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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Docket No. 10-4347

MICHAEL RAY AQUINO.

Appellant

v.

JAMES T. PLOUSIS, et al.

Appellee

District Case No. 2-10-CV-01214

On appeal from the judgment of the District Court in *habeas corpus* proceedings in the United States District Court for the District of New Jersey.

PETITION FOR REHEARING

Michael Ray Aquino
Pro Se

TABLE OF CITATIONS

1. *McMullen v. Tennis II* (No. 06-5064, Third Circuit, April 1, 2009)

2. *Whittlesey v. Patrick Conroy, Warden; Attorney General of the State of Maryland* (301 F.3d 213, Fourth Circuit, August 23, 2002)

3. Sidali v. INS, 107 F.3d 191, 199 (3d Cir. 1997)

4. State v. Farnam (Pacific Reporter Vol 161 417 Supreme Court of Oregon, Dec 12, 1916)

5. People of the Philippines v. Alexio Lupango, Supreme Court of the Philippines, November 12, 1981

http://www.lawphil.net/judjuris/juri1981/nov1981/gr_32633_1981.html

6. Panfilo M. Lacson v. Regional Trial Court of Manila, et al, Court of Appeals of the Philippines, February 3, 2011
http://pinglacson.blogspot.com/2011/03/ca-decisions-on-sen-panfilo-m-lacsons.html

or

http://www.scribd.com/full/51272029?access_key=key-26wkhy6brnu764i0uexa

SCIENTIFIC MATERIAL

1. William R. Maples, Ph. D. - Dead Men Do Tell Tales (The Strange and Fascinating Cases of a Forensic Anthropologist), (ISBN 0-385-47968-9)

2. Dr. Bill Bass - Beyond the Body Farm (ISBN 978-0-06-087529-9)

3. Open air cremation: http://crestoneendoflifeproject.org/

4. Christopher W. Schmidt, Steve A. Symes, The Analysis of Burned Human Remains, ISBN-10: 9780123725103)

PETITION FOR REHEARING

Appellant, *pro se*, to the Honorable Court, respectfully files this petition for rehearing, on the submission that it is not in accord with the accepted definition of "competent evidence," nor is it in accord with the standards for the finding of probable cause for a murder charge, as exemplified by the cases of *McMullen v. Tennis II* (No. 06-5064, Third Circuit, April 1, 2009), and *Whittlesey v. Patrick Conroy, Warden; Attorney General of the State of Maryland* (301 F.3d 213, Fourth Circuit, August 23, 2002).

The decision held that extradition lies if there is any competent evidence that supports a finding of probable cause, citing the case of Sidali v. INS, 107 F.3d 191, 199 (3d Cir. 1997). Competent evidence has been defined as one that tends to prove a matter (or fact) in issue (Black's Dictionary, 9th Ed.) Evidence that defies accepted scientific knowledge, undersigned appellant submits, cannot be considered competent evidence; for it is not probative of the fact it espouses to exist. That is the character of the physical evidence submitted by the Philippine government; it fails to prove the fact of death.

The evidence in the case of *Sidali* was concededly competent, for it was a conviction of Sidali by the trial court in Turkey.

The issue presented by the appeal was whether or not the fact of death has been established. The version espoused by the Philippine government is that Dacer and Corbito were blindfolded, tied, and strangled to death. Their bodies were placed on top of a pile of stray wood and rubber tires, doused with gasoline, and burned. The fire lasted for a mere thirty minutes, as declared by the prosecution witness at the trial [1]. Recovered at the scene of the crime were a few pieces of bones and metal dental implants.

Forensic experts have stated that to burn a body completely, the closed environment of a crematorium requires, on average, several hours (William R. Maples, Ph. D. [2]). "When the body comes out of the retort in this calcined condition, a trained osteologist can stand a few feet away, glance at the remains as they emerge, and tell the crematory employees the race, sex and approximate age of the deceased. In other words, the identifying characteristics are still

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[1] Case 2:10-cv-01214-SRC Document 14-3 Filed 06/10/10 Page 66 of 144 PageID: 245

Q: Now what happened afterwards after you saw these two bodies burning on top of the file [pile] of woods?

A: *I do not know what happened because after half an hour, we left for home.*

[2] William R. Maples, Ph. D. - Dead Men Do Tell Tales (The Strange and Fascinating Cases of a Forensic Anthropologist), (ISBN 0-385-47968-9) p. 137.

Dr. William R. Maples was distinguished service professor and curator-in-charge of the C. A. Pound Human Identification Laboratory at the Florida Museum of Natural History in Gainesville, Florida. He was president of the American Board of Forensic Anthropology and a fellow of the American Academy of Forensic Sciences.

there. *Fire does not destroy them* (emphasis in the original). (Maples) [3]. (Bass) [4], and to be reduced to "cremains" (pulverized ashes), the bones are processed in a machine similar to a blender (Bass [5]) or a grinder (Maples [6]).

The need for sufficient fuel, and a fire that lasts for several hours, is confirmed by the only licensed open-air crematorium in the United States [7]. It states that cremation requires half a cord of wood per body (a full cord for the two bodies of Dacer and Corbito). A cord of wood on the average, weighs about 2,000 pounds [8] , or the weight of a Volkswagen beetle [9].

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[3] Maples, id.
Page 138.

[4] Dr. Bill Bass - Beyond the Body Farm (ISBN – 978-0-06-087529-9
True, by subjecting corpses to temperatures of 1600 tp 1800 degrees Fahrenheit, cremation furnaces do destroy all the organic (carbon-containing) chemicals in the body, including DNA; however, when the gas is turned off, the furnace is cooled, and the door is opened, what remains is a recognizable human skeleton. Page 82

[5] Bass, id Page 82
"It takes another step to reduce those calcined bones to the granular, ashy powder funeral directors call "cremains," and that step involves feeding the bones through a pulverizer, a machine with a powerful, blender-like blade that chops or grinds the brittle bones to fragments."

[6] Maples, id Page 140
"the crudely sorted remains are next placed into a "processor," which is a euphemism for a grinder."

[7] http://crestoneendoflifeproject.org/
Click "Serices we offer", then "Disposition Choices".

[8] http://www.consumerenergycenter.org/home/heating_cooling/firewood.html

[9] http://en.wikipedia.org/wiki/Volkswagen_Beetle

The above scientific opinion and empirical observation finds judicial confirmation in the case of State v. Farnam (Pacific Reporter Vol 161 417 Supreme Court of Oregon, Dec 12, 1916). In that case, the female victim's body was burned in a barn with three to four tons of hay piled three to four feet high, for about five hours and a half. Despite the complete burning of the hay and barn, the charred body of the victim was recovered, including a recognizable fetus.

In the case of People v. Alexio Lupango [10], a case decided by the Philippine Supreme Court, "The evidence of the prosecution discloses that *the victim, Teresa Vda, de Iglesia, was burned in a fire that razed her house..*" "The charred body of the victim Mrs. Teresa Vda. de Iglesia was recovered from the burned house and autopsied.."; *and the remains were intact enough for the medico-legal to determine the cause of death as fracture of the skull, prior to burning.* In fact, soft tissue remained despite the fire that burned the house.

The few bone fragments allegedly recovered by the Philippine prosecutors, therefore, cannot be considered evidence sufficient to substantiate the fact of death, when ranged against accepted scientific knowledge.

[10] http://www.lawphil.net/judjuris/juri1981/nov1981/gr_32633_1981.html

The decision, in addressing the issue of lack of mortal remains to substantiate the fact of death, begs the question; essentially stating that even if there are no mortal remains, the discovery of the metal dental implants sufficiently substantiates the fact of death. The dental implants, in fact, prove the attempt of Philippine prosecutors to fabricate evidence.

Dr. Maples states that dental implants other than gold and silver melt, and what remains are shapeless melted slugs or beads. So even if the Philippine version is believed, that the fire was long and intense enough to pulverize skeletal remains to ashes, then that same fire should have melted the dental implants to beads, useless for identification purposes. [11]

That the Philippine NBI is wont to fabricate evidence has been underscored by an affidavit with a forged signature presented in the *Linson* case cited in the appeal. The other case cited, (*Strunk)* shows the NBI selectively presenting evidence to the US Department of State.

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[11] Maples, id, on page 141

> As for dental work, the porcelain crowns on teeth will slump, but not melt, in a crematorium retort: and dental gold and silver will not melt at all. Sterling silver begins to melt at 1,650 degrees Fahrenheit. Gold melts at 1,945 degrees Fahrenheit. Dental gold has an even higher melting point because it is an alloy, not pure gold. Amalgam tooth fillings or dental restorations will not usually survive the flames. *They aren't found afterward. A strange material called "cremation slag," consisting of small lumps of grayish shapeless material is often found.* (Emphasis supplied)

Without evidence to substantiate the fact of death, a missing persons case does not produce a murder charge. That is the teaching of *Whittlesey v. Patrick Conroy, Warden; Attorney General of the State of Maryland* (301 F.3d 213, Fourth Circuit, August 23, 2002). In that case, "Michael Whittlesey was tried and convicted by a jury for robbery, assault with intent to rob, theft of an automobile belonging to Griffin's father, and theft of a cassette player and a number of cassette tapes, all arising out of the 1982 disappearance of James Griffin." It was only "When the body of James Griffin, Whittlesey's robbery victim, was finally found in 1990 nearly eight years after his disappearance, (that) Whittlesey was indicted in Baltimore County Circuit Court for Griffin's murder."

Even if a body is recovered and identified, without evidence that death occurred by means other than natural, no indictment for murder is sought, as exemplified in the case of *McMullen v. Tennis II* (No. 06-5064) decided by the Court on April 1, 2009.

DNA issue was raised before the Magistrate Judge.

The decision further found that the issue on DNA evidence was not raised in the proceedings before the courts below. That is incorrect, for it was raised by undersigned appellant through former counsel in the letter dated

September 18, 2009 (Page 3, footnote 1). A copy was attached in the reply filed by undersigned appellant.

The decision stated that: "Aquino argues that a report that bone fragments found at the scene tested negative for human DNA removes the probable cause in this case. However, the same report suggests that it was the extremely charred nature of the samples that prevented a positive identification for human DNA."

This is another case of a Philippine assertion that defies accepted scientific knowledge.

The bone fragment tested was from the petri dish labeled DNA-01-50D, which was described in the report as "less charred, brown in color."

"The study of burned bones has produced standards for documenting the changes in color and texture that bones pass through as it (sic) experiences higher temperatures or a greater duration of heat. In general, the bone first darkens, becoming charred. *This is eventually followed by calcinations of the bones, which renders the bone starkly white as the organic content is lost.* (The analysis of burned human remains, (Christopher W. Schmidt, Steve A. Symes, ISBN-10: 9780123725103, page 137)."

Maples agrees in his book on page 137, stating: "The bones go from their natural color to black, as the organic material is carbonized. Then, as these

organic compounds are combusted, the black fades to dark gray, to light gray and finally to white. When the bones are white, they are said to be calcined.

The fact that the bone fragment was not yet white in color indicates that it had not yet calcined (calcined bones have lost their organic material, therefore do not yield DNA). That is why the report did not say that the bones are calcined, or that they did not yield DNA (animals and plants also have DNA). It stated that they "gave negative results for the presence of human DNA"; and the reason for that is that one of the bones "appears to be animal skull."

The decision also stated that: "The report recommends that the sample be sent abroad for testing in labs that routinely conduct ***mitochondrial DNA*** sequencing for human identification." But that was precisely what was done. The report states that: "DNA analysis ***targeting*** the .... ***genes of the mitochondrion*** gave negative results for the presence of human DNA."

Philippine Court of Appeals declared that Cezar Mancao is not a credible and trustworthy witness.

The decision of this Court affirmed the decisions of the courts below, which anchored their findings on the statements of Cezar Mancao. On February 3, 2011, however, in a petition for prohibition filed by Senator Lacson, questioning the finding of probable cause against, him, the Court of Appeals of

the Philippines declared that: "Cezar Mancao is not a credible and trustworthy witness." [12]

The Court of Appeals of the Philippines also observed that Cezar Mancao, in the preparation of his affidavit was visited in prison, and assisted by a panel consisting of two undersecretaries of the Philippine DOJ, the prosecutor, and a Regional Director of the NBI. Cezar Mancao admitted that the panel provided "guidance" in the preparation of the affidavit, and that his statements "will be used for a case." [13] The Court of Appeals of the Philippines set aside the finding of probable cause, and dismissed the indictment.

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[12] http://www.scribd.com/full/51272029?access_key=key-26wkhy6brnu764i0uexa http://pinglacson.blogspot.com/2011/03/ca-decisions-on-sen-panfilo-m-lacsons.html

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Philippine Courts have not yet been computerized, so their decisions are not electronically published like US courts. The scanned original was uploaded to the blog of Senator Lacson, which is the source herein.

[13] Secondly, Cezar Mancao admitted on cross-examination that before he executed his affidavit in the early part of December he talked to then DOJ Secretary Gonzales by phone. Thirdly, Cezar Mancao declared on cross-examination on the existence of "exploratory meeting" sometime in "February 12" before he executed his Affidavit wherein his statements "will be used for a case" attended by "people from the Philippines" led by Assistant or Undersecretary Ernesto Pineda, Undersecretary Oscar Calderon who is also from the DOJ, the Lady Prosecutor, NBI Regional Director Ric Diaz. Fourthly, as pointed out by the Petitioner in his Counter-Affidavit dated October 26, 2009, on cross-examination, in answer to the question who prepared the Affidavit he subscribed before Consul Macatangay on February 13, 2009, Cezar Mancao replied, "It was prepared by the panel, we read the draft, it was made more than 24 hours." When asked whether the panel of prosecutors gave inputs in the preparation of the Affidavit, he answered, "Guidance, sir." Page 78

Without Mancao's testimony, there is no evidence that links the undersigned to the alleged murder, even if it be assumed that the fact of death has been substantiated. Dumlao did not point to the undersigned. Neither is there any statement from the confessed accomplice (Alex Dilloy), (who witnessed the alleged strangulation of Dacer and Corbito, and helped in the alleged incineration of their bodies) that undersigned appellant was involved in the alleged murder.

The following facts are clear: 1) the fact of death has not been substantiated by any physical evidence; the physical evidence, in fact, negates such a finding; 2) even if death has been proven, no witness has made any statement implicating the appellant; 3) the only statement linking the undersigned to the alleged murder is the hearsay from Cezar Mancao, declared "not a credible and trustworthy witness" by the Philippine Court of Appeals.

A finding of probable cause, appellant submits, should not be made on such tenuous grounds.

WHEREFORE, it is respectfully prayed that the decision be reconsidered, set aside, and the extradition request be refused.

Respectfully submitted,

Michael Ray Aquino
Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing reply to the United States Attorney at:

PAUL J. FISHMAN
United States Attorney
STEVEN G. SANDERS
Assistant US Attorney

970 Broad Street
Newark, NJ 07102

Michael Ray Aquino
Pro Se

ALD-113 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4347

MICHAEL RAY AQUINO,
Appellant

v.

JAMES T. PLOUSIS, U.S. Marshal, District of New Jersey;
OSCAR AVILES, Director, Hudson County Correctional Center

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 10-cv-01214)
District Judge: Honorable Stanley R. Chesler

Submitted for Possible Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
February 10, 2011

Before: SCIRICA, HARDIMAN and VANASKIE, Circuit Judges

(filed: February 22, 2011)

OPINION

PER CURIAM

The Government, acting on behalf of the Republic of the Philippines ("Philippines"), applied to extradite Michael Ray Aquino to the Philippines because of

his alleged involvement in a double murder. Aquino, represented by appointed counsel, challenged the application before a Magistrate Judge. After allowing limited discovery and holding a hearing, the Magistrate Judge granted the Government's application.

Aquino challenged the Magistrate Judge's decision by filing a petition pursuant to 28 U.S.C. § 2241 in the District Court. Still represented by appointed counsel, he argued that the Government had failed to present competent evidence to demonstrate probable cause to believe that he is guilty of conspiracy to commit a double murder. He also claimed that the Government violated Brady v. Maryland, 373 U.S. 83 (1963), when it refused to produce purportedly exculpatory evidence at his hearing. The Government opposed the petition, which the District Court denied. The District Court held that there was not only competent, but also ample, evidence to support the Magistrate Judge's finding of probable cause.

Aquino, now *pro se*, appeals. In his brief in response to our notice of possible summary action, he continues to argue that the evidence is insufficient to establish probable cause. He also argues that the District Court erred by failing to consider important DNA evidence.

We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We focus our review on the issue of probable cause; that is, whether the Government offered evidence to "support a reasonable belief that [the defendant] was guilty of the crime charged." Sidali v. INS, 107 F.3d 191, 199 (3d Cir. 1997) (citation omitted). In other words, the question is whether the evidence presented was such "to cause a person of ordinary

prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." Id. (citation omitted). The standard is the same as for a federal preliminary hearing; that is, a magistrate judge must "determine whether there is competent evidence to justify holding the accused to await trial, . . . not . . . whether the evidence is sufficient to justify a conviction." Id. (citation omitted). Where, as here, a magistrate judge has found probable cause, we must uphold the finding "if there is any competent evidence in the record to support it." Id.

Upon review of the record, we conclude that competent evidence supports the probable cause finding in this case. Accordingly, and because no substantial issue is presented on appeal, we will summarily affirm the District Court's judgment. See L.A.R. 27.4; I.O.P. 10.6.

As the parties are familiar with the facts (which are not in dispute), we will not repeat the Magistrate Judge's thorough recounting of them. However, much like the District Court did, we will highlight the salient facts that support the finding of probable cause.

Aquino, at the time of the alleged crimes, was Chief of the Operations Division of a Presidential Anti-Organized Crime Task Force ("PAOCTF"), which had been formed by Joseph Estrada, then president of the Philippines. Aquino gave the order to begin a discreet investigation of one of the victims, Salvador Bubby Dacer, who had made comments against Estrada. When the first investigator assigned to the project encountered obstacles to sneaking into Dacer's hotel room to surreptitiously search it and

obtain documents, Aquino gave him an order to burn or bomb the room. Aquino later transferred the Dacer assignment to someone else, whose first questions to the first investigator included an inquiry about what type of car Dacer had. Dacer and his driver, Emmanuel Corbito, the other victim, were abducted when Dacer's car was surrounded by armed gunmen while it was stopped at a red light.

On the day that the victims were abducted, Aquino notified the first investigator and sent him to meet the second investigator to interrogate Dacer, who was then being held blindfolded and guarded in a van. At the conclusion of the interrogation, Aquino instructed the first investigator to return to base after securing all documents for him. The second investigator told the first that he would take care of things at the scene. Later that evening, Dacer and Corbito were strangled to death. Their bodies were then doused with gasoline and incinerated (the victims were identified through metal dental plates and a ring).

After the presidential administration changed in the Philippines, a senator who had been associated with the PAOCTF warned Aquino that the government was coming after him for the double murders. Aquino fled to the United States in response. The next year, in a Las Vegas hotel, Aquino was heard blaming a colleague for sloppily dumping Dacer's car into a ravine where it was easily discovered. He complained that the task had not been carried out properly.

In short, there is evidence in the record that supports the finding of probable cause. We cannot assign error to the District Court's failure to consider the DNA evidence that

Aquino cites because Aquino did not ask the District Court to consider it. Even if Aquino put the DNA evidence before the District Court, and the evidence was of the type the District Court could consider, the result would be unchanged. Aquino argues that a report that bone fragments found at the scene tested negative for human DNA removes the probable cause in this case. However, the same report suggests that it was the extremely charred nature of the samples that prevented a positive identification for human DNA. The report recommends that the sample be sent abroad for testing in labs that routinely conduct mitochondrial DNA sequencing for human identification. Also, according to the record, other physical evidence at the scene, namely metal dental plates and a ring, helped to establish that the remains were Dacer and Corbito. In any event, Aquino's argument on this and other issues in the record are for his trial. While we do not comment on their merits, we note the possibility that his arguments or proofs may ultimately undermine a finding of guilt. They do not, however, undermine the finding of probable cause.

In short, the District Court properly denied Aquino's petition. We will affirm the District Court's judgment.

ALD-113

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-4347

MICHAEL RAY AQUINO,
Appellant

v.

JAMES T. PLOUSIS, U.S. Marshal, District of New Jersey;
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District Judge: Honorable Stanley R. Chesler

Submitted for Possible Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

February 10, 2011

Before: SCIRICA, HARDIMAN and VANASKIE, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on February 10, 2011. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered October 14, 2010, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: February 22, 201