Case No. 21-3130 & 21-3131

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Blaine Franklin Shaw, *et al.*,
Plaintiffs-Appellees,

v.

Herman Jones, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for District of Kansas
Honorable Kathryn H. Vratil
United States District Court Judge
Case No. 6:19-CV-01343-KHV-GEB (D. Kan.)

BRIEF OF DEFENDANTS–APPELLANTS SCHULTE and MCMILLIAN

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Oral argument is requested

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People or Entities

Appellants ..... Defendants Master Trooper Douglas Schulte & Technical Trooper Brandon McMillan

Appellees ..... Plaintiffs Blaine Franklin Shaw, Samuel Shaw & Joshua Bosire

Shaw..... Plaintiff Blaine Franklin Shaw [driver of minivan]

S. Shaw..... Plaintiff Samuel Shaw [passenger in minivan]

Bosire ..... Plaintiff Joshua Bosire [driver of Altima]

Schulte ..... Defendant Master Trooper Douglas Schulte

McMillan..... Defendant Technical Trooper Brandon McMillan

KHP..... Kansas Highway Patrol

Court Documents, Terms, and Other Items

Aplt., __, __ ..... Appellants' Appendix, Volume number, page number

RELATED CASES

There are no related appeals.

JURISDICTION

The Court has jurisdiction, under 28 U.S.C. § 1291, to review the legal issues presented concerning the application of qualified immunity through the collateral order doctrine. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1162 (10th Cir. 2021).

The district court declined to make factual findings. However, the Court has jurisdiction to review the factual record de novo as "the district court at summary judgment fail[ed] to identify the particular charged conduct that it deemed adequately supported by the record," *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010). *Accord, Chapman v. Santini*, 805 F. App'x 548, 552 (10th Cir. February 13, 2020) (unpublished) (*quoting Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1259 (10th Cir. 1998)).

ISSUES

The overarching issues are 1) whether the facts suffice to show a legal violation, and (2) whether that law was clearly established at the time of the alleged violation. Applied to the specifics of the plaintiffs' claims:

Shaw against Schulte:

1. The Shaws' detention did not violate Fourth Amendment rights. Shaw consented to a 30-second conversation and Schulte had reasonable suspicion to extend the traffic stop for a dog sniff.

2. Schulte had probable cause to search the minivan from a drug dog alert.

3. A short detour to KHP's HQ was a reasonable extension of the search.

4. Anyway, the rights allegedly abridged were not "clearly established."

Bosire against McMillan:

1. During a traffic stop, McMillan had objective reasonable suspicion to detain Bosire for additional questions and then a dog sniff.

2. The rights allegedly abridged by McMillan were not "clearly established."

Bosire against Schulte:

3. Schulte was not obligated to second-guess and intervene in McMillon's detention of Bosire.

4. The rights allegedly abridged by Schulte were not "clearly established."

STATEMENT OF THE CASE

This 42 U.S.C. § 1983 suit arises from two separate traffic stops.

The trooper defendants asserted qualified immunity in motions for summary judgment. On June 22, 2021, the district court denied the motions. In docket entries, the court stated the motions were denied "for substantially the reasons stated" in plaintiffs' memoranda opposing the motions. Aplt., 3, 262; 263. Motions to alter and amend, in part seeking the court's factual findings, were denied. Aplt., 6, 40.

Shaws

On December 20, 2017, at about 12:25 p.m., Schulte, a seventeen-year KHP trooper, stopped a minivan traveling 91 miles per hour in the 75 miles per hour zone westbound on Interstate 70 ("I 70"). Aplt., 2, 77-78. Shaw was driving. He admits he was speeding. Aplt., 2, 96. S. Shaw was a passenger. Aplt., 2, 105.

Schulte activated his overhead lights and siren to signal the minivan to stop. The minivan changed lanes, slowed down—braking once for traffic—and eventually stopped on the shoulder of an exit ramp to Hays, Kansas. However, it did not stop for about a minute and one half, and not until after it had traveled about one mile. Aplt., 2, 78.

While attempting to get the minivan to stop, Schulte requested dispatch "run" the minivan's license plate. He learned Ronald Shaw was the registered owner. Aplt., 2, 78.

Schulte stopped his marked patrol vehicle behind the minivan. He repeated his license plate inquiry, received a response to the inquiry, exited his vehicle and walked to the minivan. Walking to and from the minivan vehicle, Schulte saw it was packed full, up into the front seats, with luggage, coolers, a cot, blankets and several other items. To Schulte, it had a "lived-in" appearance. Schulte's training and experience is drug traffickers frequently limit their stops and time from their vehicle to quickly obtain or transport illegal contraband. This results in a lived-in look. Aplt., 2, 79-80.

Schulte's first contact with Shaw was by the driver's door. It lasted about one minute. Schulte requested Shaw produce his driver's license and proof of insurance. Shaw represented the minivan was his father's. Once back to his patrol vehicle, Schulte called in the driver's license to dispatch and requested information about warrants and criminal history. Aplt., 2, 81.

Schulte received the responses Shaw's license was valid, he was not subject to a warrant, and Shaw had a 2009 felony intent to distribute narcotics on his record. Aplt., 2, 81.

Schulte then had a second exchange with Shaw at the driver's side window, which lasted about 30 seconds. Schulte handed Shaw a ticket for speeding and returned Shaw's license and proof of insurance. Schulte explained the procedure for responding to the ticket and said he could not answer Shaw's question about insurance. Schulte concluded, "have a safe trip and drive safely," turned and started walking back toward his patrol vehicle. Aplt., 2,81.

Schulte walked along the side to the back of the minivan until it was taken out of park. Then 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?" Shaw responded quickly, "Yeah." Aplt., 2, 81.

The subsequent exchange went:

> [Schulte] You are coming from Oklahoma; where are you headed to today?
>
> [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? [Shaw, denials] – no guns, no knives, no contraband, no illegal narcotics, marijuana, cocaine, opioid, no meth, no large sums of cash, anything like that? [Shaw, denials]
>
> [Schulte] Can we search your vehicle for such items?

> [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?

Aplt., 2, 82.

Schulte felt the passenger in the front passenger seat, S. Shaw, was acting suspiciously. 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. In Schulte's experience, a passenger usually looks in Schulte's direction at times and speaks with him or the driver during a stop. Aplt., 2, 83.

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). Aplt., 2, 83. Schulte believed this significant when combined with the fact Shaw was not the vehicle's owner and in light of the other circumstances, including the delay in pulling over, the contents of the minivan, Shaw's criminal history and S. Shaw's behavior. *Id*. By his experience and from other law enforcement officers, Schulte knew non-owned vehicles are frequently used by drug traffickers—one reason is to avoid forfeiture of the driver's vehicle. He also knew drug traffickers, in

route to make a purchase, frequently have large sums of cash, drug paraphilia and evidence of drugs with them. *Id*.

Schulte requested a drug dog for a sniff of the minivan upon his return to his patrol vehicle. Aplt., 2, 82. The canine alerted providing positive indications of drugs. Aplt., 2, 83.

After the dog's alerts, troopers searched the minivan. One place the dog specifically indicated was a cot in the back of the minivan. A locked black bag case was located under the cot. In the bag, troopers found pills—a few with different colors and sizes, not in a prescription bottle, which Shaw stated were Tramadol; multiple plastic bags had a marijuana smell ("smelly bags"); and Colorado medical marijuana paperwork (registry cards, which appeared to authorize some cultivation, and a Colorado residence identification card which were all issued to Shaw). Aplt., 2, 85-65.

Schulte talked to Shaw about what they found. Schulte asked if Shaw was a resident of Colorado or Oklahoma, telling Shaw "you can't be both," and asked Shaw if bag/brief case was his. Shaw would not answer the questions other than to say he had lived in Colorado in the past. Aplt., 2, 11.

Schulte discussed the Colorado medical marijuana registry card with a trooper at the scene, James McCord. McCord suggested Schulte make a copy of the paperwork and contact Colorado authorities to report Shaw was

lying about being a Colorado resident. Schulte suspected Shaw was violating Colorado law.[1] Aplt., 2,86.

At the stop, the search of the minivan and discussions between the troopers and Shaw after the search took approximately 30-35 minutes. Aplt., 2, 87. Then, Schulte directed Shaw to follow him to the Hays KHP headquarters, which was about a 700-yard detour from the Shaws' trip to Denver.[2] *Id.* The Shaws waited in the KHP HQs parking lot. Aplt., 3, 30-31; Shaw Exhibit 4[3], at 1:18:38 to 1:38:16. Copies were made of the paperwork found during the search and the Shaws left to continue to Colorado. Aplt., 2, 87.

[1] 5 CCR 1006-2:2 (Jan. 2016) provided only Colorado residents could obtain a Medical Marijuana Registry Card. That card was required for the Colorado consumption in 2017 of medical marijuana. *See* CO ST § 25-1.5-106 (June 6, 2016).

[2] The HQs are located about 350 yards from at the next exit on I 70 west of where the stop took place. Aplt., 2, 87. Leaving the HQ, the Shaws drove directly to Denver on I 70, stopping only for gas and Shaw's inspection of the minivan for any damage. Aplt., 2, 100, 108-09.

[3] Shaw's phone recording of the December 20, 2017 events, conventionally filed and exempted from Appendix, 10th Cir. Order, 10/4/21.

Bosire

On February 10, 2019, McMillan, an eleven-year KHP Technical Trooper stopped Bosire for driving 82 miles per hour in a 75 mile per hour zone eastbound on I 70 about 5 miles west of Hays, Kansas. Bosire was driving a rented Nissan Altima. Aplt., 2, 166-67.

McMillan saw the Altima at a gas pump in Love's Travel Shop ("Love's") in Ellis, Kansas about ten minutes before the stop. McMillan and Schulte were at the convenience store on a food break. While exiting the store, McMillan and Schulte smelled the odor of marijuana seeming to come from persons who were or had been near the store's entrance. Then, after standing outside the convenience store for less than five minutes, McMillan noticed two men standing and talking by the Altima. McMillan believed one or both of these men could have been the source of the marijuana odor smelled in the store. Aplt., 2, 171; Aplt., 2 203.

McMillan thought the Altima was a rental vehicle. He thought he saw a speed detector mounted on the windshield. Then, when driving from the Love's parking lot, he saw a camera mounted on vehicle's rear passenger's side headrest. Aplt., 2, 171. McMillan ran the car's Missouri license plate and determined the vehicle was registered to EAN Holdings. *Id*. At the same time, as McMillan left the Love's parking lot, he and Schulte saw a

silver Dodge Charger, which appeared to be another rental vehicle, driving back toward I 70. Aplt., 2, 171.

McMillan and Schulte thought the Altima and Charger might be connected. They knew both vehicles left Love's about the same time. Their experience caused them to suspect possible caravanning to transport or acquire drugs by the men (and perhaps others) they had seen by the Altima. Aplt., 2, 171-72; Aplt., 2, 203-04.

About ten minutes later, out on the highway, McMillan clocked a vehicle speeding. McMillan pulled the vehicle over. Aplt., 2, 167-68. He placed a license plate inquiry, received a response confirming the Altima he stopped was the one he saw at Love's. *Id.*

McMillan approached the Altima's passenger side about a minute and a half after Bosire pulled over. McMillan shined his flashlight and looked into the interior of the car as he circled, counterclockwise, to the driver's door. With the flashlight's assistance, he saw only one of the two men he had seen standing and talking by the Altima at Love's. He also saw a notebook partially covered by a blanket in the backseat. Aplt., 2, 167

When McMillan first arrived at the driver's door, it appeared the window was down less than an inch. While standing beside the window, he requested Bosire lower the window, took Bosire's Kansas driver's license,

and received and reviewed the rental agreement. Aplt., 2, 168-70. The driver's license showed Bosire had a Wichita, Kansas address, approximately 185 highway miles from the involved stop. Aplt., 2, 171. McMillan noted the rental agreement was for a two-day rental. McMillan also saw a camera, not a speed detector, mounted in the front windshield and a camera mounted on the rear passenger's side headrest. Aplt., 2, 171.

The exchange between McMillan and Bosire lasted less than two minutes. Aplt., 2, 169. Their conversation was materially the following:

> [McMillan] Roll you window down please. Kansas Highway Patrol, I checked your speed at 82, speed limit is 75. May I see your driver's license please? Do you have your rental agreement with you? Let me see you other right hand [sic] please. Where are you coming from tonight?
>
> [Bosire] [after a pause of about 7 seconds] – sighs, "west."
> [McMillan] Ok, where are you coming from tonight?
>
> [Bosire] West.
>
> [McMillan] Where at?
>
> [Bosire] West.
>
> [McMillan] You were coming from west?
>
> [Bosire] Yes, I am heading east.
>
> [McMillan] Is that in Kansas; is that in Colorado; where is west?
>
> [Bosire] Do I have to answer that question?
>
> [McMillan] I am asking what your travel plans are.

> [Bosire] I am coming from the west. I'm heading east.
>
> [McMillan] What is that?
>
> [Bosire] I am coming from the west. I'm heading east.
>
> [McMillan] You are coming from the west, heading east?
>
> [Bosire] Yes.
>
> [McMillan] OK, What is the purpose of your trip, sir?
>
> [Bosire] Do I have to have ...
>
> [McMillan] I am asking what you travel plans are; I have the right to ask you these questions.
>
> [Bosire] And I have the right to remain silent.
>
> [McMillan] OK, you are telling me you are not going to answer the questions. Is that want you are saying?
>
> [Bosire] No.
>
> ....

Aplt., 2, 169-70.

During the exchange, Bosire only partly rolled down the Altima's driver side window. McMillan did not smell marijuana in the vehicle. This left an inference of caravanning from the troopers' observations at Love's and their law enforcement experience concerning the use of rental vehicles and cameras in drug trafficking; but dispelled Bosire had been the source of marijuana smell in Love's. Aplt., 2, 170.

After this first exchange ended, McMillan was suspicious Bosire was transporting something illegal. Aplt., 2, 171. From his law enforcement experience, he knew persons transporting drugs frequently use short-term rented vehicles for the transport. Likewise, he knew people engaged in the delivery or acquisition for delivery of large amounts of drugs will travel in two or more vehicles (caravan), whereby one vehicle can attempt to distract law enforcement from the vehicle transporting contraband. *Id.* McMillan found the mounted cameras in a rental car (particularly a short-term rental) could be an attempt to (a) facilitate caravanning, (b) make the drug transporter accountable to his or her principal, and/or (c) discourage law enforcement stops. *Id.* He felt the silver Dodge Charger he saw leaving the convenience store could be associated with the man at the gas pump talking with Bosire and, therefore, caravanning with Bosire. *Id.* Further, McMillan believed Bosire's responses to his questions about travel raised suspicion about the legality of Bosire's activities in that, according to McMillan, they were entirely atypical of usual conversations with the persons he had stopped during his 13 years in law enforcement. Bosire had been non-responsive and evasive. *Id.* That Bosire did not fully roll down his window and the partial covered notebook in the back of the rental car added to McMillan's suspicion based on his law enforcement experience. *Id.*

Back at his vehicle, McMillan called in an inquiry about Bosire's license and possible warrants, and radioed Schulte to come to the stop. Schulte is not McMillan's supervisor. McMillan wanted backup, for officer safety, if a search of the Altima happened. Aplt., 2, 173.

McMillan also radioed Schulte the white man seen at the convenience store is "no longer in the car." Aplt., 2, 173. Schulte immediately sent out a request other troopers keep a look out for the silver Charger while headed to the stop. Aplt., 3, 205.

Schulte arrived at the scene of the stop approximately 7 minutes after McMillan had stopped Bosire. Aplt., 2, 173. Schulte first saw Bosire after the drug dog arrived. Schulte never spoke to Bosire and did not hear what was said in any of the encounters between McMillan and Bosire. Aplt., 2, 205. However, McMillan told Schulte he could not smell marijuana in Bosire's vehicle when Schulte came to the scene of the stop. McMillan mused, to Schulte, the marijuana smell could be in the other car, referencing the silver Dodge Charger. McMillan told Schulte he saw a notebook in back of the car, partly under a blanket. McMillan told Schulte there were several cameras in Bosire's car and Bosire was refusing to answer questions. Schulte responded "he is playing the game," which McMillan understood to relate to Bosire's non-responsiveness. Schulte

asked McMillan if he had requested consent to search the Altima and McMillan said he had not, but Bosire would not give consent. McMillan also told Schulte, "if he does not let me [search], I don't think I can hold him for a dog." However, McMillan asked Schulte to locate the nearest available drug-detention dog. Aplt., 2, 173.

McMillan received responses on the license and warrant inquires about 2½ minutes after Schulte arrived. Aplt., 2, 174. McMillan completed the paperwork to give Bosire a warning for speeding, and then walked to the passenger side window of the Altima and spoke to Bosire for a second time. *Id*. McMillan felt he had reasonable suspicion to detain Bosire for additional questions. He believed additional questioning would either abate suspicion that Bosire was involved in criminal activity or establish it was reasonable to detain Bosire ten or more minutes more for a dog sniff. *Id*.

The second exchange, which took about 4 minutes, went materially as follows:

[McMillan] Hey, were did you buddy go?

[Bosire] [No response]

[McMillan] They guy you were with at Loves?

[Bosire] Loves?

[McMillan] The gas station you were at.

[Bosire] Did you see two people?

[McMillan] Yeah when you were getting gas.

[Bosire] You saw two people?

[McMillan] I saw two people. Did he get in another car or what?

[Bosire] (Laughs) oh wow, ...

[McMillan] You don't know where he went?

[Bosire] I don't know what we are talking about.

[McMillan] You don't know what I am talking about?

[Bosire] No.

[McMillan] You don't remember talking to the guy at loves, at the gas pump?

[Bosire] A state trooper.

[McMillan] What?

[Bosire] There were 3 state troopers, I say that one say hi, I said hi and walked away

[McMillan] OK I am not talking about any troopers, I said the guy at the gas pump that was with you. I was at loves, I saw you.

[Bosire] Me?

[McMillan] Yes, you were getting gas in this car.

[Bosire] Correct.

[McMillan] There was white guy with a hoodie oh talking to you at the gas pump. He walked right by beside you.

[Bosire] [Shakes head side-to-side] unum. I opened the door for somebody, but

[McMillan] No at the gas pump.

[Bosire] What? Oh, was one of the attendants, ... pump.

[McMillan] OK. I wasn't seeing things.

***

[McMillan] I am not going to give you a ticket for that you were going 6 over. So, you are making me a little suspicious here because you are not telling me what you are doing. You know what I mean, you got all of these cameras mounted, like why?

[Bosire] Because police f--k with people.

[McMillan] We have cameras too. What are we trying to hide?

[Bosire] Police f--k with people all of the time.

[McMillan] Anyway.

[Bosire] I am just saying. You saw me at the gas station that was the reason. I saw the way you guys looked at each other like yeah we are going to get him. But...

[McMillan] You saw that?

[Bosire] Yeah.

[McMillan] You could hear us thinking that in our heads?

[Bosire] No, I saw, I saw the head...

[McMillan] I am not giving you a ticket for speeding, but you are making my highly suspicious that you are transporting something illegal. Is that the case? Is that why you don't want to answer any questions?

> [Bosire] No cause, according the Constitution you have the right to remain silent.
>
> ***
>
> [McMillan] You make me suspicious, you're not telling me your travel plans, leading me to believe that you are transporting something you shouldn't be transporting, is that the case?
>
> [Bosire] No.
>
> [McMillan] So you don't mind if I look?
>
> [Bosire] Unless you have a warrant.
>
> [McMillan] OK then we'll call a canine here.
>
> ***
>
> [McMillan] ... it will be about 10 minutes.

Aplt., 2, 174-77.

McMillan believed Bosire did not honestly (or likely not) answer his questions about the second man at the gas pump at Love's. He did not believe Bosire's explanation for the cameras in the rental car undermined their suspected use for criminal activities. Aplt., 2, 177. McMillan felt, in combination with all other indicators, the second encounter showed reasonable suspicion of criminal activity justified continued detention for a dog sniff. *Id*.

Returning to his vehicle, McMillan asked Schulte to tell a county sheriff's deputy, who had the nearest available dog, to come to the stop for a canine sniff. Aplt., 2, 177. McMillan solely made the decisions to stop and then detain Bosire. Aplt., 2, 205.

Schulte did not believe he had sufficient information to either approve or challenge whether McMillan's conclusions were reasonable. Schulte assumed and trusted McMillan possessed information that amounted to reasonable suspicion needed to detain Bosire after the work for the traffic stop was complete. Aplt., 2, 205.

When the drug dog arrived, McMillan returned Bosire's paperwork and gave him a written warning for speeding. Aplt., 2, 177. The canine sniff concluded without an alert. *Id*. Bosire was immediately told he could leave. *Id*.

SUMMARY OF ARGUMENT

Qualified immunity is a complete defense to the plaintiffs' claims.

Shaws' claims: The Shaws, after a traffic stop for speeding had concluded, were constitutionally detained by Schulte, *first*, for a 30-second consensual conversation, *second* based on reasonable suspicion and, *finally*, with probable cause from a drug-dog alert, which resulted in a

search of the Shaw minivan at the stop and collection of records-as part of the search-at KHP HQ.

The undisputable evidence shows Shaw consented to the brief conversation. No factor, which courts consider to determine voluntariness of consent, disputes the constitutionality of the questioning.

Schulte had reasonable suspicion to detain the Shaws for a drug dog sniff. Courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. This was present, based on Schulte's experience and training. Shaw did not timely pull over. Shaw had a criminal history for felony intent to sell narcotics. The minivan was registered to someone other than Shaw and was traveling on I 70, a known corridor to drug sources in Colorado. The minivan was crammed full of stuff, with a lived-in look, suggesting the hard travel characteristic of drug traffickers. Additionally, Schulte found the passenger, was acting suspiciously because he refused to look at Schulte (looking forward only).

The dog alerted to marijuana's odor, providing probable cause to search the minivan. From paperwork found in the search, Schulte suspected Shaw was violating Colorado law pertaining to medical

marijuana licensing. Having the Shaw's detour 700 yards on their trip to Denver to make copies was reasonable as part of the search.

In any event, not "every" reasonable official would have known the Schulte's conduct was unlawful, if it was. The Shaws have not presented factually similar precedential cases that show the allegedly abridged Fourth Amendment right was "clearly established" at the time of the conduct at issue.

Bosire's claims

McMillan had reasonable suspicion to detain Bosire to ask questions before calling for a dog sniff and then when he called for the sniff. Even though the dog did not alert and no criminal conduct was detected, *Terry* accepts the risk that officers may detain ("seize") innocent people.

Focused through his experience and training, McMillan had a particularized and objective basis for suspecting legal wrongdoing, under the totality of circumstances. McMillan and Schulte smelled a marijuana odor at Love's, which they believed might be associated with two men they saw a few minutes later standing by a rented Altima. The troopers saw the Altima had a mounted camera in the back. It and another rental vehicle left Love's about the same time. Then about ten minutes later, McMillan pulled over an Altima, driven by Bosire, for speeding. He confirmed it was the

Altima from Love's. McMillan thought the Altima might be "caravanning" with the other rental seen leaving Love's. Troopers immediately attempted to locate the second rental car. During the traffic stop, McMillan saw the two cameras. McMillan knew drug traffickers use surveillance cameras to facilitate caravanning, discourage a law enforcement stop, and confirm a "hired" driver appropriately transports drugs or narcotic cash. The Altima was a short-term rental. McMillan knew drug traffickers frequently use short-term rentals to transport drugs or narcotic funds. Bosire did not fully roll down his window and there was a partially covered notebook in the back of the rental car that appeared to be a ledger which drug transporters use. Bosire would only say he was traveling from the West going East, which McMillan found atypical and evasive. Moreover, McMillan's suspicions were heightened in post-stop questioning. He reasonably believed Bosire had not honestly answered his questions about the second man at Love's and the cameras in the rental car. Thus, the Fourth Amendment was not violated by Bosire's detention even though no evidence of criminal conduct was found.

Yet, it cannot be concluded "every" reasonable official would have known the McMillan's conduct was unlawful, if it was. Bosire has not presented factually similar precedential cases that show the allegedly

abridged Fourth Amendment right was "clearly established" at the time of the conduct at issue.

As to Schulte, he was backup at the Bosire stop. Schulte is not McMillan's supervisor. He had no obligation or basis to second-guess McMillan's decisions. Anyway, it cannot be concluded "every" reasonable official would have known the Schulte's failure to "intervene" was unlawful.

Thus, summary judgments should be granted to Appellants on qualified immunity.

ARGUMENT AND AUTHORITIES

A. Scope of Review

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).

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 v. United States*, 575 U.S. 348, 354 (2015).

An officer may constitutionally 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.

There is no dispute about validity of the Shaw and Bosire stops. Bosire claims his detention, after his stop should have ended, violated the Fourth Amendment. The Shaws assert their detention and the search of the minivan violated the Fourth Amendment.

The appellants assert qualified immunity. 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. *See Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011).

Given the immunity claimed, the burden shifted to the plaintiffs to satisfy a two-part test: (1) the plaintiffs must show the defendants' actions violated a constitutional or statutory right; and (2) the plaintiffs must show this right was "clearly established" at the time of the conduct at issue. *Rojas v. Anderson*, 727 F.3d 1000, 1003 (10th Cir. 2013).

In this appeal, the legal questions are: "whether the actions violated the plaintiffs' constitutional rights, whether those constitutional rights were clearly established, and whether the objectively reasonable defendant 'would have known that his conduct violated that right'" from the "historical facts." *Cavanaugh v. Woods Cross City*, 718 F.3d 1244, 1256 (10th Cir. 2013). *Accord, Ornelas v. United States,* 517 U.S. 690, 699 (1996) ("determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal"); *Donahue v. Wihongi*, 948 F.3d 1177, 1187 (10th Cir. 2020) (same, § 1983 action). *See also Fancher v. Barrientos*, 723 F.3d 1191, 1200 (10th Cir. 2013) ("[w]hether a constitutional right was clearly established at the time an alleged violation occurred is a quintessential example of a purely legal determination fit for interlocutory review").

As such, subject to the jurisdictional review of collateral orders, the Court's review of the denial of the qualified immunity defense is *de novo*. *See Dixon v. Kirkpatrick*, 553 F.3d 1294, 1301 (10th Cir. 2009).

B. The doctrine of qualified immunity bars the plaintiffs' claims.

Shaws

1. The Shaws' detention did not violate Fourth Amendment rights.[4]

(a) Shaw consented to the 30-second conversation.

A trooper may ask a driver additional questions after the traffic stop is complete without unconstitutionally prolonging the stop if the driver consents. A request for consent is not a seizure. *Fla. v. Bostick*, 501 U.S. 429, 439 (1991).

Schulte handed paperwork to Shaw, including a ticket for speeding and the license and proof of insurance information Shaw had produced. Schulte concluded, "have a safe trip and drive safely." First leaving, but then coming back towards Shaw, Schulte stated, "Hey, Blaine can I ask you

[4] The Shaws' claims are tied. "[P]assengers 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). Moreover, qualified immunity applies with equal force to S. Shaw's claim. *Eg., Rodriguez v. City of Albuquerque*, No. 13 CV 00169, 2014 WL 11514669, at *6 (D.N.M. Jan. 8, 2014) (applied qualified immunity to passenger's § 1983 Fourth Amendment claim).

a question real quick?" Shaw responded quickly, "Yeah." Aplt., 2,81. The request and the consent is recorded on the trooper's dash cam video. Aplt., 2, 87; Shaw Exhibit 2a[5], at 14:23-15:45. The Court should review the video to determine the relevant historical facts.

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 Shaw lacked the physical and mental condition and capacity of to freely consent. At the time, Schulte was the only officer at the stop. Schulte did not touch the minivan or its occupants. Shaw Exhibit 2a, at 15:08-15:45. Shaw agreed to answer questions. Aplt., 2, 81; Shaw Exhibit 2a, at 15:12-15:14. "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984); *see also United States v. Jones*, 701 F.3d 1300, 1318 (10th Cir. 2012) (listing factors as to whether consent was voluntary).

[5] First part of the dash camera video, conventionally filed and exempted from Appendix, 10th Cir. Order, 10/4/21.

Schulte was not required to tell Shaw he was "free to go." *Ohio v. Robinette*, 519 U.S. 33, 35 (1996); *United States v. Mercado-Gracia*, 989 F.3d 829, 837 (10th Cir. 2021). Schulte was not required to inform Shaw 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). Actually, Shaw knew he was not required to answer Schulte's questions as evidenced by his subsequent refusal to a search and, later, to answer questions. Aplt., 2, 82, 86.

Shaw's subjective opinion he could not leave is irrelevant. Whether the driver has consented to additional questions and detention turns on whether a reasonable person would have believed he was free to withhold consent. *United States v. Mercado-Gracia*, 989 F.3d at 836; *United States v. Gomez-Arzate*, 981 F.3d 832, 842 (10th Cir. 2020). Shaw's opinion Schulte was standing too near the minivan to allow safe merger into traffic is likewise irrelevant. *United States v. West*, 219 F.3d 1171, 1177 (10th Cir. 2000) (rejecting consent was not voluntary because the deputy was standing extremely close to West's car and leaning forward so the car door could not open without hitting the deputy); *United States v. Elliott*, 107 F.3d 810, 814 (10th Cir. 1997) (rejecting not voluntary when officer was not

leaning on or touching the car); *United States v. Mora-Alvarez*, No. 17-CR-00336-MSK-GPG, 2018 WL 6583847, at *8 (D. Colo. Dec. 14, 2018) (rejecting not voluntary when officer was standing approximately a foot away from the driver's side door with his arms crossed). *Cf. United States v. Thompson*, 546 F.3d 1223, 1228 (10th Cir. 2008) (even if the driver's car was "actually blocked" is not dispositive on the question of consent). And contrary to Shaw's opinion, Schulte was not interfering with the Shaws' departure in any objective sense when Shaw consented to the third encounter. Shaw Exhibit 2a, at 15:08 -15:16 (showing Schulte positioned away from and slightly behind driver's door when consent was requested and provided).

(b) Schulte had reasonable suspicion to extend the stop for a dog sniff under the totality of the circumstances.

Reasonable suspicion accrues when an officer possesses a "particularized and objective basis for suspecting criminal conduct under a totality of the circumstances." *United States v. Pettit*, 785 F.3d 1374, 1379 (10th Cir. 2015) (*quoting United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). "This is not an onerous standard." *United States v. Sanchez*, 983 F.3d 1151, 1158 (10th Cir. 2020).

Reasonableness of suspicion requires "considerably less" than a preponderance of the evidence and "obviously less" than probable cause. *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020). "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). "[R]easonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality." *Mocek v. City of Albuquerque*, 813 F.3d 912, 923 (10th Cir. 2015).

"The 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." *United States v. Mercado-Gracia*, 989 F.3d at 839. *See Glover*, 140 S. Ct. at 1188 (an officer need not rule out the possibility of innocent conduct). *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)).

Moreover, 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*, 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").

Finally, 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). *Accord, United States v. Sokolow*, 490 U.S. at 9-10.

Schulte had objective reasonable suspicion. *First*, Shaw did not timely pull over. Aplt., 1, 78. Schulte could reasonably infer the occupants in the

minivan delayed stopping to hide contraband, to get their stories straight or in considering running.

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 "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); *United States v. Chapman*, 115 F.3d at 802 (driver ignored flashing lights for over a mile and only stopped when officer pulled up beside the vehicle and activated his siren).

In *Orozco*, the driver claimed 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 at 1381 (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, Shaw had a criminal history for felony intent to sell narcotics. Aplt., 2, 81. While "prior criminal history is by itself insufficient to create reasonable suspicion," when viewed in conjunction with other factors that suggest criminal activity may be occurring, criminal history "contributes powerfully to the reasonable suspicion calculus." *United States v. Santos*, 403 F.3d at 1132. *Accord*, *United States v. Moore*, 795 F.3d 1224, 1230 (10th Cir. 2015); *United States v. Davis*, 636 F.3d at 1291. *See United States v. White*, 584 F.3d 935, 951 (10th Cir. 2009) ("White's prior drug-related criminal history [involving marijuana or cocaine or methamphetamine] was the sort of information that would lend credence to Dean's suspicion that White was currently involved in drug trafficking"); *United States v. Lyons*, 510 F.3d 1225, 1237 (10th Cir. 2007) ("Lyons had a criminal history for drug possession and trafficking").

Third, the minivan was registered to someone other than Shaw and was traveling on I 70, a known corridor to drug sources in Colorado. Aplt., 2, 78. "[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 at 1249 (10th Cir. 2011) (*citing United States v. Olivares–Campos*, 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 non-owned vehicles are frequently used by drug traffickers—one reason is this avoids forfeiture of the driver's vehicle. Aplt., 2, 83.

This dovetails with travel to a known drug source area. *Id.* True, standing alone, a vehicle hailing from or 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*, 989 F.3d at 839; *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); *United States v. Martinez-Torres*, No. 1:18-cr-1960, 2019 WL 113729 (D. N.M. Jan. 4, 2019). 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. Aplt., 2, 83.

Fourth, the minivan was crammed full of stuff, with a lived-in look, suggesting the hard travel characteristic of drug traffickers. Aplt., 2, 78-79. *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 because 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. Aplt., 2, 83. *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 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 because "[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, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. at 273–74. The factors going into Schulte's suspicions, in aggregate, demonstrated he had an objective, reasonable suspicion to extend the detention for a drug dog sniff.

Plaintiffs' arguments denying reasonable suspicion are the rejected divide and conquer approach. *Arvizu*, 534 U.S. at 274. *See also, United States v. Madrid-Mendoza*, 824 F. App'x 588, 593–94 (10th Cir. 2020) ("Specifically, Madrid-Mendoza's repeated reliance on *United States v. Wood*, 106 F.3d 942, 946–948 (10th Cir. 1997) and its "evaluation and rejection of ... the listed factors in isolation from each other does not take

into account the 'totality of the circumstances,'" as is required by Supreme Court precedent," *quoting Arvizu*, 534 U.S. at 274).

The Shaws want to dispute Schulte's descriptions of the minivan's "lived-in appearance." The quarrel about the words Schulte used to describe the minivan's contents does not amount to a genuine dispute of fact. Plaintiffs do not controvert that the vehicle looked as if the Shaws were limiting their stops and time from their vehicle. Further, the Shaws were living in the minivan. They were on a "week-end" trip, staying in the minivan at a state park and/or commercial parking lots. They consumed marijuana. They returned to Oklahoma on a southern route that did not go into Kansas. Aplt., 2, 97, 106, 108. There were no tents and sleeping bags in the minivan. Shaw Exhibit 2a, at 47:03 to end; Shaw Exhibit 2b[6], at start to 4:02. If fact, a urine jar was in the minivan. Shaw Exhibit 2a, at 48:34. The packed minivan provided a reasonable inference the Shaws were engaged in a trip where they planned few stops, which was consistent with a drug run from Oklahoma to Colorado and back just before Christmas.

The Shaws want the Court to accept there were innocent explanations for each of the indicators which cannot be combined to create Schulte's

[6] Aplt., 2, 87; second part of the dash camera video, conventionally filed and exempted from Appendix, 10th Cir. Order, 10/4/21.

reasonable suspicions. However, the Supreme Court, in *United States v. Sokolow*, 490 U.S. at 10 (*quoting Illinois v. Gates*, 462 U.S. 213, 245 n. 13 (1983)), explained "'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 at 1188 ("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); *United States v. Arvizu*, 534 U.S. at 277 ("Respondent argues that we must rule in his favor because the facts suggested a family in a minivan on a holiday outing. A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct.").

2. Schulte had probable cause to search the minivan.

The lawfulness of the search of the minivan is important to both the alleged interference with rights against unlawful searches and the damages

the plaintiffs can recover assuming their detention before the dog alert survives qualified immunity's application.

A plaintiff is limited, in a § 1983 suit, 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).

Here, once the dog alerted, it was reasonable to continue the detention of Shaws during the search of the minivan. *United States v. Moore*, 795 F.3d at 1231 (*quoting United States v. Williams*, 403 F.3d 1203, 1207 (10th Cir. 2005) ("[a] canine alert [provides] probable cause to search a vehicle"). *Accord*, *United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993).

Further, all of the minivan and its contents were subject to search under the automobile doctrine, which 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). *See also United States v. Ross*, 456 U.S. 798, 825 (1982) ("If 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.").

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

The Shaws drove to the KHP HQ at Schulte's request. They stayed in their vehicle in the HQ's parking lot. Shaw Exhibit 4, at 1:11:00-1:38:16. The search of the minivan was not complete until the evidence of a possible Colorado crime, discovered during the search was preserved.

Having the Shaws detour 700 yards from their trip to Denver to make copies was a reasonable part of the search. Schulte suspected Shaw was violating Colorado law pertaining to medical marijuana licensing by misrepresenting he was a Colorado resident. Schulte wanted to preserve the evidence. Aplt., 1, 86.

Directing the detour was within the trooper's authority to move a vehicle to a location more conducive for conducting a search. *See Chambers v. Maroney*, 399 U.S. 42, 52 n. 10 (1970) (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) (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) (with probable cause to search the vehicle, it was lawful for officers to transport the vehicle to highway patrol headquarters for a search); *United States v. Tapia*, No. 09-3060, 2010 WL 299245, at *5 (10th Cir. Jan. 27, 2010) (unpublished) (holding 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).

4. *The allegedly abridged Fourth Amendment right was not "clearly established."*

Schulte is immune because Schulte's actions did not violate a constitutional right for the reasons described. Even still, to avoid immunity, the Shaws must present factually similar precedential cases (particularized to the facts of this case), from a controlling jurisdiction, that show the

allegedly abridged Fourth Amendment right was "clearly established" at the time of the conduct at issue.

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 known the conduct was unlawful. *See 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.'" *Id.* at 589 (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

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). The jurisprudence upon which plaintiff relies must be "particularized to the facts of the case." *White v. Pauly*, 137 S.Ct. 548, 552 (2017); *Frasier v. Evans*, 992 F.3d 1003, 1021 (10th Cir. 2021). The Supreme Court "has repeatedly told courts ... not to define clearly established law at a high level of generality." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019).

In many setting courts "do not require a case directly on point" so

long as existing precedent placed the statutory or constitutional question "beyond debate." *White*, 137 S. Ct. at 551; *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). However, a pre-incident, all fours, precedential case, from a controlling jurisdiction, is all but required in the Fourth Amendment context. An officer's judgment "turn on the assessment of probabilities in particular factual contexts." *District of Columbia v. Wesby*, 138 S. Ct. at 590 (explaining why plaintiffs needed factually similar cases to clearly establish officers did not have probable cause to arrest). And "reasonable suspicion ... is not 'readily, or even usefully, reduced to a neat set of legal rules.'" *United States v. Sokolow*, 490 U.S. at 7; *United States v. Cortez*, 449 U.S. at 418 (noting reasonable suspicion "does not deal with hard certainties, but with probabilities"). S*ee e.g., Doe v. Woodard*, 912 F.3d 1278, 1295-96 (10th Cir.), *cert. denied*, 139 S. Ct. 2616 (2019); *Halley v. Huckaby*, 902 F.3d 1136, 1157 (10th Cir. 2018) (both finding factually similar cases necessary to clearly establish the right in a Fourth Amendment context). *See Ornelas v. United States*, 517 U.S. at 698 ("because the mosaic which is analyzed for a reasonable-suspicion ... is multi-faceted, 'one determination will seldom be a useful 'precedent' for another'"; the "exception" being when precedent is "so alike," without "any substantial basis for distinc[tion]," "remarkably similar").

(a) *It was not clearly established the manner Schulte obtained consent to the 30-second conversation was unconstitutional.*

Whether consent is voluntary is determined on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The ultimate question must be resolved by the court where the facts are largely undisputed. *Michael C. v. Gresbach*, 479 F. Supp. 2d 914, 921 (E.D. Wis. 2007), *aff'd*, 526 F.3d 1008 (7th Cir. 2008). Even so, if consent can be found lacking on the basis of disputed facts construed most favorably to the consentor, the plaintiff must still show controlling law, particularized to their version of facts, that "every" reasonable official would have known the conduct was unlawful.

Quite the contrary here, the case law, in nearly identical circumstances, is lockstep the procedure employed by Schulte does not offend any constitutional right. *See e.g.*, *United States v. Gomez-Arzate*, 981 F.3d at 841-42 (consensual encounter found 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. Hunter*, 663 F.3d 1136, 1140 (10th Cir. 2011) (trooper said "have a safe trip" and after taking a few steps away from the Dodge, turned back and asked if he could ask a few more questions); *United States v. White*, 584 F.3d at 943 (officer stepped

back away from the Cadillac and told White to "have a safe one," and then stepped back inquired if he could ask additional questions); *United States v. Martin*, No. 18-CR-40117, 2019 WL 6682990, at *1 (D. Kan. Dec. 6, 2019) (consent given after trooper told the defendant to have a safe trip, walked back towards his patrol car but reapproached and asked whether he could ask some questions; to which Defendant replied "sure"); *United States v. Beltran*, No. 17-40105-01, 2018 WL 5720247 (D. Kan. Nov. 1, 2018) (consent given after trooper "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 the subject vehicle, he pivoted and started back "asked [Beltran], '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) (consent granted to talk and search after trooper told driver to have a safe trip); *United States v. Brown*, 313 F.Supp.2d 1108, 1117 (D. Kan. 2004) (consent granted after officer told "drive carefully," began to walk away, but returned to request a search). *See also* cases cited *supra*, at 28-29.

(b) *It was not clearly established Schulte lacked reasonable suspicion to detain the Shaws.*

Arguing lack of reasonable suspicion was clearly established law here, plaintiffs rely on *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), and *Vasquez v. Lewis*, 834 F.3d 1132 (10th Cir. 2016). Neither case supports

Schulte violated established federal law. Neither is factually similar.

In *Wood*, the court rejected the claim reasonable suspicion existed, from supposed "unusual travel" plans, on the basis it was "[un]likely or [im]plausible that an unemployed painter in Kansas could afford to take a two-week vacation in California, to fly there one-way in a commercial airplane, to rent a 1995 Mercury Marqu[i]s in California, and then to drive the rental car back to Kansas." It said "[i]t is true that unusual travel plans may provide an indicia of reasonable suspicion," but concluded not in Wood's case. *Id.* at 947-48. It found Wood's error about where the car was rented was not material. *Id.* at 947. It reasoned, the presence of open maps and fast food wrappers in the passenger compartment is not only consistent with Wood's explanation, but is entirely consistent with innocent travel such that, in the absence of contradictory information, will not reasonably be said to give rise to suspicion of criminal activity. *Id.* It noted Wood's nervousness was a generic claim. *Id.* Finally, Wood's criminal history did not support a reasonable suspicion "[g]iven the near-complete absence of other factors." *Id*. at 948.

In short, *Wood* supports criminal history can be included with other factors in the reasonable suspicion analysis, but otherwise *Wood* has no application here. An entirely different set of circumstances were involved in

the Shaws' detention.

Vasquez, like *Wood*, 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 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 factors 4, 5 & 6, the court found "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 interpreted the indicators offered by the troopers to be that they had relied on the driver's state of citizenship to detain Vasquez 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.

Schulte did not factor Shaw's state of citizenship. Unlike *Vasquez*, there is no evidence the minivan's license plate was a factor. *Cf.* 834 F.3d at 1136. While *Vasquez* reaffirms drug corridor travel is a weak factor, Schulte's drug corridor consideration cannot be isolated from other relevant circumstances. The Shaws' destination and distance of travel added to suspicion, unlike if the Shaws had been traveling to, hypothetically, Hays to pick up their grandmother for Christmas.

(c) *Alleged prohibition against travel to the KHP's HQ was not clearly established.*

Plaintiffs claim cases like *Hayes v. Fla.*, 470 U.S. 811, 815 (1985), and *United States v. Arango*, 912 F.2d 441, 443 (10th Cir. 1990), established requiring the Shaws to stop at KHP HQ's parking lot violated their rights.

However, in those cases, law enforcement did not have probable cause for a search. *See United States v. Pollack*, 895 F.2d 686, 692 (10th Cir. 1990) (distinguishing *Hayes* and *Arango* when probable cause was present).

Thus, Schulte is entitled to immunity because no case law is identified that would have alerted him that completing his search, with a minimal intrusion through a 700-yard detour, violated the Fourth Amendment. *Cf. United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) ("the court should not indulge in unrealistic second guessing....post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished").

Bosire

5. McMillan had reasonable suspicion to detain Bosire for additional questions and a dog sniff under the totality of the circumstances.

Bosire's detention was justified by the specific and articulable facts and rational inferences drawn from those facts which gave rise to a reasonable suspicion he had or was committing a crime. While no evidence of a crime was discovered, "*Terry* accepts the risk that officers may [seize] innocent people." *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

There were numerous indicators a reasonable officer could have concluded established reasonable suspicion to extend the stop for McMillan's second encounter with Bosire. *First*, the smell of marijuana at the Love's convenience store and Bosire's conversation with another man at the gas pump suggested possible drug trafficking. The troopers thought the smell could have been from Bosire[7] or another man observed talking to Bosire at the gas pumps. Aplt., 2, 171, 203. And McMillan knew people hauling large amounts of drugs often travel in two vehicles (caravan) where one vehicle can be used to attempt to distract law enforcement from the vehicle transporting the drugs or large amounts of money. Aplt., 2, 172. *See*

[7] A seizure may be permissible even though the justification for the action includes a reasonable factual mistake. *Heien v. North Carolina*, 574 U.S. 54, 57 (2014).

United States v. Dilley, No. 02-40121-01-SAC, 2003 WL 356054, at *3 (D. Kan. Jan. 31, 2003) (reasonable suspicion based in part on observation caravanning, *i.e.*, "cars involved in drug trafficking will travel in caravans for protection and diversion purposes"). *Cf. United States v. Rodriguez-Rodriguez*, 550 F.3d 1223, 1228 (10th Cir. 2008) ("sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle").

In McMillan's initial encounter with Bosire, the trooper learned Bosire was the only person in the Nissan. Yet, this left his caravanning suspicion in place. Aplt., 2, 172. Troopers timely attempted to locate a rented Dodge Charger seen leaving the convenience store, which McMillan felt could be associated with the second man at the gas pump seen talking with Bosire. Aplt., 2, 169, 172-73, 204.

Bosire would ignore the troopers' observations at Love's on the ground there is no verifying evidence they smelled marijuana in his vicinity. Actually, there is no evidence controverting the troopers' testimony and no reasonable basis to ignore it.

The number of people in Love's was a small universe. But Bosire acknowledged contact with the troopers. Aplt., 2, 175; Aplt., 3, 198-99, 200.

Furthermore, McMillan and Schulte testified they smelled marijuana. Aplt., 2, 171; Aplt., 2, 203. Their conduct verifies the troopers believed Bosire could be associated with the marijuana odor. The efforts to locate the Charger immediately after McMillan radioed only one person was in the Nissan he had stopped, and later discussion of the Charger confirmed the troopers smelled marijuana and were hoping to investigate the Nissan and Charger as a result. Aplt., 2, 176; Aplt., 2, 204. Further, McMillan questioned Bosire about the man seen talking to Bosire at Love's gas pumps. Aplt., 2, 177-78.

Second, mounted cameras on a rental vehicle added to the suspicion of drug trafficking activity. The Nissan was a rental. McMillan confirmed this before leaving the convenience store in Ellis. Aplt., 2, 169, 171. The rental vehicle had cameras, mounted in the front and the back. Aplt., 2, 171. It was presumed that the cameras could video activity around the vehicle. That was the message Bosire conveyed, saying he had them because police f--k with people. Aplt., 2, 176.[8] Mounted cameras in a rental car were not only odd, but have been used to facilitate caravanning, discourage a law enforcement stop, or confirm a "hired" driver appropriately transported the

[8] Inconsistently, Bosire now states the cameras only activated in accident conditions. Aplt., 2, 190.

drugs or large amounts of cash. Aplt., 2, 172. *See United States v. Murphy*, 901 F.3d at 1195 ("taken together, digital scales, baggies, and ***surveillance cameras*** are 'tools of the trade,'" citations omitted, emphasis added). *See also United States v. Taylor*, 813 F.3d 1139, 1144 (8th Cir. 2016) ("he stored large quantities of drugs and various 'tools of the trade' such as firearms, ammunition, digital scales, plastic bags, and ***surveillance cameras***," emphasis added); *United States v. Clark*, No. CR 2018-0009, 2019 WL 3456813, at *9 (D.V.I. July 30, 2019) (surveillance cameras contributed to circumstances showing reasonable suspicion of illegal drug activity). *Cf. United States v. Johnson*, 364 F.3d 1185, 1193 (10th Cir. 2004) (presence of walkie-talkie added to reasonable suspicion criminal activity was afoot).

Third, after Bosire produced a copy of the rental agreement, McMillan learned Bosire had rented the Nissan in Wichita, Kansas and it was a short-term rental (2 days). Aplt., 2, 171. A short-term rental is frequently used to transport drugs or the funds needed for the purchase of drugs. Aplt., 2, 172. *United States v. Davis*, 636 F.3d 1281, 1291 (10th Cir. 2011) ("our cases note drug traffickers often use rental vehicles to transport narcotics," citations omitted); *United States v. Contreras*, 506 F.3d 1031, 1036 (10th Cir. 2007) ("drug couriers often use third-party rental cars").

Fourth, McMillan saw Bosire did not fully roll down his window and there was a partially covered notebook in the back of the rental car. Aplt., 2, 169-70. Partially rolling down the window suggested Bosire might be trying to hide something in the vehicle. A partially covered notebook in the back seat looked like a ledger drug transporters frequently use. Aplt., 2, 172. Neither observation is independently significant to the reasonable suspicion calculus. However, the observations were confirming of possible drug trafficking activity.

Fifth, Bosire's response and non-response to McMillan's questions about Bosire's travel were atypical of usual conversations with the persons McMillan had stopped during his 13 years in law enforcement. Aplt., 2, 172. At first, Bosire appeared to ignore the questions about his travel plans, and then he would say only he was traveling from the West going East. Aplt., 2, 172; Aplt., 3, 33-34, Bosire Exhibit 6, at 00:56-02:53.[9] *See United States v. Torres*, No. 18-2026, 786 Fed. Appx. 726 (10th Cir., Aug. 23, 2019) (unpublished) (where a defendant does not provide an explanation, significant travel for a short visit may give rise to reasonable suspicion).[10]

[9] Bosire's phone video, conventionally filed and exempted from Appendix, 10th Cir. Order, 10/4/21.

[10] McMillan reasonably inferred Bosire was traveling to his Wichita residence, approximately 185 miles away from the stop, after a short turn-around trip from some place "west."

See also United States v. Cortez, 965 F.3d 827, 833 (10th Cir. 2020) (holding evasiveness with respect to their traveling companions contributed to the reasonableness of officer's suspicion); *United States v. Cash*, 733 F.3d 1264, 1275 (10th Cir. 2013) (holding evasiveness in response to questioning supported reasonable suspicion); *United States v. Sanchez-Valderuten*, 11 F.3d 985, 989 (10th Cir. 1993) (holding reasonable suspicion in part because the defendant did not tell the officer where he was driving from). *Cf. United States v. Santos*, 403 F.3d at 1132 (stating "refusal to cooperate, ***without more***, does not furnish the minimal level of objective justification needed for a detention or seizure," but finding the detention was constitutional under the totality of circumstances which included vague answers and attempts to deflect officer's questions).

Recently, a Tenth Circuit panel found the driver's failure to identify a specific destination contributed to support reasonable suspicion. *United States v. Orozco-Rivas*, 810 Fed.Appx. at 667 (*citing United States v. Kopp*, 45 F.3d 1450, 1454 (10th Cir. 1995)). Additionally, hesitation in answering questions about travel may raise suspicion based upon training and experience. *United States v. Frazier*, 467 F. Supp. 3d 1144, 1166 (D. Utah 2020).

Although McMillan need not have waited until after the second encounter to request a dog sniff against a reasonable officer standard, McMillan's subjective view was more questioning was prudent. He believed additional questioning would either abate suspicion Bosire was involved in criminal activity or justify detention of an additional ten or more minutes for a dog sniff. Aplt., 2, 174.

During this second encounter, McMillan asked about the second man at the gas pump at Love's convenience store. Bosire initially denied talking to anyone at the pumps. McMillan formed the belief Bosire had not honestly answered his questions. Aplt., 2, 177. *See United States v. Simpson*, 609 F.3d 1140, 1149 (10th Cir. 2010) ("lies, evasions or inconsistencies about any subject while being detained may contribute to reasonable suspicion"). McMillan asked why cameras were in the rental car. Aplt., 2, 176. He did not believe Bosire's explanation, *i.e.*, "because police f--k with people," "Police f--k with people all of the time," detracted from the possible use of the cameras in criminal activities. *Id*. Bosire persisted in refusing to provide details about his travels. *Id*. Combining the factors demonstrating reasonable suspicion with the results of the questioning in the second encounter, McMillan requested a drug-detection dog sniff.

In summary, the factors going into McMillan's suspicions, in aggregate, demonstrated McMillan had a particularized and objective basis for suspecting Bosire of criminal activity to extend the stop for a drug dog sniff. *United States v. Arvizu*, 534 U.S. at 277-78 (again, it is the totality of the circumstances which determines reasonable suspicion).

Bosire claims McMillan admitted he lacked reasonable suspicion. Not so. Discussion *supra*, at 55-56. However, Trooper's subjective opinions are irrelevant. *Whren v. U.S.*, 517 U.S. 806, 811-816 (1996) (reasonableness of traffic stops does not depend on actual motivations of the officer involved). *Accord*, *Frasier v. Evans*, 992 F.3d at 1015. *See Howards v. McLaughlin*, 634 F.3d 1131, 1142 (10th Cir. 2011), *rev'd on other grounds sub nom. Reichle v. Howards*, 566 U.S. 658, (2012) ("[t]he constitutionality of Mr. Howards' arrest is not undermined simply because the justification used to support the lawfulness of the arrest was not in the Agents' mind at the time the arrest was made").

The following is apropos to the Bosire's argument about McMillan's statement he only had sufficient reasonable suspicion, before his second encounter, to ask Bosire more questions:

> Mr. Morales contends Officer Phillips's actions were unreasonable because the officer testified that he had decided to ask for consent to search seven minutes into the encounter but delayed asking for another 25 minutes. See Aplee. Br. [ ]

> (arguing Officer Phillips's "actions did not match his stated intent" and were thus unreasonable). But "[r]easonable suspicion is an objective standard," [ ], and "the officer's subjective motives are irrelevant," [ ]. The facts available to Officer Phillips warranted a reasonable officer's belief that the EPIC call was a proper and diligent means of investigation.

United States v. Morales, 961 F.3d 1086, 1094 (10th Cir. 2020) (citations omitted). *Cf. United States v. Santana-Garcia*, 264 F.3d 1188, 1192 (10th Cir. 2001) ("The fact that the officers did not believe there was probable cause ... would not foreclose the State from justifying Royer's custody by proving probable cause").

Bosire also relies on KHP's internal investigation that concluded Bosire's stop was "for a longer duration than is legally acceptable" to violate KHP policy. Yet, "[d]ecisions regarding the law are for the court, not expert witnesses," *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006). *Accord Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. v. Alerus Fin., N.A.*, 858 F.3d 1324, 1342 (10th Cir. 2017) (collecting cases). *See Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (the lead Tenth Circuit decision holding it is reversible error to allow an "expert" to testify law enforcement's searches were unconstitutional). *Cf. Webb v. Airlines Reporting Corp.*, No. CIV. A. 92-2488, 1994 WL 185928, at *3 (D. Kan. Apr. 5, 1994), *aff'd*, 57 F.3d 1081 (10th Cir. 1995) ("[T]he existence of probable cause is a question of law for the court because there are no facts

material to the issue that are in dispute. Accordingly, the opinions of plaintiff's experts have no place in our determination."); *Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provisions").

6. Rights allegedly abridged by McMillan were not "clearly established."

McMillan's conduct was not improper under any pre-existing Supreme Court or Tenth Circuit decision on point, or clearly established weight of authority.

Bosire cites to an unpublished Tenth Circuit opinion and two Kansas Supreme Court decisions. Aplt., 2, 177-78. Even if these cases were factually similar to our case—they are not—the decisions do not satisfy this circuit's requirements. An unpublished circuit opinion is not sufficient to show clearly established law. *Grissom v. Roberts,* 902 F.3d 1162, 1168 (10th Cir. 2018) (however, "an unpublished opinion can be quite relevant in showing that the law was not clearly established"). The Kansas appellate court rulings also do not suffice. *Carabajal v. City of Cheyenne, Wyoming*, 847 F.3d 1203, 1210 (10th Cir. 2017) (requiring "preexisting Supreme Court or Tenth Circuit decision, or the weight of authority from other circuits").

7. Schulte was not obligated to second-guess McMillon's detention of Bosire.

Schulte did not violate Bosire's rights. He is not McMillan's supervisor. Aplt., 2, 205. He did not make the decision to detain Bosire for additional questioning or for the subsequent dog sniff. *Id.*

While a law enforcement officer must intervene if the officer sees a person's constitutional rights against excessive force and unlawful arrests being violated by a fellow officer and has an opportunity to do so, *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1210 (10th Cir. 2008), officers are not liable "merely because he was present at the scene of a constitutional violation." *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1433 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985). *Accord*, *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir.1997).

Nothing says an officer must investigate facts and circumstances to reevaluate whether reasonable suspicion exits a fellow officer to extend a staff stop. *Cf. Stearns v. Clarkson*, 615 F.3d 1278, 1285 (10th Cir. 2010) ("When one officer requests that another officer assist in executing an arrest, the assisting officer is not required to second-guess the requesting officer's probable cause determination, nor is he required to independently determine that probable cause exists"). *Accord, Howards v. McLaughlin*, 634 F.3d at 1150.

Schulte could assume not all of McMillan's knowledge was conveyed to him. He did not hear anything Bosire said or communicate with Bosire until after the dog sniff was complete. Aplt., 2, 205. Schulte trusted McMillan to apply the correct constitutional standards. *Id.* He could assume McMillan properly extended the stop and called for a dog sniff. There is no basis in the applicable case law Schulte was required to do otherwise.

8. Rights allegedly abridged by Schulte were not "clearly established

Obviously, there can be no failure to intervene if a constitutional right has not been violated. *See, e.g.*, *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("[i]n order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation"). To avoid qualified immunity, it follows the underlying constitutional violation must also be clearly established before any duty to intervene is also clearly established. *See Franco v. City of Boulder*, No. 19-CV-02634-MEH, 2021 WL 857601, at *13 (D. Colo. Mar. 8, 2021) (the qualified immunity defense may be asserted in response to a failure to intervene claim).

However, another level of analysis pertains to the claim against Schulte. The general proposition officers have a duty to intervene in some settings, does not answer whether Schulte's asserted obligation to intervene

in a post-stop detention was clearly established. *See Franco*, 2021 WL 857601, at *13. In *Harris v. Mahr*, No. 20-1002, 2020 WL 7090506, at *3 (10th Cir. Dec. 4, 2020) (unpublished), the court held the broad duty to intervene lacked specificity, especially as to the alleged unlawful entry and search claims before it. Therefore, *Harris* affirmed dismissal of a claim the officer had failed to intervene to prevent an unlawful, warrantless search of the plaintiff's apartment on qualified immunity grounds. The court found cases involving failure to intervene to prevent use of excessive force and unlawful arrests, did not address unlawful searches. *Harris* is persuasive a federal duty to intervene to prevent an extended traffic stop was not clearly established at the time of the Bosire detention.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the district court.

Respectfully submitted,

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants believe that oral argument would assist the Court in its resolution of this appeal. The appeal combines two separate cases. Argument may help clarify the parties' positions concerning the separate facts and issues.

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The undersigned hereby certifies that on the 14th day of October 2021, a true and accurate copy of this brief and addenda was electronically filed with the Court using the Court's CM/ECF system, which will send a notice of electronic filing to the following:

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Addenda

Deckard, Connie

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Deckard, Connie

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