

**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.

REPLY BRIEF FOR PETITIONER-APPELLANT

Oral Argument Requested

H. Ron Davidson
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner-Appellant

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INTRODUCTION

In its Response, the Government claims that it can intrude upon citizens' bodily integrity when executing a Title III order to search a location because the Government does not need to describe the means of execution. The Government's claim, however, simply ignores the fact that under the Fourth Amendment, an intrusion into the bodily integrity of a person constitutes a search and seizure greater than a search of a location. As a result, the Government must obtain consent or prior judicial authorization before interfering with an individual's control over his body. In this case, the Government did not comply with the Fourth Amendment because it did not obtain Shell's consent to place a recording device on his body and the court order approving the interception of his conversation contained no language authorizing the greater intrusion.

In addition, the Government maintains that Shell did not suffer a denial of effective assistance of counsel because his counsel filed a series of unrelated motions. The Sixth Amendment, however, does not contain a hard-work exception. Instead, it establishes a constitutional threshold of effectiveness that counsel must meet. In this case, Shell's counsel fell below that threshold, despite his other efforts, when he failed to raise Shell's Fourth Amendment challenges. Because Shell is serving a life sentence as a result of a denial of effective assistance of counsel, this Court should grant his Motion to Vacate, Set Aside or Correct Sentence.

ARGUMENT

In his opening brief, Gregory Shell established two uncontroversial principles. First, Shell demonstrated that the Government may not secretly attach recording devices to free American citizens without their consent or prior judicial authorization. *See United States v. Karo*, 468 U.S. 705 (1984); 18 U.S.C. § 2518(3) (“Title III”). Second, Shell proved that an order authorizing a search of a location does not authorize the search of people in that location. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Wyoming v. Houghton*, 526 U.S. 295, 303 n.1 (1999).

In its Response, the Government raises three meritless arguments to address Shell’s illegal search and seizure point. First, it claims that the Constitution places no limits on how the Government executes all Title III orders so long as authorities have *an* order authorizing *a* search. In essence, the Government argues that all Title III orders are general warrants in their execution. Second, the Government argues that this Court should reinterpret well-settled precedent and re-define searches and seizures in terms of “information gleaned” instead of “an infringement suffered.” Third, the Government argues, against the great weight of authority, that prison gates keep out constitutional protections. As to Shell’s *Ybarra* argument that he is not a park bench for purposes of the Fourth Amendment, the Government has nothing meaningful to say.

The Government’s principal argument is that Shell received effective assistance of counsel because his counsel raised a series of unrelated arguments. This case, however, is not about defense counsel’s other efforts or the amount of paper that the trial generated. Instead, it is about the basic premise that a lawyer must defend his

client with sufficient zeal to prevent infringement of the client’s constitutional right to bodily integrity. By failing to raise meritorious Fourth Amendment arguments, Shell’s counsel, while active, was not effective.

I. The Government Offers No Meaningful Justification for Attaching Recording Devices to Free Citizens Without Consent or Prior Judicial Authorization

In *Terry v. Ohio*, the Supreme Court made clear that “[n]o right is held more sacred . . . 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.” 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). This right, which includes the right of citizens to be unencumbered by Government recording devices attached to their bodies, must be “carefully guarded.” *Id.* See also *Karo*, 468 U.S. at 711;¹ *United States v. Jones*, 31 F.3d 1304, 1311 (4th Cir. 1994). None of the Government’s three arguments justifies a departure from the well-settled principle that courts must carefully guard citizens from unauthorized searches and seizures.

A. The Government Incorrectly Maintains That All Title III Orders Are General Warrants in Their Execution

The Government argues that it acted under “clear and unquestionable authority of law” because the order to search the Vienna Correctional Facility operated as an order authorizing general warrants. Specifically, the Government cites Title III and claims that the “only limitation Title III places on the manner in which these court

¹ The Government’s reliance on *United States v. Knotts*, 460 U.S. 276 (1983), is misplaced. Gov’t Br. at 25-26. In *Knotts*, a case that predates *Karo*, the Supreme Court explicitly declined to address the issues relevant here. 460 U.S. at 279 n**.

orders are to be executed . . . is in its requirements that no order extend beyond 30 days, and that every order must include provisions that it is to be executed as soon as practicable and in a manner that will minimize the interception of communications not within the purview of the order.” Gov’t Br. at 19-20 (quoting *Dalia v. United States*, 441 U.S. 238, 250 n.11 (1979)).

In so arguing, the Government disregards constitutional limitations on the manner in which authorities may execute orders or warrants and cases that delineate what is “within the purview of the order.” For example, under *Marron v. United States*, 275 U.S. 192, 196 (1927), the Government may not seize “one thing under a warrant describing another.” Similarly, under *Ybarra*, authorities may not search a person while executing a warrant to search a location. In addition, police may not, except under limited circumstances, engage in searches or seizures that are more intrusive relative to those that a judge previously authorized. *United States v. Husband*, 226 F.3d 626, 634 (7th Cir. 2000).² Finally, this Court has held unconstitutional a warrant authorizing the Government to search for something “anywhere . . . [it] might conceivably be found,” as the Government contends that the order in this case authorized. *United States v. Nafzger*, 965 F.2d 213, 216 (7th Cir. 1992) (per curiam). See also *Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (“It is incumbent on the officer executing a search warrant to ensure the search is

² While *Husband* involved the “forcible injection of medication,” Gov’t Br. at 27, the Government cannot limit the case to this fact. Instead, *Husband* stand for a broader principle about the execution of search warrants, namely that courts must look at the level of intrusion *relative* to the level of intrusion authorized rather than of the *absolute* level of intrusion. In this case, the intrusion on Shell’s body was greater *relative* to the intrusion authorized in the order.

lawfully authorized *and lawfully conducted.*") (emphasis added). Because nothing in the language of Title III suggests that the Government is free to disregard these limitations, the Government was not acting under "clear and unquestionable authority of law" when it searched and seized Shell's body.

The Government's discussion of how the order particularly described the Vienna Correctional Facility only serves to reinforce Shell's argument. Gov't Br. at 18-22. In its order application, the Government described "the prisoner visitor room and other areas in which prisoners are able to meet in person with visitors . . . located at Vienna, Illinois Correctional Facility" because both Title III and the Fourth Amendment require a particular description of the object intended to be search. *See* SA115. This requirement discourages the Government from searching or seizing other objects not within the purview of the order. As the Supreme Court explained, a particularly described warrant or order "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, *and the limits of his power to search.*" *Groh*, 540 U.S. at 561 (*quoting United States v. Chadwick*, 433 U.S. 1, 9 (1977)) (emphasis added). Thus, the particularity requirements of the Fourth Amendment and Title III are not enabling provisions that allow the Government to engage in any search it sees fit. To the contrary, the particularity requirements act as limitations on police power.³

³ The Government cannot claim a good-faith reliance defense in this case. *See* Gov't Br. at 18 n.7. The defense operates to shield the constable from the errors of the magistrate when officers "obtain[] a search warrant from a judge or magistrate *and act[] within its scope.*" *United States v. Leon*, 468 U.S. 897, 920 (1984) (emphasis added). *Id.* at 916

B. The Government Asks This Court to Depart Radically from Existing Fourth Amendment Jurisprudence

In the alternative, the Government argues that this Court does not need to guard Shell's constitutional rights because the Government did not search or seize Shell's body. This assertion, however, hinges on a contrived definition of a "search" and "seizure" as being "information . . . gleaned from [a] body." Gov't Br. at 21, 23-24.

The Government's definition is entirely inconsistent with the great weight of authority. To the contrary, Fourth Amendment jurisprudence makes clear that a search and seizure is defined by the level of intrusion, not by "information gleaned" from a defendant.⁴ Indeed, the Government may not use unconstitutional means to acquire information that it can obtain through lawful means. *See Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001) ("The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."). For these reasons, the intrusion into Shell's interests in bodily integrity constituted a search and seizure distinct from the search authorized in the order even if

("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). In this case, authorities failed to act within the order's scope and did not provide the reviewing judge with material information. *Leon*, therefore, is inapplicable.

⁴ *Houghton*, 526 U.S. at 303 ("degree of intrusiveness") (citing *United States v. Di Re*, 332 U.S. 581 (1948)); *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) ("Courts must consider the scope of the particular intrusion . . ."); *United States v. York*, 578 F.2d 1036, 1041 (5th Cir. 1978) ("The more intrusive the search, the heavier is the government's burden of proving its reasonableness."); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) ("As intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases.").

the bodily search and seizure revealed the same information available through other means.⁵

C. Prisons Are Not Beyond the Reach of the Constitution

By applying for an order authorizing the search of the Vienna Correctional Facility, the Government correctly recognized that “prisons are not beyond the reach of the Constitution”; that “Title III clearly applies to prison monitoring”; and that “free citizens entering a prison, as visitors, retain a legitimate expectation of privacy [and may not] be made to suffer a wholesale loss of rights.” See *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987); *Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985). In a remarkable reversal, the Government now contends that it did not need to obtain an order in the first place because the Government’s interests in obtaining Shell’s conversations for a federal criminal investigation into gang activity in Chicago outweighed Shell’s interests in his body when visiting a state facility in Southern Illinois.

The Government’s new position is inconsistent with *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Hudson*, the Supreme Court stated that the Government may curtail the

⁵ In *Groh*, the Supreme Court rejected arguments similar to those the Government advances in this case, namely that the reviewing judge would have granted an order to search and seize Shell had the Government asked, and that “the omitted information would [not] have been material to the issuing judge’s determination.” 540 U.S. at 560-61; Gov’t Br. at 22, 30. To the contrary, as in *Groh*, “it is at least theoretically possible that [the reviewing judge was] not convinced that any evidentiary basis existed” for searching and seizing Shell’s body, and conceivably, the reviewing judge might have believed that there was no justification for the seizure. See *Groh*, 540 U.S. at 560-61. A before-the-fact review process removes the need for speculation whether some judge somewhere might have authorized a search or seizure.

right to privacy because of society's interests "in the security of its penal institutions." 468 U.S. at 527. However, courts "grudgingly" uphold such curtailments "because 'the privacy interests protected by the Fourth Amendment are to be jealously guarded.'" *Doe v. Heck*, 327 F.3d 492, 513 (7th Cir. 2003) (quoting *Wilson v. Health & Hosp. Corp. of Marion County*, 620 F.2d 1201, 1209 (7th Cir. 1980)). As a result, courts repeatedly make clear that the rights of free citizens can be limited *only* when the penological interests of the prisons are at stake.⁶

Remarkably, the Government cites *United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. 2001), a case that supports Shell's interpretation of *Hudson*. Gov't Br. at 24. In *Peoples*, the Eighth Circuit made clear that a prison facility may monitor inmates' conversations in "no-contact" rooms "for achieving the legitimate institutional goals of maintaining prison security." *Id.* at 636-37. The court, however, expressly

⁶ See *Hudson*, 468 U.S. at 548 (Stevens, J., concurring in part and dissenting in part) (expressing concern over the lack of "penological justification for the seizure alleged"); *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) ("[C]ourts have attempted to balance the need for institutional security against the remaining privacy interests of visitors."); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (prisoner's "rights may be diminished by the needs and exigencies of the institutional environment") (emphasis added); *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993) (noting that the "singular purpose of a jail is the confinement of known or suspected criminals"); *Amen*, 831 F.2d at 379 ("In the prison context the reasonableness of a search is *directly related to legitimate concerns for institutional security.*") (emphasis added); *Blackburn*, 771 F.2d at 563 ("Thus, *Hudson* did not suggest, and we do not find, that the security needs of a prison can, *standing alone*, properly justify the 'complete withdrawal' of Fourth Amendment rights from *all* who enter the institution . . ."); *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996) ("A search that is reasonable in the prison environment may not be in other contexts less 'fraught with serious security dangers.'"). See also *United States v. Figueroa*, 757 F.2d 466, 472 (2d Cir. 1985); *Crooker v. U.S. Dep't of Justice*, 497 F. Supp. 500, 502 (D. Conn. 1980).

distinguished the practice of monitoring calls to maintain security from monitoring calls to “to gather evidence about [extraneous crimes.]” *Id.* at 637.

In this case, the Government offers no justifications for violating or restricting Shell’s constitutional rights when he visited an inmate at a state facility. Specifically, the Government does not claim that “a retraction [of Shell’s constitutional rights was] justified by the considerations underlying our penal system.” *See Bell v. Wolfish*, 441 U.S. 520, 546 (1979). Similarly, it does not claim to have been “maintaining institutional security [or] preserving internal order and discipline.” *Id.* Finally, it does not profess any deep concerns over “the day-to-day operation of [the Vienna Correctional Facility]” or offer any “professional expertise” to justify restrictions on Shell’s rights. *Id.* at 547-48. The Government’s “failure to do so speaks volumes about the evidentiary record in this case” and demonstrates that the federal investigation did not in any way relate to the safety of state prison officials. *See Doe*, 327 F.3d at 513. Thus, the Government may not interfere with Shell’s privacy interests to investigate extraneous crimes. *See Peoples*, 250 F.3d at 637.⁷

⁷ Contrary to the Government’s suggestion, Shell never argued that “every time a visitor is required to wear a badge when visiting an inmate, [his or her body has] been seized for Fourth Amendment purposes.” Gov’t Br. at 24 n. 9. Rather, visitors consent to wearing badges as a condition for entrance and a badge policy relates to penological interests of the institution. Clearly, consent to wearing a visitor badge differs from consent to having a recording device clandestinely attached to one’s body. *See United States v. Raney*, 342 F.3d 551, 556 (7th Cir. 2003) (“We have long recognized that ‘[g]overnment agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search.’”) (*quoting United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir. 1971)).

II. The Government Concedes That There Was an *Ybarra* Place-to-Person Execution Violation

The Government devotes only two paragraphs to address Shell's case-in-point, *Ybarra v. Illinois*, 444 U.S. 85 (1979). Gov't Br. at 22-23. *Ybarra* involved the execution of two provisions in one warrant authorizing a search for illegal drugs. The first provision authorized the search of the Aurora Tap Tavern, while the second provision authorized the search of the tavern's bartender, Greg. While executing the search, authorities frisked Ventura Ybarra, a patron of the tavern, and found illegal drugs. 444 U.S. at 88-89.

Ybarra addressed two separate questions: (1) under what circumstances may the Government search one individual while executing a warrant to search a second person (a person-to-person execution), and (2) under what circumstances may the Government engage in a more intrusive search of a person while executing an order authorizing a less intrusive search of a location (a place-to-person execution). In answering the latter question, the Court held that the Government may not search a person while executing a warrant to search a location absent separate prior judicial authorization or consent. *Id.* at 90-91. See also *United States v. Di Re*, 332 U.S. 581, 587 (1948) (“[W]e suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution.”); *United States v. Bianco*, 998 F.2d 1112, 1122 (2d Cir. 1993) (noting a difference between “location-based surveillance” and “person-based surveillance”).

In the two paragraphs that the Government devotes to Shell's central argument, it merely cites law regarding person-to-person execution under *Ybarra* without addressing the issue of place-to-person execution, and the two cases that the Government cites, *United States v. Price*, 184 F.3d 637, 642 (7th Cir. 1999), and *United States v. Pace*, 898 F.2d 1218, 1240 (7th Cir. 1990), do not relate to the issue in this case.⁸ On the issue of place-to-person execution, the Government has nothing to say.

Because, as the Government implicitly concedes, the order permitting the Vienna Correctional Facility search did not authorize a search or seizure of Gregory Shell, the Government omitted material information from the order application when it failed to inform the reviewing judge that it intended to search and seize people when executing the order. The omission of this material information is apparent from the face of the order application, distinguishing this case from *Franks v. Delaware*, 438 U.S. 154 (1978).

⁸ In *Price*, this Court held that probable cause could transfer from one person, Charlene Oldenberg, to another, Gregory Prince, given the specific circumstances of the case before it. 184 F.3d at 641-42. Thus, this Court did not hold that the police could search Price merely because they had prior judicial authorization to search the car. *Id.* Meanwhile, in *Pace*, this Court held that the police had probable cause to arrest Joseph Pace and Anthony Besase because of the police observed each individual behaving suspiciously. 898 F.2d at 1240. At no point did this Court suggest that the police could search Pace or Besase while executing an order to search the apartment where they were located. *Id.* Indeed, to the extent that *Pace* is applicable, the case supports Shell's position: In analyzing whether there was probable cause to arrest Pace and Besase, this Court conducted an analysis distinct from its analysis of whether there was probable cause to search the apartment. *Id.* *United States v. Figueroa*, 757 F.2d 466 (2d Cir. 1985), is inapplicable for entirely different reasons. In *Figueroa*, the Second Circuit found that a prisoner implicitly consented to a wiretap when he made a telephone call under a sign clearly stating that calls were subject to monitoring. *Id.* at 474. In contrast, the Government here attached a recording device to an unsuspecting visitor without indicating that visitors' bodies would be searched or seized.

III. Shell's Counsel Was Ineffective for Not Raising Arguments That Would Have Led to the Suppression of the Main Evidence against Him

Shell and co-defendants pled with their counsel to argue that the interceptions at the Vienna Correctional Facility were “conducted without court authorization” under well-settled principles in *Ybarra* and *Karo*. See R. 14, Ex. D (describing how defendants provided counsel with a draft of the reply brief). Counsel, however, failed to see how these cases were relevant. In responding to defendants’ pleas, counsel failed to note *Ybarra*’s distinction between searches of locations and searches of people, *id.* (“[I]n this case there was a court order for the *prison* interception.”) (emphasis added), and *Karo*’s principle of illegal seizure. *Id.* (“[T]he wearing of the *badge* would have been a permissible investigative tool if the court order was proper.”) (emphasis added). Nowhere in the 4 volumes of transcripts of a pretrial suppression hearing, 11 volumes of transcripts of pre- and post-trial proceedings, and 54 volumes of transcripts of trial testimony and proceedings does one find any defense attorney whose clients’ bodies the Government seized⁹ raise these important arguments. See Gov’t Br. at 14.

By failing to raise the arguments that defendants identified, counsel “fumbled what should have been a successful motion to suppress evidence seized.” See *Owens v. United States*, 387 F.3d 607, 607 (7th Cir. 2004). This error constitutes ineffective assistance of counsel because it allowed the admission of “crushing” evidence. SA73.

⁹ The Government suggests that it could use evidence obtained from the illegal seizure of Shell against co-defendant and then use the evidence obtained from the illegal seizure of co-defendant against Shell. Gov’t Br. at 32 n. 11. That, however, “would have the paradoxical effect that two illegal searches would make a legal search – in fact would make two legal searches.” *United States v. Johnson*, 380 F.3d 1013, 1015 (7th Cir. 2004).

See Murray v. Carrier, 477 U.S. 478, 496 (1986) (“[T]he right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial.”); *Sanders v. Cotton*, 398 F.3d 572, 584-85 (7th Cir. 2005) (failure to raise legal argument constituted ineffective assistance of counsel); *Moore v. Bryant*, 348 F.3d 238, 242 (7th Cir. 2003) (“We have noted that the deficient performance prong is met where the inaccurate advice ‘resulted from the attorney’s failure to undertake a good-faith analysis of all the relevant facts and applicable legal principles.’”). As a result of the admission of this “crushing” evidence, counsel bet their all on a defense that “GDs” came to stand for “growth and development” and not the Gangster Disciples. SA75. That strategy constituted a “blunder of the first magnitude.” *See Owens*, 387 F.3d at 608.

The Sixth Amendment protects Shell from serving a life sentence because of the blunders of his counsel. *See* U.S. Const. amend. VI. “The right to counsel is intended to place a criminal defendant in the approximate position that he would occupy if he were learned in the law and could thus defend himself effectively.” *Owens*, 387 F.3d at 610. Indeed, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984). In this case, Shell and co-defendants were “learned in the law” enough to identify issues that would have led to the suppression of evidence under *Ybarra* and *Karo*. R. 14, Ex. D. And because there was negligible evidence of Shell’s guilt beyond what was found in the illegal search and

seizure,¹⁰ Shell had a good shot at acquittal had he been competently represented. *Owens*, 387 F.3d at 610.

Although Shell demonstrated that he was prejudiced as a result of his counsel's failure to raise meritorious claims, the Government argues that counsel's other efforts preclude a challenge to Shell's life sentence. Gov't Br. at 14. The Sixth Amendment, however, has no minimum paper requirement. As this Court made clear, the *quantity* of counsel's other efforts does not dictate effectiveness; instead, ineffective assistance of counsel claims require a *quality*-based analysis in which courts "compare the issue[s] not raised in relation to the issues that were raised." *Sanders*, 398 F.3d at 585. Because the issues not raised in this case were "both obvious and clearly stronger" than the issues raised, counsel's conduct was deficient. *Id.* See also *Harris v. Cotton*, 365 F.3d 552 (7th Cir. 2004) (finding ineffective assistance of counsel without analyzing counsel's other efforts).

Finally, the Government also contends that waiving Shell's *Ybarra* argument was a "strategic choice[]" to devote "limited resources" to "other efforts." Gov't Br. at 13-16. "The relevant question[, however,] is not whether counsel's choices were strategic, but whether they were reasonable." *Bullock v. Carver*, 297 F.3d 1036, 1047-48 (10th Cir.

¹⁰ For example, in its Response, the Government cites no evidence that authorities found Shell with illegal substances or large amounts of money. To the contrary, the illegally obtained tapes were "evidence so crushing that the rest of the prosecution's case scarcely mattered." SA73. See also SA75 ("The tapes scuttled Hoover's defense [and, thereby, implicated Shell's defense even though] Shell received less mention in the tapes . . ."). The weeks of "damning evidence" that the Government cites included the taped conversations and evidence obtained as a result of the illegal searches and seizures. Gov't Br. at 31.

2002). Because Shell's *Ybarra* and *Karo* arguments would have resulted in a suppression of "crushing" evidence, the "strategic" choice not was not reasonable.

CONCLUSION

For the foregoing reasons, Gregory Shell respectfully requests that this Court overturn the district court's denial of appellant's motion to vacate conviction and sentence pursuant to 28 U.S.C. § 2255.

Respectfully submitted,

Mayer, Brown, Rowe & Maw LLP

H. Ron Davidson
Counsel for Petitioner-Appellant

1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

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)(B)(ii) for a brief produced with a proportionally spaced font. This brief contains 4,401 words.

Dated: February 1, 2006.

Mayer, Brown, Rowe & Maw LLP

H. Ron Davidson
Counsel for Petitioner-Appellant

1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

CIRCUIT RULE 31(e) 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 digital version of the brief in a non-scanned PDF format.

Dated: February 1, 2006.

Mayer, Brown, Rowe & Maw LLP

H. Ron Davidson
Counsel for Petitioner-Appellant

1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

PROOF OF SERVICE

The undersigned, counsel of record for Petitioner-Appellant Gregory Shell, hereby certifies that on February 1, 2006, two copies of the Brief as well as a digital version, were delivered by overnight delivery, to the following:

Edward D. Siskel
Assistant U.S. Attorney
219 S. Dearborn Street, 5th Floor
Chicago, IL 60604
(312) 886-1000
Counsel for Respondent-Appellee

Dated: February 1, 2006.

Mayer, Brown, Rowe & Maw LLP

H. Ron Davidson
Counsel for Petitioner-Appellant

1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000