ORIGINAL

No. 20-29

In The

Supreme Court of the United States

SARA DISCEPOLO,
Petitioner,
v.

UNITED STATES
DEPARTMENT OF JUSTICE,
Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia

PETITION FOR WRIT OF CERTIORARI

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Pro Se

QUESTIONS PRESENTED FOR REVIEW

In all Freedom of Information Act ("FOIA") cases, the federal courts apply a deferential "presumption of good faith" to agency declarations and forego discovery unless the requestor can show "bad faith" by the agency.

1. Are the courts violating the FOIA and its mandate to conduct de novo review by applying the presumption in cases which have nothing to do with national security?

2. Do the courts have any power to deny FOIA requestors the same benefits under the Federal Rules that other civil litigants enjoy, including the right to pre-trial discovery?

   The Petitioner presented countervailing evidence of overlooked materials that the agency failed to address in its declarations. Despite this, the lower court granted summary judgment to the agency and the court of appeals summarily affirmed.

3. Did the lower court's deference to the agency via the presumption cause it to adopt a sham interpretation of the requests used by the agency to circumvent Greentree and ignore the agency's exclusion of court records from its searches prohibited by Tax Analysts and McGehee?

4. Did the lower court conduct a trial by affidavit on the agency's summary judgment motions and did the court of appeals clearly misapprehend summary judgment law in light of binding Supreme Court precedent?

5. Did the lower courts violate the Magistrate Act and reduce the litigation to an unappealable administrative proceeding?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sara Discepolo (hereinafter "Petitioner"), respectively requests a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the dismissal of Petitioner's FOIA case on summary judgment.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-3a) is unreported but available at 2019 U.S.App.LEXIS 32619. Its order denying the panel rehearing (App. G, 105a) is unreported but available at 2020 U.S.App.LEXIS 4678 and 2020 WL 873484. And its order denying rehearing en banc (App. G, 106a) is unreported.

The opinions of the district court are:

- District Court Opinion in MSJ II and Final Judgment: Unreported but available at 2019 U.S.Dist.LEXIS 17069 (App. B, 4a-16a)
- Magistrate Opinion in MSJ II: Unreported but available at 2018 U.S.Dist.LEXIS 220756 (App. C, 17a-41a)
- District Court Opinion on motion for reconsideration: Unreported but available at 2018 U.S.Dist.LEXIS 223351 and 2018 WL 6620465 (App. D, 42a-49a)
- District Court Opinion in MSJ I: Unreported but available at 2018 U.S.Dist.LEXIS 220866 (App. E, 50a-69a)
- Magistrate Opinion in MSJ I: Unreported but available at 2018 U.S.Dist.LEXIS 220867 (App. F, 70a-104a)

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2019. A timely request for rehearing and rehearing en banc was denied on February 13, 2020. On March 19, 2020, the Supreme Court entered an Order relating to COVID-19 extending the time to file a petition for writ of certiorari to 150 days from the date denying rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions are reproduced in Appendix I to this Petition. See App. I, 107a-118a.

STATEMENT OF THE CASE AND FACTS

In 2015 the Petitioner sent requests to the Massachusetts and Connecticut field offices of the United States Attorney's Office. See Husted Decl, Exhs A and B [Doc 16-3 at 9-10, 12](Massachusetts Requests); Biega Decl, Exh A [Doc 16-2 at 6](Connecticut Request). The requests to both field offices seek documents related to Petitioner's reported sighting of a fugitive at the time, Whitey Bulger, in August of 2000 while living in Boston. The Massachusetts request, however, was much broader in both time and scope. While the Massachusetts request did not identify any recipient of the Bulger reports and included a request for investigative materials for two different time periods, the Connecticut request was limited

to Petitioner's reports made to an identified recipient, AUSA Sullivan, in August of 2000 only.

In the administrative proceedings, the EOUSA asserted no responsive records were found. The agency's response as to the Massachusetts request, however, showed its search took place in Connecticut, not Massachusetts, see Discepolo Decl [Doc 18-4], Exh F, and was limited in scope to the Connecticut request, see id. ¶ 8 and Exh G (OIP decision).[1]

Petitioner filed suit in 2016 under both the Privacy Act and FOIA. See compl [Doc 1]. Among other things, the agency denied the complaint exhibits were the requests, see Ans [Doc 5], ¶¶ 7-8 and refused to answer whether any requested records existed, see id. ¶¶ 20, 27. After Petitioner served pre-trial discovery, the agency moved for a protective order after the Rule 36 requests to admit served on it had already self-executed. Compare Deft Mot for Prot Order [Doc 11](filed Mar. 22, 2017) with Discepolo Decl [Doc 18-4], ¶¶ 15-16 (requests served Jan 26, 2017 and Feb 1, 2017). The court granted and denied the motion in part and held that Petitioner could not seek discovery before the agency's summary judgment motion was filed. See Min. Order Apr. 21, 2017.

In the first summary judgment proceeding ("MSJ I"), Petitioner filed countervailing evidence showing that Massachusetts worked on a Bulger Fugitive Task Force and, in connection with that work, had held a press conference asking the public for Bulger sightings and

[1] The OIP decision describes the scope of the request as reports made to "an Assistant United States Attorney."

displaying maps of prior sightings in 2004, four years after Petitioner's own report. The agency failed to explain why it did not search Task Force The only question put to AUSA Sullivan was whether he remembered Petitioner's name. See Biega Decl, ¶ 15. Although Connecticut asserted Sullivan found "no responsive records" according to an EUSA form, it neither described the search he purportedly conducted nor attached the form. See Biega Decl, ¶ 8.

The court granted summary judgment as to Massachusetts after finding it lacked access to Task Force materials and that its search of Bulger's criminal case file was sufficient. It denied the motion as to Connecticut and ordered the agency to file supplemental declarations for a search of AUSA Sullivan's emails to fill in the "gaps" in the evidence. See App. F, 98a (Harvey, J.); App. E, 64a (Friedrich, J.). At no time did the agency ever explain its reasoning for its search decisions. Its declarations were silent about the Massachusetts field office's work on the Task Force.

In MSJ II, the agency filed a "renewed" motion as to the Connecticut search together with supplemental declarations. Its description of the search of Sullivan's emails showed its search did not include emails prior to 2010. The court granted summary judgment after finding the agency lacked access to those older emails even though none of the agency declarants asserted this was the case. During the proceeding, the agency filed the EOUSA form, see Sullivan Decl, Exh B (EOUSA form)[Doc 43-2 at 7-8], which had been denied to Petitioner in discovery in MSJ I.

The form characterized the requests as atypical first party requests that EOUSA stated would result in the

withholding of third party materials. It also showed the EOUSA excluded a search of court records as a matter of policy. Despite these admissions, the court refused to consider them as affecting adequacy for either field office search. See App. C, 29a-30a, 33a n. 5, 35a (Harvey, J.)(Connecticut in MSJ II); App. B, 13a-14a (Friedrich, J.)(Connecticut in MSJ II); App. D, 46a (Friedrich, J.)(denying motion for reconsideration of Massachusetts decision in MSJ I).

The court denied Petitioner's Rule 56(d) motions and held its prior decision on the motion for protective order constituted a withdrawal of the agency's defaulted Rule 36 admissions. It denied Petitioner's motions to strike and denied both cross-motions as moot. The Court of Appeals summarily affirmed and denied re-hearing.

REASONS FOR GRANTING THE PETITION

The federal courts have been applying the "presumption of good faith" to agency declarations in all FOIA cases for decades. Neither the statutory language nor the legislative history of the FOIA, however, authorizes this deferential standard except in national security cases. The presumption has allowed the federal courts to arbitrarily decide whether to allow FOIA cases to proceed based upon their own subjective determination as to the sufficiency of the declarations rather than allowing the truth seeking process to take its course under the Federal Rules.

In the case at bar, the use of the presumption resulted in the lower court's adoption of the agency declarant statements on disputed issues of fact that

affirmed the agency's sham interpretation of the requests and exclusion of categories of records from searches in violation of the FOIA and controlling law.

The court of appeals' summary affirmance is not just contrary to its own precedent but also conflicts with binding Supreme Court precedent governing summary judgment law. Its summary affirmance turned the lower court's erroneous decision into binding precedent that resulted in elevating the agency declarations to super-evidence that not even countervailing evidence can touch.

Congress intended the FOIA to be a check on the Executive by employing the independence of the Judiciary to review anew the actions of its agencies. Instead the courts defer to the agencies under a court-imposed standard enabling arbitrary decisions. Its deference conflicts with the legislative history and statutory language of FOIA. It also violates the Federal Rules, and ultimately, Article III of the U.S. Constitution.

THE DEVELOPMENT OF FOIA CASELAW

I. The presumption is being used by the courts to nullify the FOIA.

A. De novo review requires *no* deference to the agency

The default position for a court reviewing a FOIA case is no deference to the agency. The statutory language requires that courts engage in "de novo" judicial review of agency action when suit is filed. See 5 U.S.C. § 552(a)(4)(B). De novo review means that the courts must not defer to the

agency. See U.S. v Raddatz, 447 U.S. 667, 690 (1980)("de novo" means no deference to any prior resolution of the same controversy); Wash. Post Co. v U.S. Dep't of State, 840 F.2d 26, 31-32 n. 42 (discussing incompatibility of deference with Congressional mandate imposed on courts to independently oversee agency determinations), vacated on other grounds, 898 F.2d 793 (D.C. Cir. 1990). As recognized by this Court, the dominant objective of the statute is disclosure not secrecy. See John Doe Agency v John Doe Corp., 493 U.S. 146, 152 (1989).

Back in the 1980's before the decision in SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991), the federal courts were more cognizant of the duty they had to act independently of the Executive in deciding whether the agency's actions were proper. It was clear that "de novo" review required the proper application of the standard and respect for factual issues arising in the litigation instead of an uncritical acceptance of agency statements. See Washington Post Co. v U.S. Dept of Health & Human Servs, 865 F.2d 320, 325-26 & n. 8 (D.C.Cir. 1989)(summary judgment standard required for de novo review); See also, e.g., Founding Church of Scientology, Inc. v NSA, 610 F.2d 824, 833 (D.C.Cir. 1979)("[T]he District Court's uncritical acceptance of the affidavit deprived appellant of the full de novo consideration of its records-request to which it is statutorily entitled."). It meant the courts cannot usurp the requestor's participation in the adversary process via the Federal Rules. See Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 30 (D.C. Cir. 1988)("Courts are forbidden . . . to conduct trial by affidavit and thus deprive litigants of their right to an evidentiary hearing on issues of fact."). It was recognized that the requestor's ability to test the government's position was

central to de novo review. See id. at 30-31 (stating that "[t]he integrity of a court's de novo judgment rests upon an adversarial system of testing for truth when critical adjudicative facts are subjects of a contest.).

Today, these basic tenets for the adjudication of cases under FOIA has fallen by the wayside, overcome by the "presumption" the courts universally apply now in all FOIA cases. The result, as this case will show, is the antithesis of Congress' intent and the reduction of suits authorized by Congress to little more than administrative proceedings headed by the federal judiciary which has lost sight of the limits of its own power under Article III.

B. The legislative history only authorizes the presumption in national security cases

The lower court cited to SafeCard numerous times in support of its uncritical adoption of the agency declarant's statements. The problem is that the application of the presumption in SafeCard itself was without any legislative authority.

A review of only two cases in the chain prior to SafeCard shows the SafeCard Court's error. In support of the presumption, SafeCard cited to Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981). The request for information in Ground Saucer was made to the CIA, a national intelligence agency. Ground Saucer in turn cited to Goland v CIA, 607 F.2d 339, 352 (D.C. Cir. 1978) in support of the presumption, another case involving requests to the CIA. *Goland makes very clear that the presumption only applies in the national security context*

pursuant to the statute's legislative history. See Goland at 352 and n. 76 (discussing "substantial weight" given to good faith agency declarations allowing the court to grant summary judgment and forego discovery). Thus, under the legislative history, the presumption is actually only available in the narrow case where an agency has asserted potential harm to national security from the disclosure of information.

The basis for this deference to the Executive when national security is at stake is Congress' recognition that the Executive has special expertise in assessing harm from potential disclosures that may affect the national interest. See Ray v Turner, 587 F.2d 1187, 1193 (D.C.Cir. 1978)(deference to the Executive is due to its "unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record.").

In contrast to the Goland case, there was no national security interest at stake in SafeCard which only concerned a request for documents from the SEC. The use of the presumption in SafeCard "does not even pretend to any legislative parentage." New York Times Co. v. NASA 920 F.2d 1002, 1007 (1990).

SafeCard is not the only case wrongly citing to Goland for the presumption. In fact all FOIA cases, regardless of the circumstances ultimately use the presumption cited in Goland without even realizing the limitations for using it may mean it is unavailable under the facts of their own cases. In Meeropol v. Meese, 790 F.2d 942 (D.C. Cir.1986), a case predating SafeCard, the D.C. Circuit affirmed the lower court's denial of further discovery by citing to Goland where it judged the affidavits

were sufficient. See Meeropol at 961. Thus the denial of further discovery was not based upon the Rules but upon the presumption as stated in Goland. In Meeropol as in SafeCard however, the court had no statutory basis to apply the presumption and forego discovery because no national security issues were at stake in that case.

The courts now apply the presumption in every single FOIA case. Cases that do not involve national security cite to cases that do and vice versa; there is no demarcation in the caselaw. The strangeness of the situation is exemplified by dicta in Miller v U.S. Dept of State, 779 F.2d 1378, 1383 (8th Cir. 1985), in which the court even acknowledged the presumption applied in national security cases while seemingly oblivious to the fact no such interest was at stake in that case. See Miller at 1383.[2]

C. The presumption enables arbitrary court decisions from one to the next that are impossible to challenge

Some circuits have set up a two step process by first analyzing whether the agency has met its initial burden to show a reasonable search with the filing of sufficiently

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[2] The Fifth Circuit uses a "presumption of legitimacy" in assessing agency declarations based upon the Supreme Court's "assumption" it applied to government records and conduct in U.S. Dept of State v Ray, 502 U.S. 164, 179 (1991). See Batton v Evers, 598 F.3d 169, 176 (5th Cir. 2010). Interestingly, the Supreme Court never cited to any supporting authority for this presumption in Ray, which was decided several months after the SafeCard decision.

detailed nonconclusory declarations. See, e.g., Moffat v U.S. Dept of Justice, 716 F.3d 244, 254 (1st Cir. 2013); Miller v U.S. Dept of State, 779 F.2d 1378, 1383 (8th Cir. 1985). The standard applied to the agency however is one of reasonableness. Once the courts arbitrarily decide on their own whether that standard has been met, a requestor cannot overcome the presumption unless he can demonstrate "bad faith" rather than unreasonableness. See,e.g., Plunkett v. DOJ, 924 F. Supp. 2d 289, 297-98 (D.D.C. 2013). This amorphous standard however, is impossible to overcome by a requestor who has been denied all pretrial discovery and whose challenges are universally characterized as "speculative" by the courts. See, e.g., id. at 306.

A litigant without any discovery facing an opponent with a monopoly of information is rarely going to find the mens rea inherent in a showing of "bad faith." See Stephanie Alvarez-Jones, *Note: "Too Big To FOIA": How Agencies Avoid Compliance with the Freedom of Information Act*, 39 Cardozo L. Rev. 1055, 1068-69 (2018)("The presumption of good faith that these agency affidavits are given is hard to overcome, *particularly without inside knowledge.*")(emphasis added).

It is indisputable that the denial of discovery in FOIA cases is directly tied to the use of the presumption that is supposed to be reserved for national security cases only. See Goland at 352 (presumption allows court to decide case on summary judgment *and forego discovery*). Yet the courts are universally barring discovery in all but the rarest of cases and are subject to the whims of the judiciary. See, e.g., Heily v Dept of Commerce, 69 F. App'x 171, 174 (4th Cir. 2003)(acknowledging many restrictions

now used in FOIA cases); Taylor v Babbitt, 673 F.Supp.2d 20, 23 (D.D.C. 2009)(discovery not even considered until summary judgment motion filed)[3]; Judicial Watch v. United States Dep't of State, 2016 U.S. Dist. LEXIS 62283, at *9 (D.D.C. May 4, 2016)(discovery is "rare" and not allowed unless bad faith is shown). See also Judicial Watch v Dept of Justice, 185 F.Supp.2d 54, 65 (D.D.C. 2002)(discovery denied in favor of allowing agency's to supplement declarations).

The courts' denial of all discovery in FOIA cases pursuant to the presumption is diametrically opposed to the de novo review mandated by Congress. See Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 30-31 (D.C. Cir. 1988)("The integrity of a court's de novo judgment rests upon an adversarial system of testing for truth when critical adjudicative facts are subjects of a contest."); Washington Post Co. v U.S. Health & Human Servs, 865 F.2d 320, 325 (D.C.Cir. 1989)(discovery not mere technicality but fundamental to the "integrity of a court's de novo [FOIA] judgment")(brackets in original).

As the contrast in cases shows, where once the courts recognized that requestors' use of the adversary process was central to a de novo determination, today discovery in a FOIA case is "rare and disfavored" and only possible if a requestor can show agency "bad faith," see, e.g., Freedom Watch v. BLM, 220 F. Supp. 3d 65 (D.D.C.

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[3] This bright line rule is based upon mere dicta in Murphy v FBI, 490 F.Supp. 1134 (D.C.Cir. 1980), which actually held only that discovery is premature until the agency has filed an *answer at the pleading stage*, not declarations at the summary judgment stage.

2016), whatever that is. Even then, it still is not allowed, as recognized by the lower court in this case. See, e.g., App. F, 81a.

The only litigation in which the courts impose these arbitrary customs and procedures is in FOIA litigation. See generally, Snook v Trust Co. of Georgia Bank, N.A., 859 F.2d 865, 870 (11th Cir. 1988)(parties are entitled to discovery before summary judgment). See also e.g., Margaret B. Kwoka, *Article: Deferring to Secrecy*, 54 B.C.L.Rev.185, 223 (2013)(Vaughn index procedure prevents meaningful discovery otherwise available under Rules).

D. The courts have exceeded their power in applying the presumption to forego discovery in regular FOIA cases.

The courts do not have any power to bar requestors from utilizing the Federal Rules, including discovery, in FOIA lawsuits. They have no power under the Federal Rules. They have no power under FOIA. And they have no power under Article III. In creating their own brand of arbitrary customs and practices to deny discovery and application of the Rules, the courts are shunning their limited jurisdiction under the Constitution.

Under the Constitution, the inferior federal courts derive no original jurisdiction from Article III. See Kline v. Burke Construction Co., 260 U.S. 226, 234 (1922). In fact, the only source of power they enjoy is that which Congress provides. See, e.g., New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989)(recognizing "the undisputed constitutional principle that Congress, and not

the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.").

As a result, the courts must justify their arbitrary court procedures they have been using under FOIA as a substitute for the procedures set forth under the Federal Rules. See Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 383 (1884)("[B]ecause the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is, that it is without their jurisdiction, unless the contrary appears from the record.").

When it comes to the FOIA, the courts' idiosyncratic procedures for the civil litigation cannot be justified under either the Federal Rules or the FOIA. First, there is no authority under FOIA for the denial of all discovery. See Washington Post Co. v U.S. Dept of Health & Human Serv, 865 F.2d 320, 325 (D.C.Cir. 1989)(discovery not mere technicality but fundamental to the "integrity of a court's de novo [FOIA] judgment")(brackets in original). Congress intended for the Rules to operate in FOIA litigation. See Weisberg v Webster, 749 F.2d 864, 868 (D.C.Cir. 1984)("When Congress intended to create exceptions to regular civil procedures in FOIA litigation, it has stated these exceptions specifically.").

As already set forth above, the legislative history cannot be the basis for taking away the Rules either in cases such as this one that have nothing to do with national security.

Second, the courts also have no power to deny discovery to requestors under the Federal Rules either. See Weisberg v Webster, 749 F.2d 864, 867-88 (D.C.Cir.

1984)(Federal Rules and discovery apply in FOIA cases); Jacksonv v Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 n. 4 (D.C.Cir. 1996)(district courts may not circumvent the Federal Rules with local rules and procedures that deny rights available under those Rules); Baylor v Mitchell Rubenstein & Assocs, 857 F.3d 939, 945 (D.C.Cir. 2017). See also Brown v Crawford County, 960 F.2d 1002, 1008-09 (11th Cir. 1992); Carver v Bunch, 946 F.2d 451, 453 (6th Cir. 1991).

Because the courts have no power to apply the presumption in ordinary FOIA cases, nor forego discovery by substituting their own draconian rules barring the truth seeking process under the Rules, all of the caselaw which has developed over a period of decades has taken place without any judicial authority.

Finally, it should be noted that there is a slight difference between courts deferring to the agency and refusing to conduct the de novo review mandated by Congress to check the Executive on the one hand and denying requestors access to the Federal Rules in civil litigation on the other. The former passivity is unquestionably a violation of their limited authority under Article III, because they exceed their jurisdiction when they decline the jurisdiction conferred upon them by Congress. See Quackenbush v Allstate Ins.. 517 U.S. 706, 716 (1996)("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); Cohens v Virginia, 19 U.S. 264, 404 (1821)(Federal courts "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.").

However, their *active* denial of discovery and refusal to apply the Federal Rules in FOIA cases is much more disturbing and dangerous. Given the judiciary's demonstrated unwillingness to comply with the demands of Congress, the motivation of requestor-litigants is the only thing that can overcome the judiciary's intransigence to objectively examining the government's position. It is one thing to passively refuse to conduct an independent review of the agency, it is quite another to stop a third party – the deputized litigant – from pursuing that review under Federal Rules available in civil litigation. See Margaret B. Kwoka, *Article: Deferring to Secrecy*, 54 B.C.L.Rev.185, 235 (2013)(special FOIA procedures created by courts defeat separation of powers intended by Congress). Given the complete indifference displayed by the courts over such a long period of time, only litigants' access to the Rules can be relied upon to check the Executive. See id. at 187 (local court practice under FOIA is actually de facto system of deference that pays only lip service to de novo review).

THE LOWER COURT DECISION

II. The use of the presumption in this case caused a decision which conflicts with controlling law.

A. By adopting the agency's sham interpretation of the requests the court affirmed the agency's end run around Greentree.

In both summary judgment proceedings, the agency characterized the requests as seeking only documents that

were "about" Petitioner. See Deft's Reply and Opp [Doc 30 at 2]; Deft's Resp to Pl's Objections [Doc 72 at 9]. It was not until MSJ II, when the agency attached the EOUSA form to Sullivan's declaration that it became clearer what "about" meant. That form showed that the EOUSA interpreted the requests as "first party" requests which it defined as limited to records whose subject matter was the Petitioner only. Compare Sullivan Decl, Exh B (EOUSA form interpreting request as ""not a typical first-party request . . . .") [Doc 43-2 at 7] with Supp Luczynski Decl, ¶ 5 (defining first party request as limited to records whose subject matter was only the requestor)[Doc 59-3]. This "first party" interpretation resulted in the withholding of all third party records. See id.

Thus, by the time of the second summary judgment proceeding it was evident that the agency was restricting the scope of records to those that were only available under the Privacy Act. See Tobey v NLRB, 40 F.3d 469, 471 (D.C.Cir. 1994))(under Privacy Act, requestor is only entitled to records "about" herself). The scope of records accessible under FOIA is not limited to "about" records. See Fisher v NIH, 934 F.Supp.464, 469 (D.D.C. 1996)(FOIA materials not limited to "about" records); U.S. DOJ v. Tax Analysts, 492 U.S. 136, 145 (1989)(Agency records under FOIA encompass "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency . . . ."). In fact, some agency records under FOIA have no particular subject matter at all. See, e.g., New York Times Co. v. NASA, 920 F.2d 1002, 1007 (D.C. Cir. 1990)(explaining error of dissent was to "presuppose[s] that every file has an inherent and discoverable 'subject.'").

The actual language of the requests shows how the agency's interpretation was nothing but a sham. All of the requests seek the broadest scope of documents "related in any way" to the listed items. Nothing in the requests states Petitioner only seek records about herself as opposed to any other person or subject matter and mentions at least one other person by name. One of the requests to Massachusetts explicitly seeks records located in third party materials. See Husted Decl, Exh A (mention of Petitioner's name in third party investigative files)(item no. 2) [Doc 16-3 at 9]. Finally, at the end of each of the requests, Petitioner specified a desire for such materials as notes, memoranda, internal reports, as well, that may or may not have any particular subject matter.

Given the requirement to construe the requests liberally under FOIA, see Nation Magazine v U.S. Customs Serv. 71 F.3d 885, 890 (D.C.Cir. 1985), neither the agency nor the court could ignore the "related to" language to confine the scope of records to those whose subject matter was only the Petitioner, see Nation Magazine, Wash. Bureau v U.S. Customs Serv., 71 F.3d 885, 889-90 (D.C.Cir. 1995)(search of records under Perot's name too narrow where request sought all documents "pertaining" to Perot). See also, e.g., Wilson v U.S. Dept of Treasury, No. 15-C-9364, 2016 U.S.Dist.LEXIS 185182, at * 9 (N.D.Ill. Oct 12, 2016); Pulliam v U.S. EPA, 235 F.Supp.3d 179, 194 (D.D.C. 2017); Church of Scientology v IRS, 792 F.2d 146, 152 (D.C.Cir. 1986).

Given the current caselaw, the interpretation shows the agency had no intention of conducting a search "reasonably calculated to discover the requested

documents." See Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993)(citation omitted). A search of only records "about" Petitioner would not have found any documents related to Petitioner's whistleblower report of seeing Bulger, see, e.g., Douglass v U.S., No. 99-11288, 2000 U.S.App.LEXIS 39910, at * 12-13 (5th Cir. July 20, 2000)(holding whistleblower phone call was not "about" whistleblower); Goldstein v IRS, 279 F.Supp.3d 170, 187 (D.D.C. 2017); Unt v Aerospace Corp., 765 F.2d 1440, 1448 (9th Cir. 1985). It also would not find any of the materials specifically requested in the four corners of the requests, such as notes, memoranda, and reports, that had no subject matter. See, e.g., Boyd v Sec of the Navy, 709 F.2d 684, 686-87 (11th Cir. 1983)(notes are not in systems of records).

In fact, the agency interpretation adopted by the court was nothing but a sham designed to be an end run around Greentree v U.S. Customs Serv., 674 F.2d 74, 79-80 (D.C.Cir. 1982), codified at 5 U.S.C. § 552a(t)(2). Under Greentree, an agency may not bar an individual from obtaining FOIA materials by using the Privacy Act as a barrier. See Crumpton v. Stone, 59 F.3d 1400, 1405 (D.C. Cir. 1995), cert. denied, 516 U.S. 1147 (1996); Greentree at 78-80 (decrying "third party anomaly" that would result if agency could bar FOIA records from individual requestor under 5 U.S.C. § 552a(b)(2) where public at large could access them).

Instead of overtly stating it would not search any FOIA materials as it did in Greentree, the agency instead instituted a fraudulent characterization of the requests as a "first party request" to get the same result. This allowed it to not just avoid searching under FOIA but also to avoid producing a Vaughn index for any found records. See

Porter v U.S. DOJ, 717 F.2d 787, 799 (3rd Cir. 1983)(agency required to produce Vaughn index where its search of Privacy Act records only was improper under Greentree).

The court never addressed the implications of the agency's "about" requirement, instead superficially approving the agency's use of Petitioner's name as a search term and as a way to organize the searches. See App. C, 29a-30a n. 4, 33a n.5.

The sham nature of the agency's interpretation limiting search to the Privacy Act was also reflected in its facially deficient averment. Instead of averring "that all files likely to contain responsive materials . . . were searched," Valencia-Lucena v U.S. Coast Guard, 180 F.3d 321, 326 (D.C.Cir. 1999)(emphasis added), it averred only that "[a]ll systems of records . . . likely to contain records responsive to Plaintiff's FOIA request were searched," Husted Decl, ¶ 32 (emphasis added)[Doc 16-3]; Biega Decl, ¶ 16 (emphasis added)[Doc 16-2].[4]

The search of "records" in a "system of records" however is a Privacy Act search. See Baker v Dep't of Navy, 814 F.2d 1381, 1383 (9th Cir. 1987); 5 U.S.C. § 552a(d)(1). Although a requestor is limited to "about" "records" under the Privacy Act, see 5 U.S.C. § 552a(a)(4), there is no such limitation under FOIA, see Fisher v NIH, 934 F.Supp.464, 469 (D.D.C. 1996), which is why the averment should refer to "files" or "materials" rather than "records."

Nor can a search be limited to locations which are only "systems of records." See Clarkson v IRS, 678 F.2d 1368, 1376 (11th Cir. 1982)("[T]he FOIA is . . . in no way

[4] See also Sullivan Decl, ¶ 11 [Doc 43-2].

limited to records contained within a system of records."). Furthermore, the agency's use of the phrase "responsive records" also indicates a further limitation excluding a search of any materials the agency determined ahead of time were excludable under Section 552(c). See 28 C.F.R. § 16.4(a)(Section 552(c) record "is not considered responsive to a request").

Instead of addressing the sufficiency of the averment *language* as a matter of law, the court made a determination of disputed fact by leaping to the finding that the *actual* searches were not limited to a system of records. See App. F, 100a. As an initial matter, this finding was without foundation in the record. The agency never stated how the materials searched were grouped or information retrieved from them. See 5 U.S.C. § 552a(a)(5). At a minimum, at least some of the search descriptions raised an inference favorable to the Petitioner that the agency was limiting its searches to systems of records. For example, none of the searches were of any notes, memoranda or other materials sought in the four corners of the requests. See, e.g., Boyd v Sec of the Navy, 709 F.2d 684, 686-87 (11th Cir. 1983)(notes are not in systems of records). Other search decisions also raised the inference. See also Biega Decl, ¶ 14 (failure to search citizen emails because no files under Petitioner's name); see Sullivan Decl, ¶ 10 (failure to search files because organized under names of cases and investigations); see Supp Biega Decl [Doc 59-2], ¶ 11 (failure to search Administrative File database).

Second, the defective averment language in itself apart from the *actual* searches showed the agency failed to meet its burden on summary judgment as a matter of law.

See Am. Immig Council v U.S. Dept of Homeland Sec., 21 F.Supp.3d 60, 71 (D.D.C. 2014)(courts generally find agency has not met burden without sufficient averment). See also Huntington v U.S. Dept of Justice, No. 15-2249 (JEB), 2017 U.S.Dist.LEXIS 6477, at * 15-17 (D.D.C. Jan. 18, 2017)(likening the averment language to "magic words");Wilson v U.S. Dept of Justice, 192 F.Supp.3d 122, 128 (D.D.C. 2016)(holding Luczynski's assertion that search was "systemic" was not proper averment). The court, however, never ruled on the facial sufficiency of the averment *language* as a matter of law.

B. The court ignored the agency's policy of excluding court records from its searches which is prohibited by Tax Analysts and McGehee.

The EOUSA admitted to excluding all court filed documents from its searches in this case as a matter of policy. See Sullivan Decl, Exh B [Doc 43-2 at 7](EOUSA directed field office to not forward court filed documents); Supp Luczynski Decl, ¶ 10 (EOUSA policy is to "not seek court-filed public records"). Its explanation was that Petitioner could obtain the documents "directly from the court." Id.

The Supreme Court has already held in U.S. Dept of Justice v Tax Analysts, 492 U.S. 136 (1989) that refusing to search court records because they are publicly available from the courts constitutes an improper withholding under FOIA. See id. at 149-53. See also, e.g., Toensing v U.S. Dept of Justice, 890 F.Supp.2d 121, 146-47 and n. 16 (D.D.C. 2012)(holding agency's failure to search subpoena records

based upon its pre-emptive determination they would be exempt was inadequate FOIA search).

Furthermore, the agency's willingness to search only if the requestor specifically requests court records, see Sullivan Decl, Exh B [Doc 43-2 at 7](EOUSA's instruction to filed office to "not send court-filed documents unless specifically requested."); Supp Luczynski Decl, ¶ 10 ("*Unless specifically requested,* EOUSA does not seek court-field public records . . . ."), does not make the policy reasonable. Not only did the agency never inform Petitioner of the option to amend the request to specifically ask for this category of records, but even if it had, the policy is still improper because of the amount of increased effort and delay before this category of record may be obtained as set forth in McGehee v CIA, 697 F.2d 1095, 1110 (D.C. Cir. 1983).

The court justified its refusal to consider the agency's withholding or non-search of court records with respect to both field office searches based upon the law of the case and unavailability of the EOUSA form in the first summary judgment proceeding. See App. C, 35a (Harvey, J.)(refusing to consider nonsearch of court records in Connecticut due to prior decision approving of adequacy of searches in MSJ I); App. D, 46a (Friedrich, J.)(refusing to reconsider granting of summary judgment as to Massachusetts search because EOUSA form was not before the court in MSJ I).

By refusing to consider the court records, however, the court was not just putting blinders on to an improper withholding or inadequate search, and refusing to consider the totality of circumstances to assess the adequacy of the

searches as required under FOIA, see Cooper v Dept of Justice, No. 03-5172, 2004 U.S.App.LEXIS 8135, at * 3, 2004 WL 895748 (D.C.Cir. April 23, 2004), it was doing so based upon its own improper decision denying discovery in MSJ I based upon the mere fact that suit was filed for access under FOIA See App. F, 81a Had discovery been granted, Petitioner could have raised the agency's admissions contained in the form at that time, because Petitioner specifically sought the form in the first Rule 56(d) motion. See Decl of S Discepolo [Doc 25-2], ¶ 15.

C. The presumption was used to remove the agency's burden on summary judgment, contravening both binding Supreme Court law and the statutory language.

Throughout the proceedings the court inexplicably made findings of fact not in evidence and shifted the burden to the Petitioner on the agency's motion. The reason for the court's actions was finally revealed in MSJ II and boils down to one thing: the court's application of the "presumption of good faith" to the agency's declarations.

In MSJ I, the court found that all of the Massachusetts requests were related to criminal case files including the reported Bulger sighting. Because of this it found those documents would likely have been found in Bulger's criminal case file, which the agency had searched. See App F, 97a; App. E, 61a. First of all, there was absolutely no evidence submitted by the agency that a reported sighting of Bulger was related to the criminal case or would find its way into his criminal case file for his criminal prosecution. These findings were mere speculation and an abuse of discretion on the part of the

court. See, e.g., Day v Persels & Assocs, 729 F.3d 1309, 1327 (11th Cir. 2013); Jones v Beto, 459 F.2d 979 (5th Cir. 1972).

Second, even assuming *arguendo* the criminal case file was a likely location, the "agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested." Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt., 180 F.3d 321, 326 (1999). It also may not limit its search to investigative materials only. See Nation Magazine v U.S. Customs Service, 71 F.3d 885, 890 (D.C.Cir. 1995).

Aside from using speculation to make these findings, the court also shifted the burden to Petitioner on the agency's motion. It held that Petitioner bore the burden of presenting affirmative evidence that (1) the agency lacked access to the Task Force materials and (2) explain why the search of the criminal case file was insufficient. See App. F, 97a; App. E, 61a. As a matter of fact, Petitioner had no such burden to rebut facts that were never put into evidence by the agency in the first place. See 2361 State Corp. v Sealy, Inc., 402 F.2d 370, 375 (7th Cir. 1968).

By asserting Petitioner had this burden to rebut, the court was again implicitly finding facts that were never placed into evidence, i.e., that the agency lacked access and the search of the case file was sufficient. By shifting the burden to Petitioner on the agency's motion, the court was contravening binding Supreme Court precedent and the statutory language. See U.S. DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989); 5 U.S.C. §

552(a)(4)(B)("[T]he burden is on the agency to sustain its action.").

It was the agency's burden to show materials were not agency records if that was the case, see United States DOJ v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989); Aguiar v. DEA, 865 F.3d 730, 737 (D.C.Cir. 2017), and explain why the Task Force materials were not searched, see Ancient Coin Collectors Guild v U.S. Dept of State, 641 F.3d 504, 514-15 (D.C.Cir. 2011); Campbell v. United States DOJ, 164 F.3d 20, 27 (1998). It never did so.

As for the requested investigative materials, Massachusetts conducted just one search of a Caseview database in 2015. See Husted Decl, ¶ 28 [Doc 16-3 at 6]. Yet the agency's own evidence showed the data it contained was incomplete in the year of the search. See Luczynski Decl [Doc 31-1], ¶ 9 (transference of data from prior LIONS database was not complete until 2016). Moreover, Massachusetts' claim that it could not search witness information, see Husted Decl., ¶ 19 (asserting no file system to record tips), was contradicted by the agency's own website, see Pl's Reply, Exh B [Doc 32 at 19](stating witness information can be tracked in LIONS database). As a result, the court's determination that the Caseview search of investigative materials in Massachusetts was sufficient, see App.F, 94a-95a, was a finding on a disputed issue of fact.

As for the Connecticut search, in MSJ I the court denied the motion but ruled the search was adequate except for its determination the agency only needed to do one more search of Sullivan's emails. App. F, 97a-98a. Without any information from the agency about where it

believed likely locations were for finding materials and a proper questioning of Sullivan for leads, this determination by the court, that just this email search would suffice, was again simply speculative and lacked any foundation in the record. Moreover, the court never addressed controlling law requiring the agency to pursue clear and certain leads in the questioning of Sullivan as a key witness with a nexus to materials in that field office. See Valencia-Lucena v U.S. Coast Guard, 180 F.3d 321, 326-328 (D.C.Cir. 1999); Kowalczyk v DOJ, 73 F.3d 386, 389 (D.C.Cir. 1996).

In MSJ II it became clear how and why the court was seemingly adducing facts without basis in the record. The description provided by the agency showed it searched emails only as of 2010. The failure of the agency to explain why it did not search older emails required denial of its motion under Ancient Coin Collectors Guild v U.S. Dept of State, 641 F.3d 504, 514-15 (D.C.Cir. 2011), which was directly on point.

Instead, the court found that the agency lacked access (again) to older emails. The Magistrate made this determination based upon nothing more than the conclusory search description which was simply silent about the older emails. See App. C, 34a. Thus, the Magistrate was adducing facts from nothing more than the *gaps in the record* caused by the agency's conclusory declarations by applying the presumption. The district court went even one step further. It made an independent finding that the agency lacked access based upon nothing more than the agency's "good faith" averment. See App. B, 14a.

As the court's analysis in MSJ II shows, the presumption was responsible for the court to arbitrarily

find the agency lacked access to materials that went unsearched, i.e., the Task Force materials and older emails. This essentially removed any burden on the agency to explain why it did not search these overlooked materials. It also shifted the burden to the Petitioner to rebut a fact that was never put into evidence by the agency. It also required Petitioner to prove those records essentially existed. Binding precedent, however, places the burden on the agency, not the Petitioner, to show that materials are not agency records, not vice versa. See United States DOJ v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989); Founding Church of Scientology, Inc. v. NSA, 610 F.2d 824, 836 (D.C. Cir. 1979).

Moreover, it is well established that the issue on summary judgment is not if agency records exist, but rather whether the *search for them* was adequate. See Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993). Finally, the district court's reliance on the agency's mere (defective) averment to justify withholding is contrary to Vaughn v. Rosen, 484 F.2d 820, 825-26 (D.C. Cir. 1973)(rejecting government argument that averment established its claimed exemptions).

III. The lower court removed the Federal Rules from the case.

Not only did the court refuse to apply the summary judgment standard under Rule 56(a), it also refused to apply other Rules as well. The majority of the declarations were either unsworn or made on mere belief. The court refused to apply binding and controlling precedent barring consideration of them on summary judgment. See Adickes v S.H. Kress & Co, 398 U.S. 144, 158 n. 17 (1970)(unsworn

statements inadmissible on summary judgment); Bush v Dist of Columbia, 595 F.3d 384, 387-88 (D.C.Cir. 2010)(same); Londrigan v FBI, 670 F.2d 1164, 1174 (D.C.Cir. 1981)("An affidavit based merely on information and belief is unacceptable."); Harris v Gonzalez, 488 F.3d 442, 446 (D.C.Cir. 2007)(same); Lopez-Carrasquillo v Rubianes, 230 F.3d 409, 414 (1st Cir. 2000)(same).

The court's trial by affidavit usurped Petitioner's rights to discovery under the Federal Rules and the statute. For example, it uncritically adopted Luczynski's statement EOUSA did not use exemptions or exclusions despite his admission that the agency excluded court records from search. It adopted his statement that EOUSA leaves search decisions up to the field offices despite the form showing it was EOUSA interpreting the scope of the requests and resulting search. Because he did not oversee the searches his statements in support of the agency's motions should have been disregarded for lack of personal knowledge. Londrigan v FBI, 670 F.2d 1164, 1174 (D.C.Cir. 1981). ("requirement of personal knowledge by the affiant is unequivocal and cannot be circumvented.").

The court's adoption of the declarants' self serving statements in the face of contradictory evidence is prohibited on summary judgment according to the Supreme Court. See Poller v Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962)(trial by affidavit improper on summary judgment). See also Nyhus v Travel Mgmt Corp., 466 F.2d 440, 442 (D.C.Cir. 1972)(on summary judgment court function limited to ascertain whether factual issues exist, not resolution of them); Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 30 (D.C. Cir. 1988)("Courts are forbidden . . . to conduct trial by affidavit and thus deprive

litigants of their right to an evidentiary hearing on issues of fact.") vacated on other grounds, 898 F.2d 793 (D.C. Cir. 1990). See Sears, Roebuck & Co. v. G.S.A., 553 F.2d 1378, 1382 (D.C. Cir.)(adoption of declarant testimony was improper determination on disputed issues), cert. denied, 434 U.S. 826 (1977); Founding Church at 833 ("[T]he District Court's uncritical acceptance of the affidavit deprived appellant of the full de novo consideration of its records-request to which it is statutorily entitled."). Petitioner had a right to take live testimony, especially of Sullivan, a key witness whom the agency attempted to shield from questioning. See Amer. Broad. Co. v U.S. Info. Agency, 599 F.Supp.765 (D.D.C. 1984).

Aside from denying all discovery to Petitioner under Rule 56(d), the court then prejudiced Petitioner by refusing to accord binding effect to the agency's Rule 36 admissions. Because the court never considered potential prejudice to Petitioner upon withdrawal of the admissions as required under Rule 36(b), it had no power to remove them from the case. See, e.g., American Auto Assoc'n v AAA Legal Clinic of Jefferson Crooke PC, 930 F.2d 1117, 1119 (5th Cir. 1991)(no power to withdraw admissions outside of Rule 36(b)'s two part test); Conlon v U.S., 474 F.3d 616, 625 (9th Cir. 2007); Gutting v Falstaff Brewing Corp, 710 F.2d 1309, 1313 (8th Cir. 1983); Donovan v. Carls Drug Co., 703 F.2d 650, 651 (2d Cir. 1983); Rainbolt v Johnson, 669 F.2d 767, 768-69 (D.C.Cir. 1981)

The court also refused to ever rule on Petitioner's own cross motions in either of the summary judgment proceedings. This failure to independently consider them apart from the agency's motions is improper in civil litigation. See e.g., Heublein, Inc. v U.S., 996 F.2d 1455,

1461 (2nd Cir. 1993); Blackie v Maine, 75 F.3d 716, 721 (1st Cir. 1996).

The court held both cross motions were moot, even though the affirmative defenses challenged by the cross-motions could not be mooted by any decision on the affirmative claims. Its mootness rulings also were improper as to the affirmative claims.

In MSJ I, there was no logical reason to rule the Petitioner's cross motion moot where the court denied the agency's motion as to the Connecticut search. And although the court used the law of the case to keep out the agency's admission of excluding court records from search in MSJ II due to its prior decision on the agency's motion in MSJ I, see App. C, 35a, that justification could not be used to keep out those admissions as evidence on Petitioner's own cross motion which was never decided on the merits in MSJ I. See App. E, 67a-68a (Friedrich, J.)(denying cross motion as moot in MSJ I).

In both cross motions, the Petitioner established an absence of genuine issue the agency (1) improperly (2) withheld (3) agency records. See U.S.DOJ v Tax Analysts, Inc., 492 U.S. 136, 142 (1989). The agency's Rule 36 judicial admissions established that agency records responsive to the requests are in existence and that it did not search for all of the requested records. See Decl of S Discepolo [Doc 18-4], Exh K (First Req. nos. 5-6). Its evidentiary submissions admitted withholding court records and third party materials. See Sullivan Decl, Exh B (EOUSA Form)(Doc 43-2 at 7); Supp Luczynski Decl [Doc 59-3], ¶¶ 5, 10. Because neither category is covered by any of the strictly construed enumerated exemptions allowable under

FOIA, the withholding of these records was improper. See Tax Analysts at 151.

At a minimum, even without the defaulted Rule 36 admissions, the agency's admitted failure to search court records and third party materials constituted an inadequate search. See, e.g., Toensing v U.S. DOJ, 890 F.Supp.2d 121, 147-48 and n. 17 (D.D.C. 2012). And an inadequate search alone may be an improper withholding. See United States DOJ v. Tax Analysts, 492 U.S. 136, 151 n.12 (1989).

The refusal to decide Petitioner's cross motions should be considered in context. During the litigation the court literally removed Petitioner's first Rule 56(d) motion within two hours of its filing. See Min. Order dated June 27, 2017. The court simply did not consider Petitioner as a FOIA requestor worthy of making motions in court. The refusal to consider Petitioner's own cross motions was a refusal to allow Petitioner to access the Rules, just as the denial of all discovery was. See, e.g., Margaret B. Kwoka, *Article: Deferring to Secrecy*, 54 B.C.L.Rev.185, 233 (2013)(discussing how courts substitute agency do-over motions instead of deciding requestor cross motions in FOIA cases).

IV. The courts' refusal to review the Magistrate's decisions reduced the litigation to an unappealable administrative proceeding by a non-Article III judge in violation of the Magistrate Act.

Despite the obligation of reviewing courts to conduct de novo review, see Nation Magazine at 889, neither the

district judge nor the Court of Appeals provided it in this case. The Court of Appeals' summary affirmance cited to inapposite cases that failed to address any issues on appeal including the countervailing evidence and was contrary to its own precedent. See, e.g., Cooper v DOJ, 2004 U.S.App.LEXIS 8135, no. 03-5172 (D.C.Cir. April 23, 2004)(denying summary affirmance where agency failed to rebut countervailing evidence). The arbitrariness of its decision is evident by its recent denial of summary affirmance in an almost identical case in which the requestor similarly complained the lower court assumed facts not in evidence on summary judgment. See Hall & Assocs v EPA, No. 18-5241, 2019 U.S.App.LEXIS 5294 (D.C.Cir. Feb 15, 2019).

In the district court appeal, the district judge asserted Petitioner was not even entitled to de novo review, see App. E, 60a (Friedrich, J.) and that Petitioner could not raise arguments made unsuccessfully before the Magistrate, see, e.g., id., 58a-59a ("plaintiff already raised this argument unsuccessfully"). This amounted to denying any right to appeal at all because failing to make an argument to the Magistrate results in waiver, see Hohman v. IRS, 768 F. App'x 329, 331 (6th Cir. 2019). The district judge's primarily superficial recitation of the Magistrate's findings and conclusions of law without considering controlling law cited by Petitioner was a violation of the Rules, the Magistrate Act, and Article III. See Goney v Clark, 749 F.2d 5, 6 (3rd Cir. 1984); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72(b); U.S. Const., Art. III. On appeal, the district judge's refusal to conduct de novo review must itself be reviewed de novo. See Macort v Prem Inc., 208 Fed.Appx.781, 784 (11th Cir. 2006).

Neither the court of appeals nor the district judge provided anything but a cursory review of a decision by the Magistrate. See, e.g., Ctr. for Nat'l Sec. Studies v. U.S. Dept of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003)(de novo review requires appeals court "consider anew each of the claims and defenses advanced before the district court."). By allowing a Magistrate, who is not an Article III judge, to decide factual issues on summary judgment, the appellate courts were sanctioning a violation of the Magistrate Act, because Petitioner never consented to trial by the Magistrate. Compare 28 U.S.C. § 636(b)(1) with 28 U.S.C. § 636(c)(1). Moreover, the court's refusal to apply the Federal Rules in this case transformed it into little more than an administrative proceeding rubberstamping the decision of the agency.

V. CONCLUSION

For all the foregoing reasons, the Supreme Court should grant the Petition and allow Petitioner to fully brief the Court. Alternatively, the Court should, at a minimum, grant certiorari, vacate the lower court orders and remand with specific instruction ordering the court to allow Petitioner to conduct full discovery. See, e.g., Tolan v Cotton, 572 U.S. 650 (2014); Howard M. Wasserman, *Article: Mixed Signals on Summary Judgment*, 2014 Mich. St. L. Rev. 1331, 1344-46 (2014).

Respectfully submitted,
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