IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-00023-LTB-CBS

THOMAS MINK,

Plaintiff,

vs.

SUSAN KNOX, a Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT KNOX'S MOTION TO DISMISS

Plaintiff Thomas Mink submits this Response in Opposition to Defendant Susan Knox's Renewed Motion to Dismiss.

I. INTRODUCTION

The Motion to Dismiss is oddly presented. It discusses general principles of qualified immunity and the Fourth Amendment, but largely ignores the specific allegations in the First Amended and Supplemental Complaint ("the Complaint").[1] To the extent the Motion mentions Knox's actions, it refers to her as merely "reviewing" the search warrant affidavit, *see, e.g.*, Motion at 3, 10, 11, and 12, as if she were a mere administrative clerk confirming the proper completion of a government form. In contrast, the Complaint alleges that:

[1] For the Court's convenience, Mink provides the First Amended and Supplemental Complaint, with its attachments, as Exhibit 1 to this response.

8. . . . Defendant Knox reviewed and approved the affidavit submitted to search the Minks' residence. . . .

18. Professor Peake is well-known in the Weld County and University of Northern Colorado communities as someone who has often voiced his views publicly on a wide range of issues. . . .

20. A reasonable prosecutor would have known, or upon reasonable investigation could have discovered, the facts that demonstrate that Professor Peake was widely known for publicly expressing his views and was a public official or public figure. . . .

23. . . . [The] search warrant . . . is remarkably broad in the scope of the materials it authorizes police to seize, including all computer equipment and electronically-stored data and emails and virtually every written and printed document in the Minks' residence, including diaries, correspondence, and "personal memoirs." A copy of the search warrant is attached as Exhibit E . . . .

30. . . . [T]he affidavit that Detective Warren submitted to obtain the search warrant . . . with attachments that Detective Warren downloaded from The Howling Pig website, is attached as Exhibit F.

59. Defendant Knox knew that the search of the Minks' home would require searching for materials possessed by a person or persons involved in public expressive and communicative activities.

66. The First Amendment protects Thomas Mink's right to freedom of speech and freedom of the press, and the Fourth Amendment protects the right of the Minks to be free from unreasonable searches and seizures.

67. The search and seizure of the Minks' computer and the data stored therein was carried out pursuant to a warrant that was not based on probable cause.

68. The search and seizure of the Minks' computer and the data stored therein was based on a warrant that failed to meet the particularity requirement of the Fourth Amendment.

71. Defendant Knox reviewed and approved the affidavit submitted to the state district court in support of the warrant to search the Minks' home. Defendant Knox authorized and thereby caused the violation of Plaintiff Mink's constitutional rights.

Complaint ¶¶ 8, 18, 20, 23, 30, 59, 66-68, 71. For purposes of the Motion, these allegations must be taken as true and construed most favorably to Plaintiff. *See, e.g., Saucier v. Katz,* 533 U.S. 194, 201 (2001). Moreover, the Court must view the allegations in light of C.R.S. § 20-1-106.1, which requires district attorneys to provide legal advice to police officers. Considering this statute and Knox's actions together, it is evident that Knox's conduct was integral in obtaining a warrant that resulted in a search that violated Mink's First and Fourth Amendment rights.

II. STANDARDS FOR REVIEW OF KNOX'S MOTION.

Under the law of the case doctrine and its "important corollary," the mandate rule, "a district court must comply strictly with the mandate rendered by the reviewing court." *Huffman v. Saul Holdings Ltd. P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001) (quotation and citation omitted). Here, the Tenth Circuit held that the only remaining issue to be decided by this court is whether Knox is entitled to qualified immunity if: (1) she reasonably concluded probable cause existed to support the warrant application; or (2) the application of the Supreme Court's First Amendment cases to the Colorado criminal libel statute, , C.R.S. § 18-13-105, was not clearly established under the circumstances of the case.

In *Wilson v. Layne*, 526 U.S. 603 (1999), the Supreme Court reiterated the standards for whether Knox's conduct violated clearly-established law:

> "Clearly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*, but it is to say that in light of the pre-existing law the unlawfulness must be apparent."

Id. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added).

Much of the qualified immunity case law Knox cites is obsolete because the Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). Government officials must make "reasonable applications of the prevailing law to their own circumstances." *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001). They "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Thus, there need not be a prior case with facts similar to those here in order for Knox to be denied qualified immunity.

III. NO REASONABLE DISTRICT ATTORNEY COULD HAVE CONCLUDED THAT PROBABLE CAUSE EXISTED TO SUPPORT THE WARRANT APPLICATION.

A. The Probable Cause Analysis Necessarily Requires Consideration of the First Amendment's Limits on the Permissible Reach of the Criminal Libel Statute.

Knox insists that the criminal libel statute and the First Amendment are irrelevant to the probable cause question. Motion at 7 (citing *New York v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986) ("an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally")). Knox misapprehends and overextends the holding in that case.

In *P.J. Video*, the Supreme Court refused to alter the probable cause standard even though the seized movies were protected under the First Amendment. But the Court also noted that "[w]e have long recognized that the seizure of films or books on the basis of their content

implicates First Amendment concerns not raised by other kinds of seizures." *Id*. at 873. Therefore, Knox is wrong to say that First Amendment issues are irrelevant. In fact, in determining the validity of a warrant application, this Court must consider whether the First Amendment protects the alleged criminal conduct from prosecution; if yes, the protected First Amendment activity cannot be the basis of either criminal charges or a valid search.

One of the primary functions of the Warrants Clause is to ensure that government searches are executed pursuant to a warrant that is "confined in scope to particularly described evidence relating to a *specific crime* for which there is probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985) (emphasis added). Thus, the alleged crime and constitutionality of the underlying criminal statute are critical to the determination of probable cause for a search warrant. Otherwise, the government could obtain search warrants without regard for whether a chargeable offense may have occurred. In this case, as discussed below, the police sought to obtain, with Knox's approval, a search warrant to further their investigation of whether Mink violated Colorado's criminal libel statute. At the time, it was settled law that the statute could not be used to prosecute statements about public officials or public figures on matters of public concern, or for statements of opinion, hyperbole, or satire.

Accordingly, Knox's consideration of whether probable cause existed for the search warrant necessarily required her to consider whether the allegedly criminal conduct was protected by the First Amendment. If this were not true, law enforcement could obtain search warrants to investigate purported violations of the statute, even though well-established law would preclude bringing charges. Putative defendants such as Mink might ultimately "beat the

rap," but not without first being subjected to investigations and searches. This should not, and cannot, be what the Supreme Court intended in *P.J. Video*.

It is not surprising that Knox is running from the First Amendment issues in this case, because they are overwhelming and damning. But she is wrong on the law. In determining whether there was probable cause to issue the challenged warrant, the Court must consider its context – namely, that it was obtained to search for evidence of a crime that could not have been constitutionally prosecuted, for the reasons discussed below.

B. No Reasonable District Attorney Could Have Concluded That There Was Probable Cause to Believe That C.R.S. § 18-13-105 Had Been Violated.

Given the limited situations under which the criminal libel statute can constitutionally apply, no reasonable district attorney could have concluded that there was probable cause to believe that the statute had been violated and that a search warrant should issue in this case. The opposite conclusion was inescapable because the investigation was into allegations of (1) statements about a public official or figure on matters of public concern, and (2) statements of satire, hyperbole, and opinion. Since both categories of statements enjoy First Amendment protection, Knox could not have reasonably concluded that there was probable cause to support the warrant.

Statements about a public official or figure on matters of public concern. In *People v. Ryan*, 806 P.2d 935 (Colo. 1991), the Colorado Supreme Court held that the First Amendment forbids use of the criminal libel statute to prosecute a private person for "statements about public officials or public figures on matters of public concern." *Id.* at 940. The Court relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that a defamatory false statement about a public official is not actionable in a civil action for damages unless it was made with

"actual malice," and on *Garrison v. Louisiana*, 379 U.S. 64 (1964), which held that the actual malice standard applies to criminal defamation of public officials. 806 P.2d at 938. The Court held the criminal libel statute invalid to the extent it criminalized publication of "constitutionally protected statements about public officials or public figures on matters of public concern." *Id.* at 940. After *Ryan*, as read in conjunction with *New York Times*, *Garrison*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), there could have been probable cause for a search to investigate alleged criminal libel only if (a) the victim of the claimed libel was a purely "private person," rather than either a public official or public figure, and (b) the allegedly libelous statements addressed "purely private matters," rather than matters of public concern. *Id.* at 939, 941.[2]

Here, the affidavit for the search warrant, on its face, demonstrated that the statute could not be constitutionally applied to the statements being investigated. The affidavit stated that the investigation concerned allegations of criminal libel made by Professor Peake, who is the Monfort Distinguished Professor of Finance at the University of Northern Colorado. Complaint, Exhibit F. It stated that "[t]he website contains many opinions and articles about The University of Northern Colorado, the Greeley Community and Northern Colorado," and that "[a]ccording to

[2] Although *Ryan* arguably suggested that protected speech must be both "about public officials or public figures" *and* "involving matters of public concern," 806 P.2d at 940, protection is required under *New York Times* and *Garrison* whenever the speech is about a public official or figure – without any independent showing that the matter also relates to a matter of public concern. The Attorney General conceded this point in his brief filed in this Court in support of the limited constitutionality of the statute. *See* CM/ECF Doc. 25, at 4. *Ryan* also is unclear as to protecting statements about purely private persons involving matters of public concern, 806 P.2d at 941, but the United States Supreme Court addressed that possibility in *Gertz*, when it held that actual malice must be shown to recover punitive damages for defamatory statements on matters of public concern, even when the speech is about a private individual. 418 U.S. at 349-50.

the site, its purpose is to draw attention to issues rampant in Northern Colorado and Elsewhere." *Id.* As such, it was evident that Mr. Peake is not the "purely private person" described in *Ryan*, but instead is a public employee and a public figure, especially with regard to issues connected to the university community, which were the primary focus of the attached printouts of *The Howling Pig*. In addition, none of the allegedly libelous statements recounted in the affidavit concerned purely private matters. The general subject was a public institution – the University of Northern Colorado – and a well-known professor at the school. The more specific comments about Professor Peake also were of public concern, inasmuch as the public has an interest in the qualifications of professors at public universities.

Statements of hyperbole, satire, and opinion. The Supreme Court has made clear that statements that "could not reasonably have been interpreted as stating actual facts" enjoy absolute First Amendment protection. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court confirmed that "loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" whatever proposition he or she was expressing cannot constitutionally support a civil or criminal defamation claim. *Id.* at 21. Instructive on this issue is *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), in which the Tenth Circuit held that the First Amendment protects rhetorical hyperbole and obvious parody regardless of whether the subject is or is not a public figure. *Id.* at 442. Moreover, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 20.

Beyond demonstrating the public nature of the alleged victim and subject matter of the purportedly libelous statements, the affidavit revealed that the statements were classic satire, hyperbole, or opinion that could not reasonably be read as factual and, therefore, were not subject to prosecution. For example, the affidavit described The Howling Pig's website as containing "a logo that mimics that of The University of Northern Colorado"; it states that the photograph of Professor Peake on the site "has been altered to include sunglasses, a smaller nose, and a small moustache similar to that of Hitler's"; it explains that the website uses a satirical name (Junius Puke) for Professor Peake; it indicates that the website states that Professor Peake "'gambled in tech stocks' in the 90's"; it states that the website claims that Professor Peake "managed to luck out and ride the tech bubble of the nineties like a $20 whore and make a fortune"; it states that "[t]he website contains many opinions" and that it claims that Professor "Puke" is the author of the website's "'editorial[s].'" Complaint, Exhibit F. The website content itself, which was attached to the affidavit, includes obviously doctored photographs of Professor Peake, describes its content as "a combination of satire and parody," and ascribes to "Professor Puke" editorials expressing views diametrically opposed to those previously expressed by the real professor. *Id.*, Attachment A.

This Court recognized the facially satirical nature of the challenged statements, and their facially protected status under the First Amendment, when it granted the temporary restraining order ("TRO") at the start of the litigation.[3] For the same reasons, any reasonable prosecutor

[3] As far as Mink is aware, the January 9, 2004 hearing on the motion for TRO was not transcribed. However, according to a contemporaneous newspaper report on the Court's ruling, the Court described the challenged publications as "satire in its classic sense." Karen Abbott, "Judge huffs after cops hush online Howling Pig," Rocky Mountain News (Jan. 10, 2004) (attached as Exhibit 2).

would have known that the criminal libel statute could not be constitutionally enforced against Mink based on the content of *The Howling Pig* as described and documented in the affidavit.

IV. MINK'S FOURTH AMENDMENT RIGHT WAS ALSO CLEARLY ESTABLISHED.

The law underlying Mink's Fourth Amendment claim also was clearly established in December 2003, when Knox approved the warrant. Ordinarily, an allegedly unconstitutional arrest or search is deemed objectively reasonable when it is authorized by a warrant issued by a neutral and detached magistrate. *United States v. Leon*, 468 U.S. 897, 924 (1984). However, reliance on a warrant is not objectively reasonable when it is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *Id.* at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975)), *i.e.*, when a "reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Malley v. Briggs*, 475 U.S. 335, 345 (1986).

Nor is reliance objectively reasonable when the warrant is "so facially deficient—*i.e.*, 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." *Leon*, 468 U.S. at 923 (citation omitted). The Fourth Amendment requires a search warrant to "describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999). "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss*, 774 F.2d at 404.

In addition, courts must enforce the protections of the Fourth Amendment with "the most scrupulous exactitude" when the government seeks authority to seize materials protected by the

First Amendment. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *see Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989). In this case, the affidavit set forth *verbatim* the text of the warrant. *Compare* Warrant (Complaint, Exhibit E), *and* Affidavit (Complaint, Exhibit F). On its face, the affidavit (and, hence, the warrant) failed to satisfy the particularity requirement. In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the court held that the search warrant at issue violated the particularity requirement in each of three distinct ways. *First*, the warrant "contained no limitation on the scope of the search." *Id.* at 606. *Second*, the warrant was "not as particular as the circumstances would allow or require." *Id. Third*, the warrant "extends far beyond the scope of the supporting affidavit." *Id*. Knox approved an application for a warrant that suffers from each of the flaws identified in *Leary*:

Facial overbreadth. In *Stanford*, the Supreme Court invalidated a search of the home of the operator of a small mail-order business. The warrant authorized seizure of "material-'books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, and other written instruments concerning the Communist Party of Texas and the operations of the Communist Party in Texas." 379 U.S. at 486. The Court held that the "indiscriminate sweep" of this description was "constitutionally intolerable," because it was the equivalent of a "general warrant" that left too much discretion to the officers conducting the search. *Id*.

The proposed warrant in this case was even broader than the invalid warrant in *Stanford*, which at least limited its scope to Communist-related material. In this case, there is *no* stated limitation on what is relevant. In addition to authorizing seizure of all computer-related equipment, computer software, and all hard drives and floppy disks, paragraph 6 of the warrant directs police to seize any papers with names, addresses or telephone numbers, and paragraph 7

directs police to seize "any and all correspondence, diaries, memoirs, journals, personal reminiscences[,] electronic mail . . . letters, notes, memorandum [*sic*], or other communications in written or printed form."

After authorizing this vast seizure of virtually everything in written form and everything computer-related, the final numbered paragraph of the warrant authorizes a search of the written materials found on the computer and storage devices "as those items may relate to the allegations." But the authorization to search electronically-stored materials only for items that "relate to the allegations" does not adequately limit the scope of the warrant. *First*, even when a warrant authorizes police to search and seize all records relevant to violations of a specified criminal statute, that is not sufficient by itself to limit the warrant's scope. *See Leary*, 846 F.2d at 601-04; *Voss*, 774 F.2d at 405 ("[e]ven if the reference to Section 371 is construed as a limitation, it does not constitute a constitutionally adequate particularization of the items to be seized."). *Second*, and more to the point, the warrant provides no information about the nature of these unspecified and unnamed "allegations." Nor does the warrant mention the crime under investigation or refer in any manner to criminal activity. As the Tenth Circuit has explained, "a warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular." *Id.* at 406.[4]

[4] The affidavit (which does refer to "criminal libel," though without citation to the Colorado statute), could not cure the warrant's deficiencies. "The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents." *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). In this Circuit, both attachment and incorporation are required for an affidavit to remedy a warrant's lack of particularity. *See Leary*, 846 F.2d at 603 & n.20; *United States v. Williamson*, 1 F.3d 1134, 1136 n.1 (10th Cir. 1993). However, the affidavit was neither attached to the warrant nor incorporated by reference.

Governmental failure to narrow. This is not a case in which a broad description must be tolerated on the ground that the government has supplied all the detail that a reasonable investigation would allow. *See Leary*, 846 F.2d at 604. The warrant for the Mink residence, recited in the affidavit, refers to "the allegations" but fails to provide any information about them. As a result, this warrant, like the defective warrant in *Leary*, "authorize[s] wholesale seizures of entire categories of items not generally evidence of criminal activity and provide[s] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Id.* at 605 (citation omitted).

Scope in excess of affidavit. The search warrant also fails to meet the particularity requirement because it authorizes a search and seizure that extends far beyond the scope of whatever arguable probable cause is presented in the supporting affidavit. *See id.* at 605. Specifically:

- Nothing in the affidavit justifies a search of any and all letters, diaries, and "personal reminiscences" found in the Mink residence, yet the warrant authorizes searching these materials without regard to whether they are arguably connected to *The Howling Pig*.
- Nothing in the affidavit justifies seizing passwords for computers other than those found at the Mink residence, yet the warrant authorizes seizing passwords for any computer, no matter where it is located and without regard to any arguable connection to *The Howling Pig*.
- Even for material that is connected to *The Howling Pig*, the warrant exceeds the arguable scope of the criminal investigation suggested by the affidavit. The gist of the crime of criminal libel is *publication* of statements that fall into a particular category. The statements at issue all appear on *The Howling Pig*'s website or in the first three issues, which are available at

the website. Copies of those publicly-available materials were already in Knox's possession and were attached to the affidavit. The apparent purpose of the search was to uncover evidence linking those already-published statements to a particular computer and to particular persons. Yet the warrant authorizes the search and seizure of electronic documents that do not reveal that connection and have nothing to do with the statements at issue.

Thus, even assuming that the affidavit provided probable cause to search for at least some evidence, such as a connection between the Mink residence and *The Howling Pig* website, the warrant language was "impermissibly overbroad" because it "extends far beyond the scope of the supporting affidavit." *Id.* at 605-06.

V. *DOUGLAS V. DOBBS* DOES NOT BESTOW QUALIFIED IMMUNITY.

Knox contends that no clearly established constitutional right existed to support Mink's Section 1983 claim, because, under *Douglas v. Dobbs*, 419 F.3d 1097 (10th Cir. 2005), a deputy district attorney cannot violate a clearly established right under the facts here. Motion at 14. As an initial matter, it is questionable whether this Court should even consider *Dobbs* given the Tenth Circuit's opinion in *Mink*. The ruling in *Dobbs*, although not altogether clear, appears to focus on the role of the district attorney given the particular circumstances of that case, which involved approval of a motion and order to obtain pharmacy records. In contrast, the Tenth Circuit's opinion requires this Court to focus on probable cause and the First Amendment, neither of which was an issue in *Dobbs*. In fact, *Dobbs* discusses whether probable cause was *necessary* in order to obtain pharmacy records, as compared to whether probable cause *existed*. *Id.* at 1101-02. Further, if *Dobbs* – which Knox cited to the Tenth Circuit – were clearly controlling, as asserted by Knox, then the Tenth Circuit panel (which included Judge

Tymkovich, who authored a concurring opinion in *Dobbs*) would not have needed to remand for this Court to resolve the qualified immunity question. In other words, the Tenth Circuit presumably would have applied *Dobbs* if the panel believed it controlling here.

In any event, *Dobbs* is distinguishable in a number of key respects. *First*, it was unclear whether the "zone of privacy" had previously been extended to the prescription drug records in which the *Dobbs* plaintiff asserted a right to privacy. *Id.* at 1102. While the Tenth Circuit ultimately concluded that pharmacy records were protected, the plaintiff had not met her burden of demonstrating the law was clearly established at the time of the district attorney's actions. *Id.* at 1103. Here, by contrast, Mink identified more than a previously unrecognized and abstract right to privacy protected by the Fourth Amendment. The warrant was to search for various materials at the Mink home, and there is a clear and fundamental right to privacy in an individual's home. *United States v. Cos*, 498 F.3d 1115, 1124 (10th Cir. 2007) (privacy in the interior of a home is at the core of what the Fourth Amendment was intended to protect). There is also a clear right to privacy in the use and content of an individual's computer. *United States v. Carey*, 172 F.3d 1268, 1276 (10th Cir. 1999) (a warrant is required for closed computer files).

Second, it appears that the police officer in *Dobbs* was seeking an order more akin to a non-party subpoena, and that the deputy district attorney merely reviewed a proposed motion and order that was then submitted to a judge to obtain records from a third party. The protections provided by the Fourth Amendment are not as stringent in cases where an investigatory or administrative subpoena are at issue. *Becker v. Kroll*, 494 F.3d 904, 916 (10th Cir. 2007). "The Fourth Amendment requires only that a subpoena be 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'" *Id.*

(quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). In this case, however, Knox reviewed and approved a search warrant for Mink's home and personal computer, which implicated wholly different privacy interests from those at stake in *Dobbs*.

Third, and fundamentally, in *Dobbs* there were no violations of clearly-established First Amendment law.

Despite these key differences, Knox implies that *Dobbs* requires qualified immunity because her actions – review and approval of the warrant application and affidavit – are similar to those of the district attorney in that case. If the holding in *Dobbs* is as simple and straightforward as Knox suggests, then most of the qualified immunity analysis in the opinion is superfluous. Moreover, such a holding would be contrary to Supreme Court and Tenth Circuit precedent. This precedent establishes that a defendant need not be the "moving force" when sued in her personal capacity, but simply a cause of the constitutional violation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("It is enough to show that the official . . . *caused* the deprivation of a federal right.") (emphasis added). Knox had "fair warning" under clear Supreme Court and Tenth Circuit precedent that she could be liable for constitutional torts committed by another, if there was a causal connection between her acts or omissions and the resulting violation. *See, e.g., Johnson v. Martin*, 195 F.3d 1208, 1219 (10th Cir. 1999) ("allegations . . . of actual knowledge and acquiescence" are sufficient to establish violation of constitutional rights); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) (relying on "affirmative link" between the violation and defendant's personal participation, exercise of control or direction, or deliberately indifferent failure to supervise). Thus, Knox is not entitled to qualified immunity under *Dobbs*.

VI. CONCLUSION.

For all the above reasons, Knox does not have qualified immunity from Mink's Fourth Amendment claim. Mink respectfully requests the Court to deny Knox's Motion to Dismiss.

Dated April 21, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 4/21/2008, I have caused to be electronically filed the foregoing with the Clerk of Court using CM/ECF system which will send notification of such filing to the following e-mail addresses:

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