

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 11-1647

HANS KEIL

Petitioner

v.

**Glen Triveline et al,
Respondent**

PETITION FOR REVIEW

Appeal from the Decision of the District Court

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE ISSUES

1. Defendants did not have even “arguable probable cause” to arrest Petitioner.

U.S. v Clarke 628 F. Supp. 2d 1 (U.S. District Court D.C. 2009)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Notwithstanding Petitioners birthright, Petitioner was a U.S. Citizen by operation of law since 1967 when the U.S. Department of State issued him a valid U.S. Passport. Respondent's conceded in deposition testimony that Petitioner's passports were all validly issued and there was no indicium of fraud in their issuance. (Pltf Appx pg 59-61) Respondents conceded that at the time of Petitioner's arrest they knew he was in possession of a validly issued U.S. Passport and was to be considered a U.S. Citizen. (Pltf Appx pg 85-102). Therefore, there was no probable cause to believe that Petitioner had falsely represented his status or misused his passport.

ARGUMENT

1. DEFENDANTS DID NOT HAVE EVEN "ARGUABLE PROBABLE CAUSE" TO ARREST PETITIONER

A. The Law

Petitioner's argument stems from the Citizenship he derived from the issuance of his U.S. Passport. That authority rises from 22 U.S.C. §2705 which states:

The following documents shall have the same force and effect as proof of United States citizenship as certificates of naturalization or of citizenship issued by the Attorney General or by a court having naturalization jurisdiction: (1) A passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the United States. (2) The report, designated as a "Report of Birth Abroad of a Citizen of the United

States", issued by a consular officer to document a citizen born abroad.

Petitioner with the rest of his family entered the United States in 1961 using a "letter of identity" issued by the Acting Governor of Samoa. (Pltf Appx pg 35-38) Using this same letter of identity Petitioner joined the U.S. Airforce, swearing an oath of allegiance to the United States. (Pltf Appx pg 30) Following four years of Vietnam-era service in the U.S. Airforce and an Honorable Discharge, Petitioner applied for and received a U.S. Passport. From 1961 to 1967 Petitioner had been examined and determined a U.S. Citizen by the Governor's office of Samoa, U.S. border officials, the U.S. Airforce and finally the U.S. Department of State. Petitioner never used any fraudulent documents. (Pltf Appx pg 60 ln 7-22, 61 ln 1) Nothing in the history of Petitioners entry to the U.S. or acquisition of a U.S. Passport was fraudulent, deceitful or criminal. All this history was known to Respondents at the time of his arrest. Plaintiff was lawfully a U.S. Citizen. No representation he made was incorrect.

B. U.S. v Clarke 628 F. Supp.2d 1 (DC District Court 2009)

In this 2009 District Court opinion the Court found that even amid accusations of fraudulently obtained citizenship, until the document granting citizenship is properly revoked, that person remains for all purposes a U.S. Citizen.

Zion Clarke, Ricardo DeFour, Kevon Demerieux, Anderson Straker, Wayne Pierre, Christopher Sealey and Kevin Nixon were tried and convicted of

conspiracy to commit hostage taking resulting in the death of a U.S. Citizen. One of the issues in the trial was that Defendants claimed to have evidence that the citizenship of the victim had been fraudulently obtained. Defendant's asserted that they could not be convicted of killing a U.S. Citizen since the victim was not entitled to Citizenship.

This is the Defendant agents argument in the instant case; they had reason to believe Petitioner was not entitled to his U.S. Passport thus they could charge him criminally with lying about being a U.S. Citizen. This argument and that of the *Clarke* Defendants fails because the law grants citizenship and that citizenship is inviolable until properly revoked.

Defendants in the instant matter cannot evade proper recission proceedings by eviscerating Petitioner's citizenship in a criminal proceeding. "The Agents reasonably believed that these representations of citizenship were false." Resp Br pg 30. The *Clarke* Defendants were likewise unable to evade murdering a U.S. Citizen by attempting to tarnish his procedurally proper grant of Citizenship. "Instead, they contend that the Attorney General's order of naturalization should be considered void because Maharaj did not meet the statutory requirements for citizenship and procured the citizenship through fraud." *Clarke* at 8 (D.D.C.,2009)

Both Defendants lose sight of one simple fact; at the time of their respective misconduct their individual victims were, by operation of the same statute (22 USC §2705), citizens of the United States.

The Clarke Court does not lose sight of this important fact. After a lengthy analysis of the requirements to de-naturalize someone, the Court offers this succinct summary:

To summarize, the Court holds that § 1451 sets forth the exclusive process for declaring the citizenship of a naturalized person void and one's citizenship remains valid until an order setting aside citizenship has been issued in compliance with § 1451. Because no order revoking Balram Maharaj's citizenship has been issued, his certificate of naturalization and U.S. passport conclusively establish that he was, until his death, a citizen of the United States. This Court has no authority to conclude otherwise in this criminal case.^{FN10} Hence, the jurisdictional requirement under § 1203 that the victim is a U.S. citizen is satisfied. The criminal prosecution of defendants under 18 U.S.C. § 1203 for hostage taking of a citizen of the United States may therefore proceed, and Demerieux's motion to dismiss will be denied.

FN10. The status of Maharaj as a U.S. citizen (“a national of the United States”) is a legal status and can only be altered by a court through a proper § 1451 process.

Clarke at 9 -10 (D.D.C.,2009)

The issue in the instant matter is exactly the same. Petitioner's status as a U.S. Citizen was a legal status which could only be changed by the proper rescission of his U.S. Passport by the Department of State. That did not occur until 17 days after his arrest and following his release from custody. Thus, the inescapable conclusion, which Defendant knew, was that Petitioner was a U.S.

Citizen at the time of his arrest and could not have legally misrepresented his status. (Pltf Appx 94-102)

Following the logic of the *Clarke* Court, no probable cause existed to arrest Petitioner, as a matter of law, because he was a citizen, no cause existed to arrest him at all for the charges on which the District Court relied.

Clarke was not satisfied with the Court's decision and sought reconsideration. The Court in analyzing Clarke's position that the victim's passport was inadmissible to demonstrate citizenship held:

In other words, § 2705 puts passports in the same status as certificates of naturalization for the purpose of proving U.S. citizenship. The Ninth Circuit has persuasively explained that § 2705 is a "clear instruction from Congress to treat passports in the same manner as ... certificates of naturalization in all respects." *Magnuson*, 911 F.2d at 334. Hence, it held that the passport must be treated as "conclusive evidence of citizenship," and furthermore, consistent with the high value placed on citizenship and the statutory protections applicable before any revocation may occur, a passport may not be revoked without a predeprivation hearing, much like the revocation proceedings required under 8 U.S.C. § 1451(a) for certificates of naturalization.^{FN4} *Id.* at 334-36. Hence, a passport does not become void or revocable by operation of law because of an alleged flaw in the record supporting it. *See id.* at 335. Like a certificate of naturalization, it is presumptively valid until a process is undertaken to revoke it and a final decision to that effect is subsequently issued. *Id.* Based on these principles, this Court rejects defendants' request to treat the passport as *void ab initio*. Having been issued by the State Department, and signed by Maharaj, the 2000 passport provides conclusive evidence of Maharaj's citizenship during the period of its validity-that is, from September 28, 2000 to the date of his death. Hence, the 2000 passport must be treated as a valid document.

FN4. In *Magnuson*, the Ninth Circuit rejected the Secretary of State's claim that he possessed inherent authority to revoke an improperly issued passport without a hearing. In doing so, it stated:

Section 2705 grants no revocation power to the Secretary and certainly none greater than could be exercised by the Attorney General or a naturalization court. As a result, assuming the Secretary can revoke a passport, he can do so only if he (a) gives the passport holder an opportunity to be heard prior to revocation, and (b) seeks revocation on the basis of fraud, misrepresentation, or some other exceptional ground.

U.S. v. Clarke 628 F.Supp.2d 15, 21 (D.D.C.,2009)

Here again the *Clarke* Court's logic is relevant and persuasive to the matter at hand. Petitioner was a U.S. Citizen by the operation of law through the issuance of his passport by the Department of State. It had not been revoked at any point from 1967 to 2009. At the time of his arrest, at the time of the commission of the crimes alleged by Defendants, Petitioner was a United States Citizen. He could not have falsely claimed to be one. Again notwithstanding his birthright, he had been made a U.S. Citizen in 1967 through the issuance of his U.S. passport and nothing had changed that status at the time of his arrest.

C. Defendant's Arguments

Defendants raise several issues in their brief none of which deal with the issue at hand, Petitioner's lawful status as a U.S. Citizen.

Defendants raise four cases which they erroneously hold dissolve Petitioner's position. *U.S. v. Mugo*, 2008 WL 5105009 (E.D. Mo Dec 1, 2008) turns on the premise that an administrative judge determination of citizenship does not preclude criminal prosecution for false claim to citizenship. The issue in the

instant matter is that Petitioner is a U.S. Citizen by operation of federal law not an ALJ decision, thus *Mugo* does not support Defendants.

Next, Defendants turn to three cases they hold stand for the proposition that an individual can be prosecuted for 18 USC §911 while in possession of a passport. Defendants again misconstrue Petitioner's position. He was a citizen because he was in possession of a validly issued passport. In each of the three cases cited by Defendants; *U.S. v. Maciel-Alcala*, 612 F.3d 1092 (C.A. 9 2010); *U.S. v Castillo-Roman*, 291 F. App'x 273 (C.A. 11 2008); and *U.S. v. Lowes*, 265 F. App'x 887 (C.A. 11 2008) there is either identity theft or a physically altered passport. In none of these cases is the defendant protected by 22 USC §2705. None of these cases support Defendant's position. As such Defendant has offered no persuasive evidence to counter Petitioner's position that he was lawfully a United States Citizen who could not have falsely claimed such status, or have misused his passport to falsely claim to be a U.S. Citizen.

Defendants also mistakenly claim that Petitioner has foreclosed all of his claims pursuant to the FTCA. The District Court held that [s]ummary judgment is proper on Keil's false arrest claim because two warrants legally justified Keil's arrest and continued detention." Pltf Appx at 179. The District Court conflated the issue in holding that the agent's probable cause vitiated the unlawful arrest pursuant to the FTCA. Petitioner continues to assert that the arrest was unlawful and that the unlawful arrest claim is still properly couched under the FTCA claim.

The singular issue running through both cases is Defendant's probable cause to arrest.

As demonstrated by *Clarke*, Defendant's could not have had probable cause to believe Petitioner was not a citizen because the law made him a citizen. The District Court's decision is in error and the matter should be remanded for a hearing on the merits.

CONCLUSION

Wherefore Petitioners prays that this Court grant his appeal.

Respectfully Submitted:

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Dated: June __30____, 2011

W. MICHAEL SHARMA-CRAWFORD

CERTIFICATE OF SERVICE

I, W. Michael Sharma-Crawford, certify that I have on this ____30____
day of June, 2011 served a copy of the APPELLANT’S REPLY BRIEF on the
parties hereto by electronically filing the brief via CM-ECF

s/W. Michael Sharma-Crawford

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