No. _____

In The Supreme Court of the United States

DETECTIVE JOE RYAN HARTLEY, DETECTIVE RYAN WOLFF, DETECTIVE MIKE DUFFY, DETECTIVE HEATHER MYKES, and INVESTIGATOR MICHAEL DICKSON, in their individual capacities,

Petitioners,

v.

TYLER SANCHEZ,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is whether individual detectives and an investigator are entitled to qualified immunity from a 42 U.S.C. § 1983 claim for malicious prosecution based on allegations they knew or should have known the criminal suspect had cognitive limitations making his confession to a crime untrustworthy and not appropriately relied upon by law enforcement to support his arrest? This question raises the important and undecided issues of malicious prosecution and its place, if any, in Fourth Amendment seizure analysis, and if it has a place whether Circuit precedent can, for purposes of qualified immunity, establish clearly established law when the Circuits are divided.

LIST OF PARTIES TO THE PROCEEDING

1. Joe Ryan Hartley, Petitioner
2. Ryan Wolff, Petitioner
3. Mike Duffy, Petitioner
4. Heather Mykes, Petitioner
5. Michael Dickson, Petitioner
6. Tyler Sanchez, Respondent
7. Board of County Commissioners of Douglas County, Respondent, aligned with Petitioners
8. Douglas County Sheriff's Office, Respondent, aligned with Petitioners
9. Office of the District Attorney for the Eighteenth Judicial District, Defendant dismissed by the District Court

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit has been published at 810 F.3d 750 (10th Cir. 2015). App. 1. The decision of the United States District Court for the District of Colorado has been published at 65 F. Supp. 3d 1111 (D. Colo. 2014). App. 27.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on January 11, 2016. App. 1. This Court has jurisdiction to entertain this petition for writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On the evening of July 17, 2009, Tyler Sanchez was identified as a suspect in a trespass on Branham Drive in Parker, Colorado. App. 30. Mr. Sanchez was interviewed in front of his house by Detectives Joe Ryan Hartley and Ryan Wolff and was arrested without a warrant after making incriminating statements regarding the trespass. App. 30. During an interview at the jail, Mr. Sanchez made further incriminating statements to Detectives Hartley and Wolff and was identified as a potential suspect in other criminal activity including an alleged sexual

assault of a child. App. 30. Mr. Sanchez was later questioned by Detectives Heather Mykes and Mike Duffy and made further incriminating statements including statements linking him to the alleged sexual assault of a child. App. 31. A polygraph examination was administered to Mr. Sanchez by Investigator Michael Dickson, during which Mr. Sanchez made additional incriminating statements and then signed a written statement confessing to breaking into the home where the sexual assault occurred. App. 31-33.

Mr. Sanchez alleges he had cognitive limitations that were open and obvious and that when they questioned him, each of the Defendants knew he suffered from some type of mental impairment and limited intelligence and therefore knew his incriminating confessions were not knowing or voluntary.

On July 20, 2009, the District Attorney filed misdemeanor trespass charges against Mr. Sanchez. App. 33. On January 6, 2010, Detective Mykes drafted and signed an affidavit for arrest warrant on a felony trespass charge, and the District Attorney filed a Complaint and Information for felony trespass on January 7, 2010. App. 33-34. Respecting the sexual assault on a child charge, Detective Mykes drafted a statement in support of warrantless arrest on July 18, 2009, while Mr. Sanchez was being held on his initial arrest. Felony charges were filed July 22, 2009, and Mr. Sanchez appeared before a judge to receive the charges against him on July 23, 2009. App. 34. On March 30, 2010, a preliminary hearing began on the

felony sexual assault charge, and the judge found probable cause. App. 35.

On March 9, 2012, almost three years after his interactions with any of the Defendants, the results of a mental condition evaluation ordered respecting Mr. Sanchez were reported. The mental health evaluations allegedly concluded the inculpatory statements made by Mr. Sanchez were not made in a knowing and voluntary fashion, but were rather the results of suggestions made by the Defendants. In April of 2012, the District Attorney requested the criminal charges against Mr. Sanchez be dismissed, and the state court dismissed the criminal charges. App. 35-36.

Mr. Sanchez filed this lawsuit alleging malicious prosecution in violation of the Fourth Amendment pursuant to 42 U.S.C. § 1983 based on the theory the Defendants either knew his confessions were untrue or recklessly ignored that possibility. Defendants filed a Motion to Dismiss on September 23, 2013. App. 36-37. On August 20, 2014, United States District Judge William J. Martinez issued his Order Granting in Part Defendants' Joint Motion to Dismiss. App. 27. The District Court concluded the Office of the District Attorney for the Eighteenth Judicial District was entitled to Eleventh Amendment sovereign immunity but denied the Defendants' Motion in all other respects. App. 60-61. The District Court denied the individual Defendants qualified immunity. App. 42-51.

On September 19, 2014, the remaining Defendants filed a Notice of Appeal. The United States Court of Appeals for the Tenth Circuit, in an Opinion dated January 11, 2016, affirmed the District Court. The Tenth Circuit affirmed the District Court's denial of qualified immunity to the individual Defendants. App. 3.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT AND UNDECIDED ISSUES REGARDING MALICIOUS PROSECUTION AND ITS PLACE (OR NOT) IN THE FOURTH AMENDMENT

A. The Circuits Are Split on Whether the Fourth Amendment Supports a Malicious Prosecution Claim and, if it Does, the Contours of Such Claim

In the 1992 plurality opinion of *Albright v. Oliver*, 510 U.S. 266 (1994), this Court noted the "embarrassing diversity of judicial opinion" concerning the extent to which malicious prosecution claims are actionable under 42 U.S.C. § 1983. *Id.* at 270 n.4 (quoting *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992)).[1]

[1] The plurality opinion in *Albright* held "substantive due process may not furnish the constitutional peg on which to hang such a 'tort.'" *Id.* The plurality suggested the Fourth Amendment might provide such peg but expressly held it did not decide

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Since *Albright*, aside from a general agreement malicious prosecution claims do not find a home in Fourteenth Amendment substantive due process, there has been little convergence of legal opinion on the subject. As a commentator observed eleven years after *Albright*: "If you asked someone to explain the current state of malicious prosecution jurisprudence under § 1983, you would most likely get as confusing and frustrating a response as Abbott gave Costello in talking about his baseball team." Joseph G. Yannetti, *Who's on First, What's on Second, and I Don't Know About the Sixth Circuit: A § 1983 Malicious Prosecution Circuit Split That Would Confuse Even Abbott and Costello*, 36 Suffolk U. L. Rev. 513, 513 (2003). As recently as March 8, 2016, twenty-four years after *Albright*, Tenth Circuit Judge Neil M. Gorsuch observed that "any effort to enter the arena [of malicious prosecution jurisprudence under § 1983] and consider the question carefully is likely to leave you looking for the exits." *Cordova v. City of Albuquerque*, No. 14-2083, ___ F.3d ___, 2016 WL 873347, *13 (10th Cir. Mar. 8, 2016) (Gorsuch, J., concurring).

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the issue because *Albright* had made no Fourth Amendment claim. *See also Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007) (plurality opinion) ("We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983 . . . and we do not do so here.").

Following *Albright*, it is not always clear in which constitutional malicious prosecution camp a particular circuit tents.[2] While many circuits have, post-*Albright*, recognized some form of a Fourth Amendment right labeled as, or analogized to, a malicious prosecution claim,[3] there remains a Circuit

[2] For example, in *Kurtz v. City of Shrewsbury*, 245 F.3d 753, 758 (8th Cir. 2001), the Eighth Circuit noted: "The Constitution does not mention malicious prosecution nor do plaintiffs cite a basis for a federal action for malicious prosecution." In *Harrington v. City of Council Bluffs, Iowa*, 678 F.3d 676, 679, 680 (8th Cir. 2012), the Eighth Circuit observed: "If malicious prosecution is a constitutional violation at all, it probably arises under the Fourth Amendment" and that "[o]ur sister circuits have taken a variety of approaches on the issue of whether or when malicious prosecution violates the Fourth Amendment." The Eighth Circuit, however, determined it "need not enter this debate now." Later, in *Joseph v. Allen*, 712 F.3d 1222, 1228 (8th Cir. 2013), the Eighth Circuit again observed an "allegation of malicious prosecution cannot sustain a valid claim under § 1983." Additionally, while the Tenth Circuit below stated the Circuit recognizes a Fourth Amendment malicious prosecution claim, Judge Gorsuch more recently observed in his concurring opinion in *Cordova v. City of Albuquerque*, *supra* at *17, after a particularly comprehensive consideration of the merits of a Fourth Amendment malicious prosecution claim, that "when the avenues to a constitutional home are lined with doubt, and when there's a perfectly free and clear common law route available to remedy any wrong alleged in this case, I just do not see the case for entering a fight over an element of a putative constitutional cause of action that may not exist and no one before us needs."

[3] The First, Second, Third, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have issued opinions holding a Fourth Amendment malicious prosecution claim in some form does exist. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013); *Manganiello v. City of New York*, 612 F.3d 149, 160-61 (2d Cir. 2010); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461

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split on whether such right exists at all.[4] Even among the Circuits recognizing some form of Fourth Amendment malicious prosecution claim, a trouble-some doctrinal divide exists on the precise contours of such claim.[5] These Circuits are antipodal regarding

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(3d Cir. 2009); *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012); *Sykes v. Anderson*, 625 F.3d 294, 310 (6th Cir. 2010); *Lassiter v. City of Bremerton*, 556 F.3d 1049 (9th Cir. 2009); *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010).

[4] Indisputably, the Seventh Circuit holds no such cause of action exists. *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015), *cert. granted*, No. 14-9496, ___ U.S. ___, 136 S. Ct. 890 (Jan. 15, 2016); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) ("*Albright* scotches any constitutional tort of malicious prosecution when state courts are open."). In *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (*en banc*), the Fifth Circuit held the Fourth Amendment did not support a malicious prosecution claim but did find a Fourteenth Amendment due process claim for pre-trial evidence fabrication. Separate concurrences agreed with the Fifth Circuit's having "torpedoed § 1983 malicious prosecution claim[s]" but lamented creating a Fourteenth Amendment claim in its place. *Id.* at 963 (Barksdale, J., concurring in part and dissenting in part), and noted "[l]ike Judge Barksdale, I applaud the court's decision to jettison its mischievous and unfounded theory constitutionalizing the tort of malicious prosecution. This result is overdue." *Id.* at 961 (Jones, J., concurring in part and dissenting in part). *See also* Eighth Circuit position, *supra* at n.2.

[5] Justice Ginsburg, in her concurring opinion in *Albright*, suggested an arrestee who is later detained pursuant to legal process may be subjected to a continuing seizure, making the post legal process detention actionable under the Fourth Amendment. *See Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). This continuing seizure analysis has generated much controversy among the Circuits. *See Castellano v. Fragozo*, *supra* at 959; *Lee v. City of Chicago*, 330 F.3d 456, 463-65 (7th

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the elements of such malicious prosecution claim – if it does exist.[6]

In the face of the ongoing confusion surrounding malicious prosecution and its place (or not) in the Fourth Amendment and the Circuit split on this issue, this Court recently agreed to address the issue

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Cir. 2003); *Nieves v. McSweeney*, 241 F.3d 46, 55-56 (1st Cir. 2001); *Riley v. Dorton*, 115 F.3d 1159, 1162-63 (4th Cir. 1997) (*en banc*). A continuing seizure theory also appears inconsistent with *Wallace v. Kato*, 549 U.S. at 391, 397, where this Court held a Fourth Amendment claim accrues for purposes of the statute of limitations as soon as an arrestee is brought before a judicial officer and detained pursuant to legal process. At least one commentator has observed that *Wallace* "may well be the death knell for the 'continuing seizure' theory." Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 Chi.-Kent L. Rev. 127, 161 (2010).

[6] *See* J. Goldstein, *Note: From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 Colum. L. Rev. 643, 654-655 (2006) (footnotes omitted): "The First, Second, and Eleventh Circuits compose the 'Tort Circuits,' wherein plaintiffs pleading malicious prosecution claims under § 1983 must satisfy the common law elements of the claim in addition to proving a constitutional violation. The 'Constitutional Circuits' – the Fourth, Fifth, Seventh, and Tenth – concentrate on whether a constitutional violation exists." The author goes on to describe the Third and Sixth Circuits' approaches as unclear, while the Ninth Circuit "lies on both sides of the divide. . . . "; *Albright*, *supra*; *Hernandez-Cuevas*, 723 F.3d at 99-101 (distinguishing between those circuits that require a plaintiff to demonstrate only a Fourth Amendment violation ["purely constitutional approach"] and those that require a plaintiff to demonstrate a Fourth Amendment violation and all the elements of a common law malicious prosecution claim ["blended constitutional/common law approach"]).

in *Manuel v. City of Joliet*, *supra*. *City of Joliet* comes to this Court via the Seventh Circuit by petition from a plaintiff seeking review of the dismissal of his Fourth Amendment malicious prosecution claim on the basis the Fourth Amendment does not support a malicious prosecution claim.[7] The plaintiff brought a Fourth Amendment malicious prosecution claim against certain City of Joliet, Illinois, police officers alleging they falsified the result of a drug test leading to his arraignment and detention. The Seventh Circuit affirmed the District Court's dismissal of the claim, holding any Fourth Amendment claim was time-barred as it ended and accrued at the point of his arraignment. The Seventh Circuit rejected the argument that the post-arrest detention was an ongoing seizure and actionable as a Fourth Amendment malicious prosecution claim and held the Fourth Amendment claim ended at the point of arraignment – after which it became a Fourteenth Amendment malicious prosecution claim which could not be maintained as Illinois provided an adequate state remedy. *Id.* at 643-44.

Like *City of Joliet*, this Petition seeks clarity on whether the Fourth Amendment supports a claim of

[7] The question presented in *City of Joliet* is "whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment." *See Petition for Writ of Certiorari to the United States Supreme Court*, *Manuel v. City of Joliet*, No. 14-9496, 2015 WL 9855124, *1 (April 27, 2015).

malicious prosecution after legal process. In addition, unlike *City of Joliet*, this case comes to this Court after denial of the individual defendants' Fed. R. Civ. P. 12(b)(5) motion to dismiss for failure to state a plausible claim and, if the Fourth Amendment supports a malicious prosecution claim, seeks clarity on the elements of such claim(s) for purposes of plausible pleading and qualified immunity.

II. THIS CASE PRESENTS AN IMPORTANT AND UNDECIDED ISSUE OF WHETHER CIRCUIT PRECEDENT CAN, FOR PURPOSES OF QUALIFIED IMMUNITY, ESTABLISH CLEARLY ESTABLISHED LAW WHEN THE CIRCUITS ARE DIVIDED

The Tenth Circuit denied qualified immunity despite the absence of clearly established Fourth Amendment malicious prosecution jurisprudence by this Court and the inconsistent cacophony of inter- and intra-circuit opinions on this precise issue. As such, this case additionally raises the question, unanswered in *Taylor v. Barkes*, ___ U.S. ___, 135 S. Ct. 2042, 2045, 192 L. Ed. 2d 78 (2015), of whether any court, other than this Court, can for purposes of qualified immunity create clearly established law – particularly where the Circuits disagree.[8] That this

[8] In *Taylor*, this Court questioned, without deciding, whether the Third Circuit properly relied solely on its own opinions as clearly establishing a right for qualified immunity purposes where there was "disagreement in the courts of

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Court has reserved this issue has, not surprisingly, been noted by a number of lower courts.[9] This Petition represents this Court's opportunity to address this important qualified immunity issue to clarify whether the "fair warning" of the qualified immunity analysis should differ solely based on the location of the act or omission.

III. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT BY ANALYZING THE CLEARLY ESTABLISHED PRONG OF QUALIFIED IMMUNITY AT TOO HIGH A LEVEL OF GENERALITY

The Tenth Circuit denied qualified immunity, concluding the law was clearly established that the Fourth Amendment prohibits the falsification or omission of evidence knowingly or with reckless disregard for the truth, relying solely on the Tenth Circuit's decision in *Pierce v. Gilchrist*, *supra*. App.

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appeals." *Id*. at 2045; *see also City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776, 191 L. Ed. 2d 856 (2015) (merely assuming without deciding that "a controlling circuit precedent could constitute clearly established federal law"); *Carroll v. Carman*, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (2014) (*per curiam*); *Reichle v. Howards*, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012).

[9] *See, e.g.*, *Soto v. City of New York*, No. 12-CV-6911 (RA), 2015 WL 3422155, *3 (S.D.N.Y. May 28, 2015); *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, *19 (E.D. Va. Sept. 16, 2015); *Estate of Burns v. Williamson*, No. 11-CV-3020, 2015 WL 4465088, *7 (C.D. Ill. July 21, 2015).

18-22. This Court has warned the lower courts consistently for at least the past 29 years not to analyze the clearly established qualified immunity issue at too high a level of generality. *See Mullenix v. Luna*, 136 S. Ct. 305, 311, 139 L. Ed. 2d 255 (2015); *San Francisco v. Sheehan*, *supra*; *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

The Tenth Circuit's decision ignores this Court's clear dictates. In this case, it is simply not reasonable to characterize the Fourth Amendment constitutional right at issue as simply one involving the falsification or omission of evidence generally. Instead, any appropriate clearly established law analysis must cast the legal question in terms of the actual facts of this matter. In this case, the actual issue presented is whether it was clearly established for qualified immunity principles that the Fourth Amendment is violated when an individual law enforcement officer accepts and uses repeated confessions by a criminal suspect without presenting to the court information allegedly in the possession of the officer about alleged cognitive limitations of the suspect which allegedly call the validity of his confessions into question. It is undisputed no precedent exists holding such a correctly-framed constitutional violation was clearly established for qualified immunity purposes. The Tenth Circuit's general formulation fundamentally fails to provide the Defendants with "fair warning" their actions violated Mr. Sanchez's constitutional rights in 2009. *Compare Tolan v. Cotton*, 134 S. Ct. 1861, 1865-66,

188 L. Ed. 2d 895 (2014); and *United States v. Lanier*, 520 U.S. 259, 271 (1997). Indeed, it took until March 2012, almost three years after the Defendants interacted with Mr. Sanchez for mental health professionals and the state court to determine his cognitive issues implicated the voluntariness of his confessions. Such prolonged proceedings belie any conclusion untrained law enforcement officers should have recognized this issue during their interactions with him.[10]

CONCLUSION

In conclusion, for all of the foregoing reasons, Petitioners Joe Ryan Hartley, Ryan Wolff, Mike Duffy, Heather Mykes, and Michael Dickson, in their individual capacities, respectfully request this Court

[10] While not specifically relied upon by the Tenth Circuit below, the Tenth Circuit has adopted a "sliding-scale approach" to the clearly established qualified immunity inquiry such that the more obviously egregious the conduct is in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. *See, e.g.*, *Pauly v. White*, ___ F.3d ___, No. 14-2035, 2016 WL 502830, *20 (10th Cir. Feb. 9, 2016); *Waters v. Coleman*, ___ F.3d ___, No. 14-1431, 2015 WL 6685394, *3 (10th Cir. Nov. 3, 2015); *Estate of Booker v. Gomez*, 745 F.3d 405, 427 (10th Cir. 2014); *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008). No basis in this Court's precedent supports the Tenth Circuit's sliding-scale qualified immunity approach, and this Court's review of the Tenth Circuit's decision here will allow this Court to further clarify the correct clearly established qualified immunity analysis for the Tenth Circuit.

grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TYLER SANCHEZ,

Plaintiff-Appellee,

v.

JOE RYAN HARTLEY, Detective, in his individual capacity; RYAN WOLFF, Detective, in his individual capacity; MIKE DUFFY, Detective, in his individual capacity; HEATHER MYKES, Detective, in her individual capacity; MICHAEL DICKSON, Investigator, in his individual capacity; BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, COLORADO; DOUGLAS COUNTY SHERIFF'S OFFICE,

Defendants-Appellants,

and

OFFICE OF THE DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT,

Defendant.

No. 14-1385

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:13-CV-01945-WJM-CBS)

(Filed Jan. 11, 2016)

Kelly Dunnaway (Christopher K. Pratt, with him on the briefs), Douglas County Attorney's Office, Castle Rock, Colorado, for Mike Duffy, Detective Heather Mykes, The Board of County Commissioners of Douglas County, and Douglas County Sheriff's Office, Defendants-Appellants.

Keith M. Goman (Andrew David Ringel, with him on the briefs), Hall & Evans, LLC, Denver, Colorado, for Michael Dickson, Defendant-Appellant.

Gordon L. Vaughan, and Ann B. Smith, Vaughan & DeMuro, Colorado Springs, Colorado, on the briefs, for Joe Ryan Hartley and Ryan Wolff, Defendants-Appellants.

John A. Culver (Seth J. Benezra, with him on the brief), Benezra & Culver, Lakewood, Colorado, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **MURPHY**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

Mr. Tyler Sanchez sued state detectives and an investigator, alleging that they had used a confession to obtain legal process even though they knew the confession was untrue. The defendants moved to dismiss based in part on qualified immunity and expiration of the limitations period. The district court rejected both grounds, and the defendants brought this interlocutory appeal. We affirm the district court's denial of the defendants' motion to dismiss on the basis of qualified immunity; and we dismiss the defendants' appeal of the district court's ruling on the statute of limitations, holding that we lack jurisdiction on this part of the appeal.

I. Mr. Sanchez's Claim

This appeal grew out of an investigation into a 2009 burglary and sexual assault of an 8-year-old girl. Four detectives (Joe Ryan Hartley, Ryan Wolff, Mike Duffy, and Heather Mykes) and an investigator (Michael Dickson) participated in the investigation. In carrying out the investigation, the detectives and investigator interviewed Mr. Sanchez, an 18-year-old with substantial cognitive disabilities. After lengthy interviews, Mr. Sanchez confessed to the burglary but not the sexual assault. The confession led the district attorney to charge Mr. Sanchez with burglary and sexual assault. Based in part on this confession, multiple judges found probable cause, resulting in pretrial detention.

Mr. Sanchez alleges that his confession was false, explaining that he confessed only because his disabilities prevented him from understanding what was happening during the interviews. A subsequent medical examination supported Mr. Sanchez's explanation, and the district attorney dropped the charges in April 2012.

After dismissal of the charges, Mr. Sanchez sued under 42 U.S.C. § 1983, arguing that the defendants had committed malicious prosecution in violation of the Fourth Amendment by using a false confession to institute legal process and cause continued pretrial detention.

The defendants moved for dismissal, and the district court denied the motion. The defendants then brought this interlocutory appeal, arguing that the district court should have ordered dismissal based on qualified immunity and the statute of limitations. These arguments do not justify reversal. Mr. Sanchez's factual allegations are sufficient to overcome qualified immunity at the pleadings stage, and we lack appellate jurisdiction on the issue involving the statute of limitations.

II. We engage in de novo review of the district court's denial of qualified immunity.

In considering the defense of qualified immunity, we engage in de novo review. *Peterson v. Jensen*, 371 F.3d 1199, 1201-02 (10th Cir. 2004). This review is

based on our standards for dismissal and qualified immunity.

Under the standard for dismissal, we assume that all of the allegations in the complaint are true and view the reasonable inferences in the light most favorable to Mr. Sanchez. *Anderson v. Suiters*, 499 F.3d 1228, 1232 (10th Cir. 2007). In applying this standard to the defense of qualified immunity, we consider whether Mr. Sanchez's factual allegations and related inferences show the violation of a clearly established constitutional right. *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1337 (10th Cir. 2000).

III. Mr. Sanchez adequately pleaded the violation of a clearly established constitutional right.

Mr. Sanchez argues that the complaint stated a constitutional violation by alleging that the detectives and investigator had used a confession that they knew was untrue. We agree.

A. Mr. Sanchez alleged the violation of a constitutional right.

In the complaint, Mr. Sanchez brings a § 1983 claim against the defendants for malicious prosecution in violation of the Fourth Amendment. In our

view, Mr. Sanchez adequately pleaded the violation of a constitutional right.[1]

According to Mr. Sanchez, the detectives and investigator sought legal process based on the confession even though they either knew the confession was untrue or recklessly ignored that possibility. If Mr. Sanchez's allegation is credited, it would involve a constitutional violation, for we have held that the Fourth Amendment prohibits officers from knowingly or recklessly relying on false information to institute legal process when that process results in an unreasonable seizure. *Pierce v. Gilchrist*, 359 F.3d 1279, 1292, 1298-99 (10th Cir. 2004). Therefore, Mr. Sanchez's factual allegations, if proven, would entail a Fourth Amendment violation.

The defendants do not dispute that in the abstract, the Constitution is violated when an officer knowingly or recklessly uses false information to institute legal process. *See* Appellants' Reply Br. at 19 (conceding that the defendants "do not argue it is constitutional to knowingly use false statements"). Instead, the defendants present five reasons that the

[1] "Under our cases, a § 1983 malicious prosecution claim includes the following elements: (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008).

complaint fails to allege violation of a constitutional right for purposes of Section 1983[2]:

1. Section 1983 does not permit recovery for malicious prosecution under the Fourth Amendment.
2. In the complaint, Mr. Sanchez did not adequately allege knowledge or recklessness.
3. Mr. Sanchez's only possible claim is for false imprisonment, not malicious prosecution.
4. A malicious-prosecution theory could implicate the District Attorney, but not the detectives or the investigator because they could not have decided to prosecute Mr. Sanchez.
5. Mr. Sanchez has not alleged conduct that would shock the conscience.

We reject each argument.

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[2] The appeal was brought by all defendants, including the Douglas County Board of County Commissioners and the Douglas County Sheriff's Office. But qualified immunity is available only to defendants sued in their individual capacities. *Langley v. Adams Cty.*, 987 F.2d 1473, 1477 (10th Cir. 1993). Thus, the district court's ruling on qualified immunity affected only the individual defendants, not the board of county commissioners or the sheriff's office.

1. Under § 1983, an arrestee can recover for malicious prosecution under the Fourth Amendment.

The defendants argue that § 1983 might allow recovery for malicious prosecution based on violation of the Fourteenth Amendment, but not the Fourth Amendment. We disagree, for we have repeatedly recognized a cause of action under § 1983 for malicious prosecution under the Fourth Amendment. *See, e.g.*, *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013) (discussing a § 1983 claim for malicious prosecution under the Fourth Amendment); *Wilkins v. DeReyes*, 528 F.3d 790, 797 (10th Cir. 2008) (same); *Taylor v. Meacham*, 82 F.3d 1556, 1560-61 (10th Cir. 1996) (same).

The defendants point to two opinions in arguing that § 1983 does not allow recovery for malicious prosecution under the Fourth Amendment: *Mondragón v. Thompson* and *Rehberg v. Paulk*. The defendants' reliance on these opinions is misguided.

The defendants first argue that under *Mondragón v. Thompson*, 519 F.3d 1078 (10th Cir. 2008), a malicious prosecution resulting in legal process is actionable under the Fourteenth Amendment as a deprivation of procedural due process, but is not actionable under the Fourth Amendment. It is true that *Mondragón* recognized the existence of a § 1983 malicious-prosecution claim based on the Fourteenth Amendment. *Mondragón*, 519 F.3d at 1083. In dictum, we questioned whether the same claim could

also be based on the Fourth Amendment. *Id.* at 1083 n.4. In subsequent cases, however, we squarely addressed this question, recognizing a cause of action under § 1983 for malicious prosecution based on the Fourth Amendment. *See, e.g.*, *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013). Our dictum in *Mondragón* does not negate our more recent pronouncements recognizing such a cause of action under § 1983.

The defendants also argue that reliance on the Fourth Amendment is precluded by *Rehberg v. Paulk*, ___ U.S. ___, 132 S. Ct. 1497 (2012). But *Rehberg* does not bear on our issue. There the Supreme Court held only that "a grand jury witness," including a law-enforcement officer, "has absolute immunity from any § 1983 claim based on the witness' testimony." *Rehberg*, 132 S. Ct. at 1506. Mr. Sanchez's allegations relate to the defendants' conduct before Mr. Sanchez was charged, not testimony before a grand jury. Thus, *Rehberg* does not undermine our precedents allowing recovery under § 1983 for malicious prosecution based on violation of the Fourth Amendment.

In our view, a cause of action exists under § 1983 for malicious prosecution in violation of the Fourth Amendment.

2. The complaint contains sufficient allegations of knowledge or recklessness.

To state a claim for a Fourth Amendment violation, Mr. Sanchez bears the burden of alleging facts indicating not only that the confession was untrue, but also that the defendants either knew that the confession was untrue or recklessly disregarded that possibility. *See Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) ("It is a violation of the Fourth Amendment for an arrest warrant affiant to 'knowingly, or with reckless disregard for the truth,' include false statements in the affidavit." (quoting *Franks v. Delaware*, 438 U.S. 154, 155 (1978))). Relying on this burden, the defendants argue that Mr. Sanchez failed to allege facts indicating knowledge that the confession was untrue or reckless disregard of this possibility. We disagree.

On this issue, we must determine whether Mr. Sanchez has plausibly alleged the defendants' knowledge or reckless disregard for the truth. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (holding that to survive a motion to dismiss, the plaintiff must "state a claim to relief that is plausible on its face"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable,

and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Mr. Sanchez satisfied this standard. In the complaint, he provided factual allegations and details that would plausibly indicate that the defendants either knew the confession was untrue or acted in reckless disregard of the truth. For example, Mr. Sanchez alleged these six facts in the complaint:

1. The victim of the sexual assault gave a description of her attacker that did not suggest Mr. Sanchez. According to the victim, the attacker was roughly 40 years old, weighed about 190 pounds, had no tattoos, and had brown hair parted down the middle. *See* Appellants' App'x at 109. Mr. Sanchez was only 18 years old, weighed only about 130 pounds, had prominently displayed tattoos on both arms, and had buzz-cut red hair. *See id.* The detectives and investigator knew that Mr. Sanchez did not fit the victim's description of the perpetrator. *See id.* at 111 (Detectives Wolff and Hartley), 114 (Detectives Duffy and Mykes), 118 (Investigator Dickson).

2. Mr. Sanchez has pronounced cognitive and developmental disabilities and IQ test scores in the 60s and 70s. These disabilities cause Mr. Sanchez to engage in noticeably unusual behavior. *See id.* at 108-09.

3. In interviews with the defendants, Mr. Sanchez had significant difficulty understanding and responding to questions. *See, e.g.*, *id.* at 110-12, 114-15.

4. Mr. Sanchez's unusual behavior in the interviews was amplified by fatigue. He had been awake for over 30 hours by the end of the interviews, and he repeatedly told the defendants that he was tired and spoke with his eyes closed. *See id.* at 113-14, 117.

5. The detectives and investigator noticed Mr. Sanchez's unusual behavior. At one point, two detectives asked Mr. Sanchez if he was simply saying what they wanted to hear. *See id.* at 112 (Detectives Wolff and Hartley). One of the detectives wrote that Mr. Sanchez had difficulty remembering details of his supposed crimes and had given vague answers. *See id.* (Detective Wolff). Two other detectives suspected intoxication, asking Mr. Sanchez to take a urine test to verify that he was not under the influence of drugs or alcohol. *See id.* at 116 (Detectives Mykes and Duffy). And the investigator observed that Mr. Sanchez was behaving unusually and experiencing difficulty answering questions. *See id.* at 119 (Investigator Dickson).

6. Mr. Sanchez was unable to give any details regarding his involvement in the crime. Instead, Mr. Sanchez simply agreed to the details suggested to him. At one point, Mr. Sanchez agreed to an untrue detail that the investigator had posed (that Mr. Sanchez

> had climbed into the victim's second-story window with a ladder). As the investigator knew, no ladder was found at the scene. *See id.* at 122.

These alleged facts plausibly support the required inference of the defendants' knowledge or recklessness.

In oral argument, defense counsel suggested that the complaint does not contain sufficient factual allegations to support an inference of knowledge or recklessness against the investigator. Oral Argument at 31:40-33:10. We disagree. The complaint alleges that (1) the investigator noticed Mr. Sanchez's abnormal behavior and inability to provide any detail about the burglary and sexual assault and (2) Mr. Sanchez agreed to a detail about the crime that the investigator knew was untrue. These allegations plausibly support the required inference that the investigator knew that the confession was untrue or recklessly disregarded this possibility.

3. The initial warrantless arrest of Mr. Sanchez does not invalidate Mr. Sanchez's claim of malicious prosecution.

Our case law distinguishes between seizures based on whether they are imposed with or without legal process. Though both types of seizures implicate the Fourth Amendment, seizures imposed pursuant to legal process generally trigger claims for malicious

prosecution, while seizures imposed without legal process generally trigger claims for false imprisonment. *Myers v. Koopman*, 738 F.3d 1190, 1194 (10th Cir. 2013). Based on this distinction, the defendants argue that Mr. Sanchez could assert only a false-imprisonment claim because he was arrested and detained without a warrant.

This argument is foreclosed by *Wilkins v. DeReyes*, 528 F.3d 790 (10th Cir. 2008). There we recognized a cause of action under § 1983 for malicious prosecution in violation of the Fourth Amendment for seizures that occur after a warrantless arrest. *Wilkins*, 528 F.3d at 798. "If arrested without a warrant . . . a plaintiff can challenge the probable cause determination made during the constitutionally-required probable cause hearing," which must occur after the initial warrantless arrest. *Id.* (citation omitted). A plaintiff who brings such a challenge "would state a Fourth Amendment violation sufficient to support a § 1983 malicious prosecution cause of action." *Id.* at 799.

Our holding in *Wilkins* forecloses the defendants' argument that Mr. Sanchez is confined to a false-imprisonment claim because he was arrested without a warrant. It is true that the defendants initially arrested Mr. Sanchez without a warrant and, therefore, without legal process. But after this warrantless arrest, there were multiple judicial determinations of probable cause to detain Mr. Sanchez on all of the pending charges. Based on this legal process, Mr. Sanchez spent an additional 125 days in jail.

Under *Wilkins*, Mr. Sanchez's theory states a valid claim under § 1983 for malicious prosecution in violation of the Fourth Amendment, and Mr. Sanchez's initial warrantless arrest is immaterial to the validity of this claim. *See id.*[3]

4. The malicious-prosecution theory is not confined to the District Attorney.

The defendants also argue that the malicious-prosecution claim must be confined to the District Attorney because he was the official who decided to prosecute. The defendants provide no support for this argument, and it is invalid under *Pierce v. Gilchrist*. There we held that a malicious-prosecution theory would lie against a forensic analyst even though she did not (and could not) decide to prosecute:

> [The forensic analyst] cannot "hide behind" the fact that she neither initiated nor filed the charges against [the plaintiff]. The actions of a police forensic analyst who prevaricates and distorts evidence to convince the prosecuting authorities to press charges is no less reprehensible than an officer who, through false statements, prevails upon a magistrate to issue a warrant. In each case

[3] After releasing Mr. Sanchez, the district court imposed pretrial restrictions. The defendants argue that restrictions on movement did not qualify as a seizure under the Fourth Amendment. We need not address this argument because the jailing for 125 days constituted a seizure.

> the government official maliciously abuses a position of trust to induce the criminal justice system to confine and then to prosecute an innocent defendant.

Pierce v. Gilchrist, 359 F.3d 1279, 1293 (10th Cir. 2004); *see also Stonecipher v. Valles*, 759 F.3d 1134, 1147 (10th Cir. 2014) ("Of course, the fact that a government lawyer makes the final decision to prosecute does not automatically immunize an officer from liability for malicious prosecution.").

Like the forensic analyst in *Pierce*, the four detectives and investigator would incur liability under a malicious-prosecution theory if they knowingly or recklessly used false information to institute legal process.

5. The shock-the-conscience standard does not bear on Mr. Sanchez's Fourth Amendment claim.

The defendants argue that Mr. Sanchez has not pleaded facts that would shock the conscience. But this argument is irrelevant because Mr. Sanchez did not need to plead facts that shock the conscience.

The "shock the conscience" standard governs claims involving substantive due process. *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002). Reliance on this standard is mistaken because Mr. Sanchez has not invoked substantive due process. Instead, he invokes the Fourth Amendment. For a claim under the Fourth Amendment, Mr. Sanchez

need not plead facts that shock the conscience. *See Frohmader v. Wayne*, 958 F.2d 1024, 1027 (10th Cir. 1992) ("The due process standard is more onerous than the Fourth Amendment reasonableness standard since the former requires, in addition to undue force, personal malice amounting to an abuse of official power sufficient to shock the conscience.").

* * *

Because Mr. Sanchez has pleaded facts reflecting a constitutional violation, we must determine if the underlying right was clearly established when the alleged violation took place.

B. The underlying right under the Fourth Amendment was clearly established when the violation occurred.

Mr. Sanchez alleges that the defendants either knowingly or recklessly used an untrue confession to initiate legal process. As we have explained, this conduct would violate the Fourth Amendment. But to overcome qualified immunity, Mr. Sanchez must also show that the underlying right was clearly established in 2009, when the events took place. He has made that showing.

1. The underlying constitutional right was clearly established at the time of the alleged conduct.

By 2009, our precedents had clearly established that the defendants' alleged actions would have violated the Fourth Amendment. Five years earlier, we had held in *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), that "[n]o one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986, in the context of information supplied to support a warrant for arrest." 359 F.3d 1279, 1298 (10th Cir. 2004). Under *Pierce*, the four detectives and investigator should have known by 2009 that the knowing or reckless use of a false confession would violate the Fourth Amendment.

2. The defendants' arguments to the contrary are invalid.

The defendants present three arguments that Mr. Sanchez's asserted constitutional right was not clearly established in 2009:

1. The Fourth Amendment did not require accommodation of a cognitive disability.
2. The contours of a malicious-prosecution claim were ill defined.
3. It was not clearly established that a seizure imposed pursuant to wrongful legal process

> would violate the Fourth Amendment (as opposed to the Fourteenth Amendment).

Each argument is invalid.

First, the defendants contend that the Fourth Amendment did not clearly require interrogators to (1) determine whether a suspect had cognitive disabilities or (2) accommodate these disabilities. But this contention reflects confusion on Mr. Sanchez's claim. Mr. Sanchez claims that the defendants either knew that his confession was untrue or recklessly disregarded that possibility. If that was the case, the defendants would have violated the Fourth Amendment, regardless of whether they had a specific duty to ascertain and accommodate Mr. Sanchez's cognitive difficulties.

Second, the defendants argue that the contours of a § 1983 claim for malicious prosecution were not clearly defined in 2009. But this argument confuses the alleged constitutional violation with the underlying cause of action that provides a remedy for the violation. Section 1983 merely provides a cause of action; the substantive rights are created elsewhere. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *see also Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) ("[O]ur circuit takes the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question . . . of whether the plaintiff has proven a *constitutional* violation." (emphasis in original)). As a result, the contours of a

malicious-prosecution claim do not help resolve the material question in this appeal: whether the Constitution would clearly have prohibited the knowing or reckless use of a false confession in 2009. As discussed above, our precedents had clearly recognized this prohibition by 2009.

Third, the defendants argue that in 2009, it was not clearly established whether the underlying constitutional violation would involve the Fourth Amendment or the Fourteenth Amendment's right to procedural due process. For this argument, the defendants rely on *Mondragón v. Thompson*, 519 F.3d 1078 (10th Cir. 2008). In *Mondragón*, we held that if a defendant "has been imprisoned pursuant to legal but wrongful process, he has a claim under the procedural component of the Fourteenth Amendment's Due Process Clause analogous to a tort claim for malicious prosecution." *Mondragón*, 519 F.3d at 1082. In dictum we added that we did not "foreclose the additional, though unlikely, possibility" that such wrongful process could also give rise to a separate violation of the Fourth Amendment. *Id.* at 1083 n.4.

We reject the defendants' argument for two reasons.

First, we said in *Pierce v. Gilchrist*, which preceded *Mondragón*, that it was a Fourth Amendment violation to knowingly or recklessly use false information to initiate legal process when that process leads to an unreasonable seizure. *Pierce v. Gilchrist*, 359 F.3d 1279, 1298-99 (10th Cir. 2004).

Second, after our dictum in *Mondragón*, we held in *Wilkins v. DeReyes* that an arrestee can bring a malicious-prosecution claim when legal process is initiated and results in an unreasonable seizure under the Fourth Amendment. *Wilkins v. DeReyes*, 528 F.3d 790, 797 (10th Cir. 2008).[4] Thus, by 2009, our holding in *Wilkins* would have provided notice to the detectives and the investigator that their alleged conduct would violate the Fourth Amendment. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (holding that for a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right").

In these circumstances, we conclude that the defendants should have realized that the knowing or

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[4] The defendants characterize this conclusion in *Wilkins* as dictum rather than a holding. We respectfully disagree with this characterization. In *Wilkins*, the plaintiffs asserted a cause of action for malicious prosecution after the initiation of legal process. *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008). In light of this characterization of the claim, we analyzed it as a malicious-prosecution claim under the Fourth Amendment. *Id.* at 797; *see also Myers v. Koopman*, 738 F.3d 1190, 1194-95 (10th Cir. 2013) (relying on *Wilkins* and holding that "[u]nreasonable seizures imposed with legal process precipitate Fourth Amendment malicious-prosecution claims"). Thus, our recognition of a Fourth Amendment malicious-prosecution claim, after the initiation of legal process, was necessary to *Wilkins*'s disposition. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) (distinguishing holdings from dicta).

reckless use of a false confession to institute legal process would violate a clearly established constitutional right. The purported uncertainty did not involve the constitutionality of the conduct; instead, the purported uncertainty involved whether the violation would

- constitute malicious prosecution or false imprisonment and
- involve the Fourth Amendment or the Fourteenth Amendment's right to procedural due process.

In our view, the defendants misread our precedents, which by 2009 had clearly recognized malicious-prosecution claims under the Fourth Amendment after the initiation of a legal process resulting in an unreasonable seizure.

* * *

The district court properly held that Mr. Sanchez had adequately alleged the violation of a clearly established constitutional right. As a result, we uphold the denial of the defendants' motion to dismiss on the basis of qualified immunity.

IV. We decline to assert pendent appellate jurisdiction on the issue involving the statute of limitations.

The defendants also argue that the malicious-prosecution claim is barred by the statute of limitations. We have discretion over whether to address

this argument at the interlocutory stage. Exercising this discretion, we decline to decide whether the claim is time-barred.

The threshold issue is whether we can consider this issue. Although an interlocutory appeal is ordinarily available upon the denial of qualified immunity, an interlocutory appeal for the statute of limitations is ordinarily not appealable. *See Wilkins v. DeReyes*, 528 F.3d 790, 796 (10th Cir. 2008) ("A statute of limitations defense is ordinarily not appealable as part of an interlocutory qualified immunity appeal."). Therefore, we can decide whether Mr. Sanchez's claim is time-barred only if we first exercise pendent appellate jurisdiction over that issue. *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995).

But the exercise of pendent appellate jurisdiction is both discretionary and "generally disfavored." *Id.* Using this discretion, we decline to decide the issue of timeliness.

Although we have rejected the defendants' arguments for qualified immunity, our analysis of that issue may not fully resolve the defendants' argument on the statute of limitations. *See id.* at 930 (holding that pendent appellate jurisdiction is appropriate only "when the appellate resolution of the [appealable issue] *necessarily* resolves the [otherwise non-appealable issue] as well" (emphasis in original)).

Because we decline to exercise pendent appellate jurisdiction over the defendants' argument on the statute of limitations, we dismiss this portion of the defendants' appeal based on a lack of appellate jurisdiction. *See Cox v. Glanz*, 800 F.3d 1231, 1257 (10th Cir. 2015).

V. Disposition

We affirm the district court's denial of the defendants' motion to dismiss on the basis of qualified immunity; and we dismiss the portion of the appeal relating to the statute of limitations, holding that we lack appellate jurisdiction.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TYLER SANCHEZ,

Plaintiff-Appellee,

v.

JOE RYAN HARTLEY, Detective, in his individual capacity; RYAN WOLFF, Detective, in his individual capacity; MIKE DUFFY, Detective, in his individual capacity; HEATHER MYKES, Detective, in her individual capacity; MICHAEL DICKSON, Investigator, in his individual capacity; BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, COLORADO; DOUGLAS COUNTY SHERIFF'S OFFICE,

Defendants-Appellants,

and

OFFICE OF THE DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT,

Defendant.

No. 14-138
(D.C. No. 1:13-CV-01945-WJM-CBS)
(D. Colo.)

JUDGMENT

(Filed Jan. 11, 2016)

Before **TYMKOVICH**, Chief Judge, **MURPHY**, and **BACHARACH**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed in part and dismissed for lack of jurisdiction in part.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 13-cv-1945-WJM-CBS

TYLER SANCHEZ,

Plaintiff,

v.

JOE RYAN HARTLEY, Detective, in his individual capacity, RYAN WOLFF, Detective, in his individual capacity, MIKE DUFFY, Detective, in his individual capacity, HEATHER MYKES, Detective in her individual capacity, MICHAEL DICKSON, Investigator, in his individual capacity, BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, DOUGLAS COUNTY SHERIFF'S OFFICE, and OFFICE OF THE DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT,

Defendants.

ORDER GRANTING IN PART DEFENDANTS' JOINT MOTION TO DISMISS

Plaintiff Tyler Sanchez ("Plaintiff") brings this Fourth Amendment malicious prosecution claim[1]

[1] The Court previously dismissed Plaintiff's Fifth Amendment claim (ECF No. 28), and Plaintiff has dropped his Fourteenth Amendment claim (ECF No. 46 at 3 n.1 ("Plaintiff Sanchez will not pursue a Fourteenth Amendment claim.")).

against Detective Joe Ryan Hartley ("Hartley"), Detective Ryan Wolff ("Wolff"), Detective Mike Duffy ("Duffy"), Detective Heather Mykes ("Mykes"), and Investigator Michael Dickson ("Dickson") (collectively, the "Individual Defendants"), in their individual capacities, and the Board of County Commissioners of Douglas County ("BOCC"), Douglas County Sheriff's Office ("Sheriff's Of") (together with BOCC, the "Entity Defendants"), and the Office of the District Attorney for the Eighteenth Judicial District ("District Attorney's Office"). Before the Court is Defendants' Joint Motion to Dismiss (the "Motion"). (ECF No. 32.) For the foregoing reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

The following allegations, contained in Plaintiff's Complaint, are accepted as true for purposes of the Motion.

Plaintiff was 18 years old in July of 2009. (Compl. (ECF No. 24) ¶ 13.) He is cognitively and developmentally disabled. (*Id.* ¶ 13.) The Amended Complaint alleges that:

> [Plaintiff] suffers from a mixed receptive-expressive language disorder, borderline intellectual functioning, auditory processing deficits, social anxiety, submissive personality characteristics, and hearing impairments. His I.Q. tests in the 60s and 70s. He also suffers from a seizure disorder, which requires

> him to take medication that impairs his memory.

(*Id.* ¶ 14.)

> This combination of disorders impacts [Plaintiff's] ability to listen, comprehend, understand, communicate, and apply abstract concepts. Additionally, [Plaintiff] has problems with cognitive demands under time pressure, problems working with memory, and possesses auditory processing deficits. He also has problems comprehending vocabulary and grammar. His disabilities greatly impact his ability to communicate verbally and non-verbally to others. His disorders particularly manifest themselves under pressure, stress, questioning by authorities, and sleep deprivation.

(*Id.* ¶ 15.)

A. The Underlying Events

On July 10, 2009, a mother made a 911 call to the Sheriff's Office and told the dispatcher that someone had broken into her home and sexually assaulted her eight-year-old daughter (the "July Assault"). (*Id.* ¶ 18.) The girl described the intruder as an older man, about 40 years old, with brown hair parted down the middle, who was not wearing a hat, did not have any tattoos on his hands or arms, and had white skin. (*Id.* ¶ 19.)

B. The Interviews

On July 17, 2009, at approximately 12:40 a.m., Wolff and Hartley responded to a call regarding a prowler on Branham Drive (the "Branham Drive Trespass"). (*Id.* ¶ 21.) Beginning at around 1:18 a.m., Wolff and Hartley began interviewing Plaintiff in his driveway about the Branham Drive Trespass. (*Id.* ¶ 22.) During this interview, Wolff and Hartley repeatedly suggested to Plaintiff specific details about the Branham Drive Trespass, then asked Plaintiff to describe the incident back to them. (*Id.*) Based on Plaintiff's responses to these questions, Plaintiff was arrested, without a warrant, for second degree criminal trespass and transported to the Douglas County Jail. (*Id.* ¶ 25.)

At the Douglas County Jail, Wolff and Hartley continued to interview Plaintiff. (*Id.* ¶ 27.) Even though Wolff and Hartley knew that Plaintiff bore no resemblance to the perpetrator of the July Assault, they also interviewed Plaintiff to determine whether he had been the perpetrator of that crime. (*Id.*) During the interview, Wolff and Hartley led Plaintiff to believe that his DNA had been found in locations which implicated him in the crimes. (*Id.* ¶ 28.) They also provided Plaintiff with specific details about the Branham Drive Trespass and the July Assault and asked him exclusively "yes or no" questions regarding whether he committed these criminal acts. (*Id.* ¶.) In response to these "yes or no" questions, Plaintiff admitted to entering the home where the July Assault occurred, but denied sexually assaulting the

girl. (*Id.* ¶ 29.) During this interview, Plaintiff also confessed to other burglaries and trespasses under investigation by the Sheriff's Office. (*Id.* ¶ 30.)

Later on July 17, 2009, Plaintiff was interviewed by Mykes and Duffy about the July Assault. (*Id.* ¶ 35.) At the time of that interview, Plaintiff had been awake since the morning of July 16, 2009 – roughly 24 hours – with little or no sleep. (*Id.* ¶ 36.) Mykes and Duffy noted that Plaintiff appeared tired during the interview. (*Id.* ¶ 28.) They also observed that Plaintiff had difficulty expressing himself verbally during the interview. (*Id.* ¶ 39.)

During this interview, Plaintiff attempted to explain to Mykes and Duffy that he had been coerced by Hartley and Wolff into confessing to crimes he did not commit. (*Id.* ¶ 41.) Mykes responded to this by stating, "I know those guys [Hartley and Wolff] pretty well . . . I know they weren't forcing you to say what you said this morning. I know that, okay?" (*Id.*)

Towards the end of this interview, Plaintiff offered to take a lie detector test, which was administered by Dickson on July 18, 2009. (*Id.* ¶¶ 46, 51.) Dickson began the polygraph test by questioning Plaintiff to develop questions for the polygraph. (*Id.* ¶ 55.) While developing the questions, Dickson asked Plaintiff how much he knew about the sexual assault allegations, and Plaintiff repeated "almost verbatim" what Wolff, Hartley, Mykes, and Duffy had told him the previous day. (*Id.* ¶ 55.) Dickson then provided Plaintiff with additional information regarding what

he believed had happened during the July Assault. (*Id.*)

When Plaintiff failed the polygraph test on two questions regarding the July Assault he exclaimed, "But I don't remember any of this. That's what I'm trying to say." (*Id.* ¶ 58) Dickson, however, suggested that Plaintiff really meant to say, "It could have happened, but I don't remember." (*Id.* ¶ 59.) Plaintiff acceded to this suggestion, and explained, "I fell asleep [on the night of the July Assault] and then I woke up – I woke up the next morning in my bed. . . . I might have woke up [during the night] out of nowhere . . . And might have done that (the assault) because there's many – there's many things I don't remember doing. . . . I could have done it . . . I just don't remember. . . . I could have probably done it in my sleep." (*Id.*)

After the lie detector test, Plaintiff drafted a brief statement in which he confessed to breaking into the girls home, but not to sexually assaulting her. (*Id.* ¶ 60.) Mykes and Duffy then re-interviewed Plaintiff in an attempt to fill in missing details from his statements. (*Id.* ¶ 66.)

C. Probable Cause

a. *Trespass Charges*

On July 17, 2009, a Statement in Support of Warrantless Arrest of Plaintiff and a Misdemeanor Summons and Complaint (the "Misdemeanor Complaint") for the Branham Drive Trespass were signed by Detective Cirbo.[2] (*Id.* ¶ 34.) These documents were drafted in reliance on Harley and Wolff's statements and opinions about their interviews with Plaintiff, and did not include any information regarding Plaintiff's disabilities and limitations. (*Id.*)

On July 20, 2009, the District Attorney filed the Misdemeanor Complaint. (*Id.* ¶ 73.) Hartley and Wolff did not report Plaintiff's known seizure disorder, communication disorder, cognitive limitations, or the resulting unreliability of his confessions to the District Attorney. (*Id.*) On the same day, a magistrate judge signed a determination finding probable cause to detain Plaintiff for committing the Branham Drive Trespass. (*Id.* ¶ 74.)

On January 6, 2010, Mykes drafted and signed an Affidavit for Arrest Warrant on a new felony charge arising from the Branham Drive Trespass. (*Id.* ¶ 80.) Mykes did not include any mention of Plaintiff's known seizure disorder, communication disorder, or cognitive limitations in the affidavit. (*Id.*)

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[2] Detective Cirbo was present when Wolff and Hartley interviewed Plaintiff in his driveway on July 17, 2009 (Compl. ¶ 22), and is not a defendant in this action.

Later that day, the District Attorney filed the Affidavit in Douglas County Court and filed a Felony Complaint and Information on this additional charge on January 7, 2010. (*Id.*)

b. *Sexual Assault Charges*

On July 18, 2009, Mykes drafted and signed a Statement in Support of Warrantless Arrest of Plaintiff on three felony charges related to the July Assault. (*Id.* ¶ 71.) She later drafted and signed an Affidavit in support of a warrant for Plaintiff's arrest resulting from these charges (the "Mykes Affidavit"). (*Id.* ¶ 75.) Mykes did not report Plaintiff's known seizure disorder, communication difficulties, or cognitive limitations in the Statement in Support of Warrantless Arrest or Mykes Affidavit. (*Id.* ¶¶ 71, 75.) On July 22, 2009, the District Attorney filed a Felony Complaint and Information on the three charges arising from the July Assault. (*Id.* ¶ 76.) Mykes, Duffy and Dickson did not report Plaintiff's known seizure disorder, communication disorder, cognitive limitations, or the resulting unreliability of his confessions to the District Attorney. (*Id.*)

On July 23, 2009, Plaintiff appeared before a judge for the filing of charges arising from the July Assault. (*Id.* ¶ 77.) The judge reviewed Mykes' Statement in Support of Warrantless Arrest and the Mykes Affidavit and denied a bond reduction, based in part upon the allegation that Plaintiff had also committed the Branham Drive Trespass. (*Id.*) The judge also

denied a bond reduction on July 31, 2009 for the same reason. (*Id.*)

On March 30, 2010, the Douglas County Court began a preliminary hearing regarding the felony allegations against Plaintiff. (*Id.* ¶ 81.) Based on the statements made by Plaintiff to the Individual Defendants, the court found that there was probable cause to pursue all four felony charges against Plaintiff. (*Id.* ¶ 84.)

D. Termination of Original Action

On March 9, 2012, the District Attorney's Office received the results of an independent medical examination of Plaintiff by the Colorado Mental Health Institute at Pueblo ("CMHIP"). (*Id.* ¶ 85.) The CMHIP report concluded that the inculpatory statements made by Plaintiff were not made in a knowing and voluntary fashion, but were rather the result of suggestions made by the Individual Defendants, and that Plaintiff's disabilities combined with the Individual Defendant's treatment of him provided a reasonable basis to believe that his confessions were false. (*Id.*)

The District Attorney's Office dismissed all charges against Plaintiff in April 2012. (*Id.* ¶ 86.) The dismissals were based upon the likely falsity of his confessions and the prosecution's resultant inability to meet its burden of proof. (*Id.*) The motions filed by the District Attorney explained that "based on [Plaintiff's] intellectual disabilities, cognitive functioning

impairments, and speech and language disabilities," his statements could not be relied upon as evidence and "the People are left with insufficient evidence" to prove the charges against him. (*Id.*)

As a result of the charges leveled against Plaintiff, he spent four months (125 days) in detention in the Douglas County Jail, over five months (159 days) subject to restrictions on his geographic location that prevented him from visiting his own home, required him to live with relatives, and required GPS monitoring, and nearly two years (715 days) subject to restrictions on his geographic location that allowed him to return to live at his family home but restricted his movements and required GPS monitoring. (*Id.* ¶ 87.) As a result, he has suffered emotional distress, including depression, anxiety, humiliation, extreme feelings of guilt, and exacerbation of his preexisting disorders. (*Id.* ¶ 88.) He has also suffered damage to his reputation, lost wages, and he was required to expend substantial amounts of money on attorneys' fees and costs, including the costs of GPS monitoring. (*Id.* ¶ 89.)

E. Current Action

On these facts, Plaintiff filed this action against Defendants on July 22, 2013. (ECF No. 1.) On September 9, 2013, Plaintiff filed an Amended Complaint, asserting a claim for malicious prosecution in violation of the Fourth Amendment, Fifth Amendment, and Fourteenth Amendment procedural due

process under 42 U.S.C. § 1983. (Compl. ¶¶ 92-103.) On September 18, 2013, the Parties filed a Stipulated Motion for Dismissal with Prejudice of Plaintiff's Fifth Amendment Claim (ECF No. 27), which the Court granted (ECF No. 28). On September 23, 2013, Defendants filed the instant Motion. (ECF No. 32.) Plaintiff filed a Response to Defendants' Motion on October 31, 2013, stating that he will "not pursue a Fourteenth Amendment claim." (ECF No. 46 at 3 n.1.) Defendants filed their Reply on November 25, 2013. (ECF No. 54.) On July 1, 2014, Defendants filed a Joint Motion for Leave to File Supplemental Authority (ECF No. 74), which the Court granted (ECF No. 77).

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a claim in a complaint for "failure to state a claim upon which relief can be granted." In evaluating such a motion, a court must "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). In ruling on such a motion, the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the

spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556).

III. ANALYSIS

Defendants have moved to dismiss Plaintiff's claim for violation of the Fourth Amendment against all Defendants and argue that: (1) Plaintiff's claim is barred by the two year statute of limitations; (2) Plaintiff's claim is barred because probable cause was conclusively determined by the state court; (3) the Individual Defendants are entitled to qualified immunity; and (4) the District Attorney's Office is protected by Eleventh Amendment Immunity.[3] (ECF No. 32 at 12-18.) Defendants also argue that the claims against the Entity Defendants should be dismissed because: (1) the BOCC is not a proper party; (2) there is no allegation sufficient to assert entity liability; and (3) there is no underlying Constitutional

[3] Defendants also argue that Plaintiff's Fourteenth Amendment malicious prosecution claim is barred by availability of an adequate state court remedy. (ECF No. 32 at 13.) The Court need not address this argument, however, because Plaintiff has voluntarily dropped his Fourteenth Amendment Claim. (ECF No. 46 at 3 n.1.)

violation to support the claim against the Sheriff's Office. (*Id.* at 18.) The Court will address Defendants' arguments in turn below.

A. Statute of Limitations

Claims under § 1983 are governed by the forum state's statute of limitations. *Wallace v. Kato*, 549 U.S. 384, 387 (2007). Here, the applicable statute of limitations for Plaintiff's malicious prosecution claims is Colorado's two-year statute of limitations for personal injury actions. C.R.S. § 13-80-102(1)(g) ("All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute" and "regardless of the theory upon which suit is brought . . . shall be commenced within two years."); *see also Hunt v. Bennett*, 17 F.3d 1263, 1265 (10th Cir. 1994) (finding that "§ 1983 claims are best characterized as personal injury actions and we therefore apply" the State of Colorado's two-year statute of limitations). Although state law governs issues regarding the applicable statute of limitations, federal law determines the date on which the claim accrues and, therefore, when the limitations period begins to run. *Wallace*, 549 U.S. at 388.

Defendants argue that Plaintiff's malicious prosecution claim is analogous to a false arrest or false imprisonment claim, and that his claim, therefore, accrued on July 20, 2009, when Plaintiff was charged with a misdemeanor trespass by the District Attorney's Office via the filing of the Misdemeanor

Complaint. (ECF No. 32 at 10-13 (quoting *Mondragon v. Thompson*, 519 F.3d 1078, 1082-83 (10th Cir. 2008) (explaining that the statute of limitations for a Fourth Amendment claim for false imprisonment begins when the victim is released or legal process is instituted justifying imprisonment).) Since Plaintiff did not initiate this action until July 22, 2013, over four years after the Misdemeanor Complaint was filed, Defendants contend that his claim is untimely. (*Id.*)

While Defendants' Motion was pending, the United States Court of Appeals for the Tenth Circuit decided *Myers v. Koopman*, 738 F.3d 1190 (10th Cir. 2013). In *Myers*, the Tenth Circuit clarified that "[a] claim of malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor." *Id.* at 1194; *see also Margheim v. Buck*, 2014 WL 2206940, at *3 (D. Colo. May 27, 2014) (explaining that a claim for malicious prosecution does not accrue until the proceedings terminate in a plaintiff's favor).

Here, the legal process instituted by Defendants was terminated in favor of Plaintiff in April 2012. (Compl. ¶ 94.) As this case was filed within two years of that accrual date, the Court finds that Plaintiff's claim is timely and not barred by the statute of limitations.

B. Probable Cause

"Because the lack of probable cause is an essential element under Colorado law for malicious prosecution, the existence of probable cause is a complete defense to suit based on malicious prosecution." *Harvey v. Carter*, 2003 WL 21979111, at *2 (D. Colo. May 1, 2003). Defendants argue that since probable cause was conclusively determined by the state court (Compl. ¶¶ 74, 78), Plaintiff is collaterally estopped from re-litigating the issue (ECF No. 32 at 14 (citing *Allen v. McCurry*, 449 U.S. 90, 102 (1980) ("[C]ollateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state criminal proceedings.")).

Despite Defendants' argument to the contrary, the determination of probable cause by the state court is not, in and of itself, conclusive evidence of the existence of probable cause. *See Anthony v. Baker*, 767 F.2d 657, 663 (10th Cir. 1985). "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. *They cannot hide behind the officials whom they have defrauded.*" *Robinson v. Maruffi*, 895 F.2d 649, 656 (10th Cir. 1990) (emphasis in original) (quoting *Jones v. City of Chi.*, 856 F.2d 985, 994 (7th Cir. 1988).

Plaintiff has pled that his confession was coerced, involuntary and false, and that the Individual Defendants knew as much before process was instituted against him. (Compl. ¶¶ 1, 17, 24, 31, 32, 37, 47, 49, 53, 54, 64, 67, 68.) These allegations, taken as true for the purposes of a motion to dismiss, show that the prosecutors and state court judge relied upon the Individual Defendants' statements in making their respective probable cause determinations.

As the probable cause determinations depend on the false confessions procured by the Individual Defendants (Compl. ¶¶ 74, 84), they do not insulate Defendants from this action. Accordingly, the Court rejects Defendants' argument.

C. Qualified Immunity

The Individual Defendants assert qualified immunity against Plaintiff's claim. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (internal citation omitted). "To survive a motion to dismiss based on qualified immunity, the plaintiff must allege sufficient facts that show – when taken as true – the defendant plausibly violated his constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

1. Constitutional Violation

Plaintiff's Section 1983 malicious prosecution claim against the Individual Defendants alleges a seizure without probable cause in violation of the Fourth Amendment. (ECF No. 46 at 18.) The Individual Defendants dispute that Plaintiff has alleged a constitutional violation. (ECF No. 32 at 15-16) ("[T]here is simply no clearly-established constitutional right that is alleged to have been violated.").)

When addressing malicious prosecution claims brought pursuant to Section 1983, the Tenth Circuit uses common law elements of malicious prosecution as a "starting" point for its analysis, but ultimately determines whether the "plaintiff has proven the deprivation of a constitutional right." *Novitsky v. City of Aurora*, 491 F.3d 1244, 1257 (10th Cir. 2007). A malicious prosecution claim under § 1983 includes the following elements:

> (1) [T]he defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.

Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008).

The Court finds that the first, second and fifth elements have been satisfied here. Plaintiff alleges that the Individual Defendants caused Plaintiff's

continued confinement,[4] that the original action terminated in Plaintiff's favor,[5] and that Plaintiff sustained damages.[6]

As to the third element, "[o]fficers must have probable cause to initiate a search, arrest, and prosecution under the Fourth Amendment." *Stonecipher v. Valles*, 2014 WL 2937038, at *4 (10th Cir. 2014). "Probable cause is not a precise quantum of evidence[.]" *Id.* It exists "where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent man in believing that an offense has been or is being committed." *Karr v.*

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[4] "As a result of false charges leveled against [Plaintiff], he spent four months (125 days) in detention in the Douglas County Jail . . . ; over five months (159 days) subject to restrictions on his geographic location that prevented him from visiting his own home, required him to live with relatives, and required GPS monitoring; and nearly two years (715 days) subject to restrictions on his geographic location that allowed him to return to live at his family home but restricted his movements and required GPS monitoring." (Compl. ¶ 87.)

[5] "In two motions filed on April 4, 2012 and April 12, 2012, based upon the CMHIP independent medical examination, the [District Attorney's Office] dismissed all charges against [Plaintiff]." (Compl. ¶ 86.)

[6] "As a result of the false charges brought against him, [Plaintiff] suffered extreme emotional distress, including depression, anxiety, humiliation, extreme feelings of guilt, . . . exacerbation of his preexisting disorders[, . . .] damage to his reputation, lost wages, and was required to expend substantial amounts of money on attorneys' fees and costs and the costs of GPS monitoring, among other costs." (Compl. ¶¶ 88-89.)

Smith, 774 F.2d 1029, 1031 (10th Cir. 1985). Alternatively stated, there is no probable cause if a reasonable officer knew or should have known that there was not probable cause to bring criminal charges. *See Wilkins*, 528 F.3d at 805 (finding that, where plaintiff alleged that the information in officers' probable cause statement was fabricated, "[u]nder the version of the facts presented by Plaintiffs and accepted by the district court on summary judgment . . . a reasonable officer should have known no probable cause existed without the statements."); *Harris v. Bornhorst*, 513 F.3d 503, 513 (6th Cir. 2008) (holding that the district court erred in concluding that an officer had probable cause because the officer should have known that the confession she relied upon was suspect); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (reversing grant of summary judgment on Section 1983 malicious prosecution claim where "a jury could find that [defendant] played a role in initiating the prosecution by preparing the alleged false confession and forwarding it to prosecutors").

The facts of this case are similar to *Wilkins v. DeReyes*, in which the two plaintiffs were arrested and prosecuted based on false statements coerced from two fellow gang members. 528 F.3d at 793. This Court found that a question of fact existed as to whether the statements were involuntary and false, and whether the officers so knew. *Id.* at 799-801. The Tenth Circuit affirmed, noting that "[i]n the affidavits supporting warrants to arrest [the two plaintiffs], the

officers relied entirely on the allegedly coerced false statements[.]" *Id.* at 801. Since the court was required to set aside the false information – *i.e.*, the gang members' statements – nothing was left in the affidavits to support probable cause for the two plaintiffs' arrests. *Id.* Therefore, the Court found that the plaintiffs' allegations, if proven, showed an absence of probable cause for purposes of the third element of their malicious prosecution claim. *Id.* at 802.

Here, Plaintiff alleges that the Individual Defendants knowingly elicited false confessions from Plaintiff, then used those confessions as the basis for prosecution without disclosing their knowledge of the unreliability of the statements. (Compl. ¶ 1.) Specifically, Plaintiff alleges that the Individual Defendants fed Plaintiff specific facts about the July Assault and the Branham Drive Trespass then asked Plaintiff "yes or no" questions regarding the incidents, and asked him to describe the incidents back to them. (*Id.* ¶¶ 22, 28, 55.) They also led Plaintiff to believe that his DNA had been found in locations which implicated him in the crimes (*id.* ¶ 28), and continued to interview Plaintiff after he had been awake for over 24 hours with little or no sleep (*Id.* ¶ 36). Plaintiff alleges that he was rebuffed by the Individual Defendants when he tried to explain that his confessions had been coerced and that he didn't remember committing the crimes. (*Id.* ¶¶ 41, 58, 59.)

Plaintiff also alleges that, based on Plaintiff's demeanor and affect, among other things, the Individual

Defendants knew that Plaintiff suffered from some type of mental impairment and was of limited intelligence, knew that he was not capable of providing accurate information in response to their questions, and knew that Plaintiff was susceptible to pressure to agree with statements they made to him. (*Id.* ¶¶ 31, 47, 54, 67.) Yet, they did not report this information to the District Attorney, or include it in the various court documents used to initiate the proceedings against Plaintiff. (*See id.* ¶ 34, 73, 75, 76, 80, 93.)

Moreover, Plaintiff contends that, without the false confessions, the Individual Defendants would not have had probable cause to bring charges against Plaintiff. For instance, Plaintiff alleges that the Individual Defendants knew that Plaintiff did not match the description of the perpetrator of the July Assault. (*Id.* ¶¶ 27, 30, 37.)

Taking these allegations as true for the purposes of a motion to dismiss, the Court must set aside Plaintiff's allegedly false statements and confessions when determining whether probable cause existed to continue Plaintiff's confinement. *See Wilkins*, 528 F.3d at 801 (explaining that the court must set aside false information when determining if there is probable cause). The Court finds that, without these statements and confessions, or with the withheld knowledge of Plaintiff's cognitive limitations, there would have been no probable cause for Plaintiff's continued confinement or prosecution. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1295 (10th Cir. 2004) (explaining that plaintiff must prove "that without the

falsified inculpatory evidence, or with the withheld exculpatory evidence, there would have been no probable cause for his continued confinement or prosecution"). The Court, therefore, finds that Plaintiff has adequately pled the absence of probable cause element of a Fourth Amendment malicious prosecution claim against the Individual Defendants.

As to the fourth element, malice within the context of malicious prosecution "is any motive other than a desire to bring an offender to justice[.]" *Montgomery Ward & Co. v. Pherson*, 272 P.2d 643, 646 (Colo. 1954). "It is not necessary that the plaintiff prove malice directly." *Crow v. United States*, 659 F. Supp. 556, 573 (D. Kan. 1987). "Malice . . . may be inferred from the want of probable cause." *Montgomery Ward*, 272 P.2d at 646. Additionally, "[f]alsifying or omitting evidence 'knowingly and intentionally, or with reckless disregard for the truth' is sufficient to establish malice" in the context of malicious prosecution claims. *Carbajal v. Serra*, 2012 WL 4369873, at *13 (D. Colo. Aug. 29, 2012) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).

Plaintiff's conclusory allegation that "Defendants acted with malice" (Compl. ¶ 96) is insufficient, in and of itself, to satisfy this element. *See Koopman*, 2010 WL 3843300, at *4 (explaining that allegations of malice must not be general or conclusory). Plaintiff, however, repeatedly alleges that the Individual Defendants "knew that [Plaintiff's] statements were not knowing or voluntary and had been coerced." (Compl. ¶¶ 24, 31, 47, 54, 67.) He avers that he attempted to

explain that his confessions had been coerced, but was rebuffed by the Individual Defendants. (*Id.* ¶¶ 41, 42.) He also alleges that the Individual Defendants withheld material information regarding Plaintiff's cognitive limitations and the resultant unreliability of Plaintiff's confessions in the various court documents used to initiate the proceedings against Plaintiff, and when communicating with the District Attorney. (*See id.* ¶ 34, 73, 75, 76, 80, 93.) These allegations are specific and not conclusory. The Court finds that they are sufficient to establish the malice element of a Fourth Amendment malicious prosecution claim against the Individual Defendants. *See Barton v. City & Cnty. of Denver*, 432 F. Supp.2d 1178, 1194-95 (D.Colo. 2006) ("Thus a jury arguably may be able to infer . . . that if the officers supplied false or misleading information to prosecutors, the element of malice is satisfied[.]").

Accordingly, the Court finds that Plaintiff has alleged facts sufficient to state a claim for a violation of his Fourth Amendment right to be free from unreasonable seizures. *Schwartz*, 702 F.3d at 579.

2. Clearly Established

Because Defendants have asserted qualified immunity, Plaintiffs are entitled to proceed in this action only if the constitutional violation alleged was clearly established at the time of relevant events. *Pearson*, 555 U.S. at 232. "Ordinarily, in order for the law to be clearly established, there must be 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." *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010) (quotation omitted). The Supreme Court has held that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quotations and alteration omitted). The Tenth Circuit has observed that "[t]he *Hope* decision shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (quotations omitted).

As discussed above, the allegations in Plaintiff's Amended Complaint are similar to those in *Wilkins*, a Tenth Circuit case. *Wilkins* was decided on June 13, 2008 – nearly a year before the events at issue here – and is a published decision. Additionally, the prohibition on using false confessions in support of a probable cause determination has long been the law. *See Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996). As a result, the Court has little trouble finding that a reasonable officer in the Individual Defendants' positions would have known that using a coerced

confession to find probable cause was a violation of Plaintiff's constitutional rights.

Because Plaintiff's Amended Complaint contains sufficient allegations to state a claim for a violation of Plaintiff's clearly established constitutional rights, the Individual Defendants are not entitled to qualified immunity. *Pearson*, 555 U.S. at 232, 129 S.Ct. 808.

D. Eleventh Amendment Immunity

Defendants argue that the Eleventh Amendment to the United States Constitution precludes Plaintiff from suing the District Attorney's Office and divests this Court of subject matter jurisdiction over this claim. (ECF No. 32 at 16.) "If applicable, the Eleventh Amendment bars suits against states in federal court." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1231-32 (10th Cir. 1999) (citations omitted). Only a state or an arm of a state may assert the Eleventh Amendment as a defense to suit. *Id.* at 1232 (citation omitted).

In *Rozek v. Topolnicki*, the Tenth Circuit held that the District Attorney's Office[7] is an arm of the state, and therefore shares in the state's sovereign immunity. 865 F.2d 1154, 1158 (10th Cir. 1989).

[7] *Rozek* dealt with the very office at issue here – the Office of the District Attorney for the Eighteenth Judicial District. 865 F.2d at 1155.

Plaintiff argues that *Rozek* is no longer good law because subsequent case law states that District Attorney's offices are political subdivisions and not arms of the state, and as such, are not entitled to Eleventh Amendment immunity. (ECF No. 46 at 19-21.) The case Plaintiff cites in support, *Davidson v. Sandstrom*, states that District Attorneys are nonjudicial elected officials of their judicial districts and that judicial districts are political subdivisions of the state. *See* 83 P.3d 648, 654-56 (Colo. 2004). A subsequent case, *Masters v. Gilmore*, noted that although *Davidson* did not involve a question of Eleventh Amendment immunity, its conclusion that a judicial district is a political subdivision of the state is persuasive authority in the court's analysis of Eleventh Amendment immunity for a district attorney and the judicial district for which he serves. 663 F. Supp. 2d 1027, 1054 (D. Colo. 2009). The *Masters* court concluded that neither the Eighth Judicial District nor the Eighth Judicial District's District Attorney were entitled to Eleventh Amendment immunity. *Id.*

The Tenth Circuit, however, has held that *Davidson* did not mean to overturn *Rozek* or the multitude of case law holding that District Attorneys are arms of the state. *Van De Weghe v. Chambers*, 2014 WL 2898489, at *3 (10th Cir. June 27, 2014) ("[W]e simply cannot say that *Davidson* meant to throw *Rozek*'s analysis or conclusion overboard."). This Court has also held that, "*Davidson* notwithstanding, the weight of state case law . . . directs a finding of Eleventh Amendment immunity" for the district

attorney's office. *Bragg v. Office of the Dist. Atty.*, 704 F. Supp. 2d 1032, 1065 (D. Colo. 2009).

The Court agrees with the weight of state and federal case law, and finds that the District Attorney's Office is an arm of the State of Colorado, and thus protected from suit by the Eleventh Amendment. *See Rozek*, 865 F.2d at 1158 (citing *Beacom v. Bd. of Cnty. Commis.*, 657 P.2d 440, 445 (Colo. 1983)); *see also Romero v. Boulder Cnty. D.A.'s Office*, 87 F. App'x 696, 698 (10th Cir. 2004) ("[T]he action is barred by the Eleventh Amendment as it pertains to Quiram in his official capacity and the Boulder County District Attorney's Office."); *Bragg*, 704 F. Supp. 2d at 1067 ("This Court cannot join *Davidson* in singing against the choir and finds that a survey of state law reflects that Defendant is a state agency subject to Eleventh Amendment immunity."); *Musick v. Pickering*, 2005 WL 2739028, at *2 (D. Colo. Oct. 24, 2005) ("As an initial matter, it is abundantly clear that the District Attorney's Office and [Deputy District Attorney] in his official capacity enjoy Eleventh Amendment immunity from plaintiff's federal claims.").

E. The BOCC Is A Proper Defendant

Defendants argue that the BOCC is not a proper party because Plaintiff cannot show that the BOCC has supervisory authority over the sheriff and his

deputies,[8] and under Colorado law, only a sheriff has the right to supervise and control the sheriff's duties. (ECF No. 32 at 18-19) (citing *Tunget v. Board of Cnty. Commis. of Delta Cnty.*, 992 P.2d 650, 652 (Colo. App. 1999).) Counties, however, "can be held liable for the misdeeds of Sheriffs and their employees when the Sheriff is held to set 'official policy' for the county." *Bristol v. Bd. of Cnty. Commis. of Cnty. of Clear Creek*, 312 F.3d 1213, 1221 (10th Cir. 2002) (listing cases where the "acts of the Sheriff were held to set the 'official policy' of the County, thus making the County liable under § 1983 for the Sheriff's unconstitutional actions and those of the Sheriff's employees.").

Here, Plaintiff alleges that the "policy, custom, and practice of [the BOCC] in failing to properly train [its] employees was the moving force and proximate cause of the violation of [Plaintiff's] constitutional rights and caused [Plaintiff's] damages." (Compl. ¶ 100.) Specifically, Plaintiff alleges that the BOCC "knew that Detectives working for the Sheriff's Office would interrogate suspects with disabilities and low IQs during the course of their employment, and knew that failing to specially train them on conducting such interrogations gave rise to a risk of coerced confessions." (Compl. ¶ 70; *see also id.* ¶ 99.) Plaintiff also alleges that, despite this, the BOCC "failed to properly train and supervise their employees to avoid

[8] The Court notes that Defendants have failed to address this argument in their Reply.

the use of coercive interrogation tactics on vulnerable suspects and the pursuit of prosecution based on coerced statements." (*Id.* ¶ 98.)

Because Plaintiff has alleged that County policies caused his constitutional violation, the Court finds that the BOCC is a proper defendant in this case. *See Grady v. Jefferson Cnty., Colo.*, 2008 WL 178923, at *3 (D. Colo. Jan. 17, 2008) (declining to dismiss claims against the Jefferson County Board of County Commissioners on a Rule 12(b)(6) motion to dismiss).

F. Entity Liability

"A municipality or other local government may be liable under [42 U.S.C. § 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or causes a person 'to be subjected' to such a deprivation." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 692 (1978)). "[U]nder § 1983, local governments are responsible only for 'their *own* illegal acts.'" *Id.* at 1359 (emphasis in original). "They are not vicariously liable under § 1983 for their employees' actions." *Id.*

To prevail on a municipal liability claim, a plaintiff must establish: "(1) that a municipal employee committed a constitutional violation; and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Bd. of Cnty. Comm'rs. of Oklahoma Cnty.*, 151 F.3d 1313, 1316 (10th Cir. 1998). The Court has already found

that Plaintiff has stated a claim against the Individual Defendants for a Fourth Amendment violation. Thus, the Court finds that Plaintiff has shown that a municipal employee may have violated his constitutional rights. The Court will now turn to whether a County policy or custom was the "moving force" behind this deprivation.

The existence of a policy or custom can be established many different ways, including demonstrating the existence of:

> (1) [A] formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784 (10th Cir. 2010) (citation and quotations omitted). In the absence of an express policy or an entrenched custom, "the inadequacy of police training may serve as a basis of § 1983 liability only where the failure to train . . . amounts to a deliberate indifference to the

constitutional rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

The Tenth Circuit has "confirmed that this deliberate indifference standard may be satisfied 'when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm.'" *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1999)). Although a single incident generally will not give rise to liability, *Okla. City v. Tuttle*, 471 U.S. 808, 823-24 (1985), "deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." *Barney*, 143 F.3d at 1307 (internal citations omitted); *see also Walker v. Wegener*, 2012 WL 4359365, at *10 (D. Colo. Aug. 30, 2012) ("This may be demonstrated when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm."). The official position must operate as the "moving force" behind the violation, and the plaintiff must demonstrate a "direct causal link" between the action and the right violation. *Bd. of County Comm'rs. v. Brown*, 520 U.S. 397, 404 (1997). That is, "[w]ould the injury have been avoided had the employee been

trained under a program that was not deficient in the identified respect?" *Canton*, 489 U.S. at 391.

In *Canton*, the Court explained when inadequate police training constitutes city policy:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

489 U.S. at 390. The Court noted:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights.

Id. (citation omitted).

Here, Plaintiff alleges that the BOCC and the Sheriff's Office were deliberately indifferent to a training failure, which caused a violation of Plaintiff's

constitutional rights. (ECF No. 46 at 24.) Specifically, Plaintiff alleges that "[i]n the course of her employment with the [Sheriff's Office, Mykes] has received training on interrogation techniques, but she has not been trained regarding how to properly apply those techniques to suspects who may be vulnerable to coercion due to disabilities or low IQ." (Compl. ¶ 70.) Plaintiff further alleges that the BOCC and the Sheriff's Office knew, or should have known, that their employees would use coercive interrogation tactics on vulnerable suspects, but failed to train and supervise their employees as to how to properly apply these techniques. (*Id.* ¶¶ 99, 100.)

Like the example in *Canton*, the BOCC and the Sheriff's Office should know that their police officers will be required to interview suspects who may be vulnerable to coercion due to disabilities or low IQ. *See Canton*, 489 U.S. at 390 n.10. Accordingly, the Court finds that, in this case, the need to train officers in the proper interrogation techniques is "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights. *See id.*

Taking Plaintiff's allegations as true for the purposes of a motion to dismiss, the Court finds that the Amended Complaint supports an inference that the absence of training on proper interrogation demonstrates a deliberate indifference on the part of the County to the constitutional rights of individuals who are subject to interrogation by its law enforcement officers. *See Allen v. Muskogee*, 119 F.3d 837, 842

(10th Cir. 1997). Accordingly, Plaintiff's allegations are sufficient to state a claim against the BOCC and the Sheriff's Office under Section 1983.[9]

G. Underlying Constitutional Violation

Defendants argue that the Sheriff's Office may not be held liable because Plaintiff's claim for malicious prosecution against the Individual Defendants fails as a matter of law. (ECF No. 32 at 19 (citing *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers.").) Because the Court has already found that Plaintiff has stated a claim against the Individual Defendants for a Fourth Amendment violation, the Court rejects Defendants' argument.

III. CONCLUSION

1. Defendants' Joint Motion to Dismiss (ECF No. 32) is GRANTED IN PART and DENIED IN PART;

2. Plaintiff's claim against the Office of the District Attorney for the Eighteenth Judicial District is DISMISSED WITHOUT PREJUDICE based on Eleventh Amendment Immunity;

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[9] The Court notes that Defendants' argument may be readdressed at the summary judgment phase.

3. The Office of the District Attorney for the Eighteenth Judicial District is removed as a party in this action and the parties shall update the caption accordingly;

3. The Motion is denied in all other respects; and

4. This action shall proceed on Plaintiff's claim for violation of the Fourth Amendment against Detective Joe Ryan Hartley, Detective Ryan Wolff, Detective Mike Duffy, Detective Heather Mykes, Investigator Michael Dickson, the Board of County Commissioners of Douglas County, and Douglas County Sheriff's Office.

Dated this 20th day of August, 2014.

BY THE COURT:

/s/ William J. Martinez
William J. Martinez
United States District judge