No. _____

In the Supreme Court of the United States

ROBERT DAYON DUMAS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On July 11, 2018, Petitioner was charged in federal district court, Tampa, Florida, by Indictment with five counts of Hobbs Act robberies and two counts of use, carry, brandish and discharge of a firearm in furtherance of a crime of violence. The robbery and firearm charges were spawned from a warrantless search of Petitioner vehicle by a Pasco County Sheriff's deputy following a traffic stop for speeding on March 11, 2018. The deputy searched the vehicle because the deputy claimed to have detected an odor of marijuana emanating from the vehicle. The vehicle search was initially premised upon a search for drugs. During the search the deputy saw items of clothing and a gun that the deputy thought might be related to a robbery that occurred in the area in February of 2018. Petitioner's motion to suppress challenged the initial vehicle search, the arrest for possession of marijuana, the seizing of the very general clothing items and a gun, and all statements made by Petitioner following the stop of his vehicle and warrantless search. The District Court determined Deputy Denbo to be a credible witness in spite of numerous inconsistencies in the evidence and other factors which revealed reasons to question the truthfulness of the deputy. Petitioner's motion to suppress was denied by the District Court and the Eleventh Circuit Court of Appeals affirmed the District Court's ruling. The questions presented to this Court are:

1. Did the district court err in finding no Fourth or Fifth Amendment violation based upon the

court's credibility determination on Deputy Denbo.

2. Did the district court err in finding that Deputy Denbo had probable cause to seize items unrelated to the possession of marijuana in violation of the Fourth Amendment.

3. Did the district court err in finding that Petitioner knowingly and voluntarily waived his Miranda rights under the Fifth Amendment.

RELATED PROCEEDINGS

United States v. Dumas, No. 8:18-cr-326-TPB-TGW, U.S. District Court for the Middle District of Florida Tampa Division. Judgement entered on April 14, 2021.

Dumas v. United States, No. 21-11341, Eleventh Circuit Court of Appeals. Opinion entered on May 8, 2023.

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The opinion in United States v. Petitioner, Eleventh Circuit Court of Appeals, Case No. 21-11341 was issued on May 8, 2023. This opinion was not published. There is no published decision from the District Court Middle District of Florida in Petitioner's case.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257, which provides for filing a petition for a writ of certiorari to the United States Supreme Court. The Eleventh Circuit Court of Appeal denied Petitioner's appeal of his judgment on May 8, 2023. Petitioner's application for an extension of time within which to file a petition for writ of certiorari was presented to Justice Clarence Thomas, who on July 28, 2023, extended the time to and including September 5, 2023.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States

Constitution States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

> searched, and the persons or things to be seized.

The Fifth Amendment to the United States

Constitution States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural History

On July 11, 2018, Defendant, Petitioner, was charged by Indictment with five counts of Hobbs Act robbery, 18 U.S.C. §1951(a), and two counts use of firearm in furtherance of a violent crime, 18 U.S.C. 923(c)(1)(A)(iii). (R. Ap. 1, Doc 1)

On February 21, 2020, Defendant's Motion to Suppress Evidence was filed in the district court. (R. Ap. 1, Doc. 43)

On July 27, 2020, an evidentiary hearing was held on Defendant's motion. (R. Ap. 2, Doc. 72) Only one witness testified. That witness was Andrew Denbo of the Pasco County Sheriff's Office. (R. Ap. 1, Doc. 72)

On October 21, 2020, the district court issued an Order Denying "Defendant's Motion to Suppress Evidence." (App. 26)

On January 25, 2021, a bench trial was held and Petitioner was found guilty on all charged offenses. (R. Ap. 1, Doc. 94)

On April 14, 2021, Petitioner was sentenced to a total of 25 years (300 months) prison followed by 60 months supervised release and a Judgment was entered. (R. Ap. 1, pp. 209-215)

Petitioner timely filed a notice to appeal the denial of his motion to suppress. (R. Ap. 1, p. 220)

On May 8, 2023, the Eleventh Circuit Court of Appeals affirmed the District Court's decision and judgment.

Petitioner now files this writ of certiorari before this Court.

Statement of the Facts

In February 2018, five robberies occurred in Pasco County, Florida between February 8, 2018 and February 13, 2018. Pasco Sheriff's Deputy Denbo was involved in the investigation of these robberies. The police had compiled BOLO's, on all five incidents, which, *inter alia*, included still photos from

surveillance cameras and witness descriptions of the suspect. (R. Ap. 1, pp. 75-89)

The BOLO's were introduced by the Government at the suppression hearing. The **first** BOLO related to both the Citgo gas station robbery and the Best Western hotel robbery. (R. Ap. 2, p. 75) The **Citgo robbery** witness described the suspect as a White or Hispanic male between 5'9" and 6'0" in height, brandishing a black semiautomatic handgun with a stainless-steel upper slide, wearing a ski mask, photo showing suspect wearing white shoes. (R. Ap. 2, p. 20). The description of the **Best Western robbery** suspect was described as a White or Hispanic male between 5'9" and 6'0" in height, brandishing a handgun with a black frame and silver upper slide, wearing a black ski mask. (R. Ap. 2, pp. 20-21) The **second** BOLO related to Metro PCS robbery where the suspect was described as a White male between 5'6" and 5'9" in height and the firearm was described simply as an unknown caliber, black semi auto handgun. The suspect wore black Nikes with white soles. (R. Ap. 2, p. 21) The **third** BOLO related to the Be Creative painting studio and the Subway restaurant The Be Creative painting studio witness described a White male, late 20's to early 30's, 5'9" in height, wearing all black clothing and wire-rimmed glasses. (R. Ap. 2, p. 26). The Subway witness described the suspect as a White male, 20 to 30 years of age, wearing all black, and was believed to have a 9mm handgun. (R. Ap. 2, p. 25) A description of a vehicle seen near one of the robbery locations was contained in the third BOLO. That description was of "a light colored 2015 – 2017 Nissan Altima." (R. Ap. 2, p. 81) During the suppression hearing, Deputy Denbo admitted that none of the witnesses actually saw the

robbery suspect getting into a particular vehicle, and any vehicle information they had was "just what [they] guessed based on looking at the video." (R. Ap. 2, p. 76) These descriptions were so general that they could relate to a very large number of white males.

On March 11, 2018, at approximately 4:00 p.m., Deputy Denbo conducted a traffic stop for speeding on a black 2011 Audi A4 that was driven by Petitioner. (R. Ap. 2, pp. 30-31) When Denbo walked up to the driver's side of the black car, he was not wearing his bodycam. Despite knowing that the bodycam must be on and worn during all law enforcement activity, Denbo testified that he had forgotten it in his car. (R. Ap. 2, p. 73). The deputy says he forgot, even though he had called his supervisor earlier in the shift to report his bodycam had not been charged overnight and he needed to go home to get the bodycam charged. He did go home and get the bodycam charged. The trip to the house occurred shortly before he stopped Petitioner for speeding. (R. Ap. 2, pp. 29-30)

Not wearing the bodycam is very significant in this case, because Pasco Sheriff regulations require the bodycam to be worn "whenever the officer is engaging in police conduct." (R. Ap. p. 29) Deputy Denbo acknowledged that using the bodycams can protect the integrity of the investigation. (R. Ap. 2, p. 178) Denbo knew that a failure to comply with this regulation could result in being fired. (R. Ap. 2, pp. 65-66) Making a traffic stop and having contact with a citizen is obviously an instance of "engaging in police conduct." Yet, Deputy Denbo just "forgot" it when he got out to perfect a traffic stop.

When Deputy Denbo made his first approach to Petitioner's vehicle he was not wearing his bodycam. (R. Ap. 2, p. 57) According to Deputy Denbo, Petitioner

was cordial and did not appear nervous. (R. Ap. 2, pp. 39-40) The deputy asked for Petitioner's license and registration; Petitioner complied. He then asked Petitioner "if he had any significant driving history" to which Petitioner replied he had one previous citation. (R. Ap. 2, p. 34) Denbo admitted that Petitioner's answer of "one citation" prompted him to "assume" that Petitioner was lying. (R. Ap. 2, p. 81) The deputy then walked back to his patrol vehicle and ran a driving record check. The record indicated some prior traffic citations. However, Denbo did not check to see if the priors actually resulted in a court disposition or conviction. (R. Ap. 2 p. 81) Denbo testified that he does not give out a lot of citations and would normally issue a warning. But, in Petitioner's case, the deputy chose to follow up based on his belief that Petitioner had been untruthful with him. (R. Ap. 2, pp. 82-83)

Deputy Denbo walked up to the driver's door of Petitioner's vehicle for the second time. Again, even though Denbo was obviously "engaged in police conduct," he did not have his bodycam on and activated. Denbo said he knew he should have had it on earlier. (R. Ap. 2, p. 54-55) Deputy Denbo gave the excuse that his bodycam was charging, so that is why he did not have it on at the stop. (R. Ap. 2, p. 68). That is what Denbo had put in his report, because he was required to report violations and to advise the supervisor when his bodycam was not activated when it is supposed to be. (R. Ap. 2, pp. 68-69). At the suppression hearing Deputy Denbo changed his story and now claimed his battery was charged at the time of the stop and he just forgot to take it with him when he got out of his car at the stop scene. (R. Ap. 2, p. 70) However, he never filed a report stating that he did

not have the bodycam on during the stop of Petitioner's vehicle. He instead admitted that his excuse for not having his body worn camera on his person in his report was wrong because he did not want to include a long paragraph exploring the truth. (R. Ap. 2, pp. 69-70) That related to his call to his supervisor when he came on his shift that day, which was prior to the stop. The deputy also admitted that he did not contact his supervisor and report that he had failed to have the bodycam on during the stop of Petitioner's vehicle. (R. Ap. 2, pp. 69-70). Nor did Deputy Denbo report his violations when he turned off his bodycam 13 times on March 11, 2018. (R. Ap. 2, pp. 68-69). Deputy Denbo knew the regulation required that the bodycam had to be on until the entire incident is complete. (R. Ap. 2, p. 71). During the questioning of Denbo regarding his numerous violations of the bodycam regulations the Government prosecutor exclaimed to the court that there are no excuses for Deputy Denbo turning off his bodycam those 13 times. (R. Ap. 2, p. 74). It was clear that none of the regulations would have allowed Deputy Denbo to turn off his bodycam at his discretion. (R. Ap. 2, p. 72).

During Denbo's second interaction with Petitioner at the driver's door of the vehicle, the deputy claims he smelled the odor of marijuana. At that time, Denbo says he was less than one foot from the driver's window. (R. Ap. 2, p. 38). However, Deputy Denbo did not say he detected the odor of marijuana when he was right by the driver's window immediately following the stop. (R. Ap 2, pp. 30-33)

After claiming he smelled the odor of marijuana, Deputy Denbo testified he then noticed "shake or small pieces of green leafy substance all

throughout the vehicle passenger seat" while Petitioner was still seated in the vehicle. (R. Ap. 2, p. 38). However, in contrast to this court testimony by Deputy Denbo, Denbo's sworn police report, which was admitted as defense hearing exhibit 29, (R. Ap. 1, p. 152), explains that he did not look into the car and see "pieces of marijuana in the front passenger area until after Petitioner was out of the car, handcuffed, and told to sit on the curb. (R. Ap. 1, p. 152).

When Deputy Denbo asked Petitioner to step out of the vehicle he also asked Petitioner if he had a gun. Petitioner said he did have a gun that was in a bag in the passenger seat. (R. Ap. 2, pp. 39-40) At that point, Petitioner was placed in handcuffs with his hands behind his back and sat on a curb. (R. Ap. 2, p. 91) Deputy Denbo admitted that it was reasonable for Petitioner to believe that he was under arrest at that time. (R. Ap. 2, p. 93). Deputy Denbo admitted that he did not have probable cause to arrest Petitioner for a crime at that point. However, he did believe he had probable cause to search the vehicle. (R. Ap. 2, p. 93) Deputy Denbo said he believed there was contraband in the car. (R. Ap. 2, p. 40)

Deputy Denbo then removed a Glock 9 mm firearm with one live round from a bag in the passenger seat. (R. Ap. 2, p. 46) He said he waited for backup before doing the vehicle search. (R. Ap. 2, p. 46) It was not until another officer arrived as backup, 11 minutes into the stop, that Deputy Denbo first activated his bodycam. It was 4:07 p.m. when that occurred. (R. Ap. 2, pp. 98-99)

Deputy Denbo continued the search without any protective gloves, which he admitted he was trained to wear and the failure to do so could lead to contamination. (R. Ap. 2, p. 110) Deputy Denbo's

sworn police report noted the following: (1) he "found numerous small pieces of marijuana embedded in the floor, in cracks in the seats, etc."; (2) the scale found in the center console "smelled strongly of the odor of marijuana and had pieces on it and embedded in the crevices"; and (3) "wedged between the [front passenger] seat and the center console I found a marijuana cigarette and a small clump of marijuana that appeared to be recently burned." (R. Ap. 2, p. 152) Deputy Denbo's bodycam footage of the search does not show any marijuana embedded in the floor or in the cracks of the seats nor does it show any marijuana in the crevices of the scale. (Def. Ex. 11 Bodycam) Most importantly, the video does not depict Deputy Denbo recovering any marijuana cigarette or anything that appeared to be recently burned. (Def. Ex. 11 Bodycam) Deputy Denbo said he recovered a very small particle of suspected marijuana between the seat and the center console and he placed it on the front passenger seat. It is clear, however, that Deputy Denbo does not retrieve a marijuana cigarette. (Def.Ex. 11 Bodycam)

Later, Deputy Denbo returns to the vehicle presumably to perform a presumptive test on the particle that he placed on the passenger seat. Instead, he reaches behind his person out of the view of the bodycam and reaches underneath the passenger seat to presumably retrieve a particle for testing. All out of the view of the bodycam (Def. Ex. 12 Bodycam). Deputy Denbo agreed that it was important to utilize the bodycam when conducting a presumptive field test to ensure that the totality of the process was recorded. (R. Ap. 2, p. 168). Deputy Denbo stated that despite his understanding of the mandatory bodycam order he was required to follow, he "generally doesn't turn [it]

on until [he] is doing the test itself." (R. Ap. 2, p. 165) Here, Deputy Denbo also performed the field test without any gloves and after he touched his computer, his steering wheel, and various other items. (R. Ap. 2, p. 172)

At the suppression hearing, Deputy Denbo now claimed to have found the alleged marijuana cigarette in the ashtray of Petitioner' vehicle. (R. Ap. 2, p. 122) Deputy Denbo's sworn police report, on the other hand, claimed that he found the alleged marijuana cigarette "wedged between the seat and center console." (R. Ap. 2, p. 122, pp. 152-153) The officer attempted to explain this discrepancy in his police report by testifying that it "[p]robably would have been a good use of a comma there[.]" (R. Ap. 2, p. 121) The police report stated: "I continued to the front passenger seat where wedged between the seat and the center console I found a marijuana cigarette and a small clump of marijuana that appeared to be recently burned." (R. Ap. 1, pp. 152-153). Deputy Denbo also claimed that his alleged retrieval of a marijuana cigarette "exists in a photograph, but "I don't have that photograph with me today." I've subsequently found it since then, but not in time for this trial." (R. Ap. 2, p. 124) Deputy Denbo's bodycam does not show the discovery or retrieval of any marijuana cigarette. (Def. Ex.11, Bodycam) The police inventory list of all items seized during the vehicle search does not list a marijuana cigarette. (R. Ap. 1, pp. 164-166). The only suspected particle weighing .2 grams was tested by FDLE and found to have "insufficient characteristics for cannabis identification." The laboratory conducted analysis by gas chromatography, mass spectrometry, and microscopic examination. (R. Ap. 1, pp. 161-162)

In continuing to search of the vehicle, which was supposed to be for "drugs and contraband" Deputy Denbo decided to seize clothing items which he thought could be related to the February robberies. He found black Nike shoes with white soles that appeared to be similar to those from a robbery case he investigated. (R. Ap. 2, p. 132) Black Nike shoes with white soles are very common and Deputy Denbo agreed that hundreds of thousands of people had those shoes. (R. Ap. 2, p. 133) The officer admitted there was nothing in particular about the shoes that stood out other than they "appeared to be similar to the one in the video." (R. Ap. 2, p. 134) Likewise, the gun recovered from Petitioner' vehicle was totally black. (R. Ap. 2, p. 107). The Citgo and Best Western eyewitnesses described a gun with either a stainless-steel or silver upper slide. (R. Ap. 2, p. 104). The gun taken from Petitioner's vehicle did not have a stainless steel slide. (R. Ap. 1, p. 93)

Deputy Denbo discovered a Halloween ninja mask with a red sash around the front and back of the head area of the mask. (R. Ap. 2, p. 157, R. Ap.1, p. 145). Deputy Denbo admitted to pushing the mask inside out which made it appear predominantly black. (R. Ap. 2, pp. 157-158) The color photographs included with the BOLOs do not show any red color on the mask. This mask was not a "ski" mask but was instead, clearly a ninja Halloween mask.

Immediately after the items were found by Denbo in the search, Petitioner was placed into the back of a police vehicle. Deputy Denbo contacted Detective Toner and his supervisor to see if they come out and investigate further. (R. Ap. 2, p. 159). After speaking with his supervisors Deputy Denbo was instructed to stall and buy some time so Petitioner

could be interviewed about the robberies. (R. Ap. 2, p. 185). He was told not to take Petitioner to jail because he would likely bond out on the misdemeanor marijuana charge. This determination was made after the Major Crimes unit, who had consulted with the on-call assistant state attorney, determined there was not enough evidence for probable cause to charge Petitioner with the robberies. (R. Ap. 2, pp. 207-208) Instead, the plan was to take Petitioner to the District 2 office to be placed in a conference room. (R. Ap. 2, p. 188) Deputy Denbo wanted to discuss the items that he seized from Petitioner' vehicle with other officers. (R. Ap. 2, p. 186) Deputy Denbo admitted that the vast majority of items seized were for the robbery investigation. The property receipt for all the items seized explicitly referenced only the misdemeanor marijuana possession case. (R. Ap. 2, p. 192) No property receipt was done for the robbery investigation.

Shortly after Petitioner was placed into the police vehicle, he was finally read his *Miranda* rights by Deputy Denbo. Denbo read the *Miranda* rights from his *Miranda* rights card (R. Ap. 1, p. 47) There was no indication that Petitioner had ever been read his *Miranda* rights previously. (R. Ap. 2, p. 199) Deputy Denbo agreed that the pace with which *Miranda* is read is important so that the person can understand them. (R. Ap. 2, pp. 199-200) Deputy Denbo read Petitioner his *Miranda* rights, consisting of 100 total words, in 13 seconds, as depicted in Denbo's bodycam recording. (R. Ap. 2, p. 71, gov. Ex. 6) Deputy Denbo also agreed that it was important to acquire a free and voluntary waiver of *Miranda* rights before interrogating a suspect. (R. Ap. 2, p. 200) However, Deputy Denbo admitted that after reading

Petitioner his rights, he failed to ask, "are you going to waive your rights and talk to us[.]" (R. Ap. 2, p. 203)

Deputy Denbo was familiar with the District 2 office and noted that it had interview rooms that were set up with audio and video equipment. (R. Ap. 2, p. 202) However, Petitioner was taken to a conference room, that did not have these audio and video capabilities. (R. Ap. 2, p. 201) While in the conference room, Deputy Denbo had Petitioner execute a Multipurpose Form indicating that he was read his *Miranda* rights. (R. Ap. 2, p. 208) Deputy Denbo was familiar with the Multipurpose form and had used it many times. (R. Ap. 2, p. 207) The form was not dated or signed by two witnesses. (R. Ap. 1, p. 47) The paragraph below the section that signed by Petitioner was titled Waiver of Rights. (R. Ap. 1, p. 47) That portion of the form was blank and Deputy Denbo admitted that he did not ask Petitioner if he wished to waive his rights. (R. Ap. 2, p. 203) Deputy Denbo testified that he did not have a good answer for why he failed to get a waiver from Petitioner after either time that *Miranda* warnings were given. (R. Ap. 2, p. 203)

Deputy Denbo testified that he was not allowed to record anything using his bodycam while at the District 2 office. (R. Ap. 2, p. 204) Directly thereafter, Deputy Denbo's bodycam video from inside District 2 was played by the defense for the court. (R. Ap. 2, p. 205, Def. Ex. 35) The bodycam video captured Deputy Denbo quietly informing another officer that they did not have enough to charge Petitioner with the robberies. (R. Ap. 2, p. 205)

Petitioner was subsequently questioned and statements were obtained for use by the Government in the prosecution of their case. Likewise, forensics

were used to perform tests on items seized and produced evidence for use by the Government in the robbery cases.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

1.

Did the district court err when it determined that Officer Denbo was credible and had probable cause to search Mr. Dumas' vehicle and arrest him for possession of marijuana.

Petitioner challenges the District Court's credibility determination of Deputy Andrew Denbo. The Government, in contesting Petitioner's motion to suppress in the district court, justified the warrantless search of the vehicle based upon the testimony of Deputy Denbo. The focal issue in attacking the warrantless search of the vehicle rests on whether the deputy was telling the truth when he claimed he smelled the odor of marijuana upon his second approach to the driver's side of the car driven by Petitioner. The deputy did not report that he detected that order when he first went to the open window following the stop.

This case fully illustrates the absolute need for law enforcement in this country to utilize bodycam recorders and other legal forms of recording all encounters between police and our citizens, in order to uphold the integrity of our system of justice. A law enforcements officer's failure to document all aspects of encounters between police and our citizens should

not be tolerated and should be suspect at best. This is especially true when their own regulations require adherence to these rules to safeguard the integrity of the investigation.

The failure of law enforcement to utilize all legal means to document encounters with citizen actually deprives the court and all persons within the criminal justice system of vital corroborative information which should lead to fair and just decisions in each case.

Additionally, the failure of law enforcement officer to utilize these legal means to document "what actually occurs between the police and the citizens" undermines confidence in the police and thus undermines and denigrates our criminal justice system. This failure by law enforcement officers undermines the confidence in police by preventing corroborative evidence that will either benefit the police or will exonerate the citizen.

Petitioner is aware that the courts have consistently based denials of defense motions on credibility of the witnesses. Credibility issues certainly will arise in any court proceeding, with or without witnesses. Courts charged with making credibility determinations must utilize "common sense" factors just like the factors on which trial jurors are asked to use when determining whether a testifying witness is credible in what they say. A judge merely by virtue of his position on the bench does not necessarily possess the ability to make accurate credibility determinations. The judges need guidelines on how to develop a credibility

determination, especially in a criminal case when one's liberty is at stake.

The cross examination of Deputy Denbo, in which Denbo was repeatedly confronted about his failure to use the bodycam and his reasons for not doing so, best illustrates the deputy's ostensible lack of credibility which totally escaped the district judge. Deputy Denbo's demeanor and reactions to the questioning actually caused the government prosecutor Gammon to rise to his feet and interrupt defense counsel's cross examination by proclaiming to the court, **"Your honor, I can proffer to the court that we have—there is no excuse. It doesn't fall into any of these categories for why it should have been on. <u>He should have had it on under the rule</u>"** (R. Ap. 2, p. 74) This incredibly rare if not unprecedented outburst by the prosecutor, the likes of which this counsel has not seen in 40 years of trial practice, reveals the prosecutor's concern that his only government witness was being exposed as a witness who clearly lacks credibility and a witness who has failed to provide candor and truthfulness in his testimony. In essence, prosecutor Gammons becomes a witness against his own witness.

The deputy's testimony as well as prosecutor Gammons' pointed declaration, should have had a profound impact on the district court's decision regarding Deputy Denbo's credibility.

However, the district court, in its Order denying the motion to suppress appears to be unaffected by the Government's Deputy Denbo's declared as follows:

> "…after very carefully considering the credibility issues in this case, the Court has found Corporal Denbo's testimony to be credible. Although it is certainly the better practice for law enforcement officers to record encounters with the public, there is no legal requirement that they do so. Even though the encounter at issue here was not recorded, for the reasons discussed, the Court finds Corporal Denbo's testimony credible. Consequently, "Defendant's Motion to Suppress Evidence" is **DENIED**."
>
> (Order Denying Motion to Suppress, App-26)

A credibility determination cannot stand if it is "contrary to the laws of nature, or is so inconsistent or improbable on its face such that no reasonable factfinder could accept it." *Mendoza*, 661 Fed.Appx. at 989; *see also Diallo v. I.N.S.*, 232 F.3d 279 (2d Cir. 2000) (an adverse credibility determination is "appropriately based upon inconsistent statements, contradictory evidence, and inherently improbable testimony.") All of these factors are alive in this case.

While it is difficult to attack factual findings, the district court's determination is not a "rubber stamp." *United States v. Contreras*, 820 F.3d 255, 263 (7th Cir. 2016). "[S]imply affixing the label 'credibility determination' will not insulate a decision from review, and the court must base a finding on evidence,

not mere speculation." *Id*. (quoting *Blake v. United States*, 814 F.3d 851, 855 (7th Cir. 2016)).

In Petitioner's case the district court did not make an objective determination of Deputy Denbo's credibility. The district court failed to consider and utilize factors that should had lead the court to fully assess the inconsistent and untruthful statements by Deputy Denbo. The government's only witness was Deputy Denbo.

If the district court had approached the credibility determination for Deputy Denbo with an eye towards the "common sense" credibility factors set forth in the Federal jury instruction on credibility of witnesses, the district may have seen the pattern of questionable testimony, inconsistencies and lack of corroboration for the deputy's testimony. Other than case law which somewhat provides legal parameters for credibility determinations, the case law does not delineate the process a judge would use to determine credibility.

The **Federal Standard Jury instruction 3.9 Credibility of Witnesses** provide these "common sense" factors to be used by the jury, to wit:

> (1) the opportunity and ability of the witness to see or hear or know the things testified to;
>
> 2) the witness's memory;
>
> (3) the witness's manner while testifying;
>
> (4) the witness's interest in the outcome of the case, if any;
>
> (5) the witness's bias or prejudice, if any;
>
> (6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

The importance of these "common sense" factors is that they apply to any witness before the court or jury. It is incumbent on the court to make a fair determination and to not turn a blind eye to inconsistencies or obvious bias or self interest that taints a witness' credibility.

Defendants in criminal cases face an uphill battle when attempting to demonstrate to the court that a police officer is not credible.

Petitioner contends the following "common sense" factors are particularly pertinent to the instant case as it relates to the district court's credibility determination on Deputy Denbo's credibility:

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

7) the reasonableness of the witness's testimony in light of all the evidence;

Deputy Denbo clearly had an "interest in the outcome of this case" and the deputy did demonstrate his police focused bias in the way he dealt with Petitioner. Deputy had every interest in making himself look acceptable to the court and undoubtedly to his superiors. He knew that his failure to follow the bodycam regulations could result in being fired. (R.

Ap. 2, pp. 65-66) The deputy exhibited bias as a police officer when he surmised that the Petitioner was being untruthful in saying he only had one citation. The actions he took, without the use of his bodycam, which we know was laying in his front passenger seat, led to the warrantless search of Petitioner's vehicle. Additionally, Deputy Denbo's testimony was clearly suspect when determining "the reasonableness of the witness' testimony in light of all the evidence. The court should have recognized that indeed the overall questionable testimony of Deputy Denbo, coupled with the lack of corroboration that could have been corroborated by a bodycam, would warrant a finding that Deputy Denbo was not a credible witness and that the motion to suppress should be granted.

Deputy Denbo's behavior and actions in this investigation and in his court testimony belies his integrity as a police officer and as a truthful person. Consequently, any testimony by the deputy regarding his decision making while acting as a police officer should have been highly scrutinized by the district court.

The following portions of the evidence delineates Deputy Denbo's questionable testimony: (1) the deputy's police report only stated that he did not have the bodycam on "because it was charging," (2) then, on cross examination he admitted that the bodycam was actually charged, but he just forgot it in his passenger seat when he approached Petitioner's vehicle following the stop, (3) the deputy did not tell his supervisor that the bodycam was actually charged and that he forgot to put it on; he only reported that it was charging-he tells the judge that he was referring to his call to the supervisor at the beginning of his

shift, (4) the deputy police report failed to mention that he did not wear the bodycam during the traffic stop of Petitioner, (5) nor did he report to his supervisor that once he put on the bodycam he actually turned it off 13 times during his involvement with Petitioner on the day of the stop, (6) the deputy told the judge, once the judge interceded to give his explanation about why the deputy's report said the bodycam was charging, the deputy said he did not want to give a "long explanation" for all of that information. (R. Ap. 2, pp. 68-74)

During the suppression hearing the district court judge did not appear to understand why the deputy's failure to follow the rules about bodycam activation would affect the deputy's credibility. However, common sense dictates that the deputy's testimony, under oath, about decisions he makes in an investigation should be held to a high scrutiny by the court, in light of the questionable responses and testimony by the Deputy about his own actions.

It is feasible to assume that if a defendant testified and made excuses, and actually lied and skirted or avoided the issues about which he or she is being questioned, the court would discredit the defendant's testimony because a defendant comes to the court cloaked with a personal interest in the outcome of the case.

Additionally, the district court was provided with no corroborating evidence as to the existence of any illegal drug, other than the deputy's claim he smelled marijuana in the vehicle the second time he walked up to the driver's door, in two respects: (1) we know that the **.2 grams** of suspected marijuana failed

to demonstrate characteristics of marijuana, or any drug for that matter. (R. Ap. 1, pp. 161-162, FDLE lab report) and, (2) we know that the bodycam did not pick up the entire field reagent test on the alleged small piece of suspected marijuana that Deputy Denbo said he got from underneath the driver's seat. (R. Ap. 2, pp. 155-156) Deputy Denbo stated that despite his understanding of the mandatory bodycam order he was required to follow, he "generally doesn't turn [it] on until [he] is doing the test itself." (R. Ap. 2, p. 165) However, the bodycam of which the deputy spoke did not elucidate his entire testing. There is no independent evidence on which the court could rely as to whether the test was actually positive, as Denbo said it was. (3) there was no corroborating evidence about a supposed marijuana cigarette that Denbo claimed was in the vehicle. It was either in the ashtray or between the passenger seat and the console, depending on which version you believe. No marijuana cigarette was on the evidence inventory list, nor was a marijuana cigarette submitted to the FDLE laboratory for testing. (R. Ap. 1, p. 45) Again, this law enforcement officer left the court with no corroboration about finding marijuana in that vehicle.

In Petitioner's case the district court did not even question whether the deputy actually smelled marijuana. However, from a common sense standpoint, the miniscule amount of "alleged marijuana" belies the idea that Deputy Denbo could have smelled marijuana under the circumstances in this case. See e.g., In *United States v. Bryant*, 2020 WL 6712230 (E.D. Pa. Nov. 13, 2020), the "officers uncovered less than one ounce of marijuana, which was encased in two layers of plastic, zipped inside a backpack, and unburnt[,]" which the court stated

"further call[ed] into question the possibility that Officer Restuccia could smell it from outside of the car." *Bryant*, 2020 WL 6712230 at *2. smell less than an ounce of marijuana from outside the car. An ounce is equivalent to 28 grams. In Petitioner's case, the amount of alleged marijuana at issue is around 0.2 grams, give or take. This is a far cry from one ounce. The point is, on quantities that are over 100 times greater than the amount of alleged to be involved in Petitioner's case calls into question Deputy Denbo's claim that he smelled the odor from outside the car.

Even when Denbo's bodycam was activated, he failed to capture certain critical moments. The particle of something that he claimed to have tested in the field test was not visible even for Deputy Denbo when he viewed it in court. (R. Ap. 2, pp. 179-180) on the video. The lack of evidence from a video can diminish credibility of a law enforcement officer. A Ninth Circuit judge demonstrated the lack of corroboration from a video by declaring, "True, the district court concluded that the dash-cam video here confirmed the officers' testimony. Perhaps it did, but most respectfully, despite multiple attempts, I can't see it." *United States v. Braddy*, 11 F.4th 1298, 1316 (11th Cir. 2021) (Rosenbaum, Circuit Judge, concurring in part and dissenting in part) In Petitioner's case Deputy Denbo's alleged observation of marijuana was the basis for his search. However, his claim was belied by his own bodycam which does not show what he claims. If the courts cannot see it, the video does not corroborate. *United States v. Braddy*, 11 F.4th 1298, 1316 (11th Cir. 2021).

The district court had several red flags that went unheeded when determining Denbo's credibility. Both the district court and the Eleventh Circuit court

failed to even acknowledge the lack of evidence to corroborate the court testimony. Neither court acknowledged any weight to be given to the clear evidence that Deputy Denbo displayed a lack of integrity in his actions by demonstrating his willingness to withhold information from his supervisor about his failure to use his bodycam, and his lack of corroboration for the alleged marijuana.

It was Deputy Denbo's questionable and uncorroborated claim that he smelled the odor of marijuana that led to the warrantless search of the vehicle. Because the court accepted Deputy Denbo's testimony as credible, the district court accordingly found the deputy has a justified reason to search the vehicle.

It is the district court's credibility determination on Deputy Denbo, that brings the Petitioner to this court in order to obtain justice at the last level of the federal court system.

Deputy Denbo's actions violated Petitioner's right to be free from unreasonable search and seizure and this Court should granted Petitioner's writ for certiorari.

2.

Did the district court err in finding that Officer Denbo had probable cause to seize items unrelated to the possession of marijuana based upon plain view.

This Court in Minnesota *v. Dickerson*, 508 U.S. 366, 375 (1993) held that police who are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the

object, they may seize it without a warrant. The Court goes on to declare that "**If, however**, the police **lack probable cause** to believe that an object in plain view is contraband without conducting some further search of the object - *i.e.*, **if its incriminating character is not "immediately apparent," - the plain-view doctrine cannot justify its seizure.** (emphasis added)

The plain view doctrine, as set out in *Dickerson, supra,* requires, that the item seized be "immediately apparent as evidence of a crime." "Immediately apparent" means the officer must have "**probable cause**" that the item being seized is evidence of a crime.

Additionally, this Court has held that "[t]he seizure of property in plain view involves no invasion of privacy, and is presumptively reasonable, **assuming that there is probable cause to associate the property with criminal activity**." *Texas v. Brown*, 460 U.S. 730, 731 (1983) (emphasis added).

However, the district court's **Order denying Petitioner's** motion to suppress does not appear to take into consideration the "immediately apparent" prong of the plain view doctrine, to wit:

> "Even if the items were not specifically connected to the initial charge of marijuana possession, there is no basis to suppress the items because they were found in plain view during a lawful search of the vehicle. *See, e.g., Coolidge v. New Hampshire*,

> 403 U.S. 443, 466 (1971) (explaining that the plain view doctrine permits the warrantless seizure of evidence when an officer inadvertently comes across a piece of evidence incriminating the accused); *Harris v. United States*, 390 U.S. 234, 236 (1968) ("It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.")"
>
> (App-24)

In reviewing the case law cited by the district court in the Order denying the motion to suppress, it appears that the district court did not specifically address or consider the plain view requirement that the items seized were "immediately apparent" evidence of a crime.

Neither the *Coolidge v. New Hampshire case* nor *the Harris v. United States* case, which were cited by the district court in its Order denying the motion to suppress, allows a plain view seizure of property without the item being "Immediately apparent" based upon probable cause that the item seized is evidence of a crime. The *Harris v. United States* decision involved a driver's license that was seen by an officer while going taking inventory of an arrestee's personal property. The factual scenario and the inventory search in *Harris* are not the same as in Petitioner's case. Coolidge v. New Hampshire, *supra,* which came

down in 1971, adhered to the plain view doctrine and actually focused on the "inadvertent discovery" prong of the plain view doctrine.

In the instant case, there was no probable cause for Denbo seizing the items of clothing that he thought "might" be related to the robberies. Deputy Denbo could have been suspicious, but he did not have probable cause to believe the innocuous clothing items found in the car were actually evidence of the robberies.

The facts show that during Deputy Denbo's search of the vehicle, which was purportedly for "drugs and contraband," Deputy Denbo began seizing items of clothing items and shoes which he thought could be related to the February robberies.

The petitioner contends that the deputy did not have probable cause to seize these general items as items used in the robberies that occurred in February. Without probable cause the deputy could not seize those items under the guise of "plain view."

As previously stated by counsel, deputy Denbo could possibly have had a reasonable suspicion that the clothing and or shoes were directly related to the robberies. However, reasonable suspicion is not probable cause. The law is clear.

The facts demonstrate there was no probable cause for a "plain view" seizure of evidence in this instance.

Immediately after the items were found by Denbo in the search, Petitioner was placed into the back of a police vehicle. Deputy Denbo contacted Detective Toner and his supervisor to see if they come out and investigate further. (R. Ap. 2, p. 159). Deputy

Denbo at the scene of the stop, received communication from the Major Crimes Unit that there was not enough evidence to arrest Petitioner for the robberies. (R. Ap. 2, p. 195) After speaking with his supervisors Deputy Denbo was instructed to stall and buy some time so Petitioner could be interviewed about the robberies before being taken to jail on the misdemeanor marijuana charge. (R. Ap. 2, p. 185). This was done to avoid Petitioner bonding out of jail on the misdemeanor before they could talk to him. Major Crimes unit had consulted with the on-call assistant state attorney. The assistant state attorney advised that the police would need more evidence to have probable cause to charge Petitioner with the robberies. (R. Ap. 2, pp. 207-208)

The Petitioner was taken to the District Office and placed in an interrogation room to be questioned about the robberies. It was clear that the police did not have probable cause to arrest. Deputy Denbo's understanding of this fact was actually recorded on his bodycam at the District office. Denbo is captured on his bodycam video whispering to another officer that there was not enough evidence. This footage was played in open court at the suppression hearing. (R. Ap. 2, pp. 192, 205)

The district court and the Eleventh Circuit court erred in finding there was probable cause to seize the items of clothing and shoes.

The unlawful seizure of the items of evidence did violate Petitioner's right to be free from unreasonable search and seizure in contravention of the United States Constitution. For this reason, Petitioner should be granted relief by this Court.

3.

Did the district court err in finding that Mr. Petitioner knowingly and voluntarily waived his Miranda rights.

The principal case of *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny require that law enforcement officers provide warnings concerning certain Fifth Amendment rights – including the right to remain silent and the right to consult an attorney – before interrogating a suspect in a custodial setting. *United States v. Carpentino*, 948 F.3d 10, 20 (1st Cir. 2020). Law enforcement officers, at the outset of a custodial interrogation, are obligated to convey *Miranda* warnings – which is a prophylactic requirement designed to safeguard a suspect's Fifth Amendment privilege against self-incrimination – **and to secure a waiver of those rights**. *United States v. Outland*, 993 F.3d 1017, 1021 (7th Cir. 2021) (emphasis added). A defendant can waive these *Miranda* rights and agree to speak to the authorities as long as the waiver is "the product of a free and deliberate choice rather than intimidation, coercion, or deception" and is **made knowingly and intelligently, "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."** *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (emphasis added). An inquiring court must start with a presumption that the suspect did not waive his rights, and the government bears the burden of showing the validity of the waiver by a preponderance of the evidence. *United States v. Downs-Moses*, 329 F.3d 253, 267 (1st Cir. 2003). This Court has described the government's proof in this context as a "heavy burden[.]" *United States v. Cepeda-Chico*, 2020 WL

6949002, *2 (M.D. Fla. June 29, 2020) (quoting *Hall v. Thomas*, 611 F.3d 1259, 1285 (11th Cir. 2010)).

In Petitioner's case, following the traffic stop for speeding, Petitioner was subsequently placed in a police vehicle at the stop scene. Shortly after he was placed in the police vehicle, Deputy Denbo comes to the car and tells Petitioner that he [Deputy Denbo] has to read Petitioner his rights real quick – with an emphasis on "real quick." Denbo read the rights from Denbo's Miranda card. The warning consisted of 100 words. Deputy Denbo read those rights to Petitioner in 13 seconds, as evidenced by the audio recording of the interaction in the backseat of the patrol vehicle. (Gov. Ex. 6) The speed with which these significant rights were read had the effect of diminishing their importance and made them seem trivial. The rapid reading of these rights was also intended to deceive Petitioner into making a statement without a full understanding of his rights – which is exactly what happened. There was no indication that Petitioner had ever been read his rights before. Deputy Denbo readily admitted that the pace with which *Miranda* is read to a suspect is <u>important so that the person can fully understand them</u>. Denbo likewise admitted that it was important to acquire a free and voluntary waiver of *Miranda* rights before interrogating a suspect. The deputy's perfunctory acknowledgment that he knew about the policy and procedure, yet did not follow that procedure, is another example of how Deputy Denbo operated by his own rules to fit his motivation when acting in his law enforcement capacity. Despite the deputy's claimed knowledge of policy and procedure, he admittedly failed <u>to explicitly ask if Petitioner was waiving his rights</u>. (R. Ap.2 p. 203)

Deputy Denbo downplayed the significance of *Miranda,* even before he quickly read them to Petitioner. The deputy's actions suggested that this important warning was not significant and just a formality. The actual reading of the rights was done with such haste that Petitioner did not have time to reasonably absorb and understand them. Without a complete understanding of these rights, it was impossible for Petitioner to provide a knowing and intelligent waiver of the rights. The totality of the circumstances surrounding this interaction failed to demonstrate either "an uncoerced choice" or the "requisite level of comprehension." See e.g., *United States v. Becker*, 762 F.App'x 668, 673-74 (11th Cir. 2019).

Once Petitioner had been taken to the District Office, instead of going to jail on the marijuana possession, the second reading of *Miranda* was again conducted by Deputy Denbo. Taking Petitioner to a conference room with no recording capabilities was strategically done by Denbo, even though recording equipment was available in other rooms. Although there is no video or audio of the second reading, Denbo had Petitioner sign an acknowledgment of his rights. (R. Ap. 1, p. 47, the rights form) What Denbo did not do is have Petitioner sign the **section titled Waiver of Rights**. Denbo's failure to secure either an oral or written waiver of rights – and having ample opportunities to do so – is fatal to the district court's Order and the Eleventh Circuit's opinion that Petitioner understood his rights and knowingly and voluntarily waived them by making a conscious and intelligent decision to talk to police without an attorney. (App-26; App-1, respectfully)

The fact scenario in Petitioner's case does not demonstrate a knowing and voluntary waiver to talk to the police without an attorney. The Government has not and cannot meet its heavy burden in this case. The deputy said he "did not have a good answer for [defense counsel] why the bottom is not signed. I only asked him to sign the top portion." (R. Ap. 2, pp. 203-204) The deputy's erroneous beliefs and his inability to give a "good answer" as to why he did not have Petitioner sign the waiver section displays another example of questionable testimony by this seasoned law enforcement officer.

The law is clear that most statements made by a suspect during a custodial interrogation are inadmissible at trial absent a valid waiver of *Miranda* rights. *Id*. at 25. Because "[i]nvocation and waiver **are entirely distinct inquiries**," *James v. Marshall*, 322 F.3d 103, 108 (1st Cir. 2003), the fact that a suspect does not invoke either his right to remain silent or his right to counsel likewise does not itself establish the necessary waiver of rights, *see Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) What is required is a clear showing of the intention, intelligently exercised, to relinquish a known and understood right. *Carpentino*, 948 F.3d at 26, *supra.* (emphasis added).

Petitioner was subsequently questioned and his statements were obtained by the police for the Government's use prosecuting the robbery and use of firearm cases. Likewise, forensics testing was used on the items seized. The items and resultant testing results were used by the Government to prosecute Petitioner on the robberies and firearm offenses.

This case is void of any evidence that Petitioner waived his rights under *Miranda.* Accordingly, in

Petitioner's case, there is no showing, clear or otherwise, of an intention, intelligently exercised, to relinquish a known and understood right. The police and the court have violated Petitioner's rights under the Fifth Amendment. Petitioner is entitled to relief by this court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted

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