UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEVEN AVERY,
Plaintiff,

v.

Case No. 11-C-1093

KENNETH KRATZ, ET Al.,
Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

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COMES NOW the plaintiff, Steven Avery, *pro se* and respectfully submits to this Honorable Court this response to defendants Dedering, Tyson, Kucharski, VanAkkeren, and Calumet County's motion to dismiss.

**STATEMENT OF THE CASE**

1. In November of 2005 the Calumet County Sheriff's Department was engaged in the investigation of the reported disappearance of Teresa Halbach ("Halbach"). Investigators had already spent several days searching Avery's home pursuant to search warrants. However, on one of the searches a key to a Toyota brand vehicle was allegedly found in Avery's bedroom. The key was alleged to be the key for Halbach's Toyota that was found on a property adjoining to Avery's home.

2. Subsequent to finding the key a hearing was held to develop the facts of the finding of the key. See Plaintiff's Exhibit 2 at ¶7. Defendant Kucharski was asked about how the key was found. Defendant Kucharski stated that after twisting and moving a book case the key appears to have become dislodged and may have fallen from the book case at that time. When pressed he was unable to definitively speak to the origin of the key, as far as it coming from the book case as opposed to having been planted.

3. Not being able to determine if the key had definitively come from the book case in Avery's bedroom, on December 9th, 2005 defendant Dedering presented an "AFFIDAVIT FOR SEARCH WARRANT" (Plaintiff's Exhibit 2) to defendant Kratz of the Calumet County District Attorney's office. Defendant Kratz notarized the document. Defendant Dedering then obtained a "SEARCH WARRANT" (Plaintiff's Exhibit 1) from Winnebago County Circuit Court Judge Thomas Gritton for a "Wood cabinet/book case" from Avery's bedroom. Defendant Gritton, being a Winnebago County judge, didn't have subject matter jurisdiction to issue a warrant for an investigation in Manitowoc County.

4. The warrant was served by defendants Tyson and Kucharski. Though only the "Wood cabinet/book case" was specifically noted in the warrant, seven items were taken.

5. On December 11th, 2005 defendant Tyson submitted a "RETURN OF SEARCH WARRANT" (Plaintiff's Exhibit 3) detailing the seven items taken from Avery's home.

6. In 2011 Avery filed a complaint under 42 U.S.C. § 1983 asserting claims from the unconstitutional search of his home, seizure of his property, invasion of his privacy, and violation of his due process and equal protection rights by those acting under color of state law. Avery seeks damages as to all claims and declaratory relief.

7. In August of 2012 defendants Dedering, Tyson, Kucharski, VanAkkeren, and Calumet County motioned the Court to dismiss the suit against them. Avery now responds to this motion.

## ARGUMENT

### I. THE CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS

8. In the defendants' Brief in Support of Motion to Dismiss at 5, they assert "The original complaint in this action was filed on December 16th, 2011…" This is entirely untrue. In fact

Avery placed his original complaint in the mail on November 28th, 2011. Per the "mail box rule" his complaint was timely filed. The amended complaint was filed on December 14th, 2011.

9. Under Rule 15(a), Fed. R. Civ. P., a plaintiff can amend his complaint once "as a matter of course." The rule says "[t]he court should freely give leave when justice requires..." Fed. R. Civ. P. 15(a)(2), and the courts have said that means leave to amend should be granted unless there is some good reason like "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." ***Forman v. Davis***, 371 U.S. 178, 182-83 (1962).

10. Generally, amendments to a complaint that add new claims or parties must be made within the time set by the statute of limitations for filing the suit. However, if a new claim or defense arises from the same facts alleged in the original pleadings, it may "relate back" to the time the original pleading was filed. Rule 15(c), Fed. R. Civ. P.

11. In the present case Avery first filed a complaint within the statute of limitations but then realized that he had additional claims against additional defendants that related back to the original facts alleged in the original complaint. This amendment was presented to this Court before it was even served on the defendants and was not done in bad faith, didn't cause an undue delay, and wasn't part of a dilatory motive. Further, this amendment would not unduly prejudice any of the defendants.

12. Avery presented this amendment because to fail to do so would allow those that harmed him, while acting under color of state law, to go without being held accountable. Therefore, Avery asserts that this amendment, though past the statute of limitations, should be allowed because justice would be served by it.

## II. THE PLAINTIFF WAS DENEID HIS RIGHTS TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE, PRIVACY, EQUAL PROTECTION, AND DUE PROCESS

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

14. In ***Wilson v. Layne***, 526 U.S. 603 (1999), the United States Supreme Court commented on the history and content of the Fourth Amendment as follows:

> In 1604, an English court made the now-famous observation that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose." *Semayne's Case*, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b, 195 (K.B.). In his *Commentaries on the Laws of England*, William Blackstone noted that "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it be violated with impunity" agreeing herein with the sentiments of antient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." William Blackstone, 4 Commentaries on the Laws of England 223 (1765-1769).

***Id.*** at 609-10.

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home: "The right of the people to be secure in his persons, *houses*, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV (Emphasis added.) See also ***United States v. United States District Court***, 407 U.S. 297, 313 (1972) ("Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is Directed").

***Id.*** at 610.

15. The reasonableness clause of the Fourth Amendment is a statement of broad protection against unreasonable searches and seizures. The determination of reasonableness is made by reference to the particular circumstances of each individual case, ***Ker v. California***, 374 US. 23, 33 (1963) (plurality opinion), and balances "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" ***Tennessee v. Garner***, 471 U.S. 1, 8 (1985) (quoting ***United States v. Place***, 462 U.S. 696, 703 (1983)). Constitutional reasonableness relates not only to the grounds for a search or seizure but to the circumstances surrounding the search or seizure execution. ***Id.***

16. In ***Wong Sun v. United States***, 371 U.S. 471 (1963), the Supreme Court stated "It is basic that ... a warrant must stand upon firmer ground than mere suspicion ..." ***Id.*** at 479 (citing ***Henry v. United States***, 361 U.S. 98, 101 (1959)).

17. The Fourth Amendment's Warrant Clause provides more particularized protections governing the manner in which search and arrest warrants are issued. The warrant clause requires that officers obtain prior judicial authorization for a search from a neutral and disinterested magistrate. ***Dalia v. United States***, 441 U.S. 238, 255 (1979). It also requires the officer seeking a warrant to demonstrate upon oath or affirmation probable cause to believe that "'the evidence sought will aid in a particularly apprehension or conviction'" for a particular offense. ***Id.*** (quoting ***Warden v. Hayden***, 387 U.S. 294, 307 (1967)). Finally, it requires that warrants must particularly describe the place to be searched, as well as the items to be seized. ***Id.*** Searches made without warrants issued pursuant to the requirements of the warrant clause are presumed to be unconstitutional. ***Welsh v. Wisconsin***, 466 U.S. 740, 748-49 (1984).

18. In ***Able v. United States***, 362 U.S. 217 (1960), reh'g denied 362 U.S. 984, the Court stated that searches for evidence of a crime present situations demanding the greatest, not the least, restraining upon the government's intrusion into privacy, and that although the Fourth Amendment's protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed.

19. The defendant has the burden to prove that the challenged search or seizure violated his Fourth Amendment rights, as applied to the states through the Fourteenth Amendment. ***Rakas v. Illinois***, 439 U.S. 128, 130 n.1 (1978).

20. Standing to contest the legality of a search and seizure exists where movant asserts either a property or possessory interest and a legitimate expectation of privacy in the areas searched. ***Rakas***, 439 U.S. at 148. Whether there is a reasonable expectation of privacy in the area searched is determined by the presence of an actual and subjective, as well as a reasonable and objective, expectation of privacy. ***Smith v. Maryland***, 442 U.S. 753 (1979).

21. "The ultimate test for issuance of a search warrant is whether there is probable cause to believe that the objects sought are linked to the commission of a crime and whether those objects are likely to be found in the place designated in the search warrant. ***Ritacca v. Kenosha County Court***, 91 Wis. 2d 72, 77-78 (1979)." ***State v. Ehnert***, 160 Wis. 2d 464, 470 (Ct. App. 1991).

**A. PROBABLE CAUSE WASN'T ESTABLISHED IN THE AFFIDAVIT**

22. The warrant is defective because probable cause was not established in the affidavit. Only point # 7 of the affidavit relates to the evidence sought to be obtained. However, there was no legal reason for the bookcase to be taken. How the bookcase might be actual evidence in the present case is not established.

23. Avery contends that the affidavit does not contain enough information to establish probable cause. Because the Supreme Court defines probable cause to search as "a fair probability that contraband or evidence of a crime will be found in a particular place," ***Illinois v. Gates***, 462 U.S. 213, 238 (1983), and the affidavit doesn't establish this, probable cause is not established.

24. "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inference which reasonable men draw from evidence. Its protection consists in requiring that those inferences by drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948).

25. "In ***Warden v. Hayden***, 387 U.S. [294], at 307 [(1967)], the Court stated that when the police seize '"mere evidence," probable cause must be examined in terms of course to believe that the evidence sought will aid in a particular apprehension or conviction. In so doing, consideration of police purposes will be required.'" ***Andresen v. Maryland***, 427 U.S. 463, 483 (1976). "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. ***Giordenello v. United States***, 357 U.S. 480, 486 [1958] (collecting cases)." ***Aguilar v. Texas***, 378 U.S. 108, 109 n.1 (1964) (emphasis in the original).

26. Instead of showing probable cause, the language in the affidavit reflects that of a fishing expedition. This is a practice expressly forbidden by the 4th Amendment. See ***Coolidge v. New Hampshire***, 403 U.S. 443 (1971). Defendant Dedering should have been aware of this issue and corrected it.

27. Such circumstances have long been held to be violations of the Fourth Amendment. In ***United States v. Leon***, 468 U.S. 897 (1984), the High Court instructed:

> … reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." ***Illinois v. Gates***, 462 U.S., at 239. "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bar conclusions of others." ***Ibid.*** See ***Aguilar v. Texas***, supra, at 114-115; ***Giordenello v. United States***, 357 U.S. 480 (1958); ***Nathanson v. United States***, 290 U.S. 41 (1933).

***Id.*** at 915. In the present case the issuing judge couldn't have found the requisite information that there was probable cause that evidence of a crime would be found by taking the book case.

28. Indeed, the affidavit makes it clear that the police couldn't even explain why the bookshelf was evidence. In the affidavit there is a clear statement that the investigators weren't able to show that the key had come from the book shelf. See Plaintiff's Exhibit 2, ¶ 7. The State wanted the warrant to establish *if* the bookshelf was evidence. But the law requires that the affidavit establish that "evidence of a crime *will* be found in a particular place." ***Gates***, 462 U.S. at, 238 (emphasis added). Here, the opposite assertion is true. Here, the affidavit requests that the officers be allowed to take the bookshelf to see if they could prove evidence came from it.

29. After looking at the information contained within the four corners of the affidavit the only reasonable conclusion is that law enforcement was looking to rummage through Avery's belongings in hopes of finding evidence. See ***United States v. Noreikis***, 481 F.2d 1177, 1178 (CA7 1973) (stating "The magistrate must be given the facts so that he can make an independent judgment and not rely on the mere conclusions of the officer. See ***Giordenello v. United States***, 357 U.S. 480, 486 (1958). '[A]ll data necessary to show probable cause for the issuance of a search warrant must be contained within the four corners of a written affidavit given under oath.'

***United States v. Anderson***, 453 F.2d 174, 175 (CA9)"). Not to obtain evidence there was no probable cause to expect to find.

30. The State hadn't been able to establish that the key had come from the bookshelf. Because they failed to do a comprehensive investigation in a timely manner they requested that the Court allow them to go fishing. The investigators had the opportunity to take any evidence in plain view during the execution of the search warrant that led to the "finding" of the key. See ***Illinois v. Adreas***, 463 U.S. 765, 771-72 (1983). Yet, they selected not to take the bookshelf. Indeed, until they were forced to explain themselves in an evidentiary hearing, they hadn't even considered the bookshelf as possible evidence.

31. The request was based on the conclusory assertion of the affiant. In ***Lo-Ji Sales, Inc. v. New York***, 442 U.S. 319 (1979), the United States Supreme Court decided that "Based on the conclusory statement of the police investigator that other similarly obscene materials would be found at the store, the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. ***Roaden v. Kentucky***, 413 U.S. 496, 502 (1973); ***Stanford v. Texas***, [379 U.S. 476] at 485 [1965]; ***Marcus v. Search Warrant***, [367 U.S. 717], at 732 [1961]." ***Id.*** at 325.

32. In the end, the affidavit didn't establish probable cause that evidence of a crime would be found by taking the bookshelf.

**B. PROBABLE CAUSE WASN'T ESTABLISHED WITH THE ISSUING MAGISTRATE**

33. The warrant is defective because there is no indication that the affidavit was ever seen by the issuing judge. The affidavit is witnessed by the actual prosecutor in the case, defendant Kratz. **Wis. Stat. § 968.23** gives an example of an affidavit for a warrant. At the bottom of the

example the legislature took the time to put in the text "..., Judge of the ... Court." Clearly the legislature saw that the United States Constitution requires that a neutral magistrate be *accountably* placed between the State and a defendant. Without a way of knowing that the judge was actually involved in the process of establishing probable cause the procedure was invalid and the warrant is illegal.

34. In ***Franks v. Delaware***, 438 U.S. 154 (1978), the Supreme Court recognized that the pre-search proceeding was *ex parte* and that a defendant could challenge the information placed before the court. ***Id.*** at 169. In the present case there is no record that defendant Dedering was sworn before the Court in presenting his evidence in pursuit of the warrant. Holding an evidentiary proceeding with the actual prosecutor doesn't meet the mandates of the Constitution. See ***Coolidge***, 403 U.S. at 450, 454-55; ***Johnson v. United States***, 333 U.S. 10 (1948); ***Camara v. Municipal Court of San Francisco***, 387 U.S. 523 (1967).

35. In the defendant's brief in support of their motion for dismissal they assert that there is evidence that defendant Gritton saw the affidavit. Defendant's Brief In Support of Motion to Dismiss at 8. Avery asserts that this "evidence" does not fully support any claim that the Court actually saw the affidavit. Indeed, defendant Gritton has admitted that whether he saw the affidavit is an unresolved question of fact. Response to First Set of Admissions to Defendant Gritton, at ¶4. Despite the defendant's assertion that "there is overwhelming evidence that judge Gritton saw Dedering's affidavit in issuing the search warrant," whether this occurred is a question of fact that should be left to a jury to resolve, not for this Court to answer on a motion for dismissal. See ***Moore v. Marketplace Restaurant, Inc.***, 754 F.2d 1336, 1347-48 (CA7 1985).

36. This issue is important because the essential fact is that the affidavit acts as the only record of the court proceeding related to the issuance of the warrant. Without a record there is no "Court of Record." As a result, there can be no legal proceeding for the issuance of the warrant.

### C. THE ISSUING JUDGE LACKED JURISDICTION TO ISSUE THE WARRANT

37. The warrant was issued by a Winnebago County judge on a warrant marked as being in Calumet County, where he had no jurisdiction. Further, this warrant was for items to be seized in a Manitowoc County criminal case. Again, there was no jurisdiction for even a Calumet County judge, had one been used, to seize items where he had no jurisdiction.

38. A court has subject matter jurisdiction if it is authorized to hear and determine the primary object of the action. ***In Interest of H.N.T.***, 125 Wis.2d 242, 244 (Ct. App. 1985). **Wis. Stat. § 753.03** states in relevant part: "The courts and the judges thereof have power to award all such writs, process and commissions, throughout the state, returnable to the proper county." And the **Wisconsin State Constitution, Article VII § 8** states in relevant part "The circuit court may issue all writs necessary in aid of its jurisdiction." In other words, the proper venue to obtain this warrant was Manitowoc County Circuit Court, since the evidence sought was for a crime alleged to have occurred in that county. Defendant Gritton had usurped the power of Manitowoc County and the warrant has no validity under Wisconsin constitutional and statutory law.

39. In ***Shadwick v. City of Tampa***, 407 U.S. 345 (1972), the Court noted that an issuing magistrate must meet two tests. First, he must be neutral and detached, and second he must be capable of making a determination of probable cause for the requested arrest or search. ***Id.*** at 350. In the present case defendant Gritton was aware that his legal limitations in issuing a search warrant were to the County in which he had subject matter jurisdiction. Issuing the warrant was

an exercise in power that he didn't have. This shows that he was biased as he couldn't resist the opportunity to exercise power he didn't have.

40. Considering the second part of ***Shadwick*** defendant Gritton again fails to meet the requirements under the Fourth Amendment. Because the Fourth Amendment doesn't express who is allowed to issue a search warrant, state law is designated to make the determination. ***United States v. Master***, 614 F.3d 236, 240 (CA6 2010) (citing ***Shadwick***, 407 U.S. at 354). In ***Master*** the Sixth Circuit considered a case that is nearly identical to the present case. There, a judge authorized to issue warrants in one county issued one in another. But under Tennessee law he had no authority to issue warrants outside of his county. The Court looked at its ruling in ***United States v. Scott***, 260 F.3d 512 (CA6 2001), where a warrant issued by a retired general sessions judge was found to be invalid ab initio because the judge didn't have subject matter jurisdiction when other judges were available to issue warrants. The ***Master*** Court noted that "the difference between the judge in ***Scott*** and Judge Faris are immaterial in determining the validity of a warrant." ***Master***, at 240. Reflecting on ***Shadwick***, at 354, the Court stated "The qualifications of a magistrate are therefore inextricably intertwined with state law. State law determines what person is allowed to approve what warrant." ***Id.***

41. Because defendant Gritton didn't have subject matter jurisdiction the second part of ***Shadwick*** fails as well. Because the limits of defendant Gritton's jurisdiction are clearly laid out in both the State constitution and statutes the defendants were all put on notice that such a warrant would be void. See ***United States v. Brown***, 832 F.2d 991, 995 (CA7 1987) ("Police officers in effecting searches are charged with a knowledge of well-established legal principles as well as an ability to apply the facts of a particular situation to these principles.") The warrant cannot be said to be valid on its face.

## D. THE WARRANT WAS VOID FOR LACK OF A COURT SEAL

42. Writs are required to have a seal of the court, pursuant to **Wis. Stat. § 753.04**, and public documents not under seal are not self-authenticating, pursuant to **Wis. Stat. § 909.02(2)**; in turn, those public documents under seal are self-authenticating. **Wis. Stat. § 909.02(1).** Because the warrant lacks a seal it is not a valid warrant.

43. There is a long history in the United States and in Wisconsin of using seals on warrants. In April of 1977 the State Constitution was amended, removing the Constitutional provision in Article VII § 17, requiring all writs and processes issued from a court to have a seal of the court. In that same year **Wis. Stat. §§ 753.04** and **753.30** were instituted. **Wis. Stat. § 753.04** lays out the requirement that writs have a seal of the court and **Wis. Stat. § 753.30(3)1** lays out the procedure and rules for having writs and processes sealed.

44. Indeed, the requirement that writs have seals has been in force since Wisconsin became a state. The history of the legal requirement is reflected in ***Leas & McVitty v. Merriam***, 132 F.510, at 5-6 (W.D. V.A. 1904), where the Court stated "In ***Ins. Co. v. Hallock***, 6 Wall. 556-558 [73 U.S. 556 (1867)], it said: 'The authorities are uniform that all process issuing from a court which by law authenticates such process with its seal is void if issued without a seal. Counsel for plaintiffs in error have not cited a single case to the contrary, nor have our own researches discovered one.'" And this reflects the thinking of the people of the state at the time that Wisconsin adopted statehood. That the legislature shifted the requirement from the constitution to the statutes does not remove the requirement.

45. Further, the Wisconsin State Constitution provides that common law is still in force, unless otherwise stated by law. Wis. Const. Article XIV § 13. And **Wis. Stat. § 939.10** expressly points out that, though common law crimes are abolished, common law rules are

preserved. The United States Supreme Court has pointed out that "… there was no settled rule at common law invalidating warrants not under seal ***unless*** the magistrate issuing the warrant had a seal of office or a seal was required by statute …" ***Starr v. United States***, 153 U.S. 614, 619 (1894) (emphasis added). **Wis. Stat. § 753.05** places a requirement for the Wisconsin Circuit Courts to have seals. Further, **Wis. Stat. § 889.08(1)** points out that a "certificate must be under seal of the court" in order for it to be held as evidence outside of the court that issued it.

46. The legislative intent is found in the phrasing of **Wis. Stat. § 753.04**. Indeed, the legislature selected to distinguish all writs in general from writs of certiorari. The first sentence of the statute begins with the words "All writs …" and the second sentence of the statute begins "All writs of certiorari …" A search warrant has classically been referred to as a "writ of assistance" (Black's law dictionary, 8th Edition at page 1641) and falls under the definition of "writ" as laid out in Black's law dictionary, 8th Edition at page 1640.

47. The plain language reading of the statute requires that "All writs issued from the circuit court shall be … sealed with the seal of the court…" Shall is mandatory language, all writs must have a seal of the court, and a search warrant is a writ.

48. This is not an issue that can be considered a singular incident. This warrant cannot be said to have a mere defect that doesn't affect Avery's rights. In the criminal case against Avery there were several warrants that had a seal of the court on it. Therefore, this isn't a form over substance issue. This is a habitual ignoring of the well established law that warrants that issue without a court seal are void. Avery asserts that only if these officers hadn't habitually ignored the statutory and common law requirement that this issue would be without merit.

49. Indeed, the Wisconsin Court of Appeals, Fourth District, has commented on the fact that under Wisconsin law a search warrant requires a seal of the court. See Exhibit 4. And the

Circuit Court in Calumet County has issued at least one search warrant with a court seal on it. See Exhibit 5.

50. Further, similarly situated persons are afforded the statutory protections of the statutory and common law requirements pointed to above in the State of Wisconsin and under long standing common law as asserted by the United States Supreme Court. And Avery has a right to protections created by state law under the Fourteenth's Amendment's procedural Due Process clause. By failing to follow the legal requirements for issuance of a search warrant in Wisconsin the defendants have violated Avery's equal protection and due process rights.

### E. THE EXECUTING OFFICERS WENT OUTSIDE THE SCOPE OF THE WARRANT

51. Even if the warrant were legal the executing officers went outside the parameters of the warrant by seizing: 4 paperback books, a handset for cordless telephone, and an AC power cord. See Exhibit 3. The particularity requirement of the 4th Amendment "prevents the seizure of one thing under a warrant describing another." ***Andresen***, 427 U.S. at 480 (quoting ***Marron v. United States***, 275 U.S. 192, 196 (1972)). Defendants Tyson and Kucharski violated the plaintiff's rights when they seized these items while acting under color of state law.

52. Defendant VanAkkeren was responsible for the violation stated herein in that she was aware that the officers went outside the scope of the warrant and did nothing about it. Her awareness is evident in that she stamped the warrant's return.

53. Defendant Gritton was responsible for the violation stated herein in that he was aware that the officers went outside the scope of the warrant and did nothing about it. His awareness is evident in that he saw the warrant's return. Indeed, this goes to the very heart of why a return is required for a warrant.

## III. CALUMET COUNTY IS LIABLE

54. Plaintiffs who seek to impose liability on local governments under 42 U.S.C. § 1983 must prove that "action pursuant to official municipal policy" caused their injury. ***Monell v. Dep't of Soc. Servs.***, 436 U.S. 658, 691, 694 (1978). Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. See ***ibid***; ***Pembaur v. City of Cincinnati***, 475 U.S. 469, 480-81 (1986); ***Adickes v. S. H. Kress & Co.***, 398 U.S. 144, 167-68 (1970). These are "action[s] for which the municipality is actually responsible." ***Pembaur***, at 479-80.

55. Defendant the County of Calumet was responsible, through its policy maker/administrator, for setting the policies and/or customs inside the municipality, oversight and training of its personnel, and is responsible for the violations herein as much as the County, through its agency(s), have neglected to check the work its officers and be sure that they were properly trained or were acting within the legal boundaries of plaintiff's rights as well as applicable law. In the plaintiff's criminal case there were several search warrants issued, none of which contains a seal by the court as required under **Wis. Stat. § 753.04**. And all of the affidavits for these warrants were notarized by the prosecutor, defendant Kratz, and not by the issuing judge. This shows by negative inference that the policy or custom of the County was to *not* ensure that warrants were properly obtained from the Court before executing them.

56. A policy or custom must clearly be "the moving force of the constitutional violation." ***Polk County v. Dodson***, 454 U.S. 312, 326 (1981), and be "practices so persistent and widespread as to practically have the force of law."

57. An official policy may be demonstrated by even a single act, however, where the act represents "a particular course of action made by [a municipality's] authorized decisionmakers."

***Pembaur***, 475 U.S. 469. The complaint must set fourth specific facts and not mere conclusory allegations of such a policy or custom. ***Strauss v. City of Chicago***, 760 F.2d 765, 767-68 (CA7 1985).

58. In the present case defendant Kratz was acting as a policy maker in his capacity as the elected District Attorney. His actions set the policy or custom of law enforcement not establishing probable cause before the court, thereby creating a reliable record of the *ex parte* hearing.

59. Even if defendant Kratz were not responsible for setting policy or custom for the Calumet County Sheriff's department, the County itself, through its policy maker, is responsible. The officers in Calumet County continually went to defendant Kratz and had him hold the *ex parte* hearing with them. Further, they did continually failed to obtain lawfully issued warrants when they failed to have those warrants issued under both hand and seal. The policy or custom of the County can only be said to be that warrants were issued after a less than constitutionally sanctioned hearing and without the proper issuing procedure.

## IV. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

60. "'Generally, qualified immunity protects government agents from liability when their actions do not violate "'clearly established statutory or constitutional rights of which a reasonable person would have known.'" ***Purvis v. Oest***, 614F.3d 713, 720 (CA7 2010) (quoting ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982)). This involves two questions: "(1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." ***Saucier v. Katz***, 533 U.S. 194, 201 (2001).

61. Municipal employers may not claim the good faith of their employees or "qualified immunity" as a defense to constitutional claims. ***Owen v. City of Independence, Mo.***, 445 U.S. 622 (1980). On the other hand, "government officials performing discretionary functions, generally are shielded from liability fro civil damages insofar as their conduct doe no violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow***, 457 U.S. at 818. Thus, police officers sued in their individual capacities may be able to escape liability under principles of qualified immunity. However, because "official capacity" suits are actually suits which imputed liability to the municipality, government employees sued in their official capacity may not claim qualified immunity. ***Moore v. Morgan***, 922 F.2d 1553, 1556 (CA11 1991).

62. In the present case Avery's rights were clearly violated, as demonstrated by the facts. The defendants were all on notice that their actions would violate his clearly defined rights. As a result, they cannot now claim immunity.

**CONCLUSION**

63. Wherefore, for the foregoing reasons, Avery requests that this Honorable Court deny the defendant's request to dismiss his claim.

Respectfully submitted this 31 day of August, 2012.

Steven Avery

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CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the within **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS** on all defendants at the addresses listed below, by way of prepaid first class mail, pursuant to Rule 5(d), Federal Rules of Civil Procedure.

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Dated: 8-31-2012

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