BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
CALVARY CHAPEL OF SAN JOSE **dba CALVARY CHRISTIAN ACADEMY** **1175 HILLSDALE AVENUE** **SAN JOSE, CA 95118** **Employer**	**1564732** **ORDER RE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE**

On September 1, 2022, the assigned Administrative Law Judge (ALJ) granted Employer's Motion to Suppress Evidence, finding that the declaration submitted in support of a search warrant was insufficient to establish probable cause for an administrative warrant. The Division filed a Petition for Reconsideration, and the Appeals Board issued its Decision After Reconsideration and Order of Remand on November 2, 2023. The Appeals Board affirmed the ALJ's finding that the declaration did not meet the minimum requirements to establish probable cause. However, the Appeals Board remanded the matter for further briefing and an order by the ALJ regarding the good faith exception to the exclusionary rule. (*Calvary Chapel of San Jose*, Cal/OSHA App. 1564732, Decision After Reconsideration and Order After Remand (Nov. 2, 2023).)

The Appeals Board has previously noted that it will only exclude evidence pursuant to the exclusionary rule when it can be established that the warrant was not obtained in good faith. (*Southwest Marine, Inc*., Cal/OSHA App. 96-1902, Decision After Reconsideration (Jan. 10, 2002).) The parties submitted briefs regarding the good faith exception, focusing on the four situations set forth in *United States v. Leon* (1984) 468 U.S. 897, and *People v. Camarella* (1991) 54 Cal.3d 592, 596. Specifically: (1) Was the judge that issued the warrant misled by information that the applicant knew, or should have known, was false; (2) Did the judge wholly abandon his or her judicial role; (3) Was the affidavit so lacking in indicia of probable cause that it would be entirely unreasonable for the Division to believe such cause existed; and (4) Was the warrant so facially deficient that the executing officer could not reasonably presume it to be valid? (*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732.)

Of the four situations where exclusion of evidence would be appropriate, the first and third are of primary interest in this matter: (1) Was the judge misled by information that the Division knew, or should have known, was false; and (3) Was Associate Safety Engineer Richard Haskell's (Haskell) declaration in support of the warrant so lacking in indicia of probable cause that it would be entirely unreasonable for the Division to believe such cause existed?

1. *Was the judge misled by information that the Division knew, or should have known, was false?*

The papers filed by both parties regarding the warrant and suppression of evidence have focused on three items in Haskell's declaration that were arguably misleading: the statement that "Ms. Wood came from inside of the office and was not wearing a face covering"; the declaration's inclusion of Labor Code section 6314 as a seemingly conclusory statement that cause for a warrant "shall be deemed to exist" if a health or safety complaint is filed; and the reference in the declaration to Labor Code section 6321, which the Division appears to say means that it can waive the 24-hour advance notice requirement for executing the warrant.

Of these three items, the first demands the most discussion, as it points to the Division's effort to induce reliance by the judge when evaluating the declaration for sufficient probable cause. Of particular importance, as it was one of only two sentences in the entire declaration that in any way related to the Division's basis for seeking a warrant, was the declaration's reference to the lack of a face covering when Ms. Wood came outside to greet Haskell:

> We were directed to open this inspection in response to a complaint… that [Employer] was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements. ¶ … Ms. Wood came from inside of the office *and was not wearing a face covering*.

(Haskell Decl. p. 2, ln. 1-7. Emphasis added.)

The declaration introduced the situation by informing the judge that the issue precipitating the inspection was alleged COVID-19 violations, including not wearing face coverings. The declaration then immediately made this statement about Ms. Wood just two sentences later. There can be no plausible argument that the information was not provided to demonstrate a correlation between Ms. Wood's lack of a face covering and the complaint that had been filed with the Division.

However, the Division's brief claims that the inclusion of the statement about Ms. Wood was not intended to "present this fact as evidence of a violation." Rather, the Division argues, the statement was merely "a statement of a fact observed by Mr. Haskell." This argument is specious.[1]

If the declaration was merely reciting Haskell's observations of Ms. Wood as she walked out of the building, it could have included numerous other observations, or none at all: e.g., a woman in a blue dress, a woman with brown hair, or a woman carrying a cell phone. There can be no denying that the inclusion of *any* of these types of "observations" creates in the reader a question of, "Why do I need to know this particular fact about this woman?" Thus, it is not unreasonable that the judge reading the sentence about Ms. Wood with the very specific appended statement "and was not wearing a face covering" would afford it undue importance and rely on that statement as a basis for finding probable cause to issue the warrant.

The Division, as the government agency enforcing the COVID-19 prevention regulations, knew that there was no requirement that Ms. Wood wear a face covering outdoors and, indeed, there were several situations where it would have been entirely acceptable for her to not wear one indoors at the time of the inspection.[2] The Division was well aware that there was intense nationwide focus on the COVID-19 pandemic and mask-wearing was a topic of great import in 2021, when this situation occurred. The Division's inclusion of the statement could only have been intended to convey the message that what Ms. Wood was doing was a violation. The statement, while not "false" on its face, was certainly presented in such a way that it could reasonably mislead the judge, who would not likely have been as well-versed in the various COVID-19 prevention regulations at issue.

Thus, it is found that the judge was misled by the Division's ambiguous statement that Ms. Wood was not wearing a face covering when she walked out of the building.

2. *Was Haskell's declaration in support of the warrant so lacking in indicia of probable cause that it would be entirely unreasonable for the Division to believe such cause existed?*

A further inquiry into the application of the "good faith" exception to the exclusionary rule applicable involves the situation where a search has been conducted "in objectively

[1] In fact, in its arguments regarding the sufficiency of the declaration, the Division points to this statement as a reasonable basis to find probable cause existed. To now assert that it was not included as anything other than an observable fact is disingenuous. (Division's Opposition to Motion to Suppress Evidence, p. 6, ln. 28.) "The clear implication is that the declarant saw Ms. Woods [*sic*] come from her office to the outside and that she was not wearing a face covering either inside or outside of the office." (Petition for Reconsideration, p. 28, ln. 1.)

[2] As the Appeals Board stated in the Decision After Reconsideration in this matter: "Although section 3205 required masks indoors in some instances, it did not require masks in all instances. For example, a mask was not required when an employee was alone in a room, when the employee was eating provided the employee was at least six feet away from other employees, or where the employee cannot wear mask due to mental or medical health condition. (§ 3205, subd. (c)(6).)" (*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732.)

reasonable reliance on a subsequently invalidated search warrant." (*United States v. Leon*, 468 U.S. at p. 922.)

> [T]he question to be addressed "is whether a reasonably well-trained officer in [the trooper's] position *would have known* that his *affidavit failed to establish probable cause* and that *he should not have applied for the warrant*. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. …"

(*People v. Camarella, supra,* 54 Cal.3d at 604, citing *Malley v. Briggs* (1986) 475 U.S. 335, 345. Emphasis in original.)

"An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits." (*People v. Camarella, supra,* 54 Cal.3d at p. 604; *United States v. Leon, supra,* at p. 920, fn. 20.)

> As to the third category, *supra*, the issue is whether a "well-trained officer should reasonably have known that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant)[.]" [*People v. Camarella, supra*, 54 Cal.3d at 596.] "If the officer 'reasonably could have believed that the affidavit presented a close or debatable question on the issue of probable cause,' the seized evidence need not be suppressed." (*People v. Pressey* (2002) 102 Cal. App. 4th 1178, 1191 [other citations omitted].)

(*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732.)

In its brief regarding the good faith exception, the Division focuses on whether Haskell should have known of the inadequacy of the declaration to establish probable cause. The Division asserts that Haskell should be held to a lesser standard because he had not applied for warrants very often in his tenure with the Division, and that the Division does not train its safety officers to know the body of case law or the requirements for the legal standard of probable cause in a declaration. The Division states: "While an inspector applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits, the inspector is not expected to be an expert in statutory and constitutional interpretation." (Division's Brief re Good Faith, p. 6, ln. 25.)

The Division fails to acknowledge that this third category of the good faith exception applies an "objectively reasonable" standard, not, "Did Haskell know what he was doing?" If, in fact, Haskell wrote the declaration himself, the Division does not get a pass because it has not sufficiently trained its inspectors how to obtain enough information to establish probable cause for a search warrant. Because the Division focused its argument on Haskell's lack of expertise in the area of probable cause, there was no argument regarding the objectively reasonable well-trained officer's reliance on the declaration.

Further, what has been overlooked in all of the briefing in this matter, is that there has been no representation that Haskell actually penned the declaration that was submitted to the judge in support of the warrant. On the contrary, the declaration contains significant indicia that it was prepared by someone other than Haskell himself, as is the common practice for legal professionals whose clients need to sign declarations. For example, it is on legal pleading paper with the names of Division attorneys on the front page, is worded using legal terminology, uses citations to statutes and regulations in proper legal format, and is inarguably not the product of a lay person sitting down at a computer to draft something without substantial legal input. Of particular note is that the declaration contains a blank date to be filled in at the time it was signed: "Dated: November __, 2021." In contrast, the accompanying declaration by Division's counsel, Lisa Brokaw, has the date printed on it directly. All of this leads to the conclusion that, although he would likely have been the source of the narrative factual information, Haskell did not draft this declaration.

Without information to the contrary, it is readily apparent that Division's counsel drafted the declaration for Haskell's signature. The attorneys had access to legal research in the form of the Appeals Board's prior decisions regarding probable cause, case law relative to the issues, and all other relevant legal authorities needed to ascertain whether the sparse factual recitation in the declaration was sufficient to support a warrant.

It is unreasonable for experienced legal counsel to prepare a declaration for the signature of the inspector and then blame the inadequacy of the declaration on that inspector.

> California and federal courts have likewise made clear that the government has the burden of establishing "objectively reasonable" reliance. (*People v. Camarella, supra*, 54 Cal.3d at 596 ["The court made clear that the government has the burden of establishing 'objectively reasonable' reliance[.]"]; *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508 ["[T]he prosecution has the burden of proving that the officer's reliance on the warrant was objectively reasonable."] *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1654-1655.)

(*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732.)

The Division did not establish that its inspector's reliance on the declaration was objectively reasonable. Therefore, because (1) the judge was likely misled by information contained in the declaration and (2) a well-trained officer should reasonably have known that the affidavit failed to establish probable cause, the Division has not established the good faith exception to the exclusionary clause.

3. Exclusion of evidence obtained during the inspection

The following evidence is excluded:

1. Any and all statements allegedly made by Employer's staff during the illegal inspection;
2. Any and all observations made by Division agents as a result of their entry into and search of Employer's school premises, and any testimony based thereon;
3. Any and all photos, videos, or notes made by Cal/OSHA agents as a result of their entry into the school and search thereof; and
4. All evidence, whether tangible or intangible, that could be considered "fruit of the poisonous tree."

However, as discussed in the Decision After Reconsideration in this matter, the exclusionary rule "should not apply to preclude an agency from pursuing corrective actions but may apply for assessment of penalties after the fact." (*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732, citing to *Southwest Marine, Inc*., *supra*, Cal/OSHA App. 96-1902.)

> Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized. On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far. … The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime.

(*INS v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1046.)

As such, to the extent that any of the alleged violations are unabated, the Division may use the excluded evidence to enforce corrective action of those violations. "If, however, abatement remains at issue on any citation, … we agree that the exclusionary rule will not apply to preclude the Division from pursuing corrective actions, but will apply where the object is to assess penalties against the employer for past violations." (*Calvary Chapel of San Jose*, *supra*, Cal/OSHA App. 1564732.)

IT IS SO ORDERED.

Dated: 03/18/2024

Kerry Lewis
Presiding Administrative Law Judge