

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

UNITED STATES OF AMERICA)
)
v.) **CRIMINAL No. 16-CR-10280-MLW**
)
DAVID MAGLIO)
Defendant)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE
SEIZED PURSUANT TO AN INVALID SEARCH WARRANT**

The defendant, David Maglio, submits this memorandum in support of his *Motion To Suppress Evidence Seized Pursuant to An Invalid Search Warrant* based on the allegations contained in the search warrant affidavit dated March 16, 2016. Discussed in detail below, the search warrant affidavit clearly failed to establish probable cause under Massachusetts law where the affiant failed to establish that Maglio was not a registered medical marijuana patient lawfully cultivating marijuana; and, the affiant failed to satisfy the more stringent two-pronged *Aguilar-Spinelli* test. Even if the less stringent federal standards are applied, the affidavit still fails to establish probable cause as discussed in his *Motion for a Franks Hearing* filed on August 24, 2017 (Doc. 58). Maglio respectfully requests the right to supplement the within memorandum following argument and/or the resolution of the *Franks* motion which is relevant to issues raised herein.

STATEMENT OF FACTS

The following is based exclusively on the four corners of the affidavit of Hull police Sergeant Detective Craig Lepro (“Lepro”) submitted in support of an application for a search

warrant for 83 Main Street Hull, Massachusetts 02045 on March 16, 2016. (Attached as *Exhibit A*). Additional facts are discussed as they become relevant to the legal issues raised herein.

1. The Sole Informant

Vinicio Albuquerque (“Albuquerque”), despite his obvious motivations, is the reason Hull police began their less than two-month investigation of Maglio and 83 Main Street Hull, Massachusetts in January 2016. *Exh. A*. Discussed in detail below, such information was provided to Lepro secondhand and Lepro never bothered to speak with Albuquerque directly. Much of the claims made by Albuquerque, as well as the claims made by Lepro to establish Albuquerque’s reliability are false or misleading and subject to the outcome of the *Franks* motion.

There were no controlled buys and no other sources of information.

a. Police interactions with Albuquerque

At the beginning of January 2016, Albuquerque came into contact with police three times on three consecutive days. The first encounter on January 6, 2016 was in response to a well-being check by Hull police. Albuquerque was slumped over his steering wheel and unresponsive. Eventually, Albuquerque woke up and was transported to the hospital while his vehicle was towed. The following day, Hingham police responded to a report of a suspicious person. Albuquerque flagged officers down to inquire about picking up his vehicle towed the previous night. On the third encounter, in the early morning of January 8, 2016, Hingham police transported Albuquerque to a shelter in Quincy, Massachusetts. *Exh. A* at 6-7.

On January 20, 2016, a housekeeper reported finding two bags of marijuana in Albuquerque’s room at the Econo Lodge in Danvers, Massachusetts. Danvers police arrested Albuquerque after finding over ten pounds of marijuana and items used to harvest, weigh, and

manufacture the marijuana. During the encounter, Albuquerque told police that he was beat up at 130 Grove Street on the prior Sunday; that the Boston police were involved; and, that “they are aware of the situation ‘with the Marijuana.’” According to the Danvers’ police report, Danvers police confirmed with Boston police that Albuquerque was involved in a fight a 130 Grove Street.

Unclear whether Lepro is still referring to information contained in the Danvers police report, Lepro further alleges that:

Boston Detectives had executed a search warrant resulting in the discovery of a THC extraction lab[,] which demonstrates the Boston Police were able to corroborate information supplied by Albuquerque and the seizure of the illegal lab. Albuquerque has provided reliable information to law enforcement resulting in t[he] discovery of a THC lab and the prosecution of the offenders.

Exh. A at 5. However, as observed in Maglio’s *Motion for a Franks Hearing* (Doc. 58), this statement was deceitful, misleading, and, at the very least, made in reckless disregard for the truth considering the THC extraction lab was discovered at Albuquerque’s own residence.

b. Albuquerque provides information regarding Maglio

Purportedly upset that Maglio would not post the \$1,000 bail for Albuquerque’s release from Essex County Correctional Facility, Albuquerque notified Deputy Sheriff John Campbell (“Campbell”) that he wished to provide information on a “large scale indoor Marijuana grow in the Town of Hull.” *Exh. A* at 4-5. Campbell relayed the following information, provided by Albuquerque, to Lepro on January 22, 2016:

- The marijuana seized on January 20, 2016 resulting in the arrest [and instant incarceration] of Albuquerque belonged to Maglio;
- An indoor marijuana grow worth “tens of thousands of dollars” is located in Maglio’s basement at 83 Main Street Hull, Massachusetts;
- Maglio has at least five firearms in his residence, at least one being a “Tech-9” or similar model;
- Albuquerque observed such firearms in the basement of 83 Main Street within one week of his arrest on January 20, 2016; and,

- A second location in West Roxbury (no address provided) was also used to process marijuana.

Id. Lepro never spoke with or questioned Albuquerque during the course of his investigation. The day after securing the first search warrant for 83 Main Street on March 10, 2016, Lepro spoke with Campbell a second time regarding Albuquerque. At this time, Campbell conveyed to Lepro that the five firearms were hidden in a duffle bag in the basement of 83 Main Street. Albuquerque allegedly supplied Campbell with additional information, not described in the affidavit, that Campbell corroborated with Peabody police. *Id.*

2. The Two-Month Investigation of David Maglio and 83 Main Street Hull, Massachusetts

Based on the allegations made by Albuquerque to Campbell, Hull police began to investigate Maglio. The entirety of the investigation consisted of surveillance of 83 Main Street on **one** occasion, five months of utility bills for 83 Main Street, and a check with CJIS regarding a Medical Marijuana registration for Maglio and, his wife, the recorded owner of 83 Main Street, Erika Zerkel.

At all relevant times, the investigation was exclusively carried out by Hull police. Between the unexecuted warrant and the application of the second Hull police consulted with the Metropolitan Law Enforcement Council (Metro-LEC) – a regional agency. *Exh. A* at 13. When executing the warrant, in addition to Hull police and Metro-LEC, the Old Colony Anti-Crime Task Force (OCPAC), a state agency, was also present. *Exhibit B*. The only involvement of federal officials was when Drug Enforcement Agency (DEA) Special Agents and Task Force Officers of the Cape Cod Task Force showed up for the execution of the search. *Affidavit of Robert Barrett Doc. 3*.

a. Surveillance

On January 29, 2016, at an unknown time and from an unknown location, Lepro and

Detective Daniel Dunn conducted “discreet” surveillance of 83 Main Street and observed Maglio at the residence.¹ While approximately fifty feet from the property, they also claimed to detect a strong pungent odor of fresh marijuana. *Exh. A* at 10.

Lepro originally obtained a search warrant for 83 Main Street on March 10, 2016 and returned it to the court without service. Between the grant of the first warrant and the application of the second on March 16, 2016, law enforcement conducted “additional surveillance” not described within the affidavit. *Exh. A* at 13.

b. Utility bills for 83 Main Street Hull, Massachusetts

Lepro obtained Hull Municipal Light Plant electricity records for 83 Main Street for September 2015 through January 2016. Zerkel began service on September 21, 2015 as a new owner. Despite the limited records available, Lepro insists that the bills are consistent with the rise and dramatic decline investigators expect to see with indoor grow operations.² The rise and decline is due to the “cycles” of marijuana growth – the amount of electricity usage depends on the stage of growth. Lepro does not indicate how long it takes for a “cycle” to occur nor does he attempt to rule out any other possibility for high consumption. *Exh. A* at 10-11.

c. Medical Marijuana registration check

The only mention of a Medical Marijuana registration check for Maglio is the bare statement that “Maglio does not have any Massachusetts record of...Medical Marijuana Registration;” and similarly for Zerkel, “[a] record check with (CJIS) revealed no...Medical Marijuana registration.” *Exh. A* at 7, 8.

¹ Lepro also asserts, without further detail, that he has observed Maglio’s Toyota Camry and Zerkel’s Dodge Ram at 83 Main Street on numerous occasions. *Exh. A* at 7-8.

² September 2015: 172 kWh; October 2015: 2377 kWh; November 2015: 6661 kWh; December 2015: 9090 kWh; and, January 2016: 6302 kWh. Although Lepro provides monetary amounts, they are not indicative of electricity usage where the rates change every month. This is also problematic in Lepro’s comparison of the utility bills of three other properties in the area.

As discussed below in regard to the flagrant abuse of Massachusetts law such registration information is accessible through CJIS, but it requires a more intensive search than Lepro seems to have assumed. *Exhibit C*. For instance, it is not just a record check with CJIS. Rather, the information is only available through the Medical Use of Marijuana (MMJ) online system which is accessible through CJIS. Without having a patient's card, the MMJ online system requires the "full name, date of birth, mother's maiden name, and registration type" of the subject. Only then can law enforcement verify or disprove a registration status and determine what amount of marijuana a given registrant is allowed to possess. *Id.* Lepro's failure to conduct a thorough search³ is irrefutable considering that Maglio did in fact have an active Medical Marijuana registration as a patient and, due to hardship, was allowed to grow a certain number of plants without further registration. *Exh. B*.

ARGUMENT

Acknowledging that the silver platter doctrine is "almost eliminated in the First Circuit." *United States v. Dedrick*, 840 F.Supp.2d 482, 493 (D.Mass. 2012), this case may be the first to fit within the narrow exception that keeps the doctrine alive. *United States v. Charles*, 213 F.3d 10, 20–21 (1st Cir. 2000); *United States v. Sutherland*, 929 F.2d 765, 770–71 (1st Cir. 1991). Specifically, where there is a "flagrant abuse of the law" by state officials and federal officials seek to capitalize on that abuse, this Court may exercise its supervisory powers by excluding such evidence. *Id.* at 770. Declining to exercise such supervisory powers in the instant case will effectively encourage "state officials [to] make an 'end run' around [a] more restrictive state

³ Submitted with the government's opposition to Maglio's *Motion for a Franks Hearing*, is the CJIS system printout dated February 21, 2016 indicating that Lepro limited his search to patients, and the only information Lepro entered into the MMJ online system was Maglio's name and date of birth. Without Maglio's mother's maiden name, Lepro was unable to verify if Maglio was a patient, caregiver, or agent with an active registration. (Doc. 63-1).

constitution[] by delivering evidence seized in violation of a state's constitution and handing such evidence on a silver platter to federal officials acting under the more relaxed federal Constitution." *Dedrick*, 840 F.Supp.2d at 492.

Should this Court decide to apply federal law, as is the default in federal prosecutions in federal court, and decide to ignore the flagrant abuse of law by Lepro in an entirely state-run investigation, the warrant still fails. *Sutherland*, 929 F.2d at 769. Challenged in the *Motion for a Franks Hearing* (Doc. 58), the warrant affidavit does not even pass muster under the more lenient "totality of the circumstances" approach under the Fourth Amendment.

I. THIS COURT SHOULD EXCLUDE EVIDENCE DERIVED FROM THE EXECUTION OF AN INVALID STATE SEARCH WARRANT HANDED ON A SILVER PLATTER TO FEDERAL OFFICIALS.

In a purely state-run investigation, where the state law enforcement officers knowingly violate state law, the federal court should not condone the use of such evidence in federal court. *Sutherland*, 929 F.2d at 770. Doing so would effectively permit federal officials to obtain illegally seized evidence on a silver platter. *Id.*; *United States v. Aiudi*, 835 F.2d 943, 946 (1st Cir. 1987), *cert. denied*, 485 U.S. 978, 108 S.Ct. 1273 (1988). *See also United States v. Jarabek*, 726 F.2d 889, 900 n. 10. (1st Cir. 1984). This is especially problematic in states, such as Massachusetts, that are more protective in its treatment of search and seizure issues than is the Fourth Amendment. *Dedrick*, 840 F.Supp.2d 492-493. Nonetheless, exclusion is limited to extreme cases of flagrant abuse of the law by state law enforcement in which federal officials then capitalize on. *Id.*

Lepro committed multiple knowing and flagrant violations of Massachusetts law. As the basis of the *Franks* motion, Lepro lied and/or misled the warrant issuing judge regarding Maglio's registration as a medical marijuana patient permitted to grow a number of plants and

Albuquerque’s reliability as an informant. At the very least, Lepro should have known the procedure and requisite information – such as one’s mother’s maiden name -- for obtaining registration status within the MMJ online system. Aside from the *Franks* violations, the failure to make a sufficient showing of illegal cultivation or of Albuquerque’s reliability was in direct violation of Massachusetts warrant requirements as discussed *infra* II.

Federal officials capitalized on Lepro’s abuse. The instant case is in an unique posture considering the Department of Justice, including the Drug Enforcement Agency, was explicitly barred by the Rohrabacher-Farr Amendment from expending any federal funds on medical marijuana prosecutions in any of the states that authorize the use, distribution, possession, or cultivation of medical marijuana.⁴ With this bar in mind, it goes without saying that the federal government here sought to capitalize on Lepro’s “end run” around Massachusetts’ more restrictive warrant requirements so they could do an “end run” around Congress’ appropriations rider. If this case is not one of flagrant abuse and the federal official’s capitalization on such, the silver platter doctrine is wholly, not just almost, eliminated in the First Circuit.

II. THE SEARCH WARRANT VIOLATED MAGLIO’S RIGHTS UNDER MASSACHUSETTS LAW.

Under art. 14 of the Massachusetts Declaration of Rights, the warrant issuing judge must “determine that probable cause exists before issuing a search warrant.” *Commonwealth v.*

⁴ The language of the Rohrabacher–Farr Amendment contained in § 542 reads as follows: “None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 542, 129 Stat. 2242, 2332–33 (December 18, 2015).

Byfield, 413 Mass. 426, 428 (1993). The inquiry “begins and ends with the four corners of the affidavit,” *Commonwealth v. O’Day*, 440 Mass. 296, 297 (2003), and must establish a substantial basis for concluding that “the item sought is related to the criminal activity under investigation and may reasonably be expected to be located in the place to be searched at the time the search warrant issues.” *Commonwealth v. Kaupp*, 453 Mass. 102, 111 (2009); quoting *Commonwealth v. Cinelli*, 389 Mass. 197, 213 (1983). Although an affidavit should be read as a whole, and in a commonsense and realistic fashion without hypercritical analysis, *Id.* at 111, probable cause to believe a person is guilty of a given crime does not, without more, create probable cause to search. *Commonwealth v. Jean–Charles*, 398 Mass. 752, 757 (1986).

At the very most, the information set forth in the affidavit in support of the search warrant may have established probable cause to believe that an unknown amount of marijuana was being cultivated at 83 Main Street. However, that information (A) failed to demonstrate that Maglio or Zerkel were not registered medical marijuana patients cultivating within legal limits; and, (B) failed to satisfy the more stringent two-pronged *Aguilar-Spinelli* test with regard to Albuquerque.

A. The warrant affidavit failed to establish that marijuana was being cultivated illegally at 83 Main Street.

The possession and cultivation of medical marijuana is legal in Massachusetts so long as an individual is properly registered with the state. *Commonwealth v. Canning*, 471 Mass. 341, 342-343 (2015). To search a property for illegal cultivation in Massachusetts, the affiant must provide probable cause to believe that the individual is not properly registered to possess or cultivate such marijuana. *Id.* at 342. Without making that showing, things such as high electricity

bills⁵ and the smell of unburnt marijuana merely suggest marijuana cultivation within a given home – not that a crime is being committed. Put another way, what was missing here was whether Maglio “was or was not registered as a qualifying patient **or** personal caregiver to grow the marijuana the police reasonably suspected was growing on the property.” *Id.* at 352.

While true that facts or qualified opinions might supply an alternative basis to establish the requisite probable cause to believe the cultivation was unlawful, this case is even more bare than *Canning* where no probable cause was found despite extensive surveillance, noticeable ventilation systems, and more than one source of information. *Id.* at 343, 352-353. With no such evidence in this case, the affidavit relied on a self-interested informant, hoping to get out of jail, who claimed that the marijuana he was caught with at the Econo Lodge in Danvers, MA came from Maglio’s home in Hull. Even if this were a true statement, Lepro offered no information with any degree of specificity to indicate that Albuquerque was telling the truth or how he came to possess the marijuana, did not attempt to arrange a controlled buy from Maglio, and did not establish that the grow operation exceeded the amount a registered patient or caregiver is permitted to cultivate. As such, the warrant affidavit failed to establish probable cause under Massachusetts law.

B. The warrant affidavit also failed to establish the basis of knowledge and veracity of the only informant.

When information provided by an informant is the basis of the affidavit in support of the application of the search warrant, Massachusetts state courts continue to apply the two-prong *Aguilar-Spinelli* test. *Commonwealth v. Mendes*, 463 Mass. 353, 364 (2012). See also *Aguilar v.*

⁵ Even so, it is worth noting that high electric usage levels, alone, are insufficient to indicate the presence of a marijuana cultivation operation as there are too many other possibilities for high consumption. *Commonwealth v. Adams*, No. 2543134, 1994 WL 879701, at *5 (Mass. Super. June 2, 1994).

Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969). Hence, the affidavit must provide the magistrate with some facts and circumstances showing the basis of the informant's knowledge and their veracity. *Commonwealth v. Upton*, 394 Mass. 363, 375 (1985). Although independent police corroboration can make up for either prong, each prong must be considered and satisfied separately. *Id.*

Nonetheless, corroboration of innocent facts are given less weight than corroboration of facts suggestive of criminal conduct. *Commonwealth v. Bottari*, 395 Mass. 777, 784 (1985). As such, information that was "easily obtainable by an uninformed observer" is incapable of showing the informants basis of knowledge. *Commonwealth v. Welch*, 420 Mass. 646, 652 (1995).

Albuquerque's veracity. The search warrant affidavit in this case fails to provide any underlying circumstances from which the magistrate could conclude that Albuquerque was a "credible informant" as required for the magistrate to grant a search warrant. While the veracity prong may be satisfied when the informant previously provided information leading to arrests and convictions, *Byfield*, 413 Mass. at 431, a careful reading of the warrant affidavit reveals that what Lepro claims to establish Albuquerque's veracity is, in reality, an investigation of Albuquerque himself.

Recognizing that a named informant carries a presumption of reliability, that presumption is vitiated by the circumstances in this case. *See Commonwealth v. Atchue*, 393 Mass. 343, 348 (1984); *but see Commonwealth v. Grinkley* 44 Mass. App. Ct. 62, 66-68 (1997) (noting that when an identified individual is otherwise unknown to the police, the tip may be no greater than one from an anonymous informant). Albuquerque's motive in providing the information to law enforcement at the jail, as well as his own self-interest in blaming his arrest on Maglio undercuts

the presumption of reliability. Moreover, Albuquerque's history with law enforcement seems to suggest a rather troubled person with either mental health or substance abuse issues.

Albuquerque's basis of knowledge. For the second prong of the *Aguilar-Spinelli* test, the affidavit must provide the underlying circumstances from which the informant's basis of knowledge is established. *Commonwealth v. Upton*, 394 Mass. 363 (1985). See also *Commonwealth v. Alvarez*, 422 Mass. 198, 207 (1996) (specificity of informant's tip satisfied basis of knowledge test). Even a named informant, must provide detailed and specific information to establish his basis of knowledge. See *Grinkley*, 44 Mass. App. Ct. at 66 (tip provided by named informant inadequate where it lacked sufficient level of detail).

The informant in the present case, whose relationship with Maglio is unknown, failed to provide any specific details about Maglio and his residence beyond the declaration that in January 2017 there was a large grow in the basement worth "tens of thousands of dollars." Albuquerque does not claim to have seen this first-hand, only that he "observed...firearms in the basement...within one week of his arrest for the marijuana." *Exh. A* at 4. (emphasis added). After securing the first warrant, Campbell relayed to Lepro that there were five firearms hidden in a duffle bag in the basement of 83 Main Street Hull, MA. *Id.* Even putting aside Albuquerque's lack of veracity, the allegations made by Albuquerque were generic and easily fabricated, especially considering the informant was "upset" with Maglio and was attempting to divert attention from himself after he was arrested for drug distribution at a hotel in Danvers just days after his home was searched by Boston police. While independent police corroboration could have given strength to Albuquerque's claims, Lepro failed to conduct any independent investigation to determine whether this tip was fabricated by the informant. Rather, only innocent details establishing that Maglio did in fact live at 83 Main Street Hull, MA were

corroborated. Such information that is easily obtained by an uninformed observer, does not establish the informant's basis of knowledge.

CONCLUSION

For the foregoing reasons, Maglio respectfully requests that this Court suppress the evidence seized pursuant to an invalid search warrant.

Respectfully submitted,
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By his attorney,

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September 25, 2017

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/Carmine P. Lepore
Carmine P. Lepore