UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1868

MARC A. STEPHENS, TYRONE STEPHENS as individuals,
Appellants

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

On Appeal 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

Appellant's Petition for Rehearing and Enbanc Hearing

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

RULE 35 STATEMENT

Plaintiff-Appellant Marc and Tyrone Stephens, Pro se, seeks Panel Rehearing and Hearing En Banc because the panel decision conflicts with multiple prior decisions of this Court, most acutely **Halsey v. Pfeiffer, Court of Appeals, 3rd Circuit 2014**, regarding probable cause, and **Newell v. Ruiz, 286 F. 3d 166 - Court of Appeals, 3rd Circuit 2002** regarding the application of the Affidavit of Merit. An En banc hearing is therefore "necessary to secure and maintain uniformity of the court's decisions." F.R.A.P. 35(b)(1)(A). Additionally, En Banc hearing is warranted because the Panel's decision involves several issues of exceptional importance and squarely conflicts with decisions of this court, as well as other appellate courts, and the Supreme Court of the United States as described below, F.R.A.P. 35(b)(1)(B).

The Panel's opinion created a minefield of questions of exceptional importance, which stopped this highly straightforward case from going to trial. The Panel's opinion affirmed the District Court's judgment stating that (1) Police Officers are allowed to coerce Juveniles in the presence of their parents, (2) at the summary judgment stage the court is allowed to weight the evidence and determine the truth of the matter, (3) Police Officers who fabricate evidence are absolutely immune from § 1983 claims for damages, (4) Recusal is not allowed even if Judges ignore undisputed evidence, and (5) Englewood Officers had probable cause to arrest Appellant. The Panel also affirmed the District Court's judgment stating, in regards to obtaining an affidavit of merit, litigants are allowed to engage in "gamesmanship" and withhold discovery in order to intentionally seek a technical defeat of valid claims.

INTRODUCTION

The Panel issued an Order on Wednesday, May 3, 2017, affirming the District Court's Judgment awarding defendants Motion for Summery Judgment. An extension to file the petition was granted for August 21, 2017. In order to prevent manifest injustice, Appellant respectfully request the Panel to correct the clear errors of fact, law, overlooking undisputed evidence, suspend the rules pursuant to **Rule 2, and 61**, and consider Appellants arguments in their opposition briefs, and Reply brief on record. Appellant also submitted four motions to suspend the rules. Pursuant to **Rule 40**, "The petition must state with particularity each point of **law or fact** that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition".

WHY PANEL AND ENBANC REHEARING SHOULD BE GRANTED

I. THE PANEL OPINION IS CLEARLY ERRONEOUS REGARDING PROBABLE CAUSE BY IDENTIFICATION

A. 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. See Wilson v. Russo, 212 F.3d 781, 790 (3d Cir. 2000)".

(1) Natalia Cortes did not identify Tyrone as a perpetrator.

a. The panel is not appreciating and is overlooking the fact that The Supplementary Investigative Report states, "**On 11/02/12**, (see paragraph 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", (see paragraph 3, last sentence), **Doc: 003112688913, para #1-3**. **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". **Doc: 003112688912, #14-25**.

b. Natalia testified, **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. see **Doc: 003112688920, page #9, para #7-10**. The 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**", **Doc: 003112688917, #20.**

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

The panel is not appreciating and is overlooking the fact that the defendants testified that they coerced Justin to implicate himself and Tyrone. **Comet**: Did he say, "It's me because the officers are pushing me…" **McDonald**: correct. **Doc.: 003112688931**. "Due process is violated when police coerce a suspect into making a confession. Because it is so suspect, an involuntary confession is inadmissible for any purpose, including impeachment". See **Mincey v. Arizona, 437 U.S. 385 (1978).**

(3) There are no inconsistencies in testimony regarding Tyrone's alibi

The panel is not appreciating and is overlooking **two key facts** presented in evidence regarding Tyrone's alibi.

a. The investigating officers testified that the victims were attacked at 7-eleven at 10pm, and Tyrone was at McDonalds, **Doc: 003112688943**.
b. The trial court ruled defense witness Tyrone Roy's 10pm at McDonald's timeline was credible, and that Tyrone Stephens should have been at McDonald's during the time of the attack, **Doc: 003112688950, page 91, para #12-25.**

B. Panel Opinion states Page 6, "While the Stephenses contend that the evidence shows that Tyrone was actually half a mile away at a McDonald's at the time that the assault occurred, the equivocal evidence that they present does not dispel the probable cause described above.

The panel is overlooking the fact that the investigating officers Singh and McDonald confirmed that defendant Kinlaw, who was also an investigating officer, saw Tyrone at McDonald's at 10pm. **McDonald**: "Kinlaw said he saw you and other people…That was at **10:00** he said", **Doc: 003112688948, page 2.** The officers knew on October 31, 2012, which is **before** speaking to Natalia on November 2, 2012, Justin Evans on November 7, 2012, and **before** filing a complaint against Tyrone on November 8, 2012, that Kinlaw saw Tyrone at McDonald's. In addition, after speaking to Natalia, all investigating officers knew Natalia did not identify anyone on Nov. 2 or Nov. 13. Yet, the officers arrested Tyrone as the ski-mask suspect. Natalia Cortes and Justin Evans sworn statements and testimony, and Kinlaw's fabricated police report filed November 9, 2012 are irrelevant in regards to a finding of probable cause. If the incident was at **7-eleven at 10pm** and Kinlaw saw Tyrone at **McDonalds at 10pm**, all defendants' police reports and testimony stating Tyrone was identified as the perpetrator are clearly fabricated, and the fruit of the poisonous tree, **Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)**.

"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**. 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).

II. THE PANEL OVERLOOKED OR MISAPPREHENDED THE FACTS REGARDING PROBABLE CAUSE BY THE TRIAL JUDGE

A. Panel Opinion states Page 3, "Tyrone was charged with multiple crimes, including robbery, aggravated assault, and riot. In December 2012, a trial judge found probable cause on all seven counts of the criminal complaint, and then reiterated that finding after a second hearing in February 2013".

In both probable cause hearings the court allowed "hearsay" of defendant Marc McDonald's false testimony, "hearsay is admissible in probable cause hearings", see **Doc: 003112688943, page 17, #6-25.** Finding: (1) according to defendant Kinlaw, Tyrone admitted guilt to assaulting the victims, **ECF Document 72-3, page 65**, (2) that "Ms Cortes, who, according to detective McDonald, identified Tyrone as participating in the attack, **ECF Doc. 72-3, pg 68, #96**.

On August 5, 2013, a grand jury brought back an indictment of only 1 count of Robbery and Riot, dropping five charges, 2 counts of Robbery, and all 3 counts of Aggravated Assault, **ECF Document 72-4, page 4**. On December 13, 2013, all charges were dismissed with prejudice.

As discussed above, all investigation officers knew Tyrone was located at McDonald's during the time of the attack. "It is settled law that "officers who conceal and misrepresent material facts to the district attorney are not insulated from a § 1983 claim for malicious prosecution simply because the prosecutor, grand jury, trial court, and appellate court all act independently to facilitate erroneous convictions." Pierce, 359 F.3d at 1292; see also Ricciuti, 124 F.3d at 130; Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir.1988). If the officers influenced or participated in the decision to institute criminal proceedings, they can be liable for malicious prosecution. Sykes v. Anderson, 625 F.3d 294, 308-09, 317 (6th Cir.2010)". **Halsey v. Pfeiffer, 750 F. 3d 273 - Court of Appeals, 3rd Circuit 2014 at 297-298.**

III. THE PANEL OVERLOOKED OR MISAPPREHENDED THE FACTS AND LAW REGARDING THE AFFIDAVIT OF MERIT

A. Panel Opinion states Page 4, "While the Stephenses argue at length that Remson provided deficient representation, they do not meaningfully challenge the District Court's conclusion that their failure to provide an affidavit of merit was fatal to their claims. See N.J. Stat. Ann. § 2A:53A-29 (the failure to provide the affidavit "shall be deemed a failure to state a cause of action")".

Appellant addressed in their opening brief that the District Court errored by denying their motions for reconsideration. Appellant brief, see 'G' **ECF Doc. 40, pg 6-7**; **pg 8,** Point I, section A, B, E; **pg 13,** Point II, A, B, C, E, F, **pg 22,** Point III; and also Appellants motion for reconsideration extensively challenged the District Court's conclusion, **ECF Doc. 94, pg 1-3**.

B. Panel Opinion states Page 5, "The Stephenses have failed to provide any evidence (or even argument) that the discovery materials had "a substantial bearing on preparation of the affidavit" such that they would be excused from filing the affidavit. N.J. Stat. Ann. § 2A:53A-28; see generally Balthazar v. Atl. City Med. Ctr., 816 A.2d 1059, 1066-67 (N.J. Super. Ct. App. Div.2003). Accordingly, we will affirm the District Court's grant of judgment to Remson".

Appellants provided evidence and argued in their briefs that common knowledge applied to their case because Remson agreed not to take a plea deal, **ECF no. 40-9, page 2**, and later took a plea deal without consent from Marc Stephens, **ECF no. 40-8, page 5-6**. This is equivalent to a doctor intentionally pulling out the wrong tooth, **Steinke v. Bell, 32 N.J.Super. 67, 70, 107 A.2d 825 (App.Div.1954)** (holding that expert evidence not required in malpractice case where dentist extracted wrong tooth). Remson provided ineffective assistance of counsel because she, **admitted** that she did not speak to witnesses, **ECF no. 40-8, page 2, #48**; "The duty to investigate is part of a defendant's right to reasonably competent counsel. 'The principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." Jermyn v. Hom, 266 F.3d 257, 312 (3d Cir. 2001); **Berryman v. Morton, 100 F.3d 1089, 1101 (3d Cir. 1996)**. Appellants argued Res Ipsa Loquitor, **ECF Doc. 77, pg 13, Point IV**. "[w]here the attorney intends to rely solely on the doctrine of `res ipsa loquitur'", Hubbard ex rel. **Hubbard v. Reed, 774 A. 2d 495 - NJ: Supreme Court 2001 at 500** (holding an affidavit of merit is not necessary in common knowledge malpractice cases). "Although res ipsa does not shift the burden of proof to the defendant, it ordinarily assures the plaintiff a prima facie case that will survive summary judgment". **Jerista v. Murray, 883 A. 2d 350 - NJ: Supreme Court 2005 at 360**. "Common knowledge is sufficient to entitle plaintiffs to the res ipsa inference", **Id at 362**. "When the average juror can deduce what happened without resort to scientific or technical knowledge, expert testimony is not mandated". **Id at 365**.

C. Panel Opinion states Page 5, "They do suggest that their failure was caused by Remson's delay in responding to their discovery requests, but the undisputed evidence reveals that Remson provided her entire case file to Marc well before they filed this complaint".

Remson did not provide all of the files, or answers to the complaint and interrogatories. Appellants argued that Remson failed to provide appellants with her field of specialty. **ECF Doc. 40, pg 11, section B**. Remson **admits** to providing legal services to Appellants, **ECF Doc. 16, pg 4, #16**, but does not state, in her answer to the complaint, the field in which defendant specialized, and whether her services involved that specialty. The New Jersey Supreme Court now requires a physician defending against a malpractice claim (who admits to treating the plaintiff) **must** include in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty, **Buck v. Henry, 207 N.J. 377 (2011) at 391**. see also Ryan, supra, 203 N.J. at 52 (stating that Patients First Act provides "more detailed standards for a testifying expert and for one who executes an affidavit of merit, generally requiring the challenging expert to be equivalently qualified to the defendant"). Because Remson intentionally withheld discovery for 133 days, Appellants **could not** obtain an affidavit without knowing the case types that Remson provided, so that they could obtain a expert with equivalent background.

Remson only turned over the criminal complaint from the prosecutor's evidence. Appellant case is also about Breach of Contract, Marc requested for the **important emails** and documents in which for **6 months** Marc demanded Remson not to take plea deals. Remson engaged in "gamesmanship" and intentionally **withheld the emails** and discovery documents for **133 days**. So, Marc submitted a sworn statement stating "Affidavit not Required" due to Remson intentionally withholding emails and documents, and Common Knowledge Exception applies, **ECF Doc. 33-1, pg 1-6**, see **ECF Doc. 30-11.** "[d]efendants delayed production of important documents and records, failed to respond to requisite discovery and engaged in "gamesmanship." This raises the question whether defendants may have intentionally sought to achieve a technical defeat of valid claims", **Newell v. Ruiz, 286 F. 3d 166 - Court of Appeals, 3rd Circuit 2002 at 172**.

Appellant argued that no lawyer would review their case to prepare an Affidavit of Merit **without the emails** proving Marc Stephens stated to Remson, **for 6 months**, not to take a plea deal under any circumstances, **ECF Doc 84, #3**.

Appellants also argued that they substantially complied with the Affidavit of Merit Statue, **ECF Doc. 40, pg 12, section E** and that the Affidavit of Merit statue is facially unconstitutional, **ECF Doc. 40, pg 18-22, see F**. Appellants also addressed these issues in their Reply Brief, **Doc. 003112517474, pg 12-18**.

IV. THE PANEL'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, BINDING PRECEDENT OF THE SUPREME COURT AND THE ISSUES PRESENTED BY THIS CASE ARE OF EXCEPTIONAL IMPORTANCE -- CLEAR ERRORS OF LAW

1. The court is not barred from addressing arguments not raised in the opening brief and should allow Appellants to resubmit

A. Panel Opinion states Page 4, footnote, **"We will address only arguments that the Stephenses raised in their opening brief. See United States v. Jackson, 849 F.3d 540, 555 n.13 (3d Cir. 2017). While the Stephenses purport to incorporate by reference the arguments that they asserted in virtually every filing that they made in the District Court, "[t]his is insufficient to preserve an argument for appellate review." Spitz v. Proven Winners N. Am., LLC, 759 F.3d 724, 731 (7th Cir. 2014)".**

The court is allowed to consider arguments not raised in the opening brief, and is allowed to suspend all rules pursuant to **FRAP Rule 2** and **FRCP Rule 61** in order to prevent manifest injustice. "We consider an argument not raised in an opening brief if: (1) there is "good cause shown," or "failure to do so would result in manifest injustice"; (2) the issue is raised in the appellee's brief; or (3) failure to properly raise the issue does not prejudice the defense of the opposing party, United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992)", **US v. Mageno, 762 F. 3d 933 - Court of Appeals, 9th Circuit 2014 at 940**. "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights", **United States v. Olano, 507 US 725 - Supreme Court 1993**.

2. Police officers are not allowed to "coerce" Juveniles, and at the summary judgment stage the court is not allowed to weight the evidence and determine the truth of the matter.

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

As discussed above, McDonald coerced Justin to say he was involved, which lead to Justin implicating Tyrone out of revenge, **Doc: 003112688929.**

The panel's decision conflicts with the ruling of this court and the supreme court, "[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.**

3. Police officers are not allowed to fabricate evidence

A. 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)),

The Panel never addressed this issue in their opinion. 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)**. The common law has never granted police officers an absolute and unqualified immunity, **Pierson v. Ray, 386 US 547 - Supreme Court 1967, at 555**. The United States Supreme Court has made it "clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused." (Albright v. Oliver (1994) 510 U.S. 266, 299 [127 L.Ed.2d 114, 114 S.Ct. 807] (dis. opn. of Stevens, J.).) "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. Judges cannot ignore undisputed evidence

A. Panel Opinion states Page 7, "And, in light of these rulings, the District Court did not err in denying the Stephenses' Rule 59(e) motions.

The evidence in Appellants opposing brief, and First Motion for Reconsideration, **ECF 85**, which contains undisputed evidence and addressed the District Court's opinion **with specificity**, was ignored. The Panel and district court erred as a matter of fact and law by ignoring or overlooking the vast documentary evidence and undisputed testimony on record, see **Roe v. Operation Rescue, 54 F. 3d 133 - Court of Appeals, 3rd Circuit 1995** (holding that the district court abused its discretion by "ignoring" undisputed evidence).

B. Panel Opinion states Page 8, "Accordingly, we will affirm the District Court's judgment. We also deny the Stephenses' motion for the recusal of the District Judge, see Securacomm Consulting, Inc. v. Securacom Inc., 224 F.3d 273, 278 (3d Cir. 2000) ("We have repeatedly stated that a party's displeasure with legal rulings does not form an adequate basis for recusal."), and their motion for clarification".

The District Court ignored appellants evidence and testimony. This Court authority to direct the reassignment of a case on remand is based on 28 U.S.C. § 455(a) and 28 U.S.C. § 2106. Under § 455(a), a judge should no longer preside over a case when "a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." **United States v. Wecht, 484 F.3d 194, 213 (3d Cir. 2007)**.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant this petition for rehearing and restore the case to the calendar for reargument or resubmission.

Respectfully Submitted,

Tyrone Stephens
Plaintiff, pro se

Marc Stephens
Plaintiff, pro se

CERTIFICATION

This brief complies with the type-volume limitation of 3,900 words.