

24-2180

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

—against—

SHADELL MCBRIDE, AKA SEALED DEFENDANT 5, JUSTIN BALLESTER, AKA SEALED DEFENDANT 6, ALZUBAIR SALEH, AKA SEALED DEFENDANT 7, GIOVANNI RODRIGUEZ, AKA SEALED DEFENDANT 8, GABRIEL VALDEZ, AKA SEALED DEFENDANT 9, EMMANUEL PEREZ, AKA SEALED DEFENDANT 10, JORDAN BENNETT, AKA SEALED DEFENDANT 3, ELIJAH POUGH, AKA SEALED DEFENDANT 4, BRUCE MELVIN, AKA SEALED DEFENDANT 2,

Defendants,

BRUCE SILVA, AKA SEALED DEFENDANT 1,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF
DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLEE
BRUCE SILVA, AKA SEALED DEFENDANT 1**

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STATEMENT OF INTEREST OF AMICUS CURIAE¹

The New York Council of Defense Lawyers (“NYCDL”) is a not-for profit professional association of approximately 300 lawyers, including many former federal prosecutors and federal public defenders, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL’s mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL files this *amicus* brief in support of Appellee Bruce Silva, urging affirmance of the District Court’s decision below, which correctly granted Silva’s motion to suppress the electronic contents of the cellphone seized incident to his arrest and searched pursuant to a search warrant (the “Cellphone”).² NYCDL has a

¹ Pursuant to Rule 29.1 of this Court’s Local Rules, NYCDL certifies that: (1) this brief was authored entirely by counsel for NYCDL, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting the brief; and (3) apart from NYCDL and its counsel, no other person contributed money intended to fund preparing or submitting the brief.

² All parties have consented to the filing of this *amicus* brief. Accordingly, this brief may be filed without leave of court, pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

particular interest in this case because NYCDL's core concerns include protecting the rights of American citizens under the United States Constitution, including the Fourth Amendment right against unreasonable searches, and ensuring that all criminal defendants are afforded a fair trial in the federal system. The government's argument to uphold the search in this case, which was based on a bare-bones warrant affidavit that made no effort to establish a nexus between the Cellphone and the criminal conduct under investigation, implicates precisely these concerns.

NYCDL has participated as *amicus curiae* in numerous Supreme Court and Second Circuit proceedings. In recent years, NYCDL has filed *amicus* briefs in *Ciminelli v. United States*, 598 U.S. 306 (2023) (invalidating right-to-control theory of wire and mail fraud, following government confession of error after certiorari was granted); *Percoco v. United States*, 598 U.S. 319 (2023) (jury instructions impermissibly allowed conviction on basis that a private person could owe a duty of honest services to the public); and *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022) (reversing convictions based on insufficiency of government's proof of the making of a false statement in bank and wire fraud prosecution).

PRELIMINARY STATEMENT

To establish probable cause that a location or electronic device contains evidence of criminal conduct, it is axiomatic that law enforcement must show a nexus between the location or device to be searched and the criminal conduct at

issue. That nexus requirement may be satisfied in many ways—surveillance, toll records, cooperator information, to name just a few—but this Circuit’s decisions make clear that the nexus requirement must be satisfied with evidence, and not generalized, conclusory assertions about the affiant’s experience.

The record in this case reflects no investigative steps by law enforcement to establish such evidence, and instead exclusive reliance on the affiant’s experience. Upholding the validity of the search warrant here would mean that in virtually any case in which a defendant was arrested in possession of a phone, the government could gain access to its contents simply by repeating the mantra that people “often use cellular telephones” to engage in organized criminal conduct. That result would render the Fourth Amendment’s warrant requirement meaningless in cases involving cellphones, and remove any meaningful obstacles to unfettered and unlimited government searches of these devices carried by virtually every person.

As reflected in the body of case law precedents, and known to criminal practitioners on both the prosecution and defense side, any number of investigative steps are typically taken to show the nexus between the item to be searched and alleged criminal conduct. Those steps—many of which are simple to take—are discussed further below. But as just one example: the officers here were working with a confidential informant (“CI”) who was providing them information about the

Dub City gang, of which Silva was alleged to be a member. (A-56–57).³ The officers could simply have asked the CI whether Silva used the Cellphone—or indeed *any* phone—to communicate with him or other members of the gang at any time during the alleged multi-year time span of the purported conspiracy.⁴ (A-26–27). Although the NYPD had been investigating Silva since 2019, the federal search warrant affidavit of NYPD Detective Joseph Boyer, sworn on April 6, 2022 (the “Boyer Affidavit” or “Affidavit”) (A-54–64), gives no indication that any investigating agency ever took this step, or any other steps, to establish a nexus.

The failure of the affiant to demonstrate that he and others in law enforcement took even minimal investigative steps has two consequences. First, as correctly found below, the warrant application failed to establish probable cause that the Cellphone contained evidence of the crimes alleged. Second, the absence of evidence of nexus, drawn from the garden variety of steps that law enforcement typically employs, precludes the government from relying on the good faith exception to uphold its search. It was not “objectively reasonable,” *United States v. Leon*, 468 U.S. 897, 926 (1984)—and, at a minimum, was “grossly negligent,”

³ This brief uses “A-[X]” to refer to bates-stamped pages of the Appendix, “Gov’t Br.” to refer to the government’s brief, and “Silva Br.” to refer to Silva’s brief.

⁴ According to the officer’s “conversations” with the CI, Silva had been a member of the gang “since at least the late 2000s.” (A-56–57).

United States v. Raymonda, 780 F.3d 105, 117–18 (2d Cir. 2015)—for the officer, and the government, to present an Affidavit so utterly devoid of the evidence of nexus they routinely include in other warrant applications.

The Boyer Affidavit relies instead exclusively on the officer’s generic assertion that, in his experience, individuals engaged in organized criminal activity “often use cellular telephones to do so.” (A-58). Case law consistently acknowledges that such general and boilerplate assertions standing alone are insufficient to establish probable cause, preventing the government from meeting its burden of demonstrating good faith. In addition, it was not a reasonable “mistake” for the Boyer Affidavit to fail to present any evidence drawn from investigative steps that law enforcement officers routinely employ to establish nexus. The Affidavit’s defect was plain as compared to the government’s *own* usual practice and standards. The Affidavit’s silence strongly suggests that there was no additional investigation or that any additional investigation failed to establish the required nexus.

Also relevant to the lack of investigative diligence is that the Boyer Affidavit reflects only the most minimal effort to set forth evidence of a crime. The only evidence of Silva’s alleged crimes presented in the Affidavit—beyond allegations already presented in prior state and federal charging instruments—related to his participation in the Dub City gang. To support this allegation, Detective Boyer relied on his (undated) “conversations” with the CI, which are described in three

short paragraphs of only nine sentences—less than one-half page of text in all. The Affidavit provides: (1) no information as to when the CI belonged to or left the gang, or whether he was even a member at the time of the events he described; (2) no description of the basis for the CI’s allegations, such as whether he observed the incidents firsthand or only heard about them from others; and (3) no corroboration of the two shootings alleged, for example, by consulting the NYPD’s ShotSpotter system on which the Detective relied in the 2021 federal complaint to confirm that shots were fired in one of the shootings. The Affidavit fails even to contain any boilerplate assertion that the CI’s information has proven reliable in the past, another conspicuous omission vis-à-vis the government’s usual practice when relying on the information of an admitted wrongdoer.

Under these circumstances, for the Court to uphold the Cellphone search would be to incentivize shoddy investigations and efforts by law enforcement to substitute platitudes for evidence. The “bare-bones” nature of the warrant was a striking departure from the norm the government itself usually observes—a norm that doubtless reflects the government’s own understanding that proof of nexus requires more than just claims of “experience.” Thus, despite the government’s attempt to airbrush away “deterrence” as a factor weighing in favor of suppression Gov’t Br. at 46–47, this Court should uphold the District Court’s opinion to ensure that law enforcement officers take basic investigative steps, specific to the case, to

establish nexus, and to prevent the government from relying on “experience” when it fails to look for—or perhaps fails to find—evidence.

This Court should affirm.

STATEMENT OF FACTS

The investigation of Silva began almost two and one-half years prior to the April 2022 search warrant at issue. In November 2019, following an NYPD investigation, Silva was indicted on an attempted murder charge in state court in relation to an August 2019 shooting in the Bronx, New York and other charges (the “2019 State Indictment”). (A-20–46, A-57).

Approximately eleven months later, on October 14, 2021, Detective Boyer appeared in federal court seeking a warrant for Silva’s arrest on federal charges relating to the same August 13, 2019 shooting. (A-2). He swore to a complaint (the “2021 Federal Complaint”), charging Silva with a violation of 18 U.S.C. § 922(g) based on his alleged possession of ammunition after a prior felony conviction. (A-20–23).

The 2021 Federal Complaint relied on multiple corroborative categories of evidence. First, Detective Boyer described surveillance video of the August 2019 shooting, which in his description showed Silva carrying a firearm and firing “several shots” at a vehicle. (A-21). Second, the detective had consulted the NYPD’s “ShotSpotter gunfire detection system,” which confirmed that three

gunshots had been fired in the same vicinity. *Id.* Third, the detective reviewed forensic evidence of the recovery of three shell casings from the scene, and determinations that those casings were manufactured outside the State of New York. (A-22). And fourth, to confirm his own identification of Silva from the surveillance video, he had shown a photographic array to the victim of the shooting, who had identified Silva as the shooter. *Id.*

Five months later, on March 23, 2022, Silva was arrested on the 2021 Federal Complaint. (A-65). In his possession, Silva had the Cellphone and a driver's license and debit card that bore his true last name, "Silva," but the false first name of "Carlos." *Id.* Silva did not possess any credit card at the time of his arrest, according to the Boyer Affidavit. *Id.*

It was about two weeks later, on April 6, 2022, that the government sought a search warrant for the Cellphone. (A-52, A-61). To establish probable cause that Silva had engaged in the August 2019 shooting, the Boyer Affidavit simply referred to Silva's 2019 State Indictment and the 2021 Federal Complaint, incorporating the latter by reference. (A-57). The only evidence of Silva's alleged ongoing participation in the Dub City gang was drawn solely from the detective's "conversations" with the CI. (A-56–57). That information was the previously described three brief paragraphs comprising less than one-half page of text. (A-56–57). The paragraphs stated that the CI had known Silva to engage in financial

“scams,” including the use of “credit cards linked to false identities,” to have “pulled a gun” on another member of the Dub City gang in October 2021, and to have gotten into a shootout with a Dub City member named “Suave in November 2021.” *Id.*

The Boyer Affidavit contained no statement that the CI’s information had proven reliable in the past. It did not describe the basis of any relationship between the CI and Silva, or the time spans in which the CI had known or interacted with Silva or the Dub City gang. In stark contrast to the 2021 Federal Complaint he had earlier sworn, also under the “probable cause” standard, the Boyer Affidavit described no effort to corroborate the information provided by the CI.

With respect to the critical issue of nexus between the alleged criminal conduct and the Cellphone, the Boyer Affidavit said nothing. As described by the District Court in its opinion (A-74):

What is missing from the Boyer Affidavit . . . are allegations demonstrating that Silva used the seized cellphone in connection with his criminal activities. There are, for example, no factual allegations showing that Silva has used his phone to transmit calls or text messages to gang members, other co-conspirators, or the alleged victims of his crimes. There are no factual allegations that Silva has used his phone to post gang-related materials on social media. There are no witness accounts demonstrating that Silva has used his phone in connection with his criminal activities. There is no reference to surveillance camera footage showing Silva using his cellphone at or about the time of the shootings or other criminal activity. There is no evidence that the cellphone was observed at or recovered from the scene of any of the charged offenses.

Rather, the Boyer Affidavit relied on the general assertion based on Detective Boyer's training and experience that individuals "engaged in gang-related violence and other organized criminal activity need to arrange and coordinate their illicit activities and often use cellular telephones to do so." (A-58). The duration and nature of Boyer's "training, education, and experience" are not described in his Affidavit. (A-54).

Magistrate Judge Jennifer Willis issued the requested warrant on April 6, 2022. Approximately two and one-half months later, on June 21, 2022, Silva was indicted on the same Section 922(g) charge contained in the 2021 Federal Complaint. (A-3, A-24–25). On April 18, 2023, Silva was indicted for racketeering conspiracy and other charges in connection with his alleged participation in the Dub City gang. (A-26–46).

ARGUMENT

I. The District Court Correctly Concluded That The Boyer Affidavit Failed To Establish Probable Cause That the Cellphone Contained Evidence Of Alleged Crimes

For the reasons stated in the District Court's opinion, as well as the arguments of Silva as set forth in his Brief to this Court, *see* Silva Br. 4–40, the NYCDL supports affirmance of the District Court's conclusions that: (1) the Boyer Affidavit contained no factual allegations suggesting a connection between the Cellphone and the alleged criminal conduct (A-54–64); and (2) Detective Boyer's generic assertion,

based on his experience, that individuals engaged in organized criminal activity “often use cellular telephones to do so” (A-58), failed to satisfy the probable cause requirement.

The government’s effort to obtain reversal of the District Court’s finding of a lack of probable cause rests on two weak foundations.

First, the government repeatedly and consistently misstates the holdings of case law precedents in claiming that experience and training, standing alone, can provide probable cause of the nexus between the criminal conduct and the place to be searched. As the District Court correctly observed, “[t]he cases cited by the Government . . . merely confirm that blanket generalizations about the widespread use of cellphones are not sufficient to demonstrate probable cause,” absent additional case-specific facts. (A-79).

In each appellate case the government cites, Gov’t Br. at 35, the affiant offered facts beyond his or her opinion to show a nexus between the item to be searched and the alleged criminal conduct. *See, e.g., United States v. Riley*, 906 F.2d 841, 844–45 (2d Cir. 1990) (probable cause to search storage locker where warrant included information that locker rental agreement had been seized together with 36 pounds of marijuana from defendant’s home, storage facility was located in nearby town, and defendant had been seen using locker during alleged narcotics conspiracy); *United States v. Benevento*, 836 F.2d 60, 70–71 (2d Cir. 1987) (probable cause to search

homes where search warrant affidavits contained additional information, beyond officer's experience, "that suggested a link" between those homes and the criminal activity); *United States v. Cruz*, 785 F.2d 399, 405–06 (2d Cir. 1986) (probable cause to search apartment based on facts that the defendant, who ran a drug distribution operation and resided in different apartment, paid rent on the apartment and basement parking space yet took multiple steps to conceal his connection to the rental, including payments with cash or money orders); *see also United States v. Vizcarra-Millan*, 15 F.4th 473, 501–02 (7th Cir. 2021) (probable cause to search defendant's residence where repeated and large purchases of wholesale quantities of methamphetamines suggested ongoing retail drug distribution, cell site information placed defendant at residence the majority of the time, and physical surveillance confirmed his presence at the location); *United States v. Emmons*, 24 F.3d 1210, 1214–15 (10th Cir. 1994) (probable cause to search trailer home located on farm where defendant resided and where officers observed large quantities of marijuana plants growing along "distinctive trails" leading from the home, and officers had observed defendant tending marijuana plants at co-defendant's property in locations concealed from aerial surveillance). The same is true of the district court decisions on which the government now relies. *See Silva Br.* at 19–20 (discussing district court cases cited by government).

Second, the government resorts to creating a strawman, plucking isolated phrases from the District Court’s decision to argue that the District Judge misunderstood longstanding and axiomatic Fourth Amendment principles. *See* Gov’t Br. at 25–29. A full reading of the parties’ briefing below, and the District Court’s carefully considered opinion, shows that the experienced District Judge applied Fourth Amendment principles correctly. *See* Silva Br. at 24–29 (arguing same). This Court should not credit the government tactic of cherry-picking language, out of context, to impugn the District Court’s consideration.

The remainder of this *amicus* brief focuses on the failure of the government to meet its burden of establishing that it qualifies, in any event, for the good faith exception.

II. The District Court Correctly Concluded That The Government Could Not Rely On The Good Faith Exception

The District Court declined to apply the good faith exception on the ground that the Boyer Affidavit reflected glaring deficiencies that any reasonable law enforcement officer would recognize as undermining the warrant. (A-80–86). The good faith exception asks “whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances.” *United States v. Rosa*, 626 F.3d 56, 64 (2d Cir. 2010) (quotation marks omitted). An officer should have known a search was illegal if legal precedent established as much, *United States v. Maher*, 120 F.4th 297, 322 (2d Cir. 2024), or where the warrant was “so lacking

in indicia of probable cause as to render reliance upon it unreasonable,” *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992). “The burden is on the government to demonstrate the objective reasonableness of the officers’ good faith reliance” on an invalidated warrant. *United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012).

Here, the District Court’s rejection of the good faith exception was correct for at least two reasons. First, no binding precedent authorized the officer’s reliance on only his “training, experience, and research” to establish the evidentiary nexus for a search warrant, and this Circuit and others have routinely expressed skepticism of such reliance. Second, the exclusive reliance on training and experience to establish nexus, rather than the evidence that officers routinely put forward, made the Affidavit obviously deficient on its face. A reasonably well-trained officer would not have presented such an affidavit for court approval and cannot claim to have believed in its legality in good faith.

A. Appellate And District Court Precedents Precluded Reliance On Experience And Training Standing Alone To Establish Probable Cause

While the good faith exception will apply “when binding appellate precedent specifically *authorizes* a particular police practice,” *Maher*, 120 F.4th at 322 (emphasis added), the burden is on the government to demonstrate the objective reasonableness of the officers’ reliance, *Voustianiouk*, 685 F.3d at 215. The District

Court correctly recognized that the government cited no case from this Circuit or any other “suggesting that probable cause to search a cellphone may be established solely on the basis of (1) evidence that the suspect has engaged in gang or group-related criminal activity; and (2) generalized observations,” based on the officer’s training and experience, “that suspects engaged in conspiratorial criminal activity often use cellphones to facilitate their crimes.” (A-85). And it has again failed to do so in its brief to this Court.⁵

Far from affirmatively authorizing the government conduct here, this Circuit has long cautioned that an officer’s experience, “standing alone, might not be sufficient to establish a link between the [defendants’] current homes and their prior criminal activity,” and only “when viewed together with the other evidence” may probable cause be shown. *Benevento*, 836 F.2d at 71 (pointing to evidence of nexus beyond agent’s experience to uphold search).⁶ More recent decisions have only

⁵ For example, the government discusses at length *United States v. Morton*, 46 F.4th 331, 337 (5th Cir. 2022) (en banc). See Gov’t Br. at 41–42, 44. But in *Morton*, the three cellphones were recovered, along with drug paraphernalia, when an officer searched defendant’s car after smelling marijuana emanating from it. *Id.* at 333–34. Based on these facts *and* the arresting officer’s experience, law enforcement sought—and received—warrants to search the phones for evidence of drug possession.

⁶ *Benevento*, in turn, cited a district court decision finding no probable cause where the warrant relied on an officer’s opinion only. See 836 F.2d at 71 (citing *United States v. Gomez*, 652 F. Supp. 461, 463 (E.D.N.Y. 1987)).

reinforced the need for specificity in search warrants involving digital devices. *See United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) (reversing conviction where no probable cause for search, as the need for a warrant to specify “items to be seized by their relation to designated crimes” assumes “even greater importance” where searching digital devices). And in the parallel context of arrest warrants, this Court has determined that officers’ testimony that, in their experience, a defendant’s conduct was consistent with criminal activity is not enough to establish probable cause. *See United States v. Valentine*, 539 F.3d 88, 95 (2d Cir. 2008) (vacating denial of suppression motion because officers’ generalized “suspicions do not create probable cause to arrest,” absent more).

It is also relevant that other Circuits agree. *See Maher*, 120 F.4th at 321 (“In assessing the reasonableness of an officer’s mistaken belief,” this Court “consider[s] not only [its] own precedents but also those of other courts.”). Multiple appellate courts have deemed search warrants constitutionally inadequate where they relied only on an officer’s training and experience to establish probable cause that the item to be searched will contain evidence of the specified crimes. *See, e.g., United States v. Roman*, 942 F.3d 43, 52 (1st Cir. 2019) (affirming suppression of evidence, as officers’ “generalized observations” about their experience must be “combined with specific observations or facts connecting the [crime] to the [place to be searched] to permit an inference of nexus” (quotation marks omitted)); *United States v. Schultz*,

14 F.3d 1093, 1097 (6th Cir. 1994) (no probable cause, officer’s training “cannot substitute for the lack of evidentiary nexus in this case, prior to the search, between the safe deposit boxes and any criminal activity”); *see also United States v. Brinkley*, 980 F.3d 377, 389 n.7 (4th Cir. 2020) (“[e]xperienced officers . . . may not render the probable cause requirement a ‘toothless tiger’ through reliance on ‘cop-on-the-beat intuition[s].’”); 2 Wayne R. LaFave, *Search & Seizure* § 3.2(c) (6th ed. 2024) (“[P]olice training and experience, *without more*, is not a fact to be added to the quantum of evidence to determine if probable cause exists, but rather a ‘lens’ through which courts view the quantum of evidence” (emphasis in original)); *Silva Br.* at 13–14 (collecting cases).

For decades, district courts in this Circuit have likewise required specific facts beyond officers’ bare citation to their experience to find probable cause. *See, e.g., United States v. Santos*, No. 23-CR-436 (OEM), 2024 WL 3566983, at *9 (E.D.N.Y. July 29, 2024) (declining to apply good faith exception and suppressing cellphone evidence, where affidavit relied only on officer’s experience); *United States v. Garcia*, No. 3:20-CR-00058 (KAD), 2023 WL 4850553, at *7 (D. Conn. July 28, 2023) (same, noting: “The officer’s opinion, standing alone, is generally not sufficient to establish a link between the item to be searched and the alleged criminal activity” (quotation marks omitted)); *United States v. Kortright*, No. 10-CR-937 (KMW), 2011 WL 4406352, at *7 (S.D.N.Y. Sept. 13, 2011) (no probable cause to

search defendant's apartment based on year-old information that defendant dealt drugs on a handful of occasions and officer's experience); *United States v. Guzman*, No. 97-CR-786 (SAS), 1998 WL 61850, at *4 (S.D.N.Y. Feb. 13, 1998) ("Permitting a search warrant based solely on the self-avowed expertise of a law-enforcement agent, without any other factual nexus to the subject property, would be an open invitation to vague warrants authorizing virtually automatic searches of any property used by a criminal suspect" and would "effectively eviscerate the rule that probable cause to arrest an individual does not, in and of itself, provide probable cause to search that person's [property]." (quotation marks, brackets omitted)); *United States v. Rios*, 881 F. Supp. 772, 774–76 (D. Conn. 1995) (no probable cause based on training and experience alone); *Gomez*, 652 F. Supp. at 463 (same, stating: "While the issuing magistrate is certainly entitled to consider and credit [an officer's] specialized knowledge, it does not alone provide probable cause to search." (internal citation omitted)).

Although a district court decision on its own "cannot establish a binding principle of law sufficient to undermine an agent's good faith reliance on a later warrant," *Raymonda*, 780 F.3d at 119, this body of case law, read in light of the Circuit decisions discussed earlier, reflects a strong consensus that more than an officer's experience is required to establish nexus. That the government fails to identify *any* district court decision that supports the adequacy of the Boyer Affidavit

further reinforces that the need for specific facts establishing a nexus is well established, and the good faith exception should not apply. *See* Silva Br. at 19–20 (discussing cases cited by the government).

B. The Failure Of The Government To Establish A Factual Nexus In The Boyer Affidavit Based On Investigation Of Possible Links Between The Cellphone And The Alleged Criminal Conduct Was Objectively Unreasonable

The reliance of the government on the warrant was also objectively unreasonable because the warrant, on its face, lacked indicia of probable cause. The government exhibited “deliberate, reckless, or grossly negligent disregard” for Fourth Amendment protections, *Raymonda*, 780 F.3d at 117–18, in seeking a search warrant based on assertions that were classically, unambiguously “bare bones.”

1. The Boyer Affidavit’s Bare Assertions Are Insufficient To Demonstrate Ordinary Diligence

The norm observed by investigators, as also demonstrated by the case law cited above, is to set forth in a warrant application a “factual nexus” between the place to be searched and the alleged crimes, beyond touting experience and training, including where the place to be searched is a cell phone. The NYCDL in its experience has also observed that the inclusion of allegations showing such a nexus are utterly routine in search warrant applications. Also routine is for law enforcement officers to take investigative steps to establish that nexus—often very basic steps that were not taken here.

The stark contrast between what is ordinarily included in a warrant application to establish probable cause, and the bare assertion in the Boyer Affidavit—which suggests a failure to exercise ordinary diligence—is relevant to assessing “objective reasonableness.” For example, in *United States v. Vasquez-Algarin*, 821 F.3d 467 (3d Cir. 2016), the Third Circuit declined to apply the good faith exception where “the information that law enforcement relied upon to justify breaking into [defendant’s] apartment contrasts sharply in kind and quantity from the information deemed sufficient by this Court and other Courts of Appeals applying the probable cause standard,” *id.* at 482, 484; *see also Voustianiouk*, 685 F.3d at 216 (failure of officers to take “every step that could reasonably be expected of them,” and to seek a new warrant after finding the existing warrant specified the wrong apartment precluded applying good faith exception). The *Vasquez-Algarin* court refused to accept the government’s good faith argument, which in its view “boil[ed] down to the proposition that law enforcement officers may forcibly enter a home based on nothing more than the general representation of another law enforcement officer and the vague and uncorroborated assertions of unidentified informants that the intended arrestee lives there.” 821 F.3d at 484.

Here, as in the *Vasquez-Algarin* case, the government unreasonably failed to take investigative steps that may either have proved—or importantly, disproved—a linkage between the alleged crime and the Cellphone. In other words, instead of

hard evidence, it substituted the boilerplate assertion that targets like Silva “often use cellular telephones” in committing crimes. (A-58).

Reliance on such a warrant was plainly unreasonable.

2. The Boyer Affidavit Reflects A Lack Of Investigative Steps To Establish The Nexus Between The Criminal Conduct And The Cellphone

The steps that law enforcement officers routinely take to establish a nexus between alleged criminal conduct and a phone are numerous, well established in the case law, and well known to practitioners. As a first step, agents routinely rely on information from confidential informants. Here, a CI provided the principal evidence of Silva’s participation in the Dub City gang, but the Boyer Affidavit does not reflect that the obvious step of asking whether the CI had observed Appellant using the Cellphone, or indeed any phone, in connection with that alleged participation, was ever taken. *See Rios*, 881 F. Supp. at 775–76 (collecting cases and noting, in finding no probable cause, agents’ failure to state whether confidential informant knew defendant kept weapon in home).

A myriad of other investigative tools were available but are also unmentioned, such as obtaining the Cellphone’s number, either through the CI or by obtaining records or other proof. One standard and often-used technique is to call the device in question using a number obtained from the CI, or other sources in the investigation, to determine whether the phone rings. Once in possession of the

correct number, agents use Grand Jury subpoenas to obtain toll records for the phone to see if they reflect activity consistent with the criminal conduct alleged, such as making phone calls to other known co-conspirators. The Boyer Affidavit reflects no such investigation.

Another routine step is obtaining names of other alleged participants in a gang from a CI, and then reviewing their social media accounts to determine whether they or the investigation's target had posted photos or other evidence suggesting use of a cellphone. Here, the officers had surveillance video from the August 2019 incident and could also have attempted to find images of Silva possessing a cellphone from that video or any video surveillance relating to the other two alleged shootings.

The absence of any indication that the officers took such steps is particularly glaring given a fact the government's brief never mentions: Silva had been under NYPD investigation for years. Detective Boyer personally had obtained an arrest warrant for Silva over five months prior to the date of the search warrant application. And while the government sought the search warrant two weeks after Silva's federal arrest, no exigency is indicated in the record that prevented the government from investigating potential links to the phone before seeking the search warrant. Thus, this was not a case where conducting a thorough investigation would have been impractical or even particularly difficult. *See Voustianiouk*, 685 F.3d at 216 (noting that, while the Supreme Court has recognized that courts have sometimes allowed

latitude for “honest mistakes” made in the difficult and dangerous process of making arrests and executing searches, the Supreme Court has “explicitly rejected” the need for such deference when “no sort of exigency existed when an official drafted the affidavit” (quotation marks, brackets omitted)).

The age and duration of the conduct under investigation also raise the distinct possibility that any purported probable cause linking Silva’s conduct to the Cellphone in his possession at the time of his arrest was stale. The August 2019 shooting occurred two and one-half years prior to the search warrant application, and the most recent conduct alleged in connection with the Dub City gang was the November 2021 shooting—over four months before the search warrant was sought. Thus, even proof of Silva’s usage of the Cellphone might not have established probable cause as to events years or months before Silva’s arrest. Indeed, it is well known in law enforcement, and regularly alleged by the government, that individuals engaged in narcotics and gang activity regularly switch phones, or use multiple phones, as a way of evading arrest. *Cf. United States v. Hoey*, No. 15-CR-229 (PAE), 2016 WL 270871, at *9 (S.D.N.Y. July 28, 2023) (agent attested that witnesses saw defendant dealing narcotics for five years and that he “often had multiple cellular telephones and would frequently change his phone number, which based on my training and experience, is often something narcotics traffickers do”).

That was a distinct possibility here, where Silva was allegedly evading arrest. Fugitives typically cut ties to communication devices that can be traced to them.

The Boyer Affidavit nevertheless offered the bare assertion that “there is probable cause to believe that the [Cellphone] contains evidence of SILVA’s participation in a violent gang called ‘Dub City’ and a shooting in the vicinity of Dub City’s territory in or about August 2019.” (A-56). Given the Affidavit’s failure to include evidence that Silva ever used any phone for any purpose, and the lack of any temporal connection between the Cellphone and the Dub City shootings, this allegation is not just speculative, it is reckless.

The Boyer Affidavit implicitly recognizes this staleness problem by including among Silva’s alleged criminal conduct not only his gang participation, but his “flight from justice from in or about December 2021 to March 2022.” (A-59). But this transparent effort fails for the same reasons as the rest of the Boyer Affidavit. There is no connection described between his alleged flight and the Cellphone other than the detective’s experience and training. The Affidavit provides no evidence that Silva in fact used the Cellphone to facilitate his flight. The “evidence” is pure speculation.

3. The Boyer Affidavit Contains Sparse Evidence Of Criminal Conduct

On top of the Boyer Affidavit’s failure to establish any nexus between the Cellphone and the alleged criminal conduct, the Affidavit reflects only the most

minimal effort to establish probable cause of a crime.⁷ The portion of the Boyer Affidavit setting forth that probable cause amounts to less than two pages, and it describes only two categories of criminal conduct: the August 2019 shooting and the more recent “Racketeering Conspiracy” concerning the Dub City gang. As to the 2019 shooting, the Affidavit relies entirely on allegations made in the prior state and federal court charging instruments. No new evidence concerning that incident is presented in the warrant application.

As to the second category—Silva’s alleged participation in the Dub City gang—the Affidavit relies on the three paragraphs of CI-provided information that is both general and sparse. The affidavit provides no details as to: when the CI purportedly left the Dub City gang; whether he was a member at the time of the events he described; the basis for the CI’s allegations, including whether they were based on firsthand observation or hearsay; or whether the CI’s information had proven reliable in the past. *Compare Vasquez-Algarin*, 821 F.3d at 480 (vacating conviction and finding suppression warranted where officer relied on informants’ statements but “did not identify the number of informants, their reliability based on any prior interactions . . . , [or] the specific information they related”), *with United*

⁷ Silva has not disputed the existence of probable cause to believe that he committed crimes, with the exception of the allegations that he committed fraud. *See Silva Br.* at 1, 29–31. But the lack of diligence remains relevant to the good faith inquiry for the reasons already described.

States v. Jones, 43 F.4th 94, 109, 112 (2d Cir. 2022) (applying good faith exception where complainant, who was mother of one of two victims, specified that Jones gave her daughter and her daughter’s friend—whom she identified by name—alcohol and drugs, took nude photos of them, and made sexual advances toward them, and where signed statements from both victims corroborated complainant’s statement).

Even more striking, the Affidavit makes no effort to corroborate the information obtained from the CI. The first of the Affidavit’s three paragraphs makes the allegation that Silva “is a member” of the gang and has been so since “the late 2000s.” (A-67). This allegation is so general as to be almost meaningless, and the only sentence added is the equally imprecise allegation that since “at least the late 2000s,” Silva “engag[ed] in a variety of financial scams to make money for the gang including using credits cards linked to fake identities.” *Id.* Such an allegation of financial fraud is uniquely susceptible to corroboration, since such financial “scams” necessarily leave a paper and electronic trail in their wake. Yet the Affidavit provides no such corroboration. The Boyer Affidavit does not even say that Silva had a credit card in his possession at arrest, and instead mentions only a debit card.

The second and third paragraphs each allege a separate shooting incident, one in October 2021 and one in November 2021. Such incidents again are highly susceptible to corroboration, at least to establish that a shooting in fact occurred. In

his 2021 Federal Complaint, Detective Boyer provided corroboration of the fact of the August 2019 shooting and the identity of the perpetrator as Silva. In that Complaint, for example, in addition to describing surveillance video of the shooting itself, the detective had sought corroboration of the shooting in two different forms: the “NYPD’s ShotSpotter gunfire detection system” which detected three gunshots fired in the vicinity, and the forensic examination which recovered three casings from the crime scene. (A-21). The Boyer Affidavit provides no evidence that he sought such corroboration, or video surveillance footage, for either of the October 2021 or November 2021 shootings.

The lack of investigation vis-à-vis norms typically observed by law enforcement, including as described in the case law, renders objectively unreasonable the officers’ reliance on the search warrant. Despite every opportunity to do so and the fact that basic investigatory steps are the norm, law enforcement seemingly chose not to conduct *any* investigation. Among other things, this suggests that officers turned their backs to the possibility that their investigations might undermine, rather than support, probable cause to search the Cellphone. The Fourth Amendment does not permit such conduct to be characterized, or excused, as “good faith.”

4. The Deterrence Benefit Of Applying The Exclusionary Rule Far Outweighs Any Societal Cost Of Suppression

Application of the exclusionary rule is also warranted precisely to deter law enforcement officers from conducting no investigation and instead relying solely on their “experience and training” to obtain search warrants. *See Davis v. United States*, 564 U.S. 229, 236–37 (2011) (purpose of the exclusionary rule is “to deter future Fourth Amendment violations”). Here, it cannot be said that “[t]here is nothing more the officer could have or should have done under the[] circumstances to be sure his search would be legal.” *United States v. Ganius*, 824 F.3d 199, 223 (2d Cir. 2016) (en banc). Nor did any urgency or possibility of destruction of the contents of the Cellphone promote an “inadvertent error” or otherwise make the conducting of investigation specific to that phone impossible or impractical.

The societal costs of suppression also do not outweigh the benefits of deterrence. The failure to make any inquiries here was “sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Voustianiouk*, 685 F.3d at 216. By applying the rule and affirming the District Court, this Court would simply be requiring officers to do their jobs: to conduct the sort of basic investigations for which they were trained and which they themselves routinely undertake.

A contrary ruling would risk quickly and dramatically eroding Fourth Amendment protections, including for the reason that such a ruling will change the

law as it currently stands. If the government can gain access to the contents of a cellphone simply by repeating the mantra that people “often use cellular telephones” to engage in criminal conduct, that mantra will become the new norm in search warrant affidavits. The Fourth Amendment’s warrant requirement would be rendered meaningless in cases involving cellphones—meaning virtually every case given the ubiquity of cellphones—and the government would gain unfettered access to devices that virtually every person carries, and uses, with well settled expectations of privacy. Such a result is inconsistent with the text, history and purpose of the Fourth Amendment, and the Court should reject the government’s arguments to the contrary.

CONCLUSION

The decision of the District Court should be affirmed.

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December 9, 2024

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word.
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