

APPENDIX

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 22-1860

[Filed April 20, 2023]

| | |
|-------------------------------|---|
| Henry H. Howe |) |
| <i>Plaintiff Appellant</i> |) |
| |) |
| v. |) |
| |) |
| Steven Gilpin, in his |) |
| individual capacity, et al.) |) |
| <i>Defendants Appellees</i> |) |

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: December 13, 2022

Filed: April 20, 2023

Before LOKEN, MELLOY, and KOBES, Circuit Judges.

LOKEN, Circuit Judge.

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In late 2013, Barbara Whelan, State's Attorney for Walsh County, North Dakota, and agents of the Grand Forks Narcotics Task Force ("GFNTF"), were preparing to try pending drug charges against Paul Lysengen. Delicia Glaze and Scott Kraft were the lead GFNTF agents, supervised by Steven Gilpin. The charges were based primarily on a May 2013 controlled buy by a confidential informant, EB. Lysengen was represented by attorney Henry Howe. His stepson, Anthony Haase, pleaded guilty in a related case and was incarcerated.

In January 2014, Steven Anderson, facing felony theft charges in Grand Forks County, told Gilpin that EB was in danger. Anderson agreed to act as a GFNTF informant. He attended meetings with Lysengen, Howe, and Wesley Smith and secretly recorded comments that provided probable cause to believe a conspiracy to murder EB was afoot. On January 30, Glaze prepared and submitted a Felony Complaint charging Howe with Criminal Conspiracy to Commit Murder, together with a supporting affidavit. A Walsh County District Judge issued a warrant for Howe's arrest for that offense, commencing the criminal prosecution. See N.D.R. Crim. P. 3(a), 4(a)(1). Howe was arrested that day at the start of a preliminary hearing in one of Lysengen's criminal cases.

Some months later, prosecutor Whelan dismissed the amended charge against Howe, prior to the preliminary hearing, after learning that Anderson previously made false murder-for-hire allegations to Nebraska and Minnesota law enforcement authorities. Howe then filed this § 1983 lawsuit against Gilpin, Glaze, Kraft, and

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Whelan. After reciting Anderson's lengthy prior criminal history, Howe alleged two Fourth Amendment violations: (I) the warrant was based upon deliberate falsehood or reckless disregard for the truth -- the use of Anderson to develop and generate false evidence incorporated in Glaze's affidavit; and (ii) defendants deprived Howe of a preliminary hearing at which Howe would have been discharged because the warrant was not supported by probable cause.¹ Howe appeals the grant of summary judgment dismissing these claims. Howe v. Gilpin, No. 3:20-CV-00013, 2022 WL 1295832 (D.N.D. Mar. 28, 2022).

¹ Howe did not pursue this claim in resisting defendants' motion for summary judgment, and for good reason -- it is not a Fourth Amendment claim. Rule 4(a)(1) provides that if it appears from the criminal complaint and supporting affidavit that there is probable cause the offense has been committed, "the magistrate must issue an arrest warrant." Howe concedes Glaze's affidavit *on its face* made an adequate showing of probable cause, so his arrest was not an unconstitutional seizure. A defendant may factually attack the warrant affidavit at his subsequent preliminary hearing, where the court makes a finding that there is probable cause to hold the defendant over for trial, or he is discharged. See Sivertson v. McLees, 407 N.W.2d 799, 800 (N.D. 1987); N.D. R. Crim. P. 5.1. But that determination is based in part on evidence gathered after the defendant's arrest. Here, a map, photo of EB, and loaded handgun -- evidence of the alleged conspiracy described by Anderson during his January 14 interview -- were found in co-defendant Smith's home when he was arrested the same day as Howe.

Reviewing *de novo*, we agree with the district court² that the affidavit provided probable cause to arrest Howe, even if corrected to include the information Howe alleges was recklessly omitted. Accordingly, we affirm.

I. Background

Glaze's January 30 affidavit recited that there were two pending criminal charges against Lysengen arising out of EB's May 2013 controlled buy of methamphetamine. The first was scheduled for trial in April, the second for a preliminary hearing later that day. The GFNTF investigation revealed that, in November contacts with Haase in prison, Lysengen said he knew EB's identity. Lysengen and Haase discussed finding a way to "set up" the informant. Lysengen wrote in December, "There will be someone to visit our friend in [rural Walsh County, EB's location] just to show how grateful we are of what was done."

At this time, Lysengen was staying with Anderson, whom he met in a county jail in 2013. On January 14, 2014, Anderson reported to GFNTF that on January 9 Lysengen and Smith had discussed a plan to murder EB. Smith produced a map of EB's residence and said EB was an antiques collector. The plan was that Anderson would call EB, discuss antiques, and arrange a meeting at which

² The Honorable Daniel M. Traynor, United States District Judge for the District of North Dakota. The court also dismissed Howe's § 1983 and state law malicious prosecution claims. Howe does not appeal those rulings.

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Smith would kill her and Rodney Avron, a drug dealing associate of Lysengen, would dispose of the body.

Glaze's affidavit recited that GFNTF surveillance confirmed Anderson and Lysengen were often together. Anderson reported attending a January 22 meeting with Howe and Lysengen about making EB "go away." Howe said, "it would be good if the b**** died or went away." Lysengen asked what would happen if EB did not show up for Court. Howe responded, "They wouldn't have a case." Lysengen said, "if she shouldn't show up, then she won't show up."

Two days later, Anderson wore a body transmitter to another meeting with Lysengen and Howe. Howe explained that EB's presence is necessary for the State to proceed with the prosecution. If she's not around, he said, it is like a "house of cards" that falls down. Howe said that EB "being gone" needs to happen more than five days before trial or it looks suspicious. Howe said the Government won't have EB come to the preliminary hearing; if she did come, Howe would probably cancel the hearing so that prosecutors could not use her preliminary hearing testimony if she was not present at trial. Anderson reported that, as the plan developed over the weekend of January 24-26, Anderson was to call EB at a number Smith and Lysengen provided, arrange to meet EB at a storage unit in Grand Forks, drug EB, and place her in her car to look like asphyxiation. GFNTF asked EB to leave the area for her safety.

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The affidavit was corroborated by Anderson's wire-recorded conversations and by Lysengen's prior communications with Haase. In addition, GFNTF verified that Smith, Lysengen, and Avron knew each other; Lysengen was living at Anderson's house; EB collected antiques; and Smith had visited EB's home. Anderson knew EB's first name and provided a copy of the map and photo Smith produced.

After GFNTF enlisted Anderson as a confidential informant, he filled out a personal history report revealing convictions for aggravated forgery, bigamy, check forgery, theft by false representation, and theft by swindle. GFNTF likely ran a North Dakota criminal records, but there is no evidence of a more thorough national criminal records check known as a "Triple I" report. Anderson had felony charges pending in Grand Forks and Cass Counties. Glaze was aware of the pending Grand Forks charges. Her affidavit did not disclose this criminal history.

With the criminal charge pending, Howe's attorney hired an investigator to conduct a background investigation of Anderson. In March 2014, in response to Howe's discovery requests, Whelan obtained a Triple I report on Anderson, which revealed numerous additional charges for forgery, theft by deception, false promises, and false representation. In late March, Whelan received documents disclosing that Anderson made false allegations of "murder for hire" plots in Minnesota in 2003 and in Nebraska in 2004. Neither incident resulted in criminal charges so they were not in the Triple I report. On April 24, Whelan moved to amend the charge against Howe to

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criminal conspiracy to tamper with a witness. On May 8, the day before the preliminary hearing, Whelan moved to dismiss the amended charge against Howe. In an email to Howe's attorneys, Whelan explained that, in light of the information made available about Anderson, "Although I remain confident that there is probable cause that Mr. Howe was involved, I see no need to go through tomorrow's preliminary hearing [because] I do not believe there is proof beyond a reasonable doubt, and therefore I could not, in good conscience, proceed to trial." The Walsh County District Court dismissed the criminal case that day. This lawsuit followed.

II. Discussion

"A warrant based upon an affidavit containing 'deliberate falsehood' or 'reckless disregard for the truth' violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability." Bagby v. Brondhaver, 98 F.3d 1096, 1098 (8th Cir. 1996), quoting Franks v. Delaware, 438 U.S. 154, 171 (1978); see Burk v. Beene, 948 F.2d 489, 494 (8th Cir. 1991). In rejecting Howe's Fourth Amendment claims, the district court concluded that "Howe has alleged no facts, nor does the record support any facts, that amount to a deliberate falsehood by Glaze being the basis for the warrant affidavit." Howe v. Gilpin, 2022 WL 1295832 at *4. We agree.

On appeal, Howe argues, as he did to the district court, that defendants, working together as investigators, acted with reckless disregard of the truth by declining to inform

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the judicial officer who issued the arrest warrant “of highly material information concerning the credibility and criminal history of sole witness” Anderson. This deliberate falsehood issue turns on the mental state of the affiant, Glaze, not the informant, Anderson. See Franks, 438 U.S. 154 at 171. Howe argues Glaze failed to disclose that Anderson has a criminal history establishing that he is a chronic liar, which raises a genuine issue of fact regarding Glaze’s reckless disregard for the truth. Reckless disregard may be inferred from the omission of information. However, the party attacking a warrant affidavit “must show that the omitted material would be clearly critical to the finding of probable cause.” United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993) (quotation omitted). “In a warrant affidavit, the government need only show facts sufficient to support a finding of probable cause.” United States v. Ozar, 50 F.3d 1440, 1445 (8th Cir. 1995) (quotation omitted); see United States v. Knutson, 967 F.3d 754, 760 (8th Cir. 2020); Murray v. Lene, 595 F.3d 868, 872 (8th Cir. 2010).

“Probable cause exists if the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed an offense.” Williams v. City of Alexander, 772 F.3d 1307, 1310 (8th Cir. 2014) (cleaned up). “The core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable.” United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993). In a § 1983 case, the issues are whether “the warrant application is so lacking in indicia of

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probable cause as to render official belief in its existence unreasonable,” and, if deliberate falsehood is alleged, whether the affidavit is truthful, which “means that the information put forth is believed or appropriately accepted by the affiant as true.” Morris v. Lanpher, 563 F.3d 399, 402 (8th Cir. 2009) (cleaned up). Omissions and falsehoods that are immaterial or not supported by the record do not suffice. Id. at 403.

Glaze’s affidavit contained powerful indicia of probable cause. Most important was the detailed recitation of statements made by Howe, Lysengen, and Anderson at the recorded January 24, 2014 meeting. Standing alone, this objective evidence provided probable cause to believe a conspiracy to murder EB existed. It was supported by numerous other recitals in the affidavit: Lysengen’s pending prosecutions arising from EB’s controlled buy, giving him a motive to eliminate a government witness Howe said was essential; GFNTF investigators learning of Lysengen’s contacts with his incarcerated step-son evidencing their desire to “set up” EB; and GFNTF surveillance activities confirming numerous details of the plot Anderson reported in face-to-face meetings with officers. Opportunities to assess Anderson’s credibility first-hand gave greater weight to the informant’s information. See United States v. Robertson, 39 F.3d 891, 893-94 (8th Cir. 1994).

Howe argues that Anderson’s known fraud-related criminal convictions were relevant information because they cast doubt on his credibility. Cf. Fed. R. Evid. 609(a)(2). “Many informants have prior convictions.”

United States v. Leppert, 408 F.3d 1039, 1042 (8th Cir. 2005). The question is not whether the omitted information might be of interest to the issuing magistrate. Omitted information must be “clearly critical” to the finding of probable cause. Here, a corrected affidavit disclosing Anderson’s prior fraud-related crimes of which Glaze was aware still would have provided the issuing judicial officer probable cause to issue the arrest warrant. That Anderson was being prosecuted for theft in Grand Forks County was not plainly exculpatory evidence. If anything, it was consistent with an inference that Lysengen and Howe had involved Anderson in a criminal conspiracy. Thus, there was no Fourth Amendment violation. See Bagby, 98 F.3d at 1099.

Howe argues Defendants knew Anderson had serious credibility issues. Therefore, they had a duty to further investigate Anderson’s criminal history and to disclose his prior false “murder-for-hire” plots in two other States. We disagree. Once GFNTF agents established probable cause to arrest Howe, as recited in the Glaze affidavit, they had no constitutional duty to further investigate Anderson’s credibility. “[O]fficers are not required to conduct a mini-trial before arrest.” Fisher v. Wal-Mart Stores, Inc., 619 F.3d 811, 817 (8th Cir. 2010) (quotation omitted). As in Gibson v. Cook, the agents did not “disregard[] plainly exculpatory evidence.” 764 F.3d 810, 814 (8th Cir. 2014) (quotations omitted).

There is no evidence Whelan or any GFNTF investigator knew about the false “murder-for-hire” allegations when Glaze submitted the warrant affidavit.

An agent does not “violate a clearly established constitutional right by omitting information from a warrant application that he does not actually know, even if the reason is his own reckless investigation.” Hartman v. Bowles, 39 F.4th 544, 545 (8th Cir. 2022). As Howe’s subsequent, lengthy investigation of Anderson makes clear, minimal further investigation into Anderson’s criminal history would not have exonerated Howe. See Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999). And given the imminent threat to EB’s safety, time was of the essence.

The judgment of the district court is affirmed.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Case No. 3:20-CV-00013

[Filed March 28, 2022]

| | |
|-------------------------------------|---|
| Henry H. Howe, |) |
| |) |
| Plaintiff, |) |
| |) |
| vs. |) |
| |) |
| Steven Gilpin, Delicia Glaze, |) |
| Scott Kraft, and Barbara L. Whelan, |) |
| |) |
| Defendants. |) |

**ORDER GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

[¶1] THIS MATTER comes before the Court on two Motions for Summary Judgment filed by Defendants Delicia Glaze (“Glaze”) and Barbara Whelan (“Whelan”) and by Defendants Steven Gilpin (“Gilpin”) and Scott Kraft (“Kraft”) on October 1, 2021. Doc. Nos. 81, 86. The Plaintiff, Henry H. Howe (“Howe”) filed a Response to both Motions on November 18, 2021. Doc. No. 102. Defendants

Glaze and Whelan and Defendants Gilpin and Kraft both filed Replies on December 2, 2021. Doc. Nos. 107,108. Thereafter, Howe requested leave to file a Sur-Reply, which was Granted. Doc. Nos. 109, 110. A Sur-Reply was filed on December 6, 2021. Thereafter, Defendants Glaze and Whelan also requested leave to file additional filing, which was Granted. Doc. Nos. 112, 113. Defendants Glaze and Whelan filed a Response to the Sur-Reply on December 8, 2021. Doc. Nos. 114. For the reasons set forth below the Motions for Summary Judgment are **GRANTED**.

INTRODUCTION

[¶2] Howe commenced this action on January 29, 2020 alleging three causes of action. Doc. No. 1. Howe later amended his complaint on April 30, 2021 alleging three causes of action, all under 42 U.S.C. §1983: (1) Warrant Based Upon Deliberate Falsehood or Reckless Disregard for the Truth; (2) Warrant Not Supported by Probable Cause-Fourth Amendment; (3) and Malicious Prosecution-Fourth Amendment. Doc. No. 56. Defendant Gilpin was a Special Agent of the North Dakota Bureau of Criminal Investigation (“BCI”) and member of the Grand Forks Narcotics Task Force (“GFNTF”). Defendant Glaze was a Deputy Sheriff of the Grand Forks County Sheriff’s Department and member of GFNTF. Defendant Kraft was a Special Agent of BCI and a member of GFNTF. Defendant Whelan was the State’s Attorney for Walsh County. Howe alleges Defendants Gilpin, Glaze, Kraft, and Whalen, in concert with the GFNTF developed false evidence that was incorporated into the Arrest Warrant

Affidavit of Glaze with reckless or deliberately false testimony in violation of Howe's Fourth Amendment rights. Howe alleges the warrant was not supported by probable cause. Howe further alleges the Defendants caused his arrest and continued prosecution in the absence of probable cause. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

STANDARD FOR SUMMARY JUDGMENT

[¶3] The Court will grant summary judgment “if the movant shows. . . there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “An issue is ‘genuine’ if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party.” *Schilf v. Eli Lilly & Co.*, 687 F.3d 947, 948 (8th Cir. 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). “A fact is material if it ‘might affect the outcome of the suit.’” *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting *Anderson*, 477 U.S. at 248). Courts must afford “the nonmoving party the benefit of all reasonable inferences which may be drawn without resorting to speculation.” *TCF Nat’l Bank v. Mkt. Intelligence, Inc.*, 812 F.3d 701, 707 (8th Cir. 2016) (quoting *Johnson v. Securitas Sec. Servs. USA, Inc.*, 769 F.3d 605, 611 (8th Cir. 2014)). “At summary judgment, the court’s function is not to weigh the evidence and determine the truth of the matter itself, but to determine whether there is a genuine issue for trial.” *Nunn v. Noodles & Co.*, 674 F.3d 910, 914 (8th Cir. 2012) (citing *Anderson*, 477

U.S. at 249). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

[¶4] The basic inquiry for purposes of summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Diesel Machinery, Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). “A factual dispute is genuine if the evidence could cause a reasonable jury to return a verdict for either party.” Moore v. Philander Smith Coll., 25 F. Supp. 3d 1095, 1099 (E.D. Ark. 2014). If the movant demonstrates the absence of a genuine issue of material fact, “[t]he nonmovant ‘must do more than simply show that there is some metaphysical doubt as to the material facts,’ and must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” Id.

[¶5] The facts are viewed in the light most favorable to the Plaintiff, the non-movant, in a motion for summary judgment. Krosch v. JLG Indus., Inc., 590 F. Supp.2d 1169, 1173 (D.N.D. 2008). “At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to

those facts.” Scott v. Harris, 550 U.S. 370, 380. (2007) “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” Id.

FACTUAL BACKGROUND

[¶6] The facts in this case center around the arrest and criminal charges against Howe. Howe had been engaged in the private practice of law, including criminal defense. The events leading to Howe’s arrest spring from a criminal case against Paul Lysengen (“Lysengen”) who Howe represented. Doc. Nos. 102-26, 84-9.

[¶7] On May 22, 2013, a Confidential informant (“CI”), named “EB” bought methamphetamine from Lysengen during a controlled buy at a residence in Warsaw, North Dakota, belonging to Lysengen and his son, Anthony Haase (“Haase”). Doc. No. 82-1. On May 24, 2013, officers executed a search warrant at the residence. Id. As a result, Lysengen was charged with nine felony charges and one misdemeanor. Id. Howe was Lysengen’s attorney of record. Id. Haase was also charged. During incarceration, Haase and Lysengen would speak on jail calls. Id. Law enforcement reviewed the jail calls and found Lysengen informed Haase who the CI was. Id. On one of the calls, law enforcement noted Haase stated Howe advised him the CI needed to be “set-up.” Id. Law enforcement noted these calls indicated Lysengen listened to the recording of the controlled buy, he identified EB as the informant, and he

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directed Haase to obtain “paperwork” from Howe to let others know EB was wearing a wire. Id.

[¶8] On January 14, 2014, Special Agent Gilpin received a call from the Grand Forks County State’s Attorney’s Office. Id. A criminal defense attorney, David Ogren, advised Gilpin he received information the CI was in danger. Ogren represented an individual named Steve Anderson, who said he had information about individuals who described plans to harm or discredit EB. Id. Anderson told Ogren he believed Lysengen, an individual named Wesley Smith (“Smith”), and possibly others would hurt or kill EB. Id. Anderson provided Ogren a photo of EB and a handwritten map to her home from Lysengen. Id.; Doc. Nos. 85-6; 106.

[¶9] Gilpin showed Special Agent Kraft and GFNTF Officer Glaze the photo and map to confirm they were accurate. Doc. No. 82-1. Kraft initially signed EB up as an informant and knew where EB resided. Kraft confirmed the location on the map and the photo. Id. Gilpin and Glaze met face-to-face with Ogren and Anderson that afternoon. Doc. No. 106. Anderson advised Gilpin and Glaze that Lysengen and Smith wanted EB dead so she could not appear at Lysengen’s court appearances. Doc. No. 82-1. Smith was previously in a relationship with EB. Id. Anderson told Gilpin and Glaze there was a meeting on January 9, 2014 at his residence. Id.; Doc. No. 106. During this January 9 meeting, Lysengen produced audio CDs of the controlled purchase and discussed a plan to kill EB. Id. In particular, they planned to contact EB, entice her with a discussion of the sale of antiques and stated EB would

“end up as fish bait.” Id. At the end of the meeting, the group decided to have another meeting on January 24, when another friend would be back from selling methamphetamine in Arizona. Id. Anderson also noted Smith had gone to EB’s home on January 12, 2014. Id. The Task Force corroborated this information by finding Smith and Lysengen knew each other, Anderson knew EB’s name and her interest in antiques, the friend had been in Arizona selling methamphetamine, and confirmed with EB Smith had come to her house, among other things. Doc. No. 82-1.

[¶10] GFNTF asked Anderson to act as a CI. Anderson completed BCI’s cooperating individual agreement and personal history report. Doc. Nos. 84-26; 85-6. After, Anderson wore a body transmitter and met with Howe and Lysengen at Howe’s office on January 24, 2024. Doc. No. 84-1. Because the meeting involved potential attorney-client privilege, Gilpin contacted Whelan who determined the privilege did not apply. Doc. No. 102-12. During the meeting, a hypothetical disappearance of EB was discussed.

Anderson: I take it this shouldn’t be happening like five days before he goes to trial.

Howe: Well I, I, I think that that um it gives the state more to think about if they know that they are going through a trial and it’s going to be a little bit miserable to go through a trial and what are they going to get out of it.

Anderson: Yeah, without their star witness.

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Howe: You know if they, if they, yeah and that also looks suspicious you know if somebody

Anderson: Yeah, if someone disappears five days before action, yeah.

Howe: Yeah then they, then they tend to assume... they they start off with the assumption that it's not a coincidence

Anderson: Yeah oh gee I don't understand that.

Doc. No. 106.

[¶11] Later in the conversation Howe suggests EB will not show up to the preliminary hearing and further stated he would cancel it if she did show up. Id. Anderson had a subsequent conversation with Smith and Lysengen about plans to harm EB. Doc. No. 82-4. The plan was for Anderson to call EB to meet about antiques and he would then drug EB, get her body into his car and make it look like she died of asphyxiation. Id.

[¶12] On January 30, 2014, Glaze submitted a lengthy, six-page, arrest warrant affidavit, discussing the original control buy from Lysengen. Doc. No. 84-10. Glaze noted Haase and Lysengen had discussed handing out "paperwork" from Howe to their connections and trying to "set-up" EB. Id. Glaze stated:

After receiving the report from [Anderson] on January 9, 2014, the GFNTF began utilizing a body transmitter and digital recorders on [Anderson]. Various forms of surveillance were conducted,

corroborating that [Anderson] and Lysengen were often together. [Anderson] informed the GFNTF that he had recently attended meetings between Howe and Lysengen. [He] informed the GFNTF that he a discussion with Howe about making [EB] “go away.” [Anderson] quoted Howe as saying, “It would be good if the bitch died or went away.” [Anderson] said that Howe stated, “Then Paul Lysengen wouldn’t be facing half the shit he’s facing.” ... [Anderson] also attended another meeting at Howe’s office. Present were [Anderson], Lysengen and Howe. At that meeting, Lysengen asked Howe what would happen if [EB] didn’t show up for Court. Howe responded, “They wouldn’t have a case.” [Anderson] said, “Wouldn’t it be easier to just set [EB] up?” Howe replied, “It would be better if she just didn’t show up.” Lysengen then stated to Howe, “If she shouldn’t show up, then she won’t show up for Court.”

Id.

[¶13] Judge Richard Geiger signed an arrest warrant against Howe for the crime of conspiracy to commit murder in violation of N.D.C.C. § 12.1-06-04 and § 12.1-16-01(1)(a). Doc. No. 84-11. Howe was arrested on January 31. Doc. No. 82-9. Shortly thereafter, Howe was suspended from the practice of law. On April 24, 2014, the charge was amended to conspiracy to tamper with a witness and/or information in a criminal proceeding in violation of N.D.C.C. §§ 12.1-06-04 and 12.1-09-01. On May 8, 2014, Whelan filed a Motion to Dismiss the charge, which was

granted. Doc. No. 83-4. Whelan stated she moved to dismiss the charge due to new information about Anderson. Specifically, information had come to light after March 27, 2014 that Anderson had reported to law enforcement in Nebraska and Minnesota of other purported murder-for-hire plots. Doc. Nos. 89, 90. Whelan expressly stated she still believed there was probable cause, but not enough for proof beyond a reasonable doubt. Doc. No. 83-5.

ANALYSIS AND DISCUSSION

I. WARRANT BASED UPON DELIBERATE FALSEHOOD (FRANK'S VIOLATION)

[¶14] Howe first alleges the warrant was based upon deliberate falsehood or reckless disregard for the truth. Howe claims the Defendants, “acting in concert with and within the Grand Forks Narcotics Task Force...developed and generated false ‘evidence,’ much of which was eventually incorporated into the Arrest Warrant Affidavit... violat[ing] plaintiff Henry Howe’s Fourth Amendment constitutional rights to be free from-either or both- the reckless or deliberate provision of false testimony.” Doc. No. 56.

[¶15] “Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred.” Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114 (1994)(citing 18 U.S.C. § 1983). “A warrant based upon an affidavit containing ‘deliberate falsehood’ or ‘reckless

disregard for the truth’ violates the Fourth Amendment. An official who causes such a deprivation is subject to § 1983 liability.” Bagby v. Brondhaver, 98 F.3d 1096, 1098 (8th Cir.1996) (quoting Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). “[T]he deliberate falsity or reckless disregard whose impeachment is permitted ... is only that of the affiant, not of any nongovernmental informant.” Franks v. Delaware, 438 U.S. 154, 171, (1978). In other words, the question of deliberate falsehood is whether Glaze, as the affiant, intentionally made false statements or recklessly disregarded the truth. Howe has alleged no facts, nor does the record support any facts, that amount to a deliberate falsehood by Glaze being the basis for the warrant affidavit.

[¶16] Howe largely relies “upon the prong of Franks that holds a warrant affidavit constitutionally infirm if it reflects a material and reckless disregard for the truth.” Bagby, 98 F.3d at 1099. “This prong of Franks is governed by an objective standard that is quite amenable to qualified immunity review—whether the warrant affidavit was so materially false that defendant manifested reckless disregard for the truth in submitting it.” Id. “[A] warrant may not be collaterally attacked by a criminal defendant, the Supreme Court explained, if all the false and reckless portions of a warrant affidavit are corrected and the corrected affidavit still supports a finding of probable cause.” Id.

[¶17] The statements in the warrant must be looked at as though Glaze herself recklessly disregarded the truth, not

whether Anderson lied. Howe largely argues Anderson was an unreliable habitual liar as a CI and Whelan should have performed a more comprehensive criminal record check prior to charging Howe. Howe argues Whelan should have run a background check known as a Triple I report prior to charging him Howe. Doc. No 102. Whelan, however, testified she does not have access to the Triple I, prior to making the charging decision, only law enforcement did. Doc. No. 102-13. While Whelan may not have had access to a Triple I report until after the charge was made, it appears the GFNTF may have run a Triple I report when Anderson became a CI due to an FBI number listed on his CI form. Doc. Nos. 102-13; 84-26; 85-6. Even if a Triple I had not been done, the background check that had been done was quite comprehensive, spanning several states. Doc. Nos. 84-26; 85-6. So, it is doubtful any further background information would have been helpful.

[¶18] Furthermore, the facts stated in the warrant gave rise to probable cause. “[D]ue process ...does not require a perfect investigation. Nor does due process hold the officers liable for taking seriously [a victim’s] allegations.” Hawkins v. Gage Cty., Neb., 759 F.3d 951, 958 (8th Cir. 2014). The Fourth Amendment does not require a every stone to be unturned in an investigation. All that that Fourth Amendment requires in this case is information sufficient to establish probable cause. “The Fourth Amendment requires a showing of probable cause before a search warrant may be issued. Determinations of probable cause must be premised on the totality of the

circumstances.” United States v. Williams, 477 F.3d 554, 557 (8th Cir. 2007).

[¶19] Howe simply argues Anderson is an unreliable CI. “[T]he informant’s reliability, veracity, and basis of knowledge are relevant considerations—but *not independent, essential* elements—in finding probable cause.” United States v. Robertson, 39 F.3d 891, 893 (8th Cir. 1994)(emphasis added). “The core question in assessing probable cause based upon information supplied by an informant is whether the information is reliable.” United States v. Williams, 10 F.3d 590, 593 (8th Cir.1993). “One manner is independent corroboration of information provided by the source.” United States v. Sinnawi, No. 1:19-cr-161, 2020 WL 625287, at *3 (D.N.D. Feb. 10, 2020). A background check of Anderson had been conducted. However, his basis of knowledge matched in multiple ways to what had been verified by the GFNTF. Most importantly, recordings of Howe also followed his story. Howe himself agreed the statements he made were in the Arrest Warrant Affidavit. Doc. No. 84-1. The facts in the arrest warrant affidavit give rise to probable cause that Howe committed conspiracy to commit murder.

[¶20] Even if there had been reckless disregard for the truth, the Defendants are entitled to qualified immunity. “[Q]ualified immunity is appropriate if defendant has been accused of submitting a recklessly false affidavit and if a corrected affidavit would still provide probable cause to arrest or search.” Bagby, 98 F.3d at 1098. The affidavit had enough probable cause as it was. There did not need to be a corrected affidavit. Even if there had, there was

certainly probable cause to arrest Howe. “In a § 1983 case an official ‘is only liable for his . . . own misconduct’ and is not ‘accountable for the misdeeds of [his] agents’ under a theory such as respondeat superior or supervisor liability.” Nelson v. Corr. Med. Servs., 583 F.3d 522, 534-35 (8th Cir. 2009). “A supervisor. . . may be held liable under § 1983 if he directly participated in the constitutional violation or if his failure to train or supervise the offending actor caused the deprivation.” Tilson v. Forrest City Police Dep’t, 28 F.3d 802, 806 (8th Cir. 1994). There has been no evidence or even allegations that Gilpin, as Glaze’s supervisor, failed to supervise or train Glaze. Therefore, the Defendants are entitled to qualified immunity and Howe’s first claim is **DISMISSED**.

II. WARRANT NOT SUPPORTED BY PROBABLE CAUSE

[¶21] Howe’s second cause of action is the warrant was not supported by probable cause, “violat[ing] the Fourth Amendment, and an official lack[ing] probable cause is subject to liability under 42 U.S.C. § 1983.” This claim is similar to the first claim, but is distinct. “A claim that an affiant recklessly or deliberately provided false testimony in support of an arrest warrant is distinct from a claim that the warrant was not supported by probable cause.” Odom v. Kaizer, 638 F. App’x 553, 554 (8th Cir. 2016).

[¶22] “[P]robable cause . . . [is] ultimately [a] question of law.” Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995). The absence of probable cause “will generally provide weighty evidence that the officer’s animus caused

the arrest, whereas the presence of probable cause will suggest the opposite.” Nieves, 139 S. Ct. at 1724.

Probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. A reasonable ground for belief means more than bare suspicion, but less than evidence which would justify condemnation or conviction. Probable cause exists where the facts and circumstances within ... the officers’ knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Baribeau v. City of Minneapolis, 596 F.3d 465, 474 (8th Cir. 2010) (internal citations omitted).

[¶23] Anderson’s recordings and knowledge, together with the GFNTF’s own independent investigation was sufficient to establish probable cause. There were reasonable grounds to believe, which were “more than a bare suspicion,” Howe committed a crime. Here, the Defendants had probable cause, which provides enough evidence that it was not the officer’s animus that caused the arrest. Despite the fact the Plaintiff argues there was a “false” or misleading warrant affidavit, the factual content does not allow “the court to draw the reasonable inference that the [the Defendants are] liable for the misconduct alleged”

because there was probable cause. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plaintiff needed to show a material fact was in dispute, but has failed to do so. Furthermore, the Defendants would be entitled to qualified immunity even if a violation occurred. “[O]fficers here are entitled to qualified immunity on these First and Fourth Amendment claims if [the Plaintiff’s] arrest was supported by at least arguable probable cause.” Johnson v. McCarver, 942 F.3d 405, 409 (8th Cir. 2019)(emphasis in original). Therefore, the Defendants are entitled to qualified immunity and Howe’s second claim is **DISMISSED**.

III. MALICIOUS PROSECUTION CLAIM

[¶24] Howe’s final claim is Malicious Prosecution. For the reasons explained below, this claim is also **DISMISSED**.

A. Claim under 18 U.S.C. § 1983

[¶25] “Plaintiffs in retaliatory prosecution cases [must] show more than the subjective animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause.” Nieves v. Bartlett, 139 S. Ct. 1715, 1723, 204 L. Ed. 2d 1 (2019). “Malicious prosecution required the plaintiff to show that the criminal charge against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice. It has long been settled law that malicious prosecution requires proving ‘the want of probable cause’” Id. at 1726. This Court has

already determined there was probable cause. Merely saying there was no probable cause is a bare legal assertion. The other facts in the case show there was probable cause.

[¶26] Additionally, even if there had been enough for a malicious prosecution claim, the Eighth Circuit has been clear in holding an allegation of malicious prosecution without a corresponding constitutional violation cannot sustain a civil rights claim under § 1983. See, Joseph v. Allen, 712 F.3d 1222, 1228 (8th Cir. 2013); Kurtz v. City of Shrewsbury, 245 F.3d 753, 758 (8th Cir. 2001) (stating that “malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury.”); Technical Ordinance, Inc. v. United States, 244 F.3d 641, 650 (8th Cir. 2001); McNees v. City of Min. Home, 993 F.2d 1359, 1361 (8th Cir. 1993). As discussed throughout this Order, there are no claims of constitutional injuries that have merit. As such, the malicious prosecution claim cannot stand alone.

B. State Law Claim for Malicious Prosecution

[¶27] The Eighth has never found a malicious prosecution claim to be a Constitutional claim, saying, “[i]f malicious prosecution is a constitutional violation *at all*, it probably arises under the Fourth Amendment.” Harrington v. City of Council Bluffs, Iowa, 678 F.3d 676, 679 (8th Cir.2012) (emphasis added). However, Howe cites to a Second Circuit case where a malicious prosecution claim can be established under state law. See, Fulton v. Robinson, 289

F.3d 188, 195 (2d Cir. 2002). Even stretching state law to its end, Howe's claims still fail.

[¶28] The North Dakota Supreme Court has previously said,

In order to maintain an action for malicious prosecution one must establish, at a minimum, the following elements:

1. A criminal proceeding instituted or continued by the defendant against the plaintiff.
2. Termination of the proceeding in favor of the accused.
3. Absence of probable cause for the proceeding.
4. "Malice," or a primary purpose other than that of bringing an offender to justice.

Rodenburg L. Firm v. Sira, 2019 ND 205, ¶ 12, 931 N.W.2d 687, 690. (citing Richmond v. Haney, 480 N.W.2d 751, 755 (N.D. 1992))

[¶29] There is no dispute that criminal proceedings were instituted against Howe and the proceedings were dismissed. While a dismissal of charges is not necessarily a termination in favor of the accused, the Court will none the less analyze the final two elements. "[I]t must be stressed that although malice can be inferred from the want of probable cause in some instances, establishing malice as a matter of fact is an essential prerequisite to maintaining a claim for malicious prosecution. Thus,

although the inquiry as to the existence of probable cause in some respects parallels questions of negligence, an action for malicious prosecution cannot be based on mere negligence.” Richmond v. Haney, 480 N.W.2d 751, 755, n.4. (N.D. 1992). “When there has been a prior judicial determination of probable cause, such a finding usually constitutes prima facie evidence of probable cause in a subsequent malicious prosecution suit.” Id. A North Dakota state court found probable cause to arrest Howe. This Court also determined there was probable cause for the warrant. Two courts have found probable cause. Therefore, malice cannot be inferred from a lack of it.

[¶30] “It is sufficient if the person instigating the prosecution as a reasonable and prudent man, ... had reasonable grounds to believe the plaintiff was guilty, and that in coming to such a conclusion ... had information of such a character and obtained from such sources as men of ordinary care, prudence, and discretion would feel authorized to act upon in similar circumstances.” Id. at 756. “[T]he court decides whether or not the facts would warrant a belief of guilt in a reasonably cautious and prudent person.” Id. Howe’s own recorded statements, which he admits are true, could allow a prudent person to believe he had committed conspiracy to commit murder. In this case, Howe fails to raise issues of material fact, the resolution of which would change the determination of whether or not a reasonably cautious and prudent person would believe in Howe’s guilt at the time the prosecution was instigated.

[¶31] Howe largely alleges, without factual support, the Defendants hold a grudge against him. Howe alleges Whelan previously prosecuted a highly publicized case against a defendant Howe represented. Howe apparently recorded an interview with the victim, which Howe alleges angered Whelan. Doc. No. 56. Howe also asserts Gilpin and Kraft hold grudges because he successfully defended cases in which the GFNTF spearheaded investigations. This is unsubstantiated by anything other than Howe's theorizing. Howe has also failed to submit facts from which one could reasonably infer the Defendants did not truly believe he was guilty of the offense charged. Thus, under North Dakota law, Howe's claim has failed.

C. Qualified Immunity Shields Defendants from These Claims

[¶32] The Defendants are entitled to qualified immunity. "Officials being sued under § 1983 are entitled to qualified immunity for actions that did not violate a clearly established constitutional right at the time of the alleged violation such that reasonable officials acting in the officials' position would not have understood they were violating that right." Harrington v. City of Council Bluffs, Iowa, 678 F.3d 676, 680 (8th Cir.2012) (citations omitted). "To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." Graham v. Barnette, 5 F.4th 872, 887 (8th Cir. 2021), reh'g denied (Aug. 20, 2021). "The plaintiff has the burden to prove that a right was clearly established at the time of the alleged violation. Boudoin v. Harsson, 962 F.3d 1034,

1040 (8th Cir. 2020) (citing Wilson v. Lamp, 901 F.3d 981, 986 (8th Cir. 2018)).

[¶33] The Eighth Circuit has never held that malicious prosecution violates the Fourth Amendment or the Fourteenth Amendment's due process clause. See Technical Ordnance, Inc. v. U.S., 244 F.3d 641, 651 (8th Cir. 2001) (explaining that law was not clearly established because the Eighth Circuit has never held that a malicious prosecution claim violated the Fourth Amendment). The Eighth Circuit has said "[i]f malicious prosecution is a constitutional violation *at all*, it probably arises under the Fourth Amendment." Harrington v. City of Council Bluffs, Iowa, 678 F.3d 676, 679 (8th Cir.2012) (emphasis added). It was not a clearly established right at the time of the alleged violation. The Fourth Amendment Malicious Prosecution claims against the Defendants are **DISMISSED**.

CONCLUSION

[¶34] For the reasons explained above, Defendants' Motions for Summary Judgment are **GRANTED**. All claims are **DISMISSED with prejudice**.

[¶35] **IT IS SO ORDERED.**

DATED March 28, 2022.

/s/ _____
Daniel M. Traynor, District Judge
United States District Court

APPENDIX C

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA**

Case No. 3:20-cv-013

[Filed March 28, 2022]

| | |
|-------------------------------------|---|
| Henry H. Howe, |) |
| |) |
| Plaintiff, |) |
| |) |
| vs |) |
| |) |
| Steven Gilpin, Delicia Glaze, |) |
| Scott Kraft, and Barbara L. Whelan, |) |
| |) |
| Defendants. |) |

JUDGMENT IN A CIVIL CASE

¶ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

IT IS ORDERED AND ADJUDGED:

Defendants' Motions for Summary Judgment (Doc. 81, 86) are GRANTED. All claims are DISMISSED with prejudice.

App. 34

Date: March 28, 2022

ROBERT J. ANSLEY, CLERK OF COURT

by: /s/ Melissa Fischer, Deputy Clerk

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 22-1860

[Filed July 13, 2023]

| | |
|-----------------------------|---|
| Henry H. Howe |) |
| Appellant |) |
| |) |
| v. |) |
| |) |
| Steven Gilpin, at all times |) |
| relevant to the causes of |) |
| action set forth herein, a |) |
| Special Agent of the North |) |
| Dakota Bureau of Criminal |) |
| Investigation (BCI), and a |) |
| member of the Grand |) |
| Forks Narcotics Task Force |) |
| (GFNTF), in his individual |) |
| capacity, et al. |) |
| Appellees |) |

Appeal from U.S. District Court for the District of North
Dakota - Eastern (3:20-cv-00013-DMT)

App. 36

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

July 13, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

App. 37

APPENDIX E

PERSONAL HISTORY REPORT

See Fold-Out Exhibit Next Page



PERSONAL HISTORY REPORT
OFFICE OF ATTORNEY GENERAL
BUREAU OF CRIMINAL INVESTIGATION
SFN #10598 (6/95)

In compliance with the Federal Privacy Act 1974, the disclosure of the individual's social security number on this form is mandatory pursuant to North Dakota Century Code _____. The individual's social security number is used as an identification number by the agency. The social security number will not be disclosed without consent.

| | | | | | |
|--|---|---|---|---|--------------------|
| USED AS: (check applicable box) <input type="checkbox"/> PERSONAL HISTORY <input checked="" type="checkbox"/> INFORMANT SUBMISSION | | PHOTO <input type="checkbox"/> NO <input checked="" type="checkbox"/> YES | | CI NUMBER 14-2995 | |
| NAME (Last, First, Middle) Anderson, Steven Harold | | | | ALIAS OR OTHER NAMES Anderson, Andrew D. Anderson, Harold | |
| ADDRESS (No., Street, City, State, Zip Code) [REDACTED], East Grand Forks, MN 56721 | | | | | |
| TELEPHONE NUMBER (Include Area Code) [REDACTED] | | DATE OF BIRTH (Mo., Day, Year) [REDACTED] | | PLACE OF BIRTH (City & State) Worthington, MN | |
| RACE white | SEX <input checked="" type="checkbox"/> M <input type="checkbox"/> F | HEIGHT 6'02 | WEIGHT 300 | EYE COLOR Hazel | HAIR COLOR Grey |
| IDENTIFYING CHARACTERISTICS (Scars, Marks, Physical Defects, etc.) Scar Back | | | | OCCUPATION | |
| DRUG USER <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES - if yes, what drug? | | | | | |
| SOCIAL SECURITY NO. [REDACTED] | | FBI NO. [REDACTED] | | SID NO. [REDACTED] | |
| OTHER INTEL | | | | | |
| DRIVER'S LICENSE | | | VEHICLE REGISTRATION | | |
| State or County ND | Number | Expiration Date | Make | Year of Car | |
| EDUCATION (Level and Name of School) | | | License No. | Year | State |
| FILE REFERENCES | | | | | |
| LOCATIONS OF CRIMINAL ACTIVITY (City, State, Country) Coudwell Police Dept ADA County SO Gem County SO Valley County SO ADA County 4th District Mankato, MN | | | CRIMINAL ASSOCIATES (Last, First, Middle Name) Paul Wensene Rockney Alvon | | |
| PRIOR CRIMINAL RECORD 2002 aggravated Forgery 2003 Bigamy; Check Forgery 2004 Theft - False Representation; Theft by Swindle 2005 Offertail - Theft - More \$35000 2013 Possess Pistol / Assault Weapon by Intoxicated Person 1/24/14 | | | SOURCE OF SUPPLY (Name) | | |
| FAMILY | | | ADDRESS (No., Street, City, State, Zip Code) | | |
| SPOUSE [REDACTED] 1/24/14 | | | | | |
| FATHER deceased | | | | | |
| MOTHER deceased | | | | | |
| BROTHERS / SISTERS / CHILDREN (Name and Relationship) Tamara Robb Sandy Weber Charlene Lusher | | | Pipilian, NE Nanceato, MN Mankato | | |
| AGENT'S NAME (Print or Type) D. GLAZE #3627 | | AGENT'S SIGNATURE [Signature] #3627 | | DATE 01/24/14 | |
| SUPERVISOR'S NAME (Print or Type) Steve Gilpin | | SUPERVISOR'S SIGNATURE [Signature] | | DATE 2/3/14 | |

CONFIDENTIAL

W-G Defendants 01539

APPENDIX F

DEPOSITION EXHIBIT 15

STEVEN HAROLD ANDERSON (DOB: XX/XX/XXXX)

Criminal History

Available to the Walsh County State's Attorney

| <u>Location</u> | <u>Arrest Date</u> | <u>Charge</u> | <u>Class</u> | <u>Disp. Date</u> | <u>Disposition</u> |
|----------------------------|------------------------|----------------|--------------|-----------------------|--|
| Minnesota Mankato PD | 09/05/ 1972 | Agg Forgery | Felony | 10/13/ 1972 | Convicted; 10 years Served 10/18/ 1972 Paroled 06/29/ 1972 Parole Revoked 08/11/ 1975 Paroled 10/13/ 1976 Parole Revoked 05/10/ 1978 |

App. 39

| | | | | | |
|---------------------------|----------------|----------------------------------|--------|----------------|---|
| | | | | | Paroled 08/10/ 1978 |
| Idaho Caldwell PD | 03/24/ 1980 | Fugitive from ND NSF Cks | Felony | n/a | n/a |
| Idaho ADA County SO | 01/03/ 1984 | NSF Cks | Felony | 04/26/ 1985 | Convicted; 3 years jail suspended for 3 years probation |
| Idaho ADA County SO | 05/07/ 1986 | Probation Viol | Felony | 12/05/ 1986 | Dismissed |
| Idaho ADA County SO | 10/22/ 1987 | Probation Viol | Felony | 01/25/ 1988 | Convicted; Probation reinstated; Restitution of \$600 |
| Idaho ADA County SO | 02/26/ 1988 | Grand Theft - 5 Cts | Felony | 06/22/ 1989 | Dismissed |
| Idaho ADA County SO | 08/17/ 1990 | Warrant from GEM County | Felony | | |

App. 40

| | | | | | |
|-------------------------------|----------------|-----------------------------|---------------|----------------|---|
| GEM County SO | 08/17/ 1990 | NSF Cks | Felony | 04/23/ 1991 | Convicted; Probation 2 years; Restitution & Ct. Costs: \$17,801 |
| | | Grand Theft | Felony | 04/23/ 1991 | Dismissed |
| Idaho ADA County SO | 03/11/ 1991 | Theft - False Promise | Felony | 04/24/ 1991 | Reduced to Misdemeanor; Convicted; 90 days jail, 60 suspended for 2 years of probation; Restitution \$2,093 |
| Idaho GEM County SO | 04/23/ 1991 | NSF Cks | Misd | n/a | n/a |
| Idaho Valley County SO | 12/09/ 1992 | NSF Cks | Misd | n/a | n/a |
| Minnesota Burnsville PD | 06/22/ 1994 | Theft | Gross Misd | 10/06/ 1994 | Convicted; 2 year probation; Imposition of sentence |

| | | | | | |
|------------------------------|----------------|---------------------------------------|--------|----------------|--|
| | | | | | stayed; Restitution determined by PO |
| Minnesota Faribault PD | 08/25/ 1994 | Theft- False Represent ation | Felony | 04/10/ 2000 | Convicted; 1 year 1 day, credit for time served; \$50 fine; \$3,841 restitution NOTE: It appears that he was confined at MN Cor Fac St. Cloud, but actual confinement dates are not available |
| North Dakota Morton | 02/06/ 1995 | Theft | Felony | 02/15/ 1996 | Convicted; Sentenced to 5 years, |

| | | | | | |
|-----------|--|--|--|--|--|
| County SO | | | | | <p>with 1 year suspended for 3 years</p> <p>Penitentiary records indicate he served his time from 02/20/1996 until released on 02/19/1999 (parole/ probation)</p> <p>Penitentiary records indicate he went back into custody 11/22/1999, where he remained until</p> |
| | | | | | 03/25/2000 |

| | | | | | |
|-----------------------------|------------|-------------------------|--------|------------|---|
| | | | | | when he received a final discharge |
| South Dakota Aberdeen PD | 06/27/1996 | Grand Theft over \$500 | Felony | 10/25/1996 | Convicted; 5 years penitentiary, 3 years suspended NOTE: According to ND records, he was serving time at the ND State Penitentiary during this time |
| Idaho ADA County SO | 01/22/1997 | FTA - Contempt of Court | Felony | n/a | n/a NOTE: According to ND records, he was serving time at the ND State |

App. 44

| | | | | | |
|-----------------------------|------------|--------------------------|-------------------|------------|---|
| | | | | | Penitentiary during this time |
| Minnesota Detroit Lakes PD | 08/10/2002 | Agg Forgery - 5 Cts | Felony | 08/27/2003 | Ct 1 dismissed No disposition available for Cts 2-5 |
| Minnesota Jackson PD | 08/27/2003 | Bigamy Ck Forgery | n/a Felony | 10/06/2003 | Dismissed Convicted; 21 months concurrent which has been served; \$1,514.47 restitution; \$9 prosecution costs |
| Minnesota Jackson County SO | 09/16/2003 | Fugitive from ND | n/a | 10/06/2003 | Extradited to ND |
| Nebraska Sarpy County SO | 01/16/2004 | Fugitive from MN | Felony | 07/26/2004 | Extradited to MN |

App. 45

| | | | | | |
|---------------------------------|----------------|---------------------|------------------|----------------|--|
| Nebraska Sarpy County SO | 07/25/ 2004 | Fugitive from ND | Misd & Felony | n/a | Transferred to ND State Authorities |
| Minnesota Fergus Falls PD | 07/28/ 2004 | Theft/ False Rep | Felony | 08/08/ 2005 | Convicted; 21 months; Credit for 380 days; \$1,500 fine; \$10 court costs; Supply DNA sample; Restitution if claimed |
| | | Theft/ Swindle | Felony | 08/08/ 2005 | Dismissed NOTE: It appears that he went to the St. Cloud Cor Fac on 08/08/2005 and was released 09/22/2005 |

App. 46

| | | | | | |
|--------------------------------|----------------|-------------------|--------|----------------|--|
| Minnesota Clay County SO | 09/22/ 2005 | Theft | Felony | 12/04/ 2006 | Convicted; 26 months consecutive; Credit for 856 days; \$50 fine; \$10 court costs; Supply DNA sample; Restitution left open for 30 days |
| | | Theft/ Swindle | Felony | 12/04/ 2006 | No adjudication - lesser offense |
| | | Theft | Misd | 12/04/ 2006 | Convicted; 90 days consecutive; Credit for 90 days served |
| | | Theft | n/a | 12/04/ 2006 | No adjudication - lesser offense |

App. 47

| | | | | | |
|-----------------------------------|------------|----------------|--------|------------|---|
| | | Theft | Felony | 12/04/2006 | Convicted; 26 months consecutive; Credit for 856 days; \$50 fine; \$10 court costs; Supply DNA sample; Restitution left open for 30 days |
| | | Theft | n/a | 12/04/2006 | No adjudication - lesser offense NOTE: The Corrections information says he was discharged from the criminal justice system on 12/04/2006 |
| North Dakota Cass County SO | 12/05/2006 | NSF/No Acct Ck | Felony | 05/15/2007 | Dismissed |

App. 48

| | | | | | |
|--|----------------|--|--------|----------------|---|
| North Dakota Burleigh County SO | 05/22/ 2007 | Probation Viol - Theft by Deception | Felony | 06/18/ 2007 | Convicted; Sentenced to 48 months, with credit for 48 months NOTE: The ND Criminal History records do not show a conviction for theft by deception in Burleigh County; the case # is 95-K-1264 |
| North Dakota Morton County SO | 06/18/ 2007 | Parole Viol - Theft of Property | Felony | 07/10/ 2007 | Convicted; Sentenced to 53 months |
| | | Probation Viol | Felony | 07/10/ 2007 | Convicted; Sentenced to 53 months |

| | | | | | |
|--|----------------|--|-----|-----|---|
| | | | | | NOTE: The ND Criminal History records do not show that he was confined at the State Penitentiary at any time after 2000; the Morton County case #'s are 95-K-1153 & 95-K-2378 |
| Minnesota East Grand Forks PD | 07/27/ 2013 | Poss Pistol/ Ass Weapon by Ineligible Person | n/a | n/a | n/a |

App. 50

| | | | | | |
|--|----------------|---|----------------|------------|------------|
| North Dakota Grand Forks County SO | 07/30/ 2013 | Bail Jumping & Theft of Property | Misd Felony | n/a n/a | n/a n/a |
| North Dakota Grand Forks County SO | 08/09/ 2013 | NSF Chk | Felony | n/a | n/a |

APPENDIX G

**IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT**

File No. 50-2014-CR-44, 45, 46

[Filed January 30, 2014]

| | |
|------------------------|---|
| State of North Dakota, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| PAUL FRANCIS LYSENGEN, |) |
| WESLEY WAYNE SMITH & |) |
| HENRY H. HOWE, |) |
| |) |
| Defendants. |) |

**AFFIDAVIT OF DELICIA GLAZE IN SUPPORT OF
FELONY COMPLAINT/INFORMATION**

[1] Delicia Glaze with the Grand Forks Narcotics Task Force, after being sworn, deposes and states as follows:

[2] I am a licensed peace officer in the State of North Dakota, assigned to the Grand Forks Narcotics Task Force in 2013. I also serve as a Deputy with the Grand Forks

County Sheriff, and serve as the Deputy assigned to the Task Force for Internet Crimes Against Children since 2012. I graduated from the Lake Region Police Academy in 2008. I completed a bachelor's degree in criminal justice, earned in 2009. I spend a significant amount of time investigating illegal narcotics activity in the northeast region of North Dakota.

[3] I was involved in a controlled purchase of methamphetamine from Paul Francis Lysengen. The GFNTF had a confidential informant, identified hereafter at CI-13-1527, who purchased two "eight balls" of methamphetamine from Lysengen at his residence located at 15585 County Road 15, in Minto, within Walsh County, North Dakota. This purchase was done with GFNTF funds, and CI-13-1527 was wired throughout the transaction. The transaction occurred on May 22, 2013. After completing the purchase from Lysengen, CI-13-1527 was debriefed and the two "eight balls" of methamphetamine were taken as evidence. CI-13-1527 resides in rural Walsh County.

[4] On May 24, 2013, the GFNTF executed daytime know and announce search warrant at the same residence where the transaction occurred: 15585 County Road 15 in Minto. Lysengen was not in the residence at the time the search warrant was executed, but his step-son Anthony Haase was present. Eighty-three items were seized during the search, including numerous items of drug paraphernalia, items used to weigh and package controlled substances, various controlled substances (methamphetamine,

marijuana, and prescription pills), and evidence that the residence was occupied by Lysengen and Haase.

[5] As a result of these law enforcement activities, Lysengen was charged with the criminal offense of Delivery of a Schedule II Controlled Substance, a Class A Felony. This criminal charge is found in the records of the Walsh County District Court, State of ND v. Lysengen, File No. 50-2013-CR-231. Henry H. Howe, attorney at law of Grand Forks, North Dakota, is the attorney of record for Lysengen. The case has gone through preliminary hearing, and it presently scheduled for jury trial beginning April 7, 2013, at the Walsh County Courthouse. Judge Christofferson will be presiding over the trial. A “Notice of Status as a Habitual Offender” has been filed in this case, and Lysengen has been notified that he is facing a maximum sentence of life imprisonment.

[6] A second criminal complaint has also been brought against Lysengen. In that case, Lysengen is charged with one misdemeanor count and eight felony counts, all related to illegal drug activity and arising out of the evidence seized at the search warrant executed on May 24, 2013. Howe also represents Lysengen in that case. It can be located as State of ND v. Lysengen, File No. 50-2013-CR-435. The preliminary hearing for those charges is scheduled for January 30, 2014, at 10:00 AM in the Walsh County Courthouse. Judge Christofferson will be presiding over the preliminary hearing. If not already completed, the State intends to file a “Notice of Status as a Habitual Offender” in this case also. Lysengen will also be facing another maximum sentence of life imprisonment, and

several other maximum sentences of 20 years and 10 years.

[7] Criminal charges were also brought against Lysengen's step-son, Anthony Haase, arising out of the search warrant executed on May 24, 2013. Haase subsequently pled guilty to some of the charges pursuant to the terms of a plea agreement. Haase is presently incarcerated at the North Dakota State Penitentiary, with an expected release date in 2025. His criminal file in Walsh County is State of ND v. Haase, File No. 50-2013-CR-204.

[8] During November of 2013, while Haase was incarcerated at the Walsh County Jail, pending transfer to the North Dakota State Penitentiary, he was the recipient of several phone calls and visits from his step-father, Lysengen. During the phone calls, Lysengen informed Haase that he had discovered the identity of the confidential informant (CI-13-1527) who had made the controlled purchase at their house in Minto on May 22, 2013. It was clear during the conversations that both Haase and Lysengen were angry with CI-13-1527. They discussed handing out the "paperwork" that Lysengen was expecting to receive from his attorney, Howe, to their connections in the Grafton area so that others would know that CI-13-1527 had worn a wire during the controlled purchase on May 22, 2013. Haase made several phone calls to people he knew and provided the name of CI-13-1527 to these people. Haase even called CI-13-1527 directly and informed the CI that Haase knew she had worn the wire. Haase was very angry in the conversation. In one of the conversations between Haase and Lysengen, they discuss

trying to find a way to “set up” the CI. In fact, Lysengen told Haase words to the effect that Howe had told Lysengen that they needed to find somebody to setup the CI so that the CI’s testimony would not be credible in the cases against Lysengen.

[9] The communications between Lysengen and Haase continued after Haase arrived at the North Dakota State Penitentiary, although they became increasingly more ominous.

- a. In a letter postmarked November 29, 2013, Lysengen wrote to Haase, “They want life for me so F*** them. It will work out and hope we’ll be together later ... There will be a surprise [*sic*] for our little friend also. So relax & watch the show.”
- b. On or about December 9, 2013, Lysengen wrote to Haase about his plans to leave, and to make arrangements through a lawyer “out of the cities” to send money to Haase periodically. He also writes, “I’ll be doing what I said I was going to do. I hope things go well.” Again at the end of the same letter Lysengen writes: “I’m with my buddy in E Grand & if things work out will be a miracle. I’m sure it will. Just stay positive. There will be someone to visit our friend in [*rural Walsh County, the same location as CI-13-1527*] just to show how grateful we are of what was done. Right. I would like to tell you more but it will be done when we can talk.”

- c. On or about December 23, 2013, Lysengen again wrote to Haase, “ ... I’m at Andy’s still. I had the MRI & they want me to see someone in oncology or cancer ward. She said it could be cancerous so I’ll know more Monday. Say a prayer. I hope it’s fixable if it is. What we talked about when you were one [sic] bond. That’s the plan. Enough said The guy with the tree service in Drayton & someone else got busted. I’m sure she had something to do with it. She wanted me to do things with him. She is no good b****.” Lysengen continues the letter at a later time and tells Haase that “I guess I got cancer.” He talks about different treatments, and writes, “But the other plan might be better & then I might go. I’m on a time schedule with the other. I’ll write more. Its hard to explain some things.” At another later time, and in the same letter, Lysengen writes, “I got liver cancer & next week they are going try treating it. .. Then I’ll be on my way. So I hope it all goes well. I’m not sure on how to communicate, but have patience.” He ends this letter, “I get so mad that people go out of there [sic] say to F a person up. Right. Well Anthony, wish the best & remember I love you and I’ll do what I can for both of us.”

[10] In the meantime, Lysengen had been staying with “Susan” [believed to be Susan Aker] in Grand Forks; and also with CI-14-2995. CI-14-2995 reports that he met Lysengen while they were both in the Grand Forks County jail for a few days in 2013. On January 14, 2014, CI-14-2995 reported to the GFNTF that there had been a

meeting at his residence in East Grand Forks, MN, which had occurred on or about January 9, 2014. Present at the meeting were Lysengen, Wesley Wayne Smith, Becky [*believed to be Rebecca LaTraille*], Susan and CI-14-2995. A serious discussion took place regarding a plan to murder CI-13-1527. Utilizing the computer of CI-14-2995, Lysengen played the audio recording of the controlled buy so that the persons present could positively identify the voice on the recording as that of CI-13-1527. It was at this meeting that Smith produced a handwritten map showing the location of CI-13-1527's residence in rural Walsh County, distributed to the group. Lysengen also produced a photograph of CI-13-1527 which was shown to the group. Smith informed the group that CI-13-1527 was an antique collector. At that time, the plan was for CI-14-2995 to call CI-13-1527 and have a discussion with her about antiques and arrange a meeting with CI-13-1527. Smith informed the group that he had recently been out at CI-13-1527's residence, and that he had threatened CI-13-1527. Smith told the group, "I told you B, if I ever found out who turned Flash [*Lysengen*], I was going to kill them." Smith bragged that he had her by the throat more than once. Smith also made statements that CI-13-1527 would end up as fish bait on the north side of the Drayton Dam. Smith said, "Do you know that within 72 hours a 200 pound person would be 70 pounds," implying that the fish would eat the body. At the conclusion of this meeting, it was decided that there would be another meeting in rural Walsh County [*near the residence of CI-13-1527*] between January 22nd through the 24th. At that time it was expected that Rodney Avron would be back, and they would further discuss with him

how to deal with the dead body. Becky's role was to obtain a more current photo of CI-13-1527, as she looks different from the photo produced by Lysengen.

[11] The GFNTF is familiar with Rodney Avron. He is a known drug dealer in Grand Forks, and common associate with Lysengen. Lysengen had recently been arrested at Avron's house in Grand Forks. According to the information provided to the GFNTF, Avron was in Arizona for the purpose of picking up a load of Methamphetamine to bring back to North Dakota. After leaving Arizona, he was going to Washington state, and then returning to the Grand Forks area.

[12] After receiving the report from CI-14-2995 on January 9, 2014, the GFNTF began utilizing a body transmitter and digital recorders on CI-14-2995. Various forms of surveillance were conducted, corroborating that CI-14-2995 and Lysengen were often together. CI-14-2995 informed the GFNTF that he had recently attended meetings between Howe and Lysengen. CI-14-2995 informed the GFNTF that he a discussion with Howe about making CI-13-1527 "go away." CI-14-2995 quoted Howe as saying, "It would be good if the B***** died or went away [referring to CI-13-1527]. CI-14-2995 said that Howe stated, "Then Paul Lysengen wouldn't be facing half the shit he's facing." informed CI-14-2995 told them that a meeting was planned at the office of Henry Howe. CI-14-2995 also attended another meeting at Howe's office. Present were CI-14-2995, Lysengen and Howe. At that meeting, Lysengen asked Howe what would happen if CI-13-1527 didn't show up for Court. Howe responded, "They

wouldn't have a case." CI-14-2995 said, "Wouldn't it be easier to just set CI-13-1527 up?" Howe replied, "It would be better if she just didn't show up." Lysengen then stated to Howe, "If she shouldn't show up, then she won't show up for Court."

[13] On January 24, 2014, CI-14-2995 wore a body transmitter into a meeting taking place between Lysengen, CI-14-2995 and Henry H. Howe. Howe does not represent CI-14-2995, who has separate counsel. The recording of this meeting clearly picks up numerous statements by Howe evidencing Howe's knowledge and complicity of the plan to make CI-13-1527 "go away" so that she could not testify in the cases pending against Lysengen, and in which Howe was representing Lysengen. Howe explains to Lysengen and CI-14-2995 that the presence of CI-13-1527 is necessary in the State were to proceed with the prosecution of Lysengen. Howe opines that the controlled purchase done by CI-13-1527 on May 22nd, at the Lysengen/Haase residence, was the incident upon which the subsequent search warrant was issued. He tells them that if CI-13-1527 is not there, it is like a "house of cards" that falls down. The conversation then proceeds to a discussion about CI-13-1527 being gone 5 days before trial. Howe tells them that it needs to happen more than five days before trial, because otherwise it looks suspicious. Howe also opined that it gives the State longer to think about the difficulties of trial without the witness. Howe also stated that if the witness disappears five days before trial, "They [referring to the State] start out with the assumption that it isn't a coincidence. It blows me away,

but that's the message." The conversation then moves to the preliminary hearing, and when asked if CI-13-1527 would show up at the preliminary hearing scheduled for January 30, 2014, Howe said no, the State won't have her come. Howe then goes on to say that if CI-13-1527 does attend, he would likely cancel the preliminary hearing. He explains his strategy is that if CI-13-1527 were to appear at the preliminary hearing and be subject to cross-examination by Howe, if CI-13-1527 does not show up for the trial, then the State could likely use her testimony from the preliminary hearing at the trial. It was clear that Howe was conspiring with them to ensure that CI-13-1527 would not be on record in a criminal procedure, subject to cross-examination by Lysengen, so that the Confrontation Clause would be met.

[14] There was severe winter weather on January 24th, and the meeting scheduled for rural Walsh County between Smith, Lysengen and CI-14-2995 was canceled. Nevertheless, CI-14-2995 did wear a recorder and captured some conversations about the ongoing conspiracy. Not all conversations were able to be captured. Lysengen was hospitalized January 26-27, and was released the afternoon of January 27, 2014. During one of the recordings made by CI-14-2995, there is a discussion where Lysengen gives CI-14-2995 the first name of CI-13-1527, and then places a phone call to Smith to obtain the phone number of CI-13-1527 to give to CI-14-2995 in order to call and arrange a meeting. CI-14-2995 reports this as significant because as the plan developed over the weekend of January 24-26, it was discussed that CI-14-

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2995 would arrange a meet at a storage unit in Grand Forks. Lysengen told CI-14-2995 that the plan would be for CI-14-2995 to drug CI-13-1527, and get the CI's body into the CI's car to make it look like she died of asphyxiation. Smith provided the phone number to Lysengen, and the conversation ensued about different antiques that would intrigue CI-13-1527.

[15] The GFNTF became increasingly concerned about the safety of CI-13-1527. On January 23, 2014, the CI was contacted and asked to leave the area for safety purposes.

[16] Based on the totality of the circumstances, I believe there is probable cause that Lysengen, Smith and Howe are involved in a conspiracy to murder CI-13-1527. The plan has been discussed between the parties for several weeks. Howe has explained a legal "strategy" that involves CI-13-1527 being unavailable for Court proceedings. Contact has been made with CI-13-1527 by one of the conspirators. A map of her residence has been drawn and distributed to the conspirators. A photograph of CI-13-1527 has been distributed to the conspirators. Conversations have taken place about CI-13-1527 between the conspirators about this subject. CI-14-2995 has been given the name and telephone number of CI-13-1527 for the purpose of arranging a pretext meeting with her.

[17] I request that a Warrant of Arrest be issued for Paul Francis Lysengen, Wesley Wayne Smith and Henry H. Howe for the charge of criminal conspiracy to commit murder.

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[18] Dated this 30 day of January, 2014, in Grafton, ND.

/s/ _____
Delicia Glaze

[19] Subscribed and sworn to before me this 30 day of
January, 2014, in Grafton, ND.

JANET S. TURNOW-BERGER
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires: Apr. 26, 2014

/s/ _____
Notary Public