

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	CIVIL ACTION
MICHAEL ELBERY	)	NO. 97cv11743-MLW
Plaintiff	)	
	)	
v.	)	DEFENDANTS' OPPOSITION TO
	)	PLAINTIFF'S MOTION FOR
DANIEL SKLUT et al.	)	SUMMARY JUDGMENT
Defendants	)	
_____	)	

The defendants oppose the plaintiff's motion for summary judgment. The defendants incorporate their Defendants' Statement of Material Facts Submitted with Opposition to Plaintiff's Motion for Summary Judgment, which is required by LR 56.1.

INTRODUCTION

The plaintiff's claims in this civil action are based on the plaintiff's claims that on August 5, 1994, he was arrested without probable cause. The facts outlined in the accompanying Defendants' Statement of Material Facts Submitted with Opposition to Plaintiff's Motion for Summary Judgment, together with the applicable law, show that the plaintiff's arrest was with probable cause. This eliminates the claims for violation of civil rights, false arrest and malicious prosecution.

Even if the plaintiff's arrest had been without probable cause, the facts outlined in the accompanying Defendants' Statement of Material Facts Submitted

with Opposition to Plaintiff's Motion for Summary Judgment, together with the applicable law on August 5, 1994, show that the conduct of the individual defendants does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This raises the issue of qualified immunity for the individual defendants.

Several individual defendants have testified in their deposition of their lack of involvement in the plaintiff's arrest. This requires denial of summary judgment against them.

Even if the plaintiff's arrest had been without probable cause, the facts outlined in the accompanying Defendants' Statement of Material Facts Submitted with Opposition to Plaintiff's Motion for Summary Judgment, together with the applicable law, show that the operation of a governmental policy or custom of the Town of Shrewsbury or its police department did not deprive the plaintiff of his civil rights.

If the plaintiff is asserting intentional tort claims against the Town of Shrewsbury, such claims are barred by the town's governmental immunity, which has not been abrogated for intentional torts.

## STANDARD OF REVIEW

In deciding a motion for summary judgment, the Court should view the material submitted in a light most favorable to the party opposing the summary judgment, indulging all reasonable inferences in that party's favor. *E.g.*, *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19–20 (1st Cir.1999).

This standard of review eliminates most of the arguments the plaintiff makes, in which he explains the defendants' factual positions, but goes on to attempt to prove that the defendants are being untruthful.

## ARGUMENT

### I. PROBABLE CAUSE TO ARREST

A police officer has probable cause to arrest a suspect where the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense. *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19 (1st Cir.1999). As the Supreme Court noted in reviewing probable cause to arrest a suspect for illegal possession of firearms after legal discovery of the firearms,

Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had

probable cause for his action: In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

*Adams v. Williams*, 407 U.S. 143, 149 (1972)(citations and internal quotations omitted).

The knowledge of whichever particular police officer or officers making the arrest does not define whether probable cause to arrest existed. "The existence of probable cause is to be evaluated on the basis of the collective information of the law enforcement officers engaged in a particular investigation. *United States v. Diallo*, 2 F.3d 23, 25–26 (1st Cir.1996). Accord *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19 (1st Cir.1999).

On August 5, 1994, Shrewsbury police officers faced the following circumstances:

- upon the request of plaintiff Michael Elbery to check his Corvette, a box labeled Uzi in this car
- Mr. Elbery's statement to Sgt. James Hurley that Mr. Elbery was a convicted felon
- information from the vehicle identification number of Mr. Elbery's Corvette that Mr. Elbery resided in Worcester at the time

- information from the Worcester Police Department<sup>1</sup>
  - (1) that ~~they did not have~~ a firearms identification card for Mr. Elbery in their files
  - (2) that Mr. ~~Elbery had a license to carry firearms~~ which had been revoked, and that they received a "court memo" confirming revocation of Mr. Elbery's right to possess firearms
- the statutory crime of possession of firearms, shotguns, rifles or ammunition without a firearms identification card, Mass. G.L. c. 269, §10(h), before 1998 amendment by St. 1998, c. 180, §69
- a statutory prohibition against the issuance of a firearms identification card to anyone convicted of a felony in the last five years, Mass. G.L. 140, §129B, before 1998 amendment by St. 1998, c. 180, §29
- the statutory crime of a person knowingly having in possession or under control in a vehicle a firearm, loaded or unloaded, without either (as applicable)
  - being present in his residence or place of business

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<sup>1</sup>The "licensing authority" for possession of firearms, rifles, shotguns and ammunition is the police chief (or equivalent) for each city or town. Mass. G.L. c. 140, §121.

- having a license to carry firearms in effect

Mass. G.L. c. 269, §10(a).

- the statutory crime of a person convicted of a crime with a possible sentence of over one year having possession of a firearm which had been shipped or transported in interstate commerce, 18 U.S.C.

§922(g)

It was no surprise that defendant the court issued defendant A. Wayne Sampson a search warrant to search Michael Elbery's storage locker.

Upon executing the search warrant, the Shrewsbury police officers found a cache of firearms and ammunition, including multiple firearms<sup>2</sup>, ammunition, ammunition for a firearm not present (a .357 Magnum round), and various ammunition magazines and other firearm parts and tools. Mr. Elbery was then arrested.

The Shrewsbury police officers involved had every reason to believe that Michael Elbery had possession of the firearms in his storage locker at E-Z Mini Storage. He asked Sgt. Hurley to check his car, and at least one firearm was in his car.

The Shrewsbury police officers had every reason to believe that Mr. Elbery's E-Z Mini Storage space in Shrewsbury was not his residence, not only

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<sup>2</sup> including an "AK-47 rifle by KFS Atlanta GA"

because it was part of a storage facility in which they were already investigating a fire, but also because a check of Mr. Elbery's vehicle identification number showed him to live in Worcester.

The Shrewsbury Police Officers involved had every reason to believe that Mr. Elbery lacked a firearms identification card, because Mr. Elbery admitted being a convicted felon, because the Worcester Police Department told then-Lt. Sampson that they had not issued Mr. Elbery a firearms identification card.

The Shrewsbury police officers involved had every reason to believe that Mr. Elbery lacked a "license to carry" firearms, because the Worcester Police Department told Lt. Sampson that Mr. Elbery's license to carry had been revoked, and that they had received a court memorandum confirming revocation of Mr. Elbery's right to possess firearms.

A belief by Shrewsbury police officers that convicted felons may not possess firearms is correct, as long as those firearms were transported or shipped in interstate commerce. 18 U.S.C. §922(g). The AK-47 stating that it came from Atlanta, GA indicated a likelihood of transport or shipment in interstate commerce.

The plaintiff's reliance of *Commonwealth v. Couture*, 407 Mass. 178, 552 N.E.2d 538 (1990) does not take account of the additional information giving the police in the present case probable cause. Overall, the Shrewsbury police officers

involved were presented with a situation far more than the simple possession of one or more firearms, for which a person may or may not have the proper firearms identification card or "license to carry." Everything pointed to the criminality of Mr. Elbery's firearms possession, as well.

The existence, on August 5, 1994, of a firearms identification card not yet revoked by the Shrewsbury police chief, does not eliminate the probable cause which existed both to have a warrant issue to search the plaintiff's locker at the E-Mini Storage facility, or the probable cause which existed to arrest the plaintiff. Checking with the police department in the city where the plaintiff resided, was reasonably calculated to reveal whether the plaintiff had a firearms identification card. The statutory prohibition against issuing a firearms identification card to a person convicted of a felony within the last five years added to the unlikelihood that plaintiff Elbery had a firearms identification card. The ability of a police chief to revoke a firearms identification card for any matter which would have prevented issuance of the card (such as a felony conviction), see Mass. G.L. c. 140, §129B, before 1998 amendment by St. 1998, c.180, §29, made even more likely that any firearm identification card Mr. Elbery might have had would not be effective. Mr. Elbery's arrest for violation of Mass. G.L. c. 269, §10(h) was based on probable cause.



## II. QUALIFIED IMMUNITY

Even if probable cause to arrest plaintiff Michael Elbery did not exist on August 5, 1994, his arrest did 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). This inquiry focuses not on the officer's subjective state of mind, such as bad faith or malicious intent, but on the objective reasonableness of the officer's conduct in light of the facts actually known to the officer and not consider the officer's subjective assessment of the facts.

This qualified immunity analysis also points to setting aside the existence of a not-yet-revoked firearms identification card issued by the Shrewsbury police chief. Any officers involved in Mr. Elbery's arrest not only did not know of a firearms identification card issued to Mr. Elbery by the Shrewsbury police chief, but had every reason to reasonably believe that Mr. Elbery's firearms licensing had taken place, and been revoked in Worcester, where he lived.

In addition, even though Mr. Elbery was not immediately charged with violation of Mass. G.L. c. 269, 10(a)(possession, without "license to carry" of firearm or control of firearm in vehicle, while not in home or place of business), violation of this criminal provision is a "related crime" to violation of Mass. G.L. c. 269, §10(h)(possession of rifle, shotgun, firearm or ammunition without firearm identification card). Even if no probable cause existed to arrest Mr. Elbery for the

crime initially charged, proof of probable cause to arrest him for a related defense which entitles the police officers to qualified immunity. *Sheehy v. Town of Plymouth*, 191 F.3d 15 (1st Cir.1999)(adopting related crimes defense in First Circuit). "An officer's erroneous legal description of the basis for an arrest should not expose the officer to liability if another officer would have concluded that there was probable cause to arrest for a related offense on the basis of the same conduct." *Sheehy v. Town of Plymouth*, 191 F.3d 15, 20 (1st Cir.1999).

The investigation of plaintiff Michael Elbery's firearms possession, of his felony conviction and of his licensing to possess firearms all point to an investigation of the possible criminality of Mr. Elbery's firearms possession. Mass.. G.L. c. 269, §10(a), like Mass.. G.L. c. 269, §10(h), restricts the possession of firearms to those that have fulfilled statutory requirements of application for a license or firearms identification card. The conduct which motivated Mr. Elbery's arrest under Mass. G.L. c. 269, §10(h) unmistakably would motivate an arrest under Mass. G.L. c. 269, §10(a). In considering whether probable cause to arrest Mr. Elbery under Mass. G.L. c. 269, §10(h), the probable cause to arrest under Mass. G.L. c. 269, §10(a) provides a complete defense for the individual defendants.

In addition, the plaintiff had been convicted of assault with intent to maim under Mass. G.L. c. 265, §15. See *Commonwealth v. Elberry*, 38 Mass. App. Ct.

912 (1995), further app. rev. denied 419 Mass. 1107 (1995). This crime is punishable by imprisonment in the state prison for not more than ten years or by imprisonment in jail for not more than 2½ years. Mass. G.L. c. 265, §15. Mr. Elbery's possession of firearms gave the police clear probable cause to seek a search warrant to search for more such weapons, and to arrest Mr. Elbery. Violation of 18 U.S.C. §922(g) is also a crime related to violation of the Massachusetts criminal statute on firearms possession for the purpose of determining whether qualified immunity applies, because both statutes regulate who may possess firearms, and the police investigation was clearly focused on whether Mr. Elbery was possessed firearms illegally.

### III. NO LIABILITY FOR THE UNINVOLVED

The plaintiff has asserted claims against defendants with no involvement in his arrest. Because they testified to their lack of involvement, summary judgment cannot enter against them.

Defendant James Carlin testified he had no involvement with the arrest or investigation of plaintiff Michael Elbery.

Defendant James Coates testified he did not arrest Michael Elbery. The form on which he signed as "arresting officer" is not filled out at the place of the arrest, but later, during booking. The only other involvement of Officer Coates

seems to be the ministerial task of transporting Mr. Elbery to the station, which Sgt. Hurley thought Officer Coates did.

Sgt. Stephen Faucher did not even see Mr. Elbery being arrested. Sgt. Faucher only helped execute the search warrant.

Officer Hanson did not know Mr. Elbery was being arrested until Officer Hanson saw him handcuffed and placed in the cruiser.

Sgt. Hurley also only saw the arrest of Michael Elbery.

Sgt. Johnson saw Mr. Elbery's arrest from 50 or 60 feet away, as Sgt. Johnson was putting his dog into his cruiser.

No one is claiming that former police chief Robert McGinley arrested Michael Elbery on August 5, 1994. Chief McGinley testified he does not recall ever talking to Michael Elbery, which directly contradicts Mr. Elbery's statement that the chief spoke with him after his arrest..

Lt. Daniel Sklut was not involved in Mr. Elbery's investigation or arrest. He did not see Mr. Elbery get arrested that day.

#### IV. SUPERVISORY LIABILITY

The plaintiff claims supervisory liability against all superior officer defendants. However, Lt. Sampson, although he does not recall who arrested Mr. Elbery, is the officer identified as arresting Mr. Elbery by Sgt. Hurley. His liability for this, if any, must be for his own conduct, not for supervising anyone

else. All sergeants and police officers subordinate to Lt. Sampson were acting as officers taking orders, doing what was assigned. Nothing shows that any activity any officer supervised was activity which was a violation of the plaintiff's civil rights, much less supervision with deliberate indifference to the plaintiff's civil rights.

Former Chief McGinley had no involvement, supervisory or otherwise.

V. NO VICARIOUS LIABILITY UNDER 42 U.S.C. §1983

Because probable cause existed to arrest the plaintiff on August 5, 1994, the Town of Shrewsbury cannot be liable violation of his civil rights.

Even if probable cause to arrest Mr. Elbery did not exist, no showing has been made that it was the governmental policy or custom of the Town of Shrewsbury or its police department to seek search warrants without probable cause or to arrest suspects without probable cause. In addition, no showing has been made that it was a governmental policy or custom of the Town of Shrewsbury or its police department to arrest persons in possession of firearms despite issuance to them of an unrevoked firearms identification card. Without this, liability for the municipality under 42 U.S.C. §1983 cannot exist on a theory of vicarious liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-694 (1978). Recognizing this, the plaintiff relies on the claim that then-police chief Robert McGinley "ratified" the other officers' conduct, that the police

chief participated in the conduct, that the concerted action of a "large contingent" makes the town liable, and the subsequent promotion of those involved in Mr. Elbery's arrest shows town approval of illegal conduct.

The long period of which the plaintiff claims seems to have been the day of August 5, 1994, on which the plaintiff's gun stash was discovered, the plaintiff disclosed his felony conviction and the Worcester Police Department suggested the lack of an FID card and the revocation of the plaintiff's "license to carry." It all ended with his arrest on the afternoon of Friday, August 5, 1994. On Monday, August 8, 1994, he was before a court, with an assistant district attorney handling his case. By August 10, 1994, the stay of execution on the plaintiff's previous ten year sentence, with three days credit. Exhibit R to Plaintiff's Motion for Summary Judgment at 13. No claim of an extended period of civil rights violations is possible.

The "large contingent" the plaintiff claims conspired to arrest him without probable cause is made up mainly of officers who deny arresting him. Summary judgment against the town cannot be based on this claim denied in the officers' deposition testimonies.

The plaintiff claims former police chief Robert McGinley participated in the conduct of his subordinates in arresting the plaintiff, but offers nothing but conclusions.

The plaintiff's claim of ratification by the former police chief relies on nothing more than his asking the former police chief questions at deposition, long after the plaintiff's custody for his arrest, whether he thought various policy and conduct was correct. The police chief was not ratifying police officers' conduct at the time, contributing to the plaintiff's arrest or custody. Municipal liability (or liability of a former police chief) does not attach because the retired police chief thinks, correctly or incorrectly, that policies, procedures or interpretations of law at the time the arrest were correct.

The plaintiff also argues that municipal liability exists because former police chief Robert McGinley was the chief policy maker and final decision maker for the Shrewsbury Police Department for day to day operations and law enforcement policy. The mere existence of a chief policy maker and final decision maker does not create liability for all day to day action of police officers. This is particularly so here, because Chief McGinley had not participated in the investigation or subsequent arrest of the plaintiff, and had not put policies into place which launched that investigation and arrest.

Nothing shows that the town ratified the officers' conduct by promoting them. Nothing shows that their arrest of Michael Elbery was even considered in their promotion. Under this attempted approach, whenever anything positive

happened to a public employee who a plaintiff claimed violated his civil rights, municipal liability would attach.

#### VI. NO MUNICIPAL LIABILITY FOR INTENTIONAL TORTS

The Massachusetts legislature has not abrogated governmental immunity for intentional torts. Mass. G.L. c. 258, §10(c). Claims for false arrest, false imprisonment and malicious prosecution are specifically excluded from the abrogation of governmental immunity. Mass. G.L. c. 258, §10(c).

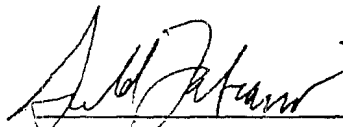
#### CONCLUSION

The plaintiff's motion for summary judgment should be denied.

Defendants Daniel Sklut, James Carlin,  
Stephen Faucher, Carl Hanson, Chester  
Johnson, James Hurley, Wayne Sampson,  
Robert McGinley and Town of Shrewsbury

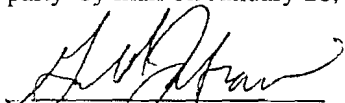
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I hereby certify that a true  
copy of the above document was  
served upon each party appearing pro  
se and upon the attorney for each  
other party by mail on January 26,  
2001.

  
Gerald Fabiano



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	CIVIL ACTION
MICHAEL ELBERY	)	NO. 97CV11743-MLW
Plaintiff	)	
	)	DEFENDANTS' STATEMENT OF
v.	)	MATERIAL FACTS SUBMITTED
	)	WITH OPPOSITION TO PLAINTIFF'S
DANIEL SKLUT et al.	)	MOTION FOR SUMMARY
Defendants	)	JUDGMENT
_____	)	

The defendants submit the following statement of material facts with their oppositions to the plaintiff's motion for summary judgment, in accordance with LR 56.1.

INITIAL INVESTIGATION

On the morning of August 5, 1994, then-Sgt. James Hurley of the Shrewsbury Police Department was assigned to go to the E-Z Mini Storage (also known as "The Lock Up") in Shrewsbury to collect evidence and photograph storage bins. He photographed the bins and took evidence officers gave him. J. Hurley Deposition 17-18. Another officer assisted Sgt. Hurley in taking pictures. J. Hurley Deposition 47.<sup>1</sup>

On August 5, 1994, at about noon or shortly thereafter, Shrewsbury police officer Chester Johnson was assigned to investigate a fire at E-Z Mini Storage. C.

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<sup>1</sup>Then-Lt. A. Wayne Sampson did not take any videos. He did not participate in the investigation of the fire. A.W. Sampson Deposition 13-14.

Johnson Deposition 7,10, 11. After speaking with fire department superior officers, Sgt. Johnson began investigating the cause and origin. At some point in the investigation, Sgt. Johnson became aware that a car contained guns. He saw the shape of a rifle box in a grayish, clear plastic bag. Sgt. Johnson could make out, "Uzi." C. Johnson Deposition 14–15.

On August 5, 1994, Sgt. Johnson had a conversation with the plaintiff. The plaintiff was concerned about damage to his car. He and Sgt. Johnson discussed when the plaintiff could come in. C. Johnson Deposition 13–14.

Defendant Carl Hanson, a former Shrewsbury police officer, also had a conversation with the plaintiff at the fence. Mr. Elbery expressed concern about a vehicle that was stored in a storage locker at EZ Mini Storage. Mr. Elbery asked Officer Hanson to check on the vehicle to see if it had been damaged in the fire. After reporting no exterior damage other than soot and water from the fire, Mr. Elbery asked Officer Hanson to check the interior. Officer Hanson did and told Mr. Elbery there appeared to be no visible sign of damage. C. Hanson Deposition 7–8. Inside the car was a box labeled, "Uzi." C. Hanson Deposition 9–10.

Michael Elbery also asked Sgt. Stephen Faucher to check his car very closely for damages. Mr. Elbery was standing outside the fence. S. Faucher Deposition 8. Sgt. Faucher looked at Mr. Elbery's car. S. Faucher Deposition 9.

Sgt. Faucher saw a what he thought was a gun and a box marked "u-z-i," both wrapped in plastic, like trash bags. S. Faucher Deposition 11-12.

Sgt. Hurley saw plaintiff Michael Elbery standing near the fence, and had a conversation with him there. J. Hurley Deposition 33. Sgt. Hurley was inside the fence. The plaintiff was outside the fence. J. Hurley Deposition 35. Sgt. Hurley said, "There appear to be some guns in your storage bin, Michael<sup>2</sup>." The plaintiff told Sgt. Hurley that he was a convicted felon and he [the plaintiff] cannot do anything anymore. J. Hurley Deposition 34-35.

Sgt. Hurley also checked the his department's computer system, which indicated that no FID card had been issued to Michael Elbery by the Shrewsbury Police Department at that point in time. J. Hurley Deposition 163. Sgt. Hurley checked to see whether the plaintiff had a valid FID card on August 5, 1994 because when he saw the Uzi box inside the plaintiff's Corvette, he thought an Uzi could be possessed with an FID card or a license to carry. J. Hurley Deposition 165-166.

#### OBTAINING SEARCH WARRANT

On August 5, 1994 in the early afternoon, then-Lieutenant A. Wayne Sampson received a call from one of the officers investigating the E-Z Mini

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<sup>2</sup>Lt. Hurley has known plaintiff Michael Elbery several years, starting when he took the plaintiff into custody on an outstanding warrant. J. Hurley Deposition 120-121.

Storage fire. The officer let him know they believed guns were inside a motor vehicle in one of the units. A.W. Sampson Deposition 6-7. One of the officers told Lt. Sampson that Mr. Elbery had specifically asked him to go in and check on the motor vehicle. A.W. Sampson Deposition 8. Mr. Elbery had also told then-Sgt. Hurley that he was a convicted felon. A.W. Sampson Deposition 8.

When the officers told Lt. Sampson of the weapons in the car and of the possibility that the plaintiff Elbery was a felon, Lt. Sampson verified the VIN [vehicle identification number] on the car. It gave him a Worcester address, indicating to Lt. Sampson that Mr. Elbery was a Worcester resident. Lt. Sampson contacted the Worcester Police Department, which informed him that Mr. Elbery did not have an FID card in their records. The Worcester Police Department also told him that Mr. Elbery had a license to carry firearms, but it had been revoked, because he was a convicted felon. A.W. Sampson Deposition 15-16.

In 1994, the Shrewsbury Police Department kept records on FID cards stacked in boxes in a storage area over a garage or in storage areas on both ends of the police department. A.W. Sampson Deposition 19-20. Computer records would show only FID cards issued to Shrewsbury residents. Lt. Sampson would check the computer records only if he had reason to believe a person was a Shrewsbury resident. In plaintiff Michael Elbery's case, he was a Worcester resident. Lt. Sampson had no reason to check Shrewsbury records because Lt.

Sampson had no knowledge that Mr. Elbery was a Shrewsbury resident. A.W.

Sampson Deposition 21-22. If a citizen of Shrewsbury was in possession of guns, the Shrewsbury Police Department would check its own records. If the issue came up for a citizen of another community, the Shrewsbury Police Department would check with the community where the person lives. A.W. Sampson Deposition 47.

On August 5, 1994, Lt. A. Wayne Sampson applied for a search warrant to search for "an illegally possessed firearm (to wit: long barrel rifle located in Chevrolet Corvette), illegally possessed ammunition for said rifle and any additional illegally possessed firearms and ammunition" in

The Lockup (a storage facility) located at 869 Boston Turnpike, Shrewsbury, MA (next to Days Inn). Storage container #C341 which is located on the west side of the building (known to this officer by sight). This facility is also known as E Z Mini Storage, which is occupied by and or in the possession of: Michael Elberry D.O.B. 2/8/52

Application for Search Warrant 8-5-94, Exhibit E to Plaintiff's Motion for Summary Judgment. In this application for a search warrant, Lt. Sampson attached his affidavit, in which he stated that he "checked with the Worcester Police Department and determined that their records indicate that on January 28, 1991 they received a court memo confirming revocation of Mr. Elbery's right to possess firearms." Application for Search Warrant 8-5-94, Exhibit E to Plaintiff's Motion for Summary Judgment, Appendix A.

## EXECUTION OF SEARCH WARRANT

The Return of Officer Serving Search Warrant, sworn to by Lt. A. Wayne Sampson, lists 68 numbered items. Exhibit E to Plaintiff's Motion for Summary Judgment.

The Return of Officer Serving Search Warrant includes the following notable items (with serial numbers omitted for this Court filing):

1. Remington 870 12 gauge shotgun
2. AK 47 rifle by KFS Atlanta, GA
3. Wrapped box w/ possible AK-47
4. Wrapped box w/ possible AK-47
5. UZI (by Action Arms)
- ...
- 15 .22 cal. Beretta semi-auto
16. Loaded magazine w/6 6 rounds
- ...
19. Trap loads (12 gauge)
20. 2 .223 Rounds
21. 1 5.56 mm. rounds
22. 1 9 mm. rounds
23. 1 .45 cal. auto rounds

24. 1 9 mm. rounds

...

37. 45 9 mm. rounds (45)

...

40. 3 .357 rounds (3)

41. 1 ammo can w/ ammo

...

45. 1 Winchester 44 mag. rounds

46. 1 .22 cal. viper rounds

...

48. 2 9 mm. rounds

...

50. 1 45 auto rounds

...

52. 3 Winchester shells (red)

...

54. 6 .38 cal. rounds

55. 2 .357 cal. rounds

56. 2 .22 cal. rounds

...

58. 1 .22 cal. high velocity [sic] rounds

59. 1 45 auto rounds

...

In addition, various ammunition magazines, other firearm parts and several firearm tools were found. Return of Officer Serving Search Warrant, in Exhibit E to Plaintiff's Motion for Summary Judgment.

Sgt. Faucher assisted with the search warrant. S. Faucher Deposition 13.

#### ARREST OF PLAINTIFF MICHAEL ELBERY

Lt. Sampson did not recall whether he arrested the plaintiff, although he remembers bringing the search warrant to the premises, informing the plaintiff that he had a search warrant, that the plaintiff was there and that the plaintiff was arrested. Lt. Sampson's involvement in the investigation of the criminal case against the plaintiff for gun possession was as a supervising officer. A.W. Sampson Deposition 11-12.

Sgt. Hurley's primary function in the arrest of plaintiff Michael Elbery was that he "tagged in" the firearms that were located in the plaintiff's storage bin. J. Hurley Deposition 33. Sgt. Hurley was involved in the arrest "[a]s far as taking property A evidence ... ." J. Hurley Deposition 46.

Sgt. Johnson had no involvement with the plaintiff's gun arrest, other than talking to the plaintiff at the fence there. C. Johnson Deposition 13. When the



plaintiff was arrested in front of his rented bay, Sgt. Johnson was fifty or sixty feet away, putting his dog back in his cruiser. C. Johnson Deposition 35–36.

Sgt. Hurley saw the plaintiff arrested at E-Z Mini Storage, inside the fence near the building that was burned. Sgt. Hurley recalls Lt. A. Wayne Sampson say to the plaintiff, "You're being placed under arrest for illegal possession of firearms." J. Hurley Deposition 33–34.

Police officer James Coates of the Shrewsbury Police Department testified that he did not arrest plaintiff Michael Elbery. J. Coates Deposition 6–7, 11–13, 18. Although the plaintiff may argue that Officer Coates signing the Miranda rights form for the plaintiff's August 5, 1994 arrest on the line for "Arresting officer," Officer Coates explained when that form is used. The written Miranda rights form is used only in the booking room, not at the scene of the arrest. J. Coates Deposition 29–30. Lt. Hurley testified that he though Officer Coates transported the plaintiff to the station. J. Hurley Deposition 56.

Officer Hanson testified he first learned Michael Elbery was being arrested when he saw Mr. Elbery being handcuffed and placed in the cruiser. C. Hanson Deposition 18.

Former Shrewsbury police officer James Carlin had no involvement with the investigation or arrest of Michael Elbery on August 5, 1994. J. Carlin Deposition 7.

Sgt. Faucher did not even see Mr. Elbery get arrested. S. Faucher Deposition 13.

Shrewsbury police lieutenant Daniel Sklut was not involved in the investigation or arrest of Michael Elbery for guns on August 4 or 5, 1994. D. Sklut Deposition 18. He did not see Mr. Elbery get arrested that day. D. Sklut Deposition 21.

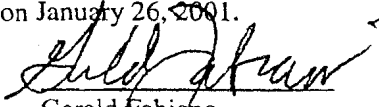
Former Shrewsbury police chief Robert McGinley testified he had no knowledge of Michael Elbery before August 5, 1994, that he had never spoken to him, and that he does not recall ever speaking to him. R. McGinley Deposition 19-20.

#### POLICE DEALING WITH ARRESTED PERSON

The "booking sheet" in this case shows plaintiff Michael Elbery's residential address as 31B Chilmark, Worcester. J. Hurley Deposition 120, Exhibit 9. The booking sheet is a computer generated copy of the data taken from the defendant [in the criminal matter.] J. Hurley Deposition 98.

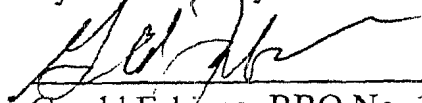
After the police department's paperwork is brought to the court, all review of the case is determined by the district attorney. A.W. Sampson Deposition 95-96.

I hereby certify that a true copy of the above document was served upon each party appearing pro se and upon the attorney for each other party by mail on January 26, 2001.

  
Gerald Fabiano

Defendants Daniel Sklut, James Carlin, Stephen Faucher, Carl Hanson, Chester Johnson, James Hurley, Wayne Sampson, Robert McGinley and Town of Shrewsbury

By their attorneys

  
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