IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Blaine Franklin Shaw, *et al*. Plaintiffs, v. Herman Jones, in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al.,* Defendants.	Case No. 6:19-CV-01343
Mark Erich, *et al*. Plaintiffs, v. Herman Jones, in his official capacity as the Superintendent of the Kansas Highway Patrol, *et al.,* Defendants.	Case No. 20-CV-01067

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST THE PLAINTIFF SHAWS' CLAIMS

This is a constitutional tort case brought under 42 U.S.C. § 1983 and arising from the extension of a traffic stop for a drug-detention dog sniff and subsequent motor vehicle search.

Defendant Douglas Schulte is entitled to summary judgment under the doctrine of qualified immunity. He had the constitutionally required consent and then reasonable suspicion to detain the Shaw plaintiffs, and then probable cause

to search the involved vehicle after the drug-detention dog alerted. Moreover, Schulte's conducted was not improper under any pre-existing Supreme Court or Tenth Circuit decision on point, or clearly established weight of authority. Alternatively, summary judgment should be entered against the plaintiffs' punitive damage claims because there are no evidence of reckless or callous indifference to the plaintiffs' federally protected rights.

Statement of Uncontroverted Facts

1. Plaintiffs Blaine Shaw[1] ("B. Shaw") and Samuel Shaw ("S. Shaw") sue Kansas Highway Patrol ("KHP") Master Trooper Douglas Schulte ("Schulte") in his individual capacity. Doc. 07, ¶¶ 128-134.

2. Schulte is a seventeen-year trooper with the KHP. He graduated a 22-week training academy at the beginning of his employment, in 2004, and has received 40 hours of continuing law enforcement education annually. He has patrolled state highways and roads in north central and western Kansas since he graduated the KHP training academy. He became a Master Trooper in 2011. Exhibit 1 (Schulte Declaration), ¶ 2.

3. On December 20, 2017, at approximately 12:25 p.m., Schulte stopped Plaintiff B. Shaw for speeding westbound on Interstate 70 ("I 70"). Exhibit 1, ¶ 3.

4. Schulte's patrol vehicle had a dashboard camera. Recordings through a microphone on his uniform synchronized with the dashboard camera's

[1] aka Elontah Blaine Shaw. ECF 7, ¶ 21.

video. A true and correct copy of this video/sound recording of the December 20, 2017 traffic stop, detention and search involved in this lawsuit is provided as Exhibits 2a & 2b. See Exhibit 1, ¶ 31.

5. B. Shaw is a resident of Oklahoma City, Oklahoma. Exhibit 3 (B. Shaw Deposition Excerpts), 5:16-19. He has been an Oklahoma resident since at least 1999. *Id.*, 12:2-4; 15:1-16:3; 26, ll. 8-23. When stopped, he was driving Ron Shaw's minivan, who is his father. *Id.,* 57:24-58:14. The minivan had an Osage Nation license plate. Exhibit 1, ¶ 7. The minivan was registered in the name of Ronald B. Shaw of Shawnee, Oklahoma. *Id.,*¶ 8.

6. B. Shaw digitally recorded his encounters with Schulte on his cellular phone. Exhibit 3, 59:1-60:18; 62:13-63:13. A copy of the recording is provided as Exhibit 4.[2]

7. S. Shaw is B. Shaw's brother. Doc. 07, ¶ 80; Exhibit 5 (S. Shaw's Deposition Excerpts), 21:16-21. S. Shaw also resides in Oklahoma City, Oklahoma. *Id.* S. Shaw was a passenger in the minivan at times relevant to his claims in this lawsuit. Doc. 07, ¶¶ 80, 91; Exhibit 5, 26:12-27:17; 35:22-36:14; 44:22-46:17.

8. Schulte clocked the minivan as traveling 91 miles per hour in the passing lane of westbound I 70, 16 miles per hour in excess of the posted 75

[2] The data file marked Exhibit 4 (bates number P000006) was produced by the plaintiffs in response to the defendant troopers' request for production of photographs, motion pictures, digital or other video records, diagrams, measurements, surveys, or reconstruction analysis the regarding the Shaw incident, any of the facts supporting plaintiff's liability claims. *See* Shaws' responses to Interrogatory # 18 and RFP # 1.

miles per hour speed limit. Exhibit 1, ¶ 4. B. Shaw admits that he was speeding. Exhibit 3, 49:19-50:17.

9. Schulte turned on his patrol vehicle's overhead lights and siren to signal the minivan to pullover and stop. The minivan changed lanes to the driving (outside) lane and slowed down (braking once for traffic in front of the minivan). However, the minivan did not pull to the side of the road and stop for about a minute and one half, and not until after it had traveled about one mile. Exhibit 1, ¶ 5.

10. B. Shaw stopped the minivan on the west shoulder to I 70's Hays, Kansas Exit 159, just before the exit's intersection with Vine Street. Exhibit 1, ¶ 6.

11. While following and attempting to get the minivan drive to stop, Schulte requested the dispatch to "run" the minivan's Oklahoma Osage Nation license plate. Exhibit 1, ¶ 7.

12. Schulte stopped his marked patrol vehicle behind the minivan. He repeated his license plate inquiry, received a response to the inquiry [reporting Ronald B. Shaw was the registered owner], exited his vehicle and walked to the minivan. Exhibit 1, ¶ 8.

13. Schulte observed, while walking to and from the minivan vehicle, that it was packed full, up into the front seats, with luggage, coolers, a cot, blankets and several other items. It had a lived-in appearance. Schulte's training and experience is that drug traffickers frequently limit their stops and time from their

vehicle hoping to quickly obtain and transport illegal contraband. This results in a lived-in look to the vehicle. Exhibit 1, ¶ 9.

14. Additionally, Schulte saw both the driver and a passenger, who was sitting in the front passenger seat in the minivan. Exhibit 1, ¶ 10.

15. Schulte stood by the driver's door for about one minute. While standing beside the window, he requested that B. Shaw produce his driver's license and proof of insurance. Exhibit 1, ¶ 11. The exchange went materially as follows:

> [Schulte] Hello.
>
> [B. Shaw] Hello, how are you?
>
> [Schulte] I'm good. You come up behind me. I checked you at 91.
>
> [B. Shaw] 91.
>
> [Schulte] That's why you caught up with me so fast.
>
> [B. Shaw] I'm really sorry …
>
> [Schulte] So lights went on before you even passed me and you decided …
>
> [B. Shaw] Well, I did not know because your lights were on ahead of me that's what threw me off so I wasn't really sure…
>
> [Schulte] What are you supposed to do when you see red and blue lights? What does state law say? Oklahoma is the same way.
>
> [B. Shaw] Pull off to the side.
>
> [Schulte] There you go.
>
> [B. Shaw] I got in the other lane. I wasn't sure. . .
>
> [Schulte] We drove another mile before you tried to pull off here.

[B. Shaw] What I certainly did not mean to do anything disrespectful or . . . [handing officer something]

[Schulte] How about the insurance car?

[B. Shaw] Yes sir.

[Schulte] Your car?

[B. Shaw] This is my father's car. I am on the insurance though.

[Schulte] OK.

[Schulte] And Blaine, is your address in Oklahoma City correct?

[B. Shaw] Yes.

[Schulte] OK.

[Schulte] Sir, if you wait in your vehicle, I will be right back.

Exhibit 1, ¶ 11; Exhibit 2a; Exhibit 4.

16. While returning to his patrol vehicle, Schulte looked into minivan through its driver's side windows. Again, he saw that the back of the van was crowded with "stuff." Exhibit 1, ¶ 12.

17. Once back to his patrol vehicle, Schulte called in B. Shaw's driver's license to dispatch and requested information about warrants and criminal history. Exhibit 1, ¶ 13.

18. Approximately 4 minutes after the first encounter with B. Shaw at the driver's door of minivan, Schulte received the responses that B. Shaw's license was valid, that he was not subject an outstanding warrant, and that B. Shaw had a 2009 felony intent to distribute narcotics on his criminal records. Exhibit 1, ¶ 14.

19. Schulte radioed a request that another trooper come to the stop for backup. Then he completed paperwork up until the time he left his patrol vehicle to walk back up to the driver's side of the minivan. Exhibit 1, ¶ 15.

20. Approximately eleven minutes after B. Shaw stopped the minivan, Schulte had a second exchange with B. Shaw at the driver's side window of the minivan. Exhibit 1, ¶ 16. That conversation lasted a little more than 30 seconds. *Id*. Schulte handed B. Shaw a ticket for speeding and returned B. Shaw's license and proof of insurance. Schulte explained the procedure for responding to the ticket and said he could not answer B. Shaw's question about the ticket's impact on auto insurance. Schulte concluded, "have a safe trip and drive safely," turned and started walking back to toward his patrol vehicle. *Id.*

21. Schulte walked along the side to the back of the minivan until it was taken out of park, and then reversed to return near the driver's window. Walking back, never touching the minivan and with his hands at his side or slightly in front of his body, Schulte stated: "Hey, Blaine can I ask you a question real quick?" S. Shaw responded quickly, "Yeah." Exhibit 1, ¶ 17; Exhibit 2a; Exhibit 4. This subsequent exchange went materially as follows:

> [Schulte] You are coming from Oklahoma; where are you headed to today?
>
> [B. Shaw] Denver. Headed to see family.
>
> [Schulte] OK, alright. Running a little fast today, which we talked about. Alright you don't have anything in the vehicle that you are not supposed to have with you? [B. Shaw, denials] – no guns, no knives, no contraband, no illegal narcotics, marijuana, cocaine, opioid, no meth, no large sums of cash, anything like that? [B. Shaw, denials]

> [Schulte] Can we search your vehicle for such items?
>
> [B. Shaw] I don't consent to searches. I am criminology major. It is like the number one golden rule
>
> [Schulte] OK. Well wait right here, I will be right back with you. OK?

Exhibit 1, ¶ 17; Exhibit 2a; Exhibit 4.

22. Schulte felt that the passenger, sitting in the front passenger seat, S. Shaw, was acting suspiciously during both his conversations with B. Shaw at minivan. The passenger did not say anything, never looked over at Schulte, never made eye contact with him, had his hands in his lap and looked straightforward, while not moving his head. Usually a passenger looks in Schulte's direction at times and speaks with him or the driver during a stop. Exhibit 1, ¶¶ 20-21; Exhibit 5, 31:11-32:13.

23. The Denver destination was relevant to Schulte because, based upon his experience and knowledge, I 70 was a corridor to Colorado (*i.e.*, a source state for marijuana). Schulte believed this added to his suspicion of drug trafficking when combined with the fact that the minivan's driver was not the vehicle's owner and in light of the other circumstances. Schulte, by his experience and information from other law enforcement officers, knew that non-owned vehicles are frequently used by drug traffickers—one reason is that this avoids forfeiture of the driver's vehicle. Exhibit 1, ¶ 20. He also knew that in route drug traffickers frequently have large sums of cash, drug paraphilia and evidence of drugs with them when traveling to make a purchase. Exhibit 1, ¶ 20.

24. Schulte decided to detain the Shaws for a canine sniff after this last encounter. Walking back to his patrol vehicle, Schulte stated into his body microphone, "refusal." Exhibit 1, ¶ 18.

25. Schulte repeated his request that another trooper come to the stop for backup once back to his patrol vehicle. This is a standard KHP officer safety procedure for a drug dog sniff and possible search. Exhibit 1, ¶ 19.

26. With the passage of time, Schulte does not remember each basis for his reasonable suspicion that justified the extended detention and canine search. Exhibit 1, ¶ 20. However, review of the dash camera video and documentation about the stop and search, added to the Schulte's incomplete memories, shows according to Schulte:

- B. Shaw, later determined to be the driver of a 2010 Chrysler Town & County minivan, did not timely pull over.
- B. Shaw's past criminal history showed his involvement with the sale of illegal drugs.
- The minivan was not registered to B. Shaw and was traveling on I 70, a known drug trafficking corridor.
- The minivan was crammed full of stuff.
- S. Shaw, in the front passenger seat, was acting suspiciously in that he refused to look at Trooper Schulte, was unmoving—looking forward only—, and was not saying anything.

Exhibit 1, ¶ 20.

27. Trooper James McCord arrived at the scene of the stop about 3 minutes after Schulte had noted the refusal to provide consent for a vehicle search. While waiting on the drug dog, McCord and Schulte discussed the circumstances in a series of conversations. Schulte told McCord, "[B. Shaw] comes up behind me fast. I light him up and he drives for about a mile before pulling over." He also told McCord that B. Shaw was not married.[3] He told McCord that B. Shaw was "nervous" and "really jumpy." Schulte answered McCord's question, stating that the minivan was his "dad's", and told McCord that B. Shaw "has prior history" and "felony on his record for intent." Schulte stated his understanding that B. Shaw and his passenger were heading to visit passenger's family and friends in Colorado. He stated that he did not know how long.[4] Schulte stated that there were blankets covering stuff in the minivan. McCord asked about the passenger (S. Shaw). Schulte told him that the passenger did not say anything, never looked over, had his hands in his lap and looks straightforward, and stated he made no eye contact, not moving his head. At this time, Schulte mistakenly believed that S. Shaw was B. Shaw's friend. Exhibit 1, ¶ 21; Exhibit 2a.

[3] This was a false assumption on Schulte's part. B. Shaw was married.

[4] McCord appeared to think that a long distance trip just before Christmas to see his friend's family was suspicious if B. Shaw was married. Exhibit 2a at 34:33 – 35:01. *Cf. United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (bizarre travel plans may contribute to reasonable suspicion of criminal activity). However, Schulte did not make this inference because he mistakenly believed that B. Shaw was single.

28. About a request for consent to search, Schulte stated, "broke contact and asked for consent; vehicle was in drive; when I asked for consent he said sure and put vehicle back into park." Schulte said B. Shaw says he is a criminology major and that the number one rule is no one searches your vehicles. Schulte said, "born in 83, but he is a criminal justice major." Exhibit 1, ¶ 22.

29. Schulte requested a drug-detecting dog for a sniff of the minivan immediately upon his return to his patrol vehicle after B. Shaw's refusal of consent to a search. It appears to have required a couple of minutes for dispatch to locate an available handler and dog. Trooper Ian Gray, a canine handler, and his dog, Jaxx arrived at the stop about 15-17 minutes after dispatch contracted Gray. Exhibit 1, ¶ 23.

30. The canine sniff took place and concluded with alerts, positive indications of drugs, about 3 minutes after the drug-detecting dog and handler arrived at the scene. Exhibit 1, ¶ 24; Exhibit 6 (KHP, Police Service Dog Report, OAG000002-03). Schulte knew and had experience with Ian Gray. To his knowledge, both Ian Gray and Jax were properly trained and credentialed. Exhibit 1, ¶ 24.

31. After the dog's alerts, troopers searched the minivan. In the vehicle, they found pills—a few with different colors and sizes, not in a prescription bottle, which B. Shaw stated were Tramadol[5]; multiple plastic bags that had a marijuana

[5] B. Shaw acknowledged the pills were his. He had the bottle for the pills in the minivan. He said that they were prescribed for pain related to injuries he suffered in an

smell ("smelly bags") that had been in a locked black bag/brief case; and Colorado medical marijuana paperwork (registry cards, which appeared to authorize some cultivation, and a Colorado residence identification card which were all issued to B. Shaw) that also was in the black bag/brief case Exhibit 1, ¶ 25; Exhibit 6.

32. One of the places that Jaxx, the drug-detection dog, specifically alerted was at a cot in the back of the minivan. The locked black bag/brief case, referenced in the preceding paragraph, was located under the cot. Exhibit 1, ¶ 27; Schulte did not personally open the bag. However, it was necessary to separate the bag's zipper to determine whether there were drugs in the bag as the dog's alert suggested. Exhibit 1, ¶ 27. A picture of the bag/brief case is below.

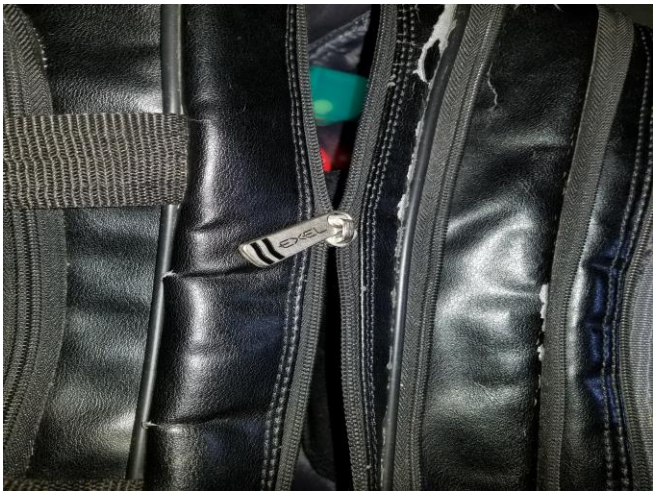

Exhibit 7 (Plaintiffs' production, P000007).[6]

automobile accident. He claimed that the few pills of different color and size were Tramadol from Mexico or China. Exhibit 1, ¶ 26.

[6] The photograph marked Exhibit 7 (bates number P000006) was produced by the plaintiffs in response to the defendant troopers' request for production of photographs … supporting … the nature and extent of injuries and damages alleged. *See* Shaws' responses to Interrogatory # 18 and RFP # 1.

33. Schulte asked B. Shaw if he was a resident of Colorado or Oklahoma, telling B. Shaw "you can't be both," and asked B. Shaw if the black bag/brief case was his. B. Shaw would not answer the questions other than to say he had lived in Colorado in the past.[7] Exhibit 1, ¶ 28.

34. Schulte discussed the Colorado medical marijuana registry card with Trooper McCord. McCord suggested that Schulte make a copy of the paperwork and contact Colorado authorities to report that B. Shaw was lying about being a Colorado resident. Schulte suspected that B. Shaw was violating Colorado law. Exhibit 1, ¶ 29.

35. The search of the minivan and discussions between the troopers and B. Shaw after the search took approximately 30-35 minutes. At the end, Schulte directed B. Shaw to follow him to the Hays KHP headquarters [1821 Frontier Road, Hays, KS], which was about a 700 yard detour from the Shaws' trip to Denver.[8] Once there, copies were made of the paperwork found during the search and the Shaws left to continue to Colorado. Exhibit 1, ¶ 30.

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[7] The address on the Colorado identification card is 2323 Curtis Street, Denver, CO. B. Shaw would not say whether any of his family lived at that address. That address is the St. Francis Center, which is a homeless shelter. http://www.sfcdenver.org/who-we-are/. The address shown on the medical marijuana paperwork is 6120 Hearth Court, Colorado Springs, CO. The most recent registry card expired about six months before the stop. However, B. Shaw obtained renewals of the one-year license on June 5, 2017, November 13, 2017 and June 4, 2018. Documents produced by the plaintiffs bate stamped P021-P023.

[8] https://www.mapquest.com/us/ks/hays/67601-9397/1821-frontier-rd-38.908170,-99.353672.

36. The Shaws drove directly to the Denver area, stopping only in Hays, Kansas for gas and B. Shaw's inspection of the minivan for any damage. Exhibit 3, 69:22-70:10; Exhibit 5, 44:22-46:17. They camped out at a state park and/or in commercial parking lots. They consumed marijuana. They returned to Oklahoma on a southern route that did not go into Kansas. Exhibit 3, 55:16-57:19; Exhibit 5, 30:15-23. It was a "weekend trip." Exhibit 3, 56:12-23.

Argument

1. *The plaintiffs must show that Schulte's actions violated their Fourth Amendment right[9] as clearly established at the time.*

A government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). A defendant's assertion of qualified immunity from suit under 42 U.S.C. § 1983 results in a presumption of immunity. *Bond v. City of Tahlequah, Oklahoma*, 981 F.3d 808, 815 (10th Cir. 2020). Accordingly, when a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff to satisfy a two-part test: (1) the plaintiff must show that the defendant's actions violated a constitutional or statutory right; and (2) the plaintiff must show that this right was "clearly established" at the time of the conduct at issue. *Rojas v. Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional burden of the movant for summary judgment. . . ." *Clark v. Edmonds*, 513 F.3d 1219, 1222 (10th Cir. 2008).

In our circuit, "the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). Courts "do not require a case directly on point, but existing

[9] The Shaws claim that Schulte violated their Fourth Amendment right to be free from unreasonable seizures. Doc. 07, ¶¶ 130-132 (Count 3).

precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks omitted); *accord, Carroll v. Carman*, 574 U.S. 13, 16 (2014). A general test defining the elements of a statutory or constitutional violation will almost never provide clearly established law. Instead, the jurisprudence upon which plaintiff relies must be "particularized to the facts of the case." *Davis v. Unified Sch. Dist. No. 512*, 335 F. Supp. 3d 1230, 1238 (D. Kan. 2018), *aff'd*, No. 18-3199, 799 F. App'x 566 (10th Cir. Nov. 7, 2019) (unpublished) (*citing White v. Pauly*, 137 S.Ct. 548, 552 (2017), *quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Tenth Circuit panels have found that a plaintiff, in the present context, must show that the defendant "lacked even arguable reasonable suspicion" to overcome the qualified immunity defense. *Leon v. Summit Cty.*, 755 F. App'x 790, 794 (10th Cir., *unpub.*, Nov. 28, 2018); *Stoedter v. Gates*, 704 F. App'x 748, 755 (10th Cir. 2017) (each *citing Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1207 (10th Cir., *unpub.*, August 3, 2008)). *See also, Anderson v. Willis*, 917 F. Supp. 2d 1190, 1196 (D. Kan. 2013) ("courts ask whether there was 'arguable' reasonable suspicion for an investigative detention. If there was, then the defendant is entitled to qualified immunity.").

However, even applying an "arguable" standard, the law is clearly established for qualified-immunity purposes only if it was sufficiently clear that, at the time of the public official's conduct, *"*every*"* reasonable official would have understood that the conduct was unlawful. *District of Columbia v. Wesby*, 138 S.

Ct. 577, 589 (2018). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Wesby*, 138 S. Ct. at 589 (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

2. *No Fourth Amendment right was violated.*

a. Applicable traffic stop standards.

A traffic stop is a seizure for Fourth Amendment purposes, subject to the reasonableness requirement therein. *United States v. Cortez*, 965 F.3d 827, 833 (10th Cir. 2020). To be reasonable, a traffic stop must be justified at its inception and the officer's actions must be "reasonably related in scope" to the "mission of the stop." *Id.* (*citing United States v. Mayville*, 955 F.3d 825, 829 (10th Cir. 2020), *quoting Rodriguez v. United States*, 575 U.S. 348, 356 (2015)).

An officer's authority to seize the occupants of a vehicle ends when "tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 575 U.S. at 354. A traffic stop may "last no longer than is necessary" to complete the mission of the stop. The mission of the stop includes both addressing the traffic violation warranting the stop and attending to "related safety concerns." *Cortez*, 965 F.3d at 837.

However, our Circuit explained:

> "*Rodriguez* does not prohibit all conduct that in any way slows the officer from completing the stop as fast as humanly possible." *United States v. Campbell*, 912 F.3d 1340, 1353 (11th Cir. 2019). Although it is appropriate to consider police diligence, *Rodriguez*, 575 U.S. at 354 [ ], the mere fact that an officer could, conceivably, have performed a task more quickly than he did fails, on its own, to generate a Fourth Amendment violation. "This is because reasonableness—rather than efficiency—is the touchstone of the

> Fourth Amendment." *Mayville*, 955 F.3d at 827; *see also Rodriguez*, 575 U.S. at 354 [ ] (holding that "[a]uthority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed").

Cortez, 965 F.3d at 837-38 (emphasis removed).

And both the Supreme Court and the Tenth Circuit have noted that, even with a traffic infraction, running records checks is an important valid activity that does not necessarily prolong a valid traffic stop or push that stop into the realm of unreasonably lengthy. Beyond writing the traffic citation, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Typically, these inquiries involve checking the driver's license, registration, and proof of insurance, as well as determining whether any outstanding warrants for the driver exist. *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979). These checks serve the same purpose as the traffic code: to ensure that vehicles on the road are operated safely and responsibly. *Id.*; *see also* 4 Wayne R. LaFave, Search and Seizure § 9.3(c), at 507-517 (5th ed. 2012).

An officer may also inquire about the driver's travel plans and the identity of the individuals in the vehicle. *Cortez*, 965 F.3d at 838 (*citing Pettit*, 785 F.3d at 1379). *See also United States v. Moore*, 795 F.3d 1224, 1229, n. 3 (10th Cir. 2015) (An officer may generally inquire about the driver's travel plans, such questions ordinarily fall within the scope of a traffic stop); *United States v. Cone*, 868 F.3d 1150, 1154 (10th Cir. 2017) (finding general questions regarding travel

plans and identity reasonable under the Fourth Amendment[10]); *United States v. Morgan*, 855 F.3d 1122, 1126 (10th Cir. 2017) (holding officer's questions regarding identity did not exceed the scope of a *Terry* stop).

In addition, because "[t]raffic stops are especially fraught with danger to police officers," law enforcement personnel may take "certain negligibly burdensome precautions in order to complete [their] mission safely." *Rodriguez*, 575 U.S. at 356. These may include conducting criminal record checks, searching for outstanding warrants, or asking limited questions directed at ensuring officer safety. *Cortez*, 965 F.3d at 838; *Cone*, 868 F.3d at 1153-54. *See e.g.*, *United States v. Torres*, 786 F. App'x 726, 731 (10th Cir., *unpub.*, 2019)

[10] *Cortez*, 965 F.3d at 839 ("Such questioning is consistent with both the public's expectations regarding ordinary inquiries incidental to traffic stops and taking the least burdensome approach to ensuring officer safety"). *See also United States v. Moore*, 795 F.3d 1224, 1229 (10th Cir. 2015) (holding "[a]n officer may ... generally inquire about the driver's travel plans" without violating the Fourth Amendment); *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001) (*en banc), overturned on other grounds by Muehler v. Mena*, 544 U.S. 93 (2005) (such inquiries are justified because "[t]ravel plans typically are related to the purpose of a traffic stop"); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1259 (10th Cir. 2006) ("[A]n officer may routinely ask about travel plans ... during a lawful traffic stop."); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) (travel questions are permissible as the type of "negligibly burdensome" inquiries directed at ensuring officer safety).

(approving Triple I check for criminal history).[11]

B. Shaw admits he had been speeding. UF ¶ 8. Therefore, there can be no Fourth Amendment issue about his initial stop. Rather the first battleground is whether Schulte unconstitutionally detained the plaintiffs, after the traffic stop ended. After the traffic stop is or should be complete, an officer may still constitutionally prolong a stop when (1) the seized individual consents or (2) the officer has independent reasonable suspicion of criminal wrongdoing on behalf of the seized individual that justifies further investigation. *Cortez*, 965 F.3d at 833 (*citing Mayville*, 955 F.3d at 830, *citing Rodriguez*, 575 U.S. at 354-57).

b. B. Shaw consented to extend the stop through the second exchange.

Additional questioning unrelated to the traffic stop is permissible if the detention becomes a consensual encounter. Thus, a procedure through which a trooper completes a traffic enforcement action and then reengages the driver to ask additional questions does not unconstitutionally prolong the stop if consent was granted.

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[11] *See also United States v. Mayville*, 955 F.3d 825 (10th Cir. 2020). Mayville reports:

> This court has routinely permitted officers to conduct criminal-history checks during traffic stops in the interest of officer safety. See, e.g., *United States v. Burleson*, 657 F.3d 1040, 1046 (10th Cir. 2011) ("[A]n officer may run a background check on a motorist to check for warrants or criminal history even though the purpose of the stop had nothing to do with the motorist's history."); *United States v. Rice*, 483 F.3d 1079, 1084 (10th Cir. 2007) ("While a traffic stop is ongoing ... an officer has wide discretion to take reasonable precautions to protect his safety. Obvious precautions include running a background check on the driver ....

Id. at 830 (citations omitted).

Whether the driver has consented to additional questions and detention turns on whether a reasonable person would believe he or she was free to leave or disregard the officer's request for information." *United States v. Villa*, 589 F.3d 1334, 1339-40 (10th Cir. 2009). *See also United States v. Jones*, 701 F.3d 1300, 1318 (10th Cir. 2012) (listing factors as to whether consent was voluntary).

Schulte handed paperwork to B. Shaw, including a ticket for speeding and the license and proof of insurance information that B. Shaw had produced. Schulte explained the procedure for responding to the ticket and said he could not answer B. Shaw's question about the ticket's impact on insurance. Schulte concluded, "have a safe trip and drive safely" and turned to walk back to the patrol vehicle. UF ¶ 20. Schulte then walked along the side to the back of the minivan until it was put into drive. He reversed to return near the driver's window. Walking back, never touching the minivan and with his hands at his side or slightly in front of his body, Schulte stated: "Hey, Blaine can I ask you a question real quick?" S. Shaw responded quickly, "Yeah." UF ¶ 21.

There is no evidence of physical mistreatment, violence, threats, promises, inducements, deception, trickery, or an aggressive tone. The questions were asked in public view during day-light hours. Nothing suggests that B. Shaw lacked the physical and mental condition and capacity of to freely consent. Schulte was the only officer at the stop when B. Shaw agreed to answer questions. Schulte did not touch the minivan or its occupants. Schulte was not required to tell B. Shaw that he was "free to go." *E.g.*, *United States v. $64,895.00*

in Currency, No. 10-1434-RDR, 2012 WL 5933069, at *3 (D. Kan. Nov. 26, 2012). B. Shaw understood that the stop had ended when he put the minivan in to drive to start to leave. UF ¶ 28. Schulte was not required to inform B. Shaw that he was not required to answer questions. *See United States v. Hernandez*, 893 F. Supp. 952, 960 (D. Kan. 1995), *aff'd*, 103 F.3d 145 (10th Cir. 1996) ("could I ask you a few questions?" provided the reasonable person with the choice to submit or not); *United States v. Beltran*, No. 17-40105, 2018 WL 5720247, at *3 (D. Kan. Nov. 1, 2018) (voluntary consent to "can I ask you a question" without explanation the drive did not need to answer the questions). B. Shaw knew he was not required to answer Schulte's questions as evidenced by his subsequent refusal to answer questions. UF ¶ 33.

Case law is lockstep that the procedure employed by Schulte does not offend any constitutional right. *See e.g.*, *United States v. Gomez-Arzate*, 981 F.3d 832, 842 (10th Cir. 2020) (found a consensual encounter permitted extended detention even after issuing the citation, the driver began walking back to his car when Deputy Mora turned around and yelled to him to ask if he would talk); *United States v. Martin*, No. 18-CR-40117, 2019 WL 6682990, at *1 (D. Kan. Dec. 6, 2019) (found consent was given after trooper issuing and explained a warning, told the defendant to have a safe trip, back towards his patrol car but then reapproached defendant and asked whether he could ask Defendant some questions; to which Defendant replied "sure" and then also said sure to a vehicle search); *United States v, Beltran*, No. 17-40105-01, 2018 WL 5720247 (D. Kan.

Nov. 1, 2018) (found consent was granted after trooper "told Mr. Beltran that he was going to give him a warning and instructed him to watch his speed in construction zones… asked Mr. Beltran if he had any questions" then "told Mr. Beltran to 'have a safe trip" and "began to walk back to his patrol vehicle," but when the trooper reached the rear edge of Mr. Beltran's vehicle, he pivoted and started back in the direction of the driver's side window of Mr. Beltran's car" and "asked him, 'Hey, can I ask you a question, Juan?"); *United States v. Ochoa*, No. 16-40028-01-DDC, 2017 WL 119628, at *5 (D. Kan. Jan. 12, 2017) (found consent to talk and search provided after trooper told driver to have a safe trip, she opened the patrol vehicle where she had been sitting, but before she exited).

c. ***Schulte had reasonable suspicion sufficient to prolong the traffic stop for more questions and then to further prolong the stop for a dog sniff.***

Even if B. Shaw did not freely consent to answer Schulte's questions, Schulte possessed the required objective, reasonable suspicion to detain B. Shaw for questioning and then for a drug-detection dog sniff.

i. ***Reasonable suspicion is not an onerous standard.***

Reasonable suspicion accrues when an officer possesses a "particularized and objective basis for suspecting criminal conduct under a totality of the circumstances." *Pettit*, 785 F.3d at 1379 (quoting *United States v. Cortez*, 449

U.S. 411, 417-18 (1981)).[12] "This is not an onerous standard." *Cortez*, 965 F.3d at 834 (*citing United States v. Kitchell*, 653 F.3d 1206, 1219 (10th Cir. 2011)). Reasonableness of suspicion requires "considerably less" than a preponderance of the evidence and "obviously less" than probable cause. *Id*. (citing *Pettit*, 785 F.3d at 1379). *See also Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) ("Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause," *citing Prado Navarette v. California*, 572 U.S. 393, 397 (2014)). "The reasonable suspicion inquiry falls considerably short' of 51% accuracy, for, as we have explained, to be reasonable is not to be perfect. *Glover*, 140 S. Ct. at 1187 (citations and internal quotation omitted).

> The standard depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Courts cannot reasonably demand scientific certainty where none exists. Rather, they must permit officers to make commonsense judgments and inferences about human behavior.

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[12] In a criminal prosecution, the burden to prove reasonable suspicion rests with the government. However, as least when qualified immunity is raised in an § 1983 action, the burden of persuasion on this issue is plaintiff's. *See Henderson v. Glanz*, 813 F.3d 938, 952 (10th Cir. 2015) ("Unlike most affirmative defenses, however, the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity by showing a violation of clearly established federal law"); *Knopf v. Williams*, 884 F.3d 939, 946 (10th Cir. 2018) (same); *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014) (same). *Cf. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 309 (2001) (courts must place the burden of persuasion on the plaintiff, not the defendant, to prove the elements of a § 1983 claim). *Compare*, *Barrera v. Kroskey*, No. 12-1376, 2013 WL 3013654 * 1, n. 2 (D. Kan. June 17, 2013) (discussing lack of clarity in the Tenth Circuit about the burden of proof in decisions predating *Henderson*, *Knopf* and *Gomez*).

Glover, 140 S. Ct. at 1188 (citations and internal quotation omitted). *See also*, *United States v. Berg*, 956 F.3d 1213, 1218 (10th Cir. 2020), *cert. denied sub nom. Berg v. United States*, 2020 WL 6037395 (U.S. Oct. 13, 2020) ("Even though Berg is correct that 'common sense and ordinary experience are to be employed' in the reasonable suspicion analysis, this court defers 'to a law enforcement officer's ability to distinguish between innocent and suspicious actions,'" *citing United States v. Hernandez*, 847 F.3d 1257, 1269 (10th Cir. 2017)).[13]

"[R]easonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality." *United States v. Madrid-Mendoza*, No. 19-2105, 824 F. App'x 588, 593 (10th Cir. Sept. 3, 2020) (unpublished) (*quoting Mocek v. City of Albuquerque*, 813 F.3d 912, 923 (10th Cir. 2015) (quotations omitted)). And "[t]he existence of reasonable suspicion does not require the officer to rule out the possibility of innocent conduct, and in assessing reasonable suspicion [courts] defer to a police officer's training and ability to discern innocent conduct from suspicious behavior." *Id.* (*citing and quoting United States v. Simpson*, 609 F.3d 1140, 1146 (10th Cir. 2010)). *See also Glover*, 140 S. Ct. at 1188 (an officer need not rule out the possibility of innocent conduct).

[13] This is not to imply that the reasonable suspicion must be determined from "experiences in law enforcement." See *Glover*, 140 S. Ct. at 1190 (expressly rejecting this requirement, while not minimizing the significant role that specialized training and experience routinely play in law enforcement investigations).

Further, the Supreme Court has rejected a "divide-and-conquer" approach in evaluating the totality of the circumstances. *See United States v. Arvizu*, 534 U.S. 266, 274 (2002) (whether reasonable suspicion exists to support a traffic stop must be based on the totality of the circumstances; rejecting appellate court's evaluation of disparate facts in isolation from each other in deciding whether reasonable suspicion existed). "The relevant question is not whether each fact taken in isolation may have an innocent explanation; rather we look to the facts as a whole to decide whether they support the enhancement." *United States v. Murphy*, 901 F.3d 1185, 1195 (10th Cir. 2018). Stated another way, "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *United States v. Arvizu*, 534 U.S. 266, 277 (2002), *overruled in part on other grounds by Davis v. Washington*, 547 U.S. 813 (2006).

The Supreme Court in *United States v. Sokolow*, 490 U.S. 1, 10 (1989) (*quoting Illinois v. Gates*, 462 U.S. 213, 245 n. 13 (1983)), explained that "'innocent behavior will frequently provide the basis for a showing of probable cause,' and that '[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry." *See also Donahue v. Wihongi*, 948 F.3d 1177, 1188 (10th Cir. 2020) ("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct."

"[R]easonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality," citations omitted).

Moreover, the constitutional reasonableness of traffic stops does not depend on actual motivations of the officer involved. *Whren v. U.S.*, 517 U.S. 806, 811-816 (1996). *See also*, *United States v. Wilkinson*, 633 F.3d 938, 943 (10th Cir. 2011) (admitted pretext to investigate drug transportation was irrelevant); *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir.1995) (*en banc*) ("[i]t is ... irrelevant that the officer may have had other subjective motives for stopping the vehicle"); *United States v. Ingram*, No. 16-6220, 721 F. App'x 811, 818 (10th Cir. Feb. 2, 2018) (unpublished) (subjective motivation to obtaining evidence of drug trafficking irrelevant a Fourth Amendment). *See also State v. Lutz*, 474 P.3d 1258, 1262 (Kan. Nov. 6, 2020) (alleged pretext to investigate suspicion of drug activity was not relevant reasonable suspicion of criminal activity in traffic stop); *State v. DeMarco*, 263 Kan. 727, 731, 952 P.2d 1276 (1998) (allegation that officer only stopped cars with out-of-state tags was irrelevant subjective motive).

ii. The totality of circumstances established reasonable suspicion.

A reasonable officer could have concluded reasonable suspicion existed to extend the stop under the totality of the circumstances.

First, B. Shaw did not timely pull over. Uncontroverted Facts ("UF") ¶¶ 9, 15, 26 & 27. Schulte could reasonably infer that the occupants in the minivan

delayed stopping to hide contraband, to get their stories straight[14] or in considering running.

Recently, a Tenth Circuit panel observed, in *United States v. Orozco-Rivas*, No. 19-6074, 810 Fed.Appx. 660, 666 (10th Cir. April 21, 2020) (unpublished), a delay in pulling over contributes to reasonable suspicion. The panel cited, *id.* at 666, *United States v. Hunnicutt*, 135 F.3d 1345, 1347 (10th Cir. 1998) (finding a defendant's "ten to twelve second[ ]" delay in pulling over to be a factor favoring reasonable suspicion); *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994) (recognizing that "a defendant's ... failure to pull over promptly in response to a trooper's flashing lights [can be] an objective indication of something more serious than a minor traffic infraction"). *See also United States v. Ludwig*, 641 F.3d 1243, 1248 (10th Cir. 2011) (44 seconds to stop supported reasonable suspicion).

In *Orozco*, the driver claimed that the closure of the right lane explained the extended time to pull over. The panel said: "But even if this explanation is plausible, we must accept Trooper Bussey's inferences when they are reasonable. *See* [*United States v.*] *Pettit*, 785 F.3d [1374,] at 1381 [(10th Cir.

[14] It seems likely that some rehearsing of stories was taking place. Certainly, rehearsing was going on later. B. Shaw told Schulte that they were traveling to Denver to see family in their second encounter. UF ¶ 21. And before then B. Shaw is heard, on his phone's recording, telling S. Shaw that they were traveling to Denver to see family. Exhibit 4 at 2:00-2:04. While Schulte could not have known otherwise, the Shaws had no family in Denver, Exhibit 3, 27:12-24; 64:4-10; Exhibit 5, 32:14-17, and did not meet with family in Denver. Exhibit 3, 55:16-57:12. B. Shaw was fashioning a lie. What the Shaws did was purchase and consume marijuana, camped out, briefly saw friends, and returned to Oklahoma by a southern, non-Kanas route. Exhibit 3, 55:16-57:19.

2015)] (accepting an officer's 'objectively reasonable' inference about a suspicious cause of the defendant's behavior despite the defendant's 'plausible innocent explanation')." *Id.*

Second, B. Shaw had a criminal history for felony intent to sell narcotics. UF ¶¶ 18, 26 & 27.[15]

> "[P]rior criminal history is by itself insufficient to create reasonable suspicion." [*United States v.*] *Santos*, 403 F.3d [1120] at 1132 [(10th Cir. 2005)] (internal citation omitted). However, when viewed in conjunction with other factors that suggest criminal activity may be occurring, criminal history can be a powerful contributor to the reasonable suspicion analysis. *Id.*; *see also United States v. White*, 584 F.3d 935, 951 (10th Cir.2009). This is especially true when, for example, a defendant lies about having a criminal history. *See Santos*, 403 F.3d at 1133-34.

United States v. Moore, 795 F.3d 1224, 1230 (10th Cir. 2015). *Accord*, *United States v. Davis*, 636 F.3d 1281, 1291 (10th Cir. 2011).

Third, the minivan was registered to someone other than B. Shaw[16] and was traveling on I 70, a known corridor to drug sources in Colorado. UF ¶¶ 5, 12, 23, 26 & 27. "[Non-ownership] is a factor [the Tenth Circuit panels] "have often held" may "indicat[e] a stolen vehicle or drug trafficking." *United States v. Ludwig*, 641 F.3d 1243, 1249 (10th Cir. 2011) (*citing United States v. Olivares-Campos*,

[15] The triple I inquiry reported charges, not a conviction. B. Shaw was charged, but not convicted of felony intent to distribute controlled substances [marijuana] and misdemeanor possession of paraphernalia. He entered into a diversion agreement. He acknowledged his guilt to do so. B. Shaw successfully completed the diversion and the charges against him were dismissed October of 2011. Exhibit 3, 43:12-44:15.

[16] Mr. Shaw said it was his father's vehicle, UF ¶ 15, and KHP dispatch confirmed the minivan was registered to Ronald B. Shaw, UF ¶ 5.

No. 06-3411, 276 Fed.Appx. 816, 821 (10th Cir. 2008) (unpublished); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.1991)). *Ludwig* found non-ownership is relevant to the reasonable suspicion analysis even if driver provides details about vehicle's owner. *Id.* at 1249. Schulte noted that non-owned vehicles are frequently used by drug traffickers—one reason is that this avoids forfeiture of the driver's vehicle. UF ¶ 23.

This dovetails with travel to a known drug source area. *Id*. True, standing alone, a vehicle that hails from or is headed to a purported known drug source area is, at best, "a weak factor in finding suspicion of criminal activity." *United States v. Williams*, 271 F.3d 1262, 1270 (10th Cir. 2001). However, it is still a fact that can add to the calculus of reasonable suspicion. *E.g.*, *United States v. Mercado-Gracia*, No. 19-2153, 2021 WL 786970, at *7 (10th Cir. Mar. 2, 2021) (unpublished); *United States v. Farmer*, No. 98-2308, 2000 WL 639474 *7 (10th Cir. May 18, 2000) (unpublished); *United States v. Gamez-Acuna*, Nos. 08-4091, 08-4122, 375 F. App'x 809, 813 n. 7 (10th Cir. March 19, 2010) (unpublished). *See also United States v. Martinez-Torres*, No. 1:18-cr-1960, 2019 WL 113729 (D. N.M. Jan. 4, 2019) ("[T]he route taken, California to Texas via I-40, based on Deputy Mora's experience and training, is a common contraband travel route. All of these facts viewed together support a reasonable suspicion of drug trafficking activity."). And, let there be no mistake, that the source of drugs is at the destination does not detract from its importance here. In route drug traffickers can

have—frequently they do—large sums of cash, drug paraphilia and evidence of drugs with them on the trip to make a purchase. UF ¶ 23.

Fourth, the minivan was crammed full of stuff, with a lived-in look. UF ¶¶ 13, 16, 26 & 27.[17] *See e.g.*, *United States v. Gaxiola-Guevara*, No. 19-20049-1-JAR, 2020 WL 4206142, at *6 (D. Kan. July 22, 2020) (lived-in look was a circumstance establishing reasonable suspicion); *United States v. Cukurs*, No. 14-10199-JTM, 2015 WL 5883904, at *7 (D. Kan. Oct. 8, 2015) (lived in nature of the vehicle combined with other factors created a reasonable suspicion). *See also United States v. Bowman*, 660 F.3d 338, 345 (8th Cir. 2011) (reasonable suspicion in part from the car had a "lived-in look").

Fifth, S. Shaw was acting suspiciously in that he refused to look at Schulte (looking forward only) when, in Schulte's experience, a passenger usually looks in his direction at times during a stop. UF ¶¶ 22, 26 & 27. *See e.g.*, *United States v. Hernandez-Lizardi*, No. 10-10136-01-02-EFM, 2011 WL 166724, at *1 (D. Kan. Jan. 19, 2011), *aff'd,* No. 11-3236, 530 F. App'x 676 (10th Cir. July 23, 2013) (unpublished) (reasonable suspicion in part from fact passenger stared straight ahead and did not make eye contact with the trooper, which trooper Summers found unusual because his experience was passengers usually talk to the driver

[17] The lived-in look of the vehicle seems inconsistent with an approximate 10-hour trip (according to mapquest) from Oklahoma City to Denver to visit family, particularly in a Colorado winter. *See United States v. Glenn*, 931 F.3d 424, 429 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 563 (2019) (reasonable suspicion in part on the interior of the vehicle looked "lived in," which the officer viewed inconsistent with the driver's story of staying with family for the weekend). However, Schulte did not ask if the Shaws would be staying a family residence, as opposed to camping out.

or him during the stop); *United States v. Binder*, No. 2:05CR597, 2008 WL 803056, at *2 (D. Utah Mar. 21, 2008) (held passenger's demeanor added to reasonable suspicion in that "[t]he passenger stared straight ahead unless [the trooper] asked her a question. When asked a question, the passenger looked at [the trooper], answered the question, and then looked straight ahead again."). *See also United States v. Branch*, 537 F.3d 328, 338 (4th Cir. 2008) (including the passenger would make eye contact in reasonable suspicion calculus).

In summary, the factors going into Schulte's suspicions, in aggregate, demonstrated that he had an objective, reasonable suspicion to extend the detention for a drug dog sniff. *United States v. Arvizu*, 534 U.S. 266, 277-78 (2002) (again it is the totality of the circumstances which determines reasonable suspicion).[18]

d. The less than 20-minute wait for the drug dog was reasonable.

"[A] detention's duration 'must be temporary and last no longer than is necessary to effectuate the purpose of either dispelling or confirming the officer's reasonable suspicion.'" *United States v. Morales*, 961 F.3d 1086, 1091-92 (10th Cir. 2020) (*quoting United States v. White*, 584 F.3d 935, 954 (10th Cir. 2009). In assessing duration, courts ask whether law enforcement "diligently pursued a

[18] Schulte also found it suspicious that B. Shaw claimed to be a criminal justice major at his age [born in 1983] and that he would refuse a search if he were a criminal justice major. UF ¶ 28. However, the existence of required reasonable suspicion is not negated by law enforcement's articulation of factors which are too innocuous to support reasonable suspicion of criminal activity. *E.g., Berg, supra*, 956 F.3d at 1219-20. *See also United States v. Santos*, 403 F.3d 1120, 1133 (10th Cir. 2005) (finding reasonable suspicion while concluding some offered factors were "pure makeweights").

means of investigation that was likely to confirm or dispel their suspicions quickly," but "do not impose a rigid time limit." *United States v. Paetsch*, 782 F.3d 1162, 1175-76 (10th Cir. 2015) (*quoting United States v. Sharpe*, 470 U.S. 675, 686 (1985)).

Schulte timely requested a drug-detecting dog. The dog and handler arrived less than 20 minutes later UF ¶ 29. A twenty-minute wait is reasonable under settled Tenth Circuit law. Our Circuit has found waits of up to 51 minutes for the drug dog to arrive are reasonable. *United States v. Orozco-Rivas*, No. 19-6074, 810 F. App'x 660, 665 (10th Cir., *unpub.*, April 21, 2020) (*citing United States v. Mendoza*, 468 F.3d 1256, 1261 (10th Cir. 2006) (holding a 40-minute delay was reasonable "[g]iven the distance between the scene of the detention and the nearest [dog-]handler"); *United States v. Villa-Chaparro*, 115 F.3d 797, 803 (10th Cir. 1997) (upholding a denial of a motion to suppress where police detained the defendant for 43 minutes, 38 minutes of which was spent awaiting a drug-sniffing dog)).

e. Schulte had probable cause to search the minivan.

The drug-detection dog alerted for drugs in the minivan. UF ¶ 30. The dog's alerts proved correct when smelly bags were located in B. Shaw's bag/brief case. UF ¶¶ 31-32.

The constitutional interest concerning searches is somewhat different from that pertaining to seizures of persons. This variance can be significant when the detention of the occupants of motor vehicle arises from lawful search of the

vehicle. *United States v. Parada*, 289 F. Supp. 2d 1291, 1301 (D. Kan. 2003) ("once the dog alerted, it was reasonable to continue the detention of defendants during the search of the van"). B. Shaw's interest in the minivan, which was loaned to him by his father, and his ownership of the black bag/brief case, which harbored smelly bags and medical marijuana paperwork, provide B. Shaw with standing to assert the search of the minivan was unconstitutional. However, even if it must be pretended that he and his brother were unconstitutionally detained before the drug detection dog alerted, the lawfulness of the search of the minivan is important to both (a) the alleged interference with rights against unlawful searches and (b) the extent of damages that the plaintiffs can recover in the unlikely event it is found their detention before the dog alert survives qualified immunity.

In a § 1983 case, a plaintiff is limited to damages associated with an illegal detention, and may not recover damages which arise from subsequent legal conduct. *Martin v. Marinez*, 934 F.3d 594, 598 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 1115 (2020); *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000); *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999). *See also Dalcour v. Gillespie*, No. 08-CV-00747, 2013 WL 2903399, at *7 (D. Colo. June 14, 2013) ("Plaintiffs cannot recover for injuries that arise from lawful conduct simply because it was preceded by unlawful conduct"). *Cf. Lingo v. City of Salem*, 832 F.3d 953, 959 (9th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016) (the

fruit-of-the-poisonous-tree exclusionary rule does not apply in a civil suit against police officers).

Thus, it is important here that "[a] canine alert [provides] probable cause to search a vehicle." *United States v. Moore*, 795 F.3d 1224, 1231 (10th Cir. 2015) (*quoting United States v. Williams*, 403 F.3d 1203, 1207 (10th Cir.2005)). See also *United States v. Chavez*, No. 17-40106, 2018 WL 4053382, *6 (D. Kan. Aug. 24, 2018) (a dog alert, without more, is enough to constitute probable cause for searches and seizures, *citing United States v. Ludwig,* 10 F.3d 1523, 1527 (10th Cir. 1993)).[19]

This means all of the minivan and its contents were subject to search under the automobile doctrine[20] that allows for searches of "compartments and containers within the automobile so long as the search is supported by probable cause." *California v. Acevedo*, 500 U.S. 565, 570 (1991). *Accord*, *United States v. Ross*, 456 U.S. 798, 820 (1982). The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United*

[19] There is no evidence that Jaxx was unqualified. Further, the party challenging a search after a positive dog alert bears the burden of proving that the dog was unqualified. *United States v. Kitchell*, 653 F.3d 1206, 1224 (10th Cir. 2011).

[20] Since *Carroll v. United States*, 267 U.S. 132, 153 (1925), the Supreme Court has recognized an exception to the Fourth Amendment's warrant requirement when there is probable cause that a car contains contraband, the so called automobile doctrine. *See California v. Carney*, 471 U.S. 386, 392 (1985); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974); *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009).

States v. Ross, 456 U.S. 798, 824 (1982). Thus, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825.

B. Shaw complains that the zipper on his bag/brief case, located under a cot in the back of the minivan, was broken. But the bag was locked and separating the zipper was a reasonable manner to search for the drugs in the areas where the detection dog alerted. UF ¶ 32. *See Dalia v. United States*, 441 U.S. 238, 257 (1979) ("[I]t is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures," footnote omitted). In particular, courts determine the lawfulness of damaging or destroying property in executing a warrant by assessing the reasonableness of the police conduct. *See* 2 Wayne R. LaFave, Search and Seizure § 4.10(d), at 971–72 (5th ed. 2012) ("The destruction of property in carrying out a search is not favored, but it does not necessarily violate the Fourth Amendment; the standard is reasonableness."). *See also United States v. Mendoza*, 817 F.3d 695, 703 (10th Cir. 2016) (probable cause destructive disassembly of ice chest was reasonable); *United States v. Carbajal-Iriarte*, 586 F.3d 795, 799, 802-03 (10th Cir.2009) (probable cause to cut open upholstered seat after dog alerted to that seat); *United States v. Lyons*, 510 F.3d 1225, 1232, 1241-42 (10th Cir.2007) (probable cause permitted destruction of spare tire when officers observed that tire

appeared to have been recently placed on the rim and was excessively heavy, and "echo test" indicated that something was stored within the tire). *See also Carroll v. United States*, 267 U.S. 132, 162, 172 (1925) (during search supported by probable cause, officers cut open upholstered seat which was harder than expected when tapped on by officers).

f. ***Requiring the Shaws to travel to the KHP's HQ was a reasonable extension of the search.***

It is not unreasonable for officers to move a vehicle to a location that is more conducive for conducting a search. *Chambers v. Maroney*, 399 U.S. 42, 52 n. 10 (1970) (holding that it was not unreasonable for officers with probable cause to move the car to the police station to search it because "[a] careful search...was impractical and perhaps not safe for the officers [where it was], and it would serve the owner's convenience and safety of his car to have the vehicle and the keys together at the station house"). *See also United States v. Oliver*, 363 F.3d 1061, 1068 (10th Cir. 2004) (holding if there was probable cause to believe Defendant's package contained contraband at the time it was seized from his vehicle, no warrant was necessary for the later search at sheriff's office); *United States v. Anderson*, 114 F.3d 1059, 1065-66 (10th Cir.1997) (holding that no Fourth Amendment violation occurred because officers had probable cause to search the vehicle and it thus was lawful for officers to transport the vehicle to highway patrol headquarters for a search instead of searching the vehicle on the roadside where it was stopped). *See also United States v. Tapia*, No. 09-3060, 2010 WL 299245, at *5 (10th Cir. Jan. 27, 2010) (unpublished) (holding that

officers with probable cause to search a car at the scene where it is stopped also may perform the search later at the station house).

Schulte suspected that B. Shaw was violating Colorado law pertaining to medical marijuana licensing by misrepresenting he was a Colorado resident. UF ¶ 34. Schulte wanted to preserve the evidence with a copy of the paperwork during the search of the minivan. Therefore, having the Shaw's detour 700 yards on their trip to Denver to make copies was reasonable as part of the search. UF ¶¶ 35-36.

g. *S. Shaw was reasonably detained.*

The Shaws' claims are moored together. S. Shaw, even as a passenger in a seized vehicle, maintains standing to challenge his individual seizure. *Brendlin v. California*, 551 U.S. 249, 258-59 (2007).[21] However, "passengers may be detained for the *duration* of an otherwise-valid traffic stop." *United States v. Gurule*, 935 F.3d 878, 883 (10th Cir. 2019), *as revised* (Oct. 10, 2019), *cert. denied*, 140 S. Ct. 1285 (2020) (emphasis original) (*citing Arizona v. Johnson*, 555 U.S. 323 (2009)). Moreover, qualified immunity applies with equal force to S. Shaw's claim. *Eg., Rodriguez v. City of Albuquerque*, No. 13 CV 00169, 2014 WL

[21] However, presence during the stop of a vehicle does not alone grant standing to challenge a subsequent search. *United States v. Powell*, 732 F.3d 361, 375 (5th Cir. 2013). Rather, "[t]o gain Fourth Amendment standing to challenge the validity of a search—not the validity of the underlying seizure—passengers must continue to show a legitimate expectation of privacy in the area or item searched." *Id.* (internal quotation marks omitted).

11514669, at *6 (D.N.M. Jan. 8, 2014) (applied qualified immunity to passenger's § 1983 4th Amendment claim).

4. *Qualified immunity bars the Shaws' claims.*

Schulte is immune because the Shaws cannot show that Schulte's actions violated a constitutional or statutory right for the reasons described. However, even still, the Shaw would have to additionally show lack of an arguable reasonable suspicion and, thereafter, lack of arguable probable cause pointing to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts to overcome qualified immunity.

The cases that the plaintiffs cite in the First Amended Complaint, Doc. 07 at ¶¶ 111-114, concerning Fourth Amendment principles do not approach the required showing that Schule's conduct violated clearly established federal law.

Rodriguez v. United States, 575 U.S. 348 (2015), rejected lower decisions that had found the Fourth Amendment was not violated by a *de minimis* intrusion. But the Court did not reach the question of whether reasonable suspicion existed to justify a dog sniff and the consequence if it did not.[22] There is no claim here that the Shaws' detention after the traffic stop concluded was *de minimis*. And *Rodriguez* offers no factual analogy to our case.

[22] On remand, the circuit court held that exclusionary rule did not apply to search conducted in reliance on then-binding precedent that had not required reasonable suspicion or consent for a *de minimis* intrusion on personal liberty by a dog sniff. *United States v. Rodriguez*, 799 F.3d 1222 (8th Cir. 2015).

Plaintiffs state that the Constitution prohibits police from extending a traffic stop in order to question a driver about issues beyond the scope of the stop absent reasonable suspicion or consent, *citing United States v. Villa*, 589 F.3d 1334, 1339 (10th Cir. 2009), and *United States v. Hunnicutt,* 135 F.3d 1345, 1349 (10th Cir. 1998). This general proposition is not in dispute.[23] However, neither *Villa* nor *Hunnicutt* establish law that placed the constitutional question about the Shaws' detention beyond debate.

Villa found that a trooper's questions about a driver's travel plans ordinarily fall within the scope of a traffic stop. 589 F.3d at 1339. The court concluded that the trooper had reasonable suspicion of criminal activity from inconsistent and unusual statements from the driver and passenger about their travel plans and the driver's nervousness [implicitly unusual nervousness]. *Id*. at 1340-41.

Hunnicutt, among other things, held that (1) a police officer had reasonable suspicion that the defendant had violated statutes governing proper use of lanes or that defendant was driving under the influence of alcohol; (2) the officer had reasonable articulable suspicion of illegal activity supporting the continued detention of defendant and his questioning of defendant about presence of guns or drugs; and (3) no individualized reasonable suspicion of criminal activity was

[23] Other case law expands on this the general proposition, including (1) whether officers may multi-task, engaging in investigation, so long as the stop is not "extended" and (2) what inquiries are within the scope of the stop as part of the measurement of whether the duration of the stop was reasonable. *See* discussion, *supra*, at 16-20.

required to call canine unit. Concerning the suspicion for the detention and dog sniff, the court stated:

> When the officer asked Mr. Hunnicutt about guns and drugs, he was confronted with a driver who had no proof he was the vehicle's owner, no registration, and no proof he was otherwise authorized to operate the vehicle. The person he claimed to have purchased the vehicle from was not the registered owner. He failed to stop promptly, which led the officer to wonder whether the occupants were stuffing things under the seats; and after the stop, the passengers repeatedly moved back and forth and leaned over.

135 F.3d at 1349.

Finally, *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016), does not establish law that the Shaws' rights were violated, much less show the alleged violation was beyond debate such that only the "plainly incompetent" would think otherwise.

The *Vasquez* defendants argued that the following factors created reasonable suspicion: (1) Vasquez was driving alone late at night; (2) he was travelling on I-70, "a known drug corridor"; (3) he was from Colorado and was driving from Aurora, Colorado, "a drug source area"; (4) the back seat did not contain items the Officers expected to see in the car of someone moving across the country; (5) the items in his back seat were covered and obscured from view; (6) he had a blanket and pillow in his car; (7) he was driving an older car, despite having insurance for a newer one; (8) there were fresh fingerprints on his trunk; and (9) he seemed nervous. 834 F.3d at 1136.

The Tenth Circuit panel found this conduct, taken together, "was hardly suspicious, nor is it particularly unusual." *Id.* at 1136-37. About 4, 5 & 6, the court

found that "the Officers' reasoning is contradictory at points. Officer Jimerson claimed that Vasquez's car contained items that were covered by blankets, but Officer Lewis found suspicious that the car was uncharacteristically empty and lacking in sundries common for someone moving cross-country." *Id.* at 1138. Regarding justifications 2 and 3, *Vasquez's* majority cabined the factors offered by the defendant troopers to be the driver's state citizenship and stated:

> It is wholly improper to assume that an individual is more likely to be engaged in criminal conduct because of his state of residence, and thus any fact that would inculpate every resident of a state cannot support reasonable suspicion. Accordingly, it is time to abandon the pretense that state citizenship is a permissible basis upon which to justify the detention and search of out-of-state motorists, and time to stop the practice of detention of motorists for nothing more than an out-of-state license plate.

Id.

In this case, out-of-state citizenship was no factor in Schulte's stop and detention of the Shaws. The Shaws' destination, Denver, was a reasonable consideration in Schulte's suspicions. They planned to travel to a drug trafficking source state. By contrast, another destination could have abated reasonable suspicion. For example, if they had been traveling to Colby, Kansas to pick up and then transport an Aunt back to Oklahoma City for Christmas. But no inference was drawn that the Shaws were engaged in criminal conduct because they were Oklahoma residents.

5. There is no basis for a punitive damage award.

This Court stated:

> Under 42 U.S.C. § 1983, plaintiffs can recover punitive damages when they show that defendants' conduct was "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Eisenhour v. Cty.*, 897 F.3d 1272, 1280-81 (10th Cir. 2018) (citations omitted). This does not mean that defendants must engage in "egregious misconduct" or even "any intentional misconduct beyond that required" for compensatory damages. *Id.* at 1281. Instead, it is defendants' mental states – not the scope of the harm – that triggers liability for punitive damages. *Id.* Accordingly, defendants can be liable for punitive damages if they acted in the face of a perceived risk that their actions will violate federal law. *Id.*

Shaw v. Jones, No. CV 19-1343-KHV, 2020 WL 2296752, at *2 (D. Kan. May 7, 2020). The uncontroverted facts do not support any reasonable inference that Schulte acted with reckless or callous indifference to the Shaws' federally protected rights.

Conclusion

Defendant Schulte requests that the Court enter summary judgment against Plaintiff Shaws' claims against him. Alternatively, he requests entry of summary judgment against the Shaws' punitive damage claims. He makes this alternative request to avoid waiver of summary judgment against the punitive damage claims, although the Court should not reach the question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2021, I electronically filed the foregoing with the Clerk by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ Arthur S. Chalmers