Laura K. Smith, Texas Bar No. 2405430
Attorney for Individual Federal Defendants
P.O. Box 7146
Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-0419
Fax: (202) 616-4314
Laura.smith2@usdoj.gov

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ESTATE OF JAMES D. REDD,

Plaintiff,

v.

DANIEL LOVE, *et al.*,

Defendants.

No. 2:11-cv-478-TS

## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF FACTS ..... 2

PROCEDURAL HISTORY ..... 4

ARGUMENT ..... 7

I. Mrs. Redd may not use this lawsuit to collaterally attack her plea agreement and conviction (Counts I and II). ..... 7

II. The doctrine of qualified immunity requires the dismissal of all of Plaintiffs' constitutional claims. ..... 8

A. Plaintiffs continue to fail to adequately allege personal involvement. ..... 10

B. Plaintiffs' Fourth Amendment claims fail (Counts I, II, and III). ..... 12

i. This Court has refused to accept as true the allegation that the value of the bird effigy was deliberately inflated (Counts I and II). ..... 12

ii. The "excessive force" claim fails (Count III). ..... 13

a. Defendant Love is entitled to qualified immunity for allegedly ordering additional agents to the Redd home. ..... 14

b. Defendant Barnes is entitled to qualified immunity for allegedly interrogating Dr. Redd harshly. ..... 17

C. Plaintiffs state no Fifth Amendment claim capable of overcoming qualified immunity (Counts IV and V). ..... 20

i. Plaintiffs' equal protection claim fails both prongs of qualified immunity (Count IV). ..... 20

ii. Plaintiffs' due process claim cannot overcome qualified immunity (Count V). ..... 21

III. CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### Cases

*Anderson v. Creighton*,
483 U.S. 635 (1987) ........ 14

*Arce v. Banks*,
913 F. Supp. 307 (S.D.N.Y. 1996) ........ 17

*Ashcroft v. al-Kidd*,
131 S. Ct. 2074 (2011) ........ 14

*Ashcroft v. Iqbal*, 55 U.S. 662 (2009) ........ passim

*Barney v. Pulsipher*,
143 F.3d 1299 (10th Cir. 1998) ........ 20

*Becerra ex rel. Perez v. Unified Government of Wyandotte Cty.*,
342 F. Supp. 2d 974 (D. Kan. 2004), *rev'd on other grounds*, 432 F.3d 1163 (10th Cir. 2005) .... 9

*Beck v. City of Muskogee Police Dept.*,
195 F.3d 553 (10th Cir. 1999) ........ 7

*Bell Atl. Corp. v. Twombly*,
550 U.S. 544 (2007) ........ 15, 16

*Berry v. City of Muskogee, Okl.*,
900 F.2d 1489 (10th Cir. 1990) ........ 8

*Bradford v. Wiggins*,
516 F.3d 1189 & n.3 (10th Cir. 2008) ........ 8

*Bridges v. Lane*,
351 F. App'x. 284 (10th Cir. 2009) (unpublished) ........ 21

*Chamberlain v. City of Albuquerque*,
No. 92-2089, 1993 WL 96883 (10th Cir. Mar. 29, 1993) (unpublished) ........ 18

*Cobello v. Pelle ex rel. Boulder County Bd. of Com'rs*,
No. CIV.A. 06-CV-02600MJ, 2008 WL 926522 (D. Colo. Mar. 31, 2008) (unpublished) ........ 9

*Davis v. Wakelee*,
156 U.S. 680 (1895) ........ 8

*Dennis v. Watco Companies, Inc.*,
631 F.3d 1303 (10th Cir. 2011) ........ 15

*Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*,
407 F.3d 1091 (10th Cir. 2005) .......... 2

*Engquist v. Oregon Dept. of Agr.*,
553 U.S. 591 (2008) .......... 20

*Estate of Fuentes ex rel. Fuentes v. Thomas*,
107 F. Supp. 2d 1288 (D. Kan. 2000) *aff'd sub nom. Cerca v. Thomas*, 30 F. App'x 931
(10th Cir. 2002) .......... 9

*Graham v. Connor*,
490 U.S. 386 (U.S.N.C. 1989) .......... 14, 17, 21

*Hackford v. Babbitt*,
14 F.3d 1457 (10th Cir. 1994) .......... 9

*Hansen v. Schubert*,
459 F. Supp. 2d 973 (E.D. Cal. 2006) .......... 18

*Heck v. Humphrey*,
512 U.S. 477 (1994) .......... 7

*Holgers v. S. Salt Lake City*,
No. 2:10-CV-532 TS, 2011 WL 98488 (D. Utah Jan. 12, 2011) (slip) .......... 21

*Holland ex rel. Overdorff v. Harrington*,
268 F.3d 1179 (10th Cir. 2001) .......... 16, 17

*Hunter v. Bryant*,
502 U.S. 224 (1991) .......... 8

*Hunter v. Namanny*,
219 F.3d 825 (8th Cir. 2000) .......... 19

*Johnson v. Liberty Mut. Fire Ins. Co.*,
648 F.3d 1162 (10th Cir. 2011) .......... 2

*Johnson v. Lindon City Corp.*,
405 F.3d 1065 (10th Cir. 2005) .......... 7, 8

*Leverington v. City of Colorado Springs*,
643 F.3d 719 (10th Cir. 2011) .......... 20

*Lowery v. Stovall*,
92 F.3d 219 (4th Cir. 1996) .......... 8

*Lucas v. City of Boston*,
No. CIVA 07-CV-10979-DPW, 2009 WL 1844288 (D. Mass. June 19, 2009) (slip) ................ 17

*Martin v. Sargent*,
780 F.2d 1334 (8th Cir. 1985) ........................................................................................ 16

*McNair v. Coffey*,
279 F.3d 463 (7th Cir. 2002) .......................................................................................... 15

*Mecham v. Frazier*,
500 F.3d 1200 (10th Cir. 2007) ....................................................................................... 19

*Medina v. City & County of Denver*,
960 F.2d 1493, 1498 (10th Cir. 1992), *rev'd in part*, *Williams v. City & County of* Denver,
99 F.3d 1009 (10th Cir. 1996) ........................................................................................ 15

*Mitchell v. Forsyth*,
472 U.S. 511 (1985)............................................................................................................ 8

*Moss v. Gillioz Const. Co.*,
206 F.2d 819 (10th Cir. 1953) .......................................................................................... 2

*Naumoff v. Old*,
167 F. Supp. 2d 1250 (D. Kan. 2001)................................................................................. 9

*New Hampshire v. Maine*,
532 U.S. 742 (2001)............................................................................................................ 8

*Nicholson v. Jones*,
No. CIV-08-227-F, 2010 WL 2106237 (W.D. Okla. Mar. 8, 2010), *report and recommendation adopted,* No. CIV-08-0227-F, 2010 WL 2106239 (W.D. Okla. May 25, 2010) (unpublished)... 18

*Nielsen v. Bixler*,
No. 8:04CV583, 2006 WL 1401711n.5 (D. Neb. May 19, 2006) (unpublished)........................ 18

*Pearson v. Callahan*,
555 U.S. 223 (2009)..................................................................................................... 5, 6, 9

*Pena-Borrero v. Estremeda*,
365 F.3d 7 (1st Cir. 2004).................................................................................................. 16

*Phillips v. Bell*,
365 F. App’x 133 (10th Cir. 2010) ................................................................................... 16

*Reeves v. Churchich*,
331 F. Supp. 2d 1347 (D. Utah 2004), *aff'd,* 484 F.3d 1244 (10th Cir. 2007)............................ 16

*Reichle v. Howards*,
132 S. Ct. 2088 (2012)........................................................................... 9, 13, 16, 20, 21

*Reindl v. City of Leavenworth, Kansas*,
443 F. Supp. 2d 1222 (D. Kan. 2006)......................................................................... 9

*Robbins v. Oklahoma*,
519 F.3d 1242 (10th Cir. 2008) ............................................................................... 16

*Ruiz v. McDonnell*,
299 F.3d 1173 (10th Cir. 2002) ............................................................................... 22

*Sager v. City of Woodland Park*,
543 F. Supp. 282 (D. Colo. 1982)............................................................................. 9

*Saucier v. Katz*,
533 U.S. 194 (2001)................................................................................................ 9

*Silvan v. Briggs*,
309 F. App'x. 216, 225 (10th Cir. 2009) (unpublished).............................................. 19

*Simkins v. Bruce*,
406 F.3d 1239 (10th Cir. 2005) ................................................................................. 9

*Smith v. United States*,
561 F.3d 1090 (10th Cir. 2009) ................................................................................. 9

*Stewart v. City of Wichita, Kan.*,
827 F. Supp. 1537 (D. Kan. 1993)........................................................................... 18

*Teufel v. United States*,
No. 92-3260, 1993 WL 345530, at *3 (10th Cir. Aug. 26, 1993) (unpublished) .......................... 8

*Thomson v. Salt Lake County*,
584 F.3d 1304 (10th Cir. 2009) ............................................................... 9, 14, 17

*United States v. Barber*,
303 F. App'x 652 (10th Cir. 2008)........................................................................... 18

*United States v. Leeper*,
No. 05-10250-01-WEB, 2006 WL 3457221 (D. Kan. Nov. 29, 2006) (unpublished) ................ 19

*United States v. Padilla*,
819 F.2d 952 (10th Cir. 1987) ........ 18

*United States v. Sanders*,
104 F. App'x 916 (4th Cir. 2004) ........ 15

*United States v. Smith*,
No. 2:09-CR-243-TS, 2011 WL 839858 (D. Utah Mar. 8, 2011) (unpublished) ........ 12

*VanZandt v. Oklahoma Dept. of Human Services*,
276 F. App'x 843 (10th Cir. 2008) ........ 8

*Verdecia v. Adams*,
327 F.3d 1171 (10th Cir. 2003) ........ 8

*Vill. of Willowbrook v. Olech*,
528 U.S. 562 (2000) ........ 20

*Whren v. United States*,
517 U.S. 806 (1996) ........ 14, 17

*William v. Nye*,
869 F. Supp. 867 (D. Kan. 1994), *aff'd,* 83 F.3d 434 (10th Cir. 1996) ........ 18

*Wims v. New York City Police Dept.*,
No. 10 CIV. 6128 PKC, 2011 WL 2946369 (S.D.N.Y. July 20, 2011) (slip) ........ 17

*Winton v. Bd. of Com'rs of Tulsa County, Okl.*,
88 F. Supp. 2d 1247 (N.D. Okla. 2000) ........ 9

*Workman v. Jordan*,
958 F.2d 332 (10th Cir. 1992) ........ 8

**Rules**

Fed. R. Civ. P. 12 ........ 1

## INTRODUCTION

This Court has already dismissed Plaintiffs' *Bivens* claims once, for failure to make sufficiently specific allegations. For the second time now, Plaintiffs have fallen far short of setting out the violation of any clearly established constitutional right by either of the two individual federal defendants. Pursuant to Federal Rule of Civil Procedure 12, Defendants Barnes and Love move to dismiss all claims against them. Each defendant is entitled to qualified immunity, and dismissal with prejudice is now appropriate.

## STATEMENT OF THE ISSUES

(1) Whether Mrs. Redd, proceeding nominally on behalf of her husband's estate, may pursue claims directly contradictory to those made in her own plea agreement and seek relief that would necessarily imply the invalidity of that agreement and her criminal conviction.

(2) Whether *Ashcroft v. Iqbal*, 55 U.S. 662 (2009), requires the Court to dismiss the majority of Plaintiffs' *Bivens* claims on qualified immunity grounds, for failure to identify acts that show each individual defendant's personal involvement in the alleged wrongdoing;

(3) Whether the entirety of Plaintiffs' *Bivens* claims face dismissal on the additional qualified immunity ground that the complaint fails to plausibly allege the violation of *any* clearly established constitutional rights.

## STATEMENT OF FACTS[1]

"In 2006, the FBI and Bureau of Land Management (BLM) began a joint investigation into the looting of Native American artifacts on public land." *Memorandum Decision and Order on Motion to Dismiss*, Dkt. No.55 ("Order"), p.1; *First Amended Complaint*, Dkt. No.56 ("FAC"), ¶ 1. "The operation, dubbed 'Cerberus,' culminated in the arrest of 24 alleged traffickers in stolen artifacts, including Dr. James Redd and his wife." Order at 1; FAC at ¶ 1. "Federal agents had obtained arrest warrants for the Redds after a grand jury issued an indictment." Order at 1; FAC at ¶ 72. That indictment charged them jointly with "receiv[ing], conceal[ing], and retain[ing] property belonging to an Indian tribal organization, with a value of more than $1,000 to wit: an effigy bird pendant, knowing such property to have been embezzled, stolen, or converted." *See Redd v. United States*, No. 2:11-cv-1162, *Memorandum Decision and Order Granting in Part and Denying in Part Defendant's Motion to Dismiss*, Dkt. No.25 ("FTCA Order"), p.13 (quoting *United States v. Redd*, No. 2:09-cr-44, Dkt. No. 4, p.2). According to the Plaintiffs, Dr. Redd had originally "picked up" the bird effigy while on a "walk with some of his family members" on public land. FAC at ¶ 2.

"Agents arrived at Dr. Redd's home in Blanding, Utah around 6:40 a.m. on June 10, 2009" and arrested Dr. Redd shortly thereafter. Order at 2; FAC at ¶ 60. "Though the exact number of officers present during Dr. Redd's arrest is not specified, 80 plus officers were present in Blanding to execute arrest warrants against various residents of the town." Order at 2; FAC at

---

[1] As it must, this motion relies on the facts alleged in the First Amended Complaint. *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1123 (10th Cir. 2005). Labels and conclusions – which, as in Plaintiffs' original complaint, abound in the First Amended Complaint – are not properly pleaded "facts" and thus not credited herein. *See Johnson v. Liberty Mut. Fire Ins. Co.*, 648 F.3d 1162, 1165 (10th Cir. 2011) ("a naked legal conclusion, backed by no well-pleaded facts … [is] hardly enough to state a claim for relief"); *Moss v. Gillioz Const. Co.*, 206 F.2d 819, 820 (10th Cir. 1953) ("we take as true all of the factual allegations in the claim, leaving only the legal conclusions from facts well pleaded").

¶ 60. As alleged, these agents carried out fourteen arrests in Blanding in addition to those of the Redds. FAC at ¶ 58. According to Plaintiffs, the unspecified number of agents who arrived at the Redd home at 6:40 a.m. were "armed with assault rifles, and clothed in flak-jackets." FAC at ¶ 60; Order at 2. Plaintiffs allege that an unidentified person "restrained Dr. Redd, subjected him to" "excessive force," and "arrested him" but, as in the original complaint, do not explain the type of force was involved or who deployed it. FAC at ¶ 61; Order at 2. The First Amended Complaint, like the original complaint, also makes vague reference to "mandhandl[ing]" without specifying what that charge entailed or who was responsible for it. FAC at ¶ 62; Order at 2. Plaintiffs have not attributed any decisions regarding the number of officers that initially arrived at the Redd home, what those officers wore, or what type of firearms they carried to Defendant Barnes or Love. Nor have Plaintiffs alleged that either individual federal defendant participated in Dr. Redd's arrest.

Plaintiffs allege that following Dr. Redd's arrest and while other agents searched the Redd home, "Defendant Barnes sequestered Dr. Redd in his garage and interrogated him during the next four hours." FAC at ¶ 62. Like Plaintiff's original complaint, the First Amended Complaint accuses Defendant Barnes of "rebuk[ing], terrify[ying], and humiliat[ing] Dr. Redd" by (1) "accusing him of unlawful activity of which he was not guilty," (2) "repetitively call[ing] Dr. Redd a liar while taunting him that a felony offense meant revocation of his medical license," (3) "harass[ing] Dr. Redd" in some other unspecified manner and "taunt[ing] him that he would never practice medicine again," and (4) "pointing to Dr. Redd's gardening tools and ask[ing] him, which shovel do you like to dig bodies with?" FAC at ¶¶ 63-67. The First Amended Complaint further alleges that "[a]t one point," pursuant to an "order" by Defendant Barnes, *id.* at 27, "[u]nidentified agents … accompanied Dr. Redd to the restroom." *Id.* at ¶ 68. According

to Plaintiffs, those unidentified officers "stood just six inches off Dr. Redd's knees as he defecated," and "would not remove Dr. Redd's handcuffs so he could properly clean himself," *id.* at ¶ 68. These allegations appeared nowhere in the original complaint. Plaintiffs have not alleged that Defendant Love participated in the interrogation.

According to the First Amended Complaint, after "the Redds were secured and the situation was under control," "Defendant Love insisted that agents continue to pour into the Redd residence." *Id.* at 27. Plaintiffs do not specify when such "insist[ence]" took place, how many of the original agents remained on the scene, how many additional agents arrived, how many agents were present at the Redd home at any given time, or whether the new agents who arrived were armed in any way. Plaintiffs allege in conclusory fashion that "the purpose of the extra agents was to embarrass and humiliate Dr. Redd and his family." *Id.* The bill of particulars from Mrs. Redd's criminal proceedings indicates that agents at the Redd home packaged and catalogued nearly 800 artifacts that day, filling 112 boxes. Plaintiffs have not alleged that Defendant Barnes instructed any additional agents to visit the Redd home.

Dr. Redd committed suicide the day after his arrest. Order at 2; FAC at ¶ 89. Soon after, his wife pleaded guilty to misappropriating the bird effigy. *See* FTCA Order at 13. "In her Statement in Advance of Plea, Mrs. Redd acknowledged that the [bird effigy] pendant had a value in excess of $1,000." FTCA Order at 14 (quoting *United States v. Redd*, Dkt. No. 31, at p.4).

**PROCEDURAL HISTORY**

Plaintiffs originally brought *Bivens* claims against sixteen individual FBI and BLM agents, pursuant to seventeen separate constitutional theories on May 27, 2011. *See* Dkt. No.2. This Court rejected all of those claims on "prong one" of the qualified immunity analysis: failure

to allege each individual defendant's personal involvement in each constitutional violation.[2] *See* Order. In addition, the Court questioned a number of Plaintiffs' legal theories, including whether the "contention that federal agents instructed Mr. Gardiner to inflate the value of the artifacts in question" set out "behavior [that] could invalidate a warrant," *id.* at 8, whether "the presence of too many officers, wearing flak jackets and bearing guns, could equate to excessive force," *id.* at 9, and whether "the rest" of the force allegedly used "was 'excessive,'" *id.* Ultimately, the Court exercised its discretion not to reach those issues in light of Plaintiffs' clear failure to allege personal involvement. *See id.* at 7 (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). The Court dismissed Plaintiffs' claims without prejudice and granted them to re-file within 21 days.

After dismissing Plaintiffs' *Bivens* claims in this suit, this Court turned to Plaintiffs' claims against the United States in parallel proceedings, which were brought under the Federal Tort Claims Act. In that ruling, this Court squarely rejected Plaintiffs' allegations that the federal informant intentionally overvalued artifacts as implausible:

> Plaintiffs' allegation that Gardiner intentionally overvalued the pendant is implausible, and therefore not well-pleaded. Jeanne Redd's admission that the pendant was worth $1,000 makes it implausible that Gardiner, at least in this instance, employed a fraudulent method of valuation in declaring that the pendant was worth $1,000. Jeanne Redd, in entering her plea, was required to convince the judge that she actually committed the crime to which she pleaded guilty. The Court cannot ignore the reliability of [Jeanne Redd's guilty plea]. [T]he Court finds Plaintiffs' allegation that Gardiner employed a deliberately inaccurate method of valuation for the bird effigy pendant implausible, and will not accept it as true.

---

[2] The Court made additional findings, as well: that it lacked personal jurisdiction over one FBI agent, Order at 6; that the Fourth Amendment does not contain guarantees of "due process"; "freedom from unlawful detention"; "freedom from unlawful restraints"; "freedom from deliberate falsehoods"; freedom from "reckless disregard for the truth"; "life, liberty and the pursuit of happiness"; "freedom from unreasonable treatment and human disrespect"; or "freedom from gross and unreasonable treatment resulting in intentional disregard of a human being and reckless disregard for a human and the denial of life, liberty and the pursuit of happiness without due process and equal protection under the law," *id.* at 10; that Plaintiffs had abandoned their "self incrimination claim," *id.* at 11; and that the Tucker Act precluded Plaintiffs' "takings" claim, *id.* at 13.

FTCA Order at 13-14. Because "the Court d[id] not accept Plaintiffs' allegation that probable cause was fabricated," it concluded that Plaintiffs' FTCA claims based on alleged overvaluation of the effigy were barred by the discretionary function exception to the FTCA's limited waiver of sovereign immunity. FTCA Order at 14.[3]

Plaintiffs have now re-pleaded their Fourth and Fifth Amendment *Bivens* claims as to two federal defendants. The First and Second Causes of Action allege that the search of the Redd home was "unreasonable" under the Fourth Amendment because "Defendant Love artificially inflated the value of Dr. Redd's shell [effigy] to manufacture a felony charge against him." *See* FAC at 26-27. The Third Cause of Action, also brought under the Fourth Amendment, generically claims "excessive force," as to Defendant Love for purportedly "insist[ing] that agents continue to pour into the Redd residence" after "the Redds were secured and the situation was under control," and as to Defendant Barnes for allegedly "humiliate[ing] Dr Redd" and "deny[ing] Dr. Redd the ability to use the restroom with a shred of dignity." FAC at 27. Plaintiffs bring the Fourth and Fifth Causes of Action under the Fifth Amendment for purported "equal protection" and "due process" violations. *See* FAC at 27-28. Each of these claims fails both prongs of the qualified immunity analysis.

---

[3] That ruling also addressed "excessive force" allegations, but ones distinguishable from those at issue here. In the FTCA context, the Court found it "unreasonable" that "100 plus heavily armed officers" were "sent to arrest Dr. Redd and search his home." FTCA Order at 16. By contrast, in these proceedings, Plaintiffs have alleged that "80 or more" agents were deployed throughout the city of Blanding to conduct 16 arrests in total. FAC at ¶¶ 58, 60. The First Amended Complaint alleges that "extra agents" were ordered to the Redd home after the arrests had been carried out but never specifies how many agents that included or how many of the original agents remained on the scene. Nor does the First Amended Complaint specify whether any agent who arrived after the arrests was armed, much less heavily armed.

## ARGUMENT

### I. Mrs. Redd may not use this lawsuit to collaterally attack her plea agreement and conviction (Counts I and II).

Counts I and II, Fourth Amendment claims of "unreasonable seizure" and "unlawful execution of a warrant," "unreasonable search" rest on the theory that in order to procure a felony warrant, Defendant Love artificially inflated the value of the artifact that the Redds were indicted for stealing, and with respect to which Mrs. Redd ultimately pleaded guilty to stealing. *See* FAC at 26 ("Defendant Love inflated the value of the shell"); *id.* at 26-27 ("Defendant Love artificially inflated the value of Dr. Redd's shell to manufacture a felony charge"). As explained below and as this Court has already concluded in a related matter, this is patently implausible in light of Mrs. Redd's admission in her plea agreement that the bird effigy was worth $1,000. *See, e.g.,* FTCA Order at 13-14. Arguably more troubling, however, is the fact that granting relief on the claims alleging that the effigy was worth less than $1,000 would necessarily call into question the validity of Mrs. Redd's plea agreement and the criminal judgment issued as a result of it. Civil suits "are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck v. Humphrey*, 512 U.S. 477, 486 (1994); *see also Beck v. City of Muskogee Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999) ("*Heck* should apply … when the concerns underlying *Heck* exist."). Moreover, the doctrine of judicial estopped precludes Mrs. Redd from pursuing claims that directly contradict the plea agreement from which she has already derived significant benefit. *See Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining

that position, he may not thereafter … assume a contrary position.") (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).[4]

## II. The doctrine of qualified immunity requires the dismissal of all of Plaintiffs' constitutional claims.

Qualified immunity shields federal officers from both civil liability and the burdens of litigation itself, including participation in discovery, unless a plaintiff has plausibly alleged that the federal official sued violated a clearly established constitutional right. *See Iqbal*, 55 U.S. at 676; *Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir. 1992); *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003).[5] When considering whether Plaintiffs[6] have stated plausible claims

---

[4] *See New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (courts should consider whether "the party seeking to assert the inconsistent position would derive an unfair advantage"); *Bradford v. Wiggins*, 516 F.3d 1189, 1194-95 & n.3 (10th Cir. 2008) (plaintiffs who admitted via pleas that they refused officers' instructions could not sue the officers for false arrest); *Johnson*, 405 F.3d at 1069 (plaintiffs who had previously entered pleas in abeyance admitting attempting to injure officers could not later sue those officers for excessive force); *Lowery v. Stovall*, 92 F.3d 219, 225 (4th Cir. 1996) (rejecting plaintiff's attempt, "after receiving the benefit of the plea bargain" for "maliciously attacking" a police officer, to "have it the other way" in a constitutional tort suit alleging "that he did not maliciously attack" the officer).

[5] Because qualified immunity "is effectively lost if a case is erroneously permitted to go to trial," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), courts should resolve immunity questions at the earliest possible stage of litigation. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *accord VanZandt v. Oklahoma Dept. of Human Services*, 276 F. App'x 843, 847 (10th Cir. 2008) (unpublished) (noting the "special interest in resolving the affirmative defense of qualified immunity at the earliest stage of a litigation") (citations and quotations omitted).

[6] As was the case with Plaintiffs' original complaint, it remains unclear whose rights, exactly, this litigation seeks to vindicate. The First Amended Complaint identifies "Plaintiffs," in the plural, as "The Estate of James D. Redd … in a survivorship action" and "The Estate of James D. Redd … in a wrongful death action." On the other hand, Plaintiffs state that "this Complaint and BIVENS action is not brought on behalf of said Jeanne H. Redd as an individual." FAC at ¶ 76. And, as Defendants have previously explained, and Plaintiffs seemed to concede in the last round of briefing, the Tenth Circuit does not recognize "wrongful death" *Bivens* claims for the suffering of relatives. *See Berry v. City of Muskogee, Okl.*, 900 F.2d 1489, 1506-07 (10th Cir. 1990); *Teufel v. United States*, No. 92-3260, 1993 WL 345530, at *3 (10th Cir. Aug. 26, 1993) (unpublished); *Coleman v. Craig*, No. 88-1401, 1991 WL 42291, at *3 (D. Kan. Mar. 11, 1991) (unpublished), *aff'd*, 951 F.2d 1258 (10th Cir. 1991) (table); *Winton v. Bd. of Com'rs of Tulsa County, Okl.*, 88 F. Supp. 2d 1247, 1256 (N.D. Okla. 2000); *Becerra ex rel.*

for constitutional violations, the Court must "accept as true all well-pleaded factual allegations in [the] complaint and view those allegations in the light most favorable to the plaintiff," *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009), but ignore "conclusory allegations, unwarranted inferences, [and] legal conclusions." *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994). "Analysis of qualified immunity involves two steps," (1) asking "whether the alleged facts … show a constitutional violation," and (2) determining "whether the right was clearly established." *Simkins v. Bruce*, 406 F.3d 1239, 1241 (10th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "Courts have discretion to determine 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" *Thomson v. Salt Lake County*, 584 F.3d 1304, 1312 n.2 (10th Cir. 2009) (quoting *Pearson*, 555 U.S. at 236); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) ("courts may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all"). In evaluating Plaintiff's original complaint, this Court exercised its discretion to dismiss the claims on prong one, for failure to allege personal involvement on the part of each named defendant, without resolving whether the behavior alleged violated any clearly established constitutional law. *See* Order at 8-9

---

*Perez v. Unified Government of Wyandotte Cty.*, 342 F. Supp. 2d 974 (D. Kan. 2004), *rev'd on other grounds*, 432 F.3d 1163 (10th Cir. 2005); *Reindl v. City of Leavenworth, Kansas*, 443 F. Supp. 2d 1222, 1235 (D. Kan. 2006); *Naumoff v. Old*, 167 F. Supp. 2d 1250, 1252-53 (D. Kan. 2001); *Estate of Fuentes ex rel. Fuentes v. Thomas*, 107 F. Supp. 2d 1288, 1295 (D. Kan. 2000), *aff'd sub nom. Cerca v. Thomas*, 30 F. App'x 931 (10th Cir. 2002); *Cobello v. Pelle ex rel. Boulder County Bd. of Com'rs*, No. CIV.A. 06-CV-02600MJ, 2008 WL 926522, at *3 (D. Colo. Mar. 31, 2008) (unpublished); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982).

**A. Plaintiffs continue to fail to adequately allege personal involvement.**

"The Supreme Court has firmly established that a plaintiff in a *Bivens* action 'must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* at 6 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). Thus, "the first requirement for Plaintiffs is to plead with specificity the alleged constitutional violations against each individual Defendant from which they seek damages." Order at 7. "To the extent that Plaintiffs seek damages for a violation but do not specify how an individual Defendant's conduct created the violation, the claim must be dismissed." *Id.* This requirement led the Court to dismiss Plaintiffs' original complaint and now mandates dismissal of most of the First Amended Complaint.

Plaintiffs' First and Second Causes of Action (for "unlawful execution of a warrant" and "unreasonable search," respectively) depend entirely on the claim that in order to procure a felony indictment, "Defendant Love inflated the value of the shell" that the Redds were indicted for stealing. *See* FAC at 8-9. As this Court has previously observed, to maintain claims based on the assumption that "the warrants in this matter were issued based on fraudulent information," Plaintiffs must "identify which Defendants were involved in the plot" and "which Defendants knew, and how they knew" about "the alleged scheme." Order at 8; *see also Id.* ("[t]o the extent that any of Plaintiffs' claims allege that the search was unreasonable because it relied on a faulty warrant, the same reasoning applies"). No allegation anywhere in the First Amended Complaint suggests any way in which Defendant Barnes knew about or participated in any purported

inflation of the value of the bird effigy. As a result, he may not be held personally liable on Count One or Two.[7]

As to the Third Cause of Action for "excessive force," neither individual defendant is accused of deciding how many agents to send to the Redd home initially, or how armed those agents should be. *See* Order at 9 (dismissing Plaintiffs' previous "excessive force" claim based on the alleged "presence of too many officers, wearing flak jackets and bearing guns" because "Plaintiffs have not identified which Defendant made the decision to use that amount of force").[8] Nor have Plaintiffs suggested that Defendant Barnes or Love had any involvement in "restrain[ing] Dr. Redd," "subject[ing] him to excessive force" at the time of his arrest, "arresting him," "mandhandl[ing]" him, or "handcuff[ing]" him. *See* FAC at ¶¶ 61-62. (Plaintiffs seem to concede this by omitting reference to these alleged activities in the actual "excessive force" claim for relief.) Defendant Love is not accused of participating in the allegedly "excessive" interrogation in any way and cannot be held personally liable for it. Nor can Defendant Barnes face personal liability for the number of officers who arrived on the scene after the arrests, a decision attributed (albeit conclusorily) to Defendant Love. *See id.* at 27. Those claims thus fail on personal participation grounds.

Count IV, the "equal protection" claim, rests solely on the allegation that "Defendant Love treated the Redds differently than other alleged traffickers arrested as part of Operation Cerberus because Defendant Love felt that Dr. Redd had escaped a felony conviction[.]" *See id.*

---

[7] As explained, *infra*, with respect to Defendant Love, that allegation does not plausibly suggest a constitutional violation, let alone one that is clearly established.

[8] The conclusory statement that "Defendant Love … utilized an excessive number of agents, an excessive number of governmental vehicles, excessive numbers of weapons and excessively brandished weapons," FAC ¶ 88, must be disregarded because "no individual officer could be said have used … 'collective' excessive force, as an individual, against the deceased merely because the officer was present at the Redds' arrest." Order at 9.

at 28. Plaintiffs therefore state no claim against Defendant Barnes. *See* Order at 10-11 (dismissing Plaintiffs' previous "equal protection" claim because "[o]nce again, Plaintiffs have failed to identify which specific Defendants took the necessary actions with the requisite state of mind to commit the alleged violation").

Count V, for "violating Plaintiffs' right to due process" in some unspecified way, points to no particular behavior by any particular Defendant at all. *See* FAC at 28. In this Court's words, the claim that "the Defendant(s) violated Plaintiff James D. Redd's rights under the Fifith Amendment of the Constitution of the United States by violating Plaintiffs' right to due process" is "self defeating" because "Plaintiffs must show that the targeted Defendant personally acted in violation of constitutional rights." Order at 9-10. The "due process" claim does not sufficiently allege any personal participation and thus cannot pass qualified immunity prong one as to either Defendant. Only Counts I and II as to Defendant Love and Count III as to both defendants identify any personal conduct on their behalf at all. All other claims cannot survive even a cursory screening for failure to establish personal participation.

**B. Plaintiffs' Fourth Amendment claims fail (Counts I, II, and III)**.

**i. This Court has refused to accept as true the allegation that the value of the bird effigy was deliberately inflated (Counts I and II).**

Plaintiffs' Fourth Amendment claims of unreasonable search and seizure rest on the conclusory theory that Defendant Love artificially inflated the value of the artifact that the Redds were indicted for stealing. *See* FAC at 26 ("Defendant Love inflated the value of the shell"); *id.* at 26-27 ("Defendant Love artificially inflated the value of Dr. Redd's shell to manufacture a

felony charge").[9] Claims that the effigy was worth significantly less than $1,000 are simply not plausible, given Mrs. Redd's own sworn admissions.[10] As this Court has previously explained, "Jeanne Redd, in entering her plea, was required to convince the judge that she actually committed the crime to which she pleaded guilty," misappropriation of an artifact worth $1,000. FTCA Order at 13. "The Court cannot ignore the reliability of" Jeanne Redd's guilty plea. *Id.* As a result, the claim that Love directed an informant to "employ[] a deliberately inaccurate method of valuation for the bird effigy pendant" is "implausible," and the Court ought not "accept it as true." *Id.* at 13-14. Nor have Plaintiffs identified any precedent establishing that the acts alleged here – even if plausibly alleged – would violate any clearly established constitutional right as required to pass prong two of qualified immunity. *See Reichle*, 132 S. Ct. at 2094 ("[W]e have previously explained that the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official.") (internal citations and quotations omitted).

**ii. The "excessive force" claim fails (Count III).**

Plaintiffs' "excessive force" claim rests on two allegations: (1) Defendant Love's purported "insiste[nce] that agents continue to pour into the Redd residence" after "the Redds

[9] This time around, Plaintiffs have wisely abandoned the claim that "the effigy bird pendant … has never been located or identified or otherwise demonstrated to exist." *See* Dkt. No. 47, at p.26.

[10] In light of Mrs. Redd's plea agreement, Plaintiffs' only identified source for this estimate, Dace Hyatt, *see* FAC at ¶ 53, cannot add plausibility to Plaintiffs' claim. Defendants, however, do note that as this Court may recall, Hyatt "has no formal education in the field of antiquities." *United States v. Smith*, No. 2:09-CR-243-TS, 2011 WL 839858, at *1 (D. Utah Mar. 8, 2011) (unpublished). In an unrelated matter, this Court permitted use of Hyatt's testimony under Rule 702 based on his experience in the market but noted opposing counsel's "ability to forcefully make [the] argument through cross examination" that "Hyatt's personal bias against the government's investigation and prosecution … caus[ed] him to undervalue the artifacts at issue" and "raised valid questions as to Hyatt's bias and interest." *Id.* at *2-3.

were secured and the situation was under control," FAC at 27, and (2) Defendant Barnes' alleged "humiliat[ion]" of Dr. Redd "by accusing him of crimes that he knew Dr. Redd did not commit" and "order[ing]" two unspecified agents to escort Dr. Redd to the restroom, *id.* The Court must assess these allegations "under the 'objective reasonableness' standard of the Fourth Amendment. *Thomson v. Salt Lake County*, No. 05-352, 2006 WL 3254471, at *3 (D. Utah) (unpublished), *aff'd*, 584 F.3d 1304 (10th Cir. 2009). "The precise question" on which qualified immunity turns is "whether the officer[s'] actions [were] 'objectively unreasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." *Thomson*, 584 F.3d at 1313 (emphasis added) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (refusing to consider officers' actual subjective motivations in evaluating Fourth Amendment reasonableness). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. An excessive force claim cannot overcome qualified immunity unless "*every* 'reasonable official would understand that what he [wa]s doing violate[d]'" clearly established law. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, "existing precedent must have placed the … constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083.

**a. Defendant Love is entitled to qualified immunity for allegedly ordering additional agents to the Redd home.**

Plaintiffs' claims that Defendant Love "insisted that agents continue to pour into the Redd residence" following the arrests states no viable excessive force claim. *See also* FAC at 27 ("Defendant Love … ordered agents to report to the Redd household throughout the day as they finished other raids in the Blanding area."). First, nowhere in the First Amended Complaint have

Plaintiffs alleged that these "orders" were actually followed. Assuming that they were, the First Amended Complaint gives absolutely no indication of how many additional agents arrived, how many of the original agents remained at the Redd home, how armed any agents were at this point, or whether any additional agent who arrived behaved in a threatening or intimidating way. Moreover, because the Redds were taken to court and arraigned on the day of the arrest and search, it is far from clear that they would even have been home to experience any "embarrass[ment] and humiliat[ion]" caused by the arrival of additional officers. FAC at 27. In short, the First Amended Complaint (like the complaint before it), fails to "nudge" the "excessive force" claim against Defendant Love "across the line from conceivable to plausible." *Dennis v. Watco Companies, Inc.*, 631 F.3d 1303, 1305 (10th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief'") (quoting *Twombly*, 550 U.S. at 557).

Nor can this portion of the "excessive force" claim pass the second prong of qualified immunity. "[N]othing in the fourth amendment specifies how many officers may respond to a call." *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002). No sufficiently analogous caselaw sets forth exactly how many officers ought to have been present at the Redd home. Certainly none suggests what amount is constitutionally suspect. The determination of how many officers were necessary to package and catalog the nearly 800 fragile artifacts seized from the Redd home with the requisite level of care is exactly the sort of fact-specific judgment call that qualified immunity was designed to protect. *See Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992) ("the fact that competing interests must be balanced to determine constitutionality does inject an additional factor that must be considered in determining whether

the conduct was clearly unconstitutional at the time of the actions in question"), *overruled in part on other grounds*, *Williams v. City & County of Denver*, 99 F.3d 1009, 1014-15 (10th Cir. 1996). Indeed, Defense counsel has been unable to find *any* caselaw directly addressing the reasonableness of a particular number of agents called to assist with a lengthy search for and seizure of delicate cultural relics. To the contrary, persuasive authority suggests that the allegations at issue in this case were entirely reasonable. *See United States v. Sanders*, 104 F. App'x 916, 922 (4th Cir. 2004) (unpublished) (where a warrant-authorized search "lasted for at least four hours and yielded 103 boxes of documents and some computer files," its scope "reasonably justified a large number of officers"). In any event, Plaintiffs' failure to even estimate how many officers "pour[ed] into the Redd residence," FAC at 27, makes it impossible to conclude that the number was so clearly too high in light of any caselaw as to overcome qualified immunity. *See Reichle*, 132 S. Ct. at 2093 ("To be clearly established, a right must be sufficiently clear 'that every reasonable official would have understood that what he is doing violates that right" and "existing precedent must have placed the statutory or constitutional question beyond debate") (internal citations and quotations omitted); *Phillips v. Bell*, 365 F. App'x 133, 139 (10th Cir. 2010) (unpublished) ("Following *Twombly*, we determined that 'plausibility,' as used by the Supreme Court, referred to the scope of the allegations in a complaint, and 'if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs have not nudged their claims across the line from conceivable to plausible.'") (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008)). As such, Defendant Love is entitled to qualified immunity on the excessive force claim.

**b. Defendant Barnes is entitled to qualified immunity for allegedly interrogating Dr. Redd harshly.**

Qualified immunity likewise defeats the allegation that Defendant Barnes "humiliated Dr. Redd by accusing him of crimes that he knew Dr. Redd did not commit." FAC at 27. Accusing an indicted defendant of violating the law and confronting him of the consequences of such a violation fall far short of "unreasonable" for the purposes of Fourth Amendment analysis. *See Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1194 (10th Cir. 2001) ("unlikely that harsh language alone would render a search or seizure 'unreasonable'"); *Reeves v. Churchich*, 331 F. Supp. 2d 1347, 1352 (D. Utah 2004), *aff'd,* 484 F.3d 1244 (10th Cir. 2007) ("The … allegation … that she called [plaintiff] a 'bitch' and told her to get back in her apartment … is not enough to find [defendant officer] liable for violating plaintiffs' Fourth Amendment rights.").[11] As to Defendant Barnes' alleged motivation, qualified immunity turns on "whether the officers' actions [were] 'objectively unreasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." *Thomson*, 584 F.3d at 1313 (emphasis added) (quoting *Graham*, 490 U.S. at 397); *see also Whren*, 517 U.S. at 813 (refusing to consider officers' actual subjective motivations in evaluating Fourth Amendment reasonableness). Even if this were not the case, the First Amended Complaint concedes that Dr.

[11] *See also Martin v. Sargent*, 780 F.2d 1334, 1338-39 (8th Cir. 1985) (name-calling and verbal abuse not constitutional violations); *Pena-Borrero v. Estremeda*, 365 F.3d 7, 12 (1st Cir. 2004) (rejecting claim for "a constitutional violation based on harsh language and handcuffing" where plaintiff had alleged that "since no force was necessary to effectuate his arrest, any force was therefore unreasonable and excessive"); *Arce v. Banks*, 913 F. Supp. 307, 309 (S.D.N.Y. 1996) ("[Y]elling, cursing, or even race-baiting does not violate any constitutionally protected rights"); *Wims v. New York City Police Dept.*, No. 10 CIV. 6128 PKC, 2011 WL 2946369, at *5 (S.D.N.Y. July 20, 2011) (slip) ("verbal abuse, on its own, is not actionable"); *Lucas v. City of Boston*, No. CIVA 07-CV-10979-DPW, 2009 WL 1844288, at *22 (D. Mass. June 19, 2009) (slip) ("the officers' harsh language and threatening use of their weapons, without more, would not be a sufficiently obvious violation of Mrs. Lucas's Fourth Amendment rights to overcome the officers' qualified immunity defense.").

Redd did pick up the bird effigy and contains no facts suggesting how Defendant Barnes might have been on notice that Dr. Redd was somehow "not guilty" despite this fact.

Nor does the claim that two unidentified officers escorted Dr. Redd to the restroom in an allegedly humiliating manner pass muster. First, the claim that Defendant Barnes "ordered" the escorts appears nowhere in the factual section of the First Amended Complaint and is the type of conclusory allegation not entitled to the assumption of truth. Even if Defendant Barnes did "order" the officers to escort Dr. Redd, Plaintiffs have not alleged that Defendant Barnes specified that they do so in a "humiliating" manner, a claim that even if made would be both conclusory and implausible. *See Holland ex rel. Overdorff*, 268 F.3d at 1191 (supervisory defendants who ordered use of SWAT team entitled to qualified immunity on excessive force claim because "plaintiffs did not show that [defendants] decided to use the SWAT team knowing that the SWAT team would use excessive force, intending to cause harm to any person, or that they instructed the SWAT team to use excessive force").

In any event, Dr. Redd had no clearly established constitutional right to visit the restroom escort-free, while he was under arrest and while officers were executing a search warrant in his home. *See Stewart v. City of Wichita, Kan.*, 827 F. Supp. 1537, 1539 (D. Kan. 1993) ("there is no question that [plaintiff] suffered some decrease in her ability to respond to the call of nature in the privacy which she might otherwise enjoy," but "a loss of privacy is an inherent consequence of arrest and confinement.").[12] A reasonable officer could have concluded

[12] *See also William v. Nye*, 869 F. Supp. 867, 871 (D. Kan.), *aff'd,* 83 F.3d 434 (10th Cir. 1996) (in case brought by plaintiff who had not been under arrest, noting that "[b]ecause the questioning occurred at the Law Enforcement Center, it was reasonable for an officer to escort petitioner to the restroom, rather than allowing him to move unsupervised through the building"); *Nielsen v. Bixler*, No. 8:04CV583, 2006 WL 1401711, at *3 n.5 (D. Neb. May 19, 2006) (unpublished) ("To the extent that [plaintiff] argues that a person subject to a lawful seizure has a right to immediate access to private restroom facilities on demand, I reject that argument.");

that allowing Dr. Redd – who admittedly "loved … hunting," FAC ¶ 2, and ultimately did commit suicide, *id.* at ¶ 89 – private access to a bathroom could endanger either officers or Dr. Redd. *See Chamberlain v. City of Albuquerque*, No. 92-2089, 1993 WL 96883, at *1 (10th Cir. Mar. 29, 1993) (unpublished) (recounting the "gun battle" that ensued after a suspect was "permitted … to go upstairs and use the telephone to call his lawyer," "retrieved a briefcase with a [hidden] gun in it," and "permitted … to go into the bathroom unescorted," where he drew the weapon).[13] An unescorted trip to the restroom could also have afforded Dr. Redd an opportunity to conceal or destroy evidence such as the "1/4 inch long, by 1/8 inch wide, and 1/16 inch thick shell" that he was indicted for stealing from public lands. FAC at ¶ 2. *See Hunter v. Namanny*, 219 F.3d 825, 831 (8th Cir. 2000) ("We find no authority for the existence of a right on the part of one who is lawfully detained pursuant to the execution of a search warrant, to use a toilet upon demand. Although Hunter's dignity was certainly compromised by what transpired as the search

---

*Hansen v. Schubert*, 459 F. Supp. 2d 973, 991 (E.D. Cal. 2006) (requiring plaintiff to remain in living room during search and escorting her to the restroom "were not unreasonable because they served the important law enforcement interests of preventing plaintiff from fleeing in the event that incriminating evidence was found, preventing plaintiff from destroying evidence, and preventing plaintiff from obtaining a weapon."); *Stewart*, 827 F. Supp. at 1539 (no constitutional violation when "there was a small number of officers at the center, and … the officers did not permit individual arrestees to go to the bathroom because to do so would have required decreasing the number of available officers so that escorts could be provided for persons going to the bathroom").

[13] *See also United States v. Padilla*, 819 F.2d 952, 962 (10th Cir. 1987) ("Five weapons and a silencer were discovered in the bathroom, where the removal of a floor board prior to the officers' arrival revealed their location."); *United States v. Barber*, 303 F. App'x 652, 653 (10th Cir. 2008) (unpublished) (recounting incident when "[i]nside [a] toilet bowl," an officer "found a handgun and baggies containing what appeared to be cocaine base"); *Nicholson v. Jones*, No. CIV-08-227-F, 2010 WL 2106237, at *5 (W.D. Okla. Mar. 8, 2010), *report and recommendation adopted,* No. CIV-08-0227-F, 2010 WL 2106239 (W.D. Okla. May 25, 2010) (unpublished) ("A gun, illegal drugs, and money were found together in an open shoebox on a shelf in the bathroom[.]"); *United States v. Leeper*, No. 05-10250-01-WEB, 2006 WL 3457221, at *6 (D. Kan. Nov. 29, 2006) (unpublished) ("the [bathroom] drawers could have contained handguns or broken-down (or collapsible) rifles").

was conducted, we are unable to conclude that the Constitution requires that police engaged in a search for drugs allow a resident of the subject property access to a ready means of disposal of such contraband."). In sum, these allegations cannot state a Fourth Amendment violation against Defendant Barnes, much less a clearly established one. *See Silvan v. Briggs*, 309 F. App'x. 216, 225 (10th Cir. 2009) ("not every indignity – 'even if it may later seem unnecessary in the peace of a judge's chambers' – rises to the level of a constitutional violation") (quoting *Mecham v. Frazier*, 500 F.3d 1200, 1205 (10th Cir. 2007)).

### C. Plaintiffs state no Fifth Amendment claim capable of overcoming qualified immunity (Counts IV and V).

#### i. Plaintiffs' equal protection claim fails both prongs of qualified immunity (Count IV).

Plaintiffs allege that Defendant Love violated the Equal Protection Clause by treating "the Redds differently than other alleged traffickers arrested as a part of Operation Cerberus because Defendant Love felt that Dr. Redd had" previously escaped state felony charges. FAC at 27-28. As in their original complaint, this fails to state an equal protection claim capable of overcoming qualified immunity. To state a viable equal protection claim, a plaintiff must "allege[] that she has been intentionally treated differently from others similarly situated." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998) ("In order to assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them."). Plaintiffs fail at prong one because they fail to explain what burden Dr. Redd was saddled with that any other similarly situated individual – as that term is understood in the equal protection context – was not. Plaintiffs' suggestion of Defendant Love's improper motive also falls short of plausible, as they offer no explanation as to why Defendant Love purportedly

felt some particular animus as a result of state authorities' allegedly failed prosecution or why he would feel a need to retaliate for it. *See Leverington v. City of Colorado Springs*, 643 F.3d 719, 734 n.10 (10th Cir. 2011) ("where a plaintiff's retaliation claim involves the retaliatory animus of a third party and the action of another, the plaintiff must show a causal connection between the third-party's animus and the action").

The "equal protection" claim also fails prong two. Plaintiffs have identified no authority in support of the theory that law enforcement authorities may not consider an arrestee's history of criminal charges for similar conduct when making inherently discretionary decisions concerning prosecution. *See Engquist v. Oregon Dept. of Agr.*, 553 U.S. 591, 604 (2008) ("[A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized."). Finally, it is not at all clear that a subjective motive to discriminate would be sufficient to state a constitutional violation where probable cause for arrest so clearly existed. *See Reichle*, 132 S. Ct. at 2093 (holding that "a First Amendment retaliatory arrest claim may [not] lie despite the presence of probable cause to support the arrest"); *id.* at 2093 ("This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause[.]").

**ii. Plaintiffs' due process claim cannot overcome qualified immunity (Count V).**

Plaintiffs' "due process" claim alleges that "the Defendant(s) violated Plaintiff James D. Redd's rights under the Fifth Amendment of the Constitution of the United States by violating Plaintiffs' right to due process." FAC at 28. Dismissal is warranted based solely on Plaintiffs' utter failure to explain what behavior, by what defendant allegedly gave rise to a due process

claim or what type of due process claim (substantive or procedural) Plaintiffs intend to pursue. *See* Order at 7 ("To the extent that Plaintiffs seek damages for a violation but do not specify how an individual Defendant's conduct created the violation, the claim must be dismissed."); *Bridges v. Lane*, 351 F. App'x 284, 287 (10th Cir. 2009) (where plaintiff "claim[ed] that his reputation ha[d] been injured irreparably" but "fail[ed] to link that damage to any specific defamatory statement by any specific defendant," he "fail[ed] to articulate any state law claims with the specificity required to state a plausible claim for relief or provide fair notice to the defendants"); *Holgers v. S. Salt Lake City*, No. 2:10-CV-532 TS, 2011 WL 98488, at *3 (D. Utah Jan. 12, 2011)) (slip) (dismissing complaint that neglected to explain "how the facts from the Factual Allegations Section of the Complaint fit with the legal standards and duties laid out in the individual causes of action").

Insofar as Plaintiffs attempt to raise a substantive due process claim for "excessive force," "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion, of 'substantive due process,' must be the guide for analyzing [those] claims." *Graham*, 490 U.S. at 395. Nothing else in the complaint even suggests any sort of conscience-shocking conduct necessary to state a substantive due process claim. *See, e.g., Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002) (The "ultimate" standard for substantive due process violation is "whether the challenged government action 'shocks the conscience' of federal judges."). Nor is there any indication that Dr. Redd – who was arrested pursuant to a warrant issued after a grand jury indictment, whose home was searched pursuant to a warrant, and who was arraigned and released on his own recognizance the very day of his arrest – was denied any measure of procedural due process by anyone, much less the named Defendants.

Thus, Plaintiffs cannot establish either prong of qualified immunity with respect to an alleged due process violation.

## III. CONCLUSION

For all of the reasons discussed here, and those contained in Defendants' original motion to dismiss and supporting memorandum, Defendants Barnes and Love respectfully request that this Court dismiss all of Plaintiffs' claims with prejudice.

Dated: October 1, 2012

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director, Torts Branch, Civil Division

MARY HAMPTON MASON
Senior Trial Counsel, Torts Branch

***s/ Laura K. Smith***
LAURA K. SMITH
Trial Attorney, Torts Branch
U.S. Department of Justice, Civil Division
Constitutional and Specialized Tort Litigation
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044
(202) 616-0419 (phone)
(202) 616-4314 (fax)
Laura.smith2@usdoj.gov

ATTORNEYS FOR THE INDIVIDUAL FEDERAL DEFENDANTS