IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re Search Warrant	:	Misc. Case No. 03-0008-MPT

MEMORANDUM

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Dated: September 9, 2003

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

This motion, initiated by Sherry L. Freebery, seeks the return of documents seized from her home pursuant to a search warrant obtained by the government on November 5, 2002 and served upon Freebery on November 6, 2002. Freebery also requests that the court grant her a *Franks* evidentiary hearing.

II. Background

The facts giving rise to this action occurred shortly before the September 2002 County Council primary election. Freebery is the New Castle County Administrator. In an effort to gain voter support for two candidates in the 2002 County Councilman primary election, Freebery had extra phone lines installed in her home and created a phone bank that could be used to contact potential voters. Notably, the extra telephones were not listed in Freebery's name, but under the name of another county classified employee. For at least two weeks before the primary, Freebery assigned certain unclassified county employees to perform various political campaign activities, such as, making telephone calls from her home, in support of the two favored County Councilman candidates.[1] All such campaign activities by these employees were performed during normal work hours. The employees were not on leave, but were

[1]Unclassified employees are political appointees who are not protected by, or evaluated upon, a merit system of employment. NCCC § 26.01.002(C).

assigned to political campaign duties as part of their normal work routine.[2] The primary election was held on September 7, 2002.

On September 24, 2002, the FBI, on behalf of the United States Attorney's Office, served New Castle County with subpoenas seeking records relating to employee leave and assignments for the weeks leading up to the September primary. Immediately thereafter, Freebery asked Acting County Attorney Eric Episcipo to draft a memorandum, ostensively to confirm his earlier informal advice, that unclassified county employees could legally perform campaign-related work during county time. Episcopo's September 25th memorandum concluded that unclassified county employees were not barred from volunteering for candidates during county work hours by various county, state, or federal laws.[3] Absent two footnotes and few conclusory lines, no adequate review of applicable state law was provided in the memorandum. Moreover, no relevant analysis was performed to support the conclusion that no state or county statute or code would prohibit unclassified employees from participating in political activities while on county time and not on unpaid leave.

On November 5, 2002, a sealed search warrant for Freebery's residence was issued. See *In the Matter of the Search of 13 Crimson Drive*, Case No. 02-110M. In support of its application for the warrant, the government submitted the affidavit of Special Agent Kevin Shannon. The warrant was sought in conjunction with an ongoing

[2]NCCC § 26.03.1411 permits county employees up to three months unpaid leave to work on political campaigns.

[3]Under Delaware law, the state code trumps any inconsistent county code provision, see 9 Del. C. § 339 ("The governing body of each county may make rules for its government not inconsistent with the Constitution and laws of the State.")

federal grand jury investigation into various allegations of fraud and abuse in county government.

To avoid interfering with the November 5 general election, the government waited until the next day, November 6, to execute the warrant at Freebery's home. Eleven federal agents participated in the execution of the search warrant. In addition to the agents, the U.S. Attorney, who is overseeing the grand jury investigation, entered Freebery's residence and surveyed the scene for about one hour.

Government agents seized 29 boxes of materials from Freebery's home. Included in those materials were documents related to the 2002 primary campaign, as well as, documents relating to the 2000 and 1996 campaigns. Also included in the seized material were two bills mailed to Freebery by the telephone company, Verizon. Those phone bills contained charges related to the installation of the extra phone lines in Freebery's home, as well as, charges for phone calls made from the home by the unclassified county employees at Freebery's behest. One of the phone bills was sent by United States mail to Freebery's house on or about September 3, 2002, five days before the primary election. Also contained in the seized materials were New Castle County records, such as, telephone messages, unrelated to the campaign.

The government made copies of all seized materials available, and those copies have been provided to Freebery. Certain copies were not received by Freebery until four months after the initial seizure and after this motion was filed.

Freebery contends that during the search of her home, government agents, including the U.S. Attorney, had the opportunity to view memoranda and materials located in her bedroom that were unrelated to the search warrant and covered by

attorney-client privilege, including a memorandum related to a civil law suit. The government counters that Freebery was given the opportunity to examine any documents in her bedroom in order to ascertain that the agents did not review or seize anything privileged. The government contends that Freebery looked through the bedroom and indicated to the agents that they could proceed with the search of her room. Furthermore, both Special Agent Shannon and U.S. Attorney Colm F. Connolly have submitted sworn affidavits stating that they did not examine any documents that were marked to suggest that the document was an attorney-client communication or any memorandum related to a civil law suit.

The government argues that the material seized is evidence that Freebery was involved in an honest services mail fraud offense.[4] The seized material also purportedly includes evidence of a scheme to defraud New Castle County and its citizens of their right to the honest services of county officials in violation of state law and the New Castle County Code. The New Castle County Council amended the County Code in November 2002, to expressly prohibit unclassified employees from performing any campaign activities during regular working hours.[5]

[4]Freebery argues that an honest services mail fraud offense requires a violation of state law. The government, citing *United States v. Panarella*, argues that the Third Circuit has not expressly resolved whether an honest services mail fraud claim must be predicated on a violation of state law. 277 F.3d 678 (3d Cir.), *cert. denied*, 1235 S. Ct. 95 (2002). In any event, the government argues that Shannon's affidavit creates sufficient probable cause of a state law violation.

[5]NCCC § 26.01.019(B)(as amended November 12, 2002). Classified employees were already barred from such activity during working hours under NCCC § 6.01.019(B)(2).

Freebery bases her motion for return of property on Rule 41 (g) of the Federal Rules of Criminal Procedure.[6] Rule 41 (g) states in part:

> A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. . . . The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Freebery argues that she has been aggrieved by an unlawful search and seizure and by the deprivation of her property. Freebery claims that the government improperly obtained the search warrant for her home and that the actual search and seizure was unconstitutional. Furthermore, Freebery contends that she has been aggrieved by the deprivation of the property as it has caused her undue public embarrassment as a prominent figure in county politics.

Freebery asks that the court use its equitable powers to return her seized property. Freebery also requests a *Franks* evidentiary hearing.

This is a pre-indictment motion.

III. Discussion

A. Motion For Return of Property

The government argues that under Rule 41(g) and applicable Third Circuit case law, the court should refrain from reaching the merits of Freebery's motion.

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[6]Effective December 1, 2002, the former Rule 41 (e) has been renumbered 41 (g), with only stylistic changes. See Fed. R. Crim. P. 41, *Adv. Comm. Notes*, 2002 Amendments. Because of this recent change, 41(e) and 41(g) are used interchangeably throughout this opinion.

According to the government, the relief Freebery requests, the pre-indictment return of property, is equitable in nature, and thus, the traditional principles of equity apply to the court's resolution of this matter.

The government's reasoning that the court should deny Freebery's motion without considering the merits of her arguments is two-fold. First, under the doctrine of clean hands, the government argues that Freebery is not entitled to request equitable relief from the court. Second, the government argues that under an analysis of the totality of the circumstances, equitable considerations dictate denial of the motion.

Unclean Hands

The government argues that the equitable principle of "unclean hands" bars Freebery from pursuing a Rule 41 Motion, and thus, precludes her from any right to a hearing to determine whether she is entitled to the return of the seized evidence. In *Highmark*, the Third Circuit repeated its rationale of when the doctrine of unclean hands is relevant: "The equitable doctrine of unclean hands applies when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d. Cir. 2001).[7]

The government argues that Freebery procured and filed a false declaration in support of her motion for return of property. To support this allegation, the government

[7]See also *United States v. Parlavecchio*, 192 F.Supp. 2d 349, 352 (M.D. Pa. 2002) (refusing to exercise equitable jurisdiction over Rule 41 motion for return of property because of movant's unclean hands), *aff'd*, 2003 WL 68073 (3d Cir. Jan. 9, 2003), and *Gaudiosi v. Mellon*, 269 F.2d 873, 881 (3d Cir. 1959) ("One who comes into equity must come with clean hands and keep those hands clean throughout the pendency of the litigation . . . .)"

relies on the sworn affidavit of Patricia Lutz DiIenno, dated February 20, 2003 ("Second Affidavit"). This Second Affidavit repeatedly contradicts DiIenno's prior sworn declaration ("First Declaration"), dated January 14, 2003, and attached to Freebery's motion.

DiIenno is the Chief Human Resources Officer for New Castle County. In this position, DiIenno is charged with interpreting and implementing the policies and procedures relating to county employees. DiIenno's First Declaration reviews the government's application and affidavit for search warrant, Case Number 02-110M. Though never contacted by Special Agent Shannon during his investigation, DiIenno's First Declaration examines and points out what she believes to be misinterpretations of the New Castle County Code made by Shannon in his affidavit in support of the warrant. The First Declaration dissects numerous paragraphs in Shannon's affidavit and gives a series of explanations, all based on DiIenno's interpretation of the County Code, which support Freebery's argument that she did not violate County Code by ordering unclassified workers to engage in political activities on county time. The First Declaration supports Freebery's underlying theory that the government presented inaccurate or misleading information about the county's personnel policies to the court when obtaining the search warrant.

DiIenno's Second Affidavit, directly contradicts many of the statements made in her First Declaration. In the Second Affidavit, DiIenno explains why her earlier First Declaration was untruthful regarding the issue of whether the County Code permitted unclassified employees to work on political campaigns while on county time. The Second Affidavit lists at least six instances in which the First Declaration was untrue.

The Second Affidavit concludes that the County Code, in fact, does not support Freebery's contention that her actions were permissible and that Shannon's affidavit contained the correct interpretation of the Code.

DiIenno explains the contradictions between her First Declaration and the Second Affidavit by claiming that she felt pressured by Victoria Toensing, who assisted DiIenno in preparing the First Declaration, to complete that declaration to Toensing's satisfaction.[8] DiIenno also claims that she feared repercussions from Freebery, her supervisor, if she did not sign the First Declaration. Moreover, DiIenno asserts that she was unaware of the intended purpose of the First Declaration.

The government argues that DiIenno was in an inherently coercive situation when she was asked to draft and sign the First Declaration. This coercive environment supposedly caused DiIenno to sign what she now asserts to be an untrue sworn statement. Moreover, according to the government, Freebery either created or tolerated this situation, thus dirtying her hands.

Other than presenting facts that Freebery was DiIenno's supervisor and that Freebery asked DiIenno to review and sign the First Declaration (a point contested by Freebery), neither the government nor DiIenno provide any evidence of Freebery influencing DiIenno to sign a false declaration. No communication of any sort is presented by the government to show that Freebery improperly pressured DiIenno into signing a false statement. There is nothing inherently suspicious in requesting the County Chief Human Resources Officer to explain county policies and regulations which

[8] Toensing is an attorney who represents Thomas Gordon, the County executive and Freebery's boss.

affect its employees. Nor is it automatically coercive when a supervisor asks an employee to complete and sign a sworn statement concerning matters within that employee's knowledge. DiIenno's contention that her untruthfulness in the First Declaration should be excused because the intended use of the declaration was unknown to her has no bearing on the issue at hand.

The government presents no evidence that Freebery directly, or even indirectly, procured and filed a false declaration. Likewise, the government presents nothing more than suspicion that Freebery created or tolerated a coercive atmosphere which led to the filing of the First Declaration. It follows, then, that the government's theory that the doctrine of unclean hands bars Freebery from moving for a return of property is not supported.

Equitable Considerations and the Totality of the Circumstances

The government bases its equitable considerations argument primarily on *Donlon v. United States*, 331 F. Supp. 979 (D. Del. 1971), the only reported decision in this district addressing a pre-indictment Rule 41(g) motion. In *Donlon*, the government seized numerous items that could be used in illegal gambling operations from Donlon's home. Thereafter, Donlon moved for the return of the property under 41(e) before indictment, arguing that the search warrant should be invalidated because it lacked probable cause.[9] Judge Layton declined to reach the merits of Donlon's motion, concluding that a pre-indictment motion for return of property, which is not tied to an

[9]Donlon also argued that the wiretap statute was unconstitutional, and that since the search warrant was obtained in part with information learned through the wiretap, it was the fruit of the poisonous tree and thus, the evidence was illegally seized. *Donlon*, 331 F. Supp. At 979-80. The court rejected both of these arguments.

existing criminal prosecution, is equitable in nature and whether to resolve such a motion on its merits is a matter within the court's discretion. *Id.* at 980

In reaching his opinion, Judge Layton set forth four reasons for declining to reach the merits of Donlon's motion. The court's reasons were that: (1) the motion was premature, since the grand jury may refuse to indict Donlon; (2) "the alleged unconstitutionality of the search and seizure was not absolutely clear on the face of the proceeding" in that the government had "obtained a warrant by the usual means based upon at least a colorable allegation of probable cause and the search was otherwise validly executed;" (3) the absence of prejudice or harm to Donlon by forcing him to present his motion at a later date; and (4) the seized items were not necessary to the operations of a legitimate business.[10] *Id*. at 980-81.

Approximately two months later, Judge Layton addressed the merits of Donlon's probable cause argument when he renewed his rule 41(e) motion after indictment. Finding the search warrant lacked probable cause, the court granted Donlon's motion, suppressed the evidence, and ordered the government to return the seized property. See *Donlon v. United States*, 334 F. Supp. 1272 (D. Del. 1971).

Although both parties implicitly agree that a pre-indictment motion to return property is within the equitable province of the court, they disagree on the relevant standards that the court should utilize in reaching its decision. The government urges this court to mimic the analysis used by the *Donlon* court when considering whether to

[10] The items seized from Donlon were considered to be contraband by the court as they were materials used in illegal gambling. The items seized by the government from Freebery are not contraband, but instead, county and campaign records. As such, the fourth test used by the *Donlon* court is not applicable.

entertain the merits of Freebery's motion. The government argues that consideration of all, any one, or any combination of the four *Donlon* factors should lead this court to refuse to entertain the merits of Freebery's motion. The government stresses that the adoption of this analytical framework is consistent with that employed by the other federal circuits who have addressed this issue. In so arguing, the government proposes that Freebery must show that she is being irreparably harmed by the unlawful seizure and that she has no remedy at law - tests which are traditionally applied when a movant is seeking extraordinary equitable relief, such as, a temporary restraining order or preliminary injunction.

Freebery points to case law from this circuit, not fully addressed by the government, that establishes a reasonableness standard which governs motions to return in this jurisdiction. In *United States v. 608 Taylor Avenue*, 548 F.2d 1297, 1302 (3d Cir. 1978), a case involving a pre-indictment motion for the return of goods seized by the government, the Third Circuit noted that "a court must weigh the interest of the government in holding the property against the owner's rights to use the property." A similar test was set forth in *Government of the Virgin Islands v. Edwards*, 903 F.2d 267 (3d Cir. 1990), a case involving a post-conviction motion under Rule 41(e). The *Edwards* court stated that "[t]he Advisory Committee Notes to the 1989 Amendment [to Rule 41(e)] suggest merely that 'reasonableness under all of the circumstances must be the test when a person seeks to obtain the return of property,' a standard comparable to that which we used on *608 Taylor Avenue*." *Edwards*, 903 F.2d at 273. While the Third

Circuit's position is a minority one, it is clearly the law of this jurisdiction.[11] A more recent case from the Middle District of Pennsylvania, *United States v. Lamplugh*, makes the standard applicable quite evident:

> Even though *608 Taylor Avenue* involved a pre-indictment claim for the return of property, the Third Circuit never considered the application of equitable injunctive principles. Further, there is nothing in the 1989 Committee Notes to Rule 41(e) which would suggest that a court must find that (1) there is no adequate remedy at law, and (2) that the movant would be irreparably harmed if the property was not returned. Given the reasonableness standard enunciated by the Third Circuit and the Committee Notes, I will not require the defendants to demonstrate that they will suffer irreparable injury if their property is not returned. *Id.* at 1207.

As the appropriate standard is clearly defined, this court will not require a showing by Freebery that she has no other remedy at law other than a pre-indictment Rule 41(g) motion, or that she has been irreparably harmed by the continued seizure of the materials.

The court will, instead, analyze Freebery's argument that she has been aggrieved by the deprivation of property under the reasonableness standard enunciated by this circuit. Freebery's argument must be balanced against the government's interest in the continued retention of the seized documents, as well as, the threat of interference that the Rule 41(g) motion poses to an ongoing investigation.

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[11] The government cites *Tyagi v. DiStazu* 809 F. Supp. 10 (M.D. Pa, 1992) to support its claim that Freebery is required to show irreparable harm and lack of adequate remedy at law. *Tyagi* can be distinguished from the present situation in that the court was concerned with whether the plaintiff could be compensated by money damages in lieu of the return of property. That issue is not before this court.

In keeping with the precedent set in this district by Judge Layton in *Donlon*, the court will analyze Freebery's argument that she has been aggrieved by an unlawful search and seizure of property using the second prong of the *Donlon* test: whether "the alleged unconstitutionality of the search and seizure" was "absolutely clear on the face of the proceeding" and whether the government had "obtained a warrant by the usual means based upon at least a colorable allegation of probable cause and the search was otherwise validly executed." *Donlon,* 331 F. Supp. at 980-81.

Deprivation of Property

As stated by the Third Circuit in *608 Taylor*, "a court must weigh the interest of the government in holding the property against the owner's rights to use the property." 548 F.2d at 1302. Freebery argues prejudice should the court decline to rule on the merits, as an indictment will cause substantial damage to her reputation.[12] Freebery contends that this is especially so because of her standing in the community, as evidenced by her status as a member of the bar and her prior employment as the County chief of police. Freebery also claims that the some of the materials seized by the government, such as telephone logs and handwritten notes, are personal property (as opposed to property belonging to the county or campaign organizations).

The government contends that the continued retention of the originals of the seized documents is reasonable. The government notes that the grand jury and the federal government are conducting an ongoing investigation into credible allegations of

[12] Freebery cites *In re Fried*, 161 F.2d 453, 458 (2d Cir. 1947) ("For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erase. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty.")

serious criminal violations by Freebery and others. The government argues that the seized materials are needed to present to the grand jury, to be used with witnesses, to develop other evidence, and for presentation at trial. The government maintains that to return the original materials to Freebery would risk their destruction or loss. Moreover, Freebery has had access to all of the seized materials and, pursuant to her request, has been provided copies.

Freebery has not demonstrated a basis of how she is being harmed by having only copies of the seized materials. Freebery has not suggested that the government's retention of the original materials has rendered her unable to perform her duties as New Castle County Administrator. Likewise, Freebery has not shown how the government's possession of the original documents has harmed her personally. Indeed, Freebery's main contention is not that she has been aggrieved by the government's retention of the materials, but that she *may be* aggrieved if the grand jury indicts. Such apprehension of the *possibility* of public embarrassment does not meet the language of Rule 41(g), which requires that the movant be *presently* aggrieved ("A person *aggrieved* by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." (emphasis added)) Furthermore, in the pre-indictment context, when the government has a continuing need for the seized property, the burden is on the movant seeking relief to show that she is entitled to possess the property.[13] Freebery admits that most seized material is, in fact, the property of the county or of

[13]See *United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987); see also *United States v. Chambers*, 192 F.3d 374, 377 (3d Cir. 1999) (burden remains on movant to show entitlement to property even when motion is filed during pendency of criminal prosecution).

campaign organizations. She has not explained how she is entitled to these documents which are, according to her own admission, not her property. Freebery's attempted use of the Third Circuit's ruling in *Edwards* to argue that her possession of the material at the time of seizure then entitles her to the return of the material is misplaced. *Id.* at 267. In *Edwards*, the court determined that possession of property at the time of the seizure is sufficient to show entitlement for purposes of a Rule 41 motion, "unless the government or a third party could show a cognizable claim of ownership or right to possession adverse to that of defendant." *Id.* at 273-74. By Freebery's acknowledgment, the county and various campaign organizations (not specified by Freebery) have a cognizable claim of ownership adverse to her. Freebery, thus, has not met her burden of showing that she is entitled to the vast majority of the material being held by the government.

Freebery's contention that this court should return the telephone logs which she claims are personal, must be weighed against the reasonableness of granting such a pre-indictment Rule 41(g) ruling. The government has not disputed Freebery's contention that the logs are her personalty, despite the fact that the extra telephone lines were not in her name, but in the name of another employee. However, as Judge Layton cautioned in *Donlon*, pre-indictment Rule 41(g) motions could cause the undue delay or postponement of criminal prosecutions and should be limited to extraordinary circumstances. *Donlon*, 331 F. Supp. at 981. Freebery's primary argument for the return of the telephone logs lies in the fact that they are personal in nature. Although these logs may be her personalty, this fact alone does not create the extraordinary circumstances which give rise to granting a pre-indictment Rule 41(g) motion.

Therefore, Freebery has not shown that she has been aggrieved by the deprivation of original materials.

Unlawful Search and Seizure

As explained above, this court will rule on whether Freebery has been aggrieved by an unlawful search and seizure according to the standard under the second prong in *Donlon*.

The affidavit by Special Agent Shannon is a detailed account of the applicable county, state and federal laws that were allegedly being violated by Freebery. The affidavit explains vividly and plausibly why Shannon believes that evidence existed in Freebery's house of a possible scheme to deprive the citizens of New Castle County of their intangible right to honest services and of the use of the United States mails in furtherance of that scheme. The affidavit creates at least a colorable allegation of probable cause. As a result, the government obtained the warrant by the usual means.

Freebery's contention that the government had the opportunity and, therefore, possibly viewed privileged material during the execution of the search warrant does not make the unconstitutionality of the search and seizure absolutely clear. Moreover, the evidence shows that Freebery was provided the opportunity to review areas of her home to determine whether documents or other materials subject to privilege existed. She checked the bedroom and confirmed that the agents could proceed with the search.

Applying the standards of *Donlon* regarding a pre-indictment Rule 41(g) motion, Freebery has not been aggrieved by a clearly illegal search and seizure.

Under the standards set by this district and this circuit for deciding the merits of pre-indictment Rule 41(g) motions, Freebery has failed to show that she has been aggrieved by an unlawful search and seizure of property or by the deprivation of property, and thus, her motion for return of property fails to satisfy the plain language of Rule 41. Therefore, Freebery's motion for return of property is denied.

B. Franks Hearing

Freebery requests a *Franks* evidentiary hearing so she may establish that the warrant affidavit of Special Agent Shannon contained incorrect statements and material omissions which led the court to find probable cause that an honest services mail fraud offense occurred, when, in fact, no probable cause exists.

To mandate a *Franks* evidentiary hearing,

> 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. . . . 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. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. *Franks v. Delaware,* 438 U.S. 154, 171-172 (1978). (emphasis added).

The Supreme Court, therefore, set up a two pronged test which must be met before a hearing will be granted. First, the petitioner must present allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. Second, such deliberately false or recklessly untrue allegations contained in the warrant affidavit must negate all support of a finding of probable cause.

Shannon's affidavit addresses state and county law to show probable cause that Freebery participated in a scheme to deprive the citizens of New Castle County of their right to honest services, and that the United States mails were used in furtherance of that scheme. The affidavit shows that the scheme to defraud could be found separately under both county and state law. Under the second prong of the *Franks* requirements, then, Freebery must show that Shannon's affidavit contains elements of deliberate falsehood or reckless disregard for the truth concerning the underlying theory of an honest services offense in relation to *both* state and county law. Freebery must also show that the affidavit contains deliberate falsehoods or a reckless disregard for the truth regarding its allegations of mail fraud.

Freebery claims that Shannon included incorrect statements and material omissions concerning state law, specifically, Shannon's statement that Delaware law prohibits New Castle County employees from working on political campaigns during

their working hours while receiving pay from the county.[14] In his affidavit, Shannon cites 15 Del. C. § 8012(d) which provides:

> No agency of the State, no political subdivision of the State, no agent of any political subdivision of the State and no agency authorized by an act of the General Assembly shall make any contribution to any political committee or candidate for any elective office.

"Contribution" is defined under 15 Del. C. § 8002(6) as, "any advance, deposit, gift, expenditure or transfer of money or any other thing of value, to or for the benefit of any candidate or political committee involved in an election, including without limitation any: . . . (f) Service or use of property without full payment therefor (except the contribution of services by an individual, the use of an individual's residence, the contribution of such items as invitations, food and beverages by an individual volunteering personal services or the individual's residence, or the use of the telephone equipment of any person.)[15] 15 Del. C. § 8002(6)(f). Freebery argues that § 8002(6)(f) expressly permits a political subdivision of the state (New Castle County), acting through individuals (unclassified employees) to contribute their personal services, their homes, and their telephones to political candidates. Furthermore, Freebery argues that Shannon's failure to include the full text of § 8002(6)(f) is a material omission that, if

[14] The Third Circuit, in *United States v. Calisto*, 838 F.2d 711, 714-16 (3d Cir. 1988), extended the *Franks* test to include an omission as the basis for a challenge to the affidavit. When reviewing alleged omissions, this court must first look to see if the information was omitted with a reckless disregard for the truth or to create a deliberate falsehood, and if so, decide whether the inclusion of such omitted information would have precluded the finding of probable cause.

[15] The full textof § 8002(6)(f) was not included in Shannon's affidavit. The affidavit included only: "Service or use of property without full payment therefor (except the contribution of services by an individual . . . ." Freebery argues that the absence of the full text is a material omission.

included, would have led the court to find that no probable cause of an honest services scheme could be based on a violation of state law.

The government argues that 15 Del. C. §§ 8012(d) and 8002(6) are clear and unambiguous on their face -- that services contributed by the unclassified employees, although performed by individuals, but done on county time, were services that were owed to the county. Since the county and its taxpayers were deprived of these services, it was the county who contributed to the campaigns. As such, the government concludes, the actions of the unclassified employees, campaigning on Freebery's orders, were in violation of state law.

These arguments were previously presented to Chancellor Chandler in *Mell v. New Castle County*, 2003 WL 1919331 (Del. Ch.)(unpublished opinion), an action arising out of the same facts as the current motion. In *Mell*, taxpayers in New Castle County sought to enjoin the county from paying attorneys' fees and expenses for Freebery for the same investigation now being conducted by the US Attorney.[16] Freebery, using the same reasoning presented to this court, argued that the government had misinterpreted 15 Del. C. § 8012. Responding to Freebery's argument, Chancellor Chandler wrote:

> In a remarkable display of legerdemain, defendants contend that § 8012(d) does not govern County employees working on County time for a political campaign. Defendants argue that such activity is allowed under state law because County employees may volunteer their individual services to a campaign. This argument, in my opinion, is pure sophistry. Section 8002(6) does permit individuals to contribute their

[16] In *Mell*, Freebery was joined as a defendant by Thomas Gordon, the New Castle County Executive, and non-party Janet Smith, an executive assistant for New Castle County.

> own personal services. The County employees in this case, however, were contributing County services to a political campaign. The County employees were campaigning during working hours while continuing to receive their salaries from the County. When an individual works on a political campaign during working hours, he or she is not contributing his or her own individual service, but, instead, is contributing the service of that person or entity paying him or her to work. In this case, political activity performed during County working hours is the contribution of County services, not individual service. *Id.* at *7.

This court agrees with the reasoning applied by Chancellor Chandler.[17] Freebery's argument that § 8012(d) permits unclassified employees to campaign for political candidates during work hours while being paid their county salaries is not within the language of the State code. Clearly, Freebery has not shown that Shannon deliberately or recklessly misrepresented state law to create probable cause that an honest services scheme to defraud county taxpayers existed. Furthermore, the language within § 8002(6)(f), omitted in Shannon's affidavit, does not change the fact that the county employees were not contributing personal services, but county services, when they campaigned during work hours. Although such activity occurred at an individual's home, or by using an individual's telephone, such facts do not negate that these employees were serving a private interest, rather than working for the citizens of New Castle County who were paying their salaries.

Freebery also claims that Shannon deliberately omitted important information when he failed to inform the court that a violation of 15 Del. C. § 8012 is a

[17] Although an unpublished opinion, and as such, not relied upon by this court in rendering its decision, the logic and analysis by Chancellor Chandler cannot be better expressed.

misdemeanor.[18] Freebery suggests that it is improper to predicate a federal mail fraud felony on a misdemeanor violation under a state criminal code. This argument was rejected by the Third Circuit in *United States* v. *Panarella,* wherein Panarella's federal felony mail fraud conviction was upheld even though his co-defendant had only violated a state misdemeanor disclosure statute. *Panarella,* 277 F.3d 678 at 694 (3d Cir. 2001).

Clearly, the telephone bills, which include charges for the installation of extra telephone lines and calls made by the county employees, were sent through the mail to Freebery's home. This information was included in Shannon's affidavit connecting the use of the United States mails in furtherance of an honest services scheme. Freebery, however, argues that Shannon omitted crucial information from his affidavit which would refute any specific intent by Freebery to commit mail fraud. Freebery relies on a memorandum, authored by Acting County Attorney Eric Episcopo, dated September 25, 2002. Accordingly Freebery argues, this memorandum proves that she received legal advice that having county employees campaign for political candidates during work hours was appropriate. Therefore, because Freebery obtained such advice, she lacked the specific intent necessary to commit mail fraud. Freebery claims that the government knew of this memorandum before Shannon presented his affidavit and that the omission of the memorandum's content is evidence of deliberate falsehood committed by the government.

The government is suspect of the memorandum's authenticity. The government maintains that it was not aware of the memorandum when Shannon's affidavit was

[18] Any person who knowingly makes an unlawful contribution or expenditure in violation of § 8012 is guilty of a class A misdemeanor. *See* 15 Del. C. § 8043(b).

executed. The government further contends that the advice of counsel defense (even if meritorious) cannot defeat probable cause.

Freebery presents no evidence that the government knew or was aware of the September 25 memorandum. Instead, she argues that the government should have known of the memorandum because it had an informant in the county office. Freebery points to one witness, whom she accuses of cooperating with the government, as having seen the September 25 memorandum. According to *Franks*, "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks*, 438 U.S. at 172. No support for Freebery's contentions through a sworn statement from any witness, nor has any reason for the lack of such evidence, has been provided. Absent such evidence that the government knew or was aware of the memorandum, under *Franks*, Freebery's mere allegations regarding Shannon's conduct are insufficient. They do not mandate a *Franks* hearing. Her arguments fail to negate all support for a finding of probable cause of an honest services mail fraud offense. Because Freebery's arguments fail to negate probable cause that an honest services theft occurred pursuant to state law under the second *Franks* prong, the court does not need to address whether probable cause exists for a violation of county law.

Therefore, Freebery's request for a *Franks* hearing is DENIED.

IV. Conclusion

In light of the foregoing, petitioner's motion for return of property is DENIED. Petitioner's request for a *Franks* evidentiary hearing is also DENIED.