

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| UNITED STATES OF AMERICA |) | |
| |) | |
| <i>v.</i> |) | Crim. No. 97-55-P-H |
| |) | |
| CATHERINE DUFFY PETIT, et al., |) | |
| |) | |
| Defendants |) | |

**MEMORANDUM DECISION ON REQUEST FOR HEARING AND
RECOMMENDED DECISION ON DEFENDANT’S MOTION
TO SUPPRESS FRUITS OF OCTOBER 9, 1997 SEARCH OF 23 WATER STREET**

The defendants are charged in a 344-count indictment with conspiracy in violation of 18 U.S.C. § 371, 14 counts of bankruptcy fraud, 72 counts of mail fraud, 233 counts of money laundering and 20 counts of securities fraud. The remaining count asserts a claim for forfeiture. Defendant Catherine Duffy Petit had moved to suppress the fruits of a search conducted at 23 Water Street, Saco, Maine, on October 9, 1997, pursuant to a search warrant issued by this court. Docket No. 94. The other defendants, David Hall, Paul Richard, Roland Morin and Steven Hall, have joined in the motion. Docket Nos. 110, 112, 114 & 116. Petit has requested a hearing on the motion. I deny the request for hearing and recommend that the court deny the motion to suppress.

I. Hearing

The parties agree that *Franks v. Delaware*, 438 U.S. 154 (1978), sets the standard for determining when a hearing must be held on a motion to suppress evidence that is based on a claim that the affidavit underlying the warrant pursuant to which the search that generated the evidence was

conducted was fatally defective. In that case, the Supreme Court stated:

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 171-72. “Material omissions may also serve as a basis for a *Franks* hearing.” *United States v. Spinosa*, 982 F.2d 620, 627 (1st Cir. 1992). “A comparable showing is required if the defendant would establish that technically accurate statements by an affiant have been rendered misleading by material omissions.” *United States v. Scalia*, 993 F.2d 984, 987 (1st Cir. 1993).

Evidentiary hearings on motions to suppress are not granted as a matter of course, *United States v. Migely*, 596 F.2d 511, 513 (1st Cir. 1979), and are required only when necessary to receive evidence on an issue of fact. *United States v. Harrelson*, 705 F.2d 733, 737 (5th Cir. 1983). The factual allegations must be such that, if proved, would require the grant of relief. *Migely*, 596 F.2d at 513. “The test for granting an evidentiary hearing in a criminal case should be substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?” *United States v. Panitz*, 907 F.2d 1267, 1273 (1st Cir. 1990). General or conclusory assertions will not suffice. *Harrelson*, 705 F.2d at 737.

A district court is not obliged to schedule an evidentiary hearing on the basis of conclusory allegations, vague insinuations, unsupported inferences, rank speculation, opprobrious epithets, or any combination of the foregoing.

Panitz, 907 F.2d at 1274.

Here, Petit argues that the affidavit submitted with the request for the search warrant, Affidavit in Support of Application for Search Warrant (the “warrant affidavit”) (Exh. D to [Affidavit of] James Osterrieder (“Osterrieder Aff.”)), submitted with Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions (“Government’s Opposition”) (Docket No. 130), failed to inform the court that the premises to be searched were the law office of Ronald G. Caron, Esq., a failure that “was knowingly false, in reckless disregard of the truth, and a material omission.” Petit’s Motion to Suppress Fruits of October 9, 1997 Search of 23 Water St. (“Motion”) (Docket No. 94) at 5. She also contends that the failure of the affidavit to disclose “the extent of Robert Paradis [sic] criminal record” was a material omission. *Id.* Robert Paradis provided much of the information upon which the warrant affidavit was based. *See, e.g.*, Warrant Aff. ¶ 5. Petit concludes that probable cause for the search of the Caron office would not have existed “had the fact that it was a law office been communicated to the Court.” Motion at 5. The search included the Coastal Associates office leased by John Rzasas across the hall from the “Caron” office. Warrant Aff. ¶ 3, Premises to Be Searched. This is not contended to have been a law office at the time of the search. Petit argues that Rzasas’s office contained only documents covered by the attorney-client privilege or work-product protection from discovery. *See* Affidavit of John Rzasas (“Rzasas Aff.”), Exh. 5 to Motion, ¶ 5.

The only allegations of falsehood or reckless disregard for the truth, whether by assertion or

omission, contained in the warrant affidavit that are attacked by affidavit submitted by Petit, as required by *Franks*, are found in the affidavit of Ronald G. Caron, Esq. (“Caron Aff.”) (Exh. 4 to Motion). He asserts the following:

In paragraph 5(a), Paradis calls my 23 Water Street office “Catherine Petit’s and Paul Richard’s office.” It is my office. I allowed Petit full access . . . as I maintained this office solely for matters related to her.

* * *

In paragraphs [sic] 5(d) the initials REP on boxes were for Richard E. Poulos, one of Petit’s attorneys until his formal withdrawal from the Key Bank case in January 1997. . . . With my knowledge boxes of files were collected from Poulos’ office and house. There were at least 10-12 boxes and each was marked R.E.P. To my personal knowledge, there were never any boxes of documents attributable to Robert Paradis.

* * *

In paragraph 5(g) I . . . met at my 23 Water Street office on many, many occasions with my client Catherine Petit, and co-counsel on her various cases From the spring [of] 1997 through Petit’s arrest I was at the 23 Water Street office meeting with Catherine on a regular basis, usually at the end of the day and into the evening.

* * *

There were legal “books and treatises” [sic] in the 23 Water Street office.

* * *

Robert Paradis could never truthfully claim that 23 Water Street was not my office. I have maintained the 23 Water Street office since May 1994 I discussed with Paradis . . . the need to be very diligent in following appropriate procedures for sensitive legal material so as not to violate work product and attorney/client privilege.¹

Caron Aff. ¶ 6. The only other challenge to the affidavit that arguably meets the requirements of *Franks* is the uncertified criminal history of Paradis from Georgia that is Exhibit 1 to the Motion. That document appears to show that Paradis was convicted of murder, sentenced to confinement for

¹ The Caron affidavit is also significant for what it does not say. Caron does not assert that he paid the rent for the suite, that any of the numerous people who worked there were employed by him, that all of the files in the suite were his or were generated in the course of his legal representation of Petit, that Petit and the other employees only worked on the lawsuits while using the office, that he paid or employed Rzasas, or that any lawyer did, or that all of the documents in Rzasas’ space were known to him and privileged.

12 years and a fine of \$4,000 as well as “restitution,” that he was “received into institution” on November 16, 1984 and that he was paroled on November 27, 1985. *Id.* The warrant affidavit states that Paradis “has a Georgia state court conviction for conspiracy to violate the controlled substances act.” Warrant Affidavit ¶ 5.

The government responds that the warrant affidavit does disclose the fact that Petit claimed that Suite 7 was the law office of Ronald Caron. Paragraph 5(g) of that affidavit notes the sign on the outside of 23 Water Street that states “Law Offices of Ronald Caron, Esq.” and repeats Paradis’ statement that Petit wanted the suite to appear to be a law office. The government also notes that Suite 7 was leased in the name of Old Orchard Beach Pier Company, one of Petit’s operating corporations, from 1989 until the lease with Caron, dated June 30, 1995, was executed. Osterrieder Aff. ¶ 6. Three of the employees whom Caron was “aware” worked in Suite 7, Caron Aff. ¶ 6(d), are listed as Petit’s employees on the bankruptcy schedules that she filed. Summary of Schedules, Exh. 1 to Petit’s Motion to Dismiss Counts 2 Through 5 and 7 Through 15, or in the Alternative for a Bill of Particulars (Docket No. 87), pp. 1.7 & 1.18. Those schedules also identify Paradis and one other employee as “bookkeepers and accountants who within the six years immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of” Petit and as individuals who were “in possession of the books of account and records of” Petit. *Id.* pp. 1.15-1.16.

On the issue of Paradis’ criminal history, the government asserts, without citation to authority, that Paradis was not convicted of murder. It notes that Paradis’ bail hearing was conducted earlier in the day on which the search warrant was approved by the same judicial officer and that the United States Probation Office at that hearing provided information that Paradis was

charged with murder in Georgia in March 1984 and that when he pleaded guilty to the conspiracy charge in November 1984 the murder charge was *nolle prosequied* as part of the plea. Government's Opposition at 30 n.15. Therefore, the government contends, the court was aware of all of the relevant facts concerning Paradis' criminal history "known to the Government" when it approved the warrant.

Of course, the issue under *Franks* is not what the judge knew when the warrant was approved, but what the affiant knew. The pretrial services report concerning Paradis, dated October 9, 1997, the same date as the warrant affidavit, reports that the United States Probation Office in Maine verified through the Morgan County, Georgia sheriff's department that Paradis had pleaded guilty to conspiracy to violate the controlled substances act and a charge of murder had been subject to a "nolle prosequi order" at the same time. Pretrial Services Report, *United States v. Paradis*, Docket No. CR 97-46-P, at 2-3. It is reasonable to infer that this information was what was available to Agent Osterrieder when he executed the warrant affidavit, rather than the unverified information sheet dated January 27, 1998 that is Exhibit 1 to the Motion. In any event, it is not necessary that the criminal record of an informant be mentioned at all in the affidavit submitted to justify approval of a search warrant, *United States v. Cody*, 812 F. Supp. 1123, 1125 (D. Colo. 1993), *aff'd* 21 F.3d 1122 (10th Cir. 1994), and the report in such an affidavit of an informant's falsified arrest record has been held to be insufficient under *Franks* to warrant a hearing, *United States v. Tribunella*, 749 F.2d 104, 112-13 (2d Cir. 1984). Where, as here, the informant's statements concerning the subject of the warrant were based on personal knowledge, the total omission of the informant's criminal record from the affidavit will not invalidate the warrant. *United States v. Ofshe*, 817 F.2d 1508, 1513 (11th Cir. 1987).

Petit's argument thus comes down to the disputed fact that Suite 7 was Caron's law office. The First Circuit has upheld the search of a law office pursuant to a warrant. *United States v. Bithoney*, 631 F.2d 1, 2 (1st Cir. 1980). *See also United States v. Mittelman*, 999 F.2d 440, 445 (9th Cir. 1993) (“[l]aw offices are not immune from search”) and cases cited therein. Even if the warrant affidavit had made clearer the contention that one of the two premises to be searched was a law office, the result would not have differed. The search warrant could, and would, be issued for items located in a law office. In addition, the warrant affidavit specifically excludes from the list of items to be searched for “all correspondence, notes, and memoranda between legal counsel and their clients, including but not limited to Ronald Caron, Esq. or Steven Gordon, Esq. and CATHERINE DUFFY PETIT, PAUL B. RICHARD, STEVEN A. HALL, DAVID J. HALL, ROLAND L. MORIN, ARMAND N. PELLETIER and ROBERT E. PARADIS.” Warrant Affidavit at 6-7. In the terms of *Franks*, even if the contested Paradis statements were set to one side, there remains ample content in the warrant affidavit to support a finding of probable cause. E.g., ¶¶ 4(a) (incorporating complaint affidavit), 5(a) (unchallenged portions), 5(b), 5(c), 5(f), 5(g) (unchallenged portions), 5(h), 8-16.

The five statements by Paradis reported by Osterrieder in the warrant affidavit and challenged by Caron are either simply not inconsistent (that Paradis only saw Caron at Suite 7 about once a month) or not material (that one box in Rzasa's suite may have contained documents from a former Petit attorney and was “not attributable” to Paradis, that there were legal books in Suite 7, that Suite 7 was a law office, and that Paradis' belief that Suite 7 was not a law office was unreasonable).

The material submitted by Petit fails to establish that the warrant affidavit could have contained any deliberate falsehoods or statements showing a reckless disregard for the truth on the

part of the affiant. Nor does it make a sufficient showing that any material facts included in the affidavit were in doubt when the warrant was approved. Even setting aside the statements of Paradis challenged by the Caron affidavit, a practice not required by *Franks*, which only addresses the statements of the affiant (here, Osterrieder), not those of the informant (here, Paradis), no hearing is required under *Franks*.

For the foregoing reasons, Petit's request for a hearing on this motion is denied.

II. The Merits

The government argues that all five of the defendants lack standing to bring this motion because none of them has shown that he or she had a reasonable expectation of privacy in Suite 7 or the Rzasa office that was independent of the other alleged co-conspirators' interests, citing *United States v. Padilla*, 508 U.S. 77, 82 (1993). Each defendant bears the burden of showing that he or she had such a reasonable expectation in order to allow the court to consider his or her challenge to a search and seizure under the Fourth Amendment. *United States v. Lewis*, 40 F.3d 1325, 1333 (1st Cir. 1994). "A defendant who fails to demonstrate a sufficiently close connection to the relevant places or objects will not have standing to claim that they were illegally searched or seized." *Id.* The factors pertinent to this threshold inquiry include

ownership, possession, and/or control; historical use of the property searched or the thing seized; ability to regulate access; the totality of the surrounding circumstances; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of such an expectancy under the facts of a given case.

United States v. Aguirre, 839 F.2d 854, 856-57 (1st Cir. 1988).

In the instant case, neither David Hall nor Roland Morin makes any attempt to meet the

threshold standing requirements for a motion to suppress, and the motion must accordingly be denied as to them. In an affidavit submitted with his reply to the government's opposition to all pending pretrial motions, Steven Hall asserts that at some unspecified time before the date of the search of Suite 7 he brought some records concerning a corporation of which he was president to Suite 7 so that defendant Richard could use them, and that these records were either taken from Rzasas's office by Paradis or seized during the October 9 search by government agents. Affidavit of Steven A. Hall (Docket No. 141) ¶¶ 2-6. These statements are insufficient to bestow standing upon Steven Hall. They show neither ownership, possession nor control of Suite 7 or the Rzasas office, nor the ability to regulate access to either; historical use of the premises; nor the existence of an anticipation of privacy in those premises.

The matter is somewhat different for defendant Petit. While the focus of her effort is to show that Suite 7 was Caron's office rather than hers, Caron's affidavit states that Petit had "full access" to Suite 7 and that it was maintained "solely for matters related to her," that "[t]he bulk of the files and information related to the State civil case [against Petit] was kept in" Suite 7, and that Suite 7 "is solely for Petit matters and is not open to the public." Caron Aff. ¶¶ 6(a), 6(d), 7. Caron refers to Suite 7 as a "satellite" office and acknowledges that he was not always there, suggesting that Petit had some ability to regulate access to it. It is clear from the materials submitted by Petit that she historically used Suite 7 and had some reasonable expectation of privacy there. Petit has standing to bring this motion.

The question is much closer for defendant Richard, who has submitted no evidentiary material of his own in support of this motion. Rzasas states that he has been employed for several lawyers who represented Richard since 1996, Rzasas Aff. ¶ 3, that he met in Suite 7 with attorneys

who represented Richard, *id.* ¶ 4, and that he considered his office to contain privileged material related to Richard, Petit or related corporations, *id.* ¶ 5. The Caron affidavit does not mention Richard. This is fairly slim support for an assertion of standing.

However, even assuming that Richard as well as Petit has standing to contest the search in this case, *see United States v. Cleveland*, 106 F.3d 1056, 1063 (1st Cir.), *cert. granted sub nom. Muscarello v. United States*, 118 S.Ct. 621 (1997), the challenge to the search warrant, based solely on an argument that there are materially false and misleading statements in the warrant application, Motion at 1 & 5, must fail for the reasons stated above.

III. Conclusion

For the foregoing reasons, I deny the request for a hearing and recommend that the Motion to Suppress Fruits of October 9, 1997 Search of 23 Water St. be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of June, 1998.

*David M. Cohen
United States Magistrate Judge*

