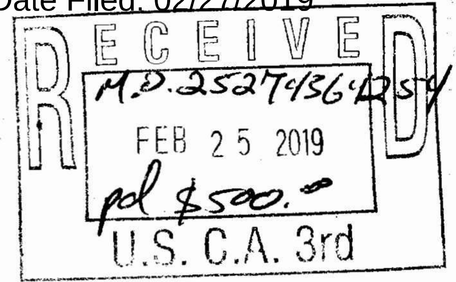


UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

19-1447

~~No. 16-1868~~

IN RE MARC A. STEPHENS, TYRONE STEPHENS as individuals,
Appellants/Petitioners

v.

CITY OF ENGLEWOOD, ENGLEWOOD POLICE DEPARTMENT,
DET. MARC MCDONALD, DET. DESMOND SINGH, DET. CLAUDIA CUBILLOS,
DET. SANTIAGO INCLE JR., AND DET. NATHANIEL KINLAW,
Individually and in official capacity, NINA C. REMSON ATTORNEY AT LAW, LLC,
AND COMET LAW OFFICES, LLC
Appellees/Respondants

ON PETITION FOR A WRIT OF MANDAMUS
from the United States District Court
for the District of New Jersey
(D.N.J. No. 2:14-cv-05362-WJM-MF)
District Judge: Honorable William J. Martini

APPELLANTS PETITION FOR A WRIT OF MANDAMUS

Marc A. Stephens and Tyrone Stephens
Plaintiffs-Appellants-Petitioners
Pro se

TABLE OF CONTENTS

PROCEDURAL BACKGROUND.......... 1
RELIEF SOUGHT.......... 2
ISSUES PRESENTED.......... 2
STANDARD OF REVIEW.......... 2
STATEMENT OF FACTS.......... 3
THE REASONS WHY THE WRIT SHOULD ISSUE.......... 7

1. THERE ARE DISPUTED MATERIAL FACTS AND THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING A SUMMARY JUDGMENT.......... 8

A. The victims were attacked at "7 eleven at 10pm" and defendants did not have probable cause to arrest Tyrone Stephens who the investigating officers stated they saw Tyrone a mile away at "McDonald at 10pm".......... 8

2. THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION BY WILLFULLY IGNORING TESTIMONY AND COMMITTED A CLEAR ERROR OF FACT AND LAW BY STATING WITNESS NATALIA CORTES IDENTIFIED TYRONE STEPHENS AS A PERPETRATOR.......... 9

3. POLICE OFFICERS ARE NOT ALLOWED TO FABRICATE EVIDENCE... 9

4. POLICE OFFICERS ARE NOT ALLOWED TO "COERCE" JUVENILES, AND AT THE SUMMARY JUDGMENT STAGE THE COURT IS NOT ALLOWED TO "WEIGHT THE EVIDENCE" OR DETERMINE THE TRUTH OF THE MATTER.......... 10

5. PETITIONERS CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO TRIAL WERE VIOLATED WHEN THE THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION AND GRANTED THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT CAUSING IRREPARABLE INJURY.......... 10

6. THE 3RD CIRCUIT AND DISTRICT COURT JUDGES CLEARLY ABUSED THEIR DISCRETION BY RELYING ON CLEARLY ERRONEOUS FACTUAL FINDINGS, ERRONEOUS CONCLUSIONS OF LAW, AND MISAPPLYING THE LAW TO THE FACTS.......... 11

7. PETITIONERS HAVE "NO REASONABLE ALTERNATIVE REMEDY" OTHER THAN A WRIT OF MANDAMUS.......... 12

CONCLUSION.......... 12

TABLE OF AUTHORITIES

United States v. Antar,
53 F.3d 568, 576 (3d Cir. 1995)....2

State v. Burkert,
174 A. 3d 987 - NJ: Supreme Court 2017 at 1004....2

Concrete Pipe and Prods. v. Construction Laborers Pension Trust,
508 U.S. 602, 623 (1993)....3

Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,
456 U.S. 844, 855 (1982)....3

Richardson v. Perales,
402 U.S. 389, 401 (1971)....3

Allah v. Seiverling,
229 F.3d 220, 223 (3d Cir. 2000)....3

Max's Seafood Café ex rel Lou-Ann, Inc. v. Quinteros,
176 F.3d 669, 673 (3d Cir. 1999)....3

United States v. United States Gypsum Co.,
333 U.S. 364, 395 (1948)....3

Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.,
866 F.2d 228, 233 (7th Cir. 1988)....3

In re Pasquarello,
16 F.3d 525, 528 (3d Cir. 1994)....7

New York v. U.S. Metals Ref. Co.,
771 F.2d 796, 801 (3d Cir. 1985)....7

Walker v. Columbia Broadcasting System, Inc.,
443 F.2d 33 (7th Cir. 1971)....7

Bankers Life & Cas. Co. v. Holland,
346 U.S. 379, 384 (1953)....7

In Re Briscoe,
448 F.3d 201, 212 (3d Cir. 2006)....7

United States v. Wright,
776 F.3d 134, 146 (3d Cir. 2015)....7

In re Howmedica Osteonics Corp.,
867 F.3d 390, 401 (3d Cir. 2017)....7

Adams v. Freedom Forge Corp.,
204 F.3d 475, 487 (3d Cir. 2000)....7

Glasco v. Hills,
588 F.2d 179, 181 (3d Cir. 1977)....7

Chiari v. City of League City,
920 F.2d 311, 314–15 (5th Cir. 1991)....8

Petruzzi's IGA Supermarkets v. Darling-Delaware Co.,
998 F. 2d 1224 - Court of Appeals, 3rd Circuit 1993....8

Aman v. Cort Furniture Rental Corp.,
85 F. 3d 1074 - Court of Appeals, 3rd Circuit 1996....8

US v. Wright,
Court of Appeals, 3rd Circuit 2019....9

Cooter & Gell v. Hartmarx Corp.,
496 US 384 - Supreme Court 1990....9

US v. Mageno,
762 F. 3d 933 - Court of Appeals, 9th Circuit 2014....9

Scott v. Harris,
550 US 372 - Supreme Court 2007....9

Malley v. Briggs,
475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L. Ed.2d 271, 278 (1986)....9

Halsey v. Pfeiffer,
750 F. 3d 273 - Court of Appeals, 3rd Circuit 2014....10

Celotex Corp. v. Catrett,
477 US 317 - Supreme Court 1986....10

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 150 (2000)....10

Petruzzi's IGA Supermarkets v. Darling-Delaware Co.,
998 F. 2d 1224 - Court of Appeals, 3rd Circuit 1993....10

Boddie v. Connecticut,
401 US 371 - Supreme Court 1971....10

Colgrove v. Battin,
413 US 149 - Supreme Court 1973....10

Parklane Hosiery Co. v. Shore,
439 US 322 - Supreme Court 1979....11

Snyder v. Massachusetts,
291 U.S. 97 (1934)....11

Elrod v. Burns,
427 U.S. 347, 373 (1976)....11

Williams v. Pennsylvania,
136 S. Ct. 1899 - Supreme Court 2016....11

In re Antar (SEC v. Antar),
71 F.3d 97, 101 (3d Cir.1995) 11

Abulashvili v. Attorney General of US,
663 F. 3d 197 - Court of Appeals, 3rd Circuit 2011...11

Patzig v O'Neil,
577 F2d 841, 848 (3d Cir 1978)...11

Koon v. United States,
518 US 81 - Supreme Court 1996...12

US v. Hinkson,
585 F. 3d 1247 - Court of Appeals, 9th Circuit 2009 12

Kerr v. United States District Court,
426 U.S. 394, 403 (1976) 12

Statues:

Fed. R. Civ. P. 56(a)

PROCEDURAL BACKGROUND

On August 26, 2014, Appellants filed a civil complaint in US District Court for the District of New Jersey against Defendants City of Englewood, Englewood Police Department, Det. Marc McDonald, Det. Desmond Singh, Det. Claudia Cubillos, Det. Santiago Incle Jr., Det. Nathaniel Kinlaw, Nina C. Remson at Law, LLC, and Comet Law Offices, LLC, **ECF no. 6.**

On September 1, 2015, Appellants filed a motion in opposition to the defendant's motion for summary judgment, **ECF no. 71, 72.**

On November 3, 2015, by Opinion and Order, Federal District Court Judge William J. Martini, dismissed the plaintiffs' complaint, and granted defendants motion for summary judgment, **ECF no. 82, 83**.

On November 17, 2015, plaintiffs filed a timely first motion for reconsideration, **ECF no. 85, 89.**

On January 13, 2016, by Opinion and Order, Federal District Court Judge William J. Martini, dismissed the plaintiffs' first motion for reconsideration, **ECF no. 91, 92**.

On January 14, 2016, plaintiffs filed a timely second motion for reconsideration, **ECF no. 93.**

On March 31, 2016, by Opinion and Order, Federal District Court Judge William J. Martini, dismissed the plaintiffs' second motion for reconsideration, **ECF no. 98**.

On April 6, 2016, The District Court dismissed the plaintiffs Motion for Default Judgment with an Opinion and Order regarding defendant Comet Law Offices, LLC, **ECF no. 99, 100**. Judge Martini's final judgment regarding Comet stated he dismissed the appellants' motion for default judgment because there was probable cause found in his previous judgment regarding the City of Englewood, Englewood Police Department. On the same day, Appellant filed a Third Motion for Reconsideration, **ECF no. 101,** and Notice of Appeal, **ECF no. 103.**

On May 3, 2017, Opinion of the United States Court of Appeals for the 3rd Circuit affirming District Court issuing a Summary Judgment in favor of Defendants.

On October 24, 2017, Petition to Rehearing and Enbanc was Denied by 3rd Circuit.

On January 17, 2018, Appellants filed a Complaint of Judicial Misconduct J. C. No. 03-18-90004 through 03-18-90007.

On April 10, 2018, Chief Judge Smith DENIED Appellants Complaint of Judicial Misconduct J. C. No. 03-18-90004 through 03-18-90007.

On March 22, 2018, Appellants filed a Petition for writ of certiorari **No. 17-9444** with the Supreme Court of the United States, Docketed June 19, 2018.

On May 24, 2018, Appellants filed a Petition for Review with the 3rd Circuit, J. C. No. 03-18-90004 through 03-18-90007.

On October 1, 2018, Appellants Petition for Writ of Certiorari DENIED.

On October 9, 2018, Appellants Petition for Review with the 3rd Circuit, J. C. No. 03-18-90004 through 03-18-90007 was DENIED.

On October 17, 2018, Appellants Petition to Rehearing filed with the Supreme Court of the United States.

On November 19, 2018, Appellants Petition to Rehearing filed with the Supreme Court of the United States was DENIED.

RELIEF SOUGHT

Petitioners respectfully request the issuance of a writ of mandamus under 28 U.S.C. § 1651, ordering the district court to: (1) Vacate or Reverse the Order Granting summary judgment, (2) Grant Plaintiffs Amended complaint and (3) Motion for Stay, (4) Recuse Judge Martini under 28 U.S.C. § 2106, United States v. Antar, 53 F.3d 568, 576 (3d Cir. 1995) (ordering reassignment to a different district judge on remand), and (5) Send this case to trial.

ISSUES PRESENTED

1. Whether the District Court and Third Circuit Court of Appeals abused its discretion and violated Petitioners right to due process and right to trial when they intentionally ignored all testimonial evidence, weighed the evidence, determined the truth of the matter, and granted defendants Motion for Summary Judgment

2. Whether the District Court and Third Circuit Court of Appeals abused its discretion and in clear error of law when it ruled that Police Officers are absolutely immune from 42 U.S. Code § 1983 claims

3. Whether the District Court and Third Circuit Court of Appeals abused its discretion by ignoring all material facts and erroneously Finding Probable Cause against Tyrone Stephens

STANDARD OF REVIEW

Preliminarily, as a reviewing court, we cannot "disturb the factual findings ... of the trial judge **unless** we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484, 323 A.2d 495 (1974). **State v. Burkert, 174 A. 3d 987 - NJ: Supreme Court 2017 at 1004.**

We have the power to issue writs of mandamus under the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the

usages and principles of law." 28 U.S.C. § 1651(a). See In re: Kensington International Ltd., 353 F.3d 211, 219 (3d Cir. 2003).

The appellate court reviews de novo a grant of summary judgment. The panel should review the appeal under the de novo standard because the district court opinion was "clearly erroneous" **Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993)** because a "mistake has been committed." **Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982)**. Appellant put forth "substantial evidence" **Richardson v. Perales, 402 U.S. 389, 401 (1971)** that the court abused its discretion by denying appellant's complaint, and motions for reconsideration, See **Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)**. Pursuant to **Max's Seafood Café ex rel Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999)**, "to the extent that the denial of reconsideration is predicated on an **issue of law**, such an issue is reviewed **de novo**". According to the Supreme Court, a "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." **United States v. United States Gypsum Co. , 333 U.S. 364, 395 (1948)**. In other words, for a decision to be clearly erroneous, it must be more than just possibly or probably wrong. Instead, it must "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." **Parts & Elec. Motors, Inc. v. Sterling Elec., Inc. , 866 F.2d 228, 233 (7th Cir. 1988), cert. denied , 493 U.S. 847 (1989)**.

STATEMENT OF FACTS

CLEAR ABUSE OF DISCRETION & CLEAR ERROR OF LAW AND FACT #1

The Panel Opinion states, Page 5, **"The facts here, viewed most favorably to the Stephenses, do not create a genuine dispute as to whether probable cause existed when Tyrone was arrested. The defendants had three compelling pieces of evidence implicating Tyrone in the attack: (1) the identification by Natalia Cortes; (2) the statement made by Justin Evans that Tyrone had participated in the attack; and (3) inconsistencies in testimony regarding Tyrone's alibi. This evidence was more than sufficient to establish probable cause.**

(1) No identification by Natalia Cortes

A. Natalia's sworn statement on November 2, 2012: **McDonald**: "If you saw the actors again, would you be able to identify them? **Natalia Cortez**: "I'm not really sure because it was really dark and most of them had hoods on and like that one in the bike had the ski-mask on", ECF Doc 72-2, pg 22, #23 & pg 23, #2-3. **EXHIBIT 1**

B. During Justin Evans probable cause hearing, McDonald testified after speaking with the victims and witness Natalia Cortes on November 2, 2012, the Englewood Investigators "**only had Derric Gatti**". "**On 11/02/12**, ECF Doc 72-3, page 19, para #1. "**After taking all of the statements from the victims and witnesses**. Detective Singh and I drove to the Winton White football stadium to pick up **Derric Gaddy** for questioning", ECF Doc 72-3, page 19, paragraph #3, last sentence. **Q**: After you attempted to interview Derric Gatti, what happened next? **McDonald**: I mean well, that was pretty much it. All we really knew at that particular point **was Derric Gatti**. ECF Doc 72-3, page 113, #14-25. **EXHIBIT 2**

C. McDonald **testified** during Justin Evans probable cause hearing that on, November 2, 2012, Natalia **did not** identify any attackers. **Q.** Okay. She also said, "I'm not sure I can identify the actors it was really dark". I think, then, that you said "**If you saw them again could you identify them?**" **McDonald (A).** Right. **Yes**. **Q.** So then I think then you showed her the photo array, again? **McDonald (A).** That was for -- **Q.** Oh, detective Cabillos. **McDonald (A).** Yes ECF Doc 72-3, page 121. **EXHIBIT 3**

D. According to detective Cubullos, **Tyrone's (a juvenile)** picture was not in the photo array, and this photo array was the same used by McDonald on November 2, "On **11/13/12**, I met with Natalia Cortes at the Englewood Police Department to show her the same photo array that Det. McDonald had provided"...**During said photo array, Natalia was unable to pick anyone out**. McDonald advised me that the individual that was placed in the photo array was a possible suspect Victory Sarhano.."No photo of any other **juvenile** suspect was used in this photo array", **Doc: 003112688916, defendants SA177**. **EXHIBIT 4**

E. Photo array eyewitness identification worksheet for Natalia states the following: "Did the witness identify any photo as depicting the perpetrator?" The answer checked is "**No**", SA186, #20 also same ECF Doc. 42, page 9. #20. **EXHIBIT 5**

F. **Q**. So, looking through the photo array, at headquarters, on November 13th, the bottom line is Natalia could not identify anyone in the photo book as being there that night, right? McDonald: Right. Doc. 003112688918, #4-21. **EXHIBIT 6**

G. Jordan Comet (Q). Did you witness Mr. Stephens fighting that night? Natalia Cortes (A). I didn't quite see anybody's faces who were actually fighting. SA234, Doc 003112432109, Page: 80, para #9, #7-10. **EXHIBIT 7**

H. Jordan Comet (Q). And, at that point, was there ever a point where you said, I identify a specific person? Natalia Cortes (A). Well, I identified, like, one or two that kind of stood out, but not him. Doc: 003112688921, para #10, #3-6. **EXHIBIT 8**

I. Jordan Comet: And the crucial question is, do you know whether one of those faces that you said might have been there was my client? Natalia Cortez: No….I'm saying, no, it wasn't him, ECF Doc. 72-3, page 94, para #17, #1-3. **EXHIBIT 9**

J. Prosecutor: Did you recognize any of the pictures that you pointed out as being Tyrone Stephens? Natalia Cortez: No. ECF Doc 72-3, pg 95, para 19, #16-18. **EXHIBIT 10.**

CLEAR ABUSE OF DISCRETION OR CLEAR ERROR OF LAW AND FACT #2

(2) the statement made by Justin Evans that Tyrone had participated in the attack was produced by coercion.

A. Defendant McDonald's testified that none of the victims or co-defendants identified Tyrone as the suspect. Comet: Did any of the victims identify my client? **McDonald**: No. **Comet**: Did any of the codefendants, other than Justin Evans who was accused himself of wearing a mask, did any of them identify my client? **McDonald**: No. ECF Doc 72-3, page 53, para 67, #7-12. **EXHIBIT 11**

B. Defendant Desmond Singh admits that he suggested Tyrone's name when he states to Justin, Singh: "You're doing good but the more names we give you". ECF Doc 72-2, page 70. **EXHIBIT 12**

C. **Justin Evans**: "How they gonna put my name in this?".."Tyrone was in High School". **McDonald**: I gave you all of them. ECF Doc 72-2, pg 59. **EXHIBIT 13**

D. Justin Evans testified that he implicated Tyrone Stephens because the officer lied to him, Justin Evans: I thought he was one of the people that said I was involved or told them"…and it was "out of revenge". ECF Doc 72-4, page 8-9. **EXHIBIT 14**

E. **Comet**: Did he say, "It's me because the officers are pushing me…" **McDonald**: correct. ECF Doc. 72-3, page 32, #24-25. **EXHIBIT 15**

CLEAR ABUSE OF DISCRETION OR CLEAR ERROR OF LAW AND FACT #3

(3) **No inconsistencies in testimony regarding Tyrone's alibi.**

A. Judge Gary Wilcox: "I heard the brief testimony of Tyrone Roy. I found Tyrone to be **credible** as a witness. And clearly the reason Tyrone Roy was called is to establish time line, indicating that, again, he and another friend, Anthony Mancini, picked up Tyrone at his house at approximately 9:40, 9:45. At approximately **10pm they went to McDonalds**. They ate food there for about **ten or 15 minutes**. And then Anthony drove Tyrone Stephens home. So, I think the Juveniles argument here is that, again, the time line, and again, the act was alleged to have occurred at 10:13pm-- that Tyrone at that time, would have been **at McDonald's**". Doc: 003112688950. **EXHIBIT 16**

B. Tyrone Stephens: Kinlaw said he seen me! Kinlaw just said he seen me!

1. Det. McDonald: **"Kinlaw said he saw you and other people**...when Kinlaw saw you on the Ave at this particular time you weren't at home.."
2. Marc Stephens: Were you there?
3. Tyrone Stephens: No I was not there at all! I was not there! I didn't see any fight, anything! **Kinlaw seen me at McDonald's**. I pulled up at McDonalds.
4. Marc Stephens: **Kinlaw said he saw him on the Ave, at, look like 10 o'clock**. Where was this altercation at? The 7-Eleven on the ave.?
5. Det. McDonald: up the street.
6. Tyrone Stephens: That's it right there! **I was in front of McDonalds**. I just hopped out of a car. I walked in McDonalds and said what's up Kinlaw.
7. Tyrone Stephens: **If Kinlaw just said that he seen me, you just said it on here, you heard Kinlaw say that he seen me**. He seen me **at McDonalds**, and he was talking to a little kid Willie. I think he was with Ron, right there **at McDonalds**. If you say that's the time, than how could I be at two places at once?
8. Det. McDonald: That was **at 10:00** he said, ECF Doc 72-2, page 91. para 9-14. **EXHIBIT 17.**

C. Prosecutor: First of all what was the time that the victims said the attack occurred?

1. McDonald: **On** or about **10pm**.
2. Prosecutor: And what day did they say the attack occurred?
3. McDonald: October 31, Halloween.
4. Prosecutor: Where did Tyrone say that he was at that time?
5. McDonald: He stated he was initially **at McDonald's**. Doc: 003112688943. **EXHIBIT 18.**

THE REASONS WHY THE WRIT SHOULD ISSUE

The authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. §1651. Under the All Writs Act, 28 U.S.C. § 1651, appellate courts have the power to issue a writ of mandamus and/or prohibition "in exceptional cases where the traditional bases for jurisdiction do not apply." **In re Pasquarello, 16 F.3d 525, 528 (3d Cir. 1994)**. Title 28 U.S.C. § 1651 provides that federal courts can "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This court has interpreted this statute as granting jurisdiction to issue a writ of mandamus where the underlying proceeding is one actually or potentially within our appellate jurisdiction. See United States v. Helstoski, 576 F.2d 511, 516 (3d Cir.1978), aff'd sub nom. Helstoski v. Meanor, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979), **New York v. U.S. Metals Ref. Co., 771 F.2d 796, 801 (3d Cir. 1985) at 801-802**.

Writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. **See, e.g., Walker v. Columbia Broadcasting System, Inc., 443 F.2d 33 (7th Cir. 1971).** "Right to issuance of the writ [must be] clear and indisputable." **Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).** "Petitioners need to show that there was a "clear abuse of discretion," **Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953)**, or judicial "usurpation of power." **DeBeers, 325 U.S. at 217**.

"The Supreme Court has identified three conditions that must be met before a reviewing court may issue a writ of mandamus under § 1651(a) in and of its jurisdiction: the petitioner must establish both that there is (1) no other adequate means to attain the relief sought; and (2) a right to the writ that is clear and indisputable; and (3) even if these first two conditions are met, the reviewing court in its discretion must conclude that the writ is appropriate under the circumstances." **In Re Briscoe, 448 F.3d 201, 212 (3d Cir. 2006), citing Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-381 (2004).**

The 3rd circuit states, a writ of mandamus may be granted "only upon a showing of (1) a clear abuse of discretion or clear error of law; (2) a lack of an alternate avenue for adequate relief; and (3) a likelihood of irreparable injury." **United States v. Wright, 776 F.3d 134, 146 (3d Cir. 2015). In re Howmedica Osteonics Corp., 867 F.3d 390, 401 (3d Cir. 2017). Adams v. Freedom Forge Corp., 204 F.3d 475, 487 (3d Cir. 2000)** (movant must show "that it specifically and personally risks irreparable harm"). `Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate.' Danielson v. Local 275, Laborers Union, 479 F.2d 1033, 1037 (2d Cir. 1973)." A. O. Smith, supra, 530 F.2d at 525. **Glasco v. Hills, 588 F.2d 179, 181 (3d Cir. 1977) at 181.**

1. THERE ARE DISPUTED MATERIAL FACTS AND THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING A SUMMARY JUDGMENT

A. The victims were attacked at 7 eleven at 10pm and defendants did not have probable cause to arrest Tyrone Stephens who the investigating officers stated they saw Tyrone a mile away at McDonald at 10pm.

Natalia Cortes sworn statement and testimony did not identify Tyrone Stephens, **EX.1-10**. Justin Evans sworn statement, Kinlaw's false police report, and McDonald's false police reports and testimony are all irrelevant, see **Reply Brief on Appeal Doc. 003112517474, pg 1-12.** Tyrone was at McDonald's at 10pm, 1 mile away. **Before** the Englewood Police investigation started, the defendants knew that Tyrone was located at McDonald's and was not identified by anyone. McDonald states, "Kinlaw said he saw you and other people…That was **at 10:00** he said", **EX. 17**. "Prosecutor: First of all what was the time that the victims said the attack occurred? McDonald: On or about 10pm", **EX. 18**. It is impossible for Tyrone Stephens to be the suspect who attacked the victims at 7 eleven at 10pm.

In order to prevail, a party seeking summary judgment must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." **Fed. R. Civ. P. 56(a).** If the evidence "presents a sufficient disagreement" over a factual issue, summary judgment must be denied. See **Chiari v. City of League City, 920 F.2d 311, 314–15 (5th Cir. 1991).** "However, at the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. Instead, these tasks are left for the fact-finder. To raise a genuine issue of material fact, therefore, "the [summary judgment] opponent need not match, item for item, each piece of evidence proffered by the movant," but simply must exceed the "mere scintilla" standard. Id. Additionally, a court should not tightly compartmentalize the evidence put forward by the nonmovant, but instead should analyze it as a whole to see if together it supports an inference of concerted action. Id. at 1364 (citing Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962)); In re Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 305 (3d Cir.1983), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)". **Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F. 2d 1224 - Court of Appeals, 3rd Circuit 1993.** "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment...." **Aman v. Cort Furniture Rental Corp., 85 F. 3d 1074 - Court of Appeals, 3rd Circuit 1996 at 1081.**

2. THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION BY WILLFULLY IGNORING TESTIMONY AND COMMITTED A CLEAR ERROR OF FACT AND LAW BY STATING WITNESS NATALIA CORTES IDENTIFIED TYRONE STEPHENS AS A PERPETRATOR

"A district court abuses its discretion when it makes an errant conclusion of law, an improper application of law to fact, or a clearly erroneous finding of fact. McDowell v. Phila. Hous. Auth., 423 F.3d 233, 238 (3d Cir. 2005)". **US v. Wright, Court of Appeals, 3rd Circuit 2019. Cooter & Gell v. Hartmarx Corp., 496 US 384 - Supreme Court 1990 at 405**. The Judges ignored the testimony of the time the victims said the attack occurred, and **created their own facts** regarding Natalia's ID, **3rd cir. Opinion Page 2,** "Tyrone was then arrested in November 2012 in connection with an assault committed by several individuals outside a 7-Eleven store a little after 10:00 pm on October 31, 2012". "Natalia Cortes, identified three of the attackers as Tyrone, Justin Evans, and Derrick Gaddy". The record states, "During said photo array, Natalia was unable to pick anyone out", **EX. 4**. "Did the witness identify any photo as depicting the perpetrator?" The answer checked is "**No**", SA186, #20 also same ECF Doc. 42, page 9. #20, **EX. 5.**

3rd cir. Opinion Page 3, "First, Cortes, while acknowledging that she had earlier identified Tyrone as a perpetrator, testified that she was not actually sure if he was involved". The record and Statement of facts clearly show that Natalia Cortes did not identify anyone, **See EXHIBITS 1-10**. "[A] finding of fact is clearly erroneous if it is without factual support in the record, United States v. Artus, 591 F. 2d 526 - Court of Appeals, 9th Circuit 1979 at 528. **US v. Mageno, 762 F. 3d 933 - Court of Appeals, 9th Circuit 2014 at 943-944**. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment". **Scott v. Harris, 550 US 372 - Supreme Court 2007 at 1776.**

3. POLICE OFFICERS ARE NOT ALLOWED TO FABRICATE EVIDENCE

The District Court stated, **see Order page 8**, "even if Tyrone did offer such evidence, "[i]t is well settled that police officers are absolutely immune from § 1983 suits for damages for giving allegedly perjured testimony…" Blacknall v. Citarella, 168 Fed.Appx. 489, 492 (3d Cir. 2006) (citing Briscoe v. LaHue, 460 U.S. 325 (1983)).

In 1986, the United States Supreme Court stated, "Qualified immunity **does not** protect police officers who are "plainly incompetent or those who knowingly violate the law." **Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L. Ed.2d 271, 278 (1986).** This court states, "A police officer who fabricates evidence against a criminal defendant to

obtain his conviction violates the defendant's constitutional right to due process of law". Halsey v. Pfeiffer, 750 F. 3d 273 - Court of Appeals, 3rd Circuit 2014 at 279.

4. POLICE OFFICERS ARE NOT ALLOWED TO "COERCE" JUVENILES, AND AT THE SUMMARY JUDGMENT STAGE THE COURT IS NOT ALLOWED TO "WEIGHT THE EVIDENCE" OR DETERMINE THE TRUTH OF THE MATTER

3rd Circuit Opinion, Page 6, states, "Further, notwithstanding their arguments to the contrary, no reasonable juror could conclude that the detectives coerced Evans's statement.

"[T]he question of whether a criminal defendant was coerced is a matter well within "lay competence" and thus a jury is not foreclosed from considering whether there was coercion even if there is "unequivocal, uncontradicted and unimpeached testimony of an expert" addressing the issue. Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 76-77 (1st Cir. 2002). **Halsey v. Pfeiffer, Court of Appeals, 3rd Circuit 2014.** "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter", Anderson v. Liberty Lobby, Inc., 477 US 242 - Supreme Court 1986 at 249. **Celotex Corp. v. Catrett, 477 US 317 - Supreme Court 1986**. The court is not allowed to weigh the evidence. That is the responsibility of the Jury. "The court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." **Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).** "However, at the summary judgment stage, a court is not to weigh the evidence or make credibility determinations. Instead, these tasks are left for the fact-finder. **Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F. 2d 1224 - Court of Appeals, 3rd Circuit 1993.**

5. PETITIONERS CONSTITUTIONAL RIGHT TO DUE PROCESS AND RIGHT TO TRIAL WERE VIOLATED WHEN THE THE 3RD CIRCUIT AND DISTRICT COURT ABUSED ITS DISCRETION AND GRANTED THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT CAUSING IRREPARABLE INJURY

The 5th Amendment of the Constitution of the United States reads, "No person shall be deprived of life, liberty, or property, without due process of law". "At its core, the right to due process reflects a fundamental value in our American constitutional system", **Boddie v. Connecticut, 401 US 371 - Supreme Court 1971 at 374**. The 7th Amendment to the Constitution of the United States reads, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved". **Colgrove v. Battin, 413 US 149 - Supreme Court 1973 at 152**. "The Seventh Amendment, which was included in the Bill of Rights in 1791 and which **has not** since been

repealed in the only manner provided by the Constitution for repeal of its provisions". Parklane Hosiery Co. v. Shore, 439 US 322 - Supreme Court 1979 at 338.

The United States Supreme Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", **Snyder v. Massachusetts, 291 U.S. 97 (1934).**
"It is fundamental that there can be no due process without reasonable notice and a fair hearing", **Snyder v. Massachusetts, 291 US 97 - Supreme Court (1934) at 127.**

Loss of Constitutional Rights to due process, right to trial, and an opportunity to be heard constitutes irreparable harm. "Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied. See, e.g., **Elrod v. Burns, 427 U.S. 347, 373 (1976)** (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). "Due process guarantees "an absence of actual bias" on the part of a judge. In re Murchison, 349 U. S. 133, 136, (1955). **Williams v. Pennsylvania, 136 S. Ct. 1899 - Supreme Court 2016 at 1905**. "Judicial conduct [is] improper ... whenever a judge appears biased, even if she actually is not biased." **See In re Antar (SEC v. Antar), 71 F.3d 97, 101 (3d Cir.1995)**. "By stepping into the role of the [Jury], the 3rd circuit panel gave the strong impression that [they] was on the government's side. It is difficult to conclude that [plaintiffs Marc and Tyrone Stephens] received a "fair and full hearing" when the [3rd circuit panel and district court judge] ceased being the "neutral arbiter" due process demands and assumed the role of [the jury] instead". **Abulashvili v. Attorney General of US, 663 F. 3d 197 - Court of Appeals, 3rd Circuit 2011 at 208.**

6. THE 3RD CIRCUIT AND DISTRICT COURT JUDGES CLEARLY ABUSED THEIR DISCRETION BY RELYING ON CLEARLY ERRONEOUS FACTUAL FINDINGS, ERRONEOUS CONCLUSIONS OF LAW, AND MISAPPLYING THE LAW TO THE FACTS

If (1)Natalia Cortes did not identify Tyrone, (2) Justin Evans and McDonald testified the police coerced him to implicate Tyrone, and (3) there are no inconsistency in Tyrone's alibi, then the Englewood Police did not have probable cause to arrest Tyrone. In **Patzig v O'Neil, 577 F2d 841, 848 (3d Cir 1978)** ("Clearly, an arrest without probable cause is a constitutional violation actionable under § 1983."). A writ of mandamus is properly granted to correct the "usurpation of judicial power." In re Link_A_Media Devices Corp., 662 F.3d 1221, 1222 (Fed. Cir. 2011). In re Volkswagen of Am., Inc., 545 F.3d at 311. A district court abuses its discretion if it: "(1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." Id. at 310 (quoting McClure v. Ashcroft, 335 F.3d 404, 408 (5th Cir. 2003)). The 3rd Circuit and District Court abused their discretion when they affirmed and granted a Summary Judgment when the record shows clear disputed material facts. "A district court by definition abuses

its discretion when it makes an error of law". Koon v. United States, 518 US 81 - Supreme Court 1996 at 100. US v. Hinkson, 585 F. 3d 1247 - Court of Appeals, 9th Circuit 2009

7. PETITIONERS HAVE "NO REASONABLE ALTERNATIVE REMEDY" OTHER THAN A WRIT OF MANDAMUS

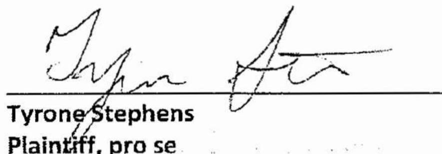
As shown in the procedural background and statement of facts above, Appellants has no other adequate means to obtain the relief sought, and the error may cause irreparable injury. "As a precondition to the issuance of the writ, the petitioner must establish that there is no alternative remedy or other adequate means to obtain the desired relief, and the petitioner must demonstrate a clear and indisputable right to the relief sought". **Kerr v. United States District Court, 426 U.S. 394, 403 (1976).** "Findings of fact in actions tried without a jury "shall not be set aside **unless** clearly erroneous". United States v. United States Gypsum Co., 333 US 364 - Supreme Court 1948 at 395.

CONCLUSION

For these reasons Petitioners respectfully move this Court to enter a writ of mandamus as specified above.

February 8, 2019

Respectfully Submitted,



Tyrone Stephens
Plaintiff, pro se

Marc Stephens
Plaintiff, pro se