

23-5378

No. _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FILED

JAN 14 2023

OFFICE OF THE CLERK
SUPREME COURT, U.S.

FRANK JAMES CAPOZZI, *Petitioner*

V.

UNITED STATES OF AMERICA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE THIRD
CIRCUIT
PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Was the State search warrant obtained based on fraudulent, deceptive, misleading, and omitted statements that Magistrate Judge Richard Cronauer relied on as substantial in the Affiant's Affidavit of Probable Cause to issue the search warrant, thus violating both the Pennsylvania Constitution and the Fourth Amendment of the Constitution of the United States?

Suggested answer: Yes.

II. Does the fact pertaining to an issue of fraudulent, deceptive, misleading, and omitted statements warrant a *Franks Hearing* to rectify the statements of the Affidavit of Probable Cause?

Suggested answer: Yes.

III. Does the fact that the Pennsylvania Office of the Attorney General's Special Agent, Douglas Hilyard, use of fraudulent, deceptive, misleading, and omitted statements in the Affiant's Affidavit of Probable Cause to issue the search warrant, as well as, his evasive omissions and elusive answers evidenced in his testimony at the suppression hearing constitute a "*fraud on the court*" and a "*miscarriage of justice*"?

Suggested answer: Yes.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

RELATED CASES

- U.S. District Court, Middle District of PA (Scranton) Case No.: 3:16-CR-347
Suppression Hearing, 2019 U.S. Dist. LEXIS 55075 (March 25, 2019)
- U.S. Court of Appeals, Third Circuit, Case No.: 20-2953
Affirmed, 2022 U.S. App. LEXIS 8712 (April 1, 2022)
- U.S. Court of Appeals, Third Circuit, Case No.: 20-2953
Sur Petition Denied, 2022 U.S. App. LEXIS 299908 (October 27, 2022)

JURISDICTIONAL STATEMENT

This Court would have jurisdiction over the judgment under 28 U.S.C.

1254(1) as is stated:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Respondent has never taken any position on the request for an Extension of Time to File Petition for Writ of Habeas Corpus.

CONSTITUTIONAL PROVISIONS

The constitutional provisions fall mainly back to the Pennsylvania State Constitution at Article I, Section 8, whereby no search warrant shall issue without probable cause, which mirrors the Fourth Amendment of the same verbiage.

In their determination, the panel of judges in the Third Circuit Court of Appeals relied upon *United States v. Rickus*, 737 F.2d 360, 363 (3d Cir. 1984). Our test for determining the admissibility of evidence recovered from a search "is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Further stating In federal court, however, "evidence obtained in accordance with federal law is admissible." But Mr. Capozzi contends that Rickus, ID at 364, that

despite the ruling that a state enforcement officer can violate state statutory law and still be used in federal court (ID. 363), but when constitutional law is violated that the evidence obtained would **NOT** be admissible in federal court. In this case at bar, Hilyard not only violated the statutory law, but the constitutional law as well, with the false, deceptive, misleading, and omissions of what he presented as probable cause.

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Reasons for the Extension

Pursuant to this Court's Rules 13.5, 22, 30.2, and 30.3, Petitioner Frank J. Capozzi ("Mr. Capozzi") respectfully requests that the time to file his Petition for Writ of Certiorari in this matter be extended for 60 days up to and including 14 August 2023. The Court of Appeals issued its opinion on 1 April 2022, 2022 U.S. App. LEXIS 8712 (3rd Cir. 4/1/2022) [Appendix ("App.") A] and denied Sur Petition For Rehearing en banc on 27 October 2022, dated 4 November 2022, 2022 U.S. App. LEXIS 299908 (App. B) and received by First Class US. Mail on 12 November 2022 over the dissent of a majority of the judges. Absent an extension of time, the Petition for Writ of Certiorari would have been due on January 27, 2023. Mr. Capozzi, after having had received the decision on 12 November 2022, was in the process of writing his Petition for Writ of Certiorari, but was incarcerated in the Segregated Housing Unit ("SHU, HOLE") for an incident report, currently being argued in the District Court of the Middle District in Scranton (Case No. 23-CV-0520). Mr. Capozzi was denied the meaningful access to the Law Library, the printing and copying resources (meaningful access to the resources of the Law Library [Bounds v. Smith]) did not work, and had attended the Library 3 times since 5 December 2022 until transfer on 20 January 2023.

Pursuant to the Rules of the Supreme Court, Mr. Capozzi had filed an

APPLICATION TO EXTEND TIME TO FILE PETITION FOR WRIT OF CERTIORARI to the best of his knowledge, dated 14 January 2023, some 13 days before his deadline to file by U.S. First Class Certified Mail [7021 0350 0001 5904 7462] and was picked up an unknown individual at the Postal Facility on 23 January 2023. (App. C). On 6 February 2023, Mr. Capozzi mailed Justice Brown [Jackson] a letter of inquiry/explanation as to the status of his case [time-stamped as received on 16 February 2023], receiving an answer from the Clerk of Court dated 17 February 2023 [time-stamped as received on 7 March 2023], further requesting an affidavit or declaration pursuant to Rule 29.2. (See App. D). Mr. Capozzi was moved on 9 February 2023 from USP Allenwood [having arrived from USP Lewisburg on 2 February 2023 where he had no mail or access to legal resources of Law Library] to the HOLE in LSCI Allenwood and did not receive any mail until the middle of March 2023, prompting his 23 March 2023 letter [to preserve his filing date and his Property Return Sheet dated 22 March 2023 representing when he finally received his legal property back] in answer [to the 17 February 2023 notice, received by the court clerk on 30 March 2023] and the Court Clerk's return answer on 31 March 2023 [received several days before transfer to the halfway house]. (See App. E).

Mr. Capozzi was further stuck in the HOLE during transfer at USP Lewisburg, and again in both USP Allenwood and the HOLE in LSCI Allenwood while waiting for bed-

space, which was released on 21 March 2023. Mr. Capozzi despite his attempts to continue his work, was released to the Halfway House at Scranton Pavilion (Firetree, LTD, a private contractor), whereby he was denied his right to attend the Law Library in the Federal Courthouse or the Lackawanna County Courthouse [provable by the request slips that were filed and never answered timely or properly] having received an answer to the first request after 4 days [told to wait on the BOP] and another request dated 1 May 2023 [after an extraordinary delay to answer] signed 3 May 2023 [some 5 days prior to Mr. Capozzi's release]. (See App. F)]. The personnel at Scranton Pavilion did not respect Mr. Capozzi's right to access of the courts (First Amendment), nor did they allow Mr. Capozzi to exit the building without a specific, pre-approved pass to do so.

For these reasons set forth above, Petitioner is filing this Application more than ten days after that date. See Supreme Court Rule 13.5. Mr. Capozzi invokes that this Court would have jurisdiction over the appellate judgment under 28 U.S.C. 1254(1). Respondent takes no position on the Mr. Capozzi's request.

By these actions of the Federal Bureau of Prisons ("BOP") and the Halfway House, Scranton Pavilion ("Pavilion", owned by Firetree, LTD.), and its employees have not only denied Mr. Capozzi his ability to properly and timely file his Petition for Writ of Certiorari, but blatantly violated his First and Fourteenth Amendment rights.

CONCISE STATEMENT OF THE CASE

State Case History

The Pennsylvania Office of the Attorney General ("PAOAG") began its investigation of Mr. Capozzi's alleged insurance fraud on Allstate Disability Insurance in November 2011. Subsequently, after an interview with Mr. Capozzi and his alleged co-defendants on 17 January 2013, on 23 April 2013, the PAOAG lodged charges against Mr. Capozzi and two other co-defendants in Magisterial District Court, Wilkes Barre, PA.

On 13 June 2013, Vito DeLuca, Mr. Capozzi's then-attorney of record, had received from Mr. Capozzi all the documents from Hindi Beginnings, Inc. and his tax filings from the 2011 tax (filed on 12 February 2012) to exonerate him in this accusation. At a 25 June 2013 preliminary hearing, the PAOAG had requested that Mr. Capozzi sign an IRS Form 2848, giving them the Power of Attorney for the IRS to verify the documents given to them by Attorney DeLuca (which they were verified).

On 30 July 2013, despite the PAOAG's receipt of the IRS filings for Mr. Capozzi's 2011 tax year, the PAOAG's Special Agent, Douglas Hilyard ("Hilyard"), had filed a totally fraudulent Affidavit of Probable Cause ("APC") to obtain a search warrant. Again, Mr. Capozzi was totally cooperative with the

exculpatory evidence and his signing the Form 2848, but after a conversation with an IRS agent (Agent Veater) that Agent Jason Tyson ("Tyson") knew, had convinced Hilyard that there was a federal tax fraud.

On 31 July 2013, Hilyard along with his partner, Tyson, executed a search warrant which yielded the thumb-drive that was given to the IRS, who filed a target letter on Mr. Capozzi on 14 May 2015. The statements made and sworn to in the affidavit of probable cause were totally false, fraudulent, deceptive, and misrepresentations of the truth had literally resolved to his closing paragraphs in his APC for the search warrant at paragraphs H. and I., whereby he depicts in his experience that fraudulent Federal tax returns are involved (APC, p. 6, paragraph H [see APP G]). His actual request for the search warrant is over-broad as Hilyard was aware that the business office/music studio was separated from the rest of the living quarters in the house and was over-broad when he requested that the entire premise be searched (APC, pgs. 6-7, paragraph I).

His sworn APC, at paragraph I, is contrary to the testimony in the State court trial, as he swore to Magisterial Judge Cronauer that Hindi Beginnings, Inc. had not conducted any real business, refuting Mr. Capozzi's income on his Federal Tax filing. These misleading statements, which had nothing to do with the state investigation led the magistrate to issue the search warrant, thus violating the

provisions of Article I, section 8 of the Pennsylvania Constitution. In reviewing the *Suffolk University Law Review*, 41 Suffolk U. L. Rev. 445, addressing perjured affidavits and the Fourth Amendment, they start off with the statement “*Though shalt not bear false witness against thy neighbor.*”¹ and this was bearing the false witness against Mr. Capozzi. In this case at bar, the protections of the Pennsylvania Constitution were non-existent by the story that Hilyard testified to, circumventing these protections and the Fourth Amendment. See *Baldwin v. Placer County*, 418 F.3d 966, 970 (9th Cir. 2005).

The Supreme Court has not addressed the doctrinal questions involving the false testimony of probable cause to obtain a search warrant since *Franks v Delaware*,² which predates *Illinois v. Gates*³ now governing the determination of probable cause in a search or arrest warrant. This practice removes the Due Process and Equal Protect of the law from the citizenry and makes it permissible for law enforcement to bear false witness to serve their end goals, not following the procedure of law.

Procedural History

On 4 October 2018, Attorney Joseph G. McGraw (“McGraw”) filed a

1 Exodus 20:16 (King James Version)

2 *Franks v. Delaware*, 438 U.S. 154 (1978).

3 *Illinois v. Gates*, 462 U.S. 213 (1983)

Motion to Suppress Evidence (ECF doc. 111), whereby Mr. Capozzi had wrote his own brief that addressed the false, fraudulent, deceptive statements used by Hilyard in his APC and omissions which were never argued by McGraw. McGraw's brief [filed 10 January 2019, ECF doc. 126] never called for a Franks hearing. Mr. Capozzi had always asserted that the search warrant was illegal and a violation of the Pennsylvania Constitution because it did not have an indicia of probable cause.

On 17 January 2019, the court held a hearing to determine the legality of the search warrant and the use of the evidence obtained in the State search warrant. Hilyard was elusive in his answers and supplemental briefs were ordered by the Court. This motion was later denied by Judge James M. Munley on 25 March 2019 (APP I, ECF docs. 154 and 155). As a result of Mr. Capozzi's wife and co-defendant decision to testify for the government and that McGraw would not file an interlocutory appeal, Mr. Capozzi was forced to accept a plea agreement to fight his suppress hearing order (ECF doc. 155), which he changed his plea at the Change of Plea Hearing on 11 September 2019 (ECF doc. 179).

Mr. Capozzi was sentenced on 9 September 2020 and McGraw had immediately filed his appeal on 24 September 2020 (ECF doc. 273) , which was docketed at 20-2953 by the United States Court of Appeals ("USCA") on 25

September 2020 (ECF doc. 274). After a series of delays involving the Transcript Purchases, on 18 December 2020, the transcripts were docketed as filed on 10 December 2020 (APP J, ECF doc. 17) and on 20 January 2021, the transcripts were docketed as being filed on 29 January 2021 (APP J, ECF doc. 18).

On 19 March 2021, the electronic filing of Mr. Capozzi's Electronic Brief and Appendix was docketed (APP J, ECF docs. 22 and 23) and the hard copies of both were received and docketed on 25 March 2021 (APP J, ECF docs. 24 and 25). The Government filed their Electronic Brief and Appendix on 23 April 2021 (APP J, ECF docs. 29 and 30), and the hard copies were docketed on 27 April 2021 (USCA ECF docs. 31 and 32).

On 1 April 2022, the USCA Opinion was docketed (APP J, ECF doc. 42) affirming the District Court's ruling in the suppression hearing (ECF doc. 155). On 28 April 2022, Mr. Capozzi filed his Pro Se Motion to Extend Time to File Petition for Rehearing (APP J, ECF doc. 45) with a response of the government by date of 9 May 2022. On 20 May 2022, Circuit Judge Greenaway Jr. Ordered Mr. Capozzi's former attorney McGraw to send him the requested documents Mr. Capozzi requested of the USCA and McGraw to file a Certificate of Service with the Court when completed. Thus, Judge Greenaway granted Mr. Capozzi 60 days from the date of the Certificate of Service was filed to file his Petition for

Rehearing. The Certificate of Service was filed on 23 May 2022 (APP J, ECF doc. 47), giving Mr. Capozzi a deadline of 23 July 2023 to file.

On 3 June 2022, Mr. Capozzi was order to pack his property and bring to the Fort Dix-FCI R & D for transfer to a Camp, but Mr. Capozzi (despite being packed) did not transfer out until 28 June 2022. He was not sent to the camp but held in transfer status in MDC Brooklyn awaiting transfer. On 21 July 2022, Mr. Capozzi filed another Motion to Extend Time to File Petition due to his personal property was still in-transit, although he was not (Certificate of Service dated 18 July 2022) (APP J, ECF doc. 48). On 25 July 2022 (APP J, ECF doc. 49), Judge Greenaway had Ordered another Extension to File for sixty days from the date of the Order, giving Mr. Capozzi until 26 September 2022 to file his Petition for Rehearing.

Finally, on 22 September 2022 (APP J, ECF doc. 50), Mr. Capozzi had filed his Petition for Rehearing (Certificate of Service dated 20 September 2022) and the panel was appointed. On 4 November 2022, the authoring Judge Greenaway Ordered that the en banc panel had failed to vote for the rehearing and the Sur Petition for Rehearing was thus denied (APP J, ECF doc. 51).

Discussion

Delays

In this Honorable Court's determination of this case at bar, the issue raised in the Application is one addressing of the actual access to the courts that Mr. Capozzi was denied based on his original filing on 14 January 2023 (App. A) that was hand-written in the HOLE without the benefit of the Law Library to know what forms to use or how to file as a Pro Se litigant. Despite these violations, Mr. Capozzi had still preserved his original date by his filing under the Prisoner Mailbox Rule of Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) as a true unrepresented litigant, as decided in the case of Cretacci v. Call, 988 F.3d 860 (6th Cir. 2021), denied because of having representation. In this case at bar, Mr. Capozzi has not had any representation after the affirmation of the District Court by the Courts of Appeals (Third Circuit) on 1 April 2022. Mr. Capozzi, as the record will reflect, had to extend his time to file his Petition for Rehearing due to lack of cooperation of his former attorney, Joseph G. McGraw, to give him the documents needed to perfect said petition, the transfers within the BOP, and the BOP keeping Mr. Capozzi in Segregated Custody waiting for bed space.

On all levels, Mr. Capozzi's First and Fourteenth Amendment rights have

been violated, prompting this Application to Extend Time to File Petition For Writ of Certiorari. Under the Fourteenth Amendment, the Constitution states:

Amendment XIV Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

that grants equal protection of the law and the due process of the law. In this case at bar, those rights were removed when under the First Amendment's freedom of speech (ruled as access to the courts) was violated due to Mr. Capozzi having no meaningful access to the courts or meaningful access to the legal resources needed to fully engage in pursuing his right to the courts in his filings. As the First Amendment is written:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

as decided by this Honorable Court in the case of *Bounds v. Smith*, 430 U.S. 817 (1977), which Justice Marshall and this panel decided the merits of the case based on the constitutional ruling found at *Younger v. Gilmore*, 404 U. S. 15 (1971)(a *per curiam* decision States must protect the right of prisoners to access to the courts by providing them with law libraries or alternative sources of legal

knowledge) to overrule that recent case, but, for reasons explained below, we decline the invitation and reaffirm our previous decision. As is the exact nature of the issue involved in this Application because of the “disciplinary or punitive” procedures of the SHU, Mr. Capozzi was not only denied his right to utilize the Law Library and its resources, but he was denied his Legal papers to help him to hand-write an application that was suitable to the requirements of the Supreme Court.

The same issue continued when Mr. Capozzi was transferred to the Pavilion, and the staff had refused to let Mr. Capozzi attend the Lackawanna County Law Library or the Federal Courthouse Law Library to do the research and use the legal resources needed to perfect this Application. As stated on page 3, supra, [exhibited in App. D], the management staff at the Pavilion refused to let Mr. Capozzi go to Law Library [originally pending BOP’s intervention] that never came to fruition. And again, redressed by request slip on 1 May 2023, stated that Mr. Capozzi had to use his leisure time for these activities, which is: 1) not long enough to do any meaningful work; and 2) restrictive of the personal activities that Mr. Capozzi needed to get done. Recalling that the second request [answered with the leisure time issue] was returned to Mr. Capozzi after his release from the Pavilion, but back-dated to 3 May 2023, a breach of professional protocol.

Since his release from inside the walls of custody, Mr. Capozzi has been and continues to frequent the Veterans Affairs Medical Center ("VA") in Wilkes Barre, PA requiring him to travel, by bus, to and from the VA. Mr. Capozzi is also disabled, in that he cannot properly walk due to his need of a left hip replacement, delayed to to his overweight condition [also being treated at the VA]. Mr. Capozzi just had surgery last week, with a post-surgery follow-up visit for the 12 June 2023.

Fourth Amendment Issues

The Fourth Amendment of the United States Constitution provides in relevant part that "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." U.S. Constitution, Amendment IV. Accordingly the Fourth Amendment lays out four requirements of a valid warrant. The Warrant must: 1) be based on probable cause; 2) be supported by a sworn affidavit; 3) describe particularly the place of the search; and 4) describe particularly the persons or things to be seized. Groh v. Ramirez, 540 U.S. 551, 557 (2004).

The Fourth Amendment protects not only property interests but certain expectations of privacy as well. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576. Thus, when an individual "seeks to preserve something as

private,” and his expectation of privacy is “one that society is prepared to recognize as reasonable,” official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings “of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted.” Carroll v. United States, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543. Article 1, Section 8 of the Pennsylvania provides that: “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.” Art. 1, Section 8 of the Pa. Constitution. The primary objective of the Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution is the protection of privacy. Warden v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) (stating that the “principal object of the Fourth Amendment is the protection of privacy”); Jones v. United States, 357 U.S. 493, 498, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958) (“The decisions of this Court have time and again

underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.”); Commonwealth v. Waltson, 555 Pa. 223, 724 A.2d 289 (citing Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887, 897–98 (1991) for the 4 propositions that “this Court has held that embodied in Article I, Section 8 is a strong notion of privacy, which is greater than that of the Fourth Amendment”); Commonwealth v. Gordon, 546 Pa. 65, 683 A.2d 253 (1996) (reiterating that legitimate expectations of privacy are protected by Article I, Section 8); Commonwealth v. Blystone, 519 Pa. 450, 549 A.2d 81, 87 (1988) (reiterating that “Article I, § 8 creates an implicit right to privacy in this Commonwealth”).

A. Probable Cause for the Items seized did not exist

“Probable Cause for searching a particular place exists in an affidavit when the affidavit sets forth facts constituting a substantial basis for finding a fair probability that first, a crime has been committed, and second, the particular place may contain the fruits, instrumentality or evidence of the crime committed.”

United States v. Conley, 813 F. Supp. 372, 381 (W.D. Pa. 1993), rev’d on other grounds (citing Illinois v. Gates, 462 U.S. 213, 236, 238-39 (1983)). Probable Cause requires a fair probability that items sought will be at the location. Gates, *ibid.* Further, in Pennsylvania, the items in a warrant must be described with

particularity and not generalized. Commonwealth v. Grossmen, 555 A.2d 896 (Pa. 1989). The standard for granting a search warrant requires that the warrant set out facts and circumstances that establish a fair probability that contraband or evidence of a crime will be found in a particular place. Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985).

In the matter before the Court, the warrant simply states that “It is expected that by examining documentation pertaining to Hindi Beginnings, LLC. That the Commonwealth will find out that Hindi Beginnings, LLC. did not conduct any real business that would support a reported gross receipts/sales of the reported \$47,563.58 and that Mr. Capozzi did not receive a legitimate salary as claimed in his documents provided to the PAOAG.” Furthermore, On June 13, 2013, Mr. Capozzi’s lawyer provided Agent Hilyard with organizational minutes, directors meeting minutes, IRS forms 1120 and K-1 for Hindi, and Mr. Capozzi’s relevant tax returns. At this point, Agent Hilyard found zero evidence of a crime. Despite zero evidence that a crime was committed, and Mr. Capozzi’s cooperation with this investigation, Agent Hilyard took it upon himself, acting as officer of the government to engage in a wild-goose chase and apply for a search warrant of Mr. Capozzi’s residence at 465 South Franklin Street, Wilkes Barre.

Therefore, Defendant requests that this Honorable Court suppress any and all

evidence seized from the residence as probable cause did not exist to search said residence.

B. And E. The Warrant was Overbroad and Failed to State with any Specificity the Items to be Searched and Seized. Good Faith Exception to the Exclusionary Rule is not Applicable here

A warrant must particularly describe the place to be searched and particularly describe the items to be seized. Groh v. Ramirez, 540 U.S. 551, 557 (2004) Even if a search warrant lacked sufficient particularity, a motion to suppress may be denied based upon the good faith exception to the exclusionary rule. The purpose of the exclusionary rule is to “deter police conduct that violates constitutional rights of citizens.” United States v. Zimmerman, 277 F.3d 426, 436 (3d Cir.2002) (citing United States v. Leon, 468 U.S. 897, 919, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). The good faith exception to the exclusionary rule applies when an officer “executes a search in objectively reasonable reliance on a warrant's authority.” United States v. Hodge, 246 F.3d 301, 307 (3d Cir.2001) (quoting United States v. Williams, 3 F.3d 69, 74 (3d Cir.1993)). The exception operates to exclude evidence seized pursuant to an invalid warrant when a “reasonably well trained officer would have known that the search was illegal despite the magistrate [judge's] authorization.” Leon, 468 U.S. at 922 n. 23.

Even though the “mere existence of a warrant typically suffices to prove that

an officer conducted a search in good faith,” the Third Circuit has identified the following four narrow situations when application of the good faith exception is not appropriate: (1) The magistrate judge relies on a deliberately or recklessly false affidavit in issuing the warrant; (2) The magistrate judge abandoned his or her judicial role and failed to perform his or her neutral and detached function; (3) When the affidavit on which the warrant was based is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; or (4) The warrant is facially deficient in that it fails to particularize the place to be searched or the things to be seized. Hodge, 246 F.3d at 308 (citing Williams, 3 F.3d at 74 n. 4).

Here, Agent Hilyard conducted an insurance fraud investigation allegedly involving Mr. Capozzi. In which, Mr. Capozzi fully complied with said investigation. Specifically, Mr. Capozzi’s lawyer provided Agent Hilyard with organizational minutes, directors meeting minutes, IRS forms 1120 and K-1 for Hindi, and Mr. Capozzi’s relevant tax returns. Despite such, Agent Hilyard, an officer of the government applied for a search warrant of Mr. Capozzi’s residence.

The Search Warrant was facially invalid, as it did not describe the items to be seized with particularity. In fact, the Search Warrant simply states that: “It is expected that by examining documentation pertaining to Hindi Beginnings, LLC.

That the Commonwealth will find out that Hindi Beginnings, LLC. Did not conduct any real business that would support a reported gross receipts/sales of the reported \$47,563.58 and that Mr. Capozzi did not receive a legitimate salary as claimed in his documents provided to the OAG.” Further, it is believed and therefore averred, that Agent Hilyard, as a well-trained officer of the government knew the search was illegal after getting the magistrate’s authorization. Agent Hilyard conducted an investigation, was provided all relevant documents by the Defendant’s lawyers, and was unsatisfied as he found no evidence that a crime was committed.

Hilyard also made no effort to limit the scope of the search. The search yielded such items as a receipt for Capozzi’s fishing license and recipes that were saved to his computer. The search amounted to a fishing expedition that allowed Hilyard to comb through every detail saved to the computer in Capozzi’s home.

Hilyard took it upon himself to apply for a search warrant of Mr. Capozzi’s residence, and in doing so got an invalid warrant, as it failed to particularize the items/things to be seized. Therefore, Defendant requests that this Honorable Court suppress any and all evidence seized from the residence as the warrant was not particular, and Officer Hilyard failed to act with good faith.

C. The Search Warrant is invalid as it is Pretextual in nature

In the matter before the Court, the Search Warrant in question is invalid, as it is pretextual in nature as it sought documents regarding Mr. Capozzi's business affairs involving Hindi Beginnings, LLC. Prior to seeking the search warrant, Mr. Capozzi in an attempt to cooperate with Agent Hilyard's investigation provided law enforcement with all relevant records they needed for the investigation. Yet, Agent Hilyard was not satisfied with this attempt at cooperation. He took it upon himself to apply for a search warrant of Mr. Capozzi's records, despite the absence of probable cause. Therefore, Defendant requests that this Honorable Court suppress any and all evidence seized from the residence as the warrant was pretextual in nature.

D. The Search Warrant is invalid as a State Agent was acting as an Agent for the Federal Government

In the matter before the Court, Mr. Capozzi was being investigated for state offenses specifically insurance fraud. Despite the offenses being federal in nature, Agent Hilyard, a state agent, working in his capacity as an officer for the Pennsylvania Office of the Attorney General sought a search warrant for Mr. Capozzi's residence located at 465 South Franklin Street, Wilkes Barre, Pa. Furthermore, Agent Hilyard was lacking probable cause when he applied for the Search Warrant in question. On June 13, 2013, Capozzi's lawyer provided Agent Hilyard with organizational minutes, Directors meeting minutes, IRS forms 1120 and K-1 for Hindi, and Capozzi's relevant tax returns. Hilyard sought a warrant

seeking any records and or documentation pertaining to this investigation. It sought all records and did not specifically state what type of information was sought from those records or expected be found therein.

The warrant was only sought after discussions with agents from the Internal Revenue Service. Therefore, Defendant request that this Honorable Court suppress any and all evidence seized from the residence as a state agent acted as a federal agent, and applied for the search warrant despite the offenses in question being federal in nature and there was no probable cause supporting the search warrant for the offenses for which Hilyard was under investigation.

F.A Fraud on the Court

To show a fraud on the court, the two (2) elements of judicial deception the Plaintiff or Petitioner MUST demonstrate are:

- (1) a substantial showing of deliberate falsehood or reckless disregard for the truth; see Liston v. County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997)(citing Hervey v. Estes, 65 F.3d 984, 988-89 (9th Cir. 1995); KRL v. Moore, 384 F.3d 1105, 1117 (9th Cir. 2004)("To support a 1983 claim for judicial deception, a Plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause."); and
- (2) Plaintiff must establish that the false statements and omissions were material to the finding of probable cause. See Klein v. City of Beverly Hills, 2015 U.S. Dist, LEXIS 192487 (C.D. CA 7/29/2015)

In this case at bar, Mr. Capozzi denotes that [in his STATEMENT OF FACTS section of his Petition for Rehearing (ECF doc. 50)] he points out all the

statements made in the APC and Suppression Hearing, that show the false statements, deceptions, misrepresentations and omissions that were incorporated into the APC that the magistrate relied upon to issue the warrant.

As this case at bar commenced on the evidence obtained from a state investigation of an alleged fraud and theft, Mr, Capozzi had provided the PA-OAG with exculpatory evidence, and has always asserted his innocence in the state case, raising the issue of a miscarriage of justice. The miscarriage of justice arose out of the fraud on the court, which without the search warrant would have been acquitted and no federal evidence would have existed. The delineation of these fraudulent statements demonstrate the cause for the default and the actual prejudice resulting in this miscarriage of justice. See Furman v. Sauers, 2021. U.S. Dist, LEXIS 105050, at *10 (E.D. PA 6/4/2021); Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

In this case at bar, when a court recognizes that it or the preceding court has suffered judicial deception of fraud on the court, there is a need to correct the fraud and to alleviate the miscarriage of justice. See United States v. Williams, 790 F.3d 1059, 2015 U.S. App. LEXIS 10631 (10th Cir. 2015) (vacated convictions to correct a fraud on the court and alleviate a

miscarriage of justice despite Government's appeal).

This issue is raised as an exceptional importance based on the use of fraudulent, deceptive, and misleading material representations of relevant facts and omissions of exculpatory statements, which induced Judge Cronauer to issue the search warrant. For these reasons, the search and seizure are invalid, and pursuant to the Pennsylvania Constitution, Article I, § 8, the lack of true probable cause violated Capozzi's constitutional rights, and the Fourth Amendment, Fifth and Fourteenth Amendments, as well.

Despite the fact that the search warrant was not suppressed, the district; court bed addressed the "highly misleading picture" painted by the affidavit of probable cause, as opposed to an accurate affidavit. The court declared that to prevail, the defendant(s) must make two showings: 1) That the agent, with at least a reckless disregard for the truth, made false statements or. omission that create a falsehood in applying for a warrant; and 2) that such statements or omissions were material, or necessary to the probable cause determination, See United States v. Lucidonio, 2022 U.S. Dist. LEXIS 45373, at *10 (E.D. PA 3/15/2022); see also Wilson v. Russo, 212 F.3d 781, 786-87 (3rd Cir. 2000)(quoting Sherwood v. Mulvihill, 113 F.3d 396, 399 (3rd Cir. 1997)).

The promise for the court to determine if there truly is probable cause, the

court must consider the addition of omissions, such as in this instant case, that during the agents 17 January 2013 interview, they omitted the fact that they were invited into the Hindi office [a separate room] to view any documents needed, such as Mr. Capozzi 's tax returns with his 1099-MISC form attached. The court must also review the false statements to reflect the truth to see if substantial probable cause existed, e..g., in this instant case, if the PA-OAG stated [in truth] that Mr. Capozzi informed thorn that in 2011 he was a 1099-MISC contractor, or that the PA-OAG and PA-UC (Pennsylvania Unemployment Compensation) had already had the bank account to verify that Mr. Capozzi had, in fact, collected UC benefits while contracting with Hindi, no search warrant. would have issued.

This analysis is embraced by the Court and is reflected in its ruling concerning a false statement in the affidavit of probable cause, "assuming arguendo" the statement is false the application for a search warrant contained sufficient probable cause without that statement. See Cousar v. Morgan, 2022 U.S. Dist. LEXIS 119648, at *15 (D. NJ 7/7/2022)(dismissed for failure to state a claim). In this instant case, if you. took away all the refuted statements made in their [PA-OAG's] APC, there would not be any substantial probable cause in the search warrant application. These particular statements of falsities and omission would change the magistrate's view on the existence of substantial probable cause,

which as Hilyard claimed, by his own sworn testimony, that he needed to search for evidence of a fraudulent Federal Tax Returns (APC, p. 6, § H) not part and parcel to the state charges or investigation.

As stated, supra, in his STATEMENT OF FACTS section, Mr. Capozzi had expected Attorney McGraw to raise these issues set forth in this petition to address the false, fraudulent, deceptive, and omitted facts in Hilyard's APC.

The fact that Hilyard omitted that Haas had received and shared the bank accounts information with him, demonstrates his propensity to commit knowingly reckless acts to hide the truth. The **Lucidonio** court made mention that to evaluate a claim of reckless omissions, a court "must first determine whether the agent, at the time of swearing the affidavit of probable cause, actually had knowledge of the information allegedly omitted. If so, then a determination must be made to the materiality of that information. In this case at bar, Hilyard knew what the statements were attested to be Mr. Capozzi and those statements were material for probable cause. Our Supreme Court specifically cautioned that "negligence." or "innocent mistake" is not a sufficient reasons for these occurrences. **Franks**, supra, at 171.

Despite her "absolute immunity," Amy Carnicella was responsible for drafting the affidavit of probable cause, with this court reiterating the requirements

of proof stated in **Sherwood**, supra. This court further explained misstatements and omissions, such as:

Even minor details can constitute a misleading statement where it demonstrates "that the affiant willingly and affirmatively distort[ed] the truth." Omissions are made with reckless regard when an officer withholds information that any reasonable person would understand "was the kind of thing the judge would want to know." See Cousar v. Morgan, 2022 U.S. Dist. LEXIS 119648, at *15 (D. NJ 7/7/2022).

as Mr. Capozzi highlighted in his STATEMENT OF FACTS section.

In the Third Circuit District Court (bankruptcy proceeding) the Actual Fraud Elements [found in the Headnotes], under New Jersey common law, fraud requires (1) a material misrepresentation or presently existing or past facts; (2) knowledge of belief by the party (defendant) of its falsity; (3) an intention that the other party rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. See Novartis Pharms. Corp. v. Adesanya (In re: Adesanya), 630 B.R. 435 (E.D. PA 7/14/2021). Using these principles of thought, Hilyard and Diller received a referral from Allstate on 15 November 2011 and started an investigation for insurance fraud. (APC, p. 3, § c, §§ g). On 17 January 2013, these agents presented themselves at the Capozzi residence/Hindi HQ and questioned the three co-defendants with regards to Hindi, its operation, and the roles the defendants played in the business. Mr. Capozzi explained that

due to Workman's Compensation Insurance requirements and its expensive costs, that the Officers (defendants) opted, on the PA Department of State's required filing (form), to be non-employed, operating corporate staff (Dept, of State has this document). Mr. Capozzi further informed the agents that he. was a 1099-- MISC contractor and invited them up to the office, offering to share and copy any corporate document they needed.

When the defendants surrendered in court [on 23 April 201.'3], they were given, a ccpy of the. Arrest Warrant/Affidavit of Probable cause, whereby Hilyard (the Affiant) .fraudulently testified that "Mr, Capozzi had reported income that he would have made if the business was making money." 'This statement is 1) a misrepresentation of the then existing fact; 2) Hilyard definitely had knowledge and belief of its falsity; 3) his intention was for both an arrest warrant (and later used the same generic APC for a search warrant APC); 4) Judge Cronauer had relied upon this fact to determine probable cause; and 5) the convictions and sentences are the damages suffered, **Novartis**, Id. at 457; see also *Green v. Didio (In Re: Green)*, 607 B.R. 804, 816 (E.D. PA 9/26/2019); *Jou v. Adalian. (In Re Adalian)*, 474 B.R. 150, 160 (M.D. PA 2012). The petitioner's burden to prove this as a fraud requires that his allegation is clear, unequivocal, and convincing evidence, which Mr. Capozzi explicitly demonstrates in the testimonies of the APC

and ST made by Hilyard. See Herring v. United States, 424 f.3d 384, 386-76, 2005 U.S, App. LEXIS 20300 (3rd Cir, 2005).

As seen by the comparison of both Hilyard's testimonies, we must rely on the surrounding facts and omissions [of questions that were elusive in answer] as well as the circumstances, In Re: Robbins, 562 B.R, at 109; In Re: Singh, 433 B.R. at 161.

The Court [in Lee v. Kereste, 2021 U.S. Dist. LEXIS 215340, at *12-13 (M,D. PA 11/8/2021)] approached its decision to dismiss the habeas corpus as he failed to show a fraud upon the court with clear., unequivocal, and convincing evidence (citing Herring, supra at 386-87). The Third Circuit recognizes that "an attorney's deliberate attempt to mislead the court may be such fraud as will reopen the judgment. Bandai America, Inc. v. Bally Midway Mfg. Co., 775 F.3d 70, 73 (3rd Cir. 1985). although in this case at bar, McGraw, who represented Mr, Capozzi in both the district and appellate courts, only focused on the search warrant APC being "overbroad" and a "fishing expedition" without Mr. Capozzi's regards to the falsities in both Hilyard's APC and his testimony at the suppression hearing, not to mention that the Assistant United States Attorney heavily relied on "truthful" sworn testimony.

In regards to showing the APC contained fraudulent, false statements, Mr.

Capozzi willingly and voluntarily handed over corporate and tax records to the PA-OAG and further assisted with a voluntary filing of a signed IRS Form 406 (authorization for the PA-OAG to receive a copy of the tax filing directly to them from the IRS) to verify Mr. Capozzi's statement, which were received and acknowledged. See United States v. Alamo, 2018 U.S. Dist. LEXIS 115728, at *19-20 (E.D. PA 7/11/2018)(denied for lack of merit in the Defendant's claim for ineffective Assistance of Counsel and the remainder of his claims were procedurally defaulted.). In this instant case, Mr. Capozzi was already in prison and was not privy to review the post-hearing and appellate briefs, but had written a brief and gave it to McGraw addressing not only the fraudulent, misleading deceptions, but also cited **Franks**, believing that a Franks Hearing would be appropriate in his Fourth Amendment challenge.

In this instant case, and similar to the findings of fraud on the court found in City of Livonia Emple. Ret. Svcs. v. Boeing Co., 711 F.3d 754, 760 (7th Cir. 2013), whereby based on the misunderstanding or misrepresentation of what the investigator told her, the Court dismissed with prejudice for fraud on the court. 'The same circumstances applies in this instant case as is pointed out in the testimony of the APC for the search warrant and the deceptive, elusive testimony of the only witness despite the mention of other agents involved and no supporting

testimony or affidavits in support of the uncontested facts.

As we previously discussed, supra, Hilyard omits the fact that Haas had already subpoenaed the bank records and received both Hindi and Mr. Capozzi's (and all the descendants bank records) prior to the search warrant application, Haas had called both Mr. Capozzi and Krissy (co-defendant) to interrogate them about the Unemployment Compensation issue.

In a binding case that is mirrored to this case at bar, the district court vacated Mr.. Williams' s judgment and sentence while dismissing the third superceded indictment. The fraud on the court is remedied in the manner stated, id., and a miscarriage of justice is prevented by a demonstration of innocence,. See United States v. Williams, 790 F.3d 1059, 1066-67 (10th Cir. 2015). Mr. Capozzi was and is innocent of the state charges and the search warrant should never h have issued, and therefore, the resulting "fruit of the poisonous tree" begot this federal case.

In this case at bar, Mr. Capozzi fully demonstrates the cause and prejudice of Hilyard's. fraud on the court, that was co-signed by the Deputy Attorney General, John T. Dickinson, knowing the falsities in the APC because of the IRS- authenticated tax returns, thus verifying Mr. Capozzi.' s income, which refuted the statements made in the APC, and the testimony at the suppression hearing - cause and prejudice. See Weathers v. Kaufman, 2021 U.S. Dist. LEXIS 12981, at. * 19

(E.D. PA 1/25/2021):(Petitioner does not assert that a fundamental miscarriage of justice will occur by the Court if it does not consider this claim, Id at21). In this instant case, Mr. Capozzi asserts that the fraudulent APC's sworn statements frauded the magisterial court to issue an unconstitutional search warrant [the exception under Rickus, at 364), and the continued deception, fraudulent,. and misleading testimony, as well as, omitted exculpatory information frauded the district court to deny suppression.

Reason for Granting Petition

The reasons for granting this petition come under the preservation of the Fourth Amendment and that when state law enforcement officials violate the respective State Constitution they take away the rights to a secure home or office. This principle is built upon and goes back to the Magna Carta in1215 and is the premise of our own Bill of Rights. The failure of this Honorable Court to NOT grant this petition would only enhance the law enforcers to use whatever method that so desire to just gain entry to the secure bonds of a man's castle. This miscarriage of justice would allow all law enforcement officers everything to perform illegal, unauthorized, unconstitutional searches of anyone they believe or suspect in being in violation of the law, which are perfunctory acts unjustified.

These unconstitutional acts, especially in this instant case, cause one to think

about how the magistrate resolved that probable cause existed for the state's case of insurance fraud, when it was clearly delineated in their APC that a federal crime had been committed, not exculpatory evidence. See **Leon**, Id. At 914 ; **United States v. Krull**, 480 U.S. 340, 349 (1987); **United States v. Spry**, 1909 F.3d 829, 835 (7th Cir. 1999)(internal quotations omitted), *cert. Denied*, 528 U.S. 1130 (2000). The Constitution prohibits the officer from making **ANY** perjurious or recklessly false statements in support of a warrant, as in this instant case as found in **Kelly v. Curtis**, 21 F.3d 1544, 1554 (11th Cir. 1994)(citation omitted).

Looking back on the Suffolk University Law Review it speaks volumes of bearing false witness and perjured affidavits and its relevance to the Fourth Amendment. This Honorable Court has not addressed this issue in over thirty (30) years and the lower court magistrate (not a lawyer) had granted a search warrant to state law enforcement for a federal investigation, whereby in **Gates**, the determination was based on the informants.

The Courts assume that police perjury in warrant affidavits is rare and deterred by the application process, but in reality, these practices have become a routine law enforcement activity. The enforcement officer gets to believing that an individual is committing a crime, the need to "embellish" facts of the participation become relevant in the investigation and warrant process.

The ease of examples found of falsified warrant applications provides powerful evidence of the serious problem of police perjury, In 2002 The United States Foreign Intelligence Surveillance Court ("FISC") reported in September 2000 that the federal government admitted to misstatements and omissions of material acts involving 75 applications related to terrorist attacks against the United States. The very same happens all over the country in every small town, borough, or whatever government is investigating, guilty before proven innocent based on perjured police testimony.

Conclusion

For the reasons set forth above and for good cause shown that *“justice delayed, justice denied”* [as coined by Dr. Martin Luther King] applies in this case at bar. Petitioner respectfully request that the time to file the Petition for a Writ of Certiorari in this matter be granted to the extended 60 days, up to and **including** August 14, 2023.

Dated this **14th** day of **August**, 2023.

Respectfully submitted,

/s/ **Frank J. Capozzi**

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APPENDIX

A