2016

Thomas A. Bowden, Petitioner v. Steve Meinberg, et al., Respondents: Petition for a Writ of Certiorari

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No. ____

IN THE

Supreme Court of the United States

THOMAS A. BOWDEN,
Petitioner,

v.

STEVE MEINBERG, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. When evaluating whether a law enforcement officer is entitled to qualified immunity in a case involving a falsehood or material omission in a warrant affidavit, whether the nature of the corrected affidavit and its effect on probable cause are questions of fact or law?

2. Whether qualified immunity is available to law enforcement officers who intentionally include a falsehood or material omission in a warrant affidavit?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Thomas A Bowden, an individual. Petitioner was the plaintiff and appellee below.

The Respondents are:

Steve Meinberg, an officer with the Jefferson County, Missouri Sherriff's office;

Patrick Hawkins, an officer with the Jefferson County, Missouri Sherriff's office;

Chris Hoffman, an officer with the Jefferson County, Missouri Sherriff's office;

Benjamin Simmons, an individual;

Aaron Gyurica, an individual; and

Wes Wagner, the Jefferson County, Missouri circuit clerk.

The Respondents were defendants and appellants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas A. Bowden respectfully petitions this Court for a writ of certiorari to review judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 807 F.3d 877, and is reproduced at page 1a of the appendix to this petition ("App."). The unpublished opinion of the United States District Court for the Eastern District of Missouri is reproduced at page 11a of the appendix.

JURISDICTION

The Eighth Circuit rendered its decision on August 25, 2015. Bowden filed a timely petition for rehearing en banc on September 22, 2015 after receiving an extension of time to file the petition, and the court denied the petition on October 22, 2015. On December 16, 2015, Justice Alito granted an application to extend the time in which to file this petition until February 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition.

INTRODUCTION

The Eighth Circuit granted qualified immunity to a sheriff's deputy who filled out a probable cause report relying exclusively on a witness statement he later admitted he believed to be false. The deputy did not inform the prosecutor or magistrate of his belief, and Thomas Bowden was arrested as a result. Yet the

Eighth Circuit reversed the district court's denial of qualified immunity, concluding that a corrected affidavit still "*could* lead a man of reasonable caution to infer" that a crime had occurred. App. 8a (emphasis added). In the Second and Third Circuits, an officer in similar circumstances is entitled to qualified immunity only if "a magistrate *would* have issued the warrant on the basis of the corrected affidavits." *Southerland* v. *City of N.Y.*, 680 F.3d 127, 144 (2d Cir. 2011) (emphasis added) (quoting *Walczyk* v. *Rio*, 496 F.3d 139, 158 (2d Cir. 2007)); *see also Sherwood* v. *Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997) (noting that qualified is available only if a magistrate could not conclude that a corrected affidavit was insufficient). Other circuits have developed still more standards. The Ninth Circuit joins the Eighth in rendering corrected affidavits issues of law, and the Fifth, Sixth, and Seventh Circuits treat the questions as mixed questions of fact and law, whereby a jury must resolve disputed underlying facts, but the court determines whether probable cause existed in light of the corrected affidavit.

The circuits' disagreement reflects a broader division among the circuits about the role of a jury in determining the nature and effect of a corrected affidavit in the qualified immunity context. While each of the circuits borrows its rule of decision in these cases from this Court's test in *Franks* v. *Delaware*, they do so without any guidance on how that criminal case's test should interact with the standards of summary judgment and qualified immunity in a civil action. Consequently, the circuit courts' various approaches to these claims diverge significantly.

As a result, falsehoods and material omissions in warrant affidavits are far less likely to be

compensable under 42 U.S.C. § 1983 in the Eighth and Ninth Circuits than they are in other circuits have decided the issue. And unfortunately, falsehoods and material omissions in warrant affidavits are an all-too-common occurrence. Resolving these issues would create uniformity in the many cases requiring a corrected affidavit, and it would provide needed guidance to the lower courts.

This Court should grant certiorari and resolve this conflict among the circuits. By failing to draw all reasonable inferences in the petitioner's favor while reconstructing and interpreting the warrant affidavit, the Eighth Circuit improperly took his case out of a jury's hands.

STATEMENT OF THE CASE

Factual Background: In 2009, Petitioner Thomas Bowden lived with his wife in a "very rural" part of Jefferson County, Missouri. (JA 171). The subdivision where their home was located was accessible only by one private gravel road, which crosses a creek via a low water bridge near the Bowdens' property. (JA 171). Prior to the events giving rise to this case, illegal activity, including trespassing and manufacture of methamphetamine, was common in the area around the Bowdens' home. (JA 118-120, 181).

One morning in July, Bowden and his wife saw a pickup truck and two men they did not recognize on the low water bridge at the edge of the Bowdens' yard. (JA 181, 118). Bowden called out loudly three times for the men to identify themselves, but they did not respond. (JA 118, 122, 181). Bowden went inside and got a single-shot 20-gauge shotgun, loaded with a single shell. (JA 122, 181). He went back outside and called to the two men once or twice more, but they did

not answer. (JA 122). Bowden saw one of the men make a "really quick movement like he was reaching into the truck to get something," and was afraid that the man was reaching for a gun, so Bowden fired his shotgun in the air. (JA 118, 122). Bowden was confident that the shotgun shell couldn't have hurt anyone at that distance; he simply wanted to get the man's attention and make him stop, which he did. (JA 118). Looking at the men, Bowden was facing west; he pointed the shotgun south over his shed, about a 110 degree angle from the men, when he fired. (JA 122-23, 181).

The two men on the bridge were Respondent Benjamin Simmons and Respondent Aaron Gyurica. Simmons admits that when he heard the shotgun blast, he was more curious than frightened, and thought Bowden was shooting at a squirrel or something similar. (JA 469). Simmons walked up the road toward Bowden's home and asked Bowden "Did you get him?" which Bowden took to mean that Simmons thought he had shot at an animal. (JA 123-24). Bowden asked Simmons his name and what Simmons was doing there. (JA 124). Simmons explained that his step-grandmother and grandmother lived up the road, and he had been coming to the area to fish since the early 1980s. (JA 123-24, 488). During this conversation Bowden held the shotgun in his hands, pointed away from Simmons. (JA 125, 498). When he learned that Bowden had fired the shot to get his attention, Simmons "went ballistic" and started "cussing and carrying on." (JA 124-25). Simmons threatened Bowden and said "we will see what will get done about this." (JA 125).

Simmons and Gyurica drove up the road to the home of Barbara Voyles, Simmons' step-grandmother, where Simmons called 911 and reported that Bowden had shot at him. (JA 125). Bowden called 911 as well. (JA 126). Respondent Vernon Martin, a deputy county sheriff, arrived to investigate, and spoke to Bowden, Simmons, and Gyurica. (JA 236-252). Deputy Martin recalls that Simmons, insisting that Martin arrest Bowden, was aggressive and agitated, "almost to the point where he wanted to tell me how to do my job." (JA 175). Both Simmons and Gyurica admitted to Deputy Martin that they did not see Bowden shoot the gun at them; their only evidence that Bowden had fired the shotgun at them was the fact that they heard a gunshot and then saw leaves falling near them. (JA 176-77, 499-502). Deputy Martin noted that their descriptions of the incident were "very vague." (JA 188). Additionally, they gave Deputy Martin an incorrect description of Bowden's shotgun. Simmons said Bowden had a 12-gauge pump-action shotgun; Bowden's shotgun was a single-barrel 20-gauge loaded with fieldshot for hunting small game. (JA 176-77). Deputy Martin did not find Simmons credible. (JA 178-79). However, Deputy Martin did find Bowden credible. (JA 183). After fully investigating and consulting the Missouri statutes, Deputy Martin told all the parties that he did not believe that Bowden had committed any crime, and did not intend to write a report or bring any charges. (JA 180, 185, 191, 219-20, 275, 457).

Unfortunately for Bowden, the Simmons family had powerful friends. The Simmons family knew Howard Wagner, the elected Circuit Clerk of Jefferson County, and his family. (JA 271-72, 451-42). Simmons' step-grandmother, Barbara Voyles, worked with

Howard's father, and is a long-time family friend of the Wagners. Benjamin Simmons' mother, Norma Elaine Simmons, worked for the Jefferson County Recorder of Deeds, in the same building as Wagner. (JA 451-52). When Deputy Martin told Norma Simmons and Barbara Voyles that he did not intend to charge Bowden, Norma and Barbara threatened to call the Circuit Clerk and have him call the Sheriff's Department to have "something done about this." (JA 211-13, 274, 457-58). Martin dismissed these threats and left the scene. (JA 458).

Later that morning, Deputy Martin spoke with his supervising officer, Corporal Chris Hoffman and explained his doubts about Simmons' credibility and his opinion that Bowden had not committed any crime. (JA 187-89). Regardless, Hoffman ordered Deputy Martin to go back to Bowden's home, read him his rights, seize his shotgun, and write a report for the unlawful use of a firearm. (JA 189-90). Hoffman told Deputy Martin that someone from Barbara Voyles' home had called Howard Wagner, that Wagner had called Respondent Lieutenant Colonel Meinberg, who then called Respondent Lieutenant Patrick Hawkins, who in turn called Hoffman and relayed the order to seize the shotgun and draft a probable cause statement charging Bowden with the unlawful use of a weapon. (JA 190). Hoffman also told Deputy Martin to draft the probable cause statement and not worry; Hoffman doubted anything would come of it. (JA 197).

Deputy Martin would not have written and signed a probable cause statement had Hoffman not ordered him to do so. (JA 193-94, 196-97). Nevertheless, he complied with his orders. He drafted the probable cause statement averring that he believed probable cause existed that Bowden had committed the crime

of unlawful use of a weapon. (JA 196, 243). He seized Bowden's shotgun and told Bowden that Deputy Martin's superiors were just trying to "appease Mrs. Voyles or whoever over there." (JA 130). Apparently, though, the county's purpose exceeded appeasement: the local prosecutor's office issued a Complaint and Request for Warrant, based on Deputy Martin's affidavit, charging Bowden with the unlawful use of a weapon, a Class D felony. (JA 285, 287). A warrant was issued for Bowden's arrest, and he turned himself in to the Sheriff's Department. (JA 131). The Sheriff's Department arrested Bowden and detained him until he posted bond. (JA 131). The local prosecutor offered a plea deal that both Bowden and his defense attorney considered "ridiculous," but fortunately a jury acquitted him after a trial on June 25, 2010. (JA 133).

Proceedings Below: In December 2013, Bowden filed suit in the U.S. District Court for the Eastern District of Missouri alleging a deprivation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983, among other claims, against Respondent Deputy Martin, Lieutenant Colonel Steve Meinberg, Lieutenant Patrick Hawkins, Corporal Chris Hoffman, and Circuit Clerk Wes Wagner, and conspiracy and other claims against Respondents Benjamin Simmons and Aaron Gyurica. App 5a. Defendants moved for summary judgment on the basis of qualified immunity, which the District Court denied. App 6a. The District Court found that a genuine issue of material fact existed as to whether Deputy Martin had probable cause that Bowden had committed a crime, such that Bowden's claim merited a jury trial. App 6a.

Respondents filed an interlocutory appeal to the Eighth Circuit appealing the denial of qualified

immunity. The Eighth Circuit panel reversed and remanded, concluding that the Respondents were entitled to qualified immunity against Bowden's Fourth Amendment claims. App. 9a.

The court rejected Bowden's argument that Deputy Martin violated Bowden's Fourth Amendment rights by drafting the probable cause statement when Deputy Martin knew the facts did not support probable cause to arrest Bowden for a crime. The court reasoned that "[w]hether probable cause existed…is an objective question of law." *Id.* at 881. And then it went on to weigh the facts. A dispute of fact centered on whether an objective magistrate would believe Bowden shot a gun at the men, based on the men's testimony. App 8a. Despite the fact that any corrected affidavit would include Officer Martin's evaluation that the men were not credible and that there was no probable cause (and in any event, a corrected affidavit likely should not have included the men's claims at all), the Eighth Circuit determined that an objective magistrate could find as a matter of law that Bowdend did shoot at the men. App. 9a.

In its weighing of the facts, the court found it irrelevant that Deputy Martin's probable cause statement omitted the facts that Simmons and Gyurica did not see Bowden fire the shotgun and that Bowden said he fired in a direction away from the men. App. 8a. The court concluded that Bowden shouting at Simmons and Gyurica and leaves falling above them could by itself support a reasonable objective belief that Bowden shot at the men, and thus probable cause that Bowden had committed a crime. *Id.* Since Deputy Martin purportedly did not violate Bowden's Fourth Amendment right against unreasonable seizure by including false information

in his probable cause report, Bowden's conspiracy claim failed as well. App. 9a. The Eighth Circuit subsequently denied panel and *en banc* rehearing. App 33a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DEEPLY DIVIDED ON HOW TO APPLY *FRANKS v. DELAWARE* IN CIVIL RIGHTS CASES.

This case is about preserving the jury's role as a factfinder in civil rights cases when a defendant claims qualified immunity despite making deliberately misleading statements or omissions in a warrant affidavit. Two circuits—the Second and the Third—have long held that whether a hypothetical, corrected affidavit would support probable cause is a question of fact. Consequently, when a defendant claims qualified immunity at the summary judgment stage, those courts require that all inferences be resolved in the plaintiff's favor and grant immunity only if there is no genuine dispute that the magistrate still would have granted the warrant. In the Ninth Circuit, the affiant's deliberate or reckless disregard for the truth is a fact question, but probable cause is exclusively a question of law. At the summary judgment stage, courts in that circuit reconstruct an affidavit to correct any errors that the plaintiff identified as being at least recklessly false through a "substantial showing" before conclusively resolving probable cause. Other circuits take an intermediate approach. The Fifth, the Sixth and the Seventh Circuits ask whether any reasonable jury could find a set of deliberate or reckless misstatements or omissions that would not support probable cause.

In reversing the district court, the Eighth Circuit drew several critical inferences in the defendant affiant's favor. The Ninth Circuit might have been able to reach that same outcome because the court has exclusive say over how a magistrate might have interpreted a warrant. Whether the Fifth, the Sixth or the Seventh Circuits' standard would have permitted the same outcome is less clear; at least one of the Eighth Circuit's conclusions in this case would be expressly foreclosed by earlier precedents from the Fifth and Seventh Circuits. In the Second and Third Circuits, however, the same conclusions reached by the court below would have required submitting Bowden's case to a jury.

A. The Circuits disagree about the proper role of a jury in resolving Fourth Amendment claims predicated upon misleading warrant affidavits.

In *Franks* v. *Delaware*, this Court established the limited circumstances in which a criminal defendant could challenge the validity of a search warrant based on an applicant's misleading affidavit. 438 U.S. 154, 171-72 (1978). A criminal defendant is entitled to a suppression hearing only if he can support a specific allegation of the affiant's deliberate or reckless falsehoods with an offer of proof. *Id.* at 171. Moreover, a suppression hearing is required only when these falsehoods are so material that the rest of the affidavit's content is insufficient to support a finding of probable cause. *Id.* at 171-72. When the defendant ultimately establishes the affiant's deliberate falsehood or reckless disregard for the truth by a preponderance of the evidence, at the hearing and the affidavit's remaining content is

insufficient, the fruits of the search must be excluded. *Id.* at 156.

While *Franks* sets forth a clear rule of criminal procedure, the Court did not expressly address whether its test would apply in civil suits. Nevertheless, the circuit courts generally borrow the *Franks* test for their rule of decision in civil rights suits based on misleading warrant affidavits. *See Burke* v. *Town of Walpole*, 405 F.3d 66, 82 (1st Cir. 2005) ("Appellate courts have consistently held that the *Franks* standard for suppression of evidence informs the scope of qualified immunity in a civil damages suit against officers who allegedly procure a warrant based on an untruthful application."). *See generally Hernandez-Cuevas* v. *Taylor*, 723 F.3d 91, 99-102 (1st Cir. 2013) (discussing different circuit's approaches to Fourth Amendment malicious prosecution claims and the role *Franks* plays in establishing the "kind of reprehensible behavior that is indistinguishable from the common law element of malice").

The circuit courts thus redeveloped the *Franks* test as a rule of decision in civil rights cases and decided on their own how that test interacts with the standards for summary judgment and qualified immunity. And because they did so without any guidance from this Court, their approaches vary substantially. *Compare Hervey* v. *Estes*, 65 F.3d 784, 789 (9th Cir. 1995) (holding that the materiality of a warrant affidavit's misstatements or omissions is a matter for the court), *with Velardi* v. *Walsh*, 40 F.3d 569, 574 (2d. Cir. 1994) (holding that the weight a neutral magistrate would give such information is a jury matter). At its narrowest, the circuits' disagreement centers on the showing a plaintiff must

make before he can bring his claim to trial; more fundamentally, the circuits disagree about the proper role of a jury in deciding these claims. *See Sherwood* v. *Mulvihill*, 113 F.3d 396, 401 n.4 (3d Cir. 1997) (noting the "tension [that] exists as to the proper role of the judge and jury where qualified immunity is asserted" in Fourth Amendment malicious prosecution claims).

1. In both the Second and Third Circuits, juries assess the weight a neutral magistrate would have assigned to the facts in an affidavit after its misstatements and omissions are corrected. *See Sherwood*, 113 F.3d at 401; *Velardi*, 40 F.3d at 574. In those courts, qualified immunity shields a warrant affiant from liability for his intentional or reckless misstatements only if a magistrate would have granted a warrant even after viewing the facts in the light most favorable to the plaintiff. *See Southerland* v. *City of N.Y.*, 680 F.3d 127, 144 (2d Cir. 2011).

The Second Circuit has held that "[t]he materiality of a misrepresentation or an omission" in a Fourth Amendment malicious prosecution claim "is a mixed question of law and fact." *Velardi*, 40 F.3d at 574. Under that court's precedents, an omission's relevance to the probable cause determination is a question of law resolved by the court. *Walczyk* v. *Rio*, 496 F.3d 139, 158 (2d Cir. 2007). "'[T]he weight that a neutral magistrate would likely have given such information,' however, is a question for the factfinder." *Southerland*, 680 F.3d at 144 (quoting *Velardi*, 40 F.3d at 574); *see Golino* v. *City of New Haven*, 950 F.3d 864, 872 (2d Cir. 1991). In essence, the factfinder is asked to predict whether the magistrate still would have issued a warrant based on an affidavit he never read. *See Velardi*, 40 F.3d at 574

n.1 ("[T]ry[ing] to predict whether a magistrate would have found probable cause if he had been presented with truthful information . . . is a question of fact rather than of law.").

The Second Circuit therefore grants qualified immunity "only if 'the evidence, viewed in the light most favorable to the plaintiffs, discloses no genuine dispute that a magistrate would have issued the warrant on the basis of the corrected affidavits.'" *Southerland*, 680 F.3d at 144 (quoting *Walczyk*, 496 F.3d at 158). At the summary judgment stage, any genuine doubt over whether the magistrate would have issued the warrant must be resolved in favor of the nonmovant. *Velardi*, 496 F.3d at 574. So long as the affiant's misstatement or omission was relevant and either deliberate or reckless, the plaintiff survives a defendant's motion for summary judgment when such a genuine dispute over the magistrate's decision exists. *Id.*

In *Sherwood* v. *Mulvihill*, the Third Circuit similarly observed that "[t]ypically, the existence of probable cause in a section 1983 action is a question of fact." 113 F.3d at 401. A defendant affiant is entitled to summary judgment or qualified immunity only "if the evidence, viewed most favorably to the plaintiff" would support finding that "that a reasonable municipal court judge, presented with the corrected affidavit, could not conclude that the affidavit was insufficient." *Id.* The Third Circuit does not require submitting "trivial" omissions to the jury if they "are not strong enough to undermine a finding of probable cause," *see Wilson* v. *Russo*, 212 F.3d 781, 791-92 (3d Cir. 2000). But the court insists that district courts interpret the record in the light most favorable to the plaintiff when an affiant claims

qualified immunity. *See, e.g.*, *Reedy* v. *Evanson*, 615 F.3d 197, 215-16 (3d Cir. 2010) (concluding that the district court "erred in its reconstruction of the Affidavit because it failed to consistently interpret the record in the light most favorable to Reedy and instead, contrary to the summary judgment standard, occasionally adopted interpretations that were the least favorable to Reedy").

2. The Second and the Third Circuits' application of *Franks* to civil rights cases stands in direct conflict to that of the Ninth Circuit. There, correcting an affidavit and determining probable cause is exclusively a function of the court. *See Ewing* v. *City of Stockton*, 588 F.3d 1218, 1224 (9th Cir. 2009) ("[T]he court must determine the materiality of the allegedly false statements or omissions."); *Butler* v. *Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) ("Materiality is for the court, state of mind is for the jury.").

"The practical effect" of the Ninth Circuit's rule "is to reserve to the court the issue of the materiality of the false statements." *Hervey*, 65 F.3d at 789. On the defendant affiant's motion for summary judgment, the district court adopts a reconstructed affidavit, correcting facts that the plaintiff "demonstrate[s] through a substantial showing of evidence were falsely included in the [original] affidavit." *See id.* at 790.[1] The court then determines "whether the

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[1] Significantly, the Ninth Circuit did not suggest in *Hervey* that it would draw all reasonable inferences in the plaintiff's favor when evaluating his "substantial showing" at the summary judgment stage. *See* 65 F.3d at 790. Indeed, the court did not discuss the ordinary standard at summary judgment at all. The court instead noted that when a plaintiff alleges a Fourth Amendment claim similar to a *Franks* claim, he must meet a "heightened pleading standard" and a "still higher standard to

affidavit, once corrected and supplemented, establishes probable cause." *Ewing*, 588 F.3d at 1224.

3. The rest of the circuits fall somewhere between the purely legal determination of the Ninth Circuit and the primarily factual determination of the Second and the Third Circuits. Some circuits acknowledge that their case law in this area is less than clear. *See, e.g.*, *Hale* v. *Kart*, 396 F.3d 721, 728 (6th Cir. 2005) ("We admit that some of these Sixth Circuit cases are confusing and many of the factual recitals in them do not lend themselves to a clear understanding of exactly what facts were in dispute."). But in general, these other circuits require that factfinders resolve a variety of questions including:

- Whether the affiant made statements that were false or misleading when applying for a warrant, *see, e.g.*, *Hart* v. *Mannina*, 798 F.3d 578, 583 (7th Cir. 2015) ("A reasonable jury [could not] find that the lead detective . . . made false or misleading statements in her probable cause affidavit.");
- Whether the affiant reasonably relied in good faith on statements that later proved false, *see, e.g.*, *Clanton* v. *Cooper*, 129 F.3d 1147, 1154 (10th Cir. 1997) (noting that triable issues of fact remained where plaintiff alleged that a defendant affiant deliberately relied on a confession he knew to be false); and
- Whether the affiant's misleading statements were made knowingly or with reckless disregard for the truth, *see, e.g.*,

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survive summary judgment." *Id.* at 788.

> *Betker* v. *Gomez*, 692 F.3d 854, 860 (7th Cir. 2012) ("[A] reasonable jury could find that Officer Gomez knowingly or with reckless disregard for the truth made false statements in his affidavit.").

After the factfinder resolves these issues, the court determines whether the corrected warrant would have supported probable cause. *Hale*, 396 F.3d at 728. At the summary judgment stage, a court can grant summary judgment only if all of the challenged misstatements would be immaterial. *See, e.g.*, *Betker*, 692 F.3d at 861-62 (analyzing whether a corrected affidavit would support probable cause in light of those misstatements or omissions a jury might reasonably have found); *Kerns* v. *Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011) (requiring that courts excise all alleged false statements and insert alleged omissions before reviewing the corrected affidavit for probable cause).

In the Fifth Circuit, for instance, juries are responsible for resolving the "facts relied upon to show probable cause" while judges decide the ultimate issue. *See Garris* v. *Rowland*, 678 F.2d 1264, 1270 (5th Cir. 1982). While courts may address whether probable cause exists when the evidence is not in dispute, factual disputes "must be resolved by the jury before controlling legal principles can be applied." *Id.*

Likewise, in the Sixth Circuit, "probable cause determinations are legal determinations that should be made by a court." *Hale*, 396 F.3d at 728. A plaintiff can survive a defendant affiant's motion for summary judgment on grounds of qualified immunity if a genuine factual dispute about the warrant affidavit's contents exists. *See id.* ("[A] jury trial is appropriate

where reasonable disputes of material fact exist on facts underlying a probable cause determination."). But even if the plaintiff's Fourth Amendment claim proceeds to trial, "the jury does not decide whether the facts it has found are legally sufficient to amount to probable cause or entitlement to qualified immunity." *Id.*

The Seventh Circuit's approach differs slightly in that courts can grant qualified immunity even where a factual dispute exists—so long as the evidence is viewed and inferences are resolved in the plaintiff's favor. *See, e.g.*, *Molina ex rel. Molina* v. *Cooper*, 325 F.3d 963, 968-69 (7th Cir. 2003) (agreeing that an informant's statement should be disregarded in a corrected affidavit but determining that probable cause still would have existed). A statement or omission's materiality is a question of law, while the statement's actual veracity and an affiant's state of mind are both questions of fact. *See, e.g.*, *Betker*, 692 F.3d at 861-62 (7th Cir. 2012) ("A reasonable jury could find that Officer Gomez knowingly or with reckless disregard for the truth made false or misleading statements. So we must decide whether probable cause would have existed . . . absent those disputed statements."). At the summary judgment stage, a defendant affiant is entitled to qualified immunity unless the plaintiff shows a "reasonable probability" that the inclusion of omitted information would have led to a different outcome. *See Molina ex rel. Molina* v. *Cooper*, 325 F.3d 963, 970 (7th Cir. 2003) (citing *United States* v. *McNeese*, 901 F.2d 585, 595 (7th Cir. 1990)).

B. In either the Second or the Third Circuits, the conclusions reached below would entitle Bowden to a jury trial.

The lower court's conclusion that "[c]ircumstantial evidence . . . could lead a man of reasonable caution to infer" a crime had been committed," App. 8a., would have been sufficient on its face to send Bowden's case to a jury in either the Second or the Third Circuits. If a reasonable person *could* infer that this evidence indicated that Petitioner fired at the apparent trespassers, one could also infer that it indicated no such thing. Where two or more inferences are reasonably possible, the Second and the Third Circuits instruct that the case must be determined at trial. *See Southerland*, 680 F.3d at 144 (observing that qualified immunity is appropriate only if there is "no genuine dispute that a magistrate would have issued the warrant); *Sherwood*, 113 F.3d at 401 (noting that while probable cause is a question of fact, a court may resolve the question only if the evidence could not support concluding that the corrected affidavit was insufficient).

The difference between "would" and "could" here is, practically speaking, the difference between *actual* probable cause and *arguable* probable cause. Notwithstanding a warrant affiant's deliberate or reckless misstatements or omission, the Eighth Circuit will grant entitled to qualified immunity "if he had 'merely arguable probable cause,' which is a mistaken but objectively reasonable belief the suspect committed a criminal offense." *Dowell* v. *Lincoln Cnty.*, 762 F.3d 770, 777 (8th Cir. 2014) (quoting *McCabe* v. *Parker*, 608 F.3d 1068, 1078 (8th Cir. 2010)). But by insisting that "summary judgment is inappropriate in doubtful cases," *Velardi*, 740 F.3d at

574, the Second and Third Circuits require *actual* probable cause to grant summary judgment.[2] *See generally McColley* v. *Cnty of Rensselaer*, 740 F.3d 817, 831 (2d Cir. 2014) (Calabresi, J., concurring) (noting that granting qualified immunity at summary judgment whenever probable cause is debatable would "conflict[] with the clear holding of *Velardi* that 'doubtful cases' must be sent to a jury").

As Judge Calabresi noted in *McColley*, arguable probable cause necessarily exists whenever reasonable people could disagree about the existence of actual probable cause. *Id.* And the consequence of granting qualified immunity whenever arguable probable cause exists is that "no case of this sort should ever go to a jury." *Id.*

Functionally, granting qualified immunity on arguable qualified immunity reverses the standard of summary judgment, requiring the court to draw reasonable inferences in favor of the nonmoving party. *Cf. Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970) (requiring that all reasonable inferences be drawn in favor of the nonmoving party at summary judgment). "[I]ntroducing reasonableness as a separate step . . . give[s] defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck." *Walczyk*

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[2] A line of Second Circuit cases starting with *Escalera* v. *Lunn* suggested that arguable probable cause is the appropriate standard in that court. *See* 361 F.3d 737, 744 (2d Cir. 2004); *see also McColley*, 740 F.3d at 829 (Calabresi, J., concurring) ("*Escalera* is important . . . for having first made 'arguable probable cause' part of the corrected affidavits doctrine in our Circuit."). But the court limited *Escalera* to prevent "the doctrine of arguable probable cause [from] swallow[ing] the entire rule of qualified immunity as well as the related limitation on our jurisdiction." *See McColley* 740 F.3d at 825-26 (opinion of the court).

v. *Rio*, 496 F.3d 139, 169 (2d Cir. 2007) (Sotomayor, J., concurring).

Additionally, the court below resolved an inference in the defendants' favor when it concluded that Bowden's own statement to officer Martin could be considered inculpatory. *See* App. 8a. By contrast, the Third Circuit explained in *Reedy* v. *Evanson* that such an inference ran contrary to the summary judgment standard. *See* 615 F.3d at 215-18 ("[T]he [district court] erred in deciding that certain facts were inculpatory when they were either irrelevant or even exculpatory.").

In *Reedy*, the court ruled that a district court must draw all inferences in the plaintiff's favor when interpreting a reconstructed affidavit at the summary judgment stage. *Id.* at 215. In that case, an officer applied for a warrant to arrest a victim for allegedly fabricating her rape. *See id.* at 202-04, 208. After the rapist confessed to the attack and Reedy was released, she sued the officer for filing a misleading affidavit in obtaining the arrest warrant. *Id.* at 209. At summary judgment, the district court concluded that while a reasonable jury could find that the officer's affidavit was deliberately or recklessly false, probable cause could still exist if certain facts were interpreted as inculpatory. *Id.* at 214-15. Reversing, the Third Circuit explained that "the District Court erred in its application of the summary judgment standard" by interpreting facts as inculpatory even though the "conduct was susceptible of innocent explanation." *Id.* at 218 (internal quotations omitted).

In this case, the Eighth Circuit improperly interpreted Bowden's statement as inculpatory under

Mo. Rev. Stat. § 571.030.1(4) (2009).[3] *See* App. 8a. This inference was simply unwarranted. Critically, the statute requires that the defendant exhibit the weapon "in an angry or threatening manner." § 571.030.1(4). But as even the Eighth Circuit recognized, Bowden's statement does not indicate that he was angry or threatening; rather, it suggested only that "he purposefully fired the gun" in the opposite direction of the apparent trespassers and that "he thought their behavior was suspicious." App. 9a.

Implicit in the Eighth Circuit's holding on this issue is the conclusion that there would *always* be probable cause to believe that *any* discharge of a firearm was angry or threatening. Sensibly, Missouri state courts have never construed the statute so broadly—and the cases relied upon by the Eighth Circuit do not suggest they would. In *State* v. *Rogers*, for instance, a court concluded that the defendant violated § 571.030.1(4) by firing into the air *because the "[d]efendant testified that the first shot was intended to scare the entire crowd of people.*" 976 S.W.2d 529, 532 (Mo. Ct. App. 1998) (emphasis added). In *State* v. *Johnson*, the court affirmed the defendant's conviction *because after a loud, angry confrontation, he shot the complaining witness's car four times while she watched*. *See* 964 S.W.2d 465, 467 (Mo. Ct. App. 1998). Bowden's statement to Martin did not carry a similar, necessary implication that he was angry or intended to threaten the apparent trespassers—indeed, the purported victims

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[3] The statute at issue prohibits "[1] exhibit[ing], [2] in the presence of one or more persons, [3] any weapon readily capable of lethal use [4] in an angry or threatening manner" as the crime "unlawful use of weapons." Mo. Rev. Stat. 571.030.1(4) (2009).

did not interpret it as a threat at the time—and to the extent the defendants might argue that it *could* carry that implication, that is a question for the factfinder.

C. While the court below concluded that Martin's belief about the apparent trespassers' credibility was irrelevant, the Fifth, the Seventh, and the Tenth Circuits regard this as a triable issue of fact.

The Eighth Circuit's holding below would not survive scrutiny even under the intermediate standards employed by the Fifth, the Seventh, and the Tenth Circuits. The Eighth Circuit disregarded arguments crucial to Bowden's case, concluding that Officer Martin's admission that his affidavit relied exclusively on a witness statement he did not believe was simply irrelevant.

> Much of Bowden's complaint is without merit, because [they] focus[ ] on Martin's subjective beliefs. There was no falsehood in Martin's report that "[a]ccording to the victim's ... Bowden shoot at them," because this was an accurate report of what Simmons and Gyurica told him. That Martin personally did not believe the men was not relevant to the existence of probable cause, so the omission of Martin's subjective belief did not violate the Fourth Amendment.

Appendix Citation (807 F.3d at 882)

That conclusion directly conflicts with the precedents of the Fifth, the Seventh, and the Tenth Circuits—as well as this Court's opinion in *Franks*.

In the Seventh Circuit, not only is an affiant's subjective belief about a witness statement's credibility relevant, but "[p]olice officers have a duty to reveal 'serious doubts' about an informant's testimony." *Molina*, 325 F.3d at 970. Although the officer is under no obligation to reveal less-than-serious doubts, *see id.*, in this case, Martin's initial decision not to charge Bowden—and especially his subsequent admissions that he did not find the apparent trespassers credible—should raise at least a triable issue as to whether his doubt was serious enough that it should have been disclosed to a magistrate.

In the Fifth Circuit, "[t]he reliability of the sources for [an officer's] beliefs" presents a factual question resolved by the jury. *Garris*, 678 F.2d at 1271. In that case, a warrant affiant misrepresented certain facts about an apparent, attempted child abduction as being within his personal knowledge. *Id.* at 1267-68. The officer in that case had not actually witnessed the attempted crime or spoken to anyone who had; rather, he later claimed that he had heard the information from a partner, who had heard it from a school principal, who had heard it from a parent. *See id.* at 1267. After the suit, substantial disagreement arose both over who had told what to whom and over how reasonable it was to rely on the information. *See id.* at 1271. Affirming judgment against the officers, the Fifth Circuit agreed that this dispute presented a factual question for the jury. *See id.*

In *Clanton* v. *Cooper*, the Tenth Circuit acknowledged that whether a warrant affiant relied in bad faith on a confession he knew was false presented a triable question of fact. 129 F.3d at 1155-56. There, an affiant's warrant "was predicated on an

oral statement by Clanton's alleged accomplice, who later testified that his statement was coerced by" the affiant. *Id.* at 1150. The Fifth Circuit acknowledged that if the affiant "relied in good faith on statements . . . that turned out to be false, there would be no *Franks* violation." *Id.* at 1155. But it further concluded that if the affiant "knowingly and intentionally swore to the veracity" of the confession "while knowing it to be false," that would be a "classic *Franks* violation." *Id.* Because only a jury could determine whether he had relied in good faith on the confession, the court denied qualified immunity. *Id.* at 1155-56.

The Eighth Circuit's holding below flies in the face of the reasoned opinions of its sister courts. The court below not only implied that officers have no duty to alert magistrates as to their serious doubts about the statements underpinning their warrant affidavits—the court concluded that this information is irrelevant.

As this Court noted in *Franks*, the truthfulness of an affidavit does not require that "that every fact recited in the warrant affidavit is necessarily correct," but "surely it is to be 'truthful' in the sense that *the information put forth is believed or appropriately accepted by the affiant as true*." 438 U.S. at 154 (emphasis added). The Eighth Circuit's conclusion to the contrary is plainly wrong.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

This case presents this Court the opportunity to provide needed clarification the interaction between the summary judgment and qualified immunity standards in cases involving corrected affidavits. This

clarification will prevent courts from granting qualified immunity to defendants guilty of unreasonable misconduct and thereby depriving citizens of the ability to vindicate their constitutional rights.

Sadly, police perjury, particularly in warrant affidavits, is a common phenomenon. Scholarly evidence suggests that the warrant application process does not effectively deter police perjury in warrant affidavits. Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 Suffolk U. L. Rev. 445, 447 (2008). In fact, as Professor Gard recognizes, "substantial evidence demonstrates that police perjury is so common that scholars describe it as a "subcultural norm rather than an individual aberration." *Id.* at 448. "[O]verwhelming anecdotal evidence" suggests that widespread police perjury occurs most often in pretrial suppression hearings litigating defense claims of police constitutional violations. *See* Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 Notre Dame L. Rev. 1259, 1266 (2005). The widespread occurrence of police perjury requires federal courts to have a clear standard for evaluating qualified immunity in civil rights claims resulting from perjurious affidavits—one that deters police misconduct by permitting meritorious claims to proceed to a jury trial.

However, substantial confusion and incorrect interpretation of the qualified immunity standard in the lower courts has barred the deserving civil rights plaintiff from the jury. In a recent article, Professor Karen Blum argues that judges deciding civil rights suits often misconstrue the summary judgment standard and resolve factual disputes themselves out

of a desire to protect government officials from the hassles of trial that qualified immunity is designed to prevent, but that in doing so, the judge usurps the role of the jury. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 940-41 (2015). In other words, "[r]unaway judges are more common than runaway jurors." *Id.* at 941. Professor Alan Chen argues that this "central paradox" in qualified immunity doctrine, the desire to protect officials from baseless suits while still protecting citizens' rights, "complicates the analysis in ways that make the doctrine not only internally inconsistent, but also extraordinarily difficult and costly to administer." Alan K. Chen, *The Facts About Qualified Immunity*, 55 Emory L.J. 229, 230-31 (2006).

The Third Circuit has noted that this "tension" surrounding the respective roles of the judge and jury is particularly acute in cases involving corrected affidavits: this Court has classified the availability of qualified immunity as a question of law, but many courts have viewed the existence of probable cause to support a warrant as a question of fact. *Sherwood*, 113 F.3d at 401. As the Third Circuit has recognized,"[t]his [tension] may prove problematic in attempting to resolve immunity issues in the early stages of litigation where a genuine and material factual dispute exists concerning probable cause." *Id.* Bowden's case presents the opportunity to formulate a clearer standard for parsing the currently murky interplay between summary judgment and qualified immunity in cases involving warrant affidavits.

The current absence of a clear standard continues to cause inconsistent lower court decisions in corrected affidavit cases. Concurring in the Second

Circuit's denial of qualified immunity in *McColley*, a case which yielded three opinions, Judge Calabresi noted that "our precedents in this area are as divided as our panel." *McColley*, 740 F.3d at 826 (Calabresi, J., concurring). Judge Calabresi succinctly summarized the confusion surrounding corrected affidavits, specifically within Second Circuit case law, but his observations apply equally to the inter-Circuit split: some cases have held that the weight a magistrate would give omitted evidence is a question of fact; if reasonable factfinders could disagree, summary judgment is inappropriate; but if reasonable factfinders could disagree, then by definition *arguable* probable cause exists. *Id.* Professor Gard attributes this inconsistency to an "acute" lack of guidance for lower courts resulting from still-unresolved questions after *Franks* and subsequent major developments in both Fourth Amendment and civil rights law. Gard, *supra*, at 446. Left without "coherent and consistent" standards, "the only area where lower courts have been consistent exists in erecting inappropriate barriers to the vindication of the serious wrongs perpetrated by perjured warrant affidavits." *Id.*

This case illustrates how the lack of guidance on the interplay between the standards creates unjust results and deprives a deserving plaintiff of a jury trial. The Court has long held that good faith must be touchstone of Fourth Amendment. *Franks,* 438 U.S. at 164 ("[W]e derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise."). However, as Professor Gard observes, lower courts have lost sight of this original focus and have applied the exclusionary rule and qualified immunity in cases of bad faith, thereby "erect[ing] inappropriate legal barriers to the

eradication of perjurious warrant affidavits." Gard, *supra*, at 484.

In this case, the Eighth Circuit erected such an inappropriate barrier: the defendant openly admitted bad faith conduct by the police in causing Bowden's arrest without probable cause. Even worse, the violation of Bowden's constitutional rights arose, not from the isolated bad faith of one police officer, but from a concerted conspiracy reaching the entire local police chain of command and an elected county official. Yet rather than allow a jury to evaluate the facts surrounding such flagrant police misconduct, the Eighth Circuit conducted its own re-evaluation of the facts based on its misunderstanding of the summary judgment and qualified immunity standards. In doing so, the Eighth Circuit prevented Bowden from vindicating his Fourth Amendment rights.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-3074

Thomas A. Bowden,

Plaintiff - Appellee,

v.

Steve Meinberg; Patrick Hawkins; Chris Hoffman,

Defendants,

Vernon Martin,

Defendant - Appellant,

Benjamin Simmons; Aaron Gyurica; Wes Wagner,

Defendants.

No. 14-3075

Thomas A. Bowden,

Plaintiff - Appellee,

v.

Steve Meinberg; Patrick Hawkins; Chris Hoffman,

Defendants - Appellants,

Vernon Martin; Benjamin Simmons; Aaron Gyurica,

Defendants,

Wes Wagner,

Defendant - Appellant.

Appeals from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: April 16, 2015
Filed: August 25, 2015

Before MURPHY, COLLOTON, and KELLY, Circuit Judges.

COLLOTON, Circuit Judge.

Thomas Bowden sued several law enforcement officers and the county clerk from Jefferson County, Missouri, alleging, among other claims, that they violated his rights under the Fourth Amendment. Bowden asserts that Deputy Sheriff Vernon Martin drafted, and the remaining defendants caused to be drafted, an affidavit in support of a request for an

arrest warrant that led to Bowden's seizure without probable cause.

The defendants moved for summary judgment on the Fourth Amendment claims based on qualified immunity. The district court denied the motion, but we conclude that the facts taken in the light most favorable to Bowden do not show a violation of his constitutional rights. We therefore reverse the decision of the district court.

I.

In a qualified immunity appeal, we have jurisdiction to resolve purely legal issues based on the facts assumed by the district court, or facts likely assumed by the court, when the record is viewed in the light most favorable to the non-movant. *Johnson v. Jones*, 515 U.S. 304, 313, 319 (1995). We therefore recite the facts in the light most favorable to Bowden.

Benjamin Simmons and Aaron Gyurica were fishing on a bridge near Bowden's property in rural Missouri in 2009. Bowden shouted to the men to identify themselves, and then fired a shotgun from his back deck when they failed to respond. After the gunshot, Bowden and Simmons engaged in a heated verbal altercation, during which Bowden was holding his shotgun. Bowden and Simmons each called the police, and Martin was dispatched to investigate.

Martin first spoke with Simmons and Gyurica at the residence of Simmons's grandmother, Barbara Voyles. Simmons and Gyurica reported their belief that Bowden shot at them on the bridge. They explained that they heard a gunshot and then saw leaves falling in front of them after the blast. Voyles stated that she could call Howard Wagner, the Jefferson County circuit clerk, to see what Voyles

could do.

Martin next spoke with Bowden. Bowden admitted that he had fired his shotgun, but said that he shot the weapon in a direction away from Simmons and Gyurica. Martin relayed these circumstances by telephone to his supervisor, Corporal Chris Hoffman. Hoffman ordered Martin to seize the shotgun and to draft a statement averring that there was probable cause that Bowden had unlawfully used a weapon.

According to Martin, Hoffman informed him that a call was placed from Voyles's residence to Howard Wagner, the circuit clerk, who contacted Lieutenant Colonel Steve Meinberg, who in turn contacted Lieutenant Patrick Hawkins. In Martin's account, Hawkins then directed Hoffman that Martin should be ordered to seize the shotgun and draft the probable cause statement. Bowden initially named circuit clerk Howard Wagner as a defendant, but later substituted the county clerk, Wes Wagner, after discovery revealed that two calls were made from Voyles's residence to Wes Wagner's office.

After receiving direction from Hoffman, Martin returned to Bowden's residence, seized his shotgun, and obtained a written statement from him. Bowden explained that he had fired in a direction away from Simmons and Gyurica after they failed to identify themselves, because he thought their actions were "suspicious." Martin also obtained written statements from Simmons and Gyurica. They reiterated their belief that Bowden shot at them on the bridge.

Martin then drafted a probable cause statement, which read:

> 1. I have probable cause to believe that . . . [Bowden] committed one or more criminal

> offense(s):
>
> Unlawful Use of a Weapon
>
> 2. The facts supporting this belief are as follows:
>
> According to the victim's [sic], they reported that they parked their pick up truck on a low water bridge in the area of [Bowden's address], to fish off the bridge when a local resident Thomas Bowden shoot [sic] at them with his shotgun.

App. 243. Martin later admitted that he did not personally believe the claims of Simmons and Gyurica that Bowden had fired a weapon in their direction. Martin also said that he did not think the facts established that Bowden had violated any Missouri law.

The Jefferson County prosecutor obtained an arrest warrant based on Martin's probable cause statement. Bowden learned that the warrant had been issued, and turned himself in. A Missouri court then held a preliminary hearing and determined that there was probable cause to believe that Bowden violated Mo. Rev. Stat. § 571.030.1(4). Under that statute, a person commits the crime of unlawful use of weapons if he "knowingly . . . [e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner." Bowden was acquitted following a jury trial in 2010.

Bowden filed his amended complaint in this case against Martin, Meinberg, Hawkins, Hoffman, and Wes Wagner in December 2013. The amended complaint alleged, as relevant on appeal, that the defendants violated Bowden's rights under the Fourth

Amendment by causing him to be arrested without probable cause. The defendants moved for summary judgment, arguing that they were entitled to qualified immunity and, alternatively, that collateral estoppel barred Bowden from relitigating the Missouri court's determination that there was probable cause to believe Bowden violated Missouri law.

The district court denied the motions for summary judgment. The court ruled that collateral estoppel did not apply, because Bowden now sought to challenge the "integrity" of the evidence presented at the preliminary cause hearing. After noting that Martin's affidavit asserted probable cause to arrest Bowden even though Martin did not believe that probable cause existed, the court denied summary judgment because there was "a genuine issue of material fact regarding the existence of probable cause." The court ruled that Martin was not entitled to qualified immunity because "the qualified immunity inquiry is identical to the probable cause question." The district court did not specifically address the qualified immunity of the other defendants, but denied their motion for summary judgment on that issue as well. All of the officials appeal the district court's denial of qualified immunity, and all but Martin appeal the court's ruling on collateral estoppel.

II.

Bowden first challenges our jurisdiction over this appeal. We have jurisdiction over interlocutory appeals of orders denying qualified immunity if the appeal seeks review of a purely legal issue. *Johnson*, 515 U.S. at 313. We do not have jurisdiction to review "which facts a party may, or may not, be able to prove at trial." *Id.* In this case, the defendants contend that when the facts are viewed in the light most favorable

to Bowden, they did not violate Bowden's clearly established rights under the Fourth Amendment. This is a purely legal issue over which we have jurisdiction. *Id.*; *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 813 (8th Cir. 2008). We review de novo the district court's decision on qualified immunity, viewing the evidence in the light most favorable to Bowden. *Doe v. Flaherty*, 623 F.3d 577, 583 (8th Cir. 2010).

Public officials are immune from suit if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A plaintiff seeking damages under 42 U.S.C. § 1983 must show first that the defendant's conduct violated a constitutional right and, second, that the right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). In this case, we elect to consider the questions in that order.

Bowden first argues that Martin violated his rights under the Fourth Amendment by averring that he "ha[d] probable cause to believe" that Bowden committed an offense when Martin did not actually believe that there was probable cause. Whether probable cause existed, however, is an objective question of law. Martin's subjective belief is irrelevant to whether his affidavit included sufficient facts to establish probable cause. Indeed, we have upheld the lawfulness of an arrest based on probable cause even where the arresting officers testified that they believed probable cause was lacking. *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436, 1439-41 (8th Cir. 1989). Martin's averment that he "ha[d] probable cause to believe" that Bowden committed an offense was thus not a false statement, because the assertion set forth a legal conclusion not a statement of

historical fact.

Bowden also argues that Martin intentionally or recklessly included false statements in, and omitted facts from, other portions of the probable cause statement. Much of Bowden's complaint is without merit, because it focuses on Martin's subjective beliefs. There was no falsehood in Martin's report that "[a]ccording to the victim's . . . Bowden shoot at them," because this was an accurate report of what Simmons and Gyurica told him. That Martin personally did not believe the men was not relevant to the existence of probable cause, so the omission of Martin's subjective belief did not violate the Fourth Amendment.

Bowden does complain about the omission of two historical facts: (1) that Simmons and Gyurica did not actually see Bowden fire his shotgun and (2) that Bowden told Martin that he fired the shotgun in a direction away from Simmons and Gyurica. Even assuming for the sake of analysis that Martin intentionally or recklessly omitted these facts from his affidavit, there was no violation of the Fourth Amendment. If we reconstruct a hypothetical affidavit that includes these additional facts, *see Hawkins v. Gage County, Neb.*, 759 F.3d 951, 959 (8th Cir. 2014), there was still probable cause to believe that Bowden committed an offense. That Simmons and Gyurica were not looking at Bowden when he fired does not establish that Bowden was innocent. Circumstantial evidence of Bowden shouting at the men and leaves falling from trees above them after the gunshot could lead a man of reasonable caution to infer that the gun was fired at the fishermen. Bowden's denial merely created a credibility question; it did not destroy probable cause.

Even if Bowden's account had been included and

believed, moreover, there was still probable cause to believe that an offense was committed. The Missouri statute does not require proof that a defendant fired a weapon at another person. It is an offense knowingly to "[e]xhibit[]" the firearm in the "presence" of another person "in an angry or threatening manner" when the weapon is "readily capable of lethal use." Mo. Rev. Stat. § 571.030.1(4). While Bowden denied that he fired his shotgun at the men on the bridge, he admitted that he purposefully fired the gun from his property nearby because the men did not identify themselves and he thought their behavior was suspicious. App. 245. There was probable cause to believe that Bowden knowingly "exhibited" the shotgun in the presence of the fishermen when he fired it, *see State v. Johnson*, 964 S.W.2d 465, 468 (Mo. Ct. App. 1998), that the exhibition was "angry or threatening" even if the gun was not aimed at the fishermen, *see State v. Rogers*, 976 S.W.2d 529, 532 (Mo. Ct. App. 1998), and that the weapon was "readily capable of lethal use" even if it had not yet been so used. *See State v. Wright*, 382 S.W.3d 902, 904-05 (Mo. 2012).

Because we conclude that Martin did not violate the Fourth Amendment, the alleged conspiracy by the remaining defendants to cause Martin's conduct also does not amount to a constitutional violation. *Slusarchuk v. Hoff*, 346 F.3d 1178, 1183 (8th Cir. 2003). We need not address the separate question of whether any infringed right was clearly established, although we note that the qualified immunity inquiry is not identical to the question of probable cause: an official enjoys qualified immunity for an objectively reasonable judgment about probable cause that turns out to be incorrect. *Anderson v. Creighton*, 483 U.S. 635, 643-44 (1987). We also do not consider whether

there would be jurisdiction to review the district court's decision on collateral estoppel, and we express no view on the merits of that issue.

* * *

For the foregoing reasons, the order of the district court, R. Doc. 85, is reversed, and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Thomas A. Bowden,

Plaintiff,

v.

Steve Meinberg, et al.,

Defendants.

No. 14:12-CV-1824 JAR
Signed Aug. 28, 2014

MEMORANDUM AND ORDER

JOHN A. ROSS, District Judge.

This matter is before the Court on the following motions: Defendant Vernon Martin's Motion for Summary Judgment (Doc. No. 52); Plaintiff's Motion for Partial Summary Judgment against Defendant Vernon Martin on the Issue of Liability (Doc. No. 57); Defendants Meinberg, Hawkins, Hoffman and Wagner's Motion for

Summary Judgment (Doc. No. 59); Plaintiff's Motion for Partial Summary Judgment Against Defendants Meinberg, Hawkins, Hoffman and Wagner on the Issue of Probable Cause (Doc. No. 64); Plaintiff's Motion to Exclude or, in the Alternative, to Limit the Trial Testimony of Diane Damos (Doc. No. 78); and Defendants' Motions to Exclude Testimony of Plaintiff's Expert Artemis Keitt Darby. (Doc. Nos. 80, 82) The motions are briefed and ready for disposition.[1]

I. Factual background[2][3]

Plaintiff Thomas A. Bowden brings this §1983 action against Deputy Sheriff Vernon Martin (Martin), Lieutenant Colonel Steve Meinberg (Meinberg), Lieutenant Patrick Hawkins (Hawkins), and Corporal Chris Hoffman (Hoffman) of the Jefferson County Sheriff's Office, and Wes

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[1] Plaintiff did not file a reply to Defendants' memoranda in opposition to his motions for partial summary judgment or his motion to exclude the trial testimony of Diane Damos. Defendants did not file a reply to Plaintiff's memorandum in opposition to their motions to exclude the testimony of his expert Artemis Keitt Darby.

[2] The factual background is taken from Plaintiff's Statements of Uncontroverted Material Facts (PSOF-1, Doc. No.

[3] -1; PSOF-2, Doc. No. 65), Defendant Vernon Martin's Statement of Uncontroverted Material Facts (Martin SOF, Doc. No. 53) and Statement of Additional Material Facts (Martin ASOF, Doc. No. 72), and Defendants Steve Meinberg, Patrick Hawkins, Chris Hoffman and Wes Wagner's Statement of Uncontroverted Material Facts.
(County Defendants SOF, Doc. No. 61)

Wagner (Wagner), Jefferson County Clerk, all in their individual and official capacities, as well as two Jefferson County residents, Benjamin Simmons and Aaron Gyurica.[4] Plaintiff alleges Defendants conspired to have him arrested for the crime of unlawful use of a weapon without probable cause in violation of his civil rights. (First Amended Complaint for Damages (FAC), Doc. No. 41) He further alleges state law claims of false arrest, malicious prosecution, fraudulent concealment and civil conspiracy.

This action arises out of an incident that occurred on January 29, 2009 in the area of Plaintiff's home located at 2120 Seneca Court in Jefferson County, Missouri. Defendants Ben Simmons and Aaron Gyurica were fishing from a bridge crossing Plattin Creek on Seneca Drive. Plaintiff saw the men fishing and shouted out at them to identify themselves. Simmons and Gyurica did not respond. Plaintiff fired a shotgun into the air from his back deck. According to Plaintiff, he fired his shotgun in the opposite direction of Simmons and Gyurica. (Martin SOF at ¶ 9) Following the gunshot, Plaintiff and Simmons engaged in a heated verbal altercation while Plaintiff was holding his shotgun. Thereafter, both Plaintiff and Simmons called 911 to report the incident. Martin responded to the calls.

Martin went first to the residence of Barbara Voyles, Simmons' grandmother. He spoke with

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[4] A clerk's entry of default was entered against Simmons and Gyurica for their failure to file an answer or other responsive pleading within the time required by Fed.R.Civ.P. 4(d)(3). (Doc. Nos. 16, 17)

Simmons and Gyruica, who told him they heard a shotgun blast and believed Plaintiff shot at them because they saw leaves fall in front of them following the blast. Simmons demanded Plaintiff be arrested; Gyurica insisted something be done. Voyles said she guessed she could call Howard Wagner to "see what she could do about this." (Martin SOF at ¶ 8). Whether Howard Wagner was actually called is disputed. (See Voyles Depo., Doc. No. 53-7 at 29:16-30:1; Simmons Affidavit, Doc. No. 61-5 at ¶ 4(a); County Defendants SOF at ¶ 8).[5] Next, Martin spoke with Plaintiff at his residence. Plaintiff told Martin about the exchange with Simmons and that he had fired his shotgun in the opposite direction of the two men. He also told Martin about the verbal altercation he had with Simmons while he, Plaintiff, was holding his shotgun.

Martin then spoke by telephone with his supervisor, Defendant Hoffman. Upon hearing the facts from Martin, Hoffman ordered Martin to seize Plaintiff's shotgun and write a report and probable cause statement for unlawful use of a weapon. According to Martin, in that phone call Hoffman told him that "somebody from [the trailer that Simmons was at] had called Howard Wagner because they had worked for Howard Wagner." Martin further testified that "Howard Wagner, allegedly – and I don't know this to be true, but Howard Wagner allegedly called

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[5] Pursuant to a subpoena, Plaintiff obtained call detail records from AT&T showing three calls made to Jefferson County government telephone extensions during the time Martin was on the scene investigating the incident, including two to the main phone number for the Jefferson County Clerk's office at 9:39 a.m. and 10:18 a.m. (Doc. No. 58-9)

Lt. Colonel Meinberg ….who called Lt. Hawkins and Lt. Hawkins contacted [Cpl. Hoffman] to convey to me to do a report and seize the weapon and to draft a probable cause statement charging Mr. Bowden with unlawful use of a weapon." (PSOF-1 at ¶ 11e; PSOF-2 at ¶ 5e; Martin SOF at ¶ 14; County Defendants SOF at ¶¶ 4-5) The County Defendants deny having any communication with each other regarding the incident. (County Defendants SOF at ¶¶ 2, 3, 7)

> Martin's probable cause statement alleges the following:
>
> I, Deputy Vernon Martin #242, knowing that false statements on this form are punishable by law, *state that the facts contained herein are true*.
>
> 1. *I have probable cause to believe* that on 7/29/2009, at 2120 Seneca Court, Festus, Missouri, in the County of Jefferson, Thomas Bowden … committed one or more criminal offense(s):
>
> Unlawful Use of a Weapon
>
> 2. The facts supporting this belief are as follows:
>
> According to the victim's [sic], they reported that they parked their pickup truck on a low water bridge in the area of 2120 Seneca Court, to fish off the bridge when a local resident Thomas Bowden shoot [sic] at them with his shotgun.

(Emphasis added). (Doc. No. 53-5 at 8) Martin later admitted that after fully investigating the matter, he did not believe a crime had been committed and that he would not have written and signed a probable cause statement but for his supervising officer ordering him to do so. (PSOF-1 at 11; PSOF-2 at 5).

Plaintiff was subsequently charged with unlawful use of a weapon, a Class D felony in violation of RSMo. § 571.030.1(4).[6] A preliminary hearing was held before Jefferson County Circuit Court Judge Nathan B. Stewart. Simmons and Martin both testified and were crossexamined by Plaintiff's counsel. Plaintiff disputes that his attorney was given the opportunity to present evidence at the preliminary hearing. (Martin SOF at ¶ 19 and Pltf. Resp.) Judge Stewart determined that probable cause existed to charge Plaintiff with unlawful use of a weapon and bound him over for trial. Martin testified at Plaintiff's criminal trial. Plaintiff was acquitted following a jury trial.

II. Summary Judgment motions

I. A. LEGAL STANDARD

Summary judgment is appropriate when no genuine issue of material fact exists in the case and the movant is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The initial burden is placed on the moving party. City of Mt. Pleasant, Iowa v. Associated Elec.

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[6] § 571.030.1(4) provides that "[a] person commits the crime of unlawful use of weapons if he or she knowingly: exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner…"

Co-op., Inc., 838 F.2d 268, 273 (8th Cir. 1988). If the record demonstrates that no genuine issue of fact is in dispute, the burden then shifts to the non-moving party, who must set forth affirmative evidence and specific facts showing a genuine dispute on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether summary judgment is appropriate in a particular case, the Court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. The Court is required to resolve all conflicts of evidence in favor of the nonmoving party. Osborn v. E.F. Hutton & Co., Inc., 853 F.2d 616, 619
(8th Cir. 1988).

II. DISCUSSION

Central to all of the summary judgment motions is the issue of probable cause for Plaintiff's arrest. "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." Green v. State of Missouri, 734 F.Supp.2d. 814, 832 (E.D.Mo.2010) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). More specifically, "[p]robable cause exists if the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed an offense at the time of the arrest." Hoffmeyer v. Porter, 2012 WL 5845094, at *3 (E.D.Mo. Nov. 19, 2012) (quoting Green v. Nocciero, 676 F.3d 748, 751 (8th Cir.2012)). In an action for false arrest, probable cause is generally a question of fact for the jury. Dowell v. Lincoln County, 927 F.Supp.2d 741, 756 (E.D.Mo. 2013) (citing State v. Morgenroth, 227 S.W.3d 517, 522 n. 6

(Mo.Ct.App.2007).

Nonetheless, to defeat summary judgment there must be material facts in dispute, "with one version establishing reasonable grounds and another refuting it." Id. (quoting Signorino v. Nat'l Super Mkts., Inc., 782 S.W.2d 100, 103 (Mo.Ct.App.1989)).

III. ESTOPPEL

As a threshold matter, Defendants argue Plaintiff is estopped from litigating the issue of probable cause in light of the Jefferson County Circuit Court's finding of probable cause in the preliminary hearing. Defendants rely on Guenther v. Holmgren, 738 F.2d 879 (7th Cir. 1984) and Sanders v. Frisby, 736 F.2d 1230 (8th Cir. 1984), two cases holding that the doctrine of collateral estoppel barred plaintiffs' § 1983 claims for alleged violations of Fourth Amendment rights because those claims had already been litigated and decided adversely to them during state court proceedings. (Doc. No. 56 at 5-8) Plaintiff responds that a probable cause finding made in a "summary and cursory" criminal preliminary hearing does not estop him from later bringing a § 1983 claim challenging the integrity, rather than the sufficiency, of the evidence, citing Whitley v. Seibel, 676 F.2d 245 (7th Cir. 1982). Plaintiff argues he did not have an opportunity to fully discover evidence and litigate whether his arrest was perpetrated in bad faith and in furtherance of a conspiracy or to appeal the circuit court's finding of probable cause. (Doc. No. 75 at 6-10).

In Allen v. McCurry, 449 U.S. 90 (1980), the

Supreme Court held that a federal court must "give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerged would do so." Id. at 96. In Haring v. Prosise, 462 U.S. 306 (1983), the Court indicated that federal courts should apply state collateral estoppel law in determining whether a § 1983 claim is precluded by a prior state proceeding.

Missouri courts consider four factors in applying collateral estoppel: (1) the issues in the present case and the prior adjudication must be identical; (2) the judgment in the prior adjudication must be on the merits; (3) "the party against whom collateral estoppel [is] asserted [must have been] the same party or in privity with a party in the prior adjudication;" and (4) "the party against whom collateral estoppel is asserted [must] have [had] a full and fair opportunity to litigate the issue in the prior suit." In re Scarborough, 171 F.3d 638, 641-42 (8th Cir. 1999) (quoting State v. Nunley, 923 S.W.2d 911, 922 (Mo.1996)).

Applying these principles, the court in Guenther concluded that Guenther's probable cause claim was precluded by the state court's determination of that claim in the state criminal preliminary hearing where he was able to thoroughly litigate and challenge issues of the arresting officer's veracity and good faith. Guenther, 738 F.2d at 884. Specifically, Guenther's counsel rigorously cross-examined the officer regarding his version of the events leading up to the arrest and called a witness to rebut the officer's version. The court heard considerable testimony from both sides before making its probable cause determination. The Guenther court held "[t]here can be little doubt that

the issue of [the officer's] veracity and good faith – the linchpin of [plaintiff's] § 1983 Fourth Amendment claim – was both raised and actually litigated in the preliminary hearing." Id.

In Sanders, the court determined that Sanders had fully litigated his Fourth Amendment claims in the state trial court, but failed on appeal from his conviction to set forth any assignments of error with respect to the trial court's denial of those claims, thereby waiving them. Sanders, 736 F.2d at 1232. Under these circumstances, the court concluded that a Missouri court would give collateral estoppel effect to the trial court's ruling on the Fourth Amendment claims in a subsequent § 1983 action based on the same claims. Id.

These cases are distinguishable from Whitely, 676 F.2d 245. In that case, Whitely's § 1983 claim was based on the arresting officer's failure to investigate his alibi and his misrepresentations to prosecuting authorities that he had checked the alibi and found it to be false. Unlike in Guenther, Whitely, presumably for tactical reasons, never raised or litigated the issue of the arresting officer's veracity during the preliminary hearing; nor did he raise or litigate the issue of his purported alibi witness. Id. at 249. The court concluded that the finding of probable cause at the preliminary hearing did not estop Whitely from bringing his § 1983 suit for false arrest because it attacked the integrity, rather than the sufficiency, of the evidence. In addition, the court found Whitely's decision not to raise his alibi defense at the preliminary hearing did not amount to a waiver of that defense. The court questioned whether collateral estoppel would ever be appropriate solely

on the basis of a preliminary hearing, noting that a preliminary hearing is a "relatively summary proceeding, designed only to reach an interim decision in the process of bringing a defendant to trial. The suspect has no right to discover what is in the prosecutor's arsenal, or to appeal the finding of probable cause. In fact, the preliminary hearing can be dispensed with entirely and the case taken directly to a grand jury. Under these circumstances a suspect may not have had time to prepare his case when the preliminary hearing is held, or may have strategic reasons for waiting until trial to make his defense." Id. at 249-50.

In the instant case, Plaintiff disputes that he was able to present evidence and fully and fairly litigate the issue of the integrity of the evidence presented at the preliminary hearing. (See Martin SOF at ¶ 19 and Pltf. Resp.) The Court has reviewed the transcript of Plaintiff's preliminary hearing and in particular Martin's testimony. (Doc. No. 53-6 at 31:5-51:20) Plaintiff's counsel attempted to question Martin on his opinion as to whether or not a crime had been committed; however, the State's objection to the line of questioning was sustained. (Id. at 49:3-14) Thus, Judge Stewart did not consider the veracity of the state's case against Plaintiff. As in Whitley, Plaintiff's § 1983 suit attacks the integrity, rather than the sufficiency of the evidence of probable cause. Under these circumstances, the Court concludes that collateral estoppel does not apply to bar Plaintiff's suit. "Nothing in Allen v. McCurry requires us to depart from the traditional precept that a party is not estopped to raise issues that he has had less than a "full and fair opportunity" to litigate in a prior proceeding." Whitley, 676 F.2d at 250 (citing 449 U.S. at 95 n. 7,

100-101).

IV. PROBABLE CAUSE

In support of his motions for partial summary judgment, Plaintiff argues that Martin's admissions that he lacked probable cause to arrest Plaintiff and believed Plaintiff's rights were violated are dispositive of the issue of probable cause. Specifically, Martin testified on deposition that he did not believe the facts of the situation fit the elements of any crime, including any weapons crime (Martin Deposition, Doc. No. 65-2, 27:3-8, 32:8-19, 38:17-24, 66:22-67:14); that he would not have written and signed a probable cause statement but for Hoffman ordering him to do so (Id. at 40:21 -25, 41:1-2, 43:7-44:2); and that he believes Plaintiff's rights were violated because "there was no just cause for this report to even be wrote (sic)" and it was only written because it was ordered from the top down. (Id. at 17:18-24).

Defendants respond that because probable cause depends on an objective analysis of the facts, i.e., what a reasonable officer could have believed under the circumstances, see Royster v. Nichols, 698 F.3d 681, 688 (8th Cir. 2012), Martin's subjective opinion on the existence of probable cause is neither relevant nor determinative. Defendants argue that the facts known to Martin at the time he wrote his probable cause statement were sufficient under the objective reasonableness standard. When Martin investigated the scene, Simmons told him he believed Plaintiff shot at him because he heard a gunshot, after which leaves fell from a tree in his immediate vicinity. (Martin ASOF at ¶ 3) In addition, Plaintiff admitted firing his shotgun, albeit in the opposite

direction (id. at ¶ 4), and that he and Simmons had engaged in a heated discussion after the shot was fired, during which time Plaintiff held his shotgun. (Id. at ¶¶ 1-5) Defendants maintain that Martin did not falsify any of the facts reported to him – his summary of the victims' statement is accurate – and that the only information omitted from his probable cause statement is his subjective belief that there was no probable cause to arrest Plaintiff, which omission is immaterial.

In reply, Plaintiff asserts that Martin's subjective beliefs are indeed relevant because the Fourth Amendment requires an affiant to be truthful and act in good faith. "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing. This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct . . . But surely it is to be "truthful" in the sense that the *information put forth is believed or appropriately accepted by the affiant as true*." Franks v. Delaware, 438 U.S. 154, 164-65 (1978). (Emphasis added.)

It is clearly established that the Fourth Amendment prohibits a police officer from manufacturing probable cause by knowingly including false statements in a warrant affidavit. See Franks, 438 U.S. 154. Here, it is undisputed that at the time he completed his report, Martin did not in fact believe there was probable cause to arrest Plaintiff. And yet, in his probable cause statement, Martin stated he had probable cause to believe Plaintiff committed a crime:

I, Deputy Vernon Martin #242, knowing that

> false statements on this form are punishable by law, state that the facts contained herein are true.
>
> 1. I have probable cause to believe that [Plaintiff committed the offense of unlawful use of weapon].

An officer must have a reasonable belief that an offense is occurring. If Martin had no reasonable basis for believing that Plaintiff had committed a crime it, then it was not objectively reasonable for him to use the information to obtain an arrest warrant. Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). Under the facts and circumstances of this case, the Court finds a genuine issue of material fact regarding the existence of probable cause for the arrest and will therefore deny the motions for summary judgment on this basis.

V. STATE LAW CLAIMS

Plaintiff asserts claims against Defendants for civil conspiracy, fraudulent concealment, false arrest and malicious prosecution, all of which rely on a showing that there was no probable cause for Plaintiff's arrest. As discussed above, the Court cannot make a probable cause determination based on the record before it. Thus, it cannot enter judgment as a matter of law on Defendants' motions on the merits of Plaintiff's state law claims.

VI. QUALIFIED IMMUNITY

Defendant Martin has also raised the issue of qualified immunity. To determine whether an official

is entitled to qualified immunity, the Court conducts a two-part analysis. First, the Court must determine whether, "taking the facts in the light most favorable to the injured party, the facts alleged demonstrate that the official's conduct violated a constitutional right." White v. McKinley, 519 F.3d 806, 813 (8th Cir.2008) (citing Clemmons v. Armontrout, 477 F.3d 962, 965 (8th Cir.2007)). If a violation is found, the Court must then analyze whether the right was clearly established. Id. "To determine whether a right is clearly established we ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id.

Here, the right in question is the Fourth Amendment right not to be arrested without probable cause, a right which is clearly established. See Habiger v. City of Fargo, 80 F.3d 289, 295 (8th Cir. 1996). As a result, the qualified immunity inquiry is identical to the probable cause question. See Alberternst v. Hunt, 2011 WL 6140888, at *4 (E.D.Mo. Dec. 9, 2011). Because the Court has found there is a genuine issue of material fact as to whether probable cause existed, Martin is not entitled to summary judgment based on qualified immunity. White, 519 F.3d at 813 ("The party asserting immunity always has the burden to establish the relevant predicate facts, and at the summary judgment stage, the nonmoving party is given the benefit of all reasonable inferences. If there is a genuine dispute concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment."). See also Berry v. Davis, No. 13-3610 (8th Cir. August 18, 2014) (citing Nance v. Sammis, 586 F.3d 604, 609 (8th Cir. 2009) (denial of qualified immunity will be affirmed if genuine issue of material fact exists as to

whether reasonable officer could have believed his actions were lawful).

II. Daubert motions

Plaintiff is a corporate airplane pilot. He claims he has suffered lost past earnings and will sustain lost future earnings as a result of the felony gun charge that now appears on a criminal background check. (FAC at ¶ 37g.) Both sides have endorsed expert witnesses to give their opinions concerning the effect of the felony gun charge on Plaintiff's ability to earn a living as a professional pilot.

VII.A. LEGAL STANDARD

The federal rules of evidence and related case law require that an expert be qualified and that the expert's testimony be both reliable and relevant. See Federal Rule of Evidence 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The burden of establishing this predicate for an expert's testimony falls on the party producing the expert; the trial court determines whether that party has met its burden. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 592, 597 (1993).

An expert may be qualified by "knowledge, skill, experience, training, or education." Fed.R.Evid. 702. Testimony that is not scientific in nature is better judged by examining whether the expert has sufficient personal knowledge, work experience, or training to support the opinions offered. See Fed.R.Evid. 702; Kumho Tire Co., 526 U.S. at 150-51. In general, the court's responsibility "is to make

certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co., 526 U.S. at 152.

Reliability hinges on the sufficiency of the facts or data on which the opinion is based, the dependability of the principles and methods employed, and the proper application of the principles and methods to the facts of the case. Fed.R.Evid. 702. If the opinion is based solely or primarily on experience, the witness must connect the experience to the conclusion offered, must explain why the experience is a sufficient basis for the opinion, and must demonstrate the appropriateness of the application of the experience to the facts. Fed.R.Evid. 702, Advisory Committee Notes. To be relevant, the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702; Daubert, 509 U.S. at 591.

"Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony." Weisgram v. Marley Co., 169 F.3d 514, 523 (8th Cir.1999), aff'd, 528 U.S. 440 (2000). The Rule "favors admissibility if the testimony will assist the trier of fact." Clark v. Heidrick, 150 F.3d 912, 915 (8th Cir.1998). Doubt regarding "whether an expert's testimony will be useful should generally be resolved in favor of admissibility." Id. (citation and internal quotation omitted).

B. Discussion

VIII. PLAINTIFF'S MOTION TO EXCLUDE DIANE DAMOS'S TESTIMONY

Defendants retained Diane L. Damos, Ph.D., to address the statements of fact and opinions offered by Plaintiff's expert Artemis Keitt (Kit) Darby, opine on the extent to which the criminal charges against Plaintiff impact his employability in the aviation industry, and address Plaintiff's claims in light of his documented attempts to obtain employment. (Damos Report, Doc. No. 79-1 at 2) Dr. Damos is an aviation psychologist who consults with the airline industry on pilot selection and aviation human factors. (CV of Diane L. Damos, Doc. No. 79-1 at 27-51) Based on her research, review of the materials provided and her personal experience in the aviation industry, Dr. Damos opined that the criminal matter would have "no significant impact on [Plaintiff's] employability in the aviation industry after his acquittal." (Damos Report at 3-4) First she states that the assertion by Plaintiff's expert, Mr. Kit Darby, that Plaintiff had a 100% probability of employment as a vice president of flight operations by a foreign corporation from the time of the incident until age 65 has no basis in fact, is speculative, and cannot be held to a reasonable degree of certainty. (Id. at 3) Second, Dr. Damos asserts that contrary to Mr. Darby's Career Earnings and Benefits Model Report, no one can say to a reasonable degree of certainty that Plaintiff will be unable to obtain a position as a non-flying flight department manager because of his arrest record. (Id.) Finally, Dr. Damos states that during the period from July 2009 to June 2010, Plaintiff was not conclusively prevented from working as a professional pilot overseas. (Id. at 4).

In support of his motion, Plaintiff argues it is

impossible for Dr. Damos to give a reliable and qualified opinion on the question at issue here for two reasons. First, she lacks actual real world experience in hiring pilots. (Doc. No. 79 at 4) Dr. Damos admits she only teaches how to quantify the selection of pilots and has never actually been employed by a private or commercial airline to perform the pilot screening and selection. (Damos Deposition, Doc. No. 79-2 at 55:2256:5; 73:23-75:1). Second, Dr. Damos lacks knowledge and experience in criminal history background checks. (Doc. No. 79 at 5) Although she acknowledges that criminal background checks are performed on pilots during the hiring process and that an applicant's criminal history will be a factor in the hiring process (see Damos Depo., 78:1-7), she does not know whether a felony criminal charge absent a conviction will appear on a criminal history background check. (Id. at 7:14-23; 58:13-16; 60:13-20).

The Court is satisfied that Dr. Damos is qualified to testify regarding Plaintiff's employability in the airline industry based on her thirty-plus years of general aviation industry experience as well as her professional experience in teaching and consulting on the screening and selection of pilots. The fact that she has not actually worked for an airline does not persuade the Court otherwise. The extent of an expert's experience or training goes to the weight of the witness's testimony, not its admissibility. Robinson v. GEICO Gen. Ins. Co., 447 F.3d 1096, 1100-01 (8th Cir.2006) (internal quotation marks and citation omitted). Dr. Damos's relative experience in the matter at issue may be explored by Plaintiff on cross-examination. See Minn.Supply Co. v. Raymond Corp., 472 F.3d 524, 544 (8th Cir. 2006). For these reasons, Plaintiff's motion to exclude Dr. Damos's

testimony will be denied.

IX. DEFENDANTS' MOTIONS TO EXCLUDE ARTEMIS KEITT DARBY'S TESTIMONY

Kit Darby was retained to develop an employability and career earnings model for Plaintiff. (Darby Expert Report, Doc. No. 81-2 at 2) Mr. Darby is a pilot, a former publisher of aviation industry job availability and salary information, and an aviation industry career consultant. He is president of KitDarby.comAviation Consulting, LLC. (Darby Report, at 2) Mr. Darby opined that the most probable income loss for Plaintiff is $2,101,739, which reflects the expected salary, benefits, and retirement income loss after Plaintiff's arrest on July 29, 2009. (Id. at 15) He further opines that the criminal charge puts Plaintiff at a competitive disadvantage in the interview process. (Id. at 6; Darby Deposition, Doc. No. 81-1 at 67:1-68:24) Defendants argue Mr. Darby's ultimate opinion on employability is not reliable because it requires speculation, is not based on experience, ignores objective data, and provides unfounded extrapolation from the facts of record. (Doc. No. 80 at 10-12) Defendants further argue that Mr. Darby's opinions regarding impact on employability, based "somewhat" on common sense and borne out by "the logic of the common man" (see Darby Deposition, Doc. No. 81-1 at 195:23-25; 196:1-8), are not helpful to a jury. (Doc. No. 80 at 3) Lastly, Defendants argue Mr. Darby is unqualified to render opinions regarding employability in this case. (Doc. No. 80 at 12-13).

The Court is satisfied that Mr. Darby is qualified to testify regarding Plaintiff's employability in the airline industry based on his thirty plus years

of experience analyzing the pilot job market, data compilation, interviews with airline applicants and recruiting personnel. (Darby Professional Publications and Biography, Doc. No. 81-2 at 19-39) Because the airline industry is highly specialized and regulated, the Court finds Mr. Darby's testimony regarding the requirements and qualifications for employment as a pilot will be helpful to a jury.

Defendants take issue with Mr. Darby's underlying data, particularly with regard to foreign market salaries and benefits. Generally, questions as to the sources and bases of an expert's opinion affect the weight, rather than the admissibility of the opinion. "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." Minn. Supply Co. v. Raymond Corp., 472 F.3d 524, 544 (8th Cir. 2006) (quotation omitted). For these reasons, Defendants' motions to exclude Mr. Darby's opinions and testimony will be denied.

Accordingly,

IT IS HEREBY ORDERED that Defendant Vernon Martin's Motion for Summary Judgment [52] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment against Defendant Vernon Martin on the Issue of Liability [57] is **DENIED**.

IT IS FURTHER ORDERED that Defendants Meinberg, Hawkins, Hoffman and Wagner's

Motion for Summary Judgment [59] is **DENIED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment Against Defendants Meinberg, Hawkins, Hoffman and Wagner on the Issue of Probable Cause [64] is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Exclude or, in the Alternative, to Limit the Trial Testimony of Diane Damos [78] is **DENIED**.

IT IS FINALLY ORDERED that Defendants' Motions to Exclude Testimony of Plaintiff's Expert Artemis Keitt Darby [80, 82] are D**ENIED**.

Dated this 28th day of August, 2014.

/s/ John A. Ross

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-3074

Thomas A. Bowden,

Plaintiff - Appellee,

v.

Steve Meinberg; Patrick Hawkins; Chris Hoffman,

Defendants,

Vernon Martin,

Defendant - Appellant,

Benjamin Simmons; Aaron Gyurica; Wes Wagner,

Defendants.

No. 14-3075

Thomas A. Bowden,

Plaintiff - Appellee,

v.

Steve Meinberg; Patrick Hawkins; Chris Hoffman,

Defendants - Appellants,

Vernon Martin; Benjamin Simmons; Aaron Gyurica,

Defendants,

Wes Wagner,

Defendant - Appellant.

Appeals from United States District Court
for the Eastern District of Missouri - St. Louis

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 22, 2015

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

The Fourth Amendment to the U.S. Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX E

42 U.S.C.A. § 1983

Effective: October 19, 1996

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

VERNON'S ANNOTATED MISSOURI STATUTES

Effective: August 28, 2007 to August 27, 2010

V.A.M.S. 571.030

571.030. Unlawful use of weapons—exceptions—penalties—qualified retired peace officers, identification

1. A person commits the crime of unlawful use of weapons if he or she knowingly:

(1) Carries concealed upon or about his or her person a knife, a firearm, a blackjack or any other weapon readily capable of lethal use; or

(2) Sets a spring gun; or

(3) Discharges or shoots a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in section 302.010, RSMo, or any building or structure used for the assembling of people; or

(4) Exhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner; or

(5) Possesses or discharges a firearm or projectile weapon while intoxicated; or

(6) Discharges a firearm within one hundred yards of any occupied schoolhouse, courthouse, or church building; or

(7) Discharges or shoots a firearm at a mark, at any object, or at random, on, along or across a public highway or discharges or shoots a firearm into any

outbuilding; or

(8) Carries a firearm or any other weapon readily capable of lethal use into any church or place where people have assembled for worship, or into any election precinct on any election day, or into any building owned or occupied by any agency of the federal government, state government, or political subdivision thereof; or

(9) Discharges or shoots a firearm at or from a motor vehicle, as defined in section 301.010, RSMo, discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was lawfully acting in self-defense; or

(10) Carries a firearm, whether loaded or unloaded, or any other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any function or activity sponsored or sanctioned by school officials or the district school board.

2. Subdivisions (1), (3), (4), (6), (7), (8), (9) and (10) of subsection 1 of this section shall not apply to or affect any of the following:

(1) All state, county and municipal peace officers who have completed the training required by the police officer standards and training commission pursuant to sections 590.030 to 590.050, RSMo, and possessing the duty and power of arrest for violation of the general criminal laws of the state or for violation of ordinances of counties or municipalities of the state, whether such officers are on or off duty, and whether such officers are within or outside of the law enforcement agency's jurisdiction, or all qualified retired peace officers, as defined in subsection 10 of

this section, and who carry the identification defined in subsection 11 of this section, or any person summoned by such officers to assist in making arrests or preserving the peace while actually engaged in assisting such officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of crime;

(3) Members of the armed forces or national guard while performing their official duty;

(4) Those persons vested by article V, section 1 of the Constitution of Missouri with the judicial power of the state and those persons vested by Article III of the Constitution of the United States with the judicial power of the United States, the members of the federal judiciary;

(5) Any person whose bona fide duty is to execute process, civil or criminal;

(6) Any federal probation officer or federal flight deck officer as defined under the federal flight deck officer program, 49 U.S.C. Section 44921;

(7) Any state probation or parole officer, including supervisors and members of the board of probation and parole;

(8) Any corporate security advisor meeting the definition and fulfilling the requirements of the regulations established by the board of police commissioners under section 84.340, RSMo; and

(9) Any coroner, deputy coroner, medical examiner, or assistant medical examiner.

3. Subdivisions (1), (5), (8), and (10) of subsection 1 of this section do not apply when the actor is transporting such weapons in a nonfunctioning state

or in an unloaded state when ammunition is not readily accessible or when such weapons are not readily accessible. Subdivision (1) of subsection 1 of this section does not apply to any person twenty-one years of age or older transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm is otherwise lawfully possessed, nor when the actor is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game, or is in his or her dwelling unit or upon premises over which the actor has possession, authority or control, or is traveling in a continuous journey peaceably through this state. Subdivision (10) of subsection 1 of this section does not apply if the firearm is otherwise lawfully possessed by a person while traversing school premises for the purposes of transporting a student to or from school, or possessed by an adult for the purposes of facilitation of a school-sanctioned firearm-related event.

4. Subdivisions (1), (8), and (10) of subsection 1 of this section shall not apply to any person who has a valid concealed carry endorsement issued pursuant to sections 571.101 to 571.121 or a valid permit or endorsement to carry concealed firearms issued by another state or political subdivision of another state.

5. Subdivisions (3), (4), (5), (6), (7), (8), (9), and (10) of subsection 1 of this section shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031, RSMo.

6. Nothing in this section shall make it unlawful for a student to actually participate in school-sanctioned gun safety courses, student military or ROTC courses, or other school-sponsored firearm-related events, provided the student does not carry a

firearm or other weapon readily capable of lethal use into any school, onto any school bus, or onto the premises of any other function or activity sponsored or sanctioned by school officials or the district school board.

7. Unlawful use of weapons is a class D felony unless committed pursuant to subdivision (6), (7), or (8) of subsection 1 of this section, in which cases it is a class B misdemeanor, or subdivision (5) or (10) of subsection 1 of this section, in which case it is a class A misdemeanor if the firearm is unloaded and a class D felony if the firearm is loaded, or subdivision (9) of subsection 1 of this section, in which case it is a class B felony, except that if the violation of subdivision (9) of subsection 1 of this section results in injury or death to another person, it is a class A felony.

8. Violations of subdivision (9) of subsection 1 of this section shall be punished as follows:

(1) For the first violation a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony;

(2) For any violation by a prior offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation or conditional release for a term of ten years;

(3) For any violation by a persistent offender as defined in section 558.016, RSMo, a person shall be sentenced to the maximum authorized term of imprisonment for a class B felony without the possibility of parole, probation, or conditional release;

(4) For any violation which results in injury or death to another person, a person shall be sentenced

to an authorized disposition for a class A felony.

9. Any person knowingly aiding or abetting any other person in the violation of subdivision (9) of subsection 1 of this section shall be subject to the same penalty as that prescribed by this section for violations by other persons.

10. As used in this section "qualified retired peace officer" means an individual who:

(1) Retired in good standing from service with a public agency as a peace officer, other than for reasons of mental instability;

(2) Before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;

(3) Before such retirement, was regularly employed as a peace officer for an aggregate of fifteen years or more, or retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) Has a nonforfeitable right to benefits under the retirement plan of the agency if such a plan is available;

(5) During the most recent twelve-month period, has met, at the expense of the individual, the standards for training and qualification for active peace officers to carry firearms;

(6) Is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) Is not prohibited by federal law from receiving a firearm.

11. The identification required by subdivision (1) of subsection 2 of this section is:

(1) A photographic identification issued by the agency from which the individual retired from service as a peace officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm; or

(2) A photographic identification issued by the agency from which the individual retired from service as a peace officer; and

(3) A certification issued by the state in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the state to meet the standards established by the state for training and qualification for active peace officers to carry a firearm of the same type as the concealed firearm.