

No. _____

**In The
Supreme Court of the United States**

—◆—

JULIE PEFFER and JESSE PEFFER,

Petitioners,

v.

MIKE STEPHENS,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—

PETITION FOR WRIT OF CERTIORARI

—◆—

J. NICHOLAS BOSTIC
Counsel of Record
BOSTIC & ASSOCIATES
909 N. Washington Ave.
Lansing, MI 48906
(517) 706-0132
barristerbosticlaw@gmail.com
Attorney for Petitioners

QUESTIONS PRESENTED

I. The Opinion addresses a question of first impression as to presumptions involving the search of a dwelling in a published opinion with no warning to the parties, with no opportunity to brief the issue and no oral argument. The analysis behind the presumption is flawed and cases leading up to this conclusion are admittedly murky. Accordingly, the issue should have been addressed after notice to the parties, briefing on the specific issue, and oral argument.

II. In deciding whether the law was clearly established concerning Defendant's immunity, the Opinion decides whether Plaintiff's conduct could have violated certain state laws and finds a lack of clear precedent. This is an incorrect use of the "clearly established law" requirement for qualified immunity and is inconsistent with established precedent from this Court.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties.....	ii
Table of authorities.....	vi
Opinions below.....	1
Statement of jurisdiction	1
Constitutional and statutory provisions involved	1
Statement of the case	2
Statement of facts.....	3
Reasons for granting the petition.....	6
I. The Sixth Circuit Opinion addressed a question of first impression as to pre- sumptions involving the search of a dwell- ing in a published opinion with no warning to the parties, no opportunity to brief the issue and no oral argument. The analysis behind the presumption is flawed and cases leading up to this conclusion are admittedly murky. Accordingly, the issue should have been addressed after notice to the parties, briefing on the specific issue, and oral argument.....	6
A. Consideration of this issue by this Court.....	6
B. Preservation of the issue.....	7
C. Plaintiffs' position to the lower Courts....	8

TABLE OF CONTENTS – Continued

	Page
D. The Sixth Circuit’s erroneous conclusion	10
E. Rebuttable presumptions have no place in ex parte proceedings	16
II. In deciding whether the law was clearly established for purposes of Defendant’s immunity, the Opinion decides whether Plaintiff Jesse Peffer’s conduct could have violated certain state laws and finds a lack of clear precedent. This is an incorrect use of the “clearly established law” requirement for qualified immunity and is inconsistent with established precedent from this Court	17
A. Consideration of this issue by this Court	17
B. Preservation of the issue	19
C. The Plaintiffs created a sufficient factual dispute as to false allegations in the affidavit	19
D. Plaintiffs asserted that the affidavit reflected mere speculation and hunches ...	24
E. There was no substantial basis in the affidavit that probable cause existed	28
F. Plaintiffs established at least a factual dispute as to whether a state crime existed	29

TABLE OF CONTENTS – Continued

	Page
G. Plaintiffs adequately addressed Defendant’s lack of good faith reliance on the warrant.....	37
Conclusion.....	41
Relief Requested	42

APPENDICES

January 17, 2018 Opinion, Sixth Circuit Court of Appeals	App. 1
January 19, 2017 Order dismissing Defendant Coon.....	App. 35
July 28, 2016 Hearing transcript.....	App. 40
July 29, 2016 Order on summary judgment.....	App. 37
February 22, 2018 Order denying rehearing/rehearing en banc	App. 76
July 31, 2014 Stephens’ search warrant affidavit.....	App. 77
April 20, 2016 Jesse Pepper affidavit	App. 92

TABLE OF AUTHORITIES

	Page
UNITED STATES CONSTITUTION	
U.S. Constitution, art. III, §2, cl. 2	1
U.S. Constitution, amend. IV.....	1, 16
UNITED STATES SUPREME COURT	
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)	18
<i>Beck v. State of Ohio</i> , 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).....	25
<i>Boumediene v. Bush</i> , 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008)	17
<i>Brosseau v. Haugen</i> , 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004)	18
<i>Florida v. Harris</i> , 568 U.S. 237, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013).....	6
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)	28, 29
<i>Mullenix v. Luna</i> , ___ U.S. ___, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015)	18
<i>Nathanson v. United States</i> , 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933)	25
<i>Pearson v. Callahan</i> , 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009)	18
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	25, 26

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Leon</i> , 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)	37
<i>Zurcher v. Stanford Daily</i> , 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978)	9
 SIXTH CIRCUIT COURT OF APPEALS	
<i>Mays v. City of Dayton</i> , 134 F.3d 809 (6th Cir. 1998)	16
<i>Patterson v. City of Cleveland</i> , 173 F.3d 429 (6th Cir. 1999)	26
<i>Sykes v. Anderson</i> , 625 F.3d 294 (6th Cir. 2010)	27
<i>United States v. Bethal</i> , 245 F. App'x 460 (6th Cir. 2007)	13, 16
<i>United States v. Carpenter</i> , 360 F.3d 591 (6th Cir. 2004)	9
<i>United States v. Cobb</i> , 397 F. App'x 128 (6th Cir. 2010)	12
<i>United States v. Frazier</i> , 423 F.3d 526 (6th Cir. 2005)	10
<i>United States v. Frechette</i> , 583 F.3d 374 (6th Cir. 2009)	16
<i>United States v. Goodwin</i> , 552 F. App'x 541 (6th Cir. 2014)	12
<i>United States v. Keith</i> , 559 F.2d 499 (6th Cir. 2009)	27
<i>United States v. Laughton</i> , 409 F.3d 744 (6th Cir. 2005)	8

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. McClain</i> , 444 F.3d 556 (6th Cir. 2005)	29
<i>United States v. Paull</i> , 551 F.3d 516 (6th Cir. 2009)	14
<i>United States v. Savoca</i> , 761 F.2d 292 (6th Cir. 1985)	10
<i>United States v. Schultz</i> , 14 F.3d 1093 (6th Cir. 1994)	9
<i>United States v. Smith</i> , 182 F.3d 473 (6th Cir. 1999)	11
<i>United States v. Urietta</i> , 520 F.3d 569 (6th Cir. 2008)	27
<i>United States v. Van Shuttters</i> , 163 F.3d 331 (6th Cir. 1998)	9
<i>United States v. Vanderweele</i> , 545 F. App'x 465 (6th Cir. 2013)	11
<i>United States v. Williams</i> , 544 F.3d 683 (6th Cir. 2008)	16
 OTHER FEDERAL COURTS	
<i>Bastida v. Henderson</i> , 487 F.2d 860 (5th Cir. 1973)	12
<i>Beltran v. Santa Clara County</i> , 389 F. App'x 679 (9th Cir. 2010)	16
<i>United States v. Anderson</i> , 851 F.2d 727 (4th Cir. 1988)	12

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Charest</i> , 602 F.2d 1015 (1st Cir. 1979)	13
<i>United States v. Colkley</i> , 899 F.2d 297 (4th Cir. 1990)	16
<i>United States v. Lacy</i> , 119 F.3d 742 (9th Cir. 1997)	14
<i>United States v. Rahn</i> , 511 F.2d 290 (10th Cir. 1975)	12
<i>United States v. Steeves</i> , 525 F.2d 33 (8th Cir. 1975)	12
<i>United States v. Tanguay</i> , 787 F.3d 44 (1st Cir. 2015)	16
MICHIGAN SUPREME COURT	
<i>Skinner v. Square D Co.</i> , 445 Mich. 153, 516 N.W.2d 475 (1994)	29
FEDERAL STATUTES	
28 U.S.C. §1254	1
42 U.S.C. §1983	2, 13, 18
FEDERAL RULES OF EVIDENCE	
FRE 301	17
FEDERAL RULES OF APPELLATE PROCEDURE	
FRAP 34	7, 10

TABLE OF AUTHORITIES – Continued

	Page
SIXTH CIRCUIT RULES	
6 Cir. R. 34.....	7
MICHIGAN STATUTES	
MCL 446.63.....	37
MCL 445.65.....	35
MCL 750.122.....	31
MCL 750.215.....	30, 31
MCL 780.654.....	17
MCL 780.655.....	17

OPINIONS BELOW

July 29, 2016 Order on summary judgment, Western District of Michigan.

January 17, 2018 Opinion; Sixth Circuit Court of Appeals.



STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this petition pursuant to U.S. Const. art. III, § 2, cl. 2 and 28 U.S.C. §1254(1). The Sixth Circuit Court of Appeals denied rehearing/rehearing en banc on February 22, 2018.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FEDERAL STATUTES

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**STATEMENT OF THE CASE**

Plaintiffs filed suit on January 28, 2015 after demands for return of their property were rejected. The initial suit was against three defendants but only one of those is the subject of this appeal.¹ After discovery,

¹ Defendant Jason Coon engaged in unlawful warrantless seizures from both Plaintiffs in 2012. All claims against him were resolved when his appeal of the denial of qualified immunity was resolved via mediation in the Sixth Circuit. 16-2212. Defendant

Defendant Stephens filed a motion for summary judgment. Plaintiffs responded. Stephens filed a reply. The trial court held oral arguments on July 28, 2016. RE 76. The trial court issued its decision on July 29, 2016 (App., Order on Summary Judgment, 37-39).

Defendant Coon filed his appeal on August 25, 2016. After resolution of the Coon appeal, Plaintiffs timely filed their claim of appeal of what then became a final order on January 20, 2017 (App., Trial Court Order of Dismissal as to Defendant Coon of January 19, 2017, 35-36). The Sixth Circuit cancelled oral argument and issued a published opinion on January 17, 2018 (App., Opinion, 1-34). Plaintiffs filed a motion for rehearing/rehearing en banc which was denied by written order of February 22, 2018.

◆

STATEMENT OF FACTS

Plaintiff Jesse Peffer was charged with one count of possession of a controlled substance (marihuana) with intent to deliver and one count of conspiracy to possess with intent to deliver a controlled substance (marihuana). The incident date was June 13, 2012. The case resulted from Mr. Peffer attempting to utilize Michigan's Medical Marihuana Act which was a 2008 voter initiative. Local drug teams had used an informant to arrange a purchase of marihuana from what was intended to be one caregiver to another.

Nathan Edwards, the affiant for the 2012 searches, was granted immunity by the trial court and that decision was not appealed.

The development, implementation, and abuse of that law by law enforcement and citizens alike has led to numerous disputes. Mr. Pepper's state criminal charges lasted two years.

In February, 2013, two letters purportedly from an investigating officer were sent to the state Department of Human Services and a local school. The letters were informing those entities of Mr. Beemer's work as an informant. The letters were typewritten. The state police investigated which led them to no particular person. The laboratory was unable to provide any leads. The original investigator was Sgt. Lator.

The investigation was turned over to Trooper Glentz. Trooper Glentz submitted the letters and one envelope from the February, 2013 letters to the laboratory. Trooper Glentz utilized the informant card for Mr. Beemer to identify all targets of his work as an informant. They are listed on the laboratory report as suspects: Lewis Robert Sanford, Jesse Lee Pepper, Douglas Wayne Frary, and Carlton Harvey Holt. The fifth name was a police officer that had handled one of the documents.

On March 29, 2014, Trooper Glentz received two suspicious packages at his home. They were purportedly sent by him but insufficient postage caused them to be delivered to his home because his address was the return address. They contained marihuana seeds.

On June 23, 2014, several flyers² were sent out to locations in the Big Rapids area. These flyers identified Mr. Beemer as an informant, the charges against him, the deal that he received, and the prosecutor responsible for the deal. The prosecutor was running for local state district judge. Mr. Peffer had been sentenced on June 16, 2014 and was back in Florida. On July 30, 2014, a second set of political flyers were received around the Big Rapids area and turned over to the police.



² The more prominent spelling “flyer” will be used except where “flier” is used in quotations.

REASONS FOR GRANTING THE PETITION

- I. The Sixth Circuit Opinion addressed a question of first impression as to presumptions involving the search of a dwelling in a published opinion with no warning to the parties, no opportunity to brief the issue and no oral argument. The analysis behind the presumption is flawed and cases leading up to this conclusion are admittedly murky. Accordingly, the issue should have been addressed after notice to the parties, briefing on the specific issue, and oral argument.**

A. Consideration of this issue by this Court.

The Sixth Circuit acknowledged that whether the nature of a computer “is such that its use in a crime is alone sufficient to justify an inference” that it will be present in a suspect’s home was an issue of first impression (App., Opinion, 27). The Sixth Circuit then concluded that computers are personal possessions which are subject to a presumption that a nexus exists between the computer and the suspect’s current residence (App., Opinion, 30-31). Plaintiffs assert that this conclusion is supported by weak analogies and speculation in favor of the moving party.

This Court should consider this issue pursuant to Rule 10(c) because this Court has consistently rejected “rigid rules, bright-line tests, and mechanistic inquiries” as to the existence of probable cause. *Florida v. Harris*, 568 U.S. 237, 244, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013).

B. Preservation of the issue.

Plaintiffs preserved this issue in the trial court by filing a response to the motion by Defendant Stephens for summary judgment. The trial court gave its preliminary conclusions at the hearing (App, Transcript, 42-47). Plaintiff orally argued against granting any relief to Defendant Stephens at the hearing in the trial court on the motions (App., Transcript, 51-63; 68).

Plaintiffs timely filed their claim of appeal and argued in their brief on appeal that the search warrant affidavit failed to establish probable cause or a nexus to their home.³ Defendant briefly addressed nexus in his brief on appeal. Defendant's brief did not assert any type of presumption and essentially claimed that his "conclusion" that Mr. Peffer would use the privacy of his residence was reasonable. Defendant's brief cited to a case that set forth the standard for reviewing an affidavit but cited no authority at all that would warn Plaintiffs that a presumption as to nexus was about to occur. Accordingly, Plaintiffs did not address the nexus issue in their reply brief. Plaintiffs raised their challenge to the presumption applied by the Sixth Circuit in a motion for rehearing/rehearing en banc which was denied.

³ Plaintiffs also included in their brief on appeal a statement in support of oral argument pursuant to FRAP 34(a)(1) and 6 Cir. R. 34(a).

C. Plaintiffs' position to the lower Courts.

The affidavit asserts that the place to be searched was the residence of Plaintiff Jesse Pepper. Nowhere does the affidavit even attempt to establish that either Plaintiff owned a computer or printer or, if they did, whether these items were at the residence. The affidavit at ¶8 does establish that Julie Pepper resided in Florida yet no effort was made to determine whether that was a source of the documents (App., Affidavit, 85). Trooper Glentz's supplemental report 004 also states that Attorney Samuels told him that Jesse Pepper was living in Florida. By the time of the search warrant, over 17 months had passed from the receipt of the first two letters by the government entities. This delay was glossed over by giving the impression that they were all generated by the same person.

In *United States v. Laughton*, 409 F.3d 744 (6th Cir. 2005), the Sixth Circuit affirmed a district court ruling suppressing evidence. Even though controlled purchases had been made at the suspect's home, the affidavit failed to specify that and left only speculation or conjecture that the place searched was the seller's residence. The issue in *Laughton* decided by the appellate court was whether the district court correctly upheld the search by applying the good faith reliance doctrine which will be discussed, *post*.

In *United States v. Carpenter*, 360 F.3d 591 (6th Cir. 2004), the Sixth Circuit explained that the affidavit must establish why evidence of illegal activity will be found “in a particular place.” *Carpenter*, at 594, citing *United States v. Van Shuttles*, 163 F.3d 331, 336-337 (6th Cir. 1998). Simply stating that a helicopter pilot saw marihuana plants “near a residence” and there was a road nearby was an insufficient nexus to that residence.

In *United States v. Schultz*, 14 F.3d 1093 (6th Cir. 1994), a search warrant for a safe deposit box based on only an officer’s training and experience was inadequate. The fact that there was criminal activity and the suspect owned the safety deposit box left the warrant in the category of a prohibited “general warrant” because there was no nexus between the safety deposit box and the criminal activity. The Sixth Circuit said that the officer’s training and experience is not a substitute for an evidentiary nexus between the location and the criminal activity. Without the evidentiary nexus, the conclusion is just a guess. Failing to adhere to this standard invites general warrants. *Schultz*, at 1097-1098.

The mere fact that Plaintiff Jesse Pepper was suspected of issuing the letters and flyers, standing alone, is insufficient to support a search of his residence. “The critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” *Zurcher v. Stanford*

Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). See also *United States v. Frazier*, 423 F.3d 526 (6th Cir. 2005) (Warrant affidavit based almost exclusively on uncorroborated testimony of unproven confidential informants who did not witness illegal activity on premises of proposed search is insufficient to tie the alleged criminal activity to the defendant's residence.); *United States v. Savoca*, 761 F.2d 292, 295 (6th Cir. 1985) (the inference that bank robbers tend to conceal evidence in motel rooms, standing alone, is insufficient to support the search of two bank robbers' hotel room).

D. The Sixth Circuit's erroneous conclusion.

The panel in this case cancelled oral argument.⁴ It then issued a published opinion deciding a case of first impression. Plaintiffs assert that the Opinion's comparison to gun cases and child pornography cases is flawed for several reasons. As the Sixth Circuit discusses on page 17 of the Opinion, the presumption that persons keep their possessions where they reside is rebuttable (App., Opinion, 27). What the Sixth Circuit fails to recognize, however, is that making a presumption rebuttable is of absolutely no use to a citizen victimized by an unlawful search when he had no opportunity to have input into the warrant request

⁴ Since the Opinion acknowledges some lack of clarity in existing precedent, it seems particularly inappropriate to decide a case of first impression in murky circumstances without oral argument or some warning to the parties inviting additional briefing. See FRAP 34(a)(2)(B).

that contained the presumption. There is simply no logic in suggesting that the affiant-officer will provide facts to steer the presumption away from his intended target.

Guns and crime

The Sixth Circuit's current assumption that guns used in crimes are usually retained by the suspect at his home is easily refuted and the cases relied on are stretched to support the assertion.

In *United States v. Smith*, 182 F.3d 473 (6th Cir. 1999), an informant observed a firearm in a suspect's home within 48 hours of the warrant. The weapon was not *used in a crime* but was contraband because the suspect was a felon. Owning a gun (legally or illegally) and using a gun in a crime are different scenarios. Just because it may be assumed that gun owners keep them in their homes, it does not follow that persons who use a gun in a crime will keep them at home or take them home. *Smith* simply does not stand for the proposition that use of a gun in the commission of a crime creates a nexus to the suspect's house. The gun was already in his house.

United States v. Vanderweele, 545 F. App'x 465, 467 (6th Cir. 2013) is also a case that involved a possession crime. While *Vanderweele* at least involved observing the contraband outside the home and then concluded it might be in the home, the silencer was not "used in the commission of a crime" but was a possessory crime.

The remaining cases relied on by the Sixth Circuit are equally unpersuasive and all unpublished.

- *United States v. Goodwin*, 552 F. App'x 541 (6th Cir. 2014) (independent witnesses had either observed the suspect in possession of the contraband or had conversations with the suspect about possessing, selling, or keeping the contraband). *Id.* at 542-543.
- *United States v. Cobb*, 397 F. App'x 128 (6th Cir. 2010) (the suspect was a serial bank robber and was seen using a gun in each of the robberies). *Id.* at 133.
- *United States v. Anderson*, 851 F.2d 727 (4th Cir. 1988) (the suspect had offered to sell the illegal silencer and pistol to three informants even stating that it had been used in a murder). *Id.* at 728.
- *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975) (the suspect had been observed robbing a bank using a pistol, discharged it at a customer, dropped an expended round while reloading and the expended round was recovered). *Id.* at 36.
- *United States v. Rahn*, 511 F.2d 290 (10th Cir. 1975) (the affidavit contained a report that the suspect had used one of the illegally possessed weapons for hunting). *Id.* at 293.
- *Bastida v. Henderson*, 487 F.2d 860 (5th Cir. 1973) (a reliable informant stated that on the day after the robbery the suspects were still armed with automatic pistols). *Id.* at 863 n.1.

There is one extremely important consideration about each of the above cases. They are all criminal cases with the exception of *Bastida* which was a *habeas* case. In criminal cases, the probable cause determination is exclusively the province of the court. The instant case is a 42 U.S.C. §1983 case in which Plaintiffs enjoy a right to trial by jury on contested issues.

Notwithstanding the above cases, this Opinion actually recognizes that persons who use a gun to commit a crime will indeed dispose of it. *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979); *United States v. Bethal*, 245 F. App'x 460, 469 (6th Cir. 2007).

The final over-arching distinction between these criminal cases and the instant case is that the affidavit is completely devoid of any evidence – direct, circumstantial, hearsay, or double hearsay – that Plaintiff Jesse Peffer owned or had ever possessed the items necessary to generate the documents. By 2014, the proliferation of mobile devices, internet cafes, business/copying centers and other options were to the point that no assumptions or presumptions could be made about the location where a document could be created.

Child pornography comparison

The Opinion's analogy to child pornography is also unconvincing. In fact, the three cases on page 20 of the Opinion all contain parentheticals that confirm that someone had either observed the suspect with a computer or communicated with the suspect electronically. Federal Courts have observed enough child

pornography cases to accept by judicial notice that most of the search warrant affidavits contain assertions by the investigator as to the habits and practices of persons who possess or traffic in child pornography.

The Sixth Circuit has previously recognized that child pornography crimes are generally carried out in the secrecy of the home and over a long period of time when a staleness challenge is presented. *United States v. Paull*, 551 F.3d 516, 522 (6th Cir. 2009). In *Paull*, this Court relied on *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997). In *Lacy*, the affiant had explained the habits and practices of collectors and distributors of child pornography which included that they rarely dispose of it and store it for long periods of time, typically in their homes. In contrast, Defendant Stephens claimed he had been a police officer for 15 years. He claims to know from his training and experience that these flyers are mass produced with computers and saved to a computer or storage device. He gives no basis as to any claim of investigating a similar crime or the content of his training. A summary breakdown of the paragraphs reveals:

- 1. His identity and general experience.
- 2. The facts related to the original two letters in February 2013 from Sgt. Lator's report.
- 3. Facts surrounding recovery of fliers in June 2014.

- 4. Facts surrounding a report of July 30, 2014 from Lt. Abendroth about another flier in the Big Rapids area.
- 5. Facts concerning the resolution of Jesse Peffer's criminal charges.
- 6. Facts concerning Beemer's status and the timing of the events related to the criminal case and the mailings.
- 7. Facts (inaccurate) about the postmarks.
- 8. Facts concerning the status of charges against Julie Peffer and contact at the Bierri Road residence.
- 9. Facts concerning his own drive by of the residence.
- 10. An allegation concerning his own training and experience related to how the fliers are produced and stored as well as his claim that the fliers are similar.
- 11. An allegation that based on his training and experience the actual search of the computer is technical and requires seizure to allow for proper forensic searching with appropriate software and training.

This affidavit is completely devoid of any claim by the affiant via personal knowledge, training, experience or informants that persons who use computers to commit crimes would store them or do store them at their homes (App., Affidavit, 77-87).

In contrast to this void, the Sixth Circuit has recognized the long-term nature of storage of child pornography images as well as referred to the same recognition in sister circuits. See *United States v. Frechette*, 583 F.3d 374, 378-379 (6th Cir. 2009). See also, *United States v. Williams*, 544 F.3d 683, 686 (6th Cir. 2008) (holding that courts may give “considerable weight to the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found” (citing *United States v. Bethal*, 245 F. App’x 460, 465 (6th Cir. 2007))). The expected conclusion of the investigator is completely absent in the instant case.

E. Rebuttable presumptions have no place in ex parte proceedings.

Multiple circuit courts have held that an affiant is under no obligation to disclose exculpatory facts in a search warrant affidavit. *Mays v. City of Dayton*, 134 F.3d 809 (6th Cir. 1998); *Beltran v. Santa Clara County*, 389 F. App’x 679, 681 (9th Cir. 2010); *United States v. Colkley*, 899 F.2d 297, 302–03 (4th Cir. 1990); *United States v. Tanguay*, 787 F.3d 44, 49 (1st Cir. 2015). This renders the discussion in the Sixth Circuit Opinion that the presumption is “rebuttable” a complete fallacy. By the time the victim of the search can present evidence in “rebuttal,” the privacy protected by the Fourth Amendment has already been invaded.

In Michigan, police officers are under no obligation to disclose the affidavits submitted in support of a

search warrant. They remain as non-public records for at least 56 days and this time period is subject to extension by ex parte application. MCL 780.654, 780.655. If a victim of an unlawful search cannot even obtain what *was* presented, he or she certainly cannot ascertain what *was not* presented. This delay in being able to challenge the governmental action can, in itself, be a separate constitutional violation. See *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008).⁵

II. In deciding whether the law was clearly established for purposes of Defendant’s immunity, the Opinion decides whether Plaintiff Jesse Pepper’s conduct could have violated certain state laws and finds a lack of clear precedent. This is an incorrect use of the “clearly established law” requirement for qualified immunity and is inconsistent with established precedent from this Court.

A. Consideration of this issue by this Court.

The panel decision looked to whether Plaintiff Jesse Pepper’s conduct violated any clearly established

⁵ See also, FRE 301: “In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”

state law to support its immunity analysis. This is a flawed use of the concept of “clearly established law” in a 42 U.S.C. §1983 case and this case should therefore receive consideration by the full court (App., Opinion, 17).

This Court should consider this issue pursuant to Rule 10(c) because this Court has identified the dispositive inquiry as to qualified immunity. The inquiry “undertaken in light of the specific context of the case, [and] not as a broad general proposition,” is “whether the violative nature of particular conduct is clearly established.” *Mullenix v. Luna*, ___ U.S. ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (first quoting *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) and then *Ashcroft v. al-Kidd*, 563 U.S. 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)).

This Court should consider this issue pursuant to Rule 10(c) because this Court has consistently ruled that the focus is on whether the government actor’s conduct violates clearly established law. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Switching the focus to whether a plaintiff’s conduct had NOT been clearly established as a violation of a state law will:

- unnecessarily complicate the immunity analysis;
- require a civil rights Plaintiff to establish a negative;

- distract from focusing on the particular search being challenged and the context in which it occurred.⁶

B. Preservation of the issue.

Plaintiffs preserved this issue in the trial court in the same manner as the previous issue. Plaintiffs raised their challenge to the Sixth Circuit's improper clearly established analysis and to the conclusion that probable cause existed in a motion for rehearing/rehearing en banc which was denied.

C. The Plaintiffs created a sufficient factual dispute as to false allegations in the affidavit.

1. False and misleading post office information.

The challenged portion of the affidavit reads as follows “7. The flyers that were recovered with envelopes showed post marks of Grand Rapids, Michigan which is the central sorting facility for the U.S. Postal Service for *this area*” (emphasis added). Because the rest of the affidavit referenced only Mecosta County and Osceola County, the intended inference is that the geography somehow pointed to Plaintiffs' residence in Osceola County. Unfortunately, the postmark cancellation is barely legible on these attachments but a source for the importance of the postmark is discussed below.

⁶ There was also no warning to Plaintiffs that the Sixth Circuit would insert this concept into its immunity analysis.

Defendant Stephens attached the report he prepared and the reports by the investigators that preceded him to his motion. It helps identify these zip codes as follows:

- The February 2013 letter to the Department of Human Services was addressed to 800 Water Tower Road, Big Rapids, MI 49307.
- Plaintiffs' dwelling was located at 21271 Bierri Road, Reed City, Michigan, 49677.
- A letter to Parts Plus Autostore showed an address of 219 N. Chestnut St., Reed City, MI 49677.
- A letter to Reed City Tire Center showed an address of 857 S. Chestnut St., Reed City, MI 49677.
- A letter to Speedway gas station in Big Rapids, 49307 with a return address State of Michigan Cadillac, MI 49601.
- Mr. Beemer's return address in Reed City has a zip code of 49677.

The challenged statement from the affidavit is one made under oath. Also while under oath at his deposition, he was asked if he realized that Big Rapids was not a post office serviced by the first three zip code digits of "494," he said the "494 has no significance to me."

A statement in his report supports the argument that he intended to convey to the reader of the search warrant affidavit that the postmark meant the items were mailed locally. In his report, Defendant Stephens indicates that he determined from the post office that

the postage cancellation mark suggests that the flyers were mailed locally. Also in his report, he said “All of the envelopes recovered to date are stamped ‘Grand Rapids MI 494’ indicating they were sorted at the U.S. Post Office in Grand Rapids. Grand Rapids is the central sorting facility for the area and all mail goes there prior to being sent to the address on the envelope. This would indicate that flyers were mailed locally. . . .” Again, this is flat wrong. Other evidence in the record – detailed above – establishes that Big Rapids has “493” as the first three digits of its zip codes and Reed City has “496” as the first three digits of its zip code. Plaintiff Jesse Peffer’s affidavit discloses that Grand Rapids actually processes mail for a huge section of Western Michigan and includes the actual “494” area. He asserted that mail from Reed City goes to Traverse City for sorting. Plaintiff Jesse Peffer also reviewed a map showing relevant zip codes in Western Michigan. While in his deposition, Defendant Stephens claimed that the “494” designation on the postmark did not mean anything to him, the map shows that “494” makes up the first three digits of a very large area west of Grand Rapids and includes numerous localities up to 30 miles from Grand Rapids (App., Peffer Affidavit, 93).

If Defendant Stephens did not truly believe the postmark was material to probable cause, he would not have included it in the affidavit for the search warrant. It tainted his hunch that all the mailings were somehow connected. It was incorrect as to where Reed City mail is first sorted and it is misleading as to the area

covered creating a significantly false impression as to the possible geographic origin of the mailings.

2. The mailings were all similar.

a. The use of a computer.

In Paragraph 10 of the search warrant affidavit (second sentence), Defendant Stephens states “The fliers in question appear to have been produced with the use of a computer” (App., Transcript 85). Prior to Defendant Stephens’ involvement in the case, other investigators actually investigated the allegations and sent items to the laboratory for examination. The first documents were sent on November 22, 2013 and listed four suspects.⁷ Once again, the actual reports undermine the false impression that the flyers were all so similar that they suggested a single source.

- The February 21, 2013 letters to DHS and the school were described as “typewritten” by Det. Glentz.

b. Format and structure of the flyers.

Defendant Stephens’ own report flatly contradicted any suggestion that the flyers were similar to the letters of February 2013. In Supplemental Report 0007, Defendant Stephens said “The new letters were different than the first sent out in 2013. The new letters were a type of flyer containing a photograph of

⁷ The person identified through fingerprints was a police officer that handled one of the documents. The existence of the other three suspects is discussed below.

Beemer identifying him as a confidential informant, his home address and phone number, and a portion of the 77th District Court/49th Circuit Court Nolle Prosequi document listing the eight criminal charges Beemer faced that were dismissed.”

The documents speak for themselves. The 2013 documents are clearly letters addressed to specific people or entities and simply relay information about Beemer and his wife being informants. It purports to be from Defendant Coon and purports to be a sort of public safety warning. The next two flyers in the Stephens’ exhibit are purely political in nature and not addressed to any particular person or entity. The third set was again obviously politically based and made specific reference to the political aspirations of the Me-costa County prosecutor. The mailings were addressed to individuals but the content was not directed toward an individual or entity as were the letters. Defendant Stephens’ conclusion was in reckless disregard of the facts. The content of the documents should have and could have been attached so the magistrate could have drawn his own conclusion. The face of the documents creates a jury issue as to whether Defendant Stephens’ conclusion created a falsehood (App., Peffer Affidavit, 92-98).

3. Jesse Peffer was living in Florida as of April 4, 2014.

Defendant Stephens put in his affidavit for the search warrant that “Jesse Peffer told Dep. Start that

he resides at the residence alone and that Julie lives in Florida” (App., Transcript 85). The original investigator made a journal entry in his investigative report on April 4, 2014 which established that Jesse Peffer was living in Florida. Defendant Stephens deliberately omitted this information to create the false impression that Plaintiff Jesse Peffer was continuously living in Reed City.

D. Plaintiffs asserted that the affidavit reflected mere speculation and hunches.

The search warrant affidavit reports nothing more than a hunch. Even more troubling is the fact that it is not even the affiant’s hunch, but the hunch of other officers who were unhappy with the resolution reached in the criminal case against Plaintiff Jesse Peffer. Existing precedent clearly establishes that a hunch is insufficient to establish probable cause under the Fourth Amendment. In explaining that the standard for probable cause is the same in the warrantless context as it is in examination of an affidavit to support a search, this Court has said:

Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e.g., *Beck v. Ohio*, *supra*; *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960); *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). And simple “good

faith on the part of the arresting officer is not enough.' * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.' *Beck v. Ohio*, supra, at 97, 85 S.Ct. at 229.

Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).⁸

In *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933), the Court squarely addressed the situation in the instant case. "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough." *Id.* at 47. In the instant case, Defendant Stephens relied on vague and unsupported conclusions of Defendant Coon and Lt. Joel Abendroth who was the CMET team leader. It was not even the hunch of the affiant although he did insert a paragraph joining in. No facts, however, were attested to so that the magistrate could draw his own conclusion. The magistrate here simply affirmed the belief and suspicions of the officers.

Defendant Stephens submitted an affidavit in support of his motion in which he tried to justify his suspicion and explain why he did not pursue or

⁸ *Beck v. State of Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

investigate the other persons that Beemer informed against. First, the after-the-fact explanations do nothing to supplant his adopted hunch aimed at Plaintiffs. Second, his deliberate exclusion of this information from the reviewing magistrate work against a conclusion that deference is due to the magistrate's decision to issue the warrant. Defendant Stephens made the choice to deprive the magistrate of this information. The weight of the analysis is directed at the reasonable inferences he is "entitled to draw *from the facts* in light of his police experience." *Terry v. Ohio*, *supra* at 27 (emphasis added) (citations omitted). There are no allegations of training and experience in this type of investigation, in document examination, or any other aspect of investigative techniques relevant to this type of investigation. Indeed, a rational jury could infer that this investigation was purely retaliatory and the means used were simply designed to justify the end result. No deference is due to that type of conduct. The affidavit fails to set forth training and experience that would allow him to draw inferences. As discussed above, some of the conclusions – not facts – were inaccurate. Additional information that would weaken support for the inferences was deliberately omitted.

In *Patterson v. City of Cleveland*, 173 F.3d 429 (6th Cir. 1999), qualified immunity was denied to an officer who made an arrest for drug trafficking. She observed some behavior that appeared to be use of the hands by the suspect and another person to exchange something. She did not see an item actually exchange hands. In the instant case, Defendant Stephens

asserted his belief that the timing and some circumstances made it “appear” that Plaintiffs were involved but he failed to articulate any facts to move it beyond a hunch. When weighed against what he omitted or had wrong, even the “hunch” disappears.

Certain situations do not even amount to “reasonable suspicion” much less probable cause. In *United States v. Urietta*, 520 F.3d 569 (6th Cir. 2008), the Sixth Circuit held that driving a SUV packed with belongings, towing a vehicle packed with belongings, having a Mexican driver’s license, having an expired license tag and appearing nervous were not sufficient reasonable suspicion to extend a traffic stop. *Id.*, at 578 (“[t]he Fourth Amendment simply does not allow a detention based on an officer’s ‘gut feeling’ that a suspect is up to no good”).

In *United States v. Keith*, 559 F.2d 499 (6th Cir. 2009), the suspect looked over at flashing lights on a police car and walked to an area around a building that caused the police to believe he was avoiding observation. All of this occurred in a “high crime” area. The Sixth Circuit held that conduct to be insufficient for a reasonable suspicion for a detention. The primary problem was that the officers did not observe any actual conduct that arguably appeared to be illegal. *Id.* at 506.

In *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010), the Sixth Circuit again emphasized that obtaining a warrant does not insulate the officer from liability if he or she inserts false or misleading statements into the

application for the warrant. *Sykes* is a good example of both false and misleading statements combined with omissions which interfere with the ability of the neutral magistrate to make a proper decision. While *Sykes* was a post-trial situation, it still stands for the proposition that when a civil rights plaintiff has submitted evidence which could support a jury's finding in his or her favor, probable cause no longer remains in the province of the court. *Id.* at 307.

E. There was no substantial basis in the affidavit that probable cause existed.

“[T]he duty of a reviewing court is simply to ensure that the magistrate had a *substantial* basis for concluding that probable cause existed.” *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (emphasis added; internal quotation marks and citation omitted). Regardless of how the Sixth Circuit viewed the Plaintiffs’ complaints about the lack of independent investigation and reliance on a mere hunch or speculation as discussed above, the affidavit facially fails to establish a crime or a nexus between the alleged criminal activity and the place searched. To simply say that it was Plaintiffs’ dwelling is insufficient – and as to Plaintiff Julie Pepper it is plainly wrong.

The examination of the affidavit in the instant case shows two glaring deficits: First, there is no allegation of criminal activity and, second, there is no nexus to Plaintiffs’ home.

It is also possible to refer to the scenario presented by Defendant Stephens as a “possibility” that evidence of a crime was being committed by Plaintiffs. As a hunch is insufficient, so is a “possibility.” “[T]he mere possibility that a crime could be occurring within a home is not sufficient to justify a warrantless search; the police must have an objectively reasonable basis for their belief that a crime is being committed.” *United States v. McClain*, 444 F.3d 556, 563 (6th Cir. 2005) (citation and internal quotation marks omitted).

Alternatively, Plaintiffs would argue that the totality of the circumstances could be labeled “speculative.” Similarly, “mere speculation that a crime could be occurring is insufficient to establish probable cause.” *Id.* Regarding evidence of a crime, probable cause arises only when “there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates, supra* at 238. For inferences to be reasonable, they may not be speculation or mere conjecture which “is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.” *Skinner v. Square D Co.*, 445 Mich. 153, 164, 516 N.W.2d 475 (1994).

F. Plaintiffs established at least a factual dispute as to whether a state crime existed.

Defendant Stephens suggested crimes of impersonating a police officer, witness intimidation, or

identify theft. When asked at his deposition whether he identified any particular crime, he said that he had discussed these three crimes with the assistant prosecutor in Isabella County. He was asked this to clarify why no warrant request form was produced in response to a discovery subpoena to the prosecutor's office. He explained that he could not recall if he prepared one or not and did not disagree with the conclusion that no such document was submitted since the prosecutor's office did not provide one. He admitted that such a form is normally used to request charges.

1. Impersonating a police officer.

In Michigan, this crime is found at MCL 750.215 and states:

Sec. 215. (1) An individual who is not a peace officer or a medical examiner shall not do any of the following:

(a) Perform the duties of a peace officer or a medical examiner.

(b) Represent to another person that he or she is a peace officer or a medical examiner for any unlawful purpose.

(c) Represent to another person that he or she is a peace officer or a medical examiner with the intent to compel the person to do or

refrain from doing any act against his or her will.⁹

The letters to the school and to the Department of Human Services were purportedly signed by Defendant Coon. This is the only possible conduct identified by Defendant Stephens that could fall under this statute. The letters facially do not contain any “unlawful purpose” and purport only to warn the public entities of potential harmful effects to the community or the children of Beemer’s conduct. Defendant Stephens has utterly failed to identify any unlawful purpose for which the letters may have been sent and applying any such label now would be mere speculation. The letters do not attempt to compel or dissuade anyone from going against their own free will.

2. Witness intimidation.

Witness intimidation is addressed in MCL 750.122. It initially addresses giving, offering to give, or promising anything of value to influence testimony or discourage attendance. Subsection 3 addresses threats and intimidation:

(3) A person shall not do any of the following by threat or intimidation:

(a) Discourage or attempt to discourage any individual from attending a present or

⁹ It is a misdemeanor unless the performance of duties or representation is made to commit or attempt to commit a crime in which case it is a felony punishable by up to 4 years in prison. MCL 750.215(2), (3).

future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

Subsection 6 addresses impeding, interfering, preventing, or obstructing a witness in appearing at or testifying at a proceeding. Defendant Stephens has failed to present any evidence that this section could have possibly been violated. Jesse Peffer entered his plea and was sentenced on June 16, 2014. The disposition was not even to a drug offense but was for false pretenses. He received credit for 2 days in jail, no probation, no community service, and fines and costs. Defendant Stephens makes no showing that Beemer would have even been a witness against Jesse or Julie Peffer since the charges against them were based on the evidence seized during the traffic stop and/or evidence seized at their residence. Mr. Beemer was not present and would have nothing to add.

Regarding the letters to the school and DHS, the school letter is stamped “received Feb 25 2013” and the DHS letter is stamped “received Feb 22 2013.”

Regarding the flyers sent out in late June 2014, Defendant Stephens concludes that Jesse Pepper's sentencing was "coinciding" with the release of the second batch of flyers (App., Transcript 83). Defendant Stephens made no effort to explain how or why Plaintiff would attempt to intimidate a witness to prevent him from testifying or appearing *after* the case was over. Even in the context of retaliation, Defendant Stephens admitted that the deal was a good one – for Plaintiff.

Defendant Stephens also relied heavily on his unsubstantiated conclusion that the only case "which brings together all of the objects of the four separate fraudulent uses of the mails is that involving Jesse and Julie Pepper." This ignores the totality of the circumstances regarding Beemer's use as an informant. The involvement of Osceola County locations is simply and logically explained by the fact that Beemer lived in Osceola. The DHS office serves both counties. The school district was where his children apparently went to school. The geographical location is driven by Beemer's presence, not the situs of charges.

The letters to the school and DHS were marked as received on February 25 and February 22, 2013, respectively. Douglas Wayne Frary was arraigned in district court on January 17, 2013 making him an equally likely suspect – under Defendant Stephens' logic – yet no search warrant was conducted on him. Mr. Frary pled guilty on October 14, 2013 but had a change of heart and filed a motion to withdraw his plea on March 5, 2014 – 24 days before Trooper Glentz received the package at his home. Mr. Frary worked out his

differences and was sentenced on March 31, 2014. Within days, Mr. Frary was being accused of probation violations and the dispute continued through June 23, 2014 at which time he pled guilty to the probation violation. This is the same day that Mr. Beemer reported to the drug team that flyers were being sent out. On July 7, 2014, Mr. Frary's probation was revoked and he was sentenced to 120 days in jail. On July 30, 2014, the drug team notified Defendant Stephens that another round of flyers had been circulated.

Lewis Robert Sanford was another target of Mr. Beemer's. He was arraigned in state district court on January 24, 2013. The register of actions lists an uncharged co-defendant, Zachary Bobosh, who had not yet been charged at the time the case was turned over to the state circuit court. Mr. Sanford had entered a guilty plea at his district court arraignment to delivery of less than 50 grams of a narcotic or cocaine as a second habitual offender. On March 4, 2013 – 25 days before Trooper Glentz received the package – Mr. Sanford went to prison for 14 months to 30 years and that sentence was consecutive to an unrelated case. His motivation for being upset is considerably higher than the others.

The third known remaining target of Mr. Beemer was Carlton Harvey Holt. While it is believed he received a diversionary disposition not available to the public, the police report was disclosed during discovery. While the register of actions is not available, the journal entries by the officers are still helpful. The initial purchase from Mr. Holt was June 5, 2012 – 8 days

before the arrest of Mr. Peffer. The raid on Mr. Holt's home was June 20, 2012 – 7 days after the arrest of Mr. Peffer. On November 6, 2012, Mr. Holt turned himself in. He entered a plea and was sentenced on June 12, 2013.

In stark contrast to the proceedings involving Mr. Sanford and Mr. Frary, the register of actions in Jesse Peffer's case shows that in the fall of 2012 he was allowed to travel out of state. His request to remand to state district court for a preliminary examination was granted on January 21, 2013, he changed attorneys in April or May of 2013, and the case was again remanded to state district court for a preliminary examination in August of 2013.

3. Identity theft.

Identity theft is the final topic that was considered and it is controlled by MCL 445.65:

Sec. 5. (1) A person shall not do any of the following:

(a) With intent to defraud or violate the law, use or attempt to use the personal identifying information of another person to do either of the following:

(i) Obtain credit, goods, services, money, property, a vital record, a confidential telephone record, medical records or information, or employment.

(ii) Commit another unlawful act.

(b) By concealing, withholding, or misrepresenting the person's identity, use or attempt to use the personal identifying information of another person to do either of the following:

(i) Obtain credit, goods, services, money, property, a vital record, a confidential telephone record, medical records or information, or employment.

(ii) Commit another unlawful act.

(2) A person who violates subsection (1)(b)(i) may assert 1 or more of the following as a defense in a civil action or as an affirmative defense in a criminal prosecution, and has the burden of proof on that defense by a preponderance of the evidence:

(a) That the person gave a bona fide gift for or for the benefit or control of, or use or consumption by, the person whose personal identifying information was used.

(b) That the person acted in otherwise lawful pursuit or enforcement of a person's legal rights, including an investigation of a crime or an audit, collection, investigation, or transfer of a debt, child or spousal support obligation, tax liability, claim, receivable, account, or interest in a receivable or account.

(c) That the action taken was authorized or required by state or federal law, rule, regulation, or court order or rule.

(d) That the person acted with the consent of the person whose personal identifying information was used, unless the person giving consent knows that the information will be used to commit an unlawful act.

The statutory definition of “personal identifying information” includes a person’s name, address or telephone number among other things. MCL 446.63(q). Defendant Stephens had no information to establish any conduct or attempted conduct included in this law.

G. Plaintiffs adequately addressed Defendant’s lack of good faith reliance on the warrant.

In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) a good faith exception to the exclusionary rule was created where items seized pursuant to the warrant would not be suppressed. The circumstances in this case fit none of the exceptions to the exclusionary rule.

1. Misleading and unsupported conclusions and claims.

a. Similarities in the questioned documents.

Defendant Stephens’ lack of training and experience, failure to attach the documents for the magistrate to review, and the actual dissimilarities on the face of the documents (supported by laboratory reports) are all discussed above.

b. Presence of other Beemer targets as suspects.

The laboratory work and reports from other officers documented the other Beemer targets. Defendant Stephens' credibility is fatally injured when the initial investigation of the first two letters is examined. It started with an investigator from the Central Michigan Enforcement Team, Liz West, creating incident report 48-13 in which she specifically identified Sanford, Frary, and Holt in addition to Plaintiffs as suspects. Page 2 of D/Sgt. Lator's report identifies Officer West's report as an external document and he took possession of the first two letters at that time.

c. Unreasonable reliance on officers involved in the investigation and failure to conduct independent investigation.

At his deposition, Defendant Stephens was given an opportunity to explain his reasoning for believing he had probable cause articulated in the affidavit. He was the third person assigned to investigate the case concerning the anonymous letters and political flyers. He explained that the investigation was initially assigned to a Detective Sergeant who was promoted and it was then assigned to a trooper. That trooper remained on the case until additional flyers came out. At this point, the drug team asked him to assist on it. This is the same drug team that provided him the hunch as to the suspect. The record adequately supports the conclusion that Defendant Stephens relied

almost exclusively on the tainted and biased hunches and speculation of the involved drug team members.

2. Disregarding other suspects.

a. Potential suspect identified by the prosecutor.

Defendant Stephens also contacted the Chief Assistant Prosecutor in Mecosta to determine his opinion as to why Mr. Peffer was a suspect. The record supports that he ignored the fact that the elected prosecutor declared a conflict of interest a week after the assistant reviewed (but did not sign) the affidavit. The assistant prosecutor gave the same feeble hunch and speculation as the drug team leader. Defendant Stephens ignored information that the elected prosecutor's political opponent for the judicial seat might be a suspect. He said it was "considered, but [he] wasn't able to find any evidence of that." He did not interview or contact the judicial seat opponent.

b. Failure to investigate political list identifiers.

Some of the envelopes seized had mysterious numbers by the names of the addressees. He asked the Mecosta County Prosecutor, the Prosecutor's Chief Assistant, and the drug team Detective but none of them knew what they were.

c. Failure to investigate phone number on facsimile machine header.

One of the letters was sent to a Meijer gas station on or about June 24, 2014 and it had a facsimile header that included a telephone number. Defendant Stephens did not pursue that potential lead.

3. Retaliatory pursuit because of Freedom of Information Act Request.

The record supports that the investigation consisted of a pattern of looking for connections with no meaning or explanation simply leads to hunches, speculation, or conjecture. Defendant Stephens looked for a connection between a Freedom of Information Act request concerning the investigation of Mr. Peffer. He did not even follow through to determine if his agency honored the request but simply focused on the fact that Mr. Peffer's former attorney made the request.¹⁰ He was asked to identify a portion of one of the flyers which contained a header from a police report on it.¹¹ The report was Beemer's report, not Plaintiff Jesse Peffer's report.

The scenario here is one of a knee jerk reaction by a drug team. It is a fair inference that they were upset with the plea bargain reached by Mr. Peffer and they were frustrated that he and Mrs. Peffer were challenging them. Sgt. Lator began investigating the case on

¹⁰ Mr. Misterovich was involved again to get property returned.

¹¹ One of the flyers.

March 15, 2013 and Trooper Glentz had the reins for a total of 16 months by the end of July 2014. New flyers came out near the end of July 2014 and CMET wanted something done immediately. Defendant Stephens put in the search warrant affidavit that he was contacted on July 30, 2014 by Lt. Abendroth. He testified that this was because Trooper Glentz was either off that day or not available for some other reason. Again, Defendant Stephens' credibility is damaged by Trooper Glentz's supplemental report which shows that the very next day Trooper Glentz retrieved an additional flyer. Certainly there could be a plausible explanation but with all of the other inconsistencies, the inference must fall in Plaintiffs' favor. Defendant Stephens was recruited and managed to complete the investigation, discover probable cause, obtain a warrant and search the Peffer residence within 24 hours where two other detectives were unable to solve the case in 16 months.

◆

CONCLUSION

The Sixth Circuit's decision creates a presumption as to searches of dwellings based on the mere connection to an electronic device with a suspect. To call it rebuttable is meaningless because the acquisition of the warrant is ex parte. This issue of first impression should not have been decided without notice, further briefing, and oral argument. The presumption is inappropriate and unsupported by current precedent or logic. This is especially true in the circumstances of this particular warrant affidavit. The conclusions

reached by the affiant and the Sixth Circuit are merely hunches, speculation, and conjecture.



RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Honorable Court grant this petition, ultimately reverse the District Court's grant of summary judgment and remand this matter for jury trial.

J. NICHOLAS BOSTIC
Attorney for Petitioners
BOSTIC & ASSOCIATES
909 N. Washington Ave.
Lansing, MI 48906
(517) 706-0132
barristerbosticlaw@gmail.com