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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIE PEFFER; JESSE PEFFER,
Plaintiffs-Appellants,

v.

MIKE STEPHENS,
Defendant-Appellee.

No. 17-1072

Appeal from the United States District Court for
the Western District of Michigan at Grand Rapids.
No. 1:15-cv-00078—Gordon J. Quist, District Judge.

Decided and Filed: January 17, 2018.

Before: BOGGS, BATCHELDER,
and BUSH, Circuit Judges.

COUNSEL

ON BRIEF: J. Nicholas Bostic, Lansing, Michigan, for
Appellants. Joseph T. Froehlich, OFFICE OF THE
MICHIGAN ATTORNEY GENERAL, Lansing, Michi-
gan, for Appellee.

OPINION

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JOHN K. BUSH, Circuit Judge. This appeal requires us to determine the extent of the Fourth Amendment's requirements for an affidavit supporting a warrant to search the residence of an individual suspected of committing a crime involving the use of a computer.

That issue figures prominently in Plaintiffs Julie and Jesse Peffer's appeal of the district court's grant of summary judgment in favor of Defendant Mike Stephens, a detective sergeant with the Michigan State Police, as to the Peffers' 42 U.S.C. § 1983 claim. This claim arises from a search of the Peffers' home in Reed City, Michigan, and from the seizure of computer equipment and other items and documents from this residence pursuant to a warrant issued on the basis of Sergeant Stephens's sworn affidavit. According to the Peffers, the affidavit (which was incorporated into the warrant by reference) failed to support a finding of probable cause for the search and seizure because it did not sufficiently allege any criminal activity or any connection between such activity and the house.

The district court granted summary judgment for Sergeant Stephens, holding that the warrant was supported by probable cause and that, in the alternative, Sergeant Stephens was entitled to qualified immunity.¹ For the reasons explained below, we affirm.

¹ The district court did not rule on qualified immunity in those terms exactly, instead holding that the *Leon* good-faith exception applied. Given that "the same standard of objective reasonableness that we applied in the context of a suppression

I

A. Factual Background

Because the district court granted summary judgment, we review the facts “in the light most favorable to the nonmoving party.” *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 301 (6th Cir. 2016). Briefly stated, the relevant facts are these:

In March 2011, Mr. Pepper met Tom Beemer at Beemer’s medical-marijuana dispensary, where Mr. Pepper was purchasing medical marijuana. By June 2011, Mr. Pepper had become a caregiver for several medical-marijuana patients, for whom he grew marijuana sufficient to cover their medical-marijuana needs. Based on his understanding of state law, when Mr. Pepper’s marijuana plants produced more marijuana than was needed for his patients, he would sell the excess to Beemer to be sold at Beemer’s dispensary.²

Unbeknownst to Mr. Pepper, Beemer became a confidential informant for both the Central Michigan Enforcement Team and the Traverse Narcotics Team (“CMET” and “TNT,” respectively). Beemer attempted

hearing in *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest,” *Malley v. Briggs*, 475 U.S. 335, 344 (1986), we proceed as if the district court had held that qualified immunity applied.

² One of the officers involved in Mr. Pepper’s arrest contested Mr. Pepper’s understanding of Michigan law. Because it is not germane to the matter before us, we need not resolve this disagreement, nor comment more generally on the legality of Mr. Pepper’s trade under state or federal law.

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to persuade Mr. Peffer to sell him more marijuana than was allowed under the Michigan Medical Marihuana Act, an offer that Mr. Peffer declined. On June 13, 2012, having become suspicious of Beemer's actions, Mr. Peffer agreed to meet with him. While en route, Mr. Peffer was the subject of a traffic stop executed by Officers Coon, King, and Edinger. The officers found fifteen ounces of marijuana in Mr. Peffer's vehicle. At that time, Mr. Peffer had six patients, which he understood to allow him to possess a total of fifteen ounces of marijuana, based on a calculation of 2.5 ounces of marijuana per patient. As of June 1, however, he had only three patients who were medical-marijuana eligible, thereby lowering the quantity of marijuana he could possess under Michigan law to 7.5 ounces. The officers arrested and charged Mr. Peffer with possession with intent to distribute and conspiracy to distribute marijuana.

On February 22 and 25, 2013, the Mecosta Osceola Office of Child Services and the Reed City Public School District received typewritten letters, both dated February 21 and purporting to be from Jason Coon of CMET. Coon was one of the officers who had arrested Mr. Peffer, though he was not identified as such in the letters. Although not identical, the letters were similar in content. They suggested that a Mr. Thomas A. Beemer had been engaged in the distribution of controlled substances but had "in exchange for immunity/leniency in sentencing . . . agreed to become a confidential informant." The letters went on to express concern for the welfare of Beemer's children.

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Officer Coon denied writing or sending the letters. Sergeant Lator, who was assigned to investigate the letters, suspected that the sender was someone with whom Officer Coon had interacted during his time assigned to CMET. Based on his CMET experience, Officer Coon thought Mr. Peffer to be the primary suspect. Trooper Glentz, who later assumed responsibility for the investigation, followed up with Officer Coon. The latter justified his suspicion of Mr. Peffer on the grounds that Beemer had been instrumental in setting up a sting operation that resulted in Mr. Peffer's arrest before the suspicious letters were sent, and that Mr. Peffer had lived in Reed City.

Detective West, who assisted in the investigation, identified five possible suspects, two of whom were the Peffers. Two of the other suspects had been arrested in circumstances similar to Mr. Peffer's, based on information received from Beemer. The third suspect had been arrested on his way to sell cocaine to Beemer, and, although the record does not directly indicate that Beemer provided information that led to that arrest, the substantial similarities among the four arrests suggest this to be the case.

On March 29, 2014, Trooper Glentz received two packages in the mail, each of which contained what appeared to be marijuana seeds. The packages had been returned for insufficient postage to Trooper Glentz's residence, which was the return address on the packages. Trooper Glentz denied that he sent the packages.

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On June 16, 2014, in exchange for the prosecutor's dropping the other charges against him, Mr. Peffer pleaded no contest to the making of false pretenses in relation to his June 13, 2012, arrest.

In July 2014, Sergeant Stephens was contacted by Lieutenant Abendroth of CMET, who informed him that a number of fliers of two types had been mailed to businesses and residences in the areas of Grand Rapids and Reed City. The first type of flier contained a picture of Beemer, identifying him as a confidential informant, an ostensibly official list of charges against Beemer that had been ordered nolle prossed, and a request to contact CMET or TNT should readers have any information concerning Beemer. The second type of flier contained the same picture and list of charges, but also included the following message: "Hi, my name is Tom Beemer. I owned a dispensary in Big Rapids and was shut down because of the charges listed below. Peter Jaklevic as prosecutor set me free. Please vote for Peter Jaklevic for District Judge. Friend of criminals."

Lieutenant Abendroth told Sergeant Stephens that he believed that Mr. Peffer had authored the fliers, as well as the earlier letters, because Mr. Peffer was the only individual about whom Beemer had provided information to both CMET and TNT. Additionally, the original letters had been sent at approximately the same time that Mr. Peffer became aware that Beemer had provided information to the police, and the fliers dated from around the time of Mr. Peffer's sentencing, which Jaklevic had attended. Because the other three suspects were involved only with CMET, but not TNT,

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Sergeant Stephens decided not to investigate them further.

On July 31, 2014, Sergeant Stephens obtained a warrant from a magistrate to search a house located at 21271 Bierri Road in Reed City. This residence was owned in fee simple by Mr. and Mrs. Peffer. Sergeant Stephens's affidavit provided details as to the letters that had been sent, the suspected marijuana seeds, the fliers, and the potential connections between Mr. Peffer and the mailings. The warrant authorized the following personal property to be searched for at the house and, if found, to be seized and searched: (1) "records, files, or documents pertaining to Thomas Owen Beemer and his role as a confidential informant and/or dismissal of charges in" certain courts, with "documents" described as including "records or documents which were created, modified . . . or interpreted by a computer" and more specifically identified to include certain computer hardware, computer-related equipment, peripheral and storage devices, software and other items used for computer operation, communication, encryption, and access, as well as electronic mail ("e-mail") and other electronically stored communications or messages; and (2) "[a]ny and all mailing items including but not limited to envelopes, address labels, and stamps that match the items seized in this investigation." The magistrate issued the warrant, finding that probable cause existed for the specified searches and seizures based on the affidavit in which Sergeant Stephens detailed his assertion of probable cause that the house "may contain evidence of the crime of

Impersonating a Police Officer and Witness Intimidation.” The warrant did not rely on evidence related to marijuana cultivation, possession, or distribution as a basis for finding probable cause for any search or seizure.

On the same day the warrant issued, Sergeant Stephens and five other officers with CMET and TNT executed the warrant on the Bierri Road residence. The officers seized a number of items, including a laptop, two computer towers, two printers, a digital video recorder, an audio recorder, and a number of envelopes, stamps, and papers. After the subsequent investigation of the seized items concluded, prosecutors declined to pursue any criminal charges against the Peffers.

B. Procedural Background

On January 28, 2015, the Peffers sued Sergeant Stephens and other defendants, alleging violations of 42 U.S.C. § 1983 stemming from the traffic stop of June 13, 2012, and the home search of July 31, 2014, as well as violations of Michigan law relating to the State’s retention of money and goods belonging to the Peffers.

As is pertinent to this appeal, the Peffers alleged that Sergeant Stephens’s affidavit lacked facts sufficient to support the magistrate’s finding that there was probable cause to search the Bierri Road residence because the affidavit failed to establish that a crime had been committed or that a nexus existed between the alleged crimes and the house, in part because it failed to establish probable cause to believe that Mr.

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Peffer had committed the alleged crimes. The Peffers further alleged that Sergeant Stephens's reliance on the warrant was unreasonable, rendering qualified immunity inapplicable.

The district court rejected both arguments and granted Sergeant Stephens's motion for summary judgment, and the Peffers timely appealed.

II

We review de novo a district court's grant of summary judgment. *Watson v. Cartee*, 817 F.3d 299, 302 (6th Cir. 2016). Summary judgment is appropriate when "no genuine dispute as to any material fact" exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Fourth Amendment begins: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Here, the parties do not dispute that a search warrant was required. *See generally Kentucky v. King*, 563 U.S. 452, 459 (2011) ("It is a basic

principle of Fourth Amendment law, we have often said, that searches and seizures inside a home without a warrant are presumptively unreasonable.”) (internal quotation marks omitted).

Under the Fourth Amendment, a search warrant may be issued only “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized.” U.S. Const. amend. IV. Probable cause exists if “the facts and circumstances are such that a reasonably prudent person would be warranted in believing that an offense had been committed and that evidence thereof would be found on the premises to be searched.” *Greene v. Reeves*, 80 F.3d 1101, 1106 (6th Cir. 1996) (quoting *United States v. Besase*, 521 F.2d 1306, 1307 (6th Cir. 1975)). “The Fourth Amendment does not require probable cause to believe evidence will *conclusively* establish a fact before permitting a search, but only ‘probable cause . . . to believe that the evidence sought *will aid* in a particular apprehension or conviction.’” *Messerschmidt v. Millender*, 565 U.S. 535, 552 n.7 (2012) (alteration in original) (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)).

If a search warrant does not comply with the probable-cause requirements of the Fourth Amendment, 42 U.S.C. § 1983 provides a civil remedy for those whose constitutional rights were violated. *See, e.g., City of Ontario v. Quon*, 560 U.S. 746, 753-54 (2010). But state actors are shielded from § 1983 liability for civil damages—that is, they are entitled to qualified immunity—“insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.” *Messerschmidt*, 565 U.S. at 546 (internal quotation marks and citation omitted).

In the context of searches and seizures, “police officers are entitled to rely on a judicially secured warrant for immunity from a § 1983 action for illegal search and seizure unless the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable.” *Yancey v. Carroll Cty.*, 876 F.2d 1238, 1243 (6th Cir. 1989). That is because “the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or . . . in ‘objective good faith.’” *Messerschmidt*, 565 U.S. at 546 (quoting *United States v. Leon*, 468 U.S. 897, 922-23 (1984)). A magistrate’s issuance of a warrant, however, does not always result in qualified immunity: there is “an exception allowing suit when ‘it is obvious that no reasonably competent officer would have concluded that a warrant should issue.’” *Id.* at 547 (quoting *Malley*, 475 U.S. at 341).

In a § 1983 action, it is generally the jury’s role to determine whether probable cause supported issuance of a search warrant. *Yancey*, 876 F.2d at 1243. A district court therefore should grant a defendant’s motion for

summary judgment on the basis that a search warrant was supported by probable cause only when the only “reasonable determination” that a jury could make is that probable cause existed. *Ibid.*

The Peffers offer two arguments that the district court erred in holding as a matter of law that Sergeant Stephens’s affidavit provided probable cause for issuance of the warrant. In order for Sergeant Stephens’s affidavit to have provided probable cause, it must have presented “facts and circumstances . . . such that a reasonably prudent person would be warranted in believing that an offense had been committed *and* that evidence thereof would be found on the premises to be searched.” *Greene*, 80 F.3d at 1106 (emphasis added) (quoting *Besase*, 521 F.2d at 1307). The Peffers argue that the affidavit was deficient for failing to satisfy both requirements: they contend that no reasonably prudent person would be warranted in believing based on the affidavit either (1) that a crime had been committed or (2) that evidence of the alleged crime would be found at the Bierri Road residence. We address these arguments below.

A. The Criminality of the Alleged Conduct

The Peffers argue that the sending of the letters to the Mecosta Osceola Office of Child Services and the Reed City Public School District could not, as a matter of law, constitute commission of the crimes stated in the affidavit—witness intimidation and impersonating a police officer. *See* Mich. Comp. Laws §§ 750.122(3)(a)

(witness intimidation) and 750.215(1)(c) (impersonating a police officer).³ The Peffers contend that Sergeant Stephens therefore violated the Fourth Amendment because the affidavit did not set forth any basis to believe that evidence of criminal activity would be found.

We need not address, however, whether there was a Fourth Amendment violation on the grounds that the affidavit did not properly allege that a crime had been committed. That is because we are convinced that there was no clearly established constitutional violation and therefore qualified immunity applies.

Although we generally determine whether a constitutional violation occurred before we determine whether qualified immunity applies, we need not follow this order of inquiry when determining whether a constitutional violation occurred would require interpreting unsettled state law. *See Pearson*, 555 U.S. at 237-38 (citations omitted). “[W]hen the definition of constitutional rights depends on a federal court’s uncertain assumptions about state law,” *ibid.*, it makes

³ An affidavit sufficiently supports a warrant so long as it provides probable cause to believe evidence of any crime will be found in the location to be searched, even if it does not provide probable cause to believe that evidence of the particular crimes listed in the affidavit will be found in the location to be searched. *United States v. Anderson*, 923 F.2d 450, 457 (6th Cir. 1991) (holding “that knowledge of the precise crime committed is not necessary to a finding of probable cause provided that probable cause exists showing that a crime was committed by the defendants”). Sergeant Stephens does not argue, however, that Mr. Pepper’s alleged actions violated any criminal statutes other than Mich. Comp. Laws §§ 750.122(3)(a) and 750.215(1)(c).

sense for the federal court to decide the issue of liability on qualified-immunity grounds where, as in this case, the right arising from the determination would not be a clearly established one. *See also Egolf v. Witmer*, 526 F.3d 104, 109-12 (3d Cir. 2008) (declining to address the alleged constitutional violation and holding instead that qualified immunity applied to an arrest for public indecency where “the state law questions underlying the constitutional issues were ones of first impression for the state courts”). Here, we decline to determine whether Sergeant Stephens’s reliance on Mich. Comp. Laws §§ 750.122(3)(a) and 750.215(1)(c) caused a constitutional violation, because it was not clearly established that Mr. Peffer’s actions as alleged in the affidavit *did not* violate Mich. Comp. Laws §§ 750.122(3)(a) or 750.215(1)(c).

Section 750.122(3)(a) provides that “a person shall not do any of the following by threat or intimidation: discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.” The Peffers argue that “Defendant Stephens makes no showing that Beemer would have . . . been a witness against [the Peffers] since the charges against them were based on the evidence seized during the traffic stop and/or the evidence seized at their residence” and that when Mr. Peffer pleaded guilty in 2014, it was to false pretenses, a charge about which Beemer knew nothing.

At the time that the letters were sent, Beemer was in possession of information pertaining to the crimes with which Mr. Peffer was charged, making Beemer a potential witness.⁴ The Peffers' argument that any testimony that Beemer would have offered at trial was either irrelevant or cumulative with "evidence seized during the traffic stop and/or the evidence seized at their residence" is unconvincing, both because Beemer could have testified to Mr. Peffer's earlier marijuana sales and because there does not appear to be any Michigan precedent suggesting that the intimidation of a potential witness is excused when the testimony of that witness would be cumulative with other evidence potentially introduced at trial.

The Peffers offer no argument beyond their assertion that Mr. Peffer's alleged actions would not constitute a threat or intimidation under Mich. Comp. Laws § 750.122(3)(a). We are not aware of any Michigan case suggesting that, as a matter of law, a defendant could not be convicted under that statute where he has sent a letter to the Department of Child Protective Services pretending to be a police officer, writing that a potential witness "endangered his children by maintaining a 'Drug House' where stock marijuana was stored, prepared, and profits were taken, counted and stashed," and suggesting that the police have "concerns for the minor children."

⁴ Mr. Peffer was originally charged with possession with intent to distribute and conspiracy to distribute marijuana, and he did not plead to false pretenses until almost two years later.

Nor is it clear that, as a matter of law, Mr. Pepper's alleged actions could not constitute the crime of impersonating a police officer. Mich. Comp. Laws § 750.215(1)(c) prohibits anyone from falsely representing "to another person that he or she is a peace officer . . . with the intent to compel the person to do or refrain from doing any act against his or her will." The Peffers assert that "[t]he letters do not attempt to compel or dissuade anyone from going against their own free will" and could not therefore be violative of § 750.215(1)(c).

Nonetheless it is clear that the letters were attempting, through deception, to elicit a response from the recipients that they otherwise would not freely undertake. The letter to the Reed City Public School District says that "[a]lthough there hasn't been any credible threat, I felt you should be informed, as to take any and all necessary precautions." And the letter to the Mecosta Osceola Office of Child Services says, "There are concerns for the minor children. Your help in addressing this issue will be greatly appreciated."

It is an open question of Michigan law whether a private citizen writing under the guise of a police officer to request an official to perform an official action constitutes an attempt to "compel" action under § 750.215(1)(c).⁵ We therefore cannot say that it is clear

⁵ There is a single unreported case from the Michigan Court of Appeals discussing this issue, but it is not dispositive, in part because it analyzed an earlier version of that statute, which prohibited a person falsely representing himself as a police officer from taking "it upon himself to . . . require any person to aid or

that Michigan courts would find that a request from a (purported) police officer to assist minor children in (imagined) danger is not, as a matter of Michigan law, an attempt to “compel” the recipient of the request to act.

Accordingly, we hold that even if the sending of the letters were not criminal under Mich. Comp. Laws §§ 750.122(3)(a) and 750.215(1)(c), the law on this point was not clearly established. Sergeant Stephens thus would be protected by qualified immunity from liability for executing an otherwise valid search warrant seeking evidence that Mr. Peffer violated those criminal statutes.

B. The Nexus Between the Evidence Sought and the Bierri Road Residence

We next turn to the Peffers’ contention that the warrant was constitutionally defective because the affidavit failed to present facts sufficient to establish that “evidence thereof would be found on the premises to be searched.” *Greene*, 80 F.3d at 1106 (quoting *Bessase*, 521 F.2d at 1307).

1. The Nexus Between Mr. Peffer and the Mailings

The Peffers first argue that there was no connection between evidence of the mailings and the Bierri

assist him or her in any matter pertaining to the duty of a . . . police officer.” *Owen v. Unadilla Twp.*, No. 206769, 1999 WL 33451605, at *2 n.3 (Mich. Ct. App. Apr. 9, 1999).

Road residence by contending that Sergeant Stephens's affidavit fails to lay out a sufficient basis for the magistrate's finding of probable cause that Mr. Peffer was the sender of the various mailings. Because the affidavit alleges Mr. Peffer as the only link between the mailings and the Bierri Road residence, if there was no probable cause to believe that he originated the mailings, there would be no probable cause to believe that evidence of the mailings would be found at the Bierri Road residence. The Peffers raise a number of points in support of this claim, two of which warrant discussion.

They begin by suggesting that Sergeant Stephens's inclusion in the affidavit of the statement that "Det. Coon informed D/Sgt. Lator that he suspected Jesse Lee Peffer . . . as being the author and sender of the letters based on his CMET experience and contacts" was nothing more than the "unsupported conclusion[] of Defendant Coon" and that "no facts . . . were attested to so that the magistrate could draw his own conclusion."

Although the Peffers may be correct that Detective Coon's suspicion, unsupported by an articulation of its basis, would be insufficient to support a finding of probable cause,⁶ it does not follow that because *this* paragraph in the affidavit cannot provide probable cause to believe that Mr. Peffer was the originator of the

⁶ See, e.g., *United States v. Giacalone*, 541 F.2d 508, 513 (6th Cir. 1976) (en banc) ("[P]robable cause is a showing of more than suspicion but less than guilt.").

mailings, the affidavit as a whole fails to do so. *See United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004) (“The affidavit should be reviewed in a commonsense—rather than a hypertechnical—manner, and the court should consider whether the totality of the circumstances supports a finding of probable cause, rather than engaging in line-by-line scrutiny.”).

Taken as a whole, the affidavit clearly supports the magistrate’s finding of probable cause to believe that the mailings originated with Mr. Peffer. Specifically, Sergeant Stephens averred: (1) Beemer had provided information that led to Mr. Peffer’s arrest; (2) the letters naming Beemer had been sent after Mr. Peffer’s arrest; (3) the fliers, which specifically named a prosecutor who had been present at Mr. Peffer’s sentencing, had been sent within two weeks of said sentencing; (4) Trooper Glentz received the marijuana seeds while he was trying to contact Mr. Peffer; (5) Mr. Peffer was the only person on whom Beemer had informed whom Trooper Glentz had attempted to contact; (6) the fliers asked for any information regarding Beemer to be forwarded to CMET and TNT, and Mr. Peffer was the only individual in the counties targeted by the mailings who had been charged with crimes stemming from interactions with both CMET and TNT; and (7) the mailings had been postmarked from Grand Rapids, which is the central sorting facility for the area where the Bierri Road residence is located.⁷ We agree with the

⁷ To the extent that the Peffers contend that Sergeant Stephens came by these facts not through direct investigation but instead through the investigations of other officers, we note that

district court that no reasonable jury could fail to find that Sergeant Stephens's affidavit provided "adequate supporting facts about the underlying circumstances to show that probable cause exist[ed]" to connect Mr. Pepper to the mailings. *See Weaver*, 99 F.3d at 1377.

The Peffers next assert that even if the magistrate correctly found that the affidavit provided probable cause to believe that Mr. Pepper was connected with the mailings, Sergeant Stephens was unable to rely on that determination because he included false or misleading statements in the affidavit. They argue that the following three statements (italicized below) are instances of Sergeant Stephens's obfuscation:

- (1) *"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."* Appellants' Br. 11 (italics added). The Peffers argue that in the context of the affidavit, the phrase "this area" refers to Mecosta County and Osceola County, in which the Bierri Road residence is located. The Peffers argue that mail sent from the Bierri Road residence in Reed City, Osceola County, is actually sorted at the Traverse City sorting facility, which would indicate that the mailings were not sent from the Bierri Road residence.

"supporting facts need not be based on the direct knowledge and observations of the affiant." *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir. 1998).

- (2) “*There are similarities in content and format between the various flyers.*” Appellants’ Br. 14 (italics added). The Peffers argue that this statement is misleading because there are a number of differences between the individual fliers as well as between the fliers and the letters, including their addressees, content, and formatting.
- (3) “*Jesse Peffer told Dep. Start that he resides at the residence alone and that Julie lives in Florida.*” Appellants’ Br. 16 (italics added). The Peffers argue that this statement was misleading because Sergeant Stephens failed to include the fact that Mr. Peffer’s attorney had earlier told Trooper Glentz that Mr. Peffer was residing in Florida.

In order to prove that Sergeant Stephens could not rely on the magistrate’s finding of probable cause, the Peffers would need to show both that Sergeant Stephens “knowingly and deliberately, or with reckless disregard for the truth, made false statements or omissions that create[d] a falsehood,” and that “such statements or omissions [we]re material, or necessary, to the finding of probable cause.” *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010) (alterations in original) (citing *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)). They are unable to make this showing for any of the statements.

Taking the evidence in the light most favorable to the Peffers, Sergeant Stephens’s statement that

“Grand Rapids, Michigan . . . is the central sorting facility for the U.S. Postal Service for this area” was intended to convey to the magistrate that Grand Rapids was the central sorting facility for the area including the Bierri Road residence. But mail sent from Reed City is actually sorted through the Traverse City sorting center, which services an area adjacent to that serviced by the Grand Rapids sorting center.

Regardless of the truth value of Sergeant Stephens’s statement, no reasonable jury could have found that it was material to the magistrate’s determination that there was probable cause to believe that Mr. Peffer was the originator of the mailings. As discussed above, the affidavit established a motive unique to Mr. Peffer for sending the mailings as well as a temporal proximity between the mailings and the motivating incidents. That the mailings originated from the geographical area serviced by the neighboring postal sorting center, which is easily accessible from the Bierri Road residence, would not materially impact the determination that there was probable cause to believe that Mr. Peffer had mailed the letters.

The Peffers next charge that Sergeant Stephens was disingenuous in asserting that the fliers were similar. But the fliers are, in fact, similar. They name Beemer as a confidential informant, they list the counts with which he was charged, they are typed in the same, or very similar, fonts, and they contain what appear to be versions of the same picture of Beemer. They are also similar to the letters that had been sent earlier because all the non-marijuana mailings named

Beemer as a confidential informant and were computer-generated. Accordingly, Sergeants Stephens's statement that "[t]here are similarities in content and format between the various fliers" is not false.

The Peffers argue that the statement was nevertheless misleading for failing to mention the differences between the mailings, including that the *letters* were addressed to specific entities, purported to be from Officer Coon, and were non-political, whereas the *fliers* were not addressed to specific entities (but were mailed to specific entities), were political, and did not purport to be from Officer Coon.⁸

Sergeant Stephens could not have been exhibiting a reckless disregard for the truth when he failed to mention these differences in his statement that the fliers share certain similarities, because elsewhere in the affidavit he provided detailed descriptions of the mailings which, when compared, reveal that they differ exactly in the respects described by the Peffers. Sergeant Stephens's statement that the fliers are similar is properly read as a conclusory summary of his earlier descriptions, which contained all the relevant information to which he had access, and not as a standalone statement that, if read in isolation, was potentially misleading.

The Peffers further contend that although the statement that "Jesse Pepper told Dep. Start that he resides at the residence alone and that Julie [Pepper] lives

⁸ The Peffers' brief also references a chart listing minor, but immaterial, grammatical differences among the various mailings.

in Florida” is true, it misled the magistrate by failing to mention that Mr. Pepper’s attorney had told Trooper Glentz that Mr. Pepper was residing in Florida. The statement to Trooper Glentz was made on April 4, 2014, almost four months before Mr. Pepper told Deputy Start in person that he resided at the Bierri Road residence. Other than the mere fact that Sergeant Stephens omitted the earlier statement, the Peffers have offered no evidence that Sergeant Stephens’s omission was borne of an intent to deceive or of recklessness as to such deception. Even when an affiant has omitted information critical to the finding of probable cause, we have expressed reticence to infer intent or recklessness without evidence beyond the omission itself. *See United States v. Colkley*, 899 F.2d 297, 301 (6th Cir. 1990).

But even if it is possible that a reasonable jury could, in light of the false statement regarding the sorting center, conclude that this omission was part of a general attempt to mislead the magistrate as to the likelihood that Mr. Pepper had been in the relevant areas at the relevant times, the Peffers cannot show that this omission was material to the magistrate’s conclusion that there was probable cause to believe that the mailings originated with Mr. Pepper. Whether or not Mr. Pepper spent part of his time in Florida, it is uncontested that he spent part of his time in Michigan, which would have afforded him ample opportunity to dispatch the mailings.

2. *The Nexus Between the Mailings
and the Bierri Road Residence*

Finally, the Peffers argue that even if the affidavit presented facts sufficient for a reasonably prudent person to believe that Mr. Peffer had sent the mailings, it lacked sufficient facts to support a reasonably prudent person in believing that evidence of those mailings would be found at the Bierri Road residence. They base this argument on the general lack of evidence presented in the affidavit connecting the mailings with the Bierri Road residence, and specifically on the fact that no assertion was made that Mr. Peffer owned either a computer or a printer or, if he did, that he kept those items at the Bierri Road residence.

Sergeant Stephens argues that the magistrate was reasonable in finding a connection between the Bierri Road residence and the items to be sought because the affidavit reported that the letters and fliers appeared to be computer-generated, and that based upon Sergeant Stephens's training and experience, evidence of those documents was likely to be found on an electronic storage device, which he argues would likely be kept at its owner's residence.

Because probable cause depends upon the belief of an idealized reasonably prudent person, "whether an affidavit establishes a proper nexus is a fact-intensive question resolved by examining the totality of circumstances presented." *United States v. Brown*, 828 F.3d 375, 382 (6th Cir. 2016). The fact-intensive nature of the inquiry "has resulted in a wide river of cases that

courts have sought, sometimes in vain, to direct into tributaries that may be applied to comparable fact patterns.” *Id.* at 381-82.

Our analysis of the instant case starts at the river’s source—cases in which an affidavit establishes probable cause to believe that a resident of the place to be searched has committed a crime, but provides no further indication that evidence of that crime will be found at the domicile. We long ago determined that in order to support a finding of probable cause, “the affidavit must suggest 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’ and not merely ‘that the owner of property is suspected of crime.’” *United States v. McPhearson*, 469 F.3d 518, 524 (6th Cir. 2006) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978)).

The requirement that there be additional reason to think that evidence of the crime will be found in the criminal’s residence is not as onerous as it may appear. A magistrate may infer that the evidence sought is likely to be found in the criminal’s residence based on “the type of crime being investigated, the nature of the things to be seized . . . and the normal inferences that may be drawn as to likely hiding places,” and “it is reasonable to suppose that some criminals store evidence of their crimes in their homes, even though no criminal activity or contraband is observed there.” *United States v. Williams*, 544 F.3d 683, 686-87 (6th Cir. 2008).

It appears to be a question of first impression in this circuit whether the nature of a computer is such that its use in a crime is alone sufficient to justify an inference that, because of “the nature of the things to be seized,” *ibid.*, evidence of the crime is likely to be found in the alleged criminal’s residence. But this question is not a difficult one to answer based on basic principles.

As a general rule, it is reasonable, *ceteris paribus*, to assume that a person keeps his possessions where he resides.⁹ This presumption is of course rebuttable and cannot always be relied upon by a magistrate in finding a nexus between the object used in a crime and the alleged criminal’s residence, because the “totality of circumstances presented” in the affidavit may suggest that the object is more likely to be found elsewhere or nowhere at all. *Brown*, 828 F.3d at 382. The affidavit may, for example, include evidence suggesting that the object was not owned by the alleged criminal; that it was discarded, sold, or was otherwise disposed of; that the alleged criminal, while retaining possession of the object, stores it elsewhere than his residence; or that the object no longer exists.

⁹ See, e.g., *United States v. Aljabari*, 626 F.3d 940, 946 (7th Cir. 2010) (“When probable cause exists to believe an individual has committed a crime involving physical evidence, and when there is no articulable, non-speculative reason to believe that evidence of that crime was not or could not have been hidden in that individual’s home, a magistrate will generally be justified in finding probable cause to search that individual’s home.”).

If an affidavit presents probable cause to believe that a crime has been committed by means of an object, however, a magistrate may presume that there is a nexus between that object and the suspect's current residence, unless the affidavit contains facts that may rebut that presumption.¹⁰

And although we have not articulated this presumption in precisely this manner, it underlies our previous decisions in cases analyzing the connection between the objects used in a crime and the alleged criminal's residence. Our jurisprudence in this area has not always been as clear as one might hope, but an analysis of several of our nexus-jurisprudence tributaries shows that it is not as muddled as one might fear.

When it comes to guns, because we “have acknowledged that individuals who own guns keep them at their homes,” *United States v. Smith*, 182 F.3d 473, 480 (6th Cir. 1999), a suspect's use of a gun in the commission of a crime is sufficient to find a nexus between the gun that was used and the suspect's residence. For example, in *United States v. Vanderweele*, an informant told an ATF agent that he had seen Vanderweele in possession of a silencer at a clubhouse. 545 F. App'x 465, 467 (6th Cir. 2013). The agent sought a search warrant for Vanderweele's residence based on nothing more than the informant's statement that

¹⁰ As with all findings of probable cause, this presumption is subject to a staleness analysis. The Peffers did not argue that any probable cause established in the affidavit had gone stale.

Vanderweele had been in possession of a silencer and his awareness, “based on his training and experience, ‘that firearms, ammunition, and related items are commonly stored within the owner or possessor’s dwelling.’” *Id.* at 469. We held that based on these alleged facts, “[t]he magistrate judge had reason to believe that the silencer would be found at Vanderweele’s house,” and we upheld the warrant. *Ibid.*

This is consistent with our holdings in similar cases.¹¹ *See, e.g., United States v. Goodwin*, 552 F. App’x 541, 546 (6th Cir. 2014) (upholding a warrant to search illegal-gun purchaser’s residence where an affidavit

¹¹ It is also consistent with the approach taken by many, but not all, of our sister circuits. *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) (“It was reasonable for the magistrate to believe that the defendant’s gun and the silencer would be found in his residence . . . even though the affidavit contained no facts that the weapons were located in defendant’s trailer.”); *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (upholding a warrant on the basis that “people who own pistols generally keep them at home or on their persons”); *United States v. Rahn*, 511 F.2d 290, 293-94 (10th Cir. 1975) (upholding a warrant because “it is reasonable to assume that [defendant’s] house was where he kept things and it is pretty normal . . . for individuals to keep weapons in their homes”); *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir. 1973) (upholding a warrant because a “reliable informant stated that on the day after the robbery [Defendants] were still armed with automatic pistols” and “[a] very likely place to find them thereafter would either be on the persons of the assailants or about the premises where they lived”). *But see United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979) (invalidating a warrant because there was “nothing in the affidavit from which a factual finding could be made that the gun used in the shooting was probably located at defendant’s premises” and “[c]ommon sense tells us that it is unlikely that a murderer would hide in his own home a gun used to shoot someone”).

established that the gun sought was valuable and that “owners usually keep machine guns in their homes”); *United States v. Cobb*, 397 F. App’x 128, 133 (6th Cir. 2010) (upholding a warrant to search bank robber’s residence for the clothing and gun he had used during a robbery because the “reasonable inference is that this clothing and gun likely would have been in [defendant’s] possession six weeks following the final robbery”).¹²

It is clear that the use of a gun in the commission of a crime is sufficient to establish a nexus between the suspected criminal’s gun and his residence. Computers are dissimilar to guns in many ways, including the nature of the crimes in which they are used and the relative ease with which guns can be transported and discarded. Computers are similar to guns, however, in

¹² This area of our jurisprudence is admittedly murky. In *United States v. Bethal*, the panel declined to find a nexus between the gun the defendant used in a shooting and his residence, despite the affidavit’s asserting that the defendant had been “identified as one of the drive-by shooters.” 245 F. App’x 460, 469 (6th Cir. 2007). Over a dissent, the panel reasoned that because “persons accused of murders often dispose of the guns utilized in the crime soon afterward” and “the affidavit . . . provided no indication that at the time of the search, [Defendant] was still participating in gang-related shootings, or was seen carrying a gun,” the affidavit failed “to establish any relationship between [Defendant]’s residence and the fair probability that weapons and drugs would be found there.” *Id.* at 468-69. We question *Bethal*’s emphasis on ongoing criminal conduct and are not bound by this unreported decision. See *United States v. Ennenga*, 263 F.3d 499, 504 (6th Cir. 2001) (“We need not concern ourselves with any perceived inconsistency, however, because [*inconsistent case*] is an unpublished case and therefore not a controlling precedent.”).

that they are both personal possessions often kept in their owner's residence and therefore subject to the presumption that a nexus exists between an object used in a crime and the suspect's current residence. This is borne out by our cases involving the consumption of child pornography via computer.

Although we have never been asked to pass judgment on a magistrate's finding of a nexus between the computer used to consume child pornography and the alleged consumer's residence based on nothing more than the use of the computer, we have placed our imprimatur on a number of search warrants issued based on affidavits with scant evidence supporting a nexus beyond the use of a computer. *See, e.g., United States v. Elbe*, 774 F.3d 885, 890 (6th Cir. 2014) (finding that affidavit established nexus because the suspect's residence had high-speed internet and the suspect had been observed using a laptop on his front porch); *United States v. Lapsins*, 570 F.3d 758, 766 (6th Cir. 2009) (finding that affidavit established nexus because the IP address used to distribute prohibited material was accessed by a residential modem located in the general vicinity of suspect's residence and that suspect had participated in an online chat regarding prohibited material between the hours of 6:30 and 8:30 a.m., when suspect would be at home); *United States v. Terry*, 522 F.3d 645, 648 (6th Cir. 2008) (finding nexus because affidavit established that the suspect had a computer at his residence and had sent an email containing prohibited material at approximately 2:30 a.m.).

Just as guns, and other possessions, are generally kept in the home, so too are computers, and so we readily find a nexus between computers used in the consumption of child pornography and the suspected consumer's residence.

The principle that we are now articulating also explains why we are more reticent to find a nexus between drugs and their distributor's residences. In *Brown*, the defendant was apprehended leaving the location of a sale of more than 500 grams of heroin, and was found to be in possession of \$4,813 in currency. 828 F.3d at 378-80. Responding to the Government's argument that "the magistrate judge was entitled to infer that evidence of drug trafficking would be found at Brown's residence because he was a known drug dealer," we pointed out that "we have never held . . . that a suspect's status as a drug dealer, standing alone, gives rise to a fair probability that drugs will be found in his home." *Brown*, 828 F.3d at 383. Recognizing that "[i]n the case of drug dealers, evidence is likely to be found where the dealers live," we nevertheless held that "if the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity, or the evidence of this connection is unreliable, it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer." *Id.* at 383-84.

This is because, unlike guns and computers that are used in the commission of a crime, when drugs are used in the commission of a distribution offense, the distributed drugs are no longer in the possession of the suspected distributor. The affidavit therefore must

establish some other reason to believe that drugs or other evidence of crime would be found in the suspect's residence if searched. *See, e.g., United States v. Raglin*, 663 F. App'x 409, 411-12 (6th Cir. 2016) (finding nexus because affidavit established that a suspect drove to the defendant's house directly after trafficking drugs, at which point \$38,000 appeared in a purse on the roof and the defendant's girlfriend told officers that guns were in the house); *United States v. Kenny*, 505 F.3d 458, 461 (6th Cir. 2007) (finding probable cause because affidavit established that an informant identified the defendant as the "cook" of a large ongoing trafficking operation that was taking place on his property, which was corroborated by independent evidence); *United States v. Newton*, 389 F.3d 631, 636 (6th Cir. 2004) (explaining that affidavit established that defendant was engaged in a "continual and ongoing" drug distribution scheme), *rev'd on other grounds*, 546 U.S. 803 (2005); *United States v. Jones*, 159 F.3d 969, 974 (6th Cir. 1989) (finding that affidavit established that defendant was seen distributing narcotics directly outside of his domicile). Unlike drugs, guns and computers are objects that generally remain in the suspect's possession after commission of the crime, and therefore it is reasonable to believe those possessions to be stored at the suspect's residence, absent evidence to the contrary.

Here, the affidavit included allegations that Mr. Peffer had used a computer in the commission of his crime, that evidence of the crime would likely be found on that computer, and that Mr. Peffer resided at the Bierri Road residence, thereby establishing a

presumption that evidence of the crime would be found at the Bierri Road residence. That the affidavit did not allege that Mr. Peffer owned a computer or that he kept one at the Bierri Road residence is immaterial, because the averment that he used one in the commission of a crime is sufficient to create the presumption that it would be found at his residence. *See e.g., Vanderweele*, 545 F. App'x at 469. The affidavit did not suggest any reason to believe that Mr. Peffer had used a computer that did not belong to him, that he had thrown out or otherwise disposed of the computer, or that he kept the computer elsewhere. Indeed, the affidavit did not suggest any reason to believe that the computer used in the commission of the crime would not be found at the Bierri Road residence, and therefore the only reasonable conclusion that a jury could draw is that a nexus existed between the evidence sought and the Bierri Road residence.

Because Sergeant Stephens executed a valid warrant supported by probable cause as to a connection between the mailings and the Bierri Road residence, when he searched that house, there was no Fourth Amendment violation on this ground. Because there was no constitutional violation, we need not address the second step of the qualified-immunity analysis, whether the law was clearly established.

III

For the forgoing reasons, we **AFFIRM**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIE PEFFER,
JESSE PEFFER,

Plaintiffs,

v

JASON COON,

Defendant.

No. 1:15-cv-00078

HON. GORDON J. QUIST

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STIPULATION AND ORDER OF DISMISSAL

(Filed Jan. 19, 2017)

IT IS HEREBY STIPULATED AND AGREED,
by and between counsel hereto, that the above-cap-
tioned matter be dismissed as to Defendant Jason
Coon with prejudice and without costs, interest or at-
torney fees to any party.

J. NICHOLAS BOSTIC,
PLLC

PLUNKETT COONEY

/s/ J. Nicholas Bostic

/s/ Susan A. Finnegan

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DATED: January 19, 2017

ORDER

At a session of said Court, held in the United States District Court for the Western District of Michigan, Southern Division, on: January 19, 2017

PRESENT: GORDON J. QUIST. U.S. District Judge

This matter having come before the Court through stipulation, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the above-captioned matter may be, and the same hereby is, dismissed as to Defendant Jason Coon with prejudice and without costs, interest or attorney fees to any party.

/s/ Gordon J. Quist

Gordon J. Quist
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIE PEFFER and
JESSE PEFFER,

Plaintiffs,

v

No. 1:15-cv-78

MIKE STEVENS,
NATHAN EDWARDS,
and JASON COON,

HON. GORDON J. QUIST

Defendants. /

ORDER SETTING FORTH RULINGS
ON DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

(Filed Jul. 29, 2016)

For the reasons set forth below and more fully explicated following oral argument held today on Defendants' motions for summary judgment:

1. Defendant Coon's Motion for Summary Judgment (ECF No. 48) is **GRANTED IN PART AND DENIED IN PART**. The motion is **denied** with regard to Counts 1 and 2 because issues of fact remain as to whether Defendant Coon searched Julie's purse; whether Defendant Coon had a sufficient basis to do a protective search of Julie's purse; and whether Defendant Coon had probable cause to seize the cash from Julie's purse. The *Rooker-Feldman* doctrine, collateral estoppel, and

the plain view exception are not applicable. The motion is **granted** with regard to Count 3 on the basis of qualified immunity and **granted** with regard to Counts 6 and 7 because there is no evidence that defendant Coon personally possessed Jesse's money or cell phone at the time of the alleged conversion and Defendant Coon is entitled to governmental immunity.

2. Defendant Stephens's Motion for Summary Judgment (ECF No. 51) is **GRANTED**, and Counts 4 and 5 are **DISMISSED**. The warrant was supported by probable cause, and even if probable cause did not exist, the *Leon* good faith exception applies. In addition, Plaintiffs failed to demonstrate that Defendant Stephens knowingly made any false statements in the warrant affidavit. In the Court's judgment any misstatement regarding the zip code issue was not material to the existence of probable cause.
3. Defendant Edwards's Motion for Summary Judgment (ECF No. 53) is **GRANTED**, and Count 8 is **DISMISSED**. Plaintiffs failed to show that Defendant Edwards possessed their property, as required for a conversion claim, and Defendant Edwards is entitled to governmental immunity.
4. The case will proceed on Counts 1 and 2. As recognized at oral argument, Count 9 does not state a separate claim for relief. It seeks a specific remedy.

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IT IS SO ORDERED.

Dated: July 29, 2016

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIE PEFFER and
JESSE PEFFER,
Plaintiffs,

v.

File No. 1:15-CV-78

MIKE STEPHENS,
NATHAN EDWARDS,
and JASON COON,
Defendants.

/

Hearing re: Defendants'
Motions for Summary Judgment

Before

THE HONORABLE GORDON J. QUIST
United States District Judge
July 28, 2016

* * *

APPEARANCES

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July 28, 2016

1:58 p.m.

- - -

PROCEEDINGS

THE COURT: Julie and Jesse Peffer against Mike Stephens and others, docket number 1:15-CV-78, time set for oral argument on motions for summary judgment by all the defendants. Can I have the appearance of counsel, please?

MR. BOSTIC: Good afternoon, Your Honor. Nick Bostic on behalf of Mr. and Mrs. Peffer who are seated here at counsel table.

THE COURT: Thank you.

MS. VOGLER: May it please the Court, Lisa Vogler on behalf of Nathan Edwards.

THE COURT: Okay.

MR. FROEHLICH: Good afternoon, Your Honor. Joe Froehlich appearing on behalf of Detective/Sergeant Stephens.

THE COURT: Thank you.

MS. DENSHAM: Good afternoon, Your Honor. Sandra Densham appearing on behalf of Defendant Jason Coon.

THE COURT: Thank you.

Counsel, let me tell you I have laryngitis. You [4] probably have noticed it, and it gets worse – the more I talk, it gets worse, so I’m not going to participate like I usually do with a lot of questions and all that. But let me tell you I’ve spent a considerable amount of time on the case and I will tell you what my tentative conclusions are, and I don’t have to read my own writing because I now have a computer that prints it as I dictate it.

Regarding Count 1, that’s the count that – I’ll just use your first names if you don’t mind so that it will just make it easier for everybody. Julie alleges that Defendant Jason Coon violated the rights of Julie by searching her purse on June 13, 2012. Mr. Coon concedes that there’s a factual dispute as to whether he ever searched the purse. Ms. Peffer, Julie Peffer said that he did. Coon said he didn’t and the police report backs Coon’s version, but there’s still an issue of fact as to whether he searched the purse.

My tentative conclusion there is that Coon’s reliance upon the fact that Jesse had been arrested does not justify the search of Julie’s purse. I’ll go into it in a little bit more detail about it. Cases that were cited where the officer made a search during criminal activity do not support Coon’s position in that regard. There was no report from third parties, no reasonable

suspicion regarding any criminal activity on behalf of Julie. That's where I'm coming from. I've got more detail about it.

[5] Regarding Count 2, that's a claim brought by Julie again. She alleges that Jason Coon unlawfully seized her cash in the amount of \$1,757 without a warrant and without probable cause. Mr. Coon argues that the claim regarding the cash is barred by the doctrine of collateral estoppel or what is called claim preclusion.

That doesn't stand up in my judgment. That argument at least doesn't stand up under Michigan law which does not give collateral estoppel effect to consent judgments. One case in that regard is *American Mutual Liability Insurance Company against Michigan Mutual Liability Company*, 64 Mich App 315, on the Westlaw printout particularly Page 7. And it's also picked up, by the way, in a federal court, and that is *Corey against Corey*, 212 Westlaw 5945164, Eastern District of Michigan Bankruptcy Court, on Page 5 of that opinion.

The *Rooker-Feldman* doctrine doesn't help Coon in that regard. That applies only to when the plaintiff complains of injury from the state court judgment. Here Julie is not complaining about injury from the state court judgment. She's complaining about injury arising from the seizure of the cash. I refer the parties to *Exxon Mobil Corporation against Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 2005.

Count 3, Jesse alleges – you’re taking good notes here, everybody? Okay. Am I going to [sic] fast? I am going to [sic] [6] fast?

MS. VOGLER: No, you’re fine, Your Honor.

THE COURT: Okay. Count 3, Jesse alleges that Mr. Coon seized his telephone without a warrant and unlawfully searched the contents of the telephone without a warrant to locate the telephone numbers of the plaintiff, Julie Pepper. Jason Coon alleges he had reasonable expectation of privacy in the telephone and the telephone numbers he called.

This claim in my judgment is barred by the doctrine of qualified immunity. Events here occurred in June 2012. As stated by the judge in *United States v. Gholston*, 993 F. Supp. 2d 704, 711, Eastern District of Michigan, the legality of a warrantless search – searches of cell phones incident to arrest remains a point of discussion and disagreement among the courts and an open question in the Sixth Circuit, but it was decided that such searches would be illegal in *Riley v. California* by the United States Supreme Court. That’s 134 S. Ct. 2473, 2488-92, 2014, which held that the police may not search the cell phone of an arrestee without a warrant. The problem with any reliance on that case, it came after the search, so you didn’t have any Sixth Circuit law and you didn’t have any Supreme Court decision that would make it clearly illegal, so I would dismiss that count.

Regarding Counts 4 and 5, these are counts in which Jesse alleges that the Defendant Mike Stephens

swore to facts [7] in an affidavit requesting the search warrant for the entire dwelling at Bierri Road, Reed City. It's alleged that the affidavit failed to establish any connection between the flyers and the plaintiffs' dwelling. The alleged affidavit also states there was no nexus or probable cause – the alleged argument is that there was no nexus or probable cause to show anything illegal going on in the residence. The search of the residence was therefore unreasonable and a violation of the Fourth Amendment of the Constitution. This is a search that occurred I think in July of 2014. But the rationale also applies to Count 5 because both go to the validity of the warrant.

Without going into all the detail, I would dismiss those counts because the argument really goes to the issue that the conclusion was wrong by apparently the magistrate or the district judge, whoever, and the officer, but there's no allegation that I saw that there were any lies in the affidavit or anything that was unreasonable, and then he would have a reasonable basis to rely on an affidavit – I mean, on the warrant issued by the appropriate court officer, which happened here. So that goes to Counts 4 and 5. Count 5 alleges that Mr. Stephens seized personal property belonging to the plaintiffs without probable cause and without exception to the Fourth Amendment.

Counts 6 and 7 allege common law conversion from [8] retention of the cell phone and bond money in 2012. This count alleges total damages, this is Count 6 now, of \$665. The defendant is Mr. Coon. And then in Count 7 Jesse alleges conversion of a cell phone and

bond money in 2012. Once again the defendant is Jason Coon.

There was a resolution of the criminal case pending against Jesse Pepper, but his bond money and cell phone were not returned. Apparently the items have now been returned. But in any event I would dismiss the case, those claims, because it's undisputed that Mr. Coon left the Sheriff's Office, Sheriff's Central Michigan Enforcement Team, in 2013, and there was no allegation that he personally possessed the money or cell phone at the time of the alleged conversion.

In addition, he's entitled to governmental immunity on the conversion claim. First, the acts were undertaken during the course of his employment. Two, he performed the acts in good faith and without malice. And three, the acts were discretionary as distinguished from ministerial, and he fails to show any facts that Coon acted with malice.

Regarding Count 8, Jesse alleges that after the search warrant in 2012 many items of property were not returned. The count is against Nathan Edwards. It's undisputed that Edwards did not execute the search warrant, and even if he had, the property by state law is in the custody of the seizing agency. That's Michigan Compiled Laws [9] Section 333.7532(2), and I'll just cite M.C.L. which I think was cited by the plaintiffs, Section 780.655 which governs an officer in the execution of a search warrant regarding the property or things covered by a search warrant, but it's the seizing

agency under the prior statute, not the officer in this case, that is responsible for retaining those things.

Regarding the count for exemplary damages, I don't see that's a separate count. It doesn't allege a separate claim. It alleges a form of relief. In other words, I think that you're not in your – Mr. Bostic, I think that's what you put in a prayer for relief as distinguished from a count.

Okay. That's where I'm coming from. I can go in a little detail. Once I make the final decision, I will. Is my voice coming back or is it going away? Mr. Bostic and I know each other quite well, so –

MR. BOSTIC: You're at about 50 to 60 percent.

THE COURT: Sixty, okay. I'm losing it here. But anyway, how do you want to proceed? In other words, right now the defendants are ahead except for Counts 1 and 2. So, Ms. Dersham (sic) why don't you go ahead and tell me why I'm wrong.

MS. DENSHAM: Thank you, Your Honor.

THE COURT: There's a lot here. That's why I have to read my writing here – not my writing, my typing.

MS. DENSHAM: Well, if I recorded the Court's [10] comments correctly with respect to Count 1, the Court found a factual dispute with respect to whether Defendant Coon actually executed the search or whether it was the other officer there. I would just

rely on our reply brief, specifically Page 2, the Supreme Court's ruling in the *Scott* case, where the Court stressed there that there must be a genuine issue of fact. There can be disputes, but in this case with –

THE COURT: Yeah, but in *Scott* they had a videotape depicting the actual facts and here you don't have that. Here you have on the one hand and on the other hand, and that makes it a jury issue.

MS. DENSHAM: For the record, Your Honor, I would –

THE COURT: But there's a videotape in *Scott*.

MS. DENSHAM: I'm sorry?

THE COURT: I think there was a videotape in *Scott* that couldn't be denied.

MS. DENSHAM: And I'm not – I don't know that, Your Honor. I just – in this case we're just – we're relying on the fact that at the time contemporaneous with how all these events went down, Trooper Frayre submitted his report where he stated that he obtained consent from Julie Peffer in regards of whether there was consent or not. He stated that he searched her purse. And the only person who says that my client, Jason Coon, searched Ms. Peffer's purse was Ms. Peffer [11] who had never met –

THE COURT: Yeah, but that's not an argument on a motion for summary judgment. I have to

take all the facts in the light most favorable to the party opposing the motion.

MS. DENSHAM: All right.

THE COURT: Unless they're clearly, you know, crazy, like the world is flat, or the other case I used to get all the time from a particular lady that she was assaulted by Bill Clinton at the hotel across the street. That kind of thing we can ignore. But when you have witnesses that were both at the point – you can have ten witnesses. It wouldn't make any difference. If she says that, you know, it was your client, that's it.

MS. DENSHAM: All right. Your Honor, I'll move on then just to – presuming in the light most favorable to the plaintiffs that it was Defendant Coon who executed the search, he had a reasonable basis to do so in fact under all of the circumstances of the arrest of Ms. Peffer's husband and just ascertaining whether there was any weapons or any drugs in her purse. And I think even Ms. Peffer conceded that when the search was conducted, she presumed it was for a search of weapons or drugs, and it wasn't until after she opened her purse more to obtain her driver's license and the cash was in plain view that the cash was seized at that time.

THE COURT: Well, I think – yeah, I think now [12] you're getting there, but it's a close question. There's nothing really to tie the wife in to drug dealing, and the only reason that they could have – the only legal reason that they could have searched the purse at that point in time with no warrant or anything

would be to protect themselves in case they had a suspicion or a reasonable basis to believe that she had some kind of weapon that would interfere with it. But anyway, I got your point.

MS. DENSHAM: All right. And I think when you say the only reason, I think that that is – it may be, you know, the only reason, but it certainly is a very important reason and one that is routinely exercised by law enforcement officers in situations such as this, especially when there's a spouse who's on the scene, not just some uninterested passerby.

THE COURT: I understand.

MS. DENSHAM: And then with respect to the seizure of the cash, if I'm understanding the Court's reasoning, the Court cited a couple of cases, and we would just rely on the arguments –

THE COURT: Okay.

MS. DENSHAM: – in our brief in that respect. I have not read the cases that the Court cited, so I don't have anything more to offer at that point other than the arguments in our brief and the fact that that was in plain view and [13] seized at that time. And I don't have anything else unless the Court has questions.

THE COURT: Not right now.

MS. DENSHAM: All right. Thank you, Your Honor.

THE COURT: Thank you very much, ma'am.

Mr. Bogren? I don't think I'm wrong on much of this, Mr. Bogren.

MS. DENSHAM: I'm sorry?

MR. BOSTIC: You called me Bogren, so Mike has been insulted.

THE COURT: Mr. Bostic.

MR. BOSTIC: Your Honor, in –

THE COURT: I miss Mr. Bogren. Tell him I miss him there, Ms. Dersham [sic].

MS. DENSHAM: I will let him know that.

THE COURT: I see these two guys together once in a while.

MR. BOSTIC: Just in rebuttal to her comments concerning the purse –

THE COURT: Don't argue it. I'm –

MR. BOSTIC: Don't need to, okay.

THE COURT: All right.

MR. BOSTIC: In terms of the qualified immunity for the search of the phone, I certainly understand the Court's point and the fact that *Riley* came out in 2014. But I wanted [14] to take the Court back one step further, and I put some of these things in my brief that we obtained during discovery where Mr. Coon acknowledged that the investigation was getting rather sketchy because Mr. Peffer was going places

they didn't anticipate. There was almost an hour delay where he went back home after the meeting at the restaurant and they had to call the informant to decide if the deal was even still going to go down, and at his deposition he expressed some reservation as to whether they even had a case.

THE COURT: What about what was on the phone? That's really what, you know, the case goes to. In other words, my recollection is they got the number of his home and they called Julie because they got the number and whatever else they looked at on the phone. You're not arguing that – well, yeah, what is – it's the confiscation of the phone you're talking about, not the numbers?

MR. BOSTIC: Not the confiscation.

THE COURT: Not the confiscation?

MR. BOSTIC: No.

THE COURT: That's what I thought you were – I didn't think you were, but I thought you were changing it here right now.

MR. BOSTIC: The search of the contents of the phone is what the claim is about, I think, but my –

THE COURT: Yeah, that's what I thought it was [15] about.

MR. BOSTIC: Mr. Coon – and I pointblank asked him, I said, Well, if you have hesitation as to whether you had probable cause to continue and make the arrest, doesn't that same hesitation apply to the

search of the phone or the seizure of the money? I don't remember which of the two, but during his deposition he acknowledged some concern as to whether the deal was going to be completed.

THE COURT: Yeah, but you have to have a clear case from the United States Supreme Court and Sixth Circuit. I'm talking about qualified immunity.

MR. BOSTIC: Right, but I'm talking about lack of probable cause to even seize it or make the arrest and make the stop initially. Now, we're not challenging those, but my point is he acknowledged to some degree some hesitation on his part and lack of confidence in his case.

So that's my only point that I would like to make in terms of, you know, the phone. A case involving the phone itself, I agree. We didn't get *Riley* until 2014, and I agree that there was – it was back and forth in the Sixth Circuit in 2012. But going back further, that there had to be probable cause in the first instance regardless of the type of container you're searching. That would be my reliance.

THE COURT: You're not done yet. You get to talk now and tell me why I'm wrong on all the other counts.

[16] MR. BOSTIC: Oh, okay. I'll start with Mr. Stephens, the detective that –

THE COURT: Okay. Count 4 and 5?

MR. BOSTIC: Count 4 and 5, who executed the search warrant in 2014 in what we're labeling retaliation because they weren't happy with the deal that Mr. Peffer got a few weeks earlier. The –

THE COURT: Well, maybe they can take the deal back.

MR. BOSTIC: Well, they let the 21 days to appeal expire. The Court's comments focused on an inability to find any particular false statements in the affidavit.

THE COURT: Right.

MR. BOSTIC: I spent a lot of time on the brief going back through and criticizing and challenging the detective's conclusions as to the importance of things. I don't need to reiterate that. I know you've seen how I approached trying to convince you that he should have known better.

He should have known that he was misleading the magistrate with some of those conclusions, particularly the post office issue. I mean, the zip code representation is just wrong, and then the conclusion, his conclusion that there was consistency between the 2013 letters and the 2014 flyers –

THE COURT: But here's the problem. You're [17] criticizing him and he put – he didn't lie in any of the affidavits. You agree he didn't lie in his affidavit?

MR. BOSTIC: No.

THE COURT: You don't agree?

MR. BOSTIC: I do not.

THE COURT: All right.

MR. BOSTIC: Especially with the post office issue.

THE COURT: Tell me what – tell me the facts that are wrong in that. I've got it marked here.

MR. BOSTIC: He alleged that the Grand Rapids post office was the central sorting facility for post office numbers beginning in 494, but Big Rapids is 493. Now, I don't think he specifically represented in the affidavit that Big Rapids was 493, and frankly I think he left it out. Well, that's a huge omission. He let that magistrate believe that because of the zip code issue, there was some direct connection between those flyers and Mr. Peffer or at least Mr. Peffer's residence. That's simply not true. Now, Big Rapids mail may in fact be sorted in Grand Rapids, but my point is the representation about the zip code connection was very misleading.

THE COURT: I don't get it. I live in Grand Rapids and my zip code is 495 and then, you know, then a lot of numbers. I used to live in Grand Haven and it would be sent from Grand Rapids and I would get a Grand Rapids postal stamp [18] on there. And I have a – or had a house up in Ludington on the lake and that zip code is almost like Spring Lake's zip code. You just trade the last couple numbers, but they're all 49 something.

MR. BOSTIC: Right. I mean, we have 48 in one half of the state and 49 on the other half of the state.

THE COURT: That's to get something there, but once they get to the post office after you mail it, they just stamp it Grand Rapids. They're all accumulated.

MR. BOSTIC: Right, and us non-postal employees, we don't know. There's a lot about how that mail is shipped around the state that we don't know. But he gave the impression that he did know, and he doesn't and he was wrong.

THE COURT: Okay.

MR. BOSTIC: Another false statement is his statement that the 2013 letters and the 2014 flyers all appeared to have some similar characteristic or characteristics or be generated by the same mechanism or the same person, and I went into a lot of detail, Your Honor, in the brief and I don't need to repeat it here. But that's another point where we would disagree with the Court on the misleading nature of the allegations in the affidavit.

Those are the two primary ones that come to mind. There was a day when I could keep three cases straight in my head, but that day is not today. It was years ago.

[19] In terms of the seizures, I agree that the things seized were – I mean, I'm troubled by the generality of the warrant, the description, but if the Court's going to uphold the warrant in terms of its

probable cause, I don't – that's not going to get me anywhere. But the last thing that I would like to discuss there is nexus.

THE COURT: Is what?

MR. BOSTIC: The nexus between the alleged criminal activity that Mr. Stephens claims he thought Jesse was engaging in and the dwelling. I went in great detail in my brief outlining the three crimes that Mr. Stephens claims he thought occurred, and he told me what they were and then I broke the elements down under state law for the Court. He didn't satisfy any of the elements of any of the three crimes he identified.

Be that as it may, assuming it was close enough for purposes of probable cause, there's nothing in that affidavit that suggests Julie or Jesse Peffer owned a printer, had a printer, a computer, or that Jesse would have done any of this at his home. So the second huge defect in that affidavit is the lack of nexus.

So even if you find probable cause and even if you find that he didn't lie, he didn't do anything, and I just read – in prepping for today I'm looking through the defense brief, and they don't try to justify the lack of nexus. They [20] simply stop with the notion that it was Jesse Peffer's residence. And I mean I put a couple of pages' worth of case citations and explanations that that is not enough in this circuit.

THE COURT: What do you do with the good faith exception?

MR. BOSTIC: He's the investigator. He's the one that obtained the warrant, and he's the one –

THE COURT: But that's the whole point. He obtained the warrant.

MR. BOSTIC: He executed the warrant and he knew the face of that warrant had no nexus as required by the Fourth Amendment. It's not like another officer gave him information or as with Mr. Edwards –

THE COURT: How would you expect him to know that there wasn't – that your client didn't have a printer? I mean, how much does he have to know? I understand your argument, but it's not a blatant misrepresentation in my mind. What you're saying is he should have given more detail.

MR. BOSTIC: He should – well, yes, but I'm talking about nexus. He should have put anything in there to show how the crimes that he thought were occurring occurred from that location. They could have occurred –

THE COURT: We're talking by each other. I keep saying you don't like the affidavit.

[21] MR. BOSTIC: True.

THE COURT: You're saying that there was not enough information in there, that there was a couple of misleading things, and you've come up with two things, the zip code and the – he didn't know anything about a printer. All right. I don't know about the zip code because I don't know what zip codes we're talking

about, but he gives it to a magistrate or a district judge, whatever, and that judge signs it. That's good enough for me.

So now you're down, it seems to me, to the zip code. Was that intentionally misleading or was it a gross error of some kind? No one's going to know whether he's got a printer in his house. You would assume so. I mean, you know, most of us do now.

MR. BOSTIC: But I was – I sort of went back to talking about – complaining about the warrant, but that's because you asked me how do I address good faith, and that's what I was getting at was that the face of the warrant has no nexus.

THE COURT: Okay. Conversion?

MR. BOSTIC: I was looking to see if I had to say anything else about Mr. Stephens and I –

THE COURT: No, no, go ahead. You can go right ahead.

MR. BOSTIC: You summed it up. I don't like the [22] affidavit.

THE COURT: Yeah. No, but now go on to – I thought you had some common law counts and a statutory count regarding conversion. I'm giving you – I've told you where I'm coming from.

MR. BOSTIC: Yes.

THE COURT: And what I'm doing here is giving those that disagree with me an opportunity to tell me why I'm wrong.

MR. BOSTIC: Yes. The reason I think you're wrong on Edwards as to the seizure and the conversion is because 333.7532, sub (2), applies in a forfeiture context, and there was no forfeiture when the demand for return of the property was made, and in fact there could no longer be because the statute of limitations had expired. So the problem here – and I laid this out in my brief as to why I think it's important that the affiant be the one responsible.

A member of the executive branch gets permission from a member of the judicial branch to kick in a door and take property and invade a private dwelling. That's very significant. I mean, it's burglary if it's done by anybody else.

And then we could have an officer in Grand Rapids who needs a search warrant executed in the Upper Peninsula. He sends it to a police officer up there, they take some property and they package it up and mail it back to Grand [23] Rapids. Then they turn that evidence over to the FBI. The citizen has no recourse except to the affiant.

And in the Criminal Procedure Codes, 780.656 and 657, I think it is, if the legislature would have wanted to treat seized property as being the property of the entity that employed the affiant, they could have put in the exact same language that they put in the forfeiture code, but they didn't.

THE COURT: Okay.

MR. BOSTIC: We've given you some basis under state law where the responsibility for the return and custody goes back to the officer, the seizing officer, which those cases do say the seizing officer, and I have to stand here and acknowledge that from everything we can determine, Mr. Edwards was not the seizing officer. But again, they can do five search warrants at one time and send them out to various other agencies to be executed all at once. The affiant can't be everywhere. So the only common denominator for accountability is back to the affiant.

THE COURT: Would you agree he didn't seize the property himself, he just did the affidavit?

MR. BOSTIC: I agree I can't prove he seized it. I mean, you know, I have to admit that.

And there's a state court judge that has ruled that one of the drug teams similar to this one is a governmental [24] entity. She looked at the way they do their business, the way they do their finances, how their board operates, and determined that they were to be treated as a municipality for purposes of suing and being sued. That's not happened to all the teams and there are a couple of different configurations that they use for their intergovernmental agreements, but you can see the problem is what is the entity. You have all of the individual agencies submitting people to these teams and the team itself may or may not be an entity.

So when it comes to accountability, I mean, the courts want – I know the courts are interested in making sure that property that is seized after they've allowed this is accounted for. And the best way and the only way under Michigan law to do that is toward the affiant.

THE COURT: Have you had any case where that was, you know, the factual situation? You mentioned a district court, I think, case. With these exact facts?

MR. BOSTIC: No. The closest ones I have are the ones out of the eastern side in state court. One of them might have been out of the Eastern District of Michigan where the liability for return of the property went back to the seizing officers, and I'm almost positive those cases said seizing officers. Now, they happened to be the affiant, you know, but the case said seizing officer, and those are –

THE COURT: How do they even – they don't even have [25] custody of it after they bring it in.

MR. BOSTIC: Right. It's logged in, it's put in the evidence room, and sometimes the officers themselves, the staff officers can't even get into the evidence room without the sergeant or the lieutenant of the team. I agree, Your Honor. But my point is in terms of accountability, once the police seize this property, the only direct recourse the Court has is back to the one person that the Court gave authority to to go take it in the first place.

THE COURT: Well, your client as I understand it did ask for the property back eventually and got it.

MR. BOSTIC: The Edwards, yes. Yes. The Coon cell phone and money, no.

THE COURT: Well, yeah. That was done pursuant to the settlement basically, wasn't it?

MR. BOSTIC: No. That was Julie's money. That was the \$1,700. The money and the phone taken from Jesse by Mr. Coon is the other conversion count. To this day we don't have that property back.

THE COURT: Okay. Okay.

MR. BOSTIC: I think that sums up – I mean, I had – you laid out your thoughts and I've addressed them directly, and my brief I think goes into a lot more detail and probably says some things I forgot, but I think I've made my record.

[26] THE COURT: Thank you. Okay. Let me just check things here a minute.

All right. We heard from Ms. Dersham [sic].

MS. DENSHAM: Densham.

THE COURT: Densham?

MS. DENSHAM: Densham, yes.

THE COURT: Tell me, because I've got D-r-s-h-a-m, it looks like.

MS. DENSHAM: It's D-e-n-s-h-a-m.

THE COURT: Densham?

MS. DENSHAM: Densham.

THE COURT: Gotcha, okay.

Ms. Vogler, why don't you go for Mr. Edwards.

MS. VOGLER: Thank you, Your Honor.

If I can clarify and understand what the Court's initial comments were, it said as a matter of law Nate Edwards did not commit common law conversion.

THE COURT: That's what I said.

MS. VOGLER: Yes, and that the statutes are clear that an author of a search warrant and a search warrant affidavit by those acts alone does not commit conversion.

THE COURT: That's what I said, but then Mr. Bostic stood up.

MS. VOGLER: Yes, sir. And the statute that Mr. Bostic and the plaintiffs are relying on is 780.655 which is a [27] criminal procedural statute, and the distinction in the case law that was raised by Mr. Bostic is simply that, and I've read those cases, is that those cases do not involve a search warrant being issued and then executed upon. Those were seizing officers who were at a scene or at a site and seized and then were held responsible for transporting that property that they seized pursuant to probable cause without a

warrant being issued, and then later that property was retained by them and logged in by that officer. That's the definition in the case law of the officer.

Clearly in this case Mr. Edwards – Detective Edwards did not execute, and the word “execute” is used in 780.655, he did not execute the search warrant that he authored. So that's the factual distinction here.

So there's two bases to dismiss plaintiffs' Count 8 against Nate Edwards. The facts are not consistent under any construction in Michigan law of common law conversion; and secondly, the property was seized pursuant to a lawfully statutorily authorized search warrant. There's no allegation that there was no probable cause for the search warrant. There's no allegation against Detective Edwards that anything was untruthful or misleading in the affidavit or the search warrant itself. So our argument is simple. As a matter of fact and as a matter of law, there is no basis for a claim of common law conversion.

[28] And even if there were, Detective Edwards is entitled to qualified immunity. There is no material issue of fact raised by the plaintiff in response to our motion that can establish or refute any of the elements under *Odom*. They're clear. No malice. They never met Detective Edwards. I asked them at their deposition, Any reason to believe he had ill will or malice towards you? No. No. Admissions of the plaintiffs.

So, Your Honor, that's our position in response to the plaintiffs' comments today. I understand the Court didn't feel the need in your initial comments to go to

the issue of qualified immunity, but perhaps in light of what Mr. Bostic stated, even if you were to assume –

THE COURT: Well, that's something if it goes on appeal you can take up with the appellate court if I rule in your favor.

MS. VOGLER: Right, yeah. But our argument is even if you assume that there is a factual and/or legal basis for common law conversion, he's still entitled to qualified immunity and that would dismiss the count in and of itself.

THE COURT: All right. Thank you.

MS. VOGLER: Thank you.

THE COURT: Okay. Next we have Mr. Froehlich.

MR. FROEHLICH: Yes, Your Honor, thank you. Joe Froehlich for Detective Stephens.

[29] THE COURT: Okay.

MR. FROEHLICH: On Mr. Bostic's second point regarding the facial validity of this warrant, what he has to show to overcome the warrant is that no reasonable officer would have ever relied on it, and I think that's a tough row to hoe. The affidavit laid out this is why I think Mr. Pepper was engaged in this activity. This is where he lives. This is how I think they're being produced. I think it's being produced at his house. I don't see how it's so lacking that no one would have ever relied on it.

Then the other point about misrepresentations or omissions, one thing that Mr. Bostic didn't talk about is it's not just a misrepresentation or omission. It has to be a misrepresentation or an omission made with the intent to mislead, and there's just no evidence of that.

And even if there was a misrepresentation about this post office issue, take it out. Take out the statement of Mr. Stephens that this was postmarked Grand Rapids and Grand Rapids is the central sorting facility. Probable cause still exists without that statement. And if it's – I don't see how it's an omission when it's an affirmative statement.

And then about the differences between the flyers, while there may have been a difference in the form of these flyers and mailings, the substance was certainly the same, being, Hey, I'm a police officer, I want you to know that Tom [30] Beemer is a snitch, with the purpose of intimidating Mr. Beemer, which is unlawful. If these were done for anything, it was to intimidate Mr. Beemer to prevent him from continuing to – as a confidential informant. So I don't know if you have any other questions for me.

THE COURT: No, I don't. Thank you.

MR. FROEHLICH: Thank you, Your Honor.

THE COURT: Well, anybody with any rebuttal? Mr. Bostic?

MS. DENSHAM: No, Your Honor.

THE COURT: Okay. Mr. Bostic, any rebuttal to this?

MR. BOSTIC: Very little, Your Honor, but yes.

Regarding Mr. Stephens, he was on the case for about 24 hours. Throughout the brief he claims he did a competent and thorough investigation. It was 24 hours' worth at best. He got a call from the lieutenant at CMET who spewed his beliefs as to who was responsible and he reacted the next day with a search warrant.

He claims that he reviewed the case file that had reports from Trooper Glentz that talked about no fingerprints and listed other suspects. He had the report from Detective West of Big Rapids Police Department which listed all four people that Mr. Beemer had informed on, and he completely disregarded all that. He went back to the prosecutor's office [31] that had disqualified itself to get his warrant. So in balance, Your Honor, I think there are things there that create a jury question.

THE COURT: All right.

Well, regarding Count 1, I'm going to pretty well stick with what I said before, and I've already read what that count is about. In *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 2007, there was a videotape depicting the events that clearly contradicted plaintiff's version of events. There's no such evidence here.

There is a dispute over the evidence as to Mr. Coon being concerned about whether Julie Pepper was armed. The police officer must point to specific facts from which a reasonable inference of her being armed could be drawn. The purpose of the search would be to allow the officer to go about his business without harm to anyone, not to find evidence of a crime. That's *Adams against Williams*, 407 U.S. 143, 146; 92 S. Ct. 1921 at 1923, 1972.

In my judgment Mr. Coon's reliance upon the fact that Jesse had just been arrested does not justify the search of Julie's purse. Cases where the officer made a search during criminal activity do not support his position as well. There was no report from third parties and no reasonable suspicion regarding any criminal activity on behalf of Julie Pepper.

[32] Count 2 which I've already described, the problem with Mr. Coon's argument is that Michigan law does not give collateral estoppel effect to consent judgments. *American Mutual Liability Insurance Company against Michigan Mutual Liability Company*, 235 N.W.2d 769, 64 Mich App 315, 1975. A consent judgment reflects the agreement of the parties, and the judge's approval is simply ministerial.

The plain view doctrine does not help Mr. Coon because the object's incriminating character must be immediately apparent. For example, in *United States v. \$99,999 In United States Currency*, 69 F. App'x 757, 765, Sixth Circuit, 2003, the Court said fifteen to twenty thousand dollars standing alone is hardly enough cash

to justify the search. The Court held that \$4,000 found in a motel room raised not more than a suspicion and did not raise probable cause or a preponderance of the evidence that this cash was connected to illegal drug activity.

I understand that the cash we're talking about was not totally the only factor being looked at because her husband had already been stopped. Her husband wanted to get in touch with her. She had it and I understand it was packed a little bit differently, but not to the extent that it was covered up with – I think she had a paper clip on it. It was not covered up with any tape or things like that that would try to keep the smell of drugs away from the drug dogs that [33] they have.

I've already referred to the *Rooker-Feldman* doctrine. It doesn't help him. That doctrine applies only when the plaintiff complains of injury from the state court judgment. Here Julie is not complaining about injury from the state court judgment. She is complaining about injury arising from the seizure of the cash. *Exxon Mobil Corporation against Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 2005.

Regarding Count 3, this claim I've already said is barred by the doctrine of qualified immunity, and I referred you to the two cases, *United States v. Gholston*, 993 F. Supp. 2d 704, 711, Eastern District of Michigan, 2014, and it goes to the fact that you cannot without a warrant get to the numbers being called or received on the cell phone. But that case came out after the events of this matter. That came out in *Riley against*

California, 134 S. Ct. 2473 at 2488-92, 2014, which I said police may not search the cell phone of an arrestee even, and she wasn't under arrest, without a warrant.

Regarding Counts 4 and 5, I've referred to those. Those go to the affidavit. These are the claims against Mike Stephens.

Probable cause is defined as a reasonable grounds for belief supported by less than prima facie proof, but more than mere suspicion. The grounds for gaining a search warrant [34] need not be perfect or provide every specific piece of information to be upheld. In a civil rights case an officer is entitled to rely on a judicially secured arrest warrant as satisfactory evidence of probable cause unless an officer knowingly makes false statements or admissions that materially affect the probable cause determination. Then the officer may be held liable if the affidavit contains false statements or those made in reckless disregard of the truth. The officer is not required to independently investigate every claim of innocence. And just bear with me a minute.

Well, yeah. Plaintiffs' primary assertion is that the affidavit does not establish probable cause or that Stephens failed to fully consider other possibilities. However, none of these arguments provide a basis for concluding that the affidavit did not establish probable cause. Once probable cause is established, an officer has no duty to investigate more or look for evidence that is exculpatory. That's *Kentucky against Young*, 51 F. App'x 543, 546, Sixth Circuit, 2002.

A problem with plaintiffs' argument is that they merely disagree, as I said earlier, with Stephens' conclusions and fail to undermine the affidavit showing probable cause. The alleged conduct of sending false letters could reasonably be attributed as they were attributed. And once again I failed to identify specific false statements with a possible [35] exception now of the post office, but that is a very minor thing in my judgment. They go to the reasonableness of the conclusions that could be drawn from the affidavit, and those reasonable conclusions are not drawn by the officer himself. Those reasonable conclusions are drawn by the judicial officer issuing the warrant.

And as I've said, then you run into the good faith exception. That is, even if the warrant is bad, if the officer relied upon it in good faith and he had all the relevant facts in there, then he cannot be held responsible.

Count 5, same rationale as I had on Count 4.

The conversion claim against Coon is dismissed because it's undisputed that he left the Sheriff's Central Enforcement Team in 2013. There's no allegation that he personally possessed the money or the cell phone at the time of the alleged conversion.

In addition, he's entitled to governmental immunity on the conversion claim. Number one, the acts were undertaken during the course of his employment. He performed the – number two, he performed the acts in good faith and without malice. And three, the acts were discretionary as distinguished from ministerial.

Regarding Count 8, Jesse alleges that the search warrant in 2012, that many items were not returned. This is the count against Nathan Edwards. It's undisputed that [36] Edwards did not execute the search warrants. Even if he had, the property by state law is in the custody of the seizing agency. M.C.L. Section 333.7532(2).

He delivered them to the premises to be searched. Furthermore, after keeping the property for a brief while – he got them from the premises to be searched. Furthermore, after keeping the property for a brief while in the Michigan State Police temporary storage, the property was delivered to and maintained in a secure storage area to which Edwards did not have direct access.

Also, plaintiffs never asked anyone to return their property or moved in state court for return of the property. As I understand it, at least, the property has now been returned to plaintiffs, but that's not dispositive in this particular thing.

M.C.L.A. Section 780.655 does not help plaintiffs. It governs an officer in execution of a search warrant regarding property or anything covered by a search warrant. It is the seizing agency, as I said earlier, that is responsible, not the officer.

And with your permission, Mr. Bostic, I'm going to strike Count 9, the exemplary damages, just to keep the record clear, understanding that you have a right to request that if it goes to trial.

MR. BOSTIC: It is derivative of what's left now, [37] would be Counts 1 and 2.

THE COURT: Right.

MR. BOSTIC: And it's merely derivative. I did stop doing that as separate counts for awhile.

THE COURT: Yeah.

MR. BOSTIC: Some of the judges preferred it.

THE COURT: Really?

MR. BOSTIC: Because of the heightened element of proof for the exemplary. But it's –

THE COURT: Okay. It's there. No matter – I'm not going to strike it. We'll leave it there, and I'm just going to slide it in my own mind from Count 9 to request for relief. How is that?

MR. BOSTIC: That's understood, Your Honor.

THE COURT: All right. Anything from the parties here?

MS. DENSHAM: No, Your Honor.

MR. FROEHLICH: No, thank you, Your Honor.

MS. VOGLER: No, thank you. I had some concern about August 17th, but to the extent that Count 8 has been dismissed, that eliminates the need for me to worry about our final pretrial.

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THE COURT: Yes.

MR. BOSTIC: Nothing from the plaintiffs,
Your Honor.

[38] THE COURT: All right. Thank you.
Okay. We're adjourned. Thank you.

MR. BOSTIC: Thank you, Your Honor.

MS. VOGLER: Thank you.

(Proceedings concluded at 2:55 p.m.)

* * *

App. 76

No. 17-1072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIE PEFFER;	)	
JESSE PEFFER,	)	
Plaintiffs-Appellants,	)	
	)	ORDER
v.	)	(Filed Feb. 22, 2018)
MIKE STEPHENS,	)	
	)	
Defendant-Appellee.	)	

BEFORE: BOGGS, BATCHELDER, and BUSH,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF
THE COURT**

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

STATE OF MICHIGAN 77th JUDICIAL DISTRICT	AFFIDAVIT FOR SEARCH WARRANT	CASE NO.
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Police Agency
Report Number: 63-1018-13

Detective Sergeant Mike Stephens, affiant(s), state that:

- A. The person, place, or thing to be searched is described as and is located at:

21271 Bierri Rd., Lincoln Township, Osceola County, State of Michigan.

More specifically the premise to be searched is a single story dwelling with tan in color siding, white in color trim, and brown in color shutters. The residence has an attached 2-stall garage on its west side of the residence. There is a green in color address post on the south side of Bierri Rd, directly in front of the residence which displays the numbers (in white) 21271. All outbuildings, persons and vehicles associated with the aforementioned premises.

- B. The PROPERTY to be searched for, seized and searched if found, is specifically described as:

1. Any and all records, files, or documents* pertaining to Thomas Owen Beemer and his role as a confidential informant and/or dismissal of charges in the 77th District Court and /or 49th Circuit Court.
2. Any and all mailing items including but not limited to envelopes, address labels, and

stamps that match the items seized in this investigation.

* As used above, the terms records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following:

- a. Any computer hardware or computer-related equipment capable of creating or storing information in electronic form;
- b. Any computer peripheral used to facilitate the transmission, creation, display, encoding or storage of information, images and data including word processing equipment, modems, monitors, printers, plotters, encryption circuit boards, optical scanners;
- c. Any magnetic or electronic storage device, including but not limited to, floppy diskettes, hard disks, backup tapes, CD-Roms, DVD-Roms, Zip disks, optical disks, printer buffers, smart cards, memory calculators, electronic dialers, Bernoulli drives, or electronic notebooks;
- d. Computer software, documentation, operating logs and instruction manuals relating to the operation of the computer hardware and software to be searched;
- e. Application software, utility programs, compilers, interpreters, and other programs or software used to facilitate direct or indirect

communication with the computer hardware and software to be searched;

- f. Any physical keys, encryption devices and similar physical items that are necessary to gain access to the computers to be searched or are necessary to gain access to the programs, data, and information contained on the computer to be searched;
 - g. Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the computers to be searched or convert any data, file or information on the computers into a readable form;
 - h. Electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail").
- C. The FACTS establishing probable cause of the grounds for the search are:
- 1. Your Affiant, Detective Sergeant Mike Stephens, hereinafter referred to as Affiant, is a law enforcement officer with the Michigan State Police, having been so for fifteen years. Affiant's duties include the investigation of criminal matters.
 - 2. On March 15, 2013, D/Sgt. Joshua Lator was contacted by Central Michigan Enforcement Team (CMET) regarding two letters sent via U.S. Mail to the Reed City Public Schools and the Mecosta Osceola Department of Human Services office.

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- a. These letters were to inform the recipient that Thomas Beemer was a confidential informant and set up former medical marijuana caregivers and patients in exchange for leniency/immunity from criminal charges he was facing.
- b. The letter to Mecosta Osceola DHS claimed that Beemer was operating a drug house and endangering his children.
- c. The author of these letters claimed to be Det. Jason Coon of CMET.
- d. Det. Coon was contacted and denied authoring these letters and CMET confirmed this is not normal practice or policy.
- e. Det. Coon informed D/Sgt. Lator that he suspected Jesse Lee Pepper, d.o.b 12/25/1958, as being the author and sender of the letters based on his CMET experience and contacts. Pepper was arrested for Delivery of Marijuana by CMET on 06/12/2012 as a result of information provided by Beemer.
- f. The information gleaned from Pepper's arrest led to a search of his residence (21271 Bierri Rd., Reed City, Osceola County, MI) in 2012 by the Traverse Narcotics Team (TNT). The search of Pepper's residence revealed further evidence of narcotics manufacturing/delivery and Pepper was charged in Osceola County as well.

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- g. D/Sgt. Lator began in [sic] investigation into the fraudulent "Coon" letter, documented as incident 63-1018-13.
 - h. The investigation was turned over to Tpr. Rob Glentz upon D/Sgt. Lator obtaining a new position within the department.
 - i. Tpr. Glentz made several attempts to contact Jesse Pepper through the office of Attorney James Samuels from 04/09/2013 to 04/04/2014 for interview without success. Tpr. Glentz' last attempt to contact Pepper was on 4/4/2014 again through Pepper's attorney, James Samuels. On these occasions Tpr. Glentz left his name as the person seeking contact with Pepper.
 - j. On 03/29/2014, Tpr. Glentz received two suspicious packages in the mail at his residence. These packages were made to appear as if Tpr. Glentz attempted to mail the packages, but insufficient postage was paid and they were returned to sender (Tpr. Glentz). These packages contained small plastic vials containing suspected marijuana seeds. Tpr. Glentz did not mail these packages nor did Tpr. Glentz know the addressees [sic] of the packages. Tpr. Glentz reported this information to affiant and an investigation in that matter was started, documented as 63-1527-14.
3. Affiant was informed by CMET detectives that Thomas Beemer contacted them on 06/23/2014 reporting that more fliers were

being sent via U.S. Mail in the Big Rapids and Reed City areas.

- a. CMET Det. Sean Shantz recovered seven of these fliers from local businesses in Big Rapids. Det. Shantz opened an investigation documented as CMT-121-14.
 - b. The fliers contained a photograph of Beemer and labeled him as a confidential informant.
 - c. The fliers list Beemer's home address and last known telephone number. They also contain what appears to be a portion of a 77th District/49th Circuit Court document detailing the charges that Beemer faced that were dismissed. The fliers request anyone with information to contact CMET or TNT. The fliers were clearly designed to cause harm to Beemer as a result of his actions as a confidential informant.
 - d. The fliers were turned over to affiant on 7/30/2014 as evidence.
4. Affiant was contacted on 7/30/2014 by CMET. Joel Abendroth of CMET. D/Lt. Abendroth advised there was another flier reference [sic] Thomas Beemer being sent via U.S. Mail to local businesses and residents in the Big Rapids, Mecosta County area.
 - a. This flier contained the same image of Beemer: The author wrote the flier to give the appearance it was written by Thomas Beemer. Beemer was contacted by CMET

detectives and denied producing the flier and a careful review of the flier indicates it would not be in Beemer's best interest to create or distribute the flier.

- b. The flier indicates that Beemer was the owner of a dispensary in Big Rapids that was shut down due to several criminal charges. The flier states that Prosecutor Peter Jaklevic set Beemer free. It states to vote for Peter Jaklevic for District Court Judge claiming he is a friend of criminals.
 - c. The flier contains the same 77th District/49th Circuit Court document indicating the eight criminal counts Beemer faced and were dismissed. It also contains descriptions of the criminal charges as they would appear on a court charging document. The bottom of the flier reads "Citizens Against Peter Jaklevic for Judge Osceola and Mecosta County, MI".
 - d. Two of these fliers were recovered by CMET detectives and turned over to the affiant as evidence. Affiant has been informed that more fliers have been mailed to other Mecosta county residents and have been saved for law enforcement.
5. Affiant contacted the Mecosta County Prosecuting Attorney's Office on 07/30/2014. Affiant was informed that Jesse Peffer was sentenced for his crimes on 06/16/2014 in Mecosta County, coinciding with the release of the second batch of fliers.

6. Affiant knows from CMET records, that Thomas Beemer was a confidential informant for CMET and provided information regarding individuals involved in narcotics activity. In reviewing these records, Jesse Pepper was the only individual charged in both Mecosta and Osceola Counties for narcotics activity which involved both CMET and TNT. As noted in section 2c of this document, the second group of fliers disseminated requested that anyone with information on Beemer contact CMET or TNT. Additionally, Affiant is unaware of any contact between Tpr. Glentz and any other person in regard to whom Beemer provided information. Prosecutor Peter Jaklevic was physically present for the plea and sentencing of Jesse Pepper on June 16, 2014. Thus, 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.
7. The fliers 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.
8. Affiant was informed by TNT Detective Rich Kopach that there are valid arrest warrants for Jesse Pepper's wife, Julie Pepper. Osceola County Sheriff Department Dep. Larry Start went to the residence described as the place to be searched (the residence of Jesse and Julie Pepper in 2012 and still owned by them) in an attempt to locate Julie on 07/30/2014. Dep. Start made contact with a man identifying

himself as Jesse Pepper. Jesse Pepper told Dep. Start that he resides at the residence alone and that Julie lives in Florida.

9. Affiant drove by the residence identified as the place to be searched on 7/31/2014 and obtained a physical description of the residence. The yard appeared freshly mowed and a vehicle was parked in the driveway.
10. Based upon the affiants training and experience, documents such as these fliers are mass produced with the use of a computer and saved to the computer hard drive or other storage devices. The fliers in question appear to have been produced with the use of a computer. There are similarities in content and format between the various fliers.
11. Based upon Affiant's knowledge, training, and experience, Affiant knows that searching and seizing information from computers often requires officers to seize most or all electronic storage devices (along with related peripherals) to be searched later by a qualified computer technician in a laboratory or other controlled environment. This search would be conducted by the MSP Sixth District Computer Crimes Unit located at 345 Northland Dr., Rockford MI 49341. This is true because of the following:
 - a. Computer storage devices (like hard disks, diskettes, tapes, laser disks) can store the equivalent of millions of pieces of information. Additionally, a suspect may try to conceal criminal evidence; he

or she might store it in random order with deceptive file names. This may require searching evidence for instrumentalities of crime. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical and invasive to attempt this kind of data search on-site.

- b. Searching computer systems for criminal evidence is a highly technical process requiring skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer technicians to specialize in some systems and applications, so it is difficult to know before a search which technician is qualified to analyze the system and its data. Data searches are exacting procedures designed to protect the integrity of the evidence and to recover “hidden,” erased, compressed, password-protected, or encrypted files. Because computer evidence is vulnerable to inadvertent or intentional modification or destruction (both from external sources or from destructive code imbedded in the system as a “booby trap”), a controlled environment may be necessary to compete [sic] an accurate analysis. Further, such searches often require the seizure of most or all of a computer system’s input/output peripheral devices, related software, documentation, and data security devices (including passwords) so that a qualified computer technician can accurately

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retrieve the system's data in a laboratory
or other controlled environment.

Based upon the above, Affiant asserts that probable
cause exists [sic] that the location described in Section
"A" above may contain evidence of the crime of imper-
sonating a Police Officer and Witness Intimidation.

IN CONSIDERATION OF THE FOREGOING, Affiant
requests this Honorable Court issue a Warrant to
search for and seize the property specified in Section
"B" above from 121271 Bierri Rd., Lincoln Township,
Osceola County, State of Michigan, then to search any
items created, modified or stored in electronic or mag-
netic form and any data, image, or information that is
capable of being read or interpreted by a computer for
the property specified above, off-site if necessary if,
upon arriving at the scene, the officers executing the
search concluded that it would be impractical to search
the computer hardware on-site for this evidence.

This affidavit consists of: 5 pages.

/s/ Mike Stephens
Affiant

Review on: Date By: _____ Prosecuting Official	Subscribed and sworn before me on: Date 7/31/14 1:12 p.m. <u>Steve Delaney</u> Judge/Magistrate
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Date 10/2/14
A Certified Copy
Signed: S Van Buskirk
Clerk

TO THE SHERIFF OR Police Agency
ANY PEACE OFFICER: Report Number: 63-1018-13

Detective Sergeant Mike Stephens, has sworn to the attached affidavit regarding the following:

- A. The person, place, or thing to be searched is described as and is located at:

21271 Bierri Rd., Lincoln Township, Osceola County, State of Michigan.

More specifically the premise to be searched is a single story dwelling with tan in color siding, white in color trim, and brown in color shutters. The residence has an attached 2-stall garage on its west side and the residence. There is a green in color address post on the south side of Bierri Rd, directly in front of the residence which displays the numbers (in white) 21271. All outbuildings, persons and vehicles associated with the aforementioned premises.

- B. The PROPERTY to be searched for and seized and searched, if found, is specifically described as:

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gain access to the computers to be searched or are necessary to gain access to the programs, data, and information contained on the computer to be searched;

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- h. Electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail").

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have found that probable cause exists and you are commanded to make the search and seize and search the described property. Leave a copy of this warrant with affidavit attached and a tabulation (a written inventory) of all property taken with the person from whom the property was taken or at the premises. You are further commanded to promptly return this warrant and tabulation to the court.

Issued:

<u>7/31/14 1:12p</u>	/s/ <u>Steve Delaney</u>	<u>02772</u>
Date	Judge/Magistrate	Bar no.

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Officer

Copy of affidavit, warrant, and tabulation served on:

Name

Tabulation filed:

Date

UNITED STATES OF AMERICA
IN THE WESTERN DISTRICT OF MICHIGAN

Julie Pepper, Jesse Pepper,
Plaintiffs
v.
Mike Stephens, Nathan
Edwards, and Jason Coon,
Defendants.

Docket No. 1:15-cv-78
Hon. Gordon J. Quist
District Court Judge

J. Nicholas Bostic P40653 Attorney for Plaintiffs 909 N. Washington Ave. Lansing, MI 48906 517-706-0132	Joseph T. Froehlich P71887 Attorney for Defendant Stephens P.O. Box 30736 Lansing, MI 48909 517-373-6434
Lisa J. Vogler P39398 Attorney for Defendant Edwards 57 N. Michigan Ave. Beulah, MI 49517 231-383-4410	Michael S. Bogren P34835 Attorney for Defendant Coon 950 Trade Center Way, Suite 310 Kalamazoo, MI 49002 269-266-8822

AFFIDAVIT

STATE OF FLORIDA)
) ss:
COUNTY OF HILLSBOROUGH)

Jesse Peffer, upon his oath, states:

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1. I am an adult and competent to testify to the matters set forth herein on personal knowledge unless stated otherwise.
2. I have reviewed the attached map showing zip codes (Attachment A) in areas of West Michigan from Grand Rapids west to the lakeshore and can state that based on my having lived in the area most of life, the designations accurately reflect zip codes for that area.
3. U.S. Mail sent out of Reed City, MI goes to Traverse City, MI to be sorted and would be designated as Traverse City on the post mark. Mail from Big Rapids would have the designation of Grand Rapids 493. Defendant Stephens states that the flyers were mailed locally but locally does not include Reed City or Big Rapids. Affiant lives in Reed City.
4. I have reviewed the register of actions from the criminal charge against me in Mecosta County (Motion Attachment 1) and can add the following on personal information:
 - a. The case was put on hold until the Michigan Supreme Court's **McQueen** decision because the prosecutor was undecided about how to proceed.
 - b. Because of this, the preliminary examination was postponed.
 - c. After the **McQueen** decision, the prosecutor's office would make an offer to settle and then require that the scheduled preliminary examination be canceled.

- d. An offer for a diversionary disposition was accepted but (then) Chief Assistant Prosecutor Thiede pulled the offer and advised that he did not have authority to make this offer.
- e. This scenario happened several times. The prosecutor would either make an offer and it was accepted or he would advise that if we went forward with the preliminary examination he would refuse to negotiate any settlement.
- f. On December 20, 2013, affiant, my attorneys, Julie Peffer's attorney, all the state police involved in the case, and the informant met at the courthouse for the preliminary examination.
- g. Soon after that we were advised that District Judge Grant was refusing to conduct the hearing claiming that there was incorrect attorney paperwork.
- h. Attorney Matt Newburg and Eric Misterovich were going to be the attorneys for affiant and they had already filed paperwork for representation. Court documents dated 4/13/13 were sent to Eric Misterovich showing he was an attorney of record.
- i. The first preliminary hearing that Newburg and Misterovich attended was on October 8, 2014. The hearing was canceled due to the court being overbooked. Before leaving the courthouse Newburg,

Misterovich and myself rescheduled the preliminary hearing for 12/20/13 with the court magistrate, a date that everyone was available. Newburg Law was provided with notice of the court date of 12/20/13.

- j. Judge Grant incorrectly thought that Attorney James Samuels was the court appointed attorney and would not continue. James Samuels was never the court appointed attorney. I hired him to represent me.
- k. Affiant's attorney, Newburg, Julie Pepper's attorney, John Lewis, and the assistant prosecutor, Nathan Hull, were all in amazement and no one could find any statute that agreed with Judge Grant's opinion but no one wanted to get her mad and it was decided by the attorneys that it was better to reschedule.
- l. Attorney Samuels also advised me that there was no reason for Judge Grant to cancel the preliminary hearing.
- m. The cost of this decision by the state district judge included payment of 4 attorneys, including travel time, lost wages, air fare, car rental, etc.
- n. Additional paperwork was signed and submitted and the prelim was again rescheduled for 4/21/14.

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- o. This is why there appears to be two separate entries regarding the addition of counsel.
- p. While Attorney James Samuels was representing me, he constantly asked for reports from the prosecutor's office but little information was provided.
- q. On January 31, 2013, Newburg Law filed an appearance and demand request for documents and related case information.
- r. The prosecutor's office responded that they would not send out everything again even though very limited responses were provided to Attorney Samuels.
- s. When Attorney Eric Misterovich took over (Newburg Law) in January of 2013, he did Freedom of Information Act requests to get the reports and information on the informant but in the documents received the information was redacted and he was required to retract his request for information on the informant or the prosecutor would stop any negotiations.
- t. Affiant has reviewed Defendant Stephens' motion and determined that his assertion that the first letters coincided with Affiant's discovery of the informant is inaccurate because Defendant Coon pulled a piece of paper out of my pocket at the traffic stop on June 12, 2012 and said to Dan King "this is Tom's handwriting." Therefor even before the traffic stop

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was completed I knew that Thomas Beemer was involved.

5. On February 21, 2013, when the letters were sent, affiant was living in Florida.
6. Affiant was sentenced on June 16, 2014 and was back in Florida on June 23, 2014 when the first flyer was mailed.

Further affiant sayeth not.

/s/ Jesse L. Peffer

Jesse L. Peffer

Subscribed to and sworn before me this 20th day of April, 2016.

/s/ Sharon S. Taylor

Notary Public

My Commission Expires: _____

[SEAL] SHARON S. TAYLOR
NOTARY PUBLIC
STATE OF FLORIDA
Comm# EE216372
Expires 10/20/2016

PEFFER AFFIDAVIT – ATTACHMENT A

