UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAWRENCE RUBIN MONTOYA, *Plaintiff/Appellee,* v. **DEFENDANT MARTIN VIGIL (Shield No. 86-12), et. al.,** *Defendants/Appellants*, and **CITY AND COUNTY OF DENVER,** *Defendants*.	**Case No. 21-1107**

On Appeal from the United States District Court for the District of Colorado
The Honorable Judge John L. Kane
Civil Action No. 1:16-cv-01457-JLK

APPELLEE LAWRENCE RUBIN MONTOYA'S ANSWER BRIEF

September 13, 2021

Respectfully submitted,

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ORAL ARGUMENT IS NOT REQUESTED

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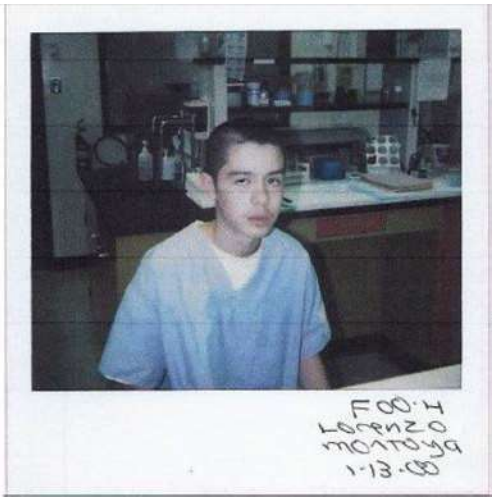
RESPONSE TO FACTUAL ALLEGATIONS IN THE OPENING BRIEF

Defendants repeatedly oversimplify the severity of the defendants' alleged harsh treatment of Lawrence Montoya. *E.g.*, Opening Brief, p. 14 ("Plaintiff claims during the interrogation, Defendants Vigil, Martinez, and Priest threatened and intimidated Plaintiff, used false evidence ploys, leading questions, and thereby coerced a confession."), citing [Appx., Vol. 1, Doc. 96, ¶¶ 50, 67-68].[1] Defendants mischaracterize the allegations. For example, in Paragraph 50 of the Second Amended Complaint ("SAC"), Montoya did not complain merely about "leading questions" and didn't use the term "false evidence ploys," but, he alleged that the defendants "aggressively interrogate[d] Lawrence using ***techniques known to cause false confessions,*** including, but not limited to, lying about evidence, manipulation, threats, false promises of leniency, and fed him statements to be repeated." [*Id*., ¶50 (emphasis added)].

Lawrence began by alleging that he was a 110-pound, 14-year-old eighth grader who had lifelong, obvious developmental disabilities. [Appx., Vol. 1, Doc. 96, ¶¶34-42]. Plaintiff included in the Second Amended Complaint ("SAC") a photograph of himself then:

[1] Counsel are aware of 10th Cir. R. 28.1(A)(1) requirement for citation to the Appendix Volume page number. To avoid confusion, counsel parallel the Appendix reference convention used by Defendants in the Opening Brief, i.e., Appendix Volume, Document Number, and page number of the Document.



[Appx., Vol. 1, Doc. 96, ¶35]. Plaintiff attached a copy of the interrogation video. [*Id*., ¶50].

Defendants mischaracterize the allegations, stating, "[e]ventually, Lawrence confessed." *E.g*., Opening Brief, p. 14. What Plaintiff alleged, and what is clear in the interrogation video he attached to the complaint, was that Defendants "us[ed] techniques known to cause ***false*** confessions" [Appx., Vol. 1, Doc. 96, ¶50 (emphasis added)] and that after extended physical and psychological coercion and several minutes of Lawrence "sobbing uncontrollably," he "eventually made some ***false inculpatory statements***." [*Id*., ¶68 (emphasis added), *see id*., ¶¶51-67]. Plaintiff does not allege that he "confessed." He alleges that he made coerced and false inculpatory statements that amounted to an "obviously false confession." [*id.*, ¶93]. To see how much Defendants are minimizing the factual allegations, this Court can contrast them with Judge Kane's findings about the allegations. [E.g., Appx., Vol. 5, Doc. 138, at 3-7].

Defendants allege that in the arrest warrant affidavit, Schneider "outlined the facts of Plaintiff's involvement … includ[ing] Plaintiff's assisting with the disposal of Ms. Johnson's bloody car elsewhere in Denver." Opening Brief, p. 14, citing Arrest Warrant Affidavit, Appx., Vol. 2, Doc. 96-7, pp. 1-2. Review of the Affidavit, however, reveals no such description. Defendants are simply repeating statements the District Court has found to have been unfounded:

> Only two aspects of the affidavit implicate Mr. Montoya—the purported statements of other witnesses and his own statement. Mr. Montoya alleges that the information regarding other witnesses implicating him is false, as no other witness statements indicated that he was present at Ms. Johnson's home. Additionally, he claims that his own statement was obviously false and that Officer Schneider misrepresented it in significant respects. As I have already found, the Second Amended Complaint adequately makes the case that Mr. Montoya's inculpatory statements were coerced. I also conclude that Mr. Montoya has sufficiently shown that the statements attributed to him in the affidavit are unreliable and false such that they should be excluded from the probable cause determination. Without Mr. Montoya's statement or the reference to other witnesses, the affidavit could not establish probable cause for his arrest, as none of the information provided would implicate him.

[Appx., Vol. 5, Doc. 138, at 36-37. *See id*., at 37-38 ("the well-pleaded allegations contradict that any witness placed Mr. Montoya at [the victim's] home, and there is no other information in the affidavit that implicates him in any way."). *Id*., at 40 (Schneider "purportedly embellished the statement and conceived evidence that was nonexistent.")].

Defendants state that a preliminary hearing was held to "test the sufficiency of the evidence," Opening Brief at 25, but fail to mention that the interrogation

videotape was played in its entirety at the hearing. In addition, substantial testimony about Montoya's inculpatory statements was also introduced. [See Appx., Vol. 2, Doc. 97-1, at 3]. The question now is whether the Affidavit establishes probable cause after the false and misleading information is excised (and if the omitted exculpatory information is included). The interrogation video and testimony about Lawrence's coerced false statements are irrelevant to this question.

Defendants allege that, on page 2 of the plea paperwork, Montoya agreed there was a factual basis for his guilty plea to accessory. [Opening Brief, p. 17]. No such statement appears on page 2. But on page 3 paragraph 13 of the plea paperwork the following appears: "I agree that there is a factual basis for the plea of guilty to the crime charged in this matter [accessory] and waive the requirements of a showing of a factual basis for the plea." [See Appx., Vol. 3, Doc. 97-1, at 3, para. 13]. At the plea proceeding, his attorney stated that, as she understood, "the factual basis for this plea is that my client was in a stolen vehicle, a Lexus, knowing it was stolen on January 1st, 2000, and hearing that they had hit some lady over the head with a rock and then, yet, remaining in the car and not informing the authorities. We're agreeing and stipulating to that factual basis for the plea based upon the fact that the People would be conceding the 35(c)." [Appx., Vol. 1, Doc. 1-2, at 14:13-21].

SUMMARY OF ARGUMENT

Decades of precedent from this Court and the U.S. Supreme Court establishes that an officer violates the Fourth Amendment Warrant Clause by inserting into an arrest warrant affidavit false or misleading material, or by omitting from the affidavit material exculpatory information. *Franks v. Delaware*, 438 U.S. 154 (1978)("*Franks*"). Almost eighteen years before the conduct here , the U.S. Supreme Court ruled that, under its cases, "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whiteley v. Warden, Wyo. State Penitentiary,* 401 U.S. 560, 565 n.8 (1971) ("*Whiteley*"), citing *Aguilar v. Texas,* 378 U.S. 108, 109 n.1 (1964). "A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Ibid*.

Because Montoya's claims are grounded in the Fourth Amendment's Warrant Clause, not its "unreasonable seizure" prong, the defendants' extreme misconduct cannot be excused by pointing to information outside the four corners of the Arrest Warrant Affidavit. Because defendants would certainly lose a qualified immunity argument that claimed that *Franks* or *Whiteley* and their progeny were not clearly-established, defendants add a twist: for the first time on

appeal, defendants argue that a reasonable officer in 1999 would not have known that, in a later civil claim raising a *Franks* violation, the officer's conduct would be judged by *Franks*. This Court should reject this novel, unfounded, unpreserved argument.

Direct evidence of a conspiracy is rarely available, so the existence of a conspiracy must usually be inferred from the circumstances. This Court should not take from the jury the question whether an agreement exists. Mr. Montoya has more than sufficiently alleged facts from which a jury could infer from the circumstances that the defendants had a meeting of the minds and an understanding to achieve the conspiracy's objectives — coercion to obtain false inculpatory statements, use of those false and misleading statements (and omission of exculpatory information) in an Affidavit to obtain an Arrest Warrant, and prosecution of 14-year-old Lawrence Montoya based on those statements.

This Court should also reject Defendants' *Heck v. Humphrey*, 512 U.S. 477 (1994) argument. This Court did not rule on this claim in *Montoya v. Vigil,* 898 F.3d 1056, 1066 (10th Cir. 2018)("*Montoya I*"), and this claim is not properly before this Court.

ARGUMENT

I. IN THE DISTRICT COURT, THE DEFENDANTS FORFEITED THE QUALIFIED IMMUNITY CLAIMS THEY NOW RAISE FOR THE FIRST TIME ON APPEAL.

"'[I]f the theory a party urges on appeal simply wasn't raised before the district court, [this Court] usually hold[s] it forfeited.'" *A Brighter Day, Inc. v. Barnes*, No. 20-1054, ___ Fed.Appx. __, __, 2021 WL 2411882, *4 (10th Cir. June 14, 2021)(unpublished)("*Brighter Day*"), *quoting In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271 (10th Cir. 2019)(citation and alteration omitted). This Court rarely addresses "bald-faced new issue[s]," or "'arguments raised in the [d]istrict [c]ourt in a perfunctory and underdeveloped manner.'" *Ibid*, quoting *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721-22 (10th Cir. 1993) and *Rumsey*, *supra* (internal citation omitted).

As explained further in Section II.B.1 below, none of the defendants raised in the district court the "any crime rule" argument they raise in this Court: i.e., that a reasonable officer in 1999 would not have known that a later *Franks* claim would be adjudged by *Franks* standards, rather than by the "any crime rule" applicable to warrantless arrests -- and the district court did not rule on any such argument.

Schneider didn't claim he could rely on alleged indicia of probable cause existing *outside* the warrant affidavit, but rather, after redacting Montoya's

statements, probable cause remained *within* the affidavit. Schneider didn't argue that a reasonable officer could have believed that a *Franks* violation would not violate the constitution if probable cause was known to the officer, even if not set forth in the arrest warrant affidavit, and the district court did not decide that issue.

Priest, Vigil, and Martinez raised qualified immunity only as it related to (1) their use of the Reid interrogation technique, as pertinent to claims that were dismissed and are not before this Court, and (2) a two-sentence "assert[ion]" to an "entitlement to qualified immunity from Plaintiff's conspiracy claims." [Appx., Vol. 2, Doc. 97, p. 50].

After explicitly announcing in the district court that its qualified immunity argument on the conspiracy claim is "identical" to and "the same as [the] merits analysis…. presented above," [*ibid*], these defendants now fault the district court for not devoting a distinct section of its ruling to the conspiracy issue rather than (as the defendants requested) essentially merging the qualified immunity issue with the merits analysis on the other claims (including presumably the *Franks* claim). If this did constitute "adequately rais[ing] qualified immunity," and if defendants are correct that the district court did not rule on the claim, then the remedy would be to remand and direct the district court to decide the issue. *Tillmon v. Douglas County*, 817 Fed. Appx. 586, 589 (10th Cir. June 10, 2020)(unpublished).

The qualified immunity claim regarding conspiracy was at best underdeveloped, even more scant than the three-sentence argument this Court found to be a forfeiture in *Tele-Communications, Inc. v. Comm'r,* 104 F.3d 1229, 1233-34 (10th Cir. 1997) or the "single, six-sentence paragraph" that failed to preserve the issue in *Tillmon*, *supra,* at 590. It "was neither pressed nor passed upon such that [this court should not] review the merits." *Brighter Day,* 2021 WL at *5.

II. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION TO DISMISS MR. MONTOYA'S *FRANKS* CLAIM.

Standard of Review

Asserting a qualified immunity defense via a Rule 12(b)(6) motion "subjects the defendant to a more challenging standard of review than would apply on summary judgment." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014)(internal quotation marks omitted). "At the motion to dismiss stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness." *Ibid.* (brackets and internal quotation marks omitted). Accepting the well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, *see Ramirez v. Dep't of Corr., Colo.*, 222 F.3d 1238, 1240 (10th Cir. 2000)("*Ramirez*") this Court evaluates "(1) whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and (2) whether

the right at issue was clearly established." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013)(internal quotation marks omitted). This Court reviews the denial of a Rule 12(b)(6) motion *de novo*, "accepting as true all well-pleaded factual allegations in the complaint and viewing the allegations in the light most favorable to the non-moving party." *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013); *Ramirez*, *supra*.

The District Court properly applied this standard. [Appx., Vol. 5, Doc. 138, at 3 n.1, citing *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)].

A. MR. MONTOYA SUFFICIENTLY ALLEGES PERSONAL PARTICIPATION OF VIGIL, MARTINEZ, AND PRIEST.

Vigil, Martinez, and Priest claim immunity because none of them personally prepared the arrest warrant affidavit. [Opening Brief, pp. 22-23]. Defendants do not even attempt to respond to the District Court's clear finding:

> Mr. Montoya does not allege that Defendant Officers acted in a supervisory capacity, nor does he attempt to hold them liable under a theory of respondeat superior. He claims that they personally took actions in furtherance of the violation of his rights and acted in concert with the other participants, which is sufficient.
>
> Specifically, Mr. Montoya alleges Officers Vigil, Martinez, and Priest knowingly, intentionally, or recklessly coerced a false confession from him with the intent that it be used to obtain a warrant for his arrest. Second Am. Compl. ¶¶ 44-89, 180, 229, 234, 253, 255, 267. .... These allegations indicate that Defendant Officers personally participated in the procurement of the warrant.

[Appx., Vol. 5, Doc. 138, at 35]. The Court's finding is correct. Mr. Montoya identifies his interrogators as Defendants Vigil, Martinez, and Priest. [Second Amended Complaint ("SAC"), Appx., Vol. 1, Doc. 96, ¶31]. Mr. Montoya identifies specific actions occurring during the interrogation; sometimes, all three defendants did a certain action [*e.g.*, *id*., ¶¶32, 44, 50-51, 55-56, 69-70, 83-87, 91, 180, 229, 234, 253, 255, 267], sometimes Vigil and Martinez [*e.g.*, *id*., ¶¶47], sometimes, Vigil [*e.g.*, *id*., ¶¶53, 71, 77], sometimes, Martinez [*e.g.*, *id*., ¶¶66-67], sometimes, Priest [*e.g.*, *id*., ¶¶88-89]. Sometimes, the allegation involves a lack of action even though all three defendants were present [*e.g.*, *id*., ¶¶32-33, 49]. Sometimes, allegations describe features about Lawrence Montoya that "were readily apparent and recognizable to an adult spending any time speaking to him," such as his "cognitive deficiencies." [*e.g.*, *id*, ¶36; see also ¶¶34-35].

Mr. Montoya attached and incorporated by reference Exhibit E, the video recording of the interrogation conducted by Defendants Vigil, Martinez, and Priest. [Appx., Vol. 2, Doc. 96-5; conventionally-filed recordings, Envelope 1 filed by Appellants]. That video makes clear the personal participation of each defendant. And the video contains statements made by one of the three defendants but because the speaker is off-camera at that moment, determining which defendant made the off-camera statement must be made by the jury. At this stage, the allegations effectively made through the video and in the Second Amended Complaint are

more than sufficient to overcome Defendants' objections and to allege personal participation.

Government officials cannot "insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity." *Franks*, 438 U.S. at 163 n. 6. For these reasons, a deliberate or reckless misstatement may support a *Franks* claim against a government official who is not the affiant. *United States v. DeLeon,* 979 F.2d 761, 764 (9th Cir.1992). A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in a warrant affidavit, whether or not he signs the affidavit. As the Ninth Circuit explained in *DeLeon*, "a different rule would permit government officials deliberately to keep from affiants or the court information material to the determination of probable cause…." *Id.*, at 764, citing *Franks,* at 163–64 n. 6. Long ago, this Court ruled that the government is accountable "for statements made not only by the affiant but also for statements made by other government employees which were deliberately or recklessly false or misleading insofar as such statements were relied upon by the affiant in making the affidavit." *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997). In *United States v. Leon*, the U.S. Supreme Court expressly ruled that courts consider the reasonableness of not only the officers "who originally obtained" the warrant, but also of the officers "who provided information material to the probable-cause

determination." 468 U.S. 897, 923 n. 24 (1984). This Court recognizes that, especially when a conspiracy is alleged, this Court "never has adopted a blanket prohibition against collective allegations." [record citation omitted]. The Tenth Circuit permits a complaint to refer to defendants collectively if 'there is no confusion as to whom the allegation is asserted against."' *Bledsoe v. Board of County Commissioners of the County of Jefferson, Kansas*, 501 F. Supp. 3d 1059, 1080 (D. Colo. Nov. 18, 2020)("*Bledsoe*"), citing *Briggs v. Johnson*, 274 F. App'x 730, 736 (10th Cir. 2008)(unpublished)(holding that plaintiff's allegations were sufficiently specific under Rule 12(b)(6) where multiple claims were asserted against multiple defendants because it was clear which acts were attributable to three defendants who plaintiff alleged acted in concert).

None of the three cases cited by defendants has anything to do with warrant affidavits or a *Franks* violation. *Bennett v. Passaic*, 545 F.2d 1260 (10th Cir. 1986) concerns how long an arrestee was kept in a "drunk tank" before seeing a magistrate; this Court ruled that the *pro se* plaintiff's case was so frivolous that he was not entitled to free process on any claim. *Pahls v. Thomas*, 718 F.3d 1210 (10th Cir. 2013) is about an alleged First Amendment violation. In *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011), the Plaintiff had sued an individual correctional officer involved in his case but also sued the Secretary of the Colorado Department of Corrections, who had nothing to do with his case and

had never heard of him. None of these cases support defendants' general arguments.

Plaintiff's allegations that Vigil, Martinez, and Priest intentionally provided false information to include in the affidavit satisfies the "personal participation" requirement for both the *Franks* claim and the conspiracy claim.

B. THIS COURT SHOULD REJECT DEFENDANTS' QUALIFIED IMMUNITY ARGUMENT[2]

The District Court found that Montoya's *Franks* claim "alleges the violation of a constitutional right that was clearly established…." [Appx., Vol. 5, Doc. 138, at 25]. Defendants fail to show this conclusion was wrong as a matter of law.

Schneider mounts no challenge to the District Court's factual findings. He does not disagree that Plaintiffs have sufficiently alleged that he committed a *Franks* violation.[3] He points to no evidence within the four corners of the affidavit -- or even to information outside the affidavit -- that would have established probable cause for murder or for any other crime. He abandons the argument he

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[2] The Opening Brief attributes the qualified immunity arguments to Schneider, however, because all defendants join in them (Opening Brief at 23), Montoya's response should be construed as responding to all defendants' qualified immunity claims.

[3] Schneider does not challenge the District Court's finding that "[t]he allegations do not describe reasonable or mistaken conduct," but allege that Schneider "purportedly embellished the statement and conceived evidence that was nonexistent." [Appx., Vol. 5, Doc. 138, at 40]. Nor can he mount such a challenge in the context of a qualified immunity appeal.

made in the district court — that the affidavit's allegations that witness interviews placed him at the scene when the victim's car was stolen provided probable cause on the face of the affidavit even after redaction of Montoya's confession. [Appx., Vol. 5, Doc. 124, at 13, 19]; Schneider has no answer for the District Court's unequivocal finding that "none of [the witness statements] indicated that fact" but that Schneider put it in the affidavit anyway, he "embellished [Montoya's] statement, and he "conceived evidence that was nonexistent." [Appx., Vol. 5, Doc. 138, at 37-38, 40]. Schneider does not dispute the District Court's conclusion that "the well-pleaded allegations contradict that any witness placed Mr. Montoya at [the victim's] home, and there is no other information in the affidavit that implicates him in any way." [*Id*., at 37-38].

Instead, Schneider raises a brand-new argument on appeal: he argues that it did not matter whether, after redaction of the misleading and false information appearing in violation of *Franks*, the affidavit for arrest warrant contained no probable cause to arrest Montoya for murder, as long as there was probable cause for an arrest for any crime. [Opening Brief, pp. 23-24 (invoking the "any crime rule")].

More to the point, Schneider suggests that, even if he is wrong about the "any crime rule," no reasonable officer in 1999 would have known that the rule did not apply to *Franks* violations. Schneider frames the issue as whether he should

have known the Affidavit would be subject to "heightened scrutiny." [Opening Brief, p. 24].

Schneider's argument is unpreserved and frivolous.

1. Appellants did not preserve for this Court's review their new argument, raised for the first time on appeal, that an officer would not have known that the warrantless arrest "any crime rule" does not apply when an officer commits a *Franks* violation.

None of the defendants raised in the district court the qualified immunity argument they now ask this Court to decide.

In the district court, Defendants Vigil, Priest, and Martinez made a "fair warning"/qualified immunity argument only as it related to Montoya's claim they employed the "Reid interrogation technique" during their interrogation. [Appx., Vol. 2, Doc. 97, at 47-48]. They mention qualified immunity as to the conspiracy claim but simply refer back to the merits and make no independent "fair warning" argument. [*Id*., at 50].[4] They made none of the "fair warning"/qualified immunity arguments that appear in the Opening Brief.

In the district court, Schneider argued that after redacting Montoya's confession from the affidavit, there remained sufficient probable cause *on the face of the affidavit* to justify an arrest for accessory. [Appx., Vol 5, Doc. 124, at 12]

[4] They make a merits argument on the Fifth Amendment claim (saying that the confession was not used at trial) and on the *Franks* claim (arguing that Vigil, Martinez, and Priest didn't draft the affidavit). [*Id*., at 48-49].

Relying on the witness statements that the district court found Schneider to have "conceived" and misrepresented [see Appx., Vol. 5, Doc. 138, at 37-38, 40], Schneider argues that the *affidavit* still contains probable cause. [Appx., Vol 5, Doc. 124, at 12-13].[5] This differs from the argument on appeal, where Schneider argues that information *outside the affidavit* provides probable cause.

Schneider did cite a case involving warrantless arrests, [*id.*, p. 14, citing *Apodaca v. City of Albuquerque*, 443 F.3d 1286 (10th Cir. 2006)], but he never made the novel argument raised for the first time in the Opening Brief, that he has qualified immunity because a reasonable officer would not know that in a later lawsuit alleging a *Franks* violation, he would be held to the *Franks* standard, rather than the "any crime rule" that applies to warrantless arrests.

Because the defendants' qualified immunity arguments are not preserved, this Court should reject them. *Brighter Day, supra*; *Tillmon v. Douglas County*, *supra*.

2. Defendants demand a degree of specificity in prior precedent that goes far beyond what is required for this Court to determine that a precedent was "clearly established."

Defendants demand a degree of specificity that goes far beyond what the U.S. Supreme Court and this Court require. As long as then-existing precedent

[5] Schneider is wrong. As argued below, after the false material is removed from the warrant affidavit, there is not probable cause to arrest for accessory.

places the unconstitutionality of the alleged conduct "beyond debate," Montoya need not produce a specific pre-1999 case about whether the "any crime rule" might someday excuse a *Franks* violation -- *McCowan v. Morales*, 945 F.3d 1276, 1285 (10th Cir. 2019)(quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)("*Wesby*")); *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1197-98 (10th Cir. 2019)(same). The Supreme Court has recently clarified that a factually similar case is not always required. *See Taylor v. Riojas*, __ U.S. __, 141 S. Ct. 52, 54 (2020)("*Taylor*"), suggesting an objective, "no reasonable correctional officer" standard when it held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house [the plaintiff] in such deplorably unsanitary conditions for such an extended period of time." *Taylor*, 141 S. Ct. at 53. Along with other Circuit Courts, the Tenth Circuit has recognized that *Taylor* changes the landscape. *See Truman v. Orem City*, 1 F.4th 1227, 1236 (10th Cir. 2021) ("Just like any reasonable corrections officer should have understood the inmate in Taylor's conditions of confinement offended the Constitution, so too should any reasonable prosecutor understand that providing a medical examiner fabricated evidence and then putting him on the stand to testify based on that false information offends the Constitution."); *Moderwell v. Cuyahoga County, Ohio*, 997 F.3d 653, 660 (6th Cir. 2021)(explaining that the Supreme Court held in

Taylor that "there does not need to be a case directly on point" when no reasonable officer could have concluded that the challenged action was constitutional); *Taylor v. Ways*, 2021 WL 2217474, at *9 (7th Cir. June 2, 2021)(unpublished)(noting that *Taylor* reaffirmed that "the Supreme Court does not demand a case directly on point"); *Roque v. Harvel,* 993 F.3d 325 (5th Cir. 2021)(citing *Taylor* for the proposition that, in an obvious case, general standards suffice to provide clearly-established law). See also Joanna C. Schwartz, Qualified Immunity and Federalism All the Way Down, 109 Geo. L.J. 305, 351 (2020)("The Court's decision in *Taylor* sends the signal to the lower courts that they can deny qualified immunity without a prior case on point.").

3. The "any crime" rule is irrelevant because the question is whether, at the time of the conduct in 1999, an officer would know that intentional, material misstatements and omissions in a warrant application would violate the Constitution.

Schneider asks the wrong question. The question is not if an officer would know whether the "any crime rule" applied to arrest warrants for purposes of a later malicious prosecution claim. The question is whether a reasonable officer in 1999 would have known that intentional, material misstatements and omissions in warrant applications violated the Constitution. The answer is an unqualified *yes.* As the Eleventh Circuit explained in *Williams v. Aguirre*,

> We have never wavered … Our prohibition of intentional, material misstatements in warrant applications has long been a cornerstone of this Court's jurisprudence on the validity of warrant-based seizures. [citations

> omitted]. In the light of this uncontroverted and well-established rule, we readily conclude that 'every reasonable official would interpret [our precedents] to establish' that intentional, material misstatements in warrant applications violate the Constitution. [*Wesby*, at 590].

965 F.3d 1147, 1169 (11th Cir. 2020). Any "doctrinal tensions" concern the relationship between Fourth Amendment violations and malicious prosecution, not the underlying constitutional rights. *Ibid*.

Under *Franks v. Delaware,* when the affidavit contains intentional or reckless false statements and if the affidavit, purged of its falsities, would not support a finding of probable cause, the constitutional violation is established. *Franks,* 438 U.S. at 155-56; *see also Stewart v. Donges,* 915 F.2d 572, 581-82 (10th Cir.1990)("*Stewart*"). In *Stewart*, this Court had ruled that the standards of "deliberate falsehood" and "reckless disregard" set forth in *Franks* apply "to material omissions, as well as affirmative falsehoods." *Stewart,* 915 F.2d at 582 (citations omitted). See also *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991)(recognizing that it is unconstitutional to make false statements in an arrest affidavit or to knowingly or recklessly omit information which, if included, would have vitiated probable cause).

Here, the constitutional violation occurred in 1999. This Court has already recognized that these constitutional principles were "clearly established" by the mid-1980's: "No one could doubt that the prohibition on falsification or omission

of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)(upholding district court's denial of qualified immunity to the forensic hair examiner accused of falsifying her investigative report and recording a "match" when one did not exist); *Stewart,* 915 F.2d at 581-582 and 582 n. 13 (rejecting a qualified immunity claim because the Supreme Court's 1978 *Franks* ruling "clearly established that knowingly, or with reckless disregard for the truth, including false information in the affidavit supporting the arrest warrant constituted a Fourth Amendment violation."). As recently as June 2021, this Court acknowledged that the constitutional right not to be deprived of liberty because of the fabrication of evidence by a government officer has long been recognized. *Truman v. Orem City*, *supra,* 1 F. 4th at 1236 n. 3 (citing *Pyle v. Kansas*, 317 U.S. 213, 216 (1942)). This Court observed that a fabrication-of-evidence claim "often overlaps with malicious prosecution claims, sometimes creating confusion about whether it is an independent constitutional claim. *See, e.g.*, *Pierce v. Gilchrist*, *supra; Wilkins v. DeReyes*, 528 F.3d 790, 795 (10th Cir. 2008)." *Ibid*. This Court reiterated that because a fabrication-of-evidence claim implicates the Constitution, it is a legitimate claim "notwithstanding its failure to satisfy the elements of a malicious prosecution claim." *Ibid*.

In *Stewart*, this Court considered whether the same principles applied to knowing or reckless *omissions* of material facts which would have vitiated probable cause. Although *Stewart* found no Tenth Circuit decisions on point, after reviewing case law from other circuits, this Court concluded, "we hold that at the time defendant submitted his affidavit and arrested plaintiff [early January of 1986], it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause." *Stewart,* at 582–83.

In 1999, "every reasonable official would interpret [this Court's precedents and those of the U.S. Supreme Court] to establish" that inserting misleading and false information in (and omitting materially exculpatory information from) an arrest warrant affidavit would violate Lawrence Montoya's constitutional rights. *Wesby*, *supra,* 138 S. Ct. at 591. See *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011)(quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). That question is "beyond debate." *Id.* Defendants had fair notice that such conduct was unlawful under *Franks v. Delaware*.

(a) The "any crime rule" cannot defeat a* Franks *claim.

The "any crime rule" is at its core a good-faith argument. The defendants would have this Court adopt a rule that, even though an officer is alleged to have

acted in bad-faith in violation of *Franks*, a plaintiff's claim should be barred on the assumption that the officer was acting in good faith because probable cause for a warrantless arrest existed for some crime not specified in the affidavit or the arrest warrant. This approach would stand *Franks* on its head. By definition, finding of a *Franks* violation negates the presumption of good faith.

"Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble." *United States v. Reilly*, 76 F.3d 1271, 1280 (2d Cir.), *on reh'g*, 91 F.3d 331 (2d Cir. 1996). Clearly-established U.S. Supreme Court caselaw has long rejected the proposition that a good-faith exception can be applied when a *Franks* violation is found.

The Supreme Court's decision in *United States v. Leon,* 468 U.S. 897 (1984), which created the good-faith exception to the exclusionary rule, expressly left the *Franks* rule intact. *Id.* at 923. In *Leon,* the Supreme Court held that the exclusionary rule "should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." 468 U.S. at 905. The Court noted, however, four specific situations when the good-faith reliance exception was inappropriate. The first exception listed was if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." Two years after it issued *Leon*, the Supreme

Court ruled that the *Leon* standard applies in the qualified immunity context. *Malley v. Briggs*, 475 U.S. 335, 344 (1986). Because of these clear pronouncements from the U.S. Supreme Court, there would have been no basis for an officer to believe his or her malicious actions regarding an arrest warrant affidavit would be judged by "good faith" standards.

"For the good faith exception to apply, the police must reasonably believe that the warrant was based on a valid application of the law to the known facts." *United States v. Reilly*, *supra,* at 1280. In *Reilly*, the Second Circuit refused to apply the good-faith standard when "officers failed to give [ ] facts to the magistrate" in a "bare-bones description" that "was almost calculated to mislead," and there were "serious doubts" about their good-faith in preparing the affidavit. *Ibid*. Further, by not disclosing in the affidavit their own bad conduct, the officers did not make their actions "the kind of behavior to which the term good faith can be applied." *Id.*, at 1281. In a later case, the Second Circuit well-articulated why the *Franks* standard "defines the scope of qualified immunity in civil rights actions":

> An officer can 'have no reasonable grounds for believing that [a] warrant was properly issued' '[i]f the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.' *United States v. Leon,* [*supra*, at 923]. Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, the shield of qualified immunity is lost. *See Malley v. Briggs,* [*supra*, at 344–45].

Rivera v. United States, 928 F.2d 592, 604 (2d Cir. 1991). See also *Golino v. City of New Haven,* 950 F.2d 864, 871 (2d Cir. 1991)("Where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause…, the shield of qualified immunity is lost, *see Malley v. Briggs,* [*supra*, at 344–45] (adopting standard set in *United States v. Leon,* [*supra*, at 923], as proper standard for objective reasonableness for qualified immunity purposes)).

By the time of Defendants' conduct in this case, virtually every federal circuit had issued cases applying the *Leon/Malley* rule. See, e.g., *Olson v. Tyler*, 771 F.2d 277, 282 (7th Cir. 1985)("[w]here the judicial finding of probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, not only does the arrest violate the fourth amendment, but the officer will not be entitled to good faith immunity [under § 1983]."); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 (9th Cir. 1990)(following *Malley v. Briggs*, *supra,* by "incorporat[ing] the *Franks* standard because we find it incongruous to employ one standard to deal with alleged falsities in a warrant affidavit in the context of a suppression motion and another in a civil rights action."); *Specht v. Jensen*, 832 F.2d 1516, 1523 (10th Cir. 1987), *on reh'g in part*, 853 F.2d 805 (10th Cir. 1988)(recognizing that the

existence of qualified immunity for police officers who rely on a warrant is determined by an inquiry "identical" to the *Leon* good-faith standard).

District courts within this Circuit had also recognized that the *Leon* standards determined the qualified immunity question. *E.g.*, *Schulte v. City of Dodge City, Kan.,* 630 F. Supp. 327, 330 (D. Kan. 1986)(citing *Leon* and observing that in *Malley,* the court held the same standard should determine civil liability as used to decide suppression issues in a criminal trial).

In 1998, the Fifth Circuit rejected the possibility that an officer could arrest someone based on a warrant and then, on its challenge, retroactively justify his conduct by arguing he had probable cause to arrest the person without a warrant for a different offense. *Vance v Nunnery*, 137 F.3d 270 (5th Cir. 1998).

Defendants provide not one case suggesting that despite these precedents, there was an exception to the *Frank*s rule based on the hypothetical existence of probable cause for some charge not identified in the arrest warrant affidavit.[6]

In 2020, a panel of this Court observed that clearly-established precedent held that "'if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth,' the affiant is not entitled to

[6] Again, Mr. Montoya notes that the premise is also incorrect: the warrant affidavit does not establish probable cause to arrest for accessory.

qualified immunity for executing that arrest warrant." *Bickford v. Hensley*, 832 F. App'x 549, 555 (10th Cir. 2020)(unpublished), quoting *United States v. Leon*, *supra,* 468 U.S. at 923. *See DeLoach v. Bevers*, 922 F.2d 618, 621–22 (10th Cir. 1990)(reasoning that where a "judicial finding of probable cause is based solely on information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, not only does the arrest violate the fourth amendment, but the officer will not be entitled to [qualified] immunity" (quoting *Olson v. Tyler*, *supra*).

"[T]he lawfulness of seizures pursuant to legal process turns on the validity of the *legal process itself." Williams v. Aguirre*, *supra,* 965 F.3d at 1162 (internal citation omitted)(emphasis added). *Accord*, *Wilkins v. DeReyes*, *supra,* 528 F.3d at 802. In *Wilkins,* this Court rejected the defendant-officers' claim that information they did not disclose in the affidavit supported probable cause despite the alleged *Franks* violation:

> because the officers revealed none of the additional information during the institution of legal process in this case, during the arrest warrant applications—the officers cannot use this information to escape liability. If institution of legal process is required to trigger a malicious prosecution claim, ***we ought not search for probable cause in a pile of unrevealed information.***

Ibid (emphasis added). This Court explained that "[t]he Fourth Amendment in the context of a malicious prosecution claim deals with *judicial determinations* of probable cause, either at the warrant application stage or during a *Gerstein* hearing

following a warrantless arrest. Judicial determination becomes a misnomer if information required to support probable cause remains at all times firmly lodged in the officer's head." *Ibid* (emphasis in original). This was not a new rule. This Court cited *Whiteley, supra,* 401 U.S. at 565 n. 8. "A contrary rule would, of course, render the [legal process] requirements of the Fourth Amendment meaningless." *Ibid*. It would also contradict the common law of malicious prosecution,[7] which allows a plaintiff to challenge prosecutions on a charge-by-charge basis.[8]

In *Williams v. Aguirre*, *supra*, the Eleventh Circuit explained that qualified immunity turns on what information was provided to the judicial officer determining probable cause, not what information or facts the arresting officer

[7] Defendants do not challenge the District Court's conclusion that a Plaintiff need not "establish each element of the tort of malicious prosecution," including the favorable termination requirement. [Appx., Vol. 5, Doc. 138, at 31 (*citing Wilkins*, 528 F.3d at 801 n.6 and *Pierce*, at 1290)].

[8] See discussion, *Miller v. Spiers*, 339 F. App'x 862, 867–68 (10th Cir. 2009)(unpublished), citing *e.g.*, *Holmes v. Vill. of Hoffman Estates,* 511 F.3d 673, 682 (7th Cir.2007) ("[P]robable cause to believe an individual committed one crime—and even his conviction of that crime does not foreclose a malicious prosecution claim for additionally prosecuting the individual on a separate charge."); *Kossler v. Crisanti,* 564 F.3d 181, 188 (3d Cir.2009). See also *Luckett v. Chambers Jones*, No. CV 119-199, 2021 WL 3084998, at *6 (S.D. Ga. July 21, 2021)(unpublished)(where the officer included false statement in two of the ten warrant affidavits, the defendant's summary judgment motion would be denied, and plaintiff's case could go forward on the malicious prosecution claim regarding those two affidavits; "the fact that the other eight warrants may be entirely valid is irrelevant").

knew. *Williams*, 965 F.3d at 1163. The inquiry is whether the "judicial officer who made the probable-cause determination had sufficient, truthful information to establish probable cause." *Ibid*.

The defendants fault the District Court for relying on *Williams* because *Williams* was not decided until 2020. But the rule set out in *Williams* was not new. It was well-established at the time of Defendants' acts. It was clearly established at least as early as 1971. *Whiteley*, *supra,* 401 U.S.at 565 n.8. This Court has ruled that, by *Wilkins, supra*, 805. May 1996, it was clearly established that officers could not coerce false statements and then use those statements to seek an arrest warrant.

The *Williams* Court wasn't announcing a new rule, it was explaining a long-existing one. The Court sets forth caselaw and legal treatises dating to before the time of Edward I in England. The Court ruled that, at the time of § 1983's enactment, it was well settled that a malicious prosecution defendant could not "shield [himself or herself] from liability by establishing probable cause for other charges." *Williams,* at 1160 (citations omitted). *See Kalina v. Fletcher*, 522 U.S. 118, 123 (1997) (explaining that section 1983 must be "construed in the light of common-law principles that were well settled at the time of its enactment"). Thus, the District Court was well-advised to look to the rich legal history in *Williams* in

determining whether a reasonable officer would have known the contours of the *Franks* rule.

(b) Schneider's cases do not support his claim that the "any crime rule" can defeat a* Franks *claim.

Schneider relies on *Taylor v. Meachum*, 82 F.3d 1556 (10th Cir. 1996), *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir.), *cert. denied*, 140 S. Ct. 220 (2019), and *Goad v. Town of Meeker*, 654 F. App'x 916, 922-24 (10th Cir. 2016) (unpublished). None supports defendants' claims.

i. Taylor v. Meachum.

In *Taylor v. Meachum*, the arrest warrant affidavit alleged that Taylor had committed murder. This Court excised the alleged false statements from the arrest warrant affidavit and found that the remaining portions still established probable cause -- not for "any crime," but for the same murder that was alleged. The 10th Circuit found a "wealth of uncontested facts which demonstrate a substantial probability that Mr. Taylor committed the … murder and rape…" *Id*., at 1562. *See also id*., at 1563 ("Setting aside the false statements….the affidavit contains ample facts supporting a finding of probable cause."). The *Taylor* Court did not have to look beyond the affidavit and assess whether probable cause for any crime otherwise existed, because the affidavit remained sufficient even after redaction of the material that violated *Franks*. *Taylor v. Meachum* represents a straightforward application of *Franks*, not some separate qualified immunity analysis.

ii. Arizmendi v. Gabbert

Arizmendi v. Gabbert was a false arrest case. Arizmendi sued Gabbert for false arrest, contending that Gabbert knowingly or recklessly misstated material facts in the affidavit. 919 F.3d at 894, 895. Ruling on defendant's motion for summary judgment, the district court found a genuine factual dispute over whether Gabbert intentionally or recklessly submitted false statements in his affidavit. *Id.,* at 897-898. The Fifth Circuit made clear that an officer cannot "deliberately or recklessly misstate or omit facts in a warrant affidavit to procure a warrant to arrest someone for a specific crime, then escape liability by retroactively constructing a justification for a warrantless arrest based on a different crime." *Id*., at 903. This result was dictated not only by Fifth Circuit precedent, *Vance v. Nunnery*, *supra,* but by *Franks* itself. *Id*., at 901-903. The Fifth Circuit found that, *on the face of the warrant affidavit itself*, there were sufficient allegations providing grounds for an arrest. *Id.*, at 898-899 ("Gabbert also alleged in his affidavit that Arizmendi told him in September 2013 that she had not signed the grade change form, and later handwriting analysis refuted her claim. We agree that this was sufficient to generate probable cause that Arizmendi violated §37.08's "false report" offense when she met with Gabbert."). *See also id*., 899 n. 23: "To be clear, the issue here is not whether Gabbert could have arrested Arizmendi without a warrant. It is whether once he obtained a warrant, potentially in violation of *Franks*, he could

retroactively justify a warrant-based arrest by claiming that he could have instead conducted a warrantless arrest based on facts stated in the affidavit." These facts critically distinguish *Arizmendi* from Montoya's case, because here, after the false and misleading statements are redacted and the omitted exculpatory material is included, there was no probable cause on the face of the affidavit.

iii. Goad v. Town of Meeker

Defendants cite *Goad v. Town of Meeker, supra,* for the unremarkable proposition that "courts [may] look to facts outside the four corners of an arrest warrant when evaluating the existence of probable cause." (Opening Brief, at 30). Defendants fail to mention this Court was evaluating not a *Franks* claim under the Warrant clause of the Fourth Amendment (as here) but claims of unreasonable seizure (false arrest and a malicious-prosecution claim based on the Fourth Amendment's "unreasonable seizure" clause. *Id*., at 923). This Court expressly distinguishes "unreasonable seizure" claims from a Warrant claim: "Goad must show a violation not of the Fourth Amendment's *Warrant Clause* but of the *Reasonableness Clause*." *Id*., at 922 (italics in original). This case is irrelevant.

4. After the misleading and false information is redacted, and considering the material information Schneider omitted, the affidavit does not establish probable cause that Mr. Montoya committed the crime of accessory.

Schneider's primary argument depends on his assertion that, after the false and misleading statements are removed, the affidavit contained facts that

demonstrated probable cause to arrest Montoya for accessory. Schneider's alternative argument is that the arrest affidavit and arrest warrant did not matter, because (even though the officers did not say so in the affidavit) they had probable cause to arrest Montoya for accessory. But after the misleading and false material is redacted, the affidavit contains no facts establishing probable cause for the offense of accessory.

"Officer Schneider represented that witnesses had placed Montoya at the scene, even though he had allegedly reviewed the witness statements and knew none of them indicated that fact." [Appx., Vol. 5, Doc. 138, at 37]. The District Court rightly found that "the well-pleaded allegations contradict that any witness placed Mr. Montoya at Ms. Johnson's home, and there is no other information in the affidavit that implicates him in any way." [*Id*., at 37-38]. "Without Mr. Montoya's statement or the reference to other witnesses, the affidavit could not establish probable cause for his arrest, as none of the information provided would implicate him." [*Id*., p. 37]. In the Opening Brief, Schneider cites no place in the affidavit where such information appears.

"To add insult to injury," as the District Court stated, with certain qualifications detailed in its ruling, "the omitted facts cited by Mr. Montoya are of the type a judicial officer would want to know." [*Id*., at 37-38]. Disputes about the materiality of omitted information are not properly resolved on a Motion to

Dismiss and are not resolvable on a Motion for Summary Judgment. *Cf. Auguste v. Sullivan*, No. CIVA03CV02256-PAB-KLM, 2009 WL 902385, at **15-16 (D. Colo. Mar. 26, 2009)(unpublished).

Schneider asserts that Plaintiff has not challenged the facts in the Affidavit related to his after-the-fact conduct which ultimately supported his eventual guilty plea to accessory liability. (Opening Brief, p. 29). That is not correct. Mr. Montoya successfully argued that the affidavit contains insufficient information to believe he committed any crime. See [Appx., Vol. 5, Doc. 131, at 13-14]. The District Court ruled against Schneider on this very issue. "Officer Schneider asserts that even without Mr. Montoya's confession there still would have been probable cause to arrest him for acting as an accomplice or accessory. But, as I explained, the well-pleaded allegations contradict that any witness placed Mr. Montoya at Ms. Johnson's home, *and there is no other information in the affidavit that implicates him in any way*." [Appx., Vol. 5, Doc. 138, at 37-38](emphasis added). Notably, Schneider does not direct this Court to any place in the affidavit where such information allegedly appears.

III. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANTS' MOTION TO DISMISS MR. MONTOYA'S CONSPIRACY CLAIM.

Defendants appear to fault the District Court for not drafting a longer section of his order on the Defendants' spurious argument to dismiss the conspiracy

counts. See Opening Brief, at p. 34, saying that the District Court's "substantive analysis" was only two paragraphs long.

Defendants' argument appears to be two-fold. They claim: (1) Mr. Montoya shows only "interrelated conduct," and (2) his allegations are conclusory, without specific facts to support them. Defendants believe the plan itself has not been sufficiently alleged. *Id*., at p. 37. Lastly, again appearing to suggest that *Franks* was not clearly-established law, Defendants make a cursory qualified immunity argument. *Id*., p. 40.

Defendants' factual disputes are not properly before this Court

Defendants' disputes with the facts about Schneider's involvement do not properly invoke the narrow jurisdiction of the Court over an interlocutory appeal of an adverse qualified immunity finding. This Court's jurisdiction is limited to resolving abstract or pure questions of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). When a factual dispute lies "at the heart" of a qualified immunity appeal, the court should dismiss the appeal. *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir.1998). *Melessa v. Randall*, 121 Fed.Appx. 803, 806 n.1 (10th Cir. 2005)(unpublished) (noting that jurisdiction did not exist to address a factual dispute about whether, when the officer omitted material information from the Warrant Affidavit, she acted knowingly or recklessly, rather than negligently).

Defendants argue that they engaged merely in "interrelated conduct," that they were simply "Officers assisting each other in a criminal investigation, and that Schneider didn't neither viewed the interrogation video nor discussed the case with the others.[9] Opening Brief, pp. 35-37.

Montoya alleges much more than merely "interrelated conduct" and his claims are not "conclusory."

As Judge Kane correctly ruled: "While cooperating does not necessarily equate to conspiring, Mr. Montoya alleges Defendant Officers did not just jointly interrogate him, they used improper tactics to coerce him and then falsified an affidavit in support of the warrant for his arrest." [Appx., Vol. 5, Doc. 138, p. 45].

The defendants' case citations do not support dismissal.

Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) contains no factual description of what was alleged in the pro se complaint, making it impossible to gauge against Mr. Montoya's Second Amended Complaint. In *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021), the allegation was a far cry from the facts alleged here: the plaintiff alleged merely that "each Officer approached the conversation [ ] and remained there for approximately 30 seconds." *Id*., at 1026. The underlying issue is distinguishable; this Court ruled that the First Amendment right to video- or audio-record police in public spaces was not clearly established in 2014.

[9] Defendants don't suggest any other way Schneider could have come up with the factual allegations that appear in the Affidavit.

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) supports Montoya's position. This Court ruled the plaintiffs were entitled to present their conspiracy claims to a jury and affirmed the principles that (1) a plaintiff need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all the participants therein," and (2) "[a]n express agreement among all the conspirators is not a necessary element." *Id.*, at 701 (internal citations omitted).

The Defendants' reliance on *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 527 (10th Cir. 1998), is misplaced. Tonkovich, a tenured law professor, was dismissed after one student said they had sexual activity after discussing her grades and another said he asked her "who her favorite professor was" while holding her hand. Tonkovich sued no less than 27 people and the entire Kansas Board of Regents for violating his due process rights during the administrative hearings leading to his termination. (He also raised an unsuccessful equal protection violation because the University had not penalized other professors for dating students).

The *Tonkovich* panel's discussion of the conspiracy claim is brief and inapplicable. Professor Tonkovich claimed the University was retaliation because of his "outspoken political conservatism" and because of his position during a search for a new Law School dean. *Id*., at 533. Tonkovich lost because he didn't point to any concerted action and presented "nothing more than conclusory

allegations." *Ibid.* The defendants had held nine months of hearings before termination. There was no indication they even knew the divisive dean search or of Tonkovich's preferred candidate. *Id*., at 533-534.

Unlike *Tonkovich*, which involved 27 individual defendants plus a Board of Regents, the events in Mr. Montoya's case involved four individuals. Each defendant's violation of clearly-established law is set forth or can be inferred from their participation as described. To allege conspiracy, Plaintiff need not allege each defendant individually commit every overt act. *See e.g*., *Bledsoe*, *supra*, at 1078 ("plaintiff's use of collective defined terms in certain allegations within the Second Amended Complaint doesn't doom plaintiff's claims because … plaintiff has alleged specific facts against each individual defendant from which the court can infer they agreed to join the alleged conspiracy.").

Because "[d]irect evidence of an agreement to join a criminal conspiracy is rare, [ ] a defendant's assent can be inferred from acts furthering the conspiracy's purpose." *United States v. Edmonson*, 962 F.2d 1535, 1548 (10th Cir. 1992) (*quoting United States v. Perkins*, 748 F.2d 1519, 1527 (11th Cir. 1984)). There is no reason a different rule would apply to allegations of a civil conspiracy. Indeed, "[i]n order to prove the existence of a civil conspiracy, a plaintiff is not required to provide direct evidence of the agreement between the conspirators." *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979), *cert. granted in part, rev'd in part*

on other grounds, 446 U.S. 754 (1980). Circumstantial evidence may provide adequate proof of a conspiracy. *Ibid*. *See also Fisher v. Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980)("Direct evidence of a conspiracy is rarely available, and the existence of a conspiracy must usually be inferred from the circumstances.").

"[T]he question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can "infer from the circumstances (that the alleged conspirators) had a 'meeting of the minds' and thus reached an understanding" to achieve the conspiracy's objectives." *Hampton v. Hanrahan,* 600 F.2d at 621, *quoting Adickes v. Kress & Co.,* 398 U.S. 144, 158-59 (1970). "The existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Id.,* 398 U.S. at 176 (1970)(Black, J., concurring), quoted in *Waltrip v. Ass'n of Mut. Prot*., No. CV-03-1245 BB/WDS, 2005 WL 8163941, at *4 (D.N.M. Apr. 20, 2005) (unpublished)(rejecting defendants' qualified immunity claim).

One critical allegation tending to prove conspiracy is that none of the defendants intervened to stop the obviously-unconstitutional acts of the others. "It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). Also, "an officer who is present but fails to intervene to prevent

another law enforcement official from infringing a person's constitutional rights is liable if the 'officer had reason to know ... that any constitutional violation has been committed by a law enforcement official [ ] and the officer had a realistic opportunity to intervene to prevent the harm from occurring.'" *Reid v. Wren*, No. 94-7122, 1995 WL 339401, at *2 (10th Cir. June 8, 1995)(unpublished)(*quoting Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994)). Plaintiff's allegations suffice because he has alleged a conspiracy among these defendants, who all contributed to and allowed fabrication of inculpatory evidence and suppression of exculpatory evidence to continue. Such fact patterns have been found to constitute plausible allegations sufficient to defeat a motion to dismiss. E.g., *Bledsoe*, *supra*.

This Court should reject defendants' Qualified Immunity arguments

With no analysis or caselaw, defendants criticize the district court for "fail[ing] to analyze whether the law was clearly established in 2000 that the type of conspiracy alleged by the Plaintiff was clearly established for qualified immunity purposes." [Opening Brief, pp. 39-40]. This Court should not consider the defendants' argument raised in this way. *Sawyers v. Norton*, 962 F.3d 1270, 1286 (10th Cir. 2020)(perfunctory, cursory contentions need not be addressed by this Court).

In his motion to dismiss, Schneider did not raise a qualified immunity defense to the conspiracy claim.

In their motion to dismiss, Priest, Vigil, and Martinez flagged the issue but stated that "[b]ecause the first part of the qualified immunity inquiry is the same as a merits analysis," their argument was subsumed by their arguments against the conspiracy claim itself. [Appx., Vol. 2, Doc. 97, at 50]. They do not dispute that the district court answered the conspiracy claims on the merits. The District Court's Order also includes an extensive discussion of qualified immunity about "the type of conspiracy alleged by the Plaintiff" -- i.e., a conspiracy to coerce a false confession, commit a *Franks* violation and thereby obtain an arrest warrant. [Appx., Vol. 5, Doc. 138, at 34-40].

The district court's order on the conspiracy and *Franks* claims demonstrates both that Mr. Montoya's constitutional rights were violated and that those rights were clearly established at the time of the defendants' conduct. Defendants do not now, and did not in the district court, disagree that, in 1999, it was clearly established that it was unlawful for officers to conspire to violate a defendant's clearly-established constitutional rights. "Mr. Montoya's *Franks* claim alleges the violation of a constitutional right that was clearly established…." [Appx., Vol. 5, Doc. 138, at 40].

IV. THE TRIAL COURT DID NOT ERR BY REFUSING TO DISMISS PLAINTIFF'S REMAINING CLAIMS FOR DAMAGES UNDER *HECK V. HUMPHREY.*

A. THE *HECK V. HUMPHREY* ISSUE IS NOT PROPERLY BEFORE THIS COURT.

Defendants, after acknowledging that the request for dismissal under *Heck* is not independently immediately appealable, ask the court to "exercise pendent appellate jurisdiction" because they claim the "*Heck* issue is inextricably intertwined with the appealable decisions as it would fully resolve the appeal as to all claims." They reason that if this Court were to decide the *Heck* issue in their favor this "would result in all claims being barred and would obviate the need to resolve the qualified immunity issues outlined above." Opening Brief, p. 41. If this were the test, whenever a defendant in a 1983 action raises both qualified immunity and a *Heck* claim, pendent jurisdiction would always be proper. The case law, however, is otherwise.

The 9th Circuit in *Cunningham v. Gates,* 229 F.3d 1271 (9th Cir. 2000), rejected the defendant's request it decide the *Heck* claim with the district court's denial of their qualified immunity claim. In rejecting the defendant's request, the Court first noted the limits of the collateral order doctrine:

> The collateral order doctrine permits an appeal from a non-final judgment if three criteria are met: the 'order must (1) conclusively determine the disputed questions, (2) resolve an important issue completely separate from the merits of the action, and (3) be

> effectively unreviewable on appeal from a final judgment.' *Midland Asphalt Co. vs. United States* 489 U.S. 794, 799 (1989). The Supreme Court has emphasized that the conditions for collateral order appeal are to be stringently applied to ensure that this narrow exception 'never be allowed to swallow the general rule' requiring a judgment to be final prior to appeal. *Digital Equip. Corp. v. Desktop Direct Inc*., 511 U.S. 863, 868 (1994). We therefore determine the applicability of the collateral order doctrine 'without regard to the chance that the litigation at hand might be speeded, or a particular injustic[e] averted by a prompt appellate court decision.' *Id*. (internal citation and quotation marks omitted).

Cunningham v. Gates, 229 F.3d at 1283-84. The Court found that

> The *Heck* issue is not 'inextricably intertwined' with the qualified immunity issues properly before us on interlocutory appeal, nor is it necessary to decide the issue to ensure meaningful review of the defendants' qualified immunity claims. The issues properly before us on interlocutory appeal are analytically distinct from the *Heck analysis.*

Id. at 1284.

The 6th Circuit also rejected a defendant's request it exercise pendent jurisdiction over a *Heck* claim while reviewing the district court's qualified immunity ruling. *Norton v. Stille*, 526 Fed. Appx. 509 (6th Cir. 2013)(unpublished). The Court recognized the Supreme Court in *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) ruled "that an appellate court's discretion in exercising jurisdiction over issues which are not directly reviewable is very limited." *Norton v. Stille*, *supra,* at 514, citing *Swint,* at 42–51. To exercise pendent appellate jurisdiction over a claim not independently appealable,

> the claim must either be inextricably intertwined with the appealable issue or must be 'necessary to ensure meaningful review' of the appealable issue. *Swint,* 514 U.S. at 51. 'Inextricably intertwined' has been interpreted by this Circuit 'to mean that the resolution of the appealable issue 'necessarily and unavoidably' decides the non-appealable issue.' *Vakilian v. Shaw,* 335 F.3d 509, 521 (6th Cir.2003); see also, e.g., C*hambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.1998)("[S]uch jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without addressing the non-appealable collateral issue.").

Norton v. Stille, *supra* at 514.

This Court has recognized that "pendent appellate jurisdiction is hard to reconcile with the collateral order doctrine, since appealability is premised on the ability to decide the qualified immunity issue 'in isolation from the remaining issues of the case.'" *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir. 2008), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 529 n. 10 (1985) and citing *Swint, supra*, and *Fogarty v. Gallegos*, 523 F.3d 1147, 1153–55 & n. 7 (10th Cir.2008)(declining pendent appellate jurisdiction in qualified immunity appeal.)

When this Court has allowed pendent appellate jurisdiction in qualified immunity cases, it has done so when the pendent claim concerns municipality liability or official capacity claims, and even then, only when the resolution of the qualified immunity claim turns on whether there has been a constitutional violation, not when the question is the "clearly established law" prong:

> we may exercise our pendent appellate jurisdiction only where 'a pendent claim was 'inextricably intertwined' with the district court's decision on a non-pendent claim.' *Cox v. Glanz*, 800 F.3d 1231, 1255

> (10th Cir. 2015)(quoting *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1148 (10th Cir. 2011)). Whether a claim is inextricably intertwined often depends on whether we address the constitutional-violation prong of the qualified-immunity analysis. In cases where we do not do so instead electing to resolve a claim under the clearly-established-law prong—we have repeatedly declined to exercise pendent appellate jurisdiction.

Brown v. The City of Colorado Springs, 709 Fed. Appx. 906, 916–17 (10th Cir. 2017)(unpublished).

Resolution of the two appealable issues at hand -- the qualified immunity claims for the *Franks* violation and the conspiracy claims -- can be resolved without deciding the *Heck* issue. Distinct legal standards and questions apply to the two qualified immunity challenges and to the *Heck* Claim. See *Sayed v. Virginia*, 744 Fed. Appx. 542, 547–49 (10th Cir. 2018)(unpublished):

> Qualified immunity and *Heck* are analytically distinct doctrines: qualified immunity asks whether a defendant violated a constitutional or statutory right that was clearly established, *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014); *Heck* evaluates whether a favorable judgment on a prisoner's § 1983 claim 'would necessarily imply the invalidity of his conviction or sentence,' 512 U.S. at 487. The *Heck* analysis does not bear on the qualified immunity inquiry, and because *Heck* issues are effectively reviewable on appeal while the denial of qualified immunity is not, courts generally decline to exercise jurisdiction over *Heck* issues raised on interlocutory appeal from the denial of qualified immunity.

Accord, *Harrigan v. Metro Dade Police Dep't Station No. 4*, 636 Fed. Appx. 470, 475–76 (11th Cir. 2015)(unpublished)(declining to exercise pendent jurisdiction

over the *Heck* claim because it was neither "'inextricably intertwined' with—or indeed even closely related to—the qualified immunity issue").

The First Circuit, in *Limone v. Condon*, 372 F.3d 39, 50–52 (1st Cir. 2004**)** also rejected a defendant's request that the Court exercise pendent jurisdiction to decide "the favorable termination issue" (i.e., the *Heck* issue) along with the qualified immunity. The Court held that

> the linchpin issue and the pendent issue cannot fairly be described as intertwined, let alone inextricably intertwined. Whereas the former (qualified immunity) focuses principally on the appellants' conduct leading up to the plaintiffs' convictions, the latter (favorable termination) entails an examination of post-conviction events.

The defendants have not cited one case in which an appellate court has exercised its pendent appellate jurisdiction under the collateral order doctrine to decide a *Heck* claim. That is because under no conceivable set of circumstances can the "favorable termination" issue be intertwined with the qualified immunity issue. Whether the defendants violated Mr. Montoya's constitutional rights and whether those rights were or were not clearly established at the time of the violation does not resolve the *Heck* issue. This Court should decline the defendant's request that this Court exercise its pendent appellate jurisdiction and decide that issue.

B. *HECK V. HUMPHREY* DOES NOT BAR PLAINTIFF'S CLAIMS

Defendants contend that Lawrence's current claims are barred by *Heck* because, according to the defendants' reading of *Montoya I* [Appx., Vol. 1, Doc. 86, at 25], this Court ruled (regarding the malicious prosecution claim) that entry of Montoya's plea to Accessory necessarily means there was not a "favorable termination." Defendants theorize this Court has ruled that *Heck* precludes Montoya's *Franks* and Conspiracy claims. The defendants misread what this Court said.

In *Montoya I*, the issue before the Court was whether Lawrence's malicious prosecution claim against the police detectives was barred because he failed to allege that "the original action terminated in favor of the plaintiff." *Montoya I*, 898 F.3d at 1066 [Appx., Vol. 1, Doc. 86, at 18-19](listing elements of a §1983 claim for malicious prosecution and observing that the detectives challenged only the second element -- favorable termination). This Court immediately clarified the issue by pointing out there are two favorable termination requirements – one, the element of the claim and the other, a separate *Heck v. Humphrey* requirement:

> One note of clarification: there are two termination requirements relevant to a § 1983 malicious prosecution claim. One is the favorable termination requirement that is an element of the malicious prosecution claim itself. The other is the *Heck v. Humphrey* rule that a litigant cannot bring a § 1983 claim challenging a conviction's legitimacy until that conviction has been dismissed. 512 U.S. 477, 486–87 (1994). Only the first termination requirement is at issue here;

> Montoya meets the *Heck* requirement because the conviction he attacks has been dismissed. *See Butler v. Compton*, 482 F.3d 1277, 1278–80 (10th Cir. 2007).

Montoya I, 898 F.3d at 1066, n.7 [Appx., Vol. 1, Doc. 86, at 19](emphasis added).

This Court's conclusion that the malicious prosecution "favorable termination" element was not met does not answer the *Heck v. Humphrey* issue. *Heck* bars a §1983 claim only if a favorable decision in the §1983 action would "*necessarily* demonstrate the invalidity of his conviction." *Simmons v. O'Brien*, 77 F.3d 1093, 1094–95 (8th Cir. 1996)(emphasis in original). "When a plaintiff's action, even if successful, will not establish the invalidity of the charge for which he stands convicted, the §1983 action is allowed to proceed." *Heck*, at 487 (emphasis added). The only charge for which Mr. Montoya stands convicted is an accessory charge. If Mr. Montoya prevails on his remaining claims, the validity of that conviction would *not* be called into question.

While the district court determined this Court's "clarification" of the scope of its ruling on the malicious prosecution issue (when this Court made clear that it was not ruling that Mr. Montoya's claims were barred by *Heck v. Humphrey*) did not determine the issue, the district court still found the Court's suggestion and the case cited to be persuasive.

In *Butler v. Compton*, this Court held that *Heck* applies only to the specific conviction for the count challenged by the Plaintiff-former defendant:

> The purpose behind *Heck* is to prevent litigants from using a §1983 action, with its more lenient pleading rules, to challenge their conviction or sentence without complying with the more stringent exhaustion requirements for habeas actions. See *Muhammad v. Close,* 540 U.S. 749, 751-52 (2004)(per curiam). The starting point for the application of *Heck* then is the existence of an underlying conviction or sentence that is tied to the conduct alleged in the §1983 action. In other words, a §1983 action implicates *Heck* only as it relates to the conviction that it would be directly invalidating.

Butler v. Compton, 482 F.3d at 1279 (holding that plaintiff's suit was not barred by the habeas exhaustion requirement of *Heck v. Humphrey*, because a § 1983 action implicates *Heck* only as it relates to the conviction it would be directly invalidating). *Accord, Vasquez Arroyo v. Starks*, 589 F.3d 1091, 1094 (10th Cir. 2009)(refusing to apply *Heck* to allegedly false arrests that resulted in pretrial diversions).

1. A finding by a jury that Detectives Schneider, Vigil, Martinez, and Priest included false information in and omitted material facts from the affidavit as prohibited by *Franks v. Delaware* would not call into question the conviction for accessory.

In his *Franks* claim, Mr. Montoya asserts that the individual defendants knowingly, or with reckless disregard for the truth, included false statements in the affidavit seeking an arrest warrant and that, had those false statements been excluded from the affidavit, the affidavit would not have provided probable cause

to arrest him. Thus, the claim is that a violation of the U.S. Constitution's Warrant Clause occurred, which does not affect what occurs after that violation.[10]

The Supreme Court itself stressed the importance of limiting the reach of its decision in *Heck*:

> we were careful in *Heck* to stress the importance of the term 'necessarily.' For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to §1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not 'necessarily imply that the plaintiff's conviction was unlawful.' 512 U.S., at 487, n.7 (noting doctrines such as inevitable discovery, independent source, and harmless error). To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted.

Nelson v. Campbell, 541 U.S. 637, 647 (2004). As Justice Alito explained in his dissenting opinion in *Manuel v. City of Joliet, Ill*., 137 S. Ct. 911, 925–26 (2017)(Alito J., dissenting):

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[10] As examples of other types of Fourth Amendment claims that are not barred by *Heck*, see, e.g., *Gonzalez v. Entress*, 133 F.3d 551, 554 (7th Cir.1998)(a favorable ruling on a claim alleging that a search violated the Fourth Amendment would not necessarily invalidate a conviction); *Shapard v. Attea,* 710 F. App'x 15 (2d Cir. 2017)(Summary Order)(unpublished)(*Heck* doctrine did not bar excessive force claims because a favorable adjudication of those claims wouldn't necessarily imply the invalidity of the inmate's assault conviction.); *Gilbert v. Cook,* 512 F.3d 899, 901 (7th Cir.2008)(excessive force claim was not barred despite disciplinary action, because only a claim that would "necessarily" imply the invalidity of the disciplinary board's sanction comes within the scope of *Heck*.).

> [M]alicious prosecution's favorable-termination element makes no sense when the claim is that a seizure violated the Fourth Amendment. The Fourth Amendment, after all, prohibits all unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends. A 'Fourth Amendment wrong' 'is fully accomplished,' *United States v. Calandra,* 414 U.S. 338, 354 (1974), when an impermissible seizure occurs. The Amendment is violated and the injury is inflicted no matter what happens in any later proceedings.

Perhaps recognizing this, the defendants do not argue that success on the *Franks* claim would somehow call into question the validity of the accessory conviction. Instead, they claim the conspiracy claim calls into question the validity of the accessory conviction. It does not.

2. A finding by a jury that Detectives Schneider, Vigil , Martinez, and Priest conspired to violate Mr. Montoya's Fourth, Fifth and Fourteenth Amendment rights would not call into question the conviction for accessory.

The Defendants assert that Mr. Montoya's "claims of substantive due process and conspiracy are directly tied to his allegations in the Second Amended Complaint that being that [sic] he was falsely coerced into admitting the facts that support the accessory charge." (Opening Brief, pp. 45-46). The defendants misstate Montoya's assertion. Mr. Montoya does not and has never claimed that he was coerced into telling the detectives he was in the stolen vehicle and he overheard one occupant of the vehicle state how they obtained the vehicle. He claims that rather than accepting this truth, Defendants Vigil, Martinez, and Priest, during the

entire interrogation, acted in concert to achieve a single end -- coercion of a "confession" that he was present and participated in a brutal murder and that neither those three detectives nor Schneider were concerned with the accuracy of Montoya's "confession." Success on his claim that the murder charges were procured through violations of the Fourth, Fifth, and Fourteenth Amendments would not necessarily disturb the accessory conviction.

3. Success in this lawsuit would not undermine the factual basis offered and found at the plea proceeding.

Colorado Criminal Procedure Rule 11 does not require proof of the offense by any particular standard for a court to accept a plea of guilty. The Court must find only a factual basis. Colo. Crim P. 11(b)(6). A defendant may waive that requirement. *Ibid.* In the guilty plea paperwork, Lawrence both waived the requirement for a showing of factual basis and also agreed there was a factual basis. [Appx., Vol. 1, Doc. 37-1, at 3]. At the court hearing for entry of the plea in 2014, the judge inquired of the defense attorney about the factual basis and stated, "it appears that there is at least some factual basis for the plea." [Appx., Vol. 1, Doc. 1-2, at 14:10-11]. Following this, as is customary, the defense attorney proffered the factual basis quoted in full *supra*, in Section I I: that during the day of January 1st, he was in vehicle he knew was stolen, heard others discussing what they had done, and stayed there without reporting it to authorities. [*Id*., at 14:13-

21]. Because the defendants fail to establish that success in this Section 1983 action would invalidate the plea as it was entered under Colorado procedures, any *Heck* claim would fail.

4. *Heck v. Humphrey* does not apply because Mr. Montoya lacks an available remedy in habeas.

That the district court raised this issue *sua sponte* is irrelevant. The district court was correct as a matter of law. This Court, adopting the reasoning of other circuits, has ruled that "a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a §1983 claim." *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). The district court's reliance on binding precedent from this Court is not "misplaced" as the defendants claim. It does not matter whether other Circuits agree with this Court; nor does it matter whether the Supreme Court has definitively reached the issue. This Court's ruling in *Cohen v. Longshore* governs.

Defendants argue that *Heck* applies because in their view, if Montoya prevails on his claims it will call into question the validity of his accessory conviction and he could have challenged that conviction through other means. The defendants' argument ignores that his accessory conviction did not come into being until he entered his plea, at which time he was immediately released from prison. Thus, because he was never incarcerated on that charge, he had no available

remedy in habeas as to that charge, and therefore under precedent from this Court (*Cohen, supra*), *Heck* does not bar his claims.

The defendants argue that because Montoya did not seek habeas relief on his murder conviction, their exposure should be limited. That argument is irrelevant to whether *Heck* acts as a bar to those claims.[11]

The defendants' argument ignores the district court's finding that Montoya has demonstrated that he was a "person under a disability" for tolling purposes [Appx., Vol. 5, Doc. 138, at 54-59]; this finding also explains any alleged lack of diligence in pursuing available remedies.

CONCLUSION

This Court should dismiss Defendants' appeal for lack of jurisdiction over the factual disputes they bring to this Court and because their *Heck* claims are not properly before the Court at this time.

If this Court elects to hear the appeal, this Court should rule that Defendants' qualified immunity claims are not preserved and are not properly before this Court.

If this Court elects to reach Defendants' two issues, this Court should affirm the ruling of the District Court.

[11] The defendants are incorrect. Montoya did in fact file a state petition for postconviction relief. [Appx., Vol. 2, Doc. 97-4].

STATEMENT REGARDING ORAL ARGUMENT

Counsel do not object to an oral argument if this Court finds it would be helpful. However, counsel see no need for oral argument. Judge Kane's Order is well written, researched and supported by legal precedent. Appellants' qualified immunity issues are weak and many issues they raise are either not preserved or not properly before this Court.

Respectfully submitted,

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Date: September 13, 2021

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I hereby certify that a copy of this APPELLEE'S ANSWER BRIEF was served on September 13, 2021, via CM/ECF to the following and further, that I will hand deliver seven (7) hard copies to the court within five (5) business days following notification from the clerk pursuant to 10th Cir. R. 31.5:

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