No. 15-_____

In The
Supreme Court of the United States

TSUTOMU SHIMOMURA,

Petitioner,

v.

WADE DAVIS,

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

TY GEE
HADDON, MORGAN AND FOREMAN, P.C.
150 East Tenth Avenue
Denver, CO 80203
Tel (303) 831-7364
tgee@hmflaw.com

Counsel for Petitioner Tsutomu Shimomura

June 2, 2016

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether use of "arguable probable cause," adopted by the Tenth Circuit and eight other circuit courts of appeals, to determine whether a police officer is entitled to qualified immunity accords with this Court's 42 U.S.C. § 1983 jurisprudence.

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PETITION FOR A WRIT OF CERTIORARI

Tsutomu Shimomura petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's opinion is reprinted at Pet. App. 1-29 and reported at 811 F.3d 349 (Dec. 29, 2015).

JURISDICTION

The court of appeals' judgment was entered December 29, 2015. Pet. App. 1-29. On March 4, 2016, the Tenth Circuit denied Mr. Shimomura's petition for rehearing. Pet. App. 59-60. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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. . . .

STATEMENT OF THE CASE

Petitioner Tsutomu Shimomura entered a TSA checkpoint at Denver International Airport. He was traveling with a rolling bag and a labeled bottle of prescription medicine. During the screening process, he observed a TSA agent touch a security sampling strip to the bottle's dispensing mechanism. Mr. Shimomura believed this violated TSA procedure. He became concerned the strip contaminated the medicine and posed a risk to his health.

When the TSA agent could not answer questions about the sterility and composition of the sampling strip, Mr. Shimomura asked to speak with a supervisor. Agent Carlson appeared. Respondent Wade Davis, a Denver Police Department officer, later arrived and stood near Agent Carlson. During the course of the discussions, Agent Carlson became increasingly hostile. Eventually, she ordered Mr. Shimomura to "get the hell

out" of the screening area. For his part, Respondent Davis threatened Mr. Shimomura with arrest if he did not leave immediately.

By the time Mr. Shimomura began to leave the screening area, he was running late for his plane. A DIA video camera – toward which Mr. Shimomura eventually walked – captured the following events. After gathering his belongings, Mr. Shimomura, pulling a roller bag, began walking briskly away. Unbeknownst to Mr. Shimomura, Agent Carlson followed him closely and aggressively, with Respondent Davis close behind her. After taking a few steps, Mr. Shimomura paused briefly and then resumed his exit. When he paused, Agent Carlson was following so closely that she had to take evasive maneuvers to avoid running into the roller bag. Her left leg stepped to the left of the bag, and she lifted her right leg to avoid contact with the bag.

The video does not show whether there actually was any contact. At the moment there would have been contact, Respondent Davis was directly behind Agent Carlson. (Respondent Davis nonetheless testified that he "observed Mr. Shimomura's roller bag strike Agent Carlson in [both] legs.") Within a few seconds after any contact would have occurred, Agent Carlson turned to Respondent Davis, said something to him (there is no audio), and then pointed at Mr. Shimomura. Respondent Davis then detained Mr. Shimomura.

For 90 minutes Respondent Davis conferred with Agent Carlson and other TSA agents. He then charged

Mr. Shimomura with assault under Denver's municipal code.[1] After reviewing the video footage, the prosecutor dismissed the complaint. Mr. Shimomura sued Respondent Davis under 42 U.S.C. § 1983 for arresting him without probable cause.

Submitting the DIA video footage as evidence, Respondent Davis moved for summary judgment based on qualified immunity. In an affidavit submitted with his summary judgment motion, he testified that the video "is a true and accurate depiction of the events that I witnessed."

The district court had no difficulty concluding Respondent Davis had no probable cause to arrest Mr. Shimomura for assault:

> [U]pon watching this footage, it appears to me that Mr. Shimomura's roller bag, at most, came into contact with Agent Carlson's right leg. In addition, as Officer Davis surely witnessed, it appears that any contact that occurred was accidental (i.e., negligent), if not Agent Carlson's own fault. The video does tend to show that she was aggressively and closely following Mr. Shimomura as he exited the screening area.

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[1] Denver's code provides: "It shall be unlawful for any person to intentionally or recklessly assault . . . any other person." App. 54. The district court concluded that one of the elements of the offense was that the defendant caused bodily injury, i.e., "physical pain . . . or any impairment of physical or mental conditions." App. 54 (internal quotations omitted).

App. 55. The court also found that "nothing in the video" supported Agent Carlson's sworn statement that after making contact with the roller bag she "fell forward but caught herself." *Id.* "Instead," the court found, "she appears to have rather adeptly stepped out of the way of the roller bag before or right after its minimal contact with her right leg." *Id.*

The next question, the district court said, was "whether there was 'arguable probable cause'" for the arrest. App. 56 (citing *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012)). The court concluded there was. It found that Respondent Davis's "mistaken" conclusion that he had probable cause was reasonable, because "the series of events occurred very rapidly" and it was reasonable for him to believe the statements of Agent Carlson. App. 57. Respondent Davis did not testify or argue that the rapidity with which the events occurred had any bearing on his probable-cause determination.

Affirming, the Tenth Circuit "assume[d] that probable cause was lacking," but it held that "[e]ven with this assumption . . . , Officer Davis would enjoy qualified immunity if probable cause had been at least 'arguable,'" App. 8 (quoting *Kaufman*, 697 F.3d at 1300). After reviewing the summary judgment evidence, the Tenth Circuit concluded that "a reasonable police officer could have viewed probable cause as arguable." App. 9.

These facts support "arguable probable cause," the court held: Mr. Shimomura stopped the roller bag and moved it "in Agent Carlson's direction"; she "moved

suddenly" after the bag was "pushed in her direction"; Mr. Shimomura "walked away more rapidly after he pushed the roller bag in [her] direction"; while the camera view does not show any actual contact, "Officer Davis had a different angle" and he had "only a momentary opportunity" to see what had happened. App. 12.

Dissenting from the Court's qualified-immunity holding, Chief Judge Tymkovich concluded that there was not "arguable probable cause," and that the majority improperly resolved a factual dispute, contrary to this Court's decision in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). App. 27-28. Faced with Mr. Shimomura's factual allegations, Judge Tymkovich concluded, Respondent Davis failed to establish that a reasonable officer "*could* have reasonably perceived evidence of bodily injury and intent or recklessness." App. 28. He disagreed with the majority's analysis of "arguable probable cause": "The majority concludes that a person standing at Officer Davis's vantage point could have perceived the requisite evidence, but that is not beyond dispute." App. 28. "We do not know what Officer Davis saw from his angle. [The video, the complaint, and summary-judgment affidavits] do not definitively settle the facts in Officer Davis's favor." App. 29. A jury, Judge Tymkovich said, could find that given Respondent Davis's angle and

> how little time he had to process what had happened, it was unreasonable to think the contact was intentional or reckless. And a jury

> most certainly could find that there was no evidence of bodily injury. Having watched the video, I find it dubious that anyone viewing the contact from *any* angle could have reasonably thought that Agent Carlson felt pain.

App. 29.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the proper application of this Court's qualified-immunity jurisprudence. In civil rights lawsuits for damages arising from arrests without probable cause, a majority of the circuit courts of appeals has adopted a rule conferring immunity on police officers for arrests without probable cause so long as they had "arguable probable cause" at the time of arrest. "Arguable probable cause" is not a part of this Court's qualified-immunity lexicon.

The Court should determine whether "arguable probable cause," as articulated and applied by nine circuit courts of appeals, is consistent with this Court's § 1983 jurisprudence.

This Court has held that a police officer who violates a constitutional right is entitled to qualified immunity depending on whether the right was clearly established at the time of the violation. *E.g.*, *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001). A right is clearly established if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he

confronted." *Id.* at 202. This standard measures the "objective legal reasonableness of the action." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

In the Fourth Amendment context, nine circuit courts of appeals have held that the "clearly established" question is answered in whole or in part by whether the police officer had "arguable probable cause."[2] The Sixth Circuit has suggested it may be in this camp.[3] The Third and Fourth circuits have not joined the other circuits in applying "arguable probable cause" in the immunity context.[4] This Court has not used this term in its qualified-immunity decisions.

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[2] *Prokey v. Watkins*, 942 F.2d 67, 72 (1st Cir. 1991); *Myers v. Patterson*, No. 14-2554-cv, 2016 WL 1397805, at *5 (2d Cir. Apr. 11, 2016); *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 207 (5th Cir. 2009); *D.Z. v. Buell*, 796 F.3d 749, 755 (7th Cir. 2015); *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015); *Kaufman*, 697 F.3d at 1300; *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011); *Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014); *Carter v. Butts Cnty., Ga.*, 2016 WL 1743573, at *5 (11th Cir. May 3, 2016); *Moore v. Hartman*, 644 F.3d 415, 422 (D.C. Cir. 2011), *vacated on other grounds*, 132 S. Ct. 2740 (2012).

[3] *Cf. Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002) (citing *Redd v. City of Enterprise*, 140 F.3d 1378, 1384 (11th Cir. 1998), for proposition that when officer has "arguable probable cause . . . , he is entitled to qualified immunity").

[4] The Third Circuit has indicated, apparently incorrectly, that it has applied an "arguable probable cause" concept. *Compare Blaylock v. City of Philadelphia*, 504 F.3d 405, 412 (3d Cir. 2007) ("[I]n *Gilles v. Davis*, 427 F.3d 197, 205-06 (3d Cir. 2005), we made an independent determination – based in part on a videotape that was in the record – that the defendant police officer had at least arguable probable cause to arrest the plaintiff for disorderly conduct and was therefore entitled to qualified immunity.") *with*

The term encompasses three different related concepts among the different circuits. In the D.C., Fifth, Seventh, Eighth, Tenth and Eleventh circuits, arguable probable cause "is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists," *Stonecipher*, 759 F.3d at 1141. *See Moore*, 644 F.3d at 422; *Club Retro*, 568 F.3d at 207; *D.Z.*, 796 F.3d at 755; *Carter*, 2016 WL 1743573, at *5; *cf. New*, 787 F.3d at 899 (arguable probable cause asks whether officer "should have known" that arrest violated plaintiff's clearly established right) (internal quotations omitted).

In the First and Second circuits, arguable probable cause "means that it is possible for 'officers of reasonable competence' to fairly disagree over whether probable cause exists," *Prokey*, 942 F.2d at 72 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See Walczyk*, 496 F.3d at 163 ("'Arguable probable cause exists "if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met."'") (quoting *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (quoting *Golino v. City of New Haven*, 950 F.2d 864, 870 (2d Cir. 1991))). The Ninth Circuit applies an amalgam of the other eight circuits: Qualified immunity depends on "whether it is *reasonably arguable* that there was probable cause for arrest – that is, whether reasonable officers could disagree as to the legality of the arrest

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Gilles, 427 F.3d at 205-06 (no reference to "arguable probable cause").

such that the arresting officer is entitled to qualified immunity." *Rosenbaum*, 663 F.3d at 1076 (emphasis in original).

In contrast, the Third and Fourth circuits do not apply "arguable probable cause." They focus on whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. *See, e.g.*, *Werkheiser v. Pocono Twp.*, 780 F.3d 172, 177 (3d Cir.), *cert. denied sub nom. Werkheiser v. Pocono Twp., Penn.*, 136 S. Ct. 404 (2015); *Raub v. Campbell*, 785 F.3d 876, 882 (4th Cir.), *cert. denied*, 136 S. Ct. 503 (2015).

As then-Judge Sotomayor suggested in her concurrence in *Walczyk*, 496 F.3d at 165-71, the use of "arguable probable cause" – in any of its variations from the nine circuits – necessarily, and inappropriately, distracts courts from "'[t]he relevant, dispositive inquiry in determining whether a right is clearly established,'" namely, "'whether it would be clear to a reasonable officer that his [or her] conduct was unlawful in the situation he [or she] confronted,'" 496 F.3d at 166 (quoting *Saucier*, 533 U.S. at 202).

That dispositive *Saucier* question, Justice Sotomayor said, "requires an inquiry into the state of the law at the time of the officer's conduct and 'in light of the specific context of the case.'" *Id.* (quoting *Saucier*, 533 U.S. at 201). If the right alleged to have been violated was not theretofore articulated or had been addressed only in a factual context that is

"distinguishable in a fair way," *Saucier*, 533 U.S. 202, then it was not a "clearly established" right and the officer is cloaked with immunity. If on the other hand the right has been articulated previously or the factual context is not distinguishable, the officer is not cloaked with immunity. Regardless of which answer is given, "the qualified immunity inquiry is complete," *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring).

Despite the nine circuits' secondary – extracurricular – focus on arguable probable cause, the various concepts embodied in that term are not separate or distinct from the core *Saucier* analysis. The "arguable probable cause" circuits variously use the term to analyze whether an officer's conduct was "objectively reasonable," *see, e.g.*, *Stonecipher*, 759 F.3d at 1141, but that "is part and parcel of the inquiry into whether the law was clearly established at the time of the challenged conduct and for the particular context in which it occurred," *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring); *see id.* at 168 ("reasonableness – and therefore the existence of 'arguable probable cause' – are considerations that properly fall *within* the clearly established inquiry as the Supreme Court has described it") (Sotomayor, J., concurring). The search for arguable probable cause has consequences: "By introducing reasonableness as a separate step, we give defendants a second bite at the immunity apple, thereby thwarting a careful balance that the Supreme Court has struck 'between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.'" *Id.* at 169 (quoting

Anderson, 483 U.S. at 639 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984))).

Additionally, the "arguable probable cause" standard subtly encourages courts to move the qualified-immunity bar slightly lower by viewing facts in a way that hypothetical reasonable police officers might "arguably" have seen them so that their mistaken probable-cause determination nonetheless was "reasonable." The case at bar is instructive. Respondent Davis, who was behind Agent Carlson, testified in his summary judgment affidavit that he "observed Mr. Shimomura's roller bag strike Agent Carlson" in the front of both "legs." The video footage – with the camera facing Agent Carlson – showed that she sidestepped the bag with her left leg and the bag *possibly* made slight contact with her right leg. As the district judge found, "it appears to me that Mr. Shimomura's roller bag, at most, came into contact with Agent Carlson's right leg. In addition, as Officer Davis surely witnessed, it appears that any contact that occurred was accidental (i.e., negligent), if not Agent Carlson's own fault." App. 55. Searching for arguable probable cause, however, the Tenth Circuit credited Respondent Davis's testimony of what he observed, even though the court itself acknowledged that Respondent Davis was positioned *behind* Agent Carlson at the time of any physical contact between *the front* of one leg and the roller bag. Although Respondent Davis never said the speed with which the events transpired had any bearing on his probable-cause determination, the Tenth

Circuit held that speed was a factor in concluding there was arguable probable cause.

Related to the arguable probable cause concept is the First and Second circuits' hypothetical polling of reasonable or competent police officers (i.e., whether "officers of reasonable competence could disagree on whether the probable cause test was met," *Walczyk*, 496 F.3d at 163 (internal quotations omitted)). As Justice Sotomayor noted in *Walczyk*, this is different from the question this Court has directed courts to ask, namely, "whether 'it would be clear to *a reasonable officer* that his [or her] conduct was unlawful in the situation he [or she] confronted.'" *Id.* at 169 (quoting *Saucier*, 533 U.S. at 202; emphasis in *Walczyk*; Sotomayor, J., concurring). Asking whether officers of reasonable competence could disagree "shifts [the *Saucier*] inquiry subtly but significantly":

> Instead of asking whether the defendant's conduct was beyond the threshold of permissible error, as the reasonable officer standard does, this inquiry affords a defendant immunity unless a court is confident that a range of hypothetical reasonably competent officers *could not disagree* as to whether the defendant's conduct was lawful. This standard is not only more permissive of defendants seeking to justify their conduct; it also takes courts outside their traditional domain, asking them to speculate as to the range of views that reasonable law enforcement officers might hold,

> rather than engaging in the objective reasonableness determination that courts are well-equipped to make.

Id. at 169-70 (emphasis in original; Sotomayor, J., concurring).

Nine circuit courts of appeals have strayed subtly, but consequentially, from this Court's teaching in *Saucier* and *Anderson*. As a result, the qualified-immunity jurisprudence has shifted from the careful balance this Court has struck.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant review of the Tenth Circuit's decision.

Respectfully submitted,

TY GEE
HADDON, MORGAN AND FOREMAN, P.C.
150 East Tenth Avenue
Denver, CO 80203
Tel (303) 831-7364
tgee@hmflaw.com

Counsel for Petitioner Tsutomu Shimomura

June 2, 2016

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TSUTOMU SHIMOMURA,

Plaintiff-Appellant,

v.

KENDRA CARLSON, an agent of the Transportation Security Administration, in her individual capacity; WADE DAVIS, a Denver Police Department officer, in his individual capacity,

Defendants-Appellees,

and

TERRY CATES, an agent of the Transportation Security Administration, in her individual capacity; PATTI ZELLER, an agent of the Transportation Security Administration, in her individual capacity,

Defendants.

No. 14-1418

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:13-CV-00462-RBJ-MJW)

(Filed Dec. 29, 2015)

Ty Gee, Haddon, (Laura G. Kastetter, with him on the briefs) Haddon, Morgan, and Foreman, P.C., Denver, Colorado, for Plaintiff-Appellant.

Paul Farley, Assistant United States Attorney, (John F. Walsh, United States Attorney, with him on the brief) Office of the United States Attorney, Denver, Colorado, for Kendra Carlson, Defendant-Appellee.

Andrew J. Carafelli, Pryor Johnson Carney Karr Nixon, P.C., Denver, Colorado, for Wade Davis, Defendant-Appellee.

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

BACHARACH, Circuit Judge.

Mr. Tsutomu Shimomura claims that an officer with the Denver Police Department (Wade Davis) and an agent with the Transportation Security Administration (Kendra Carlson) made an arrest without probable cause and conspired to fabricate grounds for the arrest. For these claims, Mr. Shimomura invoked 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that Officer Davis and Agent Carlson

violated the Fourth, Fifth, and Fourteenth Amendments.[1] On the Fourth Amendment claims, the district court granted two motions: (1) Officer Davis's motion for summary judgment based on qualified immunity and (2) Agent Carlson's motion to dismiss based on failure to state a valid claim. On the causes of action involving the Fifth and Fourteenth Amendments, the court granted the defendants' motions to dismiss for failure to state a valid claim. Mr. Shimomura appeals; to decide his appeal, we address four issues:

1. **Did Officer Davis have qualified immunity (arguable probable cause) for the arrest?** Officer Davis arrested Mr. Shimomura for assault after seeing him push his roller bag toward Agent Carlson. Mr. Shimomura contends that Officer Davis lacked qualified immunity in determining that probable cause existed. Thus, we must decide whether Officer Davis enjoys qualified immunity.

   We conclude he does. Even if probable cause had been absent, Officer Davis would enjoy qualified immunity if probable cause had been at least arguable. In our view, probable cause was arguable because Officer Davis saw Mr. Shimomura push his roller bag toward Agent Carlson, observed her reaction by trying to avoid contact, and watched Mr. Shimomura move rapidly away. These observations could reasonably lead Officer Davis to

[1] In the complaint, Mr. Shimomura also invoked the First Amendment. But the First Amendment claim is not involved in this appeal.

believe there was probable cause involving an assault under a Denver city ordinance. Thus, Officer Davis enjoys qualified immunity on the claim of unlawful arrest.

2. **Did Mr. Shimomura plead a plausible claim against Agent Carlson for fabrication and withholding of evidence to justify the arrest?** Mr. Shimomura claims that Agent Carlson violated the Fourth Amendment by fabricating evidence and withholding exculpatory evidence to justify the arrest. On these claims, we must decide whether the allegations plausibly implicate Agent Carlson in the decision to arrest Mr. Shimomura.

   We conclude they do not. Agent Carlson's conduct could not have caused the arrest because it would have taken place after the arrest. Accordingly, we conclude that Agent Carlson is entitled to dismissal of the unlawful arrest claim.

3. **Did Mr. Shimomura plead a plausible claim of a conspiracy preceding the arrest?** According to Mr. Shimomura, Officer Davis and Agent Carlson conspired to violate the Fourth Amendment by making the arrest without probable cause. We must decide whether this claim was plausible based on the factual allegations in the complaint.

   In our view, the claim fails under this test because Officer Davis arrested Mr. Shimomura within seconds of the alleged assault. Mr. Shimomura has not pleaded facts showing a plausible opportunity for Officer Davis and

Agent Carlson to conspire in those few seconds.

4. **Did Mr. Shimomura plead a plausible claim involving deprivation of procedural due process?** Mr. Shimomura claims that the false arrest, initiation of false charges, and conspiracy deprived him of procedural due process under the Fifth and Fourteenth Amendments. We must decide whether the allegations in the complaint state a viable claim.

   In our view, they do not. The Fourth Amendment – not the Fifth or Fourteenth Amendment's protection of procedural due process – generally governs pre-trial deprivations of liberty. Because the sole source of protection is the Fourth Amendment, we uphold dismissal of the claim involving deprivation of procedural due process.

I. Officer Davis arrested Mr. Shimomura after seeing him push his roller bag toward Agent Carlson.

In February 2011, Mr. Shimomura was going through security at the Denver International Airport, trying to catch a flight. At the security checkpoint, Mr. Shimomura presented his belongings for screening. When he did, a TSA agent conducted a test on Mr. Shimomura's medication, using a sampling strip. Mr. Shimomura was afraid that the test would contaminate his medication. Based on this fear, Mr. Shimomura asked about the sterility and toxicity of

the sampling strip. The TSA agent's response did not satisfy Mr. Shimomura. So he asked for the agent's supervisor.

Agent Carlson was the TSA supervisor who responded. She stated that the sampling strips were sterile for screening purposes. But Mr. Shimomura remained unsatisfied, and the conversation grew heated while Officer Davis watched from nearby.

Eventually, Mr. Shimomura was told to leave the screening area. He complied and began walking away with his roller bag, with Agent Carlson and Officer Davis following closely behind. After taking a few steps, Mr. Shimomura stopped, and Officer Davis believed that the roller bag had hit Agent Carlson. A few seconds later, Officer Davis arrested Mr. Shimomura. Following Mr. Shimomura's arrest, Officer Davis, Agent Carlson, and other TSA agents conferred for approximately 90 minutes. Officer Davis then served Mr. Shimomura with a summons and complaint, charging him with assault for pushing his roller bag into Agent Carlson. *See* Rev. Mun. Code of Denver § 38-93. After reviewing the evidence, the prosecutor dismissed the criminal complaint against Mr. Shimomura.

This suit followed.

II. Officer Davis was entitled to qualified immunity on the Fourth Amendment claim because he had arguable probable cause for the arrest.

Mr. Shimomura claims that he was arrested without probable cause. On this claim, the district court granted summary judgment to Officer Davis based on qualified immunity. This ruling was correct.

A. We engage in de novo review based on our two-part test for qualified immunity.

We review de novo the district court's grant of summary judgment. *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1278 (10th Cir. 2003). The court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

We apply this standard against the backdrop of our case law on qualified immunity. This immunity protects all government employees except those who are "plainly incompetent or those who knowingly violate the law." *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). To overcome this assertion of qualified immunity, Mr. Shimomura must show that (1) Officer Davis violated a federal statute or the U.S. Constitution and (2) the underlying rights were "clearly established at the time of their alleged violation." *Id.* To decide

whether Mr. Shimomura made this showing, we view all evidence in the light most favorable to him as the nonmoving party. *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1172 (10th Cir. 2013).

Framed under these standards, "the salient Fourth Amendment questions presented are (1) whether [Officer Davis] possessed probable cause to arrest [Mr. Shimomura for assault]; and (2) whether extant clearly established law in [February 2011] would have placed a reasonable, similarly situated police officer on notice that *no* probable cause existed." *Quinn v. Young*, 780 F.3d 998, 1007 (10th Cir. 2015) (emphasis in original).

B. Probable cause was at least arguable based on Officer Davis's observation of the events.

For the sake of argument, we can assume that probable cause was lacking. Even with this assumption, however, Officer Davis would enjoy qualified immunity if probable cause had been at least "arguable." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). In our view, probable cause would have been at least arguable.

To determine whether probable cause was arguable, we must begin with the standard for "probable cause." Under this standard, probable cause would exist if Officer Davis had reasonably trustworthy information that would lead a prudent person to believe that Mr. Shimomura had committed an offense. *Jones*

v. City & Cnty. of Denver, 854 F.2d 1206, 1210 (10th Cir. 1988).

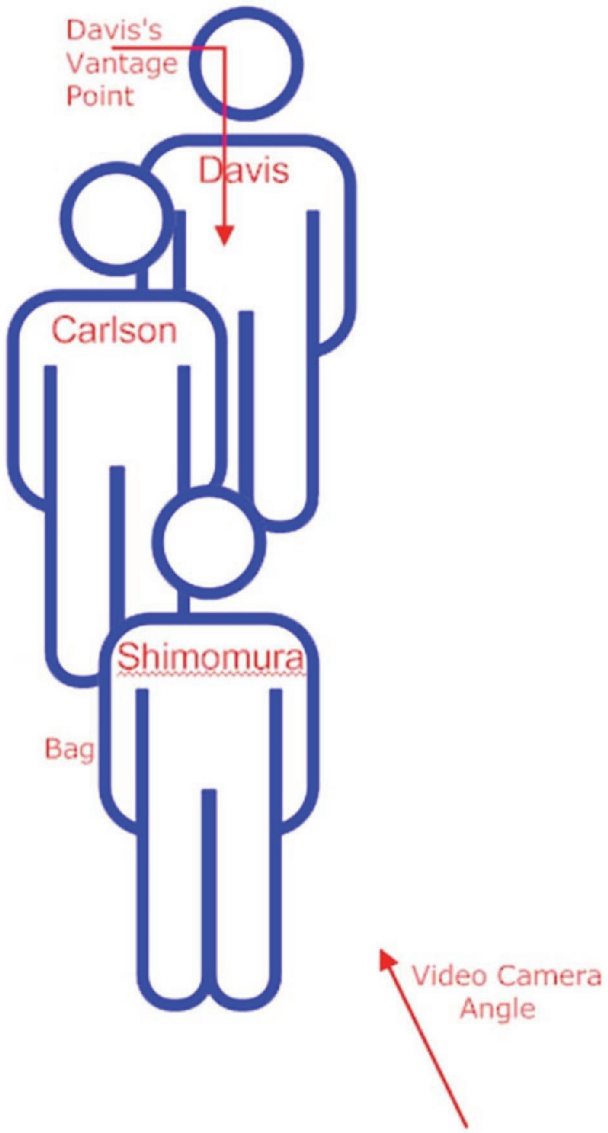
The threshold question involves identification of the alleged offense. On this question, Officer Davis identified Mr. Shimomura's conduct as a third-degree assault under the Denver Municipal Code. Thus, we must determine what constituted a third-degree assault in February 2011.

The municipal code defined third-degree assault to include the intentional or reckless commission of an assault. Rev. Mun. Code of Denver, § 38-93. Rather than define the word "assault," the municipal code referred to Colorado law. Under that law, third-degree assault required "bodily injury." Colo. Rev. Stat. Ann. § 18-3-204(1)(a) (2011). The term "bodily injury" referred to physical pain, illness, or any impairment of physical or mental condition. Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (2011). This definition was "broadly inclusive" and included physical injuries even when they might have been considered only "slight." *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) ("broadly inclusive"); *United States v. Paxton*, 422 F.3d 1203, 1206 (10th Cir. 2005) ("slight").

In applying the municipal ordinance for assault, a reasonable police officer could have viewed probable cause as arguable. Mr. Shimomura relies largely on a video of the incident. The parties agree that this video is accurate, and Officer Davis acknowledged that it

was consistent with what he had seen.[2] But we also note that Officer Davis's vantage point of the incident differs from ours as we watch the video. From our vantage point, we can see that Officer Davis walked behind both Agent Carlson and Mr. Shimomura. Officer Davis saw the same events from a different angle. *See* Appellant's App'x at 116 (TSA surveillance video at 2:03-2:06). Thus, when we watch the video, we see the events from in front of Mr. Shimomura; Officer Davis saw the events more closely from only a few feet behind Agent Carlson:

[2] Mr. Shimomura points out that the video does not show the earlier argument in the TSA screening area, does not contain audio, does not show Mr. Shimomura's or Agent Carlson's face, and Officer Davis is "barely visible." But Mr. Shimomura does not contest the accuracy of the video.



Though our vantage point differs from Officer Davis's, we can identify at least four facts that Officer Davis would have known:

1. Mr. Shimomura was pulling his roller bag, which was between Mr. Shimomura and Agent Carlson.
2. Mr. Shimomura stopped and moved his roller bag in Agent Carlson's direction.
3. Agent Carlson moved suddenly after the roller bag was pushed in her direction.
4. Mr. Shimomura walked away more rapidly after he pushed the roller bag in Agent Carlson's direction.

Mr. Shimomura suggests we add a fifth undisputed fact: that he and Agent Carlson had engaged in a heated disagreement.

Based on these five facts, Officer Davis could reasonably believe that Mr. Shimomura had intentionally or recklessly pushed his roller bag into Agent Carlson and caused her at least some slight physical injury. From our vantage point in watching the video, we cannot see the actual contact between Agent Carlson and the roller bag. But our view of the contact is impeded by the camera angle. Officer Davis had a different angle. *See Bogie v. Rosenberg*, 705 F.3d 603, 611 (7th Cir. 2013) (stating that "any . . . film shows only one perspective on a scene, so that additional perspectives, such as eyewitness testimony . . . , might reveal additional facts that would change the legal analysis"). And from his angle, Officer Davis had only a momentary opportunity to see what had taken place. (We have the luxury of watching the video repeatedly.) Officer Davis could then see Mr. Shimomura walking away more

quickly after Agent Carlson had made a sudden movement. In these circumstances, a reasonable officer could believe that Mr. Shimomura had intentionally or recklessly caused at least some slight physical injury to Agent Carlson. As a result, probable cause was at least arguable.

C. Probable cause would have remained arguable notwithstanding Mr. Shimomura's explanation for his quickened pace and challenges to Agent Carlson's credibility.

Mr. Shimomura argues that his quickened pace did not suggest guilt, for he might simply have had to hurry to catch his flight. But probable cause could have existed even if his conduct might also be interpreted as innocent. *See United States v. Muñoz-Nava*, 524 F.3d 1137, 1144 (10th Cir. 2008) ("[S]imply because an activity has an innocent connotation does not mean that it is excluded from the court's totality of the circumstances analysis.").

Mr. Shimomura also argues that Officer Davis should have discounted Agent Carlson's description of the events, giving three reasons:

1. A heated argument had just taken place between Agent Carlson and Mr. Shimomura.
2. Mr. Shimomura denied pushing his roller bag into Agent Carlson.
3. Other witnesses did not say that Agent Carlson had been injured.

But these arguments would not preclude Officer Davis from reasonably believing that probable cause existed.

Agent Carlson and the other witnesses made their statements after Mr. Shimomura's arrest; thus, these statements could not have affected the decision to arrest. And Officer Davis could see for himself what had taken place when Mr. Shimomura pushed his roller bag toward Agent Carlson. In observing the incident and Mr. Shimomura accelerating his pace afterward, Officer Davis could reasonably conclude that Mr. Shimomura had intentionally or recklessly pushed his roller bag into Agent Carlson to create at least some slight physical injury.

That push might not have created probable cause for third-degree assault. But probable cause would have been at least arguable even if (1) Mr. Shimomura had an innocent explanation for walking away more quickly and (2) Officer Davis had discounted Agent Carlson's description of events.

D. Mr. Shimomura's characterization of the video recording does not create a fact issue on arguable probable cause.

Mr. Shimomura argues that Officer Davis is not entitled to qualified immunity because the video recording is inconsistent with the defendants' statements regarding the alleged assault. According to Mr. Shimomura, the video recording shows that Mr. Shimomura did not push his roller bag into Agent Carlson. But from where Officer Davis was positioned,

he could reasonably believe that (1) he had seen Mr. Shimomura push his roller bag into Agent Carlson and (2) the contact resulted in at least slight physical injury.[3] The reasonableness of that belief made probable cause at least arguable. Thus, even when we consider the evidence in the light most favorable to Mr. Shimomura, we conclude that Officer Davis is entitled to qualified immunity on the Fourth Amendment claim of unlawful arrest.

E. Probable cause would have remained arguable notwithstanding Mr. Shimomura's allegations in the complaint and uncertainty about what Officer Davis could see.

In reaching a contrary conclusion, the partial dissent points to

- Mr. Shimomura's allegation in the complaint "that [Officer Davis] could not reasonably perceive evidence of bodily injury, such as pain" and

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[3] Mr. Shimomura relies on *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252 (10th Cir. 1998), to oppose qualified immunity for Officer Davis. In *Baptiste*, a police officer searched the plaintiff for stolen merchandise after watching surveillance video of a suspected theft. *Baptiste*, 147 F.3d at 1254-55. We concluded that the police officer was not entitled to qualified immunity because the video did not suggest that a theft had occurred. *Id.* at 1259-60. Mr. Shimomura's circumstances are different, for the video recording does not preclude a reasonable belief that a crime (assault) had been committed. Thus, *Baptiste* does not preclude qualified immunity for Officer Davis.

- uncertainty about what Officer Davis would have seen from his angle.

Dissent at 1-2. In our view, these two points do not create a genuine fact-issue on whether probable cause was at least arguable.

Because the issue involves summary judgment, we must rely on the summary judgment record rather than Mr. Shimomura's allegations in the complaint. In support of the summary judgment motion, Officer Davis stated under oath that he had seen the roller bag strike Agent Carlson in the legs. Appellant's App'x at 112. Mr. Shimomura responded to the motion, presenting affidavits by himself and Agent Carlson. Agent Carlson's affidavit said that Officer Davis had seen the contact between the roller bag and Agent Carlson. *Id.* at 176. Mr. Shimomura's affidavit was silent about what Officer Davis could see. Thus, for purposes of summary judgment, we have undisputed evidence that Officer Davis was able to see the contact between Agent Carlson and Mr. Shimomura's roller bag.

Mr. Shimomura denies that Agent Carlson was physically injured, and Officer Davis believed there was physical injury. Neither individual could know for certain, but the sole issue on qualified immunity is whether Officer Davis could reasonably believe the contact resulted in at least some slight physical injury to Agent Carlson. Even if Officer Davis's belief was wrong, he would have enjoyed qualified immunity as long as his belief was reasonable. *See Stonecipher v.*

Valles, 759 F.3d 1134, 1141 (10th Cir.) ("Arguable probable cause is another way of saying the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists."), *cert. denied*, ___ U.S. ___, 135 S. Ct. 881 (2014).

In our view, Officer Davis's belief was reasonable notwithstanding Mr. Shimomura's contrary allegations in his complaint. In Mr. Shimomura's affidavit, there is nothing casting doubt on Officer Davis's belief that Agent Carlson had suffered at least some slight injury. As a result, Officer Davis would enjoy qualified immunity even if we fully credit everything in Mr. Shimomura's affidavit.

III. Agent Carlson could not incur liability under the Fourth Amendment for an unlawful arrest because her alleged misconduct would have taken place after the arrest.

Mr. Shimomura argues that Agent Carlson violated the Fourth Amendment by withholding and fabricating evidence to justify the arrest.[4] The district court dismissed this claim, concluding that Mr. Shimomura had not adequately pleaded causation between Agent Carlson's conduct and the arrest. In a later order, the district court declined to vacate this

[4] Mr. Shimomura also contends that Agent Carlson incurred liability as an arresting officer because she had "acted in concert with Officer Davis to effect the illegal arrest lacking in probable cause." Appellant's Opening Br. at 35. This argument is identical to Mr. Shimomura's argument underlying his conspiracy claim, which we reject below in Part IV.

dismissal. In our view, the court did not err in dismissing the claim against Agent Carlson.

We review de novo the district court's grant of a motion to dismiss for failure to state a claim. *Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1275 (10th Cir. 2009). Like the district court, we must determine whether the complaint contains sufficient facts, accepted as true, to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In determining whether the claim is plausible, we view all factual allegations in the light most favorable to Mr. Shimomura as the nonmoving party. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 510 (10th Cir. 1998).

As was previously stated, a warrantless arrest without probable cause violates the Fourth Amendment. *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216 (10th Cir. 2008). But nothing in the complaint would plausibly suggest Agent Carlson's participation in the arrest.

Mr. Shimomura disagrees, arguing that Agent Carlson caused the arrest by withholding exculpatory evidence and fabricating a sworn statement that she had suffered pain from her contact with the roller bag. Officer Davis allegedly relied on Agent Carlson's fabricated account.

This contention fails as a matter of law because Agent Carlson's alleged misdeeds would have taken place after Officer Davis had already arrested Mr. Shimomura. Agent Carlson allegedly withheld exculpatory evidence and fabricated a sworn statement, but only after Officer Davis had already initiated Mr. Shimomura's 90-minute detention. That detention constituted an arrest as a matter of law. *See Manzanares v. Higdon, 575* F.3d 1135, 1148 (10th Cir. 2009)[5]; *see also* Appellant's App'x at 152-53 (Mr. Shimomura's argument that Officer Davis made an arrest by detaining Mr. Shimomura in the screening area). Thus, Agent Carlson's misconduct could not have caused the arrest. In these circumstances, we conclude that Agent Carlson is entitled to dismissal on the unlawful arrest claim.[6]

IV. Mr. Shimomura has not pleaded a plausible conspiracy claim based on the Fourth Amendment.

Invoking 42 U.S.C. § 1983, Mr. Shimomura also claims that Officer Davis and Agent Carlson violated

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[5] In *Manzanares* we stated: "As the Supreme Court has noted, it has never held a detention of 90 minutes or longer to be anything short of an arrest. [The defendant] points us to no case, and our independent research reveals none, construing a detention of 90 minutes or longer as an investigative detention." *Manzanares*, 575 F.3d at 1148 (citation omitted).

[6] On the cause of action under the Fourth Amendment for unlawful arrest, Agent Carlson also asserts qualified immunity and unavailability of a *Bivens* claim. We need not reach these contentions.

the Fourth Amendment by conspiring (1) to make the arrest without probable cause and (2) to fabricate their accounts for the initiation of criminal charges. We affirm the district court's dismissal of these causes of action for failure to state a claim upon which relief can be granted.[7]

A. We engage in de novo review, considering the plausibility of the allegations in the complaint.

In reviewing the dismissal, we engage in de novo review. *See* p. 15, above. The ultimate question is whether Mr. Shimomura had alleged specific facts showing (1) an agreement and concerted action between Officer Davis and Agent Carlson and (2) an actual deprivation of constitutional rights. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998); *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990). Conclusory allegations of conspiracy would not suffice. *Tonkovich*, 159 F.3d at 534.

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[7] On the conspiracy claim, Agent Carlson denies the availability of a *Bivens* cause of action and invokes qualified immunity. We need not address these arguments. The conspiracy claim against Officer Davis and Agent Carlson was brought under 42 U.S.C. § 1983, not *Bivens*. Therefore, we need not reach Agent Carlson's *Bivens* argument. And because the conspiracy claim is facially deficient, we need not decide whether Agent Carlson is entitled to qualified immunity on this claim.

B. For the arrest, Mr. Shimomura has not pleaded facts creating a plausible claim of conspiracy prior to the arrest.

The conspiracy allegations in the complaint involve conduct before the arrest. Thus, on the claims involving conspiracy to justify the arrest, we confine our review to the allegations involving conduct preceding the arrest. These allegations involve six facts[8]:

1. Officer Davis saw Agent Carlson communicate with Mr. Shimomura in an "increasingly hostile and intimidating manner." This conduct included Agent Carlson's refusal to contact her supervisor or provide her supervisor's name, angry threats to remove Mr. Shimomura from the airport, order for Mr. Shimomura to "get the hell out" of the TSA screening area, and statement that Mr. Shimomura had accused Agent Carlson of stealing. Appellant's App'x at 11-12 ¶¶ 18-20.
2. Officer Davis refused to put Mr. Shimomura in contact with Agent Carlson's supervisor. *Id.* at 12 ¶ 21.
3. Officer Davis and Agent Carlson threatened to have Mr. Shimomura arrested if he did not leave the screening area "in two seconds." *Id.*

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[8] In his appeal briefs, Mr. Shimomura alleges that Officer Davis failed to deescalate the increasingly hostile situation. But we decline to consider this argument because it had not been raised in district court. *See United Steelworkers of Am. v. Or. Steel Mills, Inc.*, 322 F.3d 1222, 1228 (10th Cir. 2003) (noting that we will decline to consider factual arguments that had not been raised in district court).

4. Officer Davis and Agent Carlson "crowded Mr. Shimomura in a threatening manner" and followed him "closely and aggressively" as he left the screening area. *Id.* at 12 ¶¶ 21-22.

5. Officer Davis and Agent Carlson "knew" that (1) Mr. Shimomura had not committed a crime, (2) there was no probable cause for Mr. Shimomura's arrest, (3) Agent Carlson had been following Mr. Shimomura "too closely," and (4) Agent Carlson had become even "further enraged" when she walked into the roller bag. *Id.* at 14 ¶ 28.

6. Officer Davis and Agent Carlson believed that Mr. Shimomura should be criminally punished for questioning TSA screening procedures. As a result, Officer Davis and Agent Carlson took "joint and concerted action" to arrest Mr. Shimomura. *Id.* at 15 ¶ 29; *Id.* at 13 ¶ 24.

For the sake of argument, we can assume that Mr. Shimomura has pleaded facts reflecting an agreement and concerted action by Officer Davis and Agent Carlson. But the alleged agreement could not plausibly have preceded Mr. Shimomura's arrest. The video reflects the incident, which unfolded only a few seconds before Officer Davis detained Mr. Shimomura (constituting an arrest).

It might have been theoretically possible for Officer Davis and Agent Carlson to conspire to arrest Mr. Shimomura without probable cause. Perhaps Officer Davis and Agent Carlson decided to arrest Mr.

Shimomura even before his belongings were screened; or maybe Officer Davis and Agent Carlson conspired in the few seconds between the roller bag contact and Mr. Shimomura's arrest; or perhaps Officer Davis and Agent Carlson knew and understood one another so well that they immediately formed an unspoken agreement to unlawfully arrest Mr. Shimomura. But Mr. Shimomura does not allege facts that could plausibly explain how Officer Davis and Agent Carlson might have conspired in the moments preceding the arrest.

Accordingly, Mr. Shimomura has not pleaded a plausible § 1983 claim for conspiracy to arrest without probable cause in violation of the Fourth Amendment. We affirm the dismissal of this claim.

C. The district court did not err in disallowing amendment of the Fourth Amendment claim.

In responding to Agent Carlson's motion to dismiss, Mr. Shimomura included a footnote requesting "leave to amend should the Court find his Complaint deficient." *Id.* at 121 n.1. Though the district court suggested that Mr. Shimomura might amend the complaint, the court ultimately prevented amendment by making the dismissal with prejudice. *Id.* at 218, 229.

Mr. Shimomura alleges that the district court abused its discretion by preventing amendment of the complaint. We disagree. Mr. Shimomura alleges in the complaint that he was taken into custody by Officer

Davis, not Agent Carlson. *See id.* at 12. Thus, amendment of the complaint would have been futile. In these circumstances, we conclude that the district court had discretion to make the dismissal with prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

V. Mr. Shimomura has not pleaded a viable claim for deprivation of procedural due process.

Finally, Mr. Shimomura claims deprivation of procedural due process under the Fifth and Fourteenth Amendments. The Fifth Amendment prohibits the federal government from depriving a person of "life, liberty, or property, without due process of law," and the Fourteenth Amendment extends this prohibition to the states. U.S. Const. amend. V; *Id.* amend. XIV, § 1.

On these claims, Mr. Shimomura alleges that Officer Davis and Agent Carlson withheld exculpatory evidence, fabricated inculpatory evidence, and engaged in a conspiracy. The district court dismissed these claims, reasoning that they "effectively mirror[]" Mr. Shimomura's claims under the Fourth Amendment. Appellant's App'x at 220. For this ruling, we engage in de novo review. *See* p. 15, above. In exercising de novo review, we uphold the district court's dismissal because

the Fourth Amendment applies rather than the Fifth and Fourteenth Amendments' Due Process Clauses.[9]

Mr. Shimomura is correct in asserting the constitutional requirement for probable cause before he could be arrested or charged. *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008). But this right is protected by the Fourth Amendment, not by the Fifth or Fourteenth Amendments' rights to procedural due process. The Supreme Court has held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989); *see Albright v. Oliver*, 510 U.S. 266, 274-75 (1994) (plurality opinion) (stating that the right to be free of arrest and prosecution without probable cause is governed by the Fourth Amendment, not the constitutional protections for substantive due process). We have applied this holding when the alleged denial of due process is procedural rather than substantive. *See Becker v. Kroll*, 494 F.3d 904, 919 (10th Cir. 2007) ("[W]e find *Albright's* reasoning regarding substantive due process equally

[9] Agent Carlson also makes four other arguments: (1) an adequate post-deprivation remedy exists; (2) Agent Carlson is not subject to the Fourteenth Amendment because she is not a state actor; (3) a *Bivens* action does not exist for claims involving airport screening or violation of the Fourteenth Amendment; and (4) Agent Carlson is entitled to qualified immunity. We need not address these arguments because the claim against Agent Carlson is deficient on other grounds.

persuasive with regard to the Fourteenth Amendment's procedural component. . . . The more general due process considerations of the Fourteenth Amendment are not a fallback to protect interests more specifically addressed by the Fourth Amendment. . . .").

It is true that "at some point in the prosecutorial process, due process concerns can be sufficient to support claim under § 1983." *Id.* at 920; *see also Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir. 2004) ("[A]t some point after arrest, and certainly by the time of trial, constitutional analysis shifts to the Due Process Clause."). But Mr. Shimomura's factual allegations do not cross into the due-process realm.

In *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007), we "acknowledge[d] that the Fourteenth Amendment's protections encompass harms to liberty outside the scope of the Fourth Amendment's concern with freedom from restraint." *Becker*, 494 F.3d at 920. But Mr. Shimomura has confined his allegation of injury to the deprivation of his physical liberty. Thus, his claim is governed by the Fourth Amendment rather than the Due Process Clauses.

Because the Fourth Amendment provides the sole source of constitutional protection, Mr. Shimomura has not asserted a valid claim of procedural due process. As a result, the district court properly dismissed the claims involving procedural due process.

VI. Conclusion

The district court's judgment is affirmed.

No. 14-1418, *Shimomura v. Carlson*

TYMKOVICH, Chief Judge, concurring in part and dissenting in part:

I join the majority except as to its holding that Officer Davis is entitled to qualified immunity.

In concluding that a reasonable officer with Officer Davis's vantage point could have thought there was probable cause, the majority decides a factual dispute that should be submitted to a jury. Shimomura alleges that Officer Davis could not reasonably perceive evidence of intent or recklessness. He also alleges that the officer could not reasonably perceive evidence of bodily injury, such as pain. If that version of the facts is true, then there was neither actual nor arguable probable cause to believe Shimomura had committed assault within the agreed-upon meaning of the ordinance. That satisfies Shimomura's initial burden to allege a clearly established violation of a constitutional right. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1158-59 (10th Cir. 2008) ("In the context of an unlawful arrest our analysis is simple, for the law was and is unambiguous: a government official must have probable cause to arrest an individual." (brackets and internal quotation marks omitted)). It also places a new burden on Officer Davis, on his motion for summary judgment based on qualified immunity, to show that

Shimomura's version of the facts is wrong – that is, that an officer *could* have reasonably perceived evidence of bodily injury and intent or recklessness. Officer Davis has not met that burden.

The majority concludes that a person standing at Officer Davis's vantage point could have perceived the requisite evidence, but that is not beyond dispute. Recently, in *Tolan v. Cotton*, 134 S. Ct. 1861 (2014), the Supreme Court reversed a finding of qualified immunity because the appellate court had resolved disputed factual propositions in favor of the moving officer. Most notably, the Court indicated that disputed questions about what facts an officer should have *perceived* are appropriate for a jury:

> The court noted, and the parties agree, that while Cotton was grabbing the arm of his mother, Tolan told Cotton, "[G]et your [f***ing] hands off my mom." But Tolan testified that he "was not screaming." *And a jury could reasonably infer that his words, in context, did not amount to a statement of intent to inflict harm.*

Id. at 1867 (emphasis added) (citations omitted). This illustrates the divide between determining whether there was probable (or arguable probable) cause and determining the facts that support probable cause. Just as a jury in *Tolan* should have decided whether the undisputed words, in context, seemed threatening, a jury here should decide whether the undisputed contact, in context, seemed intentional or capable of causing bodily injury.

We do not know what Officer Davis saw from his angle. All we have is the video, Shimomura's complaint, and affidavits presented on summary judgment. Those materials do not definitively settle the facts in Officer Davis's favor. A jury could find that even given his angle and how little time he had to process what had happened, it was unreasonable to think the contact was intentional or reckless. And a jury most certainly could find that there was no evidence of bodily injury. Having watched the video, I find it dubious that anyone viewing the contact from *any* angle could have reasonably thought that Agent Carlson felt pain. Although she later reported pain, it appears that this was not until after Shimomura's arrest.

For those reasons, I respectfully dissent as to the conclusion that Officer Davis is entitled to qualified immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 13-cv-000462-RBJ-MJW

TSUTOMU SHIMOMURA,

Plaintiff.

v.

KENDRA CARLSON, an agent of the Transportation Security Administration, in her individual capacity, TERRY CATES, an agent of the Transportation Security Administration, in her individual capacity, PATTI ZELLER, an agent of the Transportation Security Administration, in her individual capacity, and WADE DAVIS, a Denver Police Department officer, in his individual capacity,

Defendants.

ORDER

(Filed Aug. 27, 2014)

This matter comes before the Court on Plaintiff's Motion to Amend Judgment under Fed. R. Civ. P. 59(e). [ECF No. 60]. The plaintiff specifically moves to amend judgment as to this Court's dismissal of the Fourth Amendment claim against Agent Carlson and as to

this Court's finding that Officer Davis was entitled to qualified immunity.[1]

ANALYSIS

Under Fed. R. Civ. P. 59(e), a party may file a motion to alter or amend a judgment no later than 28 days after the entry of judgment. "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A motion to reconsider is "appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* However, it is not to be used "to revisit issues

[1] D.C.COLO.LCivR 7.1(a) provides that the court will not consider motions other than Rule 12 and 56 motions unless counsel for the moving party "has conferred or made reasonable good faith efforts to confer" with opposing counsel "to resolve the disputed matter." Plaintiff's counsel did not comply with this rule. He sent an email to the respective counsel for defendants Carlson and Davis at 3:28 p.m. on the day of filing (which was the date the motion was due). Delivery to Officer Davis' counsel immediately bounced back because plaintiff's counsel entered the wrong email address. Plaintiff's counsel did not send a follow up email to the correct address until 5:54 p.m. The motion was then filed at 6:36 p.m. Sending an email after business hours and only 42 minutes before filing a motion is not a good faith effort to confer. Plaintiff's counsel attempts to excuse the delay on his last-minute decision to file the motion, which even if true is not an excuse. In this instance the motion relates to the Court's previous Order granting motions under Rules 12 and 56 [ECF No. 57], and while that does not exempt the motion from the rule, the Court elects to consider it on its merits to avoid further procedural skirmishing.

already addressed or advance arguments that could have been raised in prior briefing." *Id.*

Upon review of the motion, the Court finds that the plaintiff made no argument that there has been an intervening change in controlling law or that there is new evidence previously unavailable that the Court should consider. Presumably, then, the plaintiff bases his motion on the need to correct clear error or to prevent manifest injustice.

A. Fourth Amendment Claim.

Beginning with the Fourth Amendment claim against Agent Carlson, the plaintiff argues that he sufficiently pled that "but for Agent Carlson's false sworn statements, the arrest would not have occurred." [ECF No. 60 at 4]. The Court already addressed this position in the previous Order. The Court found that Officer Davis based his decision to arrest Mr. Shimomura on both the statements of Agent Carlson *and* his having personally witnessed the altercation, not merely one or the other. *See* Order [ECF No. 57] at 8. However, the plaintiff argues that Agent Carlson was a but-for cause of his arrest because without her false statements of pain Officer Davis could not have arrested Mr. Shimomura for misdemeanor assault. As the plaintiff notes in his Reply, the Court chose to *sua sponte* dismiss this cause of action based on causation. *See* [ECF No. 65 at 7].

On reflection, the Court should have addressed a more basic problem. The Fourth Amendment claims

against the three TSA agents alleging false arrest should have been dismissed because none of the TSA agents acted as the arresting officer. "In the context of a false arrest claim, an arrestee's constitutional rights were violated if *the arresting officer* acted in the absence of probable cause that the person had committed a crime." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012) (emphasis added). According to the Complaint, "Defendant Davis took Mr. Shimomura into custody, directing him to sit on a bench in the screening area." [ECF No. 1 at ¶ 26]. After doing so, Officer Davis conferred with the three TSA agent defendants and thereafter "served on Mr. Shimomura a criminal summons and complaint for assault." *Id.* at ¶ 27. While Mr. Shimomura alleges that both "Defendant Carlson and Defendant Davis made the decision to charge Mr. Shimomura with assault," *id.*, only the arresting officer charges an individual with a crime. Similarly, only the arresting officer effectuates the arrest. The Complaint makes it clear that Officer Davis, and not Agent Carlson, was the arresting officer in this case. As such, the Court finds that Mr. Shimomura failed to state a claim for relief under the Fourth Amendment as against the TSA agent defendants, including Agent Carlson.

B. Qualified Immunity.

Mr. Shimomura also contends that the Court should have found that Officer Davis was not entitled to qualified immunity because the arrest lacked "arguable probable cause." [ECF No. 60 at 6]. The plaintiff

effectively makes the same arguments in this motion as he did in his earlier briefs, that Officer Davis' testimony is inconsistent because he said he saw the roller bag strike Agent Carlson's legs while also contending that the security footage was an accurate depiction of the events he witnessed. [ECF No. 60 at 7]. The Court has already addressed the video in the context of Officer Davis' qualified immunity defense. In doing so, it found that there was no probable cause to support the arrest. Order [ECF No. 57] at 14-17. However, the Court held that there was still "arguable probable cause" given how quickly the entire series of events took place coupled with Agent Carlson's allegations of pain. *Id.* at 18. The plaintiff acknowledges the Court's decision but disagrees with the Court's finding of arguable probable cause. [ECF No. 60 at 8]. I am not convinced by the plaintiff's arguments and do not find that the original ruling suffered from either clear error or manifest injustice.

ORDER

For the foregoing reasons, Plaintiff's Motion to Amend Judgment [ECF No. 60] is DENIED.

DATED this 27th day of August, 2014.

BY THE COURT:

/s/ R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 13-cv-000462-RBJ-MJW

TSUTOMU SHIMOMURA,

Plaintiff.

v.

KENDRA CARLSON, an agent of the Transportation Security Administration, in her individual capacity, TERRY CATES, an agent of the Transportation Security Administration, in her individual capacity, PATTI ZELLER, an agent of the Transportation Security Administration, in her individual capacity, and WADE DAVIS, a Denver Police Department officer, in his individual capacity,

Defendants.

ORDER

(Filed Feb. 14, 2014)

This is a case about what started as a relatively minor incident in the Denver International Airport but, due I think to a momentary lapse of judgment by the participants, has grown into a federal court case in which serious constitutional principles are claimed to be at stake. It is before the Court on the defendants' motions to dismiss or for summary judgment. Although

the Court does not necessarily condone all of their conduct, it grants the defendants' motions.

FACTS

Tsutomu Shimomura alleges that on February 22, 2011 he was going through a security checkpoint at DIA when a TSA agent took his properly labeled 180cc bottle of prescription medication and used a sampling strip to test the bottle's contents for the presence of explosive materials. [ECF No. 1 at ¶¶ 10, 13]. He was concerned that touching the sampling strip to the dispensing mechanism on the bottle might have contaminated the medicine and created a risk to his health, so he inquired about the sterility and composition of the strip. *Id.* at ¶ 14. The agent was not able to answer his questions satisfactorily, so he asked to speak to her supervisor. *Id.* at ¶¶ 14-15.

TSA Agent Kendra Carlson, a supervisor, was summoned. *Id.* at ¶ 16. Mr. Shimomura expressed concern about contamination and informed Agent Carlson that the procedure did not follow proper TSA protocol. *Id.* The Complaint does not lay out the back and forth that followed, but one might imagine its temperature from the fact that a Denver Police Officer, Wade Davis, came to the scene and stood close by, observing everything that occurred upon and after his arrival. Mr. Shimomura was unhappy with the response he was getting – or not getting – from Agent Carlson and asked to speak to her supervisor, only to be rebuffed with the retort "I am the supervisor." *Id.* at ¶ 18.

The Complaint does not tell us how the contamination discussion ended, but it does suggest that the encounter reached the point where Agent Carlson ordered Mr. Shimomura to "get the hell" out of the area *Id.* at ¶ 19. Mr. Shimomura commented that he needed to retrieve a computer bag still sitting in the bin. Agent Carlson retrieved it, but upon handing it to Mr. Shimomura, she allegedly again threatened to have him arrested, this time if his exit did not occur in "two seconds." *Id.* at ¶ 20. Mr. Shimomura said something about checking to make sure everything was there, causing Agent Carlson to take umbrage at what she perceived to be an accusation of stealing, and thereby setting off another round of spurned requests to speak to her supervisor.

Exasperated, Mr. Shimomura turned to Officer Davis, who up to that point had merely been standing by, and told him that he wanted to speak to Agent Carlson's supervisor. When Officer Davis indicated that he couldn't help, Mr. Shimomura copied down his name and badge number. That did not sit well. Officer Davis allegedly threatened to arrest Mr. Shimomura if he did not move in "two seconds." *Id.* at ¶ 21. And both Agent Carlson and Officer Davis "crowded" Mr. Shimomura in a threatening manner. *Id.*

But, all might still have ended well enough had it not been for what occurred next. Mr. Shimomura alleges that as he began walking away, pulling his roller bag behind him, Agent Carlson – with Officer Davis at her side – followed "closely and aggressively." *Id.* at ¶ 22. After taking a few steps, Mr. Shimomura

"paused," whereupon Agent Carlson walked into the bag, her right leg touching the bag's right corner. *Id.* Fortunately, from the Court's perspective at least, this part of the fray was captured on a security video. More on that later.

That was enough, according to Mr. Shimomura, to push Agent Carlson and Officer Davis over the edge. Agent Carlson accused Mr. Shimomura of assaulting her with the rolling bag. Officer Davis, claiming that he had witnessed an assault, directed Mr. Shimomura to sit on a bench in the screening area. He then huddled with Agent Carlson and two other TSA agents, Terry Cates and Patti Zeller, ostensibly to compare notes and get their stories straight.

According to Mr. Shimomura, Officer Davis and Agent Carlson then decided to charge Mr. Shimomura with assault. Officer Davis served him with a criminal complaint. Each of the four conspirators allegedly prepared "coordinated" and "false statements supporting this decision." *Id.* at ¶¶ 30-38.

Mr. Shimomura claims that he was detained for approximately an hour and a half. By the time he was released from TSA and police custody he had missed his flight and had to buy a new ticket on a different flight.

The criminal complaint was dismissed after the prosecuting attorney saw the security footage. Indeed, although he accuses TSA of delaying disclosure of the video to him, editing key portions out, and providing

no audio to go with it, he states that his lawyer obtained one of the video's key portions, i.e., a portion that establishes that defendants' assault allegations were false. The Court has been provided with a copy of the video and, because Mr. Shimomura has placed great reliance on it and has essentially incorporated it into his Complaint, I have taken a look at it. Having done so, I am not at all surprised that the D.A. dropped the criminal charge after he looked at it. It shows minor contact between the bag and Agent Carlson, at most, and lends no support to the charge that Mr. Shimomura intentionally or recklessly assaulted her.

With this factual background in mind, I turn to the task of trying to make some sense out of the variety of legal wrongs Mr. Shimomura claims to have suffered and the motions that want to make them all go away.

CLAIMS

Mr. Shimomura claims that Defendants violated a number of his constitutional rights. In particular, he alleges that Defendants (1) arrested him in retaliation for exercising his First Amendment rights; (2) arrested him without probable cause in violation of the Fourth Amendment; (3) deprived him of liberty without due process of law in violation of the Fifth and Fourteenth Amendments; (4) took part in a civil conspiracy to deprive him of his civil rights in violation of 42 U.S.C. § 1983; and (5) aided and abetted each other in the commission of the civil rights violations.

Officer Davis has filed a Motion to Dismiss [ECF No. 10] as well as a Motion for Summary Judgment [ECF No. 42] effectively objecting to every one of Mr. Shimomura's claims. The three TSA Agents have filed a joint Motion to Dismiss [ECF No. 41] doing the same. The motions also make out claims for qualified immunity for each defendant.

ANALYSIS

I. TSA DEFENDANT'S MOTION TO DISMISS [ECF No. 41].

In reviewing a motion to dismiss, the Court must accept the well-pleaded allegations of the complaint as true and construe them in the plaintiff's favor. However, the facts alleged must be enough to state a claim for relief that is plausible, not merely speculative. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A plausible claim is a claim 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). Allegations that are purely conclusory are not entitled to be assumed true. *Id.* at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

A. Retaliatory Arrest Under the First Amendment.

"[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citations omitted). To establish a claim of retaliation for exercising one's First Amendment rights, the plaintiff must show that: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in the activity; and (3) the plaintiff's exercise of the constitutionally protected activity substantially motivated the defendant's adverse action. *Van Deelen v. Johnson*, 497 F.3d 1151, 1155-56 (10th Cir. 2007). Assuming, without deciding, that Mr. Shimomura was engaged in constitutionally protected speech, and that the arrest he suffered would chill a person of ordinary firmness from continuing to engage in the speech, Mr. Shimomura has not sufficiently pled that the arrest was substantially motivated by his speech.

To satisfy the third prong, Mr. Shimomura must establish that "but for the retaliatory motive" his arrest would not have taken place. *See Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998). Looking at the facts as pleaded, and taking them as true, Mr. Shimomura does nothing more than show that he and Agent Carlson had a significant personality conflict. Rather soon after meeting, both individuals started to become frustrated with the other and their discussion

became heated, even downright hostile. Nothing in the Complaint convinces me that Agent Carlson became hostile *because of* Mr. Shimomura's speech so much as because of their distaste for each other. Further, the pleadings don't come close to suggesting that Officer Davis arrested Mr. Shimomura in retaliation for his requests to speak with Agent Carlson's supervisor. As I will discuss later on, Officer Davis appears to have made the arrest because of a mistaken belief that an assault took place.

What this situation shows is a lack of good judgment on the part of both Mr. Shimomura and Agent Carlson. The interaction should have never escalated to where it did, and had either person seriously attempted to deescalate it I doubt we would be here today. However, the unfortunate fact that neither person had the foresight to step back from the situation while tensions were rising does not establish that a retaliatory arrest took place under the First Amendment. This claim is dismissed for failure to state a claim upon which relief can be granted.

B. Arrest without Probable Cause.

Officer Davis addresses the Fourth Amendment in the context of his qualified immunity argument, and I address that argument below. Here I consider the claim as it relates to the three TSA agents, defendants Carlson, Cates, and Zeller.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S.

Const. amend. IV. A person who is arrested without probable cause and without a warrant has been subject to an illegal arrest that violates the Fourth Amendment. *See e.g.*, *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). An arrest occurs when "by means of physical force or a show of authority, an individual's freedom of movement is restrained." *Romero v. Story*, 672 F.3d 880, 885 (10th Cir. 2012) (internal quotation marks, alterations, and citations omitted). In particular, the restraint must make it "such that a reasonable person would have believed he was not free to leave." *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion).

Mr. Shimomura alleges that defendants Carlson, Cates, and Zeller violated the Fourth Amendment when he was arrested without probable cause. In particular, he alleges that all three agents conferred with Officer Davis about arresting him and charging him with a crime. [ECF No. 1 at ¶ 27]. The Complaint then quotes excerpts from the written statements that they made concerning the incident, claiming that the quoted portions of the statements were coordinated, false, made for the purpose of causing and justifying Mr. Shimomura's arrest, and omitted exculpatory facts. *Id.* ¶¶ 30-33, 35, 37.

Specifically, Agent Cates' statement relates that Mr. Shimomura "attempted to cut off Carlson path [sic] with his roller bag." Agent Zeller's statement relates that she "observed" Mr. Shimomura "push his bag into Carlson's path, nearly causing her to trip." Those statements do not support a false arrest claim against

either Cates or Zeller. Neither Cates nor Zeller stated that Mr. Shimomura hit Agent Carlson with his bag; yet, it is the alleged contact with Carlson and the pain that she claims to have sustained that fueled the arrest.

Agent Carlson's situation is different. Her statement, as quoted in the Complaint, was that Mr. Shimomura "look[ed] me right in the eye, . . . forcefully shoved his roller bag into my legs on purpose, hitting me in both ankles and shins, [and] did create pain at the moment." *Id.* at ¶ 31. Mr. Shimomura alleges that this statement is false. *Id.* I must take this statement of fact as true at this point. Moreover, the video tends to support him, as it appears to show that the contact between the bag and Agent Carlson was to her right leg only.

Mr. Shimomura's Fourth Amendment claim against Agent Carlson can survive only if but for Carlson's dishonesty the arrest would not have occurred. *See Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990). However, although he perhaps hints at it, Mr. Shimomura does not specifically allege that, but for the false statement, he would not have been arrested. This omission can be easily fixed in an amended complaint. But before amending I commend to plaintiff's attention Officer Davis' recounting of the incident in which he seems to say that he based his decision to arrest Mr. Shimomura on his actual witnessing of the bag striking Agent Carlson's legs and Agent Carlson's report that she felt pain in her ankles and shins. [ECF No. 42 at ¶¶ 7-9]. Suffice it to say that it is not clear that Mr. Shimomura can

ultimately sustain an allegation that but for Carlson's report that both her legs had made contact with the bag, the arrest would not have been made.

In any event, as the pleadings now stand, the Court grants the motion to dismiss the Fourth Amendment claims against all three TSA agents.

C. Deprivation of Liberty Without Due Process.

The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The Fourteenth Amendment extends this prohibition to state actors, who may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. IVX, § 1.

Procedural due process protects individuals against "arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). In order to proceed under a procedural due process claim, a plaintiff must demonstrate that (1) he possessed a protected interest of life, liberty, or property; and (2) the procedures utilized that impacted his protected interest were inadequate under the circumstances. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998).

The basis for Mr. Shimomura's Fourteenth Amendment claim is that Officer Davis illegally arrested him, thereby depriving him of his liberty interest. His Fifth Amendment claim is, presumably, that Agents Carlson,

Cates, and Zeller helped effectuate his arrest, thereby also depriving him of his liberty interest. Mr. Shimomura is effectively asking this Court to find that any illegal arrest also violates the Due Process Clause. However, the Supreme Court has already made it clear that this type of repetitive claim is inappropriate, at least in these circumstances.

"[W]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotation marks omitted) (finding that the plaintiff, who argued that he had a liberty interest to be free of criminal prosecution without probable cause, should have made a Fourth Amendment, not Fourteenth Amendment, claim);[1] *see also Pierce,* 359 F.3d at 1285 (citing *Albright* for the holding that the initial seizure is governed by the Fourth, not Fourteenth, Amendment).

Considering that his due process claim effectively mirrors his allegation of illegal arrest under the Fourth Amendment, Mr. Shimomura has failed to state

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[1] While Mr. Shimomura argues that his *procedural* due process rights were violated, the difference is irrelevant. In both cases, the plaintiffs' claims boil down to alleged Fourth Amendment violations. The principle articulated in *Albright* thus applies.

a claim under the Fifth and Fourteenth Amendments upon which relief can be granted.

D. Civil Conspiracy.

"[A] conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law" pursuant to § 1983 is actionable. *See Snell*, 920 F.2d at 701. In order to prevail on such a claim, the plaintiff "must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient." *Id.*

"A conspiracy requires the combination of two or more persons acting in concert." *Salehpoor v. Shahinpoor*, 358 F.3d 782, 789 (10th Cir. 2004) (internal quotation marks, alterations, and citations omitted). "In order to plead a conspiracy claim, a plaintiff must allege, either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants." *Id.* (internal quotation marks, alterations, and citations omitted). The plaintiff must show that there was "a single plan, the essential nature and general scope of which [was] know [*sic*] to each person who is to be held responsible for its consequences." *Snell*, 920 F.2d at 702 (citations omitted).

To establish a valid civil conspiracy claim, Mr. Shimomura must show that there was an agreement among Officer Davis and the other defendants to arrest him without probable cause, and that he was, in fact, illegally arrested. The first prong is as far as I need to go at this point.

A conspiracy often needs to be proven with circumstantial evidence, because there will rarely be direct evidence of an agreement to conspire. *Snell*, 920 F.2d at 702. However, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Twombly*, 550 U.S. at 556. "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-57; *see also Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) ("Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim.") (citations omitted).

As discussed above, Mr. Shimomura has alleged that the four defendants acted in concert to charge him with assault without probable cause and in retaliation for his protected speech. However, while anything can be alleged, for it to survive the first round of motions it must allege facts that with some degree of plausibility might state a claim. Unfortunately, Mr. Shimomura fails at this task.

To begin, a pleading that two or more individuals "took joint and concerted action" is a mere conclusory statement that the Court is bound to disregard. Mr. Shimomura also has no evident factual basis for alleging that while he was in custody the defendants conspired to charge him with assault. The effort seems to be to back up this allegation with the allegation that the four defendants coordinated the factual allegations in their written statements to support Carlson's and Davis' false allegations that Mr. Shimomura assaulted

Carlson. But even the excerpts from the statements quoted in the Complaint fall short of that. Accordingly, the motion to dismiss the civil conspiracy claim is granted.

E. Aiding and Abetting.

Without taking a position as to whether civil aiding and abetting liability exists for constitutional rights violations, I find that Mr. Shimomura has not pled a plausible claim of aiding and abetting liability. The Complaint fails to establish that any of the defendants were aware of his or her role as part of a tortious activity and knowingly and substantially assisted the principal violator. Therefore, this claim is dismissed for failure to state a claim upon which relief can be granted.

F. Conclusion.

For the above reasons, all claims against defendants Carlson, Cates, and Zeller are hereby dismissed. I need not consider their qualified immunity claims or the extension of *Bivens* to First Amendment actions.

II. OFFICER DAVIS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT [ECF No. 42].

Initially, I conclude that the claims against Officer Davis other than the Fourth Amendment false arrest claim must be dismissed for failure to state a claim for

essentially the same reasons as are discussed above with respect to the TSA agents. I need not repeat my findings and conclusions here. Suffice it to say that, in my view, the Complaint was complicated by the addition of several claims that essentially are a diversion from the main issue. The real kernel of this case is the claim that that Officer Davis had no business arresting Mr. Shimomura and charging him with a crime. Although Mr. Shimomura might have brought his troubles on himself to some extent, my impression from what I have read and seen is that he was poorly treated at the end. But his false arrest claim under the Fourth Amendment only continues if Officer Davis' claim of qualified immunity fails. I turn to that next.

A. **Summary Judgment in the Qualified Immunity Context.**

Officer Davis' qualified immunity claim rests on matters outside the four corners of the pleadings, and as such, it is considered in a summary judgment context. Summary judgment may only be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009) (internal quotations marks omitted) (citing Fed. R. Civ. P. 56(c)). However, the assertion of a qualified immunity defense alters the standard analysis somewhat. *See, e.g. Bowling v. Rector*, 584 F.3d 956, 964 (10th Cir. 2009).

"After a defendant asserts a qualified immunity defense, the burden shifts to the plaintiff." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). The plaintiff must establish that (1) the defendant's actions violated a constitutional right, and (2) the constitutional right was clearly established. *See e.g.*, *id.*; *Martinez*, 563 F.3d at 1088. The Court has discretion in deciding which of the two prongs should be analyzed first. *Martinez*, 563 F.3d at 1088. Only when the plaintiff meets his initial burden "does a defendant then bear the traditional burden of the movant for summary judgment – showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008). Nevertheless, "[e]ven though the plaintiff bears the burden of making this two-part showing, we construe the facts in the light most favorable to the plaintiff as the nonmoving party." *Kaufman*, 697 F.3d at 1300 (internal quotation marks, alterations, and citations omitted).

B. Qualified Immunity.

"Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity protects state actors from liability as well as suit but only if their conduct does not violate

clearly established constitutional rights of which a reasonable person should have known. *Id.* "This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson*, 555 U.S. at 244 (internal quotation marks and citation omitted). Overall, qualified immunity "operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 731 (2002).

To summarize, I elect to begin with the question whether Officer Davis had probable cause to arrest Mr. Shimomura. Because I am satisfied that Mr. Shimomura has met his burden to establish that probable cause did not exist, I then turn to the second issue, i.e., whether Mr. Shimomura's rights were clearly established, which in this case I approach by asking whether Officer Davis had "arguable probable cause." *See Kaufman*, 697 F.3d at 1300.

1. Probable Cause.

In a qualified immunity context, the probable cause evaluation is a question of law appropriate for resolution by the Court. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (reversing a holding that the probable cause determination was a question for the trier of fact because "[i]mmunity ordinarily should be decided by the court long before trial").

"In the context of a false arrest claim, an arrestee's constitutional rights were violated if the arresting officer acted in the absence of probable cause that the person had committed a crime." *Kaufman*, 697 F.3d at 1300. "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995) (citation omitted). "Probable cause must be evaluated in light of circumstances as they would have appeared to a prudent, cautious, trained police officer." *United States v. Snow*, 82 F.3d 935, 942 (10th Cir. 1996) (citation omitted). The Court's analysis is an objective one: "would the facts available to the officer at the moment of the seizure . . . warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (internal quotation marks omitted). Finally, probable cause is based on the totality of the circumstances at the time the arrest occurs. *See United States v. Munoz-Nava*, 524 F.3d 1137, 1144 (10th Cir. 2008).

Here, there might be some degree of disagreement as to whether Officer Davis merely detained Mr. Shimomura for a "brief" period of time or actually arrested him. However, neither party disputes that Mr. Shimomura was detained for one and a half hours. Without getting into the thick of it, Officer Davis has not persuaded me that this lengthy detention did not amount to an arrest, let alone that it somehow fits the

definition of brief. Mr. Shimomura has effectively pleaded that through a show of authority, his freedom of movement was restrained such that a reasonable person would have believed he was not free to leave. This constitutes an arrest. It does not appear that Officer Davis, at least in retrospect, seriously contests this proposition, given that his entire argument is relegated to a one-sentence footnote in his summary judgment motion. [ECF No. 42, at 8 n.2].

Proceeding from there, the question is whether the arrest was based upon probable cause. Mr. Shimomura was charged with a violation of Denver's municipal law. The Revised Municipal Code of Denver, § 38-93 Assault, provides: "It shall be unlawful for any person to intentionally or recklessly assault, beat, strike, fight or inflict violence on any other person." Denver, Colo., Municipal Code § 38-93 (1982). The word "assault" is not defined in the Municipal Code, but under Colorado state law assault in the third degree requires that the defendant cause "bodily injury." Colo. Rev. Stat. § 18-3-204 (2012). Bodily injury means "physical pain, illness, or any impairment of physical or mental conditions." Colo. Rev. Stat. § 18-1-901(3)(c) (2013).

In his Motion for Summary Judgment, Officer Davis argues that he had probable cause to arrest Mr. Shimomura for misdemeanor assault because he witnessed "Mr. Shimomura's roller bag strike Agent Carlson in the legs." [ECF No. 42-1 at ¶ 6]. Further, Agent Carlson informed Officer Davis "that she had pain in her ankles and shins as a result of the roller bag striking her legs." *Id.* at ¶ 7. Officer Davis' official report

also states that "Carlson fell forward but caught herself." [ECF No. 48-1 at 14].

Officer Davis offered into evidence a copy of the security footage, [ECF No. 42-2], stating that it was "a true and accurate description of the events [he] witnessed . . . ," [ECF No. 42-1 at ¶ 8]. However, upon watching this footage, it appears to me that Mr. Shimomura's roller bag, at most, came into contact with Agent Carlson's right leg. In addition, as Officer Davis surely witnessed, it appears that any contact that occurred was accidental (i.e. negligent), if not Agent Carlson's own fault. The video does tend to show that she was aggressively and closely following Mr. Shimomura as he exited the screening area. Finally, nothing in the video supports the notion that Agent Carlson fell forward but caught herself. Instead, she appears to have rather adeptly stepped out of the way of the roller bag before or right after its minimal contact with her right leg.

Considering what the security tape shows, and taking into account the weight Officer Davis gives to its accuracy, I fail to see how probable cause supported Mr. Shimomura's arrest for assault. Taking the evidence in the light most favorable to the plaintiff, I find that Mr. Shimomura has met the first prong of the qualified immunity test by establishing that no probable cause existed to support the arrest.

2. Clearly Established Right.

"As to whether the law was clearly established at the time of the alleged violation, we require a section 1983 plaintiff to show that it would have been clear to a reasonable officer that probable cause was lacking under the circumstances." *Kaufman*, 697 F.3d at 1300 (internal quotation marks and citation omitted). As a practical matter, the Court must ask whether there was "arguable probable cause" for an arrest, and, if there was, find that the defendant is entitled to qualified immunity. *Id.*

"Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Brinegar v. United States*, 338 U.S. 160 (1949). Yet, the mistakes must be reasonable; officers must act "on facts leading sensibly to their conclusions of probability." *Id.* Requiring more than this would unduly hamper law enforcement. However, "[t]o allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.*

"Our inquiry into whether a constitutional right was clearly established must be undertaken in light of the specific context of the case, not as a broad general proposition." *Bowling*, 584 F.3d at 964 (internal quotation marks and citation omitted). In particular, "[w]hen a warrantless arrest is the subject of a § 1983 action, the arresting officer is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to make the arrest." *Robertson v. Las*

Animas Cnty. Sheriff's Dep't, 500 F.3d 1185, 1191 (10th Cir. 2007). "[L]aw enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007); *see also Koch v. City of Del City*, 660 F.3d 1228, 1241 (10th Cir. 2011).

In sum, the Court is presented with whether Officer Davis made a reasonable mistake when he concluded that probable cause existed to support the arrest for misdemeanor assault. Considering the specific context of this case, I believe his mistake was reasonable.

Though viewing the surveillance video led me to the conclusion that no probable cause existed to arrest Mr. Shimomura, I also acknowledge that the series of events occurred very rapidly. In fact, I had to watch the video multiple times to make sure that I didn't miss anything. The entire incident takes place within a matter of seconds. Agent Carlson claimed to have been hit, and she claimed to have suffered pain. From an objective viewpoint, I believe that a reasonable police officer might well consider the statements of a TSA agent who claimed to have been hit and hurt by an irate and agitated passenger to be trustworthy information. *See Cortez*, 478 F.3d at 1121.

I pause here to add that, in my time on the bench, I have been educated in the difficult task one faces in overcoming qualified immunity. *See Lynch v. Barrett*, 703 F.3d 1153 (10th Cir. 2013); *Savannah v. Collins*, No. 13-1245, 2013 WL 6171012 (10th Cir. Nov. 26, 2013). This is not to say that I would not reject that

defense in a proper case. That, after all, is my job. But having reflected on the set of facts alleged here, I conclude that it was arguable, from the standpoint of a reasonable police officer, that there was probable cause to arrest. Therefore, Officer Davis is entitled to the protection of qualified immunity.

ORDER

1. The TSA defendants' motion to dismiss [ECF No. 41] is GRANTED.

2. Officer Davis' motion to dismiss or for summary judgment [ECF No. 42] is GRANTED.

3. This civil action and all claims therein are dismissed with prejudice. As the prevailing parties, the defendants are awarded their costs pursuant to Fed. R. Civ. P. 54(d) and D.C.COLO.LCivR 54.1.

DATED this 14th day of February, 2014.

BY THE COURT:

/s/ R. Brooke Jackson
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TSUTOMU SHIMOMURA,

Plaintiff-Appellant,

v.

KENDRA CARLSON, an agent of the Transportation Security Administration, in her individual capacity, et al.,

Defendants-Appellees,

and

TERRY CATES, an agent of the Transportation Security Administration, in her individual capacity, et al.,

Defendants.

No. 14-1418

ORDER

(Filed Mar. 4, 2016)

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

Appellant's petition for rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk