No. 15-1175

In the United States Court of Appeals
For the Tenth Circuit

SEAN MCALLISTER,

Plaintiff-Appellant,

v.

DETECTIVE MICHAEL KELLOGG,
in his individual capacity

Defendant-Appellee,

On Appeal from the United States District Court
For the District of Colorado, Denver
Civil Action No. 13-cv-02896-CMA-MJW
The Honorable Christine M. Arguello

APPELLE-PLAINTIFF RESPONSE BRIEF

DAVID LANE
AMY KAPOOR
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
Attorneys for Plaintiff-Appellant

ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

STATEMENT OF THE JURISDICTION

"Orders denying qualified immunity before trial are appealable to the extent they resolve abstract issues of law." *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997) (emphasis added) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). But at the interlocutory appeal stage, this Court has no jurisdiction to review the district court's rulings based on the sufficiency of the evidence--"which facts a party may, or may not, be able to prove at trial." *Medina v. Cram*, 252 F.3d 1124, 1130 (10th Cir. 2001).). On interlocutory appeal, the Court may examine only ″the purely legal question of whether the facts alleged by plaintiff support a claim of violation of clearly established law.″ *Foote,* 1189 F.3d 1422 (citing *Mitchell*, 472 U.S. at 528 n.9).

Interlocutory appeals on the issue of qualified immunity come under the ″collateral order″ doctrine, in which the order being appealed must (1) conclusively determine the disputed question; (2) resolve an important issue separately from them merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Susanavas v. Stover*, 196 Fed. Appx. 647, 651(10th Cir. 2006) (unpublished). In order to satisfy these stringent conditions, the appellant must prove a well-founded entitlement to "*immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. Such a "right to immunity is

a right to immunity *from certain claims*, not from litigation in general." *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996). Moreover, the asserted right to immunity from suit must be based on "a question of law" that is "conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, 472 U.S. at 527-28.

Thus, when a defendant appeals from the denial of a motion to dismiss civil-rights claims for damages against individual defendants under 42 U.S.C. § 1983, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." *Behrens*, 516 U.S. at 309. It is not within this Court's jurisdiction to review "a district court's factual conclusions," such as whether the plaintiff's allegations are "sufficient to support a particular factual inference." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008); *see Weise v. Casper*, 507 F.3d 1260, 1264 (10th Cir. 2007).

In several respects, the issues raised and argued by Defendant Kellogg in this appeal do not comply with the conditions set forth above. Both their opening brief to this Court and their motion to dismiss in the district court attempts to controvert the factual allegations in Mr. McAllister's complaint instead of accepting those allegations as true. *See* Appellant Brief at 25-29. Defendant states in his brief, "Respectfully, the district court's iteration of the facts in support of its conclusion is incomplete and does not obviate the existence of probable cause." *Id.*

at 31. Contrary to the Defendant's assertion, the district court was following the appropriate standard for analyzing a motion to dismiss. *See Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011) ("When a defendant files a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff."") Mr. McAllister therefore respectfully requests that this Court limit its review to those issues, if any, which meet all of the stringent criteria for an appeal of a district court's interlocutory denial of qualified immunity.

ISSUES PRESENTED FOR REVIEW

Plaintiff objects to Defendant Kellogg's statement of issues as exceeding the permissible scope of this Court's limited jurisdiction over the issue of qualified immunity. Plaintiff respectfully requests the issues on interlocutory appeal be limited to those of qualified immunity; namely:

1. Did Plaintiff Sean McAllister assert a violation of a constitutional right?
2. If so, was that right clearly established in October 2011?

STATEMENT OF THE CASE

Plaintiff Appellee Sean McAllister brought 42 U.S.C. § 1983 claims[1] against Defendants Officer Michael Reifsteck, Officer Robert Cash, and Officer Michael Kellogg ("the Individual Officers") in their individual and official capacities, and a Monell[2] claim against Denver for failing to train or supervise the Individual Officers. Aplt. App. at 10-24. This appeal concerns only the allegations against Officer Michael Kellogg ("Kellogg"). The district court denied Kellogg's motion to dismiss, concluding that Kellogg was not entitled to qualified immunity for Mr. McAllister's Fourth Amendment false arrest claim against Defendant Kellogg. Because the district court's analysis was correct, the decision below should be affirmed.

STATEMENT OF FACTS[3]

During their marriage, Sean McAllister, his wife, Hilary McAllister, and their blended family shared a residence in Breckenridge, CO. Aplt. App. at 10 ¶¶

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[1] For a full procedural history, Appellee refers to the Court to Appellant's Opening Brief at 4-5.

[2] *Monell v.Dep't. of Soc. Svcs. of the City of New York*, 436 U.S. 658 (1978).

[3] The Statement of Facts summarizes the relevant allegations found in Mr. McAllister's Complaint. Because Defendant Kellogg filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (emphasis in original) (internal quotation marks and citation omitted).

10-11. Eventually, Mr. and Mrs. McAllister began having marital problems. Although still married, they separated in 2011. *Id*. "[T]o allow their children to continue attending the same school," Mr. McAllister and Hilary continued to "share[] time" in the Breckenridge house, with one or the other of them living there with the children "during their respective parenting time." *Id.* at ¶ 12. When not with the children in Breckenridge, they would stay in either of two rental apartments in Denver. *Id*. at ¶13. The apartment that Mr. McAllister "primarily used" was located at 1055 Sherman Street (the "1055 Sherman Apartment") and *only his name* appeared on the lease. *Id*. at ¶ 14.

Mr. McAllister was arrested and jailed on October 12, 2011, on suspicion of committing domestic violence against his then-wife, Hilary McAllister. *Id*. at ¶ 18. Two days later, after holding a hearing, Summit County Judge Edward Casias issued a protective order, directing Mr. McAllister to "stay away from" Ms. McAllister's home and "any other location [she] is likely to be found." *Id*. During the course of hearing, Judge Casias concluded that Mr. McAllister was not a risk to his children and therefore only listed Ms. McAllister as a protected party in the order. *Id*. at ¶ 19.

Upon being released from jail in Breckenridge, on October 14, 2011, Mr. McAllister drove to his apartment in Denver, at 1055 Sherman Street, where he encountered the couple's two-year old son, Elijah, as well as his seventeen-year-

old stepdaughter, Madison Welch. *Id*. at ¶ 24. Hours later, Ms. McAllister called Denver Police and reported that Mr. McAllister has violated the protection order. Defendant Detective Michael Reifsteck and Defendant Officer Robert Cash spoke to Ms. McAllister about the incident. *Id*. at ¶ 25-27. In their written "investigative" reports, Detective Reifsteck and Officer Cash had conflicting information regarding who primarily resided in the apartment at 1055 Sherman Street. *Id*. at ¶ 29-35. Despite having contradictory information about an essential element of the allegation, neither Detective Reifsteck nor Officer Cash took any additional steps to verify which apartment was Mr. McAllister's primary residence. Id. at ¶ 32, 35.

On October 16, 2011, Defendant Officer Michael Kellogg began investigating Ms. McAllister's reported violation of the protective order. *Id.* at ¶ 38. After reviewing a copy of the protective order, Defendant Kellogg wrote "the PO issued out of Summit County . . . shows issue date of 10/14/11 (same date as alleged violation) . . . The victim is the only protected party listed with other instructions about the children and visitation." *Id*. at 10 ¶¶ 41-42.

On October 23, 2011, Defendant Kellogg interviewed Ms. McAllister and her stepdaughter about the alleged violation of the protective order. *Id.* at ¶ 46. Despite having just days prior reviewed the protective order in place at the time of Mr. McAllister's alleged violation, Defendant Kellogg noted in his written report

that Ms. McAllister gave him a copy of (amended) protective order and Madison, Ms. McAllister's stepdaughter, was a protected party. *Id*.

Despite full and direct knowledge that the protective order in place during Mr. McAllister's alleged violation only prohibited Mr. McAllister from contacting Ms. McAllister, and knowing that Mr. McAllister did not have any contact with Ms. McAllister, Defendant Kellogg sought and obtained an arrest warrant for Mr. McAllister on October 24, 2011. *Id.* at ¶ 51. Defendant Kellogg recklessly failed to include the date of the protective order he was relying ton to falsely allege that Mr. McAllister violated the order. The amended protective order was not valid until **after** Mr. McAllister's alleged violation on October 14. In addition, Defendant Kellogg intentionally failed to include essential information about how 1050 Sherman Street was in fact Mr. McAllister's residence, thereby vitiating any notion of probable cause.

SUMMARY OF ARGUMENT

According to Mr. McAllister's well-plead complaint, on October 24, 2011, despite full knowledge that as of October 14, 2011, no protective order prevented Mr. McAllister from contacting his children or stepdaughter, Defendant Kellogg intentionally and recklessly sought and obtained an Arrest Warrant for Mr. McAllister for the unintentional contact Mr. McAllister had with his step-daughter Madison Welch. Defendant Kellogg recklessly omitted the date of the protective

order on which he was relying on to determine that Ms. Welch was an additional protected party. On October 26, 2011, Mr. McAllister was wrongfully arrested in Denver based on falsified arrest affidavit. After spending several hours in the Denver Jail, Mr. McAllister bonded out. Shortly thereafter, the protective order violation case was dismissed.

The district court properly determined that, at the time of Defendant Kellogg's conduct, it was clearly established that the Constitution prohibited law enforcement officers from alleging materially misleading information or omitting material information from an affidavit for an arrest warrant. Further, the district court correctly concluded that, when the arrest affidavit was considered without reference to any improper evidence, and including consideration of the omitted material information, the affidavit's contents as alleged in Mr. McAllister's Complaint failed to establish probable cause for Mr. McAllister's arrest. The district court correctly concluded that the doctrine of qualified immunity did not permit Defendant Kellogg to prevail on his motion to dismiss because Mr. McAllister sufficiently alleged a false arrest claim against the Defendant. For the reasons explained in detail below, the district court's opinion should be affirmed.

ARGUMENT

Defendant's appeal alleges that the District Court erred in denying Defendant Kellogg qualified immunity. As recognized by this Court:

> Although summary judgment provides the typical vehicle for asserting a qualified immunity defense, we will also review this defense on a motion to dismiss… Asserting a qualified immunity defense via a Rule 12(b)(6) motion, however, subjects the defendant to a more challenging standard of review than would apply on summary judgment. *See Lone Star Indus., Inc. v. Horman Family Trust*, 960 F.2d 917, 920 (l0th Cir.1992) ("A motion to dismiss for failure to state a claim is viewed with disfavor, and is rarely granted.") (internal quotations omitted).

Peterson v. Jensen, 371 F.3d 1199, 1201 (l0th Cir. 2004) (emphasis added). The district court applied the proper analysis in denying Defendant's Motion. When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must determine whether the allegations of the complaint are sufficient to state a claim within the meaning of Fed. R. Civ. P. 8(a). The Court must accept all well-pleaded allegations of the complaint as true. *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 997 (10h Cir. 2002). The complaint is reviewed to determine whether it "contains enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L. C. v. Schneider*, 493 F.3d 1174, 1177 (l0th Cir. 2007) "[T]he standard remains a liberal one, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir.2009).

This Court should find that Mr. McAllister has sufficiently pled factual matter to establish that Defendant Kellogg violated Mr. McAllister's clearly established constitutional rights under the Fourth Amendment to the United States

Constitution. In addition, this Court should hold at the time Defendant violated Mr. McAllister's rights, the law was clearly established that "the omission of material information from an arrest affidavit violates[s] the Fourth Amendment." *Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991); *see also Franks v. Delaware*, 438 U.S. 154, 57 (1978); *Stewart v. Donges*, 915 F.2d 1493, 1498-99 (10th Cir. 1990).

I. The District Court Properly Concluded that Defendant-Appellant Kellogg is not Entitled to Qualified Immunity

Defendant Kellogg asserts two erroneous arguments to support his contention that he is entitled to qualified immunity: first, that the law prohibiting his conduct was not clearly established based on an overly narrowly definition of the right; and second, that a "corrected" affidavit would still contain probable cause for Mr. McAllister's arrest. Because neither argument has merit, the district court's denial of qualified immunity should be affirmed.

A. The Law Prohibiting Defendant-Appellant Kellogg's Conduct was Clearly Established

"In an action under section 1983, individual defendants are entitled to qualified immunity unless it is demonstrated that their alleged conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known." *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1251 (10th Cir. 1999). Once a defendant has raised qualified immunity

as an affirmative defense, the plaintiff bears a two-part burden of demonstrating that (1) the defendant violated a constitutional right, and (2) the constitutional right was clearly established at the time of the conduct. *Reynolds v. Powell*, 370 F.3d 1028, 1030 (10th Cir. 2004). In *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009), the United States Supreme Court held that a trial court has discretion to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand." When deciding an issue of qualified immunity, the court adopts the plaintiff's version of the facts. *Scott v. Harris*, 127 S. Ct. 1769, 1775 (2007).

In determining whether a right was "clearly established," the court assesses the objective legal reasonableness of the action at the time and asks whether "the right [is] sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The plaintiff need not establish a "'precise factual correlation between the then-existing law and the case at-hand.'" *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir. 1992) (quoting *Snell v. Tunnell*, 920 F.2d 673, 699 (10th Cir. 1990)). Furthermore, "officials 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). Indeed, "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they

are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Id*. (emphasis added). Government "'officials committing outrageous, yet sui generis, constitutional violations ought not be permitted to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression.'" *Fuerschbach v. Sw. Airlines Co*., 439 F.3d 1197, 1206, n.4 (10th Cir. 2006) (quoting *Jones v. Hunt*, 410 F.3d 1221, 1230 (10th Cir. 2005)).

Defendant Kellogg erroneously characterizes the right at issue as the following: "where an officer seeking an arrest warrant for violation of a protection order does not have an actual copy of that order, they have a constitutional duty to obtain a copy of protection order and report its precise contents to the court even to the exclusion of the information provided by apparently-reliable witnesses who have first-hand information.." Appellant's Br. 33. Mr. McAllister's constitutional rights are not so narrowly defined. *See*, e.g., Hope, 536 U.S. at 741. In the context of a false arrest claim, the "constitutional right [at issue] is the Fourth Amendment's right to be free from unreasonable seizures." *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996). Before executing an arrest, officers must make an independent probable cause determination based on their own investigation. *Koch v. Del City*, 660 F.3d 1228, 1239 (10th Cir. 2011). They "may not ignore easily accessible evidence." *Id*. (quoting *Baptiste v. J.C. Penney Co*., 147 F.3d 1252,

1259 (10th Cir. 1998)). "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when . . . it is unclear whether a crime had even taken place." *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007) (quotation omitted).

Using the correct constitutional analysis, the district court properly determined that "Defendant Kellogg…is not entitled to immunity because he omitted facts which would have negated probable cause for Mr. McAllister arrest – specifically, he omitted the effective date of amended MPO listing Mr. McAllister's stepdaughter as a protected party." Aplt. App. at 112; *see also* Aplt. App. at 113 ("As such, the Affidavit omits a crucial detail, namely the effective date of the amended MPO listing Mr. McAllister's stepdaughter as a protected party."); Aplt. App. at 114 ("As such, that the MPO in effect on the day of the alleged violation did not list Mr. McAllister's stepdaughter as a protected party, and, in fact, explicitly granted contact with his children, is an omitted fact which was "clearly critical" to a finding of probable cause that he violated the MPO as to his stepdaughter.")

The district court correctly noted that existence of an arrest warrant will not protect an officer who misrepresents or omits material facts to the magistrate judge. *Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10th Cir. 2014). Upon a

motion to dismiss, "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The district court rightly held that plaintiff had met his burden of making "a substantial showing of deliberate falsehood or reckless disregard for the truth" by showing that Defendant Kellogg omitted facts that were "clearly critical" to a finding of probable cause. *Bruning v. Pixler*, 949 F.2d 352, 357 (10th Cir. 1991). Aplt. App. at 112-114. The district court reasonably and appropriately inferred allegations of omissions of critical facts. Furthermore, the law prohibiting "the reckless disregard for the truth" by officers seeking a warrant was clearly established long before Defendant Kellogg engaged in this illegal conduct or Mr. McAllister was arrested on October 24, 2011. *Stonecipher*, 759 F.3d at 1142 (quoting *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994) ("In determining whether a plaintiff has established reckless disregard for the truth on behalf of an officer presenting facts to the magistrate judge, evidence must exist 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.")

Because the law prohibiting Defendant Kellogg's conduct as alleged in Mr. McAllister's Complaint was clearly established at the time of the conduct, the

district court properly concluded that Defendant Kellogg is not entitled to qualified immunity. That conclusion should be affirmed.

B. Defendant-Appellant Kellogg is Not Entitled to Qualified Immunity Because Mr. McAllister Has Asserted that His Arrest was not Supported by Probable Cause

Defendant Kellogg contention that he is entitled to qualified immunity, because there was 'arguable probable cause' to support the arrest warrant for McAllister, "even if Madison was not a protected party on October 14", is contrary to the allegations in Mr. McAllister's Complaint, which must be accepted as true at this stage in the litigation. Appellant's Br. 27-29. This Court has explained the standard for determining the existence of probable cause when there is an allegation that false information has been included in, or exculpatory information has been excluded from, an arrest affidavit:

> If an arrest warrant affidavit contains false statements, the existence of probable cause is determined by setting aside the false information and reviewing the remaining contents of the affidavit. Where information has been omitted from an affidavit, we determine the existence of probable cause by examining the affidavit as if the omitted information had been included and inquiring if the affidavit would still have given rise to probable cause for the warrant.

Taylor v. Meacham, 82 F.3d 1556, 1562 (10th Cir. 1996) (internal quotation marks and citation omitted).

In this case, Mr. McAllister has sufficiently pled his false arrest claim by alleging: (1) there was no probable cause to arrest him; (2) Defendants Kellogg,

flouted his duty to conduct adequate pre-arrest investigation; hence, any mistake that probable cause existed was objectively unreasonable; and (3) Defendant Kellogg actively assisted and participated in Mr. McAllister's unlawful arrest by obtaining the actual arrest warrant that led to Mr. McAllister's inevitable arrest. As the district court held, Plaintiff's complaint alleges sufficient facts to survive a motion to dismiss against Defendant Kellogg: See, e.g. Aplt. App at 10 ¶ 26 ("On October 16, 2011, Defendant Kellogg began investigating this matter and eventually prepared a warrant for Mr. McAllister's arrest, despite the fact that Mr. McAllister was never in violation of the protection order."); *id*. at ¶ 27 ("In his investigation, Defendant Kellogg explicitly relied upon Defendant Reifsteck's report, Defendant Cash's report, and a 'Letter to Detectives' that was, upon information and belief, prepared by Defendants Reifsteck and Cash to assist Defendant Kellogg's preparation of the warrant for Mr. McAllister's arrest."); *id*. at ¶ 41 ("Defendant Kellogg specifically noted in his police report that the protection order only precluded Mr. McAllister from making contact with the victim, Hilary McAllister.); *id*. at ¶ 42 ("Defendant Kellogg was in contact with authorities from Summit County and he had the ability to, and did actually obtain the actual protection order involving Mr. McAllister, as did all of the Defendants in this case."); *id*. at ¶ 43 ("The Defendants' reports all state that, in fact, Ms. McAllister advised her children to stay in Mr. McAllister's residence on October

14, 2011. No one alleges that Mr. McAllister knew his children were there or that he intended to make contact with them. In any event, nothing in the Protection Order precluded Mr. McAllister from being in contact with his children, including his step-daughter."); *id*. at ¶ 44 ("Mr. McAllister had no intention of violating the Protection Order by returning to his own residence on October 14, 2011. To Mr. McAllister's knowledge, Hilary McAllister did not have a key to 1055 Sherman, and, on information and belief, Hilary McAllister only obtained the key from the apartment building's management company by misrepresenting herself as a member of Mr. McAllister's family. Mr. McAllister had no knowledge that either Hilary McAllister or Madison Welch would have access to the 1055 Sherman apartment. Upon information and belief, October 14, 2014 was the first day that Madison Welch had ever been to the 1055 Sherman apartment.")

Defendant Kellogg would have this Court ignore the allegations that material information is removed from the affidavit and the information that is included is false. Instead, Defendant Kellogg asserts that probable cause still existed despite the omissions, based solely on Ms. McAllister's statements to the Defendant Officers, as Ms. McAllister was still "likely to be found" at the 1050 Sherman Street apartment. Defendant Kellogg chastises the district court for not acknowledging or examining the Colorado statutes or cases making leasehold interest martial property. Appellant's Br. at 30. The district court did not engage in

analyzing cases under C.R.S. §14-10-113(3) because the statute has no bearing on determining whether there was probable cause to arrest Mr. McAllister. In *People v. Johnson*, 906 P.2d 122, 125 (Colo. 1995), a case Defendant Kellogg cites, the Supreme Court states "in determining whether the crime of burglary has been committed, the focus is upon the possessory rights of the parties, and not their ownership rights. Consequently, Mr. Johnson's purported ownership interest in Ms. Johnson's lease does not equate with a possessory interest that shields him from charges of trespass and burglary." To the extent that Ms. McAllister may have had an "ownership" interest in 1050 Sherman Street, her "ownership" interest has no weight in determining whether Mr. McAllister allegedly violated the protective order by going to a place Ms. McAllister was "likely to be found".

Defendant Kellogg fundamentally misunderstands that in the context of a 12(b)(6) motion, the district court is required to determine whether a constitutional violation was pled *by accepting all allegations as true* and evaluating them in the light most favorable to the plaintiffs. *Kikumura v. Osagie*, 461 F.3d 1269, 1291 (10th Cir. 2006). By the time Defendant Kellogg applied for the warrant, he knew that the apartment at 1050 Sherman Street was in fact, Mr. McAllister's apartment. Aplt. App at 47-49 ("On October 23, 2011, Officer Kellogg interviewed Ms. McAllister, and she told him that she let her children stay over at "Sean's apt" while she was at school, because his apartment had cable and living room furniture

and she had removed these items from her own apartment because her lease was about to expire.") Moreover, Defendant Kellogg knew that Ms. McAllister stated that "she was would not have left her son there" had she known Mr. McAllister was returning from jail. Aplt. App at 44-45. The district court logically concluded that "It was not reasonable for Officer Kellogg, then, to conclude that that the apartment was a place Ms. McAllister was "likely to be found," and no probable cause existed for violating the MPO with respect to Ms. McAllister." Aplt. App at 114.

The existence of probable cause and credibility are issues for the jury in a civil rights case. Defendant Kellogg is attempting to improperly take this question away from the fact-finder. In civil suits, because the existence of probable cause depends upon the reasonableness of an officer's conduct under particular circumstances, claims challenging the bases for arrests usually present factual questions that must be resolved by a jury. *See DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) (abrogated in part on other grounds by *Hartman v. Moore*, 547 U.S. 250 (2006)); *Reichle v. Howards*, 132 S. Ct. 2008 (2012) ("We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause to arrest."). Additionally, the reliability of Ms. McAllister's statements, who was in the middle of a contentious divorce with her husband, calls for a credibility determination, exclusively reserved for a jury. *Lamon v. Shawnee*,

972 F.2d 1145, 1159 (10th Cir. 1992). ("It is the jury's exclusive province to assess the credibility of witnesses and determine the weight to be given to their testimony.").

CONCLUSION

For the foregoing reasons, the district court properly concluded that (1) Mr. McAllister successfully stated a false arrest claim against Defendant Kellogg; and (2) Defendant Kellogg is not entitled to qualified immunity. The district court's decision should therefore be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Mr. McAllister is not requesting oral argument.

DATED this 8th day of October, 2015.

Respectfully submitted,

s/ David Lane

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David Lane
Amy Kapoor
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
dlane@kln-law.com
akapoor@kln.law.com

Counsel for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A) and 32(a)(7)(B) because this brief is less than 30 pages and contains 5,296 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

Dated: October 8, 2015.

Respectfully submitted,

s/ David Lane

_____

David Lane
Amy Kapoor
KILLMER, LANE & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, CO 80202
(303) 571-1000
dlane@kln-law.com
akapoor@kln.law.com

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2015, I electronically filed the foregoing **RESPONSE BRIEF OF PLAINTIFF-APPELLEE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

BARRY A. SCHWARTZ
Assistant City Attorney
Denver City Attorney's Office
Litigation Section
201 West Colfax Ave., Dept. 1108
Denver, CO 80202-5332
(720) 913-3112
barry.schwartz@denvergov.org

Counsel for Defendant-Appellant

KILLMER, LANE & NEWMAN, LLP

s/ Jamie Akard

Jamie Akard

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee, Version 4.8.0.1500 updated on October 8, 2015 and according to the program are free of viruses.

Date: October 8, 2015.

KILLMER, LANE & NEWMAN, LLP

s/ Jamie Akard

_____

Jamie Akard

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN McALLISTER,	)	
	)	
Plaintiff – Appellee,	)	
	)	
v.	)	No. 15-1175
	)	
MICHAEL KELLOGG,	)	
	)	
Defendant – Appellant.	)	

ERRATA SHEET TO APPELLE'S / PLAINTIFF'S RESPONSE TO APELLANT'S / DEFENDANTS' OPENING BRIEF

Appellee, Sean McAllister, by and though his attorneys, David Lane and Amy Kapoor, hereby file this Errata to the Response Brief on Appeal in order to request oral argument in this case.

STATEMENT REGARDING ORAL ARGUMENT

Given the important procedural / substantive legal issues related to Fed. R. Civ. P. 12(b) (6) motions and qualified immunity this case presents, Mr. McAllister believes oral argument would assist the Court in resolving this appeal.

Respectfully submitted this 9th day of October 2015.

KILLMER, LANE & NEWMAN, LLP

s/ David A. Lane

David A. Lane
Amy Kapoor
1543 Champa Street, Suite 400
Denver, Colorado 80202
(303) 571-1000
(303) 571-1001 (FAX)
dlane@kln-law.com
akapoor@kln-law.com

Counsel for Appellee-Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I electronically filed the foregoing **ERRATA SHEET TO APPELLE'S / PLAINTIFF'S RESPONSE TO APELLANT'S / DEFENDANTS' OPENING BRIEF** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

BARRY A. SCHWARTZ
Assistant City Attorney
Denver City Attorney's Office
Litigation Section
201 West Colfax Ave., Dept. 1108
Denver, CO 80202-5332
(720) 913-3112
barry.schwartz@denvergov.org

Counsel for Defendant-Appellant

KILLMER, LANE & NEWMAN, LLP

s/ Jamie Akard

Jamie Akard

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee, Version 4.8.0.1500 updated on October 9, 2015 and according to the program are free of viruses.

Date: October 9, 2015.

KILLMER, LANE & NEWMAN, LLP

s/ Jamie Akard

Jamie Akard