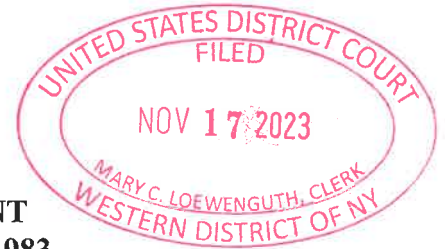


Revised 03/06 WDNV

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**



**FORM TO BE USED IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983
(Prisoner Complaint Form)**

All material filed in this Court is now available via the INTERNET. See Pro Se Privacy Notice for further information.

1. CAPTION OF ACTION

A. Full Name And Prisoner Number of Plaintiff: *NOTE: If more than one plaintiff files this action and seeks in forma pauperis status, each plaintiff must submit an in forma pauperis application and a signed Authorization or the only plaintiff to be considered will be the plaintiff who filed an application and Authorization.*

1. Samuel J Saedi

2. 1

-VS-

B. Full Name(s) of Defendant(s) *NOTE: Pursuant to Fed.R. Civ.P. 10(a), the names of all parties must appear in the caption. The court may not consider a claim against anyone not identified in this section as a defendant. If you have more than six defendants, you may continue this section on another sheet of paper if you indicate below that you have done so.*

1. Dave Price

4. Chad Arttrip

2. Village of Fredonia NY John Doe Supervisor of Price, Meyers and Matlak

5. Federal Bureau of Investigations John Doe Supervisor of Chad Arttrip

3. Brad Meyers

6. Louis Habig

2. STATEMENT OF JURISDICTION

This is a civil action seeking relief and/or damages to defend and protect the rights guaranteed by the Constitution of the United States. This action is brought pursuant to 42 U.S.C. § 1983. The Court has jurisdiction over the action pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), and 2201.

3. PARTIES TO THIS ACTION

PLAINTIFF'S INFORMATION *NOTE: To list additional plaintiffs, use this format on another sheet of paper.*

Name and Prisoner Number of Plaintiff: Samuel J Saedi MFN# 35819

Present Place of Confinement & Address: Chautauque County Jail

P.O. Box 190

Mayville, NY 14757

Name and Prisoner Number of Plaintiff: _____

Present Place of Confinement & Address: _____

Pg 1b

B, Full Name(s) of Defendant(s) Continued:

⑦ Patrick Swanson

⑧ Andrew Molitor

⑨ Jeffrey Grupa

⑩ Chautauqua County, NY John Doe Supervisor of Louis Habig and Jeffrey Grupa

⑪ Philip Maslak

⑫ Village of Fredonia, NY

DEFENDANT'S INFORMATION NOTE: To provide information about more defendants than there is room for here, use this format on another sheet of paper.

Name of Defendant: Dave Price

(If applicable) Official Position of Defendant: Detective/Investigator of Fredonia Police Department

(If applicable) Defendant is Sued in ☒ Individual and/or ☒ Official Capacity

Address of Defendant: 9-11 Central Avenue
Fredonia, N.Y 14063

Name of Defendant: Brad Meyers

(If applicable) Official Position of Defendant: Chief of Police of Village of Fredonia, NY Supervisor of Price and Maslak

(If applicable) Defendant is Sued in ☒ Individual and/or ☒ Official Capacity

Address of Defendant: 9-11 Central Ave
Fredonia, NY 14063

Name of Defendant: Chad Artrip

(If applicable) Official Position of Defendant: F.B.I. Special Agent

(If applicable) Defendant is Sued in ☒ Individual and/or ☒ Official Capacity

Address of Defendant: 1 F.B.I Plaza, Buffalo N.Y 14202 and/or
U.S. Department of Justice, 950 Pennsylvania Ave, N.W Washington D.C. 20530-0001

4. PREVIOUS LAWSUITS IN STATE AND FEDERAL COURT

- A. Have you begun any other lawsuits in **state or federal court** dealing with **the same facts involved in this action**?
Yes ☐ No ☒

If Yes, complete the next section. NOTE: If you have brought more than one lawsuit dealing with the same facts as this action, use this format to describe the other action(s) on another sheet of paper.

1. Name(s) of the parties to this other lawsuit:

Plaintiff(s): N/A

Defendant(s): N/A

2. Court (if federal court, name the district; if state court, name the county): N/A

3. Docket or Index Number: N/A

4. Name of Judge to whom case was assigned: N/A

Defendants Information Continued:

Pg 2a

Name of Defendant: Patrick Swanson

Official Position of Defendant: Former Chautauqua County, NY District Attorney

Defendant sued in ☒ Individual and/or ☒ Official capacity

Address of Defendant: 1 North Erie Street, Mayville, NY 14757

Name of Defendant: Andrew Molitor

Official Position of Defendant: Chautauqua County NY Assistant District Attorney

Defendant sued in ☒ Individual and/or ☒ Official capacity

Address of Defendant: 1 North Erie Street, Mayville, NY 14757

Name of Defendant: Louis Habig

Official Position of Defendant: Correction officer at the Chautauqua County Jail

Defendant sued in ☒ Individual and/or ☒ Official capacity

Address of Defendant: 15 E Chautauqua St., Mayville NY 14757

Name of Defendant: Jeffrey Brupa

Official Position of Defendant: Lieutenant at Chautauqua County Jail

Defendant sued in ☒ Individual and/or ☒ Official capacity

Address of Defendant: 15 E. Chautauqua St., Mayville, NY 14757

Name of Defendant: Chautauqua County NY John Doe Supervisor of Habig and Brupa

Official Position of Defendant: Supervisor at Chautauqua County Jail with Chautauqua County Sheriff's Department; Chautauqua County, NY

Defendant sued in ☒ Individual and/or ☒ Official capacity

Address of Defendant: 15 E. Chautauqua St., Mayville NY 14757

Defendant's Information Continued:

Pg 2b

Name of Defendant: Village of Fredonia, NY John Doe Supervisor of Dave Price, Brad Meyers and Philip Maslak

Official Position of Defendant: Supervisor of Dave Price, Brad Meyers and Philip Maslak

Defendants sued in ☒ Individual and/or ☒ official capacity

Address of Defendant: 9-11 Central Ave, Fredonia NY 14063

Name of Defendant: Chautauqua County NY Supervisor John Doe

Official Position of Defendant: Supervisor of Patrick Swenson and Andrew Molitor

Defendant sued in ☒ Individual and/or ☒ official capacity

Address of Defendant: 1 North Erie Street, Mayville NY 14757

Name of Defendant: Federal Bureau of Investigations John Doe Supervisor

Official Position of Defendant: Supervisor of Chad Antrip

Defendant sued in ☒ Individual and/or ☒ official capacity

Defendants Address: 1 F.B.I Plaza, Buffalo NY 14202

Name of Defendant: Philip Maslak

Official position of Defendant: Police Officer with the Fredonia Police Department

Defendant sued in ☒ Individual and/or ☒ official capacity

Defendants Address: 9-11 Central Ave, Fredonia, NY 14063

Name of Defendant: Village of Fredonia, New York

Official Position of Defendant: Municipal government

Defendant sued in ☒ Individual and/or ☒ official capacity

Defendants Address: 9-11 Central Ave, Fredonia, NY 14063

Statement of Claim(s) Overview

The claims stated herein are based on defendant's violations of Plaintiff's civil, constitutional and statutory rights under the law (pg 5 through pg 6). Specifically, claim one states that the defendants herein named violated Petitioner's rights under the Fourth Amendment of the U.S. Constitution protecting against illegal search and seizure; the Fourteenth Amendment of the U.S. Constitution ensuring due process and equal protection under the law; false arrest given Defendant's Meyers, Price, and Molitor's knowledge of statements the alleged victim made to two different government witnesses, at two separate times on the night of the alleged crime that he had walked from the location he was at to the location he was found at by the police, thus negating any kidnapping charge, therefore because of the alleged victim's statements to these two witnesses, one of which was Fredonia Police Officer Michael Hodkin, the arrest of Plaintiff was not supported by probable cause. Furthermore, those statements were deliberately withheld and suppressed from the grand jury, giving rise to not only a claim of Fourth Amendment violation for the facts stated above, but also to a violation of the Fourteenth Amendment. Furthermore, defendant's Meyers and Molitor willfully and deliberately violated NYCPL 60.45 by failing to record the interrogation that those defendants conducted with Plaintiff the day after the alleged crime and for the ensuing incarceration of Plaintiff for over seven years (5th and 14th Amendment violation; and failure of Defendants to protect Plaintiff from willful and deliberate violations of civil, constitutional and statutory rights and protections. These law enforcement officers acted under the color of state and federal law and deprived Plaintiff of rights, privileges, protections or immunity

secured by the Constitution or laws of the United States.

Fourth Amendment Illegal Search and Seizure Claim

As stated herein, Defendants Price, Artrip, Habig, and Brupa conducted an illegal search and seizure of Plaintiff's property through a defective and facially deficient search warrant. Whereas, given the New York State Supreme Court, Appellate Division, Fourth Department's August 11, 2023 decision (see Exhibit I) in executing a facially deficient search warrant, the defendant officers actions were unreasonable and given the Fourth Amendment's significance in our society and Courts, Plaintiff's private interest in the property searched and seized superseded the government's interest.

Wherefore, it is well established that a warrant deficient on its face is invalid and unconstitutional. Whereas, as determined by the New York Supreme Court, Appellate Division, Fourth Department, the search warrant in this matter was facially deficient and invalid, and thus the search of Plaintiff's property was unreasonable. Wherefore, the warrant failed to comply with the particularity requirement of the 4th Amendment; the warrant failed to properly incorporate supporting affidavits and was not restricted by reference to any crime; by not adequately describing the items to be seized and searched with any particularity, the search of Plaintiff's phone should be regarded as "warrantless" and search and seizure of property without a warrant is presumptively unreasonable. Therefore, given the strong Constitutional support and importance for the Fourth Amendment by Society and the Courts, the property searched and seized, a Plaintiff's private interests therein superseded the government's interest and there was a violation of Plaintiff's Fourth Amendment rights and protections under the U.S. Constitution.

Fourth Amendment False Arrest Claim

Plaintiff's arrest in this matter was not based on probable cause and violated promise made to Plaintiff by defendants Meyers and Molitor. Whereas, Defendants Meyers, Molitor, Swanson and Philip Maslak knew on the night of the alleged crime that no crime was in fact committed by Plaintiff given the alleged victim's statement to two different government witnesses including Fredonia Police Officer Michael Hodkin, that the alleged victim stated that he had walked from the location he was ~~at~~ at to the location he was found at. The next day, Former (then current) Chief of Police Brad Meyers contacts Plaintiff via phone to speak with him concerning the night before. Meyers asked Plaintiff to come in a speak with him and if he did, Plaintiff would not face any criminal charges based on the fact of what the alleged victim told one of his officers the night before. Based on these facts, Plaintiff agreed to speak with Meyers. Plaintiff then traveled to the Fredonia Police Station on August 15, 2016 and spoke to Meyers at 3:30 pm. Upon walking in, Plaintiff introduced Molitor and Molitor reiterated the promise that Meyers made to Plaintiff over the phone. At or about 3:40 pm Meyers and Molitor (with Molitor acting under the direction of then Chautauqua County District Attorney Patrick Swanson) conducted an off the record interrogation in violation of NYCPL 60.45 in that it was not recorded or documented in any way. (Exhibit Y) After Plaintiff gave his statement to defendants Molitor and Meyers left the police station and Plaintiff was waiting for a ride home. Then, in walks Fredonia Police Officer Philip Maslak (who wasn't part of the original investigation, did not take part in the interrogation and did not testify at either of Plaintiff's trials) and inexplicably charges Plaintiff with the crime of Kidnapping. These charges were not based on

probable cause and given the alleged victim's statements to Fredonia Police Officer Michael Hodkin on the night of the alleged crime that he walked and given the promise that Meyers and Molitor made to Plaintiff that he wouldn't be charged with a crime in exchange for his statement, Plaintiff never should have been arrested or charged with any crime. Furthermore, in regards to this issue, Defendants Molitor and Swanson failed to adequately perform their administrative and investigative functions and duties of their job by the facts stated herein and by failing to properly advise Defendants Meyers and Maslak (neither of whom was called as a witness by Molitor or Swanson at either of Plaintiff's trial in further coverup of their wrong doing) about the statements of the alleged victim given the night before and regarding the promise Molitor made to Plaintiff not to charge him based on the alleged victim's exculpatory statements in exchange for Plaintiff's statement on the matter in light of the subsequent charge placed against Plaintiff by Philip Maslak.

Furthermore, it is evident that Defendant Meyers, Maslak, Molitor and Swanson (given the subsequent charges, denial of bail and two criminal ~~the~~ trials that these Defendants did intend to confine Plaintiff and Plaintiff was in fact confined in jail and prison since August 16, 2016 and for the next subsequent seven years; Additionally, Plaintiff was conscious of the unjust confinement since day one of his incarceration and as a result of this unjust confinement, Plaintiff suffered physical injuries, mental health injuries and Plaintiff did not and would not ever consent to such confinement and the confinement was not based on probable cause, was not otherwise privileged, but was also malicious due to the more than two year cover up, lies and denials to the public and the court about this interrogation by defendants.

Fourth and Fourteenth Amendment Procedural Due Process and Substantive Due Process Claim respectively.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that "no person... shall be deprived of life, liberty or without due process of law." A substantive due process claim requires defendant's conduct to be so "extreme and egregious" that it can be fairly viewed as so brutal and offensive to human dignity that it shocks the conscience.

In this instant case, Defendants named herein (specifically Price, Meyers, Molitor and Swanson) engaged in a two year coverup and campaign of lies, fraud and deceit in the public and the trial court regarding the off the record interrogation and insistence that it never occurred and in which Molitor subsequently admitted in court, two years later at the start of Plaintiff's second trial that it indeed did happen and he was present for it; suppressed exculpatory evidence and witnesses before the grand jury and the jury at both of Plaintiff's trials, and given Swanson's, Molitor's, Meyers, Price and Atrip's social media statements, press releases, media interview and subsequent press conference after Plaintiff's second trial and conviction were false, malicious, humiliating and degrading to Plaintiff and were libelous, slanderous and defamatory in nature. (These news conferences, press releases and social media statements and media interviews that is evidence of their coverup and based on the lies, fraud and coverup of Defendants; however due to Plaintiff's current incarceration status, Plaintiff ~~he~~ does not have access to those records and evidence. Given the statute of limitations for filing a 42 USC 1983 which Plaintiff believes is nearing, Plaintiff hopes that this Court will provide Plaintiff an opportunity to provide this proof through the Discovery process)

Furthermore, Defendants Price, Atrip, Habig, Grupa, Swanson and Molitor's conduct in executing an unconstitutional search warrant, their investigations

into these criminal matter (including Molitor's false accusation that more victims were out there and further criminal charges pending) and their conduct at trial should be viewed by this Court as arbitrary, extreme and egregious and oppressive to Plaintiff's U.S. Constitutional rights and protections. There can be no doubt that Defendant's conduct throughout their investigations of Plaintiff, in executing an unconstitutional search warrant; in their participation and knowledge of an off the record interrogation of Plaintiff that they lied about and covered up for two years before Molitor finally admitted the truth and that occurred in violation of NYCPL 60.45 and their conduct and perjurious statements at trial and to and in the media was arbitrary and should shock the conscience of the Court. Whereas, these Defendants did act under the color of state law and deprived Plaintiff of his U.S. Constitutional rights and protections under the Fourth and Fourteenth Amendments of the U.S. Constitution.

Equal Protection Under The Law: Claim under the Fourteenth Amendment of the US Constitution

Whereas, under the Equal Protection Clause of the 14th Amendment all persons similarly situated should be treated alike. For the purpose of determining whether Plaintiff was treated similar to persons similarly situated, Plaintiff requests that this Court respectfully consider Plaintiff's arrest in this matter by Defendants Meyers, Molitor and Maslak and the search and seizure of Plaintiff's phone by Defendant's Price, Antrip, Habig, and Brupa. First, Defendants Meyers, Price and Maslak were already on notice that the policy, customs and procedures created by the Village of Fredonia N.Y were insufficient in protecting the rights of the citizens and that their conduct relating to arrests of and search and seizure of property were deficient and didn't do enough to protect the constitutional and civil rights of citizens through a past lawsuit of Richir v. Village of Fredonia, NY et al, 2008 WL 2778920 (see Exhibit B). Furthermore, "as a well trained F.B.I agent," Chad Antrip was on notice of past violations of the F.B.I in executing search warrants. (See Exhibits ~~9, 10~~ 9, 10). Furthermore, Defendants Habig and Brupa were on notice of (as members of the Chautauqua County Sheriff how to and how not to execute a search warrant. Furthermore, through Richir v. Fredonia Fredonia Defendants were on notice of how perform a proper arrest (that is they knew or should have known what did and did not amount to false arrest, and through its training, policies, General Orders and the police departments training file how to prevent a false arrest and properly execute a search warrant. Whereas in executing a search warrant, County Defendants Habig and Brupa should have protected Plaintiff's Fourth Amendment rights like the ~~other~~ other members of the Chautauqua County Sheriff's Department like they did in United States v. Bess (16-CR-156-LJU-MJR and United States v. Leeper

(2009 WL 2876288) and *Pierce v. Ottaway* (2009 WL 749862). Finally, FBI agent Chad Artrip was on notice of how to and how not to properly execute a search warrant both through prior claims against the FBI (see Exhibits J, L, O, P, Q, X) and official F.B.I. policy. Therefore, Defendants Price, Meyers and Molitor (Fredonia Defendants), Habig and Bruya (County Defendants) and Chad Artrip (FBI defendant) failed to ensure Plaintiff was treated equally under the law regarding the false arrest of Plaintiff (which Meyers, Molitor, Maslak and Swanson all participated in) and in executing an illegal and unconstitutional search warrant against Plaintiff's property that Defendants Price, Molitor, Swanson, Artrip and Habig and Bruya participated in. Whereas, given the facts stated herein that Defendants Meyers, Molitor, Swanson had in their possession and knowledge of the alleged victim's exculpatory statements of the alleged victim that he walked coupled with the promise Meyers and Molitor made to Plaintiff in an undocumented interrogation and the subsequent two year coverup of it is proof that Defendants Meyers, Molitor, Swanson, and Maslak did effectuate a knowingly false arrest, and failed to treat Plaintiff equally under the law. Given these facts stated herein, there can be no doubt that Defendants failed to treat Plaintiff equally under the law and different from similarly situated individuals and there was no rational basis for the difference in treatment aside from the fact that during Plaintiff's arrest and trial, Molitor and Swanson were desperate to promote and protect their own self interests during an election year campaign.

In regards to the search warrant, the Fourth Amendment requires particularity, incorporation of supporting documents into the search warrant, facial validity and reasonableness not only in the initial search and seizure but also in the manner and scope of searches and seizures are carried out. Therefore, there can be no doubt, especially in considering the New York State

Supreme Court, Appellate Division's Fourt Department's August 11, 2023 decision (Exhibit I) it is apparent that Defendants, Price, Antrip, Habig, Grupa, Molitor and Swanson's actions were not reasonable under the Fourteenth Amendment of the U.S. Constitution and as such they failed to ensure that Plaintiff received equal protection under the law.

Plaintiff has a right to be protected from illegal and negligent police conduct and officers violated their oath of office, the laws of New York, and the U.S. Constitution in arresting Plaintiff without probable cause.

Violation of New York Criminal Procedure Law Sect. 60.45

Wherefore, Defendants Molitor, Swanson, Meyers and Maslak did violate NYCPL Sect. 60.45 and Plaintiff's rights and protections thereunder. Whereas, the day after the alleged crime, Defendant, at the request of Brad Meyers was subsequently interrogated by Meyers and Molitor about the previous night's alleged incident and alleged victim. The interrogation occurred at or about 3:40pm with Plaintiff and Defendants Meyers and Molitor present. The interrogation was initiated on a promise initially made by defendant Meyers to Plaintiff over the phone, stating that "you aren't in any trouble" and "based on statements made the previous night by the alleged victim to one of our officers you won't face any charges from that incident if Plaintiff would come in and give a statement so he could close out the case." Based on that promise not prosecute in exchange for Plaintiff's statement, Plaintiff went to the Fredonia Police Department at 9-11 Central Ave in Fredonia, N.Y to give the statement. Upon entering the station, Defendants Meyers and Molitor greeted Petitioner and Molitor reiterated the promise made by Meyers over the phone that in exchange for Plaintiff's statement, Plaintiff wouldn't face any criminal charges. Therefore, there had to be discussions and approval by Patrick Swanson, the D.A and advisement between them, Meyers and Maslak. Based upon this, Plaintiff provided Defendants Molitor and Meyers his statement.

whereas, due to actions by then candidate for the Chautauque County District Attorneys office Jason Schmidt, Schmidt publicly disclosed to the public via press releases and posts on his own personal social media page via Facebook that Defendants were lying about the interrogation between them and Plaintiff. Andrew Molitor and Patrick Swanson did disclose to the public via press releases and media interviews and social media posts on Swanson's Facebook page false and misleading statements to the Public denying that any such interrogation ever occurred between members of the D.A.'s office the Fredonia Police Department and Plaintiff. Schmidt then dispatched his campaign manager Tom Tarplay to investigate, who through FOIL requests proved that the interrogation did in fact occur; Meyers, Molitor and Swanson persisted for two years and through Plaintiff's first trial with their lies, fraud and coverup of the interrogation, insisting that no such interrogation occurred. Then at the start of Plaintiff's second trial finally admitted that an interrogation occurred and he was in fact present for it. (the newspaper articles, Swanson's denials and interviews on the matter, Jason Schmidt and his Facebook posts and posting on the FOIL documents and the transcripts of Molitor's admission, exist but Plaintiff currently doesn't have access to them due to his present incarceration after the Appeal so Plaintiff respectfully requests that this Court allow him to obtain these documents through the Discovery process). However, based on the discussions that occurred during that interrogation, Plaintiff conducted boogle searches based on the information/questions Meyers and Molitor provided and asked. These subsequent boogle searches were then introduced at trial against Plaintiff as "evidence of consciousness of guilt." Whereas, NYCPL Sect. 60.45(1)(2)(b)(i)(ii)(a) (see Exhibit Y) Defendants Meyers, Molitor and Maslak did violate NYCPL Sect 60.45 by failing to record such interrogation

and such promises Defendant's made to Plaintiff on audio and visual recording equipment as required by New York State Law. Furthermore, the information and statements provided to and by Plaintiff during that interrogation was in fact used against Plaintiff at trial via the Google Searches Plaintiff conducted after the interrogation, that Defendant Molitor said at trial (falsely) were conducted the night of the alleged crime and introduced at trial as a consciousness of guilt.

Whereas, Meyers and Molitor failed to ensure that the law of NYCPL 60.45 was followed. Instead, they engaged in lies and coverup for two years in denying that no such interrogation occurred and engaged in a media campaign to promote and protect their own self interests during an election year and through their lies, denials and coverup for two years did cause Plaintiff to endure public humiliation, threats, scorn and hatred from the public as a result of Defendants failure to follow the law of NYCPL 60.45 and because of their conduct, lies and coverup of the entire matter.

Fourteenth Amendment Failure to Protect Claim:-

Whereas, all Defendants named herein, knew or should have known of the serious risk and consequences that their conduct and actions posed to Plaintiff including but not limited to false arrest and illegal search and seizure, malicious prosecution and other statutory and constitutional violations. These violations that occurred resulted from Defendants conduct as detailed herein were sufficiently serious to constitute objective deprivations of Plaintiff's rights to Due Process, false arrest and illegal search and seizure and Defendants knew that their actions and conduct posed an unreasonable risk of serious harm to Plaintiff's freedom, constitutional and statutory rights and protections and to Plaintiff's financial earnings and his physical and mental health.

Preliminary Statement:

Pg 2c

- ① This claim is the result of an August 11, 2023 decision in which the New York State Supreme Court, Appellate Division, Fourth Department reversed a 2018 judgment of conviction against Plaintiff and vacated his sentence rendered in the Supreme Court of Chautauqua N.Y. The Court ruled that the search warrant issued by law enforcement to search and seize a cellular phone in that matter was facially deficient, unparticularized and not referenced by any crime and failed to incorporate any supporting documents. As such, Plaintiff seeks to bring a claim against the officers involved in executing a facially deficient search warrant against Plaintiff and among other things stated herein, for violating Petitioner's Fourth Amendment rights under the U.S Constitution, an unconstitutional search and seizure.
- ② Whereas, after the New York State Appellate Division, Fourth Department's ruling, Plaintiff remained in the custody of the New York State Department of Corrections and Community Supervision (NYSDOCCS) until August 23, 2023. On August 23, 2023 Plaintiff was transferred from the custody of NYSDOCCS to the custody of the Chautauqua County Sheriff's Department. On August 25, 2023, the Chautauqua County Court, under judge Paul Wojtaszek continued to hold plaintiff as a pretrial detainee at the Chautauqua County Jail pending the Chautauqua County District Attorneys Office notice of its intent to seek permission of the Fourth Department's ruling on this matter to the New York State Court of Appeals. As of November 14, 2023 no further Court hearings have been held in that County matter.
- ③ On September 16, 2023 Plaintiff spoke with an attorney at the Chautauqua County Jail about the possibility that he may able to represent me in that matter out of Chautauqua County Court. (At the August 25, 2023 Court hearing, Plaintiff was essentially left without representation due to a conflict of interest involving

Pg 21

the corrupt prosecutor in Plaintiff's criminal matter, Andrew Molitor being fired for prosecutorial misconduct on my County Court case. His firing occurred immediately after Plaintiff's second trial ended but before sentencing and the resentencing that occurred. Subsequently, that former prosecutor after being fired from the D.A.'s office was then employed by Plaintiff's trial attorney and then by the Chautauque County Public Defenders Office before then being rehired by the newly elected District Attorney of Chautauque County. However, as of November, 14, 2023 no determination has been made by the Court as to who can represent Plaintiff in the County Court matter. However, on September 16, 2023 I was told that the public defenders office will most likely represent Plaintiff (despite the conflict of interest) and that to protect my rights and interests over the search warrant issue, in light of the Fourth Department's decision, that I should file a grievance at the jail (where Plaintiff is currently residing) over the search warrant since it was executed at the jail in 2017 and the jail officials should have known the warrant was facially deficient and file a 42 U.S.C 1983 prisoner complaint

(4) Due to the conflict of interest issues being unresolved, Plaintiff is proceeding pro se in this matter. Additionally, on November, 15th, 2023 (after the original grievance was filed in this matter) Plaintiff learned the names of the Chautauque County Jail officials who originally executed the warrant and subsequently testified at Plaintiff's second trial were correction officers Louis Habig and Lieutenant Jeffrey Grupa. However, I have attempted to reach out to the trial attorney in that matter (Andrew Brautigam) to obtain a copy of the search warrant and the transcripts of the officers' trial testimony and as of November, 14, 2023 he has not responded to my request.

(5) As such, if this Court should find any portion of this claim deficient due to Plaintiff's inability to obtain a copy of those documents and transcripts, Plaintiff respectfully requests that this Court grant Plaintiff an extension

Page 20

of time to file this claim (I'm not sure what the statute of limitations is for filing this claim) and allow Plaintiff to amend this complaint with those supporting documents through any Discovery ordered by this Court for Plaintiff to pursue the claims herein stated and grant me any relief that this Court deems proper and just.

5. The approximate date the action was filed: _____

6. What was the disposition of the case?

Is it still pending? Yes ☐ No ☐

If not, give the approximate date it was resolved. _____

Disposition (check the statements which apply):

☐ Dismissed (check the box which indicates why it was dismissed):

☐ By court *sua sponte* as frivolous, malicious or for failing to state a claim upon which relief can be granted;

☐ By court for failure to exhaust administrative remedies;

☐ By court for failure to prosecute, pay filing fee or otherwise respond to a court order;

☐ By court due to your voluntary withdrawal of claim;

☐ Judgment upon motion or after trial entered for

☐ plaintiff

☐ defendant.

B. Have you begun **any other lawsuits** in **federal court** which **relate to your imprisonment**?

Yes ☒ No ☐

If Yes, complete the next section. NOTE: *If you have brought more than one other lawsuit dealing with your imprisonment, use this same format to describe the other action(s) on another sheet of paper.*

1. Name(s) of the parties to this other lawsuit:

Plaintiff(s): Samuel J Saeki

Defendant(s): Chautauque County, N.Y.

2. District Court: Western District Court of New York

3. Docket Number: 20-2340-pr; 17-cv-6221

4. Name of District or Magistrate Judge to whom case was assigned: Hon. Judge Charles J. Siragusa

5. The approximate date the action was filed: April 11, 2017

6. What was the disposition of the case?

Is it still pending? Yes ☒ No ☐

If not, give the approximate date it was resolved. _____

Disposition (check the statements which apply):

- ☐ Dismissed (check the box which indicates why it was dismissed):
- ☐ By court *sua sponte* as frivolous, malicious or for failing to state a claim upon which relief can be granted;
- ☐ By court for failure to exhaust administrative remedies;
- ☐ By court for failure to prosecute, pay filing fee or otherwise respond to a court order;
- ☐ By court due to your voluntary withdrawal of claim;
- ☐ Judgment upon motion or after trial entered for
- ☐ plaintiff
- ☐ defendant.

5. STATEMENT OF CLAIM

For your information, the following is a list of some of the most frequently raised grounds for relief in proceedings under 42 U.S.C. § 1983. (This list does not include all possible claims.)

- | | | |
|--------------------|------------------------|-------------------------------|
| • Religion | • Access to the Courts | • Search & Seizure |
| • Free Speech | • False Arrest | • Malicious Prosecution |
| • Due Process | • Excessive Force | • Denial of Medical Treatment |
| • Equal Protection | • Failure to Protect | • Right to Counsel |

Please note that it is not enough to just list the ground(s) for your action. You **must** include a statement of the facts which you believe support each of your claims. In other words, tell the story of what happened to you but do not use legal jargon.

Fed.R.Civ.P. 8(a) states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "The function of pleadings under the Federal Rules is to give fair notice of the claim asserted. Fair notice is that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so it may be assigned the proper form of trial." *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995). **Fed.R.Civ.P. 10(b)** states that "[a]ll averments of claim ... shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a single set of circumstances."

Exhaustion of Administrative Remedies

Note that according to **42 U.S.C. § 1997e(a)**, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

You must provide information about the extent of your efforts to grieve, appeal, or otherwise exhaust your administrative remedies, and you must attach copies of any decisions or other documents which indicate that you have exhausted your remedies for each claim you assert in this action.

A. FIRST CLAIM: On (date of the incident) October 19, 2017 to the Present - unconstitutional search and seizure
 defendant (give the **name and position held** of **each defendant** involved in this incident) Dave Price, Detective/Investigator
with the Fredonia Police Department, Brad Meyers, the Chief of Police of the Village of Fredonia, NY, Philip Maskk
Fredonia, NY Police officer, John Doe Supervisor of Price, Maskk and Meyers, Chad Artrip, FBI special, John Doe Supervisor
of Chad Artrip.
 did the following to me (briefly state what each defendant named above did): In August of 2016 Plaintiff was
charged with violating NYPL Sect 135.20. A trial was held in 2017 that resulted in a mistrial due
to a hung jury. In 2018 a retrial was held. Prior to the 2018 trial, Defendant Price, then an "investigator/
detective with the Fredonia Police Department and under the supervision of then Fredonia Police Chief Brad
Meyers and/or John Doe Supervisor, applied for a search warrant and submitted an Affidavit with that search
warrant to the Town of Chautauque NY Court Justice Stephen Cass to search and seize a cell phone
from Plaintiff's property at the Chautauque County Jail for a Samsung Galaxy phone. The warrant
was signed and executed on October 19, 2017 (see Exhibit A) (continued on next page 5a)

→ The constitutional basis for this claim under 42 U.S.C. § 1983 is: I am seeking compensatory, monetary and
punitive damages from each defendant due to Plaintiff's Fourth Amendment rights under the U.S. Constitution being violated
violations of Due Process, Equal Protection, false arrest, illegal search and seizure, for 7 years of wrongful incarceration and intentional infliction of emotional distress. Plaintiff
→ The relief I am seeking for this claim is (briefly state the relief sought): Violations of Plaintiff's
Fourth Amendment Rights and Protections under the U.S. Constitution, Bivens Claim, Failure to properly train and supervise
defendants, Failure of Swanson, Price, Molitor, Chad Artrip and all Defendants to adequately perform the administrative and
investigative duties of their jobs.

Exhaustion of Your Administrative Remedies for this Claim:

Did you grieve or appeal this claim? ☒ Yes ☐ No If yes, what was the result? On September 18, 2023
Plaintiff filed an informal grievance. On 9/19/23 Plaintiff filed a formal grievance #23-331 - grievance denied (see Exhibit A)
 Did you appeal that decision? ☒ Yes ☐ No If yes, what was the result? Grievance denied
(see Exhibit A)

Attach copies of any documents that indicate that you have exhausted this claim.

If you did not exhaust your administrative remedies, state why you did not do so: Administrative remedies were
exhausted

A. SECOND CLAIM: On (date of the incident) (see attached sheets) August 2016 - Present,
 defendant (give the **name and position held** of **each defendant** involved in this incident) (see attached sheets)
Defendants Molitor, Swanson, Price, Artrip, Meyers, Habig and Bruga denied Plaintiff Equal Protection
under the law, Due Process under the law and failed to protect Plaintiff from violations of his Constitutional,
Civil and statutory rights under the
law.

Pg 5a

(Continued From Page 5 First Claim)

Upon obtaining the search warrant, Dave Price then took the warrant to the Chautauqua County Jail, produced it to correction officer Louis Habig and Lieutenant Jeffrey Grupa, both of whom reviewed the warrant and gave the phone to Dave Price, finding no defects to the warrant based on their knowledge, experience, education and training as correction officers. (See Exhibit B and C for the testimony of Price and Artrip and Exhibits D and E respectively for the testimony of Habig and Grupa). Dave Price then executed the search of that Samsung galaxy cell phone with F.B.I. Special Agent Chad Artrip, where they took the phone to F.B.I. headquarters in Buffalo, N.Y. Chad Artrip then reviewed the warrant and based on his knowledge, experience, education and training with the Federal Bureau of Investigations found no defects with the warrant and utilized a computer software program called Cellebrite. Using the Cellebrite software, Agent Artrip then conducted a general search for "all digital and electronic" data contained on the phone. (See Exhibit C).

- ⑥ On or about the date of May 2018, the trial court, NYS Supreme Court, Chautauqua County, under judge Paul Wojtaszek conducted a hearing concerning the search warrant and its validity. Plaintiff's defense counsel objected to the search warrant in writing as being in violation of the Fourth Amendment of the U.S. Constitution for it being facially deficient and not particularized (See Exhibit F). The trial the erroneously admitted the evidence produced from the search warrant at trial. Plaintiff was subsequently convicted of the charges at the second trial and sentenced to 16 years in New York State prison. From August 2016 to about September of 2018, Plaintiff remained in local county custody of the Chautauqua County Jail where he remains as of this filing. About around September 2018 until August 23, 2023 Plaintiff was held in state custody under the New York State Department of Corrections and Community Supervision (NYS DOCCS) custody and control. During the

Pg 56

Covid-19 pandemic, state, trial and appeal court matters were shut down. Plaintiff's appeal of his criminal convictions was prepared and perfected by John Cirando in January of 2023. (see Exhibit H).

The New York State Supreme Court Appellate Division, Fourth Department, heard oral arguments on Plaintiff's appeal (focusing on the issue of the search warrant) on May 15, 2023. On August 11, 2023, the Appellate Court ruled that the search warrant was "facially deficient" stating in part "the search warrant simply stated that the police were directed to search defendant's cellular phone for all "digital and/or electronic data" from August 13, 2016 to August 15, 2016." The warrant contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion of the search to executing officers. (see Exhibit I) All these issues related to the search warrant were somehow conveniently overlooked and missed by the highly educated and well trained officers of Price, Artrip, Habig and Gruppa. As a result, Plaintiff's conviction was reversed and sentence vacated. Plaintiff was then transferred from state custody to county custody on August 23, 2023.

⑦ Wherefore, it is incumbent on the officers executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. (Broh v. Ramirez, exhibit J) The judge's authorization of the search did not render it constitutional because the warrant's obvious deficiency required the Court to consider the search warrantless and presumptively unreasonable. Neither Price, Artrip, Habig or Gruppa are entitled to qualified immunity because no reasonable officer could have believed that a warrant that plainly did not comply with the Fourth Amendment's particularity requirement was valid nor been unaware of the basic rule that absent consent or exigency (neither of which occurred or was present in Plaintiff's circumstances) a warrantless search was presumptively unconstitutional (Broh v. Ramirez 540 U.S. 551)

Page

Therefore, the search of the phone was unconstitutional and none of the defendants are entitled to qualified immunity (Exhibit J).

An issue is whether the search and seizure of Plaintiff Saeli's phone violated the Fourth Amendment of the U.S. Constitution (which it obviously did) and if so, are Defendants entitled to qualified immunity (which Defendants are not entitled to because no reasonable officer could have believed that a warrant that plainly did not comply with the Fourth Amendment's particularity requirements was valid nor been aware of the basic rule, that absent consent or exigency (neither of which was apparent in Plaintiff's case, a warrantless search was presumptively unconstitutional). (See Exhibit J). Given that the New York State Appellate Division, Fourth Department (Exhibit I) ruled that the search warrant used to search and seize Plaintiff Saeli's phone lacked particularity stating "here, the search warrant simply stated that the police were directed to search defendant's cellular phone for digital and/or electronic evidence from August 13, 2016 to August 15, 2016." The warrant contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to a particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion to the executing officers" and "while the search warrant application contained information about the crime and defendant's possession of the phone during the crime, the search warrant application was not incorporated into the search warrant, and therefore "does not save the warrant from its facial invalidity." (Exhibit I). Additionally, Plaintiff does not believe the judge's authorization of the search did not render it constitutional because the warrant's obvious deficiency required the Court to consider the search warrantless and presumptively unreasonable. Defendants therefore should not be entitled to qualified immunity because no reasonable officer of the law could have believed that a warrant that plainly did not comply with the U.S. Constitution's Fourth Amendment particularity requirements was

Pg 5d

or been unaware of the basic rule that absent consent or exigency, a warrantless search was presumptively unconstitutional.

⑧ Whereas, the Fourth Amendment states unambiguously 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. (see Exhibit J). Furthermore, as apparent in the Appellate Division's decision, the fact that a warrant application adequately describes the things to be seized does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents. And for good reason: The presence of a search warrant serves a high function and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for its inspection. The Fourth Amendment does not forbid a warrant from cross referencing other documents. The warrant, however has to use appropriate words of incorporation (which was not done in Plaintiff's case) and if the supporting documents accompanies the warrant (also not done in Plaintiff's case). The presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant. Furthermore, the uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.

⑨ Additionally, it should be incumbent on the officer(s) executing a search warrant to ensure the search is lawfully authorized and lawfully conducted and neither Defendants Louis Habig, Jeffrey Bruce nor Dave Price and Chad Antrip ensured that the search of Plaintiff's phone was lawfully authorized and lawfully conducted.

Pg 5e

Furthermore, Defendants Price and Artrip in leading the search of Plaintiff's cellular phone had a duty in this matter to ensure they had a proper warrant that in fact authorized the search and seizure they conducted, and that duty was not a duty to just glance at or proofread the search warrant. They had a duty to ensure that the warrant conformed to constitutional requirements. Similarly, upon being presented the search warrant for the phone, defendants Louis Habig and Lieutenant Jeffrey Brupa, based on their background, knowledge, training and expertise, should have read and examined the search warrant to ensure that it conformed to the particularity requirements of the Fourth Amendment, of which they obviously failed to do.

Background Summary:

- ⑩ Fredonia Police Officer Dave Price had previously been passed over by the Village of Fredonia N.Y for the Chief of Police position two times due to concerns over his competency and trustworthiness. He later became Chief of Police when the Village couldn't find anyone else interested in the position, but he definitely wasn't the Village's first (or second or third option). Fredonia Police Officer Dave Price prepared and signed an application for a warrant to search and seize Plaintiff's cellular phone. (See Exhibit B). The application was generic and unspecific and didn't possess any information as to what specifically to search for, requesting the phone to search for "all digital and electronic data" as opposed to more specific content such as cellphone site location, telephone logs, text messages, etc. Dave Price then presented these documents along with a warrant affidavit completed by Dave Price to local judge Stephen Cass who rubber stamped the warrant and signed it and who, according to online commentators about this case is in the dementia stage of syphilis. The warrant, rather than identifying any specific items he had knowledge of and intended to seize from the phone, generically asserted that he wanted to search for "all digital and electronic data" on the phone, which essentially encompasses

Pg 5f

everything and anything on the phone, leaving discretion to Defendants Price and Artrip to pick and choose what evidence they wanted to use against Plaintiff at trial. The warrant contained no language incorporating any other documents or facts. Significantly, the warrant to search the phone was not restricted by reference to a particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion to the executing officers. While the search warrant application contained information about the crime, the search warrant application was not incorporated into the search warrant and therefore, did not save the warrant from facial invalidity.

- ⑪ Dave Price, along with F.B.I agent Chad Artrip then took the search warrant (without reviewing it to ensure that the warrant was valid under the requirements of the Fourth Amendment of the U.S. Constitution that they should have done given their background, training and expertise) and presented it to correction officers Louis Habig and Jeffrey Brupa (who given their background, training and expertise, should have, but didn't review the search warrant to ensure that the warrant was valid under the requirements of the Fourth Amendment of the U.S. Constitution and Habig and Brupa then obtained the phone and turned it over to Price and Artrip. Price and Artrip then took the phone to the F.B.I offices in Buffalo, N.Y and used a program called Cellebrite to extract any and all electronic data and digital information from the phone. Upon reviewing all the data from the phone, the only thing that the dynamically corrupt duo of Price and Artrip found were Google searches conducted the night after the alleged crime pertaining to information disclosed to Plaintiff by then Fredonia Police Chief Brad Meyers and Assistant District Attorney Andrew Molitor during an off the record and undocumented police interrogation that the district attorneys office and Andrew Molitor denied for two years from having occurred before finally admitting at the start of Plaintiff's second trial that, in a half truth,

that he was present for that interrogation. (see Exhibit K). All defendants in this matter (Price, Artrip, Habig and brupa) testified against Plaintiff at his second trial held in June of 2018 at Chautauqua County Supreme Court.

(12) Given these facts and circumstances contained herein, Plaintiff seeks to sue Dave Price of the Fredonia Police Department, his then Supervisor and Chief of Police Brad Meyers (who failed to properly train and supervise Dave Price regarding the requirements of a warrant); Chad Artrip of the Federal Bureau of Investigations (F.B.I) and his John Doe's supervisors at the F.B.I and Department of Justice who failed to properly train and supervise Chad Artrip in the execution of warrants; Louis Habig and Jeffrey brupa of the Chautauqua County Jail/Chautauqua County Sheriffs Department and their John Doe Supervisor for failing to train and supervise them regarding search warrant requirements and then Chautauqua County District Attorney Patrick Swanson and ADA Andrew Molitor for improperly advising these defendants in regards to the investigation and search warrant and their failure to properly perform the administrative and investigative functions of their jobs, all for violating Petitioner's Fourth Amendment rights under the U.S. Constitution (see Exhibit L) and under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) 403 U.S. 388 29 L.Ed 2d 619, 91 S.Ct 1999 and 42 U.S.C 1983 raising a claim that Defendants violated Plaintiff's rights and protections as guaranteed by the Fourth Amendment of the U.S. Constitution. Because the warrant was invalid because it did not describe with particularity the place to be searched and the items to be seized and did not properly incorporate supporting documents and based on their background, training and expertise, Dave Price, Chad Artrip, Louis Habig, and Jeffrey brupa should have known the search warrant was facially deficient and thus should not be entitled to qualified immunity from Plaintiff's lawsuit, because given their background, training and expertise in law enforcement, they failed to read and

Pg 5h

inspect the warrant and they failed to (1) understand the warrant was facially deficient, lacked particularity and had an unlimited scope and limitations and (2) understand the Fourth Amendment requirements for a search warrant and supporting case law for a warrant and (3) understand that the warrant they executed was obviously defective.

Wherefore, Plaintiff asserts that the search warrant in this matter as determined by the New York State Appeals Court, Fourth Department was facially deficient and invalid and the search was thus clearly unreasonable in violation of the Fourth Amendment of the U.S. Constitution for among other reasons, (a) the warrant failed all together to comply with the Fourth Amendment's unambiguous requirement that a warrant particularly describe the person or things to be seized; (b) the warrant failed to properly incorporate supporting documents and the warrant was not restricted by reference to any particular crime and the fact that the application for the warrant referenced a particular crime did not save the warrant from its facial invalidity; (c) by not adequately describing the items to be seized and searched with any particularity, the search of Plaintiff's phone should be regarded as "warrantless" and (d) search and seizures of property without a warrant were presumptively unreasonable; and (e) the presumptive rule against warrantless searches apply with equal force to searches whose only defect is a lack of particularity in the warrant.

(13)

Furthermore, Plaintiff does not believe, that due to the circumstances stated herein, that none of the defendants are entitled to qualified immunity, for among other reasons, (a) no reasonable officer could have believed that a warrant that plainly did not comply with the Fourth Amendment's particularity requirement was valid and a reasonable officer(s) would have ensured that the search warrant incorporated the search warrant application, and (b) because Dave Price prepared the invalid warrant and he executed the warrant with Chad Artrip,

Pg 5i

they both could not properly argue that they reasonably had relied on local judge Stephen Cass' assurance that the warrant contained an adequate description of the things to be seized and searched.

(Continued From pg 5)
Second Claim

(14) Violation of Due Process, Equal Protection, False Arrest, Illegal Search and Seizure
Former Chautauqua County District Attorney Patrick Swanson and Former Assistant District Attorney Andrew Molitor Failed to Adequately and Properly Perform the Administrative and Investigative Functions of a Prosecutor.

The night of the alleged incident the police and the prosecutor(s) had in their possession statements made by the alleged victim to two different government witnesses that he had walked from a Walmart to the location he was found at. Therefore, he was not kidnapped. The alleged victim made such statements to Fredonia Police Officer Michael Hodkin and government witness Elyse Mead. (See Exhibits M and N respectively). As such there was no justification to charge Plaintiff with violating NYPL 135.20. Additionally, the prosecutors in this matter deliberately suppressed those statements and evidence from the grand jury. What followed next in Plaintiff's case amounted to Swanson and Molitor conspiring with Defendants Price and Meyers to manufacture false and misleading evidence against Plaintiff in violation of his Due Process rights. Whereas, the day after the alleged incident, Plaintiff was interrogated at the Fredonia Police Department by former chief of Police Brad Meyers and former ADA Andrew Molitor. (Molitor would later be fired from the district attorneys office immediately after Plaintiff's second trial but prior to sentencing due to misconduct he committed in Plaintiff's case).

(15) The interrogation lasted five hours and was premised on the facts/statements of both Molitor and Meyers that Plaintiff would not be charged with any crime based on what the alleged victim told officer Michael Hodkin, that he had walked from one location to the location he was found at. Defendants Molitor and Meyers did not document or record the interrogation in any way as

Pg 5j

required by New York State law NYCPL 60.45; NYCPL 60.45 (3)(a) (see Exhibit Y). Instead, Andrew Molitor and Patrick Swanson and Brad Meyers engaged in a two year coverup and conspiracy to publicly deny that an interrogation ever occurred with Plaintiff in interviews with local tv stations (Spectrum, WTUB) to press releases issued to local newspapers and radio stations to social media posts by Patrick Swanson on Facebook (Exhibit K). Additionally, Brad Meyers gave a radio interview with a local radio station WDOE denying that such an interrogation ever occurred. While this conspiracy and coverup started in 2016 it didn't end until 2018 when questioned by the Court at the start of Plaintiff's second trial, Andrew Molitor finally admitted in a half truth, that he was present for such an interrogation. (see Exhibit K). The late disclosure of Molitor's admission prevented defense counsel from naming Andrew Molitor as a witness to explain the content of the interrogation to explain why those boogie searches were conducted.

(16) Whereas, it is now obvious through his late admission of being present for the interrogation that Defendants conspired together to deny that former district attorney Patrick Swanson and former ADA Andrew Molitor vindictively and maliciously advised Defendants Meyers and later Dave Price regarding the arrest of Plaintiff and later the search and seizure of Plaintiff's phone, which the defendants used to manufacture and fabricate false and misleading evidence against Plaintiff in violation of Plaintiff's Due Process rights. (see Exhibit K). In August of 2023 due to the fact that the warrant to seize and search Plaintiff's phone wasn't sufficiently particularized, referenced by any crime or properly incorporated the search warrant application with the search warrant, the New York State Supreme Court, Appellate Division, Fourth Department suppressed all evidence relating to Plaintiff's phone, reversed the conviction and vacated the sentence. (See Exhibit I). Therefore, Plaintiff seeks to sue Defendants Swanson and Molitor for failing to perform the administrative and investigative functions of their positions and for intentionally inflicting

emotional distress on Plaintiff by wrongly advising Defendants Meyers and Price and by manufacturing false and misleading evidence against Plaintiff.

Third Claim: (17) Failure of the Federal Bureau of Investigations and John Doe Supervisor of Chad Artrip; the Village of Fredonia, N.Y and Dave Price's Supervisor, Former Chief of Police of Fredonia, N.Y Brad Meyers to implement appropriate training and policy for its officers to follow regarding search warrants and the administrative and investigative functions of its officers to follow, including Patrick Swanson and Andrew Molitor, and failure to adequately train and supervise its officers. (Violation of Due Process, Equal Protection, Failure to Protect; and illegal Search)

(18) Violation of Due Process Under the Law:

Whereas, the manner in which Defendants sought a search warrant in this case violated Plaintiff's Fourth Amendment rights under the U.S Constitution and the 14th Amendment's Due Process Clause. (see exhibit I) and conducted an illegal search of Plaintiff's property. Clearly the search warrant resulted in a general search of all the content of Plaintiff's phone and a fishing expedition. The warrant failed all together to comply with the Fourth Amendment's unambiguous requirement that a warrant particularly describe the person or things to be seized. The warrant failed to properly incorporate supporting documents and the warrant was not restricted by reference to any particular crime and the fact that the application for the warrant referenced a particular crime did not save the warrant from its facial invalidity; By not adequately describing the items to be searched and seized with any particularity the search of Plaintiff's phone should be regarded as "warrantless" and an illegal search; Search and seizure of property without a warrant is presumptively unreasonable. (see Exhibit J) Therefore, there can be no doubt that Defendants Price, Swanson, Artrip, Habig, Grupa and Molitor violated Defendants Due Process rights and his Fourth Amendment Rights under the U.S. Constitution by conducting an illegal, warrantless search

Pg 5L

of Plaintiff's property.

(19) Violation of Equal Protection:

There can be no doubt that law enforcement agencies across America have protections, policy and safeguards are in place to ensure that when its officers execute a search warrant, that it complies with the Fourth Amendment of the U.S. Constitution. As a similarly situated person, Plaintiff is entitled to equal protection under the law regarding search warrants, and Defendants Price, Artrip, Molitor, Swanson, Habig and Grupa and the supervisors of Price (Meyers), Artrip, Habig and Grupa failed in ensuring Plaintiff equal protection under the law in applying for and executing an invalid search warrant and an illegal, warrantless, unconstitutional search of Plaintiff's property.

(20) Failure to Protect

There is no doubt that Defendants Price, Artrip, Molitor, Swanson, Habig, Grupa, Meyers and their supervisors failed to protect Plaintiff from violations of his constitutional rights and illegal, warrantless and unconstitutional search of his property. Defendants had a legal, moral, and ethical obligation to ensure that Plaintiff's rights and protections as guaranteed by the U.S. Constitution were protected. They failed in this regard. After failing to prove their case in the first trial, after having to acknowledge Molitor's participation in an off the record interrogation after two years of denial and in following the D.A.'s ideology of "My job is to get convictions" (see Exhibit 20) apparently at any and all costs to the innocent, sought a search warrant for Plaintiff's property in a desperate attempt to find anything to use against him at a second trial. Contrary to what the Chatham County District Attorney believes, his job should not be to get convictions. It should be the fair and equitable distribution of justice. These defendants had a moral and legal obligation to protect Plaintiff's rights. Given their background, training, education and experience Defendants should have known that the search warrant and subsequent search of Plaintiff's property was unconstitutional and illegal. Instead of doing the right thing and trying to rectify the situation

Pg 5m

which justice would call for in this situation, Defendants decided to tear up the Constitution, trample on it and obtain a conviction at any and all costs. Furthermore, Defendants the Federal Bureau of Investigations and John Doe Supervisor of Chad Artrip and the Village of Fredonia, N.Y and Dave Price's former supervisor, former chief of Police of Fredonia, N.Y Brad Meyers and the John Doe Supervisor of Habig and brupa failed to properly train, supervise and discipline its agents and officers including but not limited to Chad Artrip, Dave Price, Louis Habig, and Jeffrey brupa, failed to properly train them concerning the law and the U.S. Constitution, correct police administrative and investigative duties and functions of their job when conducting a criminal investigation, failed to implement policies and procedures to prevent their officers from disseminating false and misleading to the public about Plaintiff's case, applying for search warrants and properly reviewing the contents of a search to ensure it complies with the Fourth Amendment of the U.S. Constitution and that joint investigations, in Plaintiff's case between the Village of Fredonia Police Department and the FBI is properly conducted and devoid of gross negligence or recklessness, which did not occur in Plaintiff's case.

(21) The failure of Defendants FBI and John Doe Supervisor of Chad Artrip, and the Village of Fredonia NY supervisor Brad Meyers and John Doe Supervisor of Habig and brupa failed to properly train Defendants and this amounted to a deliberate indifference to the Fourth Amendment rights and protections of Plaintiff Seeli with whom all of these Defendants came into contact with, especially considering their conduct that ensued.

(22) Furthermore, prior case law and complaints about the Federal Bureau of Investigations, the Fredonia Police Department and the Chautauque County Jail support that these municipal and government agencies were on notice of risk of its officers committing constitutional violations and deliberately ignored that risk. For instance, in the case of *Quinones-Pimental v. Cannon*

2022 WL 826344, the F.B.I. conducted a search that exceeded the bounds of a search warrant issued, (Exhibit O); *The United States v. Cherna* 184 F.3d 403 which illustrates F.B.I. policy when executing a search warrant, which clearly wasn't followed in Petitioner Saeki's case (Exhibit P) and *United States v. Smith* 2023 WL 2446202, holding that the warrantless search of defendant's cell phone was unreasonable under the Fourth Amendment (Exhibit Q); and *Richir v. Village of Fredonia, N.Y.*, where the former police chief of Fredonia, N.Y., a member of the Chautauque County District Attorneys Office (Jason Schmidt) and several John Doe Fredonia Police Officers who were accused of, among other violations, of false arrest, denial of Due Process and an illegal search of her home and property. This Plaintiff also sued members of the Chautauque County District Attorneys office for failing to adequately perform the administrative and investigative duties of their position. (See Exhibit R, *Richir v. Village of Fredonia, N.Y. et al* 2008 WL 2778920). Therefore, all prior defendants and the agencies and municipalities they worked for were on notice of risk of its officers committing constitutional violations and deliberately ignored that risk. Furthermore, it is evident from these instances that Defendants, their supervisors and the F.B.I. and the Village of Fredonia, N.Y. failed to and continue to fail to properly train and supervise its officers in respect to constitutional violations of a citizen. Finally, Chautauque County, N.Y., the Sheriff's Department and its jail were on notice of risk of its officers committing constitutional violations through various lawsuits, including, but not limited to:

(23)

Woodward v. Chautauque County, N.Y. et al 15-cv-0246 (Exhibit S); *Tota v. Bentley, et al* 2008 WL 3540375 (Exhibit T); *Pierce v. Chautauque County Sheriff's Department* 2007 WL 2902954 (Exhibit U); *Pisateri v. Chautauque County Jail et al* 2021 WL 3160768 (Exhibit V); *Latona v. Chautauque County Jail*, 2004 WL 2457797 (Exhibit W). Therefore, the Chautauque County Sheriff's

Department, the Chautauqua County Jail, the John Doe Supervisors of these entities and of Louis Habig and Jeffrey Grupa as well as Habig and Grupa themselves were on prior notice of risk of its officers committing constitutional violations and deliberately ignored that risk and furthermore, these instances prove that Defendants, their supervisors at the Chautauqua County Jail; the Chautauqua County Sheriff's department, the Federal Bureau of Investigations and the Village of Fredonia Police Department did not properly train and supervise Defendants Artrip, Price, Habig and Grupa and Defendants Artrip, Price, Habig and Grupa were not properly trained and supervised in applying for, reviewing, and executing a search warrant and ensuring that it is in compliance with the Fourth Amendment of the United States Constitution.

(24)

Intentional Infliction of Emotional Distress:

Whereas, Defendants Price, Artrip, Habig, Grupa, Swanson, Molitor and Meyers, intentionally and deliberately inflicted emotional distress on to Plaintiff through their false and misleading press releases, news conferences, social media posts, and press interviews and by violating Petitioner Saeli's Fourth Amendment rights under the U.S. Constitution by searching and seizing Plaintiff's phone, conspiring together to falsely fabricate and manipulate their testimony (see Exhibit B testimony of Dave Price) in order to biasly and prejudicially effect the jury and trial outcome, and as such, based on this illegally seized evidence and their testimony, led to Petitioner being found guilty as charged, sentenced to 16 years in prison of which he has currently served more than seven years. Furthermore, in failing to adequately perform their administrative and investigative functions associated with a district attorney and associate district attorney, Patrick Swanson and Andrew Molitor were derelict and negligent in the administrative and investigative functions of their positions, including, but not limited to applying for, reviewing and executing a search warrant and had they done so, they would have properly reviewed the search warrant, raised

any issues of concern with the judge, ensured that it complied with the Fourth Amendment requirements and ensured that Plaintiff's rights under the Fourth Amendment were protected. Instead, when faced with an obviously deficient search warrant that resulted in no direct evidence of any crime being committed located on the phone, defendants Swanson and Molitor relied on Google searches as a "consciousness of guilt evidence" as opposed to the real reason those searches were done which is they were based on information that Molitor disclosed during an interrogation with Plaintiff the night after the alleged crime in 2016 that Swanson and Molitor denied publicly for two years of having occurred before finally admitting at the start of Plaintiff's second trial in 2018 that the interrogation did indeed happen and he was present for it.

(25)

As a result of Defendant's Price, Artrip, Habig, Bruppa, Molitor and Swanson's conduct, Plaintiff Saeki was maliciously prosecuted for and wrongfully convicted of crimes he did not commit and sentenced to 16 years in prison, of which he served more than seven years before the Appellate Court vacated the sentence in 2023. As a result of Defendant's conduct in violating Plaintiff's Fourth Amendment rights and their role in Plaintiff's trial, their media exploits, the evidence they offered at trial including the testimony of Price, Artrip, Habig, and Bruppa, Plaintiff was maliciously prosecuted and falsely convicted of crimes he did not commit. As a result of their conduct and Plaintiff's ensuing seven plus years of incarceration, Plaintiff suffered severe emotional distress for which he sought treatment for while in NYSDOCCS custody including severe depression, anxiety, bipolar disorder, suicidal and homicidal ideations, panic attacks, paranoia, humiliation, public scorn and shame and degradation and post-traumatic stress disorder due to Defendant's pre-trial, at trial and post-trial, and coupled with these emotional disturbances that Plaintiff had to suffer through and endure through seven years of

of wrongful incarceration, Defendants incarceration of Plaintiff also caused him permanent physical injuries to both his hands and wrists, to the point it was necessary to perform surgery on Plaintiff's left wrist that left Plaintiff with a permanent physical scar to constantly remind him of the pain and torture he had to endure as a result of Defendants actions.

(26)

The Extreme and Outrageous Conduct of Defendants

First, Defendants Price, Artrip, Meyers, Molitor and Swanson knew or should have known that no crime was committed by Plaintiff in his underlying criminal matter of kidnapping in the Second Degree because on the night of the alleged crime, the alleged victim told two different government witnesses, Fredonia Police Officer Michael Hodkin and government witness Elyse Mead that he had walked from Walmart to the location he was found at. This occurred on August 15, 2016. On August 16, 2016, Former Chief of Police of the Fredonia Police Department Brad Meyers contacted Plaintiff Saali for questioning about the alleged incident on the promise that because of the alleged victim's prior statements exonerating Plaintiff of any wrong doing, Plaintiff would not face any criminal charges in exchange for his statements. Plaintiff then agreed to go to the Fredonia Police Department. About or around 3:40 p.m, Plaintiff was questioned by Brad Meyers and Chautauqua County ADA Andrew Molitor. Molitor reiterated the promise made by Meyers that due to the prior statements of the alleged victim, Plaintiff would not face any criminal charges in exchange for his statement. After the interrogation, Meyers and Molitor left and Plaintiff was waiting for a ride, then enters Fredonia Police Officer Philip Maslak who charges Plaintiff with kidnapping in the Second degree, despite the promises of Molitor and Meyers not to prosecute Plaintiff. The interrogation was not documented or recorded by Meyers

or Molitor in anyway as required by New York State Law CPL 60.45(3)(a) (see Exhibit Y). For the next two years, Defendants Swanson, Molitor and Meyers would issue press releases, statements and interviews via their social media, local newspapers and tv and radio stations denying that such an interrogation ever occurred and other slanderous and libelous statements about Plaintiff causing public outrage, scorn, scourge and threats against Plaintiff. Two years after the fact, at the start of Plaintiff's second trial in 2018, Andrew Molitor, in a half hearted admission, finally admitted that the interrogation did occur and he was in fact present for it. (See Exhibits K and Z respectively). All Defendants named herein, Specifically Swanson and Molitor were central to the investigation and prosecution of Plaintiff, morally and legally culpable for the trial outcome and they crossed moral and ethical lines and breeched public trust in doing so. Given the weak case that Defendants had in this matter, they all conspired with each other to look for ways to boost their case and obtain a conviction at any and all costs, including lies, coverup, fraud and violations of Plaintiff's Constitutional rights: "My first and foremost job is to get convictions" (see Exhibit Z(1)). With the alleged victim stating to two government witnesses that he walked (thus negating any kidnapping charge) Swanson refused (as did Molitor) to allow the alleged victim to testify at Plaintiff's second trial. Regarding the phone, not having any probable cause or direct evidence as to what to look for, Defendant Rice (most likely at the direction of Swanson and Molitor) obtains a generic warrant for "any and all digital and electronic data" on the phone. The search warrant was not referenced by any crime nor incorporated by any supporting documents. The "evidence" from the phone consisted of boogle searches that were conducted the day after the alleged crime on the night of the interrogation and were based on information that Defendants Meyers and Molitor disclosed to Plaintiff during the interrogation that Meyers, Molitor, and Swanson denied for two years of

having occurred, then used such "evidence" against Plaintiff at his second trial in 2018 as "consciousness of guilt" evidence. However, Dave Price and Chad Artrip are responsible for the issuance and execution of an invalid search warrant used to violate Plaintiff's Fourth Amendment rights. Upon obtaining the warrant, Dave Price and Chad Artrip then took the warrant to the Chautauque County Jail. The defective warrant was then presented to Louis Habig and Jeffrey Brupa who obviously did not read or review the warrant to ensure it was a valid warrant and instead just turned the phone over to Price and Artrip with no questions asked. At Petitioner's second trial, Dave Price and Chad Artrip testified that they then took the phone to F.B.I headquarters and extracted all data from the phone using a program called Cellebrite. Price, Artrip, Habig and Brupa then did falsely testify at Plaintiff's second trial and did commit perjury against Petitioner in order to obtain a false conviction. After the trial, Defendants then inflicted further emotional abuse against Plaintiff by holding a press conference with the media in which Swanson, Price, Molitor and Artrip falsely told the community that "Further charges are forthcoming" and "there are more victims" of Plaintiff, subjecting Plaintiff to further public scorn, humiliation, and threats. (see Exhibit K). The information disclosed during that press conference was false and no further charges were brought against Petitioner.

(27)

Whereas, Plaintiff believes this conduct of defendants constitutes extreme outrageous conduct committed by the defendants against Plaintiff and that it was defendants' intent to cause such severe emotional distress on Plaintiff. Additionally, prior to defendants' conduct and actions, Plaintiff did not suffer from severe depression and anxiety, bipolar symptoms, suicidal and homicidal ideations, panic attacks, paranoia, and post traumatic stress disorder and these conditions only began to manifest themselves in Plaintiff's behavior and life during and after Defendants' actions and conduct against

Plaintiff. Whereas, the emotional distress inflicted by Defendants on Plaintiff has drastically altered Plaintiff's lifestyle, behavior, family, and social aspects of his life to the point where Plaintiff's paranoia and panic attacks and fear of retaliation caused by Defendants actions and conduct make it difficult to interact with others, constantly fearful of being attacked to the point he now feels he has to attack someone to prevent them from first attacking him. Plaintiff's thinking, behavior and lifestyle after wrongfully spending over seven years in prison prevents him from leading a productive life to the point where Plaintiff seeks to become a recluse and withdraw from society, even though in therapy and on mental health medications.

(28)

Request For Damages:

Wherefore due to the admission of evidence introduced at Plaintiff's second trial from an invalid warrant and given the fact that each Defendant Price, Artrip, Habig and Brupa committed perjury and falsely testified at Plaintiff's second trial in order to biasly influence the jury to obtain a conviction and that such evidence and testimony led to the wrongful conviction of Plaintiff that resulted in Plaintiff's Fourth Amendment and Due Process Rights being violated, Plaintiff suffering from Defendant's intentional infliction of emotional distress as a result of their conduct and actions and over seven years of incarceration that was subsequently vacated on appeal, Plaintiff seeks \$5 million dollars from Price and Artrip each; \$2 million dollars from Habig, Brupa, Meyers and Maslak each; \$4 million dollars from Swanson and Molitor for failing to adequately perform the administrative and investigative functions of their positions; and \$1 million dollars each from Defendants the Village of Fredonia, N.Y, the Chautauqua County Sheriff's Department and the Federal Bureau of Investigation's John Doe Supervisors for failing to properly train and supervise Price, Maslak, Meyers, Habig, Brupa and Artrip.

Monell Claim Against Village of Fredonia, N.Y

28(b) Whereas, the Village of Fredonia, NY and members of the Village of Fredonia Police Department, including at the time of Plaintiff's arrest in 2016, then Fredonia Police Chief Bradley Meyers; then detective and now current chief of Police Dave Price and Fredonia Officer Philip Maslak upon executing the false arrest of Plaintiff and a subsequent unconstitutional search warrant did so based on their training and the policies implemented by the Village of Fredonia, NY under the Department's General Orders and police training manual/records. Furthermore, these defendants were already on notice that its police officers and others employed by the Village of Fredonia, NY at the Village of Fredonia New York police department were engaging in conduct and customs that violated mine and other individuals rights and protections against false arrest, illegal search and seizure and other civil, constitutional and statutory violations committed by its officers through the 2008 lawsuit of Richir v. Fredonia, NY et al (2008 WL 2778920) (Exhibit B.) Plaintiff's case in Richir brings to light many of the same issues present in Plaintiff's instant claim against the Village of Fredonia, NY police department, including but not limited to false arrest and illegal search and seizure and this establishes that the Village of Fredonia, NY and Defendants Price, Meyers and Maslak engaged in policy and customs that provided no training or safeguards to protect an individuals civil, constitutional and statutory rights.

28(c) Furthermore, the Fredonia NY Police Department and Village of Fredonia NY maintains its police records and policy through the department's General Orders and police training records. The policy contained in these records establish and contribute to customs, conduct and behavior of its officers that permit

its officers violating an individual's rights and protections by establishing inadequate procedures to document an arrest, interrogation or how to properly execute a search warrant and these policies are complicit in violating an individual's rights and protections against illegal search and seizure and false arrest among others. Further violations caused by the policies or lack thereof by the Village of Fredonia, NY include not having separate holding cells and bathrooms for male and female detainees and not possessing or maintaining audio and visual recording devices to be in compliance with NYCPL 60.45. Finally, despite these repeated violations, it seems no one within the government of the Village of Fredonia NY to review and update its policies concerning the training of its officers to ensure that their actions and conduct are in compliance with the law and the constitution as Defendants Meyers, Price and Maslak failed to do in Petitioner's case. Additionally, current Chief of Police Dave Price was passed over for the Chief of Police position three times as not only his own officers deemed him unqualified for the position, but also the previous Mayor and members of the board of trustees deemed him unqualified before he assumed that position because nobody else wanted it.

28(d) Furthermore, it is obvious that the policy of Fredonia NY in training and educating its officers is deficient and did not adequately prepare and train Meyers, Price and Maslak on how to properly document and perform a legal investigation and arrest, how to properly execute a search warrant to ensure it complies with the requirements of the U.S. Constitution's Fourth Amendment, how to properly document and record a police interrogation so that it is in compliance with NYCP Sect. 60.45

and how to protect against other violations of mine and others civil, constitutional and statutory violations from occurring and reoccurring.

28(e)

Whereas, based on the facts stated herein, it is obvious Defendants Meyers, Price and Maslak acted under the color of law; that their conduct and actions deprived Plaintiff of both his constitutional rights under the Fourth Amendment prohibiting false arrest and illegal search and seizure. Whereas, the false arrest in this matter occurred without probable cause and with Defendant's Meyers, Price and Maslak's full knowledge that no crime was ever committed by Plaintiff due to the alleged victim's statements on the night of the alleged crime to Fredonia Police Officer Michael Hodkin that he walked from one location to the other and in fact was not kidnapped (See Exhibit M), and the illegal search and seizure of Plaintiff's property by Price due to a defective and facially invalid search warrant (See Exhibit I); that the policy of the Village of Fredonia NY concerning the hiring, training and education of officers as established through the Department's General Orders and police training records, which obviously Defendants were following in Plaintiff's case, caused Plaintiff to be deprived of his constitutional rights under the Fourth Amendment of the U.S. Constitution as well as statutory rights and protections under NYCPL Sect. 60.45, that as a result of this, Plaintiff incurred damages (including incarceration, loss of income, family and marital relations) as a result of Defendants actions that caused Plaintiff to be wrongfully incarcerated for over 7 years and that the official policies and customs of the Village of Fredonia, NY caused these constitutional and statutory injuries to Plaintiff.

(29)

Request For Jury Trial:

Plaintiff does hereby respectfully requests a jury trial in this matter.

(30)

Conclusion:

Wherefore, as stated herein, Plaintiff asserts that Defendants Price, Maslak, Artrip, Habig and Brupa violated Plaintiff's Fourth and Fourteenth Amendment rights under the U.S. Constitution, that Defendant Supervisors of Price and Maslak, John Doe of the Village of Fredonia NY; the F.B.I John Doe Supervisor of Chad Artrip; the Chautauque County Sheriff Department John Doe Supervisor of Habig and Brupa for failing to properly train and supervise Price, Maslak, Artrip, Habig, and Brupa and had they done so they would not have violated Plaintiff's constitutional rights and Defendants Swanson and Molitor failed to adequately perform the administrative and investigative functions of their jobs regarding the execution of the search warrant and its review and use of the evidence at trial obtained because of it and regarding the advisory role Swanson and Molitor played in advising the Village of Fredonia NY Defendants and Chad Artrip and the F.B.I in their joint investigation, Plaintiff Saeli respectfully requests that this Court grant Plaintiff the relief stated herein and grant him any further relief that this Court may deem just and proper.

did the following to me (briefly state what each defendant named above did): (See attached sheet)
Executed an illegal and unconstitutional search warrant that was facially
deficient (see Exhibit I) illegally searched and seized Plaintiff's property. Failed
to conduct any review of the search warrant to ensure it complied with the
requirements of the Fourth Amendment under the United States Constitution.
Did in fact use evidence from the illegal search and seizure against Plaintiff
at Plaintiff's second trial which resulted in conviction and over 7 years of wrongful incarceration
and violations of Equal Protection and Due Process under the law, and civil, constitutional and statutory violations.

The constitutional basis for this claim under 42 U.S.C. § 1983 is: (See attached sheet) Fourth and
Fourteenth Amendment under the U.S. Constitution

The relief I am seeking for this claim is (briefly state the relief sought): (See attached sheet) - Relief
sought, \$29 million dollars for violating the civil, constitutional and statutory rights of Plaintiff,
loss of freedom and enjoyment of life, loss of familial and marital enjoyment, loss of income

Exhaustion of Your Administrative Remedies for this Claim:

Did you grieve or appeal this claim? ☒ Yes ☐ No If yes, what was the result? Grievance denied
(see Exhibit A)

Did you appeal that decision? ☒ Yes ☐ No If yes, what was the result? Grievance denied
(see Exhibit A)

Attach copies of any documents that indicate that you have exhausted this claim.

If you did not exhaust your administrative remedies, state why you did not do so: Administrative remedies
were exhausted.

If you have additional claims, use the above format and set them out on additional sheets of paper.

6. RELIEF SOUGHT

Summarize the relief requested by you in each statement of claim above. (See attached sheet)

Plaintiff seeks compensatory, monetary, and punitive damages from Defendants due to Plaintiff's Fourth
Amendment rights under the U.S. Constitution being violated by Defendants; For the same plus years of
wrongful incarceration and intentional infliction of emotional distress, Plaintiff seeks \$29 million dollars
in damages as detailed herein, and for any further relief deemed necessary and just by the court and/or jury.

Do you want a jury trial? Yes ☒ No ☐

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 14, 2023
(date)

NOTE: *Each plaintiff must sign this complaint and must also sign all subsequent papers filed with the Court.*



Signature(s) of Plaintiff(s)

Index of Missing Exhibits

Due to my present incarceration (upon successful appeal from the New York State Supreme Court Appellate Division, Fourth Department) I intended to include certain documents and transcripts from my criminal trial and other supporting documents that exist to support my claim. However upon being transferred from NYSDOCCS custody to Chautauqua County Custody, my property, including all legal documents were lost in transport. I tried reaching out to my trial attorney to be provided with the documents with no success. Due to statute of limitation requirements (which I believe I am close to) I am submitting this claim without them in the hopes that if the Court decides those documents are necessary to support the claim that this Court will allow me to obtain and submit through the Discovery Process. Thank you.

- ① Exhibit B: Testimony of Fredonia Police officer Dave Price
- ② Exhibit C: Testimony of F.B.I Agent Chad Antrip
- ③ Exhibit D: Testimony of Chautauqua County Jail C.O Louis Habig
- ④ Exhibit E: Testimony of Chautauqua County Jail C.O Jeff Grupa
- ⑤ Exhibit F: Defense Counsel's objection to search warrant
- ⑥ Exhibit G: Sentence given to Plaintiff by County Court
- ⑦ Exhibit H: Proof of Custody From NYSDOCCS to Chautauqua County Jail
- ⑧ Exhibit K: D.A's denial of off the record interrogation resulting in DA Molitor's firing
- ⑨ Exhibit M: Testimony of Fredonia Police officer Michael Hodkin
- ⑩ Exhibit N: Proof of alleged victim's statement to government witness Elyse Mead
- ⑪ Exhibit Z: Chautauqua County A.D.A Andrew Molitor's Admission re: interrogation

Exhibit A

9/22/23: Response From Jail To Plaintiff's
9/20/23 Grievance Filed by Plaintiff And Corresponding
Appeal Respons

Grievance Officer's Response to Grievance # 23-331

Saeli, Samuel

9/22/23

Mr. Saeli, you have filed a grievance claiming that on the date of August 11th, 2023 the New York State Supreme Court reversed your 2018 conviction due to an unconstitutional search warrant that was executed at the Chautauqua County Jail while you were a pretrial detainee in this facility between 2016-2018. You claim that the search warrant was brought to the Jail by the Fredonia Police Dept. You claim that no one reviewed the warrant to ensure its' validity and 2 officers, that you cannot remember their names, executed the warrant for your cell phone and testified at your trial. You believe that your 4th Amendment rights were violated, as these 2 officers did not read the warrant, committed perjury and falsely testified. You request copies of this grievance, policies and procedures implemented to protect 4th Amendment rights of pretrial detainees when it comes to property and for staff to know these policies and procedures. You also request for incarcerated individuals to be able to release property at any time.

Mr. Saeli, you have been incarcerated in the Chautauqua County Jail since the date of 8/23/23. You submitted this grievance on the date of 9/20/23. That is almost a month that you have waited to file this complaint since your arrival on your appeal. Pursuant to 9 NYCRR 7032.4(d) An inmate must file a grievance within five days of the date of the act or occurrence giving rise to the grievance. Your grievance may be denied on this alone.

On the date of October 19th 2017, the Chautauqua County Jail was presented with a valid search warrant. This search warrant was signed by an active Chautauqua County judge and did direct that your cell phone be handed over to authorities. The execution of this search warrant was completed as directed, within the confines of Criminal Procedural Law 690.30. No 4th Amendment violation occurred. You have also not specified any officers to interview.

Mr. Saeli, please note, any court rulings and court proceedings are outside the control of the chief administrative officer and are considered non-grievable pursuant to New York State Minimum Standards.

You have requested copies of this grievance. Mr. Saeli, incarcerated individuals who utilize the grievance process within this facility receive all mandated copies pursuant to New York State Minimum Standards.

You have requested policies and procedures to be implemented to protect 4th Amendment rights of pretrial detainees when it comes to property and for staff to know these policies and procedures. All necessary laws, amendments, policy and procedure and Minimum Standards are followed as mandated in regards to the rights of pretrial detainees. All staff are trained appropriately through field training and a mandated academy. Please note, that there are policies and procedures in place to keep your personal property within the property room secure and protected. However, a search warrant exceeds this, by law. Also, the U.S. Supreme

Court ruled that incarcerated individuals do not have a reasonable expectation of privacy when it comes to their possessions in their prison cells. As such, the Court ruled that 4th Amendment protections do not apply when it comes to questions of searches in prison cells.

You also request for incarcerated individuals to be able to release property at any time. This is already our policy at the Chautauqua County Jail. Please refer to the section of "Property Release" in your Jail Handbook on your issued tablet.

Mr. Saeli, as stated above, appropriate actions were taken by staff in regards to a search warrant presented by authorities, signed by an acting judge. You have filed this grievance beyond 5 days of the act or occurrence. Due to all stated above reasons, I found your complaints to be unsubstantiated and your grievance is denied.

Respectfully Submitted,
Grievance Coordinator
T. Graves SD511

James B. Quattrone
Sheriff



Matthew Stuczynski
WARDEN

CHAUTAUQUA COUNTY SHERIFF'S OFFICE
CORRECTIONS DIVISION

Chief Administrative Officer decision
Grievance 23-331
September 22, 2023

I/I Saeli,

You have made a complaint concerning a search warrant the Chautauqua County Jail complied with, that your 4th amendment rights have been violated, and property release procedures. I concur with the Grievance Officers to deny your grievance. After reviewing all documentation provided and looking into the matter I do not see any violations of Jail Staff or policy and procedure. On October 19th 2017 the Chautauqua County Jail was presented with a valid search warrant and this warrant was signed by an active Chautauqua County Judge directing staff to hand your phone over to the proper authorities. Court actions and proceedings are outside the control of the chief administrative officer and are a non-grievable issue. You have been provided with all necessary documents afforded to you and no amendment protections have been violated. The Chautauqua County Jail does have property policy and procedure in place and you have been given a copy of this. Furthermore an incarcerated individual must file a grievance within five days of the date of the act or occurrence giving rise to the grievance and you failed to do so. These complaints are unsubstantiated and your requested actions are denied.

Lt. Dale Cornell

Grievance Information

Grievance Id # : 182952
ORI : NY006013C
Agency Name : Chautauqua County Jail
Facility Type : County Jail
Reported Date : 09/25/2023
Created Date : 09/25/2023
Created By : cornelld4

Grievant

Name : Saeli , Samuel
Birth Date : 06/19/1978
Sex : Male
Race : White
Ethnicity : Not Hispanic

Comments

cornelld4 : 09/25/2023 08:51 AM : Grievance 23-331

Exhibit B

Testimony of Dave Price

Exhibit C

Testimony of Chad Artrip

Exhibit D

Testimony of Louis Habig

Exhibit E

Testimony of Jeffrey Brupa

Exhibit F

Defense Counsel's Objection To
Search Warrant

Exhibit 6

Sentence Given to Plaintiff
By Court

Exhibit H

Proof of Custody From NYSDOCCS To
Chautauque County, N.Y

Exhibit I

People v. Saeli 2023 WL 5159629

New York State Supreme Court, Appellate Division,
Fourth Department's August 11, 2023 decision ruling
search warrant facially deficient, reversing conviction and
vacating sentence.



219 A.D.3d 1122, 195 N.Y.S.3d 335, 2023 N.Y. Slip Op. 04268

****1** The People of the State of New York, Respondent,

v

Samuel J. Saeli, Appellant. (Appeal No. 1.)

Supreme Court, Appellate Division, Fourth Department, New York

19-00015, 428

August 11, 2023

CITE TITLE AS: People v Saeli

HEADNOTES

Crimes

Jurors

Selection of Jury—Challenges for Cause—Impartiality

Crimes

Search Warrant

Particularity—Cellular Phone—Internet Searches

Crimes

Indictment

Inclusory Concurrent Counts—Second-Degree Kidnapping Inclusory Concurrent Count of Second-Degree Kidnapping as Sexually Motivated Felony

D.J. & J.A. Cirando, PLLC, Syracuse (John A. Cirando of counsel), for defendant-appellant.

Samuel J. Saeli, defendant-appellant pro se.

Jason L. Schmidt, District Attorney, Mayville (Erik D. Bentley of counsel), for respondent.

Appeal from a judgment of the Chautauqua County Court (Paul Wojtaszek, J.), rendered September 13, 2018. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and kidnapping in the second degree as a sexually motivated felony.

It is hereby ordered that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is reversed on the law, that part of the motion seeking to suppress evidence obtained pursuant to the search warrant is granted and a new trial is granted on both counts of the indictment.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20) and kidnapping in the second degree as a sexually motivated felony (§§ 130.91, 135.20) arising from an incident in which defendant allegedly lured a young boy with disabilities from a store when he was ***1123** separated from his family and sexually abused him. In appeal No. 2, defendant appeals from a resentence.

195 N.Y.S.3d 335, 2023 N.Y. Slip Op. 04268

lv denied 32 NY3d 1005 [2018]). The court upon retrial should submit to the jury the kidnapping in the second degree count in the alternative only (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Piccione*, 78 AD3d 1518, 1519 [4th Dept 2010]).

We have reviewed defendant's remaining contentions in his main brief and the contentions in his pro se supplemental brief in appeal No. 1 and conclude that none warrants dismissal of the indictment.

In light of our determination that reversal of the judgment in appeal No. 1 is required, we vacate the resentence in appeal No. 2 (*see generally* *People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]). Present—Whalen, P.J., Lindley, Curran, Bannister and Greenwood, JJ.

Copr. (C) 2023, Secretary of State, State of New York

End of Document

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At the outset, we note that, inasmuch as the resentencing in appeal No. 2 supersedes the original sentence in appeal No. 1, “the appeal from the judgment in appeal No. [1] insofar as it imposed sentence must be dismissed” (*People v Hazzard* [appeal No. 1], 173 AD3d 1763, 1764 [4th Dept 2019]).

We reject defendant's contention in his main brief in appeal No. 1 that County Court erred in denying his challenges for cause with respect to four prospective jurors. “CPL 270.20 (1) (b) provides that a party may challenge a potential juror for cause if the juror ‘has a state of mind that is likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial’ ” (*People v Harris*, 19 NY3d 679, 685 [2012]). “ ‘[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that [they] can be fair and impartial’ ” (*id.*, quoting *People v Chambers*, 97 NY2d 417, 419 [2002]; see *People v Warrington*, 28 NY3d 1116, 1119-1120 [2016]). Thus, “ ‘where [a] prospective juror[] unambiguously state[s] that, despite preexisting opinions that might indicate bias, [they] will decide the case impartially and based on the evidence, the trial court has discretion to deny the challenge for cause if it determines that the juror's promise to be impartial is credible’ ” (*Warrington*, 28 NY3d at 1120 [emphasis omitted]).

Here, the statements by the prospective jurors were made in the context of a question posed by defense counsel whether the prospective jurors believed that defendant, as he sat in the **2 courtroom before them, must have done something wrong. The four prospective jurors raised their hands expressing agreement with the statement. However, the second and third prospective jurors explained that they raised their hand because they believed that defendant must have been accused of doing something wrong and neither of them expressed any personal belief against defendant. Thus, because those jurors did not express any doubt concerning their ability to be fair and impartial, the court properly denied the for-cause challenges (see *People v Garcia*, 148 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 980 [2017]). The first and fourth prospective jurors expressed their agreement with the proposition that defendant is presumed to be innocent, and they indicated that they considered defendant not guilty as he sat before them prior to trial. Those assurances were sufficient to overcome the potential doubt they expressed on their impartiality and, thus, *1124 the court did not err in denying defendant's challenges for cause as to those jurors (see *People v Williams*, 107 AD3d 746, 747 [2d Dept 2013], *lv denied* 21 NY3d 1047 [2013]; cf. *People v Clark*, 171 AD3d 1530, 1531 [4th Dept 2019]).

Defendant contends in his main brief in appeal No. 1 that the court erred in denying his motion during trial seeking to suppress evidence of, inter alia, internet searches made by defendant that were discovered by police during the execution of a search warrant of defendant's cellular phone. Defendant's contention is that the search warrant, inter alia, lacked particularity. A warrant must be “specific enough to leave no discretion to the executing officer” (*People v Gordon*, 36 NY3d 420, 429 [2021] [internal quotation marks omitted]). To meet the particularity requirement, a warrant must (1) “identify the specific offense for which the police have established probable cause,” (2) “describe the place to be searched,” and (3) “specify the items to be seized by their relation to designated crimes” (*United States v Galpin*, 720 F3d 436, 445-446 [2d Cir 2013] [internal quotation marks omitted]; see generally *People v Madigan*, 169 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019]). Here, the search warrant simply stated that the police were directed to search defendant's cellular phone for “digital and/or electronic evidence from August 13, 2016 to August 15, 2016.” The warrant contained no language incorporating any other documents or facts. Significantly, the search of the phone was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion of the search to the executing officers (see *People v Melamed*, 178 AD3d 1079, 1081 [2d Dept 2019]; see generally *Gordon*, 36 NY3d at 429). While the search warrant application contained information about the crime and defendant's possession of the phone during the crime, the search warrant application was not incorporated into the search warrant and therefore “does not save the warrant from its facial invalidity” (*Melamed*, 178 AD3d at 1083 [internal quotation marks omitted]; see *United States v George*, 975 F2d 72, 76 [2d Cir 1992]). We therefore conclude that the court should have suppressed the evidence obtained by the police pursuant to the search warrant. Consequently, we reverse the judgment of conviction and a new trial is granted on both counts (see *People v Stokeling*, 165 AD3d 1180, 1181 [2d Dept 2018], *lv denied* 32 NY3d 1178 [2019]).

We agree with defendant that his conviction of kidnapping in the second degree was an inclusory concurrent count of kidnapping in the second degree as a sexually motivated felony (see *1125 *People v MacLeod*, 162 AD3d 1751, 1752 [4th Dept 2018],

195 N.Y.S.3d 335, 2023 N.Y. Slip Op. 04268

lv denied 32 NY3d 1005 [2018]). The court upon retrial should submit to the jury the kidnapping in the second degree count in the alternative only (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Piccione*, 78 AD3d 1518, 1519 [4th Dept 2010]).

We have reviewed defendant's remaining contentions in his main brief and the contentions in his pro se supplemental brief in appeal No. 1 and conclude that none warrants dismissal of the indictment.

In light of our determination that reversal of the judgment in appeal No. 1 is required, we vacate the resentence in appeal No. 2 (*see generally* *People v Cady*, 103 AD3d 1155, 1157 [4th Dept 2013]). Present—Whalen, P.J., Lindley, Curran, Bannister and Greenwood, JJ.

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Exhibit J

broh v. Ramirez 540 U.S. 551

Affirmed.

Chautauqua County Jail



KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Sampson v. Gee-Cram, 6th Cir.(Mich.), July 12, 2016

124 S.Ct. 1284

Supreme Court of the United States

Jeff **GROH**, Petitioner,

v.

Joseph R. **RAMIREZ** et al.

No. 02–811.

|

Argued Nov. 4, 2003.

|

Decided Feb. 24, 2004.

Synopsis

Background: Ranch owners brought *Bivens* and § 1983 action against federal and county law enforcement officers, alleging that their Fourth Amendment rights were violated. The United States District Court for the District of Montana, Donald W. Molloy, Chief District Judge, granted defendants' motion for summary judgment, and ranch owners appealed. Amending its prior opinion, 283 F.3d 985, the Ninth Circuit Court of Appeals, Kozinski, Circuit Judge, 298 F.3d 1022, affirmed in part and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Stevens, held that:

[1] search warrant that utterly failed to describe the persons or things to be seized was invalid on its face, notwithstanding that requisite particularized description was provided in search warrant application;

[2] residential search that was conducted pursuant to this facially invalid warrant could not be regarded as “reasonable,” though items to be seized were described in search warrant application, and though officers conducting search exercised restraint in limiting scope of search to that indicated in application; and

[3] Bureau of Alcohol, Tobacco and Firearms (BATF) agent who had prepared and executed warrant was not entitled to qualified immunity from liability.

Justice Kennedy dissented and filed opinion, in which Chief Justice Rehnquist joined.

Justice Thomas dissented and filed opinion, in which Justice Scalia joined, and in which Chief Justice Rehnquist joined in part.

West Headnotes (13)

- [1] **Searches and Seizures** ➡ Places, objects, or persons to be searched

Search warrant that utterly failed to describe the persons or things to be seized was invalid on its face, notwithstanding that requisite particularized description was provided in search warrant application, where this description was not incorporated by reference in search warrant itself, and where application, having been sealed, did not accompany warrant. U.S.C.A. Const.Amend. 4.

333 Cases that cite this headnote

- [2] **Searches and Seizures** ➡ Particularity or generality and overbreadth in general
- Fourth Amendment, by its terms, requires particularity in warrant, not in supporting documents. U.S.C.A. Const.Amend. 4.

240 Cases that cite this headnote

- [3] **Searches and Seizures** ➡ Objects or information sought

Residential search that was conducted pursuant to facially invalid search warrant, which utterly failed to describe the persons or things to be seized, could not be regarded as “reasonable,” for Fourth Amendment purposes, though items to be seized were described in search warrant application, and though officers conducting search exercised restraint in limiting scope of search to that indicated in application. U.S.C.A. Const.Amend. 4.

316 Cases that cite this headnote

- [4] **Searches and Seizures** ➡ Particularity or generality and overbreadth in general

Residential search that was conducted pursuant to warrant which, in failing to describe at all the persons or things to be seized, was obviously deficient on its face had to be regarded as warrantless, for Fourth Amendment purposes. U.S.C.A. Const.Amend. 4.

56 Cases that cite this headnote

- [5] **Searches and Seizures** ➡ Necessity of and preference for warrant, and exceptions in general

Searches and seizures inside home without warrant are presumptively unreasonable, for Fourth Amendment purposes. U.S.C.A. Const.Amend. 4.

351 Cases that cite this headnote

- [6] **Searches and Seizures** ➡ Presence of probable cause

Absent exigent circumstances, warrantless entry into home to search for weapons or contraband is unconstitutional, even when felony has been committed and there is probable cause to believe that incriminating evidence will be found within. U.S.C.A. Const.Amend. 4.

114 Cases that cite this headnote

- [7] **Searches and Seizures** ➡ Particularity or generality and overbreadth in general

Presumptive rule against warrantless searches applies with equal force to searches whose only defect is lack of particularity in warrant. U.S.C.A. Const.Amend. 4.

25 Cases that cite this headnote

- [8] **Criminal Law** ➡ Particular cases

It would not have been reasonable for officer executing search warrant to rely on warrant that,

in utterly failing to describe the persons or things to be seized, was obviously defective on its face, for purposes of *Leon* "good faith" exception to exclusionary rule. U.S.C.A. Const.Amend. 4.

166 Cases that cite this headnote

- [9] **Searches and Seizures** ➡ Particularity or generality and overbreadth in general

Purpose of Fourth Amendment requirement that a search warrant particularly describe the place to be searched and the persons or things to be seized is not limited to prevention of general searches; particular warrant also assures the individual whose property is searched or seized of lawful authority of executing officer, his need to search, and limits of his power to search. U.S.C.A. Const.Amend. 4.

480 Cases that cite this headnote

- [10] **Searches and Seizures** ➡ Execution and Return of Warrants

It is incumbent on officer executing search warrant to ensure that search is lawfully authorized and lawfully conducted; this is not a duty to proofread, but rather a duty to ensure that warrant conforms to constitutional requirements. U.S.C.A. Const.Amend. 4.

54 Cases that cite this headnote

- [11] **United States** ➡ Searches, seizures, and forfeitures

Bureau of Alcohol, Tobacco and Firearms (BATF) agent who had prepared and executed warrant for search of plaintiffs' ranch could not have reasonably believed in validity either of warrant itself, which utterly failed to describe persons or things to be seized in clear contravention of explicit Fourth Amendment command, or of search conducted pursuant thereto, and was not entitled to qualified immunity from liability in *Bivens* action for violating ranch owners' Fourth Amendment rights. U.S.C.A. Const.Amend. 4.

202 Cases that cite this headnote

- [12] **Civil Rights** ➡ Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general
- Whether officer is entitled to qualified immunity from liability for violating plaintiff's civil rights depends on whether rights that were transgressed were "clearly established," i.e., whether it would be clear to reasonable officer that his conduct was unlawful in the situation he confronted.

554 Cases that cite this headnote

- [13] **Civil Rights** ➡ Sheriffs, police, and other peace officers
- Criminal Law** ➡ Good Faith or Objectively Reasonable Conduct Doctrine
- Warrant may be so facially deficient that executing officers cannot reasonably presume it to be valid, either for purpose of *Leon* "good faith" exception to exclusionary rule, or for purpose of officer's claiming qualified immunity from liability for violating party's civil rights. U.S.C.A. Const.Amend. 4.

120 Cases that cite this headnote

****1286 *551 Syllabus***

Petitioner, a Bureau of Alcohol, Tobacco and Firearms agent, prepared and signed an application for a warrant to search respondents' Montana ranch, which stated that the search was for specified weapons, explosives, and records. The application was supported by petitioner's detailed affidavit setting forth his basis for believing that such items were on the ranch and was accompanied by a warrant form that he completed. The Magistrate Judge (Magistrate) signed the warrant form even though it did not identify any of the items that petitioner intended to seize. The portion calling for a description of the "person or property" described respondents' house, not the alleged weapons; the warrant did not incorporate by reference the application's itemized list. Petitioner led federal and local law enforcement officers to the ranch the next day but found no illegal weapons or explosives. Petitioner left a copy of the warrant, but not the application, with respondents. Respondents sued petitioner

and others under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, and 42 U.S.C. § 1983, claiming, *inter alia*, a Fourth Amendment violation. The District Court granted the defendants summary judgment, finding no Fourth Amendment violation, and finding that even if such a violation occurred, the defendants were entitled to qualified immunity. The Ninth Circuit affirmed except as to the Fourth Amendment claim against petitioner, holding that the warrant was invalid because it did not describe with particularity the place to be searched and the items to be seized. The court also concluded that *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, precluded qualified immunity for petitioner because he was the leader of a search who did not read the warrant and satisfy himself that he understood its scope and limitations and that it was not obviously defective.

Held:

1. The search was clearly "unreasonable" under the Fourth Amendment. Pp. 1289–1293.

(a) The warrant was plainly invalid. It did not meet the Fourth Amendment's unambiguous requirement that a warrant "particularly describ[e] ... the persons or things to be seized." The fact that the application adequately described those things does not save the warrant; Fourth Amendment interests are not necessarily vindicated when another *552 document says something about the objects of the search, but that document's contents are neither known to the person whose home is being searched nor available for her inspection. It is not necessary to decide whether the Amendment permits a warrant to cross-reference other documents, because such incorporation did not occur here. Pp. 1289–1290.

(b) Petitioner's argument that the search was nonetheless reasonable is rejected. Because the warrant did not describe the items *at all*, it was so obviously deficient that the search must be regarded as warrantless, and thus presumptively unreasonable. This presumptive rule applies to searches whose only defect is a lack of particularity in the warrant. Petitioner errs in arguing that such searches should be exempt from the presumption if they otherwise satisfy the particularity requirement's goals. Unless items in the affidavit are set forth in the warrant, there is no written assurance that the Magistrate actually found probable cause for a search as **1287 broad as the affiant requested. The restraint petitioner showed in conducting the instant

search was imposed by the agent himself, not a judicial officer. Moreover, the particularity requirement's purpose is not limited to preventing general searches; it also assures the individual whose property is searched and seized of the executing officer's legal authority, his need to search, and the limits of his power to do so. This case presents no occasion to reach petitioner's argument that the particularity requirements' goals were served when he orally described the items to respondents, because respondents dispute his account. Pp. 1290–1293.

2. Petitioner is not entitled to qualified immunity despite the constitutional violation because “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted,” *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272. Given that the particularity requirement is stated in the Constitution's text, no reasonable officer could believe that a warrant that did not comply with that requirement was valid. Moreover, because petitioner prepared the warrant, he may not argue that he reasonably relied on the Magistrate's assurance that it contained an adequate description and was valid. Nor could a reasonable officer claim to be unaware of the basic rule that, absent consent or exigency, a warrantless search of a home is presumptively unconstitutional. “[A] warrant may be so facially deficient ... that the executing officers cannot reasonably presume it to be valid.” *Leon*, 468 U.S., at 923, 104 S.Ct. 3405. This is such a case. Pp. 1293–1294.

298 F.3d 1022, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, *post*, p. 1295. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which REHNQUIST, C.J., joined as to Part III, *post*, p. 1298.

Attorneys and Law Firms

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Austin C. Schlick, Washington, DC, for the United States as amicus curiae, by special leave of the court, supporting the petitioner.

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Opinion

Justice STEVENS delivered the opinion of the Court.

*553 Petitioner conducted a search of respondents' home pursuant to a warrant that failed to describe the “persons or things to be seized.” U.S. Const., Amdt. 4. The questions presented are (1) whether the search violated the Fourth Amendment, and (2) if so, whether petitioner nevertheless is entitled to qualified immunity, given that a Magistrate Judge (Magistrate), relying on an affidavit that particularly described the items in question, found probable cause to conduct the search.

*554 I

Respondents, Joseph **Ramirez** and members of his family, live on a large ranch in Butte–Silver Bow County, Montana. Petitioner, Jeff **Groh**, has been a Special Agent for the Bureau of Alcohol, Tobacco and ****1288** Firearms (ATF) since 1989. In February 1997, a concerned citizen informed petitioner that on a number of visits to respondents' ranch the visitor had seen a large stock of weaponry, including an automatic rifle, grenades, a grenade launcher, and a rocket launcher.¹ Based on that information, petitioner prepared and signed an application for a warrant to search the ranch. The application stated that the search was for “any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers.” App. to Pet. for Cert. 28a. Petitioner supported the application with a detailed affidavit, which he also prepared and executed, that set forth the basis for his belief that the listed items were concealed on the ranch. Petitioner then presented these documents to a Magistrate, along with a warrant form that petitioner also had completed. The Magistrate signed the warrant form.

Although the application particularly described the place to be searched and the contraband petitioner expected to find, the warrant itself was less specific; it failed to identify any of the items that petitioner intended to seize. In the portion of the form that called for a description of the “person

124 S.Ct. 1284, 157 L.Ed.2d 1068, 72 USLW 4160, 04 Cal. Daily Op. Serv. 1522...

or property” to be seized, petitioner typed a description of respondents’ two-story blue house rather than the alleged stockpile of firearms.² The warrant did not incorporate by *555 reference the itemized list contained in the application. It did, however, recite that the Magistrate was satisfied the affidavit established probable cause to believe that contraband was concealed on the premises, and that sufficient grounds existed for the warrant’s issuance.³

The day after the Magistrate issued the warrant, petitioner led a team of law enforcement officers, including both federal agents and members of the local sheriff’s department, in the search of respondents’ premises. Although respondent Joseph Ramirez was not home, his wife and children were. Petitioner states that he orally described the objects of the search to Mrs. Ramirez in person and to Mr. Ramirez by telephone. According to Mrs. Ramirez, however, petitioner explained only that he was searching for “ ‘an explosive device in a box.’ ” Ramirez v. Butte–Silver Bow County, 298 F.3d 1022, 1026 (C.A.9 2002). At any rate, the officers’ search uncovered no illegal weapons or explosives. When the officers left, petitioner gave Mrs. Ramirez a copy of the search warrant, but not a copy of the application, which had been sealed. The following day, in response to a request from respondents’ attorney, petitioner faxed the attorney a copy of the page of the application that listed the items to be seized. No charges were filed against the Ramirezes.

Respondents sued petitioner and the other officers under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and Rev. Stat. § 1979, 42 U.S.C. § 1983, raising eight claims, including violation of **1289 the Fourth Amendment. App. 17–27. The District Court entered summary judgment for all defendants. The court found no Fourth Amendment violation, because it considered the case comparable to one in which the warrant contained an inaccurate address, and in such a case, the court reasoned, the warrant is sufficiently *556 detailed if the executing officers can locate the correct house. App. to Pet. for Cert. 20a22a. The court added that even if a constitutional violation occurred, the defendants were entitled to qualified immunity because the failure of the warrant to describe the objects of the search amounted to a mere “typographical error.” *Id.*, at 22a–24a.

The Court of Appeals affirmed the judgment with respect to all defendants and all claims, with the exception of respondents’ Fourth Amendment claim against petitioner. 298 F.3d, at 1029–1030. On that claim, the court held that

the warrant was invalid because it did not “describe with particularity the place to be searched and the items to be seized,” and that oral statements by petitioner during or after the search could not cure the omission. *Id.*, at 1025–1026. The court observed that the warrant’s facial defect “increased the likelihood and degree of confrontation between the Ramirezes and the police” and deprived respondents of the means “to challenge officers who might have exceeded the limits imposed by the magistrate.” *Id.*, at 1027. The court also expressed concern that “permitting officers to expand the scope of the warrant by oral statements would broaden the area of dispute between the parties in subsequent litigation.” *Ibid.* The court nevertheless concluded that all of the officers except petitioner were protected by qualified immunity. With respect to petitioner, the court read our opinion in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), as precluding qualified immunity for the leader of a search who fails to “read the warrant and satisfy [himself] that [he] understand[s] its scope and limitations, and that it is not defective in some obvious way.” 298 F.3d, at 1027. The court added that “[t]he leaders of the search team must also make sure that a copy of the warrant is available to give to the person whose property is being searched at the commencement of the search, and that such copy has no missing pages or other obvious defects.” *Ibid.* (footnote omitted). We granted certiorari. 537 U.S. 1231, 123 S.Ct. 1354, 155 L.Ed.2d 195 (2003).

*557 II

[1] The warrant was plainly invalid. The Fourth Amendment states unambiguously 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.” (Emphasis added.) The warrant in this case complied with the first three of these requirements: It was based on probable cause and supported by a sworn affidavit, and it described particularly the place of the search. On the fourth requirement, however, the warrant failed altogether. Indeed, petitioner concedes that “the warrant ... was deficient in particularity because it provided no description of the type of evidence sought.” Brief for Petitioner 10.

[2] The fact that the application adequately described the “things to be seized” does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting

documents. See *Massachusetts v. Sheppard*, 468 **U.S.** 981, 988, n. 5, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984) (“[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional” ****1290**); see also *United States v. Stefonek*, 179 F.3d 1030, 1033 (C.A.7 1999) (“The Fourth Amendment requires that the warrant particularly describe the things to be seized, not the papers presented to the judicial officer ... asked to issue the warrant” (emphasis in original)). And for good reason: “The presence of a search warrant serves a high function,” *McDonald v. United States*, 335 **U.S.** 451, 455, 69 S.Ct. 191, 93 L.Ed. 153 (1948), and that high function is not necessarily vindicated when some other document, somewhere, says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for her inspection. We do not say that the Fourth Amendment prohibits a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant ***558** uses appropriate words of incorporation, and if the supporting document accompanies the warrant. See, e.g., *United States v. McGrew*, 122 F.3d 847, 849–850 (C.A.9 1997); *United States v. Williamson*, 1 F.3d 1134, 1136, n. 1 (C.A.10 1993); *United States v. Blakeney*, 942 F.2d 1001, 1025–1026 (C.A.6 1991); *United States v. Maxwell*, 920 F.2d 1028, 1031 (C.A.D.C.1990); *United States v. Curry*, 911 F.2d 72, 76–77 (C.A.8 1990); *United States v. Roche*, 614 F.2d 6, 8 (C.A.1 1980). But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation.

[3] Petitioner argues that even though the warrant was invalid, the search nevertheless was “reasonable” within the meaning of the Fourth Amendment. He notes that a Magistrate authorized the search on the basis of adequate evidence of probable cause, that petitioner orally described to respondents the items to be seized, and that the search did not exceed the limits intended by the Magistrate and described by petitioner. Thus, petitioner maintains, his search of respondents’ ranch was functionally equivalent to a search authorized by a valid warrant.

[4] [5] [6] We disagree. This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical

error. Rather, in the space set aside for a description of the items to be seized, the warrant stated that the items consisted of a “single dwelling residence ... blue in color.” In other words, the warrant did not describe the items to be seized *at all*. In this respect the warrant was so obviously deficient that we must regard the search as “warrantless” within the meaning of our case law. See *Leon*, 468 **U.S.**, at 923, 104 S.Ct. 3405; cf. *Maryland v. Garrison*, 480 **U.S.** 79, 85, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); *Steele v. United States*, 267 **U.S.** 498, 503–504, 45 S.Ct. 414, 69 L.Ed. 757 (1925). “We are not ***559** dealing with formalities.” *McDonald*, 335 **U.S.**, at 455, 69 S.Ct. 191. Because “ ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion’ ” stands “ ‘[a]t the very core’ of the Fourth Amendment,” *Kyllo v. United States*, 533 **U.S.** 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting *Silverman v. United States*, 365 **U.S.** 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)), our cases have firmly established the “ ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable,” *Payton v. New York*, 445 **U.S.** 573, 586, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) (footnote omitted). ****1291** Thus, “absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.” *Id.*, at 587–588, 100 S.Ct. 1371 (footnote omitted). See *Kyllo*, 533 **U.S.**, at 29, 121 S.Ct. 2038; *Illinois v. Rodriguez*, 497 **U.S.** 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *Chimel v. California*, 395 **U.S.** 752, 761–763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *McDonald*, 335 **U.S.**, at 454, 69 S.Ct. 191; *Johnson v. United States*, 333 **U.S.** 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

[7] We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant. In *Sheppard*, for instance, the petitioner argued that even though the warrant was invalid for lack of particularity, “the search was constitutional because it was reasonable within the meaning of the Fourth Amendment.” 468 **U.S.**, at 988, n. 5, 104 S.Ct. 3424. In squarely rejecting that position, we explained:

“The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. *Stanford v. Texas*, 379 **U.S.** 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *United States v. Cardwell*, 680 F.2d 75, 77–78 (C.A.9 1982); *United States v. Crozier*, 674

F.2d 1293, 1299 (C.A.9 1982); *United States v. Klein*, 565 F.2d 183, 185 (C.A.1 1977); *United States v. Gardner*, 537 F.2d 861, 862 (C.A.6 1976); *United States v. Marti*, 421 F.2d 1263, 1268–1269 (C.A.2 1970). *560 That rule is in keeping with the well-established principle that ‘except in certain carefully defined classes of cases, a search of private property without proper consent is “unreasonable” unless it has been authorized by a valid search warrant.’ *Camara v. Municipal Court*, 387 U.S. 523, 528–529, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). See *Steagald v. United States*, 451 U.S. 204, 211–212, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958).” *Ibid*.

[8] Petitioner asks us to hold that a search conducted pursuant to a warrant lacking particularity should be exempt from the presumption of unreasonableness if the goals served by the particularity requirement are otherwise satisfied. He maintains that the search in this case satisfied those goals—which he says are “to prevent general searches, to prevent the seizure of one thing under a warrant describing another, and to prevent warrants from being issued on vague or dubious information,” Brief for Petitioner 16—because the scope of the search did not exceed the limits set forth in the application. But unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit. See *McDonald*, 335 U.S., at 455, 69 S.Ct. 191 (“Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done ... so that an objective mind might weigh the need to invade [the citizen’s] privacy in order to enforce the law”). In this case, for example, it is at least theoretically possible that the Magistrate was satisfied that the search for weapons and explosives was justified by the showing in the affidavit, but not convinced that any evidentiary basis existed **1292 for rummaging through respondents’ files and papers for receipts pertaining to the purchase or manufacture of such items. Cf. *Stanford v. Texas*, 379 U.S. 476, 485–486, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). Or, conceivably, the Magistrate might *561 have believed that some of the weapons mentioned in the affidavit could have been lawfully possessed and therefore should not be seized. See 26 U.S.C. § 5861 (requiring registration, but not banning possession of, certain firearms). The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad

as the affiant’s request. Even though petitioner acted with restraint in conducting the search, “the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.” *Katz v. United States*, 389 U.S. 347, 356, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).⁴

[9] We have long held, moreover, that the purpose of the particularity requirement is not limited to the prevention of general searches. See *Garrison*, 480 U.S., at 84, 107 S.Ct. 1013. A particular warrant also “assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.” *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (citing *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532, 87 S.Ct. 1727 (1967)), abrogated on other grounds, *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). See also *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317 (1983) (“[P]ossession *562 of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct”).⁵

1293 Petitioner argues that even if the goals of the particularity requirement are broader than he acknowledges, those goals nevertheless were served because he orally described to respondents the items for which he was searching. Thus, he submits, respondents had all of the notice that a proper warrant would have accorded. But this case presents no occasion even to reach this argument, since respondents, as noted above, dispute petitioner’s account. According to Mrs. **Ramirez, petitioner stated only that he was looking for an “‘explosive device in a box.’” 298 F.3d, at 1026. Because this dispute is before us on petitioner’s motion for summary judgment, App. to Pet. for Cert. 13a, “[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (citation omitted). The posture of the case therefore obliges us to credit Mrs. **Ramirez’s** account, and we find that petitioner’s description of “‘an explosive *563 device in a box’” was little better than no guidance at all. See *Stefonek*, 179 F.3d, at 1032–1033 (holding that a search warrant for “‘evidence of crime’” was “[s]o open-ended” in its description that it could “only be described as a general warrant”).

[10] It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully

conducted.⁶ Because petitioner did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly “unreasonable” under the Fourth Amendment. The Court of Appeals correctly held that the search was unconstitutional.

III

[11] [12] Having concluded that a constitutional violation occurred, we turn to the question whether petitioner is entitled to qualified immunity despite that violation. See *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). The answer depends on whether the right that was transgressed was “‘clearly established’”—that is, “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (“If the law was clearly established, the immunity *564 defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct”). Moreover, because petitioner himself prepared the invalid warrant, he may not argue that he reasonably relied on the Magistrate’s assurance that the warrant contained an adequate description of the things to be seized and was therefore valid. Cf. *Sheppard*, 468 U.S., at 989–990, 104 S.Ct. 3424. In fact, the guidelines of petitioner’s own department placed him on notice that he might be liable for executing **1294 a manifestly invalid warrant. An ATF directive in force at the time of this search warned: “Special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate.” Searches and Examinations, ATF Order O 3220.1(7)(d) (Feb. 13, 1997). See also *id.*, at 3220.1(23) (b) (“If any error or deficiency is discovered and there is a reasonable probability that it will invalidate the warrant, such warrant shall not be executed. The search shall be postponed until a satisfactory warrant has been obtained”).⁷ And even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal.

No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. See *Payton*, 445 U.S., at 586–588, 100 S.Ct. 1371. Indeed, as we noted nearly 20 years ago in *Sheppard*: “The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the *565 Fourth Amendment is unconstitutional.” 468 U.S., at 988, n. 5, 104 S.Ct. 3424.⁸ Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking **us**, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so.

[13] Petitioner contends that the search in this case was the product, at worst, of a lack of due care, and that our case law requires more than negligent behavior before depriving an official of qualified immunity. See *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). But as we observed in the companion case to *Sheppard*, “a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *Leon*, 468 U.S., at 923, 104 S.Ct. 3405. This is such a case.⁹

****1295 *566** Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the Court that the Fourth Amendment was violated in this case. The Fourth Amendment states 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.” The warrant issued in this case did not particularly describe the things to be seized, and so did not comply with the Fourth Amendment. I disagree with the Court on whether the officer who obtained the warrant and led the search team is entitled to qualified immunity for his role in the search. In my view, the officer should receive qualified immunity.

An officer conducting a search is entitled to qualified immunity if “a reasonable officer could have believed” that the search was lawful “in light of clearly established law and the information the searching officers possessed.” *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Court notes, this is the same objective reasonableness standard applied under the “ ‘good faith’ ” exception to the exclusionary rule. See *ante*, at 1294, n. 8 (citing *Malley v. Briggs*, 475 U.S. 335, 344, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). The central question is whether someone in the officer's position could reasonably but mistakenly conclude that his conduct complied with the Fourth Amendment. *Creighton*, *supra*, at 641, 107 S.Ct. 3034. See also *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*).

An officer might reach such a mistaken conclusion for several reasons. He may be unaware of existing law and how it should be applied. See, e.g., *Saucier*, *supra*. Alternatively, *567 he may misunderstand important facts about the search and assess the legality of his conduct based on that misunderstanding. See, e.g., *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). Finally, an officer may misunderstand elements of both the facts and the law. See, e.g., *Creighton*, *supra*. Our qualified immunity doctrine applies regardless of whether the officer's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (noting that qualified immunity covers “mere mistakes in judgment, whether the mistake is one of fact or one of law”).

The present case involves a straightforward mistake of fact. Although the Court does not acknowledge it directly, it is obvious from the record below that the officer simply made a clerical error when he filled out the proposed warrant and offered it to the Magistrate Judge. The officer used the proper description of the property to be seized when he completed the affidavit. He also used the proper description in the accompanying application. When he typed up the description a third time for the proposed warrant, however, the officer accidentally entered a description of the place to be searched in the part of the warrant form that called for a description of the property to be seized. No one noticed the error before the search was executed. Although the record is not entirely **1296 clear on this point, the mistake apparently remained undiscovered until the day after the search when respondents' attorney reviewed the warrant for defects. The officer, being

unaware of his mistake, did not rely on it in any way. It is uncontested that the officer trained the search team and executed the warrant based on his mistaken belief that the warrant contained the proper description of the items to be seized.

The question is whether the officer's mistaken belief that the warrant contained the proper language was a reasonable belief. In my view, it was. A law enforcement officer charged with leading a team to execute a search warrant for *568 illegal weapons must fulfill a number of serious responsibilities. The officer must establish probable cause to believe the crime has been committed and that evidence is likely to be found at the place to be searched; must articulate specific items that can be seized, and a specific place to be searched; must obtain the warrant from a magistrate judge; and must instruct a search team to execute the warrant within the time allowed by the warrant. The officer must also oversee the execution of the warrant in a way that protects officer safety, directs a thorough and professional search for the evidence, and avoids unnecessary destruction of property. These difficult and important tasks demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation.

An officer who complies fully with all of these duties can be excused for not being aware that he had made a clerical error in the course of filling out the proposed warrant. See *Maryland v. Garrison*, 480 U.S. 79, 87, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) (recognizing “the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants”). An officer who drafts an affidavit, types up an application and proposed warrant, and then obtains a judge's approval naturally assumes that he has filled out the warrant form correctly. Even if the officer checks over the warrant, he may very well miss a mistake. We all tend toward myopia when looking for our own errors. Every lawyer and every judge can recite examples of documents that they wrote, checked, and double-checked, but that still contained glaring errors. Law enforcement officers are no different. It would be better if the officer recognizes the error, of course. It would be better still if he does not make the mistake in the first place. In the context of an otherwise proper search, however, an officer's failure to recognize his clerical error on a warrant form can be a reasonable mistake.

*569 The Court reaches a different result by construing the officer's error as a mistake of law rather than a mistake of

fact. According to the Court, the officer should not receive qualified immunity because “no reasonable officer could believe that a warrant that plainly did not comply with [the particularity] requirement was valid.” *Ante*, at 1293. The majority is surely right that a reasonable officer must know that a defective warrant is invalid. This much is obvious, if not tautological. It is also irrelevant, for the essential question here is whether a reasonable officer in petitioner’s position would necessarily know that the warrant had a clerical error in the first place. The issue in this case is whether an officer can reasonably fail to recognize a clerical error, not whether an officer who recognizes a clerical error can reasonably conclude that a defective warrant is legally valid.

The Court gives little attention to this important and difficult question. It receives ****1297** only two sentences at the very end of the Court’s opinion. In the first sentence, the Court quotes dictum from *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405 (1984), to the effect that “ ‘a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.’ ” *Ante*, at 1294. In the second sentence, the Court informs **us** without explanation that “[t]his is such a case.” *Ante*, at 1294. This reasoning is not convincing.

To understand the passage from *Leon* that the Court relies upon, it helps to recognize that most challenges to defective search warrants arise when officers rely on the defect and conduct a search that should not have occurred. The target of the improper search then brings a civil action challenging the improper search, or, if charges have been filed, moves to suppress the fruits of the search. The inquiry in both instances is whether the officers’ reliance on the defect was reasonable. See, *e.g.*, *Garrison, supra* (apartment wrongly searched because the searching officers did not realize that ***570** there were two apartments on the third floor and obtained a warrant to search the entire floor); *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (person wrongly arrested and searched because a court employee’s clerical error led officer to believe a warrant existed for person’s arrest); *McCleary v. Navarro*, 504 U.S. 966, 112 S.Ct. 2324, 119 L.Ed.2d 243 (1992) (White, J., dissenting from denial of certiorari) (house wrongly searched because informant told officers the suspect lived in the second house on the right, but the suspect lived in the third house on the right).

The language the Court quotes from *Leon* comes from a discussion of when “an officer [who] has obtained a

[defective] warrant and abided by its terms” has acted reasonably. 468 U.S., at 922, 104 S.Ct. 3430. The discussion notes that there are some cases in which “no reasonably well trained officer should rely on the warrant.” *Id.*, at 923, 104 S.Ct. 3430. The passage also includes several examples, among them the one that the Court relies on in this case: “[D]epending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *Ibid.*

The Court interprets this language to mean that a clerical mistake can be so obvious that an officer who fails to recognize the mistake should not receive qualified immunity. Read in context, however, the quoted language is addressed to a quite different issue. The most natural interpretation of the language is that a clerical mistake can be so obvious that the officer cannot reasonably rely on the mistake in the course of executing the warrant. In other words, a defect can be so clear that an officer cannot reasonably “abid[e] by its terms” and execute the warrant as written. *Id.*, at 922.

We confront no such issue here, of course. No one suggests that the officer reasonably could have relied on the defective language in the warrant. This is a case about an officer being unaware of a clerical error, not a case about an officer relying on one. The respondents do not make the ***571** usual claim that they were injured by a defect that led to an improper search. Rather, they make an unusual claim that they were injured simply because the warrant form did not contain the correct description of the property to be seized, even though no property was seized. The language from *Leon* is not on point.

****1298** Our Court has stressed that “the purpose of encouraging recourse to the warrant procedure” can be served best by rejecting overly technical standards when courts review warrants. *Illinois v. Gates*, 462 U.S. 213, 237, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). We have also stressed that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley*, 475 U.S., at 341, 106 S.Ct. 1092. The Court’s opinion is inconsistent with these principles. Its analysis requires our Nation’s police officers to concentrate more on the correctness of paper forms than substantive rights. The Court’s new “duty to ensure that the warrant conforms to constitutional requirements” sounds laudable, *ante*, at 1293, n. 6, but would be more at home in a regime of strict liability than within

124 S.Ct. 1284, 157 L.Ed.2d 1068, 72 USLW 4160, 04 Cal. Daily Op. Serv. 1522...

the “ample room for mistaken judgments” that our qualified immunity jurisprudence traditionally provides, *Malley, supra*, at 343, 106 S.Ct. 1092.

For these reasons, I dissent.

Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE joins as to Part III, dissenting.

The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The precise relationship between the Amendment’s Warrant Clause and Unreasonableness Clause is unclear. But neither Clause explicitly requires a warrant. *572 While “it is of course textually possible to consider [a warrant requirement] implicit within the requirement of reasonableness,” *California v. Acevedo*, 500 U.S. 565, 582, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (SCALIA, J., concurring in judgment), the text of the Fourth Amendment certainly does not mandate this result. Nor does the Amendment’s history, which is clear as to the Amendment’s principal target (general warrants), but not as clear with respect to when warrants were required, if ever. Indeed, because of the very different nature and scope of federal authority and ability to conduct searches and arrests at the founding, it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance.

As a result, the Court has vacillated between imposing a categorical warrant requirement and applying a general reasonableness standard. Compare *Thompson v. Louisiana*, 469 U.S. 17, 20, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984) (*per curiam*), with *United States v. Rabinowitz*, 339 U.S. 56, 65, 70 S.Ct. 430, 94 L.Ed. 653 (1950). The Court has most frequently held that warrantless searches are presumptively unreasonable, see, e.g., *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Payton v. New York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), but has also found a plethora of exceptions to presumptive unreasonableness, see, e.g., *Chimel v. California*, 395 U.S. 752, 762–763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (searches incident to arrest); *United States v. Ross*, 456 U.S. 798, 800, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (automobile searches); *United States v. Biswell*, 406 U.S. 311, 315–317, 92

S.Ct. 1593, 32 L.Ed.2d 87 (1972) (searches of “pervasively regulated” businesses); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 534–539, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967) (administrative searches); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967) **1299 (exigent circumstances); *California v. Carney*, 471 U.S. 386, 390–394, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985) (mobile home searches); *Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (inventory searches); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (border searches). That is, our cases stand for *573 the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.

Today the Court holds that the warrant in this case was “so obviously deficient” that the ensuing search must be regarded as a warrantless search and thus presumptively unreasonable. *Ante*, at 1290. However, the text of the Fourth Amendment, its history, and the sheer number of exceptions to the Court’s categorical warrant requirement seriously undermine the bases upon which the Court today rests its holding. Instead of adding to this confusing jurisprudence, as the Court has done, I would turn to first principles in order to determine the relationship between the Warrant Clause and the Unreasonableness Clause. But even within the Court’s current framework, a search conducted pursuant to a defective warrant is constitutionally different from a “warrantless search.” Consequently, despite the defective warrant, I would still ask whether this search was unreasonable and would conclude that it was not. Furthermore, even if the Court were correct that this search violated the Constitution (and in particular, respondents’ Fourth Amendment rights), given the confused state of our Fourth Amendment jurisprudence and the reasonableness of petitioner’s actions, I cannot agree with the Court’s conclusion that petitioner is not entitled to qualified immunity. For these reasons, I respectfully dissent.

I

“[A]ny Fourth Amendment case may present two separate questions: whether the search was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless ‘reasonable’ within the meaning of the first.” *United States v. Leon*, 468 U.S. 897, 961, 104 S.Ct. 3405 (1984) (STEVENS, J., dissenting). By categorizing the search here to be a “warrantless” one,

the Court declines to perform a reasonableness inquiry and ignores the fact that this search is quite different from searches that the Court has considered to be “warrantless” in the past. Our cases *574 involving “warrantless” searches do not generally involve situations in which an officer has obtained a warrant that is later determined to be facially defective, but rather involve situations in which the officers neither sought nor obtained a warrant. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (officer entitled to qualified immunity despite conducting a warrantless search of respondents’ home in the mistaken belief that a robbery suspect was hiding there); *Payton v. New York*, *supra* (striking down a New York statute authorizing the warrantless entry into a private residence to make a routine felony arrest). By simply treating this case as if no warrant had even been sought or issued, the Court glosses over what should be the key inquiry: whether it is always appropriate to treat a search made pursuant to a warrant that fails to describe particularly the things to be seized as presumptively unreasonable.

The Court bases its holding that a defect in the particularity of the warrant by itself renders a search “warrantless” on a citation of a single footnote in *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424 (1984). In *Sheppard*, the Court, after noting that “the sole issue ... in th[e] case is **1300 whether the officers reasonably believed that the search they conducted was authorized by a valid warrant,” *id.*, at 988, 104 S.Ct. 3424, rejected the petitioner’s argument that despite the invalid warrant, the otherwise reasonable search was constitutional, *id.*, at 988, n. 5, 104 S.Ct. 3424. The Court recognized that under its case law a reasonableness inquiry would be appropriate if one of the exceptions to the warrant requirement applied. But the Court declined to consider whether such an exception applied and whether the search actually violated the Fourth Amendment because that question presented merely a “fact-bound issue of little importance.” *Ibid.* Because the Court in *Sheppard* did not conduct any sort of inquiry into whether a Fourth Amendment violation actually occurred, it is clear that the Court assumed a violation for the purposes of its analysis. Rather than rely on dicta buried in a footnote in *575 *Sheppard*, the Court should actually analyze the arguably dispositive issue in this case.

The Court also rejects the argument that the details of the warrant application and affidavit save the warrant, because “‘[t]he presence of a search warrant serves a high function.’” *Ante*, at 1290 (quoting *McDonald v. United States*, 335

U.S. 451, 455, 69 S.Ct. 191 (1948)). But it is not only the physical existence of the warrant and its typewritten contents that serve this high function. The Warrant Clause’s principal protection lies in the fact that the “ ‘Fourth Amendment has interposed a magistrate between the citizen and the police ... so that an objective mind might weigh the need to invade [the searchee’s] privacy in order to enforce the law.’ ” *Ibid.* The Court has further explained:

“The point of the Fourth Amendment ... is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.” *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S.Ct. 367 (1948) (footnotes omitted).

But the actual contents of the warrant are simply manifestations of this protection. Hence, in contrast to the case of a truly warrantless search, where a warrant (due to a mistake) does not specify on its face the particular items to be seized *576 but the warrant application passed on by the magistrate judge contains such details, a searchee still has the benefit of a determination by a neutral magistrate that there is probable cause to search a particular place and to seize particular items. In such a circumstance, the principal justification for applying a rule of presumptive unreasonableness falls away.

In the instant case, the items to be seized were clearly specified in the warrant application and set forth in the affidavit, both of which were given to the Judge (Magistrate). The Magistrate reviewed all of the documents and signed the warrant application and made no adjustment or correction to this application. It is clear that respondents here received the protection of the Warrant Clause, as described in *Johnson* and *McDonald*. Under these circumstances, **1301 I would not hold that any ensuing search constitutes a presumptively unreasonable warrantless search. Instead, I would determine whether, despite the invalid warrant, the resulting search was reasonable and hence constitutional.

II

Because the search was not unreasonable, I would conclude that it was constitutional. Prior to execution of the warrant, petitioner briefed the search team and provided a copy of the search warrant application, the supporting affidavit, and the warrant for the officers to review. Petitioner orally reviewed the terms of the warrant with the officers, including the specific items for which the officers were authorized to search. Petitioner and his search team then conducted the search entirely within the scope of the warrant application and warrant; that is, within the scope of what the Magistrate had authorized. Finding no illegal weapons or explosives, the search team seized nothing. 298 F.3d 1022, 1025 (C.A.9 2002). When petitioner left, he gave respondents a copy of the search warrant. Upon request the next day, petitioner faxed respondents a copy of the more detailed *577 warrant application. Indeed, putting aside the technical defect in the warrant, it is hard to imagine how the actual search could have been carried out any more reasonably.

The Court argues that this eminently reasonable search is nonetheless unreasonable because “there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit” “unless the particular items described in the affidavit are also set forth in the warrant itself.” *Ante*, at 1291. The Court argues that it was at least possible that the Magistrate intended to authorize a much more limited search than the one petitioner requested. *Ibid*. As a theoretical matter, this may be true. But the more reasonable inference is that the Magistrate intended to authorize everything in the warrant application, as he signed the application and did not make any written adjustments to the application or the warrant itself.

The Court also attempts to bolster its focus on the faulty warrant by arguing that the purpose of the particularity requirement is not only to prevent general searches, but also to assure the searchee of the lawful authority for the search. *Ante*, at 1292. But as the Court recognizes, neither the Fourth Amendment nor Federal Rule of Criminal Procedure 41 requires an officer to serve the warrant on the searchee before the search. *Ante*, at 1292, n. 5. Thus, a search should not be considered *per se* unreasonable for failing to apprise the searchee of the lawful authority prior to the search, especially where, as here, the officer promptly provides the requisite information when the defect in the papers is

detected. Additionally, unless the Court adopts the Court of Appeals' view that the Constitution protects a searchee's ability to “be on the lookout and to challenge officers,” while the officers are actually carrying out the search, 298 F.3d, at 1027, petitioner's provision of the requisite information the following day is sufficient to satisfy this interest.

*578 III

Even assuming a constitutional violation, I would find that petitioner is entitled to qualified immunity. The qualified immunity inquiry rests on “the ‘objective legal reasonableness’ of the action, *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)], assessed in light of the legal rules that were ‘clearly *1302 established’ at the time it was taken.” *Anderson v. Creighton*, 483 U.S., at 639, 107 S.Ct. 3034. The outcome of this inquiry “depends substantially upon the level of generality at which the relevant ‘legal rule’ is ... identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause ... violates a clearly established right.” *Ibid*. To apply the standard at such a high level of generality would allow plaintiffs “to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Ibid*. The Court in *Anderson* criticized the Court of Appeals for considering the qualified immunity question only in terms of the petitioner's “right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances.” *Id.*, at 640, 107 S.Ct. 3034. The Court of Appeals should have instead considered “the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.” *Id.*, at 641, 107 S.Ct. 3034.

The Court errs not only by defining the question at too high a level of generality but also by assessing the question without regard to the relevant circumstances. Even if it were true that no reasonable officer could believe that a search of a home pursuant to a warrant that fails the particularity requirement is lawful absent exigent circumstances—a proposition apparently established by dicta buried in a footnote in *Sheppard*—petitioner did not know when he carried *579 out the search that the search warrant was invalid—let alone legally nonexistent. Petitioner's entitlement

to qualified immunity, then, turns on whether his belief that the search warrant was valid was objectively reasonable. Petitioner's belief surely was reasonable.

The Court has stated that “depending on the circumstances of the particular case, a warrant may be so facially deficient ... that the executing officers cannot reasonably presume it to be valid.” *United States v. Leon*, 468 U.S., at 923, 104 S.Ct. 3405. This language makes clear that this exception to *Leon's* good-faith exception does not apply in every circumstance. And the Court does not explain why it should apply here. As an initial matter, the Court does not even argue that the fact that petitioner made a mistake in preparing the warrant was objectively unreasonable, nor could it. Given the sheer number of warrants prepared and executed by officers each year, combined with the fact that these same officers also prepare detailed and sometimes somewhat comprehensive documents supporting the warrant applications, it is inevitable that officers acting reasonably and entirely in good faith will occasionally make such errors.

The only remaining question is whether petitioner's failure to notice the defect was objectively unreasonable. The Court today points to no cases directing an officer to proofread a warrant after it has been passed on by a neutral magistrate, where the officer is already fully aware of the scope of the intended search and the magistrate gives no reason to believe that he has authorized anything other than the requested search. Nor does the Court point to any case suggesting that where the same officer both prepares and executes the invalid warrant, he can never rely on the magistrate's assurance that the warrant is proper. Indeed, in *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Court suggested that although an officer who is **1303 not involved in the warrant application process would normally read the issued warrant to determine the object of the search,

an executing *580 officer who is also the affiant might not need to do so. *Id.*, at 989, n. 6, 104 S.Ct. 3424.

Although the Court contends that it does not impose a proofreading requirement upon officers executing warrants, *ante*, at 1293, n. 6, I see no other way to read its decision, particularly where, as here, petitioner could have done nothing more to ensure the reasonableness of his actions than to proofread the warrant. After receiving several allegations that respondents possessed illegal firearms and explosives, petitioner prepared an application for a warrant to search respondents' ranch, along with a supporting affidavit detailing the history of allegations against respondents, petitioner's investigation into these allegations, and petitioner's verification of the sources of the allegations. Petitioner properly filled out the warrant application, which described both the place to be searched and the things to be seized, and obtained the Magistrate's signature on both the warrant application and the warrant itself. Prior to execution of the warrant, petitioner briefed the search team to ensure that each officer understood the limits of the search. Petitioner and his search team then executed the warrant within those limits. And when the error in the search warrant was discovered, petitioner promptly faxed the missing information to respondents. In my view, petitioner's actions were objectively reasonable, and thus he should be entitled to qualified immunity.

For the foregoing reasons, I respectfully dissent.

All Citations

540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068, 72 USLW 4160, 04 Cal. Daily Op. Serv. 1522, 2004 Daily Journal D.A.R. 2314, 17 Fla. L. Weekly Fed. S 146

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 Possession of these items, if unregistered, would violate 18 U.S.C. § 922(o)(1) and 26 U.S.C. § 5861.
- 2 The warrant stated: “[T]here is now concealed [on the specified premises] a certain person or property, namely [a] single dwelling residence two story in height which is blue in color and has two additions attached to the east. The front entrance to the residence faces in a southerly direction.” App. to Pet. for Cert. 26a.
- 3 The affidavit was sealed. Its sufficiency is not disputed.

124 S.Ct. 1284, 157 L.Ed.2d 1068, 72 USLW 4160, 04 Cal. Daily Op. Serv. 1522...

- 4 For this reason petitioner's argument that any constitutional error was committed by the Magistrate, not petitioner, is misplaced. In *Massachusetts v. Sheppard*, 468 **U.S.** 981, 104 S.Ct. 3424 (1984), we suggested that "the judge, not the police officers," may have committed "[a]n error of constitutional dimension," *id.*, at 990, 104 S.Ct. 3424, because the judge had assured the officers requesting the warrant that he would take the steps necessary to conform the warrant to constitutional requirements, *id.*, at 986, 104 S.Ct. 3424. Thus, "it was not unreasonable for the police in [that] case to rely on the judge's assurances that the warrant authorized the search they had requested." *Id.*, at 989, n. 6, 104 S.Ct. 3424. In this case, by contrast, petitioner did not alert the Magistrate to the defect in the warrant that petitioner had drafted, and we therefore cannot know whether the Magistrate was aware of the scope of the search he was authorizing. Nor would it have been reasonable for petitioner to rely on a warrant that was so patently defective, even if the Magistrate was aware of the deficiency. See *United States v. Leon*, 468 **U.S.** 897, 915, 922, n. 23, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984).
- 5 It is true, as petitioner points out, that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search. Rule 41(f) (3) provides that "[t]he officer executing the warrant must: (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or (B) leave a copy of the warrant and receipt at the place where the officer took the property." Quite obviously, in some circumstances—a surreptitious search by means of a wiretap, for example, or the search of empty or abandoned premises—it will be impracticable or imprudent for the officers to show the warrant in advance. See *Katz v. United States*, 389 **U.S.** 347, 355, n. 16, 88 S.Ct. 507 (1967); *Ker v. California*, 374 **U.S.** 23, 37–41, 83 S.Ct. 1623 (1963). Whether it would be unreasonable to refuse a request to furnish the warrant at the outset of the search when, as in this case, an occupant of the premises is present and poses no threat to the officers' safe and effective performance of their mission, is a question that this case does not present.
- 6 The Court of Appeals' decision is consistent with this principle. Petitioner mischaracterizes the court's decision when he contends that it imposed a novel proofreading requirement on officers executing warrants. The court held that officers leading a search team must "mak[e] sure that they have a proper warrant that in fact authorizes the search and seizure they are about to conduct." 298 F.3d 1022, 1027 (C.A.9 2002). That is not a duty to proofread; it is, rather, a duty to ensure that the warrant conforms to constitutional requirements.
- 7 We do not suggest that an official is deprived of qualified immunity whenever he violates an internal guideline. We refer to the ATF Order only to underscore that petitioner should have known that he should not execute a patently defective warrant.
- 8 Although both *Sheppard* and *Leon* involved the application of the "good faith" exception to the Fourth Amendment's general exclusionary rule, we have explained that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer." *Malley v. Briggs*, 475 **U.S.** 335, 344, 106 S.Ct. 1092 (1986) (citation omitted).
- 9 Justice KENNEDY argues in dissent that we have not allowed " 'ample room for mistaken judgments,' " *post*, at 1298 (quoting *Malley*, 475 **U.S.**, at 343, 106 S.Ct. 1092), because "difficult and important tasks demand the officer's full attention in the heat of an ongoing and often dangerous criminal investigation," *post*, at 1296. In this case, however, petitioner does not contend that any sort of exigency existed when he drafted the affidavit, the warrant application, and the warrant, or when he conducted the search. This is not the situation, therefore, in which we have recognized that "officers in the dangerous and difficult process of making arrests and executing search warrants" require "some latitude." *Maryland v. Garrison*, 480 **U.S.** 79, 87, 107 S.Ct. 1013 (1987).

Nor are we according "the correctness of paper forms" a higher status than "substantive rights." *Post*, at 1298. As we have explained, the Fourth Amendment's particularity requirement assures the subject of the search that a magistrate has duly authorized the officer to conduct a search of limited scope. This substantive right is not protected when the officer fails to take the time to glance at the authorizing document and detect a glaring defect that Justice KENNEDY agrees is of constitutional magnitude, *post*, at 1295.

Exhibit K

District Attorneys Office Denials of off the Record Interrogation. Denials lasted two years from 2016-2018 whereas at the start of Plaintiff's Second Trial Prosecutor Andrew Molitor Finally admitted in a half truth that he was present For Such An Interrogation. Molitor was subsequently fired from the Chautauqua County District Attorneys office

Exhibit L

Bivens v. Six Unknown Named Agents of the
Federal Bureau of Narcotics (1971) 403 U.S. 388
29 L. Ed 2d 619, 91 S. Ct 1999

91 S.Ct. 1999, 29 L.Ed.2d 619



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Disagreement Recognized by Callahan v. Federal Bureau of Prisons, 6th Cir. (Ky.), July 16, 2020

91 S.Ct. 1999

Supreme Court of the United States

Webster **BIVENS**, Petitioner,

v.

**SIX UNKNOWN NAMED AGENTS OF
FEDERAL BUREAU OF NARCOTICS.**

No. 301

|

Argued Jan. 12, 1971.

|

Decided June 21, 1971.

Synopsis

Appeal from order of the United States District Court for the Eastern District of New York, 276 F.Supp. 12, dismissing damage action based on unconstitutional search and seizure by defendant federal narcotics **agents**. The Court of Appeals, 409 F.2d 718, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that complaint alleging that **agents** of Federal Bureau of Narcotics, acting under color of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause, stated federal cause of action under the Fourth Amendment for damages recoverable upon proof of injuries resulting from **agents'** violation of that Amendment.

Reversed and remanded.

Mr. Justice Harlan concurred in the judgment and filed opinion, Mr. Chief Justice Burger, Mr. Justice Black and Mr. Justice Blackmun filed dissenting opinions.

West Headnotes (7)

- [1] **Searches and Seizures** ➡ Fourth Amendment and reasonableness in general
- Searches and Seizures** ➡ Liability for wrongful search and seizure; actions

United States ➡ Criminal Law Enforcement and Investigation

The Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the state in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen, and citizen who sustains damages as result of federal **agents'** violation of Fourth Amendment is not limited to action in tort, under state law, in state courts, to obtain money damages to redress invasion of Fourth Amendment rights. U.S.C.A.Const. Amend. 4.

3485 Cases that cite this headnote

- [2] **Searches and Seizures** ➡ Scope of Search

The Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant. U.S.C.A.Const. Amend. 4.

147 Cases that cite this headnote

- [3] **Searches and Seizures** ➡ Application of federal standards to states and territories

State law may not authorize federal **agents** to violate the Fourth Amendment. U.S.C.A.Const. Amend. 4.

174 Cases that cite this headnote

- [4] **Federal Preemption** ➡ Grounds for preemption in general

State law may not undertake to limit the extent to which federal authority can be exercised.

19 Cases that cite this headnote

- [5] **Searches and Seizures** ➡ Liability for wrongful search and seizure; actions

Damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials. U.S.C.A.Const. Amend. 4.

2763 Cases that cite this headnote

[] **Controlled Substances** ➡ Probable or reasonable cause

Searches and Seizures ➡ Liability for wrongful search and seizure; actions

United States ➡ Pleading

Complaint alleging that **agents** of Federal Bureau of Narcotics, acting under color of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause, stated federal cause of action under the Fourth Amendment for damages recoverable upon proof of injuries resulting from **agents'** violation of that Amendment. U.S.C.A.Const. Amend. 4.

4897 Cases that cite this headnote

[7] **Federal Courts** ➡ Presentation of Questions Below or on Review; Record; Waiver

The Supreme Court on writ of certiorari to United States Court of Appeals would not consider question not passed upon by the Court of Appeals.

811 Cases that cite this headnote

****2000 Syllabus***

***388** Petitioner's complaint alleged that respondent **agents** of the Federal Bureau of Narcotics, acting under color of federal authority, made a warrantless entry of his apartment, searched the apartment, and arrested him on narcotics charges. All of the acts were alleged to have been done without probable cause. Petitioner's suit to recover damages from the **agents** was dismissed by the District Court on the alternative grounds (1) that it failed to state a federal cause of action and (2) that respondents were immune from suit by virtue of their official position. The Court of Appeals affirmed on the first ground alone. held:

1. Petitioner's complaint states a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from the federal **agents'** violation of that Amendment. P. 2005.

****2001** 2. The Court does not reach the immunity question, which was not passed on by the Court of Appeals. Pp. 2001—2005.

409 F.2d 718, reversed and remanded.

Attorneys and Law Firms

Stephen A. Grant, for petitioner.

Jerome Feit, Washington, D.C., for respondents.

Opinion

***389** Mr. Justice BRENNAN delivered the opinion of the Court.

The Fourth Amendment provides that:

'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. * * *'

In *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we reserved the question whether violation of that command by a federal **agent** acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct. Today we hold that it does.

This case has its origin in an arrest and search carried out on the morning of November 26, 1965. Petitioner's complaint alleged that on that day respondents, **agents** of the Federal Bureau of Narcotics acting under claim of federal authority, entered his apartment and arrested him for alleged narcotics violations. The **agents** manacled petitioner in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern. Thereafter, petitioner was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search.

On July 7, 1967, petitioner brought suit in Federal District Court. In addition to the allegations above, his complaint asserted that the arrest and search were effected without a warrant, and that unreasonable force was employed in making the arrest; fairly read, it alleges as well that the arrest was made without probable cause.¹ Petitioner claimed to have suffered great humiliation, ***390** embarrassment, and mental suffering as a result of the **agents'** unlawful conduct, and

sought \$15,000 damages from each of them. The District Court, on respondents' motion, dismissed the complaint on the ground, inter alia, that it failed to state a cause of action.² 276 F.Supp. 12 (EDNY 1967). The Court of Appeals, one judge concurring specially,³ affirmed on that basis. 409 F.2d 718 (CA2 1969). We granted certiorari. 399 U.S. 905, 90 S.Ct. 2203, 26 L.Ed.2d 559 (1970). We reverse.

I

[1] Respondents do not argue that petitioner should be entirely without remedy for an unconstitutional invasion of his rights by federal **agents**. In respondents' view, however, the rights that petitioner asserts—primarily ****2002** rights of privacy—are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the **agents** could defend ***391** the state law tort suit by asserting that their actions were a valid exercise of federal power: if the **agents** were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. Candidly admitting that it is the policy of the Department of Justice to remove all such suits from the state to the federal courts for decision,⁴ respondents nevertheless urge that we uphold dismissal of petitioner's complaint in federal court, and remit him to filing an action in the state courts in order that the case may properly be removed to the federal court for decision on the basis of state law.

We think that respondents' thesis rests upon an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures by federal **agents**, a view that has consistently been rejected by this Court. Respondents seek to treat the relationship between a citizen and a federal **agent** unconstitutionally exercising his authority as no different from the relationship ***392** between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An **agent** acting—albeit unconstitutionally—in the **name** of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own. Cf. *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 267—268, 65 L.Ed. 654 (1921); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). Accordingly, as our cases

make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen. It guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority. And 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' *Bell v. Hood*, 327 U.S., at 684, 66 S.Ct., at 777 (footnote omitted); see *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36, 53 S.Ct. 454, 457, 77 L.Ed. 1011 (1933) (Cardozo, J.); *The Western Maid*, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299 (1922) (Holmes, J.).

First. Our cases have long since rejected the notion that the Fourth Amendment proscribes only such conduct as would, if engaged in by private persons, be condemned by state law. Thus in *Gambino v. United States*, 275 U.S. 310, 48 S.Ct. 137, 72 L.Ed. 293 (1927), petitioners ****2003** were convicted of conspiracy to violate the National Prohibition Act on the basis of evidence seized by state police officers incident to petitioners' arrest by those officers solely for the purpose of enforcing federal law. *Id.*, at 314, 48 S.Ct., at 137—138. Notwithstanding the lack of probable cause for the arrest, *id.*, at 313, 48 S.Ct., at 137, it would have been permissible under state law if effected ***393** by private individuals.⁵ It appears, moreover, that the officers were under direction from the Governor to aid in the enforcement of federal law. *Id.*, at 315—317, 48 S.Ct., at 138. Accordingly, if the Fourth Amendment reached only to conduct impermissible under the law of the State, the Amendment would have had no application to the case. Yet this Court held the Fourth Amendment applicable and reversed petitioners' convictions as having been based upon evidence obtained through an unconstitutional search and seizure. Similarly, in *Byars v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927), the petitioner was convicted on the basis of evidence seized under a warrant issued, without probable cause under the Fourth Amendment, by a state court judge for a state law offense. At the invitation of state law enforcement officers, a federal prohibition **agent** participated in the search. This Court explicitly refused to inquire whether the warrant was 'good under the state law * * * since in no event could it constitute the basis for a federal search and seizure.' *Id.*, at 29, 47 S.Ct., at 248 (emphasis added).⁶ And our recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the

*394 niceties of local trespass laws. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Berger v. New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 682—683, 5 L.Ed.2d 734 (1961). In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected.

[2] [3] [4] Second. The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile. Thus, we may bar the door against an unwelcome private intruder, or call the police if he persists in seeking entrance. The availability of such alternative means for the protection of privacy may lead the State to restrict imposition of liability for any consequent trespass. A private citizen, asserting no authority other than his own, will not normally be liable in trespass if he demands, and is granted, admission to another's house. See *W. Prosser, The Law of Torts* s 18, pp. 109—110 (3d ed., 1964); 1 *F. Harper & F. James, The Law of Torts* s 1.11 (1956). But one who demands admission under a claim of federal authority stands in a far different **2004 position. Cf. *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 267—268, 65 L.Ed. 654 (1921). The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See *Weeks v. United States*, 232 U.S. 383, 386, 34 S.Ct. 341, 342, 58 L.Ed. 652 (1914); *Amos v. United States*, supra.⁷ 'In such cases there is no safety for the citizen, *395 except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime.' *United States v. Lee*, 106 U.S. 196, 219, 1 S.Ct. 240, 259, 27 L.Ed. 171 (1882).⁸ Nor is it adequate to answer that state law may take into account the different status of one clothed with the authority of the Federal Government. For just as state law may not authorize federal agents to violate the Fourth Amendment, *Byars v. United States*, supra; *Weeks v. United States*, supra; *In re Ayers*, 123 U.S. 443, 507, 8 S.Ct. 164, 183—184, 31 L.Ed. 216 (1887), neither may state law undertake to limit the extent to which federal authority can be exercised. *In re Neagle*, 135 U.S. 1, 10 S.Ct. 658, 34 L.Ed. 55 (1890). The inevitable consequence of this dual limitation on state power is that the federal question becomes not merely a possible

defense to the state law action, but an independent claim both necessary and sufficient to make out the plaintiff's cause of action. Cf. *International Brotherhood of Boilermakers, etc. v. Hardeman*, 401 U.S. 233, 241, 91 S.Ct. 609, 28 L.Ed.2d 10 (1971).

[5] [6] Third. That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *396 *Nixon v. Herndon*, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Swafford v. Templeton*, 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); *Wiley v. Sinkler*, 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); *J. Landynski, Search and Seizure and the Supreme Court* 28 et seq. (1966); *N. Lasson, History and Development of the Fourth Amendment to the United States Constitution* 43 et seq. (1937); *Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U.Pa.L.Rev. 1, 8—33 (1968); cf. *West v. Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894); *Lammon v. Feusier*, 111 U.S. 17, 4 S.Ct. 286, 28 L.Ed. 337 (1884). Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is * * * well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood*, 327 U.S., at 684, 66 S.Ct., at 777 (footnote omitted.) The present **2005 case involves no special factors counseling hesitation in the absence of affirmative action by Congress. We are not dealing with a question of 'federal fiscal policy,' as in *United States v. Standard Oil Co.*, 332 U.S. 301, 311, 67 S.Ct. 1604, 1609—1610, 91 L.Ed. 2067 (1947). In that case we refused to infer from the Government-soldier relationship that the United States could recover damages from one who negligently injured a soldier and thereby caused the Government to pay his medical expenses and lose his services during the course of his hospitalization. Noting that Congress was normally quite solicitous where the federal purse was involved, we pointed out that 'the United States (was) the party plaintiff to the suit. And the United States has power at any time to create the liability.' *Id.*, at 316, 67 S.Ct., at 1612; see *United States v. Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954). Nor are we asked in this case to impose liability upon a congressional

employee for actions contrary to no constitutional *397 prohibition, but merely said to be in excess of the authority delegated to him by the Congress. *Wheeldin v. Wheeler*, 373 U.S. 647, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). Finally, we cannot accept respondents' formulation of the question as whether the availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the **agents**, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal **agents** of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. Cf. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964); *Jacobs v. United States*, 290 U.S. 13, 16, 54 S.Ct. 26, 27—28, 78 L.Ed. 142 (1933). 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra*, at 2001—2004, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the **agents**' violation of the Amendment.

II

[7] In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. 276 F.Supp., at 15. This question was not passed upon by the Court of Appeals, and accordingly we do not consider *398 it here. The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Judgment reversed and case remanded.

Mr. Justice HARLAN, concurring in the judgment.

My initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in

this opinion I am now persuaded to the contrary. Accordingly, I join in the judgment of reversal.

Petitioner alleged, in his suit in the District Court for the Eastern District of New York, that the defendants, federal **agents** acting under color of federal law, subjected him to a search and seizure contravening the requirements of the Fourth Amendment. He sought damages in the amount of \$15,000 from each of the **agents**. Federal jurisdiction **2006 was claimed, *inter alia*,¹ under 28 U.S.C. s 1331(a) which provides:

'The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.'

The District Court dismissed the complaint for lack of federal jurisdiction under 28 U.S.C. s 1331(a) and failure to state a claim for which relief may be granted. 276 F.Supp. 12 (EDNY 1967). On appeal, the Court of Appeals concluded, on the basis of this Court's decision in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), that petitioner's claim for damages did '(arise) under the Constitution' *399 within the meaning of 28 U.S.C. s 1331(a); but the District Court's judgment was affirmed on the ground that the complaint failed to state a claim for which relief can be granted. 409 F.2d 718 (CA2 1969).

In so concluding, Chief Judge Lumbard's opinion reasoned, in essence, that: (1) the framers of the Fourth Amendment did not appear to contemplate a 'wholly new federal cause of action founded directly on the Fourth Amendment,' *id.*, at 721, and (2) while the federal courts had power under a general grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right, they should do so only when the absence of alternative remedies renders the constitutional command a 'mere 'form of words.' *Id.*, at 723. The Government takes essentially the same position here. Brief for Respondents 4—5. And two members of the Court add the contention that we lack the constitutional power to accord **Bivens** a remedy for damages in the absence of congressional action creating 'a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment.' Opinion of Mr. Justice BLACK, *post*, at 2020; see also opinion of THE CHIEF JUSTICE, *post*, at 2015, 2017.

For the reasons set forth below, I am of the opinion that federal courts do have the power to award damages for violation

of 'constitutionally protected interests' and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment.

I

I turn first to the contention that the constitutional power of federal courts to accord **Bivens** damages for his claim depends on the passage of a statute creating a 'federal cause of action.' Although the point is not *400 entirely free of ambiguity,² I do not understand either the Government or my dissenting Brothers to maintain that **Bivens**' contention that he is entitled to be free from the type of official conduct prohibited by the Fourth Amendment depends on a decision by the State in which he resides to accord him a remedy. Such a position would be incompatible with the presumed availability of federal equitable relief, if a proper showing can be made in terms of the ordinary principles governing equitable remedies. See *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 776—777, 90 L.Ed. 939 (1946). However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)—that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law. Compare *Guaranty Trust Co. v. York*, 326 U.S. 99, 105—107, 65 S.Ct. 1464, 1467—1469, 89 L.Ed. 2079 (1945). **2007 with *Holmberg v. Armbrrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). See also H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 818—819 (1953).

Thus the interest which **Bivens** claims—to be free from official conduct in contravention of the Fourth Amendment—is a federally protected interest. See generally Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts* in *Bell v. Hood*, 117 U.Pa.L.Rev. 1, 33—34 (1968).³ Therefore, the question *401 of judicial power to grant **Bivens** damages is not a problem of the 'source' of the 'right'; instead, the question is whether the power to authorize damages as a judicial *402 remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands.

**2008 II

The contention that the federal courts are powerless to accord a litigant damage for a claimed invasion of his federal

constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213, 65 S.Ct. 235, 237, 89 L.Ed. 187 (1944). Cf. *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 201—204, 88 S.Ct. 379, 385—387, 19 L.Ed.2d 407 (1967).⁴

*403 If it is not the nature of the remedy which is thought to render a judgment as to the appropriateness of damages inherently 'legislative,' then it must be the nature of the legal interest offered as an occasion for invoking otherwise appropriate judicial relief. But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy. Initially, I note that it would be at least anomalous to conclude that the federal judiciary—while competent to choose among the range of traditional judicial remedies to implement statutory and common-law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 923, 1 L.Ed.2d 972 (1957); *United States v. Standard Oil Co.*, 332 U.S. 301, 304—311, 67 S.Ct. 1604, 1606—1610, 91 L.Ed. 2067 (1947); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943)—is powerless to accord a damages *404 remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will.

More importantly, the presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization. Congress provided specially for the exercise of equitable remedial powers by federal courts, see Act of May **2009 8, 1792, s 2, 1 Stat. 276; C. Wright, *Law of Federal Courts* 257 (2d ed., 1970), in part because of

the limited availability of equitable remedies in state courts in the early days of the Republic. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 104—105, 65 S.Ct. 1464, 1467—1468, 89 L.Ed. 2079 (1945). And this Court's decisions make clear that, at least absent congressional restrictions, the scope of equitable remedial discretion is to be determined according to the distinctive historical traditions of equity as an institution, *Holmberg v. Armbrrecht*, 327 U.S. 392, 395—396, 66 S.Ct. 582, 584—585, 90 L.Ed. 743 (1946); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 165—166, 59 S.Ct. 777, 779—780, 83 L.Ed. 1184 (1939). The reach of a federal district court's 'inherent equitable powers,' *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460, 77 S.Ct. 912, 919—920, 1 L.Ed.2d 972 (Burton, J., concurring in result), is broad indeed, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); nonetheless, the federal judiciary is not empowered to grant equitable relief in the absence of congressional action extending jurisdiction over the subject matter of the suit. See *Textile Workers Union v. Lincoln Mills*, supra, 353 U.S., at 460, 77 S.Ct., at 919—920 (Burton, J., concurring in result); *Katz*, 117 U.Pa.L.Rev., at 43.⁵

*405 If explicit congressional authorization is an absolute prerequisite to the power of a federal court to accord compensatory relief regardless of the necessity or appropriateness of damages as a remedy simply because of the status of a legal interest as constitutionally protected, then it seems to me that explicit congressional authorization is similarly prerequisite to the exercise of equitable remedial discretion in favor of constitutionally protected interests. Conversely, if a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein, see 28 U.S.C. s 1331(a), then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.⁶ Of course, the special historical traditions governing the federal equity system, see *406 *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), might still bear on the comparative appropriateness of granting equitable relief as opposed to money damages. That possibility, however, relates, not to whether the federal courts have the power to afford one type of remedy as opposed to the other, but rather to the criteria which should govern the exercise of our power. To that question, I now pass.

**2010 III

The major thrust of the Government's position is that, where Congress has not expressly authorized a particular remedy, a federal court should exercise its power to accord a traditional form of judicial relief at the behest of a litigant, who claims a constitutionally protected interest has been invaded, only where the remedy is 'essential,' or 'indispensable for vindicating constitutional rights.' Brief for Respondents 19, 24. While this 'essentially' test is most clearly articulated with respect to damage remedies, apparently the Government believes the same test explains the exercise of equitable remedial powers. *Id.*, at 17—18. It is argued that historically the Court has rarely exercised the power to accord such relief in the absence of an express congressional authorization and that '(i)f Congress had thought that federal officers should be subject to a law different than state law, it would have had no difficulty in saying so, as it did with respect to state officers * * *.' *Id.*, at 20—21; see 42 U.S.C. s 1983. Although conceding that the standard of determining whether a damage remedy should be utilized to effectuate statutory policies is one of 'necessity' or 'appropriateness,' see *J. I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1559—1560, 12 L.Ed.2d 423 (1964); *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 67 S.Ct. 1604 (1947), the Government contends that questions concerning congressional discretion to modify judicial remedies relating to constitutionally protected interests warrant a more stringent constraint on *407 the exercise of judicial power with respect to this class of legally protected interests. Brief for Respondents at 21—22.

These arguments for a more stringent test to govern the grant of damages in constitutional cases⁷ seem to be adequately answered by the point that the judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, 'it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri, Kansas & Texas R. Co. of Texas v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904). But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

The question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted. Cf. *J. I. Case Co. v. Borak*, supra, 377 U.S., at 432, 84 S.Ct., at 1559—1560; *United States v. Standard Oil Co.*, supra, 332 U.S., at 307, 67 S.Ct., at 1607—1608; Hill, *Constitutional Remedies*, 69 Col.L.Rev. 1109, 1155 (1969); Katz, 117 U.Pa.L.Rev., at 72. In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range of a legislature would consider with respect to an express statutory authorization of a traditional remedy. In this regard I agree with the Court that the appropriateness of according *Bivens* *408 compensatory relief does not turn simply on the deterrent effect liability will have on federal official conduct.⁸ Damages as a traditional form **2011 of compensation for invasion of a legally protected interest may be entirely appropriate even if no substantial deterrent effects on future official lawlessness might be thought to result. *Bivens*, after all, has invoked judicial processes claiming entitlement to compensation for injuries resulting from allegedly lawless official behavior, if those injuries are properly compensable in money damages. I do not think a court of law—vested with the power to accord a remedy—should deny him his relief simply because he cannot show that future lawless conduct will thereby be deterred.

And I think it is clear that *Bivens* advances a claim of the sort that, if proved, would be properly compensable in damages. The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of 'privacy'; while the Court today properly points out that the type of harm which officials can inflict when they invade protected zones of an individual's life *409 are different from the types of harm private citizens inflict on one another, the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights.⁹

On the other hand, the limitations on state remedies for violation of common-law rights by private citizens argue in favor of a federal damages remedy. The injuries inflicted by officials acting under color of law, while no less compensable in damages than those inflicted by private parties, are substantially different in kind, as the Court's opinion today discusses in detail. See *Monroe v. Pape*, 365 U.S. 167, 195, 81 S.Ct. 473, 488, 5 L.Ed.2d 492 (1961) (Harlan, J.,

concurring). It seems to me entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability. See *Wheeldin v. Wheeler*, 373 U.S. 647, 652, 83 S.Ct. 1441, 1445—1446, 10 L.Ed.2d 605 (1963); *Monroe v. Pape*, supra, 365 U.S., at 194—195, 81 S.Ct., at 487—488 (Harlan, J., concurring); *Howard v. Lyons*, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed. 1454 (1959). Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State where the injury occurs. Cf. *United States v. Standard Oil Co.*, 332 U.S. 301, 305—311, 67 S.Ct. 1604, 1606—1610, 91 L.Ed. 2067 (1947).

Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common-law actions, it is apparent that some form of damages is the only possible remedy for someone in *Bivens*' alleged *410 position. It will be a rare case indeed in which an individual in *Bivens*' position will be able to obviate the harm by securing injunctive **2012 relief from any court. However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit. Finally, assuming *Bivens*' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in *Bivens*' shoes, it is damages or nothing.

The only substantial policy consideration advanced against recognition of a federal cause of action for violation of Fourth Amendment rights by federal officials is the incremental expenditure of judicial resources that will be necessitated by this class of litigation. There is, however, something ultimately self-defeating about this argument. For if, as the Government contends, damages will rarely be realized by plaintiffs in these cases because of jury hostility, the limited resources of the official concerned, etc., then I am not ready to assume that there will be a significant increase in the expenditure of judicial resources on these claims. Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly de minimis. And I simply cannot agree with my Brother BLACK that the possibility of 'frivolous' claims—if defined simply as claims with no legal merit—warrants closing the courthouse doors to people in *Bivens*' situation. There are other ways, short of that, of coping with frivolous lawsuits.

On the other hand, if—as I believe is the case with respect, at least, to the most flagrant abuses of official power—

damages to some degree will be available when the option of litigation is chosen, then the question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. *411 See *J. I. Case Co. v. Borak*, supra. Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Of course, for a variety of reasons, the remedy may not often be sought. See generally Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn.L.Rev. 493 (1955). And the countervailing interests in efficient law enforcement of course argue for a protective zone with respect to many types of Fourth Amendment violations. Cf. *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) (opinion of Harlan, J.). But, while I express no view on the immunity defense offered in the instant case, I deem it proper to venture the thought that at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct. Although litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances. It goes without saying that I intimate no view on the merits of petitioner's underlying claim.

For these reasons, I concur in the judgment of the Court.

Mr. Chief Justice BURGER, dissenting.

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation *412 of powers—and perhaps get a better result—by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do **2013 not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say:¹

'And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. * * * For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility.'

This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Boyd v. United States*, 116 U.S. 616, 633, 6 S.Ct. 524, 533, 29 L.Ed. 746 (1886) (dictum). This rule was extended to the States in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).² *413 The rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities from using improper methods to obtain evidence.

The deterrence theory underlying the suppression doctrine, or exclusionary rule, has a certain appeal in spite of the high price society pays for such a drastic remedy. Notwithstanding its plausibility, many judges and lawyers and some of our most distinguished legal scholars have never quite been able to escape the force of Cardozo's statement of the doctrine's anomalous result:

'The criminal is to go free because the constable has blundered. * * * A room is searched against the law, and the body of a murdered man is found. * * * The privacy of the home has been infringed, and the murderer goes free.' *People v. Defore*, 242 N.Y. 13, 21, 23—24, 150 N.E. 585, 587, 588 (1926).³

The plurality opinion in *Irvine v. California*, 347 U.S. 128, 136, 74 S.Ct. 381, 385, 98 L.Ed. 561 (1954), catalogued the doctrine's defects:

Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will, release the wrongdoing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence

is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.'

From time to time members of the Court, recognizing the validity of these protests, have articulated varying ***414** alternative justifications for the suppression of important evidence in a criminal trial. Under one of these alternative theories the rule's foundation is shifted to the 'sporting contest' thesis that the government must 'play the game fairly' and cannot be allowed to profit from its own illegal acts. *Olmstead v. United States*, 277 **U.S.** 438, 469, 471, 48 S.Ct. 564, 569, 570, 72 L.Ed. 944 (1928) (dissenting opinions); see *Terry v. Ohio*, 392 **U.S.** 1, 13, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968). But the exclusionary rule does not ineluctably flow from a desire to ensure that government plays the 'game' ****2014** according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

The exclusionary rule has also been justified on the theory that the relationship between the Self-Incrimination Clause of the Fifth Amendment and the Fourth Amendment requires the suppression of evidence seized in violation of the latter. *Boyd v. United States*, supra, 116 **U.S.**, at 633, 6 S.Ct., at 533 (dictum); *Wolf v. Colorado*, 338 **U.S.** 25, 47, 48, 69 S.Ct. 1359, 1368, 93 L.Ed. 1782 (1949) (Rutledge, J., dissenting); *Mapp v. Ohio*, supra, 367 **U.S.** at 661—666, 81 S.Ct. at 1694—1697 (Black, J., concurring).

Even ignoring, however, the decisions of this Court that have held that the Fifth Amendment applies only to 'testimonial' disclosures, *United States v. Wade*, 388 **U.S.** 218, 221—223, 87 S.Ct. 1926, 1929, 18 L.Ed.2d 1149 (1967); *Schmerber v. California*, 384 **U.S.** 757, 764 and n. 8, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966), it seems clear that the Self-Incrimination Clause does not protect a person from the seizure of evidence that is incriminating. It protects a person only from being the conduit by which the police acquire evidence. Mr. Justice Holmes once put it succinctly, 'A party is privileged from producing the ***415** evidence, but not from its production.' (*Johnson v. United States*, 228 **U.S.** 457, 458, 33 S.Ct. 572, 57 L.Ed. 919 (1913)).

It is clear, however, that neither of these theories undergirds the decided cases in this Court. Rather the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.

This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule. See Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 *J.Crim.L.C. & P.S.* 271, 272 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 *J.Crim.L.C. & P.S.* 272 (1961).

I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric. Beyond doubt the conduct of some officials requires sanctions as cases like *Irvine* indicate. But the hope that this objective could be accomplished by the exclusion of reliable evidence from criminal trials was hardly more than a wistful dream. Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective. This is illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy, and hence the Court finds ***416** it necessary now—55 years later—to construct a remedy of its own.

Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. See Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 *Sup.Ct.Rev.* 1, 33 n. 172. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 *U.Chi.L.Rev.* 665, 667 (1970).

****2015** There are several reasons for this failure. The rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual

officer responsible for a particular judicial application of the suppression doctrine. *Id.*, at 710. Thus there is virtually nothing done to bring about a change in his practices. The immediate sanction triggered by the application of the rule is visited upon the prosecutor whose case against a criminal is either weakened or destroyed. The doctrine deprives the police in no real sense; except that apprehending wrongdoers is their business, police have no more stake in successful prosecutions than prosecutors or the public.

The suppression doctrine vaguely assumes that law enforcement is a monolithic governmental enterprise. For example, the dissenters in *Wolf v. Colorado*, supra, 338 U.S., at 44, 69 S.Ct., at 1370, argued that:

‘Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize *417 the importance of observing the constitutional demands in his instructions to the police.’ (Emphasis added.)

But the prosecutor who loses his case because of police misconduct is not an official in the police department; he can rarely set in motion any corrective action or administrative penalties. Moreover, he does not have control or direction over police procedures or police actions that lead to the exclusion of evidence. It is the rare exception when a prosecutor takes part in arrests, searches, or seizures so that he can guide police action.

Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not ‘reasonable’ amply demonstrate.⁴ Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity.

The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years—between the original police action and its final judicial evaluation. Given a policeman’s pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay. Finally, the exclusionary *418 rule’s deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions—

hence the rule has virtually no applicability and no effect in such situations. *Oaks*, supra, at 720—724.

Today’s holding seeks to fill one of the gaps of the suppression doctrine—at the price of impinging on the legislative and policy functions that the Constitution vests in Congress. Nevertheless, the holding serves the useful purpose of exposing the fundamental weaknesses of the suppression doctrine. Suppressing unchallenged truth has set guilty criminals free but demonstrably has neither deterred deliberate violations of the Fourth Amendment nor decreased those errors in judgment that will inevitably occur **2016 given the pressures inherent in police work having to do with serious crimes.

Although unfortunately ineffective, the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated in the same way as deliberate and flagrant *Irvine*-type violations of the Fourth Amendment. For example, in *Miller v. United States*, 357 U.S. 301, 309—310, 78 S.Ct. 1190, 1195—1196, 2 L.Ed.2d 1332 (1958), reliable evidence was suppressed because of a police officer’s failure to say a ‘few more words’ during the arrest and search of a known narcotics peddler.

This Court’s decision announced today in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 dramatically illustrates the extent to which the doctrine represents a mechanically inflexible response to widely varying degrees of police error and the resulting high price that society pays. I dissented in *Coolidge* primarily because I do not believe the Fourth Amendment had been violated. Even on the Court’s contrary premise, however, whatever violation *419 occurred was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine. A fair trial by jury has resolved doubts as to *Coolidge*’s guilt. But now his conviction on retrial is placed in serious question by the remand for a new trial—years after the crime—in which evidence that the New Hampshire courts found relevant and reliable will be withheld from the jury’s consideration. It is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time

judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition. See ALI, Model Code of Pre-Arrest Procedure s SS 8.02(2), p. 23 (Tent. Draft No. 4, 1971), reprinted in the Appendix to this opinion. Yet for over 55 years, and with increasing scope and intensity as today's Coolidge holding shows, our legal system has treated vastly dissimilar cases as if they were the same. Our adherence to the exclusionary rule, our resistance to change, and our refusal even to acknowledge the need *420 for effective enforcement mechanisms bring to mind Holmes' wellknown statement:

'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.' Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897).

In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures **2017 that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown nither deters errant officers nor

affords a remedy to the totally innocent victims of official misconduct.

I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming the Court was now prepared to *421 take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective. There is some validity to the claims that juries will not return verdicts against individual officers except in those unusual cases where the violation has been flagrant or where the error has been complete, as in the arrest of the wrong person or the search of the wrong house. there is surely serious doubt, for example, that a drug peddler caught packing his wares will be able to arouse much sympathy in a jury on the ground that the police officer did not announce his identity and *422 purpose fully or because he failed to utter a 'few more words.' See *Miller v. United States*, *supra*. Jurors may well refuse to penalize a police officer at the behest of a person they believe to be a 'criminal' and probably will not punish an officer for honest errors of judgment. In any event an actual recovery depends on finding non-exempt assets of the police officer from which a judgment can be satisfied.

I conclude, therefore, that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of respondeat superior in our tort law provides an entirely appropriate conceptual basis for this remedy. If, for example, a security guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim ****2018** has a simple and obvious remedy—an action for money damages against the guard's employer, the department store. W. Prosser, *The Law of Torts* s 68, pp. 470—480 (3d ed., 1964).⁵ Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.

A simple structure would suffice.⁶ For example, Congress could enact a statute along the following lines:

- (a) a waiver of sovereign immunity as to the illegal ***423** acts of law enforcement officials committed in the performance of assigned duties;
- (b) the creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental **agents** in violation of the Fourth Amendment or statutes regulating official conduct;
- (c) the creation of a tribunal, quasijudicial in nature or perhaps patterned after the United States Court of Claims to adjudicate all claims under the statute;
- (d) a provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
- (e) a provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment.

I doubt that lawyers serving on such a tribunal would be swayed either by undue sympathy for officers or by the prejudice against 'criminals' that has sometimes moved lay jurors to deny claims. In addition to awarding damages, the record of the police conduct that is condemned would undoubtedly become a relevant part of an officer's personnel

file so that the need for additional training or disciplinary action could be identified or his future usefulness as a public official evaluated. Finally, appellate judicial review could be made available on much the same basis that it is now provided as to district courts and regulatory agencies. This would leave to the courts the ultimate responsibility for determining and articulating standards.

Once the constitutional validity of such a statute is established,⁷ it can reasonably be assumed that the States ***424** would develop their own remedial systems on the federal model. Indeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement on the one hand and away from the irrational and drastic results of the suppression doctrine on the other. Independent of the alternative embraced in this dissenting opinion, I believe the time has come to re-examine the scope of the exclusionary rule and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.

In a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked. I can only hope now that the Congress will manifest a willingness to view realistically the hard evidence of the half-century history of the suppression doctrine revealing ****2019** thousands of cases in which the criminal was set free because the constable blundered and virtually no evidence that innocent victims of police error—such as petitioner claims to be—have been afforded meaningful redress.

APPENDIX TO OPINION OF BURGER, C.J., DISSENTING

It is interesting to note that studies over a period of years led the American Law Institute to propose the following in its tentative draft of a model prearrest code:

'(2) Determination. Unless otherwise required by the Constitution of the United States or of this State, a motion to suppress evidence based upon a ***425** violation of any of the provisions of this code shall be granted only if the court finds that such violation was substantial. In determining whether a violation is substantial the court shall consider all the circumstances, including:

- '(a) the importance of the particular interest violated;

91 S.Ct. 1999, 29 L.Ed.2d 619

‘(b) the extent of deviation from lawful conduct;

‘(c) the extent to which the violation was willful;

‘(d) the extent to which privacy was invaded;

‘(e) the extent to which exclusion will tend to prevent violations of this Code;

‘(f) whether, but for the violation, the things seized would have been discovered; and

‘(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

‘(3) Fruits of Prior Unlawful Search. If a search or seizure is carried out in such a manner that things seized in the course of the search would be subject to a motion to suppress under subsection (1), and if as a result of such search or seizure other evidence is discovered subsequently and offered against a defendant, such evidence shall be subject to a motion to suppress unless the prosecution establishes that such evidence would probably have been discovered by law enforcement authorities irrespective of such search or seizure, and the court finds that exclusion of such evidence is not necessary to deter violations of this Code.’

ALI, Model Code of Pre-Arrest Procedure ss SS 8.02(2), (3), pp. 23—24 (Tent. Draft No. 4, 1971) (emphasis supplied).

*426 The Reporters' views on the exclusionary rule are also reflected in their comment on the proposed section: ‘The Reporters wish to emphasize that they are not, as a matter of policy, wedded to the exclusionary rule as the sole or best means of enforcing the Fourth Amendment. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi.L.Rev. 665 (1970). Paragraph (2) embodies what the Reporters hope is a more flexible approach to the problem, subject of course to constitutional requirements.’ Id., comment, at 26—27.

This is but one of many expressions of disenchantment with the exclusionary rule; see also:

1. Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Calif.L.Rev. 565 (1955).
2. Burns, Mapp v. Ohio: An All-American Mistake, 19 DePaul L.Rev. 80 (1969).
3. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 929, 951, 952—954 (1965).
4. F. Inbau, J. Thompson, & C. Soble, Cases and Comments on Criminal Justice; Criminal Law Administration 1—84 (2d ed., 1968).
5. LaFare, Improving Police Performance Through the Exclusionary Rule **2020 (pts. 1 & 2), 30 Mo.L.Rev. 391, 566 (1965).
6. LaFare & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich.L.Rev. 987 (1965).
7. N. Morris & G. Hawkins, The Honest Politician's Guide to Crime Control 101 (1970).
8. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970).
- *427 9. Plumb, Illegal Enforcement of the Law, 24 Cornell L.Q. 327 (1939).
10. Schaefer, The Fourteenth Amendment and Sanctity of the Person, 64 Nw.U.L.Rev. 1 (1969).
11. Waite, Judges and the Crime Burden, 54 Mich.L.Rev. 169 (1955).
12. Waite, Evidence—Police Regulation by Rules of Evidence, 42 Mich.L.Rev. 679 (1944).
13. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A.J. 479 (1922).
14. 8 J. Wigmore, Evidence s 2184a (McNaughton rev., 1961).

Mr. Justice BLACK, dissenting.

In my opinion for the Court in Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), we did as the Court states, reserve the question whether an unreasonable search made by a federal officer in violation of the Fourth Amendment

gives the subject of the search a federal cause of action for damages against the officers making the search. There can be no doubt that Congress could create a federal cause of action for damages for an unreasonable search in violation of the Fourth Amendment. Although Congress has created such a federal cause of action against state officials acting under color of state law,^{*} it has never created such a cause of action against federal officials. If it wanted to do so, Congress could, of course, create a remedy against ***428** federal officials who violate the Fourth Amendment in the performance of their duties. But the point of this case and the fatal weakness in the Court's judgment is that neither Congress nor the State of New York has enacted legislation creating such a right of action. For **us** to do so is, in my judgment, an exercise of power that the Constitution does not give **us**.

Even if we had the legislative power to create a remedy, there are many reasons why we should decline to create a cause of action where none has existed since the formation of our Government. The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years. A majority of these cases are brought by citizens with substantial complaints—persons who are physically or economically injured by torts or frauds or governmental infringement of their rights; persons who have been unjustly deprived of their liberty or their property; and persons who have not yet received the equal opportunity in education, employment, and pursuit of happiness that was the dream of our forefathers. Unfortunately, there have also been a growing number of frivolous lawsuits, particularly actions for damages against law enforcement officers whose conduct has been judicially sanctioned by state trial and appellate courts and in many instances even by this Court. My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations ****2021** of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature.

***429** We sit at the top of a judicial system accused by some of nearing the point of collapse. Many criminal defendants do not receive speedy trials and neither society nor the accused are assured of justice when inordinate delays occur. Citizens must wait years to litigate their private civil suits. Substantial changes in correctional and parole systems demand the attention of the lawmakers and the judiciary. If

I were a legislator I might well find these and other needs so pressing as to make me believe that the resources of lawyers and judges should be devoted to them rather than to civil damage actions against officers who generally strive to perform within constitutional bounds. There is also a real danger that such suits might deter officials from the proper and honest performance of their duties.

All of these considerations make imperative careful study and weighing of the arguments both for and against the creation of such a remedy under the Fourth Amendment. I would have great difficulty for myself in resolving the competing policies, goals, and priorities in the use of resources, if I thought it were my job to resolve those questions. But that is not my task. The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States. Congress has not provided that any federal court can entertain a suit against a federal officer for violations of Fourth Amendment rights occurring in the performance of his duties. A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U.S.C. s 1983, to create a damage remedy against federal officers. **Caess** could be cited to support the legal proposition which ***430** I assert, but it seems to me to be a matter of common understanding that the business of the judiciary is to interpret the laws and not to make them.

I dissent.

Mr. Justice BLACKMUN, dissenting.

I, too, dissent. I do so largely for the reasons expressed in Chief Judge Lumbard's thoughtful and scholarly opinion for the Court of Appeals. But I also feel that the judicial legislation, which the Court by its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a Fourth Amendment right has been violated, he will now immediately sue the federal officer in federal court. This will tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical. Why the Court moves in this direction at this time of our history, I do not know. The Fourth Amendment was adopted in 1791, and in all the intervening years neither the Congress nor the Court has seen fit to take this step. I had thought that for the truly aggrieved person

91 S.Ct. 1999, 29 L.Ed.2d 619

other quite adequate remedies have always been available. If not, it is the Congress and not this Court that should act.

All Citations

403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619

Footnotes

- * NOTE: The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 Petitioner's complaint does not explicitly state that the **agents** had no probable cause for his arrest, but it does allege that the arrest was 'done unlawfully, unreasonably and contrary to law.' App. 2. Petitioner's affidavit in support of his motion for summary judgment swears that the search was 'without cause, consent or warrant,' and that the arrest was 'without cause, reason or warrant.' App. 28.
- 2 The **agents** were not **named** in petitioner's complaint, and the District Court ordered that the complaint be served upon 'those federal **agents** who it is indicated by the records of the United States Attorney participated in the November 25, 1965, arrest of the (petitioner).' App. 3. Five **agents** were ultimately served.
- 3 Judge Waterman, concurring, expressed the thought that 'the federal courts can * * * entertain this cause of action irrespective of whether a statute exists specifically authorizing a federal suit against federal officers for damages' for acts such as those alleged. In his view, however, the critical point was recognition that some cause of action existed, albeit a state-created one, and in consequence he was willing 'as of now' to concur in the holding of the Court of Appeals. 409 F.2d, at 726 (emphasis in original).
- 4 '(S)ince it is the present policy of the Department of Justice to remove to the federal courts all suits in state courts against federal officers for trespass or false imprisonment, a claim for relief, whether based on state common law or directly on the Fourth Amendment will ultimately be heard in a federal court.' Brief for Respondents 13 (citations omitted); see 28 U.S.C. s 1442(a); Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). In light of this, it is difficult to understand our Brother BLACKMUN's complaint that our holding today 'opens the door for another avalanche of new federal cases.' Post, at 2021. In estimating the magnitude of any such 'avalanche,' it is worth noting that a survey of comparable actions against state officers under 42 U.S.C. s 1983 found only 53 reported cases in 17 years (1951—1967) that survived a motion to dismiss. Ginger & Bell, Police Misconduct Litigation—Plaintiff's Remedies, 15 Am.Jur. Trials 555, 580—590 (1968). Increasing this figure by 900% to allow for increases in rate and unreported cases, every federal district judge could expect to try one such case every 13 years.
- 5 New York at that time followed the common-law rule that a private person may arrest another if the latter has in fact committed a felony, and that if such is the case the presence or absence of probable cause is irrelevant to the legality of the arrest. See McLoughlin v. New York Edison Co., 252 N.Y. 202, 169 N.E. 277; 225 App.Div. 846, 232 N.Y.S. 622 (1929); cf. N.Y.Code Crim.Proc. s 183 (1958) for codification of the rule. Conspiracy to commit a federal crime was at the time a felony. Act of March 4, 1909, s 37, 35 Stat. 1096.
- 6 Conversely, we have in some instances rejected Fourth Amendment claims despite facts demonstrating that federal **agents** were acting in violation of local law. McGuire v. United States, 273 U.S. 95, 47 S.Ct. 259, 71 L.Ed. 556 (1927) (trespass ab initio); Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) ('open fields' doctrine); cf. Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921) (possession of stolen property).
- 7 Similarly, although the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927); see Stanley v. Georgia, 394 U.S. 557, 570—572, 89 S.Ct. 1243, 1251—1252, 22 L.Ed.2d 542 (1969) (Stewart, J., concurring in result), a private individual lawfully in the home of another will not normally be liable for trespass beyond the bounds of his invitation absent clear notice to that effect. See 1 F. Harper & F. James, The Law of Torts s 1.11 (1956).

91 S.Ct. 1999, 29 L.Ed.2d 619

8 Although no State has undertaken to limit the common-law doctrine that one may use reasonable force to resist an unlawful arrest by a private person, at least two States have outlawed resistance to an unlawful arrest sought to be made by a person known to be an officer of the law. R.I.Gen.Laws s 12—7—10 (1969); *State v. Koonce*, 89 N.J.Super. 169,

1 Petitioner also asserted federal jurisdiction under 42 U.S.C. s 1983 and 28 U.S.C. s 1343(3), and 28 U.S.C. s 1343(4). Neither will support federal jurisdiction over the claim. See *Bivens v. Six Unknown Named Agents*, 409 F.2d 718, 720 n. 1 (CA2 1969).

2 See n. 3, *infra*.

3 The Government appears not quite ready to concede this point. Certain points in the Government's argument seem to suggest that the 'state-created right—federal defense' model reaches not only the question of the power to accord a federal damages remedy, but also the claim to any judicial remedy in any court. Thus, we are pointed to Lasson's observation concerning Madison's version of the Fourth Amendment as introduced into the House:

'The observation may be made that the language of the proposal did not purport to create the right to be secure from unreasonable search and seizures but merely stated it as a right which already existed.' N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution* 100 n. 77 (1937), quoted in Brief for Respondents 11 n. 7. And, on the problem of federal equitable vindication of constitutional rights without regard to the presence of a 'statecreated right,' see Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 523—524 (1954), quoted in Brief for Respondents 17.

On this point, the choice of phraseology in the Fourth Amendment itself is singularly unpersuasive. The leading argument against a 'Bill of Rights' was the fear that individual liberties not specified expressly would be taken as excluded. See generally, Lasson, *supra*, at 79—105. This circumstance alone might well explain why the authors of the Bill of Rights would opt for language which presumes the existence of a fundamental interest in liberty, albeit originally derived from the common law. See *Entick v. Carrington*, 19 How.St.Tr. 1029, 95 Eng.Rep. 807 (1765).

In truth, the legislative record as a whole behind the Bill of Rights is silent on the rather refined doctrinal question whether the framers considered the rights therein enumerated as dependent in the first instance on the decision of a State to accord legal status to the personal interests at stake. That is understandable since the Government itself points out that general federal-question jurisdiction was not extended to the federal district courts until 1875. Act of March 3, 1875, s 1, 18 Stat. 470. The most that can be drawn from this historical fact is that the authors of the Bill of Rights assumed the adequacy of common-law remedies to vindicate the federally protected interest. One must first combine this assumption with contemporary modes of jurisprudential thought which appeared to link 'rights' and 'remedies' in a 1:1 correlation, cf., *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), before reaching the conclusion that the framers are to be understood today as having created no federally protected interests. And, of course, that would simply require the conclusion that federal equitable relief would not lie to protect those interests guarded by the Fourth Amendment.

Professor Hart's observations concerning the 'imperceptible steps' between *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164, 31 L.Ed. 216 (1887), and *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), see Hart, *supra*, fail to persuade me that the source of the legal interest asserted here is other than the Federal Constitution itself. *In re Ayers* concerned the precise question whether the Eleventh Amendment barred suit in a federal court for an injunction compelling a state officer to perform a contract to which the State was a party. Having concluded that the suit was inescapably a suit against the State under the Eleventh Amendment, the Court spoke of the presence of state-created rights as a distinguishing factor supporting the exercise of federal jurisdiction in other contract clause cases. The absence of a statecreated right in *In re Ayers* served to distinguish that case from the perspective of the State's immunity to suit; *Ayers* simply does not speak to the analytically distinct question whether the Constitution is in the relevant sense a source of legal protection for the 'rights' enumerated therein.

4 The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of a federal cause statutory authorization of a federal cause of action. There we 'implied'—from what can only be characterized as an 'exclusively procedural provision' affording access to a federal forum, cf. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 462—463, 77 S.Ct. 912, 923—924, 1 L.Ed.2d 972 (1957) (Frankfurter, J., dissenting)—a private cause of action for damages for violation of s 14(a) of the Securities Exchange Act

of 1934, 48 Stat. 895, 15 U.S.C. s 78n(a). See s 27, 48 Stat. 902, 15 U.S.C. s 78aa. We did so in an area where federal regulation has been singularly comprehensive and elaborate administrative enforcement machinery had been provided. The exercise of judicial power involved in Borak simply cannot be justified in terms of statutory construction, see Hill, Constitutional Remedies, 69 Col.L.Rev. 1109, 1120—1121 (1969); nor did the Borak Court purport to do so. See Borak, supra, 377 **U.S.** at 432—434, 84 S.Ct., at 1559—1561. The notion of 'implying' a remedy, therefore, as applied to cases like Borak, can only refer to a process whereby the federal judiciary exercises a choice among traditionally available judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. See *ibid.*, and Bell v. Hood, supra, 327 **U.S.**, at 684, 66 S.Ct., at 776—777.

5 With regard to a court's authority to grant an equitable remedy, the line between 'subject matter' jurisdiction and remedial powers has undoubtedly been obscured by the fact that historically the 'system of equity' derived its doctrines, as well as its powers, from its mode of giving relief." See Guaranty Trust Co. v. York, supra, 326 **U.S.**, at 105, 65 S.Ct., at 1468, quoting C. Langdell, Summary of Equity Pleading xxvii (1877). Perhaps this fact alone accounts for the suggestion sometimes made that a court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution. See Bell v. Hood, 71 F.Supp. 813, 819 (SD Cal.1947).

6 Chief Judge Lumbard's opinion for the Court of Appeals in the instant case is, as I have noted, in accord with this conclusion:

'Thus, even if the Constitution itself does not give rise to an inherent injunctive power to prevent its violation by governmental officials there are strong reasons for inferring the existence of this power under any general grant of jurisdiction to the federal courts by Congress.' 409 F.2d, at 723.

The description of the remedy as 'inferred' cannot, of course, be intended to assimilate the judicial decision to accord such a remedy to any process of statutory construction. Rather, as with the cases concerning remedies, implied from statutory schemes, see n. 4, supra, the description of the remedy as 'inferred' can only bear on the reasons offered to explain a judicial decision to accord or not to accord a particular remedy.

7 I express no view on the Government's suggestion that congressional authority to simply discard the remedy the Court today authorizes might be in doubt; nor do I understand the Court's opinion today to express any view on that particular question.

8 And I think it follows from this point that today's decision has little, if indeed any, bearing on the question whether a federal court may properly devise remedies—other than traditionally available forms of judicial relief—for the purpose of enforcing substantive social policies embodied in constitutional or statutory policies. Compare today's decision with Mapp v. Ohio, 367 **U.S.** 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), and Weeks v. United States, 232 **U.S.** 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; i.e., that a court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies. Whether special prophylactic measures—which at least arguably the exclusionary rule exemplifies, see Hill, The Bill of Rights and the Supervisory Power, 69 Col.L.Rev. 181, 182—185 (1969)—are supportable on grounds other than a court's competence to select among traditional judicial remedies to make good the wrong done, cf. Bell v. Hood, supra, 327 **U.S.** at 684, 66 S.Ct. at 776—777, is a separate question.

9 The same, of course, may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted. See Monroe v. Pape, 365 **U.S.** 167, 196, 81 S.Ct. 473, 488—489, 5 L.Ed.2d 492 n. 5 (Harlan, J., concurring).

1 J. Thayer, O. Holmes, & F. Frankfurter, John Marshall 88 (Phoenix ed., 1967).

2 The Court reached the issue of applying the Weeks doctrine to the States sua sponte.

3 What Cardozo suggested as an example of the potentially far-reaching consequences of the suppression doctrine was almost realized in Killough v. United States, 114 U.S.App.D.C. 305, 315 F.2d 241 (1962).

91 S.Ct. 1999, 29 L.Ed.2d 619

- 4 For example, in a case arising under *Mapp*, supra, state judges at every level of the state judiciary may find the police conduct proper. On federal habeas corpus a district judge and a court of appeals might agree. Yet, in these circumstances, this Court, reviewing the case as much as 10 years later, might reverse by a narrow margin. In these circumstances it is difficult to conclude that the policeman has violated some rule that he should have known was a restriction on his authority.
- 5 Damage verdicts for such acts are often sufficient in size to provide an effective deterrent and stimulate employers to corrective action.
- 6 Electronic eavesdropping presents special problems. See 18 U.S.C. ss 2510—2520 (1964 ed., Supp. V).
- 7 Any such legislation should emphasize the interdependence between the waiver of sovereign immunity and the elimination of the judicially created exclusionary rule so that if the legislative determination to repudiate the exclusionary rule falls, the entire statutory scheme would fall.
- * 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' Rev.Stat. s 1979, 42 U.S.C. s 1983.

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Exhibit M

Testimony of Fredonia Police Officer Michael Hodkin who Testified That On The Night of the Alleged Incident, the Alleged Victim told him that he had walked

Exhibit N

Alleged Victim Also Stated To Elyse
Mead on the night of the Alleged Incident
That he walked.

Exhibit O

Quinones-Pimental v. Cannon
2022 WL 826344



KeyCite Blue Flag – Appeal Notification

Appeal Filed by QUINONES-PIMENTEL, ET AL v. CANNON, ET AL, 1st Cir., April 29, 2022

2022 WL 826344

Only the Westlaw citation is currently available.
 United States District Court, D. Puerto Rico.

Darwin QUINONES-
 PIMENTEL, et al., Plaintiffs,

v.

Nicholas W. **CANNON**, et al., Defendants.

No. 3:20-cv-01443-JAW

Signed 03/17/2022

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Sonia Torres-Pabon, Juan Carlos Fontanez-Nieves, Melendez Torres Law, PSC, Guaynabo, PR, for Defendants Bert Eichhorn, Emily Rinkel, Jordan Smith, Kevin Gedeon.

ORDER ON PENDING MOTIONS TO DISMISS

JOHN A. WOODCOCK, JR., UNITED STATES DISTRICT JUDGE

*1 Two sets of defendants file motions to dismiss plaintiffs' *Bivens* action lawsuit, which alleged violations of their Fourth Amendment rights. In keeping with the United States Supreme Court's directive that courts should be reticent to expand *Bivens* actions, the Court concludes that the present case should be dismissed because it presents a new *Bivens* context, and there are special factors counseling against expanding *Bivens* in this case, namely separation of powers

concerns and alternative remedies available to the plaintiffs. The Court grants both sets of Defendants' motions to dismiss.

I. PROCEDURAL HISTORY

On August 25, 2020, Darwin Quinones-Pimentel, Victor Vega-Encarnacion,¹ Naicom Corporation, Naicom Data Center, Artist Designs and Management Corporation, and Kiaras, LLC, filed a fifty-five-page so-called *Bivens*² action lawsuit against Nicholas W. **Cannon**, Assistant United States Attorney (AUSA), several unknown AUSA supervisors, Federal Bureau of Investigation (FBI) agents Douglas A. Leff, Brad Rex, Lance Lange, Kevin Reaves, Andrew Baker, Chris Kuhn, Celia Mahler, Clay Rehrig, Noah Eames, Justin Turner, Mark Etheridge, and Clint Nafay, FBI computer scientist, Juan Galarza, FBI evidence technician, Jason Lopez, several unknown named FBI agents, NagraStar investigators Bert Eichhorn, Jordan Smith, and Emily Rinkel, and DISH Network investigator Kevin Gedeon.³ *Compl.* (ECF No. 1).

On January 6, 2021, the DISH/NagraStar Defendants filed a motion to dismiss the Complaint. *Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(5) & 12(b)(6)* (ECF No. 69). On January 11, 2021, the Government Defendants, including AUSA Nicholas **Cannon** and the named FBI agents and employees, filed a joint motion to dismiss all counts of the Plaintiffs' Complaint. *Mot. to Dismiss* (ECF No. 82); *Mem. of Law in Supp. of Defs.' Mot. to Dismiss* (ECF No. 83). On February 12, 2021, the Plaintiffs filed their response, with supporting evidence, in opposition to the DISH/NagraStar Defendants' motion to dismiss. *Pls.' Opp'n to Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(5) & 12(b)(6)* (ECF No. 113). On March 3, 2021, the Plaintiffs filed their response, with supporting evidence, in opposition to the Government Defendants' motion to dismiss. *Pls.' Opp'n to Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)* (ECF No. 119).

On March 4, 2021, the Plaintiffs filed an Amended Complaint.⁴ *Am. Compl.* (ECF No. 122); *Second Am. Compl.* (ECF No. 202) (*Suppl. Am. Compl.*).⁵ On March 8, 2021, at their request, the Court dismissed without prejudice the DISH/NagraStar Defendants' motion to dismiss as moot in light of Plaintiffs' Amended Complaint. *Orders* (ECF Nos. 126 & 127). On March 11, 2021, the Court similarly dismissed without prejudice the Government Defendants' pending motion to dismiss. *Order* (ECF No. 132).

*2 On June 22, 2021, the DISH/NagraStar Defendants filed a renewed motion to dismiss in response to the Plaintiffs' Amended Complaint. *Defs. Bert Eichhorn, Kevin Gedeon, Emily Wrinkle, and Jordan Smith's Rule 12(b)(6) Mot. to Dismiss* (ECF No. 176) (*DISH/NagraStar Defs.' Mot.*). On July 23, 2021, the Government Defendants filed a motion to dismiss Plaintiffs' Amended Complaint. *Mot. to Dismiss* (ECF No. 183); *Mem. of Law in Supp. of Defs.' Mot. to Dismiss* (ECF No. 184) (*Gov't Defs.' Mot.*).

On July 30, 2021, the Plaintiffs filed their opposition to the DISH/NagraStar Defendants' motion to dismiss. *Pls.' Opp'n to Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)* (ECF No. 190) (*Pls.' Opp'n to DISH/NagraStar Defs.' Mot.*). On August 5, 2021, the Plaintiffs filed an opposition in response to the Government Defendants' motion to dismiss. *Pls.' Opp'n to Defs.' Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)* (ECF No. 196) (*Pls.' Opp'n to Gov't Defs.' Mot.*). On September 7, 2021, the DISH/NagraStar Defendants filed a reply to the Plaintiffs' opposition. *Defs. Eichhorn, Gedeon, Rinkle and Smith's Reply in Supp. of Fed. R. Civ. P. 12(b)(6) Mot. to Dismiss* (ECF No. 212) (*DISH/NagraStar Defs.' Reply*). On September 13, 2021, the Government Defendants filed their reply to the Plaintiffs' opposition. *Reply to Pls.' Opp'n to the Federal Defs.' Mot. to Dismiss* (ECF No. 213) (*Gov't Defs.' Reply*). Finally, on September 30, 2021, the Plaintiffs filed a sur-reply to the Government Defendants' reply to the Plaintiffs' opposition to the Government Defendants' motion to dismiss. *Pls.' Sur-Reply to the Defs.' Reply to Pls.' Opp'n to the Federal Defs.' Mot. to Dismiss* (ECF No. 218) (*Pls.' Sur-Reply*).

II. FACTS⁶

A. Naicom's Origins

Between 2002 and 2012, Naicom's President and Chief Executive Officer, Darwin Quinones developed an Internet Multicast Distribution System. *Suppl. Am. Compl.* ¶ 38. The system was identified as a Dynamic Internet Semantic Multicast Environment (DISME), and its code sources have been kept confidential under the Federal Defendant Trade Secrets Act. *Id.* ¶¶ 39-40. DISME proprietary solutions enable broadcast media via the internet by creating Internet Protocol Television (IPTV) services which distribute live-video television content via the internet and private networks. *Id.* ¶ 39. In April 2012, the Federal Communications Commission (FCC) recognized and encouraged the implementation of Digital Broadcast Television using IPTV for customers in the United States. *Id.* ¶ 40.

By 2016 Mr. Quinones had completed all DISME technology alpha and beta tests and, alongside Victor Vega, founded Naicom Corporation. *Id.* ¶ 41. Naicom Corporation is a network and internet communication platform that delivers live television, video on-demand content, internet, and wireless network services to subscribers worldwide. *Id.* ¶ 41. Naicom also provides instant access to television shows, movies, and music/videos on-demand, and live sports and music events through Naicom's set-top box using IPTV and TV Everywhere (TVE) on any mobile device. *Id.* Mr. Quinones and Mr. Vega registered Naicom Corporation as a closed corporation with the State Department of Puerto Rico and complied with all requirements as a legitimate IPTV business. *Id.* ¶ 42. Naicom also began manufacturing its own brand of set-top boxes for end users through Informir LLC and acquired the programming licenses to distribute on-demand content in the United States, Puerto Rico, and the Virgin Islands through worldwide television network companies. *Id.* ¶¶ 43-44. In 2017, Naicom became a member of the National Rural Telecommunications Cooperative (NRTC). *Id.* ¶ 44. The Plaintiffs allege that the Defendants were aware that Naicom duly registered and complied with IPTV business requirements, acquired these licenses, and was a member of the NRTC. *Id.* ¶¶ 42, 44.

*3 In 2016, Naicom executed a Business Executive Summary and Valuation for potential investors and began exploring business opportunities with other cable tv companies. *Id.* ¶ 45. On January 6, 2017, Naicom submitted a request to the Apple Corporation to have its TV App added to Apple's AppStore. *Id.* ¶ 46. Apple's legal department requested that Naicom produce all licenses authorizing the distribution of programming to Naicom's subscribers via Naicom's TV App. *Id.* ¶ 46. On February 16, 2017, Apple approved Naicom's App for inclusion in the Apple AppStore. *Id.* ¶ 47. In December 2017, Sams Club approved Naicom to launch and distribute Naicom's IPTV set-top box in their retail stores, which Plaintiffs allege Defendants were aware of. *Id.* ¶ 48.

B. Negotiations with Claro Puerto Rico

In 2017, Naicom entered into negotiations with Claro Puerto Rico to distribute Naicom set-top boxes to Claro residential and business internet customers. *Id.* ¶ 49. Claro represented to Naicom that it had approximately 320,000 internet subscribers who received only eight Megabytes and thus could not subscribe to Claro's IPTV services, which required sixty Megabytes to upload programming. *Id.* ¶

50. During negotiations, Naicom and Claro entered into a mutual non-disclosure agreement (NDA) prior to discussing and analyzing business information and the contents of the resellers' agreement. *Id.* ¶ 51. Claro's Product Development Officer Anibal Rios projected that the Claro-Naicom business alliance would bring in over \$10,000,000 in monthly gross revenue for the first year and over \$13,000,000 for the second year just by penetrating Claro's corporate and residential subscribers in Puerto Rico. *Id.* ¶ 52. Naicom projected that the Claro-Naicom alliance would add 100,000 new corporate subscribers, plus another 150,000 residential subscribers, bringing in a projected monthly income revenue of \$9,000,000 in the first year, and \$12,000,000 in the second in gross sales. *Id.* ¶ 53.

Claro had an existing contract with DISH Network Satellite TV, whereby DISH Network provided TV programming to Claro's internet subscribers who could not subscribe to Claro's IPTV services. *Id.* ¶ 54. The Naicom deal represented a cancellation threat to DISH Network's contract with Claro. *Id.* Claro was also considering shutting down its IPTV business division due to loss of revenue. *Id.* During the negotiations for the Claro-Naicom deal, Carlos Garcia, Claro's IPTV business manager, became privy to information that the Claro-Naicom deal would leave him jobless if Claro opted to shut down its IPTV division, which he managed. *Id.* ¶ 55. Mr. Garcia alerted DISH Network that the Claro-Naicom IPTV deal would lead to cancellation of the DISH contract with Claro, which the Plaintiffs allege lead to "great animosity" between DISH Network and Naicom. *Id.* ¶ 56. The Plaintiffs allege that Mr. Garcia convened a meeting of DISH Network executives and convinced them that Naicom was an IPTV pirate company because he had Claro employees photograph Naicom's Data Center and the way Naicom established its satellite dishes lock angle indicated that Naicom dishes were being used for TV piracy. *Id.* ¶ 57. Naicom Data Center employees caught Claro employees photographing Naicom's Data Center. *Id.* ¶ 58. On August 14, 2018, after a year of meetings between Naicom and Claro, Claro pulled out of negotiations without notice. *Id.* ¶ 59.

C. The DISH Network Investigation

On August 7, 2017, NagraStar instructed Brian Parson to purchase a Naicom TV set-top box receiver to conduct tests and monitor Naicom's programming. *Id.* ¶ 61. According to the DISH/NagraStar Defendants, their investigation revealed that the receiver provided access to approximately forty-three channels, including Disney, TBS, ESPN, CNN, HBO, Showtime, and Cinemax. *Id.* ¶ 62. The investigating

DISH/NagraStar Defendants downloaded the Naicom TV App through the Apple AppStore, which provided access to approximately forty-two channels, and tested Naicom TV several times to identify if it was providing DISH programming. *Id.* ¶¶ 63-64. In each case, the tests revealed no DISH content. *Id.* ¶ 65.

*4 NagraStar and DISH Network investigators also contacted several media companies to inquire into whether Naicom had the appropriate licensing contracts to distribute its programming. *Id.* ¶ 65. On each occasion, the investigators were informed that Naicom was authorized to distribute its content. *Id.* The investigators also discovered that Naicom's TV distribution technology was a threat to DISH Network and Sling for subscribers in Puerto Rico and the United States. *Id.* ¶ 66.

NagraStar and DISH Network investigators thereafter filed a complaint with the FBI alleging that Naicom Corporation was running an IPTV pirate operation. *Id.* ¶ 67. Plaintiffs allege that the motive behind the complaint against Naicom was to secure NagraStar and DISH Network's participation in the execution of a search warrant for Naicom's Data Center and the seizure of Naicom's computers, servers, and other hardware containing Naicom's intellectual property and trade secrets, under the ruse of assisting the FBI in discovering incriminating evidence. *Id.* ¶ 68.

D. The FBI and United States Attorney's Office Investigation

Beginning in September 2017 and throughout 2018, DISH Network Investigator, Kevin Gedeon, and NagraStar investigators, Jordan Smith, Bert Eichhorn and Emily Rinkel, met with Douglas A. Leff, the FBI Special Agent in charge of the San Juan Division to discuss Naicom's alleged IPTV pirate operation. *Id.* ¶ 69. Agent Leff thereafter opened a criminal investigation. *Id.*

Agent Leff arranged a meeting among Mr. Gedeon, Mr. Smith, Mr. Eichhorn, and Ms. Rinkel, and FBI Cyber Task Force Supervisor, Special Agent Brad Rex, to discuss details of the criminal investigation. *Id.* ¶ 70. Agent Leff requested that Agent Rex keep him informed of developments in the investigation so that he could discuss potential criminal prosecution with AUSA Nicholas Cannon. *Id.* ¶ 71. Agent Rex thereafter launched an investigation and instructed FBI Cyber Task Force Special Agents Kevin Pearson, Andrew Baker, Chris Kuhn, Celia Mahler, Clay Rehrig, Noah Eames, Justin Turner, Mark Ethridge, Clint Nafay, Juan Galarza,

Jason Lopez, and several other FBI agents to work with the DISH/NagraStar investigators and Lance Lange, the FBI agent assigned to the case. *Id.* ¶ 72.

Plaintiffs allege that AUSA Cannon and several other AUSA supervisors participated, supervised, led, coached, and instructed the FBI agents and DISH/NagraStar investigators throughout the criminal investigation beginning in 2017 up until the preparation of the affidavit for a warrant in 2019. *Id.* ¶ 73. Plaintiffs also submit that neither AUSA Cannon nor any of the FBI agents contacted Wapa TV, Disney, HBO, Turner, NBC, Condista, CBS, Telecinco, ABC, the National Rural Telecommunications Cooperative, Apple Corporation, or Sams Club to investigate and corroborate whether Naicom lacked the contract licenses to distribute the programming content through Naicom's TV set-top boxes, Apple iPhone App, or its contract to distribute TV set-top boxes at Sams Club retail stores. *Id.* ¶ 74. Most of the evidence furnished to the FBI, Plaintiffs allege, was collected by the DISH/NagraStar investigators in violation of United States copyright laws. *Id.*

At the final stage of the investigation, AUSA Cannon, the FBI agent defendants and the DISH/NagraStar investigators met to discuss the investigatory files, notes, memoranda, reports, photographs, videos, and other collected evidence to prepare a warrant application. *Id.* ¶ 75. The Plaintiffs allege that at this meeting, the Defendants collectively noted that the evidence did not support probable cause to procure a search and seizure warrant and that it was at this meeting that the Government and DISH /NagraStar Defendants decided to conspire with each other to figure out a way to alter the evidence in order to satisfy probable cause. *Id.* ¶¶ 76-77.

*5 On August 27, 2019, AUSA Cannon met with Agent Lange to review, approve, and sign the final draft of the affidavit and application in support of the search warrant. *Id.* ¶ 79. The Plaintiffs allege AUSA Cannon and Agent Lange knew the affidavit and warrant application, which they filed under oath, contained false and perjured testimony. *Id.* That same day, AUSA Cannon and Agent Lange met with United States Magistrate Judge Silvia Carreño-Coll to discuss their warrant application to search Naicom Corporation, located at Building Centro de Seguros, 701 Ponce de Leon, Suite 208, San Juan, Puerto Rico 00907, and Naicom's Data Center located at Villa Fontana, 4SS N2 Via Josefina, Carolina, Puerto Rico 00983. *Id.* ¶ 80. There was no discussion of authorizing a search of Artist Designs & Management Corporation (ADM), located at Building Centro de Seguros,

701 Ponce de Leon, Suite 207, San Juan, Puerto Rico 00907. *Id.* At the meeting, AUSA Cannon and Agent Lange assured the Magistrate Judge under oath that the contents of the affidavit filed in support of the search warrant were truthful and supported by probable cause. *Id.* ¶ 81. They also assured the Magistrate Judge that the warrant was being used to gather evidence of criminal conduct, including a criminal copyright property offense, criminal infringement of a copyright, money laundering, wire fraud, and unlawful access to computer systems. *Id.* ¶ 81. Magistrate Judge Carreño-Coll approved the affidavit in support of the warrant and directed the FBI to execute the search warrant on or before September 4, 2019.

E. Execution of the Search Warrant

1. The Search of Naicom's Offices

On August 27, 2019, the FBI agent Defendants and DISH/NagraStar investigators entered Naicom's offices, located at Building Centro de Seguros, 701 Ponce de Leon, Suite 208,⁷ San Juan, Puerto Rico 00907 to execute the warrant. *Id.* ¶ 83. During the execution of the warrant Agent Lange ordered Naicom staff member Yamila Garcia to unlock ADM located at Suite 207, which was not included in the search warrant. *Id.* ¶ 84. Ms. Garcia informed Agent Lange that ADM was an independent business and that the search was directed at Naicom, but Agent Lange ordered her to open the doors. *Id.* Agent Lange and the DISH/NagraStar investigators entered and seized private and confidential ADM documents. *Id.*

During the execution of the warrant, Mr. Eichhorn, in the presence of Agent Lange, took keys belonging to Mr. Vega and Mr. Quinones from the Naicom, ADM and Naicom Data Center offices; Mr. Eichhorn and Ms. Rinkel entered Naicom's business office without FBI agent supervision and searched, inspected, and photographed private documents containing business trade secrets and intellectual property information belonging to Naicom; Mr. Eichhorn and Ms. Rinkel entered Mr. Vega's office without FBI agent supervision and photographed private documents containing business trade secrets and intellectual information belonging to Naicom; Mr. Eichhorn accessed Naicom's computers and searched, read, and photographed their contents, which contained trade secrets and intellectual property belonging to Naicom; workers from the other offices in the building witnessed the embarrassment of Naicom employees. *Id.* ¶¶ 85-89. During the search, Agent Lange, the other FBI agents and DISH/NagraStar investigators seized Plaintiffs'

documents, two hard drives, two USB thumb drives, a cell phone, and one tablet containing business trade secrets and intellectual property. *Id.* ¶ 90. The Defendants left a copy of the warrant and a receipt of the property seized during the search. *Id.*

2. The First Search of Naicom's Data Center

On August 27, 2019, Agent Pearson, other unknown FBI agents, Mr. Smith, and Mr. Gedeon entered Naicom's Data Center to execute the search warrant. *Id.* ¶ 91. During the search, Mr. Quinones observed Agent Pearson allow Mr. Smith and Mr. Gedeon to access and personally search Naicom's Data Center computers, servers and other electronic hardware containing business trade secrets and intellectual property and to take pictures of Naicom's Data Center structural and network connection platform. *Id.* ¶ 92. Agent Pearson, Mr. Smith, and Mr. Gedeon questioned Mr. Quinones and Naicom employee Jaime Echevarria about Naicom's technology, functions, and protocols. *Id.* ¶ 93. During the search, Mr. Quinones requested that Agent Pearson give him an opportunity to demonstrate that he was running a legitimate IPTV operation. *Id.* ¶ 94. Mr. Quinones thereafter called Linda Kosher from the National Rural Telecommunications Cooperative who assured Agent Pearson that Naicom was authorized to distribute the programming content via the Naicom TV Home set-top box to its registered subscribers. *Id.*

*6 Agent Pearson called AUSA Cannon and informed him that they did not find any evidence indicating that Mr. Quinones was running an IPTV pirate distribution business and assured him that it appeared Naicom was a legitimate company. *Id.* ¶ 95. AUSA Cannon instructed Agent Pearson to instruct Mr. Quinones and Mr. Vega to report to the FBI offices in San Juan with their licensing contracts for an interview. *Id.* ¶ 96.

Back at the FBI offices, Agent Pearson, Mr. Smith, and Mr. Gedeon questioned Mr. Quinones, in the presence of Naicom's attorney, about how Naicom acquired the IPTV distribution contracts and technology used to distribute its programming. *Id.* ¶ 97. Mr. Quinones and Mr. Vega clarified and established through Naicom's licenses and contracts with television networks that Naicom was running a legitimate IPTV business operation. *Id.* ¶ 99. During the interview, Mr. Quinones asked Agent Pearson whether Mr. Smith and Mr. Gedeon were employees from his competition, based on their

line of questioning. *Id.* ¶ 98. Agent Pearson assured Mr. Quinones that Mr. Smith and Mr. Gedeon were expert workers of the FBI and provided Mr. Quinones with their identities. *Id.* Mr. Eichhorn and Ms. Rinkel refused to identify themselves. *Id.* At this time, Mr. Vega asked to terminate the interview due to Mr. Smith's and Mr. Gedeon's intensive interrogation regarding Naicom's distribution technology. *Id.* ¶ 100.

3. The Second Search of Naicom's Data Center

On August 29, 2019, AUSA Cannon ordered Agents Lange and Pearson to return to Naicom's Data Center to perform another search and have the Plaintiffs sign a hold harmless document. *Id.* ¶ 101. Agent Lange, Agent Pearson, Mr. Eichhorn, Mr. Smith, and Mr. Gedeon entered the Data Center and performed a second search. *Id.* Agent Pearson contacted Naicom employee Jaime Echevarria and ordered him to come to the Data Center, as Agent Pearson wanted to speak with him, Mr. Quinones, and Mr. Vega. *Id.* ¶ 102. Upon arriving at the Data Center, Mr. Quinones observed Mr. Smith, Mr. Gedeon, and Mr. Eichhorn accessing Naicom's Data Center computers, servers, and other hardware equipment without authorization. *Id.* ¶ 103.

During the search, Agents Pearson and Lange pressured Mr. Quinones to sign a hold harmless document accepting that he was running a pirate operation in the past so that they could close the case or else they would shut down the Data Center operation. *Id.* ¶ 104. Mr. Quinones refused. *Id.* ¶ 105. Sometime thereafter, Mr. Vega arrived and upon entering the Data Center asked Agents Pearson and Lange if they had another search warrant to enter and search the Data Center. *Id.* ¶ 106. Agent Lange represented to Mr. Vega that the search warrant gave him ten days to come in and out and search the Data Center. *Id.* Mr. Vega warned Agent Lange that Agent Lange was violating the United States Constitution and Federal law. *Id.*

Mr. Vega thereafter informed Agents Pearson and Lange that he had discovered via LinkedIn that the alleged FBI experts who executed the search and interrogated Mr. Quinones and him at the FBI offices were Kevin Gedeon, investigator for DISH Network, and Jordan Smith, Bert Eichhorn, and Emily Rinkel, investigators for NagraStar. *Id.* ¶ 107. Mr. Vega questioned Agents Lange and Pearson as to why the FBI brought in his competition to search, inspect, and photograph private documents and allowed them access to computers and servers containing trade secrets, code sources, and business

and intellectual property belonging to Naicom. *Id.* ¶ 108. Mr. Vega called his attorney and told him about the second search. *Id.* ¶ 109. After speaking with Agent Lange, the FBI agents and DISH/NagraStar investigators left the premises. *Id.*

*7 On August 30, 2019, Mr. Vega texted Agent Pearson seeking authorization to enter Naicom's Data Center and start up Naicom's distribution system to restore customer service. *Id.* ¶ 110. After instructing Mr. Vega to have his attorney contact the FBI, Agent Lange authorized Mr. Vega to enter Naicom's Data Center and restore the program. *Id.*

F. The Demand for the Return of Property Under Rule 41(g)

On September 6, 2019, the Plaintiffs filed a motion to demand the return of seized property under Rule 41(g) of the Federal Rules of Criminal Procedure. *Id.* ¶ 111. In their motion, the Plaintiffs argued that the search and seizure was unlawful because (1) it contained deliberately and recklessly false statements made under oath so the Magistrate Judge would issue the warrant and (2) the warrant was issued in violation of the Fourth Amendment, and they demanded the immediate return of all unlawfully seized property. *Id.* ¶ 112. To their motion, the Plaintiffs attached Naicom's contracts authorizing distribution of content programming in Puerto Rico, the United States, and the Virgin Islands, evidence that the Defendants never called HBO or NRTC to ask about Naicom, and evidence that the investigation was a ruse orchestrated by NagraStar and DISH Network to access Naicom's trade secrets and intellectual property. *Id.* ¶ 113.

On October 15, 2019, the United States filed an unopposed response to the Plaintiffs' Rule 41(g) motion stating that, without conceding any arguments raised, the property items listed in the request would be returned. *Id.* ¶ 114. The District Court granted the Plaintiffs' Rule 41(g) motion on November 5, 2019. *Id.* ¶ 115. On February 19, 2020, Agent Lange met with Mr. Quinones, Mr. Vega, and Attorney Rafael Castro Lang to return the seized items to the Plaintiffs. *Id.* ¶ 117. At the meeting, Agent Lange returned the seized items and gave the Plaintiffs an FBI document titled Document Search Warrant Execution at Naicom Corporation Headquarters, which disclosed details of the search and the identities of the FBI agents involved. *Id.*

G. The Plaintiffs' Alleged Harm

The Plaintiffs allege that the criminal investigation caused significant damage to their business reputation. *Id.* ¶ 118.

They allege that prior to the execution of the search warrants, the Plaintiffs had a great reputation and were about to close on a \$15,000,000 investment deal, but that investors pulled out upon learning Naicom was under criminal investigation. *Id.* ¶¶ 119-120. The Plaintiffs also allege that Naicom was about to close a multimillion-dollar deal with Claro when Claro learned of the FBI's investigation and pulled out of negotiations. *Id.* ¶ 121. The Plaintiffs say they have lost subscribers because of a negative reputation resulting from the investigation and that the Defendants' intrusion into Naicom's Data Center computers, servers, and equipment caused damage leaving subscribers without tv programming services for several weeks. *Id.* ¶ 122.

H. The Plaintiffs' Cause of Action

The Plaintiffs bring three counts. Count One alleges that Nicholas W. Cannon, several unknown AUSA Supervisors, Douglas A. Leff, Brad Rex, Lance Lange, Kevin Pearson, Andrew Baker, Chris Kuhn, Celia Mahler, Clay Rehrig, Noah Eames, Justin Turner, Mark Etheridge, Clint Nafay, Juan Galarza, Jason Lopez, several unknown named FBI Agents, Jordan Smith, Kevin Gedeon, Bert Eichhorn, and Emily Rinkel violated Plaintiffs' Fourth Amendment rights by "formulating false and perjured evidence and statements to be used in support of the affidavit" for a search warrant, conspiring to file an affidavit under oath containing false information, and intentionally deceiving the Magistrate Judge to get her to issue the search warrant. *Id.* at 48-50.

*8 Count Two alleges that Brad Rex, Lance Lange, Kevin Pearson, Andrew Baker, Chris Kuhn, Celia Mahler, Clay Rehrig, Noah Eames, Justin Turner, Mark Etheridge, Clint Nafay, Juan Galarza, Jason Lopez, several unknown named FBI agents, Kevin Gedeon, Jordan Smith, Bert Eichhorn, and Emily Rinkel violated the Plaintiffs' Fourth Amendment rights by searching and seizing information from the Artist Designs and Management Corporation office, which was not included in the search warrant. *Id.* at 53.

Finally, Count Three alleges that AUSA Nicholas Cannon, Agents Lance Lange and Kevin Pearson, Jordan Smith, Kevin Gedeon, and Bert Eichhorn violated the Plaintiffs' Fourth Amendment rights by entering Naicom's Data Center on August 29, 2019, without a new warrant. *Id.* at 56-57.

All three counts are brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*.

III. THE PARTIES' POSITIONS

A. The DISH/NagraStar Defendants' Motion to Dismiss

The DISH/NagraStar Defendants first argue that the Plaintiffs' claim should be dismissed because allowing their claims to proceed would require the Court to expand *Bivens*, which is a “disfavored judicial activity.” *DISH/NagraStar Defs.’ Mot.* at 2, 8. The DISH/NagraStar Defendants contend that the Plaintiffs' claims “undeniably arise in a new context, [and] bear little resemblance to *Bivens* and its progeny” because they “consist of different conduct by different officers operating under different mandates from different agencies and involve private individuals.” *Id.* at 9-10. The Defendants explain that unlike the individual whose home was searched by the FBI without a warrant in *Bivens*, the “Plaintiffs complain of a search, pursuant to a warrant, of their business offices in Puerto Rico, by FBI agents, and private citizens, which resulted in no booking, strip search or arrest but rather the seizure of certain business records and other property, which was eventually returned.” *Id.* at 10-11.

Second, the DISH/NagraStar Defendants submit that “[t]he mechanism of injury in this case also varies significantly from that in *Bivens*,” which involved “a direct causal connection ... between the plaintiff's injuries and the federal agents' conduct.” *Id.* at 11. Here, the Defendants say that the “Plaintiffs' injury occurred through a series of intervening steps which involved independent legal decisions, made at various stages, by separate and distinct legal officers.” *Id.* at 12 (internal quotation marks omitted).

Third, the DISH/NagraStar Defendants say that the Plaintiffs' Fourth Amendment Claims require significantly different proof than those in *Bivens*. *Id.* The Defendants argue that this case “would require discovery or an investigation into the evidence before numerous decision-makers, running the risk of disruptively intruding into the functioning of other branches and would require fact-checking and other probing into executive agency decisions.” *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 701, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997)).

Additionally, the DISH/NagraStar Defendants claim that the Plaintiffs' *Bivens* action involves a new category of defendants because they are “private individuals.” *Id.* at 13. Relying on *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001), and *Minnecci v. Pollard*, 565 U.S. 118, 132 S. Ct. 617, 181 L.Ed.2d 606 (2012), the Defendants contend that the Supreme Court “rejected expanding *Bivens* liability to ‘private entities acting

under color of law.’ ” *Id.* at 13 (quoting *Malesko*, 534 U.S. at 63, 122 S.Ct. 515).

Applying the various Supreme Court tests for determining whether a private party acted under the color of law, the DISH/NagraStar Defendants say they “have no direct links to the government, as they do not carry out any traditional or exclusive public function, are not in any symbiotic relationship with the government and are not federal officials, federal employees, individuals who have received any delegation of federal authority or contractors employed or under contract with the federal government.” *Id.* at 17. They argue that their “connection with the searches and seizures ... [is] too attenuated to constitute ‘federal or state action’ for [Fourth] Amendment purposes” and that “at best” they were “ ‘in the company of’ or accompanied the FBI defendants during their warrant execution in this case.” *Id.* at 18.

*9 Turning to prong two of the *Bivens* extension test, the DISH/NagraStar Defendants argue that multiple special factors counsel against expanding *Bivens* to this case. *Id.* at 20. First, they submit that the “Plaintiffs had three alternative remedies available: the Federal Tort Claims Act, Puerto Rico Law and Fed. R. Crim. P. 41(g).” *Id.* at 21. Second, the Defendants contend that expanding *Bivens* would “pos[e] the risk of burdening and encroaching on the ... executive branch's investigative and prosecutorial functions” and may “chill federal executive employees in the execution of their duties, thus undermining the separation of powers between the governmental branches.” *Id.* at 23 (citing *Ziglar v. Abbasi*, — U.S. —, 137 S. Ct. 1843, 1857, 198 L.Ed.2d 290 (2017)).

The DISH/NagraStar Defendants further argue that the Plaintiffs' *Bivens* conspiracy claim is inadequate because it “allege[s] no more than a dissatisfaction with how law enforcement officers discharged their duties—not facts demonstrating a colorable claim that an actual agreement existed amongst the defendants to deprive Plaintiffs of their constitutional rights.” *Id.* at 24. They submit that the “Plaintiffs' mere assertions that ‘upon information and belief’ the defendants conspired, colluded or acted in concert with one another to commit tortious acts against them, without more, will not suffice to state a *Bivens* conspiracy claim.” *Id.* at 25.

In the final section of their brief, the DISH/NagraStar Defendants contend that even assuming *Bivens* can be

expanded, the Plaintiffs' allegations under each Count fail to state a claim on which relief can be granted. *Id.* at 25-31.

As to Count One, the Defendants argue that there was no violation of a valid warrant or illegal search in violation of the Fourth Amendment because the FBI Defendants secured a warrant, a neutral magistrate judge "made an independent determination that sufficient probable cause existed" and that any doubt should be "resolve[d] ... in favor of a magistrate judge's probable cause finding." *Id.* at 26. The Defendants further say that the "Plaintiffs have not only failed to attribute any purported falsehoods to the[m] ... but have also failed to assert [] the omission of any such falsehoods ... [that] would otherwise vitiate the probable cause finding in this case." *Id.* at 27. The DISH/NagraStar Defendants contend that their accompaniment of "the FBI defendants during the course of the search and seizure does not render the search invalid and/or unreasonable, as the FBI defendants are given latitude in conducting computer searches and no particularized search protocol or strategy is required." *Id.* at 27 (citing 18 U.S.C. § 3105).

As to Count Two, the DISH/NagraStar Defendants argue that they did not conduct a warrantless search of the ADM office because photographs of the space "denote that Artist Designs' office space is located within and/or adjoining to Naicom's space, displays a 'Naicom HQ' stamp, and does not reflect that of a distinct office or business space." *Id.* at 28. Citing *United States v. Ferreras*, 192 F.3d 5, 10-11 (1st Cir. 1999), the Defendants say that "a search warrant will not be deemed invalid, or ... unreasonable, due to the failure to specify a subunit or numerical address to be searched, where, as in this case, the multi-unit character of the premises was not externally apparent." *Id.* at 29. They emphasize that here, "searching agents or individuals reasonably could conclude that Artist Designs' office, was appurtenant to Suite 208, and as such, a search of the area fell within the purview of the warrant." *Id.*

Finally, as to Count Three, the DISH/NagraStar Defendants argue that, even assuming that they were "federal agents," their August 29, 2019, search at Naicom's Data Center was not a search without a warrant because the Defendants had previously suspended their initial search on August 27 at the Plaintiffs' request, which "triggered the need for the subsequent search." *Id.* at 30. Thus, the search "was not a second, warrantless search ... but rather a valid continuation of the original search." *Id.* at 31.

1. The Plaintiffs' Opposition

*10 The Plaintiffs oppose the DISH/NagraStar Defendants' motion to dismiss by first insisting that they have validly stated a claim upon which relief can be granted because the "Fourth Amendment protects business[es] and corporations from unreasonable searches and seizures." *Pls.' Opp'n to DISH/NagraStar Defs.' Mot.* at 13 (citing *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977)).

As to the Defendants' first argument, the "Plaintiffs submit that they are not implying a cause of action expanding *Bivens* to a claim that arises under a 'new context' or involve[es] a 'new category of defendants.' " *Id.* at 16. They argue their "claim does not arise under a 'new context' " but instead "falls squarely under the provinces of *Bivens* and *Franks* where the Supreme Court clearly established that a violation of a person's Fourth Amendment rights by federal officers, acting under color of federal law gives rise to a federal cause of action for damages for unconstitutional conduct where the issuance of the search warrant was based on false statements to establish probable cause." *Id.* at 16-17.

Second, the Plaintiffs say that "[c]ontrary to [t]he DISH/NagraStar defendants' arguments Plaintiffs' right to sue federal officers and actors derives from the constitution itself." *Id.* at 20. The Plaintiffs submit that "[a]s of today, Congress has not either legislated any law disproving [that] monetary damages [can] be awarded under *Bivens*, nor has divested the federal Courts of their federal-question adjudicatory authority to do so." *Id.* at 21.

Third, the Plaintiffs assert that "the Dish/NagraStar and FBI Special Agent[] defendants were operating exactly under the same investigatory legal mandate as in *Bivens*." *Id.* at 22. The Plaintiffs say that "[i]n the present case, as in *Bivens* ... the FBI federal defendant agents and AUSA Cannon were seeking evidence for criminal prosecution for possible violations of United States conspiracy, copyright, and money laundering laws. *Id.* They argue that the federal defendants "unlawfully conspire[d] with the Dish/NagraStar defendants to make false allegations to the Magistrate Judge filing an affidavit containing false and perjured statements" which is "exactly what the Fourth Amendment, *Bivens*, and *Franks* prohibit." *Id.* at 22-23. Citing *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and *Aponte Matos v. Toledo Dávila*, 135 F.3d 182, 187 (1st Cir. 1998),

the Plaintiffs say that “the use of false statements to obtain a search warrant violates the Fourth Amendment warrant requirement.” *Id.* at 25.

Next, the Plaintiffs say that their claims would not require significantly different proof because it “would not require discovery or an investigation into evidence before numerous decision makers” because “[t]he factual allegations and legal controversy which gave birth to this *Bivens* cause of action are all derived from the same source, the unlawful sworn declaration filed with the Court, and the two warrantless searches.” *Id.* at 26. The Plaintiffs also assert that based on the documents already on the docket, in the absence of the alleged false statements, “the magistrate judge would never have issued the search warrant.” *Id.*

Finally, the Plaintiffs argue that the DISH/NagraStar Defendants do not constitute a “new category” of defendant under *Bivens*. *Id.* They say that “[t]here is little question that a private actor that conspires with a Governmental official to violate the Constitution is subject to liability,” *id.* at 28 (citing *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), and that the DISH/NagraStar Defendants “squarely meet all three [tests to be characterized as federal actors]; (1) Nexus Test; (2) the Symbiotic Relationship Test; and the (3) Public Function Test.” *Id.* at 29-30, 101 S.Ct. 183.

*11 The Plaintiffs submit that even if their “claims [are] viewed as an expansion of *Bivens* liability, their claims should stand because state law remedies do not provide adequate deterrence.” *Id.* at 42, 101 S.Ct. 183. The Plaintiffs cite *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), for the proposition that “it was *Bivens* and not the Federal Tort Claims Act ... [that] Congress had in mind [as the appropriate remedy] and [that Congress] did not intend to limit a *Bivens* Action to an FTCA.” *Id.* at 43, 100 S.Ct. 1468. The Plaintiffs say that the *Carlson* Court applied several factors—the deterrent effect of a *Bivens* versus FTCA suit, the availability of punitive damages and a jury trial under *Bivens*, and whether the state where the alleged misconduct took place permits a cause of action under state law. *Id.* at 43-44, 100 S.Ct. 1468. Applying these factors, the Plaintiffs argue that “state tort law claims do not effectively address the conduct” and invocation of “a Federal Tort Claim Act instead” would be “futile” because “the Supreme Court of the United States had already ruled that the correct course of action is a *Bivens*

Action[].” *Id.* at 45, 100 S.Ct. 1468 (citing *Carlson*, 446 U.S. at 100). The Plaintiffs also say that the DISH/NagraStar Defendants’ argument that Rule 41(g) provides an adequate remedy is incorrect because money damages are not available under Rule 41(g). *Id.* at 46-47, 100 S.Ct. 1468.

The Plaintiffs reject the DISH/NagraStar Defendants’ argument that they did not properly plead a *Bivens* conspiracy claim. *Id.* at 47, 100 S.Ct. 1468. The Plaintiffs say that there is ample evidence on the record that the Defendants “formed an agreement to deceive the federal magistrate” and that their “ultra vires motive in intruding into Naicom’s Data Center and Offices was to appropriate themselves of Naicom’s intellectual property” even though “[t]hey knew Plaintiffs were not engaged in tv piracy.” *Id.* at 48, 100 S.Ct. 1468.

Turning to the viability of each count, the Plaintiffs say that their allegations in Count One do state a claim on which relief can be granted because the evidence shows that the DISH/NagraStar Defendants were “performing the search to assist law enforcement efforts ... to further their own ends, by using the FBI as an instrument to learn Naicom’s methods of operation.” *Id.* at 50, 100 S.Ct. 1468. They also say that the record is clear “that any legitimate investigative purpose dissipated the moment they informed the FBI that Naicom was not using their equipment.” *Id.* at 51, 100 S.Ct. 1468.

Next, the Plaintiffs say that Count Two similarly states a valid claim because the DISH/NagraStar Defendants “knew they did not have a search warrant to enter Artist Designs & Management Corporation premises,” were warned that it was a different business, and still entered the premises and executed a warrantless search and seizure. *Id.*

Finally, the Plaintiffs say that despite the Defendants’ argument that they re-entered the Naicom Data Center on August 29, 2019, pursuant to the original warrant, Agent Pearson was aware that Naicom had all of its licensing contracts, which Mr. Quinones and Mr. Vega further confirmed during their FBI interview. *Id.* at 52, 100 S.Ct. 1468. Thus, in support of Count Three, the Plaintiffs contend that the search warrant was fully executed and once executed the Defendants “did not have any authority ... to re-enter Naicom’s[] Data Center premises, unless they applied for a second warrant.” *Id.* at 53, 100 S.Ct. 1468.

2. The DISH/NagraStar Defendants’ Reply

In reply, the DISH/Nagra Star Defendants reiterate that the current action is significantly different than *Bivens* and that “[d]espite Plaintiffs’ arguments to the contrary, functional equivalence is not the standard [for determining whether a case requires a *Bivens* expansion], as even ‘significant parallels’ are not enough to warrant a finding of no new context.” *DISH/NagraStar Defs.’ Reply* at 5 (quoting *Abbasi*, 137 S. Ct. at 1864). The Defendants further state that “[c]ourts do not define a *Bivens* cause of action at the level of ‘the Fourth Amendment’ or even at the level of ‘the unreasonable-searches-and-seizures clause’ ” and that, as a result, the Court should reject an “amendment-by-amendment ratification” approach to *Bivens*. *Id.* (first quoting *Cantú v. Moody*, 933 F.3d 414, 423 (5th Cir. 2019), then *De La Paz v. Coy*, 786 F.3d 367, 372 (5th Cir. 2015)).

*12 Second the Defendants reassert that they are “private actors not covered by the scope of Plaintiffs’ *Bivens* claims.” *Id.* at 6. Defendants say that the Plaintiffs’ reliance on *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 312 (D. Mass. 1999), is misplaced because the case was decided before *Minnecci* “which unequivocally rejected the identical argument to expand *Bivens* to non-governmental actors.” *Id.* at 7. Quoting *Stout v. Banco Popular de Puerto Rico*, 320 F.3d 26, 33 (1st Cir. 2003), the Defendants say that “[t]he First Circuit has consistently interpreted the Supreme Court’s holding in *Malesko* as ‘limit[ing] *Bivens* actions by refusing to extend them to private entities acting under color of federal law.’ ” *Id.*

Third, the Defendants say that the Plaintiffs’ reliance on *Carlson* does not negate that the FTCA is available to them as an alternative remedy because “the Supreme Court has [since] determined the availability of a remedy under the FTCA to be a significant factor militating against creating a *Bivens*-type remedy.” *Id.* at 8 (citing *Abbasi*, 137 S. Ct. at 1863). Thus, “the mere fact that the FTCA might not provide Plaintiffs with all the relief they seek does not justify finding an expansion of *Bivens* warranted in this case, but rather counsels against it.” *Id.* The Defendants further cite *Omran v. United States*, No. 1:14-CV-13881, 2016 WL 4158556, at *10-11 (D. Mass. June 22, 2016) for the proposition that “[a]lthough Rule 41(g) does not provide damages as a remedy, [a] remedial scheme need not provide [complete] relief to the plaintiff to qualify as a special factor.” *Id.* at 9 (internal quotation marks omitted). The Defendants therefore contend that “the absence of money damages ... does not negate [Rule 41(g)’s] status as an adequate, alternative remedy” to a *Bivens* claim. *Id.* In closing, the DISH/NagraStar Defendants reiterate that even if

the Court finds it appropriate to expand *Bivens* here, all three counts should be dismissed for failure to state a claim. *Id.* at 9-10.

B. The Government Defendants’ Motion to Dismiss

Like the DISH/NagraStar Defendants, the Government Defendants apply the two-part *Bivens* expansion test and argue that the Plaintiffs have not stated a cognizable *Bivens* claim. *Gov’t Defs.’ Mot.* at 7-9. The Government Defendants put forth the same arguments as the DISH/NagraStar Defendants, and the Court does not separately reiterate them here. *See id.* at 9-22.

In addition to arguing that *Bivens* is unavailable to the Plaintiffs, the Defendants further contend that even if the Court chooses to expand *Bivens*, AUSA Cannon is entitled to absolute immunity, or at the very least, qualified immunity. *Id.* at 23, 100 S.Ct. 1468. As to absolute immunity, the Defendants argue that AUSA Cannon’s actions, including evaluating evidence provided to him by the FBI and meeting with co-defendants for that purpose, were “part of his preparation to initiate the criminal process.” *Id.* at 26-27. They argue that AUSA Cannon’s “conduct ... was functionally prosecutorial and associated with his role in the judicial phase of a criminal investigation; specifically, assisting in the preparation and filing of the warrant affidavit.” *Id.* at 29. As to the warrant itself, the Defendants say that AUSA Cannon “did not swear to the facts of the search warrant in a way that made [him] more akin to a witness than a prosecutor in this function. Rather, this legal review ... is more akin to pre-trial evidence gathering intimately associated with the judicial process that is protected by absolute immunity.” *Id.* (alteration in *Gov’t Defs.’ Mot.*) (quoting *Haworth v. Walla Walla Cnty.*, No. 4:19-CV-5254-TOR, 2021 WL 2333099, at *—, 2021 U.S. Dist. LEXIS 89172, at *33 (E.D. Wash. May 10, 2021)).

*13 Even if AUSA Cannon is not entitled to absolute immunity, the Government Defendants submit that he is, at minimum, entitled to qualified immunity. *Id.* Applying the first prong of the qualified immunity test, the Defendants say that “[r]eviewing an affidavit in support of a search warrant, notarizing the affidavit and authorizing a police officer to present that application to a judge does not state a claim under the Fourth Amendment.” *Id.* at 31 (quoting *Lewis v. Hoppe*, No. 16-cv-378-pp, 2020 U.S. Dist. LEXIS 194100, at *11, 2020 WL 6149705 (E.D. Wis. Oct. 20, 2020)). Additionally, the Defendants note that the warrant application was approved by a magistrate judge, suggesting that law enforcement acted in “objective good faith.” *Id.*

(quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012)). Finally, the Defendants contend that it is “not unconstitutional for a federal prosecutor to fail to adequately investigate prior to filing charges, and several courts have found prosecutors are entitled to qualified immunity for such claims.” *Id.* at 31-32. The Defendants conclude by asserting that all claims against AUSA Cannon should be dismissed because they represent “mere conjecture and bare speculation.” *Id.* at 32 (quoting *Noble v. Brady*, No. 1:19-cv-31, 2020 U.S. Dist. LEXIS 115521 at *16, 2020 WL 3574667 (W.D. Pa. July 1, 2020)).

The Government Defendants go on to contend that the FBI defendants should similarly be entitled to qualified immunity. However, even if they are not, “[t]he allegations against [them] lack the requisite specificity.” *Id.* at 33. In particular the Defendants say that the Complaint “is deficient because it fails to specify each FBI defendant’s constitutional violation” and “[i]nstead, Plaintiffs allege a collective legal wrong” without “plead[ing] that each defendant, through the official’s own individual actions, has violated the Constitution.” *Id.* at 33. Additionally, they say that vicarious liability is inapplicable under *Bivens* so “government officials may not be held liable for unconstitutional conduct of their subordinates under a theory of respondeat superior.” *Id.* at 33-34.

As to Count One, the Defendants argue that the FBI agents are entitled to qualified immunity because the agents acted pursuant to their “discretionary functions” in creating and submitting the warrant affidavit. *Id.* at 35. The Defendants submit that the Plaintiffs did not establish the three required *Franks* elements to prove reckless falsification of the warrant affidavit, as (1) “they do not state facts to support a finding of a falsehood in the affidavit,” and instead “baldly and repeatedly state, without more, that the warrant contained ‘false and perjured’ statements,” which the court need not accept; (2) the Plaintiffs did not establish or allege “that the supposed ‘false’ information invalidates the magistrate’s finding of probable cause, and thus the legality of the search,” *id.* at 36-37, and that absent this, the “magistrate’s finding of probable cause is entitled to ‘great deference.’ ” *Id.* at 37 (quoting *Moreta-Ramirez v. Lemert*, 233 F. Supp. 2d 286, 291 (D.P.R. 2002)). Lastly, the Complaint “is devoid of any facts suggesting when or how the federal defendants knew or should have known that the information provided by Plaintiffs’ competitors was false or inaccurate, ‘particularly where the information involved complex technology and was potentially subject to dispute.’ ” *Id.* at 38 (quoting *Xiaoxing*

Xi v. Haugen, No. 17-2132, 2021 U.S. Dist. LEXIS 63863 at *26, 2021 WL 1224164 (E.D. Pa. March 31, 2021)).

Regarding Count Two, the Government Defendants offer similar arguments to those made by the DISH/NagraStar Defendants and contend that the “Artist Designs [office] was within a space shared with Naicom.” *Id.* at 38-39. Moreover, the Government Defendants say that “an owner or operator of a business has an expectation of privacy in commercial property that ‘is different from, and indeed less than, a similar expectation in an individual’s home.’ ” *Id.* at 40 (citing *Every v. Town of Littleton*, 380 F. Supp. 3d 173, 179 (D.N.H. 2019)).

*14 Similarly, on Count Three the Government Defendants echo the DISH/NagraStar Defendants in arguing that they were entitled to search the Naicom Data Center on August 29, 2019, because the warrant had not yet expired and their return search was a reasonable continuation of the August 27 search in light of the fact that the agents agreed to pause the initial search upon Mr. Quinones’ and Mr. Vega’s request. *Id.* at 40-42.

1. The Plaintiffs’ Opposition

The Plaintiffs repeat arguments made in opposition to the DISH/NagraStar Defendants’ motion to dismiss. The Court does not repeat them here. *See Pls.’ Opp’n to Gov’t Defs.’ Mot.* at 22-37.

As to immunity, the Plaintiffs submit that AUSA Cannon is not entitled to absolute immunity because he “participated in this case as an investigator” and “advis[ed] and coach[ed] [the FBI agents] on how to proceed in the investigation.” *Id.* at 43. The Plaintiffs emphasize that “[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is ‘neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.’ ” *Id.* at 44 (emphasis omitted) (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

Second, the Plaintiffs argue that AUSA Cannon is similarly not entitled to qualified immunity and that the Government Defendants’ framed their argument and cited cases without important context. *Id.* at 46. The Plaintiffs say that “what [they] are imputing to defendant AUSA Cannon is that after reviewing the information and analyzing the evidence collected from [the] ... criminal investigation, he knew that he did not have probable cause to seek a search warrant, and still

opted to conspire with the rest of the defendants.” *Id.* That such behavior is unlawful, the Plaintiffs contend, is “clearly established for civil liability purposes” and “prohibited and punishable under criminal law.” *Id.* at 46-47 & 47 n.4 (citing 18 U.S.C. §§ 2234-2236).

As to qualified immunity for the FBI agents and supervisors, the Plaintiffs argue that “[t]he allegations against the FBI defendants support the requisite specificity” based on details disclosed in the FBI search report that Agent Lange provided to Mr. Vega. *Id.* at 48. However, the Plaintiffs say that “[t]o be more specific, [they] will have to wait for discovery.” *Id.* at 49.

Second, the Plaintiffs argue that “[p]ursuant to *Franks*, the affidavit and the warrant [are] void and the defendants executed an illegal search and seizure ... and are liable pursuant to *Bivens*” because the “federal defendants knowingly, intentionally with reckless disregard for the truth included in the warrant affidavit” false and perjured statements and “that the affidavit’s remaining content [when excluding all perjured statements] was insufficient to establish probable cause.” *Id.* at 56. The Plaintiffs thus assert that “the federal defendants do not enjoy qualified immunity” on Count One. *Id.* at 57.

Third, the Plaintiffs state that the Defendants’ reliance on photographs of the ADM offices to argue that Suites 207 and 208 were shared spaces, is “totally false and [is] being used with the intent to deceive the Court.” *Id.* at 57-58. They allege that the “federal defendants are hiding from the Court [] the fact that Artist Designs & Management Corporation ... was established as an independent corporation” in June 2014, before Naicom’s founding, and that the ADM corporation has an independent lease for Suite 207. *Id.* at 58.

*15 Fourth, the Plaintiffs say that the Court must determine “whether probable cause dissipated” in analyzing whether the August 29 search was unconstitutional. *Id.* at 64, 122 S.Ct. 515. The Plaintiffs argue that after executing the first search the Government Defendants learned more about the Plaintiffs’ licensing and distribution contracts, yet despite this knowledge of the Plaintiffs’ legitimacy, AUSA Cannon ordered a second search be performed. *Id.* at 64-65, 122 S.Ct. 515. As a result, the “warrant expired once it was fully executed at Naicom’s Offices and Data Center.” *Id.* at 67, 122 S.Ct. 515.

2. The Government Defendants’ Reply

In reply, the Government Defendants say that “being afforded Fourth Amendment protections does not automatically entitle a plaintiff to redress under *Bivens*.” *Id.* at 3. They say that “*Bivens* does not create any substantive rights” and the “[f]ederal courts lack the authority to engage in the distinctly legislative task of creating causes of action for damages to enforce federal positive law.” *Id.* at 4 (first quoting *Martinez v. United States*, No. 1:10-2156, 2012 U.S. Dist. LEXIS 129809 at *19, 2012 WL 4018010 (M.D. Pa. Aug. 7, 2012), then *Hernandez v. Mesa*, 104 S. Ct. 735, 752 (2020) (Thomas, J., concurring)).

As to the strength of the caselaw cited by the Plaintiffs, the Government Defendants say that the Plaintiffs do not adequately support their arguments, and where they do, the cases are factually or legally distinguishable. *Id.* at 8. In support, the Defendants include a table pointing out the discrepancies in, or inapposite nature of, the Plaintiffs’ citations. *Id.* at 8-10. The Defendants further say that the Plaintiffs’ reliance on *Carlson* is outdated because, post-*Abbasi*, courts have held that “*Carlson*[’s] holding concerning FTCA no longer has ‘vitality’ in light of [*Abbasi*].” *Id.* at 11 (quoting *Turkmen v. Ashcroft*, 02-cv-02307 (DLI) (SMG), 2021 U.S. Dist. LEXIS 171343, at *22, 2021 WL 4099495 (E.D.N.Y. Sept. 9, 2021)).

As to immunity, the Defendants maintain that “[l]iability under ... *Bivens* requires personal involvement.” *Id.* at 13 (quoting *Boudette v. Buffington*, No. 20-1329, 2021 U.S. App. LEXIS 24512 at *8, 2021 WL 3626752 (10th Cir. Aug. 17, 2021)). Thus, because “AUSA Cannon did not participate in any of the challenged searches ... ‘even if those warrant applications contained falsehoods, responsibility would lie with the affiants,’ which is not AUSA Cannon.” *Id.* at 13-14 (quoting *Boudette*, 2021 U.S. App. LEXIS 24512, at *8, 2021 WL 3626752). As to the FBI Defendants’ qualified immunity, they say that the “Plaintiffs [did] not deny that Artists Designs and Naicom shared office space” and argue that Artist Designs’ certificate of incorporation and lease contract were not visible at the time of the search. *Id.* at 14, 100 S.Ct. 1468.

The Defendants also say that the “Plaintiffs’ argument that probable cause ‘dissipated’ immediately after the first search [on August 27] upon examining the fruit of their seizure is unavailing.” *Id.* at 15, 100 S.Ct. 1468. They say that “[i]t

is simply implausible for the Federal Defendants to have reviewed the electronic evidence seized from Plaintiffs within two days, especially when this evidence entailed matters of complex and evolving technology.” *Id.* at 16, 100 S.Ct. 1468. The Federal Defendants cite *Celestin v. City of New York*, 581 F. Supp. 2d 420, 432 (E.D.N.Y. 2008) for the proposition that “once probable cause was established to obtain the search warrants in question, the officers were not required to look through the evidence seized to investigate the suspect’s innocence.” *Id.* Thus, “[i]f the FBI Defendants reasonably thought they had not concluded the search, the brief passage of time did not dissipate the continued existence of probable cause to search the premises.” *Id.*

*16 Finally, the Government Defendants say that they “acted within the scope of their employment” pursuant to the “Westfall Act,” which “afford[s] absolute immunity from suit where they were acting within the scope of employment, but allow[s] the suit to proceed against the federal government.” *Id.* at 16-17, 100 S.Ct. 1468. In accordance with the Act, the Defendants attach a “Certification of Scope of Employment” signed by the United States Attorney for the District of Puerto Rico. *Id.*, Attach. 1, *Certification of Scope of Employment*, at 1.

3. The Plaintiffs’ Sur-Reply

In their sur-reply the Plaintiffs reiterate their arguments as to the applicability of the Fourth Amendment to businesses and maintain that federal question jurisdiction enables the Court to imply a cause of action in this case. *See Pls.’ Sur-Reply* at 2-8. The Plaintiffs say that “a simple reading of [28 U.S.C. § 1331] clearly establishes that when a party has a cause of action arising under the constitution for the deprivation of constitutional rights, and the controversy involves the sum or value of \$3,000, the aggrieved party can file a civil suit in federal Court for the resolution of the constitutional dispute.” *Id.* at 8. They argue that Congress “has not found the need to legislate any other law implementing monetary awards approved in *Bivens* since the reach of Section 1331 already affords compensatory or punitive damages.” *Id.*

The Plaintiffs further argue that, contrary to the Defendants’ assertion, their case law is “current, on point, and approved by multiple Federal Courts, even post *Abbasi*.” *Id.* at 12. They insist that “*Carlson* remains good and controlling law” because “if the [Supreme] Court intended to overrule *Carlson* ... it would simply do so.” *Id.* at 16, 100 S.Ct. 1468 (quoting

Doe v. United States, 381 F. Supp. 3d 573, 615 (M.D.N.C. 2019)).

As to the FTCA, the Plaintiffs contend that “[g]overnment employees sued in their individual capacities for acts committed within the scope of their official duties are not proper defendants to any claim brought under the FTCA” which “ends the matter.” *Id.* at 19, 100 S.Ct. 1468.

As to the Defendants’ closing argument that they are protected by the Westfall Act, the Plaintiffs contend that “the Federal Defendants did not include this defense in their motion to dismiss, therefore, it is waived” and that even if they had, “[t]he Federal Defendants did not act within the scope of their employment.” *Id.* at 27. Because they did not act within the scope of employment, the Defendants “clearly do not qualify for ... protection and this Court should reject the [Westfall] certification outright.” *Id.* at 30.

IV. LEGAL STANDARD

Rule 12(b)(6) requires dismissal of a complaint that “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To state a claim, a complaint must contain, among other things, “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In other words, a complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A claim is facially plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). Plausible means “‘something more than merely possible’ or ‘merely consistent with a defendant’s liability.’ ” *Germanowski v. Harris*, 854 F.3d 68, 71-72 (1st Cir. 2017) (internal citation omitted) (quoting *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012); *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 11 (1st Cir. 2011)). This is a “‘context-specific’ job that compels [judges] ‘to draw on’ [their] ‘judicial experience and common sense.’ ” *Schatz*, 669 F.3d at 55 (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937).

*17 This is a “two-step analysis.” *Cardigan Mountain Sch. v. N.H. Ins. Co.*, 787 F.3d 82, 84 (1st Cir. 2015). “First, the court must distinguish ‘the complaint’s factual allegations (which must be accepted as true)’ from its conclusory legal allegations

(which need not be credited).’ ” *García-Catalán v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012)); see also *Schatz*, 669 F.3d at 55 (stating that a court may “isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements”). “Second, the court must determine whether the factual allegations are sufficient to support ‘the reasonable inference that the defendant is liable for the misconduct alleged.’ ” *García-Catalán*, 734 F.3d at 103 (quoting *Haley v. City of Bos.*, 657 F.3d 39, 46 (1st Cir. 2011)).

V. DISCUSSION

“In *Bivens*, the [United States Supreme] Court held that a Fourth Amendment violation by federal agents, acting under color of governmental authority, gave rise to a cause of action for money damages against those agents in their individual capacities.” *González v. Vélez*, 864 F.3d 45, 52 (1st Cir. 2017) (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). The Supreme Court has implied a right of action against federal officials in three circumstances. The first was in *Bivens*, where the Supreme Court permitted a private right of action for a Fourth Amendment violation after law enforcement officers handcuffed a man in his own home in front of his family without a warrant. *González*, 864 F.3d at 52 (citing *Bivens*, 403 U.S. at 389, 91 S.Ct. 1999). The second was in *Davis v. Passman*, 442 U.S. 228, 243-44, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), where a congressional staffer asserted Fifth Amendment violations due to sex discrimination against a member of Congress. The third was in *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980), involving an Eighth Amendment claim against federal corrections officers who failed to treat a prisoner’s asthma while he was incarcerated.

A. Whether *Bivens* Should Be Expanded

The Supreme Court has “specified that when a *Bivens*-type claim is lodged, the appropriate analysis must begin by determining whether the plaintiff is seeking to extend the *Bivens* doctrine to a new context [beyond that of *Bivens*, *Davis*, or *Carlson*],” *González*, 864 F.3d at 52 (citing *Ziglar v. Abbasi*, — U.S. —, 137 S. Ct. 1843, 1864, 198 L.Ed.2d 290 (2017)), or to a “new category of defendants.” *Hernandez v. Mesa*, — U.S. —, 140 S. Ct. 735, 743, 206 L.Ed.2d 29 (2020) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001)). If a court determines the context is “new,” the court must

then “ask whether an alternative means of obtaining relief exists and, if so, whether ‘special factors’ counsel hesitation in extending the reach of the *Bivens* doctrine.” *González*, 864 F.3d at 52-53 (quoting *Abbasi*, 137 S. Ct. at 1865). “While the boundaries of *Bivens*-type liability are hazy, the Supreme Court ... [has] made plain its reluctance to extend the *Bivens* doctrine” beyond the settings identified in *Bivens*, *Davis*, and *Carlson*.⁸ *Id.* at 52; see also *Abbasi*, 137 S. Ct. at 1848. In fact, the Supreme Court has “gone so far as to observe that ‘if the Court’s three *Bivens* cases [had] been ... decided today,’ it is doubtful that we would have reached the same result.” *Hernandez*, 140 S. Ct. at 742-43 (alteration in *Hernandez*) (quoting *Abbasi* 137 S. Ct. at 1856). The Supreme Court has also expressly stated that “for almost 40 years [it has] consistently rebuffed requests to add to the claims allowed under *Bivens*.” *Id.* at 743.

1. Whether the Case Involves a New Context or New Category of Defendants

*18 The Court must first consider whether the Plaintiffs’ claims are brought in a new context or against a new group of defendants.

a. New Context

Under the first prong of the *Bivens* extension analysis, “a context is considered new ‘[i]f the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court.’ ” *González*, 864 F.3d at 52 (alterations in *González*) (quoting *Abbasi*, 137 S. Ct. at 1859). A “meaningful difference” may be “small, at least in practical terms,” *Abbasi*, 137 S. Ct. at 1865, and may arise even when the claim at issue is “based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.” *Hernandez*, 140 S. Ct. at 743. The Supreme Court has explained:

A case might differ in a meaningful way because of [1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other

branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider. *Abbasi*, 137 S. Ct. at 1860.

In light of the Supreme “Court’s expressed caution about extending the *Bivens* remedy ... the new-context inquiry is easily satisfied.” *Id.* at 1865. Generally, “[c]ourts considering whether to recognize an implied cause of action under *Bivens* in ‘new context[s]’ should proceed with caution because it is generally the role of Congress, not the courts, to provide for a damages remedy.” *Hornof v. Waller*, No. 2:19-cv-00198-JDL, 2020 U.S. Dist. LEXIS 198578, at *54 (D. Me. Oct. 20, 2020) (alteration in *Hornof*) (citing *Abbasi*, 137 S. Ct. at 1857 (“[T]he Court has urged ‘caution’ before ‘extending *Bivens* remedies into any new context’ ” (quoting *Malesko*, 534 U.S. at 74, 122 S.Ct. 515))); see also *Drewniak v. U.S. Customs & Border Prot.*, No. 20-cv-852-LM, 554 F.Supp.3d 348, 2021 U.S. Dist. LEXIS 67937 at *12, 2021 WL 1318028 (D.N.H. Apr. 8, 2021) (“Indeed, *Abbasi* expressed what one Court of Appeals deemed ‘open hostility’ to recognizing additional *Bivens* actions” (quoting *Tun-Cos v. Perrotte*, 922 F.3d 514, 521 (4th Cir. 2019))).

i. Analysis

The Court must first consider whether Plaintiffs’ Fourth Amendment claims present a “new context” under Supreme Court precedent.⁹ *Bivens* itself is the most analogous of the three seminal *Bivens* cases, as it involved a Fourth Amendment claim against federal agents. See *González*, 864 F.3d at 52 (citing *Bivens*, 403 U.S. at 389, 91 S.Ct. 1999). In *Bivens*, the plaintiff alleged that Federal Bureau of Narcotics agents “entered his apartment and arrested him for alleged narcotics violations.” *Bivens*, 403 U.S. at 389, 91 S.Ct. 1999. During the arrest, officers handcuffed the plaintiff in front of his wife and children and threatened to arrest the entire family. *Id.* After thoroughly searching the plaintiff’s apartment the federal agents took the plaintiff to the federal courthouse “where he was interrogated, booked, and subjected to a visual strip search.” *Id.* In his complaint the plaintiff “asserted that the arrest and search were effected without a warrant, ... that unreasonable force was employed in making the arrest,” that agents did not have probable cause, and that the agents’ unlawful conduct caused him “great humiliation, embarrassment, and mental suffering.” *Id.* With reference to the circumstances presented in *Bivens*, the Court must determine whether the factual circumstances of this case

are the same or present a “new context.” The Court concludes that the Plaintiffs’ claims arise in a new context.

*19 To begin, the fact that the Plaintiffs’ claims arise under the Fourth Amendment, like the suit in *Bivens*, does not preclude a “new context” finding. “Courts do not define a *Bivens* cause of action at the level of ‘the Fourth Amendment’ or even at the level of ‘the unreasonable-searches-and-seizures clause.’ ” *Cantú v. Moody*, 933 F.3d 414, 422-23 (5th Cir. 2019) (“No one thinks *Davis*—which permitted a congressional employee to sue for unlawful termination in violation of the Due Process Clause—means the entirety of the Fifth Amendment’s Due Process Clause is fair game in a *Bivens* action”); *Farah v. Weyker*, 926 F.3d 492, 499 (8th Cir. 2019) (“[T]reating all search-and-seizure cases the same would contradict the Supreme Court’s direction that a context can be new even if it involves the same constitutional right as an existing case” (citing *Abbasi*, 137 S. Ct. at 1859)); see also *Abbasi*, 137 S. Ct. at 1859 (“Even though the right and the mechanism of injury were the same in [*Malesko*] as they were in *Carlson*, the Court held that the contexts were different”); *Annapparedy v. Pascale*, 996 F.3d 120, 135 (4th Cir. 2021) (noting that, unlike *Bivens*, “this case ... involves searches and a seizure conducted *with a warrant*” (emphasis original)).

The Court finds particularly instructive the Fourth Circuit case, *Annapparedy v. Pascale*,¹⁰ which involved highly analogous circumstances. In that case the Maryland Medicaid Fraud Control Unit (MFCU) investigated a pharmacy’s billing practices for Medicaid fraud. 996 F.3d at 127. After being cleared of all charges, the owner of the pharmacy brought a *Bivens* action. In his complaint, the owner alleged that an MFCU investigator, who was working with one of the plaintiff’s employees, encouraged the employee to fabricate evidence and “passed ... false information to prosecutors ‘as if it were accurate and reliable.’ ” *Id.* The plaintiff also alleged that investigators with the United States Department of Health and Human Services rigged findings, ignored potentially exculpatory information, and then “used this falsified analysis as evidence to obtain [] a search warrant.” *Id.* Among his accusations, the plaintiff claimed that the FBI had “actual knowledge” of the “fabrications and falsehoods” and “acted at least recklessly in making them” and “without this flawed evidence ... the [a]ffidavit would not have established probable cause, and the magistrate judge would not have issued the warrants.” *Id.*

*20 The *Annapparedy* Court ultimately concluded that the case presented a “new context” because the “alleged

misdeeds” were different than those in *Bivens*, the search involved a warrant, proving the case would impose on the executive branch in a way that *Bivens* did not, and the case involved the search of a corporate entity rather than of an individual. *Id.* at 135-137. Given the Fourth Circuit's sound reasoning and the similarities between *Annapparedy* and this case, that Court comes to a similar conclusion here.

First, the Court notes, and finds meaningfully different, the Defendants' actions in this case compared to those in *Bivens*. In *Bivens* the defendants handcuffed the plaintiff in front of his family, threatened to arrest his family, and booked and strip-searched the plaintiff. The Defendants in this case did not do anything akin to this conduct. Based on the Amended Supplemental Complaint, the DISH/NagraStar Defendants conducted a preliminary investigation and alerted the FBI that Naicom may be pirating copyrighted materials. Then, all the Defendants met regularly regarding the investigation and allegedly conspired to falsify a search warrant and affidavit, after which the FBI Defendants and DISH/NagraStar Defendants executed the search warrant and questioned Mr. Quinones and Mr. Vega.

Notably, the law enforcement actions in this case and those in *Bivens* occurred at different points in the life of a criminal case. In *Bivens* the plaintiff was immediately arrested for his alleged criminal conduct; in this case, the Defendants were seeking a search warrant in the hopes of uncovering illegal conduct that would give probable cause for an eventual arrest. As noted by the Eighth Circuit, these types of “information-gathering and case-building activit[ies] are a different part of police work than the apprehension, detention, and physical searches at issue in *Bivens*.” *Farah*, 926 F.3d at 496, 499 (concluding that a complaint accusing the police of “exaggerating and inventing facts in reports, hiding evidence that would have exonerated [defendants], and pressuring and manipulating the alleged victims into lying” presented materially different circumstances from those in *Bivens*); *see also Annapparedy*, 996 F.3d at 136 (“[T]he Court in *Bivens* never contemplated the kind of extensive data gathering, analysis, examination, and coordination at issue in this case” (quotation marks and citations omitted)); *Greenlaw v. Klimek*, No. 4:20-CV-311-SDJ, 2021 U.S. Dist. LEXIS 245789 at *13, 2021 WL 6112784 (E.D. Tex. Dec. 27, 2021) (concluding that “a case about investigators and a prosecutor who allegedly falsified evidence in connection with a lengthy criminal investigation to facilitate a notorious investor's short and distort scheme” involved materially different conduct than that in *Bivens*).

A particularly important point of factual distinction between this case and *Bivens* is the warrant. Although both *Bivens* and this case involve Fourth Amendment claims, *Bivens* centered on an unreasonable search and seizure *without* a warrant; in this case, the Plaintiffs do not dispute that the Defendants *had* a warrant. Instead, the Plaintiffs argue that the Defendants did not have probable cause to obtain the warrant, alleging that the “warrant application contained deliberately and/or reckless false and perjured statements, ... which misled the Magistrate Judge to believe probable cause existed.” *Suppl. Am. Compl.* ¶ 7.

The issuance of a warrant makes this case meaningfully different from *Bivens* because “the Fourth Amendment sharply distinguishes between with-warrant and warrantless searches, treating the introduction of a warrant as a signal moment in the proceedings.” *Annapparedy*, 966 F.3d at 135-36; *see also Greenlaw*, 2021 U.S. Dist. LEXIS 245789, at *14, 2021 WL 6112784. In particular, the Supreme Court has explained:

*21 Because a search warrant provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime, we have expressed a strong preference for warrants and declared that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.

United States v. Leon, 468 U.S. 897, 913-14, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (internal quotation marks and citations omitted)). Given the Supreme Court's differentiation between searches with and without warrants and the development of the “good faith” exception for searches *with* warrants, *see id.*, the Court concludes that a search with a warrant—regardless of whether it was properly acquired with probable cause—is meaningfully different from the warrantless search in *Bivens*.

The Court agrees with the Defendants that the warrant at issue here ran against Naicom, the corporation, and not against Mr. Quinones and Mr. Vega as individuals, which further differentiates this case from *Bivens*. As the Fourth Circuit has noted, “[t]here appear to be no cases—in the Supreme Court or any other court—approving a *Bivens* claim for acts taken against a corporate entity” and this Court has found none. *Annapparedy*, 996 F.3d at 136-37 (“[W]e find it significant that the search warrants in this case ran against the corporate entity of Pharmacare, and not the plaintiff himself”); *see also Life Savers Concepts Ass'n v. Wynar*, 387 F. Supp. 3d 989,

998-99 (N.D. Cal. 2019) (“Thus, because *Bivens*, *Davis*, and *Carlson* do not involve a corporate entity seeking to assert a *Bivens* action on behalf of employees, the instant case presents a new *Bivens* context”).

The Plaintiffs argue that they are entitled to a *Bivens* remedy because businesses are protected by the Fourth Amendment. In particular they cite *G.M. Leasing Corporation v. United States*, 429 U.S. 338, 353, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), for the proposition that “[t]he Supreme Court’s precedents leave no doubt that proprietors of commercial premises, including corporations, also have the right to conduct their business free from unreasonable official privacy intrusion.” *Pls.’ Opp’n to Gov’t Defs.’ Mot.* at 23. Although the Plaintiffs are correct that the Supreme Court has held that businesses are entitled to Fourth Amendment protections, this broad proposition does not save them from the conclusion that a Fourth Amendment case involving a business is meaningfully different than *Bivens*. The Court agrees with the Government Defendants that “being afforded Fourth Amendment protections does not automatically entitle a plaintiff to redress under *Bivens*,” *Gov’t Defs.’ Reply* at 3, because “[n]ot all constitutional claims are cognizable in a *Bivens* action.” *Drewniak*, 2021 U.S. Dist. LEXIS 67937, at *10, 2021 WL 1318028. If falling under the umbrella of Fourth Amendment protections was all that was needed to seek redress under *Bivens*, the Supreme Court would not have instructed courts to analyze whether a *Bivens* action presents a new context or is brought against new defendants.

In *Farah v. Weyker*, the Eighth Circuit found relevant how directly the defendant’s actions caused the alleged harm. The *Farah* Court noted that *Bivens* involved “humiliation, embarrassment, and mental suffering,” which could all be directly attributed to the defendants’ conduct. 926 F.3d at 499. In contrast, the *Farah* Court found that allegations of exaggeration and inventing facts in reports and hiding evidence did not reflect direct harm, rather harm through “intervening steps involv[ing] decisions by independent legal actors” including the prosecutors who brought charges, the grand jury that voted to indict, and the magistrate who approved the defendants’ continued detention. *Id.*; see also *Xiaoxing Xi v. Haugen*, No. 17-2132, 2021 U.S. Dist. LEXIS 63863 at *48-49, 2021 WL 1224164 (E.D. Pa. Mar. 31, 2021) (concluding that the alleged harm was caused through intervening steps in an “indirect mechanism of injury” where the plaintiff claimed that the defendant recklessly disregarded evidence of his innocence, made false statements and representations in reports, affidavits, and

communications with prosecutors, and used false testimony to get an indictment).

*22 The Court finds this argument persuasive under the circumstances of this case and concludes that the alleged harm occurred after a series of intervening decisions. The DISH/NagraStar Defendants brought the Plaintiffs’ potentially illegal activity to the attention of the FBI, but the search only took place after (1) the FBI agents evaluated the claims and decided to pursue the case; (2) AUSA Cannon evaluated the FBI evidence to determine that there was probable cause to seek a search warrant; and (3) the Magistrate Judge made an independent finding that there was probable cause to grant the Defendants a search warrant. The alleged harm caused by the DISH/NagraStar Defendants would not have occurred without the intervening acts of the FBI, the prosecutor, and the Magistrate Judge; the alleged harm caused by the FBI Defendants would not have occurred but for the intervening acts of the prosecutor and the Magistrate Judge; and the alleged harm caused by the prosecutor would not have occurred except for the Magistrate Judge’s determination of probable cause, and the FBI’s subsequent execution of the warrant. As in *Farah* and *Xiaoxing Xi*, unlike the conduct of the *Bivens* defendants who handcuffed, humiliated, and strip searched the plaintiff, here, the connection between the Defendants’ actions and the alleged harm is attenuated.

In addition to different circumstances, this case requires different proof than what was required in *Bivens*. There, the plaintiff had to prove a physical invasion and search without probable cause; here, the Plaintiffs must prove that the Defendants made “intentional or reckless misstatements or omissions [that] implicate the very truthfulness, not just the sufficiency, of a warrant application.” *Burke v. Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005); see also *Ahmed v. Weyker*, 984 F.3d 564, 569 (8th Cir. 2020) (comparing doctrinal differences between false arrest and warrant falsification cases). Resolving this issue requires application of *Franks v. Delaware*, 348 U.S. 154 (1978), to determine whether the affidavit submitted by the Defendants contained a falsehood, whether eliminating the falsehood would negate probable cause, and whether the falsehood was included in the affidavit purposefully, deliberately or with reckless disregard for the truth. *Jordan v. Town of Waldoboro*, 943 F.3d 532, 541 (1st Cir. 2019); see also *Burke*, 405 U.S. at 82, 92 S.Ct. 862 (“[T]he *Franks* standard for suppression of evidence informs the scope of qualified immunity in [] civil damages suit[s] against officers who allegedly procure a warrant based on an untruthful application”).

The Plaintiffs say that proving their claim “would not require discovery or an investigation into evidence before numerous decision-makers” and that documents already on the Court’s docket show that the Magistrate Judge did not have probable cause. *Pls.’ Opp’n to DISH/NagraStar Defs.’ Mot.* at 26. The Court disagrees. Because the *Franks* analysis probes not only the sufficiency of the affidavit, but its truthfulness, to prove their claim the Plaintiffs would have to delve into the subjective beliefs of the officers at the time of the warrant and determine what the officers knew, at what points in time they knew certain information, and what information was shared between the DISH/NagraStar Defendants and the Government Defendants. This, in turn, would require the Plaintiffs to engage in the “type of fact-checking and conscious-probing, ... which can, as the Supreme Court has warned, impose ‘substantial costs.’ ” *Annapparedy*, 996 F.3d at 136 (quoting *Ahmed*, 984 F.3d at 570); *see also Ahmed*, 984 F.3d at 568 (“Lying and manipulation, however bad they might be, are simply not the same as the physical invasions that were at the heart of *Bivens*”).

In sum, the Court finds that there are ample differences that render this case a “new context” dissimilar from *Bivens*, *Davis*, or *Carlson*: (1) the case involves investigatory actions in a nascent criminal case rather than the arrest of a suspect; (2) the Defendants were conducting a search with a warrant rather than a warrantless search; (3) the search was of business premises rather than a home; and (4) the Plaintiffs do not ground their claims in a physical intrusion but rather allege the falsification of a warrant affidavit, subjecting their claims to the *Franks* standard. Even if the “new context” were a closer call, the Court would nonetheless reach the same conclusion given the Supreme Court’s explicit hesitancy to expand *Bivens* to new contexts and the low threshold for what qualifies as a “new context.”

b. New Category of Defendants

*23 A second way that *Bivens* can be extended is if the claims are brought against a category of defendant different from those in *Bivens*, *Davis*, or *Carlson*. *Hernandez*, 140 S. Ct. at 743. However, a defendant does not need to prove that a case presents both a new context and is brought against a new category of defendants. In this particular case, the DISH/NagraStar Defendants argue that the Court should dismiss the claims against them because private investigators are “new categories of defendants.” *DISH/NagraStar Defs.’ Mot.* at

14-18. To resolve this issue the Court must determine whether the DISH/NagraStar Defendants were private parties “acting under the color of federal law,” or fully private parties whose inclusion in a *Bivens* lawsuit would expand liability to a new category of defendants.

To begin, the Court notes the disagreement among the district courts in this circuit on whether the First Circuit flatly prohibits *Bivens* claims against private parties, regardless of whether they were acting under color of federal law, or whether a court must look to the individual conduct and circumstances in the case, applying a similar framework as to § 1983 claims. *Compare Marinkovic v. Osborne*, No. 19-cv-209-JL, 2019 U.S. Dist. LEXIS 99364 at *5, 2019 WL 2477710 (D.N.H. Apr. 19, 2019) (“Liability under *Bivens*, however, cannot attach to private actors”), with *Rios v. United States*, No. 14-40171-IT, 2016 U.S. Dist. LEXIS 40262 at *21-22, 2016 WL 1212530 (D. Mass. Feb. 26, 2016) (“When determining whether a party is a ‘federal actor’ under *Bivens*, courts rely on tests analogous to those employed in Section 1983 actions”); *see also Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987) (“Courts of Appeals have held that section 1983 concepts of state action apply in determining whether action was taken ‘under color of federal law’ for *Bivens* purposes”).

This confusion originates in a footnote in *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927 (1st Cir. 1974) which states that “there is no cause of action against private parties acting under color of federal law or custom.” *Id.* at 932 n.8. The defendant in that case was a National Bank. Later, in *Stoutt v. Banco Popular De Puerto Rico*, 320 F.3d 26 (1st Cir. 2003), the First Circuit stated that “[t]he Supreme Court has already limited *Bivens* actions by refusing to extend them to private entities acting under color of federal law.” *Id.* at 33 (citing *Malesko*, 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456). At the same time, the First Circuit has not definitively ruled whether a private entity can, under certain circumstances, act “under color of federal law.” Consequently, one district court questioned the binding effect of the First Circuit’s statement in *Fletcher*. *See Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 58 (D.R.I. 2003) (stating that reliance on the *Fletcher* footnote is “misplaced” because “*Fletcher* did not involve a *Bivens* claim” and that the First Circuit had previously implied, in *Gerena v. Puerto Rico Legal Services, Inc.*, 697 F.2d 447 (1st Cir. 1983), “that a private party acting under color of federal law may be liable under *Bivens*”).

Were the Court to apply the more flexible § 1983 “color of law” tests, it would have to consider (1) the state compulsion test; (2) the nexus/joint action test; and (3) the public function test. *Klunder v. Brown Univ.*, 778 F.3d 24, 30-31 (1st Cir. 2015). Under the state compulsion test, “a private party is fairly characterized as a state actor when the state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [challenged conduct] must in law be deemed to be that of the State.” *Id.* at 30 (quoting *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 5 (1st Cir. 2005) (alteration in *Estades-Negroni*) (internal quotation marks omitted)). Second, under the nexus/joint action test, a private party is a state actor “where an examination of the totality of the circumstances reveals that the state has ‘so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].’ ” *Id.* at 31 (quoting *Estades-Negroni*, 412 F.3d at 5 (alterations in *Estades-Negroni*) (quoting *Buss v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999))). Finally, a private party is a state actor under the “public function” test “if the plaintiff establishes that, in engaging in the challenged conduct, the private party performed a public function that has been ‘traditionally the exclusive prerogative of the State.’ ” *Id.* (quoting *Estades-Negroni*, 412 F.3d at 5) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)).

*24 Applying the § 1983 tests here—accepting as true the Plaintiffs’ allegations that the DISH/NagraStar Defendants conspired with the Government Defendants, met with FBI agents throughout the investigation, accompanied the FBI to execute the search warrant, searched Naicom without FBI supervision, and questioned Mr. Quinones and Mr. Pimentel alongside the FBI agents—the Plaintiffs have properly stated a claim that the DISH/NagraStar Defendants may have been acting under the color of federal law. The facts as alleged suggest that the DISH/NagraStar Defendants were acting as federal agents would by insinuating themselves into every aspect of the investigation. *See Second Am. Compl.* ¶ 98 (describing the DISH/NagraStar Defendants as “expert workers” for the FBI). While it is possible that their substantial involvement was due to the technical nature of the investigation subject matter, that is a factual issue requiring additional discovery.

However, this conclusion does not save the Plaintiffs’ *Bivens* claim against the DISH/NagraStar Defendants. The law does not require that the case present *both* a new context and a new

category of defendants for the Court to dismiss this *Bivens* action. That this case presents a new context is, by itself, enough to preclude Plaintiffs’ *Bivens* action from proceeding against the DISH/NagraStar Defendants, even if Plaintiffs have properly stated a claim that they were acting under the color of federal law.

Separately, applying “new defendants” caselaw, the Plaintiffs cannot maintain a *Bivens* action against AUSA Cannon, as it is well established that prosecutors are “new defendants” that would expand *Bivens*. *See Hornof*, 2020 U.S. Dist. LEXIS 198578, at *56 (“Three [of the defendants] are prosecutors, who have never been recognized by the Supreme Court as proper defendants under *Bivens*”); *see also Greenlaw*, 2021 U.S. Dist. LEXIS 245789, at *14, 2021 WL 6112784 (“Defendant Bunch is a prosecutor, not an on-the-scene, investigative officer. His role as a federal officer—which includes reviewing evidence, deciding whether to seek a search warrant, and pursuing criminal charges—meaningfully differs from the narcotics agents in *Bivens*”); *Martin v. Gray*, No. 20-CV-741-JPS, 2021 U.S. Dist. LEXIS 162381 at *12, 2021 WL 3855566 (E.D. Wis. Aug. 27, 2021) (“The addition of prosecutors would likely expand *Bivens* to a new set of defendants—one historically afforded great discretion” (citing *Wayte v. United States*, 470 U.S. 598, 607-08, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review”))). The *Bivens* action against AUSA Cannon is therefore improper as he is both a “new defendant” and the action arises in a “new context.”

2. Special Factors Counseling Against Extension of a *Bivens* Remedy

Because this case presents a “new context,” the Court must next consider whether there are special factors counseling hesitation against extending *Bivens*. The Supreme Court has yet to define “special factors counselling hesitation”¹¹ before expanding *Bivens* liability but has described it as something that “causes a court to pause before acting without express congressional authorization.” *Abbasi*, 137 S. Ct. at 1857-58. Under this second step, courts must consider “separation-of-powers principles” and “whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.” *Id.* at 1858; *see also Drewniak*, 2021 U.S. Dist. LEXIS 67937, at *15, 2021 WL 1318028 (“[C]ourts have found ‘military concerns, separation of powers, the

comprehensiveness of available statutory schemes, national security concerns, and foreign policy considerations' to be special factors counseling hesitation" (quoting *Alvarez v. U.S. Immigr. & Customs Enforcement*, 818 F.3d 1194, 1206 (11th Cir. 2016))).

*25 Courts should also consider whether there are alternative remedies available to the plaintiff. *Abbasi*, 137 S. Ct. at 1858, 1862-63. "For if Congress has created 'any alternative, existing process for protecting the [injured party's] interest' that itself may 'amount[t] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.' " *Id.* (alterations in *Abbasi*). (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007)). However, courts are not required to find both "special factors counseling hesitation" and an alternative remedy. *Carlson*, 446 U.S. at 18, 100 S.Ct. 1468 (explaining that a private right of action may be defeated when defendants show either special factors or an alternative remedy). The Second and Fifth Circuits have described the threshold for "factors counseling hesitation" as "remarkably low." *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (citing *De La Paz v. Coy*, 786 F.3d 367, 378 (5th Cir. 2015) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009) (en banc))).

a. Separation of Powers Concerns

The Court is reluctant to extend *Bivens* in this factual context in part due to separation of powers concerns. As noted above, "recognizing an implied cause of action here would pose a ... risk of intruding on the executive branch's investigatory and prosecutorial functions." *Greenlaw*, 2021 U.S. Dist. LEXIS 245789, at *14, 2021 WL 6112784. The type of "fact-checking and conscience-probing," *Annapareddy*, 996 F.3d at 136, that this case would require, were it to proceed, would require the judicial branch to "prob[e] executive charging decisions and peek[] behind the curtain" of investigatory and prosecutorial decision-making. *Farah*, 926 F.3d at 499. As the Supreme Court has recognized, probing the "subjective good faith of government officials" comes with "substantial costs" as it could "distract[] ... officials from their governmental duties, inhibit[] ... discretionary action, and deter[] ... people from public service." *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see also *Annapareddy*, 996 F.3d at 136 (citing *Ahmed*, 984 F.3d at 569 (quoting *Harlow*, 457 U.S. at 816, 102 S.Ct. 2727)); *Drewniak*, 2021 U.S. Dist. LEXIS 67937, at *28-29, 2021

WL 1318028 (" '*Bivens* liability could deter agents from vigorous enforcement' of their duties" (quoting *De La Paz*, 786 F.3d at 379)).

As to AUSA Cannon specifically, the Court notes that "[t]he Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). Because United States Attorneys are "designated by statute as the President's delegates to help him discharge his constitutional responsibilities," they have a great deal of "latitude." *Id.* (citing U.S. Const., art. II, § 3; 28 U.S.C. §§ 516, 547). As such, courts are "properly hesitant" to examine prosecutorial decisions, *id.* at 465, 116 S.Ct. 1480 (quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524), because of the "relative competence of prosecutors" and a desire "not to unnecessarily impair the performance of a core executive constitutional function," delay prosecutions or "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id.* (quoting *Wayte*, 470 U.S. at 607, 105 S.Ct. 1524). Because "a *Bivens* action is not 'a proper vehicle for altering an entity's policy' " or questioning the "formulation and implementation of a general policy," *Abbasi*, 137 S. Ct. at 1860, it would be inappropriate for the Court to interfere with the investigatory decisions and policies of the United States Attorney's Office.

To the extent that the Plaintiffs cite *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018) to reason that separation of powers concerns are not present in this case, see *Pls.' Opp'n to Gov't Defs.' Mot.* at 29, 32, *Lanuza* is factually distinguishable. The plaintiff in *Lanuza* had been prosecuted, pleaded guilty, and was sentenced prior to initiating his *Bivens* action. See *id.* at 1022-23. Because *Lanuza* had already been prosecuted, the court reasoned that "[his] civil suit against Love will likely involve no more investigative intrusion than the criminal prosecution initiated against Love by the United States itself." *Id.* at 1030. Indeed, the Ninth Circuit determined that the *Bivens* action would "involve [undisputed] facts the government itself made publicly available" and would "not require unnecessary inquiry ... into government deliberations or policy making." *Id.* at 1029.

*26 Here, in contrast, the Plaintiffs have not been prosecuted and allowing Plaintiffs' *Bivens* action to proceed would require the judicial branch to inquire into the intentions, decisions, and policies of the executive branch in its investigative and prosecutorial decisions. See *Greenlaw*,

2021 U.S. Dist. LEXIS 245789, at *21-22, 2021 WL 6112784 (distinguishing *Lanuza* on similar grounds); *see also* *Drewniak*, 2021 U.S. Dist. LEXIS 67937, at *30, 2021 WL 1318028 (concluding that a *Bivens* action against Customs and Border Patrol agents would result in “unwarranted judicial intrusion into an area in which the Judiciary lacks comparative constitutional authority and competence”).

Allowing Plaintiffs' *Bivens* claims to proceed would also intrude on the legislative branch, as the Judiciary is not well-positioned to resolve whether the Plaintiffs are entitled to the remedy they seek. Instead, Congress is in the best position to “consider and weigh the costs and benefits of allowing a damages action to proceed” and what is in the public's best interest. *Hernandez*, 140 S. Ct. at 743; *see also* *Byrd v. Lamb*, 990 F.3d 879, 881 (5th Cir. 2021). Congress has long been aware of the Supreme Court's *Bivens* precedent and could have enacted legislation making *Bivens* actions fully analogous with § 1983 claims. It has not done so. In the absence of congressional action and in light of the Supreme Court's stated hesitancy to extend *Bivens* to new contexts, allowing the Plaintiffs' *Bivens* action to proceed would be a foray into territory reserved for the legislative branch.

b. Alternative Remedial Scheme

The Court next considers whether there is an alternative remedial scheme available to the Plaintiffs. *See González*, 864 F.3d at 53 (“The existence of such alternative processes is a special factor that counsels convincingly against applying the holding in *Davis* to federal employees generally”).

i. The Federal Tort Claims Act (FTCA)

Both the DISH/NagraStar Defendants and the Government Defendants point to the Federal Tort Claims Act (FTCA) as an alternative remedial scheme that precludes the Plaintiffs' *Bivens* remedy. *See DISH/Nagra Star Defs.' Mot.* at 21; *Gov't Defs.' Mot.* at 17-18. A plaintiff “may seek recovery directly from the United States under the FTCA,” *Hernandez*, 140 S. Ct. at 748, which provides “the exclusive remedy for most claims against Government employees arising out of their official conduct.” *Hui v. Castaneda*, 559 U.S. 799, 806, 130 S.Ct. 1845, 176 L.Ed.2d 703 (2010).

As a threshold matter, the Court must determine whether the Plaintiffs could theoretically recover under the FTCA. “Under

the FTCA, the United States waives its sovereign immunity for ‘injury or loss of property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.’ ” *Nogueras Cartagena v. United States*, 172 F. Supp. 2d 296, 309 (D.P.R. 2001) (quoting 28 U.S.C. § 1346(b)). Section 2680(h) of the FCTA exempts certain intentional torts from the sovereign immunity waiver but expressly allows claims for “assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution” that originate from “acts or omissions of investigative or law enforcement officers of the United States Government.” *Id.* at 311; 28 U.S.C. § 2680(h).

Courts have expressly held that fraudulent warrant applications and fraudulent affidavits in support of a warrant fall within the scope of the “abuse of process” claims permitted against investigative or law enforcement officers under the FTCA. *See Hornof*, 2020 U.S. Dist. LEXIS 198578, at *39-40. “Under the FTCA, [courts] look to [the] ‘law of the place’ where the alleged wrongful actions occurred,” in this case Puerto Rico. *Rucci v. United States INS*, 405 F.3d 45, 49 (1st Cir. 2005). “Under Puerto Rico law, ‘the two basic elements of abuse of process are a bad motive, and the use of a legal process for an improper, collateral objective,’ ” *id.* at 49 (quoting *Microsoft Corp. v. Computer Warehouse*, 83 F. Supp. 2d 256, 261 (D.P.R. 2000)), which includes “challenges to the legal action's procedural components.” *Id.* Thus, the Plaintiffs could bring their claims under the FTCA, although not against all the Defendants. Prosecutors are not “investigative or law enforcement officers” meaning the Plaintiffs cannot bring an FTCA action against AUSA Cannon but could bring one against the FBI Defendants. *See Hornof*, 2020 U.S. Dist. LEXIS 198578, at *40 (citing *Yacubian v. United States*, 750 F.3d 100, 108 (1st Cir. 2014)).

*27 Having determined that the Plaintiffs could recover under the FTCA, at least from the FBI Defendants, the Court must now turn to the heart of the parties' dispute, which is whether FTCA provides a suitable alternative remedial scheme.

The Plaintiffs argue that the Supreme Court foreclosed the FTCA as a suitable alternative to *Bivens* in *Carlson v. Green*. In *Carlson*, the Supreme Court held that the FTCA was not a “substitute” for recovery under *Bivens*. 445 U.S. at 18, 100 S.Ct. 883. The Court reasoned that the petitioners had not

pointed to anything in the FTCA “or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.” *Id.* The FTCA, the Court said, “was enacted long before *Bivens* was decided, [and] when Congress amended FTCA in 1974 ... the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action.” *Id.* at 19-20, 100 S.Ct. 883.

Forty years later in *Hernandez v. Mesa*, faced with another *Bivens* suit, the Supreme Court looked to several federal statutes for alternative relief, including the FTCA, reasoning that the “pattern of congressional action ... gives [the Court] further reason to hesitate about extending *Bivens*.” 140 S. Ct. at 749. The Court explained that traditionally, “civil litigation addressed abusive conduct by federal officers ... by subjecting them to liability for common-law torts.” *Id.* at 748. The Court went on to say that after it decided *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), “Congress passed the so-called Westfall Act, formally the Federal Employees Liability Reform and Tort Compensation Act of 1988 ... [which] makes the ... FTCA ‘the exclusive remedy for most claims against Government employees arising out of their official conduct.’ ” *Id.* (quoting *Hui v. Castaneda*, 559 U.S. 799, 806, 130 S.Ct. 1845, 176 L.Ed.2d 703 (2010)). In a footnote, the Court explained that “[t]he Act also permits claims ‘brought for a violation of the Constitution.’ By enacting this provision, Congress made clear that it was not attempting to abrogate *Bivens*, but the provision certainly does not suggest ... that Congress intended for a robust enforcement of *Bivens* remedies.... Instead, the provision simply left *Bivens* where it found it. It is not a license to create a new *Bivens* remedy in a context we have never before addressed.” *Id.* at 748 n.9 (internal quotation and citation omitted) (citing *Malesko*, 534 U.S. at 68, 122 S.Ct. 515).

Since *Hernandez* and *Abbasi*, there has been confusion among the courts as to whether the FTCA is an alternative remedy foreclosing a *Bivens* action and the extent to which *Abbasi* and *Hernandez* impact the Supreme Court's holding in *Carlson*. Compare *Boule v. Egbert*, 998 F.3d 370, 392 (9th Cir. 2021) (“[T]he exclusiveness of the FTCA remedy was not extended to constitutional torts such as Fourth Amendment ... claims”); *Helvig v. United States*, No. CV 18-7939 PSG (JCx), 2019 U.S. Dist. LEXIS 228444, at *19, 2019 WL 8108720 (C.D. Cal. Oct. 1, 2019) (stating that “the Westfall Act ‘has an explicit exception for *Bivens* claims, allowing them to

proceed against individuals,’ suggesting Congress did not intend to foreclose a *Bivens* remedy” (quoting *Rodriguez v. Swartz*, 899 F.3d 719, 740 (9th Cir. 2018))), with *Turkmen v. Ashcroft*, No. 02-cv-02307 (DLI) (SMG), 2021 U.S. Dist. LEXIS 171343 at *21-22, 2021 WL 4099495 (E.D.N.Y. Sept. 9, 2021) (“In *Ziglar*, the Supreme Court made it clear that the legal landscape has changed since *Carlson*.... In determining that the FTCA is an available alternative remedy to preclude a *Bivens* remedy, the magistrate judge properly compared *Carlson* and *Ziglar* and found that ‘*Ziglar* takes a far broader view of’ alternative remedies that preclude a *Bivens* remedy”).

*28 The First Circuit has not taken a position on this issue, but the Court need not resolve this dispute here. In *Carlson* the Court stated that an implied right of action could be defeated in two situations: (1) when defendants present “special factors counselling hesitation,” or (2) when the Plaintiffs have an alternative remedy available. 446 U.S. at 18-19, 100 S.Ct. 1468. In *Carlson*, the Supreme Court found neither special factors nor an alternative remedy and thus allowed plaintiffs’ *Bivens* action to proceed. Regardless of the applicability of the FTCA, here, the Court found significant separation of powers concerns and concluded that the judiciary is not in the best position to imply a cause of action. In other words, unlike *Carlson*, there are special factors counseling hesitation here. These special factors are, themselves, sufficient to deny Plaintiffs’ *Bivens* action. See *Hernandez*, 140 S. Ct. at 750 n.12 (“[W]e explained that existence of alternative remedies was merely a further reason not to create *Bivens* liability”); *Greenlaw*, 2021 U.S. Dist. LEXIS 245789, at *18, 2021 WL 6112784 (“the FTCA’s statutory scheme is only one of several factors giving this Court pause, and its absence would not lead to a contrary result”). Moreover, the bar for what “counsels hesitation” against expanding *Bivens* is so low that the simple fact that the FTCA is a potential alternative is sufficient to give this Court pause. See *Oliva v. Nivar*, 973 F.3d 438, 443-444 (5th Cir. 2020) (“[T]he existence of a statutory scheme for torts committed by federal officers’ weighs against inferring a new cause of action” (quoting *Cantú*, 933 F.3d at 423)).

To the extent that the FTCA is available to them, Plaintiffs say that the FTCA is not an appropriate alternative to *Bivens* because they cannot get punitive damages and the FTCA does not permit jury trials. See *Pls.’ Opp’n to DISH/NagraStar Defs.’ Mot.* at 43-44. As to the unavailability of punitive damages, the Supreme Court and First Circuit have dispensed with that argument. In *González v. Vélez*, the First Circuit

rejected the plaintiff's argument that Title VII and the Civil Services Reform Act (CSRA) did not provide an "equally effective remediation" to *Bivens* because punitive damages were unavailable. 864 F.3d at 54. Citing *Bush v. Lucas*, 462 U.S. 367, 372, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), in which the Supreme Court denied a *Bivens* claim even though the alternative remedial scheme, the CSRA, did not include a punitive damages remedy, the First Circuit concluded that "[t]he fact that other or different relief might be available" did not justify creating "new causes of action on an ad hoc basis [that] would create a patchwork" of remedies, which Congress had been attempting to avoid. *Id.* at 54-55.

Applying this reasoning, the absence of punitive damages under the FTCA is not a proper basis to expand *Bivens* and imply a cause of action under the factual circumstances of this case. Given congressional efforts to craft a tort remedy against government officials through the FTCA, the judiciary is ill "suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed" in a new context that departs from the circumstances in *Bivens*. *Abbasi*, 137 S. Ct. at 1857-58. In *Farah v. Weyker*, the Eighth Circuit stated that "the [Supreme] Court has ... made clear that even remedies that provide *no* compensation for victims and little deterrence for violators, such as injunctions and writs of habeas corpus, trigger the general rule that 'when alternative methods of relief are available, a *Bivens* remedy usually is not.' " 926 F.3d at 502 (emphasis in original) (quoting *Abbasi*, 137 S. Ct. at 1863); *see also Malesko*, 534 U.S. at 74, 122 S.Ct. 515 (holding that injunctive relief and grievances filed through the Bureau of Prisons' Administrative Remedy Program are adequate alternative remedies).

Similarly, that the FTCA does not offer sufficient deterrence or allow for a jury trial does not justify allowing Plaintiffs' *Bivens* action to proceed. The wide array of alternative remedies endorsed by the Supreme Court in cases denying a *Bivens* action similarly suggests that an adequate alternative remedy need not provide the plaintiff a jury trial. *See Ramirez v. Tatum*, No. 17 Civ. 7801 (LGS), 2019 U.S. Dist. LEXIS 88027 at *5-6, 2019 WL 2250339 (S.D.N.Y. May 24, 2019) ("Plaintiff's argument that the FTCA is an insufficient alternative remedy, because it disallows jury trials, is invalid. As the Supreme Court has explained, sufficient alternative remedies come in many forms other than jury trials, including habeas corpus petitions, a civil service regulatory complaint process, an injunction or 'some other form of equitable relief' " (quoting *Abbasi*, 137 S. Ct. at 1858, 1865)); *see also*

Minneeci v. Pollard, 565 U.S. 118, 129, 132 S.Ct. 617, 181 L.Ed.2d 606 (2012) ("We note, as Pollard points out, that state tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages.... But we cannot find in this fact sufficient basis to determine state law inadequate. State-law remedies and a potential *Bivens* remedy need not be perfectly congruent").

ii. Rule 41(g)

*29 The DISH/NagraStar and Government Defendants further argue that Rule 41(g) of the Federal Rules of Criminal Procedure provides an alternative remedy for the Plaintiffs that precludes their *Bivens* action. *See DISH/NagraStar Def.'s Mot.* at 22; *Gov't Defs.' Mot.* at 20. Rule 41(g) states in relevant part:

A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed. R. Crim. P. 41(g). District courts in this Circuit have previously held that Rule 41(g) recovery can preclude a *Bivens* action. *See Omran v. United States*, No. 14-13881-LTS, 2016 U.S. Dist. LEXIS 190990, at *28, 2016 WL 4077675 (D. Mass. June 1, 2016).

The Plaintiffs say that this remedy is not a suitable alternative to *Bivens* because it is an equitable remedy and monetary damages are unavailable. Although Rule 41(g) does not provide damages as a remedy, "[a] remedial statute need not provide full relief to the plaintiff to qualify as a 'special factor.' " *Id.* (quoting *Leyland v. Edwards*, 797 F. Supp. 2d 7, 10 (D.D.C. 2011)) (holding that a *Bivens* claim brought by a plaintiff alleging that a search warrant was issued on fabricated statements and that a search exceeded the scope of the issued warrant was "barred due to Rule 41(g) providing an adequate, comprehensive procedural and remedial scheme"); *see also De La Paz*, 786 F.3d at 377 (declining to accept the argument that the Immigration and Nationality Act, which does not provide a damages remedy, was not an alternative remedy to *Bivens* because "[t]he absence of monetary damages in the alternative remedial scheme is not

ipso facto a basis for a *Bivens* claim”); *Wilson v. Libby*, 535 F.3d 697, 705-06 (D.C. Cir. 2008) (“[T]he availability of *Bivens* remedies does not turn on the completeness of the available statutory relief”). As the Fifth Circuit has stated, the proposition that an alternative remedy to *Bivens* must provide the “exact equivalent” relief is a “misreading of the case law.” *De La Paz*, 786 F.3d at 377 (citing *Malesko*, 534 U.S. at 69, 122 S.Ct. 515 (“So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability”))).

The Court therefore concludes that Rule 41(g) is an alternative remedy available to the Plaintiffs and serves as an additional factor counseling hesitation in expanding *Bivens*.

iii. 31 U.S.C. § 3724

Finally, the Government Defendants argue that the Plaintiffs have an alternative remedy under 31 U.S.C. § 3724. This statute provides, in relevant part that:

The Attorney General may settle, for not more than \$50,000 in any one case, a claim for personal injury, death, or damage to, or loss of, privately owned property, caused by an investigative or law enforcement officer as defined in section 2680(h) of title 28 who is employed by the Department of Justice acting within the scope of employment that may not be settled under [the FTCA].

*30 31 U.S.C. § 3724. The Plaintiffs argue that § 3724 is not a suitable alternative because their suit is not one

“involv[ing] a claim for personal injury, death, or damage to, or loss of, privately owned property.” *Pls.’ Opp’n to Gov’t Defs.’ Mot.* at 35. The Court agrees that the Plaintiffs do not allege property loss or damage or any type of personal injury. Even so, the inapplicability of this statute does not change the Court’s analysis that Rule 41(g) and the FTCA are alternative remedial schemes available to the Plaintiffs or its conclusion that it would be improper to expand *Bivens* in this case.

3. Conclusion

The Court concludes that the Plaintiffs’ *Bivens* action may not proceed against any of the Defendants. The Plaintiffs’ case presents the Court with a new context that raises concerns about the separation of powers. Cognizant of the Supreme Court’s repeated warnings that expanding *Bivens* is disfavored, and in light of the alternative remedies available to the Plaintiffs, the Court concludes that Plaintiffs’ claims should be dismissed.¹²

VI. CONCLUSION

The GRANTS the Defendants’ motions to dismiss (ECF Nos. 176, 183) and DISMISSES without prejudice Plaintiffs’ Supplemental Amended Complaint (ECF No. 202)

SO ORDERED.

All Citations

Slip Copy, 2022 WL 826344

Footnotes

- 1 The Complaint refers to Darwin Quinones-Pimentel as “Darwin Quinones” and Victor Vega-Encarnacion as “Victor Vega.” The Court refers to Plaintiffs in the same manner in this Order.
- 2 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).
- 3 The Court collectively refers to the AUSA and FBI defendants as the “Government Defendants” and Bert Eichhorn, Jordan Smith, Emily Rinkel, and Kevin Gedeon as the “DISH/NagraStar Defendants.”
- 4 The named Defendants remained the same except for Kevin Reaves, whose name was corrected to Kevin Pearson in the First Amended Complaint.
- 5 The Plaintiffs later filed a Supplemental First Amended Complaint to correct DISH/NagraStar Defendant Emily Rinkel’s name, which was incorrectly spelled “Emily Wrinkle.” See *Order on Defs.’ Mot. for Reconsideration and Pls.’ Mot. to Declare Reconsideration Moot* (ECF No. 209). The Supplemental First Amended Complaint is the operative document

but is substantively the same as the Amended Complaint filed March 4, 2021, with the exception of the name correction. *See id.*

- 6 Consistent with Federal Rule of Civil Procedure 12(b)(6), in describing the facts, the Court has relied upon the allegations in the Plaintiffs' Supplemental Amended Complaint. *Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 68 (1st Cir. 2014); *Medina-Velázquez v. Hernández-Gregorat*, 767 F.3d 103, 108 (1st Cir. 2014) ("We examine whether the operative complaint states a claim for which relief can be granted when we construe the well-pleaded facts in the light most favorable to the plaintiffs, accepting their truth and drawing all reasonable inferences in the plaintiffs' favor") (internal citation omitted).
- 7 The Supplemental Amended Complaint states that they entered Suite 207, not 208; however, based on facts alleged earlier in the Complaint, the Court believes that the Plaintiffs must mean Suite 208. The correct suite number does not affect the merits of this decision.
- 8 In *Abbasi*, Justice Kennedy provided context for the evolution of *Bivens* claims. *See* 137 S. Ct. at 1855. He explained that in the mid-20th century, the Supreme Court followed an "*ancien regime*" whereby the Court "assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose." *Id.* (first quoting *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), then *J.I. Case Co. v. Borak*, 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964)). As a result, the Supreme Court routinely "impl[ie]d causes of action not explicit in the statutory text itself." *Id.* It was during this "*ancien regime*" that the Supreme Court decided *Bivens*, *Davis*, and *Carlson*. "[T]here was a possibility that 'the Court would keep expanding *Bivens* until it became the substantial equivalent of 42 U.S.C. § 1983,' " had the Court not "adopted a far more cautious course before finding implied causes of action." *Id.* (quoting Kent, *Are Damages Different?: Bivens and National Security*, 87 S. Cal. L. Rev. 1123, 1139-40 (2014)). Justice Kennedy noted that "[g]iven the notable change in the Court's approach to recognizing implied causes of action, ... the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.' Indeed, the Court has refused to do so for the past 30 years." *Id.* at 1857 (quoting *Malesko*, 534 U.S. at 68, 122 S.Ct. 515). To the extent that the Plaintiffs argue that a *Bivens* remedy is inherent under this Court's federal question jurisdiction, *Pls.' Opp'n to DISH/NagraStar Defs.' Mot.* at 20-21, the Supreme Court rejected this proposition. *See Hernandez*, 140 S. Ct. at 742 ("Justice Harlan's *Bivens* concurrence argued that this power is inherent in the grant of federal question jurisdiction ... but our later cases have demanded a clearer manifestation of congressional intent"). Furthermore, in light of *Abbasi*, the Court is not generally permitted to infer a cause of action unless it presents circumstances that are the same as those in *Bivens*, *Davis*, or *Carlson*, as inferred causes of action are disfavored.
- 9 The Court simultaneously addresses both sets of Defendants' arguments as to whether this case would require extending *Bivens*.
- 10 The Plaintiffs instead ask the Court to follow *Jacobs v. Alam*, 915 F.3d 1028 (6th Cir. 2019) and *Lanuza v. Love*, 899 F.3d 1019 (9th Cir. 2018). The Plaintiffs say that *Jacobs* stands for the proposition that "a plaintiffs' 'garden-variety *Bivens* claims' against individual law enforcement officials for excessive force, false arrest, malicious prosecution, fabrication of evidence, and civil conspiracy were viable post-*Abbasi*." *Pls.' Opp'n to Gov't Defs.' Mot.* at 32. As the *Jacobs* Court rightly notes, the Supreme Court confirmed in *Abbasi* that *Bivens* is still good law, *see Abbasi*, 137 S. Ct. at 1857 ("The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere"), but "caution[ed] against expanding its outer reaches." *See Jacobs*, 915 F.3d at 1037. As the Sixth Circuit stated, *Abbasi* "clarifies the analytical framework for how courts must approach asserted *Bivens* claims" but in no-way renders pre-*Abbasi* cases null. *Id.*

To the extent that the Plaintiffs rely on *Jacobs* purely because it concluded that "excessive force, false arrest, malicious prosecution, fabrication and evidence claims" are viable post *Abbasi*, this broad characterization is not sufficient to withstand a motion to dismiss because "[c]ourts do not define a *Bivens* cause of action at the level of 'the Fourth Amendment' or even at the level of 'the unreasonable-searches-and-seizures clause.'" *Cantú*, 933 F.3d at 422-23.

To the extent that the Plaintiffs rely on *Jacobs* as an analogous case because the Sixth Circuit concluded the plaintiff's claims were "run-of-the-mill challenges to 'standard law enforcement operations,'" the facts in *Jacobs* are distinguishable and much more akin to those in *Bivens*. *Jacobs* involved a warrantless search of Jacobs' home after agents believed that

a fugitive was hiding there. *Jacobs*, 915 F.3d at 1033-34. There was no warrant in *Jacobs* nor any alleged falsification of an affidavit to support probable cause for a warrant; instead, *Jacobs* claimed that officers planted a gun at the scene “in an attempt to bolster their claim that he pulled a gun on them before the shooting.” *Id.* at 1042; see *Greenlaw v. Klimek*, No. 4:20-CV-311-SDJ, 2021 U.S. Dist. LEXIS 245789 at *16, 2021 WL 6112784 (E.D. Tex. Dec. 27, 2021) (distinguishing *Jacobs* on its facts from a case involving misstatements and omissions in a warrant affidavit).

Finally, the Plaintiffs rely on § 1983 case law to support their arguments. While the Supreme Court has characterized *Bivens* as the “federal analog” to § 1983 claims, it has also described *Bivens* claims as “more limited.” *Hernandez*, 140 S. Ct. at 747; see also *Abbasi*, 137 S. Ct. at 1855 (implying that *Bivens* is narrower than § 1983 because had the Supreme Court continued on the same path as *Bivens*, *Davis*, and *Carlson*, *Bivens* would have continued to expand to become “the substantial equivalent of 42 U.S.C. § 1983”).

- 11 “Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require.” *Drewniak*, 2021 U.S. Dist. LEXIS 67937, at *15, 2021 WL 1318028 (quoting *Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) (*en banc*)). “A factor counsels hesitation ‘whenever thoughtful discretion would pause even to consider it.’ ” *Id.* (quoting *Arar*, 585 F.3d at 573); see also *Abbasi*, 137 S. Ct. at 1858 (“[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy as part of the system for enforcing the law and correcting a wrong, the courts must refrain from creating the remedy in order to respect the role of Congress in determining the nature and extent of federal-court jurisdiction under Article III”).
- 12 Given the Court's conclusion that Plaintiffs' *Bivens* action may not proceed, the Court does not reach the merits of the parties' other arguments, including whether the Government Defendants are entitled to absolute or qualified immunity and whether the Plaintiffs have failed to state a claim on which relief can be granted.

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Exhibit P

United States v. Cherna 184 F.3d 403

184 F.3d 403

United States Court of Appeals,
Fifth CircuitUNITED STATES of
America, Plaintiff–Appellee,

v.

Marvin B. **CHERNA**, Defendant–Appellant.

No. 98–11097.

|
Aug. 4, 1999.|
Rehearing Denied Sept. 8, 1999.**Synopsis**

Defendant entered conditional plea of guilty to one count of mail fraud, in the United States District Court for the Northern District of Texas, Robert B. Maloney, J., and appealed denial of motion to suppress. The Court of Appeals, King, Chief Judge, held that: (1) magistrate judge did not abandon his judicial role, as a basis for not applying the *Leon* good-faith exception to the exclusionary rule; (2) though warrant authorized an all records search of suspect's home, probable cause was not so lacking as to preclude application of the good-faith exception; (3) affidavit was not based on stale information; (4) warrant which authorized the seizure of records as described in the affidavit but failed to include the affidavit as an attachment was not so lacking in particularity that the executing officers could not reasonably presume it to be valid; and (5) affiant's testimony at suppression hearing did not demonstrate the absence of good faith.

Affirmed.

West Headnotes (12)

- [1] **Criminal Law** ➡ Review De Novo
Criminal Law ➡ Evidence wrongfully obtained

When reviewing the denial of a motion to suppress, Court of Appeals reviews factual findings for clear error and the trial court's conclusions as to the constitutionality of law enforcement action and the sufficiency of

a warrant de novo, and the district court's determination of the reasonableness of a law enforcement officer's reliance upon a warrant issued by a magistrate, for purposes of determining the applicability of the good-faith exception to the exclusionary rule, is also reviewed de novo.

46 Cases that cite this headnote

- [2] **Criminal Law** ➡ Illegally obtained evidence
Court of Appeals employs a two-step process for reviewing a district court's denial of a motion to suppress when a search warrant is involved: first, it determines whether the *Leon* good-faith exception to the exclusionary rule applies, and, if not, it proceeds to the second step, in which it ensures that the magistrate had a substantial basis for concluding that probable cause existed; if the good-faith exception applies, court need not reach the question of probable cause.

98 Cases that cite this headnote

- [3] **Criminal Law** ➡ Deliberately or recklessly false affidavit
Criminal Law ➡ Abandonment of judicial role or lack of neutrality
The *Leon* good-faith exception to the exclusionary rule does not apply when the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, and suppression also remains an appropriate remedy where the issuing magistrate wholly abandoned his judicial role. U.S.C.A. Const.Amend. 4.

55 Cases that cite this headnote

- [4] **Criminal Law** ➡ Lack of indicia of probable cause; “bare bones” affidavits
The *Leon* good-faith exception to the exclusionary rule is not available to an officer who relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable, and,

depending on the circumstances of the particular case, a warrant may be so facially deficient that the executing officers cannot reasonably presume it to be valid. U.S.C.A. Const.Amend. 4.

50 Cases that cite this headnote

- [5] **Criminal Law** ➡ Lack of indicia of probable cause; “bare bones” affidavits

Criminal Law ➡ Lack of particularity as to place or object

Criminal Law ➡ Particular cases

Magistrate judge did not abandon his judicial role, as a basis for not applying the *Leon* good-faith exception to the exclusionary rule, by issuing a search warrant that was allegedly insufficiently particular and insufficiently supported by probable cause to pass Fourth Amendment muster; under *Leon*, excessive generality and lack of probable cause are independent reasons not to apply the good-faith exception. U.S.C.A. Const.Amend. 4.

31 Cases that cite this headnote

- [6] **Searches and Seizures** ➡ Execution and Return of Warrants

In general, an officer may rely in good faith on the validity of a search warrant so long as the warrant is supported by more than a bare bones affidavit. U.S.C.A. Const.Amend. 4.

21 Cases that cite this headnote

- [7] **Searches and Seizures** ➡ Probable or Reasonable Cause

It is more difficult to demonstrate probable cause for an “all records” search of a residence than for other searches. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

- [8] **Criminal Law** ➡ Particular cases

Though search warrant authorized an all records search of suspect's home, probable cause was not so lacking as to render official belief in its existence entirely unreasonable and thereby

preclude application of the *Leon* good-faith exception to the exclusionary rule, where the search warrant application included an 11-page affidavit from an FBI Special Agent who averred that suspect operated his businesses from his home, that he used business funds to pay for what appeared to be personal expenses, and that charities of which suspect was executive director misrepresented the nature and amount of their charitable work in an effort to increase donations. U.S.C.A. Const.Amend. 4.

10 Cases that cite this headnote

- [9] **Searches and Seizures** ➡ Time for Application or Issuance; Staleness

Although many of the misrepresentations described in affidavit to search for records pertaining to suspected mail and wire fraud took place one to two years before affiant applied for the warrant, affidavit was not based on stale information, where affiant explained that, based on various evidence, it was likely that the records sought were still located at suspect's home, especially in light of the facts that firms involved were ongoing businesses and that financial records typically are retained for long periods of time. U.S.C.A. Const.Amend. 4.

5 Cases that cite this headnote

- [10] **Searches and Seizures** ➡ Execution and Return of Warrants

Affidavit need not present a watertight criminal case to support good-faith reliance on a search warrant. U.S.C.A. Const.Amend. 4.

7 Cases that cite this headnote

- [11] **Criminal Law** ➡ Particular cases

Warrant which authorized the seizure of “[r]ecords and items related to Fraud by Wire and Mail Fraud as described in the affidavit” but failed to include the affidavit as an attachment, because the affidavit had been placed under seal, was not so lacking in particularity that the executing officers could not reasonably presume it to be valid, so as to render applicable the *Leon*

good-faith exception to the exclusionary rule, where the affidavit explained in detail the alleged scheme that was the target of the search, the agents who participated in the search read the affidavit before beginning it, attachment to the warrant referred to the affidavit and described in considerable detail 26 categories of evidence to be seized, and circuit precedent was not clear as to whether the affidavit must be physically attached. U.S.C.A. Const.Amend. 4.

9 Cases that cite this headnote

[12] **Criminal Law** ➡ Good faith

Affiant's testimony at suppression hearing did not demonstrate the absence of good faith, so as to preclude application of the *Leon* good-faith exception to the exclusionary rule, on theory affiant had drafted search warrant to give her complete discretion to seize any item she wished; instead, she stated repeatedly that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in her affidavit, though she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence. U.S.C.A. Const.Amend. 4.

1 Case that cites this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, and SMITH and BARKSDALE, Circuit Judges.

Opinion

KING, Chief Judge:

Defendant-appellant Marvin B. **Cherna** appeals his conditional plea of guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 on the ground that the district court erred in denying his motion to suppress evidence obtained pursuant to an allegedly unconstitutional search warrant. Because we find that the executing officers acted in objectively reasonable good-faith reliance on the warrant, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In 1997, defendant-appellant Marvin B. **Cherna** was the executive director of Help Hospitalized Children's Fund (HHCF) and American Veterans' Relief Fund (AVRF), two charities based in Dallas, Texas. On May 19, 1997, Special Agent Loretta Smitherman of the Federal Bureau of Investigation (FBI) applied to Magistrate Judge John Tolle of the Northern District of Texas for a warrant to search **Cherna's** business and residence, both of which, she alleged, were located at 7610 Meadow *406 Oaks Drive in Dallas, Texas. The application for the warrant referred to two documents: Attachment A, which set forth the place to be searched, and Attachment B, which described the evidence to be seized. Smitherman's affidavit in support of probable cause was also attached to the application. Without hearing oral testimony, Magistrate Judge Tolle issued a search warrant that authorized officers to search the premises described in Attachment A and to seize the property described in Attachment B. Attachment A stated that the “offices of HELP HOSPITALIZED CHILDREN'S FUND (HHCF) and AMERICAN VETERANS' RELIEF FUND (AVRF) are located at 7610 Meadow Oaks Drive, Dallas, Texas including all rooms/parts of the residence and the attached garage.” Attachment B described the evidence subject to seizure thus: “Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises of 7610 Meadow Oaks Drive, Dallas, Texas, including, but not limited to the following, however maintained,” followed by a list of twenty-six categories of evidence, primarily written and electronic documents. Smitherman's affidavit was not, however, physically attached to the search warrant.

The next day, May 20, 1997, six FBI agents executed the search warrant under Smitherman's direction. The agents were required by FBI policy to read the warrant, the accompanying documents, and the affidavit prior to participating in the search and to sign the back of the

warrant to show that they had done so. Smitherman did not know whether several other FBI employees who assisted in the search but did not participate in seizing evidence read the affidavit. **Cherna** was given a copy of the warrant and Attachments A and B but, although it was present in Smitherman's vehicle throughout the search, he was *not* shown the affidavit because it had been placed under seal. Upon entering the premises at 7610 Meadow Oaks Drive, the agents determined that four rooms were being used as office space and that the garage had been converted into a telemarketing room and a storage room for records. They did not limit their search to only these rooms, however, but also searched all areas in the residence where records might be stored, including the bedroom, kitchen, and living room. At the conclusion of the search, the agents left with **Cherna** the warrant, the attachments, and an inventory of seized property.

On March 3, 1998, a grand jury in the Northern District of Texas returned an indictment charging **Cherna** with thirteen counts of mail fraud perpetrated by soliciting funds for two non-profit entities and then converting the contributions received to his own use. **Cherna** filed a motion to suppress all evidence seized in the May 20, 1997 search. The district court denied this motion, concluding that "Attachment B to the search warrant sets out with sufficient particularity twenty-six types of items to be seized so as to remove the warrant from the purview of a general warrant" and, in the alternative, that "the officers executing the warrant acted in good faith and in reasonable reliance upon the warrant's validity, thereby avoiding the Fourth Amendment's exclusionary rule." **Cherna** then entered a conditional plea of guilty to one count of the indictment, reserving his right to appeal the district court's adverse ruling on his motion to suppress. The district court sentenced him to a four-year prison term and a \$12,500.00 fine. **Cherna** appealed.

II. STANDARD OF REVIEW

[1] When reviewing the denial of a motion to suppress, we review factual findings for clear error and the trial court's conclusions as to the constitutionality of law enforcement action and the sufficiency of a warrant *de novo*. See *United States v. Kelley*, 140 F.3d 596, 601 (5th Cir.), *cert. denied*, 525 U.S. 880, 119 S.Ct. 186, 142 L.Ed.2d 152 (1998). The district court's *407 determination of the reasonableness of a law enforcement officer's reliance upon a warrant issued by a magistrate—for purposes of determining the applicability of the good-faith exception to the exclusionary rule—is also

reviewed *de novo*. See *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir.1992).

III. DISCUSSION

On appeal, **Cherna** attacks the search warrant on two grounds. First, he contends that it is an unconstitutional general warrant. **Cherna** argues that the warrant's general grant of authority to seize "[r]ecords and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman ..., including, but not limited to" twenty-six categories of evidence does not describe the evidence sought with sufficient particularity. Although the warrant refers to Smitherman's affidavit, **Cherna** contends, the affidavit cannot save the warrant because it was neither attached thereto nor shown to **Cherna**. Second, **Cherna** maintains that the warrant was unsupported by probable cause.

[2] We employ a two-step process for reviewing a district court's denial of a motion to suppress when a search warrant is involved. See *United States v. Lampton*, 158 F.3d 251, 258 (5th Cir.1998), *cert. denied*, 525 U.S. 1183, 119 S.Ct. 1124, 143 L.Ed.2d 119 (1999). First, we determine whether the good-faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), applies. If so, we end our analysis and affirm the district court's decision to deny the motion to suppress. See *Satterwhite*, 980 F.2d at 320. If not, we proceed to the second step, in which we "ensure that the magistrate had a substantial basis for ... concluding that probable cause existed." *United States v. Pena-Rodriguez*, 110 F.3d 1120, 1129 (5th Cir.) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)), *cert. denied*, — U.S. —, 118 S.Ct. 71, 139 L.Ed.2d 32 (1997). If the good-faith exception applies, we need not reach the question of probable cause. See *id.*; see also *United States v. Craig*, 861 F.2d 818, 820 (5th Cir.1988) ("Principles of judicial restraint and precedent dictate that, in most cases, we should not reach the probable cause issue if a decision on the admissibility of the evidence under *Leon* will resolve the matter.").

[3] [4] We begin our analysis of the good-faith exception with *Leon*. In that case, the Supreme Court held that the Fourth Amendment does not require the suppression of evidence obtained as a result of objectively reasonable reliance on a warrant, even if the warrant is subsequently invalidated. See *Leon*, 468 U.S. at 922, 104 S.Ct. 3405.

Although the Court noted that “[w]hen officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time,” *id.* at 924, 104 S.Ct. 3405, it also cautioned that “the officer’s reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued,” *id.* at 922–23, 104 S.Ct. 3405 (footnotes and citation omitted). Thus, the good-faith exception does not apply when “the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.” *Id.* at 923, 104 S.Ct. 3405. Similarly, suppression remains an appropriate remedy where the issuing magistrate “wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant.” *Id.* Nor is the exception available to an officer who relies on a warrant based on an affidavit *408 “‘so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable.’” *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring)). “Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.” *Id.*

Cherna contends that the last three situations obtain here. First, he asserts that “the Warrant represents a complete abdication by the Magistrate Judge of his authority to determine what can and cannot be seized.” As we explained above, *Leon* teaches that the good-faith exception will not apply where the magistrate conducted himself as did his counterpart in *Lo–Ji Sales*. In that case, an investigator purchased two films from a so-called “adult” bookstore, concluded that they violated state obscenity laws, and applied for a warrant to search the store, representing that not only copies of the films but other “similar items” would be found there. See *Lo–Ji Sales*, 442 U.S. at 321, 99 S.Ct. 2319. The town justice viewed the films and issued a search warrant authorizing seizure of copies of the two films and “[t]he following items that the Court independently [on examination] has determined to be possessed in violation of Article 235 of the Penal Law,” followed by a blank space. *Id.* at 321–22, 99 S.Ct. 2319. The justice then accompanied

law enforcement officers to the store and conducted a six-hour search during which he examined films, books, and magazines free of charge and ordered the officers to seize such items as he thought there was probable cause to believe obscene. See *id.* at 322–23, 99 S.Ct. 2319. The Supreme Court held that the search violated the Fourth Amendment. It concluded that although “a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime,” *id.* at 326, 99 S.Ct. 2319 (internal quotation marks omitted), the town justice in *Lo–Ji Sales* “did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure,” *id.* Instead, he conducted himself as an “adjunct law enforcement officer.” *Id.* at 327, 99 S.Ct. 2319.

[5] After carefully reviewing the record, we conclude that there is no evidence that the issuing magistrate in this case abandoned his role as a neutral and detached judicial officer within the meaning of *Lo–Ji Sales*. Indeed, **Cherna** does not so much as allege that Magistrate Judge Tolle was biased. Cf. *United States v. Breckenridge*, 782 F.2d 1317, 1321 (5th Cir.1986) (“The ‘absence of a neutral and detached magistrate’ exception to *Leon*’s good faith may also extend to situations in which officers while presenting the affidavit realize that the magistrate served only to rubber-stamp a previous decision reached by the police.”). Nor does he assert that the magistrate judge participated in the seizure of evidence so as to become an “adjunct law enforcement officer.” *Lo–Ji Sales*, 442 U.S. at 327, 99 S.Ct. 2319; cf. *United States v. McKeever*, 906 F.2d 129, 131–32 (5th Cir.1990) (considering defendant’s argument that evidence should be suppressed because magistrate was a former reserve police officer and visited the site of the search). We simply see no evidence that Magistrate Judge Tolle “wholly abandoned his judicial role in the manner condemned in *Lo–Ji Sales*” *Leon*, 468 U.S. at 923, 104 S.Ct. 3405.¹

*409 [6] [7] **Cherna** also argues that the good-faith exception does not apply in this case because the warrant was insufficiently supported by a showing of probable cause. Under *Leon*, an officer may not reasonably rely on a warrant “so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable.” *Leon*, 468 U.S. at 923, 104 S.Ct. 3405 (internal quotation marks omitted). In general, “[a]n officer may rely in good faith on the validity of a warrant so long as the warrant is supported by more than a bare bones

affidavit.” *United States v. Cisneros*, 112 F.3d 1272, 1278 (5th Cir.1997) (internal quotation marks omitted). In evaluating whether the affidavit in this case justifies application of the good-faith exception, however, we must keep in mind that it is more difficult to demonstrate probable cause for an “all records” search of a residence than for other searches. *United States v. Humphrey*, 104 F.3d 65, 68–69 (5th Cir.), cert. denied, 520 U.S. 1235, 117 S.Ct. 1833, 137 L.Ed.2d 1038 (1997). In *Humphrey*, a fraud case, we upheld a warrant authorizing the seizure of all of the defendants’ financial and business records from their residence because a three-page affidavit from an FBI agent demonstrated that the fraud was pervasive, that there was considerable overlap between the defendants’ personal and business lives, especially in that they used their home as an office, and that the defendants provided services about which there had been many complaints, cashed a large number of cashier’s checks, and stored cash under their mattress. *Id.* We emphasized, however, that our holding “should not be read as a broad authorization for the issuance of all records searches of homes.... [I]t is only in extreme cases, such as the one before us today, that we will uphold warrants of this type.” *Id.* at 69 n. 2.

[8] Even in light of the fact that the warrant in this case authorized an all records search of Cherna’s home, we do not think probable cause was so lacking as to “render official belief in its existence entirely unreasonable.” *Leon*, 468 U.S. at 923, 104 S.Ct. 3405 (internal quotation marks omitted). The search warrant application included an eleven-page affidavit from FBI Special Agent Loretta Smitherman. Smitherman stated that she had been an FBI agent for six years. She had investigated Cherna, executive director of HHCF and AVRf. She discovered that in 1995 and 1996, HHCF solicited donations by representing that the money would benefit hospitalized children in the donor’s community and that HHCF was a member of certain prestigious charitable organizations. In many instances, however, HHCF representatives were unable to name any hospitals that would receive donations, and hospital administrators in the relevant communities denied having heard of or receiving assistance from HHCF. Furthermore, representatives of several charitable organizations in which HHCF claimed membership stated that HHCF neither belonged to those groups nor had permission to use their names. HHCF maintained numerous local bank accounts, despite its own accountant’s advice that it was financially and logistically preferable to have only one account, because, in Cherna’s words, “the donors want to feel as if the money they are pledging is being spent in there [sic] area of the country.”

Smitherman also discovered that, although tax records showed that HHCF executives served without compensation, HHCF regularly paid Cherna and an HHCF board member thousands of dollars, and numerous checks for what appeared to be personal expenses had been written on HHCF’s account.

*410 In addition, Smitherman related that she had reviewed ninety-three affidavits, provided to her by the Massachusetts Attorney General’s Office, in which private citizens described how AVRf telemarketers urged them to donate money, representing that (1) their donations would benefit local veterans’ hospitals, (2) retired veterans would pick up the donations, and (3) the donations would be used to purchase medical supplies for hospitalized veterans. In fact, AVRf donated only \$650.00 to Massachusetts veterans’ hospitals during the years 1994 through 1996. AVRf’s nationwide donations to hospitals run by the United States Department of Veterans’ Affairs for the tax year ended January 31, 1996 totaled only one-tenth of one percent of its total income.

Finally, Smitherman averred that she had reason to believe that HHCF and AVRf had been and still were being operated out of Cherna’s residence because, on February 13, 1997, two employees of Thomas Ewbank’s accounting firm had been inside Cherna’s home, where they observed two rooms set up as offices for HHCF and AVRf, and an auditor from the firm was scheduled to meet with Cherna there on the date Smitherman executed her affidavit, May 19, 1997. Furthermore, on April 18, 1997, a woman identifying herself as an AVRf employee accepted service of process at Cherna’s home, and as of May 11, 1997, the electric account for the residence was listed in HHCF’s name. Smitherman concluded that, after reviewing her affidavit in light of *Humphrey* with two Assistant United States Attorneys, she believed that Cherna’s business activities were “merely a scheme to defraud” and that there was “obviously considerable overlap of Cherna’s personal life and business life.”

[9] [10] Smitherman’s affidavit was not so “bare bones” as to render all belief in the existence of probable cause for an all records search unreasonable. Smitherman averred that Cherna operated his businesses from his home, that he used business funds to pay for what appeared to be personal expenses, and that HHCF and AVRf misrepresented the nature and amount of their charitable work in an effort to increase donations. She requested permission to seize all records and items relating to the mail and wire fraud scheme she believed to be in progress. *Cf. Humphrey*,

104 F.3d at 68–69 (finding probable cause for an all records search of defendants' home based on evidence that they used residence as office, engaged in suspicious financial transactions and provided services about which there had been many complaints). Although many of the misrepresentations described in Smitherman's affidavit took place in 1995 and 1996, one to two years before Smitherman applied for the warrant, she explained that, based on her conversations with employees of Ewbank's accounting firm, the acceptance of process by an AVRf employee at Cherna's residence only a month before the application, and the evidence that, a week before the search, the electric account for Cherna's residence was in the name of HHCF, it was likely that the records sought were still located at Cherna's home. Especially in light of the facts that HHCF and AVRf were ongoing businesses and that financial records typically are retained for long periods of time, we cannot say that Smitherman's affidavit was based on stale information. *See United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir.1984) (“[W]hen the information of the affidavit clearly shows a long-standing, ongoing pattern of criminal activity, even if fairly long periods of time have lapsed between the information and the issuance of the warrant, the information need not be regarded as stale.”); *United States v. Freeman*, 685 F.2d 942, 952 (5th Cir.1982) (recognizing that bank records are likely to be kept for long periods of time). Of course, there could be, as Cherna argues in his brief, innocent explanations for the evidence Smitherman discovered, but an affidavit need not present a watertight criminal *411 case to support good-faith reliance on a warrant.²

Finally, Cherna maintains that the warrant is so lacking in particularity that the executing officers could not reasonably have presumed it to be valid. Cherna points out that the warrant authorized the seizure of “[r]ecords and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI Loretta Smitherman” but failed to include the affidavit as an attachment. No law enforcement officer, he claims, could reasonably believe that a warrant for records and items relating to the broad crimes of mail and wire fraud is sufficiently particular to satisfy the Fourth Amendment.

The seminal Supreme Court case on particularity and the good-faith exception is *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984). That case concerned a warrant authorizing a search for “controlled substances” that was accompanied by a detailed affidavit indicating that the affiant wished to search for evidence relating to a homicide investigation. *See id.* at 985–86, 104

S.Ct. 3424. The defendant complained that the warrant was insufficiently particular. *See id.* at 987, 104 S.Ct. 3424. It was undisputed, however, that the issuing judge and the executing officers knew the contents of the affidavit and the focus of the search and that the affiant had, in fact, pointed out the discrepancy to the judge, who had assured him that the necessary corrections would be made. *See id.* at 986, 104 S.Ct. 3424. The Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable because the affiant prepared an affidavit that was reviewed and approved by the district attorney, presented the affidavit to a neutral judge, who found that it established probable cause for the search requested by the affiant, and informed the judge that changes might need to be made. He then observed the judge made some changes and received the warrant and the affidavit. *See id.* at 989, 104 S.Ct. 3424. “At this point, a reasonable police officer would have concluded ... that the warrant authorized a search for the materials outlined in the affidavit.” *Id.*

We have considered similar situations in this circuit. In *United States v. Beaumont*, 972 F.2d 553, 560 (5th Cir.1992), for example, the warrant contained only a generalized statement that “evidence of the commission of a criminal offense as well as contraband and [sic] the fruits of crime” were to be seized. The warrant was accompanied by an affidavit that contained a detailed description of the items sought, but it did not refer to the affidavit at all. *See id.* We found that although a warrant that relies on an affidavit to meet the Fourth Amendment particularity requirement must incorporate the affidavit by reference, *see id.* at 560–61, the good-faith exception applied:

In the instant case, there was a probable cause determination made by the state judge, the affidavit provided specific information of the objects of the search, the executing officer was the affiant, the additional officers making the search knew what was to be searched for, and, finally, the warrant could easily have been made valid by the insertion of the phrase “see attached affidavit.”

Id. at 561 (footnote omitted). For the same reasons, we held in *United States v. Shugart*, 117 F.3d 838, 845–46 (5th Cir.), *cert. denied*, 522 U.S. 976, 118 S.Ct. 433, 139 L.Ed.2d 333 (1997), that officers reasonably *412 could have relied on a warrant that was insufficiently particular on its face and did not incorporate the affidavit on which it was based.

[11] This precedent convinces us that the warrant in this case was not so lacking in particularity that the executing officers could not reasonably presume it to be valid. As in *Sheppard*, *Beaumont*, and *Shugart*, the issuing judge in this case made

a probable cause determination, the affidavit explained in detail the alleged mail and wire fraud scheme that was the target of the investigation and search, the officer in charge of the search, Smitherman, was the affiant, and the other FBI agents who participated in the search read the affidavit before beginning it. Even assuming that the absence of the affidavit rendered the warrant constitutionally defective, this defect could have been remedied with only minor corrections, such as the attachment of the affidavit. *Cf. Sheppard*, 468 **U.S.** at 990 n. 7, 104 S.Ct. 3424 (“This is not an instance in which ‘it is plainly evident that a magistrate or judge had no business issuing a warrant.’ ... Indeed, Sheppard admits that if the judge had crossed out the reference to controlled substances, written ‘see attached affidavit’ on the form, and attached the affidavit to the warrant, the warrant would have been valid.”); *Shugart*, 117 F.3d at 845–46 (noting that a warrant that did not “incorporate” an affidavit could have been made valid with minor corrections, such as a reference to and attachment of the affidavit); *Beaumont*, 972 F.2d at 562 (“[T]he warrant could easily have been made valid by the insertion of the phrase ‘see attached affidavit.’”). Smitherman was prevented from attaching her affidavit to the warrant or serving it on **Cherna**, however, because it had been placed under seal. In issuing a search warrant and sealing the affidavit on which the warrant is based, the magistrate judge was essentially assuring Smitherman that the warrant, unattached to the affidavit, was sufficient to authorize the search she had requested. The Fourth Amendment does not demand that the executing officers question his decision and determine for themselves whether the warrant is, in fact, valid. “Whatever an officer may be required to do when he executes a warrant without knowing beforehand what items are to be seized, we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested.” *Sheppard*, 468 **U.S.** at 989–90, 104 S.Ct. 3424 (footnote omitted).

Nor is this a case in which the non-attachment of Smitherman's affidavit made the warrant so obviously defective that the officers could not reasonably have relied on it. First, Attachment B, expressly mentioned in the warrant and attached thereto, referred to Smitherman's affidavit and described in considerable detail twenty-six categories of evidence to be seized. A reasonable executing officer, relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement. *Cf. United*

States v. Moser, 123 F.3d 813, 823 (5th Cir.) (approving search warrant authorizing seizure of “[r]ecords relating to the production, advertising, ordering, sale, mailing and shipment of material involved in the use of ‘Certified Money Orders’ by U.S.A. First and O.M.B., W.D. McCall. Such records, files and promotional material include but are not limited to....”), *cert. denied*, 522 **U.S.** 1020, 118 S.Ct. 613, 139 L.Ed.2d 499 (1997).

Second, as **Cherna** concedes, where a warrant relies on an affidavit to specify the objects of the search, it is not entirely clear from circuit precedent that the affidavit must be physically attached to the warrant or served on the defendant. *Compare United States v. Haydel*, 649 F.2d 1152, 1157 (5th Cir. Unit A July 1981) (“If, as is the case here, the warrant is *413 ambiguous, but fairly directs attention to the place actually searched, and if the affidavit supporting the warrant is *attached to the warrant* when issued, the affidavit may be considered to clarify an ambiguity on the face of the warrant. The affidavit must be attached to the warrant so that the executing officer and the person whose premises are to be searched both have the information contained in the affidavit, in addition to what is said on the face of the warrant.”) (citation omitted and emphases added), *opinion corrected on reh'g on other grounds*, 664 F.2d 84 (5th Cir. Unit A Dec.1981), *with Shugart*, 117 F.3d at 845 (“In addition, this court has held that the particularity requirement may be satisfied ‘by reliance on an affidavit when the affidavit is *incorporated by reference* into the warrant.’”) (quoting *Beaumont*, 972 F.2d at 561) (emphasis added); *United States v. Wuagneux*, 683 F.2d 1343, 1351 n. 6 (11th Cir.1982) (noting, shortly after the Eleventh Circuit split from the Fifth, that “although the record in *Haydel* was not entirely clear on whether the affidavit was physically attached, the record did indicate that it was available at the search site and that the searching agents knew what they were looking for” and opining that *Haydel* “mandates a more flexible approach” than a strict requirement that the affidavit be physically attached to the warrant or served on the defendant); *United States v. Cook*, 657 F.2d 730, 736 (5th Cir. Unit A Sept.1981) (“The affidavit, which was *referred to and which accompanied* the warrant, supplied a particular description....”) (emphasis added). *But see United States v. McGrew*, 122 F.3d 847, 850 (9th Cir.1997) (“If the government wishes to keep an affidavit under seal, it must list the items it seeks with particularity in the warrant itself. It is the government's duty to serve the search warrant on the suspect, and the warrant must contain, either on its face or by attachment, a sufficiently particular description

of what is to be seized.... If the ‘incorporated’ affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit’s contents.”); *United States v. Dahlman*, 13 F.3d 1391, 1395 (10th Cir.1993) (holding that affidavit could not cure particularity problem because, *inter alia*, there was no indication in the record that affidavit had been “physically attached to the warrant”). Given the state of the law in this circuit, we cannot say that the executing officers could not reasonably rely on the magistrate judge’s issuance of the warrant, even though he simultaneously sealed the affidavit on which it was based.

[12] Finally, we must address **Cherna’s** contention that Smitherman’s testimony at the suppression hearing “clearly demonstrates the absence of objective good faith.” According to **Cherna**,

Agent Smitherman candidly acknowledged that she drafted the Warrant to allow her the unfettered discretion to seize whatever she deemed to be of interest. That is precisely the type of governmental “roaming” that the Fourth Amendment’s particularity requirement was designed to prohibit. Thus, regardless of Agent Smitherman’s subjective intent, the objective record demonstrates that the good faith exception cannot save this Warrant. (citation omitted). We note as an initial matter that this argument is more correctly characterized as an allegation that Smitherman acted in “subjective,” not “objective,” bad faith: **Cherna** claims that Smitherman drafted the warrant so as intentionally to flout the Fourth Amendment’s particularity requirement. The district court, however, found that “the officers executing the warrant acted in good faith.” At the suppression hearing, the following colloquy took place between Smitherman and **Cherna’s** counsel:

Q. Can you think of one thing that wouldn’t relate to it? If his entire life is consumed by fraud, wouldn’t everything inside 7610 Meadow Oaks, based upon your affidavit, be subject to seizure under the terms of that warrant?

*414 A. Photographs of his children wouldn’t be seized, you know, religious materials.

You want me to make up a list of things that wouldn’t be seized?

Q. No. I think—

A. Anything that didn’t have to do with fraud wouldn’t be seized.

Q. But the question I have is, how would you draw the line if he paid for the camera that took those pictures, paid to develop—cost of those picture with the proceeds of charitable donations, you could seize anything under the terms of this warrant.

A. No, only things that had to do—that were evidence of mail fraud and wire fraud.

Q. Okay. As set forth in your affidavit?

A. Yes.

Q. And your affidavit just—I’m going to make this very clear, was never given or supplied to Mr. **Cherna**?

A. That’s right.

Q. So he had absolutely no way to determine what the scope of your search would ultimately be?

A. No, he did because I gave him the attachment B that is entitled Property to be Seized.

Q. Which describes the property seized to be records and items related to fraud by wire and mail fraud as described in your affidavit, which was not supplied to him?

A. Yes. But then there are—there is several pages describing the items that will be seized.

Q. Well, are those all of the items that will be seized? Your paragraph—your lead-in paragraph to attachment B says including but not limited to the following.

A. It’s—

Q. Doesn’t that provide you with the discretion to determine precisely what related to mail fraud or wire fraud?

A. Yes. In case I neglected to put something in important on the list and I found an important piece of evidence, I wouldn’t want to be precluded from being able to seize it.

Q. Exercise discretion on site to seize that item?

A. Yes.

While we agree that this testimony is sometimes equivocal, we cannot say that the district court clearly erred in finding that Smitherman acted in good faith. Smitherman did not admit that she had drafted the warrant to give her complete discretion to seize any item she wished; instead, she stated repeatedly that the warrant authorized the seizure only of

evidence related to mail and wire fraud as described in her affidavit. While she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she apparently also believed that Attachment B adequately identified the scope of her search. Quite simply, **Cherna** can point to no testimony establishing that Smitherman intended to violate the Fourth Amendment. We decline to disturb the district court's finding that she acted in good faith.

We conclude that the good-faith exception to the exclusionary rule applies in this case. "The officers in this case took every step that could reasonably be expected of them." *Sheppard*, 468 U.S. at 989, 104 S.Ct. 3424. Smitherman prepared a detailed affidavit that was reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable

cause to search **Cherna's** residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six categories of evidence subject to seizure. All the officers who participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search. Our law simply does not require a reasonable officer to do more.

*415 IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

184 F.3d 403

Footnotes

- 1 **Cherna** does suggest that Magistrate Judge Tolle abandoned his judicial role by issuing a search warrant that was insufficiently particular and supported by probable cause to pass Fourth Amendment muster. Under *Leon*, however, excessive generality and lack of probable cause are independent reasons not to apply the good-faith exception, and we therefore consider **Cherna's** arguments in this regard below. *Cf. United States v. Tedford*, 875 F.2d 446, 449–50 (5th Cir.1989) (analyzing as a single issue defendant's contentions that judge "abandoned his detached and neutral role by merely ratifying the officers' conclusions and issuing the warrant on the basis of 'bare bones' affidavits" and that "officers' reliance on the warrant was unreasonable because the underlying affidavits were completely 'lacking in indicia of probable cause' ").
- 2 Indeed, we have emphasized that probable cause to search is present where there is adequate " 'information to allow the conclusion that a fair probability existed that seizable evidence would be found' " on the premises. *Cisneros*, 112 F.3d at 1279 (quoting *United States v. Restrepo*, 994 F.2d 173, 189 (5th Cir.1993)). While **Cherna's** arguments might have been convincing to a jury had he gone to trial, they do not convince **us** that the lack of probable cause was so obvious as to deprive the officers of the good-faith exception to the exclusionary rule.

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Exhibit Q

United States v. Smith 2023 WL 2446202

2023 WL 2446202

Only the Westlaw citation is currently available.
 United States District Court, S.D. New York.

UNITED STATES of America,

v.

Jatiek SMITH et al., Defendants.

22-cr-352 (JSR)

Signed March 10, 2023

Synopsis

Background: In prosecution relating to alleged extortion by dozens of emergency mitigation services (EMS) companies and public adjusters in racketeering scheme in three-year period, defendant sought release on bail, alleging a violation of Speedy Trial Act's pretrial detention clock, and lack of treatment for serious medical issues while in federal custody.

Holdings: The District Court, Jed S. Rakoff, J., held that:

[1] six-month period between second and third scheduled trial dates would be excluded from Speedy Trial Act's pretrial detention clock because of unique and complicated nature of multi-defendant case, and

[2] no condition or combination of conditions would reasonably assure safety of others and the community if pretrial release on bail was granted.

Release on bail denied.

West Headnotes (5)

[1] **Criminal Law** ➡ Multiple charges or defendants

Criminal Law ➡ Necessities of trial procedure; docket congestion

Six-month period between second and third scheduled trial dates would be excluded from Speedy Trial Act's pretrial detention clock, on defendant's motion for release on bail, in

prosecution relating to alleged extortion by dozens of emergency mitigation services (EMS) companies and public adjusters in racketeering scheme in three-year period; defendant had right not just to speedy trial but also to fair trial, which defendant could not receive between scheduled trial dates because of unique and complicated nature of multi-defendant case, with novel questions of fact and arguably novel questions of law, with government providing evidence from over 40 potential witnesses and gigabytes of discovery, and with need to locate and prepare qualified defense experts on cell-site location and gang activity. 18 U.S.C.A. §§ 1951, 1963, 3142(e), 3161(h)(7)(B)(i, ii), 3164(a)(1), (b).

[2] **Criminal Law** ➡ Subsequent to arrest

Period of less than one year between defendant's arrest and expected trial date was not so long as to trigger constitutional scrutiny for speedy trial violation, in case involving very serious potential liability, immense legal and factual complexity, and numerous codefendants, relating to alleged extortion by dozens of emergency mitigation services (EMS) companies and public adjusters in racketeering scheme in three-year period. **U.S.** Const. Amend. 6; 18 U.S.C.A. §§ 1951, 1963.

[3] **Criminal Law** ➡ Delay caused by accused

Speedy Trial Act, by separately naming both "the defendant" and "his counsel" when excluding from speedy trial period delay resulting from a continuance granted at the request of the defendant or his counsel, contemplates situations where the two might have different views as to the desirability of a continuance and authorizes the court to grant a continuance nonetheless. 18 U.S.C.A. § 3161(7)(A).

[4] **Criminal Law** ➡ Multiple charges or defendants

For the purposes of the Speedy Trial Act's 70-day clock for bringing a defendant to trial, cases

involving multiple defendants are governed by a single speedy trial clock. 18 U.S.C.A. § 3161(c).

[5] **Bail** ➡ Right to Release on Bail

Pretrial release on bail would be denied based on determination that no condition or combination of conditions would reasonably assure safety of others and the community, though contraband cellphones in facility for defendant's pretrial detention could be used by defendant to threaten potential witnesses and their families even if defendant was not released on bail, in prosecution for extortion by dozens of emergency mitigation services (EMS) companies and public adjusters in racketeering scheme; preliminary investigation of contraband cellphone seized from defendant indicated his prohibited personal communication with his released co-defendants, with defendant seeking to influence them to be in contact with witnesses. 18 U.S.C.A. §§ 1951, 1963, 3142(e).

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OPINION AND ORDER

JED S. RAKOFF, UNITED STATES DISTRICT JUDGE:

*1 Defendant Jatiek **Smith** moves for reconsideration of this Court's prior orders on 9/9/22 and 11/4/22 denying him release on bail on the grounds that he remains a danger to the community. See Mem. Supp. Bail Mot., Dkt. 134-3 ("**Smith** Mem."). He makes two primary arguments: first, that Mr. **Smith's** continued detention violates a provision of the Speedy Trial Act that sets a 90-day presumptive limit for persons held in detention awaiting trial, 18 U.S.C. § 3164, and second, that various serious health issues are not being adequately treated while Mr. **Smith** is being held in federal custody, **Smith** Decl. ¶¶ 11-15, Dkt. 134-2. At a pre-trial in-court conference held on 3/7/23, this Court denied Mr. **Smith's** motion for bail. This Opinion explains the reasons for that decision.

I. Mr. **Smith is not entitled to release under the Speedy Trial Act.**

In general, federal courts make bail determinations pursuant to the Bail Reform Act of 1984, which provides for pretrial detention when a judicial officer finds after a hearing "that no condition or combination of conditions will reasonably

assure the appearance of the person as required and the safety of any other person and the community....” 18 U.S.C. § 3142(e). **Smith**, however, argues he is entitled to release under a separate federal statute -- the Speedy Trial Act -- that also contains a provision relating to pretrial detention. The relevant provision states that “[t]he trial or other disposition of cases involving—(1) a detained person who is being held in detention solely because he is awaiting trial ... shall commence not later than ninety days following the beginning of such continuous detention.” 18 U.S.C. § 3164(a)-(b). However, the statute also states that excluded from this 90-day calculation are “[t]he periods of delay enumerated in section 3161(h)” *Id.* § 3164(b). And 18 U.S.C. § 3161(h), in turn, sets forth a host of exclusions that thus apply both to Section 3164’s 90-day pretrial detention clock and the Speedy Trial Act’s more commonly known 70-day limit within which a defendant’s trial is supposed to commence. 18 U.S.C. § 3161(h).

A. Procedural History and Background

Resolving Mr. **Smith’s** claim for release under the Speedy Trial Act requires some background. Mr. **Smith** was arrested in Puerto Rico on June 28, 2022, and at an initial appearance that day before Magistrate Judge Giselle Lopez-Soler, **Smith** was ordered detained pending his removal to this district. See **Smith** Rule 5(c)(3) Documents, Dkt. 37. No decision was made to exclude time under the Speedy Trial Act as to him at that time. *Id.* Mr. **Smith’s** co-defendants were arrested the same day and presented in this district before Magistrate Judge Aaron, who excluded time under 18 U.S.C. § 3161(h) (7) through 7/5/23, when the defendants other than **Smith** -- who was in transit between Puerto Rico and this district -- were set for a pretrial conference. See Docket entries dated 6/28/22. At the 7/5/22 conference -- at the uniform request of defense counsel then in attendance, and given both the difficulty of coordinating schedules across attorneys for nine defendants and the sheer complexity and scope of this case (as to which the Government described “voluminous” discovery, “include[ing] a lot of electronic records, multiple months of wire calls, [and] several seized phones that we are still within the process of unlocking....” as well as the results of interviews from “over 25 victims”), this Court set a trial date for 5/1/23, ordering that: “[p]ursuant to Section 3161 of Title 18, I will exclude from calculations all time between now and May 1, 2023, finding such time is necessary for the completion of the voluminous discovery, the evaluation of the discovery, the meeting with the defendants under these difficult circumstances, and the drafting of any motions as well as subsequent trial preparation, and the accommodating

of counsels’ various schedules.” 7/5/22 Hr’g Tr. at 15-16, Dkt. 50.

*2 Later, the Court received a letter written by Mr. **Smith** and dated 7/29/22 stating that, against the wish of his lawyer, he “wish[ed] to waive [his] rights to file any motions and proceed to a speedy trial.” See 7/29 **Smith** Letter, Dkt. 40. The Court subsequently received substantially identical letters from **Smith’s** codefendants Rahmiek Lacewell, Anthony McGee, Sequan Jackson, and Damon Dore. See Dkt. 43, 53, 54, 55. The Court scheduled an all-defendant conference to discuss these requests for 9/13/23, given that **Smith** was not expected to arrive in New York until the beginning of September.

Smith was arraigned on 9/9/23, just after he finally arrived in this district. At that time, after **Smith** reiterated his request for a speedy trial in person, the Court severed **Smith’s** trial from his co-defendants and set a trial for October 17 and excluded time between 9/9/23 and 10/17/23. 9/9/23 Hr’g Tr. at 5, Dkt. 156. The Court also denied **Smith’s** bail request after the Government described some of the evidence against **Smith**, including threats of violence against potential witnesses and their families -- finding that no conditions other than **Smith’s** detention could reasonably assure the safety of the community. *Id.* at 19.

At the 9/13/23 all-defendant conference, the Government requested -- and **Smith** and those other co-defendants then also requesting a prompt trial did not oppose -- that the Court postpone the 10/17/23 trial set for **Smith** to November. See 9/13/22 Hr’g Tr. at 7, Dkt. 89. The Court accordingly set a trial date of 11/28/22, which **Smith**, Jackson, Dore, and Lacewell elected to take, while all other defendants preferred to stick with the original 5/1/22 trial date. *Id.* at 6-18; 9/13/23 Order, Dkt. 72. For those defendants set for an 11/28/22 trial, the Court specifically excluded time under the Speedy Trial Act, “finding that it represents a fair accommodation of both the requests of the government and the requests of the defendants, as well as the underlying speedy trial and preparation for trial issues, and that for those and other reasons, the best interests of justice in excluding all time through November 28 as to the defendants who are requesting a speedy trial is appropriate ...” 9/13/23 Hr’g Tr. at 17. After the release on bail of several of his co-defendants, **Smith** moved again for release on bail, and the Court once again denied that motion on the grounds of dangerousness following the Government’s detailing evidence of **Smith’s** threats towards victims and potential witnesses and toward

their families, including children. 11/4/22 Hr'g Tr. at 7, Dkt. 109. Defendants Lacewell and Dore subsequently withdrew their requests to proceed to trial on 11/28/22 and elected to instead proceed with the trial set for 5/1/23. See 10/24/22 Letter, Dkt. 85; 10/28/22 Letter, Dkt. 88.

On 11/14/22 -- two weeks before the 11/28/22 trial was set to commence against **Smith** and his codefendant Sequan Jackson -- the Court received a letter from Susan Kellman, Jackson's attorney, stating her belief that Mr. Jackson could not possibly have a fair trial if the trial were to begin on 11/28/22. See 11/14/22 Kellman Letter, Dkt. 102. Her letter represented that -- even putting aside voluminous evidence she was continuing to receive at that time from the Government and the defendants' coordinating discovery counsel -- the volume of discovery already produced made it "impossible to adequately investigate and prepare to effectively represent Mr. Jackson at trial" on 11/28/22. Id. at 1. She noted that "[t]he charged conduct here spanned three years and allegedly affected the practices of dozens of EMS companies and public adjusters in New York City," that "[i]n the fourteen months before the grand jury returned the indictment in this case, the government had already interviewed dozens of witnesses, seized and mirrored the lead defendant's cellphone and intercepted months-worth of Mr. Jackson's and Mr. **Smith's** communications," that 3500 material had been produced "for more than forty witnesses," and that despite her and her co-counsel's diligence in reviewing these materials, it would be impossible to provide Mr. Jackson with constitutionally effective assistance of trial by 11/28/23. Id. at 1-2. She also noted the expectation that the Government would call experts and her inability to find any rebuttal experts who could testify at the 11/28/23 trial, the technological challenges of processing the sheer volume of telephone data provided by the Government into a usable form, and the challenges of conducting an adequate investigation of the allegations -- including by interviewing involved people in the industry -- prior to the 11/28/23 trial. Id. at 3. Ms. Kellman expressed her sensibility that by filing this letter, notwithstanding her client's continuing wish to go to trial by 11/28/23, she might be "irreparably damage[ing] the attorney client relationship," but nonetheless expressed her "firm and unwavering assessment" that she and her co-counsel could not provide Mr. Jackson with constitutionally effective representation by 11/28/23. Id. at 4.

*3 Later that day, Mr. **Smith's** then-attorney, Michael Vitaliano, filed a similar letter "join[ing] in" the letter filed by Ms. Kellman for "for the reasons stated therein." 11/14/22

Vitaliano Letter, Dkt. 103. Mr. Vitaliano further argued that in addition to all the reasons cited by Ms. Kellman as to why a fair trial could not possibly occur on 11/28/23, there was one more that applied only to **Smith**: the fact that Mr. **Smith's** detention coupled with then "near daily lockdowns" at MDC made it challenging to even meet with Mr. **Smith** to go over evidence and prepare for trial.¹ Id.

The Court promptly convened back-to-back conferences, first with Ms. Kellman and Mr. Jackson, then with Mr. Vitaliano and Mr. **Smith**. During Mr. **Smith's** conference, Mr. **Smith** repeatedly emphasized that even if his lawyer felt he could not represent him by 11/28/22, Mr. **Smith** was prepared to do so pro se. 11/17/23 Hr'g Tr. at 3. Convinced that neither Mr. Jackson nor Mr. **Smith** could receive a fair trial on 11/28/22 or any time soon thereafter, the Court granted the motions by counsel for Mr. Jackson and Mr. **Smith**, and set both defendants for the all-defendant 5/1/23 trial. It made separate on-the-record findings as to both defendants as to why a fair trial could not take place before then and therefore excluded time under the Speedy Trial Act through 5/1/23. See 11/17/22 Hr'g Tr. at 5, 7, Dkt. 131. It also restored both defendants' right to file pre-trial motions, which they had earlier waived in order to proceed to a faster trial. Id. As to Mr. **Smith's** request to proceed pro se, the Court determined that this did not affect the determination that Mr. **Smith** could not have a fair trial by 11/28/23 -- if anything, Mr. **Smith**, proceeding pro se and while detained, would need even more time to adequately prepare than his lawyer would -- and therefore informed Mr. **Smith** that his trial would be on 5/1/23 whether or not he determined to go pro se. Id. at 3. The Court then gave Mr. **Smith** some time to consider his request to go pro se, and, at an 11/21/22 conference, Mr. **Smith** withdrew his request to go pro se but requested new counsel, which this Court appointed (Mr. **Smith's** prior counsel having been relieved). See 11/21/23 Hr'g Tr. at 2-3.

B. Legal Analysis

Through his new counsel, Mr. **Smith** now argues that his detention has exceeded the 90-day limit set for pretrial detention in 18 U.S.C. § 3164 and that he should therefore be released on bail. See generally **Smith** Mem. He does not presently argue that the presumptive 70-day clock for trials set forth in 18 U.S.C. § 3161 has been violated and that the indictment against him should therefore be dismissed under 18 U.S.C. § 3162(a)(2), although various of his arguments carry obvious implications for that question. Id. at 6.

Mr. **Smith's** argument requires separate consideration of three different time periods: the time between his 6/28/22 arrest in Puerto Rico and his 9/9/23 arraignment in New York, the time between the 9/9/23 arraignment and the 11/17/22 conference (during which the Court excluded time first on 9/9/22 through the 10/17/22 trial date it initially set and then on 9/13/22 through the 11/28/22 trial date it subsequently set, without any objection by **Smith**), and finally from 11/28/22 through the expected 5/1/23 trial. The Court addresses these from most to least recent:

1. The Court's 11/17/23 decision to exclude time through the 5/1/23 trial.

*4 [1] Mr. **Smith** contends that the Court's 11/17/23 decision "over his objection" to reset him for a 5/1/23 trial and to exclude time through that date "was not reasonable, given the fact that Mr. **Smith** was being held in custody." **Smith** Mem. 14.

[2] The Court recognizes the toll pretrial detention exacts on all defendants, very much including those who wish to make their case at trial, and it did not previously order Mr. **Smith's** detention lightly. The Court is also aware that defendants' constitutional² and statutory rights to a speedy trial carry special force when a defendant is detained pending trial. However, as eloquently put by both Mr. **Smith's** then counsel, as well as by present counsel for Mr. **Smith's** co-defendant Sequan Jackson, defendants have the right not to just a speedy but also to a fair trial -- including with constitutionally competent counsel -- and the Court remains as convinced as it was on 11/17/22 that Mr. **Smith** could not have received a fair trial on 11/28/22 or at any time for several months thereafter given the unique and complicated nature of this case. See Kellman Letter, Dkt. 102; Vitaliano Letter, Dkt. 103.

As explained above, counsel for Mr. Jackson and then-counsel for Mr. **Smith** represented that it would be utterly impossible to represent their clients fairly at an 11/28/22 trial given the many factors rendering this case extraordinarily evidence-intensive and complex, including:

- *5 • The fact that the charged conduct spans three years and concerns alleged extortion against dozens of emergency mitigation services ("EMS") companies;
- The fact that the Government has provided evidence from over 40 potential witnesses;

- The fact that gigabytes of discovery have been turned over, including months of wiretaps and the contents maintained over extended periods of multiple cellphones, which were apparently so voluminous that defendants' joint coordinating discovery counsel could not even convert the relevant data into a readable form until 11/11/23, and which could obviously not be reviewed by any defendant or team of defense counsel without very significant investments of time;
- The fact that the Government may call expert witnesses on cell-site location and gang activity, and the need to locate and prepare qualified defense experts.

Given such factors, it almost goes without saying that this case is "so complex, due to the number of defendants," "the nature of the prosecution," plainly "novel questions of fact" and arguably novel questions of law³ such that it would ordinarily be "unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii). See United States v. Pikus, 39 F. 4th 39, 53 (2d Cir. 2022) ("Cases are 'complex' where they, for example, involve numerous defendants, novel legal issues, myriad claims, or many necessary witnesses."). Despite Mr. **Smith's** representation that some of the "gigabytes" of discovery involves "irrelevant material," such as "personal photos" contained on the numerous cellphones whose contents have been produced, **Smith** Mem. 14, the Court remains convinced for the reasons described above -- which were articulated forcefully to the Court by not just one but two lawyers prepared to speak even against the wishes of their clients -- that "the failure to grant ... a continuance in the proceeding would [have been] likely to ... result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i).

[3] What makes this case a little unusual is that Mr. **Smith**, notwithstanding his then-lawyer's belief that he could not have provided constitutionally competent representation absent a significant continuance and this Court's agreement that, at the very least, a significant continuance was necessary to ensure the fairness of any trial, objected to such a continuance. This Court does not take lightly overriding a defendant's personal request to proceed to trial more quickly. But the Speedy Trial Act plainly authorizes continuances to be "granted by any judge on *his own motion*." and likewise authorizes such continuances "at the request" not just "of the defendant" but also of "his counsel." *Id.* § 3161(a). Indeed,

in separately naming both “the defendant” and “his counsel,” the Speedy Trial Act contemplates situations such as this one where the two might have different views as to the desirability of a continuance and authorizes the Court to grant one nonetheless.

*6 This understanding finds support in Second Circuit precedent. See United States v. Lynch, 726 F.3d 346, 353 (2d Cir. 2013). Lynch, noting the Speedy Trial Act’s separate identification of a defendant and “his counsel,” reasoned that “an attorney may make such a request without obtaining his client’s approval.” Id. (quoting 18 U.S.C. § 3161(h)(7)(A)) (emphasis in original). As a result, the Second Circuit held “that, pursuant to 18 U.S.C. § 3161(h)(7)(A), a district court may grant a continuance sought by counsel without the consent of the defendant so long as the district court determines that the ends of justice would be served based upon its analysis of the factors articulated in 18 U.S.C. § 3161(h)(7)(B) and sets forth its reasons on the record.” Id. at 356.

Mr. **Smith’s** views as to any extension certainly merit significant weight. But Mr. **Smith** faces very serious charges in this case, with each count charged against him and his co-defendants carrying potential sentences of up to 20 years. 18 U.S.C. §§ 1951, 1963. Mr. **Smith**, as the alleged leader of the charged conspiracy, likely faces among the most serious consequences of any of his co-defendants. Given the nature of this case, the explicit representations of Mr. **Smith’s** prior counsel and Mr. Jackson’s counsel that they could not have provided constitutionally competent representation by 11/28/22 or any time soon thereafter, and this Court’s independent satisfaction that these lawyers’ representations were reasonable in light of the complexity of this case, the Court concludes that its 11/17/22 decision to set Mr. **Smith** for a 5/1/23 trial and exclude time under the Speedy Trial Act was reasonable.

2. The Court’s exclusion of time through 11/17/22

Mr. **Smith** also objects to the Court’s exclusion of time from Mr. **Smith’s** 9/9/22 arraignment and the 11/17/22 conference (when the Court reset Mr. **Smith** for trial), arguing that no party requested the exclusion of such time and that there should have been no separate exclusion under 18 U.S.C. § 3161(h) for “preparation for trial,” as that is the point of providing 70 days in the first place. **Smith** Mem. at 16. The Court easily rejects this argument.

A judge may exclude time under the Speedy Trial Act “on his own motion....” 18 U.S.C. § 3161(h)(7)(A). And while the Court’s explanations for its exclusions (on 9/9/23, through 10/17/23, and then on 9/13/23, through 11/28/22) made reference to “preparation for trial,” it was clear on both occasions that the Court, while inclined to grant **Smith’s** request to proceed to trial quickly, nonetheless believed the case was quite complex within the meaning of 18 U.S.C. § 3161(h)(7), such that exclusion of small amounts of time through October or November was entirely justified. See 9/9/22 Hr’g Tr. at 5, 10; 9/13/23 Hr’g Tr. at 5-6, 10, 12, 15-17. As such, the Court easily concludes that its exclusion of time from Mr. **Smith’s** 9/9/22 arraignment and the 11/17/22 conference was proper.

3. Mr. **Smith’s** transfer from Puerto Rico to New York

[4] The Court must finally consider the (rather lengthy) period between Mr. **Smith’s** 6/28/22 arrest in Puerto Rico and his 9/9/22 appearance in this district, a period that apparently involved delays in transfers due to COVID-19. For the purposes of 18 U.S.C. § 3161’s 70-day clock for trial, this period does not matter, as the clock begins to run “from the filing date (and making public) of the information or indictment, *or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.*” 18 U.S.C. § 3161(c)(1) (emphasis added). Further, as the Government points out, at least for the purposes of § 3161’s 70-day clock, “cases involving multiple defendants are governed by a single speedy trial clock,” and the Court had already separately excluded time at the 7/5/22 conference for all defendants other than Mr. **Smith**. United States v. Pena, 793 F.2d 486, 489 (2d Cir. 1986).

*7 However, unlike Speedy Trial Act’s primary 70-day limit for beginning trial, 18 U.S.C. § 3164’s 90-day limit set for a defendant’s detention pending trial begins to run not on the day of the indictment or when the defendant appears in the district in which the charge is pending, but rather from “the beginning of such continuous detention....” 18 U.S.C. § 1964(b). Here, there is no dispute that Mr. **Smith** has been continuously detained since his 6/28/22 arrest.

The Court is not convinced that the Government is right that, as to Section 3164’s 90-day limit for continuous detention pending trial, the Second Circuit’s decision interpreting Section 3161 as setting forth “a single speedy trial clock, which begins to run with the clock of the most recently added defendant” applies. Pena, 793 F.2d at 489. Pena was based

on language in 18 U.S.C. § 3161(h) (6) providing for “[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.” *Pena* held that the period it took to apprehend various co-defendants was properly excluded under 18 U.S.C. § 3161(h)(6) so long as the period of exclusion remained “reasonable,” such that, in multi-defendant cases, Section 3161’s 70-day clock would start to run for all defendants from the date of the most recent defendant’s arraignment. 793 F.2d at 488-89.

It is hard to see how or why *Pena* should apply to 18 U.S.C. § 3164, which sets a 90-day limit for pretrial detention that runs not from the date of anyone’s indictment or appearance but rather from the “beginning of such continuous detention or designation....” *Id.* § 3164(b). While *Pena* might support tolling Mr. **Smith’s** co-defendants’ 70-day Speedy Trial clocks under Section 3161(h)(6), the Government does not explain why or how *Pena* authorizes the tolling of § 3164’s 90-day detention clock from when it plainly began running following **Smith’s** 6/28/23 arrest through his September appearance in this district, based solely on exclusions that were made for his co-defendants. Nothing in the text of 18 U.S.C. § 3161(h)(6) -- which relates to the delay that might be needed in order to join codefendants “as to whom the time for trial has not run” -- or in *Pena* suggests that such tolling is permissible.

However, the Court need not decide whether, in a multiple defendant trial, the 90-day detention clock under 18 U.S.C. § 3164 runs separately for all defendants or, as with 18 U.S.C. § 3161’s 70-day clock, runs as a single clock. Even assuming the former, that would mean **Smith** was detained 73 days between his 6/28/22 arrest and his 9/9/22 arraignment in this district when the Court first excluded time for **Smith** (and when, for the purposes of Section 3161’s 70-day clock, **Smith’s** time would have begun to run). As such, given the Court’s proper exclusions of time from 9/9/22 onward, **Smith** has not been detained for over 90 days of countable time pending trial under 18 U.S.C. § 3164.

II. **Smith’s** medical issues

Finally, **Smith** describes a number of serious medical issues he claims are not being adequately addressed by the Metropolitan Detention Center (“MDC”). **Smith** Decl. ¶¶ 11-15. Since **Smith** first filed his motion, this Court has convened multiple joint calls between the Government and **Smith’s** attorneys to request updates as to **Smith’s** care. See Minute Entries dated 2/14/23, 2/15/23, 2/24/23. In each

of those calls, the Government has provided an update as to current efforts to deal with Mr. **Smith’s** care, and Mr. **Smith’s** counsel has not requested further court involvement -- although the Court remains willing and ready to become involved to the extent Mr. **Smith’s** needs are not being dealt with adequately and promptly. In his reply, Mr. **Smith** acknowledges that he has received some care, including appointments with an MDC doctor and a promise of an offsite visit to a specialist, as a result of the Government’s involvement. **Smith** Reply at 4-5, Dkt. 165. However, he contends that his care remains “completely inadequate,” that the specialist offsite visit had not yet materialized by the time of filing, and that MDC is not set up to provide the care he needs. *Id.* at 5.

*8 The Court recognizes that pretrial detention at the MDC imposes very serious burdens, including on defendants requiring serious medical care, that MDC is not always readily able to provide. However, in this case, it appears that Mr. **Smith** began receiving at least relatively more of the care he claims he needs once his lawyers got the Government involved. To the extent his care remains inadequate, Mr. **Smith’s** lawyers should jointly call Chambers with the Government to provide a full update as to where things currently stand and to request the Court’s involvement, if necessary, to expedite further medical care at the MDC.

[5] However, the Court remains fully convinced for the reasons previously stated on the record during the 9/9/22 and 11/4/22 bail hearings “that no condition or combination of conditions will reasonably assure ... the safety of any other person and the community...” 18 U.S.C. § 3142(e); see 9/9/22 Hr’g Tr. at 19, Dkt. 156; 11/4/22 Hr’g Tr., Dkt. 109 at 7. As discussed at those hearings, the Government has introduced serious prima facie evidence that Mr. **Smith** has directed and threatened numerous acts of violence, including at potential witnesses and their family members. The Court has a very real fear that, should Mr. **Smith** be released, he might not just pose a general threat to the community but also perpetuate or threaten violence against witnesses in this case.

Mr. **Smith** in his reply brief notes that given the availability of contraband cellphones in MDC, he likely could have intimidated witnesses from there if he had wanted to. **Smith** Reply at 6. It turns out that that he may have done just that. As recounted by the Government at a 3/7/23 conference, a contraband cellphone was found in **Smith’s** possession and seized, and the Government subsequently obtained a warrant for its search. While that search has been paused in order

to conduct a privilege review following the discovery of potentially privileged information, the preliminary review -- before any potentially privileged material was found -- indicated that **Smith**, using an illegally possessed phone, has been in personal communication with his released co-defendants even though this is prohibited by the terms of his pre-trial detention and has sought to influence them, among other things, to be in contact with third parties that may be either witnesses themselves or in contact with third party witnesses. While the information about what **Smith** was doing with this phone remains preliminary, these events only reinforce the Court's independent belief that Mr. **Smith's** release -- which, no matter what conditions this Court orders, would certainly lead to **Smith** having relatively greater ability

to communicate with potential witnesses and co-defendants without detection -- poses too great a danger to the community to be allowed.

For all the aforementioned reasons, the Court hereby reaffirms its denial of **Smith's** motion for release on bail. The Clerk is directed to close the motion on the docket (at entries 133 and 134).

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2023 WL 2446202

Footnotes

- 1 As this Court has repeatedly emphasized during bail hearings for numerous defendants in this case, counsel having issues receiving adequate access to their clients should promptly involve the Government and, failing that, this Court, which will ensure that such access is provided.
- 2 **Smith** has not argued that his May 1 trial date violates his Sixth Amendment right to a speedy and public trial, and while the Court would ordinarily seek to ensure that a trial commence sooner following a defendant's arrest, the less-than-one year period between **Smith's** arrest on 6/28/22 and the expected trial on 5/1/23 is not so long as to trigger constitutional scrutiny, especially in a case like this involving very serious potential liability, immense legal and factual complexity, and numerous codefendants. See United States v. Moreno, 789 F.3d 72, 78 (2d Cir. 2015) (reasoning that although the Sixth Amendment right to a speedy trial turns on "four factors ...: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant," the "first factor, the length of delay, also operates as a threshold inquiry"); *id.* at 82 n.10 (stating that the threshold inquiry is "usually" triggered by a "one year" delay). Moreover, even if a Sixth Amendment inquiry were triggered, the relatively modest length of the delay for the purpose of ensuring a fair trial for Mr. **Smith** would mean no right was violated. *Id.* at 78. If the delay were longer than one year, such that a Sixth Amendment inquiry were triggered, the Court is not certain that a defendant's constitutional speedy trial rights could be waived by that defendant's lawyer in the same way that, as explained below, a lawyer may request a continuance under the Speedy Trial Act against her client's wishes. Cf. Townsend v. Superior Court, 15 Cal.3d 774, 126 Cal.Rptr. 251, 543 P.2d 619, 624 (1975) (reasoning that a while a lawyer could waive various statutory speedy trial rights, he could not waive constitutional ones). However, as the delay here does not come close to a constitutional question, the Court need not reach that question.
- 3 Mr. **Smith**, availing himself of the extended timeline now afforded him, has filed a motion to suppress evidence raising very serious and arguably novel questions of law relating to cell phone searches at the border. See **Smith** Mem. Suppress, Dkt. 161.

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Exhibit R

Richir v. Village of Fredonia NY
2008 WL 2778920

2008 WL 2778920

Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Denise **RICHIR**, Plaintiff,
v.
VILLAGE OF FREDONIA,
NEW YORK, et. al., Defendants.

No. 05-CV-076.

July 14, 2008.

Attorneys and Law Firms

Charles Edward Fagan, Jamestown, NY, for Plaintiff.

Gerard E. O'Connor, Lippman O'Connor, Buffalo, NY, for
Village of Fredonia, New York, **Village of Fredonia** Police
Department, Bradley Meyers and John Doe.

Kurt Gustafson, Mayville, NY, for Jason L. Schmidt, County
of Chautauqua, New York, Chautauqua County District
Attorney's Office and James P. Subjack.

DECISION AND ORDER

WILLIAM M. SKRETTY, District Judge.

*1 1. Plaintiff Denise **Richir** brings an action pursuant to 42 U.S.C. § 1983 against the **Village of Fredonia**, the **Village of Fredonia** Police Department, Police Chief Bradley Meyers, and Police Officer John Doe (the "**Village Defendants**"), and the County of Chautauqua, the Chautauqua County District Attorney's Office, Assistant District Attorney James P. Subjack, and Assistant District Attorney Jason L. Schmidt (the "**County Defendants**"). Presently before the Court is the County Defendants' Motion to Dismiss. (Docket No. 52). For the following reasons, the County Defendants' Motion is granted in part and denied in part.

2. Plaintiff alleges that in February of 2004, she was falsely arrested and detained by the **Village of Fredonia** Police Department. (Complaint, Docket No. 47, ¶¶ 15-16). Plaintiff further alleges that she was wrongfully prosecuted by the

Chautauqua County District Attorney's Office (Complaint, Docket No. 47, ¶ 17).

Plaintiff has alleged three causes of action against the County Defendants. First, Plaintiff brings a claim for malicious prosecution, alleging that the County Defendants wrongly prosecuted her for charges of petit larceny and unlawful possession of marijuana, despite the County Defendants' knowledge that Plaintiff was innocent of these charges. Second, Plaintiff brings a claim for denial of due process, alleging that the County Defendants manufactured false and misleading information against Plaintiff. Lastly, Plaintiff brings a claim for emotional distress, alleging that her arrest and prosecution has caused her to suffer severe anxiety and humiliation.

The County Defendants have moved to dismiss the claims against them arguing that they are entitled to absolute immunity, and that Plaintiff has failed to adequately state her causes of action.¹

3. Rule 12(b)(6) provides for dismissal of a complaint where the plaintiff has "fail[ed] to state a claim upon which relief can be granted." In determining whether a complaint states a claim, the Court construes the complaint liberally, accepts all factual allegations as true, and draws all reasonable inferences in plaintiff's favor. *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.2007); *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. Feb.1, 2008). While the complaint need not include detailed factual allegations, a plaintiff must show the "grounds of his entitlement to relief." *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*, *Goldstein*, 516 F.3d at 56.

4. Defendants contend in their Motion to Dismiss that Assistant District Attorneys James P. Subjack and Jason L. Schmidt are entitled to absolute immunity from claims arising from their prosecutorial activities. (Defendants' Mem., Docket No. 53, pp. 2-4). Plaintiff responds that absolute immunity does not extend to a prosecutor's activities in advising law enforcement on the investigation of a case, and therefore would not preclude her suit against Subjack and Schmidt. (Plaintiff's Mem., Docket No. 60, pp. 8-10).

*2 It is well established that prosecutors are immune from suit for claims arising out of their initiation and pursuit of criminal charges against Plaintiff. *Shmueli v. City of New York*,

424 F.3d 231, 236-37 (2d Cir.2005). Therefore, Defendants' Motion to Dismiss is granted in part as to Plaintiff's claim that the initiation and pursuit of charges against her constituted a malicious prosecution or a violation of due process.

Absolute prosecutorial immunity does not extend, however, to administrative and investigative functions performed by a prosecutor. *Hill v. City of New York*, 45 F.3d 653, 656 (2d Cir.1995); *Taylor v. Kavanagh* 640 F.2d 450, 452 (2d Cir.1981). To the extent that Plaintiff alleges the County Defendants advised the Village Defendants on Plaintiff's arrest and the search of her home and property, those activities are better classified as investigative, and are not entitled to absolute immunity. Defendants' Motion to Dismiss is therefore denied in part as to Plaintiff's claim that the County Defendants advised the Village Defendants on Plaintiff's arrest and the search of her home and property.

5. Plaintiff names the Chautauqua County District Attorney's Office as a Defendant in her Complaint. The County Defendants contend in their Motion to Dismiss that the District Attorney's Office is a physical location, not a legal entity, and may not be sued as a party in this action. (Defendants' Mem., Docket No. 53, p. 4). Plaintiff concedes that the District Attorney's Office "may not be an entity able to be sued." (Plaintiff's Mem., Docket No. 60, p. 10).

In New York State, a district attorney's office is not a separate legal entity capable of being sued in a § 1983 case. *See e.g. McCray v. City of New York*, 2007 WL 4352748 (S.D.N.Y.2007); *Michels v. Greenwood Lake Police Dept.*, 387 F.Supp.2d 361, 367 (S.D.N.Y.2005). Because the Chautauqua County District Attorney's Office is not a separate legal entity, it cannot be sued by Plaintiff. Defendants' Motion to Dismiss is therefore granted in part as to all claims against the Chautauqua County District Attorney's Office.

6. Defendants contend in their Motion to Dismiss that Plaintiff has failed to state a cause of action for malicious prosecution. (Defendants' Mem., Docket No. 53, pp. 5-6). Plaintiff responds that the County Defendants continued their prosecution of Plaintiff for 14 months based on improper motives and with knowledge that she was innocent. (Plaintiff's Mem., Docket No. 60, pp. 6-7).

To prevail on a claim for malicious prosecution, Plaintiff must establish four elements:

(1) the defendant initiated a prosecution against plaintiff,

(2) without probable cause to believe the proceeding can succeed,

(3) the proceeding was begun with malice and,

(4) the matter terminated in plaintiff's favor.

Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 130 (2d Cir.1997).

Defendants argue that because Plaintiff's case was terminated by an adjournment in contemplation of dismissal ("ACD") the matter was not terminated in her favor and she cannot prevail on a claim for malicious prosecution. An ACD is a conditional dismissal that becomes effective if the accused meets certain criteria during a period of time. New York CPL § 170.55 (McKinney 1999). Courts do not view an ACD as a termination in Plaintiff's favor for the purposes of a malicious prosecution claim. *See Breitbard v. Mitchell*, 390 F.Supp.2d 237, 245-46 (E.D.N.Y.2005); *See also Worytko v. County of Suffolk*, 2007 WL 1876503, at *2 (E.D.N.Y.2007) ("An ACD is not a favorable termination because it leaves open the question of the accused's guilt and thus precludes a claim of malicious prosecution").

*3 There is no dispute that on April 4, 2006, the Dunkirk City Court entered an ACD for the charges against Plaintiff. (Plaintiff's Counsel's Affidavit, ¶ 40, Docket No. 58; Defendants' Counsel's Affidavit, ¶ 4.c, Docket No. 52). Because an ACD is not a termination in favor of the accused, Plaintiff cannot prevail on her malicious prosecution claim. Defendants' Motion to Dismiss is therefore granted in part as to Plaintiff's sixth cause of action alleging malicious prosecution.

7. The County Defendants contend in their Motion to Dismiss that Plaintiff has failed to state a cause of action for a violation of due process. (Defendants' Mem., Docket No. 53, p. 6). Plaintiff alleges in her Complaint that the County Defendants manufactured false and misleading evidence against her in violation of her right to due process. (Complaint, ¶ 56, Docket No. 47). The manufacture of false evidence by a prosecutor is a violation of due process. *See e.g. Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir.2000). Construing Plaintiff's allegations as true, and drawing all reasonable inferences in her favor, this Court finds that Plaintiff has sufficiently alleged a violation of due process claim against the County Defendants. Accordingly, Defendants' Motion to Dismiss is denied in part as to Plaintiff's seventh cause of action alleging the denial of due process.

8. Plaintiff lastly brings a claim against all Defendants for intentional infliction of emotional distress. As a preliminary matter, Plaintiff's claims for intentional infliction of emotional distress must be dismissed as against the County and the District Attorney's Office. "[I]t is well-settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity." *Rivera v. City of New York*, 392 F.Supp.2d 644, 657 (S.D.N.Y.2005) (granting City of New York's motion to dismiss claim for intentional infliction of emotional distress) (quoting *Lauer v. City of New York*, 240 A.D.2d 543, 659 N.Y.S.2d 57 (App.Div.1997)).

As discussed above, Defendants Subjack and Schmidt have absolute immunity against claims stemming from the initiation and pursuit of a criminal prosecution. Thus, the only emotional distress claim Plaintiff may pursue is that Defendants Subjack and Schmidt intentionally inflicted emotional distress on Plaintiff by wrongly advising the **Village** Defendants and by manufacturing false and misleading evidence against Plaintiff. Accepting all of Plaintiff's allegations as true, and drawing all reasonable inferences in her favor, this Court finds that Plaintiff has shown the grounds of her entitlement to relief, and therefore may proceed on her claim for intentional infliction of emotional distress against Defendants Subjack and Schmidt.

9. For the foregoing reasons,

IT HEREBY IS ORDERED, that Defendants' Motion to Dismiss (Docket No. 52) is GRANTED in part and DENIED in part, consistent with this Decision and Order.

*4 FURTHER, that Plaintiff's claims against Defendants Schmidt and Subjack are DISMISSED, except for claims alleging that Schmidt and Subjack advised the **Village** Defendants on Plaintiff's arrest and the search of her home and property, and manufactured false and misleading evidence against Plaintiff.

FURTHER, that Plaintiff's claims against the Chautauqua County District Attorney's Office are DISMISSED.

FURTHER, that Plaintiff's claim for intentional infliction of emotional distress against the County of Chautauqua is DISMISSED.

FURTHER, that Plaintiff's cause of action for malicious prosecution against the County Defendants is DISMISSED.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2778920

Footnotes

- 1 In support of their Motion to Dismiss, the County Defendants filed a Memorandum of Law, and the Affidavits of Kurt Gustafson, James Subjack, and Jason Schmidt. In response, Plaintiff filed a Memorandum of Law, and the Affidavits of Charles Fagan and Denise **Richir** with supporting exhibits.

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Exhibit S

Woodward v. Chautauque County, N.Y et al.
15-cv-0246

2016 WL 4491712

Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

Dawn WOODWARD, Plaintiff,

v.

CHAUTAUQUA COUNTY, New York,
and any of its agents who may have been
involved, **Chautauqua County** Sheriff's
Department, and any of its agents who may
have been involved, Joseph A. Gerace,
Individually and as **Chautauqua County**
Sheriff, Js Hover and Lt. Nelson, **Chautauqua**
County Sheriff's Deputies, Individually and
as **Chautauqua County** Sheriff's Deputies,
New York State Police, and any of its agents
who may have been involved, Joseph A.
D'amico, Individually and as New York State
Police Superintendent, J.B. Cresanti and
Derek J. Raichel and Trooper Destro, New
York State Police Troopers, Individually and
as New York State Troopers, Defendants.

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Signed June 30, 2016

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Filed 07/05/2016

Attorneys and Law Firms

Dawn R. Woodward, Frewsburg, NY, pro se.

Michael P. McClaren, Ryan G. Smith, Webster Szanyi, LLP,
George Michael Zimmermann, Office of the New York State
Attorney General, Buffalo, NY, for Defendants.

REPORT, RECOMMENDATION AND ORDER

MICHAEL J. ROEMER, United States Magistrate Judge

*1 This case has been referred to the undersigned for all pre-trial matters, including preparation of a report and recommendations on dispositive motions. (Dkt. No. 54). Before the Court are two motions: (1) a motion to dismiss for lack of jurisdiction on behalf of defendants New York State Police, Joseph A. D'Amico, J.B. Cresanti, Trooper Destro, and Derek J. Raichel (collectively "State defendants") (Dkt. No. 35), and (2) a motion by plaintiff Dawn Woodward for an extension of time to serve process on the State defendants (Dkt. No. 48). For the reasons discussed below, it is recommended that the State defendants' motion be granted in part and denied in part. Specifically, it is recommended that all claims against the New York State Police and the claims against defendants Joseph A. D'Amico, J.B. Cresanti, Trooper Destro, and Derek J. Raichel in their official capacities be dismissed. The plaintiff is granted thirty (30) days to serve process on D'Amico, Cresanti, Destro, and Raichel. If she has not properly served D'Amico, Cresanti, Destro, and Raichel by thirty days after entry of this Report, Recommendation and Order, the action should be dismissed as against those defendants.

BACKGROUND

On June 17, 2014, Dawn Woodward was pulled over while driving down Route 62 in **Chautauqua County** because of a warrant on her passenger, Dean Sandstrom. (Dkt. No. 1 at 9-10). According to Woodward, police cars surrounded her car and forced her to brake suddenly to avoid a collision. *Id.* at 10. She considered the maneuver to constitute deadly force. *Id.* Woodward alleges that after she stopped, **Chautauqua County** deputy sheriffs Hover and Nelson and New York State Police officers Cresanti, Raichel, and Destro rushed out of their cars yelling and surrounded her vehicle. *Id.* She could not understand what they were yelling. *Id.* Raichel smashed the passenger window and forcibly removed Sandstrom from the car. *Id.* Woodward was ordered out of the car, handcuffed, and taken to town court in the Town of Kiantone. *Id.* at 11. She alleges that she asked several times why she was being arrested, but no one would answer. *Id.* She learned later that she was being charged with "obstructing governmental justice." *Id.*

On March 23, 2015, Woodward filed a complaint against the police officers in their individual and official capacities and against the New York State Police, the **Chautauqua County Sheriff's Department**, and the **County of Chautauqua**. *Id.* at 4. Woodward alleges that the defendants “interfered with, using deadly force against plaintiff, plaintiff's life, liberty, property and civil rights while traveling by right on the public highways.” *Id.* She asserted causes of action under 42 U.S.C. § 1983, § 1985, and § 1986 for alleged violations of her rights under the Fourth, Fifth, Ninth, and Tenth Amendments and under state law for trespass and trespass on the case. *Id.* at 4-5.

Woodward originally served the State defendants by mailing the Summons and Complaint directly to their business addresses. (Dkt. No. 2). At the Rule 16(b) conference on May 28, 2015, at which no one appeared for the State defendants, Judge Schroeder explained to Woodward that she had not served those defendants properly, and he referred her to the Pro Se Assistance Program for guidance. (Dkt. No. 8). An attorney with the Pro Se Assistance Program advised Woodward to hire a professional process server to serve the State defendants via delivery to the New York State Attorney General. (Dkt. No. 48 at 5). Woodward followed the attorney's advice, and five copies of the summons and complaint were served on the office of the Attorney General of the State of New York on June 16, 2015. (Dkt. No. 20). They were received by the Legal Records Supervisor, William Collins, who has affirmed that he takes whatever papers are delivered to the office but is not authorized to accept service on behalf of the New York State Police or its employees. (Dkt. No. 35-2 at 1). The local assistant attorney generals handling the defense of this case were not informed of this lawsuit until July 23, 2015, 122 days after the complaint was filed. (Dkt. No. 30-1 at 2).

*2 On August 11, 2015, the State defendants filed the pending motion to dismiss for lack of jurisdiction, alleging lack of personal jurisdiction because they had never properly been served and lack of subject matter jurisdiction over the New York State Police and the state police officers in their official capacities. (Dkt. No. 35). While the State defendants' motion has been pending, discovery has been progressing between Woodward and the **Chautauqua County** defendants.

DISCUSSION

Subject Matter Jurisdiction

Neither a state agency nor a state officer acting in his official capacity is subject to suit under 42 U.S.C. § 1983, § 1985, and § 1986. *See Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir. 1999) (dismissing claims under § 1983, § 1985, and § 1986 against a state agency and various defendants in their official capacities). Sections 1983, 1985, and 1986 provide causes of action against “persons” who have interfered with an individual's civil rights. The Supreme Court has held that “neither a State nor its officials acting in their official capacities are “persons” under § 1983.” *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). The Court reasoned that the word “person” in common usage does not include states and should not be construed to include them, especially in a statute that would “subject[] the States to liability to which they had not been subject before.” *Id.* at 64. Suits against state agencies and state officials in their official capacities are “no different from a suit against the State itself” and are barred when the state is not subject to suit. *Id.* at 71. The Supreme Court's logic extends to sections 1985 and 1986, which similarly refer only to wrongs committed by “persons” and not by states. *See* 42 U.S.C. §§ 1985, 1986.

The line of cases Woodward cites in her brief involving Congress's ability to condition receipt of federal funds on the state waiving sovereign immunity do not apply in this action. “A State's consent to suit must be ‘unequivocally expressed’ in the text of the relevant statute” and cannot be implied. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). Sections 1983, 1985, and 1986 do not mention sovereign immunity, and waiver should not be implied. *See Will*, 491 U.S. at 65. Nor does it matter that the plaintiff seeks declaratory and injunctive relief as well as damages for the alleged constitutional violations, since sections 1983, 1985, and 1986, the statutes creating causes of action for enforcement of constitutional rights, simply cannot be used against state agencies or state officials.

The state law claims for trespass and trespass on the case are also barred as to the State Police and the officers acting in their official capacity. “[A] claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment... this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984).

State officials can be sued in their individual capacity and personally held liable for damages for actions taken while they acted as officers of the state. *Hafer v. Melo*, 502 U.S. 21, 24 (1991). Ms. Woodward's claims against the state police officers in their individual capacities therefore would survive.

Personal Jurisdiction

In order to obtain personal jurisdiction over a defendant, the defendant must be properly served with process. *Licci v. Lebanese Canadian Bank*, 673 F.3d 50, 59 (2d Cir. 2012). The case may be dismissed against a defendant who was not properly served within 120 days¹ after the complaint was filed. Fed. R. Civ. P. 4(m). In a motion to dismiss for insufficient service of process under Federal Rule of Civil Procedure 12(b)(5), the plaintiff bears the burden of showing that service was proper. *U.S. v. Jost*, 9 F.Supp.3d 303, 306 (W.D.N.Y. 2014). The filed affidavits of service are prima facie evidence of the method of service. *See id.*

*3 According to the affidavits of service in this case, on March 24, 2015, a copy of the summons and complaint was mailed to D'Amico at 1220 Washington Ave, Building 22, Albany NY 12226. (Dkt. No. 2). Copies were mailed to Cresanti, Raichel, and Destro at 3081 N. Main St. Ext., Jamestown NY 14701. (Dkt. No. 2). On June 16, 2015, copies of the summons and complaint for each of the State defendants were delivered to William Collins, the Legal Records Supervisor at the Attorney General's Office in Albany. (Dkt. No. 20). No other attempts at service are noted in the affidavits.

Based on the assertions in the affidavits of service, service upon the State defendants was not proper. Service upon D'Amico, Cresanti, Destro, and Raichel should have been performed in accordance with Federal Rule of Civil Procedure 4(e), the rule for personal service on an individual, which does not permit service by mail to the defendant's place of business or service on the Attorney General.

Woodward does not dispute that service was improper but has moved for an extension of time to properly serve the State defendants. When a defendant has not been properly served with process, the Court must extend the time for service if the plaintiff showed good cause for the failure and may extend the time even if the plaintiff did not show good cause. *See* Fed. R. Civ. P. 4(m). Woodward has not shown good cause: "Ignorance of the law, even in the context of *pro se* litigants, does not constitute good cause." *Charles v. New York City*

Policy Dep't, No. 96-9757, 1999 WL 717300, at *6 (S.D.N.Y. 1999). Nevertheless, even where there was no good cause, the Court may exercise its discretion and extend the plaintiff's time to serve process, considering the following factors: "(1) whether the applicable statute of limitations would bar the refiled action; (2) whether the defendant had actual notice of the claims asserted in the complaint; (3) whether the defendant had attempted to conceal the defect in service; and (4) whether the defendant would be prejudiced by the granting of plaintiff's request for relief from the provision." *Beauvoir v. U.S. Secret Service*, 234 F.R.D. 55, 58 (E.D.N.Y. 2006) (internal citations omitted). These factors weigh in favor of extending the time for Woodward to serve the State defendants.

The deadline for 42 U.S.C. § 1983 actions in New York State is three years, *Owens v. Okure*, 488 U.S. 235, 250 (1989), so the statute of limitations has not run. Although dismissal and re-filing of the action is possible, doing so would cause unnecessary confusion and delay, since the co-defendants have already appeared in this action.

The State defendants have been on notice of this action since March 24, 2015, when the summons and complaints were mailed to their business addresses. The summons and complaints were not returned to the plaintiff and were presumably received. (Dkt. No. 48 at 6). Nothing suggests that the defendants attempted to conceal the defect in service, but Woodward was not notified of the defect until the Attorney General's office filed papers on July 23, 2015, two days after the deadline for service of process had passed.

Finally, there is no indication in the record that the State defendants would be prejudiced in any way by granting the plaintiff an extension of time to serve process. Counsel for the State defendants became aware of this lawsuit on July 23, 2015, only two days after the period for service expired. (Dkt. No. 30-1).

Under the circumstances, the plaintiff is granted thirty (30) days from service of this Report, Recommendation and Order to correctly serve defendants D'Amico, Cresanti, Destro, and Raichel via one of the following methods:

- *4 a. Delivering a copy of the summons and complaint personally to each defendant. Fed. R. Civ. P. 4(e)(2)(A); or
- b. Leaving a copy of the summons and complaint at each defendant's home with someone of suitable age and

discretion who resides there. Fed. R. Civ. P. 4(e)(2)(B);
or

- c. Delivering the summons and complaint to a person of suitable age and discretion at the defendant's actual place of business AND mailing the summons either to the defendant's last known residence or to the defendant's actual place of business with the words "personal and confidential" on the outside of the envelope. The outside of the envelope should not indicate that the communication concerns an action against the person. The delivery and mailing must be done within twenty days of each other. Fed. R. Civ. Pro. 4(e)(1); CPLR § 308(2).

If the plaintiff has not properly served D'Amico, Cresanti, Destro, and Raichel thirty (30) days after service of this Report, Recommendation and Order, dismissal of the action against those defendants is recommended.

CONCLUSION

For the foregoing reasons, it is recommended that the Court issue an order: 1) dismissing the complaint in its entirety against the New York State Police for lack of jurisdiction; and 2) dismissing all claims against defendants D'Amico, Cresanti, Destro, and Raichel in their official capacity. Plaintiff's motion for an extension of time to serve process is granted to the extent that plaintiff must complete service of process on the defendants D'Amico, Cresanti, Destro, and Raichel within thirty (30) days of entry of this order. It is recommended that the action be dismissed as against any defendant who has not been properly served thirty (30) days after entry of this Report, Recommendation and Order.

A status conference is scheduled for **August 29, 2016 at 10:15 a.m.**

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby ORDERED that this Report, Recommendation and Order be filed with the Clerk of Court.

Unless otherwise ordered by Judge Arcara, any objections to this Report, Recommendation and Order must be filed with the Clerk of Court within fourteen days of service of this Report, Recommendation and Order in accordance with the

above statute, Rules 72(b), 6(a), and 6(d) of the Federal Rules of Civil Procedure, and Local Rule of Civil Procedure 72. Any requests for an extension of this deadline must be made to Judge Arcara.

Failure to file objections, or to request an extension of time to file objections, within fourteen days of service of this Report, Recommendation, and Order WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. See *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15 (2d Cir. 1989).

The District Court will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the Magistrate Judge in the first instance. See *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988).

Pursuant to Local Rule of Civil Procedure 72(b), written objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection, and shall be supported by legal authority." ***Failure to comply with these provisions may result in the District Court's refusal to consider the objection.***

*5 Finally, pursuant to Rule 73(b)(2), the parties are reminded that the Magistrate Judge is available to conduct all proceedings in this action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States Court of Appeals like any other judgment of this Court. The Magistrate Judge may exercise this authority only if all parties voluntarily consent. You may consent to have the case referred to a Magistrate Judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with the case.

SO ORDERED.

DATED: June 30, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4491712

Footnotes

- 1 At the time Woodward's complaint was filed, the period was 120 days. Effective December 1, 2015, the time limit for service of process has been shortened to 90 days.

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Exhibit T

Tota v. Bentley et al 2008 WL 3540375

2008 WL 3540375

Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Anthony Samuel **TOTA**, Plaintiff,

v.

David W. **BENTLEY**, et al., Defendants.

No. 06CV514S.

I

Aug. 12, 2008.

Attorneys and Law Firms

Anthony Samuel **Tota**, Jamestown, NY, pro se.

Daryl P. Brautigam, Fredonia, NY, for Defendants.

Order

HUGH B. SCOTT, United States Magistrate Judge.

*1 Before the Court are the motion of defendants¹ for a protective Order (Docket No. 119²) and plaintiff's motion for an additional period of discovery (Docket No. 128³). Responses to defendants' motion initially were due on or before July 7, 2008, and any reply was due on or before July 14, 2008 (Docket No. 120). At plaintiff's motion for additional time for briefing (Docket No. 124), responses were extended to be due by July 14, 2008, and any reply due by July 21, 2008 (Docket No. 125).

Responses to plaintiff's motion for additional period of discovery were due by July 21, 2008, and both motions were deemed submitted (without oral argument) on July 21, 2008 (Docket Nos. 129, 125).

BACKGROUND

Familiarity with the facts from prior Orders in this case (*see, e.g.*, Docket Nos. 12, 37, 64, 92, 109) is presumed.

Plaintiff filed his Complaint on July 31, 2006, alleging that, on August 4, 2003, special weapons and tactics teams

from the Jamestown Police Department and Chautauqua County Sheriff's Department used excessive force upon him (*see* Docket No. 1, Compl.). The original Complaint named as defendants the City of Jamestown and Chautauqua County, Jamestown police officer Franzen, Chautauqua County Sheriff's deputy David **Bentley**, John Doe Jamestown Police Department Special Weapons and Tactics officers, and John Doe Chautauqua County Sheriff's Department Special Weapons and Tactics ("SWAT") officers (*id.*). Plaintiff alleges that, during the entry of the SWAT teams, he was "permanently" injured with respect to his back, right eye, and right shoulder blade (*id.* attachment, Statement of Claim ¶¶ 1, 4-6, 13, 14). Chautauqua County, **Bentley**, and county SWAT John Doe officers answered the initial Complaint on September 27, 2006 (Docket No. 3⁴).

After seeking and obtaining discovery to identify the John Doe defendants (Docket Nos. 9, 28), plaintiff moved for leave to amend the Complaint to name them (Docket No. 78), which was granted (Docket No. 92, Order of Nov. 19, 2007). Plaintiff was given fifteen days from entry of the Order granting leave to file and serve the Amended Complaint (*id.*). Plaintiff filed his Amended Complaint on December 3, 2007 (Docket No. 94). Plaintiff served the last of the new defendants by March 2008, when defense counsel for **Bentley** and Chautauqua County agreed to accept service (*see* Docket No. 110, minute entry, Mar. 4, 2008; text entry, Feb. 14, 2008, summons issued to other defendants).

In the Amended Complaint, plaintiff now asserts claims against **Bentley** and eight other named Sheriff's Department officers and apparently dropping claims against Chautauqua County, the City of Jamestown, and employees of the Jamestown Police Department (including Franzen and the unknown John Doe city officers). According to his Amended Complaint (Docket No. 94), plaintiff seeks compensatory and punitive damages for his physical injuries as the result of the alleged excessive use of force by county SWAT officer **Bentley** and the other named Chautauqua County Sheriff's Department officers (*id.* at 5, 1, 6-7). **Bentley** and the other sheriff's department employee defendants answered the Amended Complaint on March 17, 2008 (Docket No. 114).

*2 The current Amended Scheduling Order (Docket No. 65, Order of Sept. 10, 2007; *see* Docket No. 101, Order of Jan. 16, 2008) had discovery conclude by January 22, 2008, dispositive motions were due by April 18, 2008, and pretrial statements by June 27, 2008. The Amended Scheduling Order indicated that no further extensions of that schedule would

be granted (Docket No. 65, Order at 22; *see* Docket No. 119, Defs. Atty. Aff. ¶ 3, Ex. A). Having not moved for summary judgment, defendants filed their pretrial statement on June 26, 2008 (Docket No. 122), as did plaintiff (Docket No. 123). Final pretrial conference before Judge William Skretny was scheduled for July 16, 2008, and the trial of this action is scheduled to commence on September 16, 2008 (Docket No. 101), but, given these pending motions, Judge Skretny adjourned the final pretrial conference and will reset it in a separate Order (Docket No. 126).

Defense Motion for a Protective Order

Plaintiff has sought discovery from the new defendants (that is, the individual defendants save Bentley) after the close of discovery (Docket No. 121, discovery demands and notices dated May 27, 2008 at pages 24 of 64 to 64 of 64, eight interrogatories) without moving for extension of the discovery deadline. After seeking to have identification questions answered, plaintiff sought answers from these new defendants individually as to when, where and how they entered his house and whether officers from other agencies also entered. According to plaintiff, these are the same Interrogatories posed to defendant Bentley (Docket No. 128, Pl. Decl. ¶ 30)⁵.

Defendants move for a protective Order against being compelled to answer this latest discovery (Docket No. 119), arguing that plaintiff's discovery sought against them is untimely under the Scheduling Order. They complain that they received plaintiff's Interrogatories on May 28, 2008. Defense counsel then called plaintiff asking him to withdraw these demands as untimely, indicating that defendants would not answer them. (Docket No. 119, Defs. Atty. Aff. ¶¶ 4-6, Ex. B.)

Plaintiff's Motion to Grant a Period of Discovery

Plaintiff complains that the defendants named in the Amended Complaint answered after the discovery deadline expired hence preventing him from conducting disclosure and discovery from them (Docket No. 128, Pl. Dec. ¶¶ 14, 16-17, 13). He notes that the Court recognized in the last Amended Scheduling Order (Docket No. 65, Order of Sept. 10, 2007, at 21; *see also* Docket No. 64, Order of Sept. 10, 2007, at 21) that, once plaintiff amended the Complaint and the new defendants appeared, "further discovery may be required from these putative new defendants and by these parties," (Docket No. 128, Pl. Decl. ¶ 18, Ex. A, at 21). He argues that he is entitled to obtain discovery from the new

defendants (Docket No. 128, Pl. Decl. ¶ 19). The discovery deadline prejudiced plaintiff because it predates the formal appearances of the new defendants (*id.* ¶ 20). He contrasts the absence of prejudice to defendants if discovery is reopened and extended for a period (*see id.* ¶ 30).

*3 Plaintiff argues that defendant Bentley's answers to his Interrogatories were contradicted by Bentley's deposition testimony, leading plaintiff to want to pose his proposed Interrogatories to the new defendants to establish their version of the events (*id.* ¶¶ 24-28).

Plaintiff also seeks medical records from the authorizations he executed for defendants (*id.* ¶ 24). He describes his attempts to obtain his own medical records (or even treatment for various injuries since the August 2003 incident) (*id.* ¶¶ 45, 48-52, 56-76). All this, plaintiff concludes, shows his good cause for reopening his discovery (*id.* at page 21 of 22). He wants three months to complete the limited discovery of answers to his proposed Interrogatories and production of his medical records (*id.* at page 22 of 22).

DISCUSSION

I. Standard

At issue here is the belated discovery served by a *pro se* plaintiff. Modification of a Scheduling Order is done only upon a showing of good cause. Fed.R.Civ.P. 16(b); *see* 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1522. 1, at 230-31 (Civil 2d ed.1990). "In the absence of some showing of why an extension is warranted, the scheduling order shall control." *Id.* at 231. This Court has broad discretion in preserving the integrity of its Scheduling Orders, *see Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir.1996), including the discretion to extend its deadlines when good cause is shown, *see Carnite v. Granada Hosp. Group*, 175 F.R.D. 439, 446 (W.D.N.Y.1997) (Foschio, Mag. J.) (Report & Recommendation), *adopted*, 175 F.R.D. at 441 (Arcara, J.). This Court, in *Carnite*, addressed plaintiff's failure to move to amend the Court's scheduling order and his failure to raise "even [a] facially persuasive reason" to grant relief. *Carnite*, *supra*, 175 F.R.D. at 448 (Foschio, Mag. J.).

Under Federal Rule 26(c), this Court may issue a protective Order to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense" by not allowing the opponent to use a proposed disclosure or discovery

device, or conditioning the time and manner of that discovery. Fed.R.Civ.P. 26(c)(1), (2)-(3); *see id.* R. 26(c)(4) (limit the scope or the matters inquired into). A party may not be compelled to respond to discovery requests after the discovery cut off, *see Williams v. Little Rock Mun. Water Works*, 155 F.R.D. 188, 189 (E.D.Ark.1993), *aff'd*, 21 F.3d 218 (8th Cir.1994); *Smith v. Detroit Edison Co.*, 793 F.Supp. 151, 153-54 (E.D.Mich.1992) (plaintiff held not entitled to discovery after discovery deadline in order to respond to summary judgment motion); *but cf. La Chemise Lacoste v. Alligator Co.*, 60 F.R.D. 164, 170 (D.Del.1973) (where trial schedule was to be amended due to other motions anyway, no prejudice to conducting discovery after initial cut off date).

The pleading of a *pro se* plaintiff are to be liberally construed, *see Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam). Thus, the careful adherence to the rules (cf. W.D.N.Y.Loc.Civ. R. 5.2(e)) has to take into account the fact that plaintiff is not an attorney.

II. Application

A. Plaintiff's Discovery and Defendants' Motion for a Protective Order

*4 Ordinarily, where a party has let a Scheduling Order deadline pass without seeking its extension to continue or complete a procedural step, absent good cause, the Court would not grant leave to reopen that process or extend the schedule to allow that party to complete that step. But here, two extenuating circumstances exist that justify a contrary result. First, plaintiff is proceeding *pro se* and, second, the discovery he seeks is from defendants who formally appeared in the case *after* the close of discovery. A represented party may have sought to amend the Scheduling Order to allow sufficient time to serve the new parties, *cf.* Fed.R.Civ.P. 4(m) (120 days from filing for service of Complaint) (*cf.* Docket No. 128, Pl. Decl. ¶¶ 10, 11), and to allow those parties to answer or otherwise formally appear and eventually respond to discovery demands. Since plaintiff has been proceeding *pro se*, he may not have grasped this procedural nicety.

Although plaintiff here was ordered to file and serve his Amended Complaint within fifteen days of entry of the Order granting him leave to file it (Docket No. 92, Order of Nov. 19, 2007), he timely filed the amended pleading on December 3, 2007 (Docket No. 94) but indicated in a conference on March 4, 2008, that he was still in the process of serving the new defendants and defense counsel for Chautauqua County agreed to accept service for the last of the new parties

(Docket No. 110; *see* Docket No. 128, Pl. Decl. ¶ 11). These defendants answered on March 17, 2008 (Docket No. 114; *see* Docket No. 128, Pl. Decl. ¶ 12).

Defendants' motion for a protective Order presumes that plaintiff had plenty of time under the amended Scheduling Order to conduct discovery, but that discovery was conducted upon either parties no longer in the case (such as Jamestown and Chautauqua County) or upon defendant **Bentley**, the only remaining individual defendant named in the initial Complaint, or from John Doe defendants (through the municipal defendants still in the case) that were not identified until months later and not appearing in this action until March 2008. Absent an Order for what would have been essentially pre-action discovery from the new defendants before they appeared, plaintiff had no means of conducting discovery (or obtaining initial disclosure) from the new defendants until they appeared. Plaintiff's efforts at discovery regarding the former John Doe defendants consisted of trying to identify them (Docket Nos. 9, 28) and not detailed discovery as to their role available once they became identified and sued.

Given the possible inconsistency in **Bentley's** answers to plaintiff's Interrogatories and his deposition testimony (*see* Docket No. 128, Pl. Decl. ¶¶ 24-29), the fact that he answered those discovery questions does not justify precluding plaintiff from learning what the new defendants' answers to those questions might be.

Plaintiff thus has shown good cause-from the timing of the service of the Amended Complaint as compared with the Amended Scheduling Order-to warrant amendment of the Scheduling Order deadline *one last time*. Defendants are partially correct that discovery when the ostensible deadline has long passed should not be prolonged. Therefore, defendants' motion for a protective Order (Docket No. 119) is **denied in part**, that is the absolute ban on discovery defendants sought is **denied**, and **granted in part**, that is the discovery now allowed to plaintiff shall be limited, *see* Fed.R.Civ.P. 26(c)(1)(B) (protective order may specify terms, including time and place, for discovery), (D) (protective order may limit scope of discovery to certain matters), *see also id.* R. 26(c)(1)(C) (protective order may prescribe a discovery method other than the one selected by the party seeking discovery). Plaintiff's discovery is limited in scope and time as stated below.

*5 Plaintiff is restricted to the proposed Interrogatories directed to the new defendants (Docket No. 121, demands

at pages 24 of 64 to 64 of 64). Instead of the three months plaintiff seeks to complete this discovery (Docket No. 128, Pl. Decl. at page 22 of 22), defendants have until **September 22, 2008**, to respond and all discovery shall conclude on that date. This should be sufficient time for the new defendants to answer plaintiff's interrogatories.

B. Plaintiff's Medical Records

Plaintiff also seeks to reopen discovery to obtain his medical records. He executed authorizations to defense counsel to release those records to counsel.

Notwithstanding whatever arrangements (not disclosed to the Court) defense counsel made with plaintiff regarding provision of plaintiff's medical records that defendants obtained and absent a document production request for those records (assuming defendants have copies of these records), defendants are not obliged to produce plaintiff's medical records for him. Despite the statement in a prior Order (Docket No. 109, at 6-7) that "[f]ully executed medical authorizations issued to defense counsel may also assist in producing plaintiff's medical records, since defense counsel can obtain the materials and may have a better ability to obtain them from plaintiff's providers" (*cf.* Docket No. 128, Pl. Decl. ¶ 40, Ex. W), defendants were not ordered to assist plaintiff in producing his own medical records. "A party should seek medical records directly from the health care provider," 7-34 *Moore's Federal Practice-Civil* § 34.14 (2008); it is not defendants' responsibility to help plaintiff prove his claims or gather his evidence.

A represented party would obtain the client's medical records to make the client's case and rarely depend on authorizations issued to the opponent to discover the produced records from the opponent. As a *pro se* litigant, plaintiff may not understand that he is obligated to obtain evidence under his control, such as obtaining his own medical records.

Therefore, plaintiff has until the **September 22, 2008**, discovery deadline in order to obtain his medical records (including copies of such records that defendants may have and such other recourse plaintiff may have with his non-party medical providers to obtain those records).

III. Second Amended Scheduling Order

As a result, the previous amended Scheduling Order (Docket Nos. 65, 101) is hereby modified as follows (unless otherwise changed below, the remaining dates in the previous Scheduling Order continue in effect): all remaining discovery ordered herein shall conclude on **September 22, 2008**; dispositive motions, if any, shall be filed no later than **December 2, 2008**; in the event no dispositive motions are filed, pretrial statements (or supplements to statements already filed, Docket Nos. 122, 123) in strict compliance with Local Civil Rule 16.1(d) shall be *filed and served* no later than **January 9, 2009**; a *final pretrial conference* pursuant to Fed.R.Civ.P. 16(d) and Local Civil Rule 16.1(f) and Jury Trial dates and times will be separately ordered by Judge Skretny.

CONCLUSION

*6 For the reasons stated above, defendants' motion for a protective Order against untimely discovery (Docket No. 119) is **denied in part, granted in part** as discussed above. Plaintiff's motion to reopen discovery (Docket No. 128) is **granted in part, denied in part**, again as discussed above; plaintiff shall complete the discovery described in this Order by **September 22, 2008**. The Scheduling Order is **amended** as discussed in part III of this Order.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2008 WL 3540375

Footnotes

- 1 The remaining defendants in this action, and movants herein, are David W. **Bentley**, Steven Anderson, Bryan Burmaster, John Desnerck, Jeffrey Hover, Stephen Madonia, Jeffery Nelson, James Rensel, and Dale Van Vlack. All are officers in the Chautauqua County Sheriff's Department.
- 2 In support of this motion, defendants filed their attorney's affidavit with exhibits, Docket No. 119. Defendants did not submit a reply.

In opposition, plaintiff filed his motion for discovery, Docket No. 128, with exhibits.

- 3 Defendants did not file a separate response in opposition to this motion.
- 4 As did the City of Jamestown, Docket No. 8.
- 5 Plaintiff also sought to serve subpoenas upon various non-party witnesses, Docket Nos. 111, 115, 121.

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Exhibit U

Pierce v. Chautauqua County Sheriff's Dep't.
2007 WL 2902954

2007 WL 2902954

Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Jefferson L. **PIERCE**, Individually and
as Legal Parent and Guardian of J.P.
and M.P., Minors, and Diane J. **Pierce**,
Individually and as Legal Parent and
Guardian of J.P. and M.P., Minors, Plaintiffs,
v.
CHAUTAUQUA COUNTY, New York;
Chautauqua County Sheriff's Department;
Joseph A. Gerace, Individually and as
Chautauqua County Sheriff; **Chautauqua**
County Sheriff's Deputies, Chris Ottoway and
Jason Beichner; Intended to be the Individual
Officers involved in the harassment, assault,
and/or detention of Plaintiff, Jefferson L.
Pierce, herein "CCSD John Doe" and/or
"CCSD Jane Doe," the names "CCSD John/
Jane Doe," being fictitious, and intended to
be any additional individual officers involved
in the harassment assault and/or detention of
Plaintiffs herein; Kirk Maurer, Individually
and as Commissioner of **Chautauqua**
County Department of Social Services;
Chautauqua County Department Of Social
Services; and "DSS John Doe," and/or
"DSS Jane Doe," the names "DSS John/
Jane Doe" being fictitious, intended to be the
Chautauqua County Department of Social
Services Employees or Agents involved in the
harassment of the Plaintiffs herein, Defendants.

No. 06-CV-644C(F).

Sept. 28, 2007.

Attorneys and Law Firms

Charles Edward Fagan, Jamestown, NY, for Plaintiffs.

Diane F. Bosse, Thomas W. Bender, Volgenau & Bosse, LLP,
Buffalo, NY, for Defendants.

Opinion

JOHN T. CURTIN, United States District Judge.

*1 In this action, plaintiffs seek damages against the **County** of **Chautauqua**; the **Chautauqua County Sheriff's** Department ("Sheriff's Department"); Sheriff Joseph A. Gerace ("Sheriff Gerace"), individually and in his official capacity; Sheriff's Deputies Chris Ottoway ("Ottoway"), Jason Beichner ("Beichner"), and any other deputies involved; Commissioner of **Chautauqua County** Department of Social Services Kirk Maurer ("Commissioner Maurer") individually and in his official capacity; **Chautauqua County** Department of Social Services ("DSS"); and any of its agents who may have been involved. Plaintiffs' causes of action are based on theories of liability for several common law torts, as well as violations of plaintiffs' civil rights under 42 U.S.C. § 1983. The defendants have filed a motion to dismiss plaintiffs' claims pursuant to Fed.R.Civ.P. 12(b)(6) (Item 23). For the reasons that follow, defendants' motion is granted in part and denied in part.

BACKGROUND and FACTS

According to the amended complaint, on November 25, 2005 at approximately 7:50 p.m., **Chautauqua County Sheriff's** Deputies Ottoway and Beichner arrived at the plaintiffs' house and accused plaintiff Jefferson L. **Pierce** of discharging a firearm after dark (Item 22, ¶ 19). The deputies also stated that plaintiff Jefferson **Pierce** had a felony record and was therefore unlawfully in possession of a firearm (*id.*). Plaintiffs denied that a firearm had been discharged, and Mr. **Pierce** told the deputies that he was not a convicted felon (*id.*, ¶ 20). Nonetheless, the deputies entered the residence without a warrant and without consent, knocked over the plaintiff's two-year-old daughter, and confiscated several firearms, including a World War I-era rifle which plaintiff Diane J. **Pierce** was holding (*id.*, ¶¶ 21-22). Plaintiffs also allege that the deputies threatened the plaintiffs that **Chautauqua County** Child Protection Services agents, who were parked in plaintiffs' driveway, would remove plaintiffs' children if plaintiffs did not comply with the search of their residence (*id.*, ¶¶ 19, 24).

Plaintiffs' complaint further alleges that the deputies used excessive force when arresting Mr. **Pierce** (Item 22, ¶¶ 36-40). The complaint alleges that the deputies “ ‘grabbed’ Mr. **Pierce** by the arms, ‘wrenched’ him around, and forcibly removed him from his home ...,” causing pain and exacerbating his preexisting injuries (*id.*, ¶¶ 25, 37, 38). Mr. **Pierce** was taken to the **Chautauqua County** jail, where he was detained for approximately one hour until it was discovered that a mistake had been made, and that he was not a convicted felon (*id.*, ¶ 26). Mr. **Pierce** was then released (*id.*).

Plaintiffs initiated this action by filing a complaint on September 26, 2006 (Item 1). After the defendants filed a motion to dismiss, plaintiffs filed an amended complaint on December 4, 2006 (Item 18). Plaintiffs claim, among other things, that the actions of the **Sheriff's** Deputies violated their civil rights according to 42 U.S.C. § 1983. Specifically, plaintiffs claim that **Chautauqua County** and/or **Sheriff** Joseph A. Gerace are liable for plaintiffs' injuries because **Chautauqua County** “lacked adequate policy in recruiting, managing and training officers in police actions” (Item 22, ¶ 32). Plaintiffs also claim that **Chautauqua County** and **Sheriff** Gerace have a municipal policy which allows officers to act on complaints without sufficient investigation (*id.*, ¶ 33).

*2 On January 5, 2007, the defendants filed a motion to dismiss plaintiffs' amended complaint (Item 23). Defendants argue that plaintiffs have failed to allege any actions by the **Chautauqua County** DSS or Commissioner Maurer that constitute a violation of section 1983, failed to allege any personal involvement by **Sheriff** Gerace, failed to adequately allege any municipal custom or policy necessary to support a claim against the municipalities or individual defendants sued in their official capacities, failed to state a claim against the **Sheriff's** Department and DSS as administrative arms of **Chautauqua County**, and have failed to allege a claim against the individual deputies (Item 24, ¶¶ 14-19).

DISCUSSION

I. Motion to Dismiss

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “ ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’ ” *Bell*

Atlantic Corp. v. Twombly, 550 U.S. ----, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Under Rule 12(b)(6), a plaintiff's complaint will be dismissed if it fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, 127 S.Ct. at 1965 (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *See Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

In ruling on a motion to dismiss, the court is “not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient.” *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir.1985) (citing *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d Cir.1984)). Therefore, after interpreting the complaint in favor of the plaintiff, if it is determined that the plaintiff has failed to allege a set of facts which, if proven to be true, would entitle him to relief, the complaint will be dismissed. *See Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d. Cir.1993), *cert. denied*, 513 U.S. 1121, 115 S.Ct. 925, 130 L.Ed.2d 804 (1994); *Sworn v. Western New York Children's Psychiatric Ctr.*, 269 F.Supp.2d 152, 155 (W.D.N.Y.2003) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

II. Claims Against the **Sheriff's** Department and DSS

*3 The defendants seek dismissal of the complaint against the **Chautauqua County Sheriff's** Department and the **Chautauqua County** DSS on the ground that both governmental departments are administrative units of the **County of Chautauqua** and are not separate legal entities subject to suit.

It is well settled that, under New York law, “departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued.” *Caidor v. M & T Bank*, 2006 WL 839547, at *2 (N.D.N.Y. March

27, 2006) (quoting *Hall v. City of White Plains*, 185 F.Supp.2d 293, 303 (S.D.N.Y.2002)). Accordingly, since the **Chautauqua County Sheriff's** Department and DSS are merely administrative arms of **Chautauqua County**, the claims against them must be dismissed. See *Willard v. Town of Hamburg*, 1996 WL 607100, at *1 (W.D.N.Y. Sept.30, 1996) (dismissing the claims against the Police Department and the Town Board because neither “exist separate and apart from the Town and [they] do not have their own legal identities”).

III. Claims Against Commissioner Maurer and Sheriff Gerace

The plaintiffs have sued both Commissioner Maurer and **Sheriff** Gerace in their official capacities as well as their individual capacities. The defendants, however, argue that the complaint alleges no facts which indicate personal involvement by Commissioner Maurer or **Sheriff** Gerace in the alleged incident, and that plaintiffs have failed to allege any actions by these defendants which deprived plaintiffs of their constitutional rights.

In order for a plaintiff to sustain a section 1983 claim against a supervisory official in his individual capacity, the plaintiff must allege and demonstrate that the official was personally involved in the alleged constitutional violation. See *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003) (citing *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003), cert. denied, 543 U.S. 1093, 125 S.Ct. 971, 160 L.Ed.2d 905 (2005)).

The personal involvement of a supervisory defendant may be shown by the evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir.1995) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)).

In this case, the plaintiffs' amended complaint does not allege any personal involvement by Commissioner Maurer in the alleged violation of plaintiffs' constitutional rights. Moreover,

Commissioner Maurer is never specifically mentioned in the body of the amended complaint. Rather, plaintiffs allege that DSS employees (Child Protection Services agents) were parked in an unfamiliar van in their driveway (Item 22, ¶ 24). Furthermore, plaintiffs never allege any conduct by Commissioner Maurer's employees that would constitute a violation of plaintiffs' constitutional rights. It is merely alleged that DSS employees sat inside of a van parked in plaintiffs' driveway during the course of an official investigation. This conduct does not constitute the violation of a constitutional right. Plaintiffs also fail to allege that Commissioner Maurer has created a custom or policy which violates constitutionally protected rights, that Commissioner Maurer was grossly negligent in supervising his subordinates, or that he exhibited deliberate indifference to the constitutional rights of others. Since plaintiffs have not alleged any conduct by Commissioner Maurer which would establish personal involvement of a supervisory official under section 1983, the claims against Commissioner Maurer must be dismissed. See *Dove v. Fordham Univ.*, 56 F.Supp.2d 330, 335 (S.D.N.Y.1999) (“Where the complaint names a defendant in the caption but contains no allegations indicating how the defendant violated the law or injured the plaintiff, a motion to dismiss the complaint in regard to that defendant should be granted”), *aff'd*, 210 F.3d 354 (2d Cir.2000) (quoting *Morabito v. Blum*, 528 F.Supp. 252, 262 (S.D.N.Y.1981), *superseded on other grounds as recognized in Hines v. Sullivan*, 806 F.Supp. 413 (W.D.N.Y.1992)).

*4 Similarly, in their amended complaint, plaintiffs do not allege any personal involvement by **Sheriff** Gerace which would create liability under section 1983. There are no allegations that **Sheriff** Gerace directly participated in the arrest and detention of Mr. **Pierce**, nor are there allegations that **Sheriff** Gerace, after being informed of the wrongful arrest and detention, failed to provide a remedy. Moreover, plaintiffs' allegations of **Sheriff** Gerace's involvement are conclusory and do not state a claim upon which relief can be granted. Plaintiffs, in their claim of false imprisonment, state that **Sheriff** Gerace and/or **Chautauqua County** “lacked adequate policy in recruiting, managing and training officers in police actions and allowed the officers to act with grave indifference to human safety and life.” (Item 22, ¶ 32). The plaintiffs rely solely on the alleged constitutional violations surrounding Mr. **Pierce's** arrest in order to support their claim of inadequate policy and training. Plaintiffs claim that Mr. **Pierce's** arrest was “unreasonable” and “exhibited depravity,” and that “these actions are standard operating procedure for the **Chautauqua County Sheriff's** Department.” *Id.* In

addition, plaintiffs also allege that Sheriff Gerace has created a policy which allows officers “to act on complaints with no background check, inquiry into the source of the complaint, or without proper investigation” *Id.*, ¶ 33. Again, plaintiffs rely solely on the events surrounding the arrest of Mr. Pierce to allege that this is the “standard operating procedure” of the Sheriff’s Department. Plaintiffs assert that “[u]pon information and belief, this policy is in existence because of the action and/or lack of action in controlling and/or lack of training of deputy Sheriffs by Sheriff Joseph A. Gerace.” *Id.*

These allegations are insufficient to survive a motion to dismiss. The plaintiffs have not alleged sufficient facts to support their claims that Sheriff Gerace created unconstitutional policies, and they have not alleged any facts which indicate that Sheriff Gerace had the requisite personal involvement in the alleged constitutional violation. Specifically, plaintiffs have not alleged factual evidence, outside of this isolated incident, which would create an inference of a custom or policy created by Sheriff Gerace. Furthermore, plaintiffs’ allegations are conclusory, and they do not allege a tangible connection between any actions of Sheriff Gerace and the injuries suffered by Mr. Pierce. *See Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir.1986) (dismissing claims against the County Commissioner of Corrections and the Warden because the claims were conclusory and they did not “allege a tangible connection between the acts of [the defendants] and the injuries suffered”). Rather, plaintiffs’ allegations are simply an attempt to hold Sheriff Gerace vicariously liable for the alleged constitutional violations of deputies Ottoway and Beichner which, under section 1983, is improper. *See Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003) (“[S]upervisor liability in a § 1983 action depends on a showing of some personal responsibility, and cannot rest on respondeat superior”) (quoting *Hernandez v. Keane*, 341 F.3d 137, 144 (2d Cir.2003), *cert. denied*, 543 U.S. 1093, 125 S.Ct. 971, 160 L.Ed.2d 905 (2005)). Since plaintiffs’ allegations are conclusory and do not contain sufficient factual support, the claims against Sheriff Gerace must be dismissed.

IV. Sheriff’s Deputies Ottoway and Beichner

*5 Plaintiffs have also alleged claims against Chautauqua County Sheriff’s Deputies Chris Ottoway and Jason Beichner. Defendants argue that plaintiffs have sued the deputies solely in their official capacities, and that such claims must be dismissed as they are equivalent to claims against the County. In the amended complaint, plaintiffs state that Ottoway and Beichner are “individual[s], who

harassed and assaulted Plaintiffs and /or unlawfully detained Plaintiff Jefferson L. Pierce” Item 22, ¶¶ 9, 10. In contrast, plaintiffs named Sheriff Gerace and Commissioner Maurer, individually and as County Sheriff and Commissioner of DSS, respectively. *Id.*, ¶¶ 8, 13. While plaintiffs have stated that defendants Ottoway and Beichner are Chautauqua County Sheriff’s Deputies, a plain reading of the complaint indicates that plaintiffs intended that Ottoway and Beichner be sued in their individual capacities. The court concludes that Deputies Ottoway and Beichner are named in their individual capacities in the amended complaint, and the section 1983 claims against them for (i) false arrest, (ii) false imprisonment and, (iii) excessive use of force will thus be examined for legal sufficiency.

A. False Arrest/Imprisonment

“The elements of false arrest/imprisonment under § 1983 are substantially the same as those under New York law.” *See Caidor v. M & T Bank*, 2006 WL 839547, at *4 (N.D.N.Y. March 27, 2006) (citing *Danielak v. City of New York*, 2005 WL 2347095, at *6 (E.D.N.Y.2005), *aff’d*, 209 Fed. Appx. (2d Cir.2006). In order for a plaintiff to state a claim for false arrest/imprisonment under New York law, a plaintiff must show that: (1) the defendant intended to confine him, (2) plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged or justified. *Id.* (quoting *Brewster v. Nassau County*, 349 F.Supp.2d 540, 551 (E.D.N.Y.2004)).

A confinement is privileged or justified if the arrest is made with probable cause. *Brewster v. Nassau County*, 349 F.Supp.2d at 551. Probable cause exists when, at the moment of the arrest, “ ‘the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [individual] had committed or was committing an offense.’ ” *Id.*, quoting *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)). The determination of whether probable cause exists can be made by the court as a matter of law, so long as there is “no dispute as to the pertinent events and the knowledge of the arresting officers.” *Id.* (citing *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir.1996)). Therefore, pursuant to Rule 12(b)(6), if the court determines that a plaintiff’s complaint sufficiently demonstrates that the arresting officers had probable cause, the claim for false arrest must be dismissed. *Id.* (citing *Daniels v. City of New York*, 2003 WL 22510379, at *2-4 (S.D.N.Y. Nov.5, 2003)).

*6 In this case, the complaint clearly shows that plaintiff: (1) was confined by Deputies Ottoway and Beichner, (2) was conscious of the confinement, and (3) did not consent to the confinement by the deputies (Item 22, ¶¶ 18-35). Therefore, plaintiff satisfies the first three elements, as set forth above, of the false arrest/imprisonment claim. Defendants' motion turns on the element of probable cause, which is usually a question of fact following discovery. *See Weyant v. Okst*, 101 F.3d at 852 ("The question of whether or not probable cause existed may be determinable as a matter of law if there is no dispute as to the pertinent events and the knowledge of the officers"); *Bullard v. City of New York*, 240 F.Supp.2d 292, 298 (S.D.N.Y.2003) ("In contrast, '[w]here the question of whether an arresting officer had probable cause is predominantly factual in nature ... the existence ... of probable cause is to be decided by the jury' ") (quoting *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir.1997), *cert. denied*, 522 U.S. 1115, 118 S.Ct. 1051, 140 L.Ed.2d 114 (1998)).

With regard to the fourth element, plaintiffs allege that the deputies lacked probable cause to arrest Mr. **Pierce**. Specifically, plaintiffs allege that the deputies "had no reasonable basis to detain Plaintiff, and his false arrest was without just cause or provocation." (Item 22, at ¶ 27.) The complaint alleges that Deputies Ottoway and Beichner acted without a search warrant and upon false information regarding gunshots on Mr. **Pierce's** property (*id.*, at ¶¶ 26, 42). It is difficult, however, to determine from the complaint exactly what information was available to the deputies at the time they responded to the complaint, and whether they had any reason to question the veracity of the report of a discharged firearm. This deficiency makes it impossible for the court to determine as a matter of law that the deputies acted with probable cause. Moreover, plaintiffs allege that " 'someone' had 'misread' " information regarding Mr. **Pierce's** criminal history and, as a result, Mr. **Pierce** was thought to be a convicted felon (*id.*, at ¶ 26). It is alleged that the deputies relied on this false information in responding to the complaint and in their arrest of Mr. **Pierce** (*id.*). The fact that Mr. **Pierce's** criminal history was "misread," and that he was released immediately upon the deputies' learning of the error, raises questions with regard to the existence of probable cause. For these reasons, this court denies defendants' motion to dismiss plaintiffs' false arrest/imprisonment claim.

B. Excessive Force

The plaintiffs also assert a cause of action against Deputies Ottoway and Beichner for the use of excessive force during

the course of the arrest of Mr. **Pierce**. A person's Fourth Amendment rights are violated, and a section 1983 claim arises, if excessive force is used during an arrest, an investigatory stop, or any other seizure of a free citizen. *See Cox v. County of Suffolk*, 780 F.Supp. 103, 109 (E.D.N.Y.1991) (citing *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). To analyze a claim of excessive force under the Fourth Amendment, the court must apply an objective standard. *Caidor v. M & T Bank*, 2006 WL 839547, at *6 (N.D.N.Y. March 27, 2006). The court's inquiry is whether " 'the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them.' " *Id.* (quoting *Cox*, 780 F.Supp. at 109). Furthermore, the injuries suffered by a plaintiff need not be permanent or severe in order to recover damages under section 1983 for the use of excessive force. *See Cox*, 780 F.Supp. at 109 (quoting *Robison v. Via*, 821 F.2d 913, 924 (2d Cir.1987)).

*7 Here, it is alleged that during the arrest the deputies " 'grabbed' [Mr.] **Pierce** by the arms, handcuffed him, pulled and 'wrenched him around' with great physical force, then dragged him over the lawn of [his] home and forced him into a sheriff patrol car ." (Item 22, ¶ 37.) It is further alleged that Mr. **Pierce** showed no resistance during the arrest, yet the deputies still used such excessive force (*id.*). Plaintiffs also allege that the deputies showed a disregard for Mr. **Pierce's** preexisting injuries, which have rendered him totally disabled (*id.*). It is alleged that the excessive force used by the officers has left Mr. **Pierce** physically damaged (*i.e.*, bruised, weak, sore, lame), and has exacerbated his preexisting injuries, causing him great pain, discomfort, and restrictions in his range of motion (*id.*, ¶¶ 38-39). Plaintiffs also allege that Mr. **Pierce** has suffered emotional pain which makes him "extremely nervous, humiliated and fearful because of [the deputies'] actions, and Plaintiff's feelings that he was unable to protect his wife and children from [the deputies]." (*Id.*, ¶ 39.).

The court finds that these allegations are sufficient, if proven, to show that the actions of the deputies may not have been "objectively reasonable." *See, e.g., Robison v. Via*, 821 F.2d at 924 (denying a summary dismissal when the plaintiff alleged that she had been " 'pushed' ... against the inside of the door of her car, 'yanked' ... out, thr[own] up against the fender, and [had her arm] 'twisted behind her back' "). Since the allegations by Mr. **Pierce** are similar in nature to the allegations in *Robison*, and allowing the plaintiffs the benefit of all favorable inferences, the defendants' motion to dismiss

plaintiffs' excessive force claim against Deputies Ottoway and Beichner is denied.

V. Municipal Custom or Policy

The plaintiffs have also named **Chautauqua County** as a defendant, arguing that the **County** has a municipal custom or policy which allows officers to respond to complaints in a manner which violates constitutionally protected rights. Furthermore, the plaintiffs argue that **Chautauqua County** has not properly trained its officers, and that this lack of training allows them to act in a manner which violates constitutionally protected rights. The defendants argue that plaintiffs' section 1983 claims against **Chautauqua County** insufficiently allege a custom or policy and that plaintiffs' allegations are conclusory.

According to section 1983, "every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any ... person within the jurisdiction thereof to the deprivation of any rights ... secured by the Constitution and laws, shall be liable to the party injured" 42 U.S.C. § 1983. Municipalities are considered "persons" for purposes of section 1983 claims; however, the municipality may not be sued under section 1983 unless the challenged action of a municipal employee was performed pursuant to a municipal custom or policy. *Monell v. Dep't of Social Services*, 436 U.S. 658, 691, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Moreover, a municipality cannot be held liable under section 1983 for the tortious conduct of its employees based on a theory of *respondeat superior*. *Id.* at 691.

*8 Although a plaintiff must show the existence of a municipal custom or policy, the custom or policy need not be an explicitly stated rule or regulation. *Ricciuti v. N.Y.C. Transit Authority*, 941 F.2d 119, 123 (2d Cir.1991). Rather, an inference that a municipal custom or policy exists may be drawn from:

circumstantial proof, such as evidence that the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction, or evidence that the municipality had notice of but repeatedly failed to make any meaningful investigation into charges that police officers had used excessive force in violation of the complainants' civil rights

Id. (internal citation omitted). An inference of a municipal custom or policy may not, however, be drawn from "a single

incident alleged in a complaint, especially if it involved only actors below the policy-making level" *Id.*

In order for a plaintiff to demonstrate a municipality's "deliberate indifference" to the constitutional rights of those within its jurisdiction, a plaintiff must show that the "need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). "An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents." *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir.1995) (citing *Ricciuti*, 941 F.2d at 123; *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir.1986), *cert. denied*, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987)).

In this case, the plaintiffs allege that **Sheriff** Gerace and/or Chautauqua **County** "have a municipal policy or custom allowing its officers to act on complaints with no background check, inquiry into the source of the complaint, or without proper investigation whatsoever to justify the degree of force displayed [by deputies Ottoway and Beichner] on November 25, 2005." (Item 22, ¶ 33). The plaintiffs further allege that this policy is due to the action, or inaction, of **Sheriff** Gerace (*id.*). The plaintiffs, however, have not made sufficient factual allegations to support this claim. The plaintiffs allege that "upon information and belief" the **county** has such a policy. *Id.* However, plaintiffs' amended complaint contains no factual allegations which support an inference of such a policy other than the events which took place at plaintiffs' residence on November 25, 2005. The plaintiffs allege that because certain actions were taken during the course of the arrest of Mr. **Pierce**, these actions represent Chautauqua **County** custom or policy. As stated above, an inference of a custom or policy cannot be drawn from "a single incident alleged in a complaint." *Ricciuti*, 941 F.2d at 123. Had plaintiffs alleged other occurrences of similar conduct by **Chautauqua County** deputies, this court may have been able to draw an inference of such a custom or policy. In the absence of such factual support, however, this court must dismiss plaintiffs' claim against **Chautauqua County**.

*9 Similarly, the plaintiffs have failed to allege enough facts to support an inference that **Chautauqua County** has failed

to properly train its municipal employees. Plaintiffs allege that Sheriff Gerace and/or Chautauqua County “lacked adequate policy in recruiting, managing and training officers in police actions and allowed the officers to act with grave indifference to human safety and life.” (Item 22, ¶ 32). Again, these conclusory allegations are not supported by sufficient facts. The plaintiffs rely solely on the events surrounding Mr. Pierce’s arrest, and allege no other incidents of officers using similar conduct which would create an inference of Chautauqua County’s failure to train its officers regarding “human safety and life.” (*Id.*) Furthermore, plaintiffs do not allege that Chautauqua County had any knowledge of officers who have acted with “grave indifference to human safety and life.” Therefore, the court cannot conclude that Chautauqua County’s need to train its officers regarding “human safety and life” was “so obvious” that its failure to do so was a reflection of its “deliberate indifference” to the constitutional rights of its citizens. *See Canton*, 489 U.S. at 390; *cf. Aguilera v. County of Nassau*, 453 F.Supp.2d 601, 608 (E.D.N.Y.2006) (holding that the plaintiffs’ allegations for failure to train its employees were sufficient because the plaintiffs alleged that the county received “numerous complaints regarding its officers[’] failure to provide immediate emergency medical attention ...”). Without factual support, the court is unable to draw the inference that Chautauqua County failed to adequately train its officers. Accordingly, plaintiffs’ section 1983 claims against Chautauqua County are dismissed.

VI. State Common Law Claims

The defendants contend that plaintiffs’ state common law causes of action should be dismissed arguing that: (1) some of the causes of action are repetitive, (2) the seventh and eleventh causes of action, for “damage to personal property,” are not cognizable claims, and (3) since plaintiffs’ federal causes of action should be dismissed, the court should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3).¹ (*See* Item 24, at 14-16). Plaintiffs have not responded to defendants’ arguments regarding the state common law claims.

At the outset, the court has determined that the amended complaint sufficiently alleges federal law claims against Sheriff’s Deputies Ottoway and Beichner for false arrest/imprisonment and for the use of excessive force. In addition, the court concludes that the federal law claims and the state law claims alleged in this case “derive from a common nucleus of operative fact ... such that [plaintiffs] would ordinarily be expected to try them all in one judicial

proceeding” *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Accordingly, this court will exercise supplemental jurisdiction over all state law claims pursuant to 28 U.S.C. § 1367(a).

*10 With regard to the state law claims, defendants argue that the amended complaint contains repetitive causes of action. For example, the plaintiffs’ amended complaint states a fifth cause of action “by plaintiffs” for intentional infliction of emotional distress (Item 22, ¶¶ 43-50). Plaintiffs also allege a ninth cause of action on behalf of Diane Pierce and a twelfth cause of action on behalf of plaintiffs’ minor children for intentional infliction of emotional distress (*id.*, ¶¶ 61-66, 73-82). The defendants argue that as the fifth cause of action appears to state a claim on behalf of all the plaintiffs for intentional infliction of emotional distress, the ninth and twelfth causes of action are repetitive and should be dismissed (*See* Item 24, p. 15).

Having read the amended complaint in its entirety, and interpreting the complaint in the light most favorable to the plaintiffs, this court finds that the ninth and twelfth causes of action are not repetitive and should not be dismissed. Although the fifth, ninth, and twelfth causes of action are ambiguously labeled and allege similar facts, each cause of action contains factual allegations specific to one of the parties, and each cause of action appears to be on behalf of a particular party. For example, the fifth cause of action is labeled “by plaintiffs.” However, it contains three paragraphs (Item 22, ¶¶ 44-46) which specifically allege facts pertinent to Mr. Pierce’s claim. Additionally, these factual allegations are not made in either the ninth or the twelfth causes of action. Furthermore, paragraph E in the prayer for relief states that the fifth cause of action is “in favor of” Mr. Pierce. Similarly, paragraph I states that the ninth cause of action is “in favor of” Mrs. Pierce, and paragraph L states that the twelfth cause of action is “in favor of” plaintiffs on behalf of their minor children. Therefore, despite its lack of clarity and organization, this court finds that the amended complaint states a fifth cause of action on behalf of Mr. Pierce, a ninth cause of action on behalf of Mrs. Pierce, and a twelfth cause of action on behalf of the minor children for intentional infliction of emotional distress.

The defendants also state that plaintiffs’ seventh and eleventh causes of action, for “damages to personal property,” are not cognizable claims (Item 24, p. 15). Defendants argue that damages alone are not a “cause of action;” rather, damages to personal property can only be claimed as relief sought

in another cause of action (*id.*). The court, however, finds that plaintiffs' "damage to personal property" claims are essentially claims for trespass to chattels. *See, e.g., Davidoff v. Davidoff*, 2006 WL 1479558, at *10 (N.Y.Sup.Ct. May 10, 2006) (concluding that plaintiff's cause of action for destruction of personal property was essentially a claim for trespass to chattels). Moreover, in order to establish a claim for trespass to chattels, a plaintiff must allege that the defendants "intentionally, and without justification or consent, physically interfered with [the] use and enjoyment of [plaintiffs'] personal property in plaintiffs' possession, and that [plaintiffs were] harmed thereby." *School of Visual Arts v. Kuprewicz*, 3 Misc.3d 278, 771 N.Y.S.2d 804 (N.Y.Sup.Ct.2003). Here, the plaintiffs have alleged, in both the seventh and the eleventh causes of action, that the Sheriff's Deputies removed the heirloom rifle from Diane Pierce's hands, tossed it in the trunk of their car, and returned it in a damaged state upon the release of Mr. Pierce (Item 22, ¶¶ 56-58, 70-72). Therefore, the court finds that plaintiffs' seventh and eleventh causes of action for "damage to personal property" state sufficient claims against defendants for trespass to chattels.

Footnotes

- 1 Defendants also argue that "a number of plaintiffs' causes of action fail to meet the pleading requirements of the Federal Rules of Civil Procedure" (Item 24, Exh. 4, at 13.) The defendants do not, however, specify which causes of action fail to meet the pleading requirements. *See id.*, pp. 14, 16, 771 N.Y.S.2d 804. As the defendants have not specified which causes of action fail to meet the pleading requirements, the court does not address this argument.

CONCLUSION

*11 Accordingly, the defendants' motion to dismiss is granted in part and denied in part. The causes of action brought pursuant to 42 U.S.C. § 1983 against the municipal defendants and defendants Gerace and Maurer are dismissed, and the motion is denied as to the claims brought against deputies Ottoway and Beichner in their individual capacities. The court will retain supplemental jurisdiction over plaintiffs' state law claims. The parties shall meet with the court on Monday, November 26, 2007, at 10 a.m. to set a further schedule.

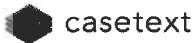
So ordered.

All Citations

Not Reported in F.Supp.2d, 2007 WL 2902954

Exhibit V

Pusateri v. Chautauqua County Jail 2021 WL 3160768

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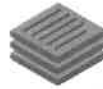
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Pusateri v. City of Dunkirk

United States District Court, Western District of New York

Jul 27, 2021

1:20-cv-00427 (W.D.N.Y. Jul. 27, 2021)

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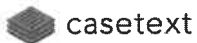
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1:20-cv-00427

07-27-2021

PATTIE ANN PUSATERI, as Administrator for the Estate of GREGORY LEE GALLAWAY, Plaintiff, v. CITY OF DUNKIRK, CITY OF DUNKIRK POLICE DEPARTMENT, CITY OF DUNKIRK POLICE OFFICER DENISE ZENTZ, CHAUTAUQUA COUNTY CHAUTAUQUA COUNTY SHERIFF JAMES B. QUATTRONE, JOHN AND/OR JANE DOE(S) said being CHAUTAUQUA COUNTY SHERIFF DEPUTIES, CHAUTAUQUA COUNTY SHERIFF SERGEANT FULLER, JOHN AND/OR JANE DOES(S) said being CHAUTAUQUA COUNTY JAIL PERSONNEL, ANGELA M. DAMORE, FNP-C, AMY MEYER RN, CHAUTAUQUA COUNTY SHERIFF'S DEPUTY TANNER DELAHOY bearing Badge Number 5100, CHAUTAUQUA

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Christina Reiss, District Judge

**OPINION AND ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS AND GRANTING LEAVE TO
AMEND (DOC. 40)**

Christina Reiss, District Judge

Plaintiff Pattie Ann Pusateri brings claims as the Administrator of the Estate of her son, Gregory Lee Gailaway (the "Decedent"), arising from the circumstances surrounding his death while he was a pretrial detainee at Chautauqua County Jail against Defendants City of Dunkirk ("Defendant City"), City of Dunkirk Police Department ("Defendant DPD"), City of Dunkirk Police Officer Denise Zentz ("Defendant Zentz"), Chautauqua County ("Defendant County"), Chautauqua County Sheriff James B. Quattrone ("Defendant Quattrone"), John and/or Jane Doe(s) said being Chautauqua County Sheriffs Deputies ("Defendant John Doe Deputies"), Chautauqua County Sheriffs Deputy Sergeant Fuller ("Defendant Fuller"), John and/or Jane Does(s) said being Chautauqua County Jail Personnel ("Defendant John Doe Jail Personnel"), Angela M. Damore, FNP-C ("Defendant Damore"), Amy Meyer, RN ("Defendant Meyer"), Chautauqua County Sheriffs Deputy Tanner Delahoy bearing Badge Number 5100 ("Defendant Delahoy"), Chautauqua County Sheriffs Deputy Roberts bearing Badge Number 5108 ("Defendant Roberts"), Chautauqua County Sheriffs Deputy Robert Burrell bearing Badge Number 5060 ("Defendant Burrell"), and Chautauqua County Sheriffs Sergeant Westfahl bearing Badge Number 671 ("Defendant Westfahl").

In her Amended Complaint, Plaintiff alleges the following claims: (1) negligence against Defendants City, DPD, and Zentz (Count I); (2) violation of the Decedent's Fourteenth Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendants City and



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Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendant County (Count VI); (7) violation of the Decedent's Fourteenth Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendants Damore and Meyer (Count VII); (8) negligence under NY. Correct. L. § 500-C against Defendant Quattrone (Count VIII); (9) violation of the Decedent's Fourteenth Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendant Quattrone (Count IX); (10) violation of the Decedent's Fourteenth Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendants John Doe Deputies, John Doe Jail Personnel, and Fuller (Count X); (11) negligence against Defendants Roberts, Delahoy, Burrell, Westfahl, Fuller, John Doe Deputies, and John Doe Jail Personnel (Count XI); (12) violation of the Decedent's Fourteenth Amendment right to adequate medical care and treatment in violation of 42 U.S.C. § 1983 against Defendants Roberts, Delahoy, Burrell, Westfahl, and Fuller (Count XII); and (13) wrongful death against all Defendants (Count XIII).

On November 2, 2020, Defendants County, Damore, Delahoy, John Doe Deputies, John Doe Jail Personnel, Fuller, Meyer, Quattrone, Roberts, Burrell, and Westfahl ("Defendants") moved to dismiss Counts VI, VII, IX, X, XI,¹ and XII with prejudice and moved to dismiss Counts IV, V, VIII, and XIII without prejudice. Plaintiff filed a response in opposition on November 30, 2020. On December 14, 2020, Defendants filed a reply.

¹ Defendants request dismissal of Count XI with and without prejudice. (Doc. 40-4 at 41.)

Plaintiff is represented by James M. VanDette, Esq., and Vincent Thomas Parlato, Esq. Defendants are represented by Michael P. McClaren, Esq., Peter L. Veech, Esq., and Shannon Brae O'Neill, Esq.

I. The Amended Complaint's Allegations.



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Defendant County is a municipal corporation located in New York. Defendant Quattrone was, at all relevant times, the Sheriff of Chautauqua County and was responsible for the day-to-day operations of the Chautauqua County Jail, including the safekeeping of its inmates. Defendants John Doe Deputies, John Doe Jail Personnel, Fuller, Delahoy, Roberts, Burrell, and Westfahl were employees or subordinates of Defendant Quattrone and/or Defendant County and were involved in the supervision of the Decedent while he was in custody of Defendant Quattrone from April 10, 2019 until April 11, 2019. Plaintiffs claims against each of these individual defendants are asserted in their individual and official capacities.

Defendant Damore was, at all relevant times, a Family Nurse Practitioner stationed at the Chautauqua County Jail, and Defendant Meyer was, at all relevant times, a registered nurse employed at the Chautauqua County Jail. Defendants Damore and Meyer were employees or subordinates of Defendant County and were responsible for rendering medical care and treatment to inmates at the Chautauqua County Jail on April 10, 2019. Plaintiff brings claims against Defendants Damore and Meyer in their individual and official capacities.

9 On April 10, 2019, the Decedent appeared at the Dunkirk City Court in response to a warrant that had been issued *9 as a result of his previous failure to appear in court in a pending criminal case. Prior to the court proceeding, the City of Dunkirk City Court Treatment Court Coordinator, Lee Ann Lazarony,² administered a drag screen of the Decedent which was positive for THC, cocaine, benzodiazepine, and Suboxone. The drug screen was done in connection with a February 1, 2018 Drug Treatment Court contract between the Decedent and Dunkirk City Court, the terms of which required the Decedent to abstain from using illegal drugs. Ms. Lazarony advised Dunkirk City Court, in open court and on the record, of the

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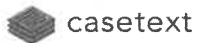
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Lazarony" as the Dunkirk City Court, Chautauqua County treatment court coordinator).

At the hearing, Ms. Lazarony stated on the record: "I am concerned for his safety and well-being, Your Honor." (Doc. 24 at ¶ 33) (internal quotation marks omitted). The Decedent's cousin, Christine Kaiser, also appeared at the hearing and advised an on-duty DPD officer at the Dunkirk City Court that the Decedent was not well and in need of medical attention. As a result of the Decedent's positive drug screen, the Dunkirk City Court remanded the Decedent to the ultimate custody of Defendant Quattrone at the Chautauqua County Jail, subject to return on April 25, 2019 for further disposition.

In the courtroom, the Decedent was allegedly observed holding his head against a wall for support, having difficulty walking, and falling on top of Ms. Kaiser when attempting to embrace her. On that same day, at approximately 10:00 a.m., Ms. Kaiser described the Decedent's mental and physical condition to Plaintiff, prompting Plaintiff to call Defendant DPD and speak with Defendant Zentz. During that call, Plaintiff informed Defendant Zentz of what she had learned about the Decedent's condition and told Defendant Zentz that she was concerned that the Decedent would die if he did not receive immediate medical treatment because he had likely taken a "suicide cocktail" of drugs. *Id.* at 12, ¶ 37. Defendant Zentz allegedly responded that the Decedent was "fine." *Id.*

Upon being remanded into custody, the Decedent became a pretrial detainee of Defendant City and/or Defendant DPD. Following his appearance at the Dunkirk City Court, the Decedent was transported to the Dunkirk City lock-up, where he remained in the custody of Defendant City until transferred to the custody of Defendant Quattrone, who oversees the Chautauqua County Jail.

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that he was a "high risk for 'medical' and psychiatric." *Id.* at 13, ¶ 41.

Responses to the Questionnaire included that the Decedent was taking the following medications: "Kep[p]ra, [o]lanzap[i]ne, [g]abapentin, Wel[l]butrin,' and^s[a]mitript[y]line CVS Brooklyn Square." *Id.* The Questionnaire further noted that the Decedent was receiving treatment for a medical condition, mental health treatment, and had taken Suboxone within the last forty-eight hours. The Questionnaire was signed by Defendant Meyer on April 12, 2019.

At approximately 1:45 p.m., Defendant Meyer completed a Chautauqua County Health and Human Services/Jail Division Opiate Withdrawal Assessment (the "Opiate Withdrawal Assessment") wherein the following narrative is set forth:

Inmate seen for Suboxone w/d Inmate takes 12mg QD, Inmate lethargic & slurring words. Inmate first admits to meth use, then denies. Inmate then states he had a dirty urine . . . multiple drugs. Inmate argumentative . . . staff & blaming medical for not getting his meds. Inmate stated he was suicidal, but when this writer phoned Sgt Fuller inmate began yelling "She's lying." Sgt Fuller spoke [with] inmate. Inmate stated he would try to kill himself just for spite. Inmate asked if he attempted suicide would he be removed from [constant watch]. Inmate then removed from medical and taken to booking for [constant watch].

(Doc. 24 at 14, ¶ 42) (first alteration in Amended Complaint).

At approximately 2:00 p.m., Defendant Damore ordered "Keppra 500 milligrams po BID," which Plaintiff alleges means to be taken by mouth twice per day, and "Olanzapine 10 milligram QHS," an antipsychotic drug. *Id.* at 24 at 14, ¶ 43 (internal quotation marks omitted). Defendant Meyer allegedly received and noted this order.



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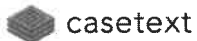
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indications could cause respiratory depression and increased risk of death as well as increasing the risk of seizure death due to respiratory depression.

Plaintiff alleges that Defendant Damore ordered olanzapine while the Decedent was experiencing polysubstance intoxication and that Defendant Damore and/or Defendant Meyer administered that drug to the Decedent. The administration of olanzapine, in combination with the multiple substances which the Decedent took before incarceration, allegedly further depressed the Decedent's respiratory function.

Plaintiff alleges, upon information and belief, that medical staff at the Chautauqua County Jail, including Defendants Damore and Meyer, were familiar with the Decedent's medical and psychiatric file and/or records as well as his prescription medications from the Decedent's prior incarceration. Plaintiff alleges this includes familiarity with the Decedent's previously recorded "high risk factors" including "medical and psychiatric risks" and "diagnosed . . . bipolar disorder, anxiety, depression and seizures, anger management issues, mood swings, paranoia, panic attacks, inability to concentrate while communicating, poor focus and attention, in addition to substantial substance abuse issues." *Id.* at 15-16, ¶ 51.

Following the Opiate Withdrawal Assessment, the Decedent was placed in a suicide gown and was under constant supervision, also known as "constant watch[.]" *Id.* at 16, ¶ 53 (internal quotation marks omitted). Plaintiff contends that according to Defendant Quattrone's and/or Defendant County's policies, constant watch required that staff maintain uninterrupted visual observation of the Decedent and continuous and direct supervision by permanently occupying an established post in close proximity to the Decedent. These alleged policies further required that staff maintain a continuous clear view of the Decedent so as to allow them to intervene immediately and directly in response to situations or behavior observed which threatened the health or safety of prisoners or good order of the facility.



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Upon information and belief, this was the last time any medical treatment was rendered to the Decedent until he was discovered unresponsive the following morning.

On April 10, 2019, beginning at approximately 6:30 p.m., Defendant Delahoy monitored the Decedent at a constant watch post outside cell CS2, noting "subject lays on his stomach, on his bunk," from 8:40 p.m. until 10:46 p.m., allegedly without periodically checking for signs of life. *Id.* at 19, ¶ 62. At 10:46 p.m., Defendant Burrell assumed the post outside CS2 for constant watch until April 11, 2019 at 6:05 a.m. For the entirety of his shift, Defendant Burrell noted at ten-minute intervals: "subject laying on bunk on his stomach[.]" *Id.* at 19, ¶ 63 (alteration in original). Plaintiff alleges that Defendant Burrell did not maintain a constant watch with an uninterrupted or unobstructed clear view at all times of the Decedent and did not periodically check to verify his signs of life.

From 1:50 a.m. until 1:57 a.m. on April 11, 2019, Defendant Burrell was relieved for a break and the post outside CS2 was assumed by Defendant Roberts. Defendant Roberts noted "subject laying on bunk on his stomach[.]" (Doc. 24 at 20, ¶ 64) (alteration in original). Defendant Roberts provided Defendant Burrell break coverage from 4:26 a.m. until 4:32 a.m. on April 11, 2019, and again noted "subject laying on his bunk on his stomach[.]" *Id.* at 20, ¶ 65 (alteration in original). Neither entry indicates that Defendant Roberts attempted to verify the Decedent's signs of life.

From April 10, 2019 at 10:56 p.m. until approximately 6:09 a.m. on April 11, 2019, Defendant Roberts conducted supervisory visits of the cells, including the Special Housing Unit. During these visits, Defendant Roberts allegedly did not inquire about or undertake to verify for himself the Decedent's signs of life. Defendant Roberts had been advised or briefed on the Decedent's supervision or monitoring requirements as well as Defendant Fuller's order to place the Decedent in a suicide gown. Defendant Westfahl also allegedly

Opinion Case details

Fuller, John Doe Deputies, John Doe Jail Personnel, and others were stationed outside to conduct supervision.

Plaintiff alleges that despite the Decedent's high-risk assessment, suicide threats, and apparent incapacitation due to drugs, he was not examined by a jail physician. Plaintiff alleges that the Decedent had been deceased for a period of several hours prior to being discovered.

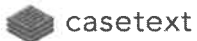
On April 11, 2019, the Office of Erie County Medical Examiner's Jay Stahl-Herz, MD, performed an autopsy on the Decedent, noting that he was found face down on the mattress of his jail cell, that he had a history of polysubstance abuse, and that the cause and manner of death were undetermined. Dr. Stahl-Herz noted a "possibility of toxicity due to an as yet unidentified substance consumed before entry into jail cannot be excluded." W. at 22, ¶ 71.

While the Decedent was under constant watch, Defendant Quattrone's staff and subordinates, including, but not limited to, Defendants Delahoy, Roberts, Burrell, Westfahl, Fuller, John Doe Deputies, and/or John Doe Jail Personnel, allegedly failed to, among other things, visually observe the Decedent without interruption at a post in close proximity to him; note his activities every fifteen minutes in a logbook; and verify the Decedent's signs of life, including movement or audible speech, breathing, or snoring. In addition, Defendant Quattrone allegedly negligently failed to train, supervise, and retain Defendants Delahoy, Roberts, Burrell, Westfahl, Fuller, John Doe Deputies, and/or John Doe Jail Personnel.

II. Conclusions of Law and Analysis.

A. Standard of Review.

To survive a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a



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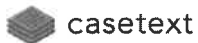
draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

The sufficiency of a plaintiff’s complaint under Rule 12(b)(6) is evaluated using a “two-pronged approach[.]” *Hoyden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010) (internal quotation marks omitted) (quoting *Iqbal*, 556 U.S. at 679). First, the court discounts legal conclusions and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements[.]” *Iqbal*, 556 U.S. at 678. The court is also “not bound to accept as true a legal conclusion couched as a factual allegation[.]” *Id.* (quoting *Twombly*, 550 U.S. at 555). Second, the court considers whether the factual allegations, taken as true, “plausibly give rise to an entitlement to relief.” *Id.* at 679. This second step is fact-bound and context-specific, requiring the court “to draw on its judicial experience and common sense.” *Id.* The court does not “weigh the evidence” or “evaluate the likelihood” that a plaintiff’s claims will prevail. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201(2d Cir. 2017).

B. Whether Plaintiff Plausibly Pleads Proximate Cause.

Defendants contend that Plaintiffs’ § 1983 claims as well as Counts IV, V, VIII, and XIII must be dismissed against them based on a failure to plausibly allege proximate cause. In support of this contention, Defendants assert that: (1) the toxicology report did not show lethal levels of prescription or illicit drugs; (2) Plaintiff fails to allege facts that any Defendant actually knew of the Decedent’s risk of polysubstance complications, including respiratory depression; and (3) the Amended Complaint contains no plausible facts “suggesting that [the Decedent] was placed ‘on watch’ for any reason other than his own threats of self-harm.” (Doc. 40-4 at 22.)

To bring a claim under § 1983, “[a] defendant’s conduct must be a proximate cause of the claimed violation in order to find that the defendant deprived



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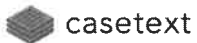
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Carmichael v. City of New York, 34 F.Supp. 3d 252, 268 (E.D.N.Y. 2014) (quoting *Phillips v. City of New York*, 871 F.Supp. 2d 200, 206 (E.D.N.Y. 2012)). "[Questions relating to proximate cause are normally questions of fact[.]" *Id.* (internal quotation marks omitted).

Defendants argue that the Decedent's death is not traceable to any violations of his civil rights because a statement in the Autopsy Report³ precludes Plaintiff from arguing that the Decedent died from a failure to administer Keppra, respiratory depression due to improper administration of olanzapine, or respiratory depression due to polysubstance intoxication. Because the Autopsy Report does not determine a cause of death, it also does not foreclose the possibility that Plaintiffs claimed causal factors were a proximate cause of the Decedent's death. The Autopsy Report alone is therefore insufficient to render Plaintiffs causation claims implausible. See *Page v. Monroe*, 300 F. App'x 71, 75 (2d Cir. 2008) ("It is axiomatic that proximate cause ordinarily is a question to be determined by the finder of fact.") (internal quotation marks omitted) (quoting *Decker v. Forenta LP*, 736 N.Y.S.2d 554, 555 (N.Y. App. Div. 2002)). This conclusion is underscored by the Autopsy Report's finding that the Decedent had ingested "*prescribed medications* in concentrations that are not consistent with an acute mixed drug intoxication that would cause death[.]" (Doc. 40-2 at 5) (emphasis supplied), while recognizing a "possibility of toxicity due to an as yet unidentified substance consumed before entry into jail[.]" (Doc. 24 at 22, If 71) (internal quotation marks omitted).

³ Defendants cite the following statement from the Autopsy Report:

Toxicology testing revealed prescribed medications in concentrations that are not consistent with an acute mixed drug intoxication that would cause death. Vitreous chemistries were within normal limits. Microscopic examination of tissues was unremarkable Following a thorough investigation, the cause and manner of death for this decedent remain undetermined----



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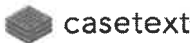
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in it by reference, and documents that, although not incorporated by reference, are integral to the complaint[.]” *Sira v. Morton*, 380 F.3d 57, 66 (2d Cir. 2004) (citations and internal quotation marks omitted). Because Plaintiff references the Autopsy Report in her Amended Complaint, it is properly considered on a motion to dismiss. *Id.*

Defendants further contend that Plaintiff fails to allege that any of them actually knew of the Decedent’s risk of polysubstance complications, including respiratory depression, and there is no basis to impute to them knowledge that the Decedent had ingested lethal doses of drugs prior to entering the jail. Defendants argue that Plaintiff alleges that information was given only to Defendants DPD and Zentz.

In her Amended Complaint, Plaintiff alleges that upon the Decedent’s arrival at the Chautauqua County Jail, the Questionnaire as well as the Opiate Withdrawal Assessment were completed and Defendant Meyer noted that the Decedent had ingested Suboxone within the last forty-eight hours, admitted to using methamphetamine, said that he had “a dirty urine” from a mix of drugs, and reported that he was suicidal. (Doc. 24 at 14, ¶ 42.) Even if, as Defendants argue, they did not know that hours earlier the Decedent’s drug screen was positive for THC, cocaine, benzodiazepine, and Suboxone and that Ms. Lazarony, Mr. Kaiser, and Plaintiff had each expressed concerns regarding the Decedent’s health and well-being, Plaintiff has plausibly alleged that Defendant Meyer was aware of the Decedent’s ingestion of multiple substances through the Questionnaire and Opiate Withdrawal Assessment and that the remaining Defendants knew that the Decedent was a “high medical and psychiatric risk[.]” (Doc. 24 at 27-28, ¶ 92.) These facts are sufficient at the pleading stage to support a claim that Defendants were on notice of the risk of death or serious harm from polysubstance abuse.

Finally, although Defendants assert that it is uncontested that the Decedent was placed on constant watch because of his threats of self-harm, a single



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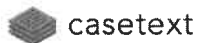
Accepting Plaintiffs allegations as true, although a close question, she has plausibly pled a proximate causal connection between Defendants' alleged deprivation of the Decedent's constitutional right to adequate medical treatment and safe conditions of confinement and the Decedent's death. Defendants' motion to dismiss on Counts IV, V, VI, VII, VIII, IX, X, XII, and XIII for failure to plausibly plead proximate cause is therefore DENIED.

C. Whether Plaintiff Plausibly Pleads a *Monell* Claim Against Defendant County.

To state a claim for deliberate indifference to serious medical needs pursuant to 42 U.S.C. § 1983, a pretrial detainee must allege: "(1) objectively, the deprivation the [detainee] suffered was sufficiently serious that he was denied the minimal civilized measure of life's necessities, and (2) subjectively, the defendant official acted with a sufficiently culpable state of mind . . . , such as deliberate indifference to [detainee] health or safety." *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (alterations in original) (internal quotation marks and citation omitted).

A municipality can be liable under § 1983 "if the deprivation of the plaintiffs rights under federal law is caused by a governmental custom, policy, or usage of the municipality." *Jones v. Town of E. Haven*, 691 F.3d 72, 80 (2d Cir. 2012). "A plaintiff may satisfy the 'policy, custom or practice' requirement [of & *Monell* claim] in one of four ways[.]" *Brandon v. City of New York*, 705 F.Supp. 2d 261, 276 (S.D.N.Y. 2010), by alleging:

- (1) a formal policy endorsed by the municipality;
- (2) actions directed by the government's authorized decisionmakers or those who establish governmental policy;
- (3) a persistent and widespread practice that amounts to a custom of which policymakers must have



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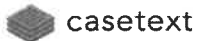
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custom, or practice and the alleged constitutional injury.” *Darnel v. Westchester Cnty.*, 2021 WL 738365, at *5 (S.D.N.Y. Feb. 25, 2021).

Defendant County asserts that Plaintiff has failed to state a *Monell* claim against it because she has not plausibly alleged that the constitutional violation was caused by its official “policy or custom,” nor has she plausibly alleged a failure to train or supervise. Plaintiff responds that Defendant County maintained a deficient formal constant watch policy, permitted practices of inmate neglect that were so widespread as to constitute a custom or policy, did not have a jail physician, and failed to train and supervise subordinates regarding medical and psychiatric care and treatment. With regard to a formal policy, Plaintiff alleges that Defendant County’s policies required “uninterrupted visual observation [of the Decedent], and continuous and direct supervision by permanently occupying an established post in close proximity to [the Decedent],” (Doc. 24 at 16, ¶ 54), which Plaintiff contends was constitutionally deficient because Defendant County’s staff were not required to verify the Decedent’s signs of life during constant watch. She points out that New York Commission of Correction standards mandate that correctional staff “periodically check to verify signs of life,” (Doc. 50-8 at 18), and further asserts “as a result of the deficient written policies of [Defendant County] . . . [D]ecedent, . . . was in fact deprived of access to adequate medical care and treatment[.]” (Doc. 24 at 33, ¶ 114.)

A violation of prison policy does not, alone, give rise to a claim under § 1983. See *Joseph v. Marche*, 2019 WL 1172382, at *4 (W.D.N.Y. Mar. 13, 2019) (“An alleged violation of a prison policy, directive, or regulation, in and of itself, does not give rise to a federal claim[.]”) (citing *Russell v. Coughlin*, 910 F.2d 75, 78 n.1 (2d Cir. 1990)). Moreover, “where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of



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Monell claim based on a failure to train or supervise is similarly deficient.

To plead a *Monell* claim based on a failure to train or supervise, a plaintiff must plead (1) that "a policymaker knows 'to a moral certainty' that her employees will confront a given situation[.]" (2) "that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation[J]" and (3) "that the wrong choice by the city employee will frequent *5 ly cause the deprivation of a citizen's constitutional rights." *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992). As the Second Circuit has observed:

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train [or supervise].

Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action-the 'deliberate indifference'-necessary to trigger municipal liability." Without notice that a course of training [or supervision] is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Connick v. Thompson, 563 U.S. 51, 62 (2011) (citations omitted).

"Merely alleging that Defendants failed to institute adequate procedures is not enough to survive dismissal. Such a failure must first rise to the level of deliberate indifference to be actionable." *Hardy v. Erie Cnty.*, 2012 WL 1835624, at *3 (W.D.N.Y. May 18, 2012). With regard to a failure to train or supervise claim, "when [municipal] policymakers are on actual or constructive notice that a particular omission in their training program



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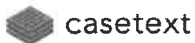
should know has failed to prevent tortious conduct by employees[.]” *Bd of Cnty. Comrn’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407 (1997).

A single instance of allegedly unconstitutional conduct is generally insufficient to impose *Monell* liability. *See Tuttle*, 471 U.S. at 831 (“To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the [County] liable on the basis of that policy, would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*”) (J. Brennan, concurring); *Iacovangelo v. Con: Med. Care, Inc.*, 624 F. App’x 10, 14 (2d Cir. 2015) (affirming a dismissal of a plaintiffs *Monell* claim for deliberate indifference to serious medical needs because “the amended complaint provides only one additional example of a similar incident”); *Jones*, 691 F.3d at 85 (finding that the plaintiff showed “two instances, or at the most three” cases of unconstitutional conduct by a “small number of officers” that occurred “over a period of several years[,]” which “fell far short of showing a policy, custom, or usage of officers” or conduct “so persistent that it must have been known to supervisory authorities”). Because Plaintiffs failure to train and supervise allegations are based on a single incident, she has not plausibly pled that Defendants had “notice that [the] course of training [and supervision were] deficient[.]” *Connick*, 563 U.S. at 1360.

For the foregoing reasons, because Plaintiff fails to plausibly allege a *Monell* claim based on Defendant County’s alleged deficient constant watch policy or based on a failure to train or supervise, Defendant County’s motion to dismiss Count VI is GRANTED.

D. Whether Plaintiffs § 1983 Official Capacity Claims Should be Dismissed as Redundant.

Defendants assert that Plaintiffs official capacity § 1983 claims against Defendants Fuller, Westfahl, Damore, Meyer, Delahoy, Roberts, Burrell, John



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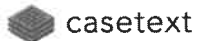
government entity and the entity's employees in their official capacity, courts have routinely dismissed corresponding claims against individuals named in their official capacity as redundant and an inefficient use of judicial resources." *Alvarado v. Westchester Cnty.*, 22 F.Supp. 3d 208, 213 (S.D.N.Y. 2014) (internal quotation marks omitted) (quoting *Castanza v. Town of Brookhaven*, 700 F.Supp. 2d 277, 284 (E.D.N.Y. 2010)).

Defendants' motion to dismiss Plaintiffs official capacity § 1983 claims in Counts VII, X, and XII against Defendants Fuller, Westfahl, Damore, Meyer, Delahoy, Roberts, Burrell, John Doe Deputies, and John Doe Jail Personnel as redundant is GRANTED.

E. Whether Plaintiff Plausibly Pleads a Deliberate Indifference Claim Against Defendants Damore and Meyer.

Defendants assert that Plaintiff's deliberate indifference claim against Defendants Damore and Meyer is indistinguishable from her negligence and medical malpractice claims against them and is unsupported by plausible factual allegations that these Defendants acted with the requisite state of mind. Plaintiff responds that Defendants Damore and Meyer knew or should have known that there was a high risk to the Decedent's health and safety due to his polysubstance intoxication and medical history which could lead to an increased risk of seizure and/or death.

[T]o establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the



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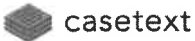
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"sufficiently culpable state of mind[.]" *See Wilson v. Setter*, 501 U.S. 294, 298 (1991). The objective component requires that "the alleged deprivation must be sufficiently serious, in the sense that a condition of urgency, one that may produce death, degeneration, or extreme pain exists." *Hathaway v. Coughlin*, 99 F.3d 550, 553 (2d Cir. 1996) (internal quotation marks omitted).

"Medical malpractice does not rise to the level of a constitutional violation unless the malpractice involves culpable recklessness—an act or a failure to act by [a] prison doctor that evinces a conscious disregard of a substantial risk of serious harm.'" *Hill v. Curcione*, 657 F.3d 116, 123 (2d Cir. 2011) (quoting *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998)). As a result, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment[.]" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (applying the Eighth Amendment).

Plaintiff alleges that Defendant Meyer knew or should have known that the Decedent's condition posed a high risk of death or serious bodily injury because she completed the Questionnaire and conducted an Opiate Withdrawal Assessment in which the Decedent was slurring his words and was lethargic; said he had "a dirty urine"; stated that he was suicidal; and had used a number of illegal drugs. (Doc. 24 at 14, ¶ 42.) Following Defendant Meyer's completion of the Opiate Withdrawal Assessment, the Decedent was placed in a suicide gown under constant watch, which Plaintiff argues was a wholly insufficient and reckless response based on the Decedent's multiple risk factors. At the pleading stage, although a close question, this is sufficient to state a claim of deliberate indifference. *See Iacovangelo*, 624 F. App'x at 13 (finding that the plaintiff had plausibly alleged the defendant recklessly failed to act with reasonable care when "[the decedent] admitted to the daily use of drugs that she had a history of drug and alcohol abuse, and that she acknowledged being under the influence of drugs at the time of her admission to jail")



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allegation that Defendant Damore was familiar with the Decedent's medical history based on his prior incarceration presupposes a physician's recall of the medical history of each person under his or her care. *See Gallop v. Cheney*, 642 F.3d 364, 368 (2d Cir. 2011) (holding a court may dismiss a claim if the "well-pleaded facts" are nonetheless implausible). Plaintiff does not further allege that Defendant Damore reviewed the Decedent's medical records before prescribing him medications. In any event, as Defendants point out, the Autopsy Report concludes prescribed medications did not cause the Decedent's death.

Although discovery may yield additional information regarding Defendant Damore's knowledge of the Decedent's condition, it is not presently set forth in the Amended Complaint. The Amended Complaint therefore does not plausibly allege that Defendant Damore "knew or should have known" that the medications she prescribed to the Decedent objectively "posed an excessive risk to [his] healthy and safety." *Darnell*, 849 F.3d at 35. Because Plaintiffs § 1983 claim against Defendant Damore does not plausibly allege deliberate indifference, it is more properly characterized as a negligence claim, which is not actionable under § 1983.⁶

⁶ *See Weyani v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) (holding a plaintiff must establish "something more than mere negligence" to establish deliberate indifference under the Fourteenth Amendment) (internal quotation marks and citation omitted).

For the reasons stated above, Defendants' motion to dismiss Count VII, deliberate indifference to the Decedent's serious medical needs, is DENIED as to Defendant Meyer and GRANTED as to Defendant Damore.

F. Whether Plaintiff Plausibly Pleads Defendants' Personal Involvement Under § 1983 and that Defendants Acted with the Requisite State of Mind.



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Eighth Amendment by his or her own conduct, "not by reason of [his or her] supervision of others who committed the violation. [A plaintiff] must show that [the defendant] herself acted with deliberate indifference'-meaning that [the defendant] personally knew of and disregarded an excessive risk to [the Decedent's] health or safety." *Tangreti v. Bachmann*, 983 F.3d 609, 619 (2d Cir. 2020) (internal quotation marks omitted). The Second Circuit has observed that while "there is no special rule for supervisory liability[,]. . ., [t]he factors necessary to establish a [§ 1983] violation will vary with the constitutional provision at issue' because the elements of different constitutional violations vary." *Id.* at 618.

In *Darnell*, the Second Circuit explained that, in contrast with Eighth Amendment deliberate indifference claims, an official can "violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, which means that the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm." *Darnell*, 849 F.3d at 35. However,

the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety. In other words, the "subjective prong" (or "*mem rea* prong") of a deliberate indifference claim is defined objectively.

Id.

Plaintiffs allegations against Defendant Quattrone are limited to his promulgation of deficient policies, permitting unlawful acts which



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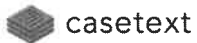
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Defendants assert that Plaintiffs individual capacity deliberate indifference claims against Defendants Fuller, Westfahl, Delahoy, Burrell, and Roberts must also be dismissed because they only knew of a risk of suicide and were unaware of the Decedent's risk of death from polysubstance intoxication or respiratory depression. Defendants argue that Plaintiff further fails to plausibly allege that these individuals acted with the requisite state of mind.

Plaintiffs allegations of deliberate indifference against Defendants Fuller, Westfahl, Delahoy, Burrell, and Roberts include that each was posted outside the Decedent's cell during the period of constant watch and failed to verify the Decedent's signs of life. She has therefore plausibly alleged personal involvement. Plaintiff does not, however, further allege that Defendants knew that the Decedent was at risk for overdose, only that he was a "known medical and psychiatric risk, as evidenced by the fact that... he . . . had been placed in a suicide gown and in cell CS2 under constant supervision or constant watch." (Doc. 24 at 42-43, ¶ 140.) "[I]n general, . . . deliberate indifference [is] lacking where officers take affirmative and reasonable steps to protect detainees from suicide." *Kelsey v. City of New York*, 306 F. App'x 700, 703 (2d Cir. 2009). Here, even though the Decedent was placed in a suicide gown, Plaintiff does not assert Defendants Fuller, Westfahl, Delahoy, Burrell, and Roberts were aware of any other specific risks of harm and intentionally or recklessly disregarded them, nor does she plausibly allege that they acted with the requisite state of mind.

Defendants' motion to dismiss § 1983 claims against Defendants Fuller, Westfahl, Delahoy, Burrell, and Roberts for failure to allege that they acted with the requisite state of mind is therefore GRANTED.⁷

⁷ Because the individual capacity claims against these Defendants under § 1983 are dismissed, the court does not address whether their dismissal is also appropriate pursuant to the doctrine of qualified immunity.



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reasonable person would have known.” *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013) (S.D.N.Y. 2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A court must determine: “(1) whether plaintiff has shown facts making out violation of a constitutional right; (2) if so, whether that right was ‘clearly established’; and (3) even if the right was ‘clearly established,’ whether it was ‘objectively reasonable’ for the officer to believe the conduct at issue was lawful.” *Id.*

Although, “usually, the defense of qualified immunity cannot support the grant of a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted,” a district court may grant a Rule 12(b)(6) motion on the ground of qualified immunity if “the facts supporting the defense appear on the face of the complaint.”

Hyman v. Abrams, 630 F. App’x 40, 42 (2d Cir. 2015) (quoting *McKenna v. Wright*, 386 F.3d 432, 435-36 (2d Cir. 2004)).

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Vega v. Semple*, 963 F.3d 259, 274 (2d Cir. 2020) (internal quotation marks and citation omitted). It is understood that this analysis is undertaken to “ensure that the official being sued had fair warning that his or her actions were unlawful.” *Id.* (internal quotation marks omitted).

Plaintiff alleges that Defendant Meyer violated the Decedent’s constitutional rights through deliberate indifference to his medical needs, resulting in the Decedent’s untimely death. Defendant Meyer conducted the Opiate Withdrawal Assessment with the Decedent, who informed her, among other things, that he was suffering withdrawal from Suboxone, may have ingested methamphetamine, had “a dirty urine” from multiple substances, and was

Opinion Case details

U.S. at 104, and because Plaintiff plausibly pleads a constitutional violation and Defendant Meyer's personal involvement, the court must await a factual record to evaluate Defendant Meyer's qualified immunity claim. Defendant Meyer's motion to dismiss claims against her on the basis of qualified immunity is therefore DENIED.

H. Whether Plaintiff Plausibly Pleads Negligent Training, Supervision, and Retention Claims Against Defendants County and Quattrone.

Defendants argue that Plaintiffs negligent training, supervision, and retention claims against Defendants County and Quattrone fail because Plaintiff has not alleged that those Defendants' subordinates acted outside the scope of their employment or had a propensity for the conduct alleged and because Defendant County is not vicariously liable for the acts of Defendant Quattrone's subordinates.

Under New York law, "[w]here the acts of 'employees' are concerned, an employer can be held vicariously liable under principles of *respondent superior* for acts committed *within* the scope of the employee's employment, or may be held directly liable for 'negligent hiring, retention, or supervision' for acts committed *outside* that scope." *Ben v. United States*, 160 F.Supp. 3d 460, 476 (N.D.N.Y. 2016) (emphasis and alteration in original) (internal quotation marks omitted) (quoting *Williams v. Boulevard Lines, Inc.*, 2013 WL 1180389, at *13, n. 10 (S.D.N.Y. Mar. 12, 2013)).

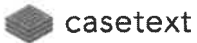
While such vicarious liability, does not arise from acts that are committed for the employee's personal motives unrelated to the furtherance of the employer's business, those acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to liability under the doctrine of *respondeat superior*, even where those acts constitute an intentional tort or a crime[.]

Opinion Case details

employee's propensity for the conduct which caused the injury." *Perrone v. Monroe Cnty. Sheriff Patrick O'Flynn*, 2015 WL 7776930, at *8 (W.D.N.Y. Dec. 2, 2015) (internal quotation marks omitted) (quoting *Shu Yuan Huang v. St. John's Evangelical Lutheran Church*, 12 N.Y.S.3d 232, 232 (N.Y. App. Div. 2015)).

Plaintiff alleges that "County employees and subordinates negligently disregarded multiple rules, regulations, and protocols in the maintenance of the Chautauqua County Jail such that" the Decedent "was not sent to a hospital or provided with heightened medical care[.]" (Doc. 24 at 31-32, ¶ 110.) These Defendants were acting "in furtherance of the[ir] employer's business," *Galasso*, 113 N.Y.S.3d at 118, and within the scope of their employment. Plaintiff does not allege that these Defendants had a propensity for such conduct or that Defendants County or Quattrone were aware of any such propensity. Therefore, to the extent that Counts V and VIII are based on negligent training, supervision, and retention of subordinates, Plaintiff fails to plead a plausible cause of action against Defendants County and Quattrone.

As an alternative ground for dismissal of Count V, Defendants contend that Defendant County cannot be held vicariously liable for Defendant Quattrone's alleged negligent training and/or supervision of his deputies. "The County's duty to provide and maintain the jail building is distinguishable from defendant Sheriffs duty to 'receive and, safely keep' prisoners in the jail over which he has custody[]" *Freeland v. Erie Cnty.*, 997 N.Y.S.2d 860, 862 (N.Y. App. Div. 2014) (quoting N.Y. Correct. Law § 500-c); *Mosey v. Cnty. of Erie*, 984 N.Y.S.2d 706, 709 (N.Y. App. Div. 2014) ("The court. . . properly granted defendants' respective motions insofar as defendants asserted that they were not vicariously liable for the conduct of the deputy sheriff."). To the extent that Plaintiffs negligence claim against Defendant County relies on Defendant County's vicarious liability for Defendant Quattrone's deputies, including Defendant John Does, that claim

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N.Y.S.2d 646, 647 (N.Y. App. Div. 1995)); *Busck v. Howard*, 2021 WL 2946532, at *4 (W.D.N.Y. July 14, 2021) (dismissing a negligence claim against a county based on *respondeat superior* liability because the “[p]laintiff ha[d] not alleged that [the] County . . . enacted a local law adopting *respondeat superior* liability”) (quoting *DeJoseph v. Erie Cnty.*, 2020 WL 4194136, at *10 (W.D.N.Y. July 21, 2020)).

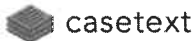
Defendants’ motion to dismiss Count V against Defendant County and Count VIII against Defendant Quattrone is GRANTED.

I. Whether Plaintiffs Negligent Breach of a Duty to Adequately Supervise Claim is Duplicative.

Defendants argue that Count XI against Defendants Roberts, Delahoy, Burrell, Westfahl, Fuller, John Doe Jail Personnel, and John Doe Deputies for negligently breaching a duty to adequately supervise the Decedent must be dismissed as duplicative of Count V because there is no allegation that these Defendants acted outside the scope of their duties as employees of the County. Plaintiff counters that her fifth and eleventh causes of action are different because Count V asserts negligence against Defendant County with respect to its “duty to maintain the jail” and negligent training of employees (Doc. 24 at 31, ¶¶ 109-10) while Count XI alleges negligence against Defendants Roberts, Delahoy, Burrell, Westfahl, Fuller, John Doe Jail Personnel, and John Doe Deputies for their negligent supervision of the Decedent.

Plaintiffs fifth and eleventh causes of action are asserted against different defendants and allege different theories of recovery. They are therefore not duplicative, and Defendants’ motion to dismiss Count XI on that ground is DENIED.

J. Whether Plaintiffs Medical Malpractice Claims Should be Dismissed for Procedural Noncompliance.



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the attorney has reviewed the facts of the case and has consulted with at least one physician in medical malpractice actions,. . . who is licensed to practice in this state or any other state and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of such review and consultation that there is a reasonable basis for the commencement of such action[.]

N.Y. C.P.L.R. § 3012-a(a)(1).

Defendants argue that Plaintiff failed to file a Certificate of Merit in compliance with New York law with her Amended Complaint. Her failure to do so does not negate her malpractice claims because she filed a Certificate of Merit with her Original Complaint. *See Buchanan v. Hesse*, 2018 WL 6067234, at *3 (S.D.N.Y. Nov. 20, 2018) (denying a motion to dismiss based on "Plaintiffs' counsel provided a certificate of merit with the original complaint, which included a personal injury claim for pain and suffering. The [m]oving [defendants do not explain why a revised certificate is necessary here]"); *Frier son v. United States*, 2019 WL 2601692, at *4 (D. Vt. June 25, 2019) (rejecting "the United States' contention that [the plaintiff's failure to include a certificate of merit with the First Amended Complaint required dismissal of the entire complaint" because the plaintiff included the certificate of merit with original complaint and therefore the "screening process]]" was complete). Defendants' motion to dismiss Plaintiffs medical malpractice claims for failure to file a Certificate of Merit is therefore DENIED.

K. Leave to Amend.

Pursuant to Fed. R. Civ. P. 15(a), courts "should freely give leave" to amend a complaint "when justice so requires." Fed. R. Civ. P. 15(a). However, "[l]eave may be denied 'for good reason, including futility, bad faith, undue delay, or

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deny leave to amend,⁸ Plaintiff is hereby GRANTED leave to amend within twenty (20) days of the date of this Opinion and Order consistent with the Federal Rules of Civil Procedure and this court's

⁸ Defendants request that the court dismiss Counts VI, IX, X, XI, and XII with prejudice but do not explain why they contend that outcome is appropriate.

Local Rules.

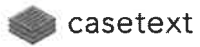
19 *19 CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss Counts V, VI, VIII, IX, and XII, GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss Counts VII and X and DENIES Defendants' motion to dismiss Count IV, XI, and XIII. The court GRANTS leave to amend the Amended Complaint within twenty (20) days of the date of this Opinion and Order.

20 SO ORDERED. *20

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Exhibit W

Latona v. Chautauqua County Jail 2004 WL 2457797

Chautauqua County Jail

2004 WL 2457797

Only the Westlaw citation is currently available.

United States District Court,
W.D. New York.

Russell Alan LATONA, Plaintiff,

v.

CHAUTAUQUA COUNTY JAIL, Officer Scott Cederquist, Officer Douglas
Christian, Officer Brian Pierce, John Doe and John Doe # 2, Defendants.

No. 97 CV 0661.

|

Nov. 2, 2004.

Attorneys and Law Firms

Judy Sager Hernandez, Damon & Morey LLP, Buffalo, NY, for Plaintiff.

Bruce David Grogan, Damon & Morey LLP, pro se.

Elizabeth Newman, Kurt Gustafson, Mayville, NY, for Defendants.

Decision & Order

SCOTT, Magistrate J.

*1 Before the Court is the plaintiff's motion for summary judgment with respect to the Third Amended Complaint (Docket No. 71).

Background

This action was commenced by the plaintiff, Russell Alan Latona ("Latona") asserting various violations of his civil rights in connection with his imprisonment upon being convicted of Driving While Ability Impaired ("DWAI") in the Town of Kiantone Court, Chautauqua County, New York. Originally named as defendants were the Town of Kiantone, the Chautauqua County Jail ("CCJ"), Officer Douglas Christian, Officer Scott Cederquist, and Officer Paul Huels. After various dispositive motions, the Court dismissed the claims against the Town of Kiantone.

In the Third Amended Complaint, Latona alleges that on September 17, 1995, he was involved in a one-car accident. He was subsequently charged with Driving While Intoxicated ("DWI"). He alleges that on September 10, 1996, the charge was reduced to DWAI. (Docket No. 69 at ¶ 14). On May 28, 1997, Latona was remanded to the CCJ as a pretrial detainee. (Docket No. 69 ¶ 16). Latona claims that he was incarcerated more than twice the length of the maximum sentence (15 days) rendered on a DWAI charge. After his requests for a razor and telephone book were denied, Latona alleges that he requested a form for filing a grievance. He claims he was pushed and threatened by correctional officers so that he would not file a grievance. (Docket No. 69 at ¶¶ 20–23).

In addition, Latona claims that on June 2, 1997 he was wrongfully accused of removing pages from certain law books made available to him while he was incarcerated in the CCJ. He was charged with Petit Larceny and Criminal Mischief in the Fourth

Degree, both misdemeanors.¹ He was also issued an Inmate Misbehavior Report based upon this alleged conduct. Latona asserts that he was denied a hearing in connection with an Inmate Misbehavior Report issued against him. Notwithstanding the lack of a hearing, Latona claims that “double lock”, also known as “keep lock” status was imposed requiring that he spend 23 hours a day in his cell. (Docket No. 69 at ¶¶ 26–31).

Latona alleges that after June 2, 1997, his requests for legal materials were denied. (Docket No. 69 at ¶¶ 32–33). The plaintiff also claims that commencing on June 10, 1997, he was repeatedly harassed by other inmates. Latona asserts that among other things, inmates stole food from his food tray while he was in “double lock” status and threw feces and urine at him through the bars of his cell (Docket No. 27 at ¶¶ 34–37). Latona asserts that on June 26, 1997, he advised defendant Paul Huels that he was being threatened with assault by other inmates and asked to be moved to another cell block. A few hours later, Latona alleges that he was, in fact, assaulted by those inmates. (Docket No. 27 at ¶¶ 38–39).

Finally, Latona states that after June 20, 1997 he repeatedly protested to corrections officers that he was being held beyond his maximum jail term on several occasions, but that those protestations went unheeded. (Docket No. 27 at ¶¶ 50–52).

*2 Based on the above, the plaintiff asserts five claims: (1) that the CCJ, as well as individual defendants Cederquist, Christian and Huels failed to act upon Latona's protestations regarding excessive detention in violation of his due process rights; (2) that defendant Cederquist pushed the plaintiff against the wall and threatened him against filing a grievance in violation of his First and Fourteenth Amendment rights; (3) that the CCJ promulgated a policy which imposed administrative penalties but denied administrative hearings to inmates who were charged with misbehavior where the allegations also resulted in separate criminal charges in violation of the plaintiff's due process rights; (4) that the CCJ and defendant Christian denied the plaintiff access to the courts by refusing his requests for legal materials; and (5) that the CCJ and defendant Huels failed to take steps to protect Latona from being assaulted by other inmates in violation of his Eighth and Fourteenth Amendment rights.

The defendants have moved for summary judgment on all claims.

Discussion

Summary Judgment

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Ford v. Reynolds*, 316 F.3d 351 (2d Cir.2003); Fed.R.Civ.P. 56(c). The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. *Ford*, 316 F.3d. at 354. “A dispute regarding a material fact is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the non moving party.’” *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535 (2d Cir.1997) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202, (1986)). While the moving party must demonstrate the absence of any genuine factual dispute, (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)), the party against whom summary judgment is sought, however, “must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538(1986); *McCarthy v. American Intern. Group, Inc.*, 283 F.3d 121 (2d Cir.2002); *Marvel Characters v. Simon*, 310 F.3d 280, 285–86 (2d Cir.2002).

Excess Detention

The plaintiff's first cause of action asserts that the CCJ maintained a policy or practice whereby it declined to determine the maximum sentence time applicable to pretrial detainees, even though it knew or should have known that the practice could result in unlawful detention.

*3 The defendants move to dismiss the claims asserted against the CCJ inasmuch as it is a subdivision of Chautauqua County and not a legal entity capable of being sued. New York law governs the capacity of a governmental entity to sue or be sued. In addition, the individual defendants seek dismissal based upon the qualified immunity defense.

In New York, departments like the defendant, which are merely administrative arms of a municipal corporation, do not have a legal identity separate and apart from the municipality and cannot be sued. *Brockport v. County of Monroe Pure Waters Div.*, 75 A.D.2d 483, 486, 429 N.Y.S.2d 931 (4th Dep't 1980), *aff'd*, 54 N.Y.2d 678, 442 N.Y.S.2d 510, 425 N.E.2d 898 (1981); *Belinson v. Sewer District No. 16 of the Town of Amherst*, 65 A.D.2d 912, 410 N.Y.S.2d 469 (4th Dep't 1978); *Loria v. Town of Irondequoit*, 775 F.Supp. 599, 606 (W.D.N.Y., 1990).

The plaintiff does not appear to dispute the fact that the CCJ is not a legal entity, but argues that Judge Arcara previously ruled that the claims against the CCJ were claims "against the municipality" and thus, under the "law of the case" doctrine it has already been determined that the claims asserted against the CCJ were actually asserted against Chautauqua County. (Docket No. 3). Similarly, the plaintiff asserts that the Second Circuit already determined this issue as well when it directed that the plaintiff be given an opportunity to amend his complaint after finding that Latona "may be able to state causes of action against individual prison officials or municipal defendants." (Docket No. 6). The cited decisions by Judge Arcara and the Second Circuit do not support the plaintiff's interpretation. Neither of these decisions addresses the issue of whether the CCJ is a legal entity or whether the claims asserted against the CCJ should be attributable to Chautauqua County. Those decisions merely addressed whether the plaintiff had properly set forth a municipal liability claim (Judge Arcara ruled he did not) and whether the plaintiff should be afforded another opportunity to amend the pleadings to do so (the Second Circuit directed that Latona be afforded such an opportunity).

The plaintiff also asserts that the Court should "construe" the custom, policy and practice claims asserted against the CCJ as being asserted "against the municipality itself." (Docket No. 79 at page 6). In support of this proposition, the plaintiff cites to *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir.1998) and *Yeksigian v. Nappi*, 900 F.2d 101, 103 (7th Cir.1990). However, in those cases the defendants named in the action included the individuals, in both their personal and official capacity, who were allegedly responsible for establishing the custom, practice or policy at issue. The Court held that the claim against those individuals in their official capacity is equivalent to a claim against the municipality itself.² In the instant case, the plaintiff has not identified a policy maker responsible for any offending policy, practice or custom. This is not a case, like *Darling v. Chautauqua County Jail*, 2004 WL 1906870 (August 25, 2004), wherein the plaintiff intended to name the County, rather than the County Jail, as a defendant; referred to the County as a defendant in the body of the complaint; and requested leave to amend the complaint to name the County as the proper party. In the instant case, the plaintiff does not assert that naming the CCJ, rather than the County itself, was an inadvertent mistake; does not refer to the County in the body of the complaint; and has not requested additional leave to further amend the complaint to name the County as the proper party. The Court notes that the original complaint in this case was amended on three occasions. Not one of the four complaints names Chautauqua County as a defendant.³ The Court concludes that Chautauqua County is not a party to this action and that the claims asserted against the CCJ, a legal non-entity cannot be attributed to Chautauqua County.

*4 Dismissal of the plaintiff's first clause of action, as asserted against all defendants, is also required because the Court agrees that the defendants are entitled to qualified immunity with respect to this claim. It is well settled that public officials sued in their individual capacity are entitled to qualified immunity from suit unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "[E]ven assuming a state official violates a plaintiff's constitutional rights, the official is protected nonetheless if he objectively and reasonably believed that he was acting lawfully." *Luna v. Pico*, 356 F.3d 481, 490 (2d Cir.2004). In order to prevent the margin of immunity from being too broadly applied, the Supreme Court has declined to hold

that “an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,” but has enunciated a standard that excludes such immunity if “in the light of pre-existing law the unlawfulness [is] apparent.” *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666. Thus, in assessing a qualified immunity claim, the Court must consider: (1) whether the right in question was defined with “reasonable specificity”; (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful. *Jermosen v. Smith*, 945 F.2d 547, 550 (2d Cir. 1991); see also *Back v. Hastings On Hudson Union Free School Dist.*, 365 F.3d 107, 129–130 (2d. Cir.2004).

The Court notes that plaintiff has failed to demonstrate evidence to support the existence of a “custom, policy or practice” to keep inmates incarcerated for periods in excess of the statutory maximum. Latona asserts only that the individual defendants ignored his repeated protests to check into the nature of the charges against him. He then states, in conclusory fashion, that the CCJ maintained a policy or practice whereby it declined to determine the maximum sentence time applicable to pretrial detainees.

More significantly, however, the plaintiff has failed to present any preexisting authority which would have led a reasonable corrections officer to presume that the officer owed a legal duty on behalf of the individual correction officers to check on an inmate's sentence merely upon the inmate's assertion that he has reached his maximum sentence. Moreover, the plaintiff does not state specifically what the correction officers were to have done in response to his protests. The plaintiff does not claim the existence of a Court order which would have advised the individual correction officers of the date upon which the plaintiff was to be released. It is undisputed that the charges against the plaintiff had not been disposed of prior to his release, no conviction or plea had been entered, and no release had been ordered by the Court. The record reflects the existence of various dates requiring the plaintiff to be brought before the Court for proceedings relating to the charges upon which he was detained. The individual correction officers were not required to act as an advocate to contact the Court on behalf of the plaintiff and prompt the Court to make a determination to release the plaintiff. Given the circumstances of this case, the Court concludes that under preexisting law the defendants in this case would not have understood that his or her acts were unlawful as a matter of law. Thus, the defendants are entitled to qualified immunity with respect to the plaintiff's first cause of action.

*5 Based on the above, the plaintiff's first cause of action is dismissed.⁴

Denial of Access to Administrative Remedies

In his second cause of action, the plaintiff asserts that his First and Fourteenth Amendment rights were violated in that defendant Cederquist intentionally pushed Latona against a wall and threatened him not to file a grievance. (Docket No. 69 at ¶¶ 62–64). Latona also asserts that the Chautauqua County Jail failed to adequately train and supervise Cederquist in this regard. The gravamen of this claim is that the defendant's conduct denied Latona his “right to seek redress of grievances.” (Docket No. 69 at ¶ 65).

In moving to dismiss this claim, the defendant argues only that Cederquist's alleged conduct does not constitute an actionable assault under *Hudson v. McMillian*, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). This argument seems to miss the point of the plaintiff's claim. (Docket No. 72 at pages 5–7). The defendants' papers do not address the plaintiff's claim that he was denied his right to seek administrative remedies in violation of his rights to due process and free speech. Thus, the defendants motion to dismiss the second cause of action is denied.

Imposition of Administrative Penalty without Administrative Hearing

The plaintiff asserts that the CCJ violated his due process rights when it imposed an administrative remedy against him for allegedly tearing out material from a County-owned law book without affording him an administrative hearing, notwithstanding the fact that the conduct at issue was also the subject of criminal charges. In addition to being subject to keeplock for approximately 17 days, Latona alleges that he was also denied participation in recreation time during this period. (Docket No. 69 at ¶¶ 30 and 69).

Because this claim is asserted only against the CCJ, it must be dismissed inasmuch as the Court has determined that the CCJ, a legal non-entity, is not capable of being sued. This claim must also be dismissed under *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Assuming that a proper defendant was named, and assuming further that the plaintiff was otherwise entitled to an administrative hearing prior to being subjected to administrative penalties, a plaintiff asserting such a claim must first establish a property interest implicating his due process rights under *Sandin*. In that case, the Supreme Court held that the failure to comply with every state or prison regulation does not necessarily create a protected liberty interest for prisoners. *Sandin*, 515 U.S. at 483-484. Instead, to create a protected liberty interest, a state must implement a regulation or other provision providing for restraints that impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484.

In *Ragland v. Crawford*, 1997 WL 53279, *3 (S.D.N.Y., 1997), the Court held that a deprivation similar to that asserted in this case was insufficient to establish an atypical hardship under *Sandin*. There, the Court held that “[i]n light of the Court's holding in *Sandin*, neither Ragland's loss of one hour daily recreation time for one week, nor his alleged confinement to keeplock on October 13, 1995, constitutes an atypical, significant hardship implicating a protected liberty interest.” *Ragland*, 1997 WL 53279 at *3. As in *Ragland*, the Court finds that the 17-day keeplock status and denial of recreation did not create an atypical or significant hardship in relation to the ordinary incidents of prison life. Thus, the plaintiff has failed to establish a protected liberty interest and may not maintain the due process claims asserted in this matter.

*6 In light of the above, the plaintiff's third cause of action is dismissed.

Denial of Access to the Courts

The plaintiff alleges that he was denied access to the Courts when his various requests for legal materials were denied after June 2, 1997. “To establish a violation of the fundamental right of access to the courts, an inmate must show actual injury caused by the alleged deprivation.” *Lewis v. Casey*, 518 U.S. 343, 353, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Although the plaintiff asserts that the denial of these legal materials “prejudiced” his application for a writ of habeas corpus, he does not assert that he was actually denied from presenting his habeas petition for review by the Courts. An inmate must do more than assert conclusory allegations that his ability to present his claims was “hindered.” The plaintiff does not articulate any argument that he was prevented from presenting in his habeas petition and thus, has not even raised an issue of fact as to whether the petition would have been successful but for the alleged denial of legal materials.

Thus, the plaintiff's claim that he was denied access to the Courts must be dismissed inasmuch as the plaintiff does not assert any actual denial of that right. *Monsky v. Moraghan*, 127 F.3d 243, 246 (2d. Cir. 1997).

Failure to Protect

The plaintiff claims that defendant Heuls⁵ violated his Eighth Amendment rights by failing to take steps to protect him from being assaulted by other inmates despite being told by Latona that several other inmates had threatened him. To establish an Eighth Amendment violation, the plaintiff must demonstrate that the defendants acted toward him with “deliberate indifference.” *Wilson v. Seiter*, 501 U.S. 294, 297, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Under that standard, the plaintiff must show, *inter alia*, that the defendants knew of or must have known of, and disregarded, an excessive risk to the plaintiff's health and safety. *Rangolan v. County of Nassau*, 217 F.3d 77, 79 (2d. Cir. 2000).

Although defendant Huels denies that he acted with deliberate indifference, the Court concludes that a question of fact exists as to exactly what information Latona provided Huels; when Latona gave the information to Huels; and what action, if any, Huels took once he was allegedly informed of the threat against Latona. These questions of fact preclude the entry of summary judgment with respect to this claim.

Conclusion

Based on the above, the defendants' motion for summary judgment (Docket No. 71) is granted in part and denied in part. Trial on the remaining issues shall commence on Monday, November 8, 2004.

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2457797

Footnotes

- 1 Latona admits that on June 20, 1997 he pled guilty to both charges. The Court imposed a fine but no additional jail time. (Docket No. 69 at ¶ 45).
- 2 The same result was found in *Robinson v. Howell*, 902 F.Supp. 836, 839 (S.D.Ind.,1995), where the Court held that “a personal-capacity action seeks to impose personal liability on an individual governmental actor for actions taken under color of state law; in contrast, an official-capacity suit is effectively a suit against the governmental entity which the individual governmental actor represents.” *Robinson*, 902 F.Supp. at 839 citing *Hafer v. Melo*, 502 U.S. 21, 24–27, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).
- 3 The plaintiff's original pro se complaint named “the People of Chautauqua County” as a defendant. The Second Circuit ruled that all claims asserted against that defendant were properly dismissed. (Docket No. 6).
- 4 The Court notes that for the first time in this matter the plaintiff's memorandum in opposition to the instant motion asserts that Latona has a valid state claim against the defendants for false imprisonment. (Docket No. 79 at page 8). No such claim is asserted in the Third Amended Complaint. The Court declines to construe the plaintiff's memorandum as a request to further amend the complaint in this matter. The Court notes that the Third Amended Complaint, the *fourth* complaint filed in this case (the second filed by counsel representing the plaintiff) was filed on July 14, 2004, almost *seven years* after this action was commenced and only a few months before the scheduled trial in this matter.
- 5 To the extent that this claim was also asserted against the CCJ, it is dismissed for the reasons stated above.

Exhibit X

United States v. Cooper 2019 WL 6167235

Chautauqua County Jail

2019 WL 6167235

Only the Westlaw citation is currently available.
United States District Court, W.D. New York.

UNITED STATES of America,

v.

Deonte COOPER a/k/a Terry, Defendant.

1:18-CR-00126 EAW

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Signed 11/20/2019

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DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

I. FACTUAL AND PROCEDURAL BACKGROUND

*1 Defendant Deonte Cooper ("Defendant") is one of ten defendants charged in a Superseding Indictment filed on October 11, 2018. (Dkt. 31). Defendant stands accused of conspiracy to commit firearms offenses as alleged in Count One, in violation of 18 U.S.C. § 371. This Court referred all pretrial matters in the case to United States Magistrate Judge H. Kenneth Schroeder, Jr. pursuant to 28 U.S.C. § 636(b)(1)(A)-(B). (Dkt. 153).

On February 15, 2019, Defendant filed pretrial motions seeking, among other things, to suppress evidence seized from 6259 Runkle Avenue in Ashtabula, Ohio, on May 30, 2018, pursuant to a search warrant issued by Ashtabula Municipal Court Judge Laura Digiacomio. (Dkt. 69; *see also* Dkt. 79 (Defendant's Affidavit)). Defendant also sought suppression of his statements made during an interview by law enforcement on the same date. (*Id.*). Judge Schroeder determined that an evidentiary hearing was necessary to resolve the suppression issues (Dkt. 91), and a hearing was conducted on June 24, 2019, where the Government presented testimony of Ashtabula City Police Department Detective Michael Palinkas and ATF Special Agent Elizabeth Gardner (Dkt. 107). Defendant and the Government filed post-hearing memoranda in support of their respective positions. (Dkt. 115; Dkt. 116).

On September 23, 2019, Judge Schroeder issued a Report, Recommendation and Order addressing Defendant's pending motions. (Dkt. 119). Judge Schroeder concluded that both Detective Palinkas and Special Agent Gardner testified credibly at the hearing. (*Id.* at 8 n.2, 13 n.3). With respect to the motion to suppress statements, Judge Schroeder concluded:

[Defendant] made a knowing and voluntary waiver of his rights, including the right to have a lawyer present during the interrogation and ... he was in no way coerced or overpowered by the agents in their questioning of the defendant and ... his replies and statements made to the agents were voluntarily given.

(*Id.* at 9). Thus, Judge Schroeder recommended that Defendant's motion to suppress statements be denied. (*Id.*).

With respect to the motion to suppress evidence seized pursuant to the search warrant issued by Judge Digiacomo, Judge Schroeder found that the warrant expressly incorporated, adopted and attached the search warrant affidavit completed by Detective Palinkas. (*Id.* at 10). Specifically, the warrant stated: "WHEREAS, there has been filed with me an affidavit for a Search Warrant, a copy of which is hereby annexed, incorporated and adopted herein as if the same were fully written herein...." (Govt. Ex. 1 (Warrant) at 1). Thus, according to Judge Schroeder's findings, "[s]ince the affidavit of Detective Palinkas sworn to May 30, 2018 was properly incorporated and annexed to the search warrant, that affidavit constitutes a legally appropriate particularized description of the items to be seized pursuant to the search warrant." (Dkt. 119 at 12). Namely, the affidavit of Detective Palinkas sought to search for the following items believed to be at 6259 Runkle Avenue: "Heroin, digital scales, drug packaging materials, pipes, syringes, firearms & other prohibited weapons...." (Govt. Ex. 1 (Affidavit) at 7).

*2 Judge Schroeder also rejected Defendant's arguments that the search warrant was invalid because Defendant was not personally handed a copy of the warrant, and that probable cause was lacking for issuance of the warrant. (Dkt. 119 at 13-19). Finally, relying on *United States v. Leon*, 468 U.S. 897 (1984), Judge Schroeder alternatively concluded that the good faith exception applied. (*Id.* at 20). Accordingly, Judge Schroeder recommended denying Defendant's motion to suppress evidence seized from 6259 Runkle Avenue, Ashtabula, Ohio, on May 30, 2018, pursuant to the search warrant issued by Judge Digiacomo. (*Id.*).

On October 7, 2019, Defendant filed objections to Judge Schroeder's Report and Recommendation. (Dkt. 127). Defendant's objections were limited to his argument that the warrant was not sufficiently particularized. (*Id.*)¹ In other words, Defendant did not object to Judge Schroeder's conclusions with respect to the motion to suppress statements, nor did Defendant challenge Judge Schroeder's conclusions that probable cause supported issuance of the warrant and that Defendant did not have to be personally handed the search warrant in order for it to be effective. (*See id.*). Defendant also failed to address Judge Schroeder's conclusion as to the applicability of the *Leon* good faith exception. (*See id.*).

Instead, the focus of Defendant's objections is on Judge Schroeder's factual conclusion that the affidavit was attached to the search warrant. Defendant relies on a photograph of the search warrant left at the scene of the search (Govt. Ex. 8; Def. Ex. 1) and testimony from Special Agent Gardner about that photograph (Dkt. 127 at 2). According to Defendant, the photograph demonstrates that the affidavit was not attached to the warrant, and therefore the affidavit cannot be relied upon to cure the lack of particularization in the warrant. (*Id.*). The Government filed a memorandum in opposition to Defendant's objections on October 21, 2019 (Dkt. 136), at which time the matter was taken under advisement by the undersigned (Dkt. 128).

II. STANDARD OF REVIEW

*3 A district court reviews any specific objections to a report and recommendation on a motion to suppress under a *de novo* standard. Fed. R. Crim. P. 59(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). To trigger the *de novo* review standard, objections to a report and recommendation "must be specific and clearly aimed at particular findings in the magistrate judge's proposal." *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009). The Court is not required to review *de novo* those portions of a report and recommendation to which objections were not filed. Fed. R. Crim. P. 59(b)(2) ("Failure to object in accordance with this rule waives a party's right to review."); *see United States v. Male Juvenile (95-CR-1074)*, 121 F.3d 34, 38 (2d Cir. 1997) ("We have adopted the rule that failure to object timely to a magistrate judge's report may operate as a waiver of any further judicial review of the decision, as long as the parties receive clear notice of the consequences of their failure to object.").

III. ANALYSIS

A. Particularization of Warrant

The Fourth Amendment requires that a search warrant be sufficiently particular by identifying the specific offense for which probable cause has been established, describing the place to be searched, and specifying the items to be seized by their relation to the designated crimes. *United States v. Lustyik*, 57 F. Supp. 3d 213, 225-26 (S.D.N.Y. 2014). “[T]he particularity requirement guards against general searches that leave to the unguided discretion of the officers executing the warrant the decision as to what items may be seized.” *United States v. Riley*, 906 F.2d 841, 844 (2d Cir. 1990). Here, Defendant challenges that third aspect of the particularity requirement—namely, that the warrant failed to specify on its face the items to be seized.

The Supreme Court has recognized that the Fourth Amendment's requirement that a warrant specify on its face with particularity all items for which the search is authorized, can be satisfied by reference to a supporting affidavit “if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant.” *Groh v. Ramirez*, 540 U.S. 551, 557-58 (2004); see also *United States v. Waker*, 534 F.3d 168, 172 (2d Cir. 2008) (although search warrant did not list on its face items to be seized, where the officer who applied for the warrant attached his affidavit and the warrant included deliberate and unequivocal language of incorporation, motion to suppress was properly denied). Here, Judge Schroeder concluded: “Since the affidavit of Detective Palinkas sworn to May 30, 2018 was properly incorporated and annexed to the search warrant, that affidavit constitutes a legally appropriate particularized description of the items to be seized pursuant to the search warrant.” (Dkt. 119 at 12). Indeed, the warrant expressly states that the affidavit is “annexed, incorporated and adopted herein as if the same were fully written herein.” (Govt. Ex. 1 (Warrant) at 1).

Contrary to Defendant's arguments, the Court is not persuaded that a photograph of the cover page of the warrant left at 6259 Runkle Avenue demonstrates otherwise.² The photograph relied upon by Defendant is far from clear (Govt. Ex. 8/Def. Ex. 1), and the testimony of Special Agent Gardner, relied upon by Defendant, actually demonstrates that she was unfamiliar with the length of the document depicted in the photograph (Dkt. 107 at 84 (stating “I don't know. It's not my warrant,” in response to question as to the number of pages for the warrant), 85 (in response to being shown photograph, stating “I do see two pages. I don't know if there's more than that or not.”)). Accordingly, the Court finds that Judge Schroeder's factual finding that the affidavit was attached to the warrant is supported by the record. Based on a *de novo* review, the Court concludes that the warrant was sufficiently particularized because it used appropriate words of incorporation and the affidavit accompanied the warrant. As a result, Defendant's motion to suppress is denied.

B. Good Faith

*4 Even if the affidavit was not attached to the warrant, the Court agrees with Judge Schroeder that the *Leon* good faith exception applies. Indeed, Defendant has not challenged that finding by Judge Schroeder, and thus any objection to that finding has been waived. See Fed. R. Crim. P. 59(b)(2); *Male Juvenile* (95-CR-1074), 121 F.3d at 38.

“A violation of the Fourth Amendment does not necessarily result in the application of the exclusionary rule.” *United States v. Rosa*, 626 F.3d 56, 64 (2d Cir. 2010). “Indeed, exclusion ‘has always been our last resort, not our first impulse.’ ” *Herring v. United States*, 555 U.S. 135, 140 (2009) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). Instead, whether the exclusionary rule applies “depends on the ‘efficacy of the rule in deterring Fourth Amendment violations in the future’ as well as a determination that ‘the benefits of deterrence ... outweigh the costs.’ ” *Rosa*, 626 F.3d at 64 (quoting *Herring*, 555 U.S. at 140). The “ ‘good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all of the circumstances.’ ” *Herring*, 555 U.S. at 145 (quoting *Leon*, 468 U.S. at 922 n. 23). “The good-faith exception first recognized in *Leon* holds that when the agents executing a search warrant act with an objectively reasonable good-faith belief that their conduct is lawful, improperly obtained evidence remains admissible because in such circumstances, the deterrence rationale loses much of its force, and exclusion cannot pay its way.” *United States v. Eldred*, 933 F.3d 110, 118 (2d Cir. 2019) (quotation and citation omitted).

In *Leon*, the Supreme Court identified four circumstances in which the good faith exception does not apply and the officer's reliance on the warrant will not be considered to have been in good faith:

(1) where the issuing magistrate has been knowingly misled; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4) where the warrant is so facially deficient that reliance upon it is unreasonable.

United States v. Moore, 968 F.2d 216, 222 (2d Cir. 1992) (citing *Leon*, 468 U.S. at 923). “These exceptions reflect the general rule that, ‘[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.’ ” *United States v. Romain*, 678 F. App’x 23, 25 (2d Cir. 2017) (alteration in original) (quoting *Herring*, 555 U.S. at 144). “ ‘The pertinent analysis of deterrence and culpability is objective,’ and ‘ ‘our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal’ in light of ‘all of the circumstances.’ ” *Rosa*, 626 F.3d at 64 (quoting *Herring*, 555 U.S. at 145).

“ ‘The burden is on the government to demonstrate the objective reasonableness of the officers’ good faith reliance’ on an invalidated warrant.” *United States v. Clark*, 638 F.3d 89, 100 (2d Cir. 2011) (citations omitted). Moreover, as counseled by the Second Circuit, in assessing whether the government has met its burden, a court must consider that “in *Leon*, the Supreme Court strongly signaled that most searches conducted pursuant to a warrant would likely fall within its protection.” *Id.*

*5 The Second Circuit has recognized that after *Groh*, a court may not rely on unincorporated, unattached supporting documents to cure a constitutionally defective warrant, but “those documents are still relevant to our determination of whether the officers acted in good faith, because they contribute to our assessment of the officers’ conduct in a particular case.” *Rosa*, 626 F.3d at 64 (where warrant failed to link items to be searched and seized to suspected criminal activity, suppression not warranted where supporting documents provided that link, search was executed by team led by application’s affiant, and there was no evidence that law enforcement officers actually relied on the defective warrant, as opposed to their knowledge of the investigation and the contemplated limits of the issuing magistrate’s authorization). Thus, even where the technical requirements of *Groh* are not satisfied, the *Leon* good faith exception may justify denial of a suppression motion. *See Romain*, 678 F. App’x at 25-26 (where text of warrant did not reference criminal statute that defendant was charged with violating, but supporting documents contained those references, good faith exception applied); *United States v. Conley*, 342 F. Supp. 3d 247, 274 (D. Conn. 2018) (where search warrant affiant and officer in charge of execution of search were the same, and search warrant application referenced crimes related to the search and referenced supporting affidavit, good faith exception applied); *Lustyik*, 57 F. Supp. 3d at 226-27 (where warrant did not incorporate attachment setting forth list of items to be seized, suppression was not warranted where officers executed warrant in good faith and were guided by the attachment to the warrant); *United States v. Cyr*, No. 2:14-cr-19, 2014 WL 6386805, at *8 (D. Vt. Nov. 14, 2014) (where failure to incorporate application into warrant was the result of an inadvertent act of negligence, good faith exception applied).

Here, the Court agrees with Judge Schroeder as to the applicability of the good faith exception. In other words, even if the record established that the search warrant affidavit was not attached to the warrant that was left at 6259 Runkle Avenue, and even if this failure constituted a violation of the Fourth Amendment’s particularity requirement, it is apparent that any technical failure to comply with the Fourth Amendment’s particularity requirement is excused by good faith. Detective Palinkas was familiar with the contents of his affidavit, he was present at the scene of the search, the warrant expressly incorporated and referenced the affidavit, and there is no evidence that the search exceeded the scope referenced in the affidavit. Thus, if the affidavit was not attached to the warrant left at the scene, it plainly would have been through inadvertence and no deterrence rationale would be served by suppression. Again, Defendant made no effort to object to Judge Schroeder’s findings in this regard, and there is no basis for concluding that the *Leon* good faith exception does not apply under the circumstances.

IV. CONCLUSION

The Court has conducted a careful review of the Report and Recommendation as well as the filings previously made in the case and the record of the hearing conducted before Judge Schroeder. With respect to those issues specifically raised in the objections filed by Defendant, for the reasons set forth above and for the reasons set forth in Judge Schroeder's Report and Recommendation, the Court agrees with Judge Schroeder that Defendant's motion to suppress must be denied. In addition, for all other issues raised by Defendant's motions filed before Judge Schroeder, but not specifically objected to by Defendant, the Court finds no reason to reject or modify the Report and Recommendation and therefore the Court accepts and adopts the Report and Recommendation (Dkt. 119) in its entirety and denies Defendant's motion to suppress evidence and statements (Dkt. 69).

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 6167235

Footnotes

- 1 Defendant's objections reference the search warrant as being "overly broad" and not sufficiently particularized, and he appears to use those terms interchangeably. (*See* Dkt. 127). Defendant's objections relate to the failure of the warrant to sufficiently particularize the items to be seized because only the affidavit described those items. Defendant has not argued that the items actually referenced in the affidavit were overly broad in view of the probable cause determination by Judge Digiaco. Overbreadth and lack of particularization do not have the same meaning:

Despite their frequent conflation, '[over]breadth and particularity are related but distinct concepts. A warrant may be broad, in that it authorizes the government to search an identified location or object for a wide range of potentially relevant material, without violating the particularity requirement.' ... In other words, a warrant is overbroad if the description of the items to be searched or seized is broader than the limits imposed by the probable cause justifying the warrant.

United States v. Conley, 342 F. Supp. 3d 247, 271 (D. Conn. 2018) (citations omitted). While Defendant initially challenged the probable cause determination for issuance of the warrant, he has not objected to Judge Schroeder's conclusion that probable cause supported issuance of the warrant. Accordingly, any argument that the warrant was overly broad in view of the probable cause determination has not been properly raised before this Court. Fed. R. Crim. P. 59(b) (2) ("Failure to object in accordance with this rule waives a party's right to review.").

- 2 The record is clear that the affidavit accompanied the warrant when it was signed by Judge Digiaco. (*See* Dkt. 107 at 13-15 (Detective Palinkas testifying that his affidavit was presented to Judge Digiaco with the warrant)). Neither party has briefed whether the failure to include a copy of the affidavit with the warrant when it was left at the place of execution would defeat the applicability of *Groh* under the circumstances (*i.e.*, where the affidavit indisputably accompanied the warrant at the time of its signing and was known to the officer executing the warrant). *Cf. Groh*, 540 U.S. at 557 (explaining that Fourth Amendment's requirement of particularity is not served by "some other document, somewhere, [that] says something about the objects of the search, but the contents of that document are neither known to the person whose home is being searched nor available for inspection."). As a result, the Court specifically does not resolve that issue, but rather assumes for purposes of this Decision and Order that *Groh* requires that the Fourth Amendment's particularity requirements are only satisfied when the copy of the warrant left at the place of execution included the incorporated affidavit.

End of Document

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Exhibit Y

NYCPL Sect. 60.45

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Criminal Procedure Law (Refs & Annos)
Chapter 11-a. Of the Consolidated Laws (Refs & Annos)
Part One. General Provisions
Title D. Rules of Evidence, Standards of Proof and Related Matters
Article 60. Rules of Evidence and Related Matters (Refs & Annos)

McKinney's CPL § 60.45

§ 60.45 Rules of evidence; admissibility of statements of defendants

Effective: April 1, 2018

Currentness

1. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him in a criminal proceeding if such statement was involuntarily made.

2. A confession, admission or other statement is “involuntarily made” by a defendant when it is obtained from him:

(a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or

(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:

(i) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or

(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

3. (a) Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves a class A-1 felony, except one defined in article two hundred twenty of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; or a felony offense defined in article one hundred twenty-five or one hundred thirty of such law that is defined as a class B violent felony offense in section 70.02 of the penal law. For purposes of this paragraph, the term “detention facility” shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.

(d) In the event the court finds that the people have not shown good cause for the non-recording of the confession, admission, or other statement, but determines that a non-recorded confession, admission or other statement is nevertheless admissible because it was voluntarily made then, upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required by this section may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.

(e) Video recording as required by this section shall be conducted in accordance with standards established by rule of the division of criminal justice services.

Credits

(L.1970, c. 996, § 1. Amended L.2017, c. 59, pt. VVV, § 1, eff. April 1, 2018.)

Editors' Notes

PRACTICE COMMENTARIES

by William C. Donnino

Table of Contents

Constitutional Basis [CPL 60.45 (1)]

Involuntarily Made Statement [CPL 60.45 (2)]

Conduct of any person [CPL 60.45(2)(a)]

Conduct of public servant [CPL 60.45(2)(b)]

Recorded Custodial Interrogations [CPL 60.45(3)]

Expert Testimony about False Admissions

Constitutional Basis [CPL 60.45 (1)]

Subdivision (1) restates the Federal and State constitutional imperative that a “statement made by a defendant with respect to his participation or lack of participation in the offense charged, may not be received in evidence against him [or her] in a criminal proceeding if such statement was involuntarily made.” See U.S. Const. Amends. V [no person “shall be compelled in any criminal case to be a witness against himself”] and XIV [no State shall “deprive any person of life, liberty, or property, without due process of law”]; and N.Y. Const. art. 1, § 6 [no person shall “be compelled in any criminal case to be a witness against himself or herself”].

The evolution of the Federal standard of voluntariness, which applies to the States, is highlighted by the following three cases: *Brown v. Mississippi*, 297 U.S. 278, 279, 56 S.Ct. 461, 462, 80 L.Ed. 682 (1936) (holding, before application of the Fifth Amendment to the states, that a confession extorted by officers of the state by brutality and violence violates the Due Process Clause of the Fourteenth Amendment); *Chambers v. Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940) (recognizing that coercion can be mental as well as physical); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct.

Exhibit Z

Trial Transcript of Andrew Molitor Admitting After Two Years of Denials That There Was A Custodial Interrogation of Plaintiff And He Was Present For This Undocumented Interrogation

Exhibit Z (1)

Chautauque County District Attorney
Stating My Job Is To Get Convictions.

County DA Office's High Dismissal Rate, Low Conviction Rate Are A Bad Combination

"I honestly don't agree with him in so many facets on what he discusses on what the job is - to advocate for policy changes. First and foremost, it's to get convictions."

We didn't disagree with then-candidate Jason Schmidt about his view of the Chautauqua County District Attorney's primary objective back in October 2020: Much like James Carville's much-quoted advice to then-candidate Bill Clinton, "It's the economy, stupid," the district attorney's job is to get convictions.

A couple of weeks ago *The Post-Journal* reported on the county's embarrassingly low conviction rates.

The county is tied for the second-lowest felony conviction rate in the state, trailing only Kings County's 7.2% and tied with Bronx and Queens counties at 8.4%. It should go without saying those three counties have much higher populations than Chautauqua County.

Jason Schmidt, Chautauqua County district attorney, blamed discovery rules with the lower felony conviction rate, saying many cases were "time dead" due to the COVID-19 pandemic that closed courts and, when courts reopened, many cases couldn't be prosecuted under the state's speedy trial statutes. The statistics, however, tell a different story. The county's dismissal rates the last two years — 27.2% and 25.2% — are noticeably higher than the two closest counties in population size — Oswego (5.2% and 7.6%) and Rensselaer (7.2% and 5.3%). Even more discouraging, of the 12 counties with higher dismissal rates than Chautauqua County, only three join Chautauqua County with dismissal rates higher in 2022 than they were in 2021.

— Broome County, which is home to Binghamton; Monroe County, which is home to Rochester, and Niagara County.

That tells us that most counties are finding ways to decrease their dismissal rates while Chautauqua County and two of its fellow rural counties are not. And Broome (28.4% and 19.3%) and Monroe (19.9% and 25.8%) boast much higher felony conviction rates than Chautauqua County.

Three years ago, during a debate with *The Post-Journal* and Dunkirk OBSERVER, Schmidt said he didn't see the need to lobby for further reforms to the state's 2019 bail and discovery reforms.

"The fact of the matter is we have to live by the rules," Schmidt said back in October 2020. "This is what we do all

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Three years ago, during a debate with *The Post-Journal* and Dunkirk OBSERVER, Schmidt said he didn't see the need to lobby for further reforms to the state's 2019 bail and discovery reforms.

"The fact of the matter is we have to live by the rules," Schmidt said back in October 2020. "This is what we do all the time. We can't complain about it. We just have to function and we have to keep moving forward."

Those words may come back to bite the district attorney next year if Schmidt runs for re-election, because while other counties are finding ways to convict more people than Chautauqua County while at the same time finding ways to decrease dismissals that are influenced by state law that hampers district attorneys, Chautauqua County's felony conviction trend has been going the wrong way since 2018.

It's time for District Attorney Schmidt, in the words of candidate Schmidt, to go get convictions.

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