

STATE OF NEW YORK
ERIE COUNTY (SUPREME) COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

DEFENDANT

NOTICE OF MOTION

Indictment No.

YOUR HONOR:

Please take notice that at a term of Erie County (Supreme Court) held at 9:30 a.m. on _____, 2023, or as soon thereafter as counsel could be heard, the defendant will move this Court to controvert the search warrant issued by Hon. _____ on _____, on the ground that it failed to conform to the particularity requirement of the Fourth Amendment of the United States Constitution and Article I, § 8 of the New York State Constitution.

_____, 2023

ATTORNEY, ESQ.
Attorney at Law

TO:

Hon. _____

Erie County District Attorney
25 Delaware Ave.
Buffalo, NY 14202

STATE OF NEW YORK
ERIE COUNTY (SUPREME) COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

DEFENDANT

SUPPORTING AFFIRMATION

Indictment No. _____

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

ATTORNEY, ESQ., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel for the defendant who charged in this indictment with _____.
(Penal Law § _____).
2. I make this affidavit in support of the defendant's motion to controvert the search warrant issued by Hon. _____ on _____. Unless otherwise stated, this affidavit is made upon information and belief, the sources of which are the warrant and the relevant legal authority.
3. "[N]o 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" (US Const Amend IV; NY Const Art I, § 8).
4. These requirements apply to all search warrants, including electronic warrants.
5. The defendant has standing to controvert the warrant because the Facebook account searched is, as alleged by the prosecution, his account. Therefore, he is "aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action" (CPL 710.20).

The warrant does not particularly describe the place to be searched.

6. There are two distinct protections served by the constitutional restrictions on search warrants. The first is to eliminate searches that are not based on probable cause. “The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the ‘general warrant’ abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings” (*Coolidge v. New Hampshire*, 403 US 443, 467 [1971]).
7. Attachment A, titled “Property to Be Searched,” states that the warrant “applies to information associated with the Facebook User ID: _____ and Facebook Account Number: _____ that is stored at premises owned, maintained, controlled, or operated by Facebook Inc., a company headquartered in Menlo Park, California.”
8. Attachment B, titled “Particular Items to be Searched for and Seized,” is broken down into two sections. Section I requires Facebook to turn over sixteen categories of information which encompasses virtually every aspect of the user’s activity – with no time limitation.
9. Section II permits the government to search for and seize for anything listed in Section I “that constitutes fruits, evidence, and instrumentalities of violations of 18 USC §§ 922(a)(1), (a)(5), and (g)(1) from May 1, 2016 through the present,” including five categories of potential evidence.
10. In essence, the government was permitted to search through the entire Facebook account to find evidence of criminal activity. This is just the type of “exploratory rummaging” forbidden by the Fourth Amendment.

The warrant does not particularly describe the items to be seized.

11. The information listed in Section II, although not as general as Section I, still fails the particularity requirement.

12. Especially problematic is Section II(c), which allows the seizure of “evidence indicating the Facebook account owner’s state of mind as it relates to the crime under investigation.”
13. “The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and 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” (*Marron v. United States*, 275 US 192, 196 [1927]).
14. Permitting the seizure of evidence indicating a person’s “state of mind” leaves vast discretion to the officer executing the warrant. It is far too vague to satisfy the particularity requirement.
15. For both Section I and Section II, “[t]he warrant merely identified generic classes of items, effectively permitting the [government] to search and seize virtually all conceivable” information that would be generated in the course of operating a Facebook account (*People v. Melamed*, 178 AD3d 1079, 1082 [2nd Dept. 2019]). The Constitution requires more.
16. “Thus, the warrant at issue was precisely the kind of general warrant that the Federal Constitution prohibits” (*id.*). Because the warrant is invalid on its face, all evidence seized pursuant to the warrant, including any derivative evidence, must be suppressed (CPL 710.20[2], [4]).

For the reasons stated, the motion should be granted.

ATTORNEY, ESQ.