

Nos. 25-6046 & 25-6051

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GLYNN SIMMONS,
Plaintiff-Appellee,

v.

CLAUDE L. SHOBERT, former detective,
Defendant-Appellant.

GLYNN SIMMONS,
Plaintiff-Appellee,

v.

CITY OF OKLAHOMA CITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Oklahoma
Civil Action No. 5:24-CV-00097-J
Hon. Bernard Jones, United States District Judge

BRIEF OF PLAINTIFF-APPELLEE GLYNN SIMMONS

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Oral Argument Not Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiff-Appellee Glynn Simmons makes the follow disclosure:

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

No.

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

No.

s/ Elizabeth Wang

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STATEMENT REGARDING PRIOR/RELATED APPEALS

There are no prior appeals. The related appeals of Defendant Claude Shobert (No. 25-6046) and the City of Oklahoma City (No. 25-6051) have been consolidated. Doc. 16.

INTRODUCTION

Plaintiff Glynn Simmons spent nearly half a century imprisoned for a robbery and murder he did not commit. During that time, he was separated from loved ones and deprived of the opportunity to enjoy basic freedoms, including the opportunity to raise a family and pursue a career. In 2023, an Oklahoma court finally vacated Simmons's conviction and dismissed the charges against him. Simmons received a formal declaration of innocence. Simmons, now in his seventies and suffering from late-stage cancer, filed this civil rights lawsuit against those whose conduct caused his wrongful conviction, including former Oklahoma City police detective Claude Shobert and the City of Oklahoma City ("the City"). After discovery, Defendants moved for summary judgment, which the district court denied, finding genuine disputes of material fact require a trial, as Defendants had failed to even present the evidence in a manner

sufficient to permit traditional summary judgment analysis (which was their burden).

Simmons alleges that Shobert violated his constitutional rights, including by fabricating a purported identification from the sole eyewitness who testified against him at the criminal trial, by suppressing exculpatory evidence, and by depriving him of his liberty without probable cause in violation of the Fourth Amendment. App.Vol.X_2421-22. Simmons contends these violations were a result of the City's policies, practices, and failure to train. App.Vol.I_18-42; App.Vol.X_2284-2323.

Halting the proceedings below, Defendants Shobert and the City now seek immediate review of the trial court's determination that a reasonable jury can find Shobert violated Simmons's constitutional rights, that the City's practices were the moving force behind these violations, and its necessary conclusion that the rights at issue were clearly established. Though Simmons and the City are required, in this posture, to accept the district court's determinations and view the facts in the light most favorable to Plaintiff, they refuse. Instead, they offer a

self-serving version of events and challenge the sufficiency of the evidence.

Defendants' recitation of facts is little more than a cut-and-paste of their facts from their summary judgment motions, which viewed the evidence in their favor. *Compare* Defs.' Br. at 8-22, 59-65 *with* App.Vol.II_260-71; App.Vol.V_918-21. This Court lacks jurisdiction over the evidence-sufficiency challenge Defendants present. There is an obvious reason why Shobert might persist in contesting the facts: there is no question the core constitutional rights at issue in this case were clearly established at the time of Shobert's conduct.

As a result, even assuming *arguendo* there is jurisdiction over Shobert's appeal, the denial of qualified immunity at summary judgment must be affirmed because, viewing the facts as found by the district court and in Plaintiff's favor, Shobert violated Plaintiff's clearly established due process and fair trial rights under the Fourteenth Amendment as well as his Fourth Amendment right not to be detained without probable cause.

As to the City's appeal, there is no basis for this Court to exercise pendent jurisdiction over it, because there is no jurisdiction over

Shobert's fact challenges in the first place. In addition, interlocutory jurisdiction rests on a premise that the issue to be decided (*e.g.*, whether the rights at issue were clearly established) is *separate* from the merits. Congress has limited this Court's jurisdiction to final decisions, 28 U.S.C. § 1291, and while some qualified immunity issues fall within the collateral bar doctrine as an extension of this rule, *no* such rule exists for the City. Because Shobert's appeal must be limited to collateral issues, and because the only issue that might hypothetically overlap with Shobert's appeal is the categorially unchallengeable determination that a reasonable jury can find Simmons's rights were violated, there is absolutely no basis for the City to seek an interlocutory appeal before trial. Despite the City's lengthy discussion of its version of the facts, there is no jurisdiction for this Court to review any other aspect of the municipal liability claim against the City, such as the sufficiency of the evidence on the City's inadequate policies and training, causation, or deliberate indifference.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331. On July 30, 2025, the district court denied

Defendants' motions for summary judgment. App.Vol.X_2420-27. Shobert timely filed a notice of interlocutory appeal on July 30, 2025. App.Vol.X_2428-32. Improperly, the City filed an appeal the same day, even though it is not entitled to qualified immunity. *Id.*

As explained below, this Court lacks jurisdiction over Shobert's appeal, which challenges the sufficiency of the evidence and the trial court's determination that the pervasive fact disputes here require a trial. Shobert has presented no issue premised on accepting Plaintiff's facts and that would permit analysis of a legal issue separate from the merits (such as the qualified-immunity inquiry of whether a particular right was clearly established at the time of Shobert's conduct—assuming Plaintiff's version of the facts).

The City's claim to jurisdiction is even more tenuous. Given that Shobert's appeal lacks jurisdiction, the City's appeal necessarily lacks jurisdiction as well. In addition, the City presents only fact-based challenges and nothing that falls even remotely within the collateral bar doctrine. These issues are addressed more fully below.

STATEMENT OF ISSUES

1. Whether there is jurisdiction to review Defendant Shobert's fact-based challenges to the district court's ruling that a reasonable jury could find Shobert violated Simmons's constitutional rights.

2. Whether it was clearly established in 1975 that a police officer could not fabricate evidence, withhold materially favorable information, or seize someone in the absence of probable cause and on the basis of fabricated evidence.

3. Whether there is a basis for this Court to exercise pendent appellate jurisdiction over Defendant City of Oklahoma City's appeal of the district court's denial of summary judgment when there is no jurisdiction over Shobert's appeal, the City challenges Plaintiff's facts, and the City presents no purely legal issues collateral to the merits.

STATEMENT OF THE CASE

The facts are presented in the light most favorable to Plaintiff and as found by the district court. These facts cannot be challenged in an interlocutory appeal. "[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even

if our own de novo review of the record might suggest otherwise was a matter of law.” *Krueger v. Phillips*, __ F.4th __, 2025 WL 2424209, at *2 (10th Cir. Aug. 22, 2025) (quoting *Estate of Booker v. Gomez*, 745 F.3d 405, 409-10 (10th Cir. 2014) (internal quotation marks omitted)). To the extent a district court fails to specify which factual disputes precluded a grant of summary judgment for qualified immunity, this Court reviews the record to “determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.” *Estate of Booker*, 745 F.3d at 410.

I. Sayre’s Liquor Store Was Robbed and a Clerk Murdered

On December 30, 1974, Sayre’s Liquor Store in Edmond, Oklahoma was robbed by two men. App.Vol.X_2420. During the robbery, store clerk Carolyn Rogers was murdered, and customer Belinda Brown was shot in the head, but survived. *Id.* When the robbers left, Norma Hankins, another store clerk, called the police. *Id.* Detective Sergeant Anthony Garrett of the Edmond Police Department (“EPD”) was assigned to the case. *Id.* When Brown was initially interviewed in the hospital on January 2, 1975, she could only give a vague description of the suspects. When asked if she could remember anything else if given more time, she

answered, “No, because I thought real hard and I told them when the policemen first came in ... if I waited much longer it would get all jumbled up in my mind and it wouldn’t be all the same.” App.Vol.II_360-61.

The Oklahoma City Police Department (“OCPD”) assisted EPD in the investigation. Specifically, Defendant Shobert designed and conducted two of the key lineups in the case, on February 7 and 8, 1975. App.Vol.X_2421.

II. Glynn Simmons Is Innocent

In 1974, Glynn Simmons lived in Harvey, Louisiana with his family. App.Vol.VI_1192. On December 30, 1974, then-20-year-old Simmons was at a pool hall in Harvey with friends. App.Vol.VI_1193-94. Simmons moved to Oklahoma on January 5, 1975. App.Vol.VI_1194. He came looking for work and a better life. *Id.*

Simmons did not commit the December 30, 1974 Sayre’s Liquor Store robbery and murder of Carolyn Rogers. App.Vol.VI_1192, 1252.

III. Simmons Was Arrested on February 6, 1975

Simmons lived with his aunt, Dorothy Norris. App.Vol.VI_1194. Norris had a daughter, Mary Grant; Mary was Simmons’s cousin. *Id.* In late January or early February 1975, Simmons went joyriding with

Mary's husband Lawrence Grant, and Grant's acquaintances, Leonard and Delbert Patterson. App.Vol.VI_1195, 1253-54. During this outing, the Pattersons stopped at a store called Tom's Market. App.Vol.VI_1254-55. Simmons and Grant stayed in the backseat of the car while the Pattersons went into the store. App.Vol.VI_1255. Simmons learned later that the Pattersons were alleged to have robbed the store. *Id.* Simmons did not know anything about it and never committed any robberies. App.Vol.VI_1195, 1255-56, 1321.

At 7:00 p.m. on February 6, 1975, Simmons was arrested by the OCPD for having been in the car when the Pattersons allegedly robbed Tom's Market. App.Vol.VI_1195, 1255-56; App.Vol.II_450. Simmons was taken to the Oklahoma City Jail. App.Vol.VI_1196.

At the jail, Simmons was placed into a holding cell where Leonard and Delbert Patterson were already being held. *Id.* Simmons heard the Pattersons talking about a murder they had committed and were arrested for. *Id.* Simmons was terrified and had no idea what they were talking about. *Id.*

On February 6, 1975 at 9:00 a.m., Shobert contacted Garrett and told him that the OCPD had two individuals in custody who were possible

suspects in relation to the liquor store robbery/murder and that they would like to show them in a lineup to the witnesses. App.Vol.X_2421; App.Vol.II_451. Simmons was not one of the two possible suspects in custody on the morning of February 6, 1975, because he was not in custody until 7:00 p.m. that day. App.Vol.X_2421 (n.4); App.Vol.II_450. The Pattersons were likely the two murder suspects in custody on the morning of February 6, 1975 about whom Shobert called Garrett.

IV. Shobert Conducted Lineups on February 7 and 8, 1975 and Fabricated a Purported Identification

The next day, February 7, 1975, Simmons was placed in a lineup for the liquor store murder because the officers needed more participants. App.Vol.VI_1196-97, 1322. Simmons was only placed in this one lineup for the liquor store murder.¹ *Id.* He was never placed in a lineup on February 8, 1975. App.Vol.VI_1196-97, 1248, 1322-23.

Shobert conducted both of the lineups on February 7 and 8, 1975 at the OCPD. App.Vol.X_2421; App.Vol.VI_1373. Shobert filled out a report purporting to document the February 8, 1975 lineup, and he indicated on the report that Belinda Brown positively identified Simmons and another

¹ Simmons was never identified in the robbery that he originally had been arrested for. App.Vol.VI_1197.

man, Don Roberts. *Id.*; App.Vol.II_453; App.Vol.VI_1159-60, 1197. This report (“Showup Report”) listed Simmons was appearing in position 2 in the February 8, 1975 lineup. App.Vol.II_453. However, Simmons was not in position 2 in the lineup—he was not in the lineup at all. App.Vol.VI_1196-97. Shobert fabricated Brown’s identification of Simmons—indeed, Simmons was not present, so she could not possibly have identified Simmons—and documented this fabricated identification in his Showup Report and Case Record, which he gave to prosecutors. App.Vol.X_2421 (n.6); App.Vol.VI_1196-97, 1248, 1322-23, 1349-52, 1385.²

V. Brown Did Not Identify Simmons in Any Lineups; Instead, She Identified Two Other Individuals

On February 7, 1975, Garrett contacted Brown and advised her to meet him at the OCPD at 11:30 a.m. to look at a lineup. App.Vol.II_451 (“Lineup Report”). Brown is identified as witness #2 in the report. *Id.* Brown met Garrett and Shobert at the OCPD at approximately 11:45 a.m. *Id.* Shobert took them to the lineup room and conducted a lineup. *Id.*

² Not even Shobert contends otherwise. For his part, Shobert has no memory whatsoever of the events of this case, who was in the lineups, whether Simmons was in any lineups, and who Brown identified, if anyone, in any lineup. App.Vol.VI_1158-59.

After the lineup, Brown was asked “if any of the subjects in the line-up were the subjects that shot her and she advised, yes #__ is the one that I did not see that well and #6 was the one that spoke to me ‘I think.’” *Id.* A “hold for County” was put on subject # __. *Id.* There is no indication that any hold was ever placed on Simmons. *Id.*

On February 8, 1975, at approximately 9:20 a.m., Garrett, Brown, and the other two witnesses, Hankins (“W#1”) and Delbrel (“W#3”), met Shobert at the OCPD. App.Vol.II_451. Shobert conducted another lineup with all three witnesses. Brown (“W#2”) “pikced [*sic*] the same two as she had on 2-7-75.” *Id.* Brown was asked if she was sure, and she replied, “yes.” *Id.* Given that Simmons was not in the lineup on February 8, 1975, and Brown identified the “same two” on February 8 as she had on February 7, 1975, Brown did not identify Simmons on February 7 *or* 8, 1975. App.Vol.VI_1198; App.Vol.II_451.³

After the lineup on February 8, 1975, Garrett and Shobert talked. App.Vol.II_451. Shobert “advised that upon apprehending a suspect in

³ Defendants argue that the Lineup Report does not indicate that Shobert was present for the conversations between Garrett and Brown about who Brown identified during the lineups. Defs.’ Br. at 14. But this is disputed because Shobert filled out the Showup Report for February 8, 1975, which indicated (falsely) that Brown identified Simmons.

one of these murder cases, upon searching his apartment incidental to arrest, two felt hats were found, matching the description of the two hats worn by the subjects in this case.” App.Vol.II_452. Leonard Patterson was the suspect at whose apartment the felt hats were confiscated. App.Vol.II_515.

Shobert’s practice was not to give a copy of reports to the prosecutor directly. Similarly, pursuant to his training and the policies and practices of the OCPD at the time, he would not have communicated the information that he learned at the lineup to the prosecutor. App.Vol.VI_1165. Shobert admitted that the Lineup Report should have been given to the prosecutor’s office, but he does not know if it was. App.Vol.VI_1174.⁴

App.Vol.VI_1159-60. And, although no copy of it is available, Shobert filled out a similar showup report for the lineup on February 7, 1975, indicating who the witness(es) identified. App.Vol.VI_1164.

⁴ Shobert’s sham declaration (App.Vol.II_298-306), which was created specifically to contradict his sworn deposition testimony that he remembered nothing (*see* App.Vol.VI_1151, 1158, 1161, 1163, 1173), is inadmissible. *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 973-74 (10th Cir. 2002). It was not considered by the district court. App.Vol.X_2420-27. As required, the district court construed the facts in Plaintiff’s favor and noted, “[i]n his deposition, Shobert testified that he did not have any independent recollection of the events that underlie this case.” App.Vol.X_2423. This Court has no jurisdiction to consider the district court’s evidentiary rulings at summary judgment. *Ellis*, 147

VI. Shobert Suppressed Alternative Suspect Information including that Brown Did Not Identify Simmons and Instead Identified Two Other Individuals

The information that Shobert learned at the February 7 and 8, 1975 lineups was exculpatory and impeaching, because it pointed to alternative suspects and away from Simmons. *See* App.Vol.II_451-52; App.Vol.VI_1269, 1274-75, 1354. This exculpatory and impeaching information was documented by Shobert and Garrett in the Lineup Report. App.Vol.II_451-52. The Lineup Report stated that at the February 7, 1975 lineup, Brown picked “#__” and “#6,” which was quite different from what was in the Case Record given to the prosecutors by Shobert and Garrett. *Id.* The Case Record stated that Brown identified Simmons and Roberts in positions 2 and 4 in the lineup on February 7, 1975. App.Vol.II_497-98; App.Vol.VI_1199, 1353-54.

The Case Record, also referred to as a “blue sheet,” contained a summary of what witnesses would testify to, and it was prepared by the detectives who investigated the case. App.Vol.VI_1347-48. The

F.4th at 1223. Defendants’ citations to Shobert’s declaration is further evidence of their refusal to accept the facts as found by the district court. *See* Defs.’ Br. at 9-11 (¶¶ 5-6, 11-13), 14-15 (¶¶ 25, 27), 16 (¶¶ 34-36), 18 (¶ 47).

prosecutor relied on the information in the Case Record to prepare for the preliminary hearing; this document contained the information that he believed the witnesses would testify to. App.Vol.VI_1346-48. The Case Record falsely states that Brown would testify that she recognized Simmons (and Roberts) and picked them out of a lineup on February 8, 1975. App.Vol.II_497; App.Vol.VI_1349. The prosecutor had no information at the time that contradicted this. App.Vol.VI_1349. Though Shobert had fabricated the idea that Simmons was in the lineup on February 8, 1975, the prosecutors had no idea, because the detectives did not tell them about it. App.Vol.VI_1366, 1381, 1385.

The Case Record also said that Garrett would testify that Brown identified Simmons and Roberts in positions 2 and 4 in the February 7, 1975 lineup, and that Shobert would testify that he conducted a lineup on February 8, 1975, and Simmons and Roberts were in positions 2 and 4. App.Vol.II_498; App.Vol.VI_1350-51. The testimony that the prosecutor elicited from Brown at the preliminary hearing was consistent with what Shobert and Garrett gave him in the Case Record.

App.Vol.VI_1351-52.⁵ The decision to charge Simmons in the first place was also based on the false information provided in the Case Record. App.Vol.VI_1370-71, 1384.

Shobert suppressed the fact that Brown had identified other people at the February lineups from the preliminary hearing and trial prosecutors (Dan Murdock and Robert Mildfelt). App.Vol.VI_1352; App.Vol.VI_1375 (44). Neither the preliminary hearing nor trial prosecutor had a copy of the Lineup Report. App.Vol.VI_1271, 1355-56, 1361-65.⁶ Nor did Shobert ever tell any prosecutors that Brown had identified other people at the February lineups. Instead, Shobert

⁵ The Case Record does not list an author. However, Shobert agreed that the information in the Case Record about what he would have testified to could only have come from him. App.Vol.VI_1168. Thus, a reasonable jury could find that Shobert contributed to the false information in the Case Record about Brown's supposed identification of Simmons. *Cf. Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)) (at summary judgment courts must make inferences in the light most favorable to the non-movant); *Estate of Booker*, 745 F.3d at 430 (in denying summary judgment, emphasizing the importance of inferences from circumstantial evidence).

⁶ Defendants assert that the Lineup Report "includes a check box noting that a copy was sent to the County Attorney," Defs.' Br. at 14, but this is disputed. Neither Shobert nor any other witness knows what the checkbox means, and the prosecutors testified they did not have the report, because if they had, they would have given it to the defense. App.Vol.VI_1174, 1363-65.

disclosed the fabricated notion that Brown had identified Simmons in those lineups. App.Vol.VI_1377-78.

In 1975, the prosecutors understood their *Brady* obligations to disclose exculpatory and impeachment evidence to the defense, complied with those obligations at the time, and would have disclosed the Lineup Report to the defense if they had had a copy of it. App.Vol.VI_1273-75, 1354-55, 1365, 1371, 1375-76, 1468 (¶¶8-9).

Simmons did not receive the Lineup Report at the time of trial; otherwise, his attorney would have used it in his defense. App.Vol.VI_1199; *see also* App.Vol.VI_1274-75, 1372. At Simmons's trial, there was no mention of the fact that Brown had identified “#6” and “#__” at the February 7, 1975 lineup, *id.*, even though the defense strategy was to challenge Brown's identification. App.Vol.VI_1199, 1343-44.⁷

Attempts were made during Simmons's post-conviction proceedings and discovery in this case to locate the District Attorney's original trial file from 1975. However, it could not be located. App.Vol.VI_1461; SA_1-2. Defendants suggest that a collection of papers produced in discovery in this case was the “DA file” from 1975. Defs.' Br. at 19-20. It is not.

⁷ Simmons and Roberts were tried together. App.Vol.X_2421.

App.Vol.VI_1356-57, 1363, 1378, 1384, 1461, 1463. It contains many documents post-dating the trial, such as post-conviction filings. App.Vol.III_654-57, 661-92; App.Vol.VI_1357. Within this collection of papers, there is a copy of the Lineup Report, but this came from Simmons's post-conviction counsel, Joseph Norwood, who had it during the 2022-23 post-conviction proceedings. App.Vol.VI_1461; *see also* App.Vol.VI_1269-75. Documents were added to this collection of papers after Simmons's trial, and no witness has identified when any of the documents were placed together. App.Vol.VI_1357-59, 1360, 1378-79, 1384; App.Vol.VII_1468 (¶7).

VII. The Suppressed Exculpatory and Impeaching Evidence Was Material

The entire criminal case against Simmons revolved around Brown's purported identification—there was no other evidence against him. App.Vol.VI_1277-78, 1361; App.Vol.VII_1471-1723; App.Vol.VIII_1724-64. Brown testified that Roberts was the man who spoke to her during the robbery and the other man (supposedly Simmons) did not speak to

her.⁸ App.Vol.VII_1499-1501. No other witnesses identified Simmons at trial or picked him out of a lineup. App.Vol.VII_1487-88, 1490, 1492, 1528-29.⁹

At trial, Brown was asked to make an in-court identification, and she identified the only two Black defendants in court. App.Vol.II_391-92. According to Plaintiff's eyewitness identification expert, Dr. Nancy Franklin, such in-court identifications are highly suggestive, unreliable, and have little to no value. SA_29-30, 46-47.¹⁰ Simmons testified in his own defense and presented several alibi witnesses at the criminal trial, to no avail. App.Vol.VII_1606-24, 1633-68. Simmons was found guilty despite the fact that he was innocent. App.Vol.X_2421.

If the prosecution had information that would have impeached Brown's credibility or called her identification into question, the

⁸ Before trial, officers took another mugshot of Simmons, which Simmons believes was shown to Brown so that officers could remind her who to pick out at trial. App.Vol.VI_1201.

⁹ Hankins's non-identification of Simmons is strong evidence of his innocence, given that she had a better opportunity to view the perpetrator than Brown. App.Vol.VII_1430 (¶¶106-07).

¹⁰ The copy of Dr. Franklin's report Defendants include in their Appendix is corrupted. Plaintiff has included a new copy in the Supplemental Appendix. (Further, copies of the filings in Defendants' appendix include defense counsel's annotations and highlights. Those markings should be ignored.)

prosecutors would have disclosed it. App.Vol.VI_1371-72, 1468 (¶¶8-9).¹¹

The evidence against Simmons was thin, and the exculpatory Lineup Report made it even thinner. App.Vol.VI_1277.

VIII. Simmons Was Exonerated

In 1997, Simmons filed an application for post-conviction relief in state court and a petition for writ of habeas corpus in federal court and was denied relief. App.Vol.X_2421.

In 2022, Simmons filed another application for post-conviction relief in state court; this time, the court held an evidentiary hearing. App.Vol.VI_1262-1330; App.Vol.X_2421. The application was granted, and Simmons was deemed innocent on December 19, 2023. App.Vol.X_2421. Simmons was released from prison after he spent 17,695 days—some 48-and-a-half years—wrongfully incarcerated for a crime he did not commit. App.Vol.VI_1192.

IX. Procedural History

Simmons filed this suit on January 26, 2024. App.Vol.X_2421. He alleges that Defendants violated his Fourteenth Amendment due process

¹¹ Indeed, the prosecutor had an open file policy. App.Vol.VI_1269, 1273-75, 1369.

right to a fair trial by suppressing exculpatory evidence and fabricating evidence that was used against him in the criminal proceedings. App.Vol.X_2421-22. Simmons alleges that Defendants violated his Fourth Amendment rights by causing the deprivation of liberty and detention without probable cause. *Id.* Simmons also alleges that Defendants conspired to deprive him of his constitutional rights. *Id.*

Defendants moved for summary judgment. App.Vol.II_246-96; App.Vol.V_912-1085. In their motions, Defendants refused to apply the summary judgment standard, which required them to view all facts and reasonable inferences therefrom in Plaintiff's favor. *Id.* Instead, Defendants did the opposite. *Id.* The district court denied both motions. App.Vol.II_2420-27. The district court found that, due to genuine disputes of material facts, "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.II_2423, 2427. The court continued, "Consequently, it will be up to a jury, after hearing all of the evidence and testimony of the witnesses, to determine what the facts are and ultimately who is entitled to judgment in their favor." *Id.*

SUMMARY OF THE ARGUMENT

Shobert's appeal should be dismissed for lack of jurisdiction because he contests the district court's finding that there are genuine disputes of material fact that require resolution by a jury. His entire appeal is focused on evidence sufficiency, ignoring the district court's recitation of the facts, ignoring facts favorable to Plaintiff, and drawing inferences in *his* favor. Nor is there any jurisdiction over the question of whether the law on Plaintiff's Fourth and Fourteenth Amendment claims was clearly established in 1975, because Shobert's arguments there are also premised on viewing the facts in his favor.

In any event, it has been established for decades—long before 1975—that (1) police officers could not fabricate false inculpatory evidence against a criminal defendant, to be used against him in his criminal proceeding, (2) police officers had an obligation to disclose exculpatory and impeachment evidence to the prosecutor, and (3) police officer could not deprive a criminal defendant of his fair trial rights by using unduly suggestive identification procedures. Viewing the evidence as the district court found it and in the light most favorable to Simmons,

Shobert violated Simmons's clearly established Fourth and Fourteenth Amendment rights.

This Court should not exercise pendent jurisdiction over the City's appeal because there is no jurisdiction over Shobert's appeal, there are no issues the City raises within the collateral order doctrine that are separable from the merits. They are purely questions of evidence sufficiency. The City's arguments are unreviewable in this interlocutory appeal.

ARGUMENT

Standard of Review

Under Rule 56, the party moving for summary judgment bears the initial burden of showing no genuine dispute of material fact exists. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment *if the movant shows* that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.") (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying [the evidence] which it believes demonstrate the absence of a genuine issue of material

fact.”); *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 982 (10th Cir. 2002).

The Court reviews *de novo* the district court’s denial of a summary judgment motion asserting qualified immunity. *Estate of Booker*, 745 F.3d at 411. The facts must be viewed in the light most favorable to Plaintiff and all factual disputes and reasonable inferences must be resolved in Plaintiff’s favor. *Id.* In order to defeat qualified immunity at summary judgment, Plaintiff must show “(1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant’s conduct.” *Id.* When a defendant explicitly raises the qualified immunity defense at summary judgment “but the district court fails to expressly decide the qualified immunity question,” this Court considers “the district court’s silence to operate as an implicit denial of qualified immunity.” *Ellis v. Salt Lake City Corp.*, 147 F.4th 1206, 1220 (10th Cir. 2025) (cleaned up).

I. This Court Lacks Jurisdiction to Review Shobert’s Fact-Based Challenge to the District Court’s Ruling

As mandated by Congress, this Court’s limited jurisdiction reaches only “final orders” and does not permit immediate appeal of unfavorable rulings. 28 U.S.C. § 1291. As a result, federal “jurisprudence is strongly

colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court.” *Will v. United States*, 389 U.S. 90, 96 (1967).

“Ordinarily, orders denying summary judgment do not qualify as ‘final decisions’ subject to appeal.” *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011). The collateral order doctrine is an exception to the final judgment rule, permitting appeals of non-final orders that: (1) conclusively determine a disputed question; (2) resolve an issue separate from the merits; and (3) are effectively unreviewable at final judgment. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 526 (1949).

Some appeals related to qualified immunity can be raised in an interlocutory posture, where they present a pure issue of law collateral to the merits of the suit. *Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985). However, under *Johnson v. Jones*, 515 U.S. 304, 309 (1995), orders that involve a question of factual sufficiency or dispute are not subject to immediate appeal. *See Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963) (the collateral order doctrine does not involve considerations that are “enmeshed in the factual and legal issues comprising the

plaintiff's cause of action"). That is, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20.

As a result, this Court lacks jurisdiction over, and is "not at liberty to review," a trial "court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008). Put differently, this Court lacks "jurisdiction to review factual disputes in this interlocutory posture." *Id.*; *see also Sawyers v. Norton*, 962 F.3d 1270, 1281 (10th Cir. 2020) (explaining that this Court "lacks jurisdiction ... to review a district court's factual conclusions, such as the existence of a genuine dispute of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference" (internal quotation marks and citation omitted)).

This Court's jurisdiction over the question of whether the law was clearly established exists only "when the defendant does not dispute the

facts alleged by the plaintiff and raises only legal challenges to the denial of qualified immunity based on those facts.” *Henderson v. Glanz*, 813 F.3d 938, 948 (10th Cir. 2015) (internal quotation marks and citation omitted). This Court has reiterated this principle many times, including recently. *E.g.*, *Love v. Grashorn*, 134 F.4th 1109, 1115 (10th Cir. 2025) (“We lack jurisdiction to reverse based on Officer Grashorn’s version of the facts.”); *Teetz as next friend of Lofton v. Stepien*, 142 F.4th 705, 718 (10th Cir. 2025) (court lacks jurisdiction to review factual disputes in interlocutory posture, including district court’s determination that the evidence could support a finding that particular conduct occurred); *Krueger*, __ F.4th __, 2025 WL 2424209, at *2 (same); *Ellis*, 147 F.4th at 1214 (“We ... lack jurisdiction over [Defendants’] (many) factual arguments.”).

Here, the district court’s order falls squarely under *Johnson*, and Defendants dispute the facts, depriving this Court of jurisdiction. By electing to “dispute the facts [the] district court determine[d] a reasonable juror could find,” Shobert fails to raise pure “legal challenges to the denial of qualified immunity based on those facts.” *Ralston v. Cannon*, 884 F.3d 1060, 1067 (10th Cir. 2018) (citation omitted).

As a result, this appeal should be dismissed for lack of jurisdiction. *Valdez v. Motyka*, 804 F. App'x 991, 992 (10th Cir. 2020) (“Because the denial of qualified immunity is based on evidentiary sufficiency, we lack jurisdiction and dismiss these appeals.”); *Mick v. Brewer*, 76 F.3d 1127, 1133 (10th Cir. 1996) (“We lack jurisdiction ... to the extent that Defendants Brewer and Meyers seek interlocutory review of the district court’s ruling that genuine disputes of fact precluded summary judgment based on qualified immunity.”); *Ralston*, 884 F.3d at 1067-68 (dismissing for lack of appellate jurisdiction); *Castillo v. Day*, 790 F.3d 1013, 1017-18 (10th Cir. 2015) (same); *Farhat v. Bruner*, 384 F. App'x 783, 786 (10th Cir. 2010); *Phillips v. Dale*, 356 F. App'x 163, 166 (10th Cir. 2009).

Given the potential for abuse, and to conserve judicial resources, this Court must carefully police the bounds of interlocutory jurisdiction. *See Johnson*, 515 U.S. at 308-09, 314-15 (discussing limits of interlocutory review and judicial economy); *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 870 (9th Cir. 1992) (recognizing that interlocutory appeals of qualified immunity can be abused as a delay tactic and that such appeals can impose considerable “burden[s] on civil rights plaintiffs, in terms of both delay and expense.”).

This Court has admonished litigants about these rules, too. For example, in *Ralston*, this Court reminded litigants that:

the jurisdictional limitation at issue in this appeal has been in place since the Supreme Court’s decision in *Johnson*, 515 U.S. at 319-20 [], more than twenty years ago. ... appeals like the instant one that flaunt the jurisdictional limitations set out in *Johnson* serve only to delay the administration of justice. ... That being the case, this court expects practitioners will be cognizant of, and faithful to, the jurisdictional limitation set out in *Johnson*.

884 F.3d at 1067-68 (internal citations omitted); *see also Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) (“there is the risk that such interlocutory appeals will be subject to abuse.”).

Federal courts recognize that a defendant, seeking to obtain interlocutory review despite jurisdiction lacking, may attempt to “couch” their fact-bound arguments as legal ones. *See, e.g., Valdez*, 804 F. App’x at 995; *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013); *Peck v. Montoya*, 51 F.4th 877, 886 (9th Cir. 2022); *Stinson v. Gauger*, 868 F.3d 516, 525 (7th Cir. 2015) (*en banc*); *Reyes v. City of Richmond*, 287 F.3d 346, 351-52 (5th Cir. 2002).

Defendants’ arguments fall into this category. They have not recited the facts as the district court found them or viewed any of the facts in Simmons’s favor, *see* Defs.’ Br. at 5-22, and all of their arguments

turn on contesting the district court’s determination that the material facts cannot be decided at summary judgment. Indeed, Defendants claim that Simmons has “no evidence” or “no proof” 26 times in their brief. Defs.’ Br. at 11, 18, 25-26, 45, 47-48, 50, 52, 55-56, 59-60, 63, 65. Defendants’ dispute of the facts (and the district court’s findings) permeate their entire brief, as the following chart shows:

District Court and/or the Record	Defendants’ Brief
<p>Simmons was not identified by Brown on February 8, 1975 because he was not in the lineup that day. App.Vol.X_2421 n.6; App.Vol.VI_1196-97, 1248, 1322-23.</p> <p>Simmons was not identified by Brown on February 7, 1975 because she identified the “same two” individuals on both February 7 and 8, 1975, but Simmons was not present on February 8, which meant Brown did not identify him on either day. <i>Id.</i>; App.Vol.II_451.</p>	<p>Simmons was identified by Brown in a lineup. Defs.’ Br. at 5-6, 16 (¶37), 17 (¶40).</p>
<p>Shobert knew that Brown did not identify Simmons and that she had, instead, identified two other individuals, because he witnessed the identifications and filled out that information on the showup reports after conducting the</p>	<p>Shobert did not talk to Brown about who she identified. Defs.’ Br. at 14 (¶25).</p>

<p>lineups. App.Vol.V_954-55; App.Vol.VI_451-53.</p>	
<p>Neither the Lineup Report nor the information in it was given to the prosecutors. App.Vol.X_2421 n.3; App.Vol.VI_1165, 1271, 1352, 1355-56, 1361-65, 1375, 1377-78.</p>	<p>Suggests that the Lineup Report was given to the prosecutors. Defs.’ Br. at 14 (¶23).</p>
<p>The original trial file of the District Attorney’s Office no longer exists. SA_1-2; App.Vol.VI_1461.</p>	<p>Suggests that the “DA file” is the original trial file from 1975 and contained the Lineup Report in 1975. Defs.’ Br. at 19-20 (¶¶51-52).</p>
<p>Shobert has no recollection of this case. App.Vol.X_2423 n.9.</p>	<p>Shobert assumed Garrett would provide all reports to the District Attorney’s Office. Defs.’ Br. at 16 (¶35).</p>
<p>Simmons never committed any robberies. App.Vol.VI_1195, 1255-56, 1321.</p>	<p>Suggests that Simmons committed robbery with Pattersons on January 30, 1975. Defs.’ Br. at 12 (¶16)</p>

Given Defendants’ challenge to the facts, there is no jurisdiction over this appeal and it should be dismissed. Indeed, policing this line is especially important in a case like this, where Glynn Simmons spent nearly half a century in prison as an innocent man and emerged from his wrongful incarceration with a terminal illness. Every moment of delay is prejudicial to Mr. Simmons.

The Supreme Court has recently emphasized this Court’s ability to summarily or dismiss as frivolous an appeal that exceeds interlocutory jurisdiction as one of this Court’s “robust tools to prevent unwarranted delay and deter frivolous interlocutory appeals.” *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 745 (2023). That authority should be exercised here and the appeal should be dismissed.

II. The District Court’s Order Implicitly Denied Qualified Immunity Due to Disputes of Material Fact

Defendants complain about the brevity of the district court’s opinion. Defs.’ Br. at 28-32. The problem is their own failure of proof, not the trial court’s decision. Defendants bore the initial burden of showing an absence of material fact in dispute. Fed. R. Civ. P. 56(a) (“The court shall grant summary judgment *if the movant shows* that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”) (emphasis added); Fed. R. Civ. P. 56(c); *Celotex Corp.*, 477 U.S. at 323-24 (“a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying [the evidence] which it believes demonstrate the absence of a genuine issue of material fact.”); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991) (“[t]he moving party

carries the burden of showing beyond a reasonable doubt that it is entitled to summary judgment.” (quoting *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987)). Defendants utterly failed in that regard. This is why the district court commented that it was “unable to engage in the requisite summary judgment analysis.” App.Vol.X_2423, 2427.

Plaintiff does not dispute that Shobert asserted qualified immunity in his summary judgment motion,¹² and the district court did not expressly address qualified immunity in its order. App.Vol.X_2420-23. It is clear, however, that the district court denied qualified immunity on the ground that there were genuine disputes of material fact that had to be resolved by a jury. *See id.* As was the case in *Cox v. Glanz*:

the district court clearly adjudicated [the defendant’s] defense of qualified immunity and ruled against him, albeit tacitly so. ... the court did not mention qualified immunity in its summary-judgment order. However—critically, for purposes of our interlocutory review—the court did explicitly deny [the defendant] *all* relief in its order, and part of the relief that [the defendant] unquestionably sought in his summary-judgment briefing was qualified immunity. Consequently, the court effectively denied [the defendant] the

¹² Although Shobert raised qualified immunity, many of his arguments were inadequately briefed, inartful, or assumed facts in his favor in order to argue that the law was not clearly established. This is discussed in greater detail below.

defense of qualified immunity when it denied his summary-judgment motion.

800 F.3d 1231, 1243 (10th Cir. 2015).

In other words, the district court's finding that there were genuine disputes of material fact concerned both aspects of qualified immunity—whether Plaintiff had produced sufficient evidence for a reasonable jury to find in his favor on the underlying constitutional violations as well as whether the law was clearly established. This is because Shobert's arguments on the second element of qualified immunity (clearly established law) were premised entirely on his version of the facts. *See, e.g.*, App.Vol.II_275 (asserting, in discussing clearly established law, that the exculpatory evidence was already known to prosecutors), 278-80 (denying that Shobert fabricated the Showup Report in arguing that the law was not clearly established in 1975), 287-88 (contesting the facts in arguing that the law was not clearly established on Plaintiff's unduly suggestive identification claim), 290-91 (contesting the facts in arguing that the law was not clearly established on Plaintiff's Fourth Amendment detention without probable cause claim).

Accepting the facts found by the district court and viewing the facts and all reasonable inferences in Plaintiff's favor, there can be no doubt

that it was clearly established as of 1975 that it violated due process for Shobert to fabricate a false witness identification of Plaintiff, withhold that fabrication, and withhold the exculpatory and impeaching evidence that the key witness had not in fact identified Plaintiff but had actually identified two other individuals. As explained below, no reasonable officer could have believed that such misconduct was permissible.¹³

¹³ The district court also implicitly rejected Plaintiff's argument that qualified immunity is unlawful. App.Vol.V_1140-42. There is no statutory or common law basis to afford immunity to police officers who are sued under § 1983 for violations of constitutional rights. "[S]tatutory interpretation ... begins with the text," *Ross v. Blake*, 578 U.S. 632, 638 (2016), and the US code version of the text of § 1983 is clear: "Every person who, under color of any statute ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities ... shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. The word "shall" typically means "must." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016); *Lopez v. Davis*, 531 U.S. 230, 241 (2001). There is no room in the statute for immunity that means an officer *may* be liable or only may be liable if the law was "clearly established" at the time of the conduct. Congress does not mention immunity in the statute, and the judicially-created qualified immunity test "cannot be located in § 1983's text and may have little basis in history." *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., respecting denial of certiorari).

Qualified immunity is also foreclosed by the actual text of § 1983 that did not make it into the US code. Qualified immunity arises from the premise that Congress did not intend to abrogate existing common-law immunities when it passed § 1983 in 1871. *E.g.*, *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). But that premise is wrong. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201

(2023). As passed by the Reconstruction Congress, Section 1 of the Civil Rights Act of 1871—now known as § 1983—provided:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added).

The notwithstanding clause in Congress’s originally promulgated text of § 1983 expressly displaces common-law defenses—it states that common law immunities will *not* protect state actors from suit. Reinert, *supra* at 235 & n.230. But the notwithstanding clause was accidentally omitted from the first compilation of the law in 1874, and it has been missing—but never amended—since then. Reinert, *supra* at 207, 236-37, 244. “[T]he Supreme Court’s original justification for qualified immunity—that Congress wouldn’t have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*.” *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). Thus, “modern immunity jurisprudence is not just atextual but *countertextual*.” *Id.*

There is nothing in the common law of 1871 that would provide officers who violated the constitutional rights of civilians immunity from suit. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871-72 (2017) (Thomas, J., concurring) (citing William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45 (2018)); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting). An officer who maliciously prosecuted an innocent person based on false evidence would have been subject to suit at common law in 1871. *See Thompson*, 596 U.S. at 43-44; *Green v. Thomas*, 734 F. Supp. 3d 532, 543-48, 560-68 (S.D. Miss. May 20, 2024).

III. Assuming Arguendo Jurisdiction, a Reasonable Jury Could Find that Shobert Violated Simmons’s Clearly Established Fourteenth Amendment Right to Due Process and a Fair Trial

A. Shobert’s Fabrication of Brown’s Identification and Related Reports

1. Disputed Facts

To show that Shobert’s fabrication of evidence constituted a constitutional violation, Plaintiff must show that “(1) the defendant knowingly fabricated evidence, (2) the fabricated evidence was used against the plaintiff, (3) the use of the fabricated evidence deprived the plaintiff of liberty, and (4) if the alleged unlawfulness would render a conviction or sentence invalid, the defendant’s conviction or sentence has been invalidated or called into doubt.” *Truman v. Orem City*, 1 F.4th 1227, 1236 (10th Cir. 2021).

Shobert does not—and cannot—dispute that there is evidence showing he knowingly fabricated evidence (*i.e.*, Brown’s identification, and the reports supposedly documenting it, the Showup Report and the Case Record), and that Plaintiff’s conviction has been invalidated.¹⁴

¹⁴ Simmons’s actual, uncontested innocence is relevant here because, among other things, it corroborates his account and demonstrates that the evidence inculpatory him in the crime (Brown’s identification) must have been fabricated. Evidence that Simmons is innocent (which Defendants do not contest) corroborates the fact that

Nonetheless, Shobert argues that the Showup Report was not introduced into evidence at trial, and it was not clearly established that an officer who fabricates evidence that was never used against a criminal defendant deprives him of due process. Defs.' Br. at 38. There are many problems with these arguments.

First, the question about the use of the fabricated reports is one about causation; *i.e.*, whether the fabricated evidence harmed Simmons in some way. Because this fact is material, the district court necessarily concluded this threshold has been met. In other words, Shobert disputes the facts about these issues. Simmons was not in the lineup on February 8, 1975; yet, Shobert's Showup Report and the Case Record states that Brown identified Simmons, and Brown's fabricated identification was the only evidence against Simmons at his trial. App.Vol.VI_453, 497-98. Indeed, Brown's fabricated testimony constituted the entire case against Simmons. App.Vol.VI_1277-78, 1361; App.Vol.VII_1487-88, 1490, 1492,

Brown never identified him and a reasonable jury could find that it is therefore more likely Shobert fabricated the Showup Report and the Case Record. *See, e.g., Ayers v. City of Cleveland*, 773 F.3d 161, 169 (6th Cir. 2014) (evidence of innocence relevant to fabrication of evidence claims); *O'Connell v. Alejo*, 2020 WL 5748810, at *9 (D. Colo. Sept. 25, 2020) (similar).

1528-29. A reasonable jury could find that evidence fabricated by Shobert—Brown’s purported identification—was used against Simmons in his criminal proceedings to deprive him of liberty. First, Brown’s fabricated identification as well as the accompanying Showup Report and Case Record were relied on by the prosecutors to arrest and charge Simmons. *Supra*, Statement of the Case (“S.C.”)_VI. Second, Brown’s fabricated identification—which was made up by Shobert and documented in the Showup Report and Case Record—was obviously used against Simmons in his criminal proceedings, resulting in his conviction and deprivation of liberty for nearly 49 years. *Supra*, S.C._VII.

Second, Shobert misunderstands the relevant inquiry. There is no rule that fabricated reports be actually admitted at trial. Instead, “where, as here, the plaintiff was allegedly deprived of a fair trial, the fabricated evidence must be material, meaning there is a reasonable likelihood that without the use of the fabricated evidence, the defendant would not have been deprived of a fair trial.” *Truman*, 1 F.4th at 1236 n.5. Simmons may also prevail on this claim by showing that “there is a reasonable likelihood that without the fabricated evidence, [he] would not have been criminally charged.” *Id.*

These standards are obviously met here. For one, Brown’s false identification—the substance of the reports—was admitted at trial. This was an identification-only case. App.Vol.VI_1277-78, 1361. As a result, and independently dispositive, the prosecutors relied on the fabricated evidence (the assertion that Brown identified Simmons) in order to charge Simmons. *Supra*, S.C._VI. There is also a reasonable likelihood that without the use of the fabricated reports—which resulted in charges being brought and Brown testifying that she had purportedly identified Simmons—Simmons would not have been deprived of a fair trial. *See, e.g., Jackson v. City of Cleveland*, 925 F.3d 793, 816-17 (6th Cir. 2019) (the false statement constituted the prosecutor’s basis for his understanding of what the witness knew; “if [the detectives] had not fabricated [the witness’s] statement, therefore, charges would not have been brought, and, of course, a jury that is never empaneled is a jury that does not return a guilty verdict.”); *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017); *Halsey v. Pfeiffer*, 750 F.3d 273, 294 n.19 (3d Cir. 2014).¹⁵

¹⁵ Shobert’s reliance on *McPherson v. Baltimore Police Dep’t*, 2023 WL 5433011 (D. Md. 2020), an out-of-circuit, fact-specific district court decision, is unavailing. Defs.’ Br. at 48-49. In *McPherson*, the court

Moreover, Shobert misunderstands the value of police reports in a criminal prosecution and how they established materiality. A reasonable jury can easily understand—as other courts have—that “police investigative materials have evidentiary value wholly apart from assisting trial testimony” when they “comprise part of the documentary record before the prosecution and defense” because they can “affect charging decisions, plea bargaining, and cross-examination of the investigating officers.” *Lisker v. City of Los Angeles*, 780 F.3d 1237, 1242 (9th Cir. 2015) (quoting *Gregory v. City of Louisville*, 444 F.3d 725, 741 (6th Cir. 2006) (citing *Ricciuti v. N.Y. City Transit Auth.*, 124 F.3d 123, 127, 130 (2d Cir. 1997) (recognizing a falsification-of-evidence claim for forwarding “false information likely to influence a jury's decision” to prosecutors, although the evidence was not admitted at trial))). The “very existence” of the antecedent acts of fabrication memorialized in police

granted defendants’ summary judgment motion after analyzing the admissibility of various pieces of evidence and finding that plaintiff could not support any of his claims with evidence that would be admissible at trial. *Id.* at *12-17. Here, the district court considered all of Plaintiff’s evidence and did not strike any evidence as inadmissible. Arguments about the admissibility of any evidence are not reviewable in this interlocutory appeal. *Ellis*, 147 F.4th at 1225.

reports “even if not introduced as evidence at trial, affected Plaintiff’s criminal prosecution independent of the officers’ testimony.” *Gregory*, 444 F.3d at 741. The fabrications here undoubtedly harmed Simmons.

2. Clearly Established Law

There is no good-faith argument that a reasonable police officer in 1975 would not have known that he could not falsify or fabricate evidence against a criminal defendant. That principle has been clearly established for over 80 years. *See, e.g., Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942) (allegations of false statements and perjured testimony made under threat by police violates due process); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (same); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (state actors violate due process when they “depriv[e] a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.”); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (same); *Miller v. Pate*, 386 U.S. 1, 7 (1967) (“More than 30 years ago this Court held that the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.”).

In *Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004), this Court held that, ever since *Pyle*, decided in 1942, government officials

have had “fair warning” that the deliberate or reckless falsification or omission of evidence was a constitutional violation. Other Circuits have agreed. *See Halsey*, 750 F.3d at 293 (“it [is] self-evident that a police officer’s fabrication and forwarding to prosecutors of known false evidence works an unacceptable corruption of the truth-seeking function of the trial process”) (cleaned up); *Devereaux v. Abbey*, 263 F.3d 1070, 1075-75 (9th Cir. 2001) (*en banc*) (proposition that there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government is “virtually self-evident,” and citing *Pyle* and *Miller*); *Limone v. Condon*, 372 F.3d 39, 44-48 (1st Cir. 2004) (this right is “self-evident” and was clearly established by the events of that case, 1967, and citing *Mooney*); *see also, e.g., Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958) (when officers procure false testimony it violates the right described in *Mooney* and *Pyle*); *Burks v. Egeler*, 512 F.2d 221, 224 (6th Cir. 1975) (same). That officers cannot make up false evidence against a criminal defendant is self-evident. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *United States v. Lanier*, 520 U.S. 259, 271 (1997).

In order to attempt circumvent this clearly established law, Shobert disputes the facts. He argues that because the Showup Report was not itself introduced into evidence at the criminal trial, fabricated evidence was not used against Simmons to deprive him of due process and a fair trial. Defs.' Br. at 38. But, as discussed above, the material facts are in dispute on this issue; admission of a report into evidence at trial is not required; and the substance of the fabrication was introduced in the criminal proceedings.¹⁶ Finally, Shobert's argument rests on an incorrect premise. Liability for fabricating evidence does not depend on the whims of whether a document is actually admitted at trial but focuses on foreseeability of causing constitutional harm and whether, at the time of the conduct, an officer had fair warning they could violate someone's constitutional rights. *Cf. Monroe v. Pape*, 365 U.S. 167, 189 (1961) (officers are "responsible for the natural consequences of [their] actions"); *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir.

¹⁶ Shobert advances an alternative argument about whether the Lineup Report was fabricated. Defs.' Br. at 38-39. To be clear, Plaintiff does not argue that the Lineup Report was *fabricated*. Plaintiff argues that the exculpatory and impeaching Lineup Report was *suppressed*, App.Vol.II_451-52, and the Showup Report (App.Vol.II_453), Case Record (App.Vol.II_497-98), and Brown's identification were *fabricated*.

2020) (collecting cases concerning immunity focusing on whether the law at the time of the *conduct* provided fair warning their alleged conduct was unconstitutional). At the time of Shobert’s conduct—1975—it was clear that it would violate the Constitution to fabricate evidence and use that evidence to prosecute someone for a crime. That is all that is required.

B. Shobert’s Suppression of Exculpatory and Impeaching Evidence

1. Disputed Facts

To establish his claim under *Brady v. Maryland*, 373 U.S. 83 (1963), Plaintiff must show “1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material.” *Smith v. Sec. of New Mexico Dep’t of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995). “For purposes of *Brady*, ‘[k]nowledge by police or investigators is ... imputed to the prosecution.’” *Id.*; *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). The disclosure obligation includes impeachment evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Finally, evidence must be material; *i.e.*, “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435; *United States v. Bagley*, 473 U.S.

667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). To determine materiality, the suppressed evidence must be viewed in relation to the record as a whole. 473 U.S. at 827. “[W]hat might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict.” *Id.* When multiple pieces of information or evidence are at issue, the question of materiality must be considered cumulatively, rather than with each piece in isolation. *Wearry v. Cain*, 577 U.S. 385, 394 (2016). The district court correctly denied Shobert qualified immunity, for the reasons discussed below.¹⁷

a. Shobert knowingly or recklessly suppressed exculpatory information

A reasonable jury could find two types of exculpatory evidence that Shobert suppressed: (1) Shobert’s suppression of the fact that he fabricated Brown’s identification of Simmons and the “results” of the

¹⁷ Defendants make a confused argument about whether the Showup Report was exculpatory. Defs.’ Br. at 45-46. Plaintiff does not contend that it was. *See* n.16. Thus, Shobert’s argument about the Showup Report on pages 45-46 can be disregarded.

February 8, 1975 lineup in the Showup Report and the Case Record, and (2) Shobert's suppression of the fact that Brown had identified two other individuals who were not Simmons in the February 7 and 8, 1975 lineups, which is shown in the Lineup Report. App.Vol.X_2421 n.3; *supra*, S.C_IV.-VI.; *Avery*, 847 F.3d at 443 (fabrication of evidence constituted impeachment evidence that was suppressed); *Kyles*, 514 U.S. at 445 (“Damage to the prosecution’s case would not have been confined to evidence of the eyewitnesses, for Beanie’s various statements would have raised opportunities to attack ... the thoroughness and even the good faith of the investigation.”).

Shobert does not contest that the information contained in the Lineup Report (and the report itself) was exculpatory and impeaching.¹⁸ Defs.’ Br. at 44-47. And a reasonable jury could find that this information was exculpatory and impeaching, because it was evidence that Brown identified other individuals who were not Simmons in the lineups. Shobert fixates on the idea that he did not write the report, Garrett did, Defs.’ Br. at 45-46, but: (1) there is certainly enough evidence for a

¹⁸ Any argument to the contrary has been waived and cannot be raised for the first time in reply. *Sanders v. Southwestern Bell Telephone, L.P.*, 544 F.3d 1101, 1104 n.3 (10th Cir. 2008).

reasonable jury to conclude that Garrett and Shobert created that report together because they conducted the lineups and interviews of witnesses regarding the lineups together, App.Vol.II_451-52, and (2) it is irrelevant whether they wrote the report together. The relevant fact is that *Shobert knew Brown did not identify Simmons in the lineups because he was present for the lineups, conducted the lineups, and documented the lineups afterwards*—it is this exculpatory and impeaching information that Shobert withheld from prosecutors. On February 7, 1975, Brown identified #6 as the one who spoke to her and #__ as the one she did not see that well. App.Vol.II_451. According to the Case Record, Simmons was in position #2 on February 7, 1975, not position #6 or #___. App.Vol.II_497-98. Also, Simmons was not present in the lineup on February 8, 1975, so given that Brown identified the “same two” on February 8 as February 7, she did not identify Simmons on either day, regardless of what position he was in during the lineup on February 7. App.Vol.II_451. (The Case Record also states that Brown picked out the same two individuals, who were in positions 2 and 4, in both lineups. App.Vol.II_498.) And, of course, since Simmons wasn’t in the lineup on February 8, Brown couldn’t have picked him out on February 8, 1975.

App.Vol.X_2421 (n.6). Because Shobert conducted the lineups, he knew who was and was not in the lineups, and he knew who the witnesses picked out (if anyone) because he documented that information for both lineups. App.Vol.X_2421; App.Vol.VI_1373; App.Vol.II_451-53.

Police officers are required to disclose all exculpatory and impeachment information that they are aware of to prosecutors, and that includes facts that they know (i.e., Brown did not identify Simmons in any lineups but instead identified different individuals), whether or not it is memorialized in the form of a report. *Giles v. State of Maryland*, 386 U.S. 66, 74-81 (1967) (officers were constitutionally obligated to disclose exculpatory evidence that called into question the alleged victim’s credibility, including what she told the police); *Kyles*, 514 U.S. at 441-44 (the purported identifications by witnesses “would have been severely undermined by use of their suppressed statements”); *Smith*, 50 F.3d at 831 (holding that information a police officer had regarding the identity of an alternative suspect and was not disclosed to the criminal defendant was imputed to the prosecution under *Brady*); *Fontenot v. Crow*, 4 F.4th 982, 1061 (10th Cir. 2021) (“Evidence suppressed by the state includes ‘evidence known only to police investigators and not to the prosecutor.’”)

(quoting *Kyles*, 514 U.S. at 438); *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846-47 (4th Cir. 1964) (holding that an officer's failure to disclose exculpatory evidence to a prosecutor violates a defendant's due process rights); *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6th Cir. 2009) (discussing police duty to disclose material information).

Shobert argues that he had no responsibility to disclose the exculpatory information to the prosecutor because he thought Garrett would do it by giving the Lineup Report to the prosecutor. Defs.' Br. at 47 (citing App.Vol.II_303-04). But this assertion relies on Shobert's declaration, which the district court refused to credit because it contradicted his deposition testimony that he remembered nothing. App.Vol.X_2423 (n.9). At his deposition, Shobert disclaimed any memory of anything that happened in this case, including any conversations with Garrett, the lineups, or the Lineup Report. App.Vol.VI_1151, 1158, 1161, 1163, 1173. Shobert does not know whether the Lineup Report was given to the prosecutor. App.Vol.VI_1174. Moreover, a reasonable jury could infer from Shobert's fabrication of Brown's identification that Shobert knowingly, deliberately, or recklessly withheld Brown's identification of other individuals from the prosecutor. These two facts are flip sides of the

same coin. Shobert's refusal to accept the facts as found by the district court and view the facts in Plaintiff's favor deprives this Court of jurisdiction and contravenes the summary judgment standard.

The two out-of-Circuit, non-precedential cases Shobert cites on page 47 are inapposite. In *Kelly v. Curtis*, 21 F.3d 1544, 1552 (11th Cir. 1994), the officer had reason to believe the exculpatory lab reports were known to the prosecutor's office. The officer did not have reason to know that the prosecutor's office did not get the evidence until months later. Here, as the district court found, and viewing the record favorably to Plaintiff, the prosecutors never received the exculpatory and impeaching information in the Lineup Report—that Brown had not, in fact, identified Simmons but instead identified two other individuals. Likewise, *Polk v. Nugent*, 554 F. App'x 795, 799 (11th Cir. 2014), an unpublished case, is distinguishable because, unlike here, the evidence at issue was actually placed into a case file. It merely stands for the proposition that negligence is not sufficient to support a *Brady* claim.

b. The alternative suspect information was material

Brown's fabricated identification of Simmons was the only evidence presented against him at trial. The entire case rested on her

identification. *Supra*, S.C._VII. Thus, any information that called Brown's identification into question was material. There was a reasonable probability that the suppressed information—that Brown did not identify Simmons, her identification was fabricated by Shobert, and Brown had actually identified two other individuals during the lineups on February 7 and 8, 1975—would have affected the outcome of the trial. Inconsistent witness statements are especially important when the State's case rests on a single witness. *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986) (evidence impeaching the two identification witnesses “would take out the heart of the State's case and greatly undermine the guilty verdicts”). Shobert's fabrication of Brown's identification could have been used not only to impeach Brown, but also “attack ... the thoroughness and even the good faith of the investigation.” *Kyles*, 514 U.S. at 445-46; *Bowen*, 799 F.2d at 613 (“The withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady*

violation”). Suppression of the fact that evidence was fabricated is conclusively material. *See Giglio*, 405 U.S. at 154-55.

Defendants argue that the information in the Lineup Report was not material because Plaintiff’s 1997 federal habeas petition was denied on this ground. Defs.’ Br. at 46. They do not argue that the habeas decisions have any preclusive effect but only that they are persuasive.¹⁹ *Id.* For several reasons, this argument lacks merit.

¹⁹ Thus, Defendants have waived any argument that the habeas decisions could have any preclusive effect. *M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 468 n.7 (10th Cir. 2009) (arguments raised for the first time in reply are waived); *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1297 (10th Cir. 1992) (party invoking preclusion has burden of proof). In the “laches” section of their brief, Defendants assert that Simmons’s “action” is “barred” by the R&R. Defs.’ Br. at 70-71. But this argument is undeveloped and cites no legal authority whatsoever. Thus, this argument is waived. It is also wrong. *See United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992) (“A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.”); *Bermudez v. City of New York*, 790 F.3d 368, 374 n.2 (2d Cir. 2015) (in § 1983 case, declining to give preclusive effect to a finding from a prior federal habeas proceeding, particular where the government conceded plaintiff’s innocence after that habeas proceeding); *Fontenot*, 4 F.4th at 1063 (regardless of whether Oklahoma law considered any reports to be “work product” at the time, Oklahoma courts still recognized that any such ‘privilege may not be applied in derogation of a criminal defendant’s constitutional rights to disclosure of evidence favorable to the defendant.’”) (citation omitted).

First, the habeas opinion contains no discussion of materiality. *Simmons v. Ward*, 198 F.3d 258, 1999 WL 983090 (10th Cir. 1999) (unpublished). The Court denied Simmons’s request for a certificate of appealability (which is an entirely different standard of review than the one before the Court here on his § 1983 claims) and dismissed his appeal, stating that the “district court’s analysis of this case is correct and that appellant has not made a substantial showing of the denial of a constitutional right.” *Id.* at *1. The district court “concluded that [Simmons] had not shown cause for his failure to raise the *Brady* issues on direct appeal and that those issues were procedurally barred.” *Id.* There was no consideration of materiality by the Tenth Circuit—indeed, the *Brady* factors are not even mentioned—and there is therefore no precedential or persuasive value to the Court’s denial of the certificate of appealability. The Court decided that appeal on an entirely different question.

Second, the district court’s decision affirming the magistrate judge’s report and recommendation (“R&R”) also contains nothing of precedential or persuasive value. It contains no analysis or discussion. App.Vol.I_106-07.

Third, the R&R has no precedential or persuasive value. *See* App.Vol.I_88-105. The Oklahoma court which granted Plaintiff's post-conviction claims in 2023 knew that the prior habeas decision existed and still reached a diametrically opposite result. App.Vol.VIII_1795-97. That is because the state court had a different record with different evidence than what was presented to the federal courts in the 1997 habeas petition. The R&R was issued without an "evidentiary hearing." App.Vol.I_88. The R&R recounted that at Plaintiff's trial, Brown "testified she had never identified anyone other than the defendants [Simmons and Roberts] in the lineups." App.Vol.I_89. The R&R continued, "Petitioner alleges that this report is evidence that Brown was uncertain about the identity of the suspects she had identified and that Brown may not even had identified petitioner on February 7, 1975, since she testified she first identified him on February 8, 1975." App.Vol.I_99. In other words, the record before the habeas court in 1997 did not show that Brown *never identified Plaintiff at all during any lineup*. But that is what the evidence now shows: Brown never identified Plaintiff in any lineup. Nor did the record in 1997 contain evidence that Brown's identification of Plaintiff was fabricated by Shobert—evidence which we

now have. Indeed, the R&R assumed that Brown identified Plaintiff, even if her identification was tentative. App.Vol.I_101-02. This is very different from what the record now shows, and what the district court concluded a reasonable jury could find.

Today, a reasonable jury could conclude that Simmons was not in the February 8, 1975 lineup; Brown's identification was fabricated; and Brown identified two other individuals on February 7 and 8. Moreover, the record now includes evidence that: (1) Lineup Report contained information favorable to Simmons, (2) the prosecutors did not have it, and (3) if they had it, they would have disclosed it to the defense. *Supra*, S.C._V.-VII. And, the record includes evidence that Brown's purported identification was the entire case against Simmons. *Supra*, S.C._VII. *See Kyles*, 514 U.S. at 441 (where "essence of the State's case" was the testimony of eyewitnesses, disclosure of their conflicting statements would have "substantially reduced or destroyed" the value of their testimony); *Bowen*, 799 F.2d at 610-11 (evidence impeaching witnesses was material where the witnesses were the "heart of the State's case"); *United States v. Robinson*, 39 F.3d 1115, 1116-19 (10th Cir. 1994) (fact that witness provided description of person who did not match defendant

was material where the evidence against defendant at trial “was hardly overwhelming” and the omitted information would have “substantially weaken[ed]” the case against the defendant’). The reason that the magistrate judge in 1997 found (in dicta) that the Lineup Report was not material was because it had a different understanding of what that report showed, based on the evidence available at the time. Here, as the district court found, a reasonable jury could conclude differently, based on the current evidence.

Finally, Defendants’ reliance on language from *Wilson v. Layne*, 526 U.S. 603, 618 (1999), and *Pearson v. Callahan*, 555 U.S. 223, 245 (2009), is misplaced. Defs.’ Br. at 46. In those cases, the Supreme Court held that Circuit splits on the relevant constitutional question meant that officers should not be subject to money damages because the law was not clearly established. That is not the case here. As discussed below, the law has been clearly established since long before 1975 that police officers must disclose exculpatory and impeachment evidence to prosecutors, and any reasonable officer in Shobert’s position would have known that his conduct did not comply with the law. It is a *fact question* whether the suppression of the Lineup Report was material or prejudiced Plaintiff.

See, e.g., Drumgold v. Callahan, 707 F.3d 28, 40 (1st Cir. 2013).²⁰

Defendants' challenge to this fact question is a challenge to the sufficiency of the evidence found by the district court, which, once again, is unreviewable in this interlocutory appeal.

2. Clearly Established Law

It was clearly established long before 1975 that a police officer violates due process by suppressing exculpatory and impeachment evidence and permitting false testimony to be given at a defendant's trial. *Pierce*, 359 F.3d at 1299 (“*Long before* the events in question [in 1986], the Supreme Court held that a defendant's due process rights are implicated when the state knowingly uses false testimony to obtain a conviction, [citing *Pyle* (1942)], or withholds exculpatory evidence from the defense, [citing *Brady* (1963)].”) (emphasis added); *Giles*, 386 U.S. at 74-81 (suppression of police reports containing favorable witness statements violated criminal defendant's due process rights); *Mooney*, 294 U.S. at 112; *Pyle*, 317 U.S. at 215-16; *Brown*, 297 U.S. at 286; *Brady*,

²⁰ Even if materiality were considered a mixed question of fact and law, it is unreviewable in an interlocutory appeal like this one. *Clark v. Louisville-Jefferson Cnty. Metro Gov't*, 130 F.4th 571, 580-81 (6th Cir. 2025).

373 U.S. at 86-87; *Giglio*, 405 U.S. at 153-54; *Barbee*, 331 F.2d at 846; *see Bledsoe v. Carreno*, 53 F.4th 589, 613 (10th Cir. 2022) (citing *Pierce* and *Brady* for the proposition that it was clearly established “long before” 1986 that police officers violate due process when they withhold exculpatory evidence); *Smith*, 50 F.3d at 824 (explaining that the “prosecution” for *Brady* purposes includes “law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture”) (citing *Brady*, *Giglio*, *Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980), *Barbee*, 331 F.2d at 846, and *United States v. Buchanan*, 891 F.2d 1436, 1442 (10th Cir. 1989) (“Since ... investigative officers are part of the prosecution, the taint is no less if they, rather than the prosecutors, were guilty of nondisclosure.”)) (cleaned up); *Bowen*, 799 F.2d at 610-11 (police suppression of information that would impeach identification testimony violates due process); *Hilliard v. Williams*, 516 F.2d 1344, 1349 (6th Cir. 1975) (police violated *Brady* obligation by withholding exculpatory report); *Smith v. Florida*, 410 F.2d 1349, 1350-51 (5th Cir. 1969) (“[I]t makes no difference is the withholding is by the prosecutor or by officials

other than the prosecutor”); *Clarke v. Burke*, 440 F.2d 853, 855 (7th Cir. 1971) (similar).

Several other Circuits have held that it was clearly established by 1975 that police violate due process when they suppress exculpatory or impeachment evidence. *Jackson*, 925 F.3d at 823-24 (clearly established by at least 1975); *Moldowan*, 578 F.3d at 381-82 (noting that decisions recognizing police obligation to disclose exculpatory evidence “date[s] back as far as 1964”); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992) (clearly established by 1971).

Shobert suggests (but does not clearly argue) that law enforcement officers had no obligation to disclose exculpatory evidence until *Kyles* was decided in 1995. Defs.’ Br. at 37. This argument has been rejected by this Circuit and numerous other Circuits. *Pierce*, 359 F.3d at 1297-1300; *Moldowan*, 578 F.3d at 382; *Jackson*, 925 F.3d at 823-24; *Carrillo v. Cnty. of Los Angeles*, 798 F.3d 1210, 1220-22 (9th Cir. 2015); *Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988); *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996); *Owens v. Baltimore City State’s Attorneys Office*, 767 F.3d 379, 396, 398-402 (4th Cir. 2014).

Shobert argues that this Circuit “finally clarified in 2011 that a police officer’s only obligation under *Brady* is to turn exculpatory evidence over to the prosecutors.” Defs.’ Br. at 37 (citing *Tiscareno v. Anderson*, 639 F.3d 1016, 1023 (10th Cir. 2011)). This is not accurate. The question in *Tiscareno* was what level of intent is required to hold an investigator liable under § 1983 for a *Brady* violation. *Id.* The Court noted *Pierce* had already held that “knowing and intentional failure of an investigator to turn over exculpatory evidence creates liability,” and held that it was “clearly established that an investigator must not knowingly or recklessly cause a *Brady* violation.” *Id.* at 1023. Thus, *Tiscareno* acknowledged that *Pierce* had already found it was clearly established “long before” 1986 that an investigator could not knowingly or intentionally withhold exculpatory evidence.²¹

²¹ Neither *Moore v. Illinois*, 408 U.S. 786 (1972), nor *Weatherford v. Bursey*, 429 U.S. 545 (1975)—cases cited by Shobert—are relevant. In *Moore*, the evidence at issue was not exculpatory or impeaching. 408 U.S. at 795-97. *Weatherford* is inapposite. That case merely held that *Brady* does not require the prosecution to “reveal before trial the names of all witnesses who will testify unfavorably.” *Id.* at 559.

C. Alternatively, Shobert Employed Unduly Suggestive Identification Procedures

Simmons maintains that he was not in the February 8, 1975 lineup. However, as the district court observed, his memory of which lineup (February 7 or 8) he appeared in has changed over the years. App.Vol.X_2423 (n.9).²² If a jury finds that Simmons participated in the lineup on February 8 rather than February 7, then he has a claim for unduly suggestive identification.

1. Clearly Established Law

The Supreme Court has recognized since 1967 that an identification procedure “so unnecessarily suggestive and conducive to irreparable mistaken identification,” violates due process. *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *see also United States v. Wade*, 388 U.S. 218 (1967) (explaining that there is “grave potential for prejudice” in a pretrial lineup, providing examples of suggestive lineups, and concluding that the accused have a right to counsel during a post-indictment lineup). Following *Stovall*, the Court decided several cases addressing unduly suggestive identification procedures, culminating in *Neil v. Biggers*, 409

²² Simmons has been consistent that he was only ever in one lineup.

U.S. 188 (1972). *See Simmons v. United States*, 390 U.S. 377, 384-85 (1968) (concluding that a photo identification procedure was improper when it was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification”); *Foster v. California*, 394 U.S. 440, 443 (1969) (excluding an eyewitness identification obtained by procedures that “made it all but inevitable that [the witness] would identify [the defendant]”); *Coleman v. Alabama*, 399 U.S. 1, 4 (1970) (explaining that an unduly suggestive identification claim “must be determined on the totality of the surrounding circumstances”).

In *Neil*, the Court explained that “[i]t is the likelihood of misidentification which violates a defendant’s right to due process,” and instructed courts to consider whether under the “totality of the circumstances,” the identification was reliable, or whether there was a “substantial likelihood of misidentification.” 409 U.S. at 188, 198-99, 201. The “central question,” the Court explained, is “whether under the totality of the circumstances [an] identification was reliable even though the confrontation procedure was suggestive.” *Id.* at 199. The Court

provided several factors to be considered when evaluating the likelihood of misidentification, including:

the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Id. at 199-200. *Neil* instructed courts to assess, “on a case-by-case basis, whether improper police conduct created a ‘substantial likelihood of misidentification.’” *Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012) (quoting *Neil*, 409 U.S. at 201). Ultimately, “[w]here the indicators of a [witness’] ability to make an accurate identification’ are ‘outweighed by the corrupting effect’ of law enforcement suggestion,” there is a due process violation. *Id.* (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 116 (1977)).

The Tenth Circuit considered several cases involving allegedly unduly suggestive identifications during this same time period. *See, e.g., Hanks v. United States*, 388 F.2d 171, 173-74 (10th Cir. 1968) (concluding that there was no due process violation when the witness had ample opportunity to observe his attacker, identified him in a photo lineup, and then was present for a conversation between the assailant

and the law enforcement officer); *United States v. Steel*, 458 F.2d 1164, 1165-66 (10th Cir. 1972) (assessing the validity of a lineup procedure given the totality of the circumstances). And notably, in *Martinez v. Turner*, this Court found that because the defendant “stood out suggestively and prominently in the line-up” for reasons of height and skin tone, the lineup was improperly suggestive. 461 F.2d 261, 264 (10th Cir. 1972).

At the time of this lineup in 1975, therefore, the law was clearly established that an unduly suggestive identification—based on the totality of the circumstances surrounding that identification—violated due process. For purposes of qualified immunity, there need not be a prior case with the exactly the same facts, it is enough that the law “is well developed enough to inform the reasonable official that his conduct violates that law.” *Patrick v. Miller*, 953 F.2d 1240, 1249 (10th Cir. 1992); *see also Truman*, 1 F.4th at 1235 (“[O]ur analysis is not a scavenger hunt for prior cases with precisely the same facts, and a prior case need not be exactly parallel to the conduct here for the officials to have been on notice

of clearly established law.”) (cleaned up). Shobert had fair warning in 1975 that an unduly suggestive lineup would violate Simmons’s rights.²³

2. Disputed Facts

The lineup on February 8, 1975—if a jury found that Simmons was present for it—*was* unduly suggestive.²⁴ As an initial matter, Brown had only a brief period to observe the partially disguised shooter before she was shot in the head and was then unable to see anything at all, as Shobert well knew. App.Vol.VIII_1819-20; App.Vol.II_358-60. Brown suffered a serious head and brain injury as a result of the incident, compromising her memory and recall. *Id.* This was compounded by the fact that Brown was shown at least eight to nine different lineups, often compromised of several suspects in addition to fillers, and in the presence of other witnesses. App.Vol.VIII_1820. In addition to the known factors

²³ Shobert’s citation to *Lemons v. Lewis*, 963 F. Supp. 1038, 1048 (D. Kan. 1997), is non-precedential and distinguishable because the suspect and fillers were similar in height, weight, and facial hair.

²⁴ Whether Simmons was in the lineup on February 7 or 8 does not affect the fabrication or *Brady* claims. If a jury finds that Simmons was in the lineup on February 8 but not February 7, Brown still could not have picked him out, because she picked out the same two individuals on both days, and he was only in one lineup. Either way, the Lineup Report is exculpatory and Brown’s purported identification of Simmons was fabricated by Shobert.

indicating that Brown could not possibly make a reliable identification, the February 8 lineup itself was flawed because the height of the men was significantly different. Simmons was 5'7" while other men in the lineup were over six feet. App.Vol.VIII_1819-20; App.Vol.II_453.

As Plaintiff's police practices expert (Andrew Scott) opined, the lineups that Shobert presented to Brown were flawed and inconsistent with well-established lineup procedures for law enforcement in 1975. App.Vol.VIII_1816-20. Scott gave nine reasons why: (1) Brown sustained a severe gunshot wound to her head and would have suffered damage to her memory; (2) Brown was shown multiple lineups, which can cause a witness to be confused and suffer from fatigue; (3) Brown viewed the lineups with other witnesses at the same time, leading the process to be contaminated and unreliable; (4) the height of the Patterson brothers was drastically different than the other four individuals (including Simmons), which forced the participants to focus on the remaining four suspects given their height; (5) Simmons and Roberts were placed in the lineup together as opposed to individually, which increased the odds that the wrong suspect(s) would be selected; (6) the Patterson brothers should have been separated and placed in separate lineups with other

participants of similar height and weight; (7) Shobert failed to document and account for every lineup presented to witnesses in this manner; (8) there was no evidence that the witnesses were provided admonishments advising that their suspect may or may not be in the lineup; and (9) during the multiple lineups, Brown picked other subjects based on their facial features, but this was never memorialized in any reports authored by Shobert or other officers. App.Vol.VIII_1820.

Even assuming that Brown identified Simmons in any lineups, as Dr. Franklin opined, those identifications were highly unreliable. SA_5. In this case, there were many observational and physical factors shown by research to undermine perception of and memory for strangers' faces, thereby diminishing the evidentiary value of any eyewitness identification that followed. *Id.* These factors included high error rates associated with stranger identification, limited opportunity to view, divided attention, partial disguise, increased risk of misidentification due to cross-race identification, Brown being on pain medication, a delay in when the identification procedures were conducted, composite sketches which were harmful to memory, non-blind administration of the lineups, multiple suspects in a single lineup and poor filler qualify, clothing bias

and suggestive showup of an object, and co-witness contamination. SA_10-30, 34-44, 48. Moreover, the descriptions of the men that Brown provided after recovering from her traumatic brain injury, as well as her supposed identification of Simmons, was very likely influenced by her exposure to multiple forms of post-event suggestion. SA_5, 48.

Shobert disputes these facts. *See* Defs.' Br. at 51-52 (citing defense expert Wallentine to contradict Plaintiff's experts and citing an expert (Carlson) who was never even disclosed by Defendants). These arguments over evidence sufficiency are unreviewable in this appeal.

Because Shobert is not entitled to qualified immunity on Simmons's unduly suggestive identification claim, the district court properly denied summary judgment.

IV. A Reasonable Jury Could Find that Shobert Violated Simmons's Clearly Established Fourth Amendment Right Not to Be Detained without Probable Cause

To succeed on his Fourth Amendment claim, Plaintiff must show that 1) Defendants caused a criminal proceeding to be commenced or continued against Plaintiff that resulted in Plaintiff being deprived of his liberty or detained; and 2) there was no probable cause or commencing or continuing that criminal proceeding. *Manuel v. City of Joliet*, 580 U.S.

357 (2017); *Margheim v. Buljko*, 855 F.3d 1077 (10th Cir. 2017). This Court has sometimes described this claim as a Fourth Amendment “malicious prosecution” claim and included additional common law elements: 1) defendant caused plaintiff’s continued confinement or prosecution; 2) the original action terminated in the plaintiff’s favor; 3) no probable cause supported the arrest, confinement, or prosecution; 4) malice; and 5) damages. *Handy v. Dobbin*, 2022 WL 5067710, at *3 (10th Cir. Oct. 5, 2022); *Thompson v. Clark*, 596 U.S. 36, 42 (2022); *Bledsoe*, 53 F.4th at 614. The district court found material disputes of fact requiring denial of Shobert’s claim of qualified immunity.

As a threshold matter, Shobert argues that Plaintiff has no Fourth Amendment claim and that he has to prove a Fourteenth Amendment substantive due process claim that involves shocking the conscience. Defs.’ Br. at 52-53. He misunderstands the law. *Manuel* explains that a plaintiff has a Fourth Amendment claim when he is detained pretrial without probable cause. The Supreme Court expressly held that legal process going forward without probable cause does not “extinguish the detainee’s Fourth Amendment claim—or somehow ... convert that claim into one founded on the Due Process Clause.” 580 U.S. at 367; *Chiaverini*

v. City of Napoleon, Ohio, 602 U.S. 556, 563 (2024) (“if an invalid charge—say, one fabricated by police officers—causes a detention either to start or to continue, then the Fourth Amendment is violated.”); *see Bledsoe*, 53 F.4th at 614 (recognizing Fourth Amendment claim for wrongfully convicted plaintiff); *see also Coones v. Unified Gov’t of Wyandotte Cnty./Kansas City*, 2024 WL 4345819, at *18-22 (D. Kan. Sept. 30, 2024); *Atchison v. City of Tulsa*, 2025 WL 2444597, at *10 (N.D. Okla. Aug. 25, 2025). After a trial and conviction, additional damages come from a Fourteenth Amendment claim. *Manuel*, 580 U.S. at 369 n.8.

A reasonable jury could find in Plaintiff’s favor. Shobert’s arguments otherwise contest the facts. For example, he argues that Plaintiff cannot prove lack of probable cause because “it is undisputed that Brown identified him as the murder suspect.” Defs.’ Br. at 54. That is disputed. There was no probable cause supporting the arrest, continued confinement or prosecution because Brown never identified Simmons in any lineups, and Shobert knew it because he was there. Likewise, Shobert caused Simmons’s continued confinement or prosecution because he fabricated Brown’s identification (a fabrication he documented in the Showup Report and Case Record). *Id.* Probable cause

cannot be based on fabricated evidence. *Manuel*, 580 U.S. at 919; *Bledsoe*, 53 F.4th at 614. There was no “arguable” probable cause because Shobert made up any probable cause (Brown’s supposed identification), and Shobert is not entitled to qualified immunity. *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014).²⁵

V. A Reasonable Jury Could Find that Shobert Conspired to Violate Plaintiff’s Constitutional Rights

To succeed on his civil conspiracy claim, Plaintiff must show the “combination of two or more persons acting in concert,” and “a meeting of the minds or agreement among the defendants.” *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004). “Frequently a conspiracy must be proven with circumstantial evidence because rarely will there be direct evidence of an express agreement among all the conspirators to conspire.” *Snell v. Tunnell*, 920 F.2d 673, 702 (10th Cir. 1990) (cleaned up).

Here, a reasonable jury could find that Shobert and Garrett conspired to violate Plaintiff’s constitutional right to due process under

²⁵ Shobert does not argue that the law was not clearly established in 1975 that a suspect could not be detained or deprived of liberty without probable cause. *See* Defs.’ Br. at 33-44, 52-54. Any attempt to argue this in reply is waived.

the Fourteenth Amendment and the Fourth Amendment right not to be detained without probable cause. First, there is evidence from which Shobert could be found liable on the underlying constitutional claims, as discussed above. Second, there is sufficient evidence from which a reasonable jury could find an agreement between Shobert and Garrett. According to the Lineup Report, Shobert and Garrett were both present for the lineups on February 7 and 8. App.Vol.II_451. They both knew who the witnesses identified (and did not identify—Simmons). *Id.* Garrett and Shobert also talked after the witnesses left. *Id.* Yet, the Case Record contains information that claims Brown identified Simmons on February 7 and 8 when she did not, and Shobert’s Showup Report states that Brown identified Simmons in the lineup on February 8 when (according to Simmons) she could not have. App.Vol.II_453, 497-98. In sum, both Shobert and Garrett knew that Brown identified other individuals in the lineups, Shobert wrote up a false report about Brown’s identification, and they together wrote a Case Record containing this false information knowing that they would give it to the prosecutors to file charges.

Shobert’s argument for qualified immunity relies wholly on disputed facts. Defs.’ Br. at 56 (repeatedly asserting there is “no evidence”

of a plan or agreement between Shobert and Garrett). This challenge to evidence sufficiency is unreviewable.

Shobert's argument that the law was not clearly established on Simmons's conspiracy claim rests on his assertion that he is entitled to qualified immunity on the underlying substantive claims. Defs.' Br. at 44. But because Shobert is not entitled to qualified immunity on the underlying claims, he is not entitled to qualified immunity on the conspiracy claim.

VI. Defendants' Laches Argument Is Unreviewable in This Appeal and Meritless

Laches is an equitable doctrine which "bars a party's dilatory claim" when there is "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1090-91 (10th Cir. 2014). The district court implicitly rejected the City's laches argument. That decision is reviewed for abuse of discretion. *Id.* at 1090.

However, this laches argument is not separable from the merits, and so it is not reviewable in this interlocutory appeal. Even if the Court were to consider laches, the district court did not abuse its discretion

because it simply does not apply.²⁶ Plaintiff was in no way dilatory in filing this lawsuit because Plaintiff's claims did not accrue until his conviction was vacated and the charges against him were dismissed in 2023. He could not possibly have filed this suit before then—he was *Heck*-barred. “An accrual analysis begins with identifying ‘the specific constitutional right,’ alleged to have been infringed.” *McDonough v. Smith*, 588 U.S. 109, 114 (2019). Plaintiff brings due process claims for the fabrication and suppression of evidence, which violated his right to a fair trial. *See Smalls v. Collins*, 10 F.4th 117, 132 (2d. Cir. 2021). Because a judgment for Plaintiff on fair trial claims would “necessarily imply the invalidity of his conviction or sentence,” *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), these claims accrued when the underlying criminal charges were dismissed, *Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999).

²⁶ Only the City raised laches as an affirmative defense in its answer. App.Vol.I_59. Because Shobert did not raise it, App.Vol.I_234-36, he has waived it. Fed. R. Civ. P. 8(c) (affirmative defenses such as laches must be pled); *Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994) (“Failure to plead an affirmative defense results in a waiver of that defense.”).

Defendants ignore clear Supreme Court precedent on this point. *See* Defs.' Br. at 65-70. When a § 1983 plaintiff brings a claim predicated on the fabrication of evidence, like Plaintiff does here, the statute of limitations "does not begin to run until the criminal proceedings against the defendant (*i.e.*, the § 1983 plaintiff) have terminated in his favor." *McDonough*, 588 U.S. at 114; *see also id.* at 120, 125.

The logic of *McDonough* applies to *Brady* claims as well, as Circuit courts have routinely recognized. *See, e.g., Camm v. Faith*, 937 F.3d 1096, 1111 (7th Cir. 2019) (*Brady* claims accrue at favorable termination); *accord Jordan v. Blount Cnty.*, 885 F.3d 413, 415-16 (6th Cir. 2018); *Bradford v. Scherschligt*, 803 F.3d 382, 387 (9th Cir. 2015); *Owens*, 767 F.3d at 390. Because *Brady* claims are fair trial claims, if they accrued before the criminal proceedings were terminated in a defendant's favor, the possibility of conflicting judgments would arise, as well as the other practical considerations discussed in *McDonough*. Plaintiff's conviction was vacated on July 20, 2023, App.Vol.VIII_1793-97, and the charges against him were dismissed on September 19, 2023, App.Vol.VIII_1801-02, at which time his claims accrued. He filed this

lawsuit on January 26, 2024, within the two-year statute of limitations, and just four months after his claims accrued. App.Vol.X_2421.

VII. The City's Appeal Must Be Dismissed

A. There Is No Jurisdiction over the City's Appeal

This Court should decline to assert pendent jurisdiction over the City's appeal of the district court's denial of its motion for summary judgment.²⁷ The City has no independent basis to file an interlocutory appeal because while “an interlocutory appeal is proper under certain circumstances from a district court's denial of qualified immunity, no such right of appeal applies to [a municipality's] appeal from the denial of summary judgment.” *Cox*, 800 F.3d at 1255 (internal quotation marks and citations omitted). The City is not entitled to qualified immunity. *Owen v. City of Independence*, 445 U.S. 622 (1980). And while this Court may exercise pendent jurisdiction “over an otherwise nonfinal and

²⁷ “The party seeking pendent jurisdiction has the burden to support an assertion that [this Court] may exercise it.” *Bustillos v. City of Artesia*, 98 F.4th 1022, 1037 (10th Cir. 2024) (internal quotations omitted). The City offers only two sentences of any substance in support of its assertion that this Court should exercise pendent jurisdiction and fails to meet its burden. *Id.* at 1038 (“by providing [the Court] with bare assertions rather than analytical guidance, an appellant effectively asks us to make arguments for them that they did not make in their appellate briefs, which we will not do.”) (cleaned up); Defs.' Br. at 3.

nonappealable lower court decision that overlaps with an appealable decision,” doing so is “generally disfavored” and should only be done “sparingly.” *Cox*, 800 F.3d at 1255-56 (internal quotation marks and citations omitted); *see also Bryson v. Gonzalez*, 534 F.3d 1282, 1285-86 (10th Cir. 2008). Pendent jurisdiction is “disfavored in qualified immunity appeals.” *Ellis*, 147 F.4th at 1224 (quoting *Wise v. Caffey*, 72 F.4th 1199, 1202 n.2 (10th Cir. 2023)). This is because “loosely allowing pendent appellate jurisdiction would encourage parties to parlay ... collateral orders into multi-issue interlocutory appeal tickets.” *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 49-50 (1995).

The City asserts—with little analysis—that its appeal is “inextricably intertwined,” with this Court’s decision on Shobert’s appeal. Defs.’ Br. at 3. In order to be “inextricably intertwined,” for purposes of pendent jurisdiction, a claim must be “coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal *necessarily* resolves the pendent claim as well.” *Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995). But the City’s argument—like Shobert’s—revolves solely around its version of the facts. Defs.’ Br. at 71-72 (arguing that the

City cannot be held liable because Shobert did not commit a constitutional violation). This Court has no jurisdiction over fact-based challenges to the district court's finding that a reasonable jury could conclude Defendants violated Plaintiff's constitutional rights.

Even if the Court did review whether a constitutional violation occurred, there is sufficient evidence in the record to show that Shobert violated Plaintiff's Fourth and Fourteenth Amendment rights, as the district court found. *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1171 (10th Cir. 2022) (finding that because a reasonable jury could find a constitutional violation, the Court lacked jurisdiction to consider the municipality's appeal); *Packard v. Budaj*, 86 F.4th 859, 870 (10th Cir. 2023) (same).

Pendent jurisdiction "must be narrowly focused on those claims the review of which would not require the consideration of legal or factual matters distinct from those raised by the claims over which [this Court] unquestionably [has] jurisdiction." *Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1317 (10th Cir. 1999) (emphasis added); *see also Valdez*, 804 F. App'x at 995 (denying city's request to exercise pendent jurisdiction when it did not consider merits of defendant officer's

qualified immunity claim); *see Heard v. Dulayev*, 29 F.4th 1195, 1207-08 (10th Cir. 2022) (declining to exercise pendent jurisdiction because the Court resolved the appeal on the clearly-established prong); *Brown v. City of Colorado Springs*, 709 F. App'x 906, 916 (10th Cir. 2017) (“When we have resolved the constitutional prong of the qualified immunity analysis, we have found interrelated claims ... [but] [b]ecause we decided this case based solely on clearly established law, the claims here are not inextricably intertwined and we lack pendent appellate jurisdiction to consider the municipal-liability claims”). Because the Court has no jurisdiction over Shobert’s fact-based appeal, this Court has no jurisdiction over the City’s appeal.

The only time that this Court has ever exercised pendent jurisdiction over a *Monell* claim in a qualified immunity interlocutory appeal is where the Court finds (1) jurisdiction over an officer’s appeal because he is not contesting evidence sufficiency and (2) the plaintiff has failed to establish a constitutional violation, which allowed the Court to dispose of the *Monell* claim on the ground that no constitutional violation was shown. *See, e.g., Moore*, 57 F.3d at 926, 929-31. This is not such a case.

Even if this Court does exercise pendent jurisdiction over the constitutional violation question, this Court does not have jurisdiction over the other issues raised by the City in its brief, namely, whether the City's training or policies were unconstitutional, whether those policies and training lead to a constitutional violation, and whether the City was on notice of any constitutional defect in its policies or training. *See* Defs.' Br. at 57-65. The City's arguments are challenges to the sufficiency of the evidence, which is appropriate only for the trier of fact and unreviewable by this Court in this interlocutory appeal. *See Crowson v. Washington Cnty., Utah*, 983 F.3d 1166, 1193 (10th Cir. 2020) (no jurisdiction in interlocutory appeal over claim that municipality failed to properly train nurses and guards in addition to having an inadequate policy); *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1221 (10th Cir. 2019) (declining to exercise pendent jurisdiction over city's interlocutory appeal on plaintiff's failure-to-train claim); *Paugh*, 47 F.4th at 1171-72 (concluding that because a reasonable jury could find constitutional violations, there was no jurisdiction to consider the municipality's appeal on plaintiff's *Monell* claims). In other words, the City's arguments do not fit within the collateral order doctrine and are not separable from the merits. In an

interlocutory appeal of the denial of qualified immunity, the Court has never considered a municipality's arguments about the sufficiency of the evidence on these elements of a *Monell* claim.

B. Even though the Question of Evidence Sufficiency Cannot Be Reviewed in This Appeal, There Is Extensive Evidence Supporting Municipal Liability

Even if the Court decided to review the City's arguments about the sufficiency of the evidence, there is a factual dispute, as the district court concluded, with respect to whether the City's lack of policies and/or failure to train were the moving force behind the constitutional violations against Simmons.

The City did not provide any training on officers' *Brady* obligations, how to conduct identification procedures, or how to write police reports and document witness statements. App.Vol.VIII_1820-24. The City had no policy manual in February 1975 and did not create a policy manual until September 1975. App.Vol.IX_2174-77; App.Vol.V_1028-38 (policy manual not created until September 1975); App.Vol.VIII_1830-2013; App.Vol.IX_2014-2265. Shobert received only "on-the-job" training, was not trained on how to conduct lineups, how to fill out lineup or other reports, and was not familiar with his *Brady* obligations.

App.Vol.VI_1152-57, 1160, 1169. Pursuant to the City's training, policies, and practices, Shobert would not have communicated information that he learned at the lineups to the prosecutor directly. App.Vol.VI_1165. The City did not provide training or policies on any of these topics. App.Vol.VIII_1820-24. The OCPD's policies and rules were approved by the Chief of Police. App.Vol.IX_2251, 2254. As Plaintiff's police practices expert opined there should have been comprehensive written policies followed by appropriate training on these topics. The failure of OCPD to have policies and training was inconsistent with well-established police practices and procedures in 1974-75. App.Vol.VIII_1821-24, 1827. The absence of such basic policies and training significantly contributed to a predictable and preventable high-risk environment, which was likely to cause the constitutional rights of citizens to be violated. App.Vol.VIII_1823. The City disputes these facts, citing its own expert. Defs.' Br. at 60-65. This challenge to evidence sufficiency is unreviewable.

As the district court found, a reasonable jury could find that the failure of the City to train its officers on *Brady* requirements, how to conduct lineups, and how to write police reports and document witness statements, was a deliberately indifferent failure to train officers on the

most basic tenets of their jobs. *See City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989); *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1988) (deliberate indifference can be shown by proving that “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”); *Waller v. City and Cnty. of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (deliberate indifference can be shown if a “violation of federal rights is a highly predictable or plainly obvious consequence of a municipality’s action or inaction”); *Gregory*, 444 F.3d at 753 (“Widespread officer ignorance on the proper handling of exculpatory materials would have the highly predicable consequence of due process violations.”) (internal quotations omitted). In failing to train its officers on these topics, the City “disregarded a known or obvious consequence,” of its inaction. *Connick v. Thompson*, 563 U.S. 51, 61 (2011).²⁸

²⁸ This Court has repeatedly affirmed jury verdicts or reversed denial of summary judgment on failure-to-train theories. *See Valdez v. Macdonald*, 55 F.4th 796, 818-23 (10th Cir. 2023); *Brown v. Gray*, 227 F.3d 1278, 1286-91 (10th Cir. 2000); *Lance v. Morris*, 985 F.3d 787, 801-03 (10th Cir. 2021); *Zuchel v. City and Cnty. of Denver*, 997 F.2d 730, 738-41 (10th Cir. 1993); *Williams v. City and Cnty. of Denver*, 99 F.3d 1009, 1017-18 (10th Cir. 1997); *Olsen v. Layton Hills Mall*, 312 F.3d 1304,

A reasonable jury could find that the City’s failure to have any policies at all—including on these fundamental, recurring tasks of basic police work—constitutes deliberate indifference. *See City of Canton*, 489 U.S. at 390 (when the need for a policy is “so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need”); *Crowson*, 983 F.3d at 1184, 1192-93 (discussing “systemic failure” claim where jail had failed to implement policies on healthcare functions); *Jackson*, 925 F.3d at 835-37 (plaintiffs could proceed to trial on their *Monell* claim related to the lack of *Brady* training or policies in 1975).

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction. Alternatively, it should affirm.

Respectfully submitted,

s/ Elizabeth Wang

1320 (10th Cir. 2002); *Allen v. Muskogee*, 119 F.3d 837, 841-42 (10th Cir. 1997).

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CERTIFICATE OF COMPLIANCE UNDER FRAP 32(G)

This document complies with the type-volume limitation allowed by the Court by order dated August 4, 2025 (Doc. 28) because, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), this brief contains 17,482 words.

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The undersigned hereby certifies that, upon the acceptance of this Brief, all hard copies required to be submitted to the Court will be exact copies of the versions filed electronically.

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The undersigned hereby certifies that all privacy redactions (if any) have been made pursuant to 10th Cir. R. 25.5.

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