 943 F.3d at 308, and, as stated, police are not required to name the informant.

More importantly, however, the "totality-of-the-circumstances test 'precludes [Smith's] sort of divide-and-conquer analysis.'" *Wesby*, 138 S. Ct. at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)). The fact is "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation." *Id.*

Our en banc decisions echo that admonition: An affidavit must be judged "holistically [on] what the affidavit does show, instead of focusing on what the affidavit does not contain, or the flaws of each individual component of the affidavit." *Christian*, 925 F.3d at 312; *see also Allen*, 211 F.3d at 975 (instructing that the "affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added"). We do not engage in "'hypertechnical, . . . line-by-line scrutiny,' of the affidavit" because that practice has been "explicitly forbidden by the Supreme Court." *Christian*, 925 F.3d at 311 (cleaned up) (citing *Gates*, 462 U.S. at 235-36, 245 & n.14). And an affidavit is "not required to use magic words, nor does what is obvious in context need to be spelled out." *Allen*, 211 F.3d at 975; *accord Christian*, 925 F.3d at 310.

Nexus. It is now long-settled that officers may "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu*, 534 U.S. at 273 (citation omitted). "The issuing judge or magistrate 'may give considerable weight to the conclusion of experienced law enforcement officers regarding *where evidence of a crime is likely to be found* and is entitled to draw reasonable inferences about *where evidence is likely to be kept*.'" *United States v. Rodriguez-Suazo*, 346 F.3d 637, 644 (6th Cir. 2003) (emphasis added) (quoting *United States v. Caicedo*, 85 F.3d 1184, 1192 (6th Cir. 1996)). In turn, we "must give 'due weight' to factual inferences drawn by resident judges and local law enforcement officers." *Arvizu*, 534 U.S. at 273-74 (citation omitted)).

In the context of a warrant issued to search a residence, this court has held that the issuing judge "may infer a nexus between a suspect and his residence, depending upon 'the type of crime being investigated, the nature of things to be seized, the extent of an opportunity to conceal the

evidence elsewhere and the normal inferences that may be drawn as to likely hiding places.'" *United States v. Williams*, 544 F.3d 683, 687 (6th Cir. 2008) (quoting *United States v. Savoca*, 761 F.2d 292, 298 (6th Cir. 1985)).

Sometimes it is only the training and experience of an officer or common sense that has supplied the necessary nexus. For instance, we have recognized that "in the case of drug dealers, evidence is likely to be found where the dealers live." *United States v. Sumlin*, 956 F.3d 879, 886 (6th Cir. 2020) (quoting *United States v. Jones*, 159 F.3d 969, 975 (6th Cir. 1998)). Thus, a judge "may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking," *Williams*, 544 F.3d at 687 (collecting cases), and that is true even "with *no facts* indicating that the defendant was dealing drugs from his residence," *Sumlin*, 956 F.3d at 886-87 (quoting *United States v. McCoy*, 905 F.3d 409, 418 (6th Cir. 2018)) (collecting cases); *see also United States v. Gunter*, 551 F.3d 472, 481 (6th Cir. 2009).

And we have accepted that "individuals who own guns keep them at their homes." *Peffer v. Stephens*, 880 F.3d 256, 271 (6th Cir. 2018) (quoting *United States v. Smith*, 182 F.3d 473, 480 (6th Cir. 1999)). Thus, "a suspect's use of a gun in the commission of a crime is sufficient to find a nexus between the gun that was used and the suspect's residence." *Id.* (collecting cases); *see also Williams*, 544 F.3d at 688 (collecting cases).

We have also declared that "child pornography crimes are 'generally carried out in the secrecy of the home.'" *United States v. Kinison*, 710 F.3d 678, 684 (6th Cir. 2013) (quoting *United States v. Paull*, 551 F.3d 516, 522 (6th Cir. 2009)) (collecting cases); *see, e.g.*, *Peffer*, 880 F.3d at 271 (collecting cases). Thus, a nexus may be inferred between child pornography crimes and a suspect's home, "even though the affidavit [does] not contain direct evidence the child

pornography was accessed at home." *Id.* (citing *United States v. Terry*, 522 F.3d 645, 647 (6th Cir. 2008)).

Do these principles support a nexus between the shooting and Smith's cell phones? On the one hand, Smith suggests that we should jettison any inferred nexus because he maintains that a nexus exists only if an affidavit affirmatively states that a suspect used a cell phone "at the shooting." (Appellant Br. 25-26). The premise of his argument is that "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Riley*, 573 U.S. at 398; (Appellant Br. 18, 20-21).

This court has assessed a cell phone warrant in only a few cases (none of which are mentioned by the parties). *Bass* had no difficulty concluding that a nexus existed between the criminal activity and the defendant's cell phone because the affidavit stated that the defendant "and his co-conspirators frequently used cell phones to communicate" in perpetrating identity theft, and it noted that the defendant was using the cell phone in question "when officers seized it incident to his arrest." *United States v. Bass*, 785 F.3d at 1043, 1046, 1049 (6th Cir. 2015). *Sims* explained that probable cause exists when "the phone itself is being used in connection with an offense or commonly used by someone committing the offense," and that standard was easily satisfied given that the affidavit stated that in one month the defendant had used his phone to make "over 200 calls . . . to and from others known to be involved in the cocaine organization." *United States v. Sims*, 508 F. App'x 452, 460 (6th Cir. 2012). And *Merriweather* was decided on *Leon* good-faith grounds. *United States v. Merriweather*, 728 F. App'x 498, 505 (6th Cir. 2018). There, the affidavit stated that: "a criminal informant (CI) had twice completed a controlled purchase of oxymorphone from [the defendant]"; "both controlled purchases were organized through cell phone communication (*between the CI and [defendant]'s co-defendant*, Lloyd Montgomery)"—

not cell phone communication with the defendant; the cell phone at issue was found in the defendant's car, along with "what appeared to be four oxymorphone pills and cocaine rocks"; and "the affiant stated that in his training and experience, drug dealers use cell phones to coordinate with conspirators, customers, and suppliers." *Id*. (emphasis added). Acknowledging that these facts did "not directly implicate [*defendant*]'s cell phone," *Merriweather* nevertheless concluded that "an officer could reasonably infer" that defendant's phone was used in criminal activity because "it seem[ed] obvious there is a good chance [defendant] at times used his cell phone to carry out the goals of this distribution conspiracy." *Id.* While these cases suggest what is sufficient to establish a nexus to a cell phone, they in no way set the floor for what is required.

On the other hand, the government contends that a nexus to a cell phone may be inferred when the crime involves the "concerted activity" of at least two suspects, *and* a 15-year officer states in the warrant affidavit that he "knows through training and experience that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime." (R. 44-2, PgID 147); (Appellee Br. 15-16).

As a practical matter, the Supreme Court has observed that cell phones are "a pervasive and insistent part of daily life" and that "[c]ell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals." *Riley*, 573 U.S. at 385, 401. *Riley* was careful to emphasize that its "holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 401.

The police sought and obtained a warrant in this case. Given that Smith and Walker "both fired guns at the deceased," it seems a judge could reasonably infer that there is a fair probability

that Smith and Walker used their cell phones to communicate, at some time, about some aspect of the shooting because that is how people in our modern society generally communicate when they do anything together. (R. 44-2, PgID 147). After all, probable cause "does not deal with hard certainties"; it "deal[s] with probabilities" based on "common-sense conclusions about human behavior." *Gates*, 462 U.S. at 231 (citations omitted); *see also Messerschmidt v. Millender*, 565 U.S. 535, 552 n.7 (2012); *Rodriguez-Suazo*, 346 F.3d at 644.

But we elect to not decide whether the state judge arbitrarily found probable cause to issue the warrant. *See, e.g.*, *Leon*, 468 U.S. at 925; *United States v. Baker*, 976 F.3d 636, 648 (6th Cir. 2020). With the above probable cause principles as a backdrop, we conclude this case qualifies for the good-faith exception under *Leon.*

B.

Good-faith Exception. The district court was correct to deny Smith's suppression motion because the officers searched Smith's phones "in objectively reasonable reliance" on the search warrant. *Leon*, 468 U.S. at 922. But Smith failed to challenge this conclusion in his initial brief on appeal. "Time, time, and time again, we have reminded litigants that we will treat an 'argument' as 'forfeited when it was not raised in the opening brief.'" *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (cleaned up); *see also United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006). Even so, Smith's belated arguments in his reply brief are unavailing.

Under the "judicially created" "exclusionary rule," "improperly obtained evidence" is inadmissible at trial. *Herring v. United States*, 555 U.S. 135, 139 (2009); *see also Davis v. United States*, 564 U.S. 229, 238 (2011). "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges." *Davis*, 564 U.S. at 246 (quoting *Leon*, 468 U.S. at 916). But the exclusionary rule is "applicable only . . . where its deterrence benefits outweigh its

substantial social costs." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (cleaned up); *accord Utah v. Strieff*, 579 U.S. 232, 237 (2016). Hence, "exclusion 'has always been [the] last resort, not [the] first impulse.'" *Herring*, 555 U.S. at 140 (quoting *Hudson*, 547 U.S. at 591).

As relevant here, the Supreme Court has also created the so-called "good-faith exception" to the exclusionary rule. *Leon*, 468 U.S. at 923-24; *accord Davis*, 564 U.S. at 240, 248. Under the exception, "the exclusionary rule does not apply when the police conduct a search in 'objectively reasonable reliance' on a warrant later held invalid," or when the police "conduct involves only simple, 'isolated' negligence." *Davis*, 564 U.S. at 238-39 (citations omitted). A court's "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n.23). "These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, but not his subjective intent." *Id.* at 145-46 (cleaned up).

Smith argues the good-faith exception does not apply due to the same affidavit deficiencies that he contends invalidate the warrant. (Reply Br. 10). But even if a "Fourth Amendment violation occurred," the "exclusion of evidence does not automatically follow." *Davis*, 564 U.S. at 244; *see also Herring*, 555 U.S at 137. Far more is required to extinguish the good-faith exception. *Christian*, 925 F.3d at 313; *Carpenter*, 360 F.3d at 595-96. *Leon* identified four egregious situations in which the good-faith exception would not apply. 468 U.S. at 923; *Hines*, 885 F.3d at 926-27. But only one situation is remotely relevant here: The warrant must be "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Messerschmidt*, 565 U.S. at 547 (quoting *Leon*, 468 U.S. at 923). This

describes a "bare bones," "conclusory affidavit," which "states only the affiant's belief that probable cause existed." *Christian*, 925 F.3d at 313 (citation omitted).

The bar for establishing that standard "is a high one, and it should be." *Messerschmidt*, 565 U.S. at 547. For the cost of exclusion to "pay its way," *Davis*, 564 U.S. at 238 (citation omitted), the police conduct must involve "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights," or there must be evidence of "'recurring or systemic negligence' on the part of law enforcement." *Id.* at 238, 240 (quoting *Herring*, 555 U.S. at 144).

No police conduct here even begins to approximate those labels, not least because there is no binding precedent dictating that this search warrant violated the Fourth Amendment. *See id.* at 240, 249. Nor can it be said that the police submitted a "conclusory," "bare bones" affidavit devoid of *any* factual allegations for probable cause or "*some* connection, regardless of how remote," between the illegal activity and the place searched. *Christian*, 925 F.3d at 312-13 (citations omitted). The necessary connection may even be based on "reasonable inferences" that would otherwise be insufficient for "probable cause in the first place." *United States v. White*, 874 F.3d 490, 500 (6th Cir. 2017). Even though the affidavit "does not directly implicate [Smith]'s cell phone[s]" in the April 11 shooting, the connection may reasonably be inferred based on the affiant officer's "training and experience," "consistent with common sense." *Merriweather*, 728 F. App'x at 505. Faced with the facts that Smith and Walker "both fired guns at the deceased" (suggesting it was a coordinated attack), Smith possessed a loaded gun and two cell phones when he was arrested, and the affiant officer attested that in his "training and experience" individuals involved in criminal activity regularly use their cell phones to plan or conceal crime, an officer could reasonably infer that Smith's cell phones contained communications with Walker regarding the April 11 shooting. (R. 44-2, PgID 147). In an "ordinary case" like this, "'an officer cannot be

expected to question the [issuing judge]'s probable-cause determination' because 'it is the [judge]'s responsibility to determine whether the officer's allegations establish probable cause.'" *Messerschmidt*, 565 U.S. at 547 (quoting *Leon*, 468 U.S. at 921); *see also Strieff*, 579 U.S. at 240.

Because the warrant affidavit is *not* "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," the search here comes within the good-faith exception and is not properly subject to the exclusionary rule. *Messerschmidt*, 565 U.S. at 547 (quoting *Leon*, 468 U.S. at 923).

III.

Evidentiary Ruling. Smith is also not entitled to relief for the ruling at trial allowing evidence about his Michigan welfare benefits application. Smith stakes his claim on Federal Rule of Evidence 404(b).

Smith's claim is subject to plain-error review because he did not properly preserve it before the district court. *See* Fed. R. Evid. 103(a), (e); Fed. R. Crim. P. 51(b); *United States v. Montgomery*, 998 F.3d 693, 698 (6th Cir. 2021). Recall that Smith objected to the evidence of his welfare application as "irrelevant" and also improper on "equal protection grounds."

He never asserted "the specific ground" that he now cites. *See* Fed. R. Evid. 103(a)(1)(B). Nor can we say that Smith's argument "was apparent from the context," *id.*, because he also failed to argue that the "probative value of the evidence is substantially outweighed by its potential prejudicial effect," and the government never argued the evidence was admissible under Rule 404(b). *See United States v. Haywood*, 280 F.3d 715, 720, 725 (6th Cir. 2002) (quoting *United States v. Johnson*, 27 F.3d 1186, 1191 (6th Cir. 1994)). Thus, Smith's reliance on *Haywood* is misplaced. With too many missing pieces, Smith's "objection is not sufficiently specific" to alert

the district court that it was called upon to apply the Rule 404(b) framework, and so we review Smith's Rule 404(b) argument for plain error. *United States v. Blood*, 435 F.3d 612, 625 (6th Cir. 2006); *see also Barner v. Pilkington N. Am., Inc.*, 399 F.3d 745, 749 (6th Cir. 2005); *United States v. Cox*, 957 F.2d 264, 267 (6th Cir. 1992).

Rule 404(b) states: "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Evidence is admissible under the rule if: (1) "there is sufficient evidence that the other act in question actually occurred"; (2) "the evidence of the other act is probative of a material issue other than character"; and (3) "the probative value of the evidence is substantially outweighed by its potential prejudicial effect." *United States v. Jackson*, 918 F.3d 467, 483 (6th Cir. 2019) (quoting *United States v. Jenkins*, 345 F.3d 928, 937 (6th Cir. 2003)).

Smith contends that Rule 404(b) precludes the government's evidence that: three months before Smith's arrest he applied for welfare benefits; Smith's application stated that he was homeless, had no income, and had less than $100 in his bank account; and he did not later report, as required, any changes to his employment or financial status. (R. 91, PgID 505, 691; R. 92, PgID 712, 715, 719). But that argument is hollow.

All the elements for admissibility are met here. First, Smith does not contend there was insufficient evidence that he applied for welfare benefits and never updated his application. It is also not clear what Smith views as the "bad act" in this scenario. *Old Chief v. United States*, 519 U.S. 172, 180-82 (1997). Second, the evidence was probative in bolstering the inference that the $2,340 found in Smith's pocket when he was arrested was drug distribution proceeds and not from lawful employment.

As to the third element, it is telling that Smith has again made no attempt to argue that the potential prejudicial effect *substantially outweighs* the probative value of the evidence. *Jackson*, 918 F.3d at 483; Fed. R. Evid. 403. Any argument would be futile in this case, especially given that "we must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States v. Chambers*, 441 F.3d 438, 456 (6th Cir. 2006) (citation omitted). And "the prejudice to be weighed is the *unfair* prejudice caused by admission of the evidence. Evidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial pursuant to Rule 403." *Id.* (citation omitted); *see also United States v. LaVictor*, 848 F.3d 428, 447-48 (6th Cir. 2017); *United States v. Sims*, 708 F.3d 832, 836 (6th Cir. 2013).

Smith has not shown that the district court erred, much less committed plain error. *See Greer v. United States*, 141 S. Ct. 2090, 2096-97 (2021).

* * *

The judgment is AFFIRMED.

CLAY, Circuit Judge, concurring in part and dissenting in part. I concur in the holding of the lead opinion that the district court did not err in admitting evidence of the welfare application under Rule 404(b) of the Federal Rules of Evidence. But because I agree with Judge Moore that the affidavit in support of the search warrant for Defendant's cell phone failed to make the requisite showing of probable cause to support the search, the majority's view is that the search was illegal. And because I believe that the good faith exception does not save the unlawful search, I dissent from the remainder of the lead opinion.

BACKGROUND

Factual Background

On April 20, 2020, a criminal complaint was filed against Defendant Smith, alleging a violation of the felon in possession of a firearm statute pursuant to 18 U.S.C. § 922(g)(1). The affiant, Theodore Westra, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, reviewed the facts said to support a probable cause determination. According to Westra's testimony provided at a preliminary hearing, Smith came to the attention of the Kalamazoo Department of Public Safety ("KDPS") during an investigation into an April 11, 2020 shooting, in which three victims were shot, one of whom was killed. For reasons not clear on the record, Smith became a person of interest in the shooting investigation, and a criminal history search revealed an outstanding warrant for his arrest for a misdemeanor offense of malicious destruction of property. KDPS "put out a be-on-the-lookout to all patrol officers" to locate and arrest Smith on this unrelated misdemeanor warrant as a part of their investigation into the April 11 shooting. (Tr. of Prelim. Hr'g, R. 36, PageID ## 70–71).

On April 17, 2020, officers followed Smith from Kalamazoo to a Battle Creek rental car center, where Smith rented a white GMC Yukon XL. On April 18, in Kalamazoo, KDPS agents

continued surveillance of Smith and saw him drive a white Yukon XL into a gas station parking lot. After Smith's arrival, a green SUV parked near the Yukon. Officers observed Smith get out of his vehicle, walk to, and open the passenger side door of the green SUV, and lean in toward where the driver was seated before leaning back out of the vehicle and shutting the door. "[O]fficers concluded that this contact was consistent with a drug transaction." (Gov't Trial Br., R. 43, PageID # 117).

At this point, KDPS Sergeant Justin Wolbrink and Officer Brett Bylsma drove into the gas station and positioned their patrol vehicles in front of the Yukon; another KDPS officer parked behind Smith's car. Officer Bylsma observed Smith "bend forward and reach his right arm down toward the floorboard area of the car, near his feet." (Compl., R. 1, PageID # 3). Sergeant Wolbrink ordered Smith to put his hands up, Smith complied, and Officer Bylsma took Smith into custody. As he did so, Officer Bylsma saw "the grip of a black pistol between [Smith's] feet." (*Id.*). The weapon, a semi-automatic pistol, was loaded with eleven rounds of ammunition, with one round in the chamber. A records check indicated that the firearm was reported stolen to KDPS on January 6, 2020.

During a search incident to arrest, officers found two cell phones; $2,340 in Smith's pants pocket; 2.61 grams of suspected crystal methamphetamine in the pocket of the driver's side door; a functioning digital scale with white residue, which later tested positive for methamphetamine; and four additional rounds of ammunition found hidden inside a cigarette box in the SUV's console. (Tr. of Prelim. Hr'g, R. 36m PageID # 75 ("This, in my training and experience, would lead me to believe that Mr. Smith is a distributor[.]")).

Later that day, on April 18, 2020, a warrant was issued authorizing a search of Smith's cell phones, though officers were able to search only one of the phones. The affidavit in support of the

warrant seeking information relating to the April 11, 2020 shooting, read as follows: "Any content or data which may establish elements of the crimes of homicide, assault with a dangerous weapon, or weapon possession." (Aff., R. 44-2, PageID # 146). The affidavit continues:

> Following the initial investigation, Kalamazoo police obtained information *from a source who is known but who has requested anonymity* at this time. This source advised that both Dauntrell Walker and [Defendant] Fharis Smith were present at the scene of the shooting and that they both fired guns at the deceased, Londrell Cook.
>
> During the initial stages of the investigation, *multiple sources* advised Kalamazoo Police officers that Dauntrell Walker and Fharis Smith had been present at, and involved in, this shooting.
>
> Investigators also received information that a person who had been shooting at Cook may also have sustained a gun-shot wound during the incident.
>
> Dauntrell Walker and Fharis Smith are known by your affiant to be involved in weapon possession and violent acts within the City of Kalamazoo on a historical and an ongoing basis.
>
> On 18 April 2020, Walker and Smith were arrested by Kalamazoo Public Safety officers. At the time of their arrests, both were in possession of loaded firearms. Smith was also in possession of two mobile [phones]. . . . Following his arrest, a fresh wound was located on Walker's lower back. Walker claimed that the wound was a stab wound [but the affiant believed it was] consistent with a gunshot wound[.]
>
> These facts corroborate the information given by the source who has requested anonymity. . . . By searching the contents of Fharis Smith's mobile devices, affiant believes . . . there could be information on the phone . . . that would show whether Smith possessed a firearm or communicated with anyone about his involvement in this matter.

(*Id.* at PageID # 147 (emphases added)).

Procedural History

On May 19, 2020, a grand jury indicted Smith as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), § 924(a)(2); possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); and possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Defendant filed a motion to suppress the data obtained from his cell phone, which the district court denied. It held that the warrant was lawfully issued and backed by probable cause. The court held that even if the

affidavit was deficient, the officers could have nevertheless relied on the warrant in good faith. The case proceeded to a jury trial, and the jury returned a verdict of guilty.[1] Smith's timely appeal followed.

DISCUSSION

Standard of Review

"Federal constitutional law applies to a state search warrant that is challenged in federal court." *United States v. Helton*, 35 F.4th 511, 517 (6th Cir. 2022) (citing another source). When reviewing a district court's denial of a motion to suppress, this Court "consider[s] the evidence in the light most favorable to the government." *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir. 1998) (en banc). This Court examines the district court's legal conclusions *de novo* but defers to the district court's factual findings unless they are clearly erroneous. *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004).

Analysis

The Fourth Amendment prescribes that "no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. To show that probable cause supports a search warrant, the officer "must submit an affidavit that 'indicate[s] a fair probability that evidence of a crime will be located on the premises [or, in this case, cell phone] of the proposed search.'" *United States v. Hines*, 885 F.3d 919, 923 (6th Cir. 2018) (quoting another source).

[1] During the trial, the government called an eligibility specialist from the Michigan Department of Health and Human Services to testify about Smith's source of income. The testimony indicated that in January 2020, Smith applied for and was approved for $194 monthly welfare assistance, but his eligibility was contingent on an obligation to report all changes to his financial situation within ten days. The government sought to introduce this evidence to imply that the money officers had seized from Smith at the time of his arrest ($2,340) was ill-gotten, such as the proceeds from an illegal drug sale, since Smith never reported receipt of this sum to the welfare agency.

Defendant makes two arguments on appeal. First, he asks this Court to reverse the district court's denial of the motion to suppress because the affidavit lacked probable cause and failed to set forth corroborative efforts to assure the reliability of the unnamed informants' tips. Second, Smith argues that the district court erred in permitting the prosecution to have a witness testify concerning Defendant's application for welfare benefits, in violation of Federal Rule of Evidence 404(b). Although the lead opinion correctly finds no error in the district court's admission of the testimony on Smith's welfare application, the evidence obtained from Smith's cell phone should have been suppressed because the warrant affidavit failed to establish the existence of probable cause and is not saved by the good-faith exception.

A. The Finding of Probable Cause

First of all, a proper analysis of the affidavit does not lead to a finding of probable cause. When, as in this case, a search warrant affidavit relies on information provided by unnamed or anonymous individuals, this Court considers the "totality of the circumstances" test, set forth by the Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 234 (1983), to determine whether "the magistrate had a substantial basis for concluding probable cause existed," *United States v. Howard*, 632 F. App'x 795, 799 (6th Cir. 2015). When confronted with hearsay information,

> [t]he 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, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, 462 U.S. at 238. Accordingly, "when a warrant is issued based on information provided by an informant, our review under the totality of the circumstances must consider the informant's 'veracity, reliability, and basis of knowledge' to determine 'whether an affidavit is sufficient to support a finding of probable cause." *United States v. Neal*, 577 F. App'x 434, 440 (6th Cir. 2014)

(citing another source). These indicia of the informant's credibility provide a general framework for assessing whether an informant's tip creates probable cause, *United States v. Helton*, 314 F.3d 812, 818–20 (6th Cir. 2003), but they should not be viewed "as entirely separate and independent requirements to be rigidly exacted in every case." *Gates*, 462 U.S. at 230, 233 (internal quotation marks omitted).

"[R]egardless [of] how an informant fares in this framework, 'corroboration through other sources of information' can provide 'a substantial basis for crediting' an informant's tip." *Howard*, 632 F. App'x at 799 (quoting *Gates*, 462 U.S. at 233–34); *cf. United States v. Williams*, 544 F.3d 683, 690 (6th Cir. 2008) ("[N]amed informants, unlike confidential informants, require little corroboration.").

In this case, the relevant language from the affidavit is as follows: "Kalamazoo police obtained information from a source who is known," and "multiple sources advised Kalamazoo Police Officers that . . . Smith had been present at, and involved in [the April 11, 2020] shooting." (Aff., R. 44-2, PageID # 147). A review of the totality of the circumstances establishes that the affidavit fails to establish the veracity, reliability, and basis of knowledge of the unnamed and anonymous tips. *Helton*, 35 F.4th at 519.

To start, the affidavit in the instant case fails to show the veracity of the anonymous tipster's statements. *United States v. Smith*, 182 F.3d 473, 477 (6th Cir. 1999) (quoting *Gates*, 462 U.S. at 229) ("'Veracity' involves the credibility of the informant[.]"). It fails to say "how[] the source was known to law enforcement or that the source's identity was provided to the judge." *Helton*, 35 F.4th at 519. Moreover, nothing in the affidavit suggested the informant's past reliability or that the informant had personal knowledge that criminal activity by Smith was afoot. *See Smith*, 182 F.3d at 477 (explaining "reliability" involves assessing the dependability "of the

informant's report"). Our precedent fails to support an affiant's unsupported assertion that an informant was reliable, particularly where, as in this case, the informant's identity was not disclosed to the judge reviewing the warrant application:

> [W]here the affidavit does not aver facts showing the relationship between the affiant and the informant, or detail the affiant's knowledge regarding the informant providing prior reliable tips that relate to the same type of crimes as the current tip concerns, this Court has generally found that other indicia of reliability must be present to substantiate the informant's statements.

Neal, 577 F. App'x at 441 (citing another source). Even though the affidavit states the informant was "known," it makes no effort to establish that the informant has provided reliable information to the police in the past, which cuts against a finding of reliability. *Cf. United States v. May*, 399 F.3d 817, 823–24 (6th Cir. 2005) (finding informant to be "known" where source "ha[d] furnished information . . . for a period of six months and has worked with [the officer] in the investigation of th[e] matter").

Furthermore, the affidavit fails to set forth the informant's basis of knowledge, i.e., "the particular means by which an informant obtained his information." *Smith*, 182 F.3d at 477 (citing *Gates*, 462 U.S. at 228). Instead, the affidavit baldly asserts, "Dauntrell Walker and Fharis Smith had been present at, and involved in, this shooting." (Aff., R. 44-2, PageID # 147). This statement does nothing to establish the basis of knowledge of the informants, such as indicating that the source witnessed Smith shoot the gunshot victims. *Cf. United States v. Dyer*, 580 F.3d 386, 392 (6th Cir. 2009) ("Because the informant witnessed the illegal activity on the premises searched and was known to the officer writing the affidavit, there were sufficient indicia of reliability without substantial independent police corroboration."); *see also United States v. Parker*, 4 F. App'x 282, 286 (6th Cir. 2001) (Clay, J., dissenting) ("The affidavit . . . failed to indicate . . . that the informant had observed any evidence of illegal sales on the premises, or had

reason to believe that the illegal activity was continuing[.]"). The affidavit does not establish how the unknown informants came by the information in this case; the contention that "multiple sources" are alleged to have incriminated Smith in the shooting does not bolster the tips' believability given the anonymous nature of the sources and the absence of other indicia of reliability. *Cf. United States v. Woosley*, 361 F.3d 924, 927–28 (6th Cir. 2004) (finding affidavit sufficient where officer previously received information from other informants regarding drug activities at defendant's business location and other officers had previously received similar tips).

On balance, it appears that the affidavit lacked sufficient detail to establish probable cause even under the totality of the circumstances. But the absence of reliability, veracity, and basis of knowledge does not end the inquiry; an affidavit that fails to establish these three elements might nevertheless "support a finding of probable cause, under the totality of the circumstances, if it includes sufficient corroborating information." *Id.* at 927; *Howard*, 632 F. App'x at 804 (citing another source) ("What an informant and her tip lack in intrinsic indicia of credibility, however, police must make up for in corroboration."). The affidavit in the present case fails to establish corroboration of the information provided by the unnamed informants. The primary piece of purportedly corroborating evidence related not to Smith but to the other subject of the search warrant, Dauntrell Walker. The affidavit stated that the presence of "a fresh wound . . . located on Walker's lower back . . . . corroborate[s] the information given by the source who has requested anonymity." (Aff., R. 44-2, PageID # 147). Contrary to the lead opinion, it is not entirely clear how the presence of a wound on Walker's back connects Smith to the homicide.

It also strains believability to assert, as the lead opinion does, that the presence of a firearm in Smith's vehicle corroborates the assertions by the unnamed and anonymous sources. If that assertion were to be believed, anyone found with a firearm might be thought to have shot the

victims on April 11, 2020. The affidavit also states that Smith and Walker are "known . . . to be involved in weapon possession and violent acts [in Kalamazoo] on a historical and an ongoing basis." (Aff., R. 44-2, PageID # 147). One might ask, "Known by whom?" These general allusions to "involvement" in "weapon possession and violent acts" do not implicate Smith in the April 11 homicide. All said, this affidavit contains inadequate information that law enforcement undertook the necessary steps for independent corroboration, which dooms it under a probable cause assessment since other indicia of reliability are absent. *See Woosley*, 361 F.3d at 927 ("[A]n affidavit that supplies little information concerning an informant's reliability may support a finding of probable cause, under the totality of the circumstances, if it includes sufficient corroborating information."). For these reasons, there was not a substantial basis for concluding that probable cause existed because the circumstances indicate a lack of reliability, veracity, and basis of knowledge of the unnamed and anonymous tips, and the facts fall short of establishing any sufficient police corroboration.

B. Nexus

Second, to be valid, a search warrant application must show more than just that "the owner of the property is suspected of [a] crime;" it must also instead establish that "there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978).

In this case, the thrust of the affiant's attempt to establish such a nexus was "that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime." (Aff., R. 44-2, PageID # 147). Without more, the information cannot establish a nexus between the thing to be searched (Smith's cell phone) and the evidence sought (involvement in a homicide). This finding is particularly apt since the only

evidence in the affidavit linking the homicide to Smith's cell phone was based on anonymous complaints and an unnamed source lacking indicia of dependability, without any adequate corroboration. *See United States v. Gunter*, 266 F. App'x 415, 419 (6th Cir. 2008) (quoting another source) ("When[] . . . the only evidence of a connection between illegal activity and the residence is unreliable, such as uncorroborated statements by a confidential informant, then a warrant may not issue allowing the search of the residence.").

Indeed, this Court has "never held . . . that a suspect's status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home." *United States v. Brown*, 828 F.3d 375, 383 (6th Cir. 2016) (quoting another source). It stands to reason that a suspect's apparent status as a drug dealer also would not give rise to a fair probability that he was involved in a homicide. *United States v. Griffith*, 867 F.3d 1265, 1274 (D.C. Cir. 2017) ("Because a cell phone, unlike drugs or other contraband, is not inherently illegal, there must be reason to believe that a phone may contain evidence of the crime.").

This case is unlike *United States v. Bass*, 785 F. 3d 1043, 1049 (6th Cir. 2015), where a nexus existed between the cell phone and allegations of identity theft because "the affidavit stated that Bass and his co-conspirators frequently used cell phones to communicate." Conversely, in this case, the affiant purportedly relied on nothing more than conjecture that whoever shot the victims on April 11 might have had a cellphone at the shooting, communicated via cellphone at the time, or took pictures on a phone that would place them on the scene. *Cf. United States v. Sims*, 508 F. App'x 452, 460 (6th Cir. 2012) (finding warrant backed by probable cause where affidavit set forth "many facts . . . that the phone was used in the drug conspiracy and that [defendant] was using it"). Accordingly, the affidavit fails to connect the item to be searched to the crime alleged,

so it cannot justify a search, and without a nexus, there is no probable cause. *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005).

C. The Good Faith Exception

Third, and finally, the good faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984) does not save the fruits of this otherwise illegal search. *United States v. Ronnie Bugger*, 529 F. App'x 482, 846 (6th Cir. 2013) ("The affidavit, which did not provide the 'substantial basis' necessary for a finding of probable cause, also fails to provide even a 'minimally sufficient nexus' that would justify application of the good-faith exception."); *see also United States v. Reed*, 993 F.3d 441, 455 (Clay, J., dissenting) ("[The good faith exception is not intended to have the untoward consequence of disincentivizing courts from enforcing the probable cause requirement[.]"). While there is no evidence that the affiant included false information or that the magistrate failed "to act in a neutral and detached fashion," official reliance on the warrant to support the search of Smith's cell phone was not "objectively reasonable." *United States v. Hython*, 443 F.3d 480, 484 (6th Cir. 2006); *see also United States v. McPhearson*, 469 F.3d 518, 526 (6th Cir. 2006) (finding affidavit "so bare bones as to preclude application of the good-faith exception"). Otherwise put, "no reasonable officer would afford much weight to the anonymous [and unnamed] statements" since those statements "were sparse in relevant detail; and, most importantly, they were not corroborated in any meaningful manner." *Helton*, 3214 F. 3d at 824; *United States v. Leake*, 998 F.2d 1359, 1367 (6th Cir. 1993) ("We . . . conclude that Officer Murphy could not properly have placed objective good faith reliance on the warrant in light of his knowledge that corroboration was needed"). The lack of a nexus between the criminal activity alleged (a homicide) and Defendant's cell phone rendered reliance on the warrant objectively unreasonable and the good faith exception inapplicable. *Brown*, 828 F.3d at 385–36 ("Although

the good-faith standard is less demanding than the standard for probable cause, the affidavit still must draw some plausible connection to the [place to be searched].”). For these reasons, the good faith exception would not apply to save the fruits of an illegal search. I would find the district court erred in failing to suppress the evidence from the cell phone.

CONCLUSION

In sum, I concur in the lead opinion’s holding that the district court did not err in admitting the testimony concerning the welfare application, consistent with Rule 404(b) of the Federal Rules of Evidence. However, I would reverse the district court’s denial of Defendant’s motion to suppress the evidence obtained according to the warrant.

KAREN NELSON MOORE, Circuit Judge, concurring in the judgment. Although the lead opinion purportedly "elect[s] to not decide" whether probable cause supported the warrant at issue in this case, many pages of the opinion are devoted to an argument that nonetheless endorses the issuing state-court judge's probable-cause finding. Lead Op. at 15. I agree with Judge Clay that the sources mentioned in the affidavit are insufficiently corroborated and that no factual allegations contained in the affidavit connect the crime at issue here to the contents of Smith's cell phone. I therefore do not join the dicta in the lead opinion insinuating that probable cause supported the warrant issued in this case, but instead I join parts A and B of Judge Clay's opinion, making that the majority on those issues.

I conclude, however, that the good-faith exception to the Fourth Amendment's exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 922 (1984), applies under this court's precedent. To address the preservation issue first, I agree with the lead opinion that Smith forfeited the good-faith exception issue on appeal. Even though the district court explicitly found that the good-faith exception applied as an alternative to its finding of probable cause, R. 90 (Suppression Hr'g Tr. at 30–31) (Page ID #492–93), Smith failed to address this finding until his reply brief. We generally consider such a failure to constitute forfeiture, *see United States v. Galaviz,* 645 F.3d 347, 362 (6th Cir. 2011), yet it is unclear whether the government raised adequately a forfeiture argument in this case. *See United States v. Turner*, 602 F.3d 778, 783 (6th Cir. 2010). The government did note Smith's failure to address the good-faith argument in his opening brief, but it did not argue that the failure constituted forfeiture or offer any cases in support. We have likewise considered as forfeiture the failure sufficiently to develop arguments. *See United States v. Johnson,* 440 F.3d 832, 846 (6th Cir. 2006).

In any case, the government prevails on the merits. Under the good-faith exception, evidence that the police obtains in violation of the Fourth Amendment is not excluded when an officer's reliance on a warrant is objectively reasonable. *Leon*, 468 U.S. at 922. *Leon* listed four instances in which a warrant could still be excluded notwithstanding the good-faith exception. *Id.* at 923. At issue here is one of those circumstances, that "the warrant was 'so lacking in indicia of probable cause' as to render official belief in its existence unreasonable." *United States v. Helton*, 35 F.4th 511, 521 (6th Cir. 2022) (quoting *United States v. McClain*, 444 F.3d 556, 564–65 (6th Cir. 2005)). A so-called "bare-bones" affidavit does not provide any indicia of probable cause and gives rise to such an unreasonable belief. *Id.* In short, presented with a bare-bones affidavit, an "officer recklessly relie[s] on the judge's decision that probable cause existed for the warrant." *United States v. Reed*, 993 F.3d 441, 450 (6th Cir. 2021).

This court has interpreted the good-faith standard (a standard that is just as much "judicially created," Lead Op. at 15, as the exclusionary rule) to be a high bar to clear. *See United States v. Christian*, 925 F.3d 305, 312–13 (6th Cir. 2019) (en banc). If "some modicum of evidence, however slight," connects the criminal activity and the item searched, we do not consider the affidavit to be bare-bones. *United States v. White*, 874 F.3d 490, 497 (6th Cir. 2017) (quoting *United States v. Laughton*, 409 F.3d 744, 749 (6th Cir. 2005)). Relevant to this case, "[a] bare-bones affidavit should not be confused with one that lacks probable cause." *Id.* Rather, some "daylight" separates the requirements for a warrant supported by probable cause—one that contains a "substantial basis" for a judge's conclusion—and a warrant that avoids the "bare-bones" moniker—one that is not "so vague as to be conclusory or meaningless." *Id.* at 497, 500 (quotations omitted).

The search warrant in this case falls within that daylight. Although the facts contained in the search warrant are not corroborated enough to establish probable cause, the tips "provide some support" that Smith was involved in the shooting. *Helton*, 35 F.4th at 522. When combined with the "minor inference" that Walker's gunshot wound made it more likely that Walker (and consequently, Smith) was present at the scene, some "modicum of evidence" supported the warrant. *White*, 874 F.3d at 497. Given that a more-than-bare-bones affidavit is one that "contains factual allegations, not just suspicions or conclusions," one cannot say that the affidavit was bare-bones with respect to the allegations that Smith was involved in the shooting. *Christian*, 925 F.3d at 313.

Whether the affidavit provided "some support" for a nexus between Smith's cell phone and evidence of the crime presents a closer question. *Helton*, 35 F.4th at 522. Ultimately, however, I recognize that the affidavit specified *some* remote connection between the contents of Smith's cell phone and the shooting. *Christian*, 925 F.3d at 313. The affidavit supporting the warrant described a shooting involving two suspects and contained the testimony of an officer who believed that relevant information would be found on one of the suspects' cell phones based on "training and experience." R. 44-2 (Aff. for Search Warrant) (Page ID #147). An officer relying on the warrant could reasonably believe that a judge relied on those allegations to find a connection between the cell phone and the shooting. In light of the allegations connecting Smith to the shooting, moreover, such reliance could not be considered reckless. *See Reed*, 993 F.3d at 450.

To be sure, an issuing magistrate would have to make some large inferential leaps to conclude that probable cause existed to support this warrant. For example, the state-court judge who issued the warrant would have had to infer that Smith and Walker planned or communicated about the shooting merely because they were both allegedly present at the scene of the crime. But

"[t]his circuit's holdings indicate that a nexus between the place to be searched and the item to be seized may sometimes be inferred." *United States v. Higgins*, 557 F.3d 381, 391 (6th Cir. 2009). This court continues to grapple, moreover, with the permissible scope of those nexus-supporting inferences. Even when faced with no evidence connecting a crime to a suspect's residence, for instance, this court has been "pulled" in "both directions" when inferring a link between the suspect and the suspect's home. *Reed*, 993 F.3d at 447. One cannot expect a reasonable officer to recognize a lack of probable cause to support an evidentiary nexus if some members of this court are unable to do so. *See id.* at 452.

The breadth of a rule allowing the government to search an arrestee's cell phone as long as two people are allegedly involved in a crime concerns me as much as it concerns Judge Clay. In this case, however, I cannot conclude that the affidavit was "so lacking in indicia of probable cause that no reasonable officer would rely on the warrant." *Helton*, 35 F.4th at 522 (quoting *White*, 874 F.3d at 496). I therefore concur in the lead opinion's judgment that the good-faith exception applies.[1]

[1] I likewise concur in Part III of the lead opinion.

Appendix B

No. 21-1457

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 17, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FHARIS DENANE SMITH,

Defendant-Appellant.

O R D E R

BEFORE: GUY, MOORE, and CLAY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

FHARIS DENANE SMITH,

Defendant.
_____/

Case No. 1:20-cr-71

HONORABLE PAUL L. MALONEY

ORDER DENYING MOTION TO SUPPRESS

In accordance with the Bench Opinion issued by the Court on today's date:

IT IS HEREBY ORDERED that the defendant's motion for suppression of phone extraction (ECF No. 44) is DENIED for the reasons stated on the record.

Dated: October 26, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO: 1:20-CR-71

Fharis Denane Smith,

Defendant.

_____/

* * * *

MOTION TO SUPPRESS HEARING and FINAL PRETRIAL CONFERENCE

* * * *

BEFORE: THE HONORABLE PAUL L. MALONEY
United States District Judge
Kalamazoo, Michigan
October 26, 2020

APPEARANCES:

APPEARING ON BEHALF OF THE PLAINTIFF:

ERIN K. LANE
TIMOTHY P. VERHEY
Assistant United States Attorney
P.O. Box 208
Grand Rapids, Michigan 49501-0208

APPEARING ON BEHALF OF THE DEFENDANT:

TAKURA NICHOLAS NYAFUKUDZA
Charter & Nyamfukudza, PLC
2295 Sower Blvd.
Okemos, Michigan 48864

Kalamazoo, Michigan

October 26, 2020

at approximately 2:33 p.m.

PROCEEDINGS

02:33:57 THE COURT: This is File Number 20-71; The United States of America vs. Fharis Smith. This matter is before the Court for two items; first, a motion to suppress filed by the defendant, which is ECF Document 44. The Court will take oral argument on that matter momentarily followed by a
02:34:18 final pretrial conference for this case.

This case is presently set for trial on November 3rd, 2020. It is in the number one position for that trial date.

The record should reflect that Assistant United
02:34:34 States Attorneys Tim VerHey and Erin Lane are here representing the government. Attorney Takura Nyamfukudza represents the defendant. The defendant is present person.

Counsel, your motion.

MR. NYAMFUKUDZA: Good afternoon, your Honor. May
02:35:08 it please the Court.

THE COURT: You may proceed. Good afternoon.

MR. NYAMFUKUDZA: Your Honor, Mr. Smith respectfully moves this Court to suppress the data obtained from his cell phone because the government's seizure of the
02:35:22 records relied on a warrant that was not supported by

probable cause. It deserves emphasis that the affidavit and search warrant that serve as the basis for this motion was submitted in an unrelated matter in which Mr. Smith actually never got charged. That was the Fourth Amendment applies. 02:35:42 "The fact that technology now allows a person to carry the privacy of life in his hand does not make the information any less worthy of the protection for which the founders fought." That is a quote from Riley vs. California, 573 U.S. 373.

02:35:58 "Additionally, the fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." That's from the same case, and it's at Page 392.

I went into greater detail in the motion -- in the 02:36:21 written motion, however, the affiant, because he did not name the motion, his failure to explain why it is that the judge should have found that individual reliable, I think, is one of the many reasons that those failures are fatal to the warrant, your Honor. United States vs Frazier, which I 02:36:49 cited in the brief, 423 F.3d 526 at Page 532, "In the absence of any indicia of the informant's reliability, 'insist' that the affidavit contain substantial police corroboration." We don't know if the affiant had prior dealings with this individual. There certainly, unlike the 02:37:12 cases that I analogized, there were no controlled buys,

there were no observations that the affiant made on his own or anybody else from the team and, in fact, the one thing that the affiant did identify or say -- it wasn't clear actually from the affidavit whether it was an observation he made himself, was the fact that the other gentleman, not Mr. Smith, had sustained a gunshot wound. And again, that points the finger away from Mr. Smith.

As the Sixth Circuit explained, your Honor, an affidavit is sufficient to where a known person named to the magistrate to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence in the recent past such that a neutral and detached magistrate may believe that evidence of a crime would be found. This nameless, faceless individual who we have no basis to determine whether he or she is reliable cannot be the basis for finding of probable cause. Again, there is no tangible proof that the affiant spoke about, and as Allen makes clear, your Honor, Detective Gates needed to explain what he did to corroborate the claims from his informant.

THE COURT: Well, there is some information in the affidavit, isn't there, concerning an affirmation of some of the information that law enforcement received, specifically the fact that one of the alleged shooters had been wounded, and that from the observations of police officers of, not

Mr. Smith, but the other individual, they felt that the wound that was apparent to them was a gunshot wound as opposed to a stab wound, as I think it was Mr. Walker asserted. Correct? What do you -- So there is some
02:39:25 corroboration for the information received by law enforcement, is there not?

MR. NYAMFUKUDZA: As it relates to Mr. Walker, but not Mr. Smith, your Honor. And it is our position --

THE COURT: Well, of course they are inextricably
02:39:40 linked, aren't they? The information is that Mr. Smith and Mr. Walker were at the scene and participated in the shooting. So to the extent that your client and Mr. Walker are named, Mr. Walker or one of the individuals sustained a gunshot wound, Mr. Walker's got a gunshot wound, that seems
02:40:00 to be information that is corroborated in some fashion, correct? That's my first question.

My second question is: The affiant on a search warrant is allowed to convey the collective information of law enforcement. He doesn't need to have personal knowledge
02:40:24 of all of the information in there as long as he attributes it to other officers of a particular department. Am I right about that.

MR. NYAMFUKUDZA: Yes, your Honor. He or she can certainly convey information that was passed along by other
02:40:41 law enforcement personnel. But here we have no idea,

certainly not by looking at the four corners of the document, how it is that Detective Gates determined that this person was reliable. And the broad sweeping statement about my training and experience is exactly the sort of statement that the Supreme Court took exception to when it said, again in Riley, "It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to supposed evidence of just about any crime could be found in its cell phone." Those broad sweeping statements, again, because the two of them were together, it makes little sense that they would be texting or calling one another when they were observed together. So it makes even less sense. It's a more tenuous connection of why they believe that they would find anything that is useful based on searching Mr. Smith's phone, and they also, while this far from dispositive, because the ends don't justify the means, we don't do a backward look, they didn't find anything useful. Nothing found on that phone was the basis for the charge, and there was no other evidence that led to charges against Mr. Smith. So I think this was just a fishing expedition. There was no claim of inculpatory postings on social media reported by an informant. Whoever this nameless, faceless individual, if he or she had said, for example, Fharis Smith posted on Instagram or Snap Chat and then deleted it, then that gets

them into the cell phone. And I noted that the fact that the person has been arrested doesn't mean that the other Fourth Amendment concerns just disappear completely.

THE COURT: Let me ask you a couple of questions. I perceive that there are certain things that really aren't contested, but I want to make sure I'm right.

First, there is no contest that there was a warrant out for your client, correct, on the day he was arrested.

MR. NYAMFUKUDZA: The misdemeanor malicious destruction of property, yes.

THE COURT: Okay. So the arrest itself, there is no quarrel with that, because it was pursuant to the warrant, am I right about that?

MR. NYAMFUKUDZA: I will say simply that he did have a warrant, although depending on whose report you read, the reason for the arrest varies, and certainly doesn't match throughout when you watch the body cam footage. But, yes, he did have a valid warrant.

THE COURT: It would seem to me that regardless of whether there was probable cause for some other crime, there was indeed a warrant out for which the officers could execute against your client and arrest him.

MR. NYAMFUKUDZA: Yes.

THE COURT: Okay. I gather also that there is no concern about the seizure of the phones from your client?

I mean once they get into the car, they see a weapon, your client's got a prior felony apparently, and they also locate drugs in the car. So my question is: There doesn't appear, based on the papers, to be any contest regarding the lawful seizure of the phones themselves by law enforcement? Recognizing, of course, that they have got to get a search warrant to get inside the phones. I'm just talking about lawful possession of the phones pursuant to the arrest of your client. There doesn't appear to be any contest about that either.

MR. NYAMFUKUDZA: I won't quibble with that either, your Honor.

THE COURT: All right. That's fine. Thank you.

Thank you, counsel. I interrupted you, go ahead.

MR. NYAMFUKUDZA: Thank you.

Also there is a broad statement in there, and this is from the affidavit, I quote, "Dontrel Walker and Fharis Smith are known by your affiant to be involved in weapon possession and violent acts within the City of Kalamazoo, on a historical and continuing basis." It doesn't say what the supposed acts of violence are, when they occurred, against whom. Again, these broad sweeping statements where we are left with more questions than answers are exactly the reason why we say at least on the four corners of the document we are left with more questions than answers.

THE COURT: Would you address, because the back-up argument of the government is Leon good faith exception, do you want to go ahead and address that?

MR. NYAMFUKUDZA: I anticipated that.

02:45:31 THE COURT: I'm sure you did.

MR. NYAMFUKUDZA: I know that the supporting -- for good faith, four things, the Court must examine four things: First, the supporting affidavit contained knowing or reckless falsity. Second, the issuing judge wholly

02:45:57 abandoned his judicial role. The third is that the affidavit is so lacking in probable cause as to render official belief in its existence entirely unreasonable. Four, the officer's reliance on the warrant was neither in good faith nor objectively reasonable.

02:46:13 On the first one, the supporting affidavit containing knowing or reckless falsity. I think we have woeful ignorance, where this officer did the absolute bare minimum and just adopted a throw something at the wall and hope it sticks. So while that may differ slightly from a

02:46:33 knowing and reckless falsity, I think it was intentionally vague, and I don't know that it was intended to mislead the Court, but there is enough in there that shows that this officer was not completely forthcoming. So I don't know that it rises though to the level of knowing or reckless

02:46:54 falsity.

Not having been privy to the exchange that the judge had with the officer, I don't know that we have a whole lot for the second point. However, I have to imagine that the judge must have asked questions that were answered but not contained within the four corners of the document. On -- I think number three though, the affidavit is so lacking in probable cause to render official belief in its existence entirely unreasonable, that is the crux of our motion. And all of the law that I provided in the 14 pages, I think, speaks to that, your Honor. And where the officer's reliance on the warrant was neither in good faith nor objectively reasonable, again, I think it goes back to the third point, the one that I just addressed where something will work, we can't get him on this, we'll -- And as it relates to the use of the affidavit from that other case where, again, Mr. Smith was not charged with anything, I know that the timing of it is far from dispositive, because I've tried other case, and actually I know discovery is ongoing and in the middle of trial we have actually received other discovery. So the fact that this phone was in the government's possession for six months and we are just now receiving these text messages certainly piques my interest, but I don't know that that is something that the Court will hang its hat on in determining whether this was sufficient probable cause.

THE COURT: Your motion goes to suppression of certain text messages that were contained on the phone, am I correct about that?

MR. NYAMFUKUDZA: That is correct, your Honor.

02:48:50 THE COURT: And how many text messages are we talking about, if we know? Approximately? I'm not going to hold you to a specific number.

MR. NYAMFUKUDZA: Perhaps 30. I didn't count.

MS. LANE: Less than 30.

02:49:07 THE COURT: All right. Thank you.

MR. NYAMFUKUDZA: And last note, your Honor, I think in looking at the text messages, they are incomplete sentences, so we could end up with a trial within a trial trying to explain away what something means and what

02:49:23 something doesn't mean. And again, in Riley indeed a cell phone search would typically expose far more than the most exhaustive search of a house. Here I think it would just muddy things up, and it's my understanding that at least until last Wednesday or whenever it is that I received the

02:49:40 disk, the government was satisfied that they had enough or what I think they would style as overwhelming evidence to support what it is -- the charges that we are going to trial on, that they didn't necessarily need them. So I would respectfully request, for the reasons I just stated, and the

02:49:59 others in the motion, that your Honor suppress the evidence.

Thank you.

THE COURT: Thank you, counsel.

Mr. VerHey, go ahead, sir.

MR. VERHEY: Thank you, your Honor.

02:50:08 One thing I would like to do is just give you an idea factually about the why this matter is for this upcoming trial. As we've pointed out in our papers, we are talking about a search warrant that was obtained from Judge Blatchford in Kalamazoo County to search one of the two 02:50:29 phones that was taken off of Mr. Smith after he was arrested at the Marathon station. And what the police found as result of looking at those phones, were a few texts that are going to be helpful in this case, because what I expect the testimony will be at this trial, among other things, is that 02:50:51 the police were watching Mr. Smith at a Marathon station in his white Yukon on the date specified in the Indictment, and they saw him deal with somebody in a green vehicle, which the police thought looked a lot like a hand-to-hand drug transaction. That becomes significant in connection with 02:51:11 these texts that were found that are at issue here, because at that same time or on the same day, there is texts to Mr. Smith from some unknown person saying -- I'm going to paraphrase here -- Where you at? I'm at the Marathon station or I will be. I need something. I need about a 02:51:33 hundred dollars. Can you bring it? I'll be in a green

vehicle. And so we feel that that shows that it was a drug transaction, which we feel is directly relevant to Counts Two and Three which relate to drug trafficking on the day specified in the Indictment.

02:51:48 So the search warrant here, you know, I will concede that there haven't been any homicide charges issued yet. We are talking about a shooting that happened in April of this year, and here we are in October, by no means am I here to tell the Court that there isn't an ongoing

02:52:09 investigation. There might be a lot of evidence from the cell phones, it's not going to come up in this case, just the ones that I've specified for you will come up in this case.

But the real issue here is, did Judge Blatchford

02:52:26 have -- did she act within the great deference that we are to give her as the issuing magistrate on a search warrant or did she somehow act arbitrarily and lose sight of her duties as a judge assigned to determine if there's probable cause. Because you're right, we are dealing with a search warrant

02:52:46 that was issued. We do get the presumption that it's a valid warrant. It's up to the defendant to convince you otherwise, and so I say that she acted well within her great deference, because we've got here Officer Gates, who is the affiant, saying, you know, without a doubt, I don't think

02:53:10 anybody is going to dispute, there was a shooting, three

people were shot, one person died. Walker and Smith, according to a quote "known source," that was included in the affidavit, shot at the victim, according to that known source. Then Gates goes on to tell Judge Blatchford that
02:53:35 multiple sources supported what the known source said and they added more information, which was that one of the two shooters, Walker and Smith, might have been hit during the exchange of gunfire.

Well, that gets to how much of this information was
02:53:59 corroborated independently by the police. Well, I submit a lot of it was. We know, first of all, that it was around a week later that both Walker and Smith were both apprehended by the police and they both had loaded firearms on them, which I think is very pertinent to a shooting case that's
02:54:19 being investigated.

As you've already noted in your question, Smith does have a wound that the officer that saw it concluded was a gunshot wound. The officer said that Smith tried to pawn it off as a stabbing, but the officer said it didn't look
02:54:39 like a stabbing wound to me. So that means, in addition to that, we have got Walker apparently lying about how he got shot in addition to the fact that he suffered a gunshot wound.

So the fact that we have multiple sources, even
02:54:58 though they are not disclosed in the affidavit, that's a

common thing for the police not to have known listed people in the affidavit, the Supreme Court said long ago that's not necessary, the fact that one of them is known to the police, I think, the law makes clear that's significant legally to the probable cause determination, because if you go to a police officer and say something happened, and it turns out to be false, you're putting yourself on the line for being prosecuted for giving a false police report.

02:55:19

So according to Officer Gates, who was the affiant, he swore that one of the people that told him about this shooting and told Judge Blatchford, Walker and Smith were part of this exchange of gunfire, I know that because a known source told me. If that known source was lying, then that known source is now subject to jeopardy him or herself for saying something that's false. Assuming it's intentionally false. So that becomes, I think, an important thing for the Court to consider.

02:55:36

02:55:59

These other multiple sources, I'll admit, they are not specified as being known to law enforcement, so let's assume they are not known with a track record to law enforcement. That doesn't mean they are worth nothing. It means they are worth something, if they corroborate each other, and they corroborate the known source which, in fact, they do. These multiple sources told the Kalamazoo Police Department that Walker and Smith were involved in the

02:56:14

02:56:34

shooting, just like the known source said. They also said that one of the two might have been injured himself in the exchange of gunfire. And of course, as I've already said, we know that that pans out. And so I think all of this gave Judge Blatchford plenty of information to decide the question of, and I'll quote here from the most recent case I could find, U.S. vs. Christian, which is an en banc Sixth Circuit case, "Was there a probability or substantial chance of criminal activity" to be found on those cell phones. Not proof positive, proof beyond a reasonable doubt, all of those higher standards that we deal with for trials, this is just a chance. Well, there I think it's an easy inference for anybody to draw, including Judge Blatchford, to say that where you've got a crime where two people were involved, Walker and Smith, the chances that their cell phones have information linking them to the crime, either talking about what they are going to do before the crime, recording it, or taking pictures of it during it, talking about it afterwards, that's an easy thing for a judge in the 21st century with everybody having a cell phone to decide.

THE COURT: How does the affidavit connect this phone to the homicide?

MR. VERHEY: It simply says that Walker had the phone at the time of his arrest seven days after the homicide. And it links, I mean, it says that Walker was one

of two people involved in the shooting, which I think is significant, because --

THE COURT: Just focusing on the phone right now.

MR. VERHEY: Sure.

02:58:42 THE COURT: I mean in contrast to connecting the phone to the drug offense which is attendant to this case, which occurred on April 18th, what is there in the affidavit that -- because the focus of the affidavit is on the events of April 11th, as I understand it, involving the fatal

02:59:09 shooting, and don't you -- in light of that, as opposed to the alleged drug dealing that was going on on the 18th, don't you have to tie that phone in some fashion to the events of April 11 in order to justify the search?

MR. VERHEY: I don't -- The bottom line for me is,

02:59:33 I don't think so, but let me tell you how I get there.

First of all, we have Officer Gates saying, in his affidavit, based on his training and experience, he says, "People involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission,

02:59:50 or the concealment of crime, and that they will document criminal activity through photographs, texts, and other electronic data contained within and accessed by such devices. Affiant has employed facts obtained from such devices in the successful prosecution of violent criminals."

03:00:07 So he does give us that much through his training and

experience.

THE COURT: But the fallout from taking that position is, is that whenever someone has a cell phone on them and they have allegedly been involved in a crime involving more than one person, you automatically get into the phone. Am I right about that?

MR. VERHEY: If an officer says people engaged in violent crime have information like that.

THE COURT: All cell phones are searchable at that point pursuant to a warrant?

MR. VERHEY: If --

THE COURT: Is that your position?

MR. VERHEY: If an officer is willing to take an oath and tell a judge that it's been his experience that it is common, I would say all cases like that with concerted activity fall within the probable cause range. And the reason I say that, your Honor, is the Golston case, which I've pulled out of many cases for your review, it was a bank robbery case, which involved two bank robbers. And very similar to this case, the police thought they had suspects, they caught Mr. Golston, he had a cell phone on him, and the police got a search warrant just like they did here to get his phone, and the Eastern District of Michigan court said, "If two people are engaged in a crime, it's likely that they will talk about it before, during, or after." And I think

you don't even need an expert to tell you that, because here we are in 2020, everybody documents everything on their phone. So I don't think it's a crazy proposition to say that people would either communicate about why they are angry with the potential victim, talk about meeting co-conspirators or co- participants to go carry out a crime and then talk about how they are going to escape from being caught for the crime. So certainly Judge Blatchford thought that was a reasonable inference.

03:02:22 And once again, the proper focus, I think for us to remember, is it's not whether you or I might draw the same conclusion now if this warrant application were put in front of us, it's whether essentially Judge Blatchford was -- I don't want to use the word crazy, but close to that, to sign it. She acted within her discretion, I say, in signing this warrant. And there certainly, I don't think, has been anything presented to you to show that this is somehow outside the scope of Leon. If you decide this warrant has no probable cause, the next issue, of course, is whether this somehow falls outside of the good faith exception.

I do not agree with defense counsel that being vague in your affidavit is the same thing as lying in a search warrant affidavit, which is one of the exceptions to the Leon rule. I've never seen a case that says that. I think the best argument -- a very few good arguments the

defense has is this is a bare bones warrant. Well, the Christian case was taken en banc. I can tell you as one of the litigants, because the panel that decided the Christian case said well, there is no probable cause, so it has to be bare bones. And Christian goes into great detail to say no, there's a lot of space between an affidavit that doesn't have probable cause and one that has so little in it that it becomes bare bones. Bare bones means -- You're essentially saying, as an affiant, I think there is probable cause, Judge, so sign the affidavit or sign the warrant. Here we have a lot of facts, and I've already told you what they are, I won't go back into that. This is not a bare bones warrant. It had plenty of facts for a reasonable judge to find probable cause. So I don't think, even at the end of the day, if you disagree with the fact that a warrant was issued here, I just see no way to get around upholding the search as an exercise of good faith based on the warrant that was issued. So unless you have questions for me, that's all I had prepared to show you.

03:03:45 03:04:06 03:04:26 03:04:43 03:05:00

THE COURT: How do you read Ramirez, which is out of the Western District of Kentucky, which appears to go the other direction from Golston in the context of a drug case.

MR. VERHEY: I apologize, I did not read that case prior to coming in here, so.

THE COURT: 180 F.Supp. 491. It's a drug case.

Defendant had a cell phone on him when he was arrested. The warrant noted two facts: In the officers' experience and training, individuals keep text messages or other electronic information stored in their phones, which may relate to the
03:05:22 crime or -- and/or a co-defendants, the Court found that that language was insufficient to support the issuance of a warrant they also found that Leon didn't save it.

MR. VERHEY: Your Honor, based on the summary you gave me, I would agree with that decision, because there is
03:05:50 a line of cases in the Sixth Circuit that say you can't get a nexus to a particular item to be seized simply through training and experience in the affidavit there has to be something more. And here that something more is the underlying crime involved two people, according to the
03:06:09 affidavit, which was Smith and Walker, and that brings into it, you know, if you got two people, then they are going to be talking to each other usually by texting on cell phone these days. If you are telling me that other case was a single defendant with a cell phone, and training and
03:06:29 experience was all that was in that affidavit, might not find very many judges that would sign that warrant.

I would respectfully disagree that that makes it bare bones, because I think one of reasons the Sixth Circuit took Christian en banc was there were way too many decisions
03:06:49 saying, oh, no P.C., must mean it's bare bones, that's not

the case, so I would still say there is a lot of daylight between an affidavit lacking probable cause and one that is so bad that it's bare bones. So I would say, if I were that judge, I would have said Leon did apply there. But the warrant probably was not supported by probable cause.

03:07:07

THE COURT: All right. Thank you, sir.

Counsel, go ahead.

MR. NYAMFUKUDZA: Try to be much more concise than I was before, your Honor.

03:07:21

THE COURT: No, that's okay. I don't want to rush you. Go ahead.

MR. NYAMFUKUDZA: Thank you.

I'll start kind of where Mr. VerHey left off.

Everyone -- People document everything on their

03:07:38

phone today, and that may not be precise statement, but I think that was the gist of what he was getting at. And that is precisely why the Court in Riley said look, you can't just say based on my training and experience, right. Because as the Court noted in Riley, a thorough search of

03:08:06

the house often will not turn up as much as a search of a cell phone would, because banking records, your location sometimes for up to a year, depending on how long you've had the phone, all sorts of things that law enforcement would have to spend literally thousands of hours to gather is

03:08:22

that's all available in the palm of somebody's hand. So --

THE COURT: My phone's got me driving on I-94 every day. I agree with you. Go ahead.

MR. NYAMFUKUDZA: Yes, your Honor.

To say that his training and experience tells him that people who commit crimes it would be the same as saying people who commit crimes live in houses, so we should be able to get into anyone's house if they are accused of a crime. No, that's not enough. What is it about the circumstances that lead them into Mr. Smith's phone? That is what is critical here.

He talks about gunshot injuries. If bullets were exchanged, it's likely that somebody was injured. So I don't know that that makes the un-named individual particularly reliable because gunshots were exchanged, people get hit.

THE COURT: Well, apparently the officers didn't know that until somebody gave them that information. And it does seem to me that in terms of looking at it from the standpoint of Judge Blatchford, you have an admittedly un-named source saying that there were two people, and that one of the assailants was wounded by a gun shot during the course of the exchange, and then Mr. Walker is found with a wound, that based on the officer's experience, was he felt was a gunshot wound as opposed to the assertion by Mr. Walker that it was a knife wound. I mean isn't that --

isn't the officer's observation corroborative of the information that this, admittedly again, un-named individual gave to law enforcement about the shooting circumstances?

MR. NYAMFUKUDZA: Perhaps as it speaks to Mr. Walker, but not Mr. Smith. And I think Mr. VerHey misspoke when he said Mr. Smith pawned it off as -- I don't think that was intentional, but it was.

THE COURT: It's clearly Mr. Walker who has got the wound.

MR. NYAMFUKUDZA: Yes. Yes.

So I don't know if I answered your question.

THE COURT: No, you're good. Go ahead.

MR. NYAMFUKUDZA: And it's not that -- I don't think it matters a great deal that the source's names are not disclosed in the affidavit. Why? How is that Detective Gates decided that these people were reliable? That is what the Sixth Circuit has demanded. You can keep this person's name a secret, but tell us how it is that you decided that this individual was reliable. Again, we don't know -- just because Officer Friendly knows John Q. Public's name, and he walks up to you and tells you a fact, what is it about your interaction? Is it the frequency? We have no idea based on the four corners of the affidavit what it is about any of those people that makes them reliable. And again, if we take that statement out and that training and experience,

then there is nothing that leads to Mr. Smith's phone. And if we look at the particular text messages about the green van, all it says is need hundred dollars. There is no mention of any unit of drugs, no type of drugs, no weight or anything. And those are the sorts of vagaries which I'm suggesting could lead to a trial within a trial. "Need hundred dollars." That is exactly what it says. "I'll meet you somewhere." Doesn't say meet me somewhere to exchange drugs or anything.

03:12:26 THE COURT: That goes to the weight of the information. I mean the government -- from the government's perspective, apparently these are text messages that occur before the April 18 encounter with the green vehicle. And from the government's perspective, they are going to argue, 03:12:48 look, this is your client sitting up the drug deal and they are there observing your client under surveillance, and again, from their perspective, trained officers would indicate based on what they saw that this was a -- that this was a drug deal going down in the parking lot. So it seems 03:13:11 to me that argument goes to the weight of the text messages, you're trying to keep the text messages out, and I appreciate the evaluation of the evidence, but I'm not sure that's important for purposes of evaluating whether there is probable cause or not.

03:13:30 MR. NYAMFUKUDZA: May I touch --

THE COURT: Come back at me if you want. Sometimes I ask provocative questions for a reason. Go ahead.

MR. NYAMFUKUDZA: Indeed, indeed.

I think we could certainly have an endless tennis match about what could have and should have been done. But we know a lot about what officers did not see also on that day. While they saw what they suspected was a drug deal, this mysterious green van nobody was stopped, there is no mention of anyone seeing money exchanging hands or anything exchanging hands. So taken out of context, any text message -- if I hand your Honor my phone, you could pick any text message, even ones I've exchanged with my mother, and read nefarious intent into those, and but nothing in the four corners leads into Mr. Smith's phone, and we are now, again, looking back, based on what the charges are and saying oh, boy, okay, on the 18th of April, although they didn't have these until whatever two Thursdays ago was, we think these should come in, but if we are looking at the four corners of the document that the judge signed, nothing leads directly into Mr. Smith's phone except the training and experience. Which again, the Court in Riley told us is not sufficient. There is nothing that leads us directly into his phone in any observations that Officer Gates made were about Mr. Walker and not Mr. Smith. So I don't want to keep repeating myself but, your Honor, I don't see anything in that

document which speaks to why they get into Mr. Smith's phone.

Thank you.

THE COURT: All right. Thank you, counsel.

03:15:27 Mr. VerHey, go ahead, sir.

MR. VERHEY: Your Honor, I don't have anything else to add unless you have a question for me based on the last --

THE COURT: All right. Thank you.

03:15:37 MR. VERHEY: -- exchange. If you would like to see the text messages, I have copies for you, but.

THE COURT: I gather Detective Gates, obviously his focus in terms of the application for the search warrant was the homicide and not what occurred in the parking lot.

03:16:00 MR. VERHEY: That is correct. And I didn't see an argument directly on point about this, but I heard defense counsel kind of cast out on why we should use evidence from a homicide investigation in a drug case. There is no caselaw that says, you know, unless what you were looking

03:16:23 for is what you find, it can't be admitted. I mean the Son of Sam case was broken when Mr. Berkowitz left his car somewhere and got tickets and they towed it away and found a dead body in the trunk, so I mean that happens all the time, you find things you are not looking for.

03:16:41 THE COURT: You are dating yourself now, Mr.

VerHey.

MR. VERHEY: I know. I don't need any reminding of that.

So I don't think that's a good argument to say well, they weren't looking for drug evidence, but they found some. So absent that, your Honor, I'll just rely on what we told you in our papers and what I just said.

Thank you.

THE COURT: All right. Thank you.

Well, this is defendant's motion to suppress certain text messages found by law enforcement pursuant to a search warrant issued by District Judge Blatchford of the Kalamazoo County District Court.

The Court's had the benefit of the pleadings filed by the government and the defendant in support of their positions. Judge Blatchford issued the search warrant, and as a result of the review of the text messages in the phone, the government seeks to introduce some of those text messages found on the phone in this particular case as it relates apparently to the drug charge which is attendant to the Indictment.

"The Fourth Amendment requires a finding of probable cause to justify a search pursuant to a search warrant." That is U.S. vs. Crawford, 943 F.3d 297, a 2019 circuit case of our circuit, citing Christian at 925 F.3d

305, an en banc 2019 Sixth Circuit case.

When determining whether a supporting affidavit establishes probable cause, the Court considers the totality of the circumstances. The probable cause standard is satisfied when the facts and circumstances within the officer's knowledge, including the knowledge obtained through reasonably trustworthy sources, warrant a man of reasonable caution to believe that an offense has been committed and has been or is being committed." That's Davis at 430 F.3d.

The affidavit's focus here, of course, was based on a shooting one week earlier, on April the 11th, which resulted in the death of one individual. The affidavit outlines, from anonymous sources, concerning the circumstances of that shooting, names the Defendant Smith as well as an individual by the name of Walker as having participated in the shooting. In addition to that, the warrant asserts that another piece of information given to law enforcement was that one of the individuals was wounded during the course of the event on April the 11th. Subsequent to that time, before the swearing out of the affidavit for the search warrant, Mr. Walker by observation of law enforcement had a wound consistent, in the officer's opinion, with a gunshot wound, and that information is contained in the search warrant.

The burden for the government here is to tie this phone to the crime committed, in this case the shooting which occurred on April 11. And to justify a search, the circumstances must indicate why the evidence of illegal activity was going to be found on the phone, and a nexus is required between, in this case, the phone, which is -- the contents of the phone and the crime which occurred on April the 11th involving the homicide. Judge Blatchford issued this warrant, and I'm not allowed in anticipation of a challenge to Judge Blatchford's decision to issue the warrant, I'm not allowed to substitute my own judgment as to whether I would have issued that warrant. I have concerns about the strength of the affidavit here in tying the probable cause together, and this is a clearly a close issue, but given the deference that I must give to Judge Blatchford and her issuance of the warrant under the circumstances, in the Court's judgment, by the barest of margins, I believe that the warrant was lawfully issued by Judge Blatchford, and accordingly, the search of the cell phone was appropriate. Even if I'm wrong about that, the Court having analyzed the warrant pursuant to the Leon decision, would find that the officers could rely on the warrant in good faith. That's part of the government's argument here. That's Leon at 468 U.S. 897. And the Court does find that for purposes of analysis of the good faith

elements contained in the Leon decision, that the good faith exception to the search warrant requirement would also apply.

So for all of those reasons, the Court will deny the defendant's motion to suppress. And accordingly, we will move to the final pretrial issues. The Court appreciates the fact that the trial briefs are in, proposed voir dire by the government and the defendant have also been filed. The proposed jury instructions were filed on the 23rd of this month.

This case is set for trial on November 3rd. Ordinarily with the length of the case, which I think is estimated at two days, if I'm not mistaken, I would pick only 13 jurors, but I'm going to pick 14 given the COVID situation. We will pick 14 jurors. I'll give each side one extra peremptory challenge. The alternates, they will not know it, but the alternates will be the two individuals who will get the seats in the auxiliary seats to the far right as you are looking at the jury box. The jurors will be sitting in the black chairs, and not the more comfortable red chairs, the Court's also already had some comments about the comfort level the black chairs from jurors who have sat in those chairs for prolonged periods of time, but there is nothing I can do about that, but the alternates will be in the front two rows as you are viewing the jury seating

format there, and to the far -- to your far right.

The case will start on Tuesday at 8:45. At some point during the course of the day, I'll inquire as to whether any jurors want to leave early for purposes of
03:25:11 voting, if they have not voted yet, so we might break a little bit early on Tuesday. On Wednesday, we will not take a full lunch break, the Court's got to leave the courthouse at 2:15 on that particular day, so we will have probably two short breaks during the course of Wednesday, but if we are
03:25:36 not completed by 2:15, we will break for the day on Wednesday and resume on Thursday if we are not completed.

The Court operates under no-strike-back rule for the jurors. Once the jurors have survived the challenges for cause in the first round of peremptories, they will sit
03:26:05 on the jury absent an indication from further questioning for one reason or another that a juror is excusable after the first round, and we will continue in that fashion until we get a jury which everybody is satisfied.

So with that introduction, let me see if there's
03:26:28 any questions. Mr. VerHey? Ms. Lane?

MS. LANE: None from the government, your Honor.

THE COURT: All right. Thank you.

Counsel, any questions?

MR. NYAMFUKUDZA: If I may have a moment, your
03:26:40 Honor, please.

THE COURT: Sure.

(Pause in proceedings.)

THE COURT: Counsel, if you want a little additional time, I'll step off and I'll come back, if you want me to.

MR. NYAMFUKUDZA: It won't take very long, your Honor.

THE COURT: All right. Let Amy know when you're ready.

03:27:10 MR. NYAMFUKUDZA: Yes. Thank you.

THE COURT: Okay.

COURT CLERK: All rise, please.

Court is in recess.

(At 3:27 p.m., recess.)

03:34:32 (At 3:34 p.m., proceedings continued.)

THE COURT: We are back on the record in 20-71.

Counsel, anything further?

MR. NYAMFUKUDZA: Your Honor, when you gave us the opportunity to ask questions, was that specifically limited

03:34:50 to what you just listed or could we ask about some --

THE COURT: Anything you want to talk about, as far as the trial is concerned.

MR. NYAMFUKUDZA: Certainly.

THE COURT: In terms of logistics or anything else,

03:35:00 go ahead.

MR. NYAMFUKUDZA: Okay. Before I get to the question I actually discussed with Mr. Smith, I would like to know -- I know this won't come up for a little bit, but in terms of approaching witnesses, do we have to request
03:35:15 permission each time or do we have continuing permission?
THE COURT: I think it's better to ask all the -- each time.
MR. NYAMFUKUDZA: Okay.
THE COURT: Yes.
03:35:24 MR. NYAMFUKUDZA: All right. Now, the question that I did have for the Court is -- I know closed mouths don't get fed, but I'll ask anyhow -- Would the Court either on before we bring the jury in or the day before entertain any additional motions?
03:35:47 THE COURT: Like?
MR. NYAMFUKUDZA: In my discussion with Mr. Smith, I think he would like to challenge the underlying arrest, so that's something that we discussed very recently, and I haven't had an opportunity to put together. So --
03:36:12 THE COURT: Well, if you file it, I've got to deal with it, if that -- My inquiry, of course, would be why hasn't that been addressed before now?
MR. NYAMFUKUDZA: Your Honor, discovery has been developing and that is --
03:36:39 THE COURT: Well, the lawfulness of the arrest

wouldn't have anything to do with discovery, either they had probable cause to arrest your client on that day or not. And there has already been some discussion about the fact there was a warrant out for him, right?

03:36:55 MR. NYAMFUKUDZA: Yes, your Honor. But at the same time, I think Governor Whitmer issued orders that prevented people from turning themselves in, and he did try to do that so, I know that concern is certainly at the forefront of his mind in terms of whether he should have, in fact --

03:37:15 THE COURT: Counsel, if you believe there is a meritorious motion out there, I'm certainly not going to prevent you from filing it. All I can ask you is to get it in as quickly as you can. And doesn't sound to me, based on your description, that it would require an evidentiary

03:37:37 hearing or oral argument, but get it in as quick as you can, and we will deal with it as quick as we can.

MR. NYAMFUKUDZA: Yes, your Honor.

THE COURT: Okay.

MR. NYAMFUKUDZA: Okay. Thank you.

03:37:46 THE COURT: All right. Anything else we need to talk about?

MR. NYAMFUKUDZA: No, your Honor.

MR. VERHEY: One thing on our side, your Honor.

THE COURT: Sure.

03:37:57 MR. VERHEY: If you've read our trial brief or even

if you haven't, you know that this case came to light because of a homicide investigation. We, of course, recognize that talking about that in this case would be inappropriate, we are not going to. But I bring it up now because that's caused some problems as recently as a trial last week where the police were doing a different investigation and encountered a defendant who is an African American, like this defendant is, and the jury really got hung up on why were the police focusing on this African American man? What reason was there? And the solution that we tried last week was it was a parallel investigation, and then we found the defendant with drugs, etcetera. All of that is background for, we are trying to figure -- and it led to six jury questions and two days of deliberation, I think over just that issue, whether there was unfair targeting. So what we would like to propose to the Court, is when we have the officers on the stand about why, you know, six officers were at that Marathon gas station arresting the defendant, why they were looking at him, rather than of course saying because we thought he was involved in a homicide, we would like to ask them something like or have them say, we were investigating a different case and wanted to talk to him. I mean that would be what I would suggest officers say.

03:38:14 03:38:39 03:39:03 03:39:25 03:39:42

And then I would even invite the Court, if you

thought it was appropriate, to give a limiting instruction like, you know, don't bother worrying about what that was, that's not part of this case or whatever you think is appropriate, just to kind of nip that kind of speculation in the bud about why were the police focusing on Mr. Smith. Because without that, all the jury is going to know is that the police were following him around and took a lot of pains to arrest him at the Marathon station, you know, with guns drawn and things like that, and the only thing the jury is going to hear, I think so far, is he had a malicious destruction of property warrant which, of course, wouldn't warrant all of that. So that's what I'm asking the Court to consider allowing us to do, try to tiptoe around the homicide investigation with something that we view as fairly innocuous, and that doesn't make the defendant look like a bad person, because they just wanted to talk to him, but I'll, of course, entertain any kind of guidance you might have on that.

03:40:01 03:40:24 03:40:42 03:40:58 03:41:19

THE COURT: All right. Thank you.

Counsel, do you want to react to that? Go ahead.

MR. NYAMFUKUDZA: Thank you, your Honor.

I certainly don't plan to open the door and ask them what the other reason was or why they were following him, but I think just leaving it hanging out there makes them think well geez, he's got more stuff going on than

this, he had a warrant they found all of this stuff on him and there is other things. I think that allows them to draw negative inferences so certainly better than mentioning the specific thing that they were investigating, but I don't know that we are in a much better position if we just leave it dangling out there. I certainly will not ask them about the validity of the surveillance, because I'm not going to open that door into the homicide.

THE COURT: Well, do you have a specific reaction to what Mr. VerHey just suggested?

MR. NYAMFUKUDZA: I appreciate the attempt to not muddy up things by mentioning the homicide, but I think just leaving it dangling, your Honor, I don't think it does very much. It just makes them think, I think, that he is a bad guy, he's got so much going on, because the police don't generally come and talk to people because they, you know, they helped somebody cross the street, for example. So I think the inference is that it was for something negative and it just muddies the waters up, even though they don't know what it is. Doesn't sit well with me. I don't have a solution, but I don't like it, and I do appreciate the effort though.

THE COURT: Well, my suggestion would be that counsel get together, see if they can agree on an approach. I mean the trial briefs clearly indicate that there is not

going to be any challenge to the reason why the officers were there that night. In other words, they are not going to be a challenge to the surveillance. I mean maybe one -- I mean the ambiguity suggested by Mr. VerHey gets us away from the officers' concerns about a homicide, but it does provide some ambiguity, which while not as prejudicial as mentioning a homicide, may lead to its own conclusions.

Maybe the other thing to do, or at least I would ask you to explore it, is to whether there is some stipulated statement that both of you can make that satisfies both sides on this issue and takes care of the government's concern as well as the defendant's.

So why don't you work together on it and, you know, I'm open to -- I mean obviously if you agree on something, that's fine. But I think to the extent that the government recognizes that the jury needs to be insulated from the information regarding the homicide, I do understand their concern that, all right, there's six officers doing the surveillance and the apprehension of Mr. Smith was a fairly strong law enforcement presence, and if all that's out there is a misdemeanor warrant for malicious destruction of property, that may send its own signal and may cause the juror to, by its -- on its own, to have some negative thoughts about the situation. So why don't you try to work it out, and if you can, great; if you can't, then I'll make

a decision based on what is submitted.

MR. NYAMFUKUDZA: One comment you did make does raise a question, your Honor.

THE COURT: Sure. I'm hearing you.

03:45:01 MR. NYAMFUKUDZA: As far as stipulations, there are some that I think we have agreed on, but others that we are still working to fine tune. When does the Court expect the final stipulations?

THE COURT: You can give me the stipulations on

03:45:14 Friday or Monday, that's fine with me.

MR. NYAMFUKUDZA: Thank you.

THE COURT: Okay. All right. Very good.

That's all for today.

MR. VERHEY: Thank you, your Honor.

03:45:25 COURT CLERK: All rise, please.

Court is adjourned.

(At 3:45 p.m., proceedings concluded.)

C E R T I F I C A T E

I, Kathleen S. Thomas, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/
_____

Kathleen S. Thomas, CSR-1300, RPR
U.S. District Court Reporter
410 West Michigan
Kalamazoo, Michigan 49007

STATE OF MICHIGAN 8th JUDICIAL DISTRICT	SEARCH WARRANT	CASE NO. 20-005440

TO THE SHERIFF OR ANY PEACE OFFICER:

Detective Jason Gates , has sworn to the attached affidavit regarding the following:

1. The person, place, or thing to be searched is described as and is located at:

iPhone device belonging to Fharis Smith, date of birth of 7 September 1990. The device is white and pink and bears FCC ID BCG-E2945A.

Samsung mobile phone belonging to Fharis Smith, date of birth of 7 September 1990. The device is black and has no external visible identifying numbers.

The device is presently possessed by Det. Jason Gates of the Kalamazoo Department of Public Safety within the City and County of Kalamazoo, State of Michigan.

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

Any content or data which may establish elements of the crimes of homicide, assault with a dangerous weapon, or weapon possession.

Any content or data which may establish or corroborate timelines or events pertaining to this investigation.

Any content or data accessed by aforementioned devices and stored remotely on external servers, including but not limited to generic cloud storage or Google drive accounts.

This is to include a full inspection and examination of the aforementioned mobile communication devices, bypass of device security features, and removal of internal components, if necessary, to obtain the aforementioned data.

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have found that probable cause exists and you are commanded to make the search and seize the described property. Leave a copy of this warrant and a tabulation (a written inventory) of all property taken with the person from whom the property was taken or at the premises. You are further commanded to promptly return this warrant and tabulation to the court.

Issued: 4-18-2020 8:22 pm
Date

Judge/Magistrate Bar no.

8th DISTRICT COURT

RETURN AND TABULATION

Search was made: _____ and the following property was seized:
Date

_____
Officer

Copy of affidavit, warrant, and tabulation served on:

_____
Name

Tabulation filed:

_____
Date

STATE OF MICHIGAN 8th JUDICIAL DISTRICT	AFFIDAVIT FOR SEARCH WARRANT	CASE NO. 20-005440

Detective Jason Gates , affiant(s), state that:

1. The PERSON, PLACE, OR THING to be searched is described as and is located at:

iPhone device belonging to Fharis Smith, date of birth of 7 September 1990. The device is white and pink and bears FCC ID BCG-E2945A.

Samsung mobile phone belonging to Fharis Smith, date of birth of 7 September 1990. The device is black and has no external visible identifying numbers.

The device is presently possessed by Det. Jason Gates of the Kalamazoo Department of Public Safety within the City and County of Kalamazoo, State of Michigan.

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Any content or data which may establish elements of the crimes of homicide, assault with a dangerous weapon, or weapon possession.

Any content or data which may establish or corroborate timelines or events pertaining to this investigation.

Any content or data accessed by aforementioned devices and stored remotely on external servers, including but not limited to generic cloud storage or Google drive accounts.

This is to include a full inspection and examination of the aforementioned mobile communication devices, bypass of device security features, and removal of internal components, if necessary, to obtain the aforementioned data.

3. The FACTS establishing probable cause or the grounds for the search are:

Your affiant has been a police officer for fifteen years and is currently assigned as a Detective to the Criminal Investigation Division of the Kalamazoo Department of Public Safety. Your affiant is specifically tasked with investigations including but not limited to serious crimes against persons. Affiant has investigated or assisted in the investigation of hundreds of serious crimes in the course of police service.

Your affiant is currently investigating a shooting that occurred at 826 Woodbury in the City and County of Kalamazoo, State of Michigan on 11 April 2020 at approximately 06:21. Presently, three victims have been identified. Londrell Cook, date of birth 16 August 1993 is deceased, presumably from gun-shot wounds. Kenneth Williams, date of birth 23 March 1990, and Jameka Ward, date of birth 29 August 1987, also

This affidavit consists of: 12 Pages.

#13577
Affiant

Review on: _____
Date

By: _____
Prosecuting Official

Subscribed and sworn before me on: 4-18-2020 @ 8:22 PM
Date

P44377
Judge/Magistrate

STATE OF MICHIGAN 8th JUDICIAL DISTRICT	AFFIDAVIT FOR SEARCH WARRANT	CASE NO. 20-005440

sustained gun-shot wounds.

Following the initial investigation, Kalamazoo police obtained information from a source who is known but who has requested anonymity at this time. This source advised that both Dauntrell Walker and Fharis Smith were present at the scene of the shooting and that they both fired guns at the deceased, Londrell Cook.

During the initial stages of the investigation, multiple sources advised Kalamazoo Police officers that Dauntrell Walker and Fharis Smith had been present at, and involved in, this shooting.

Investigators also received information that a person who had been shooting at Cook may also have sustained a gun-shot wound during the incident.

Dauntrell Walker and Fharis Smith are known by your affiant to be involved in weapon possession and violent acts within the City of Kalamazoo on a historical and an ongoing basis.

On 18 April 2020, Walker and Smith were arrested by Kalamazoo Public Safety officers. At the time of their arrests, both were in possession of loaded firearms. Smith was also in possession of two mobile communication devices. One is an iPhone device. The device is white and pink and bears FCC ID BCG-E2945A. The other is a Samsung mobile phone. The device is black and has no external visible identifying numbers.

Following his arrest, a fresh wound was located on Walker's lower back. Walker claimed that the wound was a stab wound. Your affiant has observed dozens of confirmed gunshot wounds and confirmed stab wounds. Walker's wound is consistent with a gunshot wound and is far less consistent with a stab wound.

These facts corroborate the information given by the source who has requested anonymity.

Your affiant knows through training and experience that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime and that they will document criminal activity through photographs, text messages, and other electronic data contained within and accessed by such devices. Affiant has employed facts obtained from such devices in the successful prosecution of violent criminals.

By searching the contents of Fharis Smith's mobile devices, affiant believes detectives will be able to learn more about who was at the scene and how events unfolded. Further, that there could be information on the phone including photos, communications and documents that would show whether Smith possessed a firearm or communicated with anyone about his involvement in this matter.

Based on the above facts, your affiant requests that this warrant be issued so that evidence of the crime(s) at hand may be searched for and seized.

This affidavit consists of: 2/2 Pages.

13577
Affiant

Review on: _____
Date

By: _____
Prosecuting Official

Subscribed and sworn before me on: 4-18-2020 @ 8:22 PM
Date

P44377
Judge/Magistrate