

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA**

**UNITED STATES OF AMERICA,**

**v.**

**WILBUR ENSLEY,**

**Defendant.**

**Case No. 3:09CR32  
Honorable Henry E. Hudson**

**MOTION AND MEMORANDUM OF LAW PURSUANT TO 28 U.S.C. § 2255 TO  
VACATE, SET ASIDE, AND/OR CORRECT CONVICTION AND SENTENCE**

COMES NOW Wilbur Ensley, by counsel, and hereby submits this Motion and Memorandum of Law pursuant to 28 U.S.C. § 2255 for an Order of this Court vacating his judgment and sentence, and his request for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), challenging the integrity of the search warrant in support of the search of his residence. This Memorandum addresses extraordinary misconduct of former Richmond Police Officer Jason Norton, who provided false information in an affidavit in support of a search warrant, which was unlawfully issued and executed pursuant to the search of Mr. Ensley's residence on January 20, 2009 in the City of Richmond.

Mr. Ensley pled guilty to a single-count indictment on April 13, 2009, alleging Possession with Intent to Distribute More Than 50 Grams of Cocaine Base and 500 Grams or More of Cocaine Hydrochloride, in violation of 21 U.S.C. § 841. He was sentenced by the Honorable Henry E. Hudson to 262 months of imprisonment with a 5-year term of Supervised Release to follow. His scheduled release date is January 27, 2028.

Section 2255 and its jurisprudence permits relief for federal prisoners where a defendant demonstrates that his conviction and/or sentence was obtained "in violation of

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<sup>1</sup> The documents attached to this pleading were released to the defendant by the

the Constitution, laws or Treaties of the United States." 28 U.S.C. § 2255(a). Where the "[c]ourt finds that there has been such a denial or infringement of Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b). This motion requests relief because Mr. Ensley's Fourth Amendment rights were violated by Officer Jason Norton falsifying information used in an affidavit for a search warrant of Mr. Ensley's residence. Absent the falsified information in the affidavit in support of the search warrant, there was no lawful justification for the search of the residence.

#### **Section 2255 Procedural Bar**

A one-year period of limitations is established in § 2255(f) for motions to collaterally attack a criminal conviction. Mr. Ensley was convicted and sentenced in 2009, so the one-year period has passed. However, the one-year limitations period would not bar a § 2255 petition if a defendant can show good cause as to why the filing is outside of that period. *See United States v. Liverman*, 881 F. Supp.2d 717, 718 (E.D. Va. 2012); *Cowles v. Brooks*, 241 F.Supp.2d 579, 581 (E.D. Va. 2002) ("[T]he Defendant filed his motion more than two years after the sentence became final . . . [and he] has provided no basis for the Court to find that the limitations period should begin to run from any other date.") Section 2255(f) states that the time period runs from the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral

review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." *Cowles*, 241 F.Supp.2d at 581; 28 U.S.C. § 2255(f).

Mr. Ensley's petition should not be time barred because "the date on which facts supporting the claim . . . could have been discovered through the exercise of due diligence" was no sooner than June 16, 2014.

Officer Norton is currently under investigation by the United States Attorney's Office for falsifying a number of search warrants used in support of searches, which stand as the foundations for criminal convictions of several defendants.<sup>2</sup> The United States Attorney's Office advised the Court of this misconduct in June 2014. In response, this Court appointed Amy L. Austin, Esquire to conduct an inquiry into whether the defendant's plea of guilty was tainted by evidence that was recently discovered to be fabricated and that was unwittingly provided to his counsel during discovery and to determine whether further action is required. *United States v. Ensley*, No. 3:09CR32 (E.D. Va. June 22, 2014) (order appointing counsel).

Mr. Ensley was not made aware of the facts that would support a claim to challenge the search warrant executed upon his residence until undersigned counsel notified him recently. He was not made aware of any facts to assert that Officer Norton falsified information used in the search warrant affidavit. He was not made aware of facts to suggest there was a pattern by Officer Norton of falsifying information used in other search

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<sup>2</sup> Attached as Exhibit 1 is a chart (Bates No. 1), provided to the defense by the United States Attorney's Office, that displays the number of times Officer Norton used the exact same or similar language to describe a confidential informant (CI) who provided the information for probable cause to secure a search warrant. A chronological report that lists the search warrants that Officer Norton secured while at the Richmond Police Department, from May 1, 2008 to October 26, 2012 is also attached as Exhibit 2 (Bates Nos. 473-483). This report highlights the similarities in language used in various affidavits by Officer Norton form different CIs.

warrants. Rather, the date “the facts supporting [Mr. Ensley’s] claim could have been discovered through the exercise of due diligence” was no earlier than the date that Ms. Austin was appointed to protect and address his rights. *See United States v. MacDonald*, 641 F.3d 596, 614 (4<sup>th</sup> Cir. 2011); *see also United States v. Ensley*, No. 3:09CR32 (E.D. Va. June 22, 2014) (order appointing counsel). Mr. Ensley acted with all speed and diligence to address his § 2255 claim for the unlawful search warrant. The one-year limitation period should therefore have begun on June 22, 2014. Mr. Ensley’s § 2255 motion is timely and well within that period.

#### Facts

Officer Norton received and executed a search warrant on January 20, 2009 for 1600 Pollack Street, Apartment A1, Richmond, Virginia 23222. The alleged basis for probable cause for the search was reportedly provided by a confidential informant (CI).<sup>3</sup> This CI reportedly stated that within 72 hours of January 20, 2014, he was inside 1600 Pollock Street, Apartment A1, Richmond, Virginia 23222 (“the residence”), and that he observed two black males packaging and cooking large amounts of powder cocaine for distribution. *See Ex. 4*. The CI reportedly stated that he observed packaging materials, a digital scale, and more than half a kilogram of cocaine. *Id.*

While conducting surveillance in the area of the 1600 block of Pollock Street, Officer Norton said that he has noticed heavy foot traffic coming and going from the residence, and that he has made several arrests for possession with intent to distribute and possession of

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<sup>3</sup> This information is provided pursuant to Officer Norton’s Police Report and his affidavit in support of the search warrant of Mr. Ensley’s residence executed by Officer Norton. *See Attached Exhibit 3 “Police Report” and “Affidavit for Search Warrant.”* (Bates Nos. 101-110).

cocaine in the area. See Ex. 4. In the affidavit in support of the search warrant, Ex. 4, Officer Norton alleged the following in support of probable cause to obtain the search warrant:

Within the past 72 hours [of January 20, 2014] this affiant was contacted by a reliable confidential informant (CI) that was inside 1600 Pollock Street apartment A. The CI described to this affiant that the downstairs apartment A has a door on the front side of the building and the upstairs apartment has a door on the rear of the address. The CI also described to this affiant 1600 Pollock Street as the corner apartment on Pollock at the intersection with Dill Avenue. The CI described the apartment as a white two story building. The CI described to this affiant that the number 1600 is posted on the left hand side of the door. The CI stated to this affiant that they were inside 1600 Pollock Street Apartment A and observed two black males packaging and cooking large amounts of powder cocaine for distribution. The CI stated to this affiant that they observed packaging materials and a digital scale. The CI stated to this affiant that they know one of the black males only by the nickname of "Goat". The CI stated to this affiant that "Goat" is a black male, medium complexion, and in his early to middle thirties. The CI stated to this affiant that they observed at least two handguns. The CI stated to this affiant that both of the guns were black in color. When this affiant asked the CI how much a large amount of cocaine was: The CI stated more than half of a kilogram. This affiant has conducted numerous surveillances in the area and noticed heavy foot traffic coming and going from the address. This affiant has also made several arrests for Possession with Intent to Distribute and Possession of Cocaine in the area of the 1600 block of Pollock Street.

Upon executing the warrant, the officers found 2000 grams of powder cocaine, 125 grams of cocaine base, 500 grams of "weed," \$10,000 in cash, and two .32 caliber handguns. See Ex. 3. Mr. Ensley admitted to all items, and was arrested by Federal DEA agent Sean Montgomery. *Id.* As stated above, Mr. Ensley pled guilty to the single-count indictment and is currently serving his 262-month federal sentence.

## Argument

### ***Defendant's Fourth Amendment Rights were Violated by Execution of the Search Warrant.***

The Fourth Amendment provides that "the right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause...." U.S. CONST. amend. IV. "This fundamental right is preserved by the requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer." *California v. Carney*, 471 U.S. 386, 390 (1985). Probable cause exists where, looking at the totality of the circumstances, "a man of reasonable prudence," *Ornelas v. United States*, 517 U.S. 690, 696 (1996), would believe that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In order to assess a search warrant based on information provided by an informant, the Supreme Court has adopted a "totality of the circumstances" test to determine whether probable cause supports the search warrant. *Id.* at 238. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id.* at 239. Consistent with *Gates*, the Fourth Circuit has stated that "[to] . . . establish probable cause for . . . a search warrant based upon hearsay from an informant, it is necessary to consider all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information. The degree to which an informant's story is corroborated may also be an important factor." *United States v. Dequasie*, 373 F.2d 509, 518 (4<sup>th</sup> Cir. 2004) (citing *United States v. Hodge*, 354 F.3d 305, 309 (4<sup>th</sup> Cir. 2004)). Reliability and corroboration are the cornerstones of probable cause determinations of an

affidavit in support of a search warrant, and must be substantiated to justify a search. See *United States v. Wilhelm*, 80 F.3d 116, 120 (4<sup>th</sup> Cir. 1996).

When false information is presented in an affidavit in support of a search warrant, a defendant is entitled to a hearing once he makes a preliminary showing that: (1) officers knowingly or recklessly made false statements in or omitted statements from an affidavit supporting a search warrant, and (2) that the false statements or omissions were material, i.e., rendered the affidavit unable to support a probable cause finding." *United States v. Franks*, 438 U.S. 154, 155-56 (1978); see also *United States v. McKenzie-Gude*, 671 F.3d 452, 462 (4<sup>th</sup> Cir. 2011). In *McKenzie-Gude*, the defendant did not make such a showing because the omissions were not material to the probable cause determination and because no appropriate basis was provided to demonstrate that the affiant misrepresented the facts. *McKenzie-Gude*, 671 F.3d at 462.

According to the chronological report that lists the search warrants that Officer Norton secured while at the Richmond Police Department (RPD), from May 1, 2008 to October 26, 2012, only one search warrant was received on January 20, 2009.<sup>4</sup> The CI who provided the information for that search warrant was CI # 933.<sup>5</sup> To demonstrate the veracity and basis of knowledge of CI # 933, Officer Norton claimed in the affidavit in support of the search warrant (Ex. 4) that this CI was:

"considered reliable . . . based on information they have provided to this affiant [referring to Officer Norton]. The [CI] has provided this affiant with information regarding criminal activity that has been proven through independent police investigation. This [CI] has provided this affiant information that led to the arrest of two (2) individuals wanted on outstanding warrants in the City of Richmond. The [CI] has given information that has led to the arrest of three (3)

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<sup>4</sup> See Ex. 2, Bates No. 473.

<sup>5</sup> *Id.*

individuals that were involved in the illegal drug trade. The [CI] has provided this affiant with information that has led to the obtaining of three search warrants. The search warrants have led to the arrest of five individuals and the seizure of illegal narcotics. The [CI] has made several controlled narcotics purchases. Finally, The [CI] has recognized individuals known to this affiant that sell illegal narcotics. The [CI] has used cocaine and heroin in the past and is familiar with the way cocaine and heroin is packaged for street-level distribution. In addition, the confidential informant is familiar with the methods used by those who distribute street-level drugs."

Officer Norton has used the same or similar language in other affidavits.

This same exact language was used to describe an unknown CI from a search warrant secured on April 28, 2009.<sup>6</sup> This language was also used in a search warrant secured on October 9, 2009, to describe CI # 757, with the only difference being that the officer had a relationship with the CI for 10 months. *Id.* at 474. The same language was used in a search warrant secured on December 4, 2009, to describe an unknown CI, with the only difference being that the relationship was for 14 months. *Id.* The language is the same in search warrants secured on March 12 and 30, 2010 to describe an unknown CI and CI #757, respectively, except that these relationships were for two years. *Id.* at 475.

More troubling is the fact that CI #933 was shown the affidavit in support of the search warrant in Ensley's case and stated that he never signed the document, that it was not his signature, and he was never paid. (Ex. 2, Bates no. 478). Thus, the information on the search warrant dated January 20, 2009 was false. Without this information, there was no evidence, and certainly no probable cause, to support the issuance and execution of a search warrant. The false statements submitted in the affidavit in support of the search warrant of Ensley's residence were clearly material because they provided the only

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<sup>6</sup> *Id.*



information in support of criminal activity by Ensley. The falsified affidavit in support of the search warrant violated Ensley's Fourth Amendment rights and, as a direct result, incriminating evidence was gathered and statements were elicited from Ensley.

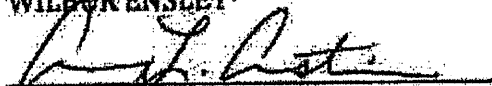
Accordingly, the evidence and the statements must be suppressed as fruit of the poisonous tree. See *Wong Sun v. United States*, 371 U.S. 472, 499 (1963); see also *Florida v. Royer*, 460 U.S. 492, 501 (1983).

The totality of circumstances in Ensley's case establishes an absence of probable cause for the search warrant when the false statements are excised. The affidavit was devoid of any legitimate basis for the informant's knowledge of criminal activity because Officer Norton provided the false information, not CI #933. Accordingly, a preliminary showing of both prongs of the test established in *Franks* and *McKenzie-Gude* has been met and Ensley is therefore entitled to a *Franks* hearing, and to relief in this case—dismissal of the charge against him.

#### Conclusion

WHEREFORE, it is respectfully requested that this Court issue an Order, pursuant to 28 U.S.C. § 2255 vacating Ensley's Judgment and Sentencing Order entered July 15, 2009. Further, Ensley requests this Court conduct a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) to hear testimony and consider evidence challenging the integrity of the search warrant and lawfulness of the search of Ensley's home, which was in violation of the Fourth Amendment to the United States Constitution.

Respectfully submitted,  
WILBUR ENSLEY

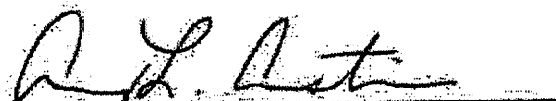


Amy L. Austin, Esquire  
VSB No. 46579  
The Law Office of Amy L. Austin  
101 Shockoe Slip, Suite O  
Richmond, VA 23219  
804.343.1900  
804.343.1901 fax  
[amyaustrinlawyer@gmail.com](mailto:amyaustrinlawyer@gmail.com)

**CERTIFICATE OF SERVICE**

I certify that on September 19, 2014, a copy of the foregoing Motion was filed Under Seal with the Clerk of the Court and a copy was emailed to the following:

Olivia Norman  
Assistant United States Attorney  
600 East Main Street  
Suite 1800  
Richmond, VA 23219



Amy L. Austin, Esquire  
VSB No. 46579  
The Law Office of Amy L. Austin  
101 Shockoe Slip, Suite O  
Richmond, VA 23219  
804.343.1900  
804.343.1901 fax  
[amyaustrinlawyer@gmail.com](mailto:amyaustrinlawyer@gmail.com)