

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA, )

*Plaintiff,* )

-vs- )

VICTOR DEWAYNE GAINES, )

*Defendant.* )

**NO. CR-15-128-D**

**RESPONSE TO PLAINTIFF’S AMENDED MOTION TO RECONSIDER**

Victor Dewayne Gaines hereby responds in opposition to the Government’s Amended Motion to Reconsider. (Doc. 43). The Government’s Motion offers no new evidence or law and merely asks the Court to reconsider its Order granting Mr. Gaines’ Motions to Suppress because it is dissatisfied with the outcome. Mr. Gaines opposes the Government’s Amended Motion because it is procedurally improper and the Court’s decision was correct in the first instance.

**Motions to Reconsider**

The Government is correct that the Federal Rules of Criminal Procedure do not provide a mechanism for motions to reconsider. (*Amended Motion to Reconsider*, Doc. 43 at 2). However, the Tenth Circuit has recognized that in certain limited situations, a proper motion to reconsider may have merit. *See, e.g., United States v. Christy*, 739 F.3d 534, 539 (10th Cir. 2014). In particular, “[a] motion to reconsider

may be granted when the court has misapprehended the facts, a party's position, or the law." *Id.* (citing *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). Proper grounds for motions to reconsider 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." *Servants of Paraclete*, 204 F.3d at 1012. Importantly, "[a] motion to reconsider should not be used to revisit issues already addressed or advance arguments that could have been raised earlier. *Christy*, 739 F.3d at 539.

The Government's motion does not assert the Court misapprehended a party's position or the law. The Motion does not assert an intervening change in law or an omitted legal argument. *United States v. Huff*, 782 F.3d 1221, 1224-25 (10th Cir. 2015) (permitting reconsideration of suppression order in light of government's failure to previously argue a legal justification for the seized evidence). Instead, the Government asserts the facts do not support a finding Detective Medley acted with reckless disregard for the truth, and should the Court decline to reconsider this determination, the remaining factual support in Det. Medley's affidavit support a finding of probable cause. These are the same arguments presented to the Court in the Government's pleadings and during the hearing on the motion to suppress. There is no new information and no support that the Court "misapprehended" the facts.

Simply put, the Government disagrees with the Court’s findings and wants a “second chance” to “make its strongest case” and “dress up arguments that previously failed.” *Id.* at 1224 (*quoting Voelkel v. Gen. Motors Corp.*, 846 F.Supp. 1482, 1483 (D. Kan. 1994)). “A motion to reconsider is inappropriate where it reargues an issue previously addressed or advances arguments that could have been raised in prior briefing.” *United States v. \$29,410.00 In U.S. Currency*, No. CIV-13-132-D, 2014 WL 1276235, at \*2 (W.D. Okla. Mar. 27, 2014) *aff’d*, 600 F. App’x 621 (10th Cir. 2015).

In short, the Government’s motion does not meet the requirements for a motion to reconsider. As explained more fully below, the factual arguments proffered by the Government fall far short of merit. As such, the Amended Motion to Reconsider should be denied.

**Government’s Argument that the Court “Misapprehended” the Facts**

As a preliminary note, the Government does not request the Court to reconsider its Order suppressing the statements of Mr. Gaines made during an invalid detention. (*Order*, filed 12/15/2015, Doc. 37, at 12-19). The Government requests the Court reconsider that (1) Det. Medley’s misrepresentations did not amount to a reckless disregard of the truth and the allegedly “false” statements in the affidavit should not be stricken; and (2) even if the Court disregards the erroneous statements, the

remaining information in the affidavit constitute probable cause. These arguments, presented previously to the Court during the hearing, do not provide the Court with a reason to revisit its Order suppressing evidence.

### **Detective Medley's Reckless Disregard for the Truth**

The Government devotes much time and effort to have the Court revisit its determination that Detective Medley acted with a reckless disregard for the truth when he submitted false and omitted information to Judge Cindy Truong in support of an application for a search warrant. In particular, the Government identifies four factual misrepresentations in the affidavit found by the Court: (1) that Mr. Gaines had prior arrests for controlled substance offenses; (2) a trash pull from the apartment yielded “baggies” with marijuana residue; (3) an unknown black male emerged from the apartment with trash bags; and (4) a pill bottle with Mr. Gaines’ name was found in the trash pull.

These arguments are simply unpersuasive. The Government, in a divide and conquer approach, attempts to single out individual facts and argue the record supports a benign interpretation of Det. Medley’s failure to properly present each of the facts on their own. This approach skews the evidence elicited at the motion hearing. Through a series of material misrepresentations and omissions, Det. Medley presented a misleading affidavit to a state court judge. When the misleading and

omitted information is considered together, the Court's determination that Det. Medley acted with a reckless disregard for the truth is amply supported by the record. The Government does not argue the Court incorrectly cited the appropriate standards:

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.

(*Order*, 12/15/2015, at 4, *quoting United States v. Garcia-Zambrano*, 530 F.3d 1249, 1254 (10<sup>th</sup> Cir. 2008)). As further explained by the Court, reckless disregard requires “evidence that the officer in fact entertained serious doubts as to the truth of his allegations . . . and [a] factfinder may infer reckless disregard from circumstances evincing obvious reasons to doubt the veracity of the allegations.” (*Order*, 12/15/2015, at 5, *quoting Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10<sup>th</sup> Cir.), *cert. denied*, 135 S. Ct. 881 (2014) (additional internal quotation omitted). As factfinder, the Court properly inferred Det. Medley acted with reckless disregard. This determination is reviewed on appeal for clear error. “[W]e review for clear error the district court's findings regarding the truth or falsity of statements in the affidavit and regarding the intentional or reckless character of such falsehoods. *United States v. Garcia-Zambrano*, 530 F.3d 1249, 1254 (10<sup>th</sup> Cir. 2008).

First, Det. Medley stated Mr. Gaines had a prior arrest for Trafficking CDS [controlled dangerous substance], Possession of CDS with Intent [to distribute], and Possession of Marijuana. Tr. at 5-6. However, as learned during the suppression hearing, Det. Medley testified he “pulled” the arrests off of the VARUNA sheet and further review of the underlying report indicated an arrest for violation of a suspended sentence. (Tr. at 6). The Court found Det. Medley’s review of the VARUNA report to be “cursory.” (Order, Doc. 37, 12/15/2015 at 8). In fact, Det. Medley testified Mr. Gaines had no arrests for Trafficking CDS, Possession with Intent, or Possession of Marijuana. Tr. at 7. The Court considered the Government’s argument that this mistake amounted to “mere negligence” and rejected it, concluding Det. Medley “had no excuse for the specific misrepresentation of the arrest in his Affidavit.”

The Government argues the mistake as a mere record keeping error and Det. Medley was under no obligation to conduct further investigation into the validity of the VARUNA report. (*Motion*, 1/5/2016, Doc. 43, at 4-6). In particular, the Government cites to *Herring v. United States*, 555 U.S. 135, 146 (2009) for the proposition that the exclusionary rule is inappropriate for record keeping errors. The mistake in *Herring* was reliance upon a report of an active warrant for an individual, who when arrested, yielded methamphetamine and a gun in a search incident to arrest. *Id.* at 137. Such evidence was not subject to the exclusionary rule because the

mistake did not rise to the level of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Id.* at 144.

Perhaps if Det. Medley’s misrepresentation of Mr. Gaines’ criminal history was the only mistake in his affidavit, suppression might be inappropriate. However, Det. Medley offered additional misrepresentations and omissions.

In his affidavit, Det. Medley stated that during surveillance on the property, “an unknown black male emerged from the apartment and brought two trash bags down and laid them on the ground next to the dumpster.” (*Order*, 12/15/2015, Doc. 37 at 20). According to the affidavit, a search of the contents of the trash bags revealed a pill bottle with Mr. Gaines’ name and “baggies” with marijuana residue. *Id.* However, Det. Medley failed to include key pieces of information. First, the “unknown black male” was a child and Det. Medley did not see the black male emerge from the apartment because he could not see the door. *Id.* The omission of the individual’s age was material because it suggested a family residence and not a drug operation. (*Order*, 12/15/2015, Doc. 37, at 9). Further, the description of the pill bottle in the affidavit omitted that it included a different address for Mr. Gaines. *Tr.* at 13-14. Given that the purpose of the pill bottle was to connect Mr. Gaines to the apartment in question, the omission of a different address was significant. (*Order*, 12/15/2017, Doc. 37 at 9). And, the “marijuana residue” was not tested. (*Tr.* at 15).

In its motion the Government restates its arguments previously presented to the Court. (*Compare Tr. 55-57 with Motion, Doc. 40, 1/05/2016 7-11*). The Court previously considered and ultimately rejected those arguments. And, to the extent each individual misrepresentation and omission may have an explanation or fail to support a finding of reckless disregard, the misrepresentations and omissions must be considered in total. The Court reviewed an affidavit prepared by an officer who: (1) misrepresented the criminal history of Mr. Gaines to make him appear as an individual with a significant controlled dangerous substance history; (2) misled the Court on the type and substance of surveillance conducted at the apartment; (*Order, 12/15/2015, Doc. 37, at 7-8*); (3) omitted the age of the unknown black male taking trash out; (4) omitted that he could not actually see the child leave the apartment in question; (5) omitted that the pill bottle found with Mr. Gaines' name contained a different, unrelated address; (6) opined the baggies found in the trash bag contained marijuana residue without any presumptive testing; and (7) omitted that the prior conviction for Shooting with Intent to Kill was over ten years old.

Taken together, the Court was absolutely correct to conclude Det. Medley acted with reckless disregard, even if "he may not have deliberately intended to mislead the state court judge who issued the search warrant." (*Order, 12/15/2015, Doc. 37, at 8*). This determination was made "from the substance of Det. Medley's testimony and



his demeanor as a witness that Det. Medley was recklessly indifferent to the falsity of material statements in his Affidavit and the misleading effect of his omissions of certain true facts.” *Id.*

Without the misrepresented information, and with the inclusion of improperly omitted information, the Court was correct to find the warrant lacked probable cause and the good faith exception does not apply. Mr. Gaines again asserts the affidavit relies upon unverifiable and untested confidential informants, whose veracity and accuracy was not included in the affidavit. *Illinois v. Gates* 462 U.S. 213 (1983).

### **Conclusion**

Mr. Gaines respectfully requests the Court deny the Government’s Motion to Reconsider because it has not demonstrated the requirements for a proper motion to reconsider and the Court has already addressed the legal and factual issues presented.

Respectfully submitted,

*s/ Paul Antonio Lacy* \_\_\_\_\_

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CERTIFICATE OF SERVICE

  X   I hereby certify that on Wednesday, January 20, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Wilson McGarry and Ashley Altshuler  
Assistant United States Attorney

*s/ Paul Antonio Lacy* \_\_\_\_\_

PAUL ANTONIO LACY