

19-7129 ORIGINAL

No. _____

DEC 13 1990

IN THE
SUPREME COURT OF THE UNITED STATES

Brian A. Moore

Petitioner,

VS.

State of New Jersey,

Respondent.

On Petition for Writ of Certiorari to the
Superior Court of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION(S) PRESENTED

- I. Whether the Petitioner's Fourth Amendment right was violated where a consent-to-search form indicates it was signed AFTER the search and seizure occurred within the Petitioner's motel room.**

- II. Whether the Petitioner's Fourth Amendment was violated where the judicial officer DID NOT administer an Oath to the complainant police officer on a telephonic warrant, nor did she remember or memorialize its issuance, and the listed complainant police officer had nothing to do with the warrant's issuance or knowledge of who issued it with his e-signature attached.**

TABLE OF CONTENTS

OPINIONS BELOW:

Trial Court Opinion (Sept. 18, 2015).....	App F 10
Trial Court Opinion (Oct. 30, 2015).....	App F 18
Appellate Division affirming conviction.....	App B

JURISDICTION.....	1
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
---	---

STATEMENT OF THE CASE.....	3
----------------------------	---

REASONS FOR GRANTING THE WRIT.....	8
------------------------------------	---

- I. The Cherry Hill Police violated Fourth Amendment where a consent-to-search form indicates it was signed AFTER the search and seizure occurred within a motel room..... 8
 - A. The police engaged in an illegal search and seizure..... 8
 - B. The State Courts failed to protect the Petitioner's Fourth Amendment rights..... 9
- II. The Cherry Hill Police and Court administrator violated the Fourth Amendment where no Oath was administered to listed complainant; and the police officer listed as the complainant, was completely unaware of who created the telephonic warrant with his e-signature on it..... 10
 - A. The Telephonic Complaint Warrant violated Federal law..... 10
 - B. There is no credible evidence to support that the warrant was originally a *telephonic* warrant..... 12
 - C. The State Courts failed to protect the Petitioner's Fourth Amendment rights..... 13

CONCLUSION.....	14
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INDEX TO APPENDICES

APPENDIX A

Denial of Suppression Motion (9/18/2015)	A1
Denial of Motion to Dismiss Indictment (*Suppression Motion) (10/30/15)	A2
Denial of Motion to Dismiss Indictment (*Suppression Motion) (4/13/16)	A3

APPENDIX B

Appellate Division Opinion	B1-9
NJ Supreme Court Denial of certification	B 10

APPENDIX C

Consent-to-Search Document	C 1
Officer Schuenemann's Supplemental Report	C 2

APPENDIX D

Original Warrant	D 1-2
Defendant's Copy of Warrant	D 3-4
Superior Court Copy of Warrant	D 5-6
'e-courts' Case Initiation Date	D 7

APPENDIX E

Fax copies of Complaint Warrant	E 1-4
Court Administrator's Statement	E 5
Investigaor Report	E 6

APPENDIX F

Transcript 4T	September 18, 2015 Hearing	F 1-14
Transcript 5T	October 30, 2015 Hearing	F 15-21
Transcript 7T	April 6, 2016 Trial (Mistrial)	F 22-24
Transcript 19T	October 6, 2016 2 nd Trial	F 25-27
Transcript 20T	October 11, 2016 2 nd Trial	F 28-30

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE NUMBER</u>
Bumper v. North Carolina (1968) 391 <u>US</u> 543, 20 <u>L Ed 2d</u> 797, 88 <u>S Ct.</u> 1788, 46 <u>Ohio Ops 2d</u> 382.	8
<u>United States v. Cardenas</u> , 410 <u>F. 3d</u> 287, 293 (5 th cir. 2005).	12
<u>Giordenello v. United States</u> , 557 <u>U.S.</u> 480 (1958)	10
<u>United States v. Rodgers</u> , (2013) US Dist LEXIS 147702013 U.S. Dist. LEXIS 14770.	10
<u>United States v. Singleton</u> 987 <u>F.2d</u> 1444, 1447 (9 th cir. 1993).	8

STATUTES AND RULES

Fourth Amendment	2, 6, 8, 9, 11, 12
<u>R. 4.1</u>	8, 10, 11
<u>R. 5 (A)</u>	12

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Brian A. Moore, respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division.

DECISION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division is an unpublished decision. The opinion of the Appellate Division, State of New Jersey v. Brian A. Moore (Docket No. A-2528-16T3), and the denial of certification by the Supreme Court of New Jersey (082558) are attached as App. B.

JURISDICTION

The Supreme Court of New Jersey filed an order denying certification on September 10, 2019. This Petition is being filed within 90 days after the order was filed. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment: ...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation...

R. 4.1:

Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means

(a) In General. A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.

(b) Procedures. If a magistrate judge decides to proceed under this rule, the following procedures apply:

(1) Taking Testimony Under Oath. The judge must place under oath—and may examine—the applicant and any person on whose testimony the application is based.

(2) Creating a Record of the Testimony and Exhibits.

(A) Testimony Limited to Attestation. If the applicant does no more than attest to the contents of a written affidavit submitted by reliable electronic means, the judge must acknowledge the attestation in writing on the affidavit.

R. 5 :

Initial Appearance

(a) In general.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

STATEMENT OF THE CASE

On March 5, 2014, Cherry Hill Township undercover police officers placed calls to individuals advertised on Backpage.com with the goal of luring prostitutes and pimps to their location at the Crowne Plaza Hotel. Police officers induced a female (Danielle Mitchell) to come to their location for a one-hour appointment.

At approximately 8 pm surveillance units spotted a black male driving an Infiniti drop-off a white female at the Crowne Plaza Hotel. The female entered the hotel, met with an undercover agent, and was arrested. The female (Danielle Mitchell) gave information to the detectives about the Petitioner, and other prostitutes located at the Inn of the Dove.

The officers went to the Inn of the Dove where they set up surveillance to watch room 112. The police detained a white male seen leaving the room. The police entered the room currently occupied by two females (Candice Mountney and Colleen Russell). The police stated that Danielle Mitchell and the Petitioner were under arrest for prostitution related charges¹. The officers informed the females that they knew they were involved in the prostitution ring. According to Officer Robert Schuenemann, Candice Mountney agreed to sign a consent-to-search form, and give a formal statement at the police station. Officer Schuenemann, the officer who conducted the search, was already at the

¹ Approximately 45 minutes later, the Petitioner was arrested after receiving text messages from Danielle Mitchell's cell phone inducing him to come to the lobby of the Crowne Plaza Hotel.

police station when Candice Mountney and Colleen Russell arrived at **11 pm** [App. F 6 (4T85-21 to 87-22)].

Upon his arrest, the Petitioner was taken to the Camden County Jail where he received a *Defendant's Copy* of the complaint warrant which *lacked* a finding of probable cause, a judicial officer's signature, and the warrant displayed Officer Ross Hensell's *e-signature* dated March 5, 2014 [App. D 3-4]. Several months later when the Petitioner received discovery, it contained:

- A copy of the 'Original' complaint warrant with a finding of probable cause and judicial officer's signature dated March 10, 2014 [App D1-2].

and

- A consent form with a date of March 6, 2014 and a *time* of 11:15 PM [App. C 1].

The Petitioner sought a suppression of evidence, based on *Fourth Amendment* grounds. At the suppression hearing (September 18, 2015)², Officer Robert Schuenemann testified that information obtained from Danielle Mitchell led police to the Inn of the Dove. The night manager of the hotel informed police that the Petitioner, along with several other females, had been staying in Room 112 for months. The room had often been registered in various names but on March 5, 2014, it was registered to Candice Mountney [App F 12 (4T102 - 1 to 22)]. Officer Ross

² The trial court refused to hear the *warrant argument*, the Court would only hear argument regarding the consent-to-search.

Hensell detained a male seen leaving the Room 112. Officer Schuenemann approached the room and knocked on the door, which was answered by Candice Mountney and Colleen Russell. He informed them that Danielle Mitchell and the Petitioner were under arrest for prostitution related charges. Furthermore, Officer Schuenemann informed the females (Candice Mountney and Colleen Russell) that he knew they were involved also. After questioning the females, he asked for consent to search the room. Candice Mountney signed a consent form and a search and seizure ensued which lasted 15 to 20 minutes [App. F 7(4T88-9 to 11)]. Subsequently, the male who was being detained by Officer Ross Hensell volunteered to drive Candice Mountney and Colleen Russell to the police station to make a video statement. Officer Schuenemann testified that he was already at the police station when Candice Mountney and Colleen Russell arrived at 11pm [App. F 3(4T80-23 to 81-2)].

With regard to the *date* and *time* discrepancy on the consent form, Officer Schuenemann stated that during the month of July 2015, the prosecutor alerted him to a discrepancy between his police report and the consent-to-search form. Subsequently, during the month of August 2015, Officer Schuenemann *created* a supplemental report indicating that he mistakenly wrote the wrong date on the consent form [App C 2]. However in reference to the time of 11:15pm, Officer Schuenemann could not recall how he verified the time [App. F 6(4T86-7 to 25)].

The Trial Court denied the Defendant's motion to suppress evidence, finding the consent-to-search form valid because she found Officer Schuenemann credible for admitting to his mistake [App F 14 (4T105-24 to 106-2)].

The Trial Court heard the *Warrant Argument* on October 30, 2015. The prosecutor presented the complaint warrant as a *telephonic warrant*. At the suppression hearing³, Ms Frances Blaum-Naughton, the court administrator, testified that she did not remember receiving a fax or talking to anyone on the morning of March 6, 2014. She also affirmed that she did not administer an Oath [App. F 17 (5T19-2 to 20-13)].

A critically *subversive* point here is the trial court *misconstrued* the nature of the hearing and mischaracterized the suppression motion as a *motion to dismiss the indictment*, and denied the motion with that mischaracterization attached (App A 2).

On March 30, 2016, Harry Ruebel, an investigator from the public defender's office, furnished a report which indicated that the Cherry Hill Police did not know who sent the fax to the court clerk and they did not know what '#466' referred to, their badge numbers only go up to #441 [App. E 6]⁴.

At the first trial⁵ (April 6, 2016), Officer Ross Hensell testified that he did not know who created the complaint warrant through the 'ECDR'

³ The standby council failed to send t subpoena to produce Officer Ross Hensell, the prosecutor only produced the court clerk, Ms. Blaum-Naughton.

⁴ The #466 appears at the top of the faxed warrant copies.

system with his name affixed to it, nor could he recall the warrant's issuance. Officer Hensell also stated that with the 20 or more warrants he has issued, he never recalled being placed under Oath — he did not know it was required [App F 24 (7T118-1 to 10)].

The Petitioner filed a *motion to suppress* based on the investigation report, and Officer Hensell's testimony. The Trial Court, without any witnesses in court, denied the motion relying on her October 30, 2015 reasoning [App A 3].

During the second trial, Officer Ross Hensell stated that he did not know who created the warrant with his name on it [App. F 27 (19T129-19 to 130-11)]. Moreover Officer Hensell stated, "*Nobody administered an Oath to me; it's not required, as I was instructed.*" [App. F 30 (20T14-4 to 9)]

The Petitioner was convicted of human trafficking N.J.S.A. 2C:13-8(a)(1)(g), N.J.S.A. 2C:13-8(a)(2)(g) and promoting prostitution N.J.S.A. 2C:34-1(b)(2) . The Petitioner received the *mandatory minimum 20 year sentence*. The Petitioner's Direct Appeal was denied on January 31, 2019 [App. B 1-9]. His Petition for Certification was denied on September 4, 2019 [App B 10].

The public interests of American citizens residing in the state of New Jersey are in *need* of the petition for writ of certiorari be granted for the following reasons:

⁵ The initial trial ended in a mistrial.

REASONS FOR GRANTING THE PETITION

I. The Cherry Hill Police violated Fourth Amendment where a consent-to-search form indicates it was signed AFTER the search and seizure occurred within a motel room.

A. The police engaged in an illegal search and seizure

The record clearly evinces that the Petitioner stayed in Room 112 for months. Whether a defendant has standing to contest the legality of a search presents a mixed question of fact and law. A defendant bears the burden of demonstrating that he had a legitimate expectation of privacy in the place searched. **United States v. Singleton** 987 F.2d 1444, 1447 (9th cir. 1993). However, where a prosecutor seeks to rely upon *consent* to justify the lawfulness of a search, she has the burden of proving that consent was in fact freely and voluntarily given. **Bumper v North Carolina** (1968) 391 US 543, 20 L Ed 2d 797, 88 S Ct. 1788, 46 Ohio Ops 2d 382.

In this matter, even if Officer Robert Schuenemann's '*wrong date*' mistake was allowable, the following must be true based on Officer Schuenemann's testimony: 1) The search occurred **15 to 20 minutes prior to** the time Officer Schuenemann arrived at the police station, *then* 2) Officer Schuenemann arrived at the police station **prior to 11pm** when he witnessed Candice Mountney's arrival, *and then* 3) The consent form was signed at **11:15pm — at the police station**. There is at least a 30 Minute disparity between the search and seizure and the *subsequent*

signing of the 'consent-to-search form — at the police station. The State clearly *did not* carry its burden [**App 7** (4T92-23 to 96-16)]. There is no MISTAKE exception for a consent-to-search form.

B. The State Courts failed to protect the Petitioner's Fourth Amendment rights.

The State's narrative is irreconcilable to evidence in the record. The Court found the consent-to-search form police relied on, *valid*, irrespective of the fact that the consent form evinces that it was signed AFTER the search and seizure occurred within the Petitioner's motel room. The court reasoned that she found the officer credible for admitting to his mistake [App **F 10** (4T97-24 to 106-21)]. The trial court erred admitting the illegally seized evidence seized from Room 112 into trial. Moreover, the Appellate Court failed give reasonable explanation for ignoring the issue. But for the illegally seized evidence admitted into trial, the Petitioner would have prevailed at trial.

II. The Cherry Hill Police and Court administrator violated the Fourth Amendment where no Oath was administered to listed complainant; and the police officer listed as the complainant, was completely unaware of who created the telephonic warrant with his e-signature on it.

A. The Telephonic Complaint Warrant violated Federal law.

The *Fourth Amendment* mandates that no warrant shall issue but upon probable cause supported by Oath or affirmation. This mandate applies to arrest warrants as well as search warrants. **Giordenello v. United States**, 557 U.S. 480 (1958). The Court in **Giordenello** noted that any person aggrieved by an unlawful arrest warrant may challenge the seizure of evidence coincident to arrest on any of several grounds. Moreover, in reference to an ill-conceived *telephonic warrant* the Court in **United States v. Rodgers**, (2013) US Dist LEXIS 147702013 U.S. Dist. LEXIS 14770 stated:

Though obtaining a warrant by requesting it from a judge over the telephone is permissible under Fed. R. Crim. P. 4.1, **the officers followed not one of the strictures of the rule that protect a defendant's rights under the Fourth Amendment.** Rule 4.1 requires that: (1) the request be given "under oath or affirmation" (Rule 4.1(b)(1)); (2) the testimony be recorded verbatim by an electronic recording device or in writing; (3) the testimony be transcribed, certified as accurate, and placed in the record; (4) the judge issuing the telephonic warrant sign it; and (5) the person seeking the warrant prepare a proposed duplicate original of it - and read or transmit its contents to the judge.

These requirements make the electronic procurement of a warrant reasonable. without such protections in place "telephonic warrants" are rife with the possibility of abuse by the government...

In similar fashion to **Rodgers**, the officers in the case below did not follow the strictures of the rule that protect a defendants rights under the *Fourth Amendment*. During the suppression hearing on October 30, 2014, the court clerk (Ms. Blaum-Naughton) testified that she *did not* administer an Oath, she *did not* remember an early morning call concerning telephonic warrant, nor did she remember *receiving* anything on March 6, 2014. She did not *record* anything.

During the first trial, Officer Ross Hensell, the listed complainant on the telephonic warrant testified: 1) he did not recall issuing the complaint warrant, 2) he speculated that a supervisor may have issued the complaint warrant via an 'ECDR' system, and 3) in the *20 or more* warrants that he has issued, he did not ever recall being placed under Oath — he didn't know it was required. Later, during the second trial, Officer Hensell re-affirmed: 1) He did not know who created the warrant with his name on it, and 2) "Nobody administered an Oath to me, it's not required, as I was instructed."

Clearly, this was an egregious violation of **R. 4.1**⁶ and the Petitioner's Fourth Amendment rights.

⁶ New Jersey's R. 3:2-3(b) governs telephonic warrants and requirements are virtually identical to federal R. 4.1.

B. ¹⁵ There is no credible evidence to support that the warrant was originally a telephonic warrant.

"A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge" FED. R. CRIM. P. 5(a)(1)(A) (emphasis added). Where a violation of Rule 5(a) is shown, the appropriate remedy is the suppression of any evidence obtained as a result of the delay.

United States v. Cardenas, 410 F.3d 287, 293 (5th cir. 2005).

This was the Petitioner's original challenge to the complaint warrant.

The Petitioner was subject to an unlawful detainment.

On its face, the warrant evinces that Officer Ross Hensell issued the complaint warrant to the Petitioner on March 5, 2014. The *original* version of the complaint warrant was signed by Ms. Blaum-Naughton on March 10, 2014. The *Defendant's Copy* and the *Superior Court Copy* remained unsigned. None of the warrants evinced that they were telephonic in nature (see **App D**). In fact, the purported faxed versions *are not* in evidence on the *initial* discovery disc. Pursuant **R. 4.1**, the person seeking the telephonic warrant must prepare a proposed duplicate original warrant - and read or transmit its contents to the judge. Here, there is no *original* fax copy of telephonic warrant filed. Moreover, Officer Ross Hensell never communicated with Ms. Blaum-Naughton in any way (see **App E 5**). He had nothing to do with the

warrant issuing process. Furthermore, the 'e-courts' case initiation date clearly indicates a date of March 10, 2014.

Only when the Petitioner raised issue with the five (5) day disparity between the date of his arrest and the finding of probable cause, did the purported fax versions appear — *one year later*. There are two (2) different signature dates on the jurat of the complaint warrant.

Furthermore, the Cherry Hill police and Ms. Blaum-Naughton do not know who sent or received the purported fax versions which appeared one year later (see **App E 6**).

C. The State Courts failed to protect the Petitioner's Fourth Amendment rights.

By mischaracterizing the nature of the suppression hearing, misconstruing it as a motion to dismiss the indictment, the trial court undermined the Petitioner's challenge to the telephonic complaint warrant. She impugned Petitioner's right to suppression of evidence as required by the *Fourth Amendment*, **R. 4.1** and **R. 5**. It is well settled law, a violation of **R.4.1** and **R. 5** do not require that an indictment or conviction be disturbed; *however*, the evidence co-incident to arrest should have been suppressed. By allowing evidence, which should have been suppressed at trial, the Trial Court denied the Petitioner a fair trial.

Moreover, the Appellate division refusing to discuss the issue, further compounded the injustice.⁷

CONCLUSION

In Rodgers, the court stated:

The Fourth Amendment contains fifty-four words. It prohibits the government from conducting unreasonable searches and seizures - and requires that, to obtain a warrant, the government official must, under oath, establish probable cause to execute the warrant, and describe with particularity the place to be searched and the person or things to be seized. These concepts are simple.

Apparently these concepts are not simple to the Cherry Hill Police. In point I supra, Officer Schuenemann's testimony is irreconcilable to the Constitution. He proffered a post-search supplemental report explaining that he *mistakenly* wrote the wrong date on the consent form and had no answer for executing an illegal search at least 30 minutes *prior* to when the consent-to search was signed. In Point II supra Officer Ross Hensell stated that in the 20 plus warrants he has issued, he never recalled being placed under Oath - he did not know it was required. In both points raised above, the Cherry Hill Police bypassed the constitutional


⁷ The Appellate Division stated that the issues raised were so lacking in merit it did not warrant discussion.

safeguards (judicial review), and wholly disregarded the protections that the United States Constitution guarantees.

These issues presented appear to be endemic in the south New Jersey area. No American citizen should be subject to the forementioned abuses by the police or the State Courts. It is for this reason the petition for writ of certiorari should be granted.

I, Brian A. Moore, the Petitioner in the above matter, certify that this Petition presents substantial questions of law and is filed in good faith and not for purposes of delay.

Respectfully submitted,



Brian A. Moore

Dated: December 8, 2019