CASE NO. 15-1175

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN MCALLISTER,

Plaintiff-Appellee,

v.

DETECTIVE MICHAEL KELLOGG,
in his individual capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
The Honorable Christine M. Arguello
District Court Case No. 13-cv-02896-CMA-MJW

REPLY BRIEF

Respectfully submitted,

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I. INTRODUCTION

In his Response Brief, McAllister argues that the district court properly denied Officer Kellogg's motion to dismiss because: 1) the law was clearly established that "the omission of material information from an arrest affidavit violate[s] the Fourth Amendment," and 2) Kellogg violated that clearly established law by intentionally and/or recklessly omitting from his Arrest Warrant Affidavit ("Affidavit") the date of the MPO he examined on October 23 and by failing to investigate further before seeking an arrest warrant. As detailed below, however, a review of the Second Amended Complaint and Kellogg's Affidavit demonstrates that McAllister failed to plead facts sufficient to plausibly suggest that Kellogg violated his constitutional rights by causing him to be arrested without probable cause. Instead of identifying specific facts sufficient to plausibly establish that Kellogg violated his constitutional rights, all McAllister offers are conclusory allegations that Kellogg acted intentionally and recklessly. McAllister has also failed to show that the law was clearly established such that Kellogg was on notice that his conduct in executing the Affidavit violated the Fourth Amendment.

Even if Kellogg's Affidavit had been "hypothetically corrected" to include the fact that the MPO Kellogg reviewed prior to executing that affidavit was dated October 18, arguable probable cause still would have existed for the issuance of

the warrant because adding that date only demonstrates that Madisonn was a protected person on that date. Including that date in the Affidavit does not indicate whether Madisonn was a protected person on October 14. Further, the record here establishes that both Ms. McAllister and social worker Wendy Van Antwerp insisted that Madisonn *was* a protected person on that date and that Kellogg relied upon their representations when executing the Affidavit. Accordingly, the district court erred in determining that Kellogg was constitutionally required to include the October 18 date in his Affidavit.

In addition, the allegations in McAllister's Second Amended Complaint are insufficient to plausibly show that probable cause was lacking to believe that Ms. McAllister was not "likely to be found" at the 1055 Sherman Apartment. Neither McAllister nor the district court point to any specific facts alleged in the Second Amended Complaint demonstrating that no reasonable officer could have concluded that Ms. McAllister was not likely to be found there. To the contrary, the facts upon which Kellogg relief demonstrate that a reasonable officer could have concluded that Ms. McAllister was likely to be found at that apartment, especially since she and McAllister were still married she used a key to gain access. In the absence of facts sufficient to plausibly suggest that the arrest that

Kellogg lacked probable cause to seek an arrest warrant for McAllister, Kellogg is entitled to qualified immunity.

McAllister has also failed to point to any law establishing that a reasonable officer would have been on notice that probable cause was vitiated by virtue of his failure to include in his Affidavit the date of the MPO he reviewed, or because he assumed that Ms. McAllister had lawful access to the apartment because she and McAllister were still married and she had gained access to the apartment without any sign of forced entry.

II. ARGUMENT

A. McAllister Failed to Plausibly Establish that Officer Kellogg Violated his Fourth Amendment Rights, so the District Court Erred in Denying Kellogg's Claim of Qualified Immunity.

1. McAllister did not plead a Fourth Amendment claim against Kellogg that is plausible on its face.

To stave off the dismissal of his claims, McAllister alleged in his Second Amended Complaint that Officer Kellogg actually reviewed a copy of the October 14 MPO (which **did not** list Madisonn as a protected person) before submitting his Affidavit and that he acted "intentionally" and "recklessly" by failing to note in his Affidavit that the MPO Ms. McAllister showed him on October 23 (which MPO **did** list Madisonn as a protected person) was dated October 18. *See* Aplt. App. at

15 ¶ 42, 19 ¶ 63. Faced with the question whether such conclusory allegations are sufficient to state a "plausible" civil rights claim under the standards enunciated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), McAllister argues that the district court properly found that his allegations were sufficient. *See* Response Brief at 7, 15-18. The record, however, belies the district court's finding because neither the Second Amended Complaint nor any of the documentary portions of the record in this case plausibly suggest that Kellogg actually reviewed – or even obtained – the October 14 MPO before executing his Affidavit. Nor does McAllister's mere inclusion of conclusory allegations of intentional or reckless conduct by Kellogg in an effort to bolster his Fourth Amendment claim demonstrate a plausible violation of his rights and fails to satisfy the standards enunciated in *Twombly* and *Iqbal*.

McAllister bears the burden of pleading "a claim to relief that is plausible on its face." *Bell Atl. Corp.* 550 U.S. at 570; *Iqbal*, 556 U.S. at 678; *accord Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). To that end, he must "plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 667; *see Kan. Penn Gaming*, 656 F.3d at 1214 (requiring plaintiff to "offer specific factual allegations to support [their] claim."). "Mere 'labels and

conclusions,' and 'a formulaic recitation of the elements of a cause of action' will not suffice," for claims pleaded in that manner fail to "raise the right to relief above the speculative level." *Id*. In *Twombly*, plaintiffs asserting a putative class action against local telephone exchange carriers for restraint of trade alleged improper parallel conduct between those carriers. 550 U.S. at 544. While acknowledging that the plaintiffs pleaded the facts with adequate particularity, *id*. at 569, the Supreme Court nevertheless held that their claims did not plausibly suggest a conspiracy to restrain trade because the defendants' conduct as alleged in the Complaint was as likely to have been the result of legal, unilateral action as the product of illicit collusion. *Id*. at 566; see *Kan. Penn Gaming*, 656 F.3d at 1214. Similarly, in *Iqbal*, the plaintiff – who had been arrested on terrorism charges in 2002 – sued FBI officials for violating his civil rights. 556 U.S. at 666. To support the claims he asserted under *Monell v. Dept. of Soc. Svcs. of City of New York*, 436 U.S. 658 (1978), Iqbal alleged that the FBI's conduct in detaining a disproportionate number of Arab Muslim men like him as part of its investigation of the events of September 11, 2001, was 'consistent with' invidious discrimination. *Iqbal*, 556 U.S. at 681. As it had in *Twombly*, the Supreme Court found that Iqbal's allegations failed to state a claim because, as this Court would later characterize the *Twombly* / *Iqbal* rule in *Kan. Penn Gaming*, those allegations

did not "'plausibly establish' a wrongful purpose, as the disparate impact could equally be explained by a legitimate policy of seeking out individuals with a connection to the known perpetrators, who belonged to an Islamic fundamentalist group." *Kan. Penn Gaming*, 656 F.3d at 1214. In other words, it held that where the conduct alleged in the complaint could as easily be seen as innocent as improper, those allegations are deficient.

As in *Twombly*, *Iqbal* and this Court's more recent decision in *Kan. Penn Gaming*, it is equally plausible here that Kellogg's failure to note in his Affidavit the date of the MPO he examined before submitting his Affidavit was the result of negligence as it was the result of recklessness or intentional misconduct. Even viewing the allegations in McAllister's Second Amended Complaint in the light most favorable to him as this Court must, *e.g.*, *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013), the record here does not support a "reasonable inference" that Kellogg reviewed the October 14 MPO prior to seeking an arrest warrant. *Accord Iqbal*, 556 U.S. at 678; *Kan. Penn Gaming*, 656 F.3d at 1214. The district court therefore erred in applying such an inference.

McAllister's mischaracterization of the record by claiming that Kellogg reviewed the October 14 MPO prior to seeking the arrest warrant, and then his conclusory allegation that Kellogg acted "intentionally" and "recklessly" by failing

to note in his Affidavit that the MPO he saw prior to completing that affidavit (*i.e.*, the MPO listing Madisonn as a protected person) was dated October 18 (*see id.* at 19 ¶ 63), do not "nudge[]" his claim from conceivable to plausible. *See Twombly*, 550 U.S. at 555.

This Court should reject McAllister's allegation that Kellogg saw the October 14 MPO before executing his Affidavit because "'factual allegations that contradict ... a properly considered document are not well-pleaded facts that the court must accept as true.'" *Kennedy v. Peele*, 552 Fed. App'x. 787, 792 (10th Cir. 2014)) (quoting *GFF Corp. v. Associated Wholesale Grocers*, 130 F.3d 1381, 1385 (10th Cir. 1997)). Far from plausibly establishing that Kellogg actually reviewed the October 14 MPO prior to seeking the arrest warrant, the documentary materials in the record here suggest that Kellogg's understanding of the terms of the October 14 MPO came solely from Officers Reifsteck and Cash's investigative notes (including the statements by Mses. McAllister and Van Antwerp, insisting that Madisonn was indeed a protected person as of October 14), the Mobile Data Terminal readout describing the terms of the October 14 MPO, and the information Kellogg gleaned from his own October 23 interview with Ms. McAllister. *See* Aplt. App. at 15 ¶ 39, 46 (Second Amended Complaint); Aplt. App. at 42-43 (Affidavit). That information was more than sufficient, as it is well-established in

this Circuit that the Fourth Amendment only "requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all." *Romero v. Fay*, 45 F.3d 1472, 1476-77 (10th Cir. 1995). A statement from another officer or a witness who shows no apparent signs of untrustworthiness is itself sufficient to establish probable cause, *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1256 (10th Cir. 1998), and once such probable cause is established, officers have no constitutional duty to investigate further for exculpatory evidence. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1321 (10th Cir. 2002) (Hartz, J., concurring); *accord Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006). Accordingly, McAllister did not satisfy his obligation to plausibly allege specific facts sufficient for the district court to conclude that Kellogg had indeed seen the October 14 MPO at the time he sought an arrest warrant for McAllister later that month.

Nor has McAllister plausibly alleged specific facts to support his conclusion that Kellogg acted intentionally or recklessly (or, indeed, that Kellogg's conduct was anything more than merely negligent) in failing to note in his Affidavit that the MPO Ms. McAllister showed him on October 23 was dated October 18 and not than October 14. *Franks v. Delaware*, 438 U.S. 154, 171 (1978) (negligent conduct does not constitute a constitutional violation); *Bruner v. Baker*, 506 F.3d

1021, 1026 (10th Cir. 2007) (same). In the specific context of pleading a Fourth Amendment claim based on an allegedly-improper arrest warrant, it is well-settled in this Circuit that "[a]ffiants seeking arrest warrants violate the Fourth Amendment when they . . . knowingly or recklessly omit from [their Affidavits] information which, if included, would vitiate probable cause." *Puller v. Baca*, 781 F.3d 1190, 1197 (10th Cir. 2015); *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996). Recklessness in this context "may be inferred from [the] omission of facts which are 'clearly critical' to a finding of probable cause." *DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir. 1990), *cert. denied*, 502 U.S. 814 (1991). Negligence or innocent mistake do not, however, constitute a Fourth Amendment violation, and *Twombly*, *Iqbal* and this Court's decisions in cases like *Kan. Penn Gaming* make clear that a plaintiff claiming intentional or reckless conduct must allege specific facts sufficient to "nudge[] those claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570; *see Kan. Penn Gaming*, 656 F.3d at 1215. Mere conclusions will not suffice. *Id*.

Neither the Second Amended Complaint nor the Arrest Warrant Affidavit plausibly suggest conduct by Kellogg that arguably rises to the level of a Fourth Amendment violation. At best, Kellogg's conduct could be characterized as negligent. Because the Second Amended Complaint fails to sufficiently set forth

facts plausibly demonstrating a violation of McAllister's Fourth Amendment rights, the district court erred in rejecting Kellogg's claim of qualified immunity.

2. Even when the Affidavit is 'Hypothetically Corrected' to Add the Omitted Date, Arguable Probable Cause Still Exists to Seek an Arrest Warrant for McAllister.

In the context of an unlawful search or arrest claim, the way this Court performs its qualified immunity analysis is "'by asking whether there was 'arguable probable cause'' for the challenged conduct." *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) (quoting *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012)). "Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Id*. (citing *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007)). Therefore, a defendant is "entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff." *Cortez*, 478 F.3d at 1120.

In determining whether arguable probable cause exists in cases involving the omission of information from an arrest warrant application, courts examine the application along with the omitted information and then inquire whether, together, they establish probable cause. *Puller*, 781 F.3d at 1197; *Wolford*, 78 F.3d at 489. In making that determination, "[a]ll that matters is whether [the officer] possessed

knowledge of evidence that would provide probable cause to arrest [the person] on *some* ground." *Apodaca v. City of Albuquerque*, 443 F.3d 1286, 1289 (10th Cir. 2006) (emphasis in original) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)); *accord Quinn v. Young*, 780 F.3d 998, 1006 (10th Cir. 2015). If hypothetically correcting the omission in that manner "would not alter the determination of probable cause, the misconduct was not of constitutional significance and is not actionable under § 1983." *Grubbs*, 445 F.3d at 1278; *see Taylor v. Meacham*, 82 F.3d 1556, 1562-63 (10th Cir. 1996).

Here, even when Kellogg's Affidavit is "hypothetically corrected" by including the date of the version of the MPO Kellogg reviewed on October 23 and that listed Madisonn as a protected person (*i.e.*, October 18), that hypothetical affidavit still supports the existence of arguable probable cause to arrest McAllister for violating the October 14 MPO, for even if Kellogg *had* noted that the date of the MPO he examined prior to seeking the warrant was October 18, that fact would not have been dispositive of whether Madisonn was a protected person on October 14. Nor would the inclusion of that date have undermined Mses. McAllister and Van Antwerp's unequivocal prior assurances that Madisonn was indeed a protected person as of October 14, for McAllister has not alleged that Kellogg had any reason to believe that either of those women was unreliable. *See, e.g.*, *Baptiste*,

147 F.3d at 1256 (statement from a witness who shows no apparent signs of untrustworthiness creates probable cause); *Walker v. Oklahoma City*, No. 98-6457, slip. op. at *5 (2000 WL 135166) (10th Cir. Feb. 7, 2000) ("law enforcement officers are entitled to rely on information supplied by the victim of a crime, absent some indication that the information is not reasonably trustworthy or reliable."). Therefore, Mses. McAllister and Van Antwerp's statements that Madisonn was indeed a protected person on October 14, standing alone, provided objectively reasonable (even if mistaken) grounds for an objectively reasonable officer to conclude that probable cause existed to arrest McAllister for violating the MPO.

The district court erred in finding that arguable probable cause for the arrest warrant was lacking and in rejecting Officer Kellogg's claim of qualified immunity.

3. Arguable probable cause also existed for a reasonable officer to conclude that Ms. McAllister was "likely to be found" at the 1055 Sherman Apartment.

McAllister also contends that the allegations in his Second Amended Complaint, when accepted as true, are sufficient to plausibly establish that probable cause was lacking because it was not reasonable for an officer such as Kellogg to have concluded that Ms. McAllister was likely to be found at the 1055 Sherman Apartment, given that she and McAllister were estranged. A review of

the record demonstrates that McAllister is incorrect and that the district court erred in denying Kellogg's motion to dismiss on this ground.

For the purpose of determining whether McAllister met his burden of establishing that probable cause was lacking in the Affidavit, the issue is not whether the 1055 Sherman Apartment was in fact McAllister's sole or primary property; indeed, Kellogg concedes for purposes of his motion to dismiss that it was. Nor is the relevant issue whether Ms. McAllister could have been arrested for trespassing under *People v. Johnson*, 906 P.2d 122 (Colo. 1995), if indeed she did lie to the building manager at 1055 Sherman on October 14 to gain access to the apartment there. Rather, the relevant issue is whether, when Kellogg applied for the arrest warrant on October 24, arguable probable cause existed for an objectively reasonable police officer to believe that Ms. McAllister – to whom McAllister was, after all, still married – was likely to be found at that apartment. *See, e.g.*, *Stonecipher*, 759 F.3d at 1141 ("A defendant 'is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff.'") (quoting *Cortez*, 478 F.3d at 1120).

C.R.S. § 14-10-113(3) provides in pertinent part (and with certain express exceptions that are inapplicable here) that:

> all property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property….

In *Johnson*, the defendant was charged with trespass after going to his estranged wife's apartment, starting a fight with her friend and later kicking the door in. 906 P.2d at 123. Having been charged with burglary and criminal trespass, he argued that he could not be convicted of those crimes because he and his estranged wife were still married at the time and § 14-10-113(3) therefore provided him a joint leasehold interest in the apartment that barred him from being convicted of trespassing there or burglary. *Id*. at 124. Even assuming for purposes of that case that the leasehold for the apartment *was* marital property under § 14-10-113(3), *id*., the Colorado Supreme Court rejected Johnson's argument, holding instead that a "trespass is an invasion of one's interest in habitation or possession of a building, rather than an invasion of one's ownership interest in a building" and that the focus of the burglary statute is "the possessory rights of the parties, and not their ownership rights." *Id*. at 125.

Although the Colorado Supreme Court concluded that Johnson's joint ownership interest in the leasehold did not bar his prosecution for kicking in

the door and making a forced entry, that is a far cry from holding, as McAllister claims in his Response Brief, that *Johnson* stands for the proposition that it would be objectively unreasonable for a police officer to believe that an apartment that at least one of the spouses described as "shared" (Aplt. App. at 44) was not a place his estranged spouse was 'likely to be found.'

Although Kellogg did not claim in his Affidavit that probable cause existed because the 1055 Sherman Apartment was a place Mr. McAllister "likely to be found," the record here demonstrates that arguable probable cause did exist to arrest him on that ground. Because such arguable cause existed, McAllister did not satisfy his burden of demonstrating an absence of probable cause sufficient to overcome Kellogg's qualified immunity claim.

4. Nor are McAllister's allegations that he was the sole lessee of the 1055 Sherman Apartment dispositive.

McAllister also argues that there was no arguable probable cause to believe that Ms. McAllister was "likely to be found" at the 1055 Sherman Apartment because he was the sole lessee and occupant of that apartment. His argument does not carry the day because even if he *was* the sole lessee / occupant of that apartment and he had not authorized Ms. McAllister to enter it, arguable probable cause nevertheless existed because, even according to his Second Amended

Complaint, Ms. McAllister was there on October 14 under a claim of right because she was inside of that apartment with no sign of forced entry when Officers Reifsteck and Cash arrived to investigate.

As detailed above, "[a]rguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists." *Stonecipher*, 759 F.3d at 1141. And a police officer's decision – like Kellogg's decision here – to seek an arrest warrant in the face of such conflicting information indicates, at most, that the officer was negligent rather than recklessness. *Id*. at 1144-45.

Here, Reifsteck and Cash's investigations (and their notes to Kellogg) indicated not only that the 1055 Sherman Apartment was "Sean's apartment," but also that it was a "shared" apartment and that McAllister "had started staying at" the other apartment (*i.e.*, the 1250 Sherman Apartment) "when their relationship started going bad." *See* Aplt. App. at 44, 47 (Reifsteck investigative note), 46 (Cash investigative note). Given the conflicting information Kellogg had received from his fellow officers and Ms. McAllister about which of the McAllisters used which apartment, and the fact that when Reifsteck and Cash arrived Ms. McAllister and the children were inside with no sign of forced entry (because the building manager let them in, *see* Aplt. App. at 16 ¶44), it cannot fairly be said that

there was no arguable probable cause to believe that Ms. McAllister was likely to be found at the 1055 Sherman Apartment. That being so, the district court erred in denying Kellogg's Motion to Dismiss.

B. The District Court Erred in Rejecting Officer Kellogg's Argument that McAllister Did Not Plausibly Allege a Violation of Clearly Established Law.

1. McAllister has not met his burden of demonstrating that it was clearly established that the omission of less-than-material information from an Affidavit violates the Fourth Amendment.

Attempting to satisfy his burden of identifying the clearly established rule of law that Kellogg allegedly violated, McAllister identifies it as the rule, announced in *Salmon v. Schwarz*, 948 F.2d 1131, 1139 (10th Cir. 1991), that "the omission of material information from an arrest affidavit violate[s] the Fourth Amendment." Response Brief at 10.[1] That rule does not govern here because it only governs "the omission of ***material*** information from an arrest affidavit," and, as detailed above, the information Kellogg omitted was not material because arguable probable cause existed without it.

[1] In discussing this issue, McAllister asserts that the district court held that "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." Response Brief at 8. A review of the district court's Order here indicates that that court did not expressly determine precisely what clearly established law Kellogg allegedly violated.

In determining whether a plaintiff has satisfied his burden of overcoming a qualified immunity challenge, "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see Stewart v. Beach*, 701 F.3d 1322, 1329 (10th Cir. 2012). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Thomas v. Durastanti*, 607 F.3d 655, 663, 669 (10th Cir. 2010) (internal quotation marks omitted). "The plaintiff bears the burden of citing to [this Court] what he thinks constitutes clearly established law." *Albright v. Rodriguez*, 51 F.3d 1531, 1534–35 (10th Cir. 1995).

Kellogg concedes that if the record here had indicated that the information he omitted from his Affidavit (*i.e.*, the date of the MPO Kellogg examined on October 23 before seeking the arrest warrant) was material, then *Salmon* would qualify as the "clearly established law" that governs McAllister's claim against Kellogg. But as demonstrated above, the omitted information was *not* material because arguable probable cause to arrest McAllister existed even without it.

Although the district court did not expressly determine what clearly established rule of law Kellogg violated here, it nevertheless erred in failing to rule

that Kellogg is entitled to qualified immunity due to McAllister's failure to satisfy his burden by demonstrating a violation of clearly established law.

2. Even if McAllister's assessment of *People v. Johnson* as supporting his position in this case is correct, that fact is of no moment because *Johnson* does not qualify as "clearly established" law for qualified immunity purposes.

And even if *Johnson* could be read to have created a rule under which it would be unlikely to find someone at her estranged spouse's separate apartment under circumstances like those here, that rule was not "clearly established" for purposes of this case because it was not announced by the United States Supreme Court or this Court. *Cf. Lundstrom v. Romero*, 616 F.3d 1108, 1119 (10th Cir. 2010) ("In determining whether a right was clearly established, we look for Supreme Court or Tenth Circuit precedent on point or clearly established weight of authority from other courts finding the law to be as the plaintiff maintains."); *Medina v. City of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) (same).

Because *Johnson* was announced by the Colorado Supreme Court rather than this Court or the United States Supreme Court, it does not qualify as "clearly established law" for purposes of the second prong of the qualified immunity analysis. And because McAllister fails to satisfy his burden vis-à-vis that prong, Kellogg is entitled to qualified immunity and the district court erred in holding otherwise.

III. CONCLUSION

For the reasons detailed above, the District Court erred in denying Officer Kellogg's Motion to Dismiss on qualified immunity grounds. Officer Kellogg therefore asks this Court to reverse the district court's May 14, 2015 Order and dismiss McAllister's claims against him, with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,430 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Office Word in 14-point, Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the forgoing **Reply Brief**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the McAfee VirusScan Enterprise, Version 4.8.0.1938, updated October 26, 2015 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

s/ Barry A. Schwartz
Attorney for Appellant

CERTIFICATE THAT ELECTRONIC COPY AND REQUIRED HARD COPIES OF APPELLANT'S OPENING BRIEF ARE IDENTICAL

I hereby certify that that the seven hard copies of Michael Kellogg's Reply Brief, which are required to be submitted to the Clerk's Office within two days of electronic filing pursuant to 10th Cir. R. 31.5, are exact copies of Michael Kellogg's Reply Brief which was filed with the with the Clerk of the Court using the electronic filing system on October 26, 2015.

s/ Barry A. Schwartz
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day October 2015, the foregoing **REPLY BRIEF** was filed with the Clerk of the Court via the CM/ECF system which will send a notification of such filing to the following:

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