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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

REPLY IN SUPPORT OF INDIVIDUAL FEDERAL DEFENDANTS' CONSOLIDATED MOTION TO DISMISS

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The Court should grant individual federal defendants Dan Love and Dan Barnes' motion to dismiss all of the claims against them. *See* Dkt. No. 60-1 ("MTD"). As explained in that motion and the briefing on Plaintiffs' original complaint, this lawsuit is an improper vehicle for Mrs. Redd to relitigate her own criminal conviction, *see id.* at 7-8, and Plaintiffs have failed to articulate facts plausibly establishing that either defendant violated any clearly established constitutional right, *see id.* at 8-22. Plaintiffs' response brief fails to explain away either of these fundamental, fatal flaws. *See* Dkt. No. 64 ("Resp."). Dismissal with prejudice is now appropriate.

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

As Defendants have explained and this Court has found in parallel litigation, the claim that Defendant Love artificially inflated[1] the value of the artifact that the Redds were indicted for stealing (and with respect to which Mrs. Redd ultimately pleaded guilty to stealing) is patently implausible, in light of Mrs. Redd's admission in her plea agreement that the bird effigy was worth $1,000. *See* MTD at 7-8; *see* Case No. 11-cv-1162, Dkt. No. 25, at 13-14 ("The court cannot ignore the reliability of such a statement."). Such a claim is also problematic in that granting relief on it would necessarily call into question the validity of Mrs. Redd's plea agreement and the criminal judgment issued as a result of it. MTD at 7 (citing *Heck v. Humphrey*, 512 U.S. 477, 486 (1994) (civil suits "are not appropriate vehicles for challenging the

[1] This claim is conclusory in that Plaintiffs offer no explanation as to how Defendant Love effected legal process against Dr. Redd or interfered with the legal process that Dr. Redd received.

validity of outstanding criminal judgments")).[2] Moreover, the doctrine of judicial estoppel precludes Mrs. Redd from pursuing claims that directly contradict the plea agreement from which she has already derived significant benefit. *Id.* at 7-8 (citing *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)). Plaintiffs respond with three arguments, none of which carries the day: (1) Mrs. Redd's position in this lawsuit is consistent with the positions she took in her criminal case, because she arguably contested this valuation of the effigy at her sentencing hearing, and her pre-sentence report states that the effigy's value is $500,[3] *see* Resp. at 15-16; (2) *Heck* and judicial estoppel do not apply because Mrs. Redd sues only on behalf of her husband's estate, *see id.* at 12-13; and (3) judicial estoppel does not apply because "courts … generally require something more than the pre-printed form that Jeanne Redd signed," *id.* at 15.

As to the "consistency" of Mrs. Redd's positions, there can be no true question. The plea agreement signed by Mrs. Redd and her attorney on July 6, 2009, unambiguously states that "the [bird effigy] pendant is valued in excess of $1000." Dkt. No. 64-2 at 4.[4] Immediately above Mrs. Redd's signature, the plea agreement states:

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[2] Contrary to Plaintiffs' suggestion, *see* Resp. at 12, Defendants have raised these arguments only with respect to the unreasonable search and seizure claims predicated on the theory that Defendant Love artificially raised the value of a bird effigy, not any claim of excessive force.

[3] The report actually values the effigy at "a *minimum* of $500." *See* Dkt. No. 64-3 at 4 (emphasis added).

[4] There is no evidence to support Plaintiffs' suggestion that Mrs. Redd had incompetent legal counsel. *See* Resp. at 17. *See* Dkt. No. 64-2 at 7 ("I have discussed this case and this plea with my lawyer as much as I wish, and I have no additional questions."); *id.* ("I am satisfied with my lawyer."). In any event, Mrs. Redd's conclusory claims with respect to the alleged

> I understand and agree to all of the above. I know that I am free to change or delete anything contained in this statement. I do not wish to make changes to this agreement because I agree with the terms and all of the statements are correct.

Id. at 8; *see also id.* at 7 ("I have no mental reservations concerning the plea.").[5] At her plea hearing,[6] Mrs. Redd's lawyer stated that "we accept [the $1,000] value for purposes of today." Dkt. No. 64-1 at 5:24-25.[7] Plaintiffs cannot now plausibly plead otherwise. *See Twombly*, 550 U.S. at 555.

Though Plaintiffs' clarification that Mrs. Redd seeks to sue only on behalf of her husband's estate may make the application of *Heck v. Humphrey* and the doctrine of judicial estoppel somewhat less straightforward, the concerns implicated by those authorities remain.

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ineffective assistance cannot defeat her failure to plausibly allege any constitutional violation on the part of either defendant. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

[5] Even accepting Plaintiffs' argument that Redd herself was not convinced that the effigy was worth $1,000 and expressed some reservations as to that value at her sentencing hearing, the relevant consideration in the context of judicial estoppel is whether she "succeeded in persuading a court to accept that" the effigy had that value. *Johnson*, 405 F.3d at 1069. Because the court accepted her plea, we know that to be the case. Plaintiffs identify no reason to suspect that the court failed in its duty to ensure that a factual basis existed to support Mrs. Redd's guilty plea before accepting it. *See North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970) ("pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea"). All of this underscores the lack of plausibility of Plaintiffs' constitutional claims.

[6] Plaintiffs' response seems to suggest that Mrs. Redd changed her plea from guilty of a felony to something else. *See* Resp. at 9. However, the change of plea was from "not guilty" to "guilty." *See* Case No. 2:09-cr-00044-CW-1, Dkt. No. 10,

[7] The fact that the pre-sentence report, drafted by a probation officer and not signed by Mrs. Redd states that "[t]he pendant had an estimated value of a *minimum* of $500" neither changes nor contradicts these facts. *See* Dkt. No. 64-3 at 4 (emphasis added). Nor is Plaintiffs' pleading consistent with the theory that $500 somehow became the generally-accepted value of the pendant. *See* Dkt. No. 56 ("FAC") at ¶ 54 ("Defendant Love artificially increased the value to $500); *id.* at ¶ 74 ("There was no evidence that the item was worth in excess of $1,000 or $500.00. The best, most favorable evidence … could only prove a value of $125.00."); *id.* at ¶ 80(b) ("its value … was not more than $500.00. Experts estimate the pendent [*sic*] was actually worth between $75.00 and $100.00.").

The specific circumstances of this case – where the named plaintiff was not acquitted but rather died before he could be prosecuted, and where the person pursuing the suit ostensibly on his behalf has pleaded guilty to associated crimes – indicate that the considerations underlying the *Heck* decision remain acutely present. And while Plaintiffs are correct that the Tenth Circuit has not addressed whether *Heck* would bar a claim by a *true* third party, it has remarked (in the context of extending *Heck*'s reach to criminal charges) that "*Heck* should apply … when the concerns underlying *Heck* exist." *Buck v. City of Muskogee Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999). The same is true with respect to the doctrine of judicial estoppel. Although Mrs. Redd may wear a different "hat" in pursuing these *Bivens* claims nominally on behalf of her husband, she made and benefited from a plea agreement and now seeks money damages based on allegations contrary to that plea agreement. Thus, should the Court elect to address the *Heck* issue or judicial estoppel – which it need not, in light of the clear insufficiency of the complaint otherwise – it ought not allow Mrs. Redd, through artful pleading, to use this lawsuit to challenge the very investigation, including specific matters to which she pleaded guilty, that resulted in her own conviction.

Finally, the claim that courts generally require "something more than the pre-printed form that Jeanne Redd signed" to apply the doctrine of judicial estoppel, *see* Resp. at 15, lacks any support. Plaintiffs identify no case in which a court applying the doctrine refused to rely on a signed plea agreement, or required "actual verbal statements to the judge." *See id.* In any event, when Plaintiffs' own attorney stated in court that they "accept[ed] [the $1,000] value," she did not correct him, and she accepted the benefit of the plea agreement. *See* Dkt. No. 64-1 at 5.

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

As explained in Defendants' opening brief, 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 personally violated a clearly established constitutional right. *See* MTD at 8 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)); *Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir. 1992); *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003)). "When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show the defendant is not entitled to immunity." *Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006); *see also Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) ("[P]laintiffs … carry 'the burden of showing both that a constitutional violation occurred and that the constitutional right was clearly established at the time of the alleged violation.") (quoting *Williams v. Barney*, 519 F.3d 1216, 1220 (10th Cir. 2008)). "To meet [their] burden," Plaintiffs "must 'do more than simply allege the violation of a general legal precept'; rather, they are required to 'demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant[s'] actions were clearly prohibited." *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1184 (10th Cir. 2010) (quoting *Jantz v. Muci*, 976 F.2d 623, 627 (10th Cir. 1992)).

Here, Plaintiffs do no more than make attempts at drawing superficial distinctions between the cases cited in Defendants' brief and the allegations at issue. *See, e.g.*, Resp. at 28 (arguing that *Reeves v. Churchich*, 331 F. Supp. 2d 1347 (D. Utah 2004), does not apply because rather than calling Dr. Redd "a bitch and order[ing] him to get back in [an] apartment," Defendant Barnes allegedly "accused Dr. Redd of committing a crime"). This falls far short of meeting their burden of affirmatively presenting authority in their favor. *See Debbrecht v. City of Haysville, Kan.*, No. 10-1419-JAR-DJW, 2012 WL 1080527, at *10 (D. Kan. Feb. 7, 2012)

(slip) ("to overcome [defendant]'s claim of qualified immunity, plaintiffs must make such a showing by reference to applicable Tenth Circuit or Supreme Court caselaw").

A. Plaintiffs continue to fail to adequately allege personal involvement of Defendants Love and Barnes in each claim.

"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.'" Dkt. No. 55 at 6 (quoting *Iqbal*, 556 U.S. at 676); *id.* at 7 ("the first requirement for Plaintiffs is to plead with specificity the alleged constitutional violations against each individual Defendant from which they seek damages"); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) (plaintiffs must "make clear exactly *who* is alleged to have done *what* to *whom* … as distinguished from collective allegations against the state").[8] In their motion to dismiss, Defendants demonstrated that Plaintiffs failed to meet this requirement as to the Third Cause of Action for "excessive force." *See* MTD at 11. This is because neither

[8] In accordance with DUCiv R 7-1(b)(3)(A), this Reply will address only "matters raised in the memorandum opposing [Defendants'] motion" to dismiss. For the sake of clarity, however, Defendants note that Plaintiffs have not responded to the argument that Defendant Barnes cannot be held personally liable on Plaintiffs' First and Second Causes of Action, which depend entirely on allegations of wrongdoing by Defendant Love. *See* MTD at 10-11. Nor have Plaintiffs responded to Defendants' points that neither Defendant is accused of personally participating in any exercise of physical force against Dr. Redd and that Defendant Love is not accused of participating in the allegedly "excessive" interrogation. *Id.* Plaintiffs have thus abandoned Counts One and Two as to Defendant Barnes, any excessive force claim based on the interrogation as to Defendant Love, any excessive force claim based on the number of officers present as to Defendant Barnes, and any excessive force claim based on actual physical force used against Dr. Redd as to both Defendants. *See Granato v. City and County of Denver*, No. 11-cv-00304-MSK-BNB, 2011 WL 3820730, *3 n. 2 (D. Colo. Aug. 30, 2011) (unpublished) ("the Court assumes that [plaintiff's] failure to separately address [other constitutional claims] in her response to the motion to dismiss reflects an abandonment of those claims"); *Turney v. Dz Bank AG Deutsche Zentral Genossenschaftsbank*, No. 09-2533-JWL, 2010 WL 3735757, *6 (D. Kan. Sept. 20, 2010) (unpublished) ("Defendants seek dismissal ... for various reasons. Plaintiffs have not responded to these arguments in their opposition brief. Accordingly, the Court deems this count to have been abandoned by plaintiffs.").

individual defendant is accused of personally restraining Dr. Redd or subjecting him to physical force over the course of his arrest, or even deciding how many agents to send to the Redd home initially, or how armed those agents should be. *Id.*

Plaintiffs concede that they have "no evidence suggesting that Defendant Barnes played any role in deciding how many agents to send to the Redd household." Resp. at 20. As to Defendant Love, they argue that "since Defendant Love headed Operation Cerberus, it is plausible that his organization of the raid would encompass the amount of agents to send to the Redd household as well as the manner in which they entered and the dress they donned." *Id.* This argument fails for two reasons. First, regardless of the plausibility of such a claim, Plaintiffs have not made it in either iteration of their complaint. *See* FAC at 27 (in "excessive force" cause of action, referring only to Defendant Love's purportedly ordering additional agents to the home following the Redds' arrests and "Dr. Redd's interrogation"). Moreover, conclusorily describing someone as the "head" of an operation is not enough to sufficiently allege personal involvement in a purported constitutional violation. *See Iqbal*, 556 U.S. at 677 ("each Government official, *his or her title notwithstanding*, is only liable for his or her own misconduct") (emphasis added).[9] Nor can the conclusory claim that "Defendant Love masterminded the raid" suffice. *See Iqbal*, 556 U.S. at 680-81 (allegations "that Ashcroft was the 'principal architect of [an] invidious policy" and "Mueller was 'instrumental' in adopting and executing it" are "bare assertions" that "are conclusory and not entitled to be assumed true").

[9] *See also Williams v. Berney*, 519 F.3d 1216, 1225 (10th Cir. 2008) ("official position alone is not enough to create a substantive due process claim"); *Smith v. Millet*, No. 07-723, 2009 WL 3181996, at *8 (D. Utah Sept. 28, 2009) (unpublished) ("despite identifying [defendant] as the Task Force Commander, Plaintiff has not alleged any facts showing that [defendant] personally directed or controlled either of the investigations in this case or directly caused any injury by failing to supervise his officers" and so stated no "plausible claim for relief").

And even if Defendant Love played some role in deciding how many officers should visit the Redd home, what they should wear, or how armed they should be, this is not enough to plausibly suggest that he is responsible for any unreasonable behavior that they allegedly engaged in once they arrived. *See Holland v. Harrington*, 268 F.3d 1179, 1191 (10th Cir. 2001) (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 … no violation of a constitutional right arising from the decision to deploy the SWAT Team … has been established").

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

i. Claims that the value of the bird effigy was deliberately inflated (Counts I and II) remain implausible.

As explained, *supra*, Mrs. Redd's own guilty plea renders implausible any claim that federal agents artificially inflated the value of the bird effigy. *See* MTD at 12-13. This Court correctly reached the same conclusion in parallel proceedings against the United States. *See* Case No. 11-cv-1162, Dkt. No. 25, at 13-14 ("The Court cannot ignore the reliability of such a statement."). The pre-sentence report and transcript now proffered by Plaintiffs are red herrings that neither contradict nor change this fact. Plaintiffs' own decision not to offer these exhibits or make arguments based on them in the FTCA context is a particularly compelling indication of their irrelevance.[10] Just as it correctly did in the FTCA case, the Court should dismiss such claims in this *Bivens* action.

[10] Plaintiffs have not responded to Defendants' point as to the lack of precedent establishing that the acts alleged in the First Amended Complaint – even if plausibly alleged – would violate any constitutional right as required to pass prong two of qualified immunity. MTD at 13 (citing *Reichle v. Howard*, 132 S. Ct. 2088, 2094 (2012)) ("[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 that right are clear to a reasonable official.") (internal

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

As pleaded, Plaintiffs' excessive force claim rests on two allegations: (1) Defendant Love's purported ordering of additional agents to the Redd home following the Redds' arrest and (2) the interrogation of Dr. Redd. *See* FAC at 27.[11]

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

As Defendants have explained, Plaintiffs have failed to plausibly allege that Defendant Love was responsible for the number of agents who initially arrived at the Redd home or that Defendant Love caused so many agents to arrive at the Redd home as to constitute a use of excessive force, clearly established or otherwise. *See* MTD at 14-15. Plaintiffs allege nowhere

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quotation omitted). Plaintiffs also offer no substantive response on the issue of the lack of plausibility imparted by their chosen "expert." *See* MTD at 13 n.10. As confirmed in prior proceedings before this Court, Hyatt "has no formal education in the field of antiquities," and Judge Stewart has 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." *See United States v. Smith*, No. 2:09-CR-243-TS, 2011 WL 839858, at *1, *2-3 (D. Utah Mar. 8, 2011) (unpublished).

[11] Plaintiffs' excessive force claim does not rely on the number of agents at the Redd home at the beginning of the day. *See* FAC at 27. In their opposition to Defendants' motion to dismiss, Plaintiffs seem to suggest that their excessive force claim encompasses the allegation that "100 plus heavily armed officers" initially arrived at the Redd home. *See* Resp. at 26. The Court must reject such an attempt because "[w]hile it *might* be appropriate for a court to consider additional facts or legal theories asserted in a response brief to a motion to dismiss if they were consistent with the facts and theories advanced in the complaint, a court *may not* consider allegations or theories that are inconsistent with those pleaded in the complaint." *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001) (internal citation omitted, emphasis added). Rather than "100 plus" officers, Plaintiffs' First Amended Complaint alleges that the number of agents at the Redd home at the beginning of the day was something less than "approximately 80." *See* FAC at ¶ 1 ("approximately 80 federal agents" carried out a total of "24" arrests that day throughout the Four Corners Region, including "16" in the town of Blanding). In any event, as Defendants have explained thoroughly, Plaintiffs have not plausibly alleged that either Defendant Barnes or Defendant Love was personally responsible for the number of officers who initially arrived at the Redd home.

in the First Amended Complaint that anyone actually followed Defendant Love's alleged instructions to "continue to pour into the Redd residence" following the arrests of the Redds. *Id.* at 14. Even if these instructions were followed, "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." *Id.* at 14-15. And, because Dr. Redd was taken to court and arraigned on the day of the search, it is far from clear that he would even have been home to experience any "embarrass[ment] and humiliat[ion]" caused by the arrival of additional officers. *Id.* at 15. Plaintiffs contest none of these points. *See* Resp. at 27 (arguing only that Plaintiffs were not required to "conduct discovery prior to the filing of the Complaint").

Defendants have also explained that this portion of the excessive force claim cannot pass the second prong of qualified immunity because, even if plausible, it states no violation of clearly established law. MTD at 15-16. In doing so, Defendants cited caselaw demonstrating the absence of any clearly established rule as to how many agents ought to participate in a lengthy search and seizure involving a large volume of delicate cultural artifacts, as well as the existence of persuasive authority suggesting that calling a large number of officers would have been objectively reasonable under the circumstances.[12] And, as Defendants have explained, 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. MTD at 16 (citing *Reichle*, 132 S. Ct. at 2093) ("existing precedent must have placed the … constitutional question beyond debate.")). Plaintiffs have

[12] *See id.* (citing *McNair v. Coffey*, 279 F.3d 463, 466 (7th Cir. 2002); *Medina v. City & County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992), *abrogated in part on other grounds, see Ellis v. Ogden City*, 589 F.3d 1099, 1103-04 (10th Cir. 2009); *United States v. Sanders*, 104 Fed. Appx. 916, 922 (4th Cir. 2004) (unpublished).

responded to none of these points. At this juncture, it is Plaintiffs' burden to identify caselaw that clearly establishes their claims, not merely to urge non-dispositive distinctions in the wealth of authority cited by Defendants. *See Busby v. Dickson*, No. 1:10-CV-171, 2012 WL 918480, at *7 (D. Utah Mar. 16, 2012) (slip) ("Plaintiff has not offered any caselaw showing that the unreasonableness of this action was clearly established at the time of the incident"). They have failed to "satisfy [their] heavy two-part burden" of "showing that (1) the defendant[s] violated a constitutional or statutory right and (2) the right was clearly established[.]" *Buck v. City of Albuquerque*, 549 F.3d 1269, 1277 (10th Cir. 2008).

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

As Defendants have now explained in two rounds of briefing, the "verbal abuse" alleged in the complaint simply does not rise to the level of a constitutional violation. *See* MTD at 17. Accusing an indicted defendant of violating the law and confronting him with the consequences of such a violation are not objectively "unreasonable" for the purposes of Fourth Amendment analysis. *Id.* (citing, among many others, *Holland*, 268 F.3d at 1194); *Reeves v. Churchich*, 331 F. Supp. 2d 1347, 1352 (D. Utah 2004), *aff'd*, 484 F.3d 1244 (10th Cir. 2007)).[13] The claim that two unidentified officers escorted Dr. Redd to the restroom in an allegedly humiliating manner also falls short, because (1) it 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, and (2) even if Defendant Barnes did "order" the officers to escort Dr. Redd, Plaintiffs have not alleged

[13] What little caselaw Plaintiffs do cite indicates only that courts should consider "verbal interaction as well as … physical conduct" when evaluating Fourth Amendment reasonableness and that "verbal abuse *may be* sufficient to tip the scales *in a close case*." *See* Resp. at 27 (quoting *Holland*, 268 F.3d at 1194) (emphasis added). This is not a close case, because Plaintiffs have not alleged that Defendant Barnes personally engaged in *any* "physical conduct" with respect to Dr. Redd. Resp. at 27 (quoting *Holland*, 268 F.3d at 1194).

that Defendant Barnes specified that they do so in a "humiliating" manner, a claim that even if made would be both conclusory and implausible. MTD at 18 (citing *Holland*, 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")).[14] Plaintiffs offer no authority contradicting Defendants' showing of a lack of caselaw indicating that the incident described for the first time in the First Amended Complaint violated clearly established law. *See* MTD at 18-20; Resp. at 29-30. Laid bare, Plaintiffs' claim relies on nothing more than harsh language and Dr. Redd's subjective feeling of humiliation, far less than is required to state a claim for objectively unreasonable behavior under the Fourth Amendment. *See Silvan v. Briggs*, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (unpublished) ("while we do not doubt that being detained in handcuffs in public view would be traumatic, not every indignity … rises to the level of a constitutional violation"). Once again, Plaintiffs fail to carry their burden.

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

As Defendants have explained and Plaintiffs have not contested, to state a viable equal protection claim, a plaintiff must "allege[] that she has been intentionally treated differently from others similarly situated." MTD at 20 (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Plaintiffs' equal protection claim fails both prongs of the qualified immunity inquiry

[14] Plaintiffs' response brief argues that "Defendant Barnes humiliated Dr. Redd while Dr. Redd used the restroom," Resp. at 28, and that "there is simply no reason that Defendant Barnes could not remove Dr. Redd's handcuffs to allow him to use the restroom," *id.* at 21. However, the First Amended Complaint makes clear that it was "unidentified agents," not Defendant Barnes, who "would not remove Dr. Redd's handcuffs so he could properly clean himself." FAC at ¶ 68.

because: They never explain what burden Dr. Redd was saddled with that any other similarly situated individual was not (prong one); and they 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 and thus cannot state a clearly established equal protection claim (prong two). MTD at 20-21. To these points, Plaintiffs offer no meaningful response, declining to even attempt identifying any individual similarly-situated to Dr. Redd who was treated differently from him.

The First Amended Complaint utterly failed 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 intended to pursue. *See* FAC at 28. In their response brief, Plaintiffs clarify that they wish to pursue a substantive due process claim. *See* Resp. at 32-33. However, as explained in Defendants' opening brief, "*all* claims that law enforcement officers have used excessive force … in the course of an arrest … should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process approach.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989); *see* MTD at 22. Even if this were not the case, nothing in the complaint even suggests the sort of conscience-shocking conduct necessary to state a substantive due process claim. MTD at 22.[15] As to both points, Plaintiffs respond with no authority to the contrary. *See* Resp. at 32-33. Thus, on an issue on which *Plaintiffs* bear the burden, they fail completely to cite any caselaw – attempting only (unpersuasively) to distinguish Defendants'. This is simply not enough. *See Hale v. Ashcroft*, No. 06-cv-541-REB-KLM, 2008

[15] Even if the Fifth Amendment Substantive Due Process clause did apply here, Plaintiffs are mistaken in suggesting that that the substantive due process standard for excessive force claims is "deliberate indifference" or "deliberate indifference to innocence." *See* MTD at 22 (citing *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002)); *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) ("as with *all* substantive due process claims, the supervisor's conduct must shock the conscience") (emphasis added).

WL 4426128, at *9 (D. Colo. Sept. 24, 2008) (unpublished) ("Plaintiff must … show that it is clearly established that such conduct constitutes a constitutional violation by pointing to caselaw from the U.S. Supreme Court or Tenth Circuit that recognizes this right in the particularized circumstances of the instant case.") (internal citation and quotations omitted). Defendants are therefore entitled to dismissal.

III. Conclusion

For the reasons discussed here, in Defendants' motion to dismiss Plaintiffs' First Amended Complaint and supporting memorandum, and 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: November 26, 2012

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