Case No. 22-8015

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANDREW J. JOHNSON,
Plaintiff-Appellant,

v.

CITY OF CHEYENNE, a municipal corporation;
LANCE COOPER OVERSTREET,
administrator of the estate of George W. Stanford, deceased;
ALAN W. SPENCER, an individual and Does 2 through 20, inclusive,
Defendants-Appellees.

Appeal from the United States District Court for the District of Wyoming (Cheyenne), Case No. 2:17-CV-00074-SWS · Honorable Scott W. Skavdahl, U.S. District Judge

APPELLANT'S OPENING BRIEF
Oral Argument Requested

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STATEMENT OF RELATED CASES

This matter was before the Court in *Johnson v. Spencer*, 950 F.3d 680 (10th Cir. 2020).

JURISDICTIONAL STATEMENT

A. Basis for District Court's Subject-Matter Jurisdiction.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. The action was brought under the Federal Civil Rights Act because the acts complained of caused damages to, and violated the rights of, Andrew J. Johnson, a citizen, and were committed under color of law of the State of Wyoming and the Town and/or City of Cheyenne.

B. Basis for Court of Appeals' Jurisdiction.

This Court has jurisdiction over this appeal judgment under 28 U.S.C. § 1291.

C. Filing Dates Establishing Timeliness of Appeal.

The district court entered final judgment on March 30, 2022 (App. Vol. 7 at 255). The notice of appeal was timely filed on April 5, 2022.

D. Finality of Judgment.

The March 30, 2022 judgment disposes of all claims as to all parties.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting summary judgment for Defendants Spencer and Stanford on Mr. Johnson's *Brady/Trombetta/Youngblood* claim?

2. Whether the district court erred in dismissing Mr. Johnson's claims against the Defendant City of Cheyenne Police Department?

3. Whether the district court erred in dismissing Mr. Johnson's fabrication-of-evidence claims against Defendant Spencer?

STATEMENT OF THE CASE

I. MR. JOHNSON'S COMPLAINT.

On August 7, 2013—after having served 24 years in prison—Mr. Johnson was declared innocent by the District Court of Laramie County, Wyoming, of the sexual assault and burglary charges of which he had been convicted in 1989. (App. Vol. 1 at 35, 255). Mr. Johnson had been accused by Laurie Slagle, an acquaintance, and was convicted, and sentenced to life imprisonment, based on her testimony. (App. Vol. 1 at 35, 47-52).

In early 2013, the Wyoming State Crime Laboratory, acting under the State's newly enacted DNA-testing statute, § 7-12-303(b), Wyo. Stat., "determined that the seminal fluid[] samples from Ms. Slagle's rape kit did not match Mr. Johnson's DNA"—but instead matched the DNA of Barney Haggberg, who was Ms. Slagle's boyfriend. (App. Vol. 1 at 35). Mr. Johnson was thereafter declared actually innocent by the Wyoming District Court. (App. Vol. 1 at 35; App. Vol. 2 at 135).

On April 17, 2017, Mr. Johnson sued the City of Cheyenne (the City) and two Cheyenne Police Department (CPD) officers, Detective George W. Stanford

(through the personal representative of Mr. Stanford's estate) and Officer Alan W. Spencer (collectively, Defendants). (App. Vol. 1 at 34-73) (the Complaint).

A. Factual Allegations.[1]

1. Background.

Ms. Slagle and Mr. Johnson, who had known each other, met on the night of June 10, 1989, at a Cheyenne bar. (App. Vol. 1 at 47-48). Ms. Slagle, who was "frustrated" because she had been unable to reach her boyfriend, Mr. Haggberg, by telephone, had been drinking and socializing with friends for three hours. (App. Vol. 1 at 47). Mr. Haggberg testified at Mr. Johnson's trial that he had been out of town. (App. Vol. 1 at 51-52).

Mr. Johnson told Ms. Slagle that he had "broken up" with his girlfriend, and she said that, "we would go have a drink and talk about this." (App. Vol. 1 at 48). Before they went to other bars, however, Ms. Slagle drove Mr. Johnson back to her apartment so that she could get money and her identification. (App. Vol. 1 at 48).

Ms. Slagle's apartment was on the third floor of the apartment building, which was accessed through a ground-level doorway and a second locked door on the second-floor interior landing. (App. Vol. 1 at 39). Her apartment is referred to as the "Attic Apartment" in the Complaint. (App. Vol. 1 at 39).

[1] Because Mr. Johnson is challenging the district court's ruling on the motion to dismiss, the facts set forth in this section are taken from the Complaint.

At the apartment, Mr. Johnson used the plastic sleeve enclosing his photo identification card and driver license "to separate marijuana leaves from other debris" so that he could "roll[] two marijuana joints." (App. Vol. 1 at 42). He and Ms. Slagle drank wine and smoked marijuana. (App. Vol. 1 at 42-43). When they left the apartment, Mr. Johnson inadvertently left the sleeve with his identification cards on the coffee table in Ms. Slagle's living room. (App. Vol. 1 at 43). Because she was by then "pretty well legally intoxicated," Ms. Slagle had Mr. Johnson drive her car to the Cheyenne Club, where they stayed briefly before going to another bar, the Mayflower. (App. Vol. 1 at 49).

After they left the Mayflower in her car, Ms. Slagle vomited and Mr. Johnson "ran into [a] building," telling Ms. Slagle to wait; instead, Ms. Slagle drove herself home, leaving Mr. Johnson behind. (App. Vol. 1 at 50, 52). She testified at Mr. Johnson's trial that she went to bed, only to be awakened by "the sound of breaking glass, the lock click on the door, and the sound of someone walking across the broken glass and up the last flight of stairs" to her apartment. (App. Vol. 1 at 51). Ms. Slagle maintained that Mr. Johnson had broken into her apartment and raped her. (App. Vol. 1 at 51).

2. The police investigation.

A downstairs neighbor, Julie Prodis, was awakened by loud knocking and the sound of glass breaking, after which she heard footsteps in Ms. Slagle's apartment

and a woman screaming. (App. Vol. 1 at 39). Officer Phillip E. Raybuck, Sr., was the first officer on the scene, arriving within one minute after Ms. Prodis called the police. (App. Vol. 1 at 40). Officer Spencer arrived shortly thereafter. (App. Vol. 1 at 40).

The officers saw that a door on the stairway's second-floor landing had been broken open. (App. Vol. 1 at 40). They found Ms. Slagle inside the apartment's bathroom, "screaming and yelling." (App. Vol. 1 at 41). She opened the bathroom door after the officers assured her that no one else was inside. (App. Vol. 1 at 40). According to Officer Spencer, Ms. Slagle accused "A.J." of having assaulted her, but claimed not to know his last name. (App. Vol. 1 at 42). Officer Spencer testified at Mr. Johnson's criminal trial that he "had glanced down on the ground" while standing in the bathroom doorway and "noticed a driver's license or an identification card in a plastic-type container," which bore Mr. Johnson's name. (App. Vol. 1 at 42). He showed the identification to Ms. Slagle, who "went into hysterics" and eventually said, "Yes, that's A.J." (App. Vol. 1 at 42).

Officer Spencer took Ms. Slagle to the hospital. (App. Vol. 1 at 44). The physician's report included Ms. Slagle's statement that she had last had consensual intercourse about three weeks earlier. (App. Vol. 1 at 53).

Officer Raybuck retrieved his crime scene kit from his car, "loaded a cassette of unexposed color negative film into a 35mm camera . . . , called the CPD dispatcher

to get the CPD case investigation number, and wrote a case-identifier card showing both the CPD case number . . . and his badge number." (App. Vol. 1 at 45). "[A]t the beginning of the film roll, Officer Raybuck photographed the case-identifier card he had prepared . . . to ensure that this specific . . . cassette roll and corresponding negatives and print photos were linked to the CPD investigative file." (App. Vol. 1 at 45).

Officer Raybuck took photographs of the door and the staircase leading to Ms. Slagle's apartment. (App. Vol. 1 at 45). The Complaint further alleges:

> It is presently unknown whether the next immediate sequence of photos taken by Officer Raybuck on June 11, 1989, was of doorway/stairwell shots leading up to the Attic Apartment or of photos of the Attic Apartment's living quarters. . . . [F]ollowing his standard procedure . . . , Officer Raybuck photographed the rooms of the Attic Apartment from different angles, including . . . the bedroom, bathroom, and living room. . . . .

(App. Vol. 1 at 45-46). Officer Raybuck then went to the hospital, where he took photographs of Ms. Slagle's arm and inner thigh. (App. Vol. 1 at 46).

Officer Raybuck gave the film cassette to another officer to be placed into evidence. (App. Vol. 1 at 46). Only six of Officer Raybuck's photographs were provided to Mr. Johnson's counsel before the criminal trial. (App. Vol. 1 at 46). The Complaint alleged that, "[i]t is presently unknown whether the missing negative film and/or missing photographic prints therefrom have been misplaced, purposely

or inadvertently destroyed, purposely or carelessly sequestered, lost, or something else improperly done with this forensic evidence." (App. Vol. 1 at 36).

Detective Stanford questioned Ms. Slagle on June 12, 15, and 30, 1989. (App. Vol. 1 at 53). The first interrogation (June 12), in which Mr. Haggberg was included, was not recorded. (App. Vol. 1 at 53). On the day after that interview, Ms. Slagle contacted Detective Stanford and told him she had discovered a pair of eyeglasses in her bedroom when she was changing the bedsheets and that she "realized they must have been A.J.'s." (App. Vol. 1 at 54-55). In the interview on June 15, Ms. Slagle told Detective Stanford "she bit Mr. Johnson twice in his shoulder area while he was supposedly raping her"; no bite marks were observed on Mr. Johnson. (App. Vol. 1 at 53). In the last interview, Ms. Slagle asserted that she and Mr. Haggberg had not had intercourse since June 1988, because of complications from STD surgery. (App. Vol. 1 at 53).

B. The Claims.

The Complaint pleads two claims against Defendants Stanford and Spencer under *Brady v. Maryland*, 373 U.S. 83 (1963), *California v. Trombetta*, 467 U.S. 479 (1984), and *Arizona v. Youngblood*, 488 U.S. 51 (1988), arising from the failure to produce or the disappearance of Officer Raybuck's photographs. (App. Vol. 1 at 56-58). A third count, against Officer Spencer, alleges fabrication of evidence, *i.e.*, that he removed Mr. Johnson's driver license and identification card from the coffee

table in Ms. Slagle's apartment, and used the license and card impermissibly to prompt Ms. Slagle to identify Mr. Johnson as the perpetrator; further, Officer Spencer falsely reported both that Ms. Slagle had identified the assailant by his initials before he displayed the photo to her—that he found the identifications by the bathroom door. (App. Vol. 1 at 59-60).

The fourth claim for relief alleges that the CPD had either no written policies or constitutionally inadequate policies with respect to material aspects of the criminal investigation against Mr. Johnson. (App. Vol. 1 at 61-64).[2]

C. The District Court's Ruling on Defendants' Motions to Dismiss the Complaint.

The Defendants moved to dismiss the Complaint. (App. Vol. 1 at 74-102, 103-254; App. Vol. 2 at 45-81; App. Vol. 3 at 215-45, 246-48, 263-67). On August 20, 2020, the district court issued its Order Granting in Part and Denying in Part Motions to Dismiss (the Dismissal Order). (App. Vol. 4 at 118-58).

The court first ruled that Defendants Spencer and Stanford are not entitled to qualified immunity on the first two claims for relief. (App. Vol. 4 at 145-46) (footnote omitted). The court ruled, however, that Defendant Spencer is entitled to qualified immunity on Mr. Johnson's fabrication-of-evidence claim. (App. Vol. 4

[2] The fifth claim for relief pleads an inadequate training or supervision claim against the City (App. Vol. 1 at 64-67), the dismissal of which is not at issue on this appeal.

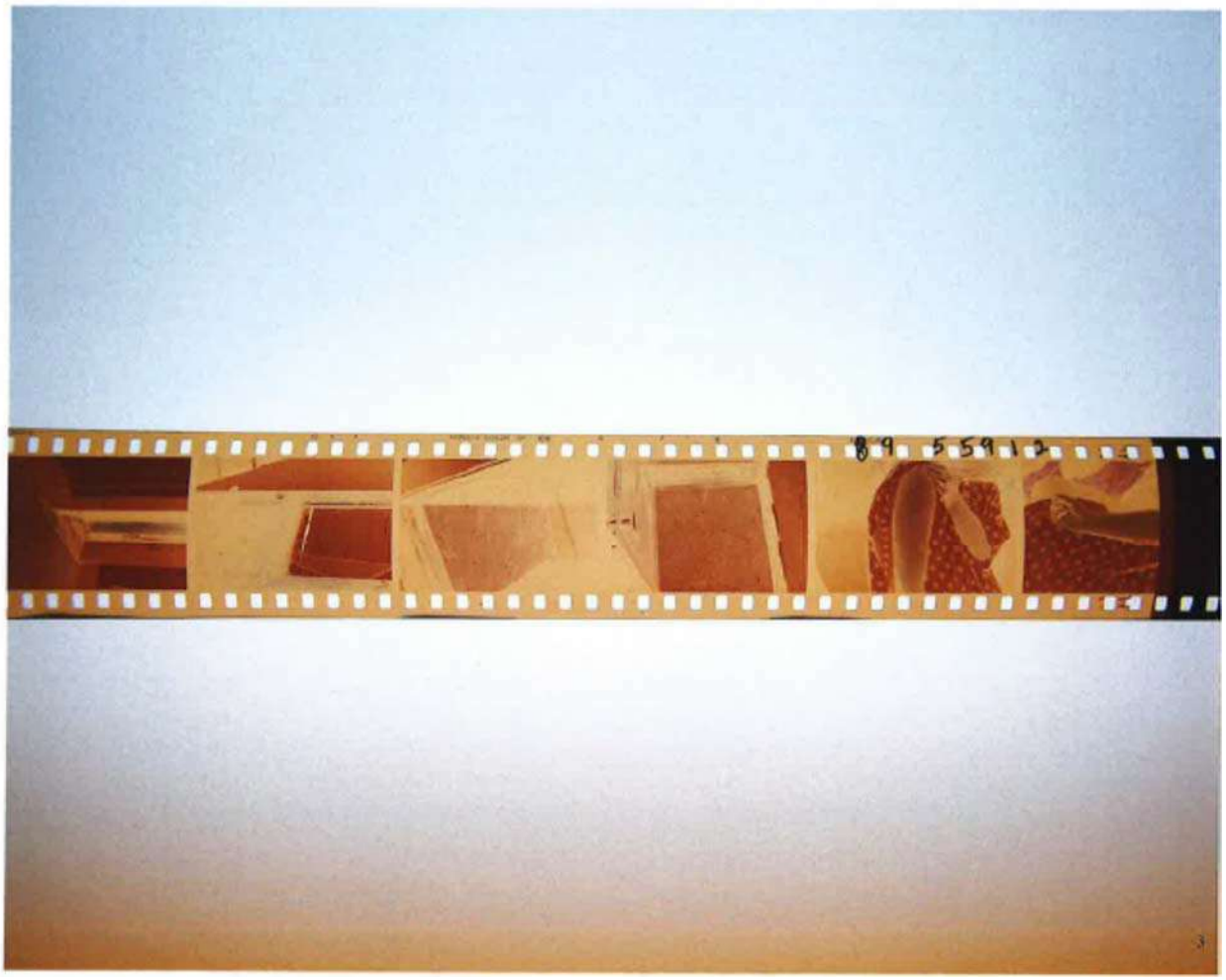
at 146-50). The court also ruled that Mr. Johnson failed to allege sufficient facts showing a constitutional violation. (App. Vol. 4 at 147).

Addressing the claim against the City, the court noted that "CPD officers were already constitutionally required to comply with the dictates of the *Brady/Trombetta/Youngblood* line of cases with respect to the disclosure and preservation of evidence," such that "it can hardly be said that a lack of, or inadequate, or failure to enforce, certain written policies or procedures regarding the proper handling and disclosure of crime scene photographs caused the individual defendants to violate Plaintiff's due process rights." (App. Vol. 4 at 153). The court accordingly dismissed the claims against the City. (App. Vol. 4 at 158).

II. THE SUMMARY JUDGMENT ORDER.

Defendants Spencer and Stanford moved for summary judgment on Mr. Johnson's first two claims for relief, based solely on their assertion that no crime-scene photographs exist that were not produced in the criminal case. (App. Vol. 5 at 121-24). For the same purported reason, the Defendants renewed their claim for qualified immunity. (App. Vol. 5 at 124-27). Mr. Johnson disputed the facts upon which the motion was based and asserted that "the evidence is susceptible of different interpretations or inferences by the trier of fact as to whether the photographs existed." (App. Vol. 5 at 250-54, 260) (citation and internal quotation marks omitted).

Defendants relied on two affidavits. The affidavit of Jennell Webster (the CPD's current evidence manager), attached five strips of negatives—totaling 26 photographic images—and stated that these strips represented all negatives in the CP:D's current possession. (App. Vol. 5 at 113, 122, 132-34). An affidavit from Officer Raybuck stated that one of the five negative strips—reflecting six photographic images—were photographs he took the night of the incident:



(App. Vol. 5 at 115, 122, 142-43; App. Vol. 7 at 177).

The six images show broken glass and the floor of Ms. Slagle's apartment adjacent to the door, and two photographs of Ms. Slagle at the hospital:

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(App. Vol. 5 at 134, App. Vol. 7 at 18-23). Officer Raybuck's affidavit does not state or claim that the one strip—of six images—includes or represents all photographs he took that night of the crime scene or of Ms. Slagle at the hospital. (App. Vol. 5 at 115, 122, 134, 142-43).

Mr. Johnson relied on Officer Raybuck's deposition testimony:

- Officer Raybuck testified, in accordance with CPD protocol, that he used a "flash card" or "identifier" when he took crime scene photographs, both "at the beginning and at the end of [the] film." (App. Vol. 5 at 177, 198, 252, 257). There is no "flash card" or "identifier" on the negative strip shot by Officer Raybuck that was produced by the CPD. (App. Vol. 5 at 134).
- Officer Raybuck testified that he took photographs of Ms. Slagle's inner thigh while she was at the hospital. (App. Vol. 5 at 164-65, 174, 200). There is no photograph of her inner thigh on the negative strip produced by CPD. (App. Vol. 5 at 134, 200). Officer Raybuck testified that "it should be part of this strip, and it's not there." (App. Vol. 5 at 200).

- Officer Raybuck described the single negative strip of six photographic images as including "the ones that I took, some of them." (App. Vol. 5 at 201).

In Mr. Johnson's opposition to the summary judgment motion, he relied, in part, on the report of his law enforcement and police procedure expert, Christopher D. Bertram, who stated, in pertinent part:

> Officer Spencer stated he located identifications of Mr. Johnson in the apartment lying on the floor near the bathroom. . . . . However, IDs were never photographed in the location they were located before they were collected as evidence . . . . Officer Raybuck said he photographed the apartment thoroughly; however, there are only a minimal number of photographs in the case file that he acknowledges he took. This raises a significant question as to where the remaining pictures are of the apartment and of the IDs collected by Officer Spencer. Where the IDs locations actually were as photographed in the apartment would allow us to understand where they were in proximity to other items in the apartment. . . . [I]t is below standard investigative procedure that the detective in this case did not provide all the evidence collected and did not perform his due diligence with regards to key elements of investigating this case correctly and thoroughly. The fact that Officer Raybuck mentions in his police report that photographs were taken of the victim at the hospital, specifically of her thigh, indicates Detective Stanford failed to locate those photographs or attempted to locate all the photographs taken by Officer Raybuck, or misplaced or intentional[ly] removed the now missing photographs from the case file. This important detail leads to the high probability that Det[ective] Stanford either overlooked these photographs intentionally or internally omitted them before passing the remaining to the prosecutor. One way or another, the integrity of this investigation was seriously compromised by Detective Stanford.

(App. Vol. 4 at 271).

Mr. Bertram also addressed the absence of photographs in the CPD production showing Mr. Johnson's identification cards in the apartment:

> A proper crime scene documentation would have included photographing the IDs in place and then gathering them as evidence. . . . Absent this, it raises the question as to whether the IDs were collected where they were stated in Officer Spencer's report. Additionally, the fact all the pictures taken of the apartment that night [are] not included in evidence turned over to the prosecution and the defense clearly indicates that somebody had altered, recklessly misplaced, or intentionally removed those pictures from the case file. Det[ective] Stanford was responsible for the case after the patrol officers finished their initial investigation. . . . Members of a police department who assume custody of evidence shall be responsible for ensuring its security, proper storage, and maintenance, and for the ready retrieval of such evidence upon demand. Photographs should be preserved as evidence in accordance with department evidence procedures. . . . There is no excuse for misplacing or destroying any of [the] officers' photographs in this case.

(App. Vol. 4 at 272).

The district court granted summary judgment. (App. Vol. 7 at 227-54) (the Summary Judgment Order). The court ruled that Mr. Johnson had "fail[ed] to clear [the] first hurdle of establishing the existence of additional photos taken by Raybuck of the inside of Slagle's apartment." (App. Vol. 7 at 244). "At best, a reasonable inference can be drawn there was a picture taken of Slagle's inner thigh that was lost/mis-handled and not produced to Johnson's defense." (App. Vol. 7 at 244). "Beyond that, it is pure speculation that Raybuck took additional photos of the inside of Slagle's apartment when he responded to the crime scene." (App. Vol. 7 at 244). And the court discounted Mr. Bertram's report, ruling that his opinion "is based on

his view that additional photographs *should have been taken*." (App. Vol. 7 at 245) (original emphasis). "Bertram's speculative opinion . . . is based on an unreasonable inference that additional pictures of the apartment's interior were in fact taken that night." (App. Vol. 7 at 246).

The court further ruled that Mr. Johnson failed to show that "the missing evidence was materially exculpatory at the time it was lost or destroyed." (App. Vol. 7 at 248). "While it is *possible* photographs of the interior of Slagle's apartment . . . would have revealed impeachment evidence," there was no "substantial basis" for so finding. (App. Vol. 7 at 248) (original emphasis). Moreover, "because there is no evidence photos of the apartment's interior ever existed, there is also no evidence as to when and by whom any such photos were lost or destroyed." (App. Vol. 7 at 248). "Because Plaintiff has not demonstrated the missing photographs possessed 'an exculpatory value that was apparent before the evidence was destroyed' and because Plaintiff could—by cross-examining the State's witnesses or testifying himself—obtain 'comparable evidence by other reasonably available means,' the failure of the police to preserve the missing photos did not violate Plaintiff's due process rights." (App. Vol. 7 at 250).

Based on these rulings, the court revisited its qualified-immunity ruling in the Dismissal Order. (App. Vol. 7 at 251). Finding that "there is no evidence [Officer Spencer or Detective Stanford] participated in any violation of Johnson's

constitutional rights, let alone did so knowingly or recklessly," the court ruled that qualified immunity barred the claims. (App. Vol. 7 at 252-53).

SUMMARY OF ARGUMENT

1. The district court erred in dismissing Mr. Johnson's claim against the City. A plausible showing was made of the violation of Mr. Johnson's due process rights to be free from police department failure to disclose material exculpatory, constitutionally material, or potentially useful evidence. The City's police department customs, or written policies or procedures (or lack thereof), regarding handling and disclosure of crime scene photos caused the constitutional violations to Mr. Johnson. This §1983 claim meets the *Iqbal/Twombly* pleading standard and the district court erred by dismissing the claim at the Rule 12(b)(6) stage.

2. The district court erred in granting summary judgment for Defendants Spencer and Stanford on Mr. Johnson's *Brady/Trombetta/Youngblood* claim. The material facts and reasonable inferences to be drawn therefrom defeat Defendants' assertion that no photographs were taken at the crime scene—save for the single strip of six negatives that were produced before Mr. Johnson's criminal trial. The assumption that no such evidence existed was the linchpin of the district court's summary judgment ruling, and the existence of conflicting facts and inferences invalidate that ruling.

3. The district court erred in dismissing Mr. Johnson's fabrication-of-evidence claim against Defendant Spencer. A plausible showing was made that Mr. Johnson's due process right to be free from reckless falsification of identification evidence was violated when Officer Spencer recklessly manufactured the identification of Ms. Slagle's alleged assailant, resulting in the false accusation against Mr. Johnson. Officer Spencer is not entitled to qualified immunity. By 1989, it was well-established that, absent exigent circumstances, the practice of showing a photograph of a single suspect to a victim was condemned. The district court erred by dismissing this claim at the Rule 12(b)(6) stage.

ARGUMENT

I. STANDARD OF REVIEW.

The orders granting dismissal under Federal Rule of Civil Procedure 12(b)(6) and granting summary judgment are reviewed *de novo*. *E.g., Renfro v. Champion Petfoods USA, Inc*, 25 F.4th 1293, 1300 (10th Cir. 2022) (dismissal order); *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1287 (10th Cir. 2022) (summary judgment).

II. THE DISTRICT COURT ERRED IN DISMISSING MR. JOHNSON'S CLAIM FOR RELIEF AGAINST THE CITY.

"Granting a motion to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. Of Denver*, 567 F.3d 1169,

1178 (10th Cir. 2009) (cleaned up). "Dismissal under Rule 12(b)(6) is appropriate only if the complaint, viewed in the light most favorable to plaintiff, lacks enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 764 (10th Cir. 2019) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task." *Iqbal*, 556 U.S. at 679. The Court views "the totality of the circumstances as alleged in the complaint," *Jones v. Hunt*, 410 F.3d 1221, 1229 (10th Cir. 2005), accepting the well-pleaded facts as true, *Sylvia v. Wisler*, 875 F.3d 1307, 1313 (10th Cir. 2017), and drawing all reasonable inferences in the nonmoving party's favor, *Doe v. Woodard*, 912 F.3d 1278, 1285 (10th Cir. 2019), *cert. denied*, 139 S.Ct. 2616 (2019).

A complaint "must give just enough factual detail to provide 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Warnick v. Cooley*, 895 F.3d 746, 751 (10th Cir. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, the Rule 12(b)(6) standard "is still fundamentally one of notice

pleading intended 'to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense.'" *Sylvia*, 875 F.3d at 1326 (citation omitted).

Plaintiff's fourth claim asserts that the City's customs, or written policies or procedures (or lack thereof), regarding handling and disclosure of crime scene photos caused the constitutional violations and injury to Mr. Johnson. (App. Vol. 3 at 276-79, 284-86.). The most important "context-specific" fact is that the operative facts occurred more than 30 years ago. (App. Vol. 3 at 283). To prepare and present a plausible claim, Mr. Johnson was confronted with an archeological dig for old facts. (App. Vol. 3 at 284). Due process requires that an evaluation of the "plausibility" of this claim must take into account the reality of this pre-discovery impediment. (App. Vol. 3 at 284)

In opposing the City's renewed Rule 12(b)(6) motion, Mr. Johnson highlighted one substantial problem blocking him from pleading more factual detail: the relevant policies and procedures manuals no longer exist in written form. (App. Vol. 3 at 283). This impediment compounds the more general problem that most of the relevant historical policy/procedure/custom facts are still solely in the City's control. *See generally Gee v. Pacheco*, 627 F.3d 1178, 1185 (10th Cir. 2010) ("One of the chief concerns of critics of [*Iqbal*] is that plaintiffs will need [formal]

discovery before they can satisfy plausibility requirements when there is asymmetry of information, with the defendants having all the evidence.")

The district court should have been more attentive to the context-specific pleading hurdles in ruling that Mr. Johnson had failed to cross the plausibility finish line. Under the circumstances, fair notice of the claim and its grounds were given to the City, given the *Twombly/Iqbal* standards. (App. Vol. 3 at 272-76.) These standards are still flexible enough to accommodate the unusual pleading impediments here.

The district court committed other errors in dismissing this claim with prejudice. It mischaracterized the nature of the claim. It failed to address the plausibility of each theory of liability. It misstated and misapplied substantive law. And it wrongly converted Mr. Johnson's trial proof burden into a pleading burden.

A. The District Court Mischaracterized Mr. Johnson's Claim.

The district court's analysis began:

> Plaintiff does not allege the execution of any formal City regulation or policy inflicted injury upon him; rather, he alleges that, in 1989, the [CPD] had no written policies or procedures, or had constitutionally inadequate written policies or procedures, addressing the proper handling and disclosure of crime scene forensic photographs, which "was a moving force in causing constitutional injury" to him.

(App. Vol. 4 at 151-52).

It is true that Mr. Johnson singled out the CPD, rather than the municipality itself, as the source of the "constitutionally inadequate" written policies or

procedures, if any there were. This is inconsequential. Mr. Johnson pleaded that the City "delegated to CPD all policymaking authority regarding CPD practices and procedures for criminal law enforcement for the City." (App. Vol. 1 at 37-38). City police chiefs are acknowledged municipal law enforcement policymakers. *See, e.g., Grandstaff v. Borger*, 767 F.2d 161, 169 (5th Cir. 1985).

The district court also misconstrued the meaning of "constitutionally inadequate." In context, that phrase—as read in the light most favorable to Mr. Johnson—means that that CPD's written policies and procedures (if any) were insufficient, or the monitoring and enforcement of them was insufficient, to prevent the constitutional injuries. It is not Mr. Johnson's position that the absence of any of these written policies and procedures was itself unconstitutional—or, said another way, that any of them were constitutionally required. Thus, the court erred in faulting Mr. Johnson for citing "no authority supporting that . . . specific procedures were (or are) constitutionally required." (App. Vol. 4 at 152 (footnote omitted)). The specific procedures pleaded (App. Vol. 1 at 60-61) are examples of ones which, *if* CPD had had them in place, would tend to operate to prevent the constitutional violations allegedly suffered by Mr. Johnson. That was Mr. Johnson's point.

B. The District Court Incorrectly Analyzed the Plausibility of Each Theory of Liability.

Four alternative *Monell* liability theories are pleaded. The City: (1) had no written policies or procedures governing crime scene forensic photograph

negative/print handling and disclosure; (2) had "constitutionally inadequate" (*i.e.*, gaps in) written policies or procedures governing such photo handling and disclosure; (3) had "constitutionally inadequate" (*i.e.*, inaction in) monitoring or enforcement of the written policies or procedures governing such photo handling and disclosure; or (4) had customs of individual patrolman, supervisor or detective custodianship and disclosure of negatives and/or prints, allowing for impermissible selective preservation and disclosure on a case-by-case basis. (App. Vol. 1 at 60-64). Each failure individually and/or collectively caused constitutional violations.

1. No written policies or procedures.

Mr. Johnson alleged a total absence of any CPD written policies or procedures governing forensic photo handling and disclosure. The total vacuum can plausibly be viewed as a deliberate choice of the municipality itself, constituting a "City regulation or policy." The district court apparently credited this reasonable inference. But it reasoned that such a policy choice could not plausibly be a "moving force" in causing Mr. Johnson's constitutional injuries because CPD officers were already "constitutionally required to comply with the dictates" of *Brady*/*Trombetta*/*Youngblood*. (App. Vol. 4 at 153). This reasoning is unsound. This line of cases sets out general principles regarding evidence handling and disclosure. The total absence of CPD policies or procedures specifically directed to preservation, handling, and disclosure of crime scene photos plausibly left peace

officers inattentive to or unaware of their duties regarding such often-critical evidence. This reasonable inference should have been credited to Mr. Johnson, *see Woodard*, 912 F.3d at 1285, but was not. Mr. Johnson alleged sufficient causation. *See Quintana v. Santa Fe City Bd. of Comm'rs*, 973 F.3d 1022, 1034 (10th Cir. 2020) (plaintiff alleged sufficient causation—even if the complaint's allegations struck the district court as improbable—to satisfy the low bar for motion to dismiss).

2. Gaps in written policies or procedures.

The plausibility of this claim is addressed in section II.C., *infra*.

3. Inaction in monitoring and enforcement of policies or procedures.

This liability theory presupposes the existence of relevant written CPD policies or procedures in 1989. As previously noted, the relevant policy or procedures manual(s) no longer exist in written form (App. Vol. 3 at 283), so written interrogatories and deposition discovery will be necessary to establish the foundational policies/procedures. If there are in fact none, this theory disappears.

However, the district court altogether rejected this theory's plausibility at the pleading stage. It reasoned that such an alleged "policy of inaction" must be accompanied by alleged facts showing that the municipality had prior notice that its inaction program will cause constitutional violations, citing *Connick v. Thompson*, 563 U.S. 51, 61-62 (2011). (App. Vol. 4 at 153).

Connick involved a failure-to-train claim, which requires special proof of "deliberate indifference." 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of [a] failure to train [claim]" (citation omitted)). *Connick* is not a case of alleged failure to monitor and enforce existing police policies or procedures, and it did not involve case disposition at the 12(b)(6) stage. The district court wrongly relied upon *Connick* in reaching its conclusion as to this theory of liability.

4. Custom of individual peace officer handling and selective disclosure of crime scene forensic photos.

"[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). The district court gave short-shrift to Plaintiff's "custom" theory, noting:

> Plaintiff further alleges CPD's custom or practice in 1989 relating to crime scene photographs—specifically, "for the investigating patrolman and/or detective and/or CPD supervisor to maintain in his/her own case investigation file" the negatives and/or prints of the photographs –allowed for the "selective" preservation and disclosure of the negatives and prints, which was *somehow* a "moving force in causing constitutional injury" to Plaintiff.

(App. Vol. 4 at 152 (emphasis added)).

Providing no further explanation, the district court implicitly disallowed a reasonable inference (App. Vol. 4 at 153-54) that the occurrences of Mr. Johnson's constitutional injuries were made "reasonably probable by permitted continuation of the custom." *Bielevicz v. Dubinson*, 915 F.2d 845, 851 (3d Cir. 1990). Overlooking this reasonable inference was error.

The inference here of permitted continuation of the custom is implicit in the existence of the custom itself. In effect, the court decided that the pleaded facts regarding the occurrence and nature of the constitutional violations (and all reasonable inferences therefrom) were unrelated to the alleged widespread custom. In other words, the custom was not, as a matter of law, sufficiently "closely related to the violation of the plaintiff's federally protected right[s]," *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 770 (10th Cir. 2013), as to state a plausible claim for relief. This conclusion was error. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), established that "there must be an affirmative link between the policy [or custom] and the particular constitutional violation alleged." *Id*. at 823. But "[a]s long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz*, 915 F.2d at 851 (citation omitted).

The words "moving force" are simply words for "causation." Apparently, the court concluded that Mr. Johnson failed to allege enough specific facts of causation.

This was too shortsighted. Although *Twombly* and *Iqbal* changed federal court pleading standards, they did not change the Rule 12(b)(6) standard that, in assessing a motion to dismiss, the district court must review the complaint as a whole to determine whether a plausible claim is stated against the moving defendant. *See Hunt*, 410 F.3d at 1229 (the court must embrace "the totality of the circumstances as alleged in the complaint"). Mr. Johnson alleged sufficient facts to support the plausibility of his custom theory.

C. The District Court Got Principles of Substantive Law Wrong.

The district court made at least one substantive law error. Seizing upon language in *Tuttle*—that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the [deficient policy] and the constitutional deprivation," 471 U.S. at 824—the district court concluded that both the "custom" and policy-gap theories were defectively pleaded because Mr. Johnson alleged only his own violations, a "single incident." (App. Vol. 4 at 153-54).

Multiple incidents are not an essential element of this *Monell* claim. There are other ways to plead and prove that Plaintiff's incident was not a "random event," *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005), and that the City had sufficient notice of the propensity of its policies/practices to create a substantial risk

of constitutional injuries. *See Rivera v. Guevara*, 319 F. Supp. 3d 1004, 1064–65 (N.D. Ill. 2018) (sufficient evidence, including detectives not checking out and keeping personal copies of documents, existed for jury to find widespread practice of not disclosing evidence).

As Mr. Johnson described in his opposition to the City's original 12(b)(6) motion, the law does not require that a plaintiff allege (and prove) the requisite notice by showing a pattern of similar constitutional violations, but rather notice can be proven in a variety of ways. (App. Vol. 1 at 293-94). "Notice can come from 'the existence of a pattern of tortious conduct' *or* facts showing that a constitutional violation is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action or inaction." *Quintana*, 973 F.3d at 1056 (citation omitted; emphasis added).

D. The District Court Confused Mr. Johnson's Trial Burden of Proof with His 12(b)(6) "Burden."

The moving defendant bears the burden of proving entitlement to dismissal. *See* 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 (3d ed. 2015) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exists."). Losing this focus, the district court instead undertook ascertaining whether Mr. Johnson had pleaded a *prima facie* case in the Fourth Cause of Action. (App. Vol. 4 at 151-54). This was error. "[T]he Rule 12(b)(6) standard doesn't require a plaintiff to 'set forth

a *prima facie* case for each element'" of a claim. *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016) (citation omitted; emphasis added). A plaintiff's "burden" in opposing a Rule 12(b)(6) motion is pointing out that a claim asserts "plausible grounds" for relief. "Asking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a *reasonable expectation* that discovery will reveal evidence." *Twombly*, 550 U.S. at 556 (emphasis added); *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008) (same); *see also Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) ("[T]he complaint taken as a whole must establish a nonnegligible probability that the claim is valid, though it need not be so great a probability as such terms as 'preponderance of the evidence' connote.").

In dismissing this claim, the district court *did not cite a single published decision* finding a *Monell* claim implausible at the 12(b)(6) stage because of inadequate facts pleaded or inadequate plaintiff-oriented reasonable inferences. This is telling. "Fair notice under Rule 8(a)(2) depends on the type of case." *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008). As a practical matter here, exposing more factual specificity depends on formal discovery for this particular kind of claim.[3] Direct proof of causation and fault in a § 1983 *Monell* case is rarely,

[3] One respected commentator has observed that "*Iqbal's* heightened pleading should not apply in §1983 local government liability cases because local governments are not protected either by absolute or qualified immunity and thus *Leatherman* [*v.*

if ever, available; such proofs emerge largely from all the surrounding circumstances. (App. Vol. 3 at 288). Most importantly, more factual specificity here requires discovering which of the four liability theories—or combination of them—is in play. Only narrowing the theories in play will set up targeted discovery developing more factual support for the requisite culpability and causation elements.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR DEFENDANTS SPENCER AND STANFORD.

A. The Constitutional Standards.

The United States Supreme Court "has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'" *Trombetta*, 467 U.S. at 485 (citation omitted). The required pleading and proof vary, principally depending on the nature of the suppressed evidence.

Brady requires disclosure of material exculpatory evidence which, "if suppressed, would deprive the defendant of a fair trial." *Smith v. Sec'y of N.M. of Corr.*, 50 F.3d 801, 834 (10th Cir. 1995) (citation omitted). *Trombetta* extended *Brady* in the context of the government's duty to take affirmative steps to preserve "evidence that might be expected to play a significant role in the suspect's defense." 467 U.S. at 488. The "constitutional materiality" of such evidence is an essential

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Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 165 (1993)] should remain good law." Sheldon Nahmod, Civil Rights & Civil Liberties Litigation: The Law of Section 1983 (4th ed. 1997), §1:43.

element. The test is that such "evidence must both possess an exculpatory value that was apparent" to the government and "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489. *Youngblood* addressed the due process duty to preserve evidence that does not meet the *Trombetta* "constitutional materiality" standard, but which nonetheless "might be useful to a criminal defendant." 488 U.S. at 52. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58.

This Court places claims involving nondisclosure of exculpatory or impeachment evidence "into two distinct universes." *Smith*, 50 F.3d at 824 n.34. "*Brady* and its progeny address exculpatory evidence still in the government's possession," while *Youngblood* and *Trombetta* govern cases in which "the government no longer possesses the disputed evidence." *Id.* (citation omitted).

B. Reasonable Inferences From the Evidence Establish the Existence of Additional Photographs Taken by Officer Raybuck.

The Summary Judgment Order does not draw distinctions among the doctrines, lumping them together as "*Brady/Trombetta/Youngblood* claims," which the court first rejected based upon its ruling that Mr. Johnson failed to show that any discoverable evidence existed in the first instance. (App. Vol. 7 at 243-46). The reasonable inferences from the evidence invalidate that ruling.

1. Summary judgment standards.

The burden was on Defendants Spencer and Stanford to come forward with "affirmative evidence that negates an essential element of the nonmoving party's claim" or to demonstrate that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 994 (10th Cir. 2019) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)). Once such a showing is made, the burden is on the plaintiff to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 250 (1986).

As the nonmovant, Mr. Johnson was entitled to have "all justifiable inferences . . . drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651 (2014) (citation omitted). The district court was "required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the [summary judgment] motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citation and internal quotation marks omitted; alteration in original). This Court has explained the shifting burdens:

> After the moving party has met its initial burden of showing an absence of a genuine issue of material fact, "the burden then shifts to the nonmoving party, who must offer evidence of specific facts that is sufficient to raise a 'genuine issue of material fact.'" *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1097 (10th Cir. 1999) (citation omitted). "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). The district court must draw all reasonable inferences in favor of the nonmoving party. *Hornady Mfg.*

> *Co. v. Doubletap, Inc.*, 746 F.3d 995, 1004 (10th Cir. 2014). But an inference is unreasonable if it requires "a degree of speculation and conjecture that renders [the factfinder's] findings a guess or mere possibility." *United States v. Bowen*, 527 F.3d 1065, 1076 (10th Cir. 2008) (internal quotation marks omitted). The nonmoving party "must set forth evidence sufficient for a reasonable jury to return a verdict in [its] favor." *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999); *Schutz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005).

Pioneer Centres Holding Co. Employee Stock Ownership Plan & Tr. v. Alerus Fin., N.A., 858 F.3d 1324, 1334 (10th Cir. 2017).

The linchpin of the district court's Summary Judgment Order is that Mr. Johnson failed to "establish[] the existence of additional photos taken by Raybuck of the inside of Slagle's apartment." (App. Vol. 7 at 244). Because that premise fails—either because Defendants failed to carry their burden or because, if they did, Mr. Johnson presented sufficient evidence for a jury to find that the evidence existed, both of which pertain—the Summary Judgment Order must be reversed.

2. The existence of additional photographs is supported by reasonable inferences from the evidence.

The record establishes that it was "standard practice" for CPD crime scene photographers to photograph a "flash card" bearing the case number and the officer's identification information at the beginning and end of a shoot. (App. Vol. 5 at 264-66). Officer Raybuck testified that he followed that standard practice, photographing with the flash card at *both* the commencement and conclusion of the photo shoot. (App. Vol. 5 at 177). There are no photographs of such a flash card,

either at the beginning or the end, of the one strip of Raybuck negatives that the CPD produced. (App. Vol. 5 at 134). Moreover, there are photographs that Officer Raybuck recalls having taken of Ms. Slagle that are also missing from the negatives produced by the CPD. (App. Vol. 5 at 164-65, 174, 200). It is, at a bare minimum, a reasonable inference that photographs taken by Officer Raybuck were destroyed or otherwise are missing from the CPD evidence room.[4] Indeed, that is precisely what the officer said—that the single strip of negatives includes "the ones that I took, *some of them*." (App. Vol. 5 at 201 (emphasis added)).

The district court accordingly should have accepted the reasonable inference that crime scene photographs are missing from the CPD's evidence files. Support for the additional reasonable inference that those missing photographs included photographs taken at the actual crime scene—inside Ms. Slagle's apartment—is found in Mr. Bertram's expert report:

> [A]ny professional photograph examination of a crime scene of this nature would have included photographs of the bathroom area where the assault allegedly occurred, in the bedroom area, in the living room, and throughout the apartment.

(App. Vol. 4 at 270).

[4] The district court, which was quick to castigate Mr. Johnson for "speculation" about the missing photographs, itself engaged in precisely such speculation, suggesting that "the inner thigh picture was overexposed having been taken at the end of the roll of film." (App. Vol. 7 at 244).

Contrary to the district court's view (App. Vol. 7 at 245-46), Mr. Johnson did not rely on Mr. Bertram's report to establish, as a matter of fact, that Officer Raybuck actually took additional photographs. The circumstantial evidence establishes that reasonable inference. Mr. Bertram's report shows that a reasonable officer in Officer Raybuck's position *would* have photographed the apartment's interior. These reasonable inferences are sufficient to establish that additional photographs existed—and the further inference that those photographs depicted the apartment.

Moreover, to the extent that the court sought to bolster its ruling by further declaring that the photographs' utility to Mr. Johnson was "a matter of further speculation" (App. Vol. 7 at 246-47), the court's failure to address this Court's decision in *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994), upon which Mr. Johnson relied (App. Vol. 5 at 259-60), is telling. That decision fully supports finding a constitutional violation here.

In *Bohl*, the defendants were charged with offenses arising from the manufacture of defective transmission towers under a federal contract. 25 F.3d at 906-08. "The linchpin of the government's case was that [defendants] committed fraud . . . by fabricating the . . . towers with steel pipe of inferior grade and type than that which the [c]ontract specified." *Id.* at 909. Because the allegedly defective towers were destroyed, the government produced to the defendants only an 18-inch

portion of "one leg" from a single tower, and "shavings extracted from legs" on the other two towers. *Id*. at 908.

Treating the defendants' claim under *Youngblood*—because the produced material "offered only potentially useful evidence"—this Court held that the defendants had stated a due process claim, despite the fact that *no testing could be performed on the surviving material*. *Id*. at 910-11. Evidence showing "the possibility that the steel met the [c]ontract specifications" and questionable testing by the government were sufficient to satisfy the *Youngblood* "potentially useful" test. *Id*. at 911.

This Court also found bad faith in the destruction of the towers—in part because the government could not offer an "innocent explanation" for the destruction. *Id*. at 911-13; *cf., United States v. Simpson*, 845 F.3d 1039, 1059 (10th Cir. 2017) ("the government had an innocent explanation for the loss of [evidence]"; a "hard drive crashed"). Here, Defendants failed to offer and the district court found no such "innocent explanation"; instead, the court rested its ruling on the erroneous premise that the photographs "never existed" in the first instance. (App. Vol. 7 at 248).

Ultimately, the district court rejected the inference that photographs of the crime scene would have provided favorable, or at least "potentially useful," evidence by showing that, contrary to Officer Spencer's testimony, Mr. Johnson's

identification cards were on the living room table (where he had inadvertently left them), and *not* by the bathroom door, where Officer Spencer claimed to have found them. But the court did so *only* by hypothesizing that the identification cards had ended up on the floor by the bathroom because of a "physical altercation" between Ms. Slagle and her boyfriend, Mr. Haggberg—that is, the forcible sexual assault with which Mr. Johnson was wrongly charged and convicted. (App. Vol. 7 at 248 n.6). That is rank speculation; there is not shred of evidence to support it.

C. The District Court Erred in Invoking Purportedly "Overwhelming" Evidence to Reject Mr. Johnson's Claim.

In a basis for summary judgment that Defendants never offered, and the court suggested that, even if it "could draw a reasonable inference that such photographs ever existed," Mr. Johnson cannot "show a reasonable probability that, had photos . . . been disclosed, the result of the proceeding would have been different, particularly in light of the 'overwhelming' evidence against him at trial." (App. Vol. 7 at 247). That "overwhelming evidence"—meaning Ms. Slagle's testimony—is now known to be utterly false.

But the district court, nevertheless, would apparently require Mr. Johnson, who has been adjudicated actually and factually *innocent* by the Wyoming courts, to show that his trial might well have resulted in an *acquittal* if the photographic evidence had been disclosed. (App. Vol. 7 at 247-48). That is an unsustainable basis upon which to base the summary judgment for Defendants.

This is so, in the first instance, because the district court seems to be relying on the "overwhelming" evidence to break the chain of causation from the constitutional violations on which Mr. Johnson's claim is based. While doing so might be *theoretically* viable, *see, e.g., Carey v. Piphus*, 435 U.S. 247, 260 (1978), the district court should not have relied on the Wyoming state appellate court's holding that "the state's evidence against [Mr. Johnson] is . . . overwhelming," *Johnson v. State*, 806 P.2d 1282, 1287 (Wyo. 1991) (App. Vol. 7 at 247)—because the Wyoming state court has now ruled that Mr. Johnson is *innocent* of the charges on which he was convicted.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts are required to "give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *accord Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1302 (10th Cir. 2012). Under Wyoming law, a finding in a criminal case has preclusive effect in a subsequent civil case. *Worman v. Carver*, 44 P.3d 82, 86 (Wyo. 2002) ("[c]ollateral estoppel may preclude the relitigation in a subsequent civil action of an issue decided in a criminal case").

On the other hand, "a vacated criminal conviction cannot have preclusive effect" and "the judgment of any court tasked with a review of that now-vacated

criminal conviction likewise has no preclusive effect." *Siggers v. Alex*, No. 19-CV-12521, 2021 WL 4391170, at *5 (E.D. Mich. Sept. 24, 2021), *reconsideration denied,* No. 19-CV-12521, 2022 WL 476069 (E.D. Mich. Feb. 16, 2022). The district court should not have invoked the state appellate court's holding on Mr. Johnson's now-vacated conviction to reject his Section 1983 claims.

Moreover, even if that were not so, the district court's ruling cannot stand. Undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *accord United States v. Smith*, 534 F.3d 1211, 1223 (10th Cir. 2008).

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citation omitted). "[T]his is not a requirement that the evidence be sufficiently strong to *ensure* an acquittal had it been presented at trial." *Fontenot v. Crow*, 4 F.4th 982, 1080 (10th Cir. 2021) (citation omitted; original emphasis).

The same standard applies to Section 1983 claims based on constitutional disclosure obligations. *E.g., White v. McKinley*, 605 F.3d 525, 537-38 (8th Cir. 2010); *Bledsoe v. Bd. of Cnty. Comm'rs of Cty. of Jefferson, Kan.*, 501 F. Supp. 3d 1059, 1123-24 (D. Kan. 2020). The district court's *sua sponte* materiality theory cannot defeat Mr. Johnson's claims.

D. The District Court Erred in Ruling That Mr. Johnson's Claims Are Barred by Qualified Immunity.

The district court rejected Defendants' qualified immunity defense to the *Brady/Trombetta/Youngblood* claims on their motion to dismiss, ruling that — "[a]ccepting [Mr. Johnson's] factual allegations regarding the material and exculpatory nature (and existence) of the photographic evidence as true—. . . it would have been apparent to Defendants that a failure to disclose and/or preserve the photographs taken at the scene shortly after the crime was committed would violate [Mr. Johnson's] due process rights." (App. Vol. 4 at 146). Based on the rulings addressed above, however, the court revisited that conclusion and, finding that "there is no evidence [Officer Spencer or Detective Stanford] participated in any violation of Johnson's constitutional rights, let alone did so knowingly or recklessly," determined that qualified immunity barred the claims. (App. Vol. 7 at 252-53). Because the court was required to draw the reasonable inference in Mr. Johnson's favor that the additional photographs indeed were taken at the crime scene, the qualified immunity ruling meets the same fate as the court's merits rulings.

IV. THE DISTRICT COURT ERRED IN DISMISSING THE FABRICATION OF EVIDENCE CLAIM AGAINST DEFENDANT SPENCER.

The district court did not find the allegations failed to give Defendant Spencer fair notice of this claim. Rather, the court decided that the allegations and inferences did not show (and none could show) a plausible constitutional violation. (App. Vol. 4 at 146-150). And, were a violation alleged, Spencer would nevertheless be entitled to qualified immunity. (App. Vol. 4 at 150). Both conclusions were erroneous.

A. The Allegations and All Reasonable Inferences State a Plausible Claim.

The three most important and "context-specific" allegations permeating this claim—and given too little weight and effect by the district court—are that: (a) the burglar-rapist in the underlying criminal case was Barney Haggberg (App. Vol. 1 at 35,); (b) Ms. Slagle lied—not just mistakenly identified Mr. Johnson—when accusing him (App. Vol. 1 at 51-52); and (c) the state court found and ordered that Mr. Johnson was actually innocent of the crimes for which he was charged, convicted, and imprisoned (App. Vol. 1 at 35). The district court treated these allegations and the reasonable inferences therefrom as if they were mere after-the-fact revelations, which had little or no bearing on proper assessment of the then-contemporaneous conduct of Defendant Spencer as to this claim. This was error.

Both Ms. Slagle and Mr. Haggberg are Caucasian. (App. Vol. 1 at 35). Mr. Johnson is African-American. (App. Vol. 1 at 37). The allegation here is that Ms.

Slagle did not mistake or confuse Mr. Johnson—who was an acquaintance (App. Vol. 1 at 47)—for Mr. Haggberg, Ms. Slagle's boyfriend or fiancé (App. Vol. 1 at 35); rather, she lied. (App. Vol. 1 at 51-52). Despite his sexual assault and whatever her thought processes, Ms. Slagle did not point her finger at Mr. Haggberg, the person who the DNA evidence factually established to be the perpetrator.[5]

The elusive factual question at the heart of this case is *why* did it pop into Ms. Slagle's head to accuse Mr. Johnson? A jury should be allowed to consider conflicting evidence and decide that question and its consequences, if any, for Officer Spencer's liability.

Officer Spencer was the designated investigating officer in the criminal case. (App. Vol. 1 at 40). He performed the first questioning of Ms. Slagle when the identity of the supposed perpetrator was first disclosed (App. Vol. 1 at 40-44); he then questioned the reporting person, Ms. Prodis, on site (App. Vol. 1 at 44); and he took Ms. Slagle to the hospital (App. Vol. 1 at 44). The reasonable inference is that, as the investigating first-responder, Officer Spencer reported his purported factual observations and findings to the assigned detective, Defendant Stanford (App. Vol.

[5] Notably, Ms. Slagle also did not need to point her finger at Mr. Johnson. Under the circumstances, she could have opted to blame no one, saying she did not get a good look and could not describe the intruder other than his being a man. Or she could have simply said that she did not want to press charges.

1 at 52-55), and that Detective Stanford implemented those purported facts/findings in pursuing the crime investigation and recommended charges.

Officer Spencer's questioning occurred within minutes after the intruder had left the premises. (App. Vol. 1 at 40-42). As of that time, all he could know from his own observation was that: the interior-stairway landing door to the attic apartment was broken open (App. Vol. 1 at 40), the apartment was dark (except the lighted bathroom) (App. Vol. 1 at 40-41, 51), a woman was sobbing and yelling behind the closed bathroom door (App. Vol. 1 at 40-41), she had uttered words to the effect that an intruder had "hurt her" (App. Vol. 1 at 41) and asked whether "he"[6] had left (App. Vol. 1 at 40).[7] There are no allegations or inferences that, prior to questioning Ms. Slagle, Officer Spencer could or should rationally have assumed that at roughly 3:00 a.m. she had sufficiently seen the intruder to identify him by any name, let alone by any physical description. She was screaming, whimpering, and hysterical behind a closed door in an unlit apartment well before dawn. (App. Vol. 1 at 40-41).

[6] Ms. Slagle's first discernable words were either "is he gone?" or "is he still here?" (App. Vol. 1 at 40-41).

[7] The one additional key fact Officer Spencer knew before showing Ms. Slagle a photo of Mr. Johnson was that he had found that photo on the coffee table in the living room of the apartment (App. Vol. 1 at 59), not on the floor in front of the bathroom (App. Vol. 1 at 42).

Under these circumstances, any reasonably competent police officer would have immediately searched the apartment to ascertain if the intruder was still there, which Officers Spencer and Raybuck did. (App. Vol. 1 at 40-41). After completing the search and returning to the victim, who was still behind a closed door, any reasonably competent police officer would have reassured her the intruder was gone (which Officer Spencer did (App. Vol. 1 at 41)); and then asked for a physical description of the offender, which Officer Spencer did not do (App. Vol. 1 at 41-42). Why did Spencer fail to establish a physical description of the intruder; should he have asked for a physical description of the intruder so as not to corrupt the investigation; and what were the dangers and consequences to Mr. Johnson of his failure to do so?

Under the circumstances, not only the rational thing for Spencer to do, but also the proper investigative thing to do was to obtain a physical description (if possible) of the intruder so as not to corrupt the investigation. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (four of the five factors for identification reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of [the witness's] *prior description* of the criminal, . . . and the time between the crime and the confrontation" (emphasis added), citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

Offender physical description questions are the very foundation of sound police investigation procedure and crime-solving.[8] Suggestibility is minimized. Neutral facts are elicited. Had Officer Spencer followed this well-worn path, Ms. Slagle would have been prompted to give objective answers about Mr. Haggberg. Instead, she was confronted with one man's photo and asked if he was the intruder.

Nothing in the Complaint (or reasonable inferences therefrom) suggests that at the relevant time Officer Spencer knew who, if anyone, Ms. Slagle lived with. Nothing suggests that he knew Ms. Slagle and Mr. Haggberg had rented the apartment together. (App. Vol. 1 at 39). Nothing in the Complaint (or reasonable inferences therefrom) suggests that, before questioning, Officer Spencer knew or suspected that Ms. Slagle either knew or was acquainted with the intruder.[9]

Mr. Johnson alleged that, led by the prosecutor, Officer Spencer testified he commenced questioning by asking Ms. Slagle "[w]ho hurt you[]" to which she

[8] "[S]tudies of the investigative process revealed that the key factor in determining whether a crime was solved was the quality of the information contributed to the investigation by victims and witnesses about the identity of the offender." *Perspectives on Policing*, U.S. Dept. of Justice (June 1988, Vol. 2), https://www.ojp.gov/pdffiles1/nij/111460.pdf.

[9] The court made much of the facts that "Plaintiff admits Ms. Slagle knew him and even spent time with him before the assault; [and] Plaintiff admits he was in the attic apartment that evening, leaving behind his identification." (App. Vol. 4 at 148). These facts are immaterial to the question of what Defendant Spencer knew as of the time he confronted Ms. Slagle with an identification or driver's license photo of Mr. Johnson. That confrontation did not achieve an uncorrupted, truthful result.

replied "A.J." but she said she didn't know his last name. (App. Vol. 1 at 42).[10]

Then followed:

> Q. What next happened as you are trying to talk with her in the [bathroom] doorway, to find out what happened?
>
> A. As I was talking to her, I had glanced down on the ground, right there at my feet I noticed a driver's license or an identification card in a plastic-type container.[11] I then reached down and picked it up. On one side there was an identification card. There was also, I think, a driver's license in there. It was a picture I.D., of that type. I looked at the card and it said Andrew J. Johnson on it. I held it, and as I held it[,] I showed it to her and asked, "Is this the A.J. that you're talking about?"
>
> Q. Did she respond to you?
>
> A. Her response—at first she didn't say anything, she just went back into hysterics when she looked at the picture. Eventually she shook her head, and I asked her again, and she said, "Yes, that's A.J."

(App. Vol. 1 at 42).[12]

Contradicting Officer Spencer's reporting and testimony, Mr. Johnson alleged:

> In truth, on the living room coffee table in the Attic Apartment the evening of or after midnight June 10, 1989, Mr. Johnson had used the single, clear plastic sleeve enclosing his Driver's license and picture I.D. card ("Plastic Sleeve") to separate marijuana leaves from other debris (stems, seeds, dirt, etc.), and he rolled two marijuana joints. Ms.

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[10] The reasonable inference is that Spencer prepared one or more reports purportedly summarizing his investigation and findings, and that his trial testimony generally conformed to his report(s).

[11] Officer Spencer later contradicted himself, testifying he discovered the plastic container containing identifications when he "kicked it up with [his] foot." (App. Vol. 1 at 42, n.2),

[12] It is unclear exactly when Officer Spencer supposedly "asked her again, and she [then] said, 'Yes, that's A.J.'" This either could have occurred when Spencer questioned Ms. Slagle in the bathroom doorway, or later in the apartment living room. (App. Vol. 1 at 43-44).

> Slagle then smoked the joints with Mr. Johnson and drank Lancers wine with him in her living room. When Mr. Johnson and Ms. Slagle thereafter left the Attic Apartment to go to bars in downtown Cheyenne, he inadvertently left the Plastic Sleeve with cards showing his identity on or near the marijuana detritus sitting in a box top on the coffee table with the Lancers wine bottle. Neither Patrolman Spencer nor any other law enforcement personnel, nor Ms. Slagle, ever disclosed to Mr. Johnson's criminal trial counsel the marijuana smoking, the Lancers wine drinking, the related marijuana physical evidence, or the Plastic Sleeve identification resting on the coffee table in the Attic Apartment.

(App. Vol. 1 at 42-43).

Again, disputing Officer Spencer's reporting and testimony, Mr. Johnson alleged:

> Defendant Spencer removed Mr. Johnson's Plastic Sleeve from the Attic Apartment coffee table when Defendant Spencer did his first walk-through of the Attic Apartment living room to check if an intruder was there; shortly thereafter, when endeavoring to learn the identity of the intruder and *before Ms. Slagle in any way generally or specifically identified the man who "hurt" her in the Attic Apartment that early morning*, Patrolman Spencer showed Ms. Slagle Mr. Johnson's I.D. or Driver's License in the Plastic Sleeve, recklessly and carelessly or with deliberate indifference or willful blindness to Mr. Johnson's federally protected rights, prompting Ms. Slagle at that time to affirmatively assert Mr. Johnson was that man.

(App. Vol. 1 at 59 (emphasis added)).

Without further explanation or citation to any supporting authority, the district court dismissed these allegations, saying:

> Where in the apartment Patrolman Spencer found the identification, or whether Ms. Slagle first indicated "A.J." was her assailant, is immaterial—Defendant Spencer's actions in showing Ms. Slagle Plaintiffs I.D./driver's license and asking if he was the perpetrator

> simply cannot be fairly characterized as "crafting false evidence" or fabricating evidence.

(App. Vol. 4 at 149.)

The court said the only way to view the allegations was as if Officer Spencer were being accused of intentionally, deliberately creating a false identification: "Plaintiff's third claim for relief alleges Defendant Spencer . . . deliberately fabricated evidence." (App. Vol. 4 at 146). This view is too narrow; it does not faithfully characterize the core constitutional violation that Mr. Johnson alleged.[13]

Rather than accusing Spencer of *acting* deliberately, *i.e.*, acting knowingly and/or with malice aforethought to frame an innocent man, Mr. Johnson, alleged:

> Patrolman Spencer showed Ms. Slagle Mr. Johnson's I.D. or Driver's License in the Plastic Sleeve, *recklessly and carelessly or with deliberate indifference or willful blindness* to Mr. Johnson's federally protected [due process] rights, prompting Ms. Slagle at that time to affirmatively assert Mr. Johnson was [the man who "hurt her"].

(App. Vol. 1 at 59 (emphasis added)). An unduly suggestive or unnecessary identification procedure need not be fraught with malice or bias in order to constitute a falsification of evidence in violation of the Due Process Clause. *See, e.g.*, *Biggers v. Tennessee*, 390 U.S. 404, 406 (1968) ("a procedure of identification may be 'so

[13] The only allegation of a *deliberate act* of fabrication is Officer Spencer's act of falsely reporting where he initially found the plastic sleeve. Also, since discovery on the third claim was foreclosed by the court's dismissal ruling, it is still unclear whether Spencer may have had any doubt or lack of clarity when he reported that he showed the photo to Ms. Slagle only after she first identified the intruder as "A.J."

unnecessarily suggestive and conducive to irreparable mistaken [false] identification' that due process of law is denied when evidence of the identification is used at trial" (citation omitted)).

The district court's duty was to take all the factual allegations as true, viewing them in favor of the nonmoving party, and to ascertain if the allegations may support a plausible assertion of a constitutional violation. The district court failed to do this.

B. Defendant Spencer is Not Entitled to Qualified Immunity.

This Court has held—as have the First, Third, Fourth, Sixth and Ninth Circuits—that precedent can provide a police officer "fair warning" of clearly established law, despite factual variations. *See, e.g.*, *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("[Q]ualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts."); *Suboh v. Dist. Attorney's Office of Suffolk Dist.*, 298 F.3d 81, 94 (1st Cir. 2002) ("We have no doubt that there is a clearly established constitutional right at stake, although have found no case exactly on all fours with the facts of this case. The difference in contexts in which the right is discussed in the case law does not mean such a right does not exist."); *Hopper v. Plummer*, 887 F.3d 744, 754 (6th Cir. 2018) ("[W]e have cautioned against taking 'too cramped a view' of our precedent."); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 680 (9th Cir. 2021) (defendant was "not entitled to qualified immunity simply because 'the very action in question ha[d] not

previously been held unlawful.'" (citation omitted)), *cert. denied*, 142 S.Ct. 711 (2021). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)—*i.e.*, even without a prior case that had "fundamentally similar" or "materially similar" facts. *Id*.

To "determine whether the right asserted was clearly established at the time of the alleged violation . . . the relevant inquiry is whether 'the right was sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Lowery v. Cnty. of Riley*, 522 F.3d 1086, 1091 (10th Cir. 2008) (citation omitted). In a line of cases decided more than 10 years before June 1989, the Supreme Court established "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire*, 565 U.S. 228, 232, 238 (2012) (citing *Biggers* and *Manson*). "The Court emphasized, first, that due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id*. at 238-39. Both of these foundational requirements are met in this case.[14]

[14] Without analysis or explanation, the district court found that "Plaintiff has failed first to show that Patrolman Spencer's actions . . . were impermissibly suggestive." (App. Vol. 4 at 150).

Second, the Due Process Clause requires a determination on a case-by-case basis "whether improper police conduct created a 'substantial likelihood of misidentification.'" *Perry*, 565 U.S. at 239 (quoting *Biggers*, 409 U.S. at 201). Any reasonable police officer in Defendant Spencer's position would have known that, under the totality of the alleged circumstances, showing Ms. Slagle one man's photo—and asking if it depicts the perpetrator—was fraught with substantial likelihood of misidentification.

Absent either exigent circumstances, *see, e.g., Stovall v. Denno*, 388 U.S. 293, 302 (1967), or a victim or witness volunteering the criminal's name, it is ordinarily both the only rational thing to do as well as the established thing to do for a police officer to first obtain a suspected criminal's physical description (if possible) from a victim or witness. *See, e.g., Biggers*, 409 U.S. at 194 ("fat and flabby with smooth skin, bushy hair and a youthful voice"); *Johnston v. Makowski*, 823 F.2d 387, 389 (10th Cir. 1987) ("approximately 27 years old, about six feet tall, with dark brown hair and hazel eyes," and distinctive shoes).

Absent such exceptional circumstances, it is and always has been both the law and common sense that the improper investigatory thing to do, before any physical description at all is obtained, is to show only one photo to the victim or witness and then ask if the photo portrays the perpetrator. *See, e.g., Stovall*, 388 U.S. at 302 ("The practice of showing suspects singly to persons for the purpose of identification

. . . has been widely condemned" (footnote omitted)). Searching for applicable precedent does not mean eschewing common sense. "[I]t is a matter of common experience that, once a witness has picked out the accused . . . [she] is not likely to go back on [her] word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." *United States v. Wade*, 388 U.S. 218, 229 (1967).

Although Mr. Johnson did not plead a malicious prosecution claim, *Pierce v. Gilchrist*, 359 F.3d 1279, 1282 (10th Cir. 2004), is instructive. The plaintiff in *Pierce* spent 15 years in state prison for a rape he had not committed. *Id*. at 1281. After being exonerated with DNA evidence, he brought § 1983 malicious prosecution claims against a police chemist, alleging that she fabricated inculpatory evidence. *Id*. at 1281.

This Court affirmed the district court's denial of qualified immunity, holding that the "prohibition on falsification or omission of evidence, knowingly *or with reckless disregard for the truth*, was firmly established" when defendant acted. *Id*. at 1298 (emphasis added). "Even if there were no case directly on point imposing liability on officials . . . an official in [defendant's] position could not have labored under any misapprehension that the knowing *or reckless* falsification . . . of evidence was objectively reasonable." *Id*. at 1299 (emphasis added).

Mr. Johnson alleged that Officer Spencer recklessly falsified the identification of the assailant (App. Vol. 1 at 35, 51, 59-60), leading to his being charged, prosecuted, convicted, and imprisoned. There is no qualified immunity for that conduct.

The right to be free from reckless falsification of identification evidence was very well-established by 1989. *See, e.g., Biggers*, 409 U.S. at 201. As of June 1989, that well-established principle—plus (a) the well-established, standard police procedure of first obtaining (if possible) a suspect's physical description from the victim or witness and (b) the well-publicized cautionary fact that eyewitness misidentification may be the greatest cause of miscarriages of justice[15]—put a reasonable police officer on notice that a substantial risk of misidentification existed by failing to obtain a physical description of the intruder and by going first with a single-photo identification. That is enough for a plausible showing of violation of a clearly established right. *Id*. at 198 ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.").

[15] "[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." *Wade*, 388 U.S. at 228-29 (citation omitted).

But there is even more alleged here to overcome qualified immunity. Mr. Johnson has alleged that, before she was shown his photo, Ms. Slagle gave no prior statement about the identity or physical characteristics of the intruder (other than being a man). (App. Vol. 1 at 40-44, 59). She gave no prior statement indicating her reliability in identifying her attacker. Reliability "is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114 (listing five reliability factors). Of the five factors, the district court here seized on "the level of certainty demonstrated at the confrontation," *Id*. (citing *Manson*, 432 U.S. at 114). (App. Vol. 4 at 148). The district court said: "Ms. Slagle was certain in her identification of Plaintiff as her alleged assailant, which occurred within minutes of the crime." (App. Vol. 4 at 148). But the court got it backwards.

Mr. Johnson alleged that, after Officer Spencer showed Mr. Johnson's photo to Ms. Slagle and asked if he was the intruder, "[h]er response—at first she didn't say anything, she just went back into hysterics when she looked at the picture," but "[e]ventually she shook her head, and I asked her again, and she said, 'Yes, that's A.J.'" (App. Vol. 1 at 42 (emphasis added)). Rather than being "certain" that the photo depicted the offender, Ms. Slagle denied it: "she shook her head." Because there has been no discovery, it is still unknown how many times Officer Spencer asked Ms. Slagle whether the photo depicted the intruder before she finally caved in to the unnecessary suggestion.

The district court did not give full credit to the Complaint's in deciding the qualified immunity question. This was error, requiring reversal.

CONCLUSION AND RELIEF SOUGHT

Mr. Johnson requests the Court to reverse the final judgment, the Dismissal Order, and the Summary Judgment Order, and to remand with directions to vacate the judgment and the orders, and to afford Mr. Johnson a trial on his claims against Defendants.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Johnson requests oral argument, with 15 minutes allotted per side. The issues presented on appeal are sufficiently complex that oral argument would be of material benefit to the Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 12,932 words

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

By: /s/ *Elliot H. Scherker*
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