No. 24-3147

In the United States Court of Appeals
for the Tenth Circuit

DEIRDRE COONES,
as executor of the estate of OLIN COONES,
Plaintiff-Appellee,

v.

UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, et al., Defendant-Appellant.

On Appeal from the United States District Court for the District of Kansas
The Honorable Julia A. Robinson
Dist. Ct. No. 2:22-CV-2447-JAR

RESPONSE BRIEF OF PLAINTIFF-APPELLEE DEIRDRE COONES

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ORAL ARGUMENT NOT REQUESTED

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. 26.1(a), Plaintiff-Appellee Deirdre Coones makes the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

s/ Israa Alzamli
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STATEMENT REGARDING PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331.

This Court lacks jurisdiction to review "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 320 (1995). When reviewing the denial of qualified immunity at the summary judgment stage, this court "'lacks jurisdiction at this stage to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference.'" *Sawyers v. Norton*, 962 F.3d 1270, 1281 (10th Cir. 2020) (quoting *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013)). "[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own de novo review of the record might suggest otherwise as a matter of law." *Id.* (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 409–10 (10th Cir. 2014) (internal quotation marks omitted)). "The district court's factual findings and reasonable assumptions comprise 'the universe of facts

upon which we base our legal review of whether defendants are entitled to qualified immunity.'" *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) (quoting *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008)).

In an interlocutory appeal such as this one, this Court has jurisdiction only to review "abstract issues of law." *Ralston v. Cannon*, 884 F.3d 1060, 1066 (10th Cir. 2018) (citations omitted). The only abstract issue of law raised by Defendants Michael and Garrison on appeal is whether (1) A showing of bad faith is required to prevail on a *Brady* claim, and (2) the district court can assess materiality by looking at the "totality of the evidence."

There is no appellate jurisdiction over Defendants' other arguments on appeal because they "dispute[s] the facts [the] district court determines a reasonable juror could find" and does not raise "'only legal challenges to the denial of qualified immunity based on those facts.'" *Ralston*, 884 F.3d at 1067 (quoting *Henderson v. Glanz*, 813 F.3d 938, 947–48 (10th Cir. 2015)); see also *Dodds v. Richardson*, 614 F.3d 1185, 1192 (10th Cir. 2010) (no jurisdiction in interlocutory appeal to review district court's factual inferences).

On April 30, 2024, the district court denied Defendants' motion for summary judgment on Plaintiff's claim that Defendants Michael and Garrison suppressed exculpatory evidence and that Defendant Michael fabricated evidence in violation of Plaintiff's Fourteenth Amendment due process rights. App. Vol. XIV at 3795. Defendants timely filed their notice of appeal on October 1, 2024. App. Vol XIV at 3855.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a showing of bad faith is required to prevail on a *Brady* claim under § 1983.

2. Whether the district court can assess the materiality of suppressed and fabricated evidence by looking at the "totality of the evidence."

3. Whether there is jurisdiction to review Defendants' fact-based challenge to the district court's finding that Michael and Garrison acted with the requisite intent when they suppressed and fabricated evidence.

4. Whether there is jurisdiction to review Defendants' fact-based challenge to the district court's materiality finding of the suppressed and fabricated evidence.

5. Whether there is jurisdiction to review Defendants' fact-based challenge to the district court's finding that Michael and Garrison maliciously prosecuted Mr. Coones.

6. Whether (1) Defendants forfeited any "clearly established" qualified immunity arguments; (2) Michael forfeited his qualified

immunity defense on Plaintiff's fabrication claim; and (3) Defendants forfeited their malicious prosecution qualified immunity appeal.

STATEMENT OF CASE

Mr. Pete Coones spent over a dozen years in prison for a crime that he did not commit: the alleged murder of Kathleen Schroll and her husband. In fact, the murder of which he was convicted was not a murder at all—it was a planned suicide by Kathleen Schroll who planned to escape tens of thousands of dollars of fraud and elder abuse charges by killing herself and her husband. In 2020, after a post-conviction evidentiary hearing in which extensive scientific and other evidence was presented showing that Kathleen and Carl's deaths were in fact a murder-suicide, Mr. Coones's conviction was vacated, the charges against him were dismissed, and he received a declaration of innocence. Mr. Coones died 108 days after his release. Mr. Coones's arrest, prosecution, and conviction were a direct result of the suppression and fabrication of evidence by Defendants William Michael and Angela Garrison, two former Kansas City Kansas Police Department detectives and the lead detectives on the Schroll murder investigation. Based on the record developed at summary judgment, Defendants Michael and Garrison suppressed critical exculpatory evidence of Kathleen's motive to commit suicide, and Defendant

Michael fabricated a story of Mr. Coones opportunity to commit the murder. This suppressed and fabricated evidence was used to deprive Mr. Coones of his liberty in violation of the Due Process Clause of the Fourteenth Amendment.

I. FACTS

A. Pete Coones Rescues His Father from Elder Abuse Perpetrated by Kathleen Schroll, Starting Kathleen's Downward Spiral

In April 2008, Olin "Pete" Coones (Mr. Coones) was a retired mail carrier, was 50 years old, and lived with his wife, Plaintiff Deirdre Coones. App. Vol. I at 263. He had never been convicted of any crime. App. Vol. 1 at 97. His father, Olin F. Coones ("Senior"), who raised Mr. Coones from childhood, had recently died in January 2007. App. Vol. I at 263. Shortly before his death, Mr. Coones helped Senior escape the custody of Kathleen Schroll ("Kathleen"), a woman who had entered Senior's life as a purported caretaker but ultimately neglected, abused, and financially exploited him. App. Vol. XI at 2933.

Senior lived in a home that he owned with his stepdaughter Patsy Van Vleck ("Patsy"). App. Vol. I at 263. In 2003, Kathleen began working as a housekeeper for Senior and Patsy. App. Vol. I at 263. Both

Senior and Patsy were in poor physical health. App. Vol. 1 at 75-76. Aware of their vulnerability, Kathleen schemed to acquire Senior and Patsy's assets. In 2004, Kathleen pressured Patsy to execute a will and power-of-attorney that would leave everything she had to Kathleen and give Kathleen legal authority over her. App. Vol. VII at 1780-1782. Around September 2005, Patsy and Senior purportedly signed over the house they owned to Kathleen. Shortly thereafter, Kathleen's daughter Blair Hadley moved into the house. App. Vol. 1 at 29. In March 2006, Patsy died. Not even two months later, the beneficiary of Senior's life insurance was changed from Mr. Coones to Kathleen. App. Vol. 1 at 30. In addition, after Patsy's death, Kathleen cashed over 100 checks purportedly signed by Senior, stealing more than $30,000 from Senior's accounts. App. Vol. VII at 1610. Eventually, Mr. Coones was able to save Senior from Kathleen by removing him from her care, and he filed an elder abuse complaint against Kathleen. App. Vol. 10 at 2401-2417. Senior died just a few months after moving in with Mr. Coones and his family. App. Vol. 1 at 263.

B. Kathleen Continues to Commit Other Financial Crimes to Fund Her Life and Pay Off Her Debts

After Senior died, Kathleen's debts rapidly outpaced her income. She and her husband, Carl Schroll ("Carl"), took out a second mortgage on their home. App. Vol. 1 at 30. By 2008, Kathleen was repaying short-term loans from six high-interest payday lenders. *Id*. Around January 2008, Kathleen started bouncing checks. *Id*. In February 2008, she began embezzling money from her employer, the Midwest Regional Credit Union. App. Vol. XI at 2939. In fewer than 60 days, she stole over $11,000. *Id*. By early April 2008, she knew that her embezzlement would soon be discovered because the ledger she maintained was out of balance. *Id*. *at* 2939-40; App. Vol. XIII at 3337-3338.

C. Kathleen, Desperate for an Out, Kills Herself and Points The Finger at Mr. Coones For Her "Murder"

Drowning in debt, and with her employer about to discover her embezzlement, Kathleen decided to escape her problems—permanently. Kathleen wanted to leave money for Blair Hadley, her daughter. She and Carl had life insurance policies, but those policies would not pay out for a suicide. App. Vol. I at 73. Kathleen plotted to kill herself and

Carl and to frame Mr. Coones for murder, allowing her life insurance to pay out to her daughter.

Mr. Coones was the natural choice for Kathleen's scheme: she despised him for uncovering her abuse of Senior and she wanted to ensure his litigation against her estate would not continue. She set the stage by spreading numerous false rumors about Mr. Coones to her family and friends. Kathleen told her mother that she had made several police reports about Mr. Coones stalking her. App. Vol. I at 264. No such reports existed. *Id.* Kathleen told her daughter that she called the police on Mr. Coones many times for harassing her. *Id.* Kathleen made no such calls. *Id.* Kathleen told her brother that she had a restraining order against Mr. Coones. *Id.* No such restraining order existed. *Id.*

On April 7, 2008 at 2:21 a.m., Kathleen called her mother and claimed that Mr. Coones was in her house, that he was trying to kill her and her husband, and that he said "he has his tracks covered where no one will find out." App. Vol. I at 264; *id.* at 89. Kathleen's brother then called 911 and reported that Kathleen had called and said Mr. Coones was there trying to kill Kathleen and her husband. *Id.* at 264.

Shortly thereafter, police officers discovered Kathleen and Carl Schroll dead inside their home. App. Vol. XI at 2934. Carl had been shot to death, and his body was discovered laying on his bed. *Id.* Kathleen sustained a single gunshot to the back of her head; her body was found laying supine on the floor with a gun on the left side of her body. *Id.* There were no signs of forced entry or struggle within the home. *Id.* Upon viewing the scene, Sergeant Dorsett radioed to dispatch and reported that the death appeared to be a "possible murder-suicide." *Id.* Defendants Michael and Garrison, detectives with the Kansas City, Kansas Police Department, were then assigned to the case as the lead detectives. *Id.*

D. Despite Kathleen's Attempt to Implicate Mr. Coones, the Story Quickly Unraveled, and All the Evidence Pointed to a Murder-Suicide

After learning of the phone call in which Kathleen told her mother that Mr. Coones was in her home and about to kill her, Defendants found no corroboration for that claim.

A tremendous volume of evidence proved that Mr. Coones had nothing to do with Kathleen and Carl Schroll's deaths. App. Vol. XI at 2943. Defendants interviewed Kathleen's mother, who reported that she

did not hear any sounds in the background that corroborated what Kathleen was telling her on the phone. *Id.*

In addition to there being no signs of forced entry or a struggle, no physical evidence tied Mr. Coones to the scene. Despite thoroughly searching the crime scene for trace evidence, investigators found no physical evidence linking Mr. Coones to the crime. App. Vol. I at 265. Likewise, although Mr. Coones was arrested within hours of the deaths, investigators found no physical evidence in his car or on his person suggesting he had anything to do with the crime. *Id.*

To the contrary, the murder weapon was Kathleen's own revolver, which had only one person's DNA: Kathleen's. *Id.* Her DNA was found not only on the barrel of the gun, but also on the trigger. App. Vol. XI at 2935. In addition, the gun was recovered from the left side of Kathleen's body and investigators knew that Kathleen was left-handed. App. Vol. I at 264; App. Vol. XI at 2935.

Critically, one of the investigating detectives submitted a report on April 15, 2008, documenting that Kathleen's left hand (but not her right hand) had blood spatter on it. App. Vol. XI at 2935. Defendant Michael submitted an affidavit on April 8, 2008, stating that

investigators would expect to see blood evidence on the hand of the person firing the weapon that killed Kathleen and Carl, among other places. *Id.* If Kathleen shot herself in the back of her head, Defendant Michael would expect to see blood spatter only on the hand used to fire the gun, rather than on her arm, which is exactly what the evidence showed. *Id.*

E. Police Suppressed and Fabricated Evidence to Convict Mr. Coones of Her Murder

i. Kathleen's Embezzlement Was Withheld from Mr. Coones

In 2008, Thaddaeus Jones was a Vice President at Midwest Regional Credit Union, where Kathleen worked. App. Vol. XI at 2939. Jones was Kathleen's direct supervisor in 2008. *Id.* Kathleen's job was to process checks deposited with the credit union so that they could be transmitted to the Federal Reserve. *Id.* When Kathleen did not show up for work on the day she died, April 7, 2008, Jones discovered an irregularity in Kathleen's accounts and opened an investigation. *Id.* Kathleen's scheme involved submitting checks for payment by Midwest Regional Credit Union that were supposed to be drawn against other banks once they were submitted to the Federal Reserve. *Id.* Kathleen embezzled over $11,000 from the credit union before her scheme was

uncovered. *Id.* Regardless of Kathleen's demise, her scheme would have been uncovered by the end of April 2008. *Id.* Upon discovery of the embezzlement, had Kathleen not died, she would have been terminated and referred for criminal prosecution. *Id.* at 2940.

Jones created a Suspicious Activity Report documenting Kathleen's embezzlement on April 9, 2008. App. Vol. XIII at 3337-3338. On April 14, 2008, Defendants Michael and Garrison interviewed Jones. App. Vol. XI at 2940. They asked Jones generally about what kind of employee Kathleen was. *Id.* Jones told the detectives that he had discovered Kathleen's embezzlement and provided them with a copy of the Suspicious Activity Report he generated. *Id.* For his part, Defendant Michael agrees that he asked Jones what kind of employee Kathleen was. Defendant Michael agrees that, during that conversation, Jones informed him of Kathleen's embezzlement. *Id.* Defendant Michael further admits that Jones provided either himself or Defendant Garrison with a copy of the Suspicious Activity Report. *Id.*

Defendants Michael and Garrison withheld the exculpatory Suspicious Activity Report and any other evidence of Kathleen's embezzlement from the criminal justice system. The prosecutor,

Edmond Brancart, had no knowledge about Kathleen's embezzlement until long after Mr. Coones's conviction. *Id*. Mr. Coones's defense lawyer never learned that Kathleen was embezzling from her employer; had she learned about the embezzlement, she would have used that information in his defense. *Id.* Defendant Michael agrees that if he was told about Kathleen's embezzlement and provided the Suspicious Activity Report, he should have documented that information in an official police report and inventoried the evidence. *Id*. at 2940-2941. Defendant Michael has no explanation for why his report does not document that Jones told him about the embezzlement. *Id*. at 2941.

The suppression of this evidence proved centrally important to the case. At Mr. Coones's second trial, in response to the defense contention that Kathleen killed her husband and herself, the prosecutor argued in closing that "[n]o evidence suggests that [Kathleen] would have any motivation other than to do anything [but] to live and keep on living." *Id*. Even Defendant Michael acknowledged the importance of evidence relating to the reasons a person might have taken their own life, explaining that when investigating a potential suicide he would look for

motivations to commit suicide—including financial trouble or imminent criminal prosecution. *Id.*

ii. Michael and Garrison Withheld Exculpatory Video Evidence

As stated above, Defendants Garrison and Michael interviewed Kathleen's daughter, Hadley. Hadley reported that her mother told her that on the Saturday before her death (April 5, 2008), Mr. Coones had confronted her at a QuikTrip gas station and threatened her by telling her "you're not gonna be sitting on my dad's money no more, Bitch." App. Vol. XI at 2936. The QuikTrip altercation allegedly occurred, according to Kathleen, around 1 p.m. on that Saturday, as Kathleen was exiting the QuikTrip after purchasing cigarettes and Mr. Coones was walking inside. *Id.* In response, Michael and Garrison went to the QuikTrip to see if they could corroborate Kathleen's allegation. *Id.* at 2937. At the QuikTrip, the employee burned a CD of the surveillance footage for Defendants Michael and Garrison. *Id.* Michael and Garrison brought the surveillance video back to the police station and reviewed it. *Id.* Defendants Garrison and Michael determined that neither Kathleen nor Mr. Coones appeared on the footage. *Id.* Defendants Garrison and Michael did not document that they went to the QuikTrip,

or that the surveillance footage did not show either Kathleen or Mr. Coones at the QuikTrip.

Garrison and Michael agree that their investigation at the QuikTrip should have been documented. *Id.* Defendant Michael's practice was to make a report and inventory surveillance footage recovered during an investigation regardless of whether the footage was believed to have evidentiary value. *Id.*

Mr. Coones's criminal defense attorney asked Defendant Michael for the QuikTrip video, but Michael responded that he did not have it. *Id.* If Defendant Michael obtained a copy of the QuikTrip video, he was required to inventory it. *Id.* The QuikTrip video was exculpatory, because if Kathleen's story about the QuikTrip confrontation between her and Mr. Coones were true, then Michael would have seen either Mr. Coones or Kathleen on the video, but he did not. *Id.* at 2938.

iii. Defendant Michael Fabricated Mr. Coones's Opportunity to Murder Kathleen Schroll

Defendant Michael fabricated a statement that Mr. Coones's van was not parked at his home at the time of Kathleen's murder, which falsely suggested that Mr. Coones had the opportunity to commit the crime. At the time of the murder, Mr. Coones was in poor health and

had suffered two heart attacks and a stroke. App. Vol. XI at 2941. Mr. Coones did not move well, as he had broken both of his kneecaps. *Id.* Mr. Coones relied on his van, which he parked behind his house, to get around. *Id.* Mr. Coones hid his van behind his house to prevent it from being repossessed. *Id*; App. Vol. XIV at 3805-3806. To further foil anyone attempting to access his van, his daughter's boyfriend parked his van in the front driveway to block Mr. Coones's van in the back. App. Vol. XI at 2941. When Mr. Coones wanted to drive his kids to school on the morning of April 7, he had to obtain the keys to his daughter's boyfriend's van in order to access his own van. *Id.;* App. Vol. VII at 1687-1690.

Mr. Coones's van was parked in its usual location in back of the house on the night Kathleen and Carl were killed and in the morning after. App. Vol. VII at 1687-1690; App. Vol. XIII at 3436-3437. In addition to the evidence showing that the van was in fact parked at Mr. Coones's house during the early morning hours of April 7, 2008, Mr. Coones had an alibi that he was home. Ross Minks, his son-in-law, was watching a movie in the Coones home during the early morning hours of April 7, 2008, the day of the Schroll shooting. App. Vol. VII at 1687-

1690; App. Vol. XI at 2947. Minks saw Mr. Coones exit his bedroom to use the bathroom around 2 a.m. App. Vol. XI at 2947. Minks was awake until about 2:30 or 3 a.m. *Id.* Minks heard Mr. Coones using the computer in his room until Minks went to sleep. *Id.* Based on where Minks was sitting watching the movie, Mr. Coones would have had to pass him in order to leave the house. *Id.* At about 6 a.m., Mr. Coones woke up Minks to obtain the keys to his vehicle so that Mr. Coones could access his own van. *Id.* at 2948.

Defendant Michael, however, concocted a false story that the van was missing from Mr. Coones's home. Shortly after Kathleen's body was discovered, Defendant Michael went to Mr. Coones's house. *Id.* at 2941-42. After Mr. Coones's arrest, Defendant Michael told Mr. Coones that he had not seen his van parked at his house. *Id.* at 2942. Given that Defendant Michael had only a partial view of the backyard, the van might have been in a location not visible from Michael's vantage point. *Id.* Mr. Coones explained that he parked his van in the back to hide it from anyone looking to repossess it, but did not provide Michael with a specific location where in the backyard it was parked. *Id.*

Defendant Michael then fabricated another account to prop up his false claim that the van was missing on the morning of April 7. Defendant Michael falsely claimed that Mr. Coones told him the specific location where he parked his van behind his house: a spot where vehicles had left ruts in the yard. App. Vol. XI at 2942; App. Vol. IV at 730-731. He also stated that he returned to the Coones residence and ascertained that he would have been able to see the location where the ruts were when he viewed the backyard during the early morning hours of April 7. *Id.*

This story was not true. App. Vol. XIII at 3436-3437; App. Vol. XIV at 3805-3806. Defendant Michael did not document or photograph his vantage point from which he was allegedly able to see the spot where the van was supposed to be. App. Vol. XI at 2942, App; Vol. XII at 3051-3063. Defendant Michael agrees that, if he had been able to determine that the van was missing during the early morning hours of April 7 shortly after the murder, he should have documented that fact and photographed the viewpoint of where he was standing when he looked into the backyard. App. Vol. XII at 2989-2992.

Defendant Michael used this false story to further Mr. Coones's prosecution, relating it to the prosecutor in advance of trial. In general, Defendant Michael admitted that he would always speak with the prosecutor before testifying to go over the questions he would be asked on the stand. App. Vol. XI at 2942-43. And, at trial, the prosecutor elicited Defendant Michael's testimony that he went back to the Coones home to look for the ruts in the yard, and that he was able to see the ruts. App. Vol. IV at 730-731, 733.

F. Mr. Coones Is Wrongfully Convicted of the Murder of Kathleen and Carl Schroll

Because of Defendant Michael and Garrison's misconduct, Mr. Coones was charged with murder. There was no probable cause to believe that Mr. Coones was involved in Kathleen and Carl Schroll's deaths, either before or after the Defendant Officers' misconduct. App. Vol. XIII at 3453-3454. Nonetheless, the Defendant Officers' misconduct caused Mr. Coones to be prosecuted. Indeed, Mr. Coone's criminal prosecution was closely balanced. In an initial jury trial, Mr. Coones was acquitted of murdering Carl Schroll but convicted of murdering Kathleen. App. Vol. I at 39. In a second jury trial, Mr. Coones was convicted of murdering Kathleen and was sentenced to serve at least

fifty years in prison before becoming eligible for parole. *Id.* For Mr. Coones, who was fifty-two years old, this was a life sentence. Mr. Coones thus faced the prospect of spending the rest of his life in prison for a crime he did not commit.

G. Nearly 13 Years Later, Mr. Coones Is Found Innocent.

On November 5, 2020, Mr. Coones's conviction was vacated by the Wyandotte County District Court and all charges against him were dismissed. Mr. Coones walked out of prison a free man, having spent more than twelve years incarcerated for a crime he did not commit. Mr. Coones died only 108 days later, on February 21, 2021. After his death, Mr. Coones was granted a certificate of innocence. App. Vol. XI at 2947.

ARGUMENT

I. Defendants Michael and Garrison Are Not Entitled to Qualified Immunity on Plaintiff's *Brady* Claim

For the purposes of her *Brady* claim, Plaintiff limits her discussion to only two pieces of suppressed evidence: the Suspicious Activity Report ("SAR")[1] and the QuikTrip video. Defendants contest

[1] "SAR" refers to all evidence suppressed by the Defendants Michael and Garrison about Kathleen's embezzlement from her employer, the Midwest Credit Union. This includes the suppression of their conversation with Kathleen's supervisor Thad Jones as well as the

only (1) the sufficiency of Plaintiff's evidence showing that the SAR and the QuikTrip video were material, and, (2) the sufficiency of Plaintiff's evidence showing that Defendant Michael and Garrison's acted with the requisite intent when they suppressed this evidence. Both of Defendants' arguments challenge fact-based determinations by the district court and, therefore, cannot be adjudicated in an interlocutory qualified immunity appeal. Moreover, Defendants' arguments are legally incorrect, misstate the district court's opinion, and, again, challenge the district court's factual findings in a manner inappropriate for qualified immunity interlocutory appeal.

A. Bad Faith Is Not Required to Prevail on a *Brady* Claim

Settled Tenth Circuit law imputes liability on officers who deliberately or recklessly suppress exculpatory evidence under *Brady*. Applying this precedent, the district court properly found that Michael and Garrison acted at least recklessly when they suppressed exculpatory evidence from Mr. Coones's defense.

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physical copy of the Suspicious Activity Report which Jones provided to Michael and Garrison.

i. Settled Tenth Circuit Law Imposes § 1983 Liability for "Deliberate or Reckless" Due-Process Violations

Defendants suggest that reckless intent is not enough for liability in a § 1983 claim under *Brady*, claiming that a showing of bad faith is required. Br. at 54 ("Liability under § 1983 in the absence of a showing of bad faith on the part of the police does not constitute a denial of due process of law[.]"). They are wrong. This Court has held repeatedly that § 1983 liability under *Brady* requires a defendant act with a "mental state surpassing negligence—that is, acting at least knowingly or recklessly." *Johnson v. City of Cheyenne*, 99 F.4th 1206, 1225 (10th Cir. 2024); *Tiscareno v. Anderson*, 639 F.3d 1016, 1023 (10th Cir. 2011), reh'g granted, vacated in part regarding other state-law claims, 421 F. App'x 842 (10th Cir. 2011); *see also Bledsoe v. Carreno*, 53 F.4th 589, 612 (10th Cir. 2022) ("[T]his court has recognized that 'the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986.'") (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004)).

Defendants' only authority suggesting that a "bad faith" standard should apply to *Brady* claims under § 1983 is the Fourth Circuit's

decision in *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000).[2] Even if Fourth Circuit law would preclude § 1983 liability based on evidence of recklessness,[3] *Jean* does not reflect the settled law of the Tenth Circuit.[4] The only other case Defendants cite, *Daniels v. Williams*, 474 U.S. 327 (1986), simply held—consistent with this Court's precedent and the district court's ruling in this case—that negligence is not sufficient to support a § 1983 claim under the Due Process clause. *Id.* at 328. Indeed, in *Archuleta v. McShan*, 897 F.2d 495 (10th Cir. 1990), this Court explained that under *Daniels*, "reckless conduct could also form the basis for a due process violation." *Id.* at 499; *see also Trigalet v. Young*, 54 F.3d 645, 648 (10th Cir. 1995) ("[T]his circuit had clearly held by May 1990 that recklessness could form the basis for a due process violation.").

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[2] Defendants also rely on two Second Circuit cases for the proposition that only intentional – and presumably not reckless – misconduct can suffice to prove a section 1983 *Brady* violation. Br. at 29. These out of circuit cases, however, do not accurately state the law in the Tenth Circuit. *See Johnson*, 99 F.4th at 1225.

[3] In expounding its "bad faith" standard, the Fourth Circuit stated that the evidence must "negate any negligent or innocent explanation for the actions on the part of the police." *Jean*, 221 F.3d at 663 (Wilkerson concurrence).

[4] This Circuit expressly rejected the *Jean* concurrence's approach in *Tiscareno v. Anderson*, 639 F.3d 1016, 1023 n.3 (10th Cir. 2011)).

Defendants are well aware of this settled law. Indeed, in its order denying Defendants summary judgment, the district court explicitly cited to this Court's precedent establishing the "deliberate or reckless intent" standard. *See* App. Vol. XIV at 374 ("Specifically, Plaintiff must show that the officers acted 'with deliberate or reckless intent'") (quoting *Johnson*, 99 F.4th at 1232). Defendants do not cite, let alone attempt to distinguish, this controlling authority that defeats their reliance on *Jean* and *Daniels*. Their failure to address these cases in their opening brief, moreover, precludes them from raising new arguments in reply. *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994) (explaining that it is "manifestly unfair" to both the appellee and the Court to raise new arguments in a reply).

ii. The "Bad Faith" Standard Articulated in *Youngblood* Does Not Apply to Plaintiff's *Brady* Claims.

Throwing every option they have at the wall, Defendants argue that the Plaintiff must prove that they acted in bad faith in suppressing the QuikTrip video because *Youngblood v. Arizona*, 488 U.S. 51 (1988), "sets forth principles that apply to plaintiff's claim." Br at 33. Defendants are confused. Plaintiff's claim is a *Brady* claim, not a *Youngblood* claim.

Under *Brady*, when the exculpatory value of evidence is known, all a plaintiff must show is that the officer acted with "deliberate or reckless intent" when he suppressed it. *Johnson*, 99 F.4th at 1232 (holding that it is clearly established that the requisite mental state for a *Brady* claim brought under § 1983 is "deliberate or reckless intent" (citing *Webber v. Mefford*, 43 F.3d 1340, 1343 (10th Cir. 1994)); *Tiscareno*, 639 F.3d at 1023). Here, although Defendants Michael and Garrison destroyed the QuikTrip video, its contents are undisputed and thus its exculpatory value is known. Indeed, the Parties stipulated to the fact that "Detectives William Michael and Angela Garrison reviewed the QuikTrip surveillance video and determined that neither Mr. Coones nor Kathleen were shown on video." App. Vol. I at 264. The fact that neither Mr. Coones nor Kathleen appear on the video is exculpatory because the alleged altercation between Kathleen and Mr. Coones occurred while Kathleen was walking out of the QuikTrip and Mr. Coones was walking in. *Id.* Thus, the video footage disproves that the alleged altercation ever occurred. Because the exculpatory value of the QuikTrip video is known, its suppression amounts to a *Brady* claim, not a *Youngblood* claim, and thus no showing of bad faith is required.

The *Youngblood* standard, by contrast, applies only to physical evidence that has been destroyed before it could have been subjected to testing to determine its probative value. *See Youngblood*, 488 U.S. at 57 (explaining that "the due process clause … as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence" but that a different standard is required when the State fails to "preserve evidentiary material of which no more can be said than that it *could have* been subjected to tests, the results of which *might have* exonerated the defendant." (emphasis added)). In *Youngblood,* the destroyed evidence was untested rectal swabs and clothing taken from a crime scene. *Youngblood*, 488 U.S. at 58. Because the evidence was destroyed before it could be tested for DNA, its exculpatory value was unknown.

Courts uniformly agree that when the exculpatory value of untested physical evidence is unknown, bad faith is required to make out a due-process claim, because liability can be imputed only when the governmental actor evinces an intent to harm. *See California v. Trombetta,* 467 U.S. 479, 489 (1984) (applying bad faith standard when

assessing State's failure to preserve untested breath samples in drunk-driving prosecution).

That is not the case in the *Brady* context. If exculpatory evidence is suppressed, the only *mens rea* required is deliberate or reckless intent. *See Johnson*, 99 F.4th at 1226 (explaining the distinction between cases that allege due process violations based on *Brady* and those based on *Trombetta/Youngblood*).

iii. Bad Faith Is Not Required for a Police Officer to Be Liable Under *Brady*

Finally, Defendants claim that police officers either cannot be held liable under *Brady* at all, or alternatively that liability requires a showing of bad faith. They first argue that even if they recklessly or intentionally suppressed material exculpatory evidence from Mr. Coones, they cannot be liable because "[t]he duty to disclose exculpatory evidence under *Brady* rests with the prosecution, not with police officers." Br. at 30-31. Specifically, they claim that "it is incorrect to frame the duty under *Brady* as a duty binding upon police officers because the *Brady* duty, as defined by the Supreme Court, has always been defined as one that rests with the prosecution." *Id*. at 31.

Defendants further argue that if police officers can be held liable under *Brady*, then a bad faith standard should apply. Br. at 33-36.

With respect to the contention that police officers can never be liable for violating *Brady*, Defendants are wrong as a matter of well-settled law. This Court in *Bledsoe*, 53 F.4th 589, explained that as early as 1995 the Court had held that "*Brady* requirements 'extend[ ] to . . . law enforcement personnel." *Id*. at 613 & n.21 (citing *Pierce*, 359 F.3d at 1299 and *Smith v. Sec'y of N.M. Dep't of Corr*., 50 F.3d 801, 824 (10th Cir. 1995)). Indeed, "police are considered agents of the prosecution for *Brady* purposes." *Smith*, 50 F.3d at 824 (quoting *Fero v. Kerby*, 39 F.3d 1462, 1472 (10th Cir. 1994). As a result, because "investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure." *Id.* at 824 (quoting *United States v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989)). These precedents align with *Kyles v. Whitley*, 514 U.S. 419, 438 (1995), that it would "amount to a serious change of course from the *Brady* line of cases" to "not [hold the State] accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor." Defendants simply ignore these controlling cases

establishing—long before the Schroll murder investigation—that police officers violate the Constitution when they suppress or fabricate material evidence.

Similarly, no authority supports Defendants' assertion that police officers can only be held liable for a *Brady* violation if they act in bad faith. The cases they cite (*Jean*, *Daniels,* and *Youngblood*), discussed in detail in sections (I)(A)(i) and (I)(A)(ii), above, do not alter this Circuit's stated *mens rea* for *Brady* violations. On the contrary, as this Court held in *Johnson*, the scienter requirement for *Brady* claims against officers is simply "deliberate or reckless intent." *Johnson*, 99 F.4th at 1232 ("[B]ecause Mr. Johnson brings his claims under § 1983, he must show that Officer Spencer and Detective Stanford acted with deliberate or reckless intent."). Defendants' effort to rewrite the elements of *Brady* claims simply has no basis in this Court's law.

iv. The District Court Found That Michael and Garrison Acted With "At Least Reckless Intent" When They Suppressed Evidence, Which Defendants Challenge With Impermissible Factual Disputes

The district court applied the correct legal standard when evaluating the evidence of their mental state when suppressing exculpatory evidence. The court noted, consistent with this Court's

precedent, that "Plaintiff must show that the officers acted 'with deliberate or reckless intent.'" *See* App. Vol. XIV at 3774-75 (citing *Johnson*, 99 F.4th at 1232). And the district court found that Plaintiff pointed to evidence of "at least reckless intent on behalf of Detective Michael and Garrison" for his suppression claims. *Id.* at 3775. Defendants' arguments challenging these holdings mischaracterize the district court's decision and improperly raise factual disputes.

To begin, Defendants mistakenly contend that the district court erred in holding that Michael and Garrison "can be held liable under § 1983 . . . without a *mens rea* or scienter requirement." Br. at 23. This argument wholly disregards the fact that the district court *explicitly* considered the necessary scienter to prevail on a §1983 claim. *See* Dist. Ct. Op. at 36. Because the district court identified and applied the correct legal standard, this argument is meritless.

Defendants' remaining arguments improperly raise factual disputes, effectively asking this Court to draw inferences in their favor and credit their own testimony. They contend repeatedly that district court should have given them the benefit of the doubt with respect to their mental state. *See, e.g.*, Br. at 39 ("the only reasonable inference

from the evidence was that neither detective perceived any materiality to the [Suspicious Activity Report]"); Br. at 44 ("[T]here is no evidence, other than supposition and speculation, that either Michael or Garrison somehow understood the exculpatory value of the [QuikTrip video].").

This Court's precedent squarely forecloses raising such a challenge in an interlocutory appeal. In *Ralston*, this Court held because a defendant "simply assert[ed] the district court erred in determining a reasonable juror could conclude he acted intentionally or consciously," that it "lack[ed] jurisdiction to take up such an issue in an interlocutory appeal from the denial of summary judgment." *Ralston*, 884 F.3d at 1067. Defendants' arguments are indistinguishable from the ones rejected in *Ralston*. *See also Amundsen v. Jones*, 533 F.3d 1192, 1196 (10th Cir. 2008) ("Because we may review only legal issues, we must accept any facts that the district court assumed in denying summary judgment."); *Bustillos v. City of Artesia*, 98 F.4th 1022, 1037 (10th Cir. 2024) (the Court lacked jurisdiction to review a fact-based challenge to the sufficiency of the evidence of the defendant's mental state).

Even if this Court had jurisdiction to consider these fact-bound challenges to the denial of summary judgment, they would fail on the merits. Assessing whether a party acted in bad faith is determined by considering the totality of the circumstances, including circumstantial evidence of the party's state of mind. *See Martinez v. CorrHealth, Pro. Ltd. Liab. Co.*, 734 F. Supp. 3d 1190, 1195 (D.N.M. 2024), reconsideration denied sub nom. *Martinez,* No. 1:22-CV-00288-WJ-SCY, 2024 WL 2975846 (D.N.M. June 13, 2024), citing *Toma v. Weatherford*, 846 F.2d 58, 60 (10th Cir. 1988).

As the district court correctly determined, the evidence showed that Defendants Garrison and Michael knew that the crime could be considered a murder-suicide, but chose to suppress evidence that tended to show Kathleen's motive to kill herself and her husband. Defendants Garrison and Michael hid evidence of Kathleen's embezzlement from their police reports, withheld the Suspicious Activity Report that documented the embezzlement, and kept the prosecution, defense, and judge ignorant of their misconduct. Although Garrison and Michael documented Hadley's allegations that Mr. Coones threatened Kathleen at the QuikTrip, they failed to document the exonerating evidence: that

they viewed the video and it disproved Kathleen's account. Further, upon realizing they possessed exonerating evidence in the form of the QuikTrip video, they suppressed it.

Moreover, Defendant Michael fabricated an account to make it appear Mr. Coones was absent from his home at around the time of the murder, negating his alibi defense, and falsely suggesting Mr. Coones had the opportunity to commit murder. Despite knowing that Kathleen was lefthanded, had blood spatter on her left hand, was killed with her own gun, which only had her own DNA on it, Defendants Michael and Garrison chose not to swab her left hand for gunshot residue to see if she had fired the gun that killed her and her husband.

Defendants can claim at trial that their intentions were pure, but certainly from the record presented, a reasonable jury could find that Defendants suppressed this evidence in bad faith. Based on the totality of the evidence, this Court cannot determine as a matter of law that Defendants Michael and Garrison acted without bad faith.

B. Defendants Are Not Entitled to Qualified Immunity Based on Their Challenges to the Materiality of the Suppressed Evidence.

Despite well-settled law limiting Defendants' appeal to pure questions of law, they mount a fact-based challenge to the sufficiency of the evidence underlying the district court's materiality determination. Because Defendants challenge the district court's factual determinations, this Court lacks jurisdiction to hear Defendants' challenge.

i. The District Court Properly Determined the Materiality of the Evidence

Defendants contest the district court's materiality analysis by arguing that the court improperly considered evidence other than the information that Defendants were personally responsible for suppressing. Br. at 38. This argument fails at the outset because it mischaracterizes the district court's reasoning. The court evaluated the materiality of each piece of suppressed evidence by examining the reasonable probability that its disclosure would have changed the outcome of Mr. Coones's trial. App. Vol. XIV at 3767-68 ("Plaintiff has met her burden of demonstrating that the embezzlement evidence 'could reasonably be taken to put the whole case in such a different light as to

undermine confidence in the verdict.'" (citations omitted)); *Id.* at 3769-70 ("A reasonable jury could find that [the QuikTrip video] tipped the scales in terms of supporting the defense theory that Kathleen had been lying to her family about Mr. Coones harassing her, and specifically lied about harassing her two days before her death."). The court's decision therefore considered each piece of evidence Defendants were personally responsible for suppressing and found that each was material.

Even if Defendants were correct that the district court determined materiality by examining multiple pieces of evidence in conjunction, that would not constitute legal error. Analyzing materiality necessarily requires considering the importance of a piece of evidence in relation to the other evidence in the case. *See Kyles*, 514 U.S. at 436 (stressing that the materiality of suppressed evidence is assessed "collectively" and "not item by item"); *Fontenot v. Crow*, 4 F.4th 982, 1081 (10th Cir. 2021) ("In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather we review the cumulative impact of the withheld evidence, its utility to the defense as well as its potentially damaging impact on the prosecution's case.")

(quoting *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018) (quotation marks omitted)).

Thus, Plaintiff need not prove each suppressed item was independently material, but can instead rely on the cumulative weight of the evidence. As this Court explained in *Moore v. Reynolds*, 153 F.3d 1086 (10th Cir. 1998), "the court views the undisclosed evidence in relation to the record as a whole, as the materiality of exculpatory evidence will vary with the overall strength of the government's case." *Id.* at 1112. Moreover, if the information Defendants suppressed was material in part because other information was also suppressed, that fact in no way undermines their personal responsibility. Defendants' efforts to shift blame onto other wrongdoers do not absolve their own involvement in suppressing material evidence.

ii. This Court Lacks Jurisdiction to Review Defendants' Fact-Based Challenge to the District Court's Materiality Finding

Defendants repeatedly seek to challenge the factual underpinnings of the district court's decision denying their motion for summary judgment. These fact-based arguments, which ignore the persuasiveness of Plaintiff's evidence and seek to draw inferences in

Defendants' favor, are improper, and this Court lacks jurisdiction to consider them. *See Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015) (noting that defendants appealing from a denial of qualified immunity may not challenge "the district court's conclusion [p]laintiffs presented sufficient evidence to survive summary judgment"); *Fogarty*, 523 F.3d at 1154 n.7 (noting that questions of evidence sufficiency are "nonreviewable factual determinations" over which this Court does not have jurisdiction).

For this reason, Defendants' arguments in this appeal must be limited to abstract issues of law. *Henderson*, 813 F.3d at 947. For example, in *Castillo v. Day*, 790 F.3d 1013 (10th Cir. 2015), this Court held that it lacked jurisdiction to consider the defendant's arguments that involved "a determination of evidence sufficiency and not an abstract question of law." *Id.* at 1021. The Court's jurisdiction was limited to addressing a legal question that did not turn on any of the factual particularities of the case or require the court to delve into the adequacy of the evidence presented: whether certain types of prison officials could be liable for claims under the 8th Amendment. *Id.* at 1020.

Here, Defendants raise factual rather than legal arguments. They do not contest the existence of clearly established law regarding materiality or other abstract questions of law like the one considered in *Castillo*. Instead, they challenge the district court's ruling by contesting the first prong of the qualified immunity analysis—*i.e.*, by contending that there is not sufficient evidence for a reasonable jury to find that the suppressed evidence was material. The only "legal question" Defendants raise is whether the district court was right about what inferences a reasonable jury could draw. Br. at 39 ("the only reasonable inference from the evidence, was that neither detective perceived any materiality to the [SAR]."); *Id.* at 44 ("there is no evidence, other than supposition and speculation, that either Michael or Garrison somehow understood the exculpatory value of the [QuikTrip video]"). In the absence of a legal dispute that does not simply repackage evidentiary arguments that defendants already unsuccessfully presented to the district court judge, there can be no appellate jurisdiction.

Defendants cannot skirt this jurisdictional limitation by simply recasting these essentially fact-based arguments as legal challenges. In *Vette v. Sanders*, for example, the defendant asserted that the district

court made a legal—rather than factual—error by misapplying the summary judgment standard in the context of qualified immunity. But "each of the ways he claim[ed] the district court misapplied the standard, in fact, relate[ed] to the district court's assessment of the evidence." *Vette v. Sanders*, 989 F.3d 1154, 1167 (10th Cir. 2021). The Tenth Circuit held that, despite the defendant nominally framing his argument as a legal issue, it "lack[ed] jurisdiction to review the district court's factual conclusions concerning the reasonable facts and inferences the evidence could support." *Id.* Similarly, in *Fancher v. Barrientos*, although the defendant "nominally frame[d his] argument as a legal issue" concerning the district court's purported misapplication of the legal standard, "[u]ltimately ... [his] argument depends upon a challenge to the facts the district court concluded a reasonable jury could infer based upon the evidence in the summary judgment record," and it was therefore unreviewable on interlocutory appeal. *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013).

Just as in *Vette* and *Fancher,* Defendants pay lip service to challenging the district court's legal analysis while disputing the court's

findings about the sufficiency of the evidence. These arguments are improper in an interlocutory appeal and should be rejected.

a. The District Court Correctly Found That the Suspicious Activity Report Was Material

The district court concluded that, when viewed in the light most favorable to Plaintiff, evidence that Kathleen embezzled thousands of dollars from her employer was material to Mr. Coones's defense. Defendants do not dispute that the evidence shows that Michael and Garrison were told about Kathleen's embezzlement by her supervisor, Thad Jones, or that Jones also gave them a copy of the Suspicious Activity Report that he prepared regarding Kathleen's embezzlement. Instead, Defendants plainly argue the facts by stating that the "only reasonable inference from the evidence, was that neither detective perceived any materiality to the information" and that the "alleged embezzlement by Kathleen from her employer had no readily apparent relevance to the case[.]" Br. at 39.

As discussed above, this Court has no jurisdiction to consider this argument. Defendants ask this Court to reject the district court's finding that the evidence of Kathleen's embezzlement, if properly disclosed, would have resulted in a different outcome at Mr. Coones's

criminal trial. At Mr. Coones's criminal trial, the prosecution rejected the notion that any evidence supported Mr. Coones's contention that Kathleen committed suicide, arguing that "no evidence suggests that [Kathleen] would have any motivation other than to do anything but live and keep on living." App. Vol. XIV at 3767-3768. The fact that Kathleen's employer had discovered that she was embezzling thousands of dollars was material to determining whether Kathy died by suicide, a central defense to this case. To that end, the district court correctly found that "[e]vidence of Kathleen's embezzlement supports the defense theory of murder-suicide by providing a motive for Kathleen to commit suicide" and that it "[c]orroborates the defense theory that Kathleen was stealing money from Senior, because it showed similar behavior with a subsequent employer." *Id.* at 3768. Further, the Court found that the evidence "[s]upports the defense's theory at trial that Kathleen had a reason to frame Mr. Coones for her murder." *Id.*

Defendants' arguments do not raise a legal challenge to the district court's holding, but instead dispute whether the evidence was sufficient to permit a jury to find in Plaintiff's favor at trial. As framed, Defendants can prevail only if this Court agrees with them that the

facts do not support an inference in Plaintiff's favor. As explained above, this Court lacks jurisdiction to review that fact-bound determination on an interlocutory appeal from a denial of qualified immunity.

Nevertheless, even if this Court had jurisdiction to consider the question, the SAR evidence was material. Or, phrased correctly at this juncture of the case, this Court cannot conclude as a matter of law that the SAR evidence was not material to the outcome of Mr. Coones's trial.

The evidence at the criminal trial was closely balanced. The first jury acquitted Mr. Coones of killing Carl in a split verdict. Absent evidence of Kathleen's embezzlement, Mr. Coones had no facts to demonstrate Kathleen's motive to kill herself. The prosecutor took full advantage of that evidentiary hole, arguing that Kathleen had no reason whatsoever to commit suicide. Where no physical evidence corroborated Kathleen's accusation, and there were many reasons to doubt her story, evidence of Kathleen's felony crimes could have been the difference between guilt and acquittal.

b. The District Court Correctly Found That the QuikTrip Video Was Material

Defendants' arguments about the QuikTrip video fail for similar reasons. Defendants make perfunctory reference to the fact that "the QuikTrip video was viewed and did not show either Kathleen or Pete Coones was introduced at both trials" without further developing any arguments about materiality. This undeveloped argument is forfeited. *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1207 (10th Cir. 2022). But even if Defendants had not forfeited this argument by failing to develop it, the district court correctly found—based on its analysis of the entire factual record—that the materiality of the video itself was a question for the jury, notwithstanding the testimony supposedly describing the video's contents. App. Vol. XIV at 3770-71. ("Assuming the QuikTrip video confirmed Detective Michael's trial testimony, it was not cumulative. A reasonable jury could find that the QuikTrip video, standing alone, made a difference because it showed no confrontation between Kathleen and Mr. Coones"). Defendants' disagreement with the district court's assessment raises only a dispute about the sufficiency of Plaintiff's evidence, not a legal challenge to the district court's decision, and it is therefore improper in an interlocutory appeal. For the reasons

explained above, this Court has no jurisdiction to review such an argument.

The Quiktrip video would have been a crucial component of Mr. Coones's attack on Kathleen's credibility. It would have presented as one of the only pieces of objective evidence to disprove Kathleen's allegations. Although Defendant Michael testified to what he observed on the video, the video itself would have proved far more powerful. *See Old Chief v. United States*, 519 U.S. 172, 188 (1997) (denying a defense request to stipulate to evidence in favor of allowing the jury to see the evidence for itself, because of "the need for evidence in all its particularity to satisfy the jurors' expectations about that proper proof should be.").

Moreover, because this Court must weigh the suppressed evidence cumulatively, *see Wearry v. Cain*, 577 U.S. 385, 394 (2016), the Quiktrip video combined with the SAR evidence is sufficient evidence that could reasonably be seen to have turned the tide in Mr. Coones's defense.

II. Defendant Michael Is Not Entitled to Qualified Immunity on Plaintiff's Fabrication Claim

Michael failed to address Plaintiff's fabrication claim in the district court, therefore forfeiting any argument about this claim on

appeal. Even if Michael had not forfeited his argument on Plaintiff's fabrication claim, Michael disputes the facts as found by the district court thereby depriving this Court of jurisdiction.

A. Michael Forfeited Any Qualified Immunity Arguments on Plaintiff's Fabrication Claim

Defendants contend that Michael is entitled to qualified immunity on Plaintiff's fabrication claim because "the evidence, viewed in the light most favorable to Plaintiff does not support a fabrication claim against Defendant Michael." Br. at 41. Defendants' argument is not a qualified immunity argument, but rather, a fact-based challenge to the sufficiency of Plaintiff's evidence because they do not actually take the facts as found by the district court. *See* section (II)(B) below. To the extent that a qualified immunity defense can be construed from Defendants' argument, it was forfeited in the lower court.

Below, Defendants failed to challenge Plaintiff's fabrication claim on qualified immunity grounds, thereby forfeiting any argument on appeal. *See Wall v. Astrue*, 561 F.3d 1048, 1066 (10th Cir. 2009) (finding claimant's argument was unpreserved for failure "to present any developed argumentation" to the district court); *Harrell v. United States*, 443 F.3d 1231, 1233 (10th Cir. 2006) (concluding undeveloped

argument to district court was not preserved for appeal); *Tele-Communications, Inc. v. Comm'r of Internal Revenue*, 104 F.3d 1229, 1234 (10th Cir. 1997) (rejecting argument as inadequately preserved where a single "perfunctory" paragraph of briefing in district court expanded to 10 pages of argument on appeal).

The forfeiture in this case is clear. In their summary judgment briefing, Defendants dedicated a mere 36 words in response to Plaintiff's allegation that Michael fabricated his account that Mr. Coones's van was not parked at his home. Defendants argued only the following:

> Det. Michael went to the cul de sac where Coones lived. He did not see Coones' van. Nothing during the investigation corroborated, as fact, that Coones' [sic] could not have used his van to commit the murder.

App. Vol. II at 318. This argument raises no legal issues about their entitlement to qualified immunity; instead, Defendants sought to dispute the factual record and draw inferences in their favor. Because Defendants' argument was so brief and undeveloped, the district court found that it was "insufficient to trigger invocation of qualified immunity, or otherwise move for summary judgment," and it and denied summary judgment on the fabrication claim. *See* App. Vol. XIV

at 3831 ("Defendants make no argument specific to the elements discussed above. Nor do they acknowledge in their motion that the fabrication claim requires a separate test from the *Brady* claim. The Court will not conduct that analysis on its own.")

In their opening brief, Defendants expand 36 words into three pages of argument. Again, Defendants make no cognizable legal argument and only challenge the factual findings made by the district court on this point. Br. at 41-43. And, despite the district court's express finding that this argument was forfeited, Defendants do not attempt to overcome that finding by, for example, showing that the district court's disposition of the argument was plainly erroneous. The failure to address the applicable "plain error" standard in their opening brief forecloses appellate review. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) ("even if [a party's] arguments were merely forfeited before the district court, her failure to explain in her opening appellate brief why this is so and how they survive the plain error standard waives the arguments in this court."); *see also* 10th Cir. R. 28.1(A) ("[f]or each issue raised on appeal, all briefs must cite the precise references in the record where the issue was raised and ruled on."). Therefore,

Defendant Michael forfeited any argument regarding Plaintiff's fabrication claim. Finally, even if these arguments had not been forfeited, they do not raise appealable issues of law but rather disputes of fact, as discussed above, and are not a basis to reverse the district court's decision.

B. Even If Michael's Arguments Are Not Forfeited, He Disputes the District Court's Factual Findings, Depriving This Court of Jurisdiction.

The district court determined that the record supports the conclusion that Defendant Michael fabricated evidence that Mr. Coones's van was not parked at his home the night of the murder, thus fabricating an opportunity for Mr. Coones's to travel to Kathleen's home to commit the crime. To the extent that it was not forfeited, Defendants still lose because their argument hinges entirely on disputing the Court's factual findings, thus depriving this Court of jurisdiction.

Defendants claim that the only evidence related to Plaintiff's fabrication claim is (1) that "Michael went to Coones' residence at 6:00 a.m. and walked part-way up the cul de sac and could not see Coones' van from his vantage point," and (2) that "there was an area in the back yard he would not have seen from his vantage point." Br. at 41.

Though Defendants claim they are "taking the facts in the light most favorable to Plaintiff," *Id.*, their brief ignores the actual record.

In reality, Defendant Michael testified that he "personally went to the Coones' residence after the murder, that he did not see the brown van there and that *he would have seen it* based on where the tire ruts were located when he viewed the backyard on the morning of April 7, 2008." App. Vol. XIV at 3774. (emphasis added). The district court identified three specific pieces of evidence from which a reasonable jury could infer that this fabrication occurred. First, "Michael failed to document his vantage point on the morning of the Schroll death" despite that being his normal practice. *Id.* Second, there were "multiple witness accounts" that "supported Mr. Coones's statement to police that the van was parked behind his house and in front of Minks' vehicle." *Id.* And third, Minks "tried to contact the detectives and give an alibi statement, even though Detective Michael testified he had no recollection of that." *Id.*

Defendants, in a poor attempt to disguise their fact-based arguments as ones based on qualified immunity, fail to discuss any of these findings despite claiming to view "the evidence . . . in the light

most favorable to Plaintiff." Br. at 41. Indeed, their self-serving and incomplete recitation of the factual basis of the district court's decision makes their argument improper and deprives this Court of jurisdiction. The Court cannot resolve Defendants' challenge to the sufficiency of the evidence regarding Plaintiff's fabrication claim because Defendants are arguing from a different factual record. *See Lowery v. Cnty. of Riley*, 522 F.3d 1086, 1091 (10th Cir. 2008) ("We do not have jurisdiction to resolve disputed issues of fact and have therefore observed that a defendant may not appeal the sufficiency—as opposed to the legal significance—of the plaintiff's evidence."); *Garrett v. Stratman,* 254 F.3d 946, 953 (10th Cir. 2001) ("If we determine the district court's conclusion rests on findings of evidence sufficiency, we must dismiss for lack of jurisdiction."); *Gross v. Pirtle,* 245 F.3d 1151, 1156 (10th Cir. 2001) ("Courts of appeals clearly lack jurisdiction to review summary judgment orders deciding qualified immunity questions solely on the basis of evidence sufficiency—which facts a party may, or may not, be able to prove at trial.").

III. Defendants Are Not Entitled to Qualified Immunity on Plaintiff's Malicious Prosecution Claim

The district court properly found that Defendants Michael and Garrison caused Mr. Coones's continued confinement and prosecution and that no probable cause supported support his original arrest. Defendants cannot challenge this fact-based determination on appeal.

A. This Court Lack Jurisdiction Over Defendants' Bid for Qualified Immunity on Plaintiff's Malicious Prosecution Claim

Rather than accept the factual record found by the district court in denying Defendants' bid for summary judgment on Plaintiff's malicious prosecution claim, Defendants repeatedly contest those facts. *See* Br. at 50 ("Michael did not testify the van was not at Coones' house. Rather, his testimony was clear that the van could not be seen from his vantage point and he admitted the van could be parked behind the house without him being able to see it."); *id.* at 50 n.4. Defendants' argument requires this Court to revisit the district court's finding—that Defendant Michael testified "that the van was not at Mr. Coones' house on the morning of April 7." App. Vol. XIV at 3778. Revisiting factual disputes, however, is something this Court cannot do in resolving an interlocutory qualified immunity appeal. *Lowery*, 522 F.3d at 1091–92

("the defendants contest the nature of and circumstances surrounding the questioning that led to Mr. Lowery's confession, as well as the extent—if any—to which Mr. Lowery was in custody during the questioning. This amounts to a challenge to the sufficiency of the evidence, which presents a question of fact that we do not have jurisdiction to consider."). The avenue for Defendants to contest the factual underpinnings for the district court's decision is at trial before a jury.

B. Even If This Court Had Jurisdiction to Consider Defendants' Malicious Prosecution Appeal, Defendants Have Forfeited That Challenge by Not Properly Raising It Before the District Court

As explained above, this Court can consider only arguments properly raised before the district court. Before the district court, Defendants devoted one paragraph to their malicious prosecution qualified immunity argument. App. Vol. II at 328-29. That paragraph regurgitated boilerplate law about probable cause and contained no argument as to why Defendants are entitled to qualified immunity here. Essentially, Defendants rested on their argument that Plaintiff's evidence was insufficient to hold them liable for malicious prosecution. That sort of sufficiency of the evidence argument "is insufficient to raise

qualified immunity." *Montoya v. Vigil*, 898 F.3d 1056, 1065 (10th Cir. 2018) (defendant forfeited qualified immunity appeal when only argument below was to sufficiency of the evidence).[5]

Defendants failed to explain why they were entitled to qualified immunity below, and thus cannot advance that argument on appeal. *See Wall*, 561 F.3d at 1066; *Harrell*, 443 F.3d at 1233; *Tele-Communications, Inc.*, 104 F.3d at 1234.

C. Even If This Court Had Jurisdiction and Defendants Had Not Forfeited Their Appeal, Defendants Are Still Not Entitled to Qualified Immunity

Even if this Court were to consider Defendants' argument on the merits, they would still lose. Defendants take the ill-fated approach of citing only select portions of the record and then claim victory. Taken as a whole, the evidence before the district court precludes Defendants from obtaining qualified immunity.

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[5] Defendants have also forfeited any argument regarding lack of malice. Their brief makes one passing reference to the malice element, br. at 48, but Defendants provide no argument as to why malice is not present here. Any argument regarding the malice prong has therefore been forfeited. *United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013) (cursory argument not meaningfully developed by any analysis or citation is deemed forfeited).

To begin, Defendants wrap themselves in the criminal judge's determination of probable cause at the preliminary hearing. Br. at 46. Defendants misleadingly claim that Michael's affidavit contains no false statements, but Defendants omit Michael's false testimony before the judge at the preliminary hearing.

As Plaintiff argued below, Defendant Michael falsely testified at the preliminary hearing that when he was at Mr. Coones's house in the early morning hours of April 7, he viewed the location where Mr. Coones's van was reported to be, and the van was missing.[6] For summary judgment purposes, with the evidence taken in the light most favorable to Plaintiff, that testimony was not true. Mr. Coones's van was parked behind his house, and he was unable to move it because Minks's van was blocking it. Michael's testimony on this point was a

[6] Defendants are wrong to contest that Defendant Michael falsely testified that Mr. Coones's van was not in his backyard the morning of the shootings. Defendant Michael testified: "I did see some tire marks. I went back up to the area where I initially began my walk-up; and if the van would have been anywhere near those tire marks, I -- I would have seen it." App. Vol III at 588-89; *see also* App. Vol. IV at 733-34 (Michael testifying at trial that Mr. Coones supposedly told him that he parked his van where the tire marks were in the backyard of his home).

complete fabrication, but there was no way for the criminal court judge to know that.

Based on the (false) record presented to the criminal court, Mr. Coones had the opportunity to commit the crime because his vehicle was not at his house around the time of the murder, and the evidence indicated that Mr. Coones lied to the police when he claimed his car was in his backyard. This (false) evidence would have corroborated Kathleen's telephone call in the mind of the judge deciding whether to approve charges.

And that is exactly what the prosecution argued at the preliminary hearing. Based on Defendant Michael's false testimony, the prosecutor claimed that Mr. Coones lied about his van being at his house during the early morning hours of April 7, 2008, and argued that Mr. Coones could have committed the murders because his van was missing without any innocent explanation.

Moreover, because Defendants Michael and Garrison did not document the fact that Kathleen had lied about the QuikTrip altercation, and suppressed the video, Mr. Coones had no ability to bring that evidence to the Court's attention. Likewise, because

Defendants Michael and Garrison withheld the Suspicious Activity Report and did not document Kathleen's embezzlement, Mr. Coones could not bring that evidence to the Court's attention either.

Finally, at the preliminary hearing, the criminal court received Kathleen's autopsy report into evidence. But because Defendants Michael and Garrison had withheld key points of evidence from Dr. Mitchell, that autopsy report did not contain Dr. Mitchell's ultimate finding: that Kathleen's most likely cause of death was suicide. This was particularly important because the judge presiding over the preliminary hearing stopped the proceedings so that he could review that autopsy report before rendering his decision on probable cause.

Defendants, accordingly, cannot rely on the preliminary hearing determination of probable cause because their fabrication and suppression of evidence altered the outcome. *See Stonecipher v. Valles*, 759 F.3d 1134, 1142 (10th Cir. 2014); *Pierce*, 359 F.3d at 1292; *Kaul v. Stephan*, 83 F.3d 1208, 1213 n.4 (10th Cir. 1996); *Robinson v. Maruffi*, 895 F.2d 649, 655–56 (10th Cir. 1990); *Tran v. City of Lawrence, Kansas*, 653 F. Supp. 3d 894, 907 (D. Kan. 2023). *Cf. Taylor v. Meacham*, 82 F.3d 1556, 1564 (10th Cir. 1996) (chain of causation

broken only "absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor.").

Properly viewed, the debate about whether probable cause extinguished after Defendants learned additional exculpatory evidence is one for the jury. *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990) ("We have long recognized that it is a jury question in a civil rights suit whether an officer had probable cause.").

Moreover, viewing the evidence in the light most favorable to Plaintiff, the only evidence implicating Mr. Coones came from Kathleen's phone call to her mother. Defendants then discovered that Kathleen had lied to family members about Mr. Coones on at least 13 different occasions, including about him stalking her, harassing her, and threatening her. Despite a thorough investigation, Defendants never uncovered any evidence to corroborate Kathleen's claims.

On the other hand, there was a bounty of evidence exculpating Mr. Coones and pointing to Kathleen as the culprit. There were no signs of forced entry and no signs of a struggle. Upon first blush, the scene looked like a murder-suicide. Kathleen's mother did not hear any sound

of an altercation in the background of Kathleen's phone call. The murder weapon was Kathleen's own gun and only her DNA was found on the barrel and the trigger. The murder weapon was left in plain view at the scene of the crime. The murder weapon was recovered on Kathleen's left side, and the Defendants knew that she was left handed. Blood spatter was observed on Kathleen's left hand (but none on her right), and the Defendants expected to see blood spatter on the hand of the person who killed Carl and Kathleen. The weekend of the murder, Kathleen reported that she and Carl were having marital tension.

Despite the immediate police investigation, none of Mr. Coones's fingerprints or DNA was found at the murder scene, and no forensic evidence was found on his person or in his vehicle. Mr. Coones was 50 years old, had no prior criminal record, and it made no sense to Defendants why Kathleen would allow Mr. Coones into her home or why Mr. Coones would go to the Schroll house unarmed and then somehow obtain Kathleen's gun to commit murder and then leave it at the scene.

Defendants Michael and Garrison learned that Kathleen had embezzled over $10,000 from her employer, providing her with a motive to kill herself.

Furthermore, as Plaintiff's police practices expert averred in determining that a homicide detective would conclude that probable cause would not exist under the totality of the circumstances:

> While the lack of corroboration will not necessarily destroy probable cause in every case where it existed initially, in this case not only is there a lack of corroboration, but also significant evidence that contradicts probable cause that Mr. Coones committed murder. Kathleen had made a number of false statements inflating the conflict between her and Mr. Coones and painting him as the aggressor; Kathleen was engaged in crimes of dishonesty that suggested she was undergoing financial hardship; the evidence did not explain how Mr. Coones would gain entry to the Schroll house, obtain Kathleen's gun, and use it to kill her and her husband without any sign of forced entry or a struggle. No forensic evidence suggested a link between Mr. Coones and crime, despite officers acting very quickly to search both the Schroll and the Coones residences.

App. Vol. XIII at 3453.

Defendants discuss none of the exonerating evidence on appeal. Instead, they cherry pick a selective view of the record and proclaim victory. Again, this Court cannot hear Defendants' appeal if they fail to accept the factual record found by the district court. *See Lowery*, 522

F.3d at 1091–92 (denying interlocutory appeal when "defendants in fact only cite to select portions of the record evidence and ignore" plaintiff's allegations).

Certainly, a jury could determine that nonetheless probable cause existed; or that Defendant Michael was telling the truth when he claimed not to have seen the van in Mr. Coones's backyard, claimed not have learned about Kathleen's embezzlement, or when he claimed not to have recovered the QuikTrip video. But "where there is a question of fact or room for a difference of opinion about the existence of probable cause, it is a proper question for a jury." *Bruner v. Baker,* 506 F.3d 1021, 1028 (10th Cir. 2007) (quoting *DeLoach,* 922 F.2d at 623). Defendants' appeal must be denied.

IV. Defendants Forfeited Any "Clearly Established" Qualified Immunity Arguments

Defendants forfeited any additional arguments based on the "clearly established" prong of the qualified immunity test. Their catch-all discussion of clearly established law is limited to a few pages at the end of the brief, in which they quote cases discussing the general legal standard for qualified immunity but fail to develop a single specific argument about their entitlement to qualified immunity in the context

of this case. *See* Br. at 52-54. By making only superficial references to a broad legal principle without explaining their position, Defendants have forfeited this argument. *Nixon v. City & County. of Denver*, 784 F.3d 1364, 1370 (10th Cir. 2015) ("[A] brief must contain an argument consisting of more than a generalized assertion of error, with citations to supporting authority.... Yet [appellant] offers no articulable basis for disturbing the district court's judgment." (quoting *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir.2001))); *see also GeoMetWatch Corp*, 38 F.4th at 1207 (noting that "skeletal and inadequate presentation" of a legal theory amounts to forfeiture).

Plaintiff acknowledges that in one previous case this Court exercised its discretion to consider forfeited arguments under the "clearly established" prong. *See Cox*, 800 F.3d at 1246. It should not do so here. In *Cox*, the defendant—despite making only a cursory reference to the "clearly established" prong in submissions to the district court—developed his arguments on appeal. *See id.* at 1247 (noting that the defendant "focus[ed] on the second prong" in his arguments to the Tenth Circuit). Defendants in this case have not done so. *See* Br. at 52-54. And unlike in the "unique factual and legal context of" *Cox*, *id.* at 1244,

Plaintiff's briefing to the district court extensively discussed the applicable clearly established constitutional duties with respect to the fabrication and suppression of evidence. App. Vol. XI at 2953-2960 (suppression and fabrication); *id.* at 2961-2966 (malicious prosecution). In *Cox*, Plaintiff's arguments appropriately "define[d] the contours of the clearly-established-law question," allowing the district court to correctly analyze the applicable precedent. *Id*, 800 F.3d at 1246. But in their opening brief, Defendants fail to address this precedent in any way, effectively forcing Plaintiff to guess what arguments—if any—they are advancing. No authority supports excusing their forfeiture under these circumstances.

Even if the Court were to disregard this forfeiture and consider arguments based on the "clearly-established" prong, it should reject them because the relevant constitutional obligations were settled by Supreme Court and Tenth Circuit case law long before the Schroll death investigation. *See Bledsoe*, 53 F.4th at 613 (holding that it was clearly established as of 1986 that the falsification or omission of evidence violated a defendants due process rights); *see also Pierce*, 359 F.3d 1279 ("[n]o 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.").

CONCLUSION

In Sum, this Court should dismiss this appeal for lack of jurisdiction because Defendants raise fact-based challenges to the district court's ruling and do not accept the facts as found by the district court or view the evidence in the light most favorable to Plaintiff. Moreover, the legal arguments that Defendants do present, whether police officers can be liable for due process violations without a showing of bad faith and whether the district court can consider the totality of the evidence when assessing materiality, are frivolous. As discussed at length above, well-settled Tenth Circuit law is decisively clear on both issues. Further, Defendants waived their only true qualified immunity argument on appeal: whether their violations were clearly established. And, finally, even if the Court were to reach the merits, the district court correctly found that Plaintiff's evidence was sufficient to show that Defendants acted with the requisite mental state, that the

suppressed and fabricated evidence was material, and that Defendants' conduct led to Plaintiff's unlawful imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Israa Alzamli , an attorney, certify that on March 17, 2025, I filed the foregoing Response Brief via CM/ECF, thereby delivering an electronic copy to all counsel of record for Defendants listed below:

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