UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GLYNN SIMMONS,

Plaintiff - Appellee,

v.

CLAUDE L. SHOBERT, former detective,

Defendant - Appellant,

and

CITY OF OKLAHOMA CITY,

Defendant.

No. 25-6046
(D.C. No. 5:24-CV-00097-J)
(W.D. Okla.)

GLYNN SIMMONS,

Plaintiff - Appellee,

v.

CITY OF OKLAHOMA CITY,

Defendant - Appellant,

and

CLAUDE L. SHOBERT, former detective,

Defendant.

No. 25-6051
(D.C. No. 5:24-CV-00097-J)
(W.D. Okla.)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CIV-24-97-J
HONORABLE BERNARD M. JONES, DISTRICT JUDGE

APPELLANTS' OPENING BRIEF

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CITY OF OKLAHOMA CITY

July 30, 2025

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED APPEALS

Shobert filed Appeal No. 25-6046 and the City filed Appeal No. 25-6051. On May 16, 2025 this Court entered an Order consolidating the two appeals for purposes of briefing, oral argument, and submission to a panel of judges. [Dkt. 16]. There are no other prior or related appeals in this matter.

APPELLANTS' OPENING BRIEF

Defendants/Appellants Claude Shobert and the City of Oklahoma City (collectively, "Appellants") appeal from the District Court's March 10 and 17, 2025 Orders denying their Motions for Summary Judgment. [App. Vol. 10, pp. 2420-2427]. Appellants submit this Joint Opening Brief for the Court's consideration on appeal.

I. STATEMENT OF JURISDICTION

A. Subject Matter Jurisdiction of the District Court

Plaintiff/Appellee Glynn Simmons brought claims against Shobert, individually, for alleged violations of his Fourth and Fourteenth Amendment constitutional rights and for conspiracy pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Oklahoma. Simmons additionally brought a § 1983 municipal liability claim against the City of Oklahoma City regarding the alleged violations of his Fourth and Fourteenth Amendment rights. The District Court had jurisdiction of those claims under 28 U.S.C. § 1331.

B. Timeliness of Appeal

On March 10, 2025, the District Court entered an Order denying Shobert's Motion for Summary Judgment, thereby denying qualified immunity to him on Simmons' § 1983 claims. [App. Vol. 10, pp. 2420-2423]. Shobert filed his Notice of Appeal on March 28, 2025. [App. Vol. 10, pp. 2428-2430]. On March 17, 2025, the

District Court entered an Order denying the City's Motion for Summary Judgment on Simmons' claims against it. [App. Vol. 10, pp. 2424-2427]. The City filed its Notice of Appeal on April 10, 2024. [App. Vol. 10, pp. 2431-2432]. Therefore, both appeals are timely pursuant to Fed. R. App. P. 4(a)(1)(A).

C. Appellate Jurisdiction

A District Court's denial of summary judgment is generally not appealable. However, an exception is made when the defendant is a public official asserting qualified immunity and the issue appealed is a matter of law. *Blossom v. Yarbrough*, 429 F.3d 963, 966 (10th Cir. 2005). This Court therefore has jurisdiction over this qualified immunity appeal pursuant to 28 U.S.C. § 1291 and 1292(a) and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

This Court has pendent jurisdiction over Appellant City in conjunction with the jurisdiction over Shobert because Appellants' claims are "inextricably intertwined." While discretionary, pendent appellate jurisdiction allows the Court to exercise jurisdiction over an otherwise nonfinal and nonappealable lower court decision which overlaps with an appealable decision. *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1171 (10th Cir. 2022). This Court has pendent jurisdiction over the denial of the City's Motion for Summary Judgment because the claims against the City at issue are inextricably intertwined with the claims at issue regarding qualified

immunity. *See* 28 U.S.C. § 1291; *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995).

City's alleged liability is inextricably intertwined with the claims against Shobert because both Appellants' alleged liability hinges on Simmons making an initial showing of an underlying constitutional violation by Shobert and then that the underlying constitutional violation was directly caused by a City policy. Simmons stated his claims against Shobert and the City in a manner where they are inarguably "inextricably intertwined" by pleading in his complaint and throughout his Response to the City's Motion for Summary Judgment, that the City is responsible for every action taken by Shobert, even alleged illegal acts, outside of the course and scope of his employment. [App. Vol. 1, pp. 28-32; App. Vol. 10, pp. 2318-2319].

II. STATEMENT OF RELATED APPEALS

Shobert filed Appeal No. 25-6046 and the City filed Appeal No. 25-6051. On May 16, 2025 this Court entered an Order consolidating the two appeals for purposes of briefing, oral argument, and submission to a panel of judges. [Dkt. 16]. There are no other prior or related appeals in this matter.

III. STATEMENT OF ISSUES

The issues to be decided in this consolidated appeal with respect to Shobert include:

1. Whether Shobert was entitled to qualified immunity.

2. Whether the District Court's Order denying summary judgment to Shobert properly applied the qualified immunity standard.

3. Whether it was clearly established in 1975 that Shobert's actions violated Simmons' constitutional rights.

These issues were raised in Shobert's Motion for Summary Judgment, pp. 16-40. [App. Vol 2, pp. 271-240]. The district court did not make any ruling on these issues. The cursory March 10, 2025 Order denying Shobert's Motion for Summary Judgment did not discuss or even mention qualified immunity. [App. Vol. 10, pp. 2420- 2423].

The issues to be decided with respect to the City are:

1. Whether this Court accepts pendent jurisdiction of this appeal, as the claims against the City are so inextricably intertwined with those against Shobert that resolution of Shobert's appeal would resolve all claims against the City.

2. Whether the District Court erred in its decision there was a question of a fact regarding the alleged unconstitutional policies/and or training on the part of the City.

3. Whether Appellee suffered a constitutional violation because of the actions of Shobert or the policies or training of the City at the subject time.

4. Whether the City was on notice of a defect in its policies or training at the subject time.

5. Whether Appellee's claims are barred by laches and/or a prior District Court opinion.

These issues were raised in the City's Motion for Summary Judgment, pp. 7-30. The district court did not make any specific rulings on these issues. The March 17, 2025 Order denying the City's Motion for Summary Judgment simply stated "the Court is unable to engage in the requisite summary judgment analysis." [App. Vol. 10, pp. 2424-2427].

IV. STATEMENT OF THE CASE

This appeal arises from the 1975 arrest and subsequently overturned criminal conviction of Simmons. On December 30, 1974, a store clerk was murdered and another was injured during the robbery of a liquor store in Edmond, Oklahoma. The robbery homicide was investigated by Detective Garrett ("Garrett") of the Edmond Police Department. [App. Vol. 2, pp. 344-347; App. Vol. 10, pp. 2420, 2424]. The Oklahoma City Police Department ("OCPD") did not conduct the investigation. [App. Vol. 5, pp. 955-959] Shobert was an employee of the OCPD at this time, assigned to the robbery/homicide unit. [App. Vol. 2, pp. 298, 313].

In February 1975 the OCPD arrested Simmons for unrelated armed robberies. [App. Vol. 2, pp. 445-446]. Simmons was included in one or two line-ups conducted

by Shobert on February 7 and/or 8 related to the Edmond murder. Simmons was identified by a witness as one of the two men who had committed the Edmond robbery/homicide. [App. Vol. 2, p. 437; App. Vol. 5, pp. 966-967]. Simmons was convicted of the murder. [App. Vol. 10, p. 2421]. Simmons made an attempt in 1997 to overturn his conviction which was denied, but a second attempt initiated in 2022 was successful based on the state's admission in 2023 that a *Brady* violation occurred due to the failure to disclose a February 10, 1975 report. [App. Vol. 6, pp. 1263, 1270]. The Oklahoma County District Court found Simmons did not commit the 1975 murder, but did not make any findings as to who was responsible for the failure to disclose the report. [App. Vol 3, pp. 629-631; App. Vol. 10, p. 2421, 2425]. Shobert was not called as a witness at that hearing. [App. Vol. 5, pp. 960-963].

Following his release, Simmons sued the City of Edmond, the Estate of Garrett, Shobert, and the City. [App. Vol. 1, 18-44]. He brought claims against Shobert, individually, for alleged violations of his Fourth and Fourteenth Amendment constitutional rights, and for conspiracy and failure to intervene pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Oklahoma. [App. Vol. I, 18-44]. Simmons additionally brought a § 1983 municipal liability claim against the City regarding the alleged violations of his Fourth and Fourteenth Amendment rights. [App. Vol. I, 18-44].

Simmons' Fourteenth Amendment due process claims against Shobert are

premised on an alleged *Brady* violation, alleged fabrication of evidence, and the alleged use of suggestive identification techniques, while his Fourth Amendment claim is premised on an alleged continued deprivation of liberty without probable cause. [App. Vol. 1, 18-44]. Shobert filed a Motion to Dismiss, seeking qualified immunity on all claims against him; the District Court granted qualified immunity on the failure to intervene claim but denied qualified immunity on the other claims. [App. Vol. 1, pp. 61-151, 197-204].

Both Shobert and the City moved for summary judgment on all claims against them. [App. Vol. 2, p. 243 – Vol. 5, p. 1085]. Shobert specifically sought summary judgment based on qualified immunity, arguing that Shobert did not violate Simmons' constitutional rights and that such rights were not clearly established in 1975. [App. Vol. 2, pp. 0246-297]. The City sought summary judgment on the grounds that if there was no constitutional violation by Shobert, there could be no municipal liability, and on the grounds that its training, policies and procedures during the relevant time frame (1968-1975) were constitutional. [App. Vol. 5, pp. 912-948].

The District Court generally denied Shobert's summary judgment motion on March 10, 2025. [App. Vol. 10, pp. 2422-2423]. The four page Order never mentioned qualified immunity and did not engage in any analysis regarding whether Simmons' alleged rights were clearly established in 1975. This Order states:

> Because the events at issue in this case occurred approximately fifty years ago, because key witnesses are now either deceased or have no specific recollection of the events that took place fifty years ago, and because no one is able to confirm whether the documents in the current district attorney file for Simmons' criminal case are the same documents that were in the file at the time of the original trial, the Court is unable to engage in the requisite summary judgment analysis. There are simply no undisputed facts, other than the basic facts of this case, upon which to decide Shobert's motion for summary judgment [App. Vol. 10, 2422-2423].

The District Court denied summary judgment to the City in a similar Order on March 17, 2025. This Order states:

> Because the events at issue in this case occurred approximately fifty years ago, because key witnesses are now either deceased or have no specific recollection of the events that took place fifty years ago, because no one is able to confirm whether the documents in the current district attorney file for Simmons' criminal case are the same documents that were in the file at the time of the original trial, because no Oklahoma City Policies and Procedures Manuals from 1969-1975 have been found, and because there are no officers still with the City that were employed during 1974-75 who can testify about OCPD's policies and procedures and/or training of OCPD officers during that time frame, the Court is unable to engage in the requisite summary judgment analysis. There are simply no undisputed facts, other than the basic facts of this case, upon which to decide City's motion for summary judgment. [App. Vol. 10, 2426-2427].

V. STATEMENT OF FACTS

1. In 1975, Simmons was convicted of murder in *State of Oklahoma v. Don Roberts and Glynn Ray Simmons,* CF-1975-551. [App. Vol. 10, p. 2421]. Simmons does not dispute that the case was prosecuted by the State of Oklahoma and based on an investigation by the Edmond Police Department. [App. Vol. 5, pp.

918, 1093; App. Vol. 10, p. 2421]

2. In 2023, following an evidentiary hearing, the Oklahoma County District Court deemed Simmons innocent. [App. Vol 3, pp. 629-631; App. Vol. 10, p. 2421]

3. In 2024, Simmons filed a lawsuit against the City of Edmond, the City of Oklahoma City, OCPD Detective Claude Shobert, and the Estate of Edmond Detective Anthony Garrett. Simmons settled with the City of Edmond and the Estate of Garrett, and the claims against these defendants were dismissed with prejudice. [App. Vol. 1, pp. 242-245; App. Vol. 10, pp. 2421, 2425]

4. The only remaining defendants are the City of Oklahoma City and Shobert. The facts related to the remaining claims against these defendants are set out below.

5. Defendant Shobert joined the OCPD in 1968, and applied and was selected to be a detective in 1972. [App. Vol. 2, p. 298, ¶5 (Shobert Declaration), 311-312 (Shobert Deposition)] After several years as a detective, Shobert was promoted to Sergeant and served as a supervisor in patrol and the K-9 unit until he retired in 1988. During Shobert's 20 years at OCPD, he received numerous certifications, awards and commendations. He was never sued, and was never disciplined. [App. Vol. 2, pp. 298, ¶¶3-4, 309, 313]

6. During his time as a detective, Shobert was assigned to the

robbery/homicide division. His primary assignment was investigating robberies. While Shobert might work on a homicide case if a robbery was involved, the primary investigator would be a homicide investigator. [App. Vol. 2, pp. 298, ¶4, 312]

7. As a detective, Shobert received on the job training from OCPD from older experienced officers on conducting lineups. [App. Vol. 5, p. 950 (Shobert Deposition)]

8. Shobert received training that exculpatory information was to be disclosed, and remembers OCPD had policies and procedures that he was supposed to follow. [App. Vol. 5, pp. 951-953)]

9. On December 30, 1974, Sayre's Liquor store in Edmond, Oklahoma was robbed. During the robbery, store clerk Carolyn Rogers was murdered and customer Belinda Brown was shot in the head. The crime was reported to the Edmond Police Department (EPD) by Norma Hankins. [App. Vol. 2, pp. 335-337 (EPD Reports from 12-30-1974), 340-342 (Hankins Preliminary Hearing Testimony (PHT))]

10. Detective Sergeant Anthony Garrett was the EPD homicide investigator assigned to the case. [App. Vol. 2, pp. 344-345 (Garrett Trial Testimony (TT)), 346-347 (Garrett EPD Report from 12-30-1974); App. Vol. 10, pp. 2420, 2424]

11. On December 31, 1974, Garrett and EPD officer Carson, took Hankins, Johnny Delbrel and two other witnesses to OCPD to look at mug shots. No

identifications were made. [App. Vol 2, p. 356 (Garrett EPD Report (1) from 1-3-1975)][1] There is no evidence that Detective Shobert was present. App. Vol. 2, p. 300, ¶9.] The witnesses then went back to EPD and met with a sketch artist to produce a composite drawing of one of the suspects. [App. Vol 2, p. 356]

12. On January 2, 1975, Detective Garrett interviewed Belinda Brown at St. Anthony's Hospital about the liquor store robbery. Prior to the interview, Brown met with the sketch artist. [App. Vol 2, pp. 357-361 (Garrett EPD Reports (2) and (3) from 1-3-1975)]. There is no evidence Detective Shobert was present during this interview. [App. Vol. 2, p. 300, ¶9.]

13. Between January 2, 1975 and February 8, 1975, the eyewitnesses Delbrel, Hankins and Brown (collectively) attended approximately eight lineups. [App. Vol. 10, p. 2421]. Not every witness was present at every lineup. [App. Vol. 2, pp. 340-341 (Hankins PHT), p. 353 (Delbrel Trial Testimony (TT)), pp. 365-366 (Hankins TT), pp. 370-375, 386-387 (Brown PHT), pp. 393-401, 404 (Brown. TT), pp. 407-411 (Delbrel PHT)]. There is no evidence Shobert was present during any lineups prior to February 7, 2025. [App. Vol. 2, p. 300, ¶9; App. Vol. 10, p. 2421]

14. During this time frame, EPD released the composite sketches of the

[1]Detective Garrett prepared multiple reports on January 3, 1975 reporting prior actions he took in the case. Garrett also prepared multiple reports on February 10, 1975, which are discussed below.

suspects. [App. Vol. 2, pp. 412-413; App. Vol. 10, p.2420]

15. In January of 1975, Glynn Simmons, Don Roberts, Lawrence Grant, Leonard Patterson and Delbert Patterson attended the same party. Simmons would play cards, drink and smoke weed with the Pattersons and Grant. They also went "joyriding," which Simmons defined as riding around, listening to music, drinking and smoking weed. They stopped at multiple convenience stores, including a Tom's Market. [App. Vol. 2, pp. 415-417, 422, 425-427 (Simmons Discovery Deposition (DD)]

16. On January 30, 1975, an armed robbery was allegedly committed at a Tom's Market in Oklahoma City. On January 31, 1975, another armed robbery was allegedly committed at another Tom's Market. The named defendants in both cases were Simmons and Leonard Patterson; the investigator who signed both Informations was Rinehart. [App. Vol. 2, p. 445, 446 (Informations in CRF-75-524 and CRF-75-5254)]

17. On February 3, 1975, a double murder was allegedly committed near N. 50th Street and Sooner Road. The named defendant was Leonard Patterson; the investigator who signed the Information was B. Jackson. [App. Vol. 2, p. 447 (Information in CRF-75-526)]. On February 5, 1975, Delbert Patterson was arrested as a material witness in the February 3, 1975 murder. [App. Vol. 2, p. 448]

18. On February 6, 1975, at 6:30 a.m., Leonard Patterson was arrested for

the February 3, 1975 murder. Don Roberts was also arrested on February 6. 1975. [App. Vol. 2, p. 449 (Patterson Arrest Report)]

19. On February 6, 1975 at approximately 6:30 p.m., Simmons was arrested on the charge of armed robbery related to the Tom's Market robberies. [App. Vol. 2, p. 450 (Simmons Arrest Report)]

20. In 1974 and 1975, there were approximately 27 detectives in the robbery/homicide division. All of the detectives were in one large room. Shobert has no memory of working on the cases discussed above, but believes it is possible he assisted other OCPD detectives in CRF-75-524, CRF-75-525 and CRF-75-526. Shobert has no direct memory of the Simmons murder case. [App. Vol. 2, pp. 299, ¶5 301-302, ¶10-11]

21. Shobert's first documented involvement with the Simmons case was on the morning of February 6, 1975. [App. Vol. 2, pp. 451-452 (Garrett EPD Report (1) from 2-10-1975)]. According to this EPD Report, Det. "Shober" called Garrett at approximately 9:00 a.m. and stated "they [OCPD] had two possible suspects in our Armed Robbery and Murder, in custody at the OCPD and that they would like to show them in a line-up to the witnesses in this case." [App. Vol. 2, pp. 451-452; App. Vol 10, pp. 2421, 2425]

22. The "two possible suspects" are not named in the report, but it is undisputed Simmons was not one of these suspects because he was not yet in custody

on the morning of February 6, 1975. [App. Vol. 5, p.4; App. Vol. 10, p. 2421, n. 4.]

23. This is the report Simmons alleges was "suppressed" and never provided to the District Attorney. [App. Vol 10, pp. 2421, 2425]. It is undisputed this report was an *Edmond* Police Department Report. This report includes a check box noting that a copy was sent to the County Attorney. [App. Vol. 2, pp. 451-452]

24. Shobert's next documented involvement in the case was conducting two lineups at the OCPD, one on February 7, 1975, and one on February 8, 1975. [App. Vol. 2, pp. 451-452; App. Vol 10, pp. 2421, 2425]

25. Garrett's report indicates he talked to Brown after the February 7, 1975 lineup, and talked to all three of the witnesses after the February 8, 1975 lineup. It does not indicate Shobert was present during these conversations, or that Shobert talked to any of the witnesses prior to the lineups. [App. Vol. 2, pp. 451-452]. Shobert had no reason to try to influence Brown to select any of the subjects. [App. Vol. 2, p. 301, ¶14]

26. Shobert's last reported involvement in the Simmons case was on the morning of February 10, 1975, when Garrett went to OCPD to pick up reports and evidence from "Shober." [App. Vol. 2, p. 515 (Garrett EPD Report (2) from 2-10-1975); App. Vol. 5, p.1; App. Vol 10, pp. 2421, 2425]

27. Prior to the lineups in the Simmons case, Shobert had conducted approximately 25 lineups in other cases. He was trained on how to conduct lineups

by senior detectives. [App. Vol 2, p. 302, ¶17; App. Vol. 5, p. 950]

28. Shobert's practice was to fill out the names, heights and weights of the suspects, then have the witnesses fill out their own names and addresses on the Special Showup Report. If a witness made an identification, either the witness or the detective could note that on the form. Shobert then signed the form at the conclusion of the lineup to note that he witnessed the identification. [App. Vol. 5, pp. 954-955]

29. Shobert filled out a form documenting the February 8 lineup. [App. Vol 2, p. 453 (Oklahoma City Special Showup Report); App. Vol. 10, pp. 2421, 2425]

30. It was Shobert's regular practice to prepare a Showup Report for every lineup he conducted. [App. Vol 2, p. 301, ¶13]

31. Shobert provided the February 8 Showup Report to Garrett. There is no similar report for the February 7 lineup. [App. Vol. 10, p. 2421, n. 5]

32. The February 8 Showup Report documents there were six individuals in the lineup, including Simmons, Roberts and both of the Pattersons, and lists the race, age, height, weight and clothing of every suspect in the lineup. All of the suspects were Black, and their age ranged from 19 to 23. The height range of the suspects was from 5'7" to 6'2" and their weight ranged from 135 to 163 pounds. The Showup Report indicates Brown identified Simmons (#2) and Roberts (#4). [App. Vol 2, p. 453]

33. Simmons alleges this identification and report were "fabricated." [App.

Vol. 5, pp. 1093, 1107, 1109, 1116, 1120, 1123, 1127-1129, 1133 (Response to Shobert MSJ); App. Vol.10, pp. 2294-2295, 2305-2306, 2312 (Response to City MSJ), pp. 2422, 2426 (MSJ Orders)]

34. After preparing the 2-8 Showup Report, Shobert provided it to Garrett because Garrett was the lead investigator on the case. [App. Vol. 2, p. 300, 303, ¶¶9, 19]. Shobert's role in the case was to assist Garrett and the Edmond Police Department. [App. Vol. 5, pp. 955-959]

35. Shobert did not review Sgt. Garrett's reports or case file (as evidenced by the repeated misspellings of his name). Based on his experience as a detective, Shobert assumed Garrett would provide all reports to the District Attorney's Office. [App. Vol. 2, p. 305, ¶28]

36. Shobert did not testify, and was not asked to testify, at either the preliminary hearing or the trial. Shobert was never contacted by anyone from the District Attorney's Office about the February 7 and/or February 8 lineups. App. Vol. 2, p. 305, ¶¶27-28; App. Vol 7, pp. 472-474 (Trial Transcript Index)]

37. Simmons admits he was in one of these two lineups, and that he was identified by the eyewitness Belinda Brown in that lineup. Simmons testified in the 2023 Evidentiary Hearing, and again in his deposition, that he was advised by Edmond Detective Garrett immediately after the lineup that Brown had identified Simmons. [App. Vol. 2, p. 437 (Simmons DD); App. Vol. 5, pp. 966-967 (2023

Evidentiary Hearing Transcript (EHT))]

38. Simmons testified in the evidentiary hearing that the other participants in the lineup he was in were Don Roberts, Leonard Patterson, Delbert Patterson, Tony Jones and Don Freeman. [App. Vol. 5, p. 968]. These are the same subjects as those identified on the February 8 Showup Report. [App. Vol. 2, pp. 453]

39. Simmons testified he did not know who selected him to appear in the lineup, or even if that officer was in uniform. [App. Vol. 2, pp. 424, 436]

40. Simmons has never denied that he was in a lineup, and that he was identified by Brown in that lineup, but he has given contradictory statements regarding the date of that lineup. Simmons' 1997 Application for Post-Conviction Relief and Petition for Writ of Habeas Corpus both assert Simmons was *not present at the February 7, 1975 lineup*. [App. Vol. 3, pp. 534-535, 561-562]

41. Simmons also stated in a handwritten note to Jim Priest, who represented him in the 1997 proceedings, that "I did not attend a lineup *until* 2-8-75, yet the State's chief witness claim she picked the same two as on 2-7-75." [App. Vol. 3, p. 627]

42. The district court denied the Petition for Writ, finding the February 10, 1975 Report by Garrett describing the lineups was not material under *Brady.* The denial was upheld in *Simmons v. Ward,* 198 F. 3d 258 (10th Cir. 1999). [App. Vol. 1, pp. 88-109]

43. Simmons filed another application for post-conviction relief in 2022. [App. Vol. 8, p.1770]. The Oklahoma County District Court held an evidentiary hearing on April 23, 2023. Shobert did not testify at this hearing. [App. Vol. 5, pp. 960-963 (EHT Index)]

44. In this hearing, Simmons claimed that he was not at the February 8 lineup; he was *only* at the February 7 lineup. Simmons repeated this testimony in his Discovery and Trial Depositions. [App. Vol. 2, 418-423, 437 (Simmons DD), 632, 634-635 (Simmons EHT); App. Vol. 3, pp. 637-641 (Simmons TD)]

45. There is no evidence to establish that the February 7 lineup and the February 8 lineup contained the same subjects, or that they were presented in the same order. Brown testified at the preliminary hearing that there were eight suspects in the first OCPD lineup and six in the second OCPD lineup. [App. Vol. 2, pp. 371-372 (Brown PHT)]

46. Brown testified at both the preliminary hearing and the trial that she recognized Brown from the night of the murder and that she had identified him in two lineups. [App. Vol. 2, pp. 370-372 (Brown PHT)], 391-392, 403 (Brown TT)]

47. Brown was cross-examined at length at the preliminary hearing regarding the many lineups she attended, including the two lineups at OCPD. [App. Vol. 2, pp. 374-385, 388]. Despite this testimony, Simmons' attorneys never contacted Shobert to ask about the OCPD lineups. [App. Vol. 2, p. 305, ¶27]

48. Brown's preliminary hearing testimony regarding multiple lineups also gave the prosecution reason to seek clarification. Mildfelt testified it would be the responsibility of the investigating agency, in this case Edmond, to make sure the prosecutor had copies of all reports. If he had any questions about the case or needed additional information, he would have talked to Garrett because Garrett was the lead investigator. [App. Vol. 2, pp. 474-478.]. Dan Murdock, the prosecutor who handled the preliminary hearing, agreed it would have been Garrett's responsibility, as the lead detective on the case, to provide reports to the District Attorney's office. [App. Vol. 2, p. 504 (Murdock Depo.)]

49. It was Mildfelt's practice in the 1970s to let defense counsel review his file. [App. Vol. 5, p. 1050]

50. In the 2023 Evidentiary Hearing, Mildfelt testified he did not have Garrett's February 10, 1975 report at the time of the original trial. [App. Vol 2, pp. 456-457 (Mildfelt EHT). However, in his subsequent deposition, Mildfelt testified Simmons' counsel did not show him the entire "DA File" at the evidentiary hearing; they only showed him Garrett's February 10, 1975 Report and the February 8, 1975 lineup report. After looking at the entire "DA File," Mildfelt thought it was possible Garrett's report was in the DA File at the time of trial. [App. Vol. 2, pp. 466-469, 486-489]

51. The evidence being referred to as the "DA File" is a set of documents

produced by Simmons in discovery. [App. Vol. 3, pp. 641-759]. The documents are white text on a black background and appear to have been copied from microfiche. This set of documents contains, among other things, the cover of a file folder labeled "ROBERTS, Don et al MURDER 1," handwritten notes made by Mildfelt, documents relating to jury empanelment, the verdict form for Simmons, and the death certificate and ME report for Carolyn Rodgers. [App. Vol. 3, pp. 642-643, 721-723, 751-752] This set of documents also contains several police reports *including the February 8, 1975 Special Showup Report and Garrett's February 10, 1975 Report regarding the lineups conducted at OCPD on February 7, 1975 and February 8, 1975.* [App. Vol. 3, pp. 724-726]. It also contains some post-trial pleadings. [App. Vol. 3, pp. 646-657, 659-720]

52. Both Murdock and Mildfelt reviewed the "DA File" in their respective depositions and testified that, while they did not remember having the disputed reports prior to trial, they could not be certain. [App. Vol. 2, pp. 469, 485-487 (Mildfelt Depo.), 502-506 (Murdock Depo.)] Murdock testified the collection of microfiche documents "appeared to be the entire file" and noted the first page was the "initial cover page of the file from the District Attorney's office." [App. Vol. 6, pp.1356-1358]

53. Murdock was 78 years old at the time of deposition and his recollection is not great. Murdock did not see Shobert's name on the witness list. Murdock does

not remember talking to Shobert. Murdock does not recall seeing Garrett's February 10, 1975 report in his prosecution file but "he would have given it to defense if he had it." [App. Vol. 5, pp. 1042-1044]

54. Murdock questioned the abilities of Henry Floyd, Simmons' attorney at his criminal trial. Murdock has no opinion as to Simmons' guilt or innocence. [App. Vol. 5, pp. 1040, 1045]

55. Mildfelt was 81 years old at the time of his deposition. Mildfelt does not recall speaking with Shobert. However, Mildfelt respected Shobert and considered him an efficient and honorable detective. Mildfelt described Shobert's February 8, 1975 lineup report as a "perfect" report, and stated a lineup like the one reflected in the report "wouldn't be a problem for any DA anywhere, any county, United States." Mildfelt had no reason to believe Shobert fabricated the report or conspired with Garrett to frame Simmons. [App. Vol. 2, pp. 483, 488, 492, 495-496; App. Vol. 5, pp. 1049-1050]

56. Current OCPD Chief Ron Bacy has been with the Department for 32 years, starting on August 17, 1992. [App. Vol. 5, p. 983 (Bacy Depo.)]

57. Bacy has no knowledge of any of the events of Simmons' lawsuit that occurred in 1975. [(App. Vol. 5, pp. 983-984]

58. Bacy sought to determine if there were any officers still with the City that were employed during the time frame (1974-75) to testify about policies and

procedures and there are none. Bacy could not find anyone who can testify about training of OCPD officers in 1974-75, or any witness who can testify about investigations, misconduct, or discipline from the subject time frame. [App. Vol. 5, pp. 990-992]

59. No OCPD training records from 1974-1975 were located. [App. Vol. 5, p. 992]

60. Amy Simpson, the City Clerk, reviewed records in her capacity as custodian but could not locate any police training records as far back as 1975. Similarly, Simpson could not find any Oklahoma City Policies and Procedures Manuals from the subject time frame of 1969-1975 [App. Vol. 5, pp. 1010-1012 (Simpson Depo.)]

61. Simpson did find a document entitled "Council Memo dated 9/11/74" with Resolution and Contract attached, which represents a contract for the first known Oklahoma City Police Policies and Procedures Manual. [App. Vol. 5, pp. 1011-1012, pp. 1028-1037 (Council Memo, Resolution and Contract)]. This would have been after the subject timeframe.

62. Simpson's interpretation was that there was no Manual prior to that timeframe. [App. Vol. 5, p. 1012]

63. Simpson looked for a City retention document or retention policy; the earliest she could find was dated and approved in 2004. [App. Vol. 5, pp. 1013-1015]

VI. SUMMARY OF ARGUMENT

The District Court improperly denied summary judgment to both Shobert and the City. Shobert was entitled to qualified immunity on all of Simmons' § 1983 claims against him because the evidence in the case does not establish Shobert committed constitutional violations and because the constitutional rights Simmons has asserted in this lawsuit were not clearly established in 1975. It is well-established that a government official such as Shobert is entitled to qualified immunity on § 1983 claims against him unless the official violated constitutional rights which were clearly established at the time of the alleged constitutional violation. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Determining whether an official is entitled to qualified immunity requires the court to answer two different questions: (1) whether the plaintiff has established that the defendant violated a constitutional right and, if he has, (2) whether that right was clearly established such that a reasonable person in the defendant's position would have known his conducted violated that right. *Keylon v. City of Albuquerque*, 6535 F.3d 1210 (10th Cir. 2008).

The court may elect to address either prong of the two-step qualified immunity analysis first. *Pearson v. Callahan*, 555 U.S. 223, 236-239 (2009). However, when qualified immunity is denied, the record must reflect that the plaintiff satisfied his burden as to *both* prongs of the qualified immunity test. *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001). The Order denying summary judgment to Shobert did

not mention qualified immunity and did not conduct *either* prong of the analysis. [App. Vol. 10, pp. 2420-2423]. Therefore, the district court's denial of qualified immunity to Shobert was not proper.

Moreover, qualified immunity must be judged against the backdrop of the law at the time of the conduct. *Lynch v. Barrett,* 703 F.3d 1153, 1161 (10th Cir. 2013). Shobert's conduct, as alleged by Simmons, did not violate law which was clearly established in 1975. In terms of the *Brady* violation claim, police officers have no duty to disclose information directly to defense counsel; such duty of disclosure belongs to the prosecutor. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *Tiscareno v. Anderson*, 639 F.3d 1016, 1023, n.3 (10th Cir. 2011). In 1975 there was no clearly established constitutional duty to inform prosecutors of exculpatory evidence which a police officer had reason to believe was already known to them. *Kelly v. Curtis,* 21 F.3d 1544, 1552 (11th Cir. 1994). Likewise, in 1975 there was no clearly established law regarding the deprivation of liberty as a result of the fabrication of evidence. *Truman v. Orem City,* 1 F.4th 1227, 1236 (10th Cir. 2021); *Pierce v. Gilchrist,* 359 F. 3d 1279, 1298 (10th Cir. 2004). The same is true for the identification techniques allegedly used by Shobert in the lineups in question; the right Simmons claimed was violated was not clearly established in 1975. *See, Sexton v. Beaudreaux,* 585 U.S. 961, 965 (2018); *Neil v. Biggers,* 409 U.S. 188 (1972) and *United States v. Wade,* 388 U.S. 218 (1967).

As for the conspiracy claim, because the law was not clearly established in 1975 that the actions taken by Shobert were unlawful, then it "ineluctably follows" that the law did not clearly establish that it was unlawful to conspire to engage in the same actions. *Frasier v. Evans,* 992 F.3d 1003, 1024 (10th Cir. 2021). Because law was not clearly established regarding the aforementioned rights in 1975 and because Shobert's actions did not violate any of Simmons' constitutional rights, the District Court's denial of qualified immunity was improper.

A municipality may only be held liable "for its own unconstitutional or illegal policies" and not merely because its employee injured the plaintiff. Proof of a single incident of unconstitutional activity is not sufficient to impose liability on a municipality where the policy relied on is not itself unconstitutional. In the instant case, City's policies and training could not have been the direct cause of any alleged constitutional violation. A plaintiff must show the existence of a municipal policy or custom that caused an alleged injury to prove the municipality is actually liable under §1983. Simmons has no proof the City or its officers were aware of any claimed deficient custom or that the custom directly caused the alleged violation in this case. He has no evidence of anything that Oklahoma City did amounting to a violation of his rights.

A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. Shobert testified that the City trained him

on how to be a police officer and to turn over evidence that might be exculpatory. This is the crux of Simmons' case for municipal liability, yet Simmons has no evidence to prove his claims of unconstitutional policies, training, or supervision against the City. Simmons also has no evidence the City failed to appropriately discipline or supervise its officers.

Simmons' claims are barred by laches, because Simmons and his counsel knew of the allegedly suppressed report by the time of his 1997 federal habeas proceeding. All of the witnesses upon which Simmons relies in this case were known to him in the 1997 proceedings, but because of the delay are now being asked to recall events from 50 years ago. This prejudices the City by putting it in a position where it will be trying to prove a negative at trial.

City liability is inextricably intertwined with the claims against Shobert because Appellee must first show an underlying constitutional violation by Shobert. Shobert did not violate Simmons' constitutional rights because the legal requirements for lineups and/or disclosure of witness statements was unclear in 1975. The District Court erred in denying the Motions for Summary judgment of both Appellants and should be reversed.

VII. STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed *de novo*, applying the same legal standard employed by the District Court pursuant to Rule 56(c) of the

Federal Rules of Civil Procedure. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

This Court also reviews the denial of qualified immunity on summary judgment *de novo*. *Anderson v. DelCore,* 79 F.4th 1153, 1162 (10th Cir. 2023); *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003); *Benefield v. McDowall*, 241 F.3d 1267, 1270 (10th Cir. 2001). However, the Court's review of summary judgment orders deciding qualified immunity questions is somewhat different because a defendant's assertion of qualified immunity in a §1983 case creates a presumption of immunity. *Anderson* at 1162; *Estate of Taylor v. Salt Lake City,* 16 F.4th 744, 757 (10th Cir. 2021).

The City's pendent appeal should also be reviewed "de novo, using the same standard applied by the district court pursuant to Fed. R. Civ. P 56(a)." *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). The nonmoving party must do "more than simply show that there is some metaphysical doubt as to the material facts" and must "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Thus, "the mere existence of *some* alleged factual dispute

between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issues of *material* fact." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248 (1986). Summary judgment is also appropriate where the moving party shows that the opposing party is unable to produce sufficient evidence in support of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

VIII. ARGUMENT AND AUTHORITY

PROPOSITION I

THE DISTRICT COURT'S ORDER WAS INSUFFICIENT TO DENY QUALIFIED IMMUNITY

Qualified immunity protects government officials from liability for claims of constitutional violations unless the official violated a right which was "'clearly established' at the time of the challenged conduct." *Ashcroft* at 735. It is a complete immunity to liability which protects all but the most incompetent government officials. *Medina v. Cram*, 252 F.3d 1124, 1127 (10th Cir. 2001). Whether qualified immunity applies depends on the "objective legal reasonableness" of an action taken by a government official "in light of the legal rules that were clearly established at the time [the action] was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). For law to be clearly established, the constitutional question at issue must have been settled "beyond debate" by existing Tenth Circuit or Supreme Court precedent.

White v. Pauly, 580 U.S. 73, 79 (2017). The requirement that the law be clearly established ensures that, based on existing precedent, a reasonable government official would have a "sufficiently clear" understanding that his actions were unlawful at the time he acted. *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). A government official cannot knowingly violate the law unless he can "'reasonably…anticipate when [his] conduct may give rise to liability for damages.'" *Reichie v. Howards*, 566 U.S. 658, 664 (2012). Consequently, qualified immunity must be decided based on existing law already in effect at the time of the conduct. *Lynch* at 1161.

Once the defense of qualified immunity has been raised, "the onus is on the plaintiff to demonstrate (1) that the official violated a statutory or constitutional right and (2) that the right was clearly established at the time of the challenged conduct." *Quinn v. Young*, 780 F.3d 908, 1004 (10th Cir. 2015). The court may address either prong of the qualified immunity analysis first. *Pearson* at 236. But precedent is extraordinarily clear that the court must actually conduct the qualified immunity analysis, because if the plaintiff fails to establish either prong, the defendant automatically prevails on the qualified immunity defense. *Brown v. City of Tulsa,* 124 F.4th 1251, 1265 (10th Cir. 2025); *A.M. v. Holmes*, 830 F.3d 1123, 1134-35 (10th Cir. 2015). If the court elects to first address whether a constitutional right was violated but finds that no constitutional violation occurred, then the analysis ends

and the official is entitled to qualified immunity. *Pearson* at 236-239. If, however, a constitutional violation can be made out, then the court must analyze whether the constitutional right in question was clearly established at the time of the violation. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Conversely, if the court first addresses whether the right in question was clearly established and finds it was not, then the analysis ends and the official is entitled to qualified immunity. *Cummings v. Dean*, 913 F.3d 1227, 1239, 1242 (10th Cir. 2019). If, however, the right in question was clearly established, then the court must consider whether the right was violated. *Id.*

There is no Tenth Circuit or Supreme Court precedent which permits a court to deny qualified immunity to a defendant by finding a jury could determine a constitutional violation occurred but without conducting the second step of the analysis to determine whether the constitutional right at issue was clearly established. As *Brown* recently reaffirmed, if the plaintiff fails to satisfy *either* prong, a court must grant qualified immunity. *Brown* at 1265, citing *Medina* at 1128. There is also no Tenth Circuit or Supreme Court precedent which permits a court to deny qualified immunity to a defendant without addressing either prong of the qualified immunity analysis once the defense has been raised. When qualified immunity has been denied, the record must reflect the plaintiff satisfied his heavy burden as to both prongs of the qualified immunity test. *Gross* at 1156.

There is no scenario in which the court can find a constitutional violation was

identified but then fail to analyze whether the right in question was clearly established. There is certainly no scenario in which the court can avoid conducting *both* prongs of the qualified immunity analysis once the defense has been raised. When a district court "fails to identify the particular conduct of the alleged constitutional violation," this Court can, and should review the factual record *de novo*. *Works v. Byers,* 128 F.4th 1156, 1161 (10th Cir. 2025). Yet the approach criticized in *Works* is precisely what the District Court did in the present case. It neither found that the rights in question were clearly established nor found that a constitutional violation had been made out. It simply refused to conduct any analysis at all, stating that it would be up to a jury to determine liability. Whether an official is entitled to qualified immunity is a matter of law for the courts decide, not a question of fact for the jury to decide. *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996). The mere existence of controverted factual issues does not divest the Court of jurisdiction. *Estate of Valvedere ex rel Padilla v. Dodge,* 967 F.3d 1049, 1059 (10th Cir. 2020). When the district court expresses no view on the sufficiency of the evidence regarding an essential element of a claim or defense, this Court may assume that task. *Id.*

The District Court denied summary judgment to Shobert without addressing either prong of the qualified immunity analysis. The order did not mention qualified immunity, and the court did not conduct any analysis at all regarding whether a

constitutional violation occurred or whether the rights in question had been clearly established prior to February 1975, despite Shobert arguing in his summary judgment motion that Simmons had failed to meet his burden on both prongs. In fact, the court stated that it was impossible to conduct a summary judgment analysis, stating that it would be up to a jury to determine liability. [App. Vol. 10, pp. 2420-2423]. As a result, the District Court's denial of summary judgment (and therefore qualified immunity) to Shobert was improper.

Despite the District Court's lack of qualified immunity analysis, this Court still has the jurisdiction and ability to determine whether qualified immunity was improperly denied to Shobert. Under the collateral order doctrine, appellate courts may review "'(1) whether the facts that the district ruled a reasonable jury could find would suffice to show a legal violation, or (2) whether that law was clearly established at the time of the alleged violation.'" *Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015). *See also, Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021). It is equally well-established that whether a genuine issue of material fact exists for a jury to determine is not an abstract issue of law that may form the basis of a qualified immunity appeal. *Id.* However, in this interlocutory qualified immunity appeal, Shobert may challenge the lower court's legal analysis of the facts it found and its "ultimate resolution of the abstract legal questions before it." *Frasier v. Evans*, 992 F.3d 1003, 1030-1031 (10th Cir. 2021) (citing *District of*

Columbia v. Wesby, 583 U.S. 48, 60 (2018)). In other words, when the lower court concludes that a genuine dispute of material facts exists, as the district Court has done here, this Court may consider the legal question of whether Shobert's conduct, taken as alleged by Simmons, violates law which was clearly established in 1975. *Thomas v. Durastanti*, 607 F.3d 655, 659 (10th Cir. 2010). Therefore, this Court may therefore consider and reverse the District Court's denial of qualified immunity.

PROPOSITION II

SHOBERT IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE HIS ACTIONS DID NOT VIOLATE CLEARLY ESTABLISHED LAW

Shobert is entitled to qualified immunity on all of Simmons' claims against him because even considering the facts in the light most favorable to Simmons, Shobert did not violate Simmons' constitutional rights. He is additionally entitled to qualified immunity on each of the due process claims and the conspiracy claim because the law was not clearly established as to each of those constitutional rights in 1975. Appellants will address the "clearly established" prong of the qualified immunity analysis first, at it is exceedingly clear that the asserted legal rights were not clearly established before 1975.

1. The Relevant Law Was Not Clearly Established in 1975

Simmons' due process and conspiracy claims against Shobert stem from police lineups conducted in February 1975 and Simmons' subsequent criminal trial

and conviction. [App. Vol. 1, pp. 18-44]. Thus the relevant inquiry is "whether the violative nature of [Shobert's] *particular* conduct" was clearly established regarding Brady violations, alleged fabrication of evidence, the use of suggestive techniques, and conspiracy in 1975. *Ullery v. Bradley*, 949 F.3d 1282, 1291 (10th Cir. 2020) (quoting *Mullenix*, *supra*, 577 U.S. at 12). *See also Lynch, supra,* 703 F.3d at 1161 (qualified immunity must be judged against the backdrop of the law at the time the conduct occurred). What constitutes clearly established law therefore cannot be defined at a high level of generality; it must be examined in the specific context of the case. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018).

Although it is not necessary for the *exact* act in question to have previously been declared unlawful for law to be clearly established, a certain degree of specificity is required for legal precedent to place an official on notice that the relevant legal doctrine will apply in the situation with which he is confronted. *Ziglar v. Abbasi*, 582 U.S. 120, 150-152 (2017). This specificity requirement is met when there is precedent which "squarely governs the specific facts at issue." *Kisela a*t 104-105 (citing *Mullenix* at 309). If, however, under existing precedent "a reasonable officer might not have known for certain that [his] conduct was unlawful – then the officer is immune from liability" because the law has not been clearly established. *Ziglar* at 152. Tenth Circuit and Supreme Court precedent which was already in existence in 1975 would in no way have put Shobert on notice that his specific

conduct, as alleged by Simmons, would violate Simmons' constitutional rights. As such, the law was not clearly established and Shobert is entitled to qualified immunity.

a. The law regarding Simmons' due process rights was not clearly established in 1975

Simmons alleges Shobert violated his Fourteenth Amendment due process rights in three separate ways: by suppressing exculpatory or impeachment evidence (a *Brady* violation), by fabricating evidence, and by using suggestive identification techniques in a police lineup. [App. Vol. 1, pp. 18-44] However, the law was not clearly established in any of these areas in 1975.

1. The alleged Brady violation

In 1963 the Supreme Court declared that a prosecutor's suppression of evidence favorable to a criminal defendant upon request by that defendant violates constitutional due process rights when the evidence in question is material to the defendant's guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Notably, the *Brady* decision itself "does not discuss the relative disclosure obligations of the police and prosecutor." *Walker v. New York City*, 974 F.2d 293, 299 (2nd Cir. 1992). There were relatively few Tenth Circuit and Supreme Court decisions interpreting and applying *Brady* between 1963 and early 1975, and even fewer which would arguably apply to any due process obligations specifically

imposed on law enforcement officers.

In 1972. the Supreme Court addressed a criminal defendant's claim that a *Brady* violation had occurred when a witness statement which included a sketch made by a police officer was not turned over to the defense during discovery. *Moore v. Illinois*, 408 U.S. 786, 793 (1972). It was unknown to the court whether the statement was in the file the prosecutor provided to defense counsel and the counsel had just not noticed it or whether it was never in the possession of the prosecution. *Id.* at 795. The Court determined that the reason defense counsel had not seen the statement was irrelevant, as it knew of "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id.* Thus, as of 1972, it was certainly not clearly established that a police officer had any duty to ensure all of his evidence, even exculpatory evidence, had been turned over to prosecutors.

By 1977 there was still no such clearly established law. The Supreme Court reaffirmed in *Weatherford v. Bursey,* 429 U.S, 545, 559 (1975) that it is the prosecutor who has the duty under the due process clause to ensure the fairness of criminal trials by disclosing evidence favorable to the criminal defendant upon request. 429 U.S. 545, 559 (1977). Even though the actions and statements of a police officer were ultimately at issue, the Court's focus was on whether the actions of the *prosecutor*, not the officer himself, violated *Brady*. *Id.* In 1995, the Court

again held that the ultimate duty of disclosure under *Brady* belongs to the prosecutor, not to the police. *Kyles* at 438. It stated that a prosecutor has the duty to learn of any favorable evidence known to the police officers investigating the crime. *Id.* at 437. Even twenty (20) years *after* Shobert allegedly suppressed exculpatory evidence, Shobert *still* would not have been placed on notice by Tenth Circuit or Supreme Court precedent that his actions as a police officer, as alleged by Simmons, would violate Simmons' constitutional rights. The Tenth Circuit finally clarified in 2011 that a police officer's only obligation under *Brady* is to turn exculpatory evidence over to the prosecutors. *Tiscareno* at 1023. But that rule was simply not clearly established in 1975. Consequently, Shobert is entitled to qualified immunity on the *Brady* violation due process claim against him and the District Court's denial of summary judgment should be reversed.

2. The alleged fabrication of evidence

The same is true for Simmons' due process claim premised upon the alleged fabrication of evidence by Shobert in February 1975. There was simply no Tenth Circuit or Supreme Court decision in existence prior to that date which would have put Shobert on notice that his actions, as Simmons alleges them to be, would violate Simmons' constitutional rights. In fact, as the law currently stands, fabrication of evidence is not in and of itself a violation of a criminal defendant's due process rights. *Warnick v. Cooley*, 895 F.3d 746, 753 (2018). The Tenth Circuit stated in

2018 that it is "aware of no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Id.* It explained that a police officer does not violate a suspect's rights if he fabricates evidence but does not actually use it against the suspect. *Id.*

That is precisely what Simmons claims happened in the present case. He testified that Shobert fabricated the February 8, 1975 Special Showup Report but then suppressed that same report by not providing it to the prosecution. [App. Vol. 2, pp. 438-440]. It is undisputed the February 8 report was not introduced or used at trial. [App. Vol. 6, pp. 1377-1378; App. Vol 7, p. 1471-App. Vol 8, p. 1769]. There is no precedent which has *ever* established that such an action violates constitutional rights. To the contrary, the Tenth Circuit has held there must be a connection between the fabricated evidence and the deprivation of liberty for a constitutional violation to have occurred. *Truman v. Orem City,* 1 F.4th 1227, 1236 (10th Cir. 2021).

To the extent Simmons' fabrication claim is premised on the February 10, 1975 report written by Garrett, even assuming Shobert played some role in drafting that report, he is still entitled to qualified immunity because the relevant law had not been clearly established in 1975. In 2021 the Tenth Circuit plainly stated that the constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer was clearly established by the court's decision in

Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004). *Truman* at 1236. In turn, *Pierce* held that a government official should have known in 1986 that the falsification or omission of evidence, either knowingly or with reckless disregard for the truth, was firmly established. *Pierce* at 1298.

While *Pierce* indicates this right was established by 1986, nothing in that decision remotely suggests that the law was clearly established prior to 1975. The only case cited by *Pierce* which could even be arguably applicable to a claim of evidence fabrication and which was decided prior to 1975 is *Pyle v. Kansas*, 317 U.S. 213 (1942). But *Pyle* is insufficient to have put Shobert on notice that assisting in creating a report drafted by someone else which allegedly contains falsified evidence would violate Simmons' constitutional rights. *Pyle* involves a claim that *prosecutors* violated a defendant's due process rights by knowingly presenting witnesses who gave perjured testimony and by simultaneously suppressing evidence favorable to him by coercing, intimidating, and threatening witnesses. *Id.* at 214. The alleged fabrication of evidence in reports is not similar enough to the facts of *Pyle* for the relevant law to have been clearly established by *Pyle.* Therefore, the law regarding falsification of reports was not clearly established in 1975 and Shobert is entitled to qualified immunity.

3. The allegedly suggestive identification techniques

Simmons claims Shobert violated his due process rights by employing

suggestive identification techniques during lineups conducted in February 1975. [App. Vol. 1, pp. 25, 35]. However, the law regarding suggestive identification techniques in police lineups was also not clearly established at the time the lineups at issue occurred. In 1967, the Supreme Court held that a post-indictment lineup is a critical stage of prosecution at which an accused is entitled to counsel, because improper suggestion during pretrial identification procedures can increase the dangers inherent in eyewitness testimony. *United States v. Wade*, 388 U.S. 218, 228-237 (1967). The *Wade* decision provided a few examples of particularly egregious lineup procedures including: 1) a lineup in which the defendant was the only man of Asian descent; 2) a lineup in which all but the suspect were individuals known to the witness; 3) a lineup in which the suspect is pointed out to the witness before or during the lineup; 4) a lineup in which the suspects were "grossly dissimilar" in appearance; 5) and a lineup in which the participants are asked to try on a piece of clothing which fits only the suspect. *Id.* at 231-235. Aside from those very specific examples which are not applicable to this case, the decision gives police officers no guidance as to what constitutes an unduly suggestive procedure.

Two years later the Court decided *Foster v. California*, 394 U.S. 440 (1969). In *Foster,* police had arranged a lineup in which the petitioner stood out from the others because he was significantly taller and was wearing a jacket similar to the one worn by the robber. *Id.* at 441. Despite that, the lineup did not result in a witness

identification. *Id.* The police then employed a one person showup, which is a practice the Court stated "has been widely condemned." *Id.* at 443. When the showup resulted in only a tentative identification, the police arranged a second lineup in which the petitioner was the only suspect who had also been in the first lineup. *Id.* That finally produced a definite identification. *Id.* The combination of multiple lineups and a showup, each with one or more suggestive elements violated the petitioner's due process right because it made the resulting identification virtually inevitable. *Id.* [2]

Then in 1972 the Supreme Court held that "[s]uggestive 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." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). *Neil* found that a showup procedure in which only the suspect was presented to the victim was not so suggestive that it violated the suspect's due process rights. *Id.* at 199-201. The court further found that even though the police did not "exhaust all possibilities in seeking persons physically comparable to respondent," that alone was not a reason to exclude the witness identification evidence. *Id.* at 199. Like *Wade*, outside of the very specific instance described in

[2] In 2018 the Court in *Sexton v. Beaudreaux*, 585 U.S. 961, 966 (2018) noted that in the fifty years since *Wade* was decided, the *Foster* decision was the only decision in which the Supreme Court has held pretrial identification procedures violated the due process clause.

the decision, *Neil* did not provide any guidance to officers regarding what constitutes "physically comparable" individuals such that they would know how to ensure a lineup is not unnecessarily suggestive.

By 1975, the Supreme Court had obviously recognized that a suspect's due process rights may be violated by an unduly suggestive lineup procedure, but it had not established *any* standards or tests to determine whether the number of people in a lineup and/or the physical differences between individuals in a lineup render the lineup unduly suggestive. Tenth Circuit law provided similar scant guidance prior to 1975. *Davida v. United States*, 422 F.2d 528, 531-532 (10th Cir. 1970) held the appellant's due process rights were not violated by the use of single and multiple photos arrays to elicit an out-of-court identification because the witnesses also positively identified the appellant in the courtroom at trial and testified that their identification was independent of the photographs they had previously been shown. *Haskins v. United States,* 433 F.2d 836, 838 (10th Cir. 1970,) cited *Wade* for the general rule that some identification procedures might be so unnecessarily suggestive they violated a suspect's constitutional rights, but did not find a constitutional violation occurred and did not discuss any particular pretrial identification procedures. *United States v. Steel,* 458 F. 2d 1164, 1166 (10th Cir. 1972) held that a lineup viewed by four witnesses at the same time was not unduly suggestive.

The Tenth Circuit did find that the lineup procedure used in *Martinez v. Turner*, 461 F.2d 261 (10th Cir. 1972) was unconstitutional. But the lineup procedure used in that case was drastically different and infinitely more suggestive than the lineup procedure used in the present case. There, only the suspect and one other individual had a complexion which would fit the witness's physical description of the suspect. *Id.* at 263. The suspect was much shorter than all other individuals, and the officers had the participants try on a coat which had been illegally seized from the suspect. *Id.* There was additionally evidence that an officer had told the witness that the suspect would be in the lineup. *Id.* While *Martinez* may have put police officers on notice that having one suspect who significantly stands out from the others on the basis of height may violate due process rights, that ruling cannot rationally be interpreted to mean that a lineup including suspects with a range of heights spanning 7 inches is inherently unconstitutional.

The Tenth Circuit and Supreme Court decisions which had been issued before 1975 were far too general to provide adequate guidance to Shobert and other officers in his position regarding what measures must be taken to ensure a given lineup is not unduly suggestive. Because the law was not clearly established, Shobert is entitled to qualified immunity on the claim for suggestive identification procedures.

b. The law was not clearly established regarding Simmons' § 1983 conspiracy claim

The nature of a conspiracy claim is such that if Shobert is entitled to qualified immunity on the underlying constitutional claims, then he is also entitled to qualified immunity on Simmons' conspiracy claim. *Frasier* at 1024. In other words, if the law was not clearly established in 1975 that Shobert's were unlawful, then it "ineluctably follows" the law was not clearly established that it was unlawful to conspire with another to engage in those same actions. *Id.* The above cases demonstrate the law was not clearly established in 1975 as to any of Simmons' due process claims against Shobert. Therefore, Shobert is also entitled to qualified immunity on the conspiracy claim to the extent it is premised on an alleged violation of his due process rights.

PROPOSITION III

SHOBERT'S ACTIONS DID NOT VIOLATE SIMMONS' CONSTITUTIONAL RIGHTS

Even if this Court determines the law was clearly established as to Simmons' due process claims and conspiracy claim premised on due process violations, he is still entitled to qualified immunity on those claims because his actions did not violate those rights. He is additionally entitled to qualified immunity on Simmons' claim for deprivation of liberty without probable cause for the same reason.

a. Shobert's actions did not constitute a *Brady* violation

There are three elements which a plaintiff must prove to succeed on a *Brady*

claim: 1) that the prosecutor suppressed the evidence; 2) that the suppressed evidence was favorable to the accused, either because it is exculpatory or impeaching; and 3) that the plaintiff was prejudiced because the suppressed evidence was material to the case. *Andrew v. White,* 62 F.4th 1299, 1327 (10th Cir. 2023). Additionally, in a § 1983 claim premised on a *Brady* violation, the plaintiff must also prove that the police officer acted with deliberate or reckless intent. *Johnson v. Cheyenne*, 99 F. 4th 1206, 1232 (10th Cir. 2024). Mere negligence in failing to turn over *Brady* material to the prosecution, which in turn causes a conviction at trial, does not amount to a due process violation. *Id.* at 1232, n. 12; *Tiscareno* at 1023. Here, the allegedly suppressed evidence was not material and there is no evidence Shobert acted with deliberate or reckless intent.

Assuming Simmons' unsupported assertions that the subjects in the lineups conducted on February 7 and February 8, 1975 were the same individuals and were presented in the same order are true, then the February 10, 1975 report prepared by Garrett is arguably exculpatory or impeaching. However, the February 8 Showup Report prepared by Shobert is neither. Shobert's February 8 report corroborates Brown's preliminary hearing and trial testimony that she identified Simmons as one of the men who robbed the liquor store, shot her, and killed Rogers. [App. Vol. 2, pp. 370-372, 391-392, 403]. Although Simmons has attempted to shift liability to Shobert for the contents of Garrett's February 10 report by alleging Garrett and

Shobert created it together, that is pure speculation unsupported by any admissible testimony (and undermined by the misspelling of Shobert's name in the report).

Regardless, it has already been determined that neither report was material under *Brady*. *See, Simmons v. Ward*, Western District of Oklahoma Case no. CIV-97-064, affirmed in *Simmons v. Ward*, 198 F.3d 258 (10th Cir. 1999). [App. Vol. 1, pp. 88-109]. Although the 1997 ruling on materiality was not given preclusive effect by the Oklahoma County District Court in Simmons' 2022 application for post-conviction relief, it still supports Shobert's qualified immunity defense. Accordingly, Shobert could not possibly have committed a *Brady* violation because the reports were not material. *Andrew* at 1327. When two courts disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy. *Pearson* at 245; *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Simmons has not produced any evidence that Shobert acted with deliberate or reckless intent regarding the reports. Shobert was not the lead investigator on the Edmond robbery and murder case, nor on the case in which Simmons was initially arrested. [App. Vol. 2, pp. 300, 344-345, 445, 477, 504.] While it may never be possible to establish whether Shobert's February 8 report or Garrett's February 10 report were in the prosecutor's file at the time of Simmons' trial, Shobert's entitlement to qualified immunity does not depend on that determination. A police

officer has no duty to follow up on whether evidence placed into the case file actually reaches prosecutors. *Polk v. Nugent*, 554 Fed. Appx. 795, 799 (11th Cir. 2014). Additionally, when an officer has reason to think the district attorney's office already knows about exculpatory evidence because it was the general practice for another agency to send the evidence to the prosecutor, no *Brady* violation occurs. *Kelly v. Curtis*, 21 F.3d 1544, 1548, n. 3, 1552 (11th Cir. 1994).

In the present case, Shobert had reason to believe that Garrett, as the lead investigator, would provide all relevant reports to the District Attorney's office. [App. Vol. 2, pp. 303-304, 477-478]. When Shobert was not the lead investigator but was instead assisting a detective from another agency, as was the case here, his practice was to provide a copy of any report he prepared to that lead detective, who would submit the evidence to the prosecutor. [App. Vol. 5, pp. 955-959]. As *Polk* and *Kelly* illustrate, this practice was reasonable rather than reckless. Because the reports in question were not material and because there is no evidence Shobert acted with deliberate or reckless intent regarding the reports, Shobert is entitled to qualified immunity on the *Brady* claim.

b. No rights were violated by fabrication of evidence

Shobert did not violate Simmons' due process rights by fabricating evidence. As the case above establish, to prevail on a due process claim premised on an alleged fabrication of evidence, the plaintiff must demonstrate a causal connection between

the fabrication of evidence and the deprivation of liberty. *Truman* at 1236. Due process rights are simply not violated when evidence is fabricated but is never used to deprive the plaintiff of a fair trial or to otherwise harm him. *Warnick*, at 753. Here, Simmons himself testified Shobert fabricated the February 8 Showup report but then suppressed it by not providing it to the prosecutor. [App. Vol. 2, pp. 438-440]. Per Simmons' own testimony the February 8 report was never actually used against him at trial or otherwise. [App. Vol. 2, p. 440]. Consequently, Shobert could not have violated Simmons' due process rights as a result of allegedly fabricating that evidence.

Furthermore, Simmons has no evidence that Shobert actually fabricated any evidence at all. The court in *McPherson v. Baltimore Police Department,* 494 F. Supp. 3d 269, 282-283 (D. Md. 2020), ruled on a case similar to the case at bar. There, the plaintiffs alleged the defendant officers fabricated statements to corroborate each other and to bolster witness testimony in a criminal case three decades earlier. In granting summary judgment and qualified immunity to the officers, the court found the plaintiffs could not present admissible evidence that the witness statements at issue were actually fabricated. *McPherson v. Baltimore Police Department,* 2023 WL 5433011 (D. Md. August 3, 2023) [App. Vol. 4, pp. 801-833]. The Court noted that "a glaring lack of documentation" in a thirty-year-old homicide case file "merely reflects the lack of evidence plaintiffs can find decades

later" to support their fabrication claim. The Court reasoned that if a missing report in a homicide file from before the time the BPD had computers could establish intentional fabrication by investigators, there would be no end to the number of fabrication claims that could survive summary judgment. *Id.* at *19. The court also noted that the plaintiffs were attempting to "have it both ways at once" because their case was premised on one of the witnesses having never actually given a statement to police, but for purposes of admissibility, the plaintiffs asked the court to assume the witness *did* give a statement, rendering the latter assertion she did not give a statement admissible as a statement against penal interest and then attempting to use the latter statement for its truth. *Id.* at *17.

The same analysis is applicable here. Simmons' MSJ Response asked the District Court to assume Garrett fabricated and suppressed a report with the intent of framing Simmons, but then asked it to admit Garrett's report into evidence and accept the hearsay statements within it as truth regarding the circumstances of the lineups. [App. Vol. 5, pp. 1095-1096, 1102, 1104, 1107, 1115-1116, 1128-1129]. And as in *McPherson,* Simmons' case is based on pure speculation. Therefore, consistent with *Truman, Warnick,* and *McPherson,* Shobert is entitled to qualified immunity on the due process claim based on fabrication of evidence.

c. No due process violation due to suggestive identification techniques

The Supreme Court has held that due process concerns arise when law enforcement officers use identification procedures which are "both suggestive and unnecessary" and which create a substantial likelihood of misidentification. *Sexton* at 965-966. Whether improper police conduct creates a substantial likelihood of misidentification must be assessed on a case-by-case basis, taking the totality of the circumstances into consideration. *Id.* at 966. Here, Simmons' suggestive identification technique claim appears to be premised on the theory that lineups conducted on February 7 and 8, 1975 were unduly suggestive because they included the same participants, in the same lineup positions. [App. Vol. 2, pp. 1098, 1117]. There is no evidence to support this theory. First, there is no Showup report from the February 7, 1975 lineup which documents the participants or the order in which they appear. [App. Vol. 10, p. 2421, n. 5, p. 2425, n. 5]. Second, contrary to the allegations in his Complaint, Simmons has consistently taken the position that he was only in *one* lineup. What has "evolved" is Simmons' testimony regarding *which* lineup.

In his 1997 application for post-conviction relief and subsequent habeas corpus petition, Simmons argued he was not in the February 7 lineup and therefore could not have been identified by Brown at both lineups. [App. Vol. 3, pp. 534-535, 561-562]. Plaintiff also provided this information in a handwritten letter to the

attorney who filed the Petition on his behalf which stated "I did not attend a lineup *until* 2-8-75, yet the State's chief witness claim she picked the same two as on 2-7-75." [App. Vol. 3, p. 627]. In the 2023 evidentiary hearing and in his deposition in the present case, Simmons changed his position and testified he was not at the February 8, 1975 lineup but was instead *only* at the February 7, 1975 lineup. [App. Vol. 2, pp. 632, 634-635]. If Simmons was not in the February 8 lineup, then any complaint about how that lineup was constructed or conducted, especially in relation to the February 7 lineup, would be moot. No amount of suggestion or manipulation, from either the detectives or the other witnesses present at that lineup could have influenced Brown to pick Simmons out of a lineup that Simmons did not appear in.

In *Lemons v. Lewis,* 963 F. Supp. 1038 (D. Kan. 1997), affirmed at 132 F. 3d 43, 1997 WL 767523 (unpublished), the court held police officers are required to make every reasonable effort under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification but "are not required to conduct a search for identical twins in age, height, weight or facial features." *Id.* at 1048 (quoting *Hensley v. Carey,* 818 F.2d 646, 650 (7th Cir. 1987). Shobert testified he knew, based on his on-the-job training and common sense, that an officer should pick the best matches to the suspect from the available pool of subjects. If there was not an adequate selection of subjects resembling the suspect, the lineup would be canceled and rescheduled. [App. Vol. 2, pp. 314-316, 325-328]. There is no

evidence that the lineups in this case did not meet lineup standards in effect in 1974-1975. While best practices for conducting a lineup may be common knowledge in the present day, they were neither taught nor required in February 1975. [App. Vol. 4, pp. 774-778 (Wallentine Report), pp. 909-911 (Carlson EHT)] Shobert is therefore entitled to qualified immunity on the claim he violated Simmons' due process rights during the February 1975 lineups.

d. No continued deprivation of liberty without probable cause

Shobert is entitled to qualified immunity on Simmons' Fourth Amendment deprivation of liberty claim because there is no evidence he took any affirmative action to continue Simmons' detention or prosecution in the period between Simmons' arrest and his conviction. In *Manuel v. City of Joliet,* 580 U.S. 357, 367-368 (2017) the Supreme Court recognized a Fourth Amendment claim based upon continued pretrial detention unsupported by probable cause. However, that claim does not survive a conviction because once a trial has occurred, the Fourth Amendment is no longer relevant. *Id.* at 362-363. A plaintiff challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration must do so under the Due Process clause of the Fourteenth Amendment. *Manuel* at 368-369, n. 8.

To recover under §1983 for a violation of Fourteenth Amendment substantive due process rights, a plaintiff must demonstrate the challenged government action

shocks the conscience of federal judges. *ETP Rio Rancho Park, LLC v. Grisham*, 564 F.Supp. 3d 1023, 1066 (D.N.M. 2021). This standard is higher than the intentionality or reckless disregard standard used in a Fourth Amendment analysis and is reserved for only the most egregious official conduct. *Id.* However, if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision. *County of Sacramento v. Lewis*, 523 U.S. at 833 (1998). When a plaintiff's substantive due process claim is duplicative of his other more specific claims, as Simmons' claims are here, the Fourteenth Amendment does not provide an independent basis for liability. *Id.*

Even if Simmons could proceed under the Fourth Amendment, he would have to prove that no probable cause supported the original arrest, continued confinement, or prosecution. *Margheim v. Buljko,* 855 F.3d 1077, 1085 (10th Cir. 2017). When pursuing post-conviction relief and habeas corpus in 1997, Simmons took the position that Brown could not have identified him in both the February 7 and 8 lineups because he was only in the latter. [App. Vol. 3, pp. 534-535, 561-562, 627] In his 2022 post-conviction proceedings and this lawsuit, Simmons testified that Brown only identified him on February 7 because he was not in a lineup on February 8. [App. Vol. 2, pp. 632, 634-635; App. Vol. 3, pp. 637-641]. At the Evidentiary Hearing, Simmons testified Garrett told him immediately after the February 7 lineup

that he had been picked out of the lineup as the person who committed the murder. [App. Vol. 5, pp. 966-967].

It is unnecessary to determine which of Simmons' statements is true because under either version it is undisputed that Brown identified him as the murder suspect. Courts generally deem a victim's identification of their assailant reasonably trustworthy to establish probable cause. *United States v. O'Neil*, 62 F.4th 1281, 1291 (10th Cir. 2023). Thus, there was at least "arguable probable cause" for the initial arrest and charges. See, *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014)

The only issue, then, is whether Shobert can be found liable under §1983 for "continued confinement or prosecution" based on his alleged failure to make sure the prosecutor received his February 8 Showup Report and/or Garrett's February 10 report. The court in *Washington v. Howard,* 25 F.4th 891, 906-907 (11th Cir. 2022), addressed a similar claim and held the defendant officer was entitled to qualified immunity because the Fourth Amendment imposes no affirmative duty on an investigator to return to the magistrate after every twist and turn in an investigation. Instead, once probable cause is established, the officer is allowed to defer to the prosecutor's determination of whether to proceed with the prosecution. *Id.* While a police officer cannot intentionally or recklessly make material misstatements or omissions in later testimony to continue detention, such as at an arraignment, indictment or bond hearing, he has no duty to "run after his warrant." *Id.* at 908,

912. To succeed on a Fourth Amendment claim for continued seizure, Simmons must prove Shobert took an affirmative action to continue the prosecution. *Id.* at 912. In the instant case, it is undisputed that Shobert did not talk to the prosecutor or testify at the preliminary hearing or trial. [App. Vol. 2, p. 305; App. Vol 7, pp. 472-474] Because Simmons has not proved Shobert took any affirmative action to continue the prosecution, Shobert is entitled to qualified immunity on the deprivation of liberty claim.

e. No evidence of a conspiracy involving Shobert

To establish a conspiracy under §1983, Simmons must prove (1) an agreement and concerted actions between the defendants and (2) an actual deprivation of constitutional rights. *Shimomura v. Carlson*, 811 F. 3d 349, 359 (10th Cir. 2015). Conclusory allegations of conspiracy will not suffice. *Id.* When no deprivation of constitutional rights occurred, there can be no liability for conspiracy to violate those rights under 42 U.S.C. § 1983. *Dixon v. City of Lawton, Okla*., 898 F.2d 1443, 1449 (10th Cir. 1990). Appellants have demonstrated that Simmons did not suffer a deprivation of his constitutional rights. Simmons therefore failed to prove the second required element of his conspiracy claim and it fails on that basis alone.

The claim also fails because there is no evidence of an agreement and a general conspiratorial objective involving Shobert. *Snell v. Tunnell,* 920 F.2d 673, 702 (10th Cir. 1990). While a plaintiff does not have to prove each participant in a

conspiracy knew the "exact limits of the illegal plan," he must show that there was a single plan, and that the "essential nature and general scope" of the plan was "known to each person who is held to be responsible for its consequences." *Frasier* at 1025; *Snell* at 702. Here, there is no evidence of a single plan or that it was known by both Shobert and Garrett. There is no evidence the two officers discussed who should be in the lineups ahead of time. [App. Vol. 2, pp. 451-452]. Apart from the February 10 report, there is no evidence Shobert even conducted the February 7 lineup. Shobert testified that if he conducted the lineup, he would have prepared a Special Showup Report like the one he prepared for the February 8 lineup and would have given it to Garrett, but there is no such report for the February 7 lineup in the record. [App. Vol 2, p. 301; App. Vol. 10, p. 2421, n. 5].

Simmons does not know who conducted the lineup, who picked him to be in the lineup, or even if the officer who selected him was in uniform. [App. Vol. 2, pp. 424, 436]. Similarly, there is no evidence Shobert knew the contents of Garrett's narrative report, which was written two days after the February 8 lineup, much less whether it was given to the prosecutor. [App. Vol. 2, p. 305] Even if there is arguably some evidence that Garrett's February 10 report and/or Shobert's February 8 report were not given to the prosecutor, that evidence does not support the assumption Shobert was involved in the decision not to produce them as part of a

single plan to violate Simmons' rights. He is therefore entitled to qualified immunity on the conspiracy claim.

PROPOSITION IV

APPELLEE CANNOT PROVE A PRIMA FACIE CASE THE CITY'S POLICIES AND/OR TRAINING WERE UNCONSTITUTIONAL AND LED TO A CONSTITUTIONAL VIOLATION

A municipality may only be held liable "for its own unconstitutional or illegal policies" and not merely because its employee injured the plaintiff. *Barney v. Pulsipher,* 143 F.3d 1299, 1308 (10th Cir. 1998). A municipal policy or custom must be the "moving force" behind a constitutional injury to impose municipal liability. *Monell v. Dep't. of Social Services*, 436 U.S. 658, 690-95 (1978). The challenged policy must also be "closely related to the violation of the Plaintiff's federally protected right." *Schneider v. City of Grand Junction Police Department*, 717 F.3d 760, 770 (10th Cir. 2013) . Proof of a single incident of unconstitutional activity is not sufficient to impose liability on a municipality where the policy relied on is not itself unconstitutional. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). The City's policies and training could not have been the direct cause of any alleged constitutional violation.

The *Monell* court discussed the circumstances in which a municipality could be imposed of liability under §1983, holding that:

> "a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell,* at 694.

The result of *Monell* is that "city[s] may only be held accountable if the deprivation was the result of municipal "custom or policy." *Tuttle*, at 817.

Municipalities may be held liable under §1983 but only for their own unlawful acts which are "officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). As stated in *Monell,* and further discussed in *City of Canton v. Harris*, 489 U.S. 378, 385 (1989), a plaintiff must show the existence of a municipal policy or custom that caused an alleged injury to prove the municipality is actually liable under §1983. The municipal policy or custom can include a variety of acts. *Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1239-40 (10th Cir. 2020), quoting *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1189 (10th Cir. 2010). *See also Pyle v. Woods*, 874 F.3d 1257, 1266 (10th Cir. 2017).

> "A policy or custom includes a formal regulation or policy statement, an informal custom that amounts to a widespread practice, decisions of municipal employees with final policymaking authority, ratification by final policymakers of the decisions of subordinates to whom authority was delegated, and the deliberately indifferent failure to adequately train or supervise employees."

The policy requirement is necessary to "distinguish the acts of the municipality from the acts of employees of the municipality and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Folts v. Grady Cnty. Bd. of Cnty. Comm'rs*, 2021 U.S. Dist. LEXIS 62567, *14-15 (W.D. Okla. Mar. 31, 2021) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)).

Simmons has no proof the City or its officers were aware of any claimed deficient custom or that the custom directly caused the alleged violation in this case. In *City of St. Louis v. Praprotnik*, 485 U.S. 112(1988), the Supreme Court stated:

> Municipal liability may be based on a formal regulation or policy statement, or it may be based on an informal "custom" so long as this custom amounts to "a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law."'

Id. at 117. Simmons cannot meet the high standard of *Praprotnik* because he has no proof that the OCPD has any "widespread practice." Simmons cannot point to any written policies of the City, or pattern of practice resulting in an unconstitutional policy. In fact, Simmons does not have any evidence of anything that Oklahoma City did amounting to a violation of his rights, as the City cannot locate any written policy or recorded evidence of any policy fifty years after the fact. What the City can do is show that after a thorough search of its records by the City Clerk, Amy Simpson, it

cannot find a written Oklahoma City Police Department policy and procedures manual prior to the time of Simmons arrest, investigation, and conviction. (App. Vol. 5, p. 1011). Simpson did find a City Council Memo, dated September 11, 1974, with accompanying Resolution signed by then Mayor Patience Latting, and contract with Arthur Young & Co., to prepare a policy and procedures manual for the police department. (App. Vol. 5, pp. 1011-1012, 1028-1038).

This was the only document that could be found from the subject time *or before.* The City cannot produce a policy manual for the subject time frame as there was none. There certainly is no evidence that there was a police department policy manual. Based upon the authority above, Appellee cannot prove an unconstitutional policy, or widespread custom or practice that amounted to one, and because a single isolated event cannot be the predicate for constitutional liability. Defendant City's policies, whether written or unwritten during the subject time frame of 1974-75, were constitutional and there is no evidence the City maintained any unlawful "custom." The District Court should have found that Simmons cannot prove a prima facie case and its decision should be reversed.

PROPOSITION V

CITY'S TRAINING ON PRODUCING EXCULPATORY INFORMATION AND/OR CONDUCTING POLICE LINEUPS WAS CONSTITUTIONAL AND DID NOT LEAD TO A VIOLATION OF SIMMONS' CONSTITUTIONAL RIGHTS

Simmons alleges the City failed to properly train its officers regarding the use of lineups and turning over presumed exculpatory information. A "municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train," rising to the level of an official government policy for the purposes of §1983 only in limited circumstances. *Connick v. Thompson*, 563 U.S. 51, 61 (2011).

In *Canton*, the Court stated "the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to a deliberate indifference to the constitutional rights of persons with whom the police come into contact." Further, one officer who is "unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program [. . .]." *Canton.* at 390. Finally, the Court concludes, "adequately trained officers occasionally make mistakes; the fact that

they do says little about the training program or the legal basis for holding the city liable". *Id.* at 391.

Shobert testified that the City trained him on how to be a police officer. (App. Vol. 5, pp. 1056). He specifically remembers being trained to turn over evidence that might be exculpatory. (App. Vol. 5, pp. 0957-0959). That is the crux of this case. In fact, Shobert turned over what limited information he had, *when he assisted* Garrett and the City of Edmond in their investigation and prosecution of Simmons: he provided information to Garrett, and he helped Garrett conduct a lineup where Simmons was picked out by Belinda Brown. (App. Vol. 5, pp. 1056-1059). This is a far cry from withholding "exculpatory" evidence and is a death knell to Simmons' case.

All the information Simmons contends was withheld from him and his counsel during the State of Oklahoma's 1975 prosecution of him was in the hands of the charging agency, the City of Edmond. All of the documents that Plaintiff complains of in regard to Shobert, and thereby Oklahoma City, are City of Edmond documents. In fact, it is undisputed that Shobert's connection to Simmons investigation was so tenuous that the prosecuting attorneys, Mildfelt and Murdock, never bothered to call him to talk with him about the case or present him as a witness in any stage of the proceedings.

Importantly, *Canton* is explicit that the focus must be on the training program itself, not whether a particular officer was not satisfactorily trained. *Id.* at 388. Simmons' cannot prove the City's training was inadequate at the time of the alleged civil rights violation. This is at least in part because of the passage of time as Shobert is the only witness available to testify about what this training may have been, and he testified explicitly that he was trained to turn over exculpatory evidence and how to conduct lineups. Simmons has no evidence to prove otherwise. He has no expert, or witnesses of any kind, who can prove or otherwise elaborate on his claims of unconstitutional policies, training, or supervision against the City.

In fact, Appellants' expert, Wallentine, will give the following opinions concerning the City's policies and training at the subject time: that this was a time where "formalized police training was still in its infancy," that there was "little, if any," eye witness identification and lineup training, that the steps were normally taught on the job by a "more experienced" police officer. (App. Vol. 5, pp. 1062-1064). Wallentine also opines that the OCPD policy on lineups formalized after the facts in this case was likely developed from already recognized and used practices in the department. (App. Vol. 5, pp.1065-1066). Accordingly, there will be evidence submitted to the jury that the City's policy and training were adequate at the time and consistent with other agencies which cannot be refuted by Simmons. The

District Court erred in denying the City's Motion for Summary Judgment and should be reversed.

PROPOSITION VI

THE CITY WAS NOT ON NOTICE OF ANY CONSTITUTIONAL DEFECT IN ITS POLICIES OR TRAINING

Deliberate indifference is "a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019). A municipality must have "notice that a course of training is deficient in a particular respect," which usually requires proof that there was a "pattern of similar constitutional violations by untrained employees." *Id.* at 1285. The Court defined deliberate indifference as "[. . .] when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Id.* at 1284.

Similarly, a "wrongful supervision" claim would also require proof of deliberate indifference. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 789-90 (10th Cir. 2010). Finally, a failure to discipline can only be actionable if it precedes the alleged constitutional injury. *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009)("As for any failure to discipline [the police officer], basic principles of linear time prevent us from seeing how conduct that occurs *after* the alleged violation could

have somehow caused that violation." (emphasis in original). In *Butler v. City of Norman,* 992 F.2d 1053, 1056 (10th Cir. 1993), the Tenth Circuit Court held a municipality could not be held liable for the unconstitutional incident based upon a single incident of a failure to discipline a police officer.

Simmons has zero evidence to show the City failed to appropriately discipline or supervise its officers or that this alleged fault directly contributed to a violation of the Appellee's constitutional rights. There is no evidence suggesting Defendant City failed to appropriately discipline or supervise its police officers or that such a failure actually caused a deprivation of Appellee's constitutional rights. There is also no evidence suggesting Defendant City was aware of, or should have been aware of, some widespread custom of failing to appropriately discipline or supervise its officers and was deliberately indifferent to the need for further supervision.

PROPOSITION VII

SIMMONS CLAIMS ARE BARRED BY LACHES AND BY THE PRIOR DISTRICT COURT ORDER

a. Appellee's Claims are Barred by Laches

The district court should have found that Simmons' claims are barred by laches. Simmons' last known effort to pursue any relief to be freed from prison was his 1998 effort at habeas which ended with Judge Purcell's order finding that the allegedly withheld documents would not have made any difference in the

prosecution and subsequent conviction of Simmons.

Laches is recognized in federal jurisprudence and is incorporated into Rule 9(a) of the Rules Governing 28 USCA 2254 for habeas corpus actions. Laches has been utilized in federal courts, including the Tenth Circuit, to throw out cases where delay in bringing the action was unreasonable and prejudiced the defendants. The Tenth Circuit has held Rule 9 establishes grounds for dismissal of state habeas petitions:

> "Rule 9(a) provides: Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

Bowen v. Murphy, 698 F.2d 381, 382 (10th Cir. 1983).The *Bowen* court went on to explain:

> "Subdivision (a) provides that a petition attacking the judgment of a state court may be dismissed on the grounds of delay if the petitioner knew or should have known of the existence of the grounds he is presently asserting in the petition and the delay has resulted in the state being prejudiced in its ability to respond to the petition." *Id*.

Finally, the court concludes:

> [. . .] [T]he limitation is based on the equitable doctrine of laches. 'Laches is such delay in enforcing one's rights as works disadvantage to another.' 30A C.J.S. Equity § 112, p. 19. Also, the language of the subdivision, 'a petition *may* be dismissed' (emphasis added), is

> permissive rather than mandatory. This clearly allows the court which is considering the petition to use discretion in assessing the equities of the particular situation. *Id.*

Ultimately, the Court established "The petitioner is held to a standard of reasonable diligence." *Bowen* at 383.

In *Bowen*, the Court found the State made a particularized showing of prejudice, which include an affidavit from the clerk of the sentencing court that no transcripts of his trial were available, "[t]hus, testimony from the presiding judge or the prosecutor regarding the voluntariness of the guilty plea would be based on recollections of events taking place ***almost seventeen years ago****." Id.* (emphasis added) Also, the court noted, his attorney had died in the meantime. *Id.* The present matter is situated nearly identically to *Bowen.*

Here, there are no records of policies and procedures, much less any document that required retention of policies fifty years ago. The current Chief of Police, Ron Bacy, is a long serving Oklahoma City Police Officer of nearly thirty-five years, but he did not start with the department until August 17, 1992. (App. Vol. 5, p. 984). Bacy testified he has no knowledge of the events of this lawsuit which occurred in 1975, nearly twenty years prior. He also testified the City could not find any training documents from 1975. (App. Vol. 5, p. 985). Notably, he also testified there was no one currently employed by the police department who had been there during the subject time frame. (App. Vol. 5, p. 991). Another similarity between this case and

the *Bowen* case, is that the lawyer representing Simmons at trial is now dead. (App. Vol. 5, p. 1076).

Shobert is in his eighties, as are several of the "witnesses" identified by Simmons: Mildfelt at approximately eighty-one, Murdock around seventy-eight, and investigator Charles Nobles who found the records from the City of Edmond and sent them to Simmons *in 1996*. All of these individuals are trying to recall events that happened **fifty years ago**, not the mere "seventeen years" which was concerning to the Tenth Circuit in *Bowen*.

The City is stuck trying to prove a negative and the district court seemingly would like it to do so. If prejudice to the City and Shobert is not apparent at the time of this writing, it will be when Simmons and his attorneys rely on the fact that the City cannot point to witnesses or written policies and training in their presentation of this case at trial. If the defense of laches does not apply in this case, it never will. Simmons knew of the basis of his attack in the federal habeas proceeding which was resolved against him by Judge Purcell. He was represented by an attorney in that case. The Fifth Circuit has long interpreted Rule 9(a) in much the same light. In *Baxter v. Estelle*, 614 F.2d 1030 (5th Cir. 1980), the court provided:

> "Laches is an equitable doctrine. Its application must be considered on the facts of each case, based upon the reasonableness of the party's behavior under the circumstances. Baxter's delay was unreasonable in the extreme. The offense itself, the alleged beating and

> coerced confession, and the asserted ineffective assistance of counsel all took place in 1962. Baxter first raised these specific factual allegations in 1977 fifteen years later." *Id.* at 1033.

Even more on point, the court went on to explain:

> "Baxter of course knew the facts upon which his claim is based during the entire period; it is not as if he only recently became aware of the grounds for a sixth amendment claim. Indeed, given Baxter's intelligence, education, and familiarity with the criminal justice system, it is difficult to understand why he did not initially raise these factual allegations to the trial court in 1962 [. . .]." *Id*. at 1034.

Considering that Baxter had been "sleeping" on his rights since 1962 and there was "no excuse for his fifteen-year delay," the Court held "Baxter's failure to raise these allegations for fifteen years has rendered it virtually impossible for the state to rebut them" and "the state's ability to rebut his allegations is seriously damaged if not destroyed." *Id.* at 1035. Much like in the present matter, and in *Bowen* above, the court considered, among other things, the faulty recollection of aging witnesses, particularly lawyer witnesses, long gone documents, deceased witnesses and those that simply cannot be found. *Id*.

These same prejudicial concerns are present in this matter. The mere fact that witnesses are going to be talking about documents that they have not seen in fifty years should be a major alarm to the court. Appellee's criminal trial lawyer, Henry Floyd, died on June 30, 1995, so the parties and the Court are left with the

recollections of Murdock and Mildfelt about three pages of documents that they both claim could not have been in their prosecution file because surely they would have disclosed them if they were. If the Fifth Circuit found that a fifteen-year delay was prejudicial, then certainly a fifty-year delay is. The district court's order denying the City's Motion for Summary Judgment should be reversed as this action should be barred by laches.

b. Simmons' Action is Barred by the Prior District Court Order

In 1998, Simmons initiated a federal habeas case in this district court (CIV-97-649-M). His claims were consistent with, if not identical, to those here: that prosecutors (*and police),* had exculpatory information (the records at issue here) not disclosed to defense counsel prior to trial. Judge Purcell entered an order disposing of the matter, legally and factually, determining "[i]n Oklahoma at the time of Petitioner's trial and appeal, the OCCA had concluded that *Brady* did not require prosecutors to disclose their police reports containing unsworn witness statements, even if the reports contained eyewitness accounts of the crime. *Ray v. State,* 510 P.2d 1395, 1398 (Okla.Crim.App.1973)." Judge Purcell then concluded "Thus, even if Petitioner's trial or appellate counsel had requested disclosure of exculpatory or impeachment evidence, the prosecution would not likely have turned over the investigative police reports." (App. Vol. 5, p. 1079).

Judge Purcell also concluded that the alleged failure to produce would not have been prejudicial to Simmons, stating "Sufficient evidence was introduced at trial from which the jury could have believed that Brown had in fact made two pre-trial identifications of the Petitioner and she unhesitatingly identified him at trial [. . .]. "She [Brown] stated that she first identified Petitioner in a lineup on February 8." (App. Vol. 5, p. 1080). This seems to be the point of contention in this case because Simmons claims that he was never in a lineup on February 8th, only on February 7th. He apparently believes this to be true based solely on his memory because even the documented lineup is dated February 8th. His case hinges on his 50-year-old memory.

At least two courts have resolved this case against Simmons, both closer in time to the actual alleged incident when more evidence would have been available and memories would have been stronger and more accurate. Now, Simmons relies on fifty-year muddled memories to reconcile this matter in his favor. This matter should be reversed in favor of Appellant City.

PROPOSITION VIII

QUALIFIED IMMUNITY IN FAVOR OF SHOBERT RESOLVES SIMMONS' CLAIMS AGAINST THE CITY

City liability is inextricably intertwined with the claims against Shobert. Simmons must show both an underlying constitutional violation by Shobert and that

the underlying constitutional violation was directly caused by a City policy before the City itself can be held liable. *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993); see also *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), and *Mann v. Hyler*, 918 F.3d 1109, 1117 (10th Cir. 2019).

Furthermore, a municipality may not be held liable on a constitutional claim, regardless of what its policies authorize, if its employee did not commit a constitutional violation. *Heller* at 798-99. Shobert did not violate Plaintiff's constitutional rights because the rules governing participating in police lineups were legally ambiguous at the subject time. *Neil v. Biggers*, 409 U.S. 188 (1972) would have been the most recent case on lineups at the subject time; it included a review of most of the courts' lineup/identification cases at that time and concluded that the totality of circumstances must show a "very substantial likelihood of irreparable misidentification" from a lineup, showup or even a photographic lineup. *Neil* held that even where the suspect was walked in front of the victim and told to say "shut up or I'll kill you" so she could hear his voice, there was no violation.

IX. CONCLUSION

The District Court improperly denied summary judgment to both Shobert and the City. Shobert was entitled to qualified immunity on all of Simmons' § 1983 claims against him because the evidence in the case does not establish that Shobert committed constitutional violations and, most importantly, because the

constitutional rights Simmons has asserted in this lawsuit were not clearly established in 1975 when the lineups at issue here were conducted and when Simmons was arrested and tried for robbery and homicide.

If this court finds that Shobert is entitled to qualified immunity, as he did not violate clearly established law, the case against the City is resolved. If there was not a Constitutional violation, the City cannot be liable. The District Court erred in denying the Motions for Summary Judgment of both Appellants and should be reversed.

X. ORAL ARGUMENT REQUESTED

If this court finds that Appellant Shobert is entitled to qualified immunity as he did not violate clearly established law, the case against the City is resolved. If there was not a Constitutional violation, the City cannot be liable. The District Court erred in denying the Motions for Summary judgment of both Appellants and should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this Opening Brief complies with Fed. R. App. P. 32(a)(7)(B), in that it is proportionally spaced and contains 17,458 words[3], excluding portions of the Brief that are exempt by Fed. R. App. P. 32(f). I relied upon my word processor, Microsoft Word 2016, to obtain the count.

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

s/ Stacey Haws Felkner
Stacey Haws Felkner

CERTIFICATE OF DIGITAL SUBMISSION

I certify that (a) all required privacy redactions have been made, (b) that the hard copies to be submitted to the Court are exact copies of the version submitted electronically, and (c) that the electronic submission was scanned for viruses with the most recent version of the scanning software program Trend Micro Security Agent and is free of viruses.

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[3]Because this is a Joint Opening Brief, the Court set a higher word count of 17,500 words. [Doc. 21]

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that on July 30, 2025, the foregoing Opening Brief was filed electronically via the CM/ECF system with the Court and caused the following parties or counsel in this matter to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

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I further certify that the requisite number of true and correct copies of the foregoing Opening Brief will be forwarded by U.S. First Class Mail to the Court within five business days of the Court issuing notice that the electronic Brief has been accepted:

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