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*/s/ Paul G. Crist*

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Paul G. Crist

IN THE UNITED STATES DISTRICT COURT, FILED  
FOR THE DISTRICT OF WYOMING, U.S. DISTRICT COURT  
DISTRICT OF WYOMING

JOSEPH V. LIBRETTI, JR.,

Plaintiff,

vs.

TAYLOR COURTNEY, and  
STEVEN WOODSON,  
in their individual capacities,

Defendants.

2015 MAR 27 PM 3 40

STEPHAN HARRIS, CLERK  
CASPER

Case No. 14-CV-107-SWS

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**ORDER GRANTING DEFENDANT COURTNEY'S MOTION FOR SUMMARY  
JUDGMENT**

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This matter comes before the Court on Defendant Taylor Courtney's Motion for Summary Judgment (Doc. 16). Plaintiff filed an opposition to the motion (Doc. 28) and Defendant Courtney replied (Doc. 30). Having considered the parties' filings, the record herein, and being otherwise fully advised, the Court finds the motion should be granted.

**BACKGROUND**

Plaintiff Joseph Libretti<sup>1</sup> filed this *Bivens* action<sup>2</sup> against Defendant Steven Woodson, who was a Special Agent for the United States Drug Enforcement Administration (DEA), and Defendant Taylor Courtney, who was a deputy sheriff with the Natrona County Sheriff's Office and a member of the Wyoming Division of Criminal Investigation (DCI) at all relevant times. (Docs. 1, 5.) Mr. Libretti takes issue with two warrants that were executed against his property, the first in June 2010 and the second in April 2011. Mr. Libretti asserts 13 causes of action in his

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<sup>1</sup> Because Mr. Libretti proceeds pro se, the Court construes his pleadings liberally. See *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010).

<sup>2</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

First Amended Complaint with only the final four claims aimed at Defendant Courtney. (Doc. 5 at ¶¶ 176-223.) Additionally, Defendant Courtney was only involved in the June 2010 search and seizure. (*See id.*) In short, Mr. Libretti contends Defendant Courtney wrongfully seized some items from Mr. Libretti's residence and then wrongfully failed to return them in a timely manner. He seeks to recover civil damages for the alleged violations of his Fourth Amendment rights. Defendant Courtney filed this motion for summary judgment, asserting the defense of qualified immunity. (*See* Doc. 17.)

### **STANDARD OF ANALYSIS**

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is genuine “if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way,” and it is material “if under the substantive law it is essential to the proper disposition of the claim.” *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (internal quotation marks omitted). In considering the motion, the Court must view the evidence in the light most favorable to the party opposing summary judgment. *Puller v. Baca*, --- F.3d ---, No. 13-1156, slip op. at 10 (10th Cir. Mar. 20, 2015) (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1115 (10th Cir. 2007) (en banc)).

“Because of the underlying purposes of qualified immunity, we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions.” [*Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007)] (quoting *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001)). When a defendant asserts qualified immunity, as [Defendant Courtney] does here, the burden shifts to the plaintiff to establish (1) a violation of a constitutional right (2) that was clearly established. *Id.* This is a “heavy, two-part burden” that the plaintiff must meet. *Medina*, 252 F.3d at 1128 (quoting *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995)). Failure on either element is fatal to the plaintiff's claims. *Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011). The plaintiff bears this heavy burden because we presume that law enforcement

officers “are immune from lawsuits seeking damages for conduct they undertook in the course of performing their jobs.” *Id.*

When a plaintiff meets this heavy burden, the burden shifts back to the defendant to prove that there are no genuine disputes of material fact and that he is entitled to judgment as a matter of law. *Medina*, 252 F.3d at 1128. Ultimately, “the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendant[] is entitled to qualified immunity.” *Id.*

*Puller v. Baca*, slip op. at 10.

### FACTS

In 2010, Defendant Woodson was investigating methamphetamine trafficking in Wyoming. *Libretti v. Woodson*, --- F. App'x ---, 2015 WL 221617, at \*1 (6th Cir. 2015) (unpublished). Mr. Libretti's name surfaced as part of this investigation due to his connections with two individuals (William Breeden and Cole Herrick) who were planning to transport 200 grams of methamphetamine from Phoenix, Arizona, for distribution in Wyoming. *Id.* Defendant Woodson was familiar with Mr. Libretti's history of drug trafficking when he discovered this connection. *Id.* “In 1992, Libretti pled guilty to running a Continuing Criminal Enterprise following a drug trafficking investigation by the Wyoming Division of Criminal Investigation. Libretti was sentenced to a 20 year sentence in federal prison for that conviction.” *Id.* at \*1 n.2. Mr. Libretti was released from federal incarceration on supervised release in 2007.

#### 1. May 2010 Search Warrant for Wyoming Residence

On May 28, 2010, Defendant Woodson applied to a judicial officer for a warrant to search Mr. Libretti's home in Casper, Wyoming. (Doc. 5 at ¶ 5; *see* Docs. 16-1, 16-2.) Defendant Woodson's affidavit in support of the search warrant application showed multiple connections between Mr. Libretti and drug trafficking.<sup>3</sup> (*See* Doc. 16-2.) Defendant Woodson's

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<sup>3</sup> Defendant Woodson's search warrant affidavit was a “global affidavit,” containing information regarding several subjects of investigation and seeking multiple warrants for various locations. Not all of the information in the affidavit related to the search warrant application for Mr. Libretti's home.

application for search warrant sought to search for evidence of drug trafficking. (See Doc. 16-2 at ¶ 3 (describing the affiant's knowledge that drug traffickers often use false names, large amounts of cash, records, receipts, computers, etc. in their illegal enterprise); see also Doc. 16-1 (listing 11 categories of property to search for and seize based on probable cause that the items would demonstrate evidence of drug trafficking)). The United States Magistrate Judge granted the search warrant, permitting law enforcement to search Mr. Libretti's house, but striking the portion that would allow a search of vehicles. (Doc. 16-3.)

On June 2, 2010, agents searched Mr. Libretti's home. (Doc. 5 at ¶ 16.)

Defendant Courtney was one of the agents who executed the search warrant. (Doc. 5 at ¶ 177.) His role in the search, however, was limited; his only participation consisted of inventorying the seized evidence and transporting it to Wyoming DCI to be logged into the tracking system.

(Doc. 16-7 at ¶¶ 4-6.) "The search uncovered spice<sup>4</sup>, as well as currency that had been concealed within the heating ducts of Libretti's home." *Libretti v. Woodson*, 2015 WL 221617, at \*1.

Additionally, among other things, agents seized a laptop computer, a flash drive, a pump sprayer, seven cell phones, and two scales. (Doc. 16-3 at p. 3.)

On March 18, 2011, Mr. Libretti was indicted on a charge of conspiring to possess with intent to distribute 50 grams or more of methamphetamine. *Libretti v. Woodson*, 2015 WL 221617, at \*1. Shortly before he was indicted, Mr. Libretti moved to Ohio. *Id.*

## 2. Acquittal and Return of Property

Following jury trial, Mr. Libretti was acquitted of the charge of conspiring to possess with intent to distribute 50 grams or more of methamphetamine. *Libretti v. Woodson*, 2015 WL

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<sup>4</sup> "'Spice' is a brand name of 'herbal incense' that is commonly used to refer to all synthetic cannabis products. These products are often composed of a variety of legal herbs that have been sprayed with chemicals that mirror the effects of the psychoactive ingredient in marijuana when smoked." *Libretti v. Woodson*, 2015 WL 221617, at \*1 n.3 (internal citations omitted).

221617, at \*2. “The court ordered that his property be returned—though Libretti disputes that the government has fully complied.” *Id.*

Mr. Libretti contends Defendant Courtney violated his Fourth Amendment right to be free from unreasonable searches and seizures, and he seeks civil damages as compensation. He asserts Defendant Courtney exceeded the scope of the search warrant by seizing items that were not illegal and not evidence of a crime, including legal spice, the laptop computer, and the flash drive. (Doc. 5 at ¶¶ 177, 205.) Additionally, Mr. Libretti asserts Defendant Courtney failed to promptly return the items after determining they were not illegal or evidence of a crime. (*Id.* at ¶¶ 189, 214.)

### **DISCUSSION**

The Court will address Counts X and XII together, which allege Defendant Courtney wrongfully exceeded the scope of the search warrant. Likewise, Counts XI and XIII, which allege Defendant Courtney wrongfully failed to timely return the property to Mr. Libretti, will be considered together.

#### **1. Counts X and XII - Seizure of Legal Items**

In Count X, Mr. Libretti argues the search warrant did not permit Defendant Courtney to seize “legal Spice, legal JWH-018, and legal herbs.”<sup>5</sup> (Doc. 5 at ¶ 177.) In Count XII, Mr. Libretti asserts Defendant Courtney exceeded the scope of the search warrant by seizing a computer and a flash drive that were not illegal or evidence of a crime.<sup>6</sup> (*Id.* at ¶ 205.)

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<sup>5</sup> In his response to the motion for summary judgment, Mr. Libretti for the first time asserts a spray bottle was also improperly seized when the search warrant was executed. (Doc. 28 at pp. 2-3.) The Court will not consider this claim because Mr. Libretti never alleged it in his First Amended Complaint. (*See* Doc. 5.) Nonetheless, if the claim was considered, the analysis would fit squarely within this section of the Order and the result would be the same. A spray bottle can be used to apply the chemicals to the herbs to make illegal spice. (*See* Doc. 30 at p. 2 n.1.)

<sup>6</sup> In his First Amended Complaint, Mr. Libretti asserts multiple “flash drives” were seized. (Doc. 5 at ¶¶ 205, 216.) Defendant Courtney’s inventory return, however, demonstrates unambiguously that a single flash drive was seized. (Doc. 16-3 at p. 3.)

“The Fourth Amendment’s particularity requirement targets the constitutional evil of ‘general exploratory rummaging in a person’s belongings’ pursuant to a warrant.” *Bowling v. Rector*, 584 F.3d 956, 971 (10th Cir. 2009) (quoting *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999)).

It is apparent that in order to satisfy the “reasonableness” requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable. As we put it in *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949):

“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.”

*Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

The search warrant in Mr. Libretti’s case expressly authorized the seizure of “Spice,” along with “[a]ny controlled substances including but not limited to methamphetamine.” (Doc. 16-3 at p. 5.) Additionally, the search warrant authorized the seizure of “[c]omputers, computer storage medium, including but not limited to ... memory sticks and removable storage, which are instrumentality of a crime.” (*Id.*) Moreover, it permitted the search and seizure of “[a]ll records relating to violations of drug trafficking offenses and/or conspiracy to do the same ... in whatever form and by whatever means they may have been created or stored[.]” (*Id.*)

Following the search and seizure, the items in question were later analyzed and tested. (Doc. 5 at ¶¶ 190, 218.) The herbs, spice, and chemical compounds were determined not to be controlled substances. (*Id.* at ¶¶ 191, 195, 199.) Likewise, the computer and flash drive were not and did not contain evidence of crime. (*Id.* at ¶ 219.)

As to the suspected drugs, Mr. Libretti has provided no evidence or authority to suggest Defendant Courtney reasonably could have distinguished between legal and illegal herbs, legal and illegal chemical compounds to be applied to herbs, or legal and illegal spice at the time of the search and seizure. (*See* Docs. 5, 28.) Defendant Courtney asserts the chemical composition of these substances would have to be analyzed in a laboratory after the seizure (Doc. 17 at p. 9), and Mr. Libretti does not appear to disagree (*see* Doc. 28 at p. 3). “It is impossible to distinguish, with the naked eye, between legal herbs and those that have been chemically altered.” *Libretti v. Woodson*, 2015 WL 221617, at \*4. Specific to the legal herbs, the sheer quantity possessed by Mr. Libretti suggested the herbs may be evidence of drug trafficking. In a “Claim for Damage, Injury, or Death” submitted by Mr. Libretti to the United States Attorney’s Office, he contends agents seized approximately 85 pounds of herbs (including sage, damiana leaf, and marshmallow leaf) during the search of his home. (Doc. 16-6 at p. 5.) Suffice it to say that Mr. Libretti has not argued this enormous quantity of herbs was due to a passion for cookery or tea. And the JWH-018 is one of the synthetic chemicals that can be sprayed on herbs to cause effects similar to the psychoactive ingredient in marijuana when the herbs are smoked. In other words, the chemical compounds are what turn the legal herbs into “spice.” Given these circumstances, it was reasonable for Defendant Courtney to seize the herbs, chemical compounds, and spice under the authority of the search warrant based on his reasonable belief these items could be contraband or evidence of a crime.

Mr. Libretti runs into the same shortcoming when considering the electronic devices. He has provided no evidence or authority to suggest Defendant Courtney reasonably could have determined the contents of the computer and flash drive prior to seizure. *See United States v. Campos*, 221 F.3d 1143, 1147 (10th Cir. 2000) (quoting an FBI agent’s explanation “as to why it

was not usually feasible to search for particular computer files in a person's home"<sup>7</sup>). Mr. Libretti has not explained how or why Defendant Courtney should have been able to tell the computer and flash drive would not contain evidence of drug trafficking prior to their testing. And more significantly, Mr. Libretti has not explained why Defendant Courtney's inability to foretell the contents of the electronic devices was somehow a constitutional violation. In short, because the contents of the computer and flash drive had to be forensically examined at a later time to determine whether they contained evidence of a crime, it was reasonable for Defendant Courtney to seize them pursuant to the search warrant. It was reasonable for him to believe there was a fair probability the items contained evidence of drug trafficking.

Given the circumstances, it was reasonable for Defendant Courtney to seize the herbs, chemical compounds, spice, computer, and flash drive (and spray bottle) under the authority of the search warrant based on his reasonable belief these items could be contraband, evidence of a crime, or contain evidence of drug trafficking. And even though the forensic testing later proved Defendant Courtney was mistaken, the reasonableness of his actions remains intact. His mistakes were more than reasonable. The Fourth Amendment protects Mr. Libretti from *unreasonable* searches and seizures. U.S. Const. amend. IV. Mr. Libretti has not carried his

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<sup>7</sup> The Tenth Circuit quoted:

Computer storage devices ... can store the equivalent of thousands of pages of information. Especially when the user wants to conceal criminal evidence, he often stores it in random order with deceptive file names. This requires searching authorities to examine all the stored data to determine whether it is included in the warrant. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical to attempt this kind of data search on site; and

Searching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The wide variety of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert should analyze the system and its data.... Since computer evidence is extremely vulnerable to tampering or destruction (both from external sources or from destructive code embedded into the system as "booby trap"), the controlled environment of a laboratory is essential to its complete analysis.

burden of establishing Defendant Courtney's conduct to be unreasonable and, therefore, has not established a violation of the Fourth Amendment. Consequently, Mr. Libretti has not overcome the presumption of qualified immunity as to Counts X and XII.

2. **Counts XI and XIII - Failure to Return Property**

In Count XI, Mr. Libretti alleges Defendant Courtney never returned the spice, JWH-018, or herbs after being informed they were not controlled substances. (Doc. 5 at ¶ 189.) He asserts in Count XIII that Defendant Courtney failed to "promptly" return the computer and flash drive after learning they were not instrumentalities of a crime. (*Id.* at ¶ 214.)

Stated simply, the evidence establishes Defendant Courtney is not at fault for these alleged inactions. Defendant Courtney did not decide which, if any, items should be analyzed or tested; he did not receive the results of DCI's testing; and he did not have the authority to return any of the evidence to Mr. Libretti. (Doc. 16-7 at p. 2.) Defendant Courtney's role in Mr. Libretti's case was limited to inventorying the seized items and transporting them to Wyoming DCI to be logged into the evidence tracking system. (*Id.* at pp. 1-2.) Common to all § 1983 and *Bivens* claims is the requirement that liability be predicated on a violation traceable to a defendant-official's "own individual actions." *Iqbal*, 556 U.S. at 676. Here, Mr. Libretti has not shown it was Defendant Courtney's own individual actions that deprived Mr. Libretti of his property after the property was analyzed. The evidence establishes Mr. Libretti is attempting to hold Defendant Courtney personally liable for another's alleged misconduct, but *Bivens* does not permit such.

Moreover, some of the items seized were not controlled substances at the time of seizure, but became controlled substances in the intervening months (some, like JWH-018, even before Mr. Libretti was indicted). *See* 76 Fed. Reg. 11075-01 (Mar. 1, 2011) (listing JWH-018, among

other synthetic chemical compounds, as a Schedule I controlled substance as of March 1, 2011). The JWH-018 and other suspected controlled substances were accordingly not returned. (*See* Doc. 16-4 at pp. 2-6.) Mr. Libretti has not shown how Defendant Courtney would have authority to return controlled substances to him.

Additionally, apart from money, Mr. Libretti first requested that the government return his property when he was acquitted at the conclusion of his criminal trial, which was January 26, 2012. *See United States v. Libretti*, 11-CR-0069-NDF (Docs. 223, 235). The computer was delivered to Mr. Libretti's attorney less than one month later. (*See* Doc. 16-4 at p. 39.) Mr. Libretti has not demonstrated how this was an unreasonable delay.

Finally, the flash drive was never returned to Mr. Libretti because it was not identified as belonging to Mr. Libretti. (*See* Doc. 16-4 at p. 6.) He has never challenged that determination. (*See* Docs. 5, 28.)

Regarding the return of his property, Mr. Libretti has not shown it was Defendant Courtney's "own individual actions" that resulted in the allegedly-wrongful retention of his property. Indeed, the unrebutted evidence establishes it was not Defendant Courtney who failed to return Mr. Libretti's property. (*See* Doc. 16-7 at ¶ 9 ("I had no authority to return any of the evidence").) To overcome the presumption of qualified immunity, it is Mr. Libretti's burden to show Defendant Courtney violated Mr. Libretti's constitutional rights, but Mr. Libretti has failed to show such. To be sure, he spent a good deal of time in his response to the motion for summary judgment alleging Defendant Courtney never said it would be illegal for Defendant Courtney to inquire into the test results and then return the legal property to Mr. Libretti after testing. (*See* Doc. 28 at pp. 4-5.) While perhaps true, these allegations simply do not suggest Defendant Courtney violated the Fourth Amendment by failing to do so. Mr. Libretti has not

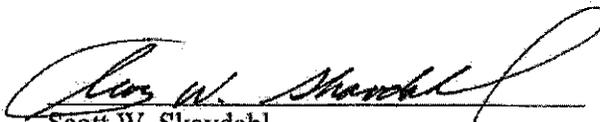
carried his burden of establishing Defendant Courtney's conduct to be unreasonable and, therefore, has not established a violation of the Fourth Amendment. Consequently, Mr. Libretti has not overcome the presumption of qualified immunity as to Counts XI and XIII.

**CONCLUSION AND ORDER**

Even viewing the evidence in the light most favorable to Mr. Libretti, he has not demonstrated Defendant Courtney violated his Fourth Amendment protections. The search warrant permitted Defendant Courtney to seize the challenged items. And Mr. Libretti is only grasping at straws when he alleges Defendant Courtney was required to learn of the results of DCI's testing and then return the items to Mr. Libretti that proved to be legal. The evidence shows Defendant Courtney could not have done so. Therefore, Mr. Libretti has not overcome Defendant Courtney's presumed qualified immunity because he has not shown that Defendant Courtney violated Mr. Libretti's constitutional rights. Accordingly, Defendant Courtney is entitled to summary judgment on Counts X through XIII.

**It is therefore ordered** that Defendant Taylor Courtney's Motion for Summary Judgment (Doc. 16) is hereby **granted**. Summary judgment on Counts X through XIII is hereby granted in Defendant Courtney's favor. Defendant Courtney is entitled to qualified immunity against Mr. Libretti's claims.

Dated this 22<sup>nd</sup> day of March, 2015.

  
Scott W. Skavdahl  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

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U.S. DISTRICT COURT  
DISTRICT OF WYOMING

JOSEPH V. LIBRETTI, JR.,

Plaintiff,

vs.

TAYLOR COURTNEY, and  
STEVEN WOODSON,  
in their individual capacities,

Defendants.

2015 MAR 27 PM 3 40

STEPHAN HARRIS, CLERK  
CASPER

Case No. 14-CV-107-SWS

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**ORDER GRANTING DEFENDANT WOODSON'S MOTION TO DISMISS**

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This matter comes before the Court on the Motion to Dismiss Steven Woodson (Doc. 14). Plaintiff filed an opposition to the motion (Doc. 32) and Defendant Woodson replied (Doc. 37). Having considered the parties' filings, the record herein, and being otherwise fully advised, the Court finds the motion should be granted.

**BACKGROUND**

Plaintiff Joseph Libretti<sup>1</sup> filed this *Bivens* action<sup>2</sup> against Defendant Steven Woodson, who was a Special Agent for the United States Drug Enforcement Administration (DEA), and Defendant Taylor Courtney, who was a deputy sheriff with the Natrona County Sheriff's Office and a member of the Wyoming Division of Criminal Investigation (DCI) at all relevant times. (Docs. 1, 5.) Mr. Libretti takes issue with two warrants that were executed against his property, the first in June 2010 and the second in April 2011. Mr. Libretti asserts 13 causes of action in his First Amended Complaint with the first nine claims aimed at Defendant Woodson. (Doc. 5 at ¶¶

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<sup>1</sup> Because Mr. Libretti proceeds pro se, the Court construes his pleadings liberally. See *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010).

<sup>2</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

5-175.) In short, Mr. Libretti contends Defendant Woodson's applications for the search and seizure warrants were unconstitutionally defective for numerous reasons. He seeks to recover civil damages for the alleged violations of his Fourth Amendment rights. Defendant Woodson filed this motion to dismiss him as a defendant from the First Amended Complaint based on qualified immunity. (Doc. 14.)

### **STANDARD OF ANALYSIS**

"[T]o withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, taken as true, 'to state a claim for relief that is plausible on its face.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court accepts as true the well-pleaded allegations in the complaint. Further, it construes all facts in the light most favorable to the plaintiff and resolves all reasonable inferences in the non-movant's favor. *Arnold v. McClain*, 926 F.2d 963, 965 (10th Cir. 1991). The Court, however, is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 555 U.S. at 555).

Dismissal is appropriate if the complaint fails to state a plausible claim for relief. The "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*; see also *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214-15 (10th Cir. 2011).

### **FACTS**

This lawsuit is very similar to a suit Mr. Libretti filed in the Northern District of Ohio, including many of the same parties and similar causes of action. *Libretti v. Woodson*, N.D. Ohio No. 13-CV-932-DAP. That case was dismissed by the district court under Fed. R. Civ. P.

12(b)(6) based on Defendant Woodson's qualified immunity. *Libretti v. Woodson*, 2013 WL 6634249 (N.D. Ohio Dec. 17, 2013). The Sixth Circuit affirmed the dismissal based on qualified immunity on all grounds. *Libretti v. Woodson*, --- F. App'x ---, 2015 WL 221617 (6th Cir. 2015) (unpublished). While that case involved the search and seizure of Mr. Libretti's property in Ohio and therefore is not binding here, the Court finds much of the Sixth Circuit's analysis to be persuasive and applicable to the similar claims asserted here.

1. **General Facts**

In 2010, Defendant Woodson was investigating methamphetamine trafficking in Wyoming. *Libretti v. Woodson*, 2015 WL 221617, at \*1. Mr. Libretti's name surfaced as part of this investigation due to his connections with two individuals (William Breeden and Cole Herrick) who were planning to transport 200 grams of methamphetamine from Phoenix, Arizona, for distribution in Wyoming. *Id.* Defendant Woodson was familiar with Mr. Libretti's history of drug trafficking when he discovered this connection. *Id.* "In 1992, Libretti pled guilty to running a Continuing Criminal Enterprise following a drug trafficking investigation by the Wyoming Division of Criminal Investigation. Libretti was sentenced to a 20 year sentence in federal prison for that conviction." *Id.* at \*1 n.2. Mr. Libretti was released from federal incarceration on supervised release in 2007.

Using court-authorized telephone intercepts, the DEA learned of the drug traffickers' plans. *Id.* at \*1. On May 21, 2010, the DEA stopped the two individuals on their way back from Phoenix. *Id.* The individuals implicated Mr. Libretti in the methamphetamine transaction when interviewed by the DEA. *Id.* Defendant Woodson "learned, after the fact, that Libretti had sought leave and was granted permission from his probation officer to travel to Phoenix at that same time." *Id.*

**2. May 2010 Search Warrant for Wyoming Residence**

On May 28, 2010, Defendant Woodson applied to a judicial officer for a warrant to search Mr. Libretti's home in Casper, Wyoming. (Doc. 5 at ¶ 5; *see* Docs. 14-2, 14-3.<sup>3</sup>) Defendant Woodson's affidavit in support of the search warrant application showed multiple connections between Mr. Libretti and methamphetamine trafficking.<sup>4</sup> (*See* Doc. 14-2.) For example, Defendant Woodson's affidavit states one of the individuals who was later arrested coming back from Phoenix, William Breeden, was in Casper on March 16, 2010, "distributing methamphetamine." (Doc. 14-2 at ¶ 40.) "The intercepts revealed that Joseph Libretti obtained a discounted room for Breeden at a Casper motel." (*Id.*) During his police interview, Breeden admitted to distributing "pounds of methamphetamine" in Wyoming, and he advised Mr. Libretti was distributing "spice" and Breeden was considering becoming involved in that distribution as well. (*Id.* at ¶ 84.)

Defendant Woodson's application for search warrant sought to search for evidence of drug trafficking. (*See* Doc. 14-2 at ¶ 3 (describing the affiant's knowledge that drug traffickers often use false names, large amounts of cash, records, receipts, computers, etc. in their illegal enterprise); *see also* Doc. 14-3 (listing 11 categories of property to search for and seize based on probable cause that the items would demonstrate evidence of drug trafficking)). The United States Magistrate Judge granted the search warrant, permitting law enforcement to search Mr. Libretti's house, but striking the portion that would allow a search of vehicles. (Doc. 14-3.)

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<sup>3</sup> "In evaluating a Rule 12(b)(6) motion to dismiss, courts may consider not only the complaint itself, but also attached exhibits and documents incorporated into the complaint by reference ...." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (internal citations omitted). Here, Mr. Libretti's First Amended Complaint repeatedly refers to Defendant Woodson's applications for the warrants and the warrants themselves.

<sup>4</sup> Defendant Woodson's search warrant affidavit was a "global affidavit," containing information regarding several subjects of investigation and seeking multiple warrants for various locations. Not all of the information in the affidavit related to the search warrant application for Mr. Libretti's home.

On June 2, 2010, agents searched Mr. Libretti's home. (Doc. 5 at ¶ 16.) "The search uncovered spice<sup>5</sup>, as well as currency that had been concealed within the heating ducts of Libretti's home." *Libretti v. Woodson*, 2015 WL 221617, at \*1. Additionally, agents recovered "pay owe sheets, paper bindles in a plastic bag containing a white powdery substance, various suspected containers of spice, several phones, a computer, digital scales from both bedrooms, as well as numerous additional items." *United States v. Libretti*, D. Wyo. 11-CR-0069-NDF (Doc. 76 at p. 3) (Government's response to Mr. Libretti's motion to suppress). On March 18, 2011, Mr. Libretti was indicted on a charge of conspiring to possess with intent to distribute 50 grams or more of methamphetamine. *Libretti v. Woodson*, 2015 WL 221617, at \*1. Shortly before he was indicted, Mr. Libretti moved to Ohio. *Id.*

### **3. April 2011 Seizure Warrant for Financial Accounts**

On April 14, 2011, Defendant Woodson applied to a judicial officer for a warrant to seize the assets held by Mr. Libretti at Wells Fargo Bank, Key Bank, and Vanguard as possible proceeds traceable to controlled substances violations. (*See* Docs. 14-4, 14-5, 14-6.) In Defendant Woodson's affidavit in support of the seizure warrant application, he connected Mr. Libretti to potential drug money. (*See* Doc. 14-5.) For example, during subsequent DEA interviews with Breeden, Breeden stated he had actually purchased the methamphetamine in Phoenix from Mr. Libretti. (*Id.* at ¶ 7.) Breeden also told agents Mr. Libretti "had instructed Breeden to deposit money that was owed for the methamphetamine into one of Libretti's Wells Fargo Bank accounts." (*Id.*) Further, on March 29, 2011, DEA agents had learned Mr. Libretti had two active bank accounts at Key Bank, one with a balance of over \$50,000 and the other

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<sup>5</sup> "'Spice' is a brand name of 'herbal incense' that is commonly used to refer to all synthetic cannabis products. These products are often composed of a variety of legal herbs that have been sprayed with chemicals that mirror the effects of the psychoactive ingredient in marijuana when smoked." *Libretti v. Woodson*, 2015 WL 221617, at \*1 n.3 (internal citations omitted).

with a balance of over \$42,000. (*Id.* at ¶ 12.) And a court-authorized search of Mr. Libretti's Ohio residence showed Mr. Libretti had placed an order over the internet with an individual or company in Canada for five kilograms of "JWH-018" at a cost of \$17,500 on February 28, 2011. (*Id.* at ¶ 17.) JWH-018 is one of the synthetic chemicals used to create spice, and it was listed as a controlled substance effective March 1, 2011, the very day following Mr. Libretti's order. (*Id.* at ¶¶ 17-18.) Finally, Mr. Libretti's probation officer reported to Defendant Woodson that Mr. Libretti was required to report all of his financial accounts, but had failed to report his two bank accounts at Key Bank and his Vanguard account. (*Id.* at ¶ 24.)

Defendant Woodson's application for seizure warrant sought to seize Mr. Libretti's assets as proceeds traceable to controlled substances violations. (*Id.* at ¶ 26.) The United States District Judge granted the seizure warrant, permitting law enforcement to seize the assets in Mr. Libretti's bank accounts and Vanguard account. (Doc. 14-7.) The warrants were executed on April 15, 2011, and resulted in the seizure of over \$125,000. (*Id.*)

#### 4. Acquittal and Return of Property

Following jury trial, Mr. Libretti was acquitted of the charge of conspiring to possess with intent to distribute 50 grams or more of methamphetamine. *Libretti v. Woodson*, 2015 WL 221617, at \*2. "The court ordered that his property be returned—though Libretti disputes that the government has fully complied." *Id.* Mr. Libretti contends Defendant Woodson violated his Fourth Amendment right to be free from unreasonable searches and seizures, and he seeks civil damages as compensation.

### DISCUSSION

#### 1. Applicable Law

Qualified immunity protects government officials "from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Additionally, qualified immunity is “the norm” in § 1983 and *Bivens* actions against public officials, and “officials enjoy a presumption of immunity when the defense of qualified immunity is raised.” *Pahls*, 718 F.3d at 1227 (quoting and citing *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010)).

To overcome the presumption of qualified immunity, a plaintiff must establish two requirements: (1) a public official violated the plaintiff’s constitutional or federally-protected rights, and (2) the rights were clearly established at the time of the alleged violations. *Id.* (citing *Lewis*, 604 F.3d at 1225, and *Thompson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009)). Only if the plaintiff has satisfied both steps is qualified immunity defeated. *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012).

The Tenth Circuit recently described the probable cause standard of the Fourth Amendment as follows:

Officers must have probable cause to initiate a search, arrest, and prosecution under the Fourth Amendment. Probable cause is not a precise quantum of evidence—it does not, for example, “require the suspect’s guilt to be ‘more likely true than false.’ Instead, the relevant question is whether a ‘substantial probability’ existed that the suspect committed the crime, requiring something ‘more than a bare suspicion.’” *Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir.2011) (citations omitted); *see also United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir.2010) (“As the standard itself indicates, *probable* cause does not require metaphysical certitude or proof beyond a reasonable doubt. Probable cause is a matter of probabilities and common sense conclusions, not certainties. At the same time, probable cause requires, of course, more than mere suspicion that unlawful activity is afoot.” (internal quotation marks and citations omitted)).

*Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir.) *cert. denied*, 135 S. Ct. 881 (2014).

The Tenth Circuit also explained the probable cause analysis is less rigorous when considered in conjunction with qualified immunity, requiring only “arguable probable cause” to exist to support qualified immunity:

In the context of a qualified immunity defense on an unlawful search or arrest claim, we ascertain whether a defendant violated clearly established law “by asking whether there was ‘arguable probable cause’” for the challenged conduct. *Kaufman*, 697 F.3d at 1300. Arguable probable cause is another way of saying that the officers’ conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists. *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir.2007). A defendant “is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff.” *Id.*

*Id.* at 1141-42.

Finally, with particular regard to Mr. Libretti’s assertions that Defendant Woodson included false statements and omitted relevant information in his affidavits, the following guidance is pertinent:

Nor will a warrant protect officers who misrepresent or omit material facts to the magistrate judge. The burden is on the plaintiff to “make a substantial showing of deliberate falsehood or reckless disregard for truth” by the officer seeking the warrant. *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir.1990). This test is an objective one: when there is no dispute over the material facts, a court may determine as a matter of law whether a reasonable officer would have found probable cause under the circumstances. *Cortez*, 478 F.3d at 1120–21 (“The conduct was either objectively reasonable under existing law or it was not.”); see also *Fleming v. Livingston Cnty.*, 674 F.3d 874, 881 (7th Cir.2012) (describing the inquiry into reckless disregard as objective). Qualified immunity applies equally to reasonable mistakes of law and fact. See *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir.2009).

*Id.* at 1142.

**2. May 2010 Search Warrant for Wyoming Residence**

Counts I through IV of Mr. Libretti’s First Amended Complaint concern the May 2010 search warrant authorizing the search of his Wyoming residence. The general facts underlying the May 2010 search warrant were set forth earlier in this Order. The Court will address Counts

I and IV together because they both question whether the search warrant was supported by sufficient probable cause. Likewise, Counts II and III will be addressed together because they both concern whether the search warrant included enough specificity and particularity to pass constitutional muster.

## **2.1 Counts I and IV - Lack of Probable Cause**

Count I alleges Defendant Woodson's affidavit in support of search warrant application failed to establish probable cause to believe Mr. Libretti was distributing illegal (as opposed to legal) spice. (Doc. 5 at ¶ 5; Doc. 32 at p. 4.) Mr. Libretti contends the affidavit "was so lacking in indicia of probable cause to believe that Plaintiff was distributing illegal spice that Defendant Woodson's belief that such probable cause existed was unreasonable." (Doc. 5 at ¶ 5.) Count IV alleges Defendant Woodson intentionally made false statements in his affidavit in support of search warrant application while omitting other relevant information. (Doc. 5 at ¶¶ 60, 63-65.)

A search warrant must be voided and the fruits of the search suppressed where a court (1) finds that the affiant knowingly or recklessly included false statements in or omitted material information from an affidavit in support of a search warrant and (2) concludes, after excising such false statements and considering such material omissions, that the corrected affidavit does not support a finding of probable cause.

*United States v. Garcia-Zambrano*, 530 F.3d 1249, 1254 (10th Cir. 2008); *see also Puller v. Baca*, --- F.3d ---, No. 13-1156, slip op. at 11-12 (10th Cir. Mar. 20, 2015). In accordance with the applicable standard of analysis, the Court accepts Mr. Libretti's assertions as true. Therefore, the Court will consider whether the affidavit, absent the allegedly false statements and with the allegedly wrongly-omitted information, would establish probable cause to search Mr. Libretti's home. This is a question of law. *Id.* To overcome the presumption of qualified immunity, Mr. Libretti must demonstrate Defendant Woodson's affidavit lacked any "arguable probable cause." *See Stonecipher*, 759 F.3d at 1141. If the affidavit still exhibits arguable probable cause when

read as Mr. Libretti contends it should have read, then the Court is comfortable that it also established arguable probable cause in its original form.

Mr. Libretti contends as follows regarding the truth and falsity of Mr. Woodson's affidavit in support of application for search warrant:

1. In paragraph 85 of the affidavit, Defendant Woodson falsely asserted that Cole Herrick told agents that the phone number of "Joe," who introduced them to their methamphetamine source in Phoenix, was the same phone number as Mr. Libretti's. (Doc. 5 at ¶ 52.) Likewise, Defendant Woodson falsely stated the agents conveyed this information to Defendant Woodson. (Doc. 5 at ¶¶ 53, 55.)
2. In paragraph 83 of the affidavit, Defendant Woodson falsely claimed William Breeden and Herrick were caught with approximately 252 grams of methamphetamine. (Doc. 5 at ¶ 64.)

Additionally, Mr. Libretti asserts Defendant Woodson omitted the following pertinent information from the affidavit:

1. William Breeden told agents that Mr. Libretti had no involvement in Breeden and Herrick's methamphetamine acquisition. (Doc. 5 at ¶¶ 57, 59, 60.)
2. Breeden told agents the name of the person who sold him the methamphetamine, and it was not Mr. Libretti's name. (Doc. 5 at ¶¶ 58, 65.)
3. Herrick told agents he had never met and did not know Mr. Libretti. (Doc. 5 at ¶¶ 61, 63.)

The Court accepts these assertions as true and considers whether, omitting the allegedly false statements and including the allegedly omitted statements, there exists probable cause to support the search warrant for Mr. Libretti's Wyoming residence.

Omitting the challenged statements and including the allegedly exculpatory statements, the salient information from the affidavit in support of application for search warrant would be:

1. On March 16, 2010, William Breeden was in Casper, Wyoming, to distribute methamphetamine, and Mr. Libretti obtained a discounted room for Breeden at a Casper motel. (Doc. 14-2 at ¶ 40.)
2. Mr. Libretti at the time was on federal supervised release “after serving a lengthy prison sentence for operating a continuing criminal enterprise.” (Doc. 14-2 at ¶ 43.)
3. Multiple intercepted phone calls between Mr. Libretti and Breeden discussed the distribution of spice, and at least some forms of spice were controlled substances. (Doc. 14-2 at ¶¶ 42-44, 48, 52.)
4. Mr. Libretti sold spice to Breeden. (Doc. 14-2 at ¶ 43.)
5. Mr. Libretti told Breeden he needed a person like Breeden to distribute spice for him. (Doc. 14-2 at ¶ 48.) Breeden stated he was distributing spice to a person at the Warren Air Force Base in Cheyenne, Wyoming. (*Id.*)
6. Breeden informed Mr. Libretti he was traveling to Utah to obtain methamphetamine. (Doc. 14-2 at ¶ 48.)
7. Mr. Libretti said he was becoming paranoid because people were pleading guilty to the possession of spice, to which Breeden responded that Mr. Libretti should “clean house.” (Doc. 14-2 at ¶ 48.) Mr. Libretti said he did not have any drugs in his house. (*Id.*)

8. Breeden and Herrick were caught transporting methamphetamine in a rental car from Phoenix into Wyoming.<sup>6</sup> (Doc. 14-2 at ¶ 83.) A search of that rental car also uncovered digital scales. (*Id.*)
9. Law enforcement then executed search warrants on Breeden's camper and Breeden's father's residence, which resulted in the seizure of spice, scales, money wire receipts, prepaid credit cards, pay-owe sheets, and firearms. (Doc. 14-2 at ¶ 83.)
10. After they were caught, Breeden told agents that Mr. Libretti was distributing spice and Breeden was considering becoming involved in that distribution (in addition to his distribution of methamphetamine). (Doc. 14-2 at ¶ 84.)
11. Herrick told law enforcement that a "Joe" had introduced them to the Phoenix source of methamphetamine. (Doc. 14-2 at ¶ 85.)
12. Through a court-authorized pen register, Defendant Woodson confirmed that Mr. Libretti had received calls from five different Phoenix numbers and a call from Breeden the day before Breeden and Herrick traveled to Arizona. (Doc. 14-2 at ¶ 86.)
13. William Breeden told agents that Mr. Libretti had no involvement in Breeden and Herrick's methamphetamine acquisition. (Doc. 5 at ¶¶ 57, 59, 60.)
14. Breeden told agents the name of the person who sold him the methamphetamine, and it was not Mr. Libretti's name. (Doc. 5 at ¶¶ 58, 65.)

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<sup>6</sup> Mr. Libretti's challenge to this statement remains unclear. Apparently, he takes issue with how much methamphetamine Breeden and Herrick possessed. Evidently, though, he agrees Breeden and Herrick were caught "red-handed" in the possession of some quantity of methamphetamine. (Doc. 32 at p. 8; *see also* Doc. 15 at p. 16 n.10; Doc. 37 at p. 3 n.5.)

15. Herrick told agents he had never met and did not know Mr. Libretti. (Doc. 5 at ¶¶ 61, 63.)

In assessing whether there is probable cause to support a warrant, the Court must “assess the sufficiency of a supporting affidavit based on the totality of the circumstances.” *United States v. Perrine*, 518 F.3d 1196, 1205 (10th Cir. 2008) (quoting *United States v. Cantu*, 405 F.3d 1173, 1176 (10th Cir. 2005)). In doing so here, the Court finds Defendant Woodson’s affidavit provides, at a minimum, arguable probable cause. Based on the information recounted above, it was “more than a bare suspicion,” *Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011), that Mr. Libretti was again involved in the distribution of controlled substances.<sup>7</sup> Defendant Woodson was objectively reasonable, even if mistaken, in believing probable cause existed to search Mr. Libretti’s home. See *Stonecipher*, 759 F.3d at 1141 (citing *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007)). The information strongly indicated Mr. Libretti was distributing spice, some forms of spice were illegal, and Mr. Libretti was consorting with methamphetamine dealers. Taken together, it creates a substantial probability that Mr. Libretti was committing a controlled substances violation. The very fact he was so involved with an admitted methamphetamine dealer (which was unquestionably illegal) causes a reasonably prudent person to believe the spice he was dealing may be illegal too. It amounts to far more than mere suspicion that criminal activity was afoot.

Even reading the affidavit as Mr. Libretti contends it should have read, the Court is quite comfortable in finding it established at least arguable probable cause to justify the search warrant. Additionally, the affidavit in its original form also established arguable probable cause to justify the search warrant. Consequently, Mr. Libretti has not overcome the presumption of

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<sup>7</sup> A judicial officer considering a warrant application may “draw reasonable inferences from the material provided in the warrant application” in making his or her probable cause determination. *United States v. Tisdale*, 248 F.3d 964, 971 (10th Cir. 2001) (quoting *United States v. Nolan*, 199 F.3d 1180, 1183 (10th Cir. 1999)).

qualified immunity, and the motion to dismiss must be granted as to Counts I and IV of the First Amended Complaint.

## 2.2 Counts II and III - Unconstitutionally Overbroad and Lacking Specificity

Count II alleges the search warrant was unconstitutionally overbroad because it authorized the seizure of both legal and illegal spice. (Doc. 5 at ¶ 19.) Count III is similar and alleges the search warrant did not particularly describe illegal (as opposed to legal) spice as the object of the search. (Doc. 5 at ¶ 31.)

A search warrant must “enable the searcher to reasonably ascertain and identify the things authorized to be seized.” *United States v. Wolfenbarger*, 696 F.2d 750, 752 (10th Cir. 1982) (internal quotation marks omitted). The warrant must contain “as much specificity as the government’s knowledge and circumstances allow.” *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988).

At the time of the May 2010 search warrant, Defendant Woodson averred “that some ‘spice’ is illegal” and was candid in noting he did not know “if Libretti is distributing legal or illegal spice.” (Doc. 14-2 at ¶ 52.) Far from being unconstitutionally overbroad, however, this lack of specific knowledge demonstrated the need for further investigation into the matter by law enforcement to properly determine whether Mr. Libretti was violating the law. A search warrant is not the goal of law enforcement’s investigation; it is merely one of the many tools available with which to investigate. *See United States v. Markan*, 356 F. Supp. 742, 747 (N.D. Ohio 1972) (“The search warrant is a valuable investigative tool.”). The shortcoming of Mr. Libretti’s argument was already discussed by the Sixth Circuit:

It is also unavailing that Woodson incorrectly identified the legal herbs as illegal spice. It is impossible to distinguish, with the naked eye, between legal herbs and those that have been chemically altered.

*Libretti v. Woodson*, 2015 WL 221617, at \*4. That some spice was illegal but Defendant Woodson did not know which type Mr. Libretti was distributing, coupled with the fact that legal spice cannot be separated from the illegal with the naked eye, demonstrates the search warrant contained as much specificity as the government's knowledge and circumstances permitted. *See Leary*, 846 F.2d at 600. It was not unlawfully overbroad because it reasonably identified "spice" and "any controlled substances including but not limited to methamphetamine" as the primary targets of seizure. (Doc. 14-4 at p. 5.) The warrant provided sufficient guidance to law enforcement regarding the place to search and the items to seize.

Additionally, "[q]ualified immunity applies equally to reasonable mistakes of law and fact." *Stonecipher*, 759 F.3d at 1142 (citing *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009)); *see also Heien v. N. Carolina*, 135 S. Ct. 530, 537 (2014) ("reasonable mistakes of law, like those of fact, would justify certificates of probable cause" and "a certificate of probable cause functioned much like a modern-day finding of qualified immunity"). Mr. Libretti has not established that Defendant Woodson's mistakes of fact or law, if any, were unreasonable.

The Court concludes the search warrant was not "so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Groh v. Ramirez*, 540 U.S. 551, 565 (2004) (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)). Defendant Woodson reasonably believed the search warrant was valid. Consequently, Mr. Libretti has not overcome the presumption of qualified immunity, and the motion to dismiss must be granted as to Counts II and III of the First Amended Complaint.

**3. April 2011 Seizure Warrant for Financial Accounts**

Counts V through IX of Mr. Libretti's First Amended Complaint concern the April 2011 seizure warrant authorizing the seizure of Mr. Libretti's monetary assets. The claims are nearly identical to each other with the primary difference being the financial account from which the assets were seized. The general facts underlying the April 2011 seizure warrant were set forth earlier in this Order.

In all, over \$125,000 was seized from five accounts: (1) a Wells Fargo checking account, (2) a Wells Fargo savings account, (3) a Key Bank checking account, (4) a Key Bank savings account, and (5) a Vanguard individual retirement account (IRA). All of the money was later returned to Mr. Libretti. Counts V through IX are the same in that Mr. Libretti argues the seizure warrant lacked sufficient probable cause and included false statements and/or omitted pertinent information.<sup>8</sup> Because the legal challenge is the same throughout, the Court will address Counts V through IX together.

In his First Amended Complaint, Mr. Libretti contends the following with regard to the truth or falsity of Defendant Woodson's statements in his April 2011 affidavit in support of application for seizure warrant:

1. In footnote 1, Defendant Woodson asserted spice was scheduled as a controlled substance, but in reality only some forms of spice were controlled substances. (Doc. 5 at ¶¶ 77-81.)
2. In paragraph 7 of the affidavit, Defendant Woodson falsely asserted Herrick corroborated Breeden's (subsequent) claim that Breeden had purchased the methamphetamine in Phoenix from Mr. Libretti. (Doc. 5 at ¶¶ 83, 118, 149-52.)

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<sup>8</sup> In Counts V, VI, and VIII, Mr. Libretti asserts Defendant Woodson included false statements and omitted other relevant information. In Counts VII and IX, he only alleges Defendant Woodson omitted relevant information.

3. In paragraph 9 of the affidavit, Defendant Woodson falsely claimed Mr. Libretti had transferred more than \$250,000 to a business or person in Canada. (Doc. 5 at ¶ 99.)
4. In paragraph 13 of the affidavit, Defendant Woodson falsely asserted a search of Mr. Libretti's Ohio residence resulted in the seizure of spice. (Doc. 5 at ¶¶ 84, 119.)
5. In paragraph 23 of the affidavit, Defendant Woodson falsely claimed a search of Mr. Libretti's storage locker resulted in the seizure of more than five pounds of spice chemicals. (Doc. 5 at ¶¶ 85, 120.)
6. In paragraph 25 of the affidavit, Defendant Woodson falsely claimed that an examination of Mr. Libretti's cellphone records revealed that he was selling spice to people in Wyoming. (Doc. 5 at ¶¶ 86, 121.)

Additionally, Mr. Libretti asserts Defendant Woodson omitted the following pertinent information from the affidavit:

1. Between May 2008 and April 2011, approximately \$100,000 of direct payroll deposits from legitimate employment had been deposited into one or more of Mr. Libretti's accounts. (Doc. 5 at ¶ 74.)
2. In his first interview with law enforcement, Breeden had exculpated Mr. Libretti from any involvement with the methamphetamine Breeden and Herrick had been caught with. (Doc. 5 at ¶¶ 98, 155.)<sup>9</sup>

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<sup>9</sup> In his First Amended Complaint, Mr. Libretti spends several paragraphs repeating the allegation that Defendant Woodson intentionally omitted from the affidavit that the funds in the various financial accounts "had no nexus to a controlled substance violation" (Doc. 5 at ¶¶ 76, 116, 130, 147, 173) and "were not derived from or traceable to a controlled substance violation" (Doc. 5 at ¶¶ 100-01, 103-07, 132-38, 156-57, 160-63, 174-75). The Court has not included these allegations in its review because they are legal conclusions and were the very issues in question with regard to the seizure of assets. The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678. Mr. Libretti appears to conflate the seizure of his assets with complete civil

Mr. Libretti argues that omitting the allegedly false statements and including the wrongly-omitted information would have negated probable cause for the seizure warrant. (Doc. 32 at pp. 20-22.) As previously quoted above:

A search warrant must be voided and the fruits of the search suppressed where a court (1) finds that the affiant knowingly or recklessly included false statements in or omitted material information from an affidavit in support of a search warrant and (2) concludes, after excising such false statements and considering such material omissions, that the corrected affidavit does not support a finding of probable cause.

*Garcia-Zambrano*, 530 F.3d at 1254; *see also Puller v. Baca*, *supra*. For purposes of this motion to dismiss, the Court accepts Mr. Libretti's assertions as true. Therefore, the Court will consider whether the affidavit, absent the allegedly false statements and with the allegedly omitted information, would establish probable cause to seize Mr. Libretti's financial assets. This is a question of law. *Id.* The Court finds probable cause would still exist to support the seizure warrant. Omitting the challenged statements and including the allegedly exculpatory statements, the salient information in the affidavit would be:

1. In Mr. Libretti's earlier criminal case (from 1992), he frequently utilized bank safety deposit boxes, accounts and other related methods to conceal his drug proceeds. (Doc. 14-5 at ¶ 5.) As part of his plea agreement in that case, he agreed to forfeit all assets related to that crime up to \$1.5 million, including any later-discovered assets. (*Id.*)
2. The 2010 court-authorized telephone intercepts revealed Mr. Libretti was involved in the distribution of spice. (Doc. 14-5 at ¶ 6.)

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forfeiture of those assets. Further, as the Court's analysis will show, Defendant Woodson did have arguable probable cause to suspect at least some of the funds in Mr. Libretti's financial accounts were derived from or traceable to a controlled substances violation.

3. In subsequent interviews with agents, Breeden told the agents he purchased the methamphetamine he had obtained in Phoenix from Mr. Libretti.<sup>10</sup> (Doc. 14-5 at ¶ 7.) Mr. Libretti had been authorized by the U.S. Probation and Parole Office to travel to Phoenix at the same time that Breeden and Herrick were there. (*Id.*) Breeden also told the agents that Mr. Libretti instructed Breeden to deposit the money owed for the methamphetamine into one of Mr. Libretti's Wells Fargo Bank accounts. (*Id.*) Defendant Woodson reviewed Mr. Libretti's Wells Fargo Bank records from that time period, which corroborated Breeden's statement regarding depositing the drug money into Mr. Libretti's account. (Doc. 14-5 at ¶ 9.)
4. The June 2010 search of Mr. Libretti's home had resulted in the seizure of spice along with U.S. currency, some of which had been concealed in the heat ducts of the residence. (Doc. 14-5 at ¶ 8.)
5. One of Mr. Libretti's Wells Fargo Bank accounts and two of his Key Bank accounts each held nearly as much or more money than he made in a year from his legitimate employment with Energy Transportation.<sup>11</sup> (Doc. 14-5 at ¶¶ 10, 12, 19, 21.)
6. Defendant Woodson had been advised that Mr. Libretti "had transferred approximately \$19,000 via wire transfer on March 29, 2011, to a company

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<sup>10</sup> Mr. Libretti does not take issue with this allegation regarding William Breeden's purported statements to law enforcement in his subsequent interviews. Mr. Libretti alleges only that Cole Herrick never corroborated these later statements.

<sup>11</sup> In his response to the motion to dismiss, Mr. Libretti goes to great lengths to argue these amounts were simply saved up money from legitimate employment. (*See* Doc. 32 at pp. 16-22.) Mr. Libretti's argument could carry the day in a civil forfeiture trial, but it misses the mark in this case. This case asks whether arguable probable cause existed to support the seizure warrant.

- believed to be supplying spice.”<sup>12</sup> (Doc. 14-5 at ¶ 14.)
7. Mr. Libretti had wire transferred \$15,020 to “Source1Herbs” in Canada on February 28, 2011, and during the search of his Ohio apartment, agents found an invoice and email that showed the wire transfer was for the purchase of five kilograms of JWH-018. (Doc. 14-5 at ¶¶ 15, 17.) Further, JWH-018 was one of the spice chemicals classified as a controlled substance effective March 1, 2011, the very day following Mr. Libretti’s purchase order. (*Id.* at ¶ 18.)
  8. Mr. Libretti was required to report all of his financial accounts to his probation officer as part of his supervised release, but his probation officer advised Defendant Woodson that Mr. Libretti had not reported the two bank accounts at Key Bank. (Doc. 14-5 at ¶ 24.)
  9. An analysis of Mr. Libretti’s text messages from his cellphone revealed he was in contact with individuals in Wyoming who were suspected by law enforcement of being involved in the distribution of spice and other controlled substances. (Doc. 14-5 at ¶ 25.)
  10. At the time of the April 2011 affidavit and seizure warrant, Mr. Libretti had been indicted in Wyoming on a charge of conspiracy to possess with intent to distribute and to distribute 50 grams or more of methamphetamine. (Doc. 14-5 at ¶ 11.) The indictment further alleged a forfeiture count in the amount of \$10,000. (*Id.*)
  11. Between May 2008 and April 2011, approximately \$100,000 of direct payroll deposits from legitimate employment had been deposited into one or more of Mr. Libretti’s accounts. (Doc. 5 at ¶ 74.)

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<sup>12</sup> “[H]earsay evidence may form the basis for a probable cause determination,” and “multiple layers of hearsay may support a finding of probable cause for a search warrant.” *United States v. Mathis*, 357 F.3d 1200, 1204 (10th Cir. 2004).

12. In his first interview with law enforcement, Breeden had exculpated Mr. Libretti from any involvement with the methamphetamine Breeden and Herrick had been caught with. (Doc. 5 at ¶¶ 98, 155.)

This information establishes arguable probable cause sufficient to support the seizure warrant. It strongly indicated that Mr. Libretti was again distributing illegal drugs (both spice and methamphetamine), and at least some of the proceeds of that illegal distribution could be found in one or more of his financial accounts. Examining this information under the totality of the circumstances, it demonstrates a substantial probability that Mr. Libretti was using multiple financial accounts to both hold proceeds of his illegal drug sales and pay for acquiring the ingredients (e.g., JWH-018) to make additional illegal spice. The Court agrees with Mr. Woodson that it was logical and permissible to infer that Mr. Libretti received his order of JWH-018 on or after March 1, 2011 (the day after he placed his order for it), which suggested he possessed a controlled substance, the quantity of which (five kilograms) suggested he was re-distributing it. (See Doc. 37 at p. 6 n.8.) Additionally, it shows Breeden first exculpated Mr. Libretti from any involvement in the Phoenix methamphetamine purchase, but then recanted in later police interviews and implicated Mr. Libretti. These conflicting statements create rich fodder for cross-examination at a trial, but they do not negate probable cause to support a civil seizure warrant. These allegations, which were not challenged by Mr. Libretti, amount to far more than mere suspicion that criminal activity was afoot.

Mr. Libretti argues probable cause was required for “every dollar in all of Mr. Libretti’s bank accounts” before the seizure warrant could be granted. (Doc. 32 at p. 22.) Mr. Libretti is incorrect. “[F]orfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate, i.e.,

disguise the nature and source of, his scheme.” *United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998) (citing *United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir.), *cert. denied*, 522 U.S. 960 (1997)). Further, in a forfeiture action, “[c]ircumstantial evidence of drug transactions may support the establishment of probable cause.” *United States v. Wagoner Cnty. Real Estate*, 278 F.3d 1091, 1098 (10th Cir. 2002) (quoting *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868, 877 (10th Cir. 1992)). In Defendant Woodson’s affidavit supporting seizure warrant application, there was evidence that at least some of Mr. Libretti’s funds were involved in drug transactions, and it was more than circumstantial evidence. Moreover, the question at issue is limited to whether arguable probable cause supported the seizure warrant.

Even reading the affidavit as Mr. Libretti contends it should have read, the Court is quite comfortable in finding it established at least arguable probable cause to support the seizure warrant. Additionally, the affidavit in its original form also established arguable probable cause to justify the seizure warrant. Consequently, Mr. Libretti has not overcome the presumption of qualified immunity, and the motion to dismiss must be granted as to Counts V through IX of the First Amended Complaint.

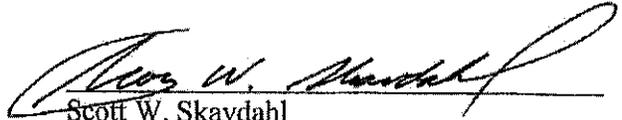
### **CONCLUSION AND ORDER**

Assuming Mr. Libretti’s allegations to be true, Defendant Woodson’s affidavits in support of the warrant applications established arguable probable cause to support the issuance of the respective warrants. Therefore, Mr. Libretti has not overcome Defendant Woodson’s presumed qualified immunity because he has not shown that Defendant Woodson violated Mr. Libretti’s constitutional or federally-protected rights. Accordingly, the First Amended Complaint must be dismissed as it relates to Defendant Woodson.

**It is therefore ordered** that the Motion to Dismiss Steven Woodson (Doc. 14) is hereby **granted**. Counts I through IX of Mr. Libretti's First Amended Complaint are hereby dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Defendant Woodson is entitled to qualified immunity against Mr. Libretti's claims.

Dated this 27<sup>th</sup> day of March, 2015.

  
Scott W. Skavdahl  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF WYOMING

FILED

U.S. DISTRICT COURT  
DISTRICT OF WYOMING

JOSEPH V. LIBRETTI, JR., )  
)  
Plaintiff, *pro se*, )  
)  
v. )  
)  
TAYLOR COURTNEY, et al., )  
)  
DEFENDANTS )

Civil Case No. 14-cv-00107-SWS  
11 09

STEPHAN HARRIS, CLERK  
CHEYENNE

**PLAINTIFF'S MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND  
THE MARCH 27, 2015, ORDER AND JUDGMENT GRANTING DEFENDANT STEVE  
WOODSON'S MOTION TO DISMISS; OR IN THE ALTERNATIVE MOTION FOR  
LEAVE TO FILE AN AMENDED COMPLAINT CORRECTING DEFICIENCIES**

Plaintiff Joseph V. Libretti, Jr., proceeding *pro se*, pursuant to Fed. R. Civ. P. 59(e), hereby files his Motion to Alter or Amend the March 27, 2015, Order Granting Defendant Steve Woodson's Motion to Dismiss, and motion seeking leave to file an amended complaint.

**INTRODUCTION**

Because this Court made factual and legal errors in granting Defendant Woodson's Motion to Dismiss, Plaintiff requests relief from that Order and Judgment, pursuant to Fed. R. Civ. P. 59(e). Grounds warranting a grant of relief pursuant to Fed. R. Civ. P. 59(e) include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000), citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. *Id.*

The Court's March 27, 2015, Order Granting Defendant Woodson's Motion to Dismiss separately addressed the claims in the Complaint related to the May, 2010 Casper, Wyoming search

warrant (Counts I-IV) and the April 2011, warrant authorizing the seizure of Plaintiff's financial accounts (Counts V-IX). This motion will likewise.

**I. BECAUSE THE COURT MADE FACTUAL AND LEGAL ERRORS RELATED TO THE MAY, 2010, SEARCH WARRANT, IT SHOULD REVERSE ITS GRANT OF DEFENDANT WOODSON'S MOTION TO DISMISS**

Because the Court incorrectly held (1) the search warrant affidavit alleged that Breeden had informed Mr. Libretti that he was travelling to Utah to obtain methamphetamine, (2) the search warrant affidavit indicated that Mr. Libretti was "consorting" with multiple methamphetamine dealers, and (3) it is impossible to distinguish between legal herbs, legal Spice, and illegal Spice, this Court should reverse its Order granting Defendant Woodson's Motion to Dismiss.

**A. Because the Warrant Affidavit did not Allege that Breeden had Informed Mr. Libretti that the Purpose of his Trip to Utah was to Obtain Methamphetamine, this Court Erred in Granting Woodson's Motion to Dismiss.**

Because the 2010 search warrant to search Mr. Libretti's home in Wyoming did not establish that Mr. Libretti had any knowledge of Breeden's methamphetamine dealing, and the Court's erroneous interpretation of ¶ 48 of the warrant affidavit is the only evidence otherwise, this Court should reverse its Order granting Defendant Woodson's Motion to Dismiss.

At page 11 of the Court's March 27, 2015, Order Granting Defendant Woodson's Motion to Dismiss, the Court found that Woodson's affidavit stated, in part,

"6. Breeden informed Mr. Libretti he was travelling to Utah to obtain methamphetamine. (Doc. 14-2 at ¶ 48)."

Significantly, this was the only "fact" in the entire Order that would permit a finding that Mr. Libretti knew that Breeden was dealing methamphetamine. Without this interpretation of the affidavit, and after excising Woodson's false statements, not a shred of evidence in the entire affidavit suggests that Mr. Libretti knew that Breeden was dealing methamphetamine. This Court made an error.

To be sure, ¶ 48 of the warrant affidavit was drafted to mislead the issuing judicial official, just as this Court was misled. Paragraph 48 of the warrant affidavit stated, in pertinent part,

On March 24, 2010, the court authorized intercepts revealed that Breeden and Libretti discussed the distribution of “spice.” Breeden advised Libretti that Breeden was travelling to Salt Lake City, Utah (to obtain methamphetamine).

The words “to obtain methamphetamine” are in parentheses because that is only Woodson’s commentary based on his own thoughts, and not what Breeden said to Mr. Libretti. Although Woodson claimed in his motion to dismiss, at page 13, that Breeden “confided to Libretti that he was travelling out of state to obtain methamphetamine,” Woodson subsequently withdrew that claim. *See* doc. 26, Notice of Errata in ECF-15—Memorandum in Support of Motion to Dismiss Steven Woodson. Although Breeden stated to Mr. Libretti that he was travelling to Salt Lake City, Breeden did not tell Mr. Libretti that he was doing so “to obtain methamphetamine,” and the word “methamphetamine” was neither mentioned nor alluded to in the conversation. *See* Notice of Errata.

Without this erroneous finding that Breeden told Mr. Libretti he was travelling to Utah “to obtain methamphetamine,” the warrant affidavit merely alleged that Breeden told Mr. Libretti he was travelling to Utah. Nowhere in the entire affidavit can a single fact be found to support probable cause to believe that Mr. Libretti knew that Breeden was dealing methamphetamine, let alone that Mr. Libretti knew of, was involved in, or was connected to, Breeden’s methamphetamine dealing.

Without this reference to methamphetamine, the warrant affidavit does not establish probable cause to believe that Mr. Libretti was either involved in selling methamphetamine, or had any knowledge of Breeden’s methamphetamine activities. The warrant only established (1) Breeden was dealing methamphetamine, (2) on a single occasion Mr. Libretti obtained a discounted

motel room for Breeden when he was in Casper,<sup>1</sup> (3) Mr. Libretti was on supervised release after serving a federal sentence for operating a continuing criminal enterprise, (4) Mr. Libretti was selling Spice to Breeden for distribution, (5) Mr. Libretti told Breeden he was not doing anything illegal and had nothing illegal in his home, (6) Herrick, who was caught transporting methamphetamine with Breeden from Arizona, told the police that someone named “Joe” had introduced them to their source (but had not sold them the methamphetamine), (7) Breeden had called Mr. Libretti the day before he and Herrick travelled to Arizona to buy methamphetamine, but did not call Mr. Libretti on the day of their travel, or at any time during their stay in Arizona, (8) Mr. Libretti—who was in Arizona—received calls from five different Phoenix phone numbers.

Furthermore, as Mr. Libretti alleged in the Complaint (doc. 5 ¶¶ 57, 59, 60), Breeden, now a reliable informant, not only told the police that Mr. Libretti had no involvement in Breeden’s and Herrick’s methamphetamine acquisition, but told the police the name of the person who sold him the methamphetamine in Arizona, that he was caught with. Finally, Herrick told the police that he had never met, and did not know, Mr. Libretti (doc. 5 at ¶¶ 61, 63). Nothing in these facts shows “multiple connections between Mr. Libretti and methamphetamine trafficking” (*see* Order at 4). In fact, none of these facts show any connection between Mr. Libretti and methamphetamine

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<sup>1</sup>The warrant affidavit at ¶ 40 claimed that Breeden was in Casper “distributing methamphetamine” on March 16, when Mr. Libretti obtained the discounted hotel room for Mr. Breeden. This Court simply accepted that allegation at face value, *see* doc. 57 (Order) at p. 11 ¶ 1. In fact, the affidavit does not establish that this claim was based on anything more than speculation on Woodson’s part, or on a rumor circulating in the criminal underworld. Not one fact in the affidavit supports the conclusion that Breeden was in Casper distributing methamphetamine on March 16. Even though hearsay evidence may form the basis for probable cause, a judicial official would need to determine the veracity and basis of knowledge of the information source (which the affidavit does not provide). Furthermore, the affidavit does not even allege that this claim—that Breeden was in Casper distributing methamphetamine—was based on hearsay. The claim could simply be Woodson’s assumption. This claim—that Breeden was in Casper distributing methamphetamine on March 16—is entitled to no weight.

trafficking. The facts do not even suggest that Mr. Libretti knew that Breeden was selling methamphetamine.

After the false statements in the affidavit are omitted, and the material omissions are included, the affidavit only establishes that Mr. Libretti knew Breeden, Mr. Libretti was selling Spice, and Mr. Libretti was selling Spice to Breeden. The affidavit does not establish probable cause to believe that Mr. Libretti was involved in methamphetamine trafficking.

Furthermore, after the false statements in the affidavit are omitted, and the material omissions are added, the affidavit does not establish probable cause to believe that Mr. Libretti was selling an illegal form of Spice. This Court was remiss in not taking ¶ 52 of the affidavit into consideration. That paragraph stated,

52. On March 30, 2010, the court authorized intercepts revealed that Breeden and Libretti again discussed the distribution of “spice.” Libretti advised Breeden that Libretti had seen an article in the paper where the Wyoming State Crime laboratory director had said “spice” was completely legal. Libretti stated that as a result he was going to start distributing more. The affiant knows that some “spice” is illegal, however as stated before the affiant does not know if Libretti is distributing legal or illegal spice.

Probable cause to believe that Mr. Libretti was selling an illegal form of Spice did not exist simply because Mr. Libretti was selling Spice—a substance that could be made either legally or illegally—to a person who was selling methamphetamine. Yet that is all the warrant affidavit establishes, after the false statements are redacted, and the material omissions are included. Breeden told the agents the name of the person who sold him the methamphetamine in Arizona, and it was not Mr. Libretti. Herrick told the agents that he did not know Mr. Libretti. Nothing in the warrant affidavit, after the false statements are redacted, and the material omissions are included, establishes probable cause to believe that Mr. Libretti was involved in methamphetamine trafficking, or selling illegal Spice.

**B. Because the Warrant Affidavit did not Establish That Mr. Libretti was Consorting With Multiple Methamphetamine Dealers, This Court**

**Should Reconsider its Order Granting Defendant Woodson's Motion to Dismiss.**

Because this Court erred in finding that that warrant affidavit “strongly indicated . . . Mr. Libretti was consorting with methamphetamine dealers,” Order at 13, this Court should reconsider its Order granting Defendant Woodson’s motion to dismiss. Nothing in the warrant affidavit, after the false statements are redacted and the material omissions are included, suggests that Mr. Libretti knew, or ever met, any person mentioned in the affidavit other than Breeden. The only methamphetamine dealer that the affidavit “indicates” that Mr. Libretti ever “consorted with” was Breeden. Nothing in the redacted affidavit suggests that Mr. Libretti knew Breeden was selling methamphetamine. Breeden told the agents that Mr. Libretti did not sell him the methamphetamine he (Breeden) was caught with. Herrick told the agents that he did not know Mr. Libretti, and had never met him.

**C. Because the Court Erred in Finding that Legal Herbs and Legal Spice are Indistinguishable From Illegal Spice With the Naked Eye, This Court Should Reconsider its Order Granting Defendant Woodson's Motion to Dismiss.**

Because this Court erred in finding that legal herbs and legal Spice are indistinguishable, with the naked eye, from illegal Spice, this Court erred in granting Woodson’s Motion to Dismiss on Counts II and III. The procedural posture of the case was a motion to dismiss. Mr. Libretti was not allowed to present evidence to prove that legal Spice and legal herbs are distinguishable from illegal Spice. Significantly, the defendants were not allowed to, and did not, provide any evidence to support the Court’s finding, at pages 14-15 of its Order, that legal Spice and legal herbs are indistinguishable from illegal Spice.

It is unclear where the Court derived the notion that legal Spice and illegal Spice are indistinguishable with the naked eye. Although the Court referred to the Sixth Circuit’s ruling in *Libretti v. Woodson*, 2015 WL 221617, that was error for two reasons.

First, the Sixth Circuit did not state that legal and illegal Spice were indistinguishable from each other with the naked eye; the Sixth Circuit stated that legal herbs and illegal Spice are indistinguishable from each other.

Second, the Sixth Circuit's factual finding on this issue is not binding on Mr. Libretti in this case. Mr. Libretti did not have an opportunity to litigate this issue in the earlier (Sixth Circuit) case against Woodson. That factual finding was not made at the trial court level. The Sixth Circuit based that finding on a question that it asked Woodson's attorney at oral argument. No evidence was presented to support Woodson's counsel's claim that legal herbs were indistinguishable from illegal Spice, and more importantly, Mr. Libretti had no opportunity to present evidence otherwise. Furthermore, Mr. Libretti disputed this claim then, and he does so now.

It is beyond cavil that if legal Spice and legal herbs are distinguishable from illegal Spice, then this Court erred in granting the motion to dismiss. Because this Court based its ruling on "facts" that are disputed and have no evidentiary support in either this case or the Sixth Circuit case, this Court should reconsider its Order granting Woodson's motion to dismiss.

**II. BECAUSE THE COURT MADE FACTUAL AND LEGAL ERRORS RELATED TO THE APRIL, 2011, WARRANT, IT SHOULD REVERSE ITS GRANT OF DEFENDANT WOODSON'S MOTION TO DISMISS**

Because the Court incorrectly held (1) allegations that funds "had no nexus to a controlled substance violation" and "were not derived from or traceable to a controlled substance violation" were legal conclusions that the Court was not bound to accept as true, (2) the warrant affidavit established probable cause to believe that all legitimate funds in all accounts were being used to facilitate a crime, and (3) probable cause that "some proceeds" could be found in "one or more financial accounts" was probable cause to seize all funds in all accounts, this Court should reverse its Order granting Woodson's Motion to Dismiss.

**A. Because Allegations That State That Funds Had no Nexus to, and Were not Derived From, a Controlled Substance Violation, are not Legal Conclusions, This Court Should Reconsider its Order Granting Woodson's Motion to Dismiss.**

Because this Court erred in concluding that allegations in a Complaint that state funds “had no nexus to a controlled substance violation” and “were not derived from or traceable to a controlled substance violation” are legal conclusions that the Court was not bound to accept as true, Order at p. 17 fn. 9, this Court should reconsider its Order granting Woodson’s motion to dismiss.

An allegation in a Complaint that alleges that money in a bank account was not from selling illegal drugs is not a “legal conclusion,” and a court is required to accept the allegation as true on a motion to dismiss. For the same reason, an allegation in a Complaint stating that funds in a financial account were not derived from selling a controlled substance is not a “legal conclusion” that a court is not bound to accept as true on a motion to dismiss.

Woodson’s April 2011 affidavit for the seizure of all of the funds in all of Mr. Libretti’s financial accounts was based on the ground that “the subject bank account(s) . . . represent and contain proceeds traceable to” violations of Title 21. Warrant aff. ¶ 26 (doc. 14-5). In alleging in the Complaint that funds “had no nexus to a controlled substance violation” and “were not derived from or traceable to a controlled substance violation” Mr. Libretti was merely stating that the funds were not from selling illegal drugs. This is no more a “legal conclusion” than the allegation, “The funds in the account were not from selling methamphetamine” is a “legal conclusion.”

Without a doubt, if Woodson knew that funds in the seized accounts were not proceeds traceable to a crime, then Mr. Libretti’s constitutional rights were violated. That is Mr. Libretti’s claim, and it could not be stated more clearly in the Complaint. Stating that money was not derived from or traceable to a crime is not a “legal” conclusion that is not entitled to be accepted as true on a Rule 12(b)(6) motion. If such was the case, then no claim that the police falsely swore out a warrant to seize “proceeds” of a crime, knowing that the funds were not criminal proceeds, could

ever be made in a Complaint, because the Court would simply treat the allegation as a “legal conclusion.”

Mr. Libretti requests that this Court take judicial notice, pursuant to Fed. R. Evid. 201(c)(2), of ¶ 5 of the Complaint *in rem* filed in *United States v. \$85,668*, No. 2:09cv00029 (D. Utah), attached hereto. That paragraph alleged, “The defendant property is subject to forfeiture . . . because it was used to commit, facilitate, was involved in or was proceeds of the commission of violations of 21 U.S.C. ¶ 841(a)(1) and 844(a).” The court in that case did not find that this was a “legal conclusion” not entitled to be accepted as true, and certainly neither the United States, nor any federal court, would consider it to be a “legal conclusion” for Rule 12(b)(6) purposes.

At the very least, Mr. Libretti should be allowed to file an amended complaint rewording the claim in a manner that suits this Court. Mr. Libretti’s claim is plausible: Woodson swore out a warrant claiming that he had probable cause to believe that all of the funds in all of Mr. Libretti’s accounts were “proceeds” traceable to violations of Title 21, when he knew for certain that such was not true. This claim states a constitutional violation.

**B. Because the Court Erred in Finding That the Affidavit Established Probable Cause to Believe That all of the Legitimate Funds in all of the Accounts Were Used to “Facilitate” a Crime, This Court Should Reconsider its Grant of Defendant Woodson’s Motion to Dismiss.**

Because the warrant affidavit failed to establish, or even allege, probable cause to believe that any legitimate funds in Mr. Libretti’s accounts had been pooled to facilitate, i.e., disguise the nature and source of, a criminal scheme, this Court erred in holding that probable cause existed for the seizure of every last dollar in each and every one of Mr. Libretti’s financial accounts, including funds that Woodson knew were legitimate. *See* Order at 21-22. Initially, it is undisputed that not one penny in any of Mr. Libretti’s accounts was derived from a crime. Additionally, accepting Mr. Libretti’s allegations in the Complaint as true, Woodson knew that legally earned funds that were not “proceeds traceable to” a violation of Title 21 were in the accounts.

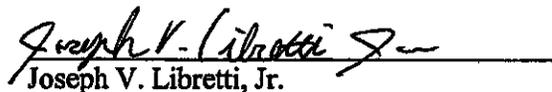
In Woodson's affidavit he only claimed to have probable cause to believe that Mr. Libretti's financial accounts represented and contained proceeds traceable to a violations of Title 21. *See* affidavit at ¶ 26 (doc. 14-5). Woodson never claimed, and the affidavit does not establish, that probable cause existed to believe that any legitimate funds in any of Mr. Libretti's accounts had been pooled to facilitate a criminal scheme. This Court conceded that the warrant affidavit only established probable cause to believe that "some of Mr. Libretti's funds were involved in drug transactions." *See* Order at p. 21, and p. 17-18 fn. 9.

Woodson claimed in his affidavit that he had probable cause to believe that all of the funds in all of the accounts were proceeds from violations of Title 21, but he really knew otherwise. No facts in the affidavit remotely suggest that legitimate funds had been pooled in any account to facilitate a crime. For example, other than merely stating that Mr. Libretti had a Vanguard IRA, *see* affidavit at ¶ 20, not one fact suggests that the legitimate funds in this account were used to facilitate a crime. However, this Court held that because legitimate funds can be seized if they were used to facilitate a crime, Woodson could seize Mr. Libretti's legitimate funds. *See* Order at 21-22. Because the affidavit neither alleged, nor established, the existence of probable cause to believe that Mr. Libretti's legitimate funds had facilitated a crime, this was error.

#### CONCLUSION

Based on all of the above, Plaintiff requests that this Court reconsider its grant of Defendant Woodson's Motion to Dismiss, or in the alternative, allow Mr. Libretti to file an amended complaint correcting any deficiencies.

Respectfully submitted,

  
Joseph V. Libretti, Jr.

Plaintiff, *pro se*  
1900 E. 30th St. Apt. 305  
Cleveland, OH 44114  
(224)355-6358

**CERTIFICATE OF SERVICE**

I certify that on April 17, 2015, I mailed a copy of the foregoing

**PLAINTIFF'S MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND  
THE MARCH 27, 2015, ORDER AND JUDGMENT GRANTING DEFENDANT STEVE  
WOODSON'S MOTION TO DISMISS; MOTION FOR LEAVE TO FILE AMENDED  
COMPLAINT**

to the following parties, by depositing same, postage paid, in the U.S. Mails.

U.S. ATTORNEY  
PO Box 668  
Cheyenne, WY 82003-0668

A handwritten signature in black ink, reading "Joseph V. Libretti, Jr.", written over a horizontal line.

Joseph V. Libretti, Jr.  
Plaintiff, *pro se*

**PLAINTIFF'S EXHIBIT A**

**Complaint *in rem* filed in *United States v. \$85,668*, No. 2:09cv00029 (D. Utah)**

FILED  
U.S. DISTRICT COURT

2009 JAN 15 P 2:34

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,  Plaintiff,  v.  \$85,668.00 in United States Currency,  Defendant.</p>	<p>CASE: #  VERIFIED COMPLAINT FOR FORFEITURE <i>IN REM</i>  ----- Case: 2:09cv00029 Assigned To : Sam, David Assign. Date : 1/15/09 Description: USA v. 85668 in US Currency</p>
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Plaintiff, United States of America, by and through the undersigned Assistant United States Attorney for the District of Utah, alleges the following upon information and belief for its claim against the Defendant property:

1. This is a civil forfeiture action in rem brought pursuant to 21 U.S.C. § 881(a).
2. The Defendant property is known and numbered as:
  - \$85,668.00 in United States Currency
3. Subject matter jurisdiction over this matter by the Court is proper by virtue of 28 U.S.C. §§ 1345 and 1355(a). In Rem jurisdiction over this matter by the Court is proper by virtue of 28 U.S.C. §§ 1355(b) and (d). Venue is proper in this district pursuant to 28 U.S.C. §§

1391 and 1395 and 18 U.S.C. § 981(h).

4. In accordance with the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule G(2)(d), the Defendant property was initially seized at or near westbound I-80 near 6900 West, Salt Lake City, Utah.

5. The United States alleges the Defendant property is subject to forfeiture to the United States because it was used to commit, facilitate, was involved in or was proceeds of the commission of violations of 21 U.S.C. §§ 841(a)(1) and 844(a).

#### FACTS AND CIRCUMSTANCES SUPPORTING FORFEITURE

6. On or about September 15, 2008, Andrew C. Wiley (hereinafter referred to as "WILEY") was driving a 2002 Toyota Tundra pickup truck, VIN: 5TBBT48152S323487 westbound on I-80 at or near 6900 West, Salt Lake City, Utah at approximately 10:05 a.m. when he was stopped by Trooper Chamberlain Neff (hereinafter referred to as "NEFF") of the Utah Highway Patrol because there was no registration on file with law enforcement for the plate on his vehicle, Missouri license plate 2SD398.

7. Upon approaching the passenger side door, NEFF advised WILEY of the reason for the stop and asked WILEY to produce a driver license, registration, and proof of insurance. NEFF asked WILEY to step outside his vehicle. NEFF then invited WILEY to sit in the front seat of his trooper vehicle, which he did, and the two engaged in general conversation. WILEY told NEFF that he was on his way to Los Angeles, California, to visit his aging aunt.

8. WILEY did not produce a valid vehicle registration but instead handed NEFF the vehicle title to the 2002 Toyota Tundra pickup truck which indicated that the vehicle was

purchased for \$5000.00. WILEY stated that he had recently purchased this truck.

9. WILEY stated that he left Missouri on Saturday, September 13, 2008, and drove westbound on I-70 for a while and then changed directions and traveled westbound on I-80. NEFF told WILEY that he could have saved a day in travel time by continuing on I-70 to get to Los Angeles. WILEY stated that I-80 was a beautiful drive, and he wanted to go that route.

10. WILEY stated that he did not have a job and that his parents gave him \$1000.00 for the trip. NEFF asked WILEY how he could afford to take such a long distance trip and purchase a new truck without having a job. WILEY responded that his parents were helping him.

11. NEFF asked WILEY if he had ever been arrested. WILEY responded that he was arrested for a DUI long ago. At that time, dispatch relayed to NEFF that the vehicle was not reported as stolen and that a valid registration could not be found. Dispatch also reported to NEFF that WILEY had a valid driver license and no outstanding warrants for his arrest. Dispatch further advised NEFF that WILEY had been previously arrested for possession of marijuana and paraphernalia. NEFF asked WILEY about the marijuana charge and WILEY admitted he should have told NEFF about that and was sorry for not disclosing that to him.

12. After NEFF rechecked the VIN on the vehicle to compare it to the title, NEFF returned to his vehicle and returned all the requested paperwork to WILEY. NEFF told WILEY to "Have a nice day," and WILEY left NEFF's vehicle to return to the Toyota Tundra pickup truck.

13. NEFF exited his vehicle and approached WILEY. NEFF then asked WILEY if he could ask him some more questions about his trip. WILEY stated, "No, I need to get back on the

road." NEFF told WILEY that he was not free to leave and that NEFF suspected WILEY was participating in criminal activity. NEFF asked WILEY if he was doing anything illegal today and WILEY said, "No, sir." NEFF asked WILEY if he traveled with large amounts of money and WILEY said, "No, sir." NEFF asked WILEY if there were any narcotics in the vehicle and WILEY quickly said, "No, sir." NEFF asked WILEY if there was any marijuana in the vehicle and WILEY quickly said, "No, sir." NEFF asked WILEY if there was any cocaine in the vehicle and WILEY said, "No, sir." NEFF asked WILEY if there was any methamphetamine in the vehicle and WILEY said, "No, sir." NEFF asked WILEY again if there was a large amount of money in the vehicle and WILEY said, "No, sir." NEFF asked WILEY if he could search the vehicle and WILEY said, "No, sir." NEFF then directed WILEY to stand at the front of the Toyota Tundra pickup truck while NEFF ran his police service dog around the outside of the truck. WILEY responded by saying "No" and that he needed to leave. NEFF replied that based on his suspicion of criminal activity, NEFF didn't need WILEY's permission to conduct a canine sniff. NEFF's suspicions were based on the following reasons:

- a. single occupant driving a long distance across the country
- b. traveling to a known source area of narcotics
- c. two visible cellular phones in the vehicle
- d. vehicle had a 'lived-in' look
- e. vehicle cabin contained energy drink powder, Febreze air freshener, a new cell phone charger and coffee cups
- f. travel plans did not make sense
- g. newly registered and insured vehicle
- h. vehicle was purchased for \$5000.00 when the retail value is over \$10,000.00
- i. driver lied about his criminal past
- j. police training and experience

14. NEFF returned to his vehicle and retrieved his police dog "Tank." Tank was most recently certified in narcotics detection in September 2008. NEFF took Tank around the Toyota Tundra pickup truck starting at the bed area of the truck. NEFF moved Tank toward the passenger side of the truck, which still had the passenger window rolled down. As Tank approached the passenger door, he stood up on his hind legs and began to scratch the passenger door. This scratching from Tank indicated the presence or odor of drugs. Tank sniffed the open passenger window and showed great interest in the vehicle's interior cabin. Tank then attempted to jump into the vehicle cabin. NEFF prevented Tank from jumping into the vehicle cabin several times. Tank's attempts to get inside the vehicle cabin indicated an alert for drugs. Tank will not enter a vehicle's open window without the odor of narcotics drawing him in. Tank was then placed at the front of NEFF's vehicle.

15. During the canine sniff test of the vehicle, NEFF observed WILEY swaying back and forth and almost falling over several times as if WILEY was about to pass out. NEFF approached WILEY and asked him what was wrong. WILEY stated that he was nervous because of the dog and because WILEY had not been in trouble with law enforcement for a long time. NEFF then conducted a Terry Frisk search of WILEY and found nothing illegal. NEFF then called for a medical team to come check out WILEY.

16. Based on Tank's alerting on the interior of the truck, NEFF began searching the interior of the truck. NEFF located a computer bag on the back seat. An envelope containing a large amount of cash was found inside the computer bag. NEFF continued searching and found a purple gym bag on the back seat containing another stack of cash wrapped in a plastic sack.

NEFF continued searching and found a black backpack on the back seat containing 10 large bundles of cash. NEFF continued searching and found another gym bag containing a small amount of marijuana and rolling papers.

17. Once the medical team had released WILEY, NEFF placed him under arrest at approximately 10:48 a.m. Incident to his arrest, NEFF searched WILEY's person and found \$278.00 in his front pocket. All of the money that was found was placed into the black backpack and sealed. After transportation to Utah Highway Patrol to be photographed, the all the money seized from WILEY was taken to Wells Fargo Bank to be counted and deposited. The following stacks of money contained the amounts as follows:

- a. small brown rubber band = \$5,640.00
- b. small yellow rubber band = \$10,000.00
- c. white envelope = \$6,260.00
- d. thin tan rubber band = \$5,300.00
- e. thin tan rubber band = \$1,740.00
- f. small red rubber band = \$10,150.00
- g. small tan rubber band = \$9,000.00
- h. small tan rubber band = \$10,090.00
- i. small tan rubber band = \$10,010.00
- j. fat red rubber band = \$10,000.00
- k. black bag = \$7,200.00
- l. WILEY's person = \$278.00

**TOTAL SEIZED CURRENCY = \$85,668.00**

18. During the search of the Toyota Tundra pickup truck interior, several pieces of recent paper work were found showing numerous addresses for WILEY:

- a. Kansas title and registration for 1999 Honda Accord dated September 10, 2008, showing an address for WILEY at 2410 Crestline Drive #9, Lawrence, Kansas 66047
- b. Missouri motor vehicle title receipt for 2002 Toyota Tundra pickup truck dated September 8, 2008, showing an address for WILEY at 3508 Longwood Court, Lee's Summit, Missouri 64064.
- c. Geico vehicle insurance card for 2002 Ford F-350 truck effective from September 27, 2008 to March 27, 2009, showing an address for WILEY at 3375 Calwell Drive, Mckinleyville, California 95519.
- d. Wells Fargo check book belonging to WILEY showing an address at 22626 Califa Street, Woodland Hills, California 91367.

19. NEFF then opened the bed cover of WILEY's Toyota Tundra pickup truck and located three large empty duffle bags. Two of the bags contained the strong odor of raw marijuana and contained small pieces of marijuana in the bottom. These bags are consistent with the size of those used in transporting one pound bags of marijuana.

20. WILEY was cited with possession of marijuana and paraphernalia and was released to continue his trip without the money or marijuana.

#### CONCLUSION

The above facts demonstrate that the Defendant currency is proceeds from illegal narcotics transactions and that the money was en route to be used to purchase additional narcotics. Therefore, the Defendant currency constitutes property used to commit, facilitate, was involved in or was proceeds of the commission of violations of 21 U.S.C. §§ 841(a)(1) and 844(a). The Defendant property is therefore subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a).

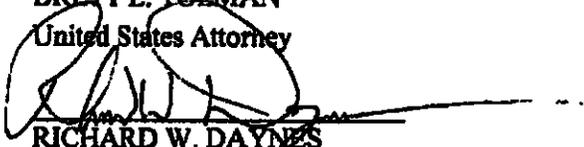
WHEREFORE, the United States respectfully asserts that there is reasonable cause to believe the Defendant property is forfeitable to the United States under 21 U.S.C. § 881(a) and

requests:

- A. That, pursuant to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule G(3)(b)(i), the Clerk issue a Summons and Warrant of Arrest as to the property:
- \$85,668.00 in United States Currency
- B. Notice of this action be given to all persons known or thought to have an interest in or right against the property;
- C. That the Defendant property be forfeited and condemned to the United States of America;
- D. That subsequent to and post-trial, to: decree, confirm, enforce, and order an Order of Forfeiture as to the Defendant property to the United States and thus order the United States Marshal, or his delegate, to dispose of the Defendant property as provided by law; and
- E. Award Plaintiff, the United States, all other relief to which it is entitled, including the costs of this action and for such other and further relief as this court deems just and proper.

Dated this 15<sup>th</sup> day of January, 2009.

BRETT L. TOLMAN  
United States Attorney

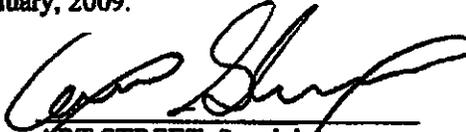
  
RICHARD W. DAYNES  
Assistant United States Attorney

### **VERIFICATION**

I am a Special Agent of the Drug Enforcement Administration (DEA) and have been employed by the DEA since February 1999. In June 1999, I completed an intensive 17-week DEA training academy, in Quantico, VA, which provided me with a background and basis of knowledge relating to the investigation of drug related crimes, including but not limited to, the importation and distribution of controlled substances in violation of Title 21 of the United States Code. I am responsible for the investigation of violations of Federal Criminal Code 21 U.S.C. §841, 21 U.S.C. §846, 21 U.S.C. §881 and State of Utah Criminal Code §58-37 and other laws pertaining to the illegal use and/or trafficking of controlled substances. Since May 2003, I have been and am currently assigned to the DEA/Metro Narcotics Task Force in Salt Lake City where I have been investigating both federal and state narcotics cases. Before being assigned to the Salt Lake City Office, I was assigned to the DEA New Orleans Field Division Office for approximately four years. Prior to my employment with the DEA, I was employed as a Adult Probation and Parole (AP&P) Agent, for the Utah Department of Corrections, in Salt Lake City, UT for approximately 9 ½ years. During my employment with AP&P, I was assigned to the DEA Metro Narcotics Task Force for approximately four years and participated in the investigation and arrest of numerous narcotic traffickers, manufacturers, customers, as well as suspects involved in money laundering activities.

I have read the contents of the foregoing Complaint for Forfeiture *In Rem* and verify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the statements contained therein are true and correct to the best of my knowledge and belief.

Executed on this 15<sup>th</sup> day of January, 2009.

  
ART STREET, Special Agent  
Drug Enforcement Administration

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF WYOMING

FILED  
U.S. DISTRICT COURT  
DISTRICT OF WYOMING

JOSEPH V. LIBRETTI, JR., )  
)  
Plaintiff, *pro se*, )  
)  
v. )  
)  
TAYLOR COURTNEY, et al., )  
)  
DEFENDANTS )

Civil Case No. 14-CV-10789-11 32

STEPHAN HARRIS, CLERK  
CHEYENNE

**PLAINTIFF'S MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND THE MARCH 27, 2015, ORDER AND JUDGMENT GRANTING DEFENDANT TAYLOR COURTNEY'S MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT CORRECTING DEFICIENCIES**

Plaintiff Joseph V. Libretti, Jr., proceeding *pro se*, pursuant to Fed. R. Civ. P. 59(e), hereby files (1) his Motion to Alter or Amend the March 27, 2015, Order Granting Defendant Taylor Courtney's Motion for Summary Judgment, and in the alternative (2) motion seeking leave to file an amended complaint.

**INTRODUCTION**

Because this Court made factual and legal errors in granting Defendant Courtney's Motion for Summary Judgment, Plaintiff requests relief from that Order and Judgment, pursuant to Fed. R. Civ. P. 59(e). Grounds warranting a grant of relief pursuant to Fed. R. Civ. P. 59(e) include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000), citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. *Id.*

**I. BECAUSE NO ADMISSIBLE EVIDENCE ESTABLISHED THAT THE LEGAL SUBSTANCES DEFENDANT COURTNEY SEIZED WERE INDISTINGUISHABLE FROM CONTROLLED SUBSTANCES, THIS COURT ERRED IN GRANTING COURTNEY'S MOTION FOR SUMMARY JUDGMENT.**

Because the Court incorrectly (1) failed to view the evidence and all reasonable inferences in the light most favorable to Mr. Libretti, the nonmoving party, and (2) erred in holding that it is impossible to distinguish between the legal substances that Courtney seized and controlled substances, this Court should reverse its Order granting Defendant Courtney's Motion for Summary Judgment. This Court erred in simply accepting Defendant Courtney's attorney's bald, unsworn, and unsupported claim that Courtney could not have reasonably "distinguished between legal and illegal herbs, legal and illegal chemical compounds to be applied to herbs, or legal and illegal spice at the time of the search and seizure." Order (doc. 56) at p. 7.

In concluding that (1) the legal herbs that Courtney seized were indistinguishable from illegal herbs, (2) the legal Spice that Courtney seized was indistinguishable from illegal Spice, (3) legal chemicals that Courtney seized were indistinguishable illegal chemicals, and (4) plain, legal herbs that Courtney seized were indistinguishable from illegal Spice, this Court failed to view the evidence in the light most favorable to Mr. Libretti, and failed to draw all reasonable inferences in the light most favorable to Mr. Libretti.

As the party moving for summary judgment, the burden was on Defendant Courtney to produce admissible evidence to establish that a well-trained law enforcement officer could not have distinguished between the legal substances that Courtney seized from Mr. Libretti, and controlled substances. Defendant Courtney produced no such evidence, admissible or otherwise. Courtney's affidavit does not suggest that the legal substances that he seized were indistinguishable from illegal substances. *See* doc. 16-7 (Courtney affidavit).

This Court erroneously held that the burden was on Mr. Libretti to provide "evidence or authority to suggest Defendant Courtney reasonably could have distinguished between legal and

illegal herbs, legal and illegal chemical compounds to be applied to herbs, or legal and illegal spice at the time of the search and seizure.” Order (doc. 56) at 7. But the distinguishability of any of these substances was never in issue, simply because Courtney never proffered any admissible evidence to put the distinguishability of the substances in issue. Because no admissible evidence put the distinguishability of the substances in issue, Mr. Libretti, as the nonmoving party, had no burden to prove that a reasonably well-trained officer could have distinguished between the legal substances that Courtney seized, and controlled substances.

This Court has mistaken Courtney’s attorney’s bald, unsworn, conclusory claims in his pleading for evidence. *See, e.g.*, Order at p. 7, “Defendant Courtney asserts the chemical composition of these substances would have to be analyzed in a laboratory after the seizure (Doc. 17 at p. 9).” First of all, Courtney’s attorney’s unsworn claim is not admissible evidence that can be used to support a grant of a motion for summary judgment. Not only is it unsworn, it is at best a conclusory opinion, not a fact. It is certainly not evidence. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1321 (10th Cir.2010), “The purpose of a summary judgment motion . . . is to determine whether there is evidence to support a party’s factual claims. Unsupported conclusory allegations thus do not create a genuine issue of fact.”

Secondly, the Court misstated what was actually written. In that sentence, Courtney’s attorney wrote, “The court authorized seizure of **all spice** was obviously in recognition of the fact that the chemical composition of the putative illegal substance would have to be analyzed after the fact.” Doc. 17 p. 7 (emphasis added). Courtney’s attorney was not discussing all of the legal substances that Courtney seized—such as JWH-018, legal herbs, and legal Spice—but only the seizure of “all spice.” The warrant did not authorize the seizure of legal JWH-018, and nowhere does Courtney even claim that he could not distinguish between legal JWH-018 and a controlled

substance, let alone proffer any admissible evidence that might tend to prove that a reasonably well-trained officer could not distinguish between legal JWH-018 and a controlled substance.

Third, this Court erred in finding that Mr. Libretti did not “appear to disagree” with Courtney’s claim that he could not have reasonably distinguished between legal and illegal herbs, legal and illegal chemical compounds, or legal and illegal spice at the time of the search and seizure. Order at p. 7. Mr. Libretti does disagree. Had Courtney actually put the distinguishability in issue, and proffered even a scintilla of evidence to support his attorney’s unsworn claims in his brief, Mr. Libretti would have come forward with his own evidence. As it was, Courtney produced no evidence to prove (1) a reasonably well-trained officer could not have distinguished legal JWH-018 from a controlled substance, (2) a reasonably well-trained officer could not have distinguished plain, legal herbs from Spice, (3) a reasonably well-trained officer could not have distinguished legal Spice from illegal Spice, and (4) a reasonably well-trained officer could not have distinguished legal herbs from illegal herbs.<sup>1</sup> Because Courtney, as the party moving for summary judgment, produced no admissible evidence on these issues, Mr. Libretti had no burden to present any evidence to the contrary.

Fourth, this Court’s reliance on *Libretti v. Woodson*, 6th Cir. No. 14-3266, 2015 WL 221617, at \*4, to support its conclusion that all of the legal substances that Courtney seized were indistinguishable from controlled substances, was error. At page 7 of this Court’s Order (doc. 56) this Court cited the following language from *Libretti v. Woodson*, “It is impossible to distinguish, with the naked eye, between legal herbs and those that have been chemically altered.” This Court’s reliance on this language from *Libretti v. Woodson* was error for two reasons.

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<sup>1</sup>Neither Courtney nor his attorney ever contended that Courtney believed that the legal herbs that he seized could have been “illegal herbs,” or identified any herbs that are illegal to possess. It is unclear why this Court found it significant that Mr. Libretti provided “no evidence or authority” to suggest that Courtney could have distinguished between legal and illegal herbs. Additionally, distinguishing between different herbs is easily done by relying on sight and smell.

First, the Sixth Circuit did not state that legal and illegal Spice were indistinguishable from each other with the naked eye; the Sixth Circuit only stated that legal herbs and illegal Spice are indistinguishable from each other. The Sixth Circuit also neither stated that legal JWH-018 is indistinguishable from a controlled substance, nor stated that legal herbs are indistinguishable from illegal herbs.

Second, the Sixth Circuit's factual finding—that legal herbs are indistinguishable from illegal Spice with the naked eye—is not binding on Mr. Libretti in this case. Mr. Libretti did not have an opportunity to litigate this issue in the earlier (Sixth Circuit) case against Woodson. Importantly, *Libretti v. Woodson* was decided on a Rule 12(b)(6) motion to dismiss, and Mr. Libretti had no opportunity to present his evidence. That factual finding was not made at the trial court level. Instead, the Sixth Circuit based that finding on a question that it posed to Woodson's attorney at oral argument. No evidence had been presented to support Woodson's counsel's claim that legal herbs were indistinguishable from illegal Spice, and more importantly, Mr. Libretti had no opportunity to present evidence otherwise. Furthermore, Mr. Libretti disputed this claim then, and he does so now. The Sixth Circuit erred in making this finding based on non-evidence, and this Court erred in perpetuating that error.

It is beyond cavil that if legal Spice, legal herbs, and JWH-018 are distinguishable from controlled substances, then this Court erred in granting Defendant Courtney's Motion for Summary Judgment. Because this Court based its ruling on "facts" that are disputed and have no evidentiary support in either this case, or the Sixth Circuit case of *Libretti v. Woodson*, this Court should reconsider its Order granting Courtney's Motion for Summary Judgment.

**II. BECAUSE THE LEGAL SUBSTANCES COURTNEY SEIZED WERE DISTINGUISHABLE FROM ILLEGAL SPICE IN JUNE OF 2010, THE SEARCH WARRANT WAS OVERBROAD IF IT AUTHORIZED THE SEIZURE OF LEGAL SPICE**

Because Spice that was legal in June of 2010 was distinguishable from Spice that was illegal in June of 2010, this Court erred in holding that the warrant authorized Courtney to seize legal Spice. *See* Order (doc. 56) at p. 7, “[I]t was reasonable for Defendant Courtney to seize the herbs, chemical compounds, and spice under the authority of the search warrant based on his reasonable belief these items could be contraband or evidence of a crime.” Because the Court’s conclusion is based on the incorrect premise that the substances that Courtney seized—the entirety of which were one-hundred-percent legal—were somehow indistinguishable from controlled substances, this Court should reverse its grant of summary judgment.

In *United States v. Fuccillo*, 808 F.2d 173, 177-178 (1st Cir. 1987), the police had a warrant to seize stolen women’s clothing. In executing the search warrant, the agents seized, in addition to the authorized cartons of women's clothing, racks of clothing, empty boxes, and two racks of men's clothing. The entire contents of the warehouse were seized. The court held that the seizure of items that the warrant did not authorize violated the Fourth Amendment. Furthermore, the good faith exception did not apply, because it was not reasonable for the agents to believe that the property that they seized, such as men’s clothing, was covered by the warrant.

Here, Defendant Courtney took the position that the warrant authorized Courtney’s seizure of legal chemicals, legal herbs, and legal Spice. *See* Memorandum in Support of Taylor Courtney’s Motion for Summary Judgment, p. 9, “The magistrate judge made the determination . . . that all spice should be seized.” But nothing in the warrant affidavit suggested that legal spice, legal herbs, and legal chemicals were indistinguishable from illegal substances, so therefore legal substances could be seized. Certainly probable cause did not exist to believe that legal substances were illegal. On the contrary, Woodson admitted in his affidavit that only some Spice was illegal. (*See* warrant affidavit at ¶ 52). It strains the imagination to think of what information in the warrant affidavit the magistrate could have relied on to determine that legal Spice should be seized.

Just as the men's clothing in *Fuccillo* was distinguishable from women's clothing, the legal spice, legal herbs, and legal chemicals that Courtney seized were distinguishable from illegal substances. Construing the warrant to seize legal spice, legal herbs, and legal chemicals, results in the warrant being overbroad. Certainly if the warrant authorized the seizure of legal spice, legal herbs, and legal chemicals, then the scope of the warrant exceeded the probable cause to support it. *See United States v. Leary*, 846 F.2d 592, 605 (10th Cir. 1988) (holding that an otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based). Because this Court should not construe the warrant in a manner that would render it in violation of the Fourth Amendment, the warrant should be construed as only authorizing the seizure of illegal Spice and controlled substances, and not legal herbs, legal chemicals, and legal Spice.

**III. BECAUSE A RULE THAT AUTHORIZES THE SEIZURE OF A COMPUTER, REGARDLESS OF WHETHER OR NOT IT CONTAINS EVIDENCE OF A CRIME, IS UNCONSTITUTIONAL, THIS COURT SHOULD RECONSIDER ITS GRANT OF SUMMARY JUDGMENT**

The practical effect of this Court's Order (doc. 56) granting Defendant Courtney's motion for summary judgment is that when a warrant authorizes the seizure of a computer that is evidence or an instrumentality of a crime, in effect the warrant authorizes the seizure of a computer even if it is not evidence or an instrumentality of a crime. *See* Order at pp. 7-8. This Court's ruling would result in a warrant being constitutional that authorized the seizure of, "Any computer on the premises, even if it does not contain evidence of a crime, is not an instrumentality of a crime, and has no connection to any crime." Certainly such a warrant would not be reasonable under the Fourth Amendment, yet this is the result of this Court's Order (doc. 56) in this case.

It is axiomatic that a rule that allowed the police to seize every document in a business, pursuant to a warrant that only authorized documents that are evidence of a crime, would violate the Fourth Amendment. *See, e.g., Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985) (holding that

even if the allegedly fraudulent activity constituted a large portion, or even the bulk, of the business's activities, there was no justification for seizing records and documents relating to its legitimate activities). Yet this Court's rule would allow the seizure of all of a person's or organization's documents, even if none of them were evidence of a crime, so long as the documents were electronically stored on a computer. Due to the prevalence of storing documents on computers since *Voss* was decided, this Court's rule effectively overrules *Voss*. For the same reason that a seizure of paper documents that are not evidence of a crime is unjustified, a seizure of a computer with electronically stored documents, none of which are evidence of a crime, is also unjustified, and in violation of the Fourth Amendment. Distinguishing between electronically stored documents and paper documents, for purposes of the Fourth Amendment, has no basis in either fact or logic, and is error.

Furthermore, this Court erred in holding that Mr. Libretti, the nonmovant, had the burden of providing "evidence or authority to suggest Defendant Courtney reasonably could have determined the contents of the computer and flash drive prior to seizure." Order (doc. 56) at p. 7. Defendant Courtney had the burden of production on his motion for summary judgment, not Mr. Libretti. Defendant Courtney provided no evidence to suggest that he could not have easily determined the contents of the computer and flash drive prior to seizing them. Defendant Courtney neither claimed, nor even suggested, that he even turned the computer on for the purpose of determining its contents, nor did he claim to have attempted to determine the contents of the flash drive prior to seizing it. Had he claimed that prior to seizing the electronic devices he attempted to determine their contents, but had been unable to, then this would be a different case.

Mr. Libretti is not contending that "Defendant Courtney's inability to foretell the contents of the electronic devices" violated the Constitution. *See* Order at 8. The Fourth Amendment violation in *Voss* was not the agents' inability to foretell the contents of the documents they seized, it was

their seizure of the documents. If the agents had claimed that they had not bothered to look at the documents they seized—and they probably had not—that would have been irrelevant to the Fourth Amendment seizure. Here, it is irrelevant whether Defendant Courtney bothered himself to look at the contents of the computer or flash drive prior to seizing them. He had the opportunity to inspect the contents of the computer and flash drive, and it is entirely possible that he did. He certainly did not claim that he did not inspect them prior to seizing them, and this Court should not assume otherwise. Regardless, Defendant Courtney seized the computer and flash drive, no admissible evidence suggests that he could not have determined that they contained no evidence of a crime prior to seizing them, and the seizure violated the Fourth Amendment.

This Court assumed, without any admissible evidence, that “the contents of the computer and flash drive had to be forensically examined at a later time to determine whether they contained evidence of crime.” Defendant Courtney, as the party moving for summary judgment, provided no admissible evidence to support this Court’s assumption in his favor. Indeed, the Court erred in not drawing all reasonable inferences in Mr. Libretti’s favor, as he was the nonmoving party. Certainly, if Defendant Courtney could have easily determined, prior to seizing, that the computer and flash drive contained no evidence of a crime, then the seizure of the items violated the Fourth Amendment. This Court erred in assuming that Courtney could not have easily determined that the computer and flash drive contained no evidence of a crime prior to seizing them.

This Court is advocating for a blanket rule holding that in the execution of any search warrant that authorizes the seizure of a computer or data storage device that is evidence of a crime, the seizing agents need not make any effort, prior to seizing the items, to determine if the items actually contain evidence of a crime. This Court’s ruling would uphold the seizure of a computer even if the seizing agent could have easily determined, prior to seizing it, that it contained no evidence of a

crime. This Court's ruling in this case would even allow the seizure of a computer after the seizing agent had determined that it contained no evidence of any crime.

**IV. BECAUSE THIS COURT ERRED IN HOLDING THAT MR. LIBRETTI DID NOT REQUEST THE RETURN OF HIS COMPUTER UNTIL JANUARY 26, 2012, THIS COURT SHOULD RECONSIDER ITS ORDER GRANTING COURTNEY'S MOTION FOR SUMMARY JUDGMENT**

At page 10 of its Order (doc. 56) this Court held that Mr. Libretti first requested that the government return his property at the conclusion of this criminal trial, which was January 26, and the computer was delivered to him less than one month later. Based on these "facts" this Court found that Mr. Libretti had not demonstrated an "unreasonable delay." *Id.*

The Court is incorrect on its "facts." On September 28, 2011, Mr. Libretti filed a motion in his criminal case, no. 11-CR-69-F, demanding the return of his computers and auto title. *See* docket entry 108, *Libretti v. United States*, no. 11-CR-69-F. The motion was granted on November 9, 2011. *See* docket entry 148. Because the computer was not delivered to Mr. Libretti's attorney until the end of February of 2012, Mr. Libretti demonstrated an unreasonable delay.

**CONCLUSION**

Because this Court made factual and legal errors, improperly shifted the burden of production and persuasion to Mr. Libretti (the nonmoving party), accepted Defendant's attorney's unsworn claims in a brief as evidence, and failed to draw all inferences in the light most favorable to Mr. Libretti, Mr. Libretti requests that this Court reconsider its grant of Defendant Courtney's Motion for Summary Judgment, or in the alternative, allow Mr. Libretti to file an amended complaint correcting any deficiencies.

Respectfully submitted,



Joseph V. Libretti, Jr.

Plaintiff, *pro se*

1900 E. 30th St. Apt. 305

Cleveland, OH 44114

**CERTIFICATE OF SERVICE**

I certify that on April 20, 2015, I mailed a copy of the foregoing

**PLAINTIFF'S MOTION PURSUANT TO FED. R. CIV. P. 59(e) TO ALTER OR AMEND  
THE MARCH 27, 2015, ORDER AND JUDGMENT GRANTING DEFENDANT TAYLOR  
COURTNEY'S MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE  
MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT CORRECTING  
DEFICIENCIES**

to the following parties, by depositing same, postage paid, in the U.S. Mails.

U.S. ATTORNEY  
PO Box 668  
Cheyenne, WY 82003-0668

A handwritten signature in cursive script, reading "Joseph V. Libretti, Jr.", is written over a horizontal line.

Joseph V. Libretti, Jr.  
Plaintiff, *pro se*  
1900 E. 30th St. Apt. 305  
Cleveland, OH 44114  
(224)355-6358