Case No. 08-1002

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MERCEDES ARCHULETA,

Plaintiff-Appellee,

vs.

MICHELE WAGNER,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
The Honorable Lewis T. Babcock, District Judge
D.C. Civil Action No. 06-CV-2061-LTB-MJW

BRIEF OF APPELLEE MERCEDES ARCHULETA

Oral Argument Is Not Requested.

April 2, 2008

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Prior or Related Appeals

In Compliance with 10th Cir. R. 28.2(C)(1), Appellee states that there is one related appeal. Another defendant in the case below, D.L. Mandelko, has taken an interlocutory appeal from the District Court's denial of her motion to dismiss. This appeal, No. 07-1108, was argued on March 17, 2008 and is pending before the Court.

I. JURISDICTIONAL STATEMENT

The Court's jurisdiction over this interlocutory qualified immunity appeal is limited to reviewing "abstract issues of law" and does not permit a review of "the sufficiency of the evidence or the correctness of the district court's findings with respect to genuine issues of material fact." *Shrum v. City of Coweta*, 449 F.3d 1132, 1137 (10th Cir. 2006); *see also, e.g.*, *Johnson v. Jones*, 515 U.S. 304, 313 (1995) (holding that an order denying summary judgment on qualified immunity grounds that determines the question of "evidence sufficiency" is not appealable). Rather, the Court must "'take, as given, the facts that the district court assumed when it denied summary judgment' to the Defendant." *Shrum*, 449 F.3d at 1137 (quoting *Johnson*, 515 U.S. at 319). Here, because Defendant Wagner's brief primarily challenges the sufficiency of the evidence and takes issue with disputed facts, this Court should summarily affirm the District Court's denial of qualified immunity and decline Defendant Wagner's invitation to reweigh the facts and evidence on this interlocutory appeal.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the District Court properly deny Defendant's motion for summary judgment where the facts and reasonable inferences therefrom would allow a jury to conclude that Defendant recklessly or intentionally included material false

statements and omissions in her arrest warrant affidavit to arrest Plaintiff for a crime in which she had no involvement?

III. STATEMENT OF THE CASE

In April 2005, Defendant Wagner, a detective with the Lakewood Police Department, swore out a materially false and misleading warrant for the arrest of Plaintiff Mercedes Archuleta, an indisputably innocent person, for violating the Lakewood municipal ordinance against harassment. All parties agree that Plaintiff had absolutely nothing to do with the underlying crime, and, Lakewood acknowledged its officer's mistake by dismissing the charges against Mrs. Archuleta the day after her arrest and thereafter obtaining a Finding of Factual Innocence.

The arrest of Plaintiff occurred in June 2005 while she was riding with her husband and children on the way to drop off her son at his job at Elitch Gardens. After the car was pulled over for a routine traffic stop, Mrs. Archuleta was pulled from her vehicle, handcuffed, arrested, and taken to the Jefferson County jail until she could post bond many hours later. Mrs. Archuleta filed her Complaint in October 2006. The Complaint asserts a claim against Defendant Wagner for violating Plaintiff's Fourth Amendment rights by knowingly or recklessly including material false statements in and omitting material statements from her arrest warrant affidavit. Defendant Wagner filed a motion for summary judgment

on grounds of qualified immunity in October 2007. In an Order dated November 28, 2007, the District Court denied Wagner's motion. Defendant Wagner sought this interlocutory appeal from the denial of her motion for summary judgment.

IV. STATEMENT OF THE FACTS

For purposes of this appeal, all facts and reasonable inferences therefrom must be construed in the light most favorable to Mrs. Archuleta, the non-moving party. *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 1231 (10th Cir. 2007). Defendant's brief violates this principle. Instead, she construes facts in the light most favorable to her and makes unsupported assertions that ignore or contradict many of the critical facts. Consequently, Mrs. Archuleta offers this short statement of the pertinent facts.

A. The Underlying Incident

On April 18, 2005, Lakewood Police Officers Clifford and Bell responded to an altercation between two women at a Walgreens store on Colfax Avenue in Lakewood. Aplt. App. at 75-76. When the officers arrived at the scene, the alleged victim, Alexandria Silvas, informed them that she had been involved in a dispute with her girlfriend. *Id.* Ms. Silvas told Officer Clifford that she began arguing with her girlfriend at a bus stop on Colfax Avenue, and that when Ms. Silvas went to a nearby Walgreens store to call the police, her girlfriend took the phone away from her and pulled the cord from its base. *Id.* at 75-76, 78. Officer

Bell spoke to an employee of the Walgreens store who confirmed that she saw another woman pull Ms. Silvas' hair and take the telephone away from her. *Id*. Ms. Silvas informed Officer Clifford that she had not been hurt, and he observed no injuries. *Id.* at 76, 95.

Ms. Silvas also told Officer Clifford that she had been involved in an intimate relationship with her girlfriend for three months. *Id.* at 76. Yet Ms. Silvas was unwilling or unable to provide her girlfriend's date of birth, home or work address, phone number, physical description or identifying marks, or any location where her girlfriend could be found. *Id.* In fact, Ms. Silvas was unable to provide more than the alleged name of her girlfriend (which she said was "Mercedes Archuleta"), her girlfriend's age (which said was 42-43 years old), and the fact that her girlfriend had warrants out for her arrest. *Id*. Ms. Silvas provided the officers at the scene with what turned out to be a wrong phone number where she could not be reached. *See id.* at 79.

After interviewing Ms. Silvas, Officer Clifford used his patrol car computer to search drivers' license records for people named "Mercedes Archuleta." *Id.* at 81; Aplee. Supp. App. at 6. The driver's license search returned Plaintiff's name as a possible match. *See* Aplt. App. at 81; Aplee. Supp. App. at 6. Officer Clifford discovered that Mrs. Archuleta was 45 years old (not 42 or 43), and, more importantly, that there were no warrants for her arrest. Aplt. App. at 75-76.

Clifford also discovered that Mrs. Archuleta lived in Thornton – not Lakewood, where the alleged crime took place – nearly twenty miles away. *Id.* at 75; Aplee. Supp. App. at 5. Contrary to the assertions in Defendant's brief, Mrs. Archuleta was a "local resident" only in the sense that she lived in the greater Denver metropolitan area. *See* Appellant's Opening Br. at 3, 14 ("Aplt. Br.").

Officer Clifford memorialized his information in a written report, carefully stating that the only information he obtained from the alleged victim was the name, approximate age, and warrant status of the suspect, and also stating that the address information for Mrs. Archuleta in his report came from DMV records, not the complaining witness. Aplt. App. at 75-76. Agent Bell also created a report summarizing the incident, although it does not report any information for the suspect. *Id.* at 78. Neither officer reported receiving any physical description of the suspect. *Id.* at 75-78.

B. Wagner's Deficient Investigation

Shortly after Officers Clifford and Bell created their reports, the case was assigned to Defendant Wagner, a detective with the Lakewood Police Department, for investigation. Defendant Wagner conducted essentially no investigation, other than adding inaccurate information to an arrest warrant affidavit she prepared about an hour after receiving the file. Defendant Wagner began working on the

case sometime on the morning of April 20, 2005.[1] The only act described in her investigation report was a telephone call at 9:41 a.m. *Id.* at 79. In her report dated just an hour later, at 10:55 a.m., Wagner stated that she had already "requested a warrant for the arrest of Mercedes Archuleta on the charge of DV-Harassment, through the Lakewood Municipal Courts." *Id*. Thus, taking reasonable inferences from the facts, Defendant Wagner's entire "investigation" lasted about an hour.

In the hour she had the file, Defendant Wagner's investigative efforts consisted of (1) making one phone call that confirmed the complaining witness had given false information to the officers at the scene;[2] (2) retrieving Mrs. Archuleta's DMV records; and (3) retrieving the criminal history and criminal record for a third person, Phyllis Rivera, and including that criminal history in her affidavit as if the crimes had been committed by Mrs. Archuleta. Aplt. App. at 151, 153-155; Aplee. Supp. App. at 13-21, 34-43.

It appears that Phyllis Rivera had used the name "Mercedes Archuleta" as an alias at some point in time (along with several other names), and that Wagner

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[1] Although Wagner testified that she had "most likely" received the case on April 19, she had no recollection of what investigative steps she might have taken on the evening of the 19th, and there is substantial evidence that she received the case on April 20. *See* Aplt. App. at 150; *id.* at 165-70 (this version of the Incident/Investigation Report contains date stamps on the lower left-hand part of the pages that indicate "4/20/2005 10:55"); Aplee. Supp. App. at 12; Aplt. App. at 78 (Agent Bell's report was not filed until April 19 at 8:17 p.m.); *Id.* at 148-149.

[2] Ms. Silvas apparently gave the officers at the scene a phone number for her former foster mother who had not seen Ms. Silvas in six months and was looking for her herself. *Id.* at 79.

stumbled upon Rivera's records when searching a criminal database. Aplee. Supp. App. at 18-27, 34-43. Defendant Wagner retrieved and printed Rivera's criminal history and criminal record. *Id.* Yet Defendant Wagner claims not to have noticed that she was working with records relating to a third party, in spite of the fact that the Rivera records bore a different name, a different physical description, a different address, a different birth date and a different social security number than the one listed in Defendant Wagner's affidavit. Aplee. Supp. App. at 26-31, 34-43. Defendant Wagner never attempted to compare the identifying information in the criminal history and criminal record with the information in her warrant application, giving rise to a reasonable inference that she did not even read the criminal history before attributing the crimes to Mrs. Archuleta and including the list of crimes in her affidavit. Aplee. Supp. App. at 26-31.

Although Defendant Wagner claims that she acted with "quick attention" because she believed there was an "imminent possibility of more violence," Aplt. Br. at 7, she fails to mention that neither she nor anyone else at the Lakewood Police Department did any investigation to determine who committed the alleged hair-pulling offense after they realized that Plaintiff was not the suspect. Aplt. App. at 136-137. The complete absence of any investigation into the offense or possible suspects after realizing that Plaintiff was the wrong person demonstrates that Wagner's lack of investigation was not likely motivated by a concern about

"the imminent possibility of more violence." Aplt. Br. at 7. Because no investigation has been done to this day, there is no way to know whether Phyllis Rivera, with the long criminal record, had anything to do with the underlying incident.

The steps that Wagner did not take during her "investigation" are telling. She made no attempt to positively identify Mrs. Archuleta as the correct suspect. Aplt. App. at 130-131. This is particularly troubling in light of the fact that Officer Clifford was careful to note in his report that the complaining witness supplied him with nothing more than the name and approximate age of the perpetrator. *Id.* at 76. Likewise, Defendant Wagner did not speak to the complaining witness, Ms. Silvas, and made no effort to contact the Walgreens employees who witnessed the altercation in the store. *Id.* at 79, 156; Aplee. Supp. App. at 14-15. She also made no attempt to contact or speak to Mrs. Archuleta (the supposed suspect) or even Officers Clifford or Bell to gather additional information. Aplt. App. at 156, 159-161.

Defendant Wagner's supervising officer, Sergeant Streeter, testified that Wagner committed an "egregious error" in swearing out an arrest warrant for Plaintiff and concluded that she should not have sought an arrest warrant without speaking to the victim or the witnesses, and without attempting to locate the suspect. *Id.* at 127, 128-129, 134, 135. She further erred by failing to use a

photograph to correctly and positively identify the subject. *Id.* at 135. Defendant Wagner admitted that she could have obtained a photo of Plaintiff from DMV records, but chose not to. *Id.* at 157-158. Sergeant Streeter also stated that it was an "obvious error" for Wagner to confuse the criminal history of Phyllis Rivera with Mrs. Archuleta. *Id.* at 134.

At its core, Defendant Wagner was in possession of no information that would identify Mrs. Archuleta as the specific person who committed the alleged harassment violation. Based on her brief review of the police reports and one phone call, Defendant Wagner knew only that an uncooperative victim had given a name of a possible suspect to officers at the scene, along with other false and unreliable information. Nevertheless, Wagner prepared an affidavit to have Mrs. Archuleta arrested for the violation of the Lakewood municipal ordinance prohibiting harassment. *Id.* at 154-155, 95-96, 98.

Mrs. Archuleta was arrested pursuant to Wagner's warrant while riding in the car with her husband and children on their way to take her son to work on June 12, 2005. *Id.* at 175-177. She was taken to the Jefferson County jail and held until she posted bond. The next day, the Lakewood Police Department recognized that the warrant should not have been issued, and the charges against Mrs. Archuleta were dismissed. *Id.* at 179. One of Wagner's fellow detectives (Michelle Current) reviewed the police file the morning after Mrs. Archuleta's wrongful arrest and

quickly recognized what Wagner had ignored, that "there is no indication of the suspect's identity, other than the victim's statement." *Id.* at 181. After Detective Current recognized that there was no basis to connect Mrs. Archuleta to the crime, Lakewood sought and obtained a judicial finding that Mrs. Archuleta is factually innocent of the charges brought by Wagner. *Id.* at 183-187.

V. SUMMARY OF ARGUMENT

Defendant Wagner, a detective with the Lakewood Police Department, swore out an affidavit seeking an arrest warrant for Plaintiff. Wagner's superior officer, Sergeant Jeff Streeter, testified that Wagner committed an "egregious error" and an "obvious error" in the process of obtaining an arrest warrant for Mrs. Archuleta. Aplt. App. at 127, 134. As the District Court held, a reasonable jury could find that Wagner lacked probable cause to seek an arrest warrant for Mrs. Archuleta. If the false statements were stricken from the affidavit and the material omissions included, the affidavit would have been the very definition of bare bones and would not have supported probable cause to arrest Mrs. Archuleta. Furthermore, a jury may infer recklessness or intentional conduct from omissions and false statements like those here – particularly where, as here, many other facts, such as Defendant Wagner's egregious mistakes, non-existent investigation, and failure to read the very materials on which she relied in her affidavit – buttress the inference.

The District Court correctly concluded that a truthful and complete affidavit would not have connected Plaintiff to the crime. *See id.* at 222-23. It would have stated that an uncooperative complaining witness had provided officers at the scene with nothing more than a first and last name and age of the person who harassed her. It would have explained that the complaining witness could not or would not give any identifying information about the alleged assailant, despite the fact that she claimed to be in an intimate relationship with the person. It would have explained that the complaining witness could not or would not provide an address or phone number or birth date or physical description for the suspect, or any place she could be reached, despite their relationship. It would have explained that the complaining witness could not or would not provide an address for herself. It would have explained that the complaining witness told the officers several times that she did not want to press charges and that she gave officers at the scene a wrong phone number – for a place she had not lived for 6 months – where the person who answered the phone, her former foster mother, had not heard from her since that time and was trying to find her herself.

A truthful and complete affidavit would have explained that the complaining witness told officers at the scene that her alleged assailant had outstanding warrants, but that Mrs. Archuleta had no warrants and no prior arrests. It would have explained that Detective Wagner did not interview any witnesses in preparing

her affidavit, did not interview any police officers, and obtained her "facts" about the underlying incident by doing nothing more than reading the reports of the officers who had gone to the scene.

In addition, a truthful and complete affidavit would not have contained a physical description of Plaintiff; none was provided by any witness. It would not have contained her driver's license number, her social security number, and her date of birth. It would not have contained her address. It would not have stated that the whereabouts of Plaintiff were unknown, when (a) Wagner made no effort to contact her; (b) Plaintiff had lived at the same address for more than four years, and (c) Wagner identified Plaintiff's own home address in her warrant application. *See id.* at 140. It would not have stated that Plaintiff had previous arrests for Burglary, False Information, Theft by Receiving, Shoplifting, Larceny, Forgery, Receiving Stolen Property, Obstructing Police, Escape, and Parole Violation. Plaintiff had never been arrested before.

Viewing the facts in the light most favorable to Mrs. Archuleta, the non-moving party, and drawing all inferences in her favor, there are an abundance of facts from which a jury could find that Defendant Wagner violated Mrs. Archuleta's clearly established Fourth Amendment rights by swearing out a recklessly or knowingly false and materially inaccurate affidavit. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004); *Bruning v. Pixler*, 949 F.2d 352,

357 (10th Cir. 1991). Remarkably, despite the obvious errors that her own superiors and colleagues readily identified, Aplt. App. at 127, 128-129, 134-135, Wagner's brief still maintains that there was probable cause to arrest Mrs. Archuleta and suggests that she would do the same thing again, if given the opportunity. Aplt. Br. at 17-25. If this were true, any innocent citizen could be subject to arrest based on nothing more than a name given by an uncooperative witness who provided other false information to the police. Based on the facts of this case, the District Court properly denied Wagner's request for summary judgment.

VI. ARGUMENT

A. Standard of Review

1. Interlocutory Appeal of Denial of Motion for Summary Judgment

This Court's interlocutory review of a denial of summary judgment on qualified immunity grounds is necessarily narrow. *See, e.g.*, *Johnson*, 515 U.S. at 313; *Shrum*, 449 F.3d at 1137. The Court "must 'take, as given, the facts that the district court assumed when it denied summary judgment'" and must limit its inquiry to resolving "abstract issues of law." *Shrum*, 449 F.3d at 1137 (quoting *Johnson*, 515 U.S. at 319).

Furthermore, summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1112-13 (10th Cir. 2007) (quoting FED. R. CIV. P. 56(c). The Court must view the evidence and all reasonable inferences therefrom in the light most favorable to Mrs. Archuleta, the nonmoving party. *E.g.*, *Roberts v. Barreras*, 484 F.3d 1236, 1239 (10th Cir. 2007). Summary judgment is *not* proper if – viewing the evidence in a light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor – a reasonable jury could return a verdict for that party. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992).

2. <u>Claim of Qualified Immunity</u>

When a defendant pleads qualified immunity, the plaintiff must show "(1) that the defendant's actions violated a constitutional or statutory right, and (2) that the rights alleged to be violated were clearly established at the time of the conduct at issue." *Anderson v. Blake*, 469 F.3d 910, 913 (10th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). A plaintiff may establish that a right is clearly established by reference to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits. *Id.* at 914. To show that a right is clearly established, a plaintiff need show only that the right is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

at 913 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). There need not be a precise factual correspondence between earlier cases and the facts of the case at hand; general statements of the law are capable of giving a fair and clear warning. *Id.* at 913-14 (quoting *Hope*, 536 U.S. at 741); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("We cannot find qualified immunity whenever we find a new fact pattern.") A general constitutional rule that has already been established can "apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Anderson*, 469 F.3d at 914 (brackets in original) (quoting *Hope* 536 U.S. at 741). As this Court explained in *Casey*, "[t]he *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." 509 F.3d at 1284 (internal quotations omitted).

After the plaintiff makes these showings, the burden shifts to the defendant, who must prove that there exist no genuine issues of material fact "as to whether the defendant's actions were objectively reasonable in light of the law and information the defendant possessed at the time of his actions." *Hollingsworth v. Hill*, 110 F.3d 733, 738 (10th Cir. 1997) (quoting *Guffey v. Wyatt*, 18 F.3d 869,

871 (10th Cir. 1994) and *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991)) (internal quotations omitted).

B. There Are Sufficient Facts To Conclude That Wagner Violated Plaintiff's Clearly Established Fourth Amendment Rights.

"No one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard of the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (discussing *Stewart v. Donges*, 915 F.2d 572, 581-83 (10th Cir. 1990)). In *Bruning*, this Court held that "the law was clearly established [by 1986] that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest warrant, if the false statement were material to the finding of probable cause." *Bruning v. Pixler*, 949 F.2d 352, 357 (10th Cir. 1991); *accord, e.g., Pierce v. Gilchrist*, 359 F.3d at 1298; *DeLoach v. Bevers*, 922 F.2d 618, 621-22 (10th Cir. 1990). Similarly, it has been clearly established since at least 1986 that it violates the Constitution for an officer "to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause." *Bruning*, 949 F.2d at 357 (quoting *Stewart*, 915 F.2d at 582-583).

In analyzing whether the reckless or knowing inclusion of false information in or the omission of true information from a warrant affidavit impinged on the

plaintiff's constitutional rights, the Court should examine whether there would be probable cause if the false information is excised from the warrant application and the omitted evidence is included. *Pierce*, 359 F.3d at 1293 (citing *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996)). Here, construing the facts in the light most favorable to Plaintiff, a jury could conclude that a complete and truthful affidavit would not have established probable cause to believe that Plaintiff was the person who committed the underlying offense. Furthermore, there is substantial evidence to conclude that Wagner acted knowingly or recklessly in making false statements and omitting material information from the affidavit. *See, e.g.*, *Miller v. Prince George's County*, 475 F.3d 621 (4th Cir. 2007) (reversing district court's grant of qualified immunity to officer, where officer listed plaintiff's birth date, physical description, driver's license number and license plate number in arrest warrant affidavit, without disclosing that information was obtained from computer search and there was no connection between plaintiff and crime except for plaintiff's name).

1. There Are Sufficient Facts to Conclude That Wagner's Warrant Is Materially Inaccurate and Does Not Establish Probable Cause

Defendant Wagner's warrant affidavit includes a number of material false statements and omits a considerable number of material facts. When these inaccuracies are corrected, the affidavit does not establish probable cause to

believe that Mrs. Archuleta had any involvement in the underlying crime, since there is nothing to connect her to the alleged harassment of Ms. Silvas.[3] At a minimum, the District Court properly determined that summary judgment was not appropriate and that, based on genuine issues of material fact, the existence of probable cause is a question that should go to the jury. *See DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) ("We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause to arrest"); *Bruner v. Baker*, 506 F.3d 1021, 1028 (10th Cir. 1997) (holding that "where there is a question of fact or 'room for a difference of opinion' about the existence of probable cause, it is a proper question for a jury, even though it is normally determined by a court during the warrant application process.").

Wagner's material false statements and omissions include the following:

- Defendant Wagner states that she has "personal knowledge of the facts contained within this affidavit through personal involvement, interviews with witnesses and other police officers . . . ." Aplt. App. at 95. This statement is not true. She did not interview any witnesses from the incident and did not even attempt to speak to the police officers who were at the scene. *Id.* at 156. Instead, she obtained information for her affidavit by doing nothing more than reading Officer Clifford's and Officer Bell's police reports and obtaining inaccurate information from the computer records. Wagner also had no personal knowledge or "personal involvement" of any of the facts contained in her affidavit

[3] Wagner attempts to conflate the question of whether there was probable cause to believe that a crime had been committed by someone with the separate question of whether there was probable cause to believe that Mrs. Archuleta was the specific perpetrator of the crime. Aplt. Br. at 17-25.

(other than that she made one unsuccessful attempt to contact the complaining witness).

- Wagner lists Mrs. Archuleta's physical description, including her height, weight, hair color, and eye color, as those of the suspect. *Id.* at 95. There was no basis for this description. Defendant Wagner's affidavit fails to note that neither the complaining witness, who claimed to be in an intimate relationship with the suspect, nor the Walgreen's employee, who witnesses the incident, provided any physical description of the suspect to the officers at the scene, and that Defendant Wagner instead obtained the description of Plaintiff by searching the DMV records for the name "Mercedes Archuleta." Aplt. App. at 95-96, 151, 153-155; Aplee. Supp. App. at 13-21, 34-43.

- Wagner lists Mrs. Archuleta's date of birth as that of the suspect. Aplt. App. at 95. Again, there was no basis for this description. Wagner does not acknowledge that the complaining witness, Ms. Silvas, did not know or would not divulge the assailant's date of birth, even though she claimed to be in an intimate relationship with her. *Id.* at 76, 95.

- Wagner lists Mrs. Archuleta's social security number and Colorado driver's license number as those of the suspect, *id.* at 95, without acknowledging that this information came from a search of the DMV records for the name "Mercedes Archuleta." Aplt. App. at 95-96, 151, 153-155; Aplee. Supp. App. at 13-21, 34-43.

- Wagner includes a statement that the complaining witness and Mercedes Archuleta had been involved in an intimate relationship, *id.* at 95-96, but fails to acknowledge that the complaining witness did not know the suspect's birth date, address, telephone number, and told the officers at the scene that she "did not know where Ms. Archuleta would be going or where she could be located." *Id.* at 76, 95-96.

- Similarly, Wagner's affidavit does not acknowledge that neither she nor the officers at the scene obtained any description of the assailant from Ms. Silvas, the Walgreens employee, or anyone else. *Id.* at 95-96.

- The affidavit does not mention that the complaining witness stated that her girlfriend had outstanding warrants, but that Mrs. Archuleta did not

have any outstanding warrants, had never been arrested before, and had never even received a speeding ticket. *Id.* at 76, 190-191.

- Instead, Defendant Wagner's affidavit states that Mrs. Archuleta had previously been arrested for Burglary, False Information, Theft by Receiving, Shoplifting, Larceny, Forgery, Receiving Stolen Property, Obstructing Police, Escape, and Parole Violation. *Id.* at 96. Each of these statements is false. In fact, this is the criminal history of a third person, Phyllis Rivera, who has a different date of birth, a different social security number, a different description, and who once used the name Mercedes Archuleta, among many other names, as an alias. Aplee. Supp. App. at 18-20, 22-23, 34-43.[4]

Setting aside the false information contained in the warrant affidavit and examining the affidavit as if the omitted information had been included, the District Court correctly concluded that there was no probable cause to arrest Mrs. Archuleta. To establish probable cause for an arrest, there must be a "substantial probability that a crime has been committed and that *a specific individual* committed the crime." *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996) (emphasis added) (quoting *Wolford*, 78 F.3d at 489). Here, a truthful and complete affidavit would have been a "bare bones" affidavit that did not identify Plaintiff in

[4] Although Wagner asserts that the criminal history is not relevant to probable cause, this Court has held that "criminal history, combined with other factors, can support a finding of reasonable suspicion or probable cause." *United States v. Artez*, 389 F.3d 1106, 1114-15 (10th Cir. 2004); *see also Burrell v. McIlroy*, 464 F.3d 853, 858 n.3 (9th Cir. 2006) ("Although a prior criminal history cannot alone establish reasonable suspicion or probable cause to support a detention or an arrest, it is permissible to consider such a fact as part of the total calculus of information in these determinations."); *United States v. Sherman*, 576 F.2d 292, 295 (10th Cir. 1978) ("[A]ffidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial . . . ."). In addition, a jury could reasonably infer that Defendant Wagner included the information to corroborate Silvas' statement about her assailant's criminal history and outstanding warrants.

any specific way. *United States v. Leon*, 468 U.S. 897, 923 n.24 (1984) (officer may not obtain warrant on the basis of a "bare bones" affidavit); *see also United States v. Danhauer*, 229 F.3d 1002, 1005-06 (10th Cir. 2000) (affidavit for search warrant was "bare bones" where it contained only a description of the residence, identity of occupants, statements regarding the occupants' criminal histories, and an uncorroborated statement by an informant that occupants were manufacturing drugs); *United States v. Rowland*, 145 F.3d 1194, 1207 (10th Cir. 1998) (probable cause cannot be based on a "bare bones affidavit, containing only conclusory statements and completely devoid of factual support").

Defendant Wagner asserts, however, that the District Court identified only four individual omissions or false statements in her affidavit. *See* Aplt. Br. at 29. This is incorrect, as the District Court opinion and the recitation above makes clear. *See* Aplt. App. at 220-21. In addition, Wagner's brief argues that each of the omissions or false statements, when viewed in isolation from the others, fails to negate probable cause and is therefore not material. *See* Aplt. Br. at 29-33. However, false statements and omissions in warrant affidavits are not to be atomized and analyzed for materiality in isolation. In assessing whether false statements or omissions are material, a court must set aside all false information, insert all omitted truths, and examine the "corrected" affidavit to determine

whether it supports a finding of probable cause. Aplt. App. at 221-22; *see also*, *e.g.*, *Pierce*, 359 F.3d at 1293; *Stewart*, 915 F.2d at 582 n.13.

If Wagner's warrant affidavit disclosed that the only link to Plaintiff was that the name Mercedes Archuleta had been given to the police officers at the scene by the uncooperative complaining witness, who refused to give other information about the suspect, her alleged girlfriend, who did not want to press charges, who had given false information to the police, and whose whereabouts were unknown, there would not have been probable cause to believe that Mrs. Archuleta committed the crime in question. *See Wong Sun v. United States*, 371 U.S. 471, 480-82 (1963); *see also Miller*, 475 F.3d at 629 (analyzing the material inaccuracies in a warrant affidavit in a similar case and concluding that there was no probable cause to arrest the suspect) (citing *Pierce*, 359 F.3d at 1293). Looking only at the files Wagner looked at and without any further investigation, another Lakewood detective was able to determine the day after Mrs. Archuleta's arrest that there was no basis to charge Mrs. Archuleta with any offense. Aplt. App. at 181. Under these circumstances and given the summary judgment standard, the District Court properly decided that the existence of probable cause should be submitted to a jury. *See DeLoach*, 922 F.2d at 623; *Bruner*, 506 F.3d at 1028.

Defendant Wagner, however, still claims that there was probable cause to arrest Mrs. Archuleta and she cites two cases in support of her claim. Aplt. Br. at

22-23 (discussing *Thompson v. Prince William County*, 753 F.2d 363 (4th Cir. 1985) and *Lane v. Sarpy County*, No. 8:CV-9700013, 1997 U.S. Dist. LEXIS 23274 (D. Neb. Oct. 29, 1997) (unpublished)). These cases do not establish probable cause in this case.

The officer in *Thompson* had substantially more information connecting the plaintiff to the underlying crime and did an actual investigation of the events in question. In that case, the defendant undercover detective personally purchased drugs from a woman identified to him as "Lisa." *Id.* 364. Later that same day, he personally observed the drug dealer driving a car; he recorded the vehicle's license plate number, and then reconfirmed, through a police informant, that the woman driving the car was named "Lisa." *Id.* He then determined based on DMV records that the car that the drug-dealer Lisa was driving was registered to "Lisa Ann Thompson," the plaintiff. Believing that Lisa Ann Thompson was the drug dealer driving her own car, the undercover agent swore out an arrest warrant for the plaintiff. *Id.* 365-66. The court concluded that probable cause existed to arrest the plaintiff because the identity of names between the suspect and the plaintiff, the confirmation of the suspect's name by an informant, and the fact that the suspect drove the plaintiff's car on the night of the crime were strong indications that the plaintiff was the suspect. *Id.*

In *Lane v. Sarpy County*, No. 8:CV-9700013, 1997 U.S. Dist. LEXIS 23274 (D. Neb. Oct. 29, 1997), an unpublished district court decision from another circuit, the officer had ample information to identify the suspect, but a clerical employee inadvertently incorporated both the suspect's and the plaintiff's identifying information into a single document. *Id.* at *5-7. That document was then used to prepare a warrant affidavit. *Id.* at *7-8. In that case, the county attorney was investigating a bad check. *Id.* at *4-5. Based on the information from the check, the county attorney prepared an arrest warrant for the check writer, intending to arrest the person whose identifying information appeared on the bad check. *Id.* at 8-9. However, in the process of preparing the warrant affidavit, an error by a clerical employee at the attorney's office inadvertently led to the listing of the plaintiff's date of birth and physical description on the affidavit, along with the actual suspect's address. *Id.* at 6-9. The trial court held that the clerical error amounted to simple negligence, not reckless or knowing conduct. *Id.* at 20, 26. There was no suggestion that the county attorney attempted to identify the author of the bad check by merely searching for his name and approximate age in DMV records.

Here, however, there are sufficient facts to conclude that Defendant Wagner included material false statements and omissions from the warrant affidavit and

that there was no probable cause to believe that Plaintiff was the specific person who committed the offense in question.

2. There Are Sufficient Facts to Conclude That Wagner Acted Recklessly or Knowingly.

In order to prove reckless or knowing conduct, direct evidence of the officer's mental state is not required; rather, "a factfinder may infer reckless disregard from circumstances evincing obvious reasons to doubt the veracity of the allegations." *DeLoach*, 922 F.2d at 622 (internal quotations omitted). In addition, the factfinder may infer recklessness from false statements or from omissions of facts that are clearly critical to a finding of probable cause. *See Bruning*, 949 F.2d at 357, 360. Indeed, in the case of false statements, a factfinder may infer recklessness by the mere fact of the affiant's willingness to distort the truth, without regard to the relevance of the falsified information. *See Wilson v Russo*, 212 F.3d 781, 788 (3d Cir. 2000) ("Unlike omissions, assertions can be made with reckless disregard for the truth even if they involve minor details-recklessness is measured not by the relevance of the information, but the demonstration of willingness to affirmatively distort truth."); *DeLoach*, 922 F.2d at 622.

Viewing the facts through the lens of the summary judgment standard, the District Court properly determined that a jury could conclude that Wagner's errors evidence either knowing or reckless conduct. We need look no further than the words of Defendant Wagner's own superior officer at the Lakewood Police

Department, who described her mistakes as "egregious" and "obvious." Aplt. App. at 127, 134. "Egregious" means "extraordinary in some bad way; glaring; flagrant." Random House Unabridged Dictionary (2nd Ed. 1993).

Although Defendant Wagner's brief seeks to downplay her supervisor's contemporaneous characterization of her extraordinary mistakes by claiming that his criticism was based on "the clarity of hindsight," Aplt. Br. at 40 n.5, Wagner provides no cite for this claim. In actual fact, the supervisor's criticism was based on the reckless manner in which Defendant Wagner procured an arrest warrant for an innocent person without any investigation. *See* Aplt. App. at 127-31, 134-35. Wagner's brief also cites the supervisor's subsequent positive statement made during deposition as an apparent means to avoid being held accountable for the consequences of her actions in this case. Aplt. Br. at 40 n.5. To the extent the supervisor now seeks to praise the conduct he previously described as "egregious," this presents a classic question for the jury. *Shrum*, 449 F.3d at 1137 (interlocutory appeal does not permit a review of "the sufficiency of the evidence or the correctness of the district court's findings with respect to genuine issues of material fact").

Additionally, as recited at length above, Defendant Wagner performed virtually no investigation of the "facts" identified in her affidavit before applying for an arrest warrant; indeed, it appears that she merely tried (unsuccessfully) to

contact the victim, gave up, and sought a warrant for an innocent person. Aplee. Supp. App. at 14-15. She failed to take a number of obvious and important steps to confirm that she was seeking the arrest of the right person, including speaking with witnesses, conducting a photo lineup, or speaking with the victim. Aplt. App. at 79, 152, 156, 157; Aplee. Supp. App. at 14-15.

Although Defendant's brief notes that an affiant is not obligated to pursue "every avenue of investigation" or follow "every lead" or interview "all potential witnesses," Aplt. Br. at 34 (quoting *Beard v. City of Northglenn*, 24 F.3d 116 (10th Cir. 1994)), the facts of this case indicate that Wagner spent a grand total of one hour on this matter, did not pursue *any* avenue of investigation, did not follow *any* lead, and did not interview *a single* witness. Aplee. Supp. App. at 14-15; Aplt. App. at 79, 156, 159-161. These facts are not consonant with "mere negligence"; they are extraordinary.

Wagner's brief also tries to excuse her errors and omissions by pointing to Agent Clifford's report, which she says that she included in her warrant application along with a number of other documents. Aplt. Br. at 31, 40-42. Defendant Wagner claims that if the magistrate had only taken the time to read those materials (and, apparently, assumed that Wagner's own affidavit was false when she claimed to have obtained "personal knowledge" through "interviews with witnesses" and "personal involvement"), he or she could have been alerted to the

fact that Wagner got most of the information in her warrant application from the DMV, rather than witnesses. *Id.* at 31-32. Wagner goes so far as to assert that it was "obvious" that she had done no actual investigative work, and that "no person could reasonably believe" that she had done what her affidavit claimed, and that "[a]nyone reviewing such materials was able to discern what happened." *Id.* at 31-32, 40.

Defendant Wagner's argument turns the summary judgment standard on its head, construing (indeed, stretching) the facts in the light most favorable to herself, and is entirely improper on interlocutory appeal from a denial of summary judgment. Moreover, Defendant Wagner cites no authority for the proposition that she is free to attest to a materially false and misleading warrant affidavit so long as she staples additional materials to the back of her warrant application packet that might conceivably be used to divine some of the errors in her affidavit. It would be a perverse ruling to conclude that an officer is protected by qualified immunity if they commit a sufficiently careless investigation and submit an affidavit that is so full of flagrant misstatements and omissions that "anyone should be able to discern what happened."[5]

[5] Defendant Wagner provides no explanation of how the magistrate should have been able to discern her misstatements and omissions. Presumably, the magistrate believed that Wagner performed an actual investigation, as she claimed in her affidavit.

Furthermore, it is plain that Defendant Wagner's belated effort to shift the blame to Officer Clifford is misplaced. The District Court recognized that Officer Clifford's report is careful to point out that the complaining witness gave him only the name and approximate age of the suspect. *Id.* at 216, 221; *see also id.* at 76. Officer Clifford recites that he obtained the other identifying information in his report from a search of the DMV records. Aplee. Supp. App. at 5-6; Aplt. App. at 75, 76, 81. Defendant Wagner confirms that when she looked at Clifford's report, she did not believe that he got the identifying information from the victim, but rather obtained it from the driver's license records. Aplee. Supp. App. at 11. These facts and Defendant Wagner's mistakes were immediately apparent to the second Lakewood detective who performed a review of the file the day after Plaintiff was arrested. *Id.* at 181.

Finally, Wagner committed the "obvious error" of including a third person's criminal history in her warrant affidavit as if that history was Mrs. Archuleta's. She failed to notice that the criminal history and record – which she went so far as to print out – included a different name, social security number, birth date, address, and physical description displayed prominently at the top of the first page of the records. Aplee. Supp. App. at 26-31, 34-43. Indeed, she testified that she did not even attempt to check this information. *Id.* at 26-31.

The Fourth Circuit's recent decision in *Miller v. Price George's County* is instructive in assessing Wagner's conduct. In *Miller*, the defendant detective investigated the theft of a lawnmower. The mower's owner informed him that a person named Daniel Miller was likely the thief, and that he may have driven a jeep in the course of the theft. The detective searched a computer database for persons named Daniel Miller, and learned that one of them – the plaintiff – had once owned a jeep.[6] Although the detective established no connection between plaintiff Miller (or his jeep) and the crime, he nonetheless sought a warrant for plaintiff's arrest. *Id.* at 625. His affidavit listed plaintiff's birth date, height, weight, and driver's license number from his DMV records, without disclosing the source of that information. *Id.* at 625, 628. Like Wagner, the detective made no effort to locate either the real suspect or plaintiff Miller. *Id.* at 625, 626 (Detective did not ask suspect's relatives for his whereabouts, and "[t]here is no evidence that Det. Dougans ever attempted to serve the warrant on a Daniel Miller or otherwise attempted to find a Daniel Miller"). Rather, the officer swore out a warrant affidavit. Based on this course of events – strikingly similar to Defendant Wagner's conduct in this case – the Fourth Circuit held that a jury could find that

[6] Like Defendant Wagner, who failed to note that Phyllis Rivera's criminal records were for Phyllis Rivera, the detective in *Miller* failed to note that the Jeep-owning Miller was ten years older and a different race than the suspect. *See Miller*, 475 F.3d at 625. He also apparently falsely stated that a witness gave him Mr. Miller's license plate number. *Id.* at 624-25.

the defendant acted recklessly or knowingly, and indeed that he must have entertained serious doubts as to the accuracy of the information he reported in his affidavit. *Id.* at 629. Consequently, the Fourth Circuit denied qualified immunity and reversed the district court's grant of summary judgment in favor of the detective.

Again, Wagner's recklessness cases are plainly distinguishable. In *Beard*, police detectives investigated a man who used stolen credentials from two individuals to set up a variety of bank accounts and defrauded several business in a check-kiting scheme. 24 F.3d at 110, 112 (10th Cir. 1994). The detectives believed that the plaintiff was the perpetrator and took a number of steps to confirm their suspicion. *Id.* at 112. These steps included multiple photographic lineups using a copy of plaintiff's driver's license. *Id.* at 113. During each lineup, the victim of the perpetrator's schemes identified the plaintiff as the perpetrator, even though the plaintiff had nothing to do with the crimes. *Id.* The detectives also submitted a number of documents signed by the perpetrator along with the plaintiff's driver's license (which was signed by the plaintiff) to a handwriting expert, who concluded that all of the papers had been signed by the same person. *Id.*[7] After this thorough investigation, the detectives became convinced that the

[7] It was ultimately discovered that the detectives had erroneously informed the handwriting expert that some documents had been signed by the plaintiff while they had actually been signed by the perpetrator. *Id.* at 115-16.

plaintiff had committed the crimes and applied for a warrant for his arrest. *Id.* at 116. The court held that in light of the thorough investigation of the crime, and because "the perpetrator had crafted his crimes with the very intention of leading investigators to believe falsely that [the plaintiff] was their man," *id.* at 117, an inference of recklessness was not justified. *Id.* at 117-18.

The Court declined to infer recklessness in *Beard* because the officers thoroughly and diligently investigated the crime.[8] Here, Wagner performed virtually no investigation but committed several egregious mistakes before erroneously applying for a warrant to arrest Mrs. Archuleta.

Like the detective in *Miller*, a jury could find that Wagner acted recklessly in seeking a warrant for the arrest of Mrs. Archuleta. Wagner had "obvious reasons" to doubt the veracity of her allegations regarding Mrs. Archuleta – a sufficient basis for the jury to find recklessness. *DeLoach*, 922 F.2d at 622. And more, she plainly misstated and omitted a host of facts that were "clearly critical" to probable cause. *See Bruning*, 949 F.2d at 357, 360. Based on the facts adduced through discovery, the District Court properly denied Defendant Wagner's request for summary judgment.

[8] Similarly, in *Herrera v. Millsap*, 862 F.2d 1157, 1158 (5th Cir. 1989), there was an administrative error that led to a mistaken arrest. There was no evidence of extraordinary, flagrant mistakes stemming from a non-existent investigation.

VII. CONCLUSION

According to *Miller*, *Bruning*, *Pierce*, and *Wolford*, among others, and viewing the facts and inferences in favor of Plaintiff, there are sufficient facts to conclude that Defendant Wagner's inclusion of false statements in and omission of facts from the warrant affidavit violated Plaintiff's clearly established Fourth Amendment rights. The District Court properly denied summary judgment.

VIII. STATEMENT REGARDING ORAL ARGUMENT

Mrs. Archuleta respectfully suggests that oral argument will not materially assist in the disposition of this case. The relevant Tenth Circuit jurisprudence is well-established and the District Court's opinion is clear and well-reasoned. Because the District Court has stayed the trial of the remaining claims against the remaining defendants, additional delay from an oral argument will further postpone the resolution of this case.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 8,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I make the foregoing certification in reliance on the word count provided by Microsoft Office Word 2003, the word processing system on which this brief was prepared.

I hereby certify further that 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in fourteen (14) point Times New Roman font.

DATED this 2nd day of April, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 2, 2008 a true and correct copy of the foregoing **BRIEF OF APPELLEE MERCEDES ARCHULETA** was electronically submitted to the clerk of the court at esubmission@ca10.uscourts.gov.

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