No. 04-3890

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GREGORY SHELL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 03-C-3182 (95 CR 508-2)

The Honorable Harry D. Leinenweber, U.S.D.J.

BRIEF AND APPENDIX
FOR PETITIONER-APPELLANT

Oral Argument Requested

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JURISDICTIONAL STATEMENT

On August 13, 2004, the district court (Leinenweber, J.), pursuant to its jurisdiction under 28 U.S.C. § 2255, entered a final judgment denying Petitioner-Appellant Gregory Shell's Motion to Vacate, Set Aside or Correct Sentence. A1.[1] On October 4, 2004, Shell applied for a certificate of appealability, SA6, which the district court denied on November 8, 2004, SA4, and this Court (Posner, J.) granted on April 21, 2005. SA2. This Court's jurisdiction rests on 28 U.S.C. § 2253(c).

ISSUES PRESENTED

Suspicious that Larry Hoover, Gregory Shell and other individuals were engaging in illegal conduct at the Vienna Correctional Facility, law enforcement authorities obtained court orders authorizing electronic surveillance of the facility's visitor area. Even though the orders did not authorize any searches or seizures of Gregory Shell's body, authorities placed a listening device on Shell's body and obtained incriminating evidence that led to Shell's conviction and the life sentence that he currently serves. Shell's trial and appellate attorney never raised the meritorious argument that the introduction of the incriminating evidence violated his client's Fourth Amendment rights.

This case raises the important question of whether Shell was deprived of his Sixth Amendment right to effective assistance of counsel because his attorney never argued that:

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[1] Citations to "A__" refer to the required short appendix bound with this brief. Citations to "SA__" refer to the Separate Appendix.

1. The intercepted conversations were obtained in violation of the Fourth Amendment because the Government illegally seized Shell's body;
2. The trial court erred when it admitted the intercepted conversations because law enforcement officials searched Gregory Shell's body, and the orders only authorized a search of the Vienna Correctional Facility Visitor Area; and
3. The Government's deliberate omissions of material information about the interception method rendered the court orders void, and the reviewing judge would not have authorized the orders had he known that law enforcement officials intended to use a more intrusive method.

STATEMENT OF THE CASE

On December 5, 1996, a grand jury indicted Shell as part of a 42-count multi-defendant indictment. SA20. On May 9, 1997, a jury in the United States District Court for the Northern District of Illinois convicted Shell, SA6, and the district court (Leinenweber, J.) sentenced him to life imprisonment. Shell's conviction resulted from the admission of damning audio tapes that the district court ruled admissible on December 12, 1996. SA79. This Court upheld Shell's conviction on April 12, 2001. SA72.

On May 13, 2003, Shell filed a timely *pro se* motion under 28 U.S.C. § 2255. SA20. Over a year later, on August 13, 2004, the district court denied Shell's § 2255 challenge

and motion for default judgment.[2] A1. Shell filed a notice of appeal and a request for a certificate of appealability on October 4, 2004. SA6. This Court (Posner, J.) granted Shell's request for a certificate of appealability on April 21, 2005. SA2.

STATEMENT OF FACTS

A. The Application for Orders and the Subsequent Search and Seizure

Gregory Shell frequently visited Larry Hoover, the alleged leader of the Gangster Disciples, at the Vienna Correctional Facility in Vienna, Illinois, where Hoover was incarcerated. The two would meet other acquaintances at the facility's outdoor picnic area to talk and play cards. Shell's repeated visits led Assistant U.S. Attorney Ronald S. Safer and Drug Enforcement Administration ("DEA") Special Agent David C. Tibbetts to believe that Shell and Hoover discussed Gangster Disciples-related business at the Vienna facility to avoid detection by the prison guards, who monitored inmates' mail and telephone conversations. SA128. Safer and Tibbetts sought to catch Shell and Hoover in the act of engaging in gang activities at the Vienna Correctional Facility Visitor Area.

On October 29, 1993, Safer applied for an order under Title III of the Omnibus Crime Control and Safe Streets Act, 82 Stat. 22 (1968) ("Title III"), authorizing the interception of the conversations of Shell, Hoover, and other named and unnamed individuals "occurring at the prisoner visitor area at the Vienna Correctional Facility." SA99. The order application specifically stated that law enforcement authorities would

[2] The district court twice ordered the Government to file a response to Gregory Shell's § 2255 challenge, and twice the Government failed to do so. On March 30, 2004, Gregory Shell filed a motion for default judgment, to which the Government finally responded on April 26, 2004, almost a year after Gregory Shell filed his § 2255 challenge.

limit their intrusions to the physical space of the Vienna Correctional Facility Visitor Area because there was only "probable cause to believe that the Visitor Area located at the Vienna Correctional Facility, has been, is being and will continue to be used or caused to be used by the target subjects in connection with the commission of the above-described offenses." SA103. Similarly, the order application stated the Government would only intercept the conversations among named individuals because there was only "probable cause to believe that particular oral communications of Larry Hoover, Gregory Shell [and other individuals] . . . occurring at the Visitor Area . . . will be obtained through the interception for which authorization is herein applied." SA102.

The order application, however, never informed the reviewing judge that law enforcement authorities intended to seize individuals by placing secret listening devices on the bodies of Shell and other Hoover visitors. Furthermore, it never informed the court that law enforcement authorities would require Shell to wear the listening devices in the lobby of the Vienna Correctional Facility administration building prior to entering the Visitor Area. Instead of revealing the true nature of the search and seizure, the application merely asked the reviewing judge to allow federal and state officials "to make all necessary surreptitious entries to effectuate the purpose of this order, including but not limited to entries to install, maintain and remove electronic listening devices within the Visitor Area located at the Vienna Correctional Facility." SA106. The order application contained no mention of any expected intrusion on Shell's body, and assured the court that the Government would "notify the Court of each surreptitious entry." SA106.

As a result of these assurances, the reviewing judge (Moran, C.J.) on October 29, 1993, approved the limited order, authorizing only the interception of conversations and a search of the Vienna Correctional Facility Visitor Area. SA92. On December 3, 1993, the reviewing judge extended the order authorizing only the seizure of conversations. SA86. Borrowing language from the order application, both orders authorized the interception of conversations among Hoover, Shell and other named individuals because there was only "probable cause to believe that particular oral communications of Larry Hoover, Gregory Shell [and other named individuals would occur] at the prisoner visitor area at the Vienna Correctional Facility in Vienna, Illinois (the 'Visitor Area')." SA87, SA93. Furthermore, both orders stated that there was only "probable cause to believe that the Visitor Area located at the Vienna Correctional Facility, has been, is being and will continue to be used or caused to be used by the target subjects in connection with [illegal conduct]." SA88, SA94. Finally, both orders deputized Illinois officials only "to intercept the oral communications occurring at the Visitor Areas located at [the] Vienna Correctional Facility," SA89, SA94-SA95, and authorized agents to "make all necessary surreptitious entries to effectuate the purposes of this order, including but not limited to entries to install, maintain and remove electronic listening devices within the Visitor Area located at the Vienna Correctional Facility." SA89, SA95-SA96.

Neither order mentioned a search or seizure of Shell's body. SA86, SA92. Indeed, both orders make clear by referencing the Visitor Area a total of eight times that the court intended the Government to engaged *only* in a limited search of the Vienna

Correctional Facility. The absence of any reference to Gregory Shell's body or to visitor badges demonstrates that the reviewing judge had no idea of the real methods that the Government intended to use, namely a search and seizure of Gregory Shell's body that exceeded the scope of the orders.

Instead of complying with the orders' limitations, law enforcement authorities forced Shell to wear a listening device secretly concealed in a visitor badge. In so doing, authorities engaged in an illegal search and seizure of his body. The device bore illegal fruits, which served as the main evidence against Shell and co-defendants. SA73.

B. The Motion to Suppress Evidence and the Subsequent Trial and Appeal

Before the trial against Shell and co-defendants commenced, defense counsel raised various challenges to the admission of the illegally obtained conversations.[3] Counsel, however, never argued that the seizure of Gregory Shell's body violated his Fourth Amendment rights; that the intrusion on Shell's body exceeded the orders; or that the Government's omission of material information in the order application rendered the reviewing judge a "rubber stamp." On December 12, 1996, the district court denied defendants' motion to suppress, and the Government introduced the taped conversations at trial. SA79.

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[3] Specifically, counsel argued that the district court lacked the jurisdiction necessary to authorize the orders; that the application, which mentioned the Vienna Correctional Facility Visitor Area, did not describe that location sufficiently; that the Government failed to seal the intercepted tapes; and that the orders were not necessary. SA72.

Relying on the illegally obtained conversations, a jury convicted Shell of numerous felonies[4] and the district court sentenced Shell to life imprisonment. He is currently serving this life sentence in a federal prison in Florence, Colorado.

In arguments before the Seventh Circuit in March 2001, counsel for the defendants raised various arguments that this Court had previously rejected. SA73. Counsel, however, did not raise the important and meritorious arguments that the orders did not authorize a search or seizure of Gregory Shell's body, or that the omissions in the order application rendered the reviewing judge a "rubber stamp."[5] Without considering these important arguments, this Court affirmed Shell's conviction on April 12, 2001 in *United States v. Hoover* after scolding counsel for raising frivolous arguments. SA73. The Supreme Court denied Shell's petition for a writ of certiorari on June 28, 2002. SA71.

C. The Section 2255 Proceedings

On May 13, 2003, Shell filed a timely 28 U.S.C. § 2255 challenge to his conviction, arguing that his Sixth Amendment right to effective assistance of counsel was denied because his attorney failed to raise his meritorious Fourth Amendment claims. The district court denied Shell's § 2255 challenge on August 13, 2004. A1. Without citing

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[4] Shell was convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848; conspiracy to possess with intent to distribute cocaine, cocaine base, heroin, and marijuana in violation of 21 U.S.C. § 846; distribution of narcotics in violation of 21 U.S.C. § 841(a)(1); use of minors in furtherance of the conspiracy in violation of 21 U.S.C. § 843(b); and use of firearms during and in relation to the conspiracy in violation of 21 U.S.C. § 924(c).

[5] During oral arguments on appeal, counsel for a co-defendant observed for the first time that the order location (the Vienna Correctional Facility Visitor Area) did not match the search location (defendants' bodies). Counsel, however, did not use this discrepancy to argue that the search and seizure of Shell's body fell outside the orders.

any language from the orders, the district court held that the orders authorized the invasive seizure of Gregory Shell's body. A2-A3. It reasoned that the Government's seizure of Shell constituted a "minuscule" "invasion of privacy" and that the discovery of incriminating evidence created a *post hoc* justification for the illegal seizure. A3. Next, without citing or distinguishing contrary precedent from the Supreme Court, the district court held that the orders to search the prison grounds authorized the intrusion on Gregory Shell's body because Shell "was within the confines of the designated prisoner visitor area," and law enforcement authorities could search any person in a location after receiving authorization to search that location. *Id.* Finally, the district court denied Shell's argument that the reviewing judge became a "rubber stamp." A3-A4. Instead, it adopted the Government's position that law enforcement authorities did not need to inform the court whether they intended to use an invasive method outside the scope of the orders. *Id.* This appeal followed.

SUMMARY OF ARGUMENT

Law enforcement authorities know, as a basic tenet in Fourth Amendment jurisprudence, that the search or seizure of a person presents a greater intrusion on the interests protected by the Fourth Amendment than a search or seizure of property. They also know that, as a result of this well-established principle, judges consider the interests of security of a person when they carefully scrutinize a search warrant or interception order application. Judges do so because the Fourth Amendment interests at stake in searches or seizures of a person are greater than those involving property.

In this case, the Government thwarted the court's ability to determine whether intrusion on personal interests was justified by presenting their application for an interception order as one that contemplated intrusions only of interests associated with a location. The applying officers told the reviewing judge only that they sought to enter and intercept conversations in a prison visitor area. Having been told only that much, the reviewing judge approved the limited order, believing that the less intrusive search was justified.

In execution, however, the intrusions and interceptions that took place were of a considerably and critically different character, particularly with respect to Fourth Amendment interests. Rather than simply entering and intruding upon the described location, the Government planted a listening device on Gregory Shell's body when he visited a prison inmate. Through this physical intrusion, which constituted an illegal search and seizure of his body, the Government obtained incriminating evidence that led to Shell's conviction and the life sentence that he currently serves. More to the point of this proceeding, Shell's trial and appellate counsel never raised the obvious argument that the order did not authorize the more intrusive search and seizure of Shell's body. No court heard arguments that the physical and personal intrusion on Shell's body constituted an intrusion greater than a search of one part of the Vienna Correctional Facility.

Shell is currently serving a life sentence because his counsel failed to raise these serious and meritorious Fourth Amendment claims. Had Shell's counsel raised these arguments, the district court, this Court, or the Supreme Court would have suppressed

the illegally obtained evidence that became the centerpiece at Shell's trial. To prevent the injustice of having citizens serve life sentences for their counsel's lapses, the Sixth Amendment and § 2255 require this Court to reverse Shell's conviction.

STANDARD OF REVIEW

This Court will review the district court's denial of Shell's § 2255 challenge under a *de novo* standard because his case raises pure issues of law involving important constitutional and statutory rights under the Fourth Amendment and Title III. *See Cooper v. United States*, 378 F.3d 638, 640 (7th Cir. 2004); U.S. Const. amend. IV; 18 U.S.C. § 2518.

The failure to raise meritorious Fourth Amendment claims can constitute ineffective assistance of counsel. *Owens v. United States,* 387 F.3d 607, 610 (7th Cir. 2004). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that an attorney's behavior must satisfy an objective standard of reasonableness and cannot prejudice defendant by resulting in an unreliable and fundamentally unfair outcome at trial). Ineffective assistance of counsel can constitute a fundamental defect in the judicial process justifying the overturning of a conviction. *See, e.g., United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005). Shell has standing to challenge the violation of his Fourth Amendment rights. *See Alderman v. United States*, 394 U.S. 165, 174 (1969).

ARGUMENT

I. Background of Applicable Law

The Fourth Amendment and Title III both provide three important protections applicable to the facts of this case. U.S. Const. amend. IV ("The right of the people to be

secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched*, and *the persons or things to be seized*.") (emphasis added); 18 U.S.C. §§ 2510-2520. First, both the Fourth Amendment and Title III create a review process in which law enforcement authorities seek warrants or orders from neutral judges before engaging in invasive searches and seizures. U.S. Cont. amend. IV; 18 U.S.C. § 2518. Second, to enable the reviewing judge to evaluate whether there is probable cause to justify a warrant or order for a search or seizure, law enforcement authorities must provide details about the "place to be searched" and "the persons or things to be seized," U.S. Const. amend. IV, and "a *particular* description of the nature and location of the facilities from which or the place where the communication is to be intercepted." 18 U.S.C. § 2518(1)(b)(ii), (3)(d) (emphasis added). Third, to ensure that law enforcement authorities seek warrants and orders, courts must suppress evidence obtained from illegal searches unsupported by warrants. *Weeks v. United States*, 232 U.S. 383, 392 (1914); 18 U.S.C. § 2518(10)(a)(iii). *See also* 18 U.S.C. § 2515 ("Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . if the disclosure of that information would be in violation of this chapter."). The suppression of evidence provides an incentive for law enforcement authorities to abide by the Amendment's requirements. *Weeks*, 232 U.S. at 392.

Finally, the protections embodied in the Fourth Amendment and Title III must be liberally construed. *See, e.g., Boyd v. United States*, 116 U.S. 616, 635 (1886) (describing how courts must remain vigilant against any "obnoxious . . . stealthy encroachments"); *United States v. Chavez*, 416 U.S. 562, 593-94 (1974) (describing how "the protection of privacy was an overriding concern of Congress when it established the requirements of Title III"). Both the Fourth Amendment and Title III require the suppression of evidence in this case because the placing of the listening device on Shell's body constituted both an illegal seizure and an illegal search of his body that the orders did not authorize.

II. This Court Must Suppress Evidence Obtained from the Illegal Seizure of Gregory Shell's Body Because the Orders Did Not Authorize the Seizure of His Body

The Fourth Amendment regulates two types of seizures of a person. When a Government official identifies him- or herself as a law enforcement officer, a seizure occurs when the officer uses physical force and a citizen submits to a showing of authority. *McCoy v. Harrison*, 341 F.3d 600, 605 (7th Cir. 2003). However, when officials hide their authority, as they did in this case, a seizure "occurs when there is some meaningful interference with an individual's possessory interests," without the consent of the owner. *United States v. Karo*, 468 U.S. 705, 712 (1984) (internal quotation marks omitted).

A. The Government Seized Shell by Placing a Listening Device on His Person

The Supreme Court's decision in *United States v. Karo*, 468 U.S. 705 (1984), demonstrates that the placing of a listening device on Gregory Shell's body without prior judicial authorization constituted a Fourth Amendment violation. In *Karo*, DEA agents placed a tracking device in defendant's sealed container, which they used to follow the container and obtain incriminating evidence. *Id.* at 708-09. The Supreme Court held that placing a device in the container did not constitute a seizure of the container because the alleged seizure did not occur when the container was in Karo's possession. Rather, a DEA informant, who had possession of the container, authorized the Government to attach the tracking device. *Id.* at 711.

The Court's reasoning in *Karo* makes clear that there would have been a seizure of Karo's container had DEA agents placed the tracking device while the container was in Karo's possession. *See, e.g., id.* at 729 n. 2 (Stevens, J., dissenting) (describing the importance of the fact that DEA agents attached the device prior to Karo's obtaining possession); *United States v. Jones*, 31 F.3d 1304, 1311 (4th Cir. 1994) (describing how *Karo* "raises the disturbing specter of government agents hiding electronic devices in all sorts of personal property and then following private citizens who own such property as they go about their business"). Thus, under *Karo*, the Government may not seize property by attaching tracking devices without either an order or the consent of the person in possession of the property.

Karo involved the seizure of property, not a person. The privacy interests that prevent the Government from seizing property by attaching a tracking device, however, also prevent the Government from seizing a person by placing a listening device on his or her body because the seizure of a person implicates greater interests than those implicated by a seizure of property. In *Terry v. Ohio*, 392 U.S. 1, 9 (1967), the Supreme Court made clear "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law" (quoting *Union P. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). Such interests go to the "inviolability of the person." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Thus the Fourth Amendment, as interpreted in *Karo*, *Terry* and *Wong Sun*, prevents the Government from surreptitiously placing a listening device on a person's body just as it prevents the Government from placing a tracking device on an individual's property without prior judicial authorization.

The Government infringed on Shell's Fourth Amendment exclusionary right to his body by attaching an electronic listening device on him outside the Visitor Area. *See Karo*, 468 U.S. at 712. In so doing, the Government converted Gregory Shell's body for its own use in violation of the Fourth Amendment's prohibition on illegal seizures. *See id.*

B. The Government Did Not Obtain Prior Authorization to Seize Gregory Shell's Body

The Government did not obtain prior authorization to seize Gregory Shell's body. First, at no point did Shell consent to the placing of a listening device on his body prior to entering the Visitor Area. Second, the orders did not authorize any interference with Shell's interests in his body because the Government offered no justification for the higher intrusion. The orders only authorized the Government to seize conversations among Shell and other named individuals in the Visitor Area. SA86-SA88, SA92-SA94. An order to seize one object (a conversation), however, does not authorize the seizure of another (Shell's body). *See, e.g., Dale v. Bartels*, 732 F.2d 278, 285 (2d Cir. 1984) (warrant to seize person did not authorize seizure of personal photographs). As the Supreme Court made clear, the Fourth Amendment "prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Horton v. California*, 496 U.S. 128, 143 (1990) (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)).

C. This Court Must Suppress Evidence Obtained from the Illegal Seizure of Shell's Body

Because the Government obtained evidence from an illegal seizure of Shell's body, this Court must suppress that evidence. *See Weeks*, 232 U.S. at 392. The admission of evidence obtained in violation of the Fourth Amendment corrupts the judiciary, and illegal law enforcement practices "should find no sanction in the judgments of the courts which are charged at all times with the support of the

Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." *Id*. *See also Wong Sun*, 371 U.S. at 486.[6]

In this case, the Government could have requested authorization from the reviewing judge to seize Gregory Shell's body. The Government, however, chose not to, and its failure to do so demonstrates either the Government's admission that there was no justification for the seizure, or the Government's blatant disregard for the important supervisory role of the judiciary. In light of the Government's failure to request prior authorization to seize Shell's body, the unilateral and unlawful seizure of Shell's body deserves no sanction in this Court's judgments.

III. This Court Must Suppress Evidence Obtained from the Illegal Search and Seizure of Gregory Shell's Body Because the Search and Seizure Interfered with Interests Beyond Those Implicated in the Orders

A. The Government Engaged in a Search of Gregory Shell's Body

By placing a listening device on Gregory Shell's body and recording his conversations, the Government intruded on his reasonable expectation of privacy in his body. *See Wyoming v. Houghton*, 526 U.S. 295, 304 n.1 (1998) (describing how a search of a person's clothing and pockets constitutes a search of that person); *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that placing a recording device in a phone booth and monitoring conversations constitutes an illegal search of the person in the booth); *Karo*, 468 U.S. at 713-18 (same result for placing a tracking device in a container and monitoring its movements).

[6] The Government convinced the district court to admit the evidence and to deny Shell's § 2255 challenge because the illegal search and seizure uncovered evidence of criminal behavior. The discovery of contraband, however, cannot validate an illegal search and seizure. *See Maryland v. Garrison*, 480 U.S. 79, 85 (1987).

B. The Orders Did Not Authorize the Search or Seizure of Gregory Shell's Body Because a Search and Seizure of a Person Is More Intrusive Than a Search of a Location

Law enforcement authorities asked for and obtained narrowly drafted orders authorizing only searches of the Vienna Correctional Facility Visitor Area. The orders made clear that the reviewing judge deputized Illinois agents only to "make all necessary surreptitious entries to effectuate the purpose of this order, including but not limited to entries to install, maintain and remove electronic listening devices within the *Visitor Area located in the Vienna Correctional Facility*." SA89, SA95-SA96 (emphasis added). The orders each repeated four times that authorities had permission to search only the Visitor Area and never mentioned a search or seizure of Gregory Shell's body. SA89, SA92.

The orders that authorized the search of the Visitor Area did not authorize the search or seizure of Shell's body simply because he was in that area. Orders authorizing searches and seizures of persons and orders authorizing searches of property are distinct and require balancing of different interests. *See Houghton*, 526 U.S. at 304 n.1. As the Supreme Court made clear in *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1979), and re-affirmed twenty years later in *Houghton,* 526 U.S. at 304 n.1, a warrant to search a place does not authorize the search of each individual in that place, unless the warrant specifically authorizes the searches of individuals.

The facts of *Ybarra* could not be more similar to the facts of this case. In *Ybarra*, state police obtained a warrant to search a property, the Aurora Tap Tavern, and a person, the bartender named Greg, for illegal drugs. 444 U.S. at 88. The police,

however, did not limit their search to the locations specified in the warrant. Instead, they searched patrons in the Aurora Tap Tavern, including Ventura Ybarra. As a result of these illegal searches, the police found heroin on Ventura Ybarra, and the state subsequently introduced the fruits of their illegal search at Ybarra's trial. *Id.* at 88-89. The Supreme Court held that the warrant to search the tavern for illegal drugs did not authorize the search of Ybarra, who was located inside the tavern and had possession of illegal drugs, and the Court suppressed the evidence obtained from the search. *Id.*

The *Ybarra* distinction between person and place is important because "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." *Berger v. New York*, 388 U.S. 41, 69 (1967) (Stewart, J., concurring). A search or seizure of a person demands higher scrutiny than a search of a location because the former constitutes a greater intrusion than the latter.[7] Indeed, the Supreme Court affords searches of one's person a "unique, significantly heightened protection" different from those afforded to searches of property. *Houghton*, 526 U.S. at 303. As a result of this heightened protection, the search of Ybarra was less reasonable than the search of the Tavern. *See also Nat'l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 684 (1989); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984); *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978).

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[7] Courts have consistently applied and expanded the central principle in *Ybarra* that a search of one place or person does not authorize the search of another place or person. *See, e.g., Houghton,* 526 U.S. at 295; *United States v. Di Re,* 332 U.S. 581, 587 (1948) (a warrant to search a car does not authorize the police to search the car's occupant as incident to the warrant's execution); *United States v. Butler*, 71 F.3d 243, 249 (7th Cir. 1995) (*citing United States v. Hinton*, 219 F.2d 324, 326 (7th Cir. 1955) (warrant to search one residential unit does not authorize search of each unit in building)); *United States v. Baca*, 480 F.2d 199 (10th Cir. 1973) (noting that search warrants for persons and property are distinct).

Ybarra demonstrates that the orders in this case did not authorize the search of Gregory Shell's body. As in *Ybarra*, law enforcement authorities obtained a warrant to search a location. And in both *Ybarra* and this case, the Government found the object that they were looking for: drugs in a bar and a conversation in a prison, respectively. In both cases, however, the Government did not receive prior authorization to abrogate the "heightened protection" afforded to the defendant's person. Consequently, the intrusive searches in both cases fell outside the scope of the orders and constitute Fourth Amendment violations.

C. This Court Must Suppress Evidence Obtained from the Illegal Search of Shell's Body

Because the orders only authorized a search of the Vienna Correctional Facility Visitor Area and law enforcement authorities searched and seized Shell's body instead, this Court must suppress the evidence obtained from the illegal search and seizure. Suppressing the illegally obtained evidence is necessary to protect Shell's expectation of privacy in his body and ensures that a "valid search warrant [will not turn] into an invalid general search [when law enforcement] officers flagrantly disregard the limitations of the warrant." *See United States v. King*, 227 F.3d 732, 751 (6th Cir. 2000); U.S. Const. amend. IV; 18 U.S.C. § 2518.

IV. Because the Search and Seizure of Shell's Body Was Not Implicit in the Orders or the Order Application and Because the Fourth Amendment Prohibits General Searches, the District Court Incorrectly Interpreted Supreme Court Precedent

The district court erred in relying on *Dalia v. United States*, 441 U.S. 238 (1979), to justify the illegal search and seizure of Gregory Shell's body. In *Dalia*, FBI agents

obtained an order to wiretap business telephones without explaining to the reviewing judge that they intended to conduct a routine entry into the business location to execute the order. *Id*. at 245. The Supreme Court held that police in *Dalia* were not required to explain to the court their typical methods for executing the order, and that the police implicitly requested from the court authority to enter the business premises when they requested the order to wiretap the business's telephones. *Id.* at 257-58. The district court misapplied *Dalia* to the facts of this case and, consequently, authorized general warrants in direct contradiction of precedent of the Supreme Court and this Court.

A. The Search and Seizure of Shell Was Not Implicit in the Orders Because They Were More Intrusive Than the Search of the Location

The Supreme Court in *Dalia* emphasized that it allowed the police to enter a business premise to execute a wiretap order because the order application for a wiretap of a business' telephone lines implicitly requests authorization to enter the business. 441 U.S. at 257-58. As a result, in *Dalia*, the order to wiretap the business' phone lines – a greater intrusion – implicitly authorized the lesser intrusion of entry into the business. The Supreme Court, however, never sanctioned a search or seizure consisting of the reverse fact pattern in which the Government uses a warrant authorizing a less intrusive search to justify a more intrusive search or seizure.

This Court in *United States v. Husband*, 226 F.3d 626, 634 (7th Cir. 2000) (citing *Dalia*, 441 U.S. at 257-58), made explicit what was implicit in *Dalia*: that a warrant for a less intrusive search does not authorize a more intrusive search. In *Husband*, law enforcement officials obtained a warrant to search the defendant's body. 226 F.3d at

628-29. The warrant, however, did not authorize officials to engage in the more intrusive search of the defendant's stomach or to force the defendant to undergo sedation. *Id*. Because law enforcement engaged in a more "significant intrusion upon an individual's dignity and privacy interests" beyond the intrusion authorized in the warrant, this Court held there should have been a "neutral evaluation of the manner in which the search [was] to be executed." *Id.* at 634.

Like the authorities in *Husband,* authorities in this case obtained prior authorization to engage in the less intrusive search of the Vienna Correctional Facility Visitor Area. And like the authorities in *Husband*, they engaged in a more intrusive search when they searched Shell's body. As a result, the Government in this case needed to obtain a neutral assessment of the reasonableness of its more invasive search. 226 F.3d at 634. It did not do so, and there was, as a result, nothing in the orders that implicitly or explicitly authorized the police to search or seize Gregory Shell's body.

Thus, *Dalia* does not permit the more intrusive search and seizure that law enforcement authorities executed in this case. Opening a door is implicit in a request to wiretap a business telephone because it is less intrusive than using the wiretap; however, searching and seizing visitors by concocting a first-of-its-kind listening device in a visitor badge is not implicit in a request to record conversations in a Visitor Area because the search and seizure of a body is more intrusive than a search of a Visitor Area.

B. The District Court's Broad Reading of the Location Requirement Authorizes General Searches

The district court's application of *Dalia* is also flawed because it contradicts precedent from the Supreme Court and this Court prohibiting general searches. Specifically, the district court's holding permits the Government to conduct invasive searches of persons when executing warrants authorizing the searches of places and *vice versa*. As a result, every warrant is a general one.

Under *Dalia*, the orders to search the Vienna Correctional Facility Visitor Area permitted the Government to engage in a wide range of methods to search that location. *See Dalia*, 441 U.S. at 239; *United States v. Ross*, 456 U.S. 798, 825 (1982) (holding that probable cause for the search of a lawfully stopped vehicle "justifies the search of every part of the vehicle and its contents that may conceal the object of the search"); *United States v. Lambert*, 771 F.2d 83, 91 (6th Cir. 1985) (holding that an order to wiretap a building did not require the judge to approve "the precise *location in the house* where each listening device will be placed") (emphasis added). For example, law enforcement authorities could have placed listening devices under the Visitor Area benches or used amplifying microphones to intercept the conversations described in the order application. Conversely, a warrant authorizing the search or seizure of Gregory Shell's body would have permitted law enforcement authorities to use a range of means, including frisking, to search or seize his body because such methods were implicit in the warrant request. *Husband*, 226 F.3d at 629-32 (citing cases); *id.* at 637-39

(Easterbrook, J., dissenting) (stating that a warrant to search a person authorizes an even wider range of invasive means).

Under the district court's reading of *Dalia,* every warrant to search a location authorizes a wide range of means to search that location *and* a wide range of means to search any person in that location. As a result, all warrants become "open-ended" and conflate a search and seizure of a person and a search of a location. *United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999). Under the district court's holding, no warrant would "limit [any] search at all." *United States v. Nafzger*, 965 F.2d 213, 216 (7th Cir. 1992) (holding that a warrant to search the entire judicial district "does not limit the search at all"). This radical interpretation of *Dalia*, in which every warrant violates the Fourth Amendment, creates exactly the "wide-ranging exploratory searches [that] the Framers [of the Fourth Amendment] intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). *See also United States v. Brown*, 832 F.2d 991, 996 (7th Cir. 1987). Clearly, the Supreme Court did not intend such a result in *Dalia*, and this Court should overturn the district court's decision which relies exclusively on *Dalia* to justify its radical holding.

V. The Government Deprived the Court of Important Information, Thus Rendering the Reviewing Judge a "Rubber Stamp"

When the Government "intentionally or recklessly omit[s] material facts from warrant affidavits and applications," or "pick[s] and choose[s] which facts to present to the magistrate," it renders "meaningless" the magistrate's review. *United States v. Dorfman*, 542 F. Supp. 345, 367 (N.D. Ill. 1982). Such manipulation, misrepresentations,

and omissions all render the reviewing judge a "rubber stamp for the police" and deprive citizens of their rights. *King*, 227 F.3d at 753. As a result, appellate courts will not reward law enforcement officials who supply "artfully drafted" warrant applications. *United States v. Simpson,* 813 F.2d 1462, 1471 (9th Cir. 1987).

In this case, the Government artfully drafted its order application to omit material facts about the true nature of its searches and seizures. Specifically, the Government must have known[8] that "judges interpreting the Fourth Amendment take account of the fact that searches vary in the degree to which they invade personal privacy." *United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984). Similarly, the Government must have known that the reviewing judge would have required additional justifications to authorize a search or seizure of Shell's body. *Id.* Instead of providing the court with the information that it needed to make these important determinations, the Government prevented the reviewing judge from assessing the reasonableness of its invasive methods. The reviewing judge, consistent with *Torres* and the cases cited above, would have required the Government to justify the more invasive search and to explain the need to search and seize Shell when a search of the Visitor Area alone would have accomplished the Government's goals.

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[8] *See Brown*, 832 F.2d at 995 ("Police officers in effecting searches are charged with a knowledge of well-established legal principles as well as an ability to apply the facts of a particular situation to these principles.").

The Government's failure to provide the reviewing judge with the information necessary to make important determinations about the reasonableness of the search and seizure conveniently avoided the risk that the reviewing judge would rule against the Government and would limit the orders' scope. *See Terry*, 392 U.S. at 9; *Husband,* 226 F.3d at 634. The Government appeared unwilling to take this risk and deviated from the accepted practice of writing warrant applications "as particular as [the] circumstances permit[ed]." *Brown*, 832 F.2d at 996. *See also Garrison*, 480 U.S. at 94 (Blackmun, J., dissenting); *Ybarra*, 444 U.S. at 90 n.2; Howard Blum, GANGLAND: HOW THE FBI BROKE THE MOB 237-38 (1993) (describing law enforcement authority's insistence on carefully following warrant procedures). This failure to follow general practice deserves admonishment because, as the Supreme Court emphasized, "it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment." *Berger*, 388 U.S. at 63.

The evidence obtained while executing the orders must be suppressed. "No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment." *Sibron v. New York*, 392 U.S. 40, 59 (1968). In this case, the reviewing judge offered no "neutral contemplation" as to whether there was probable cause to search or seize Shell's body, and the order procedures failed to provide Shell the level of protection envisioned by the drafters of the Fourth Amendment and Title III**.**

VI. Shell Did Not Receive Effective Assistance of Counsel Because His Attorney Failed to Raise His Fourth Amendment Claims

Shell's attorney and counsel for co-defendants never raised any of the arguments presented above, which would have led to the suppression of evidence against Shell. Had they argued that the search and seizure of Shell's body fell outside the scope of the orders instead of raising frivolous claims, the district court, this Court, or the Supreme Court would have suppressed the illegally obtained evidence and the jury would not have heard "evidence so crushing that the rest of the prosecution's case scarcely mattered." SA73. A jury, however, should not determine the fate of an individual based upon his counsel's inability to apply *Karo* and *Ybarra*.

The Sixth Amendment specifically addresses the injustice of punishing defendants for the lapses of their counsel. The Amendment makes clear that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have [effective] Assistance of Counsel for his defence." U.S. Const. amend. VI; *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."). Shell lost his Sixth Amendment guarantees to an impartial jury and effective assistance of counsel because his attorney was deficient in his duties to find and cite applicable and binding case law and because the introduction of "crushing" evidence despite *Ybarra* and *Karo* prejudiced Shell. *See United States v. Stewart*, 388 F.3d 1079, 1084 (7th Cir. 2004) (citing *Strickland*, 466 U.S. at 690-91). Counsel's failure to cite cases to suppress the main evidence against Shell constituted a "fundamental defect [in the judicial process] which inherently results

in a complete miscarriage of justice," *see United States v. Addonizio*, 442 U.S. 178, 185 (1979), and deprived Shell of "rudimentary demands of fair procedure," *see Hill v. United States*, 368 U.S. 424, 428 (1962); *Kaufman v. United States*, 394 U.S. 217, 224 (1969), thus satisfying the Sixth Amendment and § 2255 requirements for a reversal.

CONCLUSION

The injustice of having Shell serve a life sentence for his counsel's conduct requires a reversal of the district court's denial of Shell's § 2255 challenge. The right of citizens to be free from unauthorized searches and seizures demands nothing less.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Petitioner-Appellant Gregory Shell, furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief contains 7,191 words.

Dated: October 18, 2005.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned, counsel of record for Petitioner-Appellant Gregory Shell, hereby certifies that I have filed electronically pursuant to Circuit Rule 31(e) a version of the brief and all of the appendix items that are available in a non-scanned PDF format.

Dated: October 18, 2005.

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel of record for Petitioner-Appellant Gregory Shell, certifies that all material required by Rules 30(a) and (b) are included in the Appendices.

Dated: October 18, 2005.

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APPENDIX

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Included Pursuant to Circuit Rule 30(a):

District Court Judgment (August 13, 2004) A1

GREGORY SHELL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.

Case No. 03 C 3182

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 16382

August 13, 2004, Decided

PRIOR HISTORY: *Wilson v. United States, 2004 U.S. Dist. LEXIS 15810 (N.D. Ill., Aug. 10, 2004)*

DISPOSITION: Shell's Motion for Default Judgment and his Petition for Habeas Corpus are denied.

LexisNexis(R) Headnotes

COUNSEL: [*1] For UNITED STATES OF AMERICA, plaintiff: AUSA, [NTC], Edmond E. Chang, [NTC], United States Attorney's Office, Chicago, IL.

For GREGORY SHELL, defendant: Gregory Shell, [NTC] [PRO SE], Florence - ADMAX, Florence, CO.

JUDGES: Harry D. Leinenweber, Judge.

OPINIONBY: Harry D. Leinenweber

OPINION:

MEMORANDUM OPINION AND ORDER

Petitioner Gregory Shell (hereinafter, "Shell") filed a petition to vacate, set aside, or correct sentence pursuant to *28 U.S.C. § 2255* ("*§ 2255*"), and a motion for default judgment on that petition.

I. INTRODUCTION

In 1998, Shell was convicted of numerous offenses relating to his participation in activities of the Gangster Disciples, a large and vicious street gang that sold large quantities of cocaine, heroin, and other drugs in Chicago. Shell served on the gang's so-called "board of directors," and was the gang's second-in-command. He was the highest-ranking non-incarcerated gang officer, and orchestrated the gang's day-to-day operations.

Shell was convicted of engaging in a continuing criminal enterprise in violation of *21 U.S.C. § 848*; conspiracy to possess with intent to distribute cocaine, [*2] cocaine base, heroin, and marijuana in violation of *21 U.S.C. § 846*; distribution of narcotics in violation of *21 U.S.C. § 841(a)(1)*; use of minors in furtherance of the conspiracy in violation of *21 U.S.C. §§ 861(a)(1)*, *861(a)(2)*; use of telephones in furtherance of the conspiracy in violation of *21 U.S.C. § 843(b)*; and use of firearms during and in relation to the conspiracy in violation of *21 U.S.C. § 924*(c). For these convictions, Shell received a sentence of life imprisonment. Shell's convictions were affirmed on direct appeal. *United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001).*

The government's main evidence against Shell came from recordings of intercepted conversations between Shell and Larry Hoover ("Hoover"), the leader and "chairman of the board" of the Gangster Disciples, who was incarcerated at the Vienna Correctional Center in Vienna, Illinois. Pursuant to *18 U.S.C. § 2518(3)*, the government obtained court authorization to monitor and record Hoover's conversations with certain prison visitors, including Shell. [*3] As Vienna inmates received visitors in an outdoor picnic area, the government accomplished this monitoring by concealing a transmitter in the badge a visitor was required to wear while in the institution. Since Shell frequently visited Hoover at the Vienna Correctional Center, the government used this concealed transmitter to record numerous conversations between Shell and Hoover discussing the gang's drug conspiracy.

In May 2003, Shell filed this petition for post-conviction relief pursuant to *28 U.S.C. § 2255*. Shell's petition alleges four discernable claims which Shell believes entitle him to relief under *§ 2255*: (1) the trial court erred in admitting the intercepted conversations because the government's placement of "listening bugs" on Shell's person, without Shell's consent, violated his rights under both the *Fourth Amendment to the United States Constitution* and *18 U.S.C. § 2511(2)(c)*; (2) the trial court erred in admitting the intercepted conversation because the government's application to intercept oral communications between Hoover and Shell, and the resulting

court order permitting them, did not sufficiently specify where [*4] the communications would be intercepted creating both statutory violations and violations of the *Fourth Amendment*; (3) the court order authorizing the interception of conversations between Hoover and Shell was void because the government deliberately omitted material information as to the method of interception from its application seeking authorization, such that the issuing judges would not have authorized the surveillance in the absence of the omission; and (4) Shell's trial and appellate counsel were constitutionally ineffective because they failed to pursue the above issues concerning the validity of the government's placement of "listening bugs" on Shell's person under the *Fourth Amendment* and *§ 2511(2)(c)*.

In August 2003, this Court ordered the government to respond to Shell's petition pursuant to *28 U.S.C. § 2255* by October 15, 2003. The government failed to do so. This court subsequently ordered the government to respond by January 5, 2004. The government again failed to respond. Shell filed his motion for default judgment premised on the government's failure to respond to his *§ 2255* petition on March 30, 2004. The government responded to the petition [*5] on April 26, 2004.

II. STANDARD OF REVIEW

Section 2255 provides that "a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence." To receive relief under *§ 2255*, a prisoner must show a "fundamental defect which inherently results in a complete miscarriage of justice," *United States v. Addonizio, 442 U.S. 178, 185, 60 L. Ed. 2d 805, 99 S. Ct. 2235 (1979)*, or "an omission inconsistent with the rudimentary demands of fair procedure," *Hill v. United States, 368 U.S. 424, 428, 7 L. Ed. 2d 417, 82 S. Ct. 468 (1962)*.

III. DISCUSSION

A. Default Judgment

While the government promptly responded to Shell's *§ 2255* petition after it became aware that its filing did not occur in the time prescribed by the Court, the government missed two briefing schedules eventually turning in its response brief nearly nine months after the Court originally asked for it. Although a court is usually justified in entering [*6] a default judgment against a party that fails to respond after notice in a civil case, *Bermudez v. Reid, 733 F.2d 18, 21 (2d Cir. 1984)*; *see FED. R. CIV. P. 55*, "a default judgment, without full inquiry into the facts, is especially rare when entered against a custodian in a habeas corpus proceeding," *Ruiz v. Cady, 660 F.2d 337, 340 (7th Cir. 1981)*, Courts are reluctant to grant default judgments without reaching the merits of the claim in habeas corpus cases because such judgments would cause the public at large to suffer by bearing either the risk of releasing prisoners that were duly convicted or the costly and difficult process of retrying them rather than impose hardship on the defaulting party. *See id.* (acknowledging that default judgments in habeas corpus proceedings might compromise the public's right to protection). Although default judgment in a habeas corpus proceeding is an extreme remedy, the Seventh Circuit permits a trial court to employ it as a sanction against a respondent's unwarranted delay. *See id.* Delays that are both long and inadequately explained are presumed to be unwarranted. [*7] *See id.* Under this framework, the trial court has discretion in determining whether a default judgment for the petitioner is the appropriate remedy for the government's delay in a habeas corpus proceeding. *See id. at 341*.

The government's response to Shell's *§ 2255* petition asserts that the counsel for the government assigned to the *§ 2255* petition was not the counsel of record for the trial or direct appeal and had no record of the briefing schedule until Shell filed the motion for default judgment. While the Court concludes that this explanation for the delay is not adequate, this finding does not require the Court to grant a default judgment for Shell. *See id.* Given the strong policy reasons against granting a default judgment for the petitioner in a habeas corpus proceeding, the Court finds that the circumstances of this case do not warrant the extreme remedy of granting a default judgment. When a petitioner files a motion for default judgment alleging the government's failure to respond to a *§ 2255* petition, and the Court subsequently accepts the government's late reply, the claimed grounds for default judgment are eliminated. *See Irorere v. United States, 2002 U.S. Dist. LEXIS 18117* * 12, No. 01 C 332 (N.D. Ill. September 24, 2002); *United States v. Messino, 1998 U.S. Dist. LEXIS 16573 *2, No. 97 C 2767 (N.D. Ill. October 13, 1998)*. Accordingly, the Court denies Shell's motion for default judgment. [*8]

B. Habeas Corpus

1. Consent

Shell argues that the *Fourth Amendment* required the government to obtain his consent before requiring him to wear a badge containing a transmitter that intercepted his conversations with Hoover at the prison. However, the *Fourth Amendment* only protects citizens from secret electronic surveillance in the absence of both a warrant and the consent of a participant in the monitored activity. *See United States v. Nerber, 222 F.3d 597, 606 (9th Cir. 2000)*. Here, pursuant to *18 U.S.C. § 2518(3)*, the government obtained a court order from a United States District

Judge authorizing it to monitor and record Hoover's conversations with particular visitors including Shell. Shell does not contend that the government lacked probable cause for this warrant. Therefore, Shell's consent was not required. The Court notes that [*9] it has reached the identical conclusion in previous litigation involving other members of the Gangster Disciples. *United States v. Jackson, No. 2004 U.S. Dist. LEXIS 6929, *7 (N.D. Ill. April 21, 2004). Branch v. United States, 2004 U.S. Dist. LEXIS 5836, *8 (N.D. Ill. April 6, 2004).*

Shell also appears to contend that method of surveillance, the covert placement of a transmitter on a visitor's badge worn on his person, was a severe intrusion on his privacy such that consent was required irrespective of judicial authorization. While a method of surveillance may be banned outright if it intrudes on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law, *see United States v. Torres, 751 F.2d 875, 882-83 (7th Cir. 1984)*, this is not the case here. Shell's conversations with Hoover at the prison directly involved and facilitated the operation of a vicious street gang's extensive drug operation. As the *Fourth Amendment* permits electronic surveillance of conversations, the incremental increase in invasion of privacy in placing the transmitter on a badge worn by a visitor [*10] as opposed to elsewhere in the visiting area is minuscule. *See id. at 878*. A visitor has no right to be let alone while visiting a prisoner to conduct the business of a violent street gang. *See id. at 883*. Thus, the social gain from monitoring the conversations between Hoover and Shell outweighs the intrusion of privacy in this case. Accordingly, the Court finds that Shell's argument that the *Fourth Amendment* required his consent to the surveillance in this case is without merit.

In addition, Shell argues that the surveillance in this case violated his statutory rights under *18 U.S.C. § 2511(2)(c)* because he did not consent to it. *Section 2511(2)(c)* states that "it shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication . . . where one of the parties to the communication has given prior consent to such interception." This Court has held that "simply because consent makes it Lawful to intercept a communication does not by analogy mean that it is always unlawful for the government to intercept a communication without consent of the parties involved in the communication. [*11] " *Jackson, 2004 U.S. Dist. LEXIS 6929, at *9*. Therefore, Shell's argument that the surveillance violated his statutory rights under *§ 2511(2) (c)* also fails.

2. Particularity

The *Fourth Amendment* prohibits general and open-ended search warrants and requires that a search warrant particularly describe both the place to be searched and the persons or things to be seized. *See Dalia v. United States, 441 U.S. 238, 255, 60 L. Ed. 2d 177, 99 S. Ct. 1682 (1979)*. To reflect this particularity requirement, *18 U.S.C. § 2518 (1) (b) (ii)* requires that the application and order to intercept oral communications state the "place where the communication is to be intercepted." Shell contends that the government's application to intercept oral communications between Hoover and his visitors, and the resulting court order permitting them, did not sufficiently specify where the communications would be intercepted to satisfy *Fourth Amendment* and statutory particularity requirements. This, in Shell's view, is because they described the place to be searched as the visiting room area at the Vienna Correctional Center, not the "bodies" of the visitors. [*12]

Under both *18 U.S.C. § 2518(1)(b)(ii)* and the *Fourth Amendment*, the particularity requirement is satisfied "by identifying [the] location in terms of where a specified individual engages in certain conversation." *United States v. Bianco, 998 F.2d 1112, 1123-24 (2d Cir. 1993)* (quoting *United States v. Ferrara, 771 F. Supp. 1266, 1291 (D. Mass. 1991))*. Here, the government's warrant application specified that the desired conversations between Hoover and named visitors including Shell would take place at the prisoner visitor area at the Vienna Correctional Center in Vienna, Illinois.

Shell argues that the placement of a transmitter in the visitor's badge he wore while at the prison violated this particularity requirement because it led to conversations being intercepted on his "body," which neither the warrant nor the warrant application mentioned. However, even if the Court accepted that the government intercepted conversations on Shell's "body," it did so only while Shell's body was within the confines of the designated prisoner visitor area. Shell does not contend that the government used conversations that occurred outside [*13] the visitor area, nor does the record support such a conclusion. The Supreme Court has stated that "the *Fourth Amendment* does not generally extend to the means by which warrants are executed." *Dalia, 441 U.S. at 257*. Thus, it is not necessary or practical that a judicial order approving electronic surveillance specifically approve of the particular means by which the surveillance is accomplished. *See id.* As the monitored conversations took place within the prisoner visitor area at the Vienna Correctional Center, the placement of transmitters in the visitor's badge worn by Shell to accomplish the surveillance did not violate the particularity requirement.

3. Omission of Material Information

Shell also contends that the government's decision to place listing devices on his "body," without being speci-

fied in the warrant, voided the warrant itself by constituting a material omission in the government's warrant application. Shell contends that, had the government specified the method of intercepting the conversations, the issuing judge's would never have authorized a warrant.

In seeking a search warrant, "the government may not intentionally or recklessly [*14] misrepresent material information to magistrate judges, and misrepresentations encompass omissions." *Supreme Video, Inc. v. Schauz, 15 F.3d 1435, 1441 (7th Cir. 1994).* A defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth" was made by the government in seeking the warrant in order to demonstrate that a search warrant is void due to the use of alleged intentionally or recklessly false information by the government in procuring the warrant. *Franks v. Delaware, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).*

The government's omission of its method of intercepting conversations did not constitute a misrepresentation. The government is neither required to include the specific means by which a warrant for electronic surveillance is executed in its application, *Dalia, 441 U.S. at 257*, nor required to identify the precise location within a building where electronic surveillance will take place to the judge approving the surveillance. *See United States v. Lambert, 771 F.2d 83, 91 (6th Cir. 1985).* Furthermore, the government's warrant [*15] permitted it to make "all necessary surreptitious entries . . . including but not limited to entries to install, maintain, and remove electronic listening devices within the Visitation Area located at the Vienna Correctional Facility." (Tibbetts Aff. at 46.) This Court has held that "based on this language, the scope of the warrant does not preclude the use of wiretaps inside visitors' name-tags for the purpose of intercepting the oral communications occurring in the Visitor Areas of the Vienna Correctional Center." *Branch, 2004 U.S. Dist. LEXIS 5836, at *8*; *see Jackson, 2004 U.S. Dist. LEXIS 6929, at *8*. Thus, as the government's surveillance was within the scope of the warrant authorizing the surveillance, no misrepresentation as to the method of surveillance occurred, and Shell's assertion that the issuing judge would not have issued the warrant had the application describe the means of surveillance is erroneous. Therefore, Shell's claim that the warrant was void for omission of material information constituting a misrepresentation from the application is without merit.

4. Ineffective Assistance of Counsel

Shell alleges ineffective assistance [*16] of counsel at both the trial and appellate levels because his attorneys failed to pursue the issues concerning the validity of the government's placement of "listening bugs" on Shell's person under the *Fourth Amendment* and *§ 2511(2)(c)* that he has raised in this petition at trial or on direct appeal. The Court notes that Shell's counsel at trial and on direct appeal did challenge the electronic surveillance evidence, albeit on somewhat different grounds than Shell asserts in his *§ 2255* petition, and lost. In any event, if Shell had argued the meritless claims he put forth in his habeas petition at trial or on appeal, they would have been rejected at that time. Therefore, Shell's counsel's failure to raise them did not compromise the fairness of his trial. *See Strickland v. Washington, 466 U.S. 668, 691-92, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* Accordingly, Shell's argument that his counsel was ineffective for failing to present these claims at trial or on appeal fails.

5. Effect of Blakely and Booker on Shell's Sentence

While Shell's petition was pending, but after briefing on his petition was complete, the Supreme Court declared that Washington's state sentencing [*17] guidelines violated defendants' *Sixth Amendment's* right to a trial by jury. *Blakely v. Washington, U.S. , 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).* Following, *Blakely,* the Seventh Circuit held the United States Federal Sentencing Guidelines - under which Strawhorn was sentenced - unconstitutional. *United States v. Booker, 375 F.3d 508, 2004 U.S. App. LEXIS 14223, 2004 WL 1535858 at *1, (7th Cir. 2004).* Therefore, the Court also briefly considers what effect, if any, *Blakely* and *Booker* have on this petition.

The Court notes that the Seventh Circuit has already rejected extending the holding of *Booker* to cases up on collateral review pursuant to *§ 2255*. *Simpson v. United States, 376 F.3d 679, 2004 U.S. App. LEXIS 14650, *7 (7th Cir. 2004). Simpson* did, however, dismiss its petitioner's *Blakely/Booker* argument without prejudice, noting that the Supreme Court has yet to decide whether or not *Blakely* applies to habeas petitions. *See id.* Therefore, although Shell does not technically make a *Blakely or Booker* claim, any such claim would be dismissed without prejudice within the Seventh Circuit. [*18]

IV. CONCLUSION

For the reasons stated above, Shell's Motion for Default Judgment and his Petition for Habeas Corpus are denied.

IT IS SO ORDERED.

DOCKET ENTRY:

[X] [Other docket entry] ENTER MEMORANDUM OPINION AND ORDER: Shell's Motion for Default Judgment and his Petition for Habeas Corpus are denied.

[X] [For further detail see order attached to the original

minute order.]
[X] Docketing to mail notices.
[X] Mail AO 450 form.

JUDGMENT IN A CIVIL CASE

[X] Decision by Court. This action came before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Gregory Shell's Petition for Habeas Corpus is denied.

PROOF OF SERVICE

The undersigned, counsel of record for Petitioner-Appellant Gregory Shell, hereby certifies that on October 18 2005, two copies of the Brief and Appendix of Petitioner-Appellant, and one copy of the Separate Appendix of Petitioner-Appellant as well as a digital version, were delivered by UPS overnight delivery, to the following:

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No. 04-3890

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GREGORY SHELL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
No. 03-C-3182 (95 CR 508-2)

The Honorable Harry D. Leinenweber, U.S.D.J.

SEPARATE APPENDIX FOR PETITIONER-APPELLANT

Oral Argument Requested

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LARRY HOOVER, TIRENZY WILSON, GREGORY SHELL, JERRY STRAWHORN, ADRIAN BRADD, DARRELL BRANCH, ANDREW HOWARD, AND WILLIAM EDWARDS v. UNITED STATES

01-529

SUPREME COURT OF THE UNITED STATES

536 U.S. 958; 122 S. Ct. 2660; 153 L. Ed. 2d 835; 2002 U.S. LEXIS 4929; 70 U.S.L.W. 3798

June 28, 2002, Decided

PRIOR HISTORY: *United States v. Hoover, 246 F.3d 1054, 2001 U.S. App. LEXIS 6175* (7th Cir. Ill., 2001)

JUDGES: [*1] Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: Petition for writ of certiorari to the United States Court of Appeals
for the Seventh Circuit denied.

LEXSEE 246 F3D 1054

United States of America, Plaintiff-Appellee, v. Larry Hoover, Tirenzy Wilson, Gregory Shell, Jerry Strawhorn, Adrian Bradd, Darrell Branch, Andrew Howard, and William Edwards, Defendants-Appellants.

Nos. 98-2600, 98-2820, 98-2915, 98-3433, 98-3840, 99-1377, 99-2142 & 00-2520

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

246 F.3d 1054; 2001 U.S. App. LEXIS 6175; 56 Fed. R. Evid. Serv. (Callaghan) 1148

March 2, 2001, Argued
April 12, 2001, Decided

SUBSEQUENT HISTORY: [**1] Rehearing Denied May 14, 2001, Reported at: *2001 U.S. App. LEXIS 10566.* Certiorari Denied November 13, 2001, Reported at: *2001 U.S. LEXIS 10552.* Writ of certiorari denied: *Hoover v. United States, 2002 U.S. LEXIS 4929* (U.S. June 28, 2002). Rehearing denied by, Rehearing, en banc, denied by *United States v. Hoover, 2001 U.S. App. LEXIS 10566* (7th Cir. Ill., May 14, 2001)
Subsequent appeal at *United States v. Jackson, 19 Fed. Appx. 404, 2001 U.S. App. LEXIS 21589 (2001)*
Writ of certiorari denied *Bradd v. United States, 534 U.S. 1033, 151 L. Ed. 2d 446, 122 S. Ct. 574, 2001 U.S. LEXIS 10552 (2001)*
Writ of certiorari denied *Hoover v. United States, 536 U.S. 958, 153 L. Ed. 2d 835, 122 S. Ct. 2660, 2002 U.S. LEXIS 4929 (2002)*
Rehearing denied by, Motion granted by *Hoover v. United States, 536 U.S. 987, 153 L. Ed. 2d 890, 123 S. Ct. 27, 2002 U.S. LEXIS 5365 (2002)*
Post-conviction relief denied at *United States v. Edwards, 2004 U.S. Dist. LEXIS 23110* (N.D. Ill., Nov. 12, 2004)
Post-conviction relief denied at *Hoover v. United States, 2005 U.S. Dist. LEXIS 12894* (N.D. Ill., June 7, 2005)

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 CR 508. Harry D. Leinenweber, Judge. *United States v. Hoover, 1998 U.S. Dist. LEXIS 9451* (N.D. Ill., June 18, 1998)

DISPOSITION: Judgments affirmed with respect to all defendants other than Branch. His conviction affirmed but his sentence vacated, and the case remanded with instructions to impose a new sentence from the range of 292 to 365 months' imprisonment.

LexisNexis(R) Headnotes

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee (98-2600, 98-2820, 98-2915, 98-3433, 98-3840, 99-1377, 99-2142): David E. Bindi, OFFICE OF THE UNITED STATES ATTORNEY, Criminal Division, Chicago, IL USA.

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For ANDREW HOWARD, Defendant - Appellant (99-2142): Nathan Diamond-Falk, Chicago, IL USA. John

M. Cutrone, Chicago, IL USA.

For WILLIAM EDWARDS, Defendant - Appellant (00-2520): John M. Cutrone, Chicago, IL USA.

JUDGES: Before Cudahy, Easterbrook, and Rovner, Circuit Judges. Cudahy, Circuit Judge, concurring. ROVNER, Circuit Judge, concurring.

OPINIONBY: Easterbrook

OPINION: [*1056]

Easterbrook, Circuit Judge. The Gangster Disciples, a large and vicious street gang, sells great quantities of cocaine, heroin, and other drugs in Chicago. A series of cases has seen the conviction of many members, some of them high in its hierarchy. See *United States v. Ray, 238 F.3d 828 (7th Cir. 2001); United States v. Wilson, 237 F.3d 827 (7th Cir. 2001); United States v. Johnson, 223 F.3d 665 (7th Cir. 2000); United States v. Smith, 223 F.3d 554 (7th Cir. 2000); United States v. Jackson, 207 F.3d 910 (7th* [*1057] *Cir. 2000),* remanded, *121 S. Ct. 376 (2000),* decision on remand, [**2] *236 F.3d 886 (7th Cir. 2001); United States v. Irwin, 149 F.3d 565 (7th Cir. 1998).* Today we deal with eight more members of the organization, including Larry Hoover, its "chairman of the board"; Gregory Shell, Hoover's second in command; Andrew Howard, the third of the gang's "directors"; and two "governors" (Tirenzy Wilson and Jerry Strawhorn). The other three appellants were lower in the hierarchy but still deeply involved in its operations. The five directors and governors, the gang's top echelon, have been convicted of operating a continuing criminal enterprise, *21 U.S.C. § 848,* and sentenced to life imprisonment. Of the remaining three appellants, William Edwards was sentenced to life imprisonment and Adrian Bradd to 292 months' imprisonment for conspiring to distribute drugs, while Darrell Branch was sentenced to 324 months' imprisonment for conspiracy plus money laundering.

Many of the arguments these eight defendants present on appeal have been dealt with by the panels that affirmed the convictions of other gang members. For example, Hoover and his henchmen direct their strongest fire against the prosecution's best evidence—tapes [**3] of intercepted conversations, evidence so crushing that the rest of the prosecution's case scarcely mattered. Defendants offer three principal arguments: that a district judge in the Northern District of Illinois lacked authority under *18 U.S.C. § 2518*(3) to authorize interceptions of conversations that occurred in the Southern District of Illinois, that the statutory authority for roving surveillance is unconstitutional, and that the recorded conversations must be suppressed because the original tapes were not sealed promptly after the authorization expired, as *18 U.S.C. § 2518*(8)(a) requires. All of these arguments were made in Jackson and rejected there with respect to these very tapes. *207 F.3d at 914-18.* Although the Supreme Court remanded in Jackson so that we could consider the effect of *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),* the petition for certiorari was denied to the extent that it sought review of the wiretap issues. Relying on Jackson, we rejected in Wilson arguments materially identical to those now presented. *237 F.3d at 831.* Our appellants [**4] have offered some additional arguments, such as a contention that the affidavits do not show the necessity of using interceptions, as opposed to other investigative techniques, but these are weak. None of the new arguments is persuasive, and the new versions of the old arguments run headlong into the law of the circuit. Now that the court has held that these tapes were properly admitted in two other trials, and rehearing en banc and certiorari have been denied on that subject, it would be inappropriate for a third panel to offer an independent view as if the matter were presented for the first time. Therefore, just as in Wilson, we reject on the basis of stare decisis appellants' contention that the use of these tapes requires reversal.

Similarly we conclude that the CCE convictions are valid whether or not Hoover and the other leaders personally committed the predicate offenses on which the CCE convictions depend. So we held in *Wilson, 237 F.3d at 833-34,* and *Smith, 223 F.3d at 573.* Cf. *United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989)* (en banc) (aiding and abetting a kingpin can support a CCE conviction). Predicate offenses include [**5] violations of *21 U.S.C. § 841* (the principal substantive drug crimes). One way of violating § 841 is to join a conspiracy whose members defy that statute. This is the holding of *Pinkerton v. United States, 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946):* every member [*1058] of a conspiracy is substantively culpable for other conspirators' acts within the scope of the conspiracy. This means that Hoover and other top managers have violated § 841 whether or not they sold drugs (or committed the conspiracy's other crimes) personally. Requiring personal commission of the predicate offenses would essentially knock out the sentencing enhancements that § 848 provides for kingpins, who delegate the dirty work. They direct others in selling drugs or rubbing out rivals, and if this insulated them from culpability then § 848 might as well be repealed. Using as predicate offenses crimes committed by a different branch of the organization also is appropriate. Wilson and Strawhorn want us to proceed as if the Gangster Disciples were multiple organizations, one for each territory controlled by a governor, but that is not what the jury found: they were convicted [**6] of a single conspiracy and

under Pinkerton are answerable for the crimes committed by the whole of that organization.

Because a lawful punishment for every CCE conviction is life in prison, we held in Smith that Apprendi does not affect sentencing for this offense. The three defendants who were not convicted under § 848 have a sound contention that the district court committed error by not telling the jury to determine the kind and quantity of drugs that they distributed. But these defendants did not request such an instruction in the district court, so appellate review is limited to a search for plain error. Only a miscarriage of justice could justify a remand. See *Johnson v. United States, 520 U.S. 461, 137 L. Ed. 2d 718, 117 S. Ct. 1544 (1997); United States v. Olano, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993); United States v. Nance, 236 F.3d 820 (7th Cir. 2000).* What must be proved beyond a reasonable doubt after Apprendi is the minimum quantity needed to authorize a particular punishment. Given *21 U.S.C. § 841*(b)(1)(A)(iii), a conclusion that Edwards conspired to distribute 50 grams of crack cocaine [**7] would authorize life imprisonment; even 5 grams would do for Bradd and Branch, who were sentenced to fewer than 40 years. See *21 U.S.C. § 841*(b)(1)(B)(iii). Evidence in the record establishes beyond any doubt that the Gangster Disciples distributed (much) more than 50 grams of crack daily, so given Pinkerton (and the jury's verdict convicting each appellant of the over–arching conspiracy) there is no likelihood that any reasonable jury would have failed to find that each is culpable for more than 50 grams of crack. Plain error has not been established. Defendant Wilson's variations (adopted by other defendants) on the Apprendi argument fare no better. Wilson contends that any fact raising a mandatory minimum penalty must be established beyond a reasonable doubt, even if the statutory maximum is life. Smith addressed and rejected that precise argument. As for the contention that § 841 and § 848 are unconstitutional (and therefore cannot support any conviction at all) because they do not designate as "elements" the quantities of drugs that matter to punishment: that position is considered, and rejected, in *United States v. Brough, 243 F.3d 1078, 2001 U.S. App. LEXIS 4284 (7th Cir. 2001).* [**8]

Thus we arrive at issues unique to these defendants. The most serious is a Bruton problem (see *Bruton v. United States, 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968))* created when the district judge permitted the prosecutor to use against Andrew Howard a statement that named Hoover and Shell as the gang's top bosses. Bruton holds that it violates the confrontation clause of the sixth amendment to admit against one defendant a confession accusing a co–defendant, when the declarant will not testify and thus cannot be cross–examined. Judges' instructions [*1059] to consider the statement solely against its maker will be impossible to follow, the Court concluded. Bruton left open the possibility of redacting a confession to avoid the problem, and *Richardson v. Marsh, 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987),* held that some forms of redaction are permissible. Seizing this opening, the prosecutors amended Howard's confession so that "incarcerated leader" replaced every reference to Hoover, and "unincarcerated leader" every reference to Shell. (Hoover ran the Gangster Disciples from state prison, apparently bribing guards with cash and drugs to be [**9] allowed the freedom to do this; Shell, who was released from state prison in 1992, was Hoover's ambassador on the outside from then on.) Only a person unfit to be a juror could have failed to appreciate that the "incarcerated leader" and "unincarcerated leader" were Hoover and Shell; we doubt that the majority in Richardson would have countenanced so transparent a device. No matter, because in *Gray v. Maryland, 523 U.S. 185, 140 L. Ed. 2d 294, 118 S. Ct. 1151 (1998),* the Court placed close limits on the use of pseudonyms and indirect references. The Court wrote: "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that . . . the law must require the same result." *Id. at 192.*

The district judge cannot be faulted for failing to anticipate Gray, which was issued after the trial; but we are surprised that even after Gray the United States contends that no error occurred. "Incarcerated leader" and "unincarcerated leader" are obvious stand–ins for "Hoover" [**10] and "Shell." A name is itself just one among many means of identification. The amended confession just gave Hoover and Shell aliases based on their occupations. It no more concealed their identities than the substitution of "Mark Twain" for "Samuel Clemens" conceals the author.

The prosecutor relies on *United States v. Stockheimer, 157 F.3d 1082, 1086 (7th Cir. 1998),* for the proposition that Bruton and Gray permit the use of placeholders when their incriminating nature is not apparent to persons unaware of the other evidence offered at trial. True enough, the panel in Stockheimer remarked that the altered confession, which referred to an "inner circle" of persons, would not have incriminated the non–confessing defendants without considerable other evidence. But the proposition that replacing a name with a pseudonym is proper unless the identity of the alias can be deduced within the four corners of the confession is incompatible with Gray, and we do not read the opinion in Stockheimer to adopt what was, after all, the main argument of the dissenting opinion in Gray. Very little evidence is incriminating when viewed in isolation; even most confessions

depend for their [**11] punch on other evidence. To adopt a four-corners rule would be to undo Bruton in practical effect. An alteration that uses an open-ended reference such as "inner circle" at least avoids a one-to-one correspondence between the confession and easily identified figures sitting at the defense table. "Incarcerated leader" and "unincarcerated leader" are just the sort of symbols that the majority in Gray had in mind. If the prosecutors wanted to use Howard's confession yet avoid a severance, they had to make substantially greater alterations to avoid the obvious pointers.

Nonetheless, the Bruton error was harmless beyond a reasonable doubt. The tapes scuttled Hoover's defense. Shell received less mention in the tapes, but Howard's words could not have mattered to the jury's consideration of the case against [*1060] Shell given seven weeks of other damning evidence. Indeed, the defense pretty much sewed up the prosecutor's case. Hoover and Shell admitted that they were the leaders of what everyone called the "GD" but contended that since 1987 "GD" has stood for "growth and development" rather than "Gangster Disciples." Shell portrayed himself as the CEO of an organization of community activists [**12] committed to cleanup, education, political awareness, and suppression of gang and drug activities. Other evidence introduced at trial made mincemeat of that defense (the only gang and drug activities being suppressed were those of the GD's rivals), leaving Shell's admission that he was No. 2 in the GD equivalent to a confession. His conviction cannot plausibly be traced to the thinly disguised accusations in Howard's statement.

Two arguments about co-conspirator hearsay come next. All defendants contend that the district court should not have allowed any co-conspirator evidence to be admitted without first holding an evidentiary hearing to supply a basis for a conclusion that a conspiracy existed and the statements were in furtherance of that conspiracy. See *Fed. R. Evid. 104*, *801(d)(2)(E)*. A hearing is one way to go about the task, see *United States v. James, 590 F.2d 575 (5th Cir. 1979)* (en banc), but not the only or even the best way. A judge may act on the basis of a pretrial evidentiary proffer or evidence introduced in the early stages of trial. See *United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990)* (en banc); *United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978).* [**13] The district judge's decision to admit co-conspirator hearsay in this case was supported by a preponderance of the evidence demonstrating that a conspiracy existed and that the statements had been made during and in furtherance of its objectives. That is so even for the statements to which Strawhorn particularly objects. Tyrone Reames testified that in August 1988 Strawhorn and another gang member threatened to "take care" of Reames unless he changed his account of a murder in which two gang members had been implicated. Strawhorn observes that Reames was not a member of the Gangster Disciples, and we shall assume that this is so. But the declarant in the statement being admitted was Strawhorn, not Reames (who was available for cross-examination). Much evidence showed that the Gangster Disciples protected their organization by threatening to "take care" of potential witnesses (and by using violence against them when threats were insufficient). The district judge did not abuse his discretion in concluding that Strawhorn threatened Reames in furtherance of the conspiracy's objective of protecting itself (and its members) from criminal prosecution. It could not be excluded under Fed. R. [**14] Evid. 404(b) as other-crime evidence, because it was part of the very crime (conspiracy) of which Strawhorn had been indicted. The statement therefore was admissible.

Shell and Strawhorn were not the only defendants whose words came to haunt them at trial. The defense rested without presenting any testimony by Bradd, and the prosecution began its rebuttal case. Bradd then changed his mind and asked for an opportunity to testify. The district judge had the discretion to say that he had waited too long, but the judge elected to grant Bradd's request. None of the other defendants objected. Soon they wished that they had, because Bradd's testimony inculpated not only himself (he admitted being a drug dealer but claimed that he had quit the GD and usually operated independently) but also Hoover and other defendants whom Bradd depicted as drug lords. Bradd supported the prosecutor's claim that Hoover initiated a program [*1061] under which members of the Gangster Disciples would "donate" their profits from drug sales one day each week to supervisory levels of the gang. (This program, known variously as "nation work" and "one-day-a-week", had been a bone of contention at trial. Other defendants [**15] contended that references on the tapes dealt only with working for community betterment one day a week. Bradd supported the prosecution's view.) Other defendants then moved for a mistrial or a severance. The district judge denied both requests and did not abuse his discretion in doing so. If Bradd had testified during the defense's case there would have been no occasion for either a mistrial or a severance. See *Zafiro v. United States, 506 U.S. 534, 538-39, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993).* Finger-pointing among the defendants is not only acceptable but also a benefit of a joint trial, for it helps the jury to assess the role of each defendant. Defendants believe that things are otherwise if the evidence comes after the close of the defense case, but we cannot see why—nor do we understand what difference it makes whether the district judge recognized that he had discretion to block Bradd's testimony or thought instead (though wrongly) that a defendant's entitlement

to testify on his own behalf supersedes the rules for the orderly presentation of evidence. The harm to the other defendants would have been much the same had Bradd testified before the defense rested. [**16] They contend that if Bradd had testified sooner they could have countered his evidence more effectively, but this is not so; the district judge gave them adequate opportunity to respond to Bradd's testimony as things transpired.

One final issue arising out of the trial requires comment. (Defendants make many additional claims of trial error, but none requires discussion.) Wilson testified in his own defense that he joined the GDs in 1987 when it was solely a civic improvement organization and that neither he nor anyone he associated with was involved in drug trafficking. In rebuttal, the government called Naseen Soldana, Wilson's former wife, who testified that in late 1992 or early 1993 Wilson asked her for an introduction to Reynard McDowell, from whom Wilson sought to buy 15 kilograms of cocaine. Soldana made the introduction, McDowell quoted a price of $270,000, Wilson came up with that sum, and Soldana acted as his agent to finish the deal (paying McDowell and returning the drugs to Wilson). Soldana testified that Wilson and McDowell later had at least two other transactions of 26 kilograms apiece. Following her separation from Wilson, Soldana became romantically involved with [**17] McDowell, who later was prosecuted on drug charges. She testified under a grant of immunity as part of a plan to reduce McDowell's sentence. On learning that Soldana would take the stand in the prosecutor's rebuttal case, defendants asked the judge to issue a writ of habeas corpus to produce McDowell in Chicago for an interview, so that they could determine whether he might undermine Soldana's testimony. The court declined to do so unless defendants first ascertained from McDowell's attorney whether McDowell would consent to be interviewed (and to testify), for if McDowell would balk and assert his privilege against self-incrimination, the exercise would be pointless. On learning from McDowell's lawyer that McDowell would not cooperate with the defendants, the district judge declined to issue the writ.

Wilson contends that this episode violated his right under the sixth amendment to "have compulsory process for obtaining witnesses in his favor", but his problem is that McDowell did not seem likely to be a witness "in his favor", or indeed a witness of any kind. Soldana's testimony depicted McDowell as the supplier of 67 kilograms of cocaine. He has not been convicted of [*1062] those sales, [**18] and the defense wanted to paint him not only as a drug dealer but also as a person who had suborned perjury; risks of prosecution for these offenses entitled McDowell to invoke his privilege against compulsory self-incrimination. If the district judge had gone off half-cocked, predicting that McDowell would invoke the privilege without troubling to check, then we would be receptive to an argument that he abused his discretion (which is the right standard of review). See *United States v. Williamson, 202 F.3d 974, 978-79 (7th Cir. 2000).* But the judge deferred decision until inquiry could be made, and only after learning that McDowell would clam up did the judge deny the defense request. We agree with the judge's assessment. It would have been wasteful—and could have caused a substantial and unproductive delay of a week or more—to fetch McDowell by Con Air from Florida only to have him repeat in court what he had told his lawyer. Even now the defendants have no indication that McDowell's lawyer misunderstood or misrepresented his client's intentions.

Sentencing is the final subject of discussion. The United States has confessed error with respect to Branch's sentence, [**19] and after an independent review we agree that an error has been made. The district judge assessed one criminal history point for Branch's 1980 conviction for resisting arrest. That put Branch in criminal history category IV (he had six other, undisputed, criminal-history points) and led to a sentencing range of 324 to 405 months under the Sentencing Guidelines. The judge imposed a sentence of 324 months, the bottom of this range, which suggests that Branch might have received an even lower sentence had his background been assessed as category III, for which the sentencing range would have been 292 to 365 months. Like the United States, we think that category III is the correct one, because *U.S.S.G. § 4A1.2(c)* disregards Branch's conviction for resisting arrest. A conviction for resisting arrest leads to a criminal history point only if the defendant received at least 30 days' imprisonment or one year's probation. Branch's sentence to two days (time served before his guilty plea) was well short of that. He therefore must be resentenced within the range of 292 to 365 months. Branch's original sentence of 324 months is below the middle of the reduced guideline range, so the district [**20] judge may elect to impose the same sentence on remand, but if he does this the judge should explain why the change in criminal history did not affect the sentence.

None of the other arguments concerning sentencing calls for a reduction. The life sentences for the CCE defendants are foreordained. And although we may assume, as the other three defendants insist, that the one-day-a-week program did not get off the ground and that the nation-work program (which did) entailed smaller quantities, the sums the leaders hoped to rake in were so large that they conveyed to other defendants, such as Bradd, the scale of the organization, which enabled them to anticipate (and so be held accountable for) sales other than those in which they personally participated.

The judgments are affirmed with respect to all defendants other than Branch. His conviction is affirmed but his sentence is vacated, and the case is remanded with instructions to impose a new sentence from the range of 292 to 365 months' imprisonment.

CONCURBY: Cudahy; ROVNER

CONCUR:

Cudahy, Circuit Judge, concurring. Although it probably did not affect the outcome, the admission of Reames' testimony about Strawhorn's threats raises serious [**21] questions. Tyrone Reames was permitted to testify that in August 1988, he witnessed a murder committed by two [*1063] Gangster Disciples from his neighborhood. Two years later, as the Gangster Disciples' state court murder trial date approached, Reames said he was approached by Strawhorn and another Disciple, who grabbed him and took him to see "Coal Black," who was identified as Robert Dordies, another Disciple. Strawhorn and Dordies, according to Reames, threatened that if Reames did not change his account of the murder to exculpate the Disciples charged with it, Strawhorn would "take care of" him. Reames himself was not a member of the Gangster Disciples or any other street gang, and the alleged murder had nothing to do with the drug conspiracy charged in this case.

The government offered the Reames testimony to show, among other things, an example of enforcement of the law of silence and secrecy in the gang. The district court instead found that "in order to make the conspiracy go, they offered protection to certain people and one of the ways they did that was to intimidate people from testifying. So, it seems to me one of the main procedures that gangs have always—not gangs so much [**22] as organized crime activities—have always been conducted."

There may be some marginal relevance to Reames' testimony as showing gang practices in enforcing silence about gang crimes. As the district judge said, this was the way of organized crime. But the facts surrounding Reames' testimony had nothing to do with the drug conspiracy with which the Disciples were charged.

It was uncontested at trial that Strawhorn was a longstanding member of the Disciples with the rank of governor and that he knowingly assented to gang rules. The probative value of showing his threats to silence witnesses in matters having nothing to do with the distribution of drugs is slight while the prejudice attaching to hushing up a witness could hardly be greater. Indeed, we have noted that evidence of witness intimidation constitutes "a striking example of evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *United States v. Thomas, 86 F.3d 647, 654 (7th Cir. 1996).* The introduction of this testimony, therefore, exposed [**23] heinous conduct typical of organized crime but which had no plausible connection with the drug conspiracy. Although the outcome may not be affected, Reames' testimony should not have been admitted.

ROVNER, Circuit Judge, concurring. I join the court's opinion. I write separately only to express my concern about the findings of a previous panel of this court regarding the government's failure to have the Vienna surveillance tapes sealed immediately upon expiration of the surveillance warrant, as *18 U.S.C. § 2518*(8)(a) required. See *United States v. Jackson, 207 F.3d 910, 915-18* (7th Cir.), remanded on other grounds, *121 S. Ct. 376 (2000).* Jackson concluded that none of the documented reasons that the government gave to the district court for waiting 32 days to have the tapes sealed constituted the "satisfactory explanation" for the delay that section 2518(8)(a) demands. *207 F.3d at 915-18.* Rather than ordering the tapes suppressed, however, the court embraced an explanation founded on facts that were not asserted in the affidavit submitted by the prosecutor in charge of the surveillance. *Id. at 918.* If indeed [**24] the "real reason" for the delay was the government's expectation, based on the assurance of technicians, that a new and smaller microphone would become available within a day or two, an assurance that purportedly [*1064] was repeated until finally "it became clear that 'a few days' were going to stretch on indefinitely," id., then I cannot fathom why that reason was not spelled out in the affidavit, which was the only evidence before the district court, and remains the only evidence before this court, as to the explanation for the delay in sealing the tapes. See *id. at 916.* Even more perplexing to me is this court's decision to accept as a satisfactory explanation for the delay an asserted reason which, although it may be true and accurate, has no support in the record.

We routinely disregard arguments premised upon factual assertions that are not borne out by the record. E.g., *United States v. Phillips, 914 F.2d 835, 840 (7th Cir. 1990)* ("An appellant may not attempt to build a new record on appeal to support his position with evidence that was never admitted in the court below."); *Box v. A&P Tea Co., 772 F.2d 1372, 1379 n.5 (7th Cir. 1985)* ("arguments [**25] in briefs are not evidence"), cert. denied, *478 U.S. 1010, 106 S. Ct. 3311, 92 L. Ed. 2d 724 (1986);* see also *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-58 n.16, 90 S. Ct. 1598, 1608 n.16, 26 L. Ed. 2d 142 (1970); Russell v. Southard, 53 U.S. (12 How.) 139, 159, 13 L. Ed. 927 (1851).* We do not allow parties to stray beyond

the bounds of the record for reasons so obvious and familiar that they scarcely require mention: if the evidence upon which a party bases its argument is not in the record, then the opposing party has not had the opportunity to respond appropriately, the district court has never had the opportunity to assess that evidence, and last, but by no means least, when push comes to shove, the "evidence" may never materialize—litigants often make representations that turn out to be inaccurate. I have no reason to think that the government has misrepresented the facts, but if indeed the "real reason" for the delay in sealing the tapes was the prosecutor's expectation that a more discreet microphone would shortly become available, then some evidence of that expectation should have been produced long before the record closed and the [**26] Jackson case was on appeal. Instead, the unverified and untested factual assertions of a brief have become the foundation for the law of this circuit, binding panel after panel hearing the Gangster Disciple appeals and defendant after defendant—none of whom has ever seen any evidence bearing out the government's asserted rationale for the delay in sealing the tapes. n1

n1 Jackson notes that the district judge himself relied on the government's explanation as a reason for admitting the belatedly sealed tapes into evidence. *207 F.3d at 918;* see *United States v. Parks, 1997 U.S. Dist. LEXIS 3576, No. 95 CR 510, 1997 WL 136761,* at *20 (N.D. Ill. March 24, 1997). To the extent that is true, it hardly justifies this court's resort to asserted facts that are without support in the record; our review of the sufficiency of the government's explanation must focus on the evidence submitted to the district court. See *United States v. Ojeda Rios, 495 U.S. 257, 267, 110 S. Ct. 1845, 1851, 109 L. Ed. 2d 224 (1990)* (majority); *id. at 267-68, 110 S. Ct. at 1852* (O'Connor, J., concurring).

[**27]

Our credibility as a judiciary depends in great measure upon the consistency and fairness with which we honor our own rules. At oral argument, Mr. Edwards' counsel observed that if he were to make assertions outside of the record, we would not tolerate it for a moment. He is right. The government should be treated no differently. Obviously, suppression of the tapes—described in Jackson as "some of the government's strongest evidence," *207 F.3d at 913,* and here as its "best evidence . . ., evidence so crushing that the rest of the prosecution's case scarcely mattered," ante at *3, might have dire ramifications for the government's case. Yet, the stakes were no doubt apparent to the government when the affidavit was prepared. I do not [*1065] understand why the government should be relieved of the obligation to make a record in support of its arguments—particularly its "real reason" for a crucial delay in complying with a statutory requirement—when we would not relieve any other litigant of that obligation. Simply because the ramifications are odious does not justify a departure from the basic tenets of fairness, common sense, and the rule of law.

It is with the greatest reluctance [**28] that I criticize the holding of another panel of my colleagues. But the same issue that confronted the panel in Jackson is squarely presented here, and the briefing in this case makes it abundantly clear that the key facts on which Jackson relied have no support in the record—Jackson itself leaves little doubt in that regard. After much reflection, and with a heavy heart, I have concluded that I cannot remain silent with respect to this court's unusual decision to accept the government's unverified allegations as "a (barely) satisfactory explanation" for the government's delay in complying with its statutory obligations. See *207 F.3d at 918.*

I accept, as I must, the panel's holding in Jackson; it is the law of this circuit vis–a–vis the admissibility of the Vienna tapes. See *United States v. Wilson, 237 F.3d 827, 831 (7th Cir. 2001);* ante at *2–3. I do so, however, with great reservation as to the prudence of this court's decision to accept as fact crucial assertions made only in a brief, and with the hope that in the future, the government will make an appropriate record as to its "real reason" for any failure to comply with the requirements of Title III. [**29]