No. _____

In The
Supreme Court of the United States

ANTHONY AND MELISSA STONECIPHER,

Petitioners,

v.

SPECIAL AGENTS CARLOS VALLES; JOHN ESTRADA; MATT CRECILIUS; DAVID TABULLO; McCARTHY; KING; JORGENSEN; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; and UNITED STATES MARSHALS JOHN DOES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether legally-trained federal agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) should be granted qualified immunity on Petitioners' Fourth, First, and Fourteenth Amendment *Bivens*[1] claims, where agents knowingly, maliciously, and/or recklessly provided false information to a neutral magistrate, such that a search warrant wrongfully issued for Petitioners' private home.

2. Whether Petitioners' separate claims of overly-broad execution of a search warrant, and excessive force, should have been permitted narrowly-tailored discovery and jury consideration.

3. Whether Petitioner's warrantless home arrest was supported with objective probable cause, where information was reviewed by a prosecuting U.S. Attorney, and member of the prosecutorial team, several months prior to conducting a warrant-based search, under *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012).

4. Whether a Suspended Imposition of Sentence (SIS) from Missouri, which does not constitute a conviction of domestic violence in New Mexico or under a plain reading of federal firearms statutes [27 CFR 478.11 and 18 U.S.C. §921(a)(33)], provided arresting officers with objective probable

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

QUESTIONS PRESENTED – Continued

cause for causing a warrantless arrest and warrant-based search of the private home of husband and wife.

5. Whether a search warrant was facially invalid when it was unaccompanied by either a probable cause statement left at the scene, or a complete inventory of items seized at Petitioners' home, and failed to include willfully-concealed exculpatory evidence, under *Brady v. Maryland*, 373 U.S. 83 (1963).

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OPINIONS BELOW

The Tenth Circuit Court of Appeals selected its opinion for publication at 759 F.3d 1134 (10th Cir. 2014). The U.S. District Court for the District of New Mexico did not publish its opinions in this case. Its rulings appear reprinted in the Appendix **("App.")** at 29-108.

STATEMENT OF JURISDICTION

Anthony and Melissa Stonecipher appealed the *Opinion* and *Order* of the U.S. District Court for the District of New Mexico, the Honorable Judith Herrera presiding. The District Court had jurisdiction under U.S. Const. art. III and 28 U.S.C. §1331, and entered its *Memorandum Opinion and Order* (Doc. 132) granting federal Defendants' *Renewed Motion to Dismiss or, in the Alternative, for Pre-discovery Summary Judgment* (Doc. 90); filed June 28, 2013 and *Final Judgment* (Doc. 133). The Tenth Circuit Court of Appeals had jurisdiction under Fed.R.App.P. 4(a)(1)(A), and Affirmed the District Court on July 1, 2014. On July 30, 2014, Petitioners' *Petition for Rehearing and Hearing En Banc* was denied **(App. 109)**. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV (1791).

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

27 CFR 478.11

"What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms."

18 U.S.C. §922(g)(9)

"It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or

> transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

STATEMENT OF THE CASE

This is a civil rights lawsuit from the State of New Mexico, brought following an unlawful home invasion and warrantless arrest on May 18, 2010 of disabled military veterans, Petitioners Anthony and Melissa Stonecipher. The Stoneciphers are gun collectors, who at all times strictly adhered to federal and state firearms laws. They peacefully bore arms, stored responsibly in a gun safe, and in the privacy of their own home. After an extensive period of undercover investigation, the BATF raided the Stonecipher family's home on May 18, 2010, arrested Anthony, and charged him with violation of 18 U.S.C. §922(g)(9), ultimately dismissed in Anthony's favor without prejudice [(Appellants' Tenth Circuit Appendix, "DNM," at 360, 4) and District Court Document No. **("Doc.")** 24-5]. Respondents found no contraband or actual evidence of crime in the home. On January 13, 2011, the Stonecipher family brought a mixture of state and federal claims under multiple theories of

liability,[2] against both a mixture of state and federal Defendants, under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971); 42 U.S.C. §1983; and claims under the Constitutions of the U.S. and New Mexico. Plaintiffs alleged violations of their civil rights as guaranteed by the 1st, 4th, and 14th Amendments. These violations included use of excessive force, malicious prosecution without probable cause, unreasonable seizure, unreasonable search, and retaliation for expression of speech.

The Petition concerns only those remaining counts relevant to Special Agents with the BATF: Carlos Valles, John Estrada, David Tabullo, First Names Unknown ("FNU") McCarthy, King, Jorgensen, and unknown United States Marshals John Does ("Respondents"). On May 16, 2011, the Stoneciphers demanded trial by jury pursuant to U.S. Const. amend. VII, relief currently denied. On June 27, 2011, Defendants filed a Partial Motion to Dismiss as to the individually-named Federal Agents. On January 5, 2012, the District Court granted in part, and

[2] While drafting this Petition, this Court heard oral argument on Oct. 6, 2014, concerning similar and reoccurring issues in *Heien v. North Carolina,* No. 13-604. This case is distinguished because: 1) it involves a home invasion and not a traffic stop; 2) the New Mexico Supreme Court does not recognize the *Leon* good faith exception; 3) this federal case was unilaterally removed by Respondents, denying N.M. opportunity to rule on Petitioners' N.M.Const. art. II §10 claims; 4) Petitioners preserved arguments in the Tenth Circuit concerning denial of meaningful remedy.

denied in part, federal Defendants' Partial Motion to Dismiss, based on qualified immunity and other grounds ["2012 Order" **(App. 64-108)**]. Judge Bruce Black determined that the Stonecipher family's U.S. Const. amend. I Retaliation Claim, and their U.S. Const. amend. IV claims could proceed forward **(App. 89)**.

The court dismissed Petitioners' U.S. Const. amend. II claims because they had adequate remedies available under U.S. Const. amends. IV and I, and did not extend *Bivens* to the Second Amendment pursuant to this Court's reasoning in *Wilkie v. Robbins*, 551 U.S. 537 (2007), and lack of clearly-established law extending *Bivens* under *Heller v. District of Columbia,* 554 U.S. 570 (2008) **(App. 84)**.

Anthony's excessive force, unlawful search and seizure, First Amendment retaliation, and criminal prosecution without probable cause claims survived as " . . . the Court concludes that Agent Valles cannot rely on *Leon's* good-faith exception as a basis to dismiss Counts I-IV and VI." **(App. 83).** In conflict with an Order issued a year later by a reassigned trial judge, Judge Black concluded that Plaintiffs satisfied the two-prong inquiry governing qualified immunity: **"[f]irst, the Plaintiffs have established that the Agents violated their constitutional right to be free from unreasonable searches and seizures." (App. 76).** "In denying qualified immunity, and examining 'the totality of the circumstances set forth in Valles' affidavit, *see Illinois v. Gates*, 462 U.S. 213,238 (1983), the Court [was] unable to find a

'substantial basis for concluding that probable cause existed.' . . . Accordingly, the Court concludes that the Complaint is sufficient to set forth a claim that the Agents violated Plaintiffs' Fourth Amendment rights by entering the residence, conducting a search, detaining the Stoneciphers, and instigating the criminal process without a valid warrant or probable cause." **(App. 83).**

Similarly, Judge Black found that the good-faith exception to the warrant requirement did not apply, pursuant to this Court's reasoning in *Leon.* " . . . It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware*, 438 U.S. 154 (1978)." *United States v. Leon*, 468 U.S. 897,914 (1984).

New Mexico does not recognize the *Leon* good-faith exception under art. II §10 of the State Constitution. Petitioners argued that both the sovereignty of New Mexico and its citizens were infringed by Respondents' heavy-handed misapplication of federal law. ("We agree . . . that the good-faith exception is incompatible with the guarantees of the New Mexico Constitution that prohibit unreasonable searches and seizures and that mandate the issuance of search warrants only upon probable cause.") *State v. Gutierrez*, 116 N.M. 431,432 (1993).

Even assuming negligent states of mind on the part of Respondents (Petitioners always argued that

the agents' states of mind were reckless, knowing, and/or malicious), New Mexico seeks to protect its citizens to greater extent. By granting the Writ, this Court may provide import to New Mexico law, protecting the sovereignty of the State's decisions from federal encroachment. Supplying predictability to enforcement of federal firearms laws, and interpreting them in balance with Constitutional guarantees, are concerns of national importance.

Respondents successfully applied this Court's holding in *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012), arguing that a federal criminal prosecutor's review of the search warrant application granted Respondents immunity, despite ample evidence of malicious and reckless intent on the part of arresting agents, who *all* acknowledge receiving extensive legal and professional training in the enforcement of federal firearms law. "Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments.' . . . " *Messerschmidt,* 132 S.Ct. at 1249.

This case is distinguished from *Messerschmidt* because: 1) the Stonecipher family is missing numerous personal items seized from the privacy of their home, not inventoried in the warrant receipt, including photos of an intimate nature between husband and wife; 2) Petitioners endured verbal ridicule from Respondents regarding the private photographs, prior to conducting a warrantless arrest; and 3) lead agents were in possession of information, for over five months,

conclusively showing Anthony was never convicted of a crime of domestic violence.

It was undisputed by the Government that Agent Valles reviewed numerous official documents, beginning on December 8, 2009, and absolutely **knew** that Anthony had zero (0) total convictions in his FBI NCIC report and certified Missouri State Highway Patrol Criminal History Record, obtained at Valles's own request. Appellees' Sealed Tenth Circuit Appendix (2 Aple. Sealed App. 186-188) (Doc. 91-2,p.3). Valles had information displaying zero convictions, including cautionary language in capital letters that: "SUSPENDED IMPOSITION OF SENTENCE DISPOSITIONS ARE NOT CONVICTIONS" [(Direct Quote, EMPHASIS in original) (Doc. 91-2,p.5)]. Valles had these documents in his possession, at least five months and nine days prior to seeking a search warrant, definitively proving Anthony was never convicted of any crime. Valles's concealing, or failure to include, the information, reporting zero (0) "Total Convictions" in his affidavit, should be construed as reckless at best, malicious at worst (Doc. 91-2,p.4). For Valles to swear that Anthony was "convicted" of a crime was a false, malicious, and/or reckless statement, made in affidavit form, to a neutral magistrate. It lies at the heart of the Stonecipher family's plea for relief from this Court. The integrity of our justice system is based on the reliability of sworn statements from highly-trained law enforcement agents. It is compromised through allowing executives to "say

what the law is," based on their own subjective understandings or feigned mistakes of law.

This Court's decision in *Messerschmidt*[3] was narrowed where the warrant was facially valid and the officers were not "plainly incompetent" because the warrant was complete and included a probable cause statement. 132 S.Ct. 1235. The officers there reasonably relied on a magistrate to have read the Affidavit. Here the initials 'KBM' are found nowhere on the Valles Affidavit. It was not left at the scene, making other agents' reliance on such problematic, and later challenge by Anthony's criminal defense attorney, next to impossible. Anthony's attorney had to independently obtain the Affidavit and exculpatory NCIC well after Valles filed a Criminal Complaint. *Compare* (Doc. 22-1,p.4-5) *and* Clerk's Minutes (Doc. 22-3). After Anthony was formally charged with violation of federal gun possession laws, the withholding of these documents implicates this Court's Due Process concerns in *Brady v. Maryland,* 373 U.S. 83 (1963). Star Chamber proceedings are antithetical to a society which values openness, education, and the rule of law.

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[3] Detective Messerschmidt learned that Bowen had been arrested and convicted for numerous violent and firearm-related offenses, spanning 17 pages with 31 total arrests. *Id.* at 1242. Here, Anthony's FBI NCIC report showed 0 convictions and 1 arrest, and Valles had five months to read such (Doc. 24-1,p.2).

Here, in addition to defective information included in the warrant affidavit, the Petitioners preserved the argument that the warrant was facially invalid, implicating *Groh v. Ramirez,* 540 U.S. 551 (2004). ("The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity . . . ('[A] warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.'") *Id.* at 557. In the instant case: 1) not even a redacted version of the Affidavit was provided to the Stonecipher family;[4] 2) the receipt did not include specificity of property actually seized; 3) the search was overly-broad in scope; and 4) the affidavit was unreliable.

The cases cited *supra* were clearly-established law at the time of the invasion, and were only strengthened by this Court's recent decisions in *Riley v. California* ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'"). *Riley,* 134 S.Ct. 2473,2482 (2014); and *United States v. Castleman*, 134 S.Ct. 1405 (2014) (respondent's conviction qualified as a misdemeanor crime of domestic violence where he had pled guilty to having intentionally or knowingly caused bodily injury to the mother of his child, and

[4] The Government left undisputed that Agents refused to provide a copy of the probable cause statement to the Stonecipher family. *See* Answer of Federal Agents (Doc. 71, ¶70).

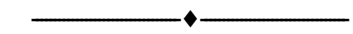
the knowing or intentional causation of bodily injury necessarily involved the use of physical force).

This case is highly distinguished from *Castleman*, in that it involves a suspended imposition of sentence, and not a conviction, and seeks civil redress for the Stonecipher family under *Bivens,* as opposed to criminal relief.

Discovery never opened on the instant case. During the parties' initial Fed.R.Civ.P. 16 conference before the non-dispositive Judge, Respondents' attorney announced his intention to file a second Motion for Summary Judgment. Neither side had an opportunity to conduct depositions, interrogatories, requests for production, or requests for admission, nor discover basic information such as the names of several unnamed agents and marshals who participated in the raid, as eyewitnesses to the excessively forceful arrest. Anthony's military service-related back injury was exacerbated by an unknown Respondent, who placed his knee in Anthony's back during handcuffing, after he was forced to the ground outside his home. *See* Anthony's Affidavit (Doc. 104-1). As a result, Anthony was diagnosed by a clinical psychologist with "Post-traumatic stress disorder (PTSD), chronic 309.81, Major Depressive Disorder 311.00," *non-de-minimis* injuries which will never receive jury consideration, should the Writ be denied (Doc. 5,p.11). Similarly, Melissa underwent a humiliating search beneath her undergarments, and male agents searched through her lingerie drawers and

verbally ridiculed her about the contents of photographs. *See* Affidavit of Melissa and Complaint (Doc. 1-2, at ¶33); (Doc. 101). Respondents successfully argued that discovery should be stayed. No limited discovery was granted the Stonecipher family in rebutting Defendants' numerous motions to dismiss.

On June 4, 2012, Defendants filed a *Renewed Motion to Dismiss or, in the Alternative, for Pre-discovery Summary Judgment.* On June 28, 2013, following the retirement of Judge Black, a long period of inactivity, and two trial judge reassignments, Judge Herrera entered an Order disposing of the Stonecipher family's case and dismissing all Counts against Respondents, Affirmed by the U.S. Court of Appeals for the Tenth Circuit on July 1, 2014. Denial of the Writ would ratify the Agents' malicious behavior and gross invasions of privacy.



STATEMENT OF FACTS AND INTRODUCTION

Petitioners are disabled veterans, honorably discharged from the Armed Forces, having dutifully and courageously served their county in Operation Iraqi Freedom. During his tour of duty in Iraq, Anthony Stonecipher survived multiple rocket-propelled grenade attacks, in support and defense of the U.S. Constitution, and the guaranteed protections he now attempts to employ, on behalf of himself and all citizens. In 2004, Anthony became injured and partially-disabled while serving in Iraq. After receiving numerous

awards for valor, Anthony was Honorably Discharged on October 3, 2005. At the time of the raid, he continued to productively work as a radar technician, with reduced hours due to the injuries, both physical and psychological.

Melissa Stonecipher served in the U.S. Army as a PFC and animal care specialist, training dog handlers in proper care for animals, receiving the Global War on Terrorism Service medal, in addition to numerous other distinctions and honors. She was honorably discharged at Fort Bliss, after courageous and devoted service to her country. Melissa was compensated as 100% disabled by the VA.

At the time of the raid, Petitioners were married. Anthony and Melissa initiated divorce proceedings in Oct. 2011, following a deteriorating relationship, and psychological distress, caused and exacerbated by the unlawful invasion of their home, on May 18, 2010. Respondents are several, still largely unknown by name, masked BATF agents with assault rifles, who forcefully entered the family's home on May 18, under false pretense and undercover capacity. After months of undercover investigation into the private lives of the Stonecipher family, Respondents posed as the "uncles" of an Air Force officer, and expressed feigned interest in buying firearms from Anthony through completely legal, private sale. The precise details of the undercover investigation, are unavailable to Petitioners. The doctrine of qualified immunity was utilized to deny the family narrowly-tailored discovery.

On May 17, 2010, Magistrate Judge Molzen ordered the seizure of the Petitioners' firearms, based upon faulty information intentionally, maliciously, and/or recklessly provided by Agent Valles with the BATF. Valles misled the magistrate by swearing in his Affidavit in Support of a Search Warrant Anthony was **convicted** of a domestic assault charge in 2007, which would prohibit him from owning a firearm under 18 U.S.C. §922(g)(9). Valles utilized the word **"conviction,"** without qualification or disclosure that he knew, five months prior, the actual disposition was a Suspended Imposition of Sentence (SIS) (Doc. 23-1,p.7,¶8). Anthony was never convicted of a crime of domestic violence, nor was he informed of any weapons restrictions. On April 16, 2007 in Missouri, Anthony agreed to a SIS on a misdemeanor domestic assault allegation. The numeral zero (0) appeared below the words "Total Convictions" in the certified Missouri record obtained, reviewed, and concealed by Valles in Jan. of 2010 (Doc. 26-2,p.4).

As instructed by the BATF's own website,[5] Missouri law applies in determining that the SIS Anthony did receive does not equate to a conviction under 18 U.S.C. §921(a)(33) and 27 CFR 478.11. *See* BATF Website Page, Presented as FAQ to Public (Attachment B to Appellants' Tenth Cir. Opening Brief).

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[5] *See* http://www.atf.gov/firearms/faq/misdemeanor-domestic-violence.html, last visited October 2, 2013. This Court may take judicial notice of public documents generated by the BATF under a totality of the circumstances test.

Not only was the law publicly available to gun owners on Respondents' website, but Petitioners acted in reasonable reliance on such. The law was information available to all Agents for over five months, prior to the raid of May 18. "The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation." *United States v. Int'l Minerals*, 402 U.S. 558,563 (1971). Respondents do not deny that the laws deferring to a State's definition of conviction were published and available to all equally. Law enforcement officers, because they are highly-trained professionals and educated in federal firearms law,[6] have a heightened duty to ensure their actions comport with Constitutional protections [(Valles): **"I have received formal training for law enforcement personnel in both a general and specific nature as it pertains to investigating and enforcing violations of Federal law, including violations of Federal firearms and explosives laws."** Affidavit of Carlos Valles (Doc. 23-1, at ¶1)]. Here, should the Writ be denied, federal agents will have successfully demonstrated that

[6] In New Mexico, law enforcement officers are held to a higher standard than ordinary citizens, because of their training and experience paid for by the People of the State. " . . . [P]olice officers are not 'average persons' when considering the likelihood of provocation, because '[p]olice officers, by the nature of their training, are generally expected to have a higher tolerance for offensive conduct and language.'" *State v. Correa*, 147 N.M. 291,297-298 (2009) (BOSSON, J.).

feigned ignorance of law is a legal excuse for gross violations of Constitutional rights.

Neither Petitioners' right to possess firearms peacefully within their own home was infringed by Missouri law, either before, during, or after the raid. Discovering this information in Anthony's records, however, did not stop Valles from using the word "conviction" in his Affidavit (Doc. 22-1,¶8). An actual copy of Anthony's criminal record wasn't provided to Judge Molzen for review, and a conviction was presumed based on the Affidavit alone. The probable cause statement wasn't provided to the Stonecipher family for challenging the obviously faulty information, or left at their home.

In 2007, Anthony was involved in a dispute involving his then-wife, Danielle. Anthony's charges ended after he agreed to an SIS, completed probation, and paid court costs, in Randolph County, MO. He paid a $2500 bond and his wife didn't wish to prosecute. Anthony retained a letter from his criminal defense attorney of the time, James Cooksey, informing Anthony he did not have a conviction ["Cooksey" (Doc. 22-2)]. Anthony did not have any weapons restrictions placed upon him by the Missouri court. They later divorced in March 2007.

Leading up to the raid in 2010, other information was supplied to Respondents from Air Force officer Crecilius, feigning friendship with Anthony at the local VFW bar, in order to feed Respondents with information on Anthony's ultimately-legal activities

(Doc. 22-1,¶9). Crecilius was voluntarily dismissed by Petitioners (Doc. 49).

No arrest warrant issued for the seizure of persons. During the search, despite Anthony's attempts to inform agents that he had never been convicted of domestic assault, they conducted a full-custodial, warrantless arrest, which Anthony alleges to be retaliatory and in violation of the First Amendment (Doc. 5,p.18). Agents searched through Petitioners' personal items, exceeding the authority granted by the search warrant, including private medical information, family photographs, unrelated computer files, and military service records (Doc. 5,p.7). Agents seized several photographs of an intimate nature between husband and wife, and effects beyond the scope of the warrant. Respondents have failed or refused to return these missing items.

Respondents interrogated and laughed at Petitioners about the nature of several of their adult items, stored privately in their bedroom, maliciously inflicting emotional distress. Respondents ridiculed Petitioners concerning the nude nature of the photos seized (*Id.*). Anthony was arrested without probable cause, although he wasn't obstructing the officers in the execution of the search warrant, nor was he charged for resistance or obstruction (Doc. 5,p.8). Prior to the home invasion, Melissa was sitting inside reading a book in the living room (*Id.,* at 7). Respondents pointed several assault weapons in her face as they seized her person. Melissa was subjected to a humiliating search by an unknown male officer,

including around her inner thighs and other personal areas, while an unknown female officer conducted a search under her bra (*Id.,* at 8). Melissa remained in handcuffs until officers left her home, three (3) hours after Anthony was subjected to full-custodial arrest and transported to the Doña Ana County Detention Center (*Id.*) A neighbor tried to talk with Melissa during the time of investigatory detention, which Defendants refused to permit (*Id.*).

Before the raid commenced, Anthony was asked by Valles and Estrada, posing as Crecilius's uncles, to come outside to inspect a weapon in their vehicle. When Anthony turned to leave to the safety of his home, he was taken to the dirt by assisting agents and handcuffed. One unknown agent exacerbated Anthony's service-related injury by kneeling into his back (*Id.*).

Petitioners cooperated and did not resist while the officers executed the search warrant. Petitioners even asked Respondents to shut the door so their cat, Midnight, would not escape. A $5,000 appearance bond was set on May 21. Anthony was ordered to appear at Preliminary Hearing on May 25 or forfeit bond. While in custody, Anthony was denied medical care by the Detention Center after requesting his prescription medication, now in extreme pain from the exacerbated back injury. Anthony had a severe panic attack, caused by Respondents (*Id.*).

While in custody, Anthony was subjected to an illegal strip search of his person, causing him extreme

pain and humiliation (*Id.*). Anthony was transported to the Defendant Detention Facility in an undercover SUV, driven by Respondents Estrada and Valles (*Id.*).

On May 25, a Motion to Dismiss without Prejudice was granted on possession of a firearm charges under 18:922(g)(9) – *United States v. Stonecipher,* #2:10-mj-01487-LAM-1 (Doc. 24-5). Sandra Grisham, Anthony's criminal defense attorney, demonstrated through the use of withheld documents that Anthony had no prior conviction prohibiting him from possessing firearms. According to Grisham, Valles attempted to withhold Plaintiff's NCIC report from her, refusing to make it available until well after Valles initiated criminal proceedings. A copy reads: "SUSPENDED IMPOSITION OF SENTENCE DISPOSITIONS ARE NOT CONVICTIONS" [(Direct Quote, EMPHASIS in original) (Doc. 24-2,p.6)].

During the raid, Anthony read his own unofficial copy of the FBI document, and the Cooksey letter, out loud to Respondents, after retrieving them from his file cabinet. One Respondent replied that, 'Well, attorneys are often wrong,' or similar words. Prior to arrest, Respondents would have to plausibly believe the State of Missouri, the BATF's own website, Attorney Cooksey, the NICS check, and the FBI NCIC record were all collectively untrustworthy. Qualified immunity was invoked to protect the 'reasonably mistaken.' Plaintiff attempted to draw attention to the number zero (0) under the words "Total Convictions" in his NCIC report, at the time of arrest, but

Respondents ignored this, and proceeded to ripen an investigatory detention into full-custodial arrest.

On July 21, Anthony received back a pile of parts that was his personal computer. Anthony's hard drives were in damaged condition, after his family photographs, medical information, and military documents had been thoroughly searched by Respondents. This Petition represents the family's only and final means of remedy.

In addition to the physical injuries sustained by Anthony, he was subsequently diagnosed with chronic PTSD and other conditions, as directly attributable to this raid, and disclosed in Plaintiffs' initial Fed.R.Civ.P. 26 disclosures (Doc. 5,p.11). For months after, Anthony suffered repeated night terrors of anonymous agents with assault weapons indiscriminately searching his home, abusing his wife, causing him physical injury to his back, and strip searching him. Reliving the experience caused significant disruption to Anthony's previously-steady employment, having a profound and continuing effect on the family's pursuit of happiness. Four years after filing their civil Complaint in Jan. of 2011, the Stoneciphers have yet to secure relief.

Petitioners invested a great deal of uncompensated time and costs, in pursuing justice, and in making the U.S. Constitution more than a mere fiction. As discussed thoroughly in a law review article, citizen-Plaintiffs prevail in a fraction of 1% of *Bivens* claims, due to superior Government resources, and other

factors systematically denying justice. *See* Pillard, Cornelia T.L.(1999) *Taking Fiction Seriously, The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 Geo. L.J. 65-104,66. As documented:

> "[g]overnment figures reflect that, out of approximately 12,000 *Bivens* claims filed between 1971 and 1985, *Bivens* plaintiffs actually obtained a judgment that was not reversed on appeal in only four cases. . . . recoveries from both settlements and litigated judgments continue to be extraordinarily rare. According to one estimate, plaintiffs obtain a judgment awarding them damages in a fraction of one percent of *Bivens* cases and obtain a monetary settlement in less than one percent of such cases. The low rate of successful claims indicates that, notwithstanding *Bivens*, federal constitutional violations are almost never remedied by damages. The low success rate of these claims also reflects that the courts are processing a tremendous amount of *Bivens* litigation. When analyzed by traditional measures of a claim's 'success' – whether damages were obtained through settlement or court order – *Bivens* litigation is fruitless and wasteful, because it does not provide the remedies contemplated by the decision, and it burdens litigants and the judicial system."

Id.

The numbers confirm a great deal of injustice due to disparity in the system. Our Republic would do

well to correct this trend, and provide actual consequence to *Bivens*, starting with the instant case. For any private attorney to risk taking a *Bivens* case on contingency, given a fraction of a 1% success rate, is not a wise decision under any calculation of odds, and is the surest sign of a peculiar business sense, given the costs and years of time involved. Despite best intentions, relief *via Bivens* has proven to be a chimera.

Since less than 1% of everyday citizens successfully enforce their Constitutional rights, in court, against federal law enforcement agents, *Bivens* represents a remedy "on paper" only, nearly-impossible of enforcement in reality. This Court's decisions should be more than mere fiction, but a remedy which has less than 1% chance of success is no remedy at all, but instead a Due Process violation. Rights without statistically-significant remedies are no rights at all:

> "Where failure to provide a remedy is unconstitutional, then under the Fourteenth Amendment's due process guarantee, the State must provide 'the remedy it has promised.' *Alden,* 527 U.S. at 740. . . . the *Alden* opinion emphasizes the point, central to our case, that failure to provide a promised remedy in the state courts may lead to a violation of due process . . . "

Manning v. Mining & Minerals Div., 140 N.M. 528,534-35 (2006).

Federal Defendants unilaterally removed this case from NM Courts, denying the State opportunity

to rule on federal law. Only Plaintiffs, and not government Defendants, risk their own money in pursuing justice *via Bivens*. Respondents don't pay their own defense costs, and multiple, highly-experienced attorneys are provided, free of charge, by the DOJ. In the statistically-insignificant fraction of cases where Defendants are held liable, they're indemnified by the Government with " . . . virtual certainty." Pillard, 88 Geo.L.J., at 77. Litigation on the *Bivens* field represents acceptance of rigged odds, with which to begin. This Court may choose to reverse realization of a troubling trend, utilizing the instant case as a vehicle.

Instead, the decision to pursue justice *via Bivens* is grounded in the notion that the Fourth Amendment means what it says, and is capable of being enforced. If Abraham Lincoln is any guide, society would do better to ignore the odds of success and heed his advice from 1839: "Broken by it, I, too, may be; bow to it I never will. The probability that we may fall in the struggle ought not to deter us from the support of a cause we believe to be just; it shall not deter me."

REASONS THE WRIT SHOULD BE GRANTED

The instant case is defined by the struggle to provide meaning to the Fourth Amendment.

Invasions of private homes, by their destructive and insidious nature, enjoy a close study in the history of American jurisprudence. For many, the home

is a sacred place. The walls of the castle may not be breached lightly with armed, government force.

Federal law, in which all Respondent agents acknowledge receiving extensive legal training, is clear and unambiguous:

> "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."

27 CFR 478.11. The law was so obvious to Respondents they discuss it on their website, and represent to the nation that the several States' definition of the word "conviction" controls. As tutored by Respondents' website, Missouri law applies in determining the SIS Anthony received does not equate to a conviction under 18 U.S.C. §921(a)(33) and 27 CFR 478.11. Likewise, Respondents induce members of the public to reasonably rely on the BATF's legal interpretation of the definition of "conviction," and here seek to simultaneously avoid liability for the consequences of such reliance.

"The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, . . . should be liberally construed in favor of the individual." *Sgro v. United States*, 287 U.S. 206,210 (1932). Abuse must be carefully limited so as to prevent unauthorized invasions of 'the sanctity of a man's [or woman's] home and the privacies of life.' Nothing at law has been previously interpreted by this Court, as more sacred, or worthy of this Court's valuable time:

> "The principles . . . reach farther than the concrete form of the case then before the court, . . . they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, . . . – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

Boyd v. United States, 116 U.S. 616,630 (1886).

"The home derives its pre-eminence as the seat of family life. . . . Of the whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations." *Griswold v. Connecticut,* 381 U.S. 479 (1965). For the Stonecipher family, whose marriage, privacy, security, peace of mind, and refuge were violated, through an untenable claim of ignorance makes right, the law must come to life and breathe with renewed vitality. For all citizens, the instant case, and those like it, are crucibles for determining whether the Fourth Amendment is relevant. In the end, more than the sanctity of the Stonecipher family home is at stake. The integrity of the American Home, and our justice system, is also wagered here.

I. AGENTS REVIEWED FOUR (4) DOCUMENTS, ALL OF WHICH INDEPENDENTLY CONFIRMED, IN PLAIN LANGUAGE, THAT ANTHONY HAD ZERO (0) CONVICTIONS

The Government's sealed appendix, filed with the Tenth Circuit, confirms that Valles reviewed three independent documents that Anthony had zero (0) convictions, prior to seeking a warrant. He reviewed not only Anthony's **FBI National Crime Information Center (NCIC)** report, but a certified Missouri State criminal record obtained at Valles's own request (2 Aple. Sealed App. 186-188) (Doc. 91-2,p.3). If Valles did not trust the reliability of these two documents, the information was also confirmed in Anthony's **National Instant Criminal Background Check System (NICS)** report, clearly and unambiguously listing the numeral zero (0) under the words 'Total Convictions' (2 Aple. Sealed App. 184). Only the plainly incompetent, reckless, or malicious could fail to disclose this information after reviewing such, over a period of five months, and still use the word "conviction" in his search warrant affidavit of May 2010 (Doc. 23-1,¶8). Agent Valles acknowledges being a highly-trained professional, and legally-trained in applying firearms laws (*Id.,* at ¶1).

On December 8, 2009, at 8:42:18 AM, Defendant and lead-agent Carlos Valles indisputably **KNEW** that Plaintiff Anthony Stonecipher had zero (0) total convictions in his FBI NCIC report, obtained at Valles's Request (Doc. 91-2,p.3) **(emphasis added)**.

Valles, willfully and/or recklessly failed or refused to disclose the existence of this document to Magistrate Molzen, and used the word "conviction" several times throughout his Application for Search Warrant (Doc. 22-1,¶8). The sealed NCIC report was provided to Petitioners, for the first time, as part of several exhibits filed under seal by the Government between June 4, 2012 and July 30, 2012. In this document, the words: "ATN/SA CARLOS VALLES" are used at the top, making it undisputed that Valles received and reviewed this document several months before the home invasion. Valles was aware that Anthony had no conviction approximately five (5) months and nine (9) days prior to seeking a search warrant on May 17, 2010 (Doc. 22-1). The documents available to legally-trained Special Agent Valles for several months also confirm that Anthony successfully "COMPLETED" the terms of his probation (2 Aple. Sealed App. 187). This document included the warning, in capital letters, that suspended impositions of sentence dispositions are not convictions, and Respondents were strictly liable for its irresponsible use (*Id.,* at 188).

This Court made it clear that "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue. . . ." *Malley v. Briggs*, 475 U.S. 335,341 (1986). In *Malley,* the officers applied for, and received, arrest warrants based on information supplied to a magistrate which was faulty. Here, Respondents did not apply for an Arrest warrant, despite over five months to do

so. Respondents ripened a warrant-based search of a home, with which both Petitioners were not physically resisting, into a full-custodial and warrantless home arrest. Agents arrested Anthony because they failed to find any evidence of crime in the residence, after a highly invasive search, and in retaliation for Anthony providing a letter from his criminal defense attorney confirming Anthony was not convicted. The letter became *the fourth document* confirming that Anthony did not have any convictions or weapons restrictions, ignored by Respondents. Cooksey (Doc. 22-2). No reasonably competent officer could find probable cause under these circumstances.

Despite ample evidence of malice on the part of Respondent agents, this Court made clear that Plaintiffs seeking to enforce the Constitution do not necessarily need to prove malice on the part of responding officers:

> "At common law, in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner."

Malley, 475 U.S. at 341.

The Tenth Circuit required Petitioners to prove malicious conduct on the part of Respondents, but has

also affirmed denial of reasonable discovery with which to prove these states of mind:

> "Because Valles did not act in reckless disregard for the truth, the Stoneciphers cannot demonstrate that Valles lacked **arguable** probable cause." **(App. 24).**

Ample evidence of malice and recklessness exists on the part of Respondent agents, as listed in detail in Petitioners' First Amended Complaint (Doc. 5,¶¶33-60). These allegations, along with Anthony and Melissa's Affidavits (Docs. 104-1,2), must be ignored to conclude that Respondents acted without malice. [Respondents ridiculed Petitioners about personal photographs between husband and wife, conducted an excessively forceful arrest, threatened to blow up the Petitioners' gun safe with explosives if Anthony did not provide the combination, seized items beyond the scope of the warrant (including Melissa's handgun still unreturned or accounted for), destroyed computer equipment, and withheld the documents displaying 0 criminal convictions from Anthony's criminal defense attorney, among numerous items not discussed below]. Similarly, "**arguable** probable cause" is not the standard, as agents do not invent the law, but are charged to enforce it. Because proving malice without discovery is not a requirement imposed by this Court, the Writ should be granted.

II. RESPONDENTS ACTED IN AN OBJECTIVELY UNREASONABLE MANNER

This Court made clear that review of a prosecuting attorney[7] is one of many factors to be considered in evaluating objective reasonableness, however, it is not dispositive:

> "[W]e have recognized an exception allowing suit when 'it is obvious that no reasonably competent officer would have concluded that a warrant should issue.' *Malley*, 475 U.S., at 341, . . . The 'shield of immunity' otherwise conferred by the warrant, . . . will be lost, for example, where the warrant was 'based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' . . . "

Messerschmidt, 132 S.Ct. at 1245. Here, the magistrate did not initial each page of the Affidavit, as she did the warrant itself, making reliance on the idea it

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[7] Furthermore, "All those individuals [prosecutor], as the Court puts it, are 'part of the prosecution team.' *Ante,* at 1249. To make their view relevant is to enable those teammates (whether acting in good or bad faith) to confer immunity on each other for unreasonable conduct – like applying for a warrant without anything resembling probable cause." *Messerschmidt,* 132 S.Ct. at 1252 (KAGAN, J.). This Court made clear that armed government force, sanctified by the review of a prosecutor, has limited relevance to an objective analysis. "Early Patriots railed against these practices as 'the worst instrument of arbitrary power' and John Adams later claimed that 'the child Independence was born' from colonists' opposition to their use. . . . " *Id*. (SOTOMAYOR, J.).

was thoroughly reviewed problematic (Doc. 23-1). Even if casually reviewed by a neutral magistrate, with an extremely busy criminal docket, she did not review the three supporting documents obtained by Valles, but instead relied on his representation that an unambiguous "conviction," and not an SIS, were confirmed by the certified Missouri record, the FBI NCIC, and the NICS report.

As discussed by Judge Black, this Court evaluates the Affidavit if the information concerning an SIS were included, and then evaluates whether objective probable cause still exists:

> " . . . Agent Valles' affidavit must be read as if it mentioned the fact that Anthony Stonecipher had a SIS and excluded the allegation that he had a conviction for domestic assault. . . . Moreover, even examining 'the totality of the circumstances set forth' in Valles' affidavit, *see Illinois v. Gates*, 462 U.S. 213, 238 (1983), **the Court is unable to find a 'substantial basis for concluding that probable cause existed**.'"

(App. 79-81).

Until Anthony's arraignment, Valles's Affidavit, the MO record, the FBI NCIC report, and the NICS report were secret documents reviewed only by Respondents and prosecutor Jennings, and based entirely on their personal knowledge and arbitrary interpretation. A review of available emails reveals that members of the prosecution team were only concerned with congratulating each other after

successful completion of an undercover sting operation, rather than with the accuracy of their information, the law, or protecting the Constitutional rights of the Stonecipher family. [AUSA Jennings (to Valles): "Carlos, you did a really good job on this," and "Thank you for all your hard work on this. I really appreciate it." (Docs. 91-2,p.16 and 110-5,p.7)]. Petitioners have no way of knowing if the emails, hand-picked by Respondents, are the full record of correspondence, because they have been denied discovery. All were engaged in the "competitive" enterprise of ferreting out and prosecuting crime, and work together on a first-name basis: "Carlos." No written evidence discusses the rights of their targets.

Because the law has not changed, even after this Court's recent decision in *Castleman* (suggesting the Government must make a showing of *conviction* and actual injury or physical violence caused by a criminal defendant), granting Writ will square previous holdings. Both *Gates* and *Harlow* seek to avoid indecisive results caused when Plaintiffs are required to delve into the states of mind of *Bivens* Defendants. To Affirm would shift the definition of probable cause to the control of Respondents, rather than the courts. The resolution brought from this Court would achieve the uniformity desired surrounding these extremely important Constitutional questions, and provide further contour to *Castleman*.

III. AGENTS NOT ENTITLED TO QUALIFIED IMMUNITY UNDER *ASHCROFT V. IQBAL*

The question of whether legally-trained federal agents are entitled to qualified immunity under *Ashcroft v. Iqbal,* 556 U.S. 662 (2009) is also central. As held below, "Plaintiffs failed to meet their burden to make sufficient allegations, ..." as the basis for granting summary judgment **(App. 31)**.

> "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."

Ashcroft v. Iqbal, 556 U.S. 662,678 (2009) (KENNEDY, J.).

In 2012, the District Court previously resolved issues related to qualified immunity upon threshold motion. Petitioners' multiple claims were deemed facially plausible. The court previously concluded that *both* prongs of a qualified immunity analysis were satisfied **(App. 81)**:

> "Agent Valles' inclusion of material false statements or omissions in the search warrant affidavit, if ultimately true, violated clearly established law. *Franks*, 438 U.S. at 155-56 . . . the Court concludes that Plaintiffs have overcome the defense of qualified

immunity; thus, Count I-IV and VI survive the Agents' motion to dismiss." **(App.82).**

In the interests of judicial efficiency and issue preclusion, these rulings should have allowed Petitioners to proceed forward with discovery on all surviving counts.

A. Warrantless Home Arrests Are Presumptively Unreasonable

"It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable. . . ." *Payton v. New York*, 445 U.S. 573,586-87 (1980). Because Respondents had over five months to seek an arrest warrant, and no clear exigent circumstances, taking Anthony into custody without an arrest warrant was presumptively unreasonable. A blank, separate 'arrest warrant' was contemplated by Respondents, but never filled out (Doc. 110-9,p.3).

B. Excessive Force Claims Sufficiently Pled

Petitioners pled sufficient facts, 146 allegations in their First Amended Complaint, which the District Court deemed facially plausible, in 2012 (Doc. 5). This makes the June 2013 reversal, by a different trial judge, on *Ashcroft* grounds, and without any change in discovery, error.

As clearly-established law, Anthony's excessive force claim should be analyzed under three factors, independent of a probable cause analysis, or the subjective intent or states of mind of the Agents:

> "[P]roper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest. . . ."

Graham v. Connor, 490 U.S. 386,396 (1989). Numerous medical records were shared with Defendants' attorney, AUSA Lucero, as part of Petitioners' initial Fed.R.Civ.P. 26 disclosures, demonstrating injuries attributed to Respondents. These private records would have been inappropriate to file on the electronic docket, and such is not required by *Ashcroft.* Excessive force is usually a jury question, and turns on questions concerning flight risk, etc., separate and distinct from probable cause. Similarly, a clinical psychologist's diagnosis of Anthony with PTSD directly attributable to the raid, will never reach a jury, should the Writ not be granted (Doc. 5,p.11). It went undisputed that neither Petitioner was armed nor resisted arrest. They posed no immediate threat to the safety of any officer, suggesting the force used in taking Anthony to the dirt, outside his home, was excessive. For several months after, Anthony was required to walk with a cane.

The Government was granted unlimited amounts of time in which to craft a Pre-Discovery Motion for Summary Judgment. *See* Motion to Stay Discovery, filed May 2012 (Doc. 82). Petitioners requested the opening of Discovery from the non-dispositive judge, following the 2012 ruling, and again in Motion Form, and through Fed.R.Civ.P. 56(d) Affidavit (Docs. 36-1; 115,¶5). Plaintiffs were denied discovery in rebutting Respondents' summary judgment motion.

Petitioners' affidavits establish they needed discovery to establish the identity of other eyewitnesses to injury, complete correspondence, details of the undercover investigation, and current location of missing personal items seized from the home (*Id.*).

The first *Graham* factor required the court to analyze the "severity of the crime at issue," which was no crime at all. Here, Respondents entered no objective evidence beyond their unreliable Affidavits. A granting of immunity on the excessive force claim is therefore improper, because the courts below did not conduct a *Graham* analysis.

Petitioners genuinely disputed several areas of material fact, including the idea that Anthony caused himself injury when he threw himself to the ground (Doc. 101,p.26), or that he offered to make an illegal conversion to a fully-automatic firearm for the agents.

C. Respondents Failed to Conduct Reasonable Investigation; Willfully Concealed NCIC, NICS, and Cooksey Docs.

Prior to initiating arrest and filing a criminal complaint, the arresting officers must investigate whether a crime was committed. Anthony must receive reasonable investigation prior to being charged with felonies, accusations which can have a lifetime of repercussions.

As clearly established, and "[t]his Court has previously held that officers who conceal and **misrepresent material facts** to the district attorney are not insulated from a §1983 claim for malicious prosecution simply because the prosecutor, grand jury, trial court, and appellate court all act independently to facilitate erroneous convictions. . . . " *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). If there is information indicating a reason to doubt the accuracy of the investigation under a temporary arrest and detention, in making an original probable cause determination to *arrest*, further investigation is necessary to make an arrest Constitutional.

Because none of the four available documents indicated conviction, no reasonably cautious person could have found probable cause, without additional investigation. Similarly, because Melissa had nothing even resembling a criminal conviction in her record, the invasion of her home, and search beyond the scope, were unlawful. There is no civilized reason for

Agents to have searched through her lingerie and beneath her bra.

The totality of the circumstances must include exculpatory evidence that Respondents were aware of, or should become aware of, by dint of reasonable investigation. ["An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Kuehl v. Burtis*, 173 F.3d 646,650 (8th Cir. 1999)]. Voluntary disclosure of the Cooksey letter, NCIC, NICS, and MO record was required.

The courts must weigh the totality of the circumstances as judged by the conduct of a reasonably prudent officer or person. The Writ should be granted to reconcile this Court's holdings in *Messerschmidt* with that in *Harlow.* In granting immunity, Judge Herrera cites *Snell*:

> "For this theory to survive qualified immunity, a plaintiff must make a substantial showing of deliberate falsehood or reckless disregard for truth,. . . ."

Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990).

However, the instant case is distinguished: Defendants in *Snell* were social workers acting in an investigative, rather than prosecutorial capacity. Additionally, the one Defendant acting in a prosecutorial capacity was ultimately denied immunity. *Id.* at 676. Here, Valles's signature appears on page one of the

criminal complaint (Doc. 26-4). *Snell* did not involve a home invasion escalating into a warrantless arrest. Here, after Agents failed to find any contraband, plenty of time remained to continue their investigation. Respondents did not conduct such a reasonable investigation because they willfully intended to violate Petitioners' rights, and make their five-month investigation worthwhile.

D. A Reasonably Prudent Officer Would Seek an Arrest Warrant, Prior to Initiating Arrest

A reasonably prudent person would conclude the search and seek an arrest warrant after allegedly discovering, for the first time, that Anthony didn't have a conviction. Such wasn't done because Respondents knew the information provided to the magistrate was unreliable. A reasonably prudent person, as required by this Court in *Beck,* would seek additional guidance and training, and provide an accurate set of facts in his Affidavit, before misleading a Magistrate Judge. It is objectively unreasonable for Respondents to fail to make any of these basic phone calls or consult the BATF website, prior to conducting a full-custodial arrest.

The instant case presents the opposite situation from that in *Payton,* where an arrest warrant was present and search warrant lacking. However, it is clear that warrantless home arrests are disfavored, and are considered offensive to the Fourth Amendment.

It's Respondents' burden to prove the reasonableness of their decision to arrest in the home, after completing a search, and failing to find any contraband. As concluded by the *Payton* Court, "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Id.,* at 587. A warrantless home arrest of Anthony, even with the presence of a substantively and facially invalid search warrant, was unnecessary.

Here, a reasonably prudent BATF agent would consult their own website, held out to the public as trustworthy:

> "Q: In determining whether a conviction is a State court is a 'conviction' of a misdemeanor crime of domestic violence, does Federal or State law apply? [A:] State law applies. Therefore, if the State does not consider the person to be convicted, the person would not have the Federal disability."

See BATF Website Screen Shot, and 27 CFR 478.11.

Should the Internet prove untrustworthy, Missouri's certified record gave warnings in capital letters (Doc. 26-2,p.6), as read, and ignored by Valles, five months prior. Only the plainly incompetent or willfully malicious could ignore these warnings without attempting to investigate further.

Granting the Writ will discourage officers nationwide from conducting an "eyes wide shut" approach to crime fighting. Instead, they're charged

with the solemn knowledge of what they would become aware of, by dint of a reasonable investigation. Respondents argued they were not legally trained and cannot be held responsible for any knowledge concerning the CFR, despite blatant contradiction in the record, and the Valles Affidavit acknowledging education. Discovery on Respondents' knowledge of the law was denied. It's only reasonable to ask those enforcing the law, in the particular area of gun control, to be familiar with gun laws.

Questions of witness credibility and state of mind are predominant features, and courts are typically reluctant to grant summary judgment in such situations. *See Hutchinson v. Proxmire,* 443 U.S. 111 (1979). Nowhere in the record is the Petitioners' claim of knowing and/or malicious action by Respondents blatantly contradicted.

IV. PETITIONERS SHOULD RECEIVE JURY CONSIDERATION ON THEIR U.S. CONST. AMEND. I RETALIATION CLAIM

As established by the available evidence, Respondents ripened an investigatory detention to a full-custodial, warrantless arrest because Anthony presented information making the facts relied on in obtaining a search warrant, invalid, and because Anthony otherwise attempted to protest the propriety of the Agents' actions and refused to answer questions **(App. 86)**. Under Petitioners' theory of the case, these were the true reasons Respondents decided to

initiate a full-custodial arrest and sustained criminal prosecution. Because the arrest was unsupported by probable cause and retaliatory, it is clearly-established law that Anthony's First Amendment retaliation claim should survive for jury consideration. Under *Reichle v. Howards,* 132 S.Ct. 2088,2093 (2012), the retaliation must be supported by probable cause to be potentially entitled to qualified immunity. Denying the Writ will forever enshrine feigned "mistakes of law" as legal excuses, for law enforcement agents nationwide, while still holding citizens accountable (through incarceration or civil penalty) for deficiencies in their own legal education. Improper motives and animus should be considered by a jury, since Respondents lacked probable cause under a reasonably prudent officer test. To hold otherwise encourages universal disrespect for the plain meaning of words and the rule of law.

CONCLUSION

To deny a Writ of Certiorari forecloses on the Stonecipher family achieving justice on their Constitutional claims and allows those primarily responsible for causing incalculable damage go without responsibility. The District Court's Order of June 28, 2013 and the Tenth Circuit Affirmance of its Judgment should be Reversed. Jury trial on the merits as to all remaining state of mind questions, or summary judgment in favor of Petitioners, should be granted, in accordance with the 2012 Order. Because peaceful

and law-abiding gun owners, nationwide, honor and respect the First and Fourth Amendments with as much fidelity as they defend the Second, and because a limiting clarification is desired after this Court's holdings in *Messerschmidt* and *Castleman,* a Writ of Certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANTHONY STONECIPHER and MELISSA STONECIPHER, Plaintiffs-Appellants, v. SPECIAL AGENTS CARLOS VALLES; JOHN ESTRADA; DAVID TABULLO; McCARTHY; KING; and JORGENSEN, Defendants-Appellees.	No. 13-2124

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 2:11-CV-00417-JCH-GBW)

(Filed Jul. 1, 2014)

Derek Garcia, Law Office of Derek V. Garcia, P.C., Albuquerque, New Mexico, for Appellants.

Edward Himmelfarb, Appellate Staff (Stuart F. Delery, Assistant Attorney General, Steven Yarbrough, United States Attorney, and Barbara L. Herwig, Appellate Staff, with him on the brief),

United States Department of Justice, Civil Division, Washington, D.C., for Appellees.

Before **KELLY**, **TYMKOVICH**, and **McHUGH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Anthony and Melissa Stonecipher became targets of an investigation into their purchases and sales of firearms and explosives. During the investigation, federal officers discovered that Mr. Stonecipher had pleaded guilty in 2007 to a misdemeanor crime of domestic violence in Missouri. One of the officers, Carlos Valles, concluded Mr. Stonecipher had violated federal law, which makes it illegal for anyone convicted of even a misdemeanor crime of domestic violence to possess a firearm.

Acting on this knowledge, Valles obtained a search warrant for the Stoneciphers' home. Valles executed the search and arrested Mr. Stonecipher, who was subsequently charged with unlawful firearms possession.

It turns out, however, that Mr. Stonecipher had not been convicted of a misdemeanor crime of domestic violence for purposes of federal law. Prosecutors soon learned that the Missouri conviction did not count because the sentence had been suspended and,

under Missouri law, a suspended sentence in these circumstances does not amount to a conviction. With this knowledge, the government dismissed the criminal complaint.

The Stoneciphers filed a *Bivens*[1] action against Valles and other law enforcement officers involved in the investigation, alleging violations of their Fourth and First Amendment rights in connection with the search of their home and Mr. Stonecipher's arrest and prosecution. The district court granted summary judgment for the defendants on the grounds of qualified immunity. The Stoneciphers appealed the grant of summary judgment on their claims for unreasonable search and seizure, unlawful arrest, malicious prosecution, and violation of their First Amendment rights.

Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM the judgment of the district court. For purposes of qualified immunity, Valles had enough information to (1) conclude he had probable cause to search the Stoneciphers' home; and (2) arrest and file charges based on Mr. Stonecipher's possession of firearms and explosives. Further, there was no evidence that Mr. Stonecipher's arrest and prosecution were in retaliation for the exercise of his First Amendment rights.

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[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

I. Background

The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) began an investigation into Melissa Stonecipher's purchase of handguns from a federally licensed firearms dealer in New Mexico. She purchased fourteen handguns over the course of ten months, including twelve on a single day. The ATF also received information that her husband, Anthony, was attempting to sell firearms from their house.

Special Agent Valles and his colleague, John Estrada, went undercover to the Stoneciphers' house and purchased a firearm and two explosives from Mr. Stonecipher. After testing, the ATF determined the sale of the explosives ran afoul of 18 U.S.C. § 842(a)(1), which prohibits sales of certain types of explosive materials without a federal license. Valles also confirmed that Mr. Stonecipher bought and sold firearms, gun parts, and ammunition online and that the Stoneciphers did not have federal firearms or explosives licenses.

Valles investigated Mr. Stonecipher's criminal history. During this investigation, Valles obtained a certified court document showing that Mr. Stonecipher pleaded guilty in Missouri to a misdemeanor charge of "Domestic Assault – Third Degree" on April 16, 2007. The document also showed the Missouri court imposed a suspended imposition of sentence, which required Mr. Stonecipher to serve one year of probation and that he was discharged from probation after serving the one-year term. In addition

to the state court file, Valles obtained a report from the National Instant Criminal Background Check System (NICS) that indicated Mr. Stonecipher had been denied the right to purchase a gun in 2007 because of a conviction for domestic assault. He also obtained a National Criminal Information Center (NCIC) report that noted Mr. Stonecipher's guilty plea to the Missouri domestic assault charge.

Valles and Special Agent Joel Marquez sought legal advice from the United States Attorney as to whether Mr. Stonecipher's firearms possession and sale violated 18 U.S.C. § 922(g)(9), which makes it a crime for anyone convicted of a misdemeanor crime of domestic violence to possess a firearm. An Assistant United States Attorney, Ron Jennings, reviewed Mr. Stonecipher's file and concluded that he was prohibited from possessing firearms under the statute due to his previous domestic assault conviction.

Valles prepared an application and supporting affidavit for a search warrant for the Stoneciphers' house. Valles averred that Mr. Stonecipher was likely in violation of § 922(g)(9) because Mr. Stonecipher had been convicted of a misdemeanor crime of domestic violence in Missouri in 2007. The application, however, did not mention that Mr. Stonecipher received a suspended imposition of sentence for the crime, which the documents disclosed. Valles also mentioned in his affidavit that the NICS report indicated Mr. Stonecipher was previously denied the right to purchase a firearm because of his conviction,

but he omitted that the report also noted his denial status was overturned.

The application also averred the Stoneciphers were likely in violation of 18 U.S.C. § 842(a)(1), which prohibits unlicensed dealing in explosive materials, and that Mr. Stonecipher was likely in violation of 26 U.S.C. § 5861(d), which prohibits a person from possessing firearms not registered to him. Jennings approved the final version of the warrant application. Valles then submitted the application and supporting affidavit to a magistrate judge, who issued the search warrant.

Valles, along with other ATF agents and state and local law enforcement officers, executed the search warrant. Valles and Estrada arrived undercover at the Stoneciphers' home and asked Mr. Stonecipher to inspect a weapon in their car. The agents then arrested Mr. Stonecipher, placed him in a police car, and read him his Miranda rights. He refused to answer the officers' questions, asserted the officers were violating his Second Amendment rights, and maintained his innocence of any crime. Mrs. Stonecipher was patted down, handcuffed, led outside, and detained while agents searched the house. She was not arrested.

While the agents were conducting the search, Mr. Stonecipher asked for permission to retrieve documents from inside the house. One document was a letter to Mr. Stonecipher from his criminal defense attorney in Missouri. The letter, written shortly after

Mr. Stonecipher pleaded guilty, noted that a guilty plea to domestic assault, assuming Mr. Stonecipher served his probation, would not count as a conviction on his record. Mr. Stonecipher read part of the letter aloud to Valles and other agents, and Valles read the letter himself. Because the statement conflicted with Jennings's legal advice, the agents continued the search.

The next day, Valles informed Jennings about the contents of the letter from Mr. Stonecipher's attorney, but Jennings advised Valles to proceed with the case. Valles prepared a criminal complaint and supporting affidavit, which Jennings approved, and Valles filed the criminal complaint in federal district court. Five days later, upon discovering that Mr. Stonecipher's previous domestic assault was not a qualifying conviction, the prosecuting United States Attorney filed a motion to have the complaint dismissed, which the magistrate judge granted.

The Stoneciphers brought a civil rights action against Valles and five other ATF agents involved in the search. The defendants moved to dismiss some claims on qualified immunity grounds. The court held that the defendants were entitled to qualified immunity because they reasonably concluded on the facts available that they had probable cause to search the house and arrest and file charges against Mr. Stonecipher.

II. Analysis

The Stoneciphers contend the officers are not entitled to qualified immunity because the search, as well as Mr. Stonecipher's arrest and prosecution, were unsupported by probable cause, in violation of the Fourth Amendment. They also contend Mr. Stonecipher was arrested and prosecuted in retaliation for exercising his First Amendment rights.[2]

A. Fourth Amendment Claims

1. Qualified Immunity Standard

We review grants of summary judgment based on qualified immunity de novo. *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1172 (10th Cir. 2013). At the summary judgment stage in a qualified immunity case, the court may not weigh evidence and must resolve genuine disputes of material fact in favor of the nonmoving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). Summary judgment is appropriate only if "the movant shows that there is no genuine issue as

[2] The Stoneciphers' opening brief mentions an excessive force claim arising from the arrest as an issue presented for review. The argument section of the brief, however, makes no mention of the claim. Because "[a]rguments inadequately briefed in the opening brief are waived," *Utah Lighthouse Ministry v. Found. for Apologetic Info. and Research*, 527 F.3d 1045, 1049 n.1 (10th Cir. 2008), we will not review the excessive force claim. Regardless, we agree with the district court that the defendants are entitled to qualified immunity on this claim.

to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

When a defendant raises qualified immunity as a defense, "a plaintiff must properly allege a deprivation of a constitutional right and must further show that the constitutional right was clearly established at the time of the violation." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally 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." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)).

Officers must have probable cause to initiate a search, arrest, and prosecution under the Fourth Amendment. Probable cause is not a precise quantum of evidence – it does not, for example, "require the suspect's guilt to be 'more likely true than false.' Instead, the relevant question is whether a 'substantial probability' existed that the suspect committed the crime, requiring something 'more than a bare suspicion.'" *Kerns v. Bader*, 663 F.3d 1173, 1188 (10th Cir. 2011) (citations omitted); *see also United States v. Martin*, 613 F.3d 1295, 1302 (10th Cir. 2010) ("As the standard itself indicates, *probable* cause does not require metaphysical certitude or proof beyond a reasonable doubt. Probable cause is a matter of probabilities and common sense conclusions, not

certainties. At the same time, probable cause requires, of course, more than mere suspicion that unlawful activity is afoot." (internal quotation marks and citations omitted)).

In the context of a qualified immunity defense on an unlawful search or arrest claim, we ascertain whether a defendant violated clearly established law "by asking whether there was 'arguable probable cause'" for the challenged conduct. *Kaufman*, 697 F.3d at 1300. 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. *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007). A defendant "is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to arrest or detain the plaintiff." *Id.*

A neutral magistrate judge's issuance of a warrant is "the clearest indication that the officers acted in an objectively reasonable manner or . . . in 'objective good faith.'" *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (quoting *United States v. Leon*, 468 U.S. 897, 922–23 (1984)). But "the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness." *Id.* If "it is obvious that no reasonably competent officer would have concluded that a warrant should issue," the warrant offers no protection. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity will not be granted "where the warrant was

based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Messerschmidt*, 132 S. Ct. at 1245 (internal quotation marks omitted).

Nor will a warrant protect officers who misrepresent or omit material facts to the magistrate judge. The burden is on the plaintiff to "make a substantial showing of deliberate falsehood or reckless disregard for truth" by the officer seeking the warrant. *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990). This test is an objective one: when there is no dispute over the material facts, a court may determine as a matter of law whether a reasonable officer would have found probable cause under the circumstances. *Cortez*, 478 F.3d at 1120-21 ("The conduct was either objectively reasonable under existing law or it was not."); *see also Fleming v. Livingston Cnty.*, 674 F.3d 874, 881 (7th Cir. 2012) (describing the inquiry into reckless disregard as objective). Qualified immunity applies equally to reasonable mistakes of law and fact. *See Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009).

To establish reckless disregard in the presentation of information to a magistrate judge, "there must exist evidence that the officer in fact entertained serious doubts as to the truth of his allegations . . . and [a] factfinder may infer reckless disregard from circumstances evincing obvious reasons to doubt the veracity of the allegations." *Beard v. City of Northglenn*, 24 F.3d 110, 116 (10th Cir. 1994). "[T]he failure to investigate a matter fully, to exhaust every

possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence rarely suggests a knowing or reckless disregard for the truth. To the contrary, it is generally considered to betoken negligence at most." *Id.* (internal quotation marks and citations omitted); *see also Moldowan v. City of Warren*, 578 F.3d 351, 388 (6th Cir. 2009) (asserting the exculpatory value of evidence must be "apparent" and that "the police cannot be held accountable for failing to divine the materiality of every possible scrap of evidence"); *Wilson v. Russo*, 212 F.3d 781, 787-88 (3d Cir. 2000) (holding that "omissions are made with reckless disregard if an officer withholds a fact in his ken that any reasonable person would have known that this was the kind of thing the judge would wish to know" and that assertions are in reckless disregard of the truth if they are made "with a high degree of awareness of the statements' probable falsity" (internal quotation marks and alterations omitted)).

With this legal framework in mind, we turn to the Stoneciphers' arguments.

2. Unlawful Search and Entry

The Stoneciphers first argue the district court erred in concluding the officers were entitled to qualified immunity for their search and entry without

arguable probable cause.[3] They allege Valles submitted a warrant application, in reckless disregard for the truth, that falsely averred Mr. Stonecipher had been "convicted" of a misdemeanor crime of violence and omitted that Mr. Stonecipher received a suspended imposition of sentence for the crime. The Stoneciphers' argument is based on their contention that Valles knew, or should have known, that a suspended imposition of sentence was not a "conviction" for purposes of § 922(g)(9).

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[3] The Stoneciphers do not identify which of the various defendants committed the particular violations of clearly established law. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008) ("It is particularly important . . . that the complaint make clear exactly *who* is alleged to have done *what* to *whom*, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." (emphasis in original)). It is clear that the plaintiffs have alleged sufficient facts against Valles on all claims. But because he was the only official responsible for procuring the search warrant (although Marquez appears to have been minimally involved with this process), the other defendants cannot be liable for executing the search because they were entitled to rely on the fact that a search warrant had issued. *See United States v. Richie*, 35 F.3d 1477, 1488 (10th Cir. 1994). Nevertheless, the Stoneciphers have alleged that the other ATF officers were present when Mr. Stonecipher read aloud the letter from his attorney, which he maintains should have notified the defendants that they lacked probable cause to continue with the search and arrest. *See infra* at 18. Thus, based on the Stoneciphers' allegations, only Valles can be liable for actions taken in connection with procuring the search warrant and authorizing the search, and the other defendants can be liable only for actions taken after Mr. Stonecipher read aloud the letter from his attorney.

The district court held that Valles did not act in reckless disregard for the truth. The court found the state and federal documents Valles reviewed did not give a strong indication that Mr. Stonecipher was not "convicted" for purposes of § 922(g)(9), and Valles's conclusion was further mitigated by the fact an AUSA independently reviewed the materials. We agree with the district court.

The materials Valles reviewed indicated that Mr. Stonecipher pleaded guilty to a crime of misdemeanor domestic violence. To a non-legally trained officer, this fact demonstrates that Mr. Stonecipher was "convicted" under the term's ordinary meaning. *See Webster's New International Dictionary* (3d ed. 2002) (defining conviction as "the act of proving, finding, or adjudging a person guilty of an offense or crime"). Thus, in the ordinary case, the fact of conviction would suffice to establish a probable violation of § 922(g)(9).

But the Stoneciphers argue this is not the ordinary case. An ATF regulation prescribes a different definition of "convicted" for purposes of § 922(g)(9).[4]

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[4] The regulation is codified at 27 C.F.R. § 478.11. It provides, "A person shall not be considered to have been convicted of such an offense for purposes of this part unless . . . [t]he person is considered to have been convicted by the jurisdiction in which the proceedings were held." It also states, "A person shall not be considered to have been convicted of such an offense for purposes of this part if the conviction has been expunged or set aside. . . ."

This regulation incorporates the definition of conviction of the state in which the conviction occurred, and it provides that convictions that are expunged do not qualify as convictions for purposes of § 922(g)(9). The Stoneciphers argue Valles acted in reckless disregard for the truth by failing to understand how the ATF regulation qualifies the statute's applicability to Missouri domestic violence convictions.

We do not agree the regulation establishes Valles's conduct was objectively unreasonable. It is true that officers will attain as a part of their jobs and training some legal understanding of the nuances and effects of punishments imposed in various states, especially their home state. But to require a non-legally trained officer to know the precise ins-and-outs of regulatory provisions and discrete aspects of every state's criminal procedure would defeat one of the purposes of qualified immunity, which is to prevent the threat of personal liability from inhibiting officers in the exercise of their duties. *See Messerschmidt*, 132 S. Ct. at 1244 ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." (internal quotation marks omitted)).

This is not to say that officers are relieved from the responsibility of understanding the laws they are charged with enforcing. Where the law is technical and obscure, seeking the advice of a legally trained individual may be required. But in this case, the nuances of Missouri law in combination with the facts

and federal law were not so obvious that Valles acted recklessly in failing to recognize their operation. To the contrary, Valles proceeded reasonably by securing the legal opinion of the AUSA when the law was unclear to him.

The Stoneciphers argue that several aspects of the materials Valles reviewed should have put him on further notice that Mr. Stonecipher was not convicted for purposes of § 922(g)(9). First, the Missouri state court documents indicate Mr. Stonecipher received a suspended imposition of sentence. Second, in a summary portion of the NICS and NCIC reports, it is indicated that Mr. Stonecipher has "0" convictions. Supp. App. 184, 187. Third, at the end of the reports, there is a paragraph that includes the sentence: "Suspended imposition of sentence dispositions are not convictions and are closed record when probation is completed or finally terminated." *Id.* at 184, 188. Fourth, the NICS report indicated that Mr. Stonecipher's denial status (with regards to ability to purchase firearms) was "overturned." *Id.* at 178.

Our review of the materials leads us to conclude that the legal significance of these statements was not so obvious that Valles's failure to recognize their significance amounts to reckless disregard for the truth. As to the Missouri state court documents, the documents disclose Mr. Stonecipher pleaded guilty to an offense of misdemeanor domestic violence. Although the documents showed Mr. Stonecipher received a suspended imposition of sentence and that his probation was completed, the documents did not

reveal the legal significance of these facts. To a non-legally trained officer, it is reasonable to assume that a conviction and sentence are two separate things and that the latter does not qualify the former in ordinary circumstances.

Likewise, the NICS and NCIC reports contained conflicting information. The NICS report stated, "Subject has been *convicted* of a Misdemeanor Crime of Domestic Violence." *Id.* at 178 (emphasis added). It also stated, "Date of Conviction: 1/26/2007." *Id.* Although the summary portions expressed "0" convictions and one report noted Mr. Stonecipher's denial status was overturned, we cannot say it was objectively unreasonable for Valles to credit the unambiguous statement that Mr. Stonecipher was "convicted" of a misdemeanor crime of domestic violence.

Nor does the statement in the reports – noting that suspended impositions of sentences are not convictions – defeat qualified immunity. First, the sentence is buried in disclaimer-like language at the end of the reports and is qualified by the requirement that the reader understand state law probation requirements. Second, the reports show the court action as "Guilty – SIS" without spelling out that an SIS is a suspended imposition of sentence. Valles's failure to cross-reference the information from the state-court documents with the disclaimer-like language at the end of the reports, while perhaps negligent, is not objectively unreasonable based on the amount of confusing information contained in the materials.

In sum, the amount of conflicting information in the documents reviewed by Valles indicates that Valles may have been, at most, negligent in the course of his investigation. But his effort to secure the second opinion of AUSA Jennings further undercuts any notion that Valles acted recklessly. The Supreme Court's holding in *Messerschmidt* is instructive. In that case, the Court found it important to the objective reasonableness inquiry that the investigating officer sought the advice of a superior officer and the local deputy district attorney in determining whether the scope of the warrant was supported by probable cause. 132 S. Ct. at 1249-50. Acknowledging that review by another member of the prosecution team cannot be *dispositive* as to whether the officer acted reasonably, the court nonetheless considered it *relevant* to the officer's objective reasonableness. *Id.* The Court held that the officer's probable cause determination was objectively reasonable and noted that "a contrary conclusion would mean not only that Messerschmidt and [his superior officer] were 'plainly incompetent,' but that their supervisor, the deputy district attorney, and the magistrate were as well." *Id.* at 1249 (internal citation omitted).

Here, Valles did not simply tell Jennings that Mr. Stonecipher had a conviction on his record; he provided Jennings with all of the materials he used to reach that conclusion. Indeed, the potential for a technical, legal mistake in the probable cause determination is precisely why Valles would seek out a legal expert. Valles did not act in reckless disregard for the truth

when he not only sought legal advice from an AUSA, but also provided the AUSA with all the materials he used to make his assessment.[5]

Based on the totality of the circumstances, Valles proceeded in an objectively reasonable manner based on arguable probable cause. The district court correctly granted summary judgment in his favor on qualified immunity grounds with respect to the claims for unlawful search and entry.[6]

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[5] The Stoneciphers contend that Valles cherry-picked information from the reports in compiling his warrant application and supporting affidavit. Specifically, Valles mentioned in his supporting affidavit that the NICS report indicated Mr. Stonecipher was denied the right to purchase a firearm on the basis of his previous conviction without mentioning the NICS report also noted the denial status was "overturned." As we have described, this report contained conflicting information, and Valles (after consulting with Jennings) made an objectively reasonable conclusion that Mr. Stonecipher was "convicted" for purposes of § 922(g)(9). There is nothing in the application to suggest that Valles deliberately or recklessly presented false information or omitted exculpatory information. This is all the more true because, from the perspective of the reasonable officer, it is not necessarily the case that overturning an individual's denial status means a previous conviction was also overturned.

[6] The Stoneciphers also argue that the defendants exceeded the scope of their warrant when executing the search. But, because they do not develop this argument in their opening brief, the claim is considered waived. *See Utah Lighthouse Ministry*, 527 F.3d at 1049 n.1.

3. Unlawful Seizure and Arrest

The Stoneciphers also argue that, even if there was arguable probable cause to initiate the search and arrest, probable cause evaporated during the course of the search. In particular, they contend a reasonable officer would not believe he had probable cause after Mr. Stonecipher presented the officers with the letter from his Missouri attorney indicating that, if he completed his probation, he would not have a conviction on his record.

The district court correctly held that the defendants were not required to forego arresting Mr. Stonecipher under these circumstances. Officers executing a search warrant are not required to credit a suspect's explanation if the officers reasonably believe they still have probable cause to make the arrest despite the explanation. *Romero v. Fay*, 45 F.3d 1472, 1478 (10th Cir. 1995) ("A policeman . . . is under no obligation to give any credence to a suspect's story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause." (quoting *Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988))).

The defendants were entitled to continue the arrest without conducting further investigation into Mr. Stonecipher's explanation at that time. Mr. Stonecipher's explanation of the status of his prior offense, and supporting documentation, could have plausibly defeated probable cause, but the explanation

was by no means conclusive. In addition, there was no way to verify the authenticity of the letter, or reconfirm that Mr. Stonecipher had in fact completed probation as required, or ascertain its legal implications under Missouri law for § 922(g)(9) purposes. In fact, subsequent to Mr. Stonecipher's arrest, Valles did what a reasonable officer would do with new information – he shared it with the AUSA he had consulted before.

In sum, the district court was correct to grant summary judgment for the defendants on Mr. Stonecipher's claim for unlawful seizure and arrest.

4. Malicious Prosecution

The Stoneciphers next argue that Valles committed the tort of malicious prosecution by filing a criminal complaint against Mr. Stonecipher without conducting a reasonable investigation into his guilt. He argues that the information in the materials reviewed by Valles, as well as the letter from Mr. Stonecipher's Missouri attorney, should have alerted Valles that further investigation into the legal significance of Mr. Stonecipher's prior crime was necessary.

A malicious prosecution claim brought under the Fourth Amendment requires a showing that "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice;

and (5) the plaintiff sustained damages." *Wilkins v. DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008).[7] Malice may be inferred if a defendant causes the prosecution without arguable probable cause. *See id.* at 800-01 (malice may be inferred from intentional or reckless behavior).

As discussed above, Valles acted in an objectively reasonable manner when he reviewed the materials and sought Jennings's legal advice as to whether Mr. Stonecipher was guilty of violating § 922(g)(9). But after Mr. Stonecipher's arrest, Valles had in his possession the letter from Mr. Stonecipher's attorney that explained Mr. Stonecipher would no longer have a conviction on his record after completing probation. Valles informed Jennings of this new information, but Jennings still agreed that Mr. Stonecipher could be liable under § 922(g)(9).

The Stoneciphers' argument still assumes that the failure to understand the legal significance of a successful probation and the removal of a conviction from one's state criminal record – under § 922(g)(9) and ATF regulations – amounts to recklessness. We

[7] We noted in *Wilkins* that a malicious prosecution claim based on the deprivation of a constitutional right need not always rest on the Fourth Amendment right to be free from unreasonable searches or seizures. 528 F.3d at 797. But the Stoneciphers allege that Valles committed the tort of malicious prosecution because he filed a criminal complaint without arguable probable cause. We will therefore analyze the claim in light of Fourth Amendment guarantees.

have already concluded that the failure to perform a correct legal analysis after examining materials with conflicting information does not show reckless disregard for the truth. And Valles cannot have acted in reckless disregard of the information found in the letter from Mr. Stonecipher's attorney when he informed Jennings of this new information and obtained Jennings's approval to proceed before filing the criminal complaint.

Of course, the fact that a government lawyer makes the final decision to prosecute does not automatically immunize an officer from liability for malicious prosecution. The Stoneciphers point to *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), where we held that the prosecutor's decision to indict and prosecute the plaintiff did not shield a forensic analyst, who flagrantly misrepresented evidence to the prosecutor, from liability for malicious prosecution. We noted that defendants "cannot hide behind the officials whom they have defrauded." *Id.* at 1292 (emphasis omitted) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)). But, in this case, Valles did not misrepresent any information to Jennings. To the contrary, Valles provided Jennings with all of the original materials he reviewed to analyze whether Mr. Stonecipher was guilty of violating § 922(g)(9) and informed Jennings about the letter from Mr. Stonecipher's Missouri attorney. Seeking an independent opinion from a legally trained official, while not dispositive on the issue, shows that Valles

acted in an objectively reasonable manner under the totality of the circumstances in this particular case.

Because Valles did not act in reckless disregard for the truth, the Stoneciphers cannot demonstrate that Valles lacked arguable probable cause. They offer no other basis from which one can infer Valles acted with malice in filing the criminal complaint. The district court was correct in granting summary judgment for Valles on the malicious prosecution claim.

B. First Amendment Claims

The Stoneciphers also argue that the defendants arrested and prosecuted Mr. Stonecipher in retaliation for exercising his First Amendment rights. He contends the officers held against him his protestations of innocence and his assertion of his Second Amendment rights at the time of his arrest. In particular, Mr. Stonecipher alleges that these protestations were the true reason the defendants initiated the prosecution.[8]

To make a First Amendment retaliation claim, "a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of

[8] The Stoneciphers do not argue that the district court was incorrect to grant summary judgment for the defendants as to their claim that the defendants retaliated against Mrs. Stonecipher for her speech.

ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Nielander v. Bd. of Cnty. Comm'rs of Cnty. of Republic*, 582 F.3d 1155, 1165 (10th Cir. 2009).

The district court held that since Mr. Stonecipher's arrest preceded any potentially protected speech, the defendants could not have made the arrest in retaliation for the protected speech. We agree. The record is clear that the statements occurred after Mr. Stonecipher had been arrested and read his Miranda rights.

But the Stoneciphers also alleged that Valles subsequently filed the criminal complaint against Mr. Stonecipher in retaliation for his protected speech. The district court resolved this claim by holding Valles could not be liable for Jennings's decision to prosecute. Valles did, however, file the criminal complaint. For purposes here, we assume the filing of a criminal complaint – even if approved by the prosecutor – may "chill a person of ordinary firmness," establishing the second element of a retaliation claim.

Mr. Stonecipher, however, cannot meet his burden to show that the filing of the complaint was "substantially motivated" (or even motivated at all) by the protected speech. At the summary judgment stage, "some facts must demonstrate the defendants acted on the basis of a culpable subjective state of mind." *Trant v. Oklahoma*, No. 13-6009, 2014 WL

2199365, at *8 (10th Cir. May 28, 2014) (internal quotation marks omitted). The only evidence the Stoneciphers offer is that Valles submitted the complaint without probable cause. But, as we have already explained, Valles possessed arguable probable cause to arrest and file charges. The Stoneciphers have thus not met their burden of pointing to some facts that demonstrate Valles was "substantially motivated" to submit the complaint because of Mr. Stonecipher's attempts to explain his innocence and assert his Second Amendment rights. Indeed, the filing of the complaint was the next logical step in the ATF's pursuit of charges against Mr. Stonecipher, which began months before Mr. Stonecipher made his statements. The Stoneciphers do not explain how Mr. Stonecipher's speech affected this course of events.

We affirm the grant of summary judgment for the defendants on the Stoneciphers' First Amendment retaliation claims.

C. Discovery

The Stoneciphers make one last procedural argument. They contend the district court abused its discretion when they were denied the opportunity for additional discovery before it granted the defendants' motions for summary judgment.[9]

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[9] The Stoneciphers also argue that the denial of the defendants' motion to dismiss on qualified immunity grounds precluded the court from granting the defendants qualified immunity at

(Continued on following page)

But because qualified immunity protects against the burdens of discovery as well as trial, a district court may stay discovery upon the filing of a dispositive motion based on qualified immunity. *See Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) ("[E]ven such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government." (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))). The court may grant pre-discovery summary judgment on the basis of qualified immunity if the plaintiffs cannot explain "how discovery will enable them to rebut a defendant's showing of objective reasonableness." *Jones v. City & Cnty. of Denver*, 854 F.2d 1206, 1211 (10th Cir. 1988). If, however, the district court determines it cannot rule on the immunity defense without clarifying the relevant facts, the court "may issue a discovery order narrowly tailored to uncover only those facts needed to rule on the

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the summary judgment stage. But the denial of qualified immunity protection at the motion to dismiss stage does not bind the court at the summary judgment stage. The legally relevant factors for a qualified immunity decision will be different at the summary judgment stage – no longer can the plaintiffs rest on facts as alleged in the pleadings. *See Behrens v. Pelletier*, 516 U.S. 299, 309 (1996); *see also Robbins v. Wilkie*, 433 F.3d 755, 762 (10th Cir. 2006) ("[A] defendant should be permitted to raise the qualified immunity defense at successive stages of litigation because different legal factors are relevant at various stages."), *rev'd on other grounds* 551 U.S. 537 (2007). The district court did not err in reevaluating whether the defendants were entitled to qualified immunity protection at the summary judgment stage.

immunity claim." *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (internal quotation marks omitted).

The district court concluded, and we agree, that Valles possessed arguable probable cause for the arrest and charging decision. The Stoneciphers do not explain how discovery would enable them to rebut this showing. In their reply brief, the Stoneciphers mention that discovery would allow them to obtain the complete correspondence between Valles and Jennings, but they do not explain how this material would rebut the finding of arguable probable cause.[10] Both Valles and Jennings averred that Jennings independently reviewed Mr. Stonecipher's file. Because the Stoneciphers do not explain how discovery will allow them to rebut the finding of objective reasonableness, the district court did not err in granting summary judgment for the defendants without allowing for discovery.

III. Conclusion

Because the defendants are entitled to qualified immunity, the judgment of the district court is AFFIRMED.

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[10] The Stoneciphers also assert the district court erred by failing to review their affidavits, but this contention is directly contradicted by the district court's opinion, which explicitly refers to their affidavits.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANTHONY and MELISSA STONECIPHER,

Plaintiffs,

v.

SPECIAL AGENTS Carlos VALLES, John ESTRADA, Matt CRECILIUS, David TABULLO, McCARTHY, KING, JORGENSEN, Bureau of Alcohol, Tobacco, Firearms, and Explosives; Alamogordo City Police Department Officer Luis HERRERA; United States Marshals John DOEs; Doña Ana County Sheriff's Officers John DOEs; CITY OF ALAMOGORDO; BOARD OF COUNTY COMMISSIONERS OF DOÑA ANA COUNTY; UNITED STATES OF AMERICA,

Defendants.

No. 11-0417 JCH/GBW

MEMORANDUM OPINION AND ORDER

(Filed Jun. 28, 2013)

THIS MATTER comes before the Court on the remaining[1] federal Defendants Special Agents ("SA") Carlos Valles', John Estrada's, David Tabullo's, Peter McCarthy's, Dennis King's, and Karl Jorgensen's *Renewed Motion to Dismiss or, in the Alternative, for Pre-discovery Summary Judgment*, filed June 4, 2012 (Doc. 90). The individual federal Defendants seek dismissal of and/or summary judgment on, all of the Plaintiffs' remaining claims for violation of their First and Fourth Amendment rights. The remaining claims are as follows: Count I – Anthony Stonecipher's [hereinafter "Anthony"] claim for unreasonable seizures and false arrest; Count II – Anthony's claim for unreasonable search; Count III – Anthony's claim for malicious prosecution against SA Valles; Count IV – Anthony and Melissa Stonecipher's [hereinafter "Melissa"] claims for unlawful entry; Count V – Anthony's claim for excessive force; Count VI –

[1] Plaintiffs voluntarily dismissed Matt Crecilius as a defendant on September 26, 2011. *See* Doc. 49. They voluntarily dismissed their claims against the City of Alamogordo on December 14, 2011. *See* Doc. 54. The Court dismissed the United States of America and the Board of County Commissioners of Doña Ana County as parties on January 5, 2012, after dismissing claims against them, *see* Docs. 55, 56. The Court granted the Plaintiffs' motion to dismiss all claims against the Doña Ana County Sheriff's Officers John Does on March 6, 2012. *See* Doc. 70. The Court dismissed all claims against Officer Luis Herrera of the Alamogordo City Police Department on March 28, 2013. *See* Doc. 125.

Melissa's claim for unreasonable seizure and false arrest; and Count IX – Anthony and Melissa's First-Amendment retaliation claims, which all are brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

After reviewing the briefs and evidence submitted by the parties, as well as the controlling precedent and applicable authorities, the Court concludes that the motion should be granted because Plaintiffs failed to meet their burden to make sufficient allegations, grounded in the record, that these Defendants violated their constitutional rights, and because the undisputed evidence demonstrates that the Defendants are entitled to qualified immunity.

LEGAL STANDARDS

I. Motions to Dismiss.

A motion to dismiss, including one based on qualified immunity, must be decided by accepting the well-pleaded facts of the complaint as true and analyzing those facts under the standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). *See Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011). The assumption that all facts in the complaint are true, however, is inapplicable when the complaint relies on a recital of the elements of a cause of action and supports those elements only with conclusory statements. *See Iqbal*, 556 U.S. at 678-79. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the

complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Federal Rule of Civil Procedure 8(a)(2)). In addition," documents referred to in the complaint may be considered at the motion-to-dismiss stage if they are 'central to the plaintiff's claim' and their authenticity is undisputed." *Phillips v. Bell*, No. 08-1420, 365 Fed. App'x 133, 137, 2010 WL 517629, *3 (10th Cir. Feb. 12, 2010) (considering the search warrant and supporting affidavits referenced in the complaint in analyzing the issue of qualified immunity that was raised in motion to dismiss, and quoting *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007)).

II. Motions for Summary Judgment.

When a defendant files a motion for summary judgment on the issue of qualified immunity and submits additional evidence, in contrast, the Court may consider the whole summary-judgment record to decide the qualified-immunity issue, and plaintiffs may not rest upon the allegations in their complaint. Because the remaining federal Defendants rely heavily on affidavits and other evidence and have brought their motion alternatively as one for summary judgment, the Court will principally analyze their motion under the appropriate summary-judgment standards.

Summary judgment generally is appropriate when a court determines that "there is no genuine dispute as to any material fact and the movant is entitled to a

judgment as a matter of law." FED. R. CIV. P. 56(a)[2]; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (noting that a summary judgment movant need not negate all the nonmovant's claims, but need only point to an "absence of evidence to support the nonmoving party's case"). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Rather, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

The standard for analyzing a motion for summary judgment shifts, if, as here, a defendant raises qualified immunity as a defense in a lawsuit brought under 42 U.S.C. § 1983 or *Bivens*. "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009). "If, and only if, the plaintiff meets this two-part test does a defendant then bear the traditional

[2] Rule 56 was amended, effective December 1, 2010. The summary judgment standard previously enumerated in subsection (c) was moved to subsection (a), and there was one word change from the previous version – genuine 'issue' became genuine 'dispute.' *See* FED. R. CIV. P. 56 advisory committee note (2010 Amendments). But the "standard for granting summary judgment remains unchanged." *Id.*

burden of the movant for summary judgment-showing that there are no genuine issues of material fact and that he . . . is entitled to judgment as a matter of law." *Clark v. Edmunds*, 513 F.3d 1219, 1222 (10th Cir. 2008) (internal quotation marks omitted).

"[O]nce [the court has] determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, . . . the reasonableness of [the officer's] actions . . . is a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007) (emphasis in original). Consistent with the Supreme Court's opinion in *Scott*, the Honorable Jerome A. Holmes of the Tenth Circuit Court of Appeals wrote, in a concurring opinion, a very useful discussion for district courts that sheds "some clarifying light on the process of applying the summary judgment standard of review in the qualified immunity setting." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1326 (10th Cir. 2009) (Holmes, J. concurring).

> In addressing the legal issue in the qualified immunity context of a violation *vel non* of a clearly established constitutional right, however, the principal purpose of assessing whether plaintiff's evidence gives rise to genuine issues of material fact is different than it is in the traditional summary judgment analytic paradigm. Specifically, contrary to the latter, the objective is not to determine whether a plaintiff survives summary judgment because plaintiff's evidence raises material issues that warrant resolution

by a jury. Instead, the principal purpose is to determine whether plaintiff's factual allegations are sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for answering the legal question before the court. . . .

It is only *after* plaintiff crosses the legal hurdle comprised of his or her two-part burden of demonstrating the violation of a constitutional right that was clearly established, that courts should be concerned with the *true* factual landscape – as opposed to the factual landscape as plaintiff would have it. Based upon that true factual landscape, courts should determine whether defendant can carry the traditional summary judgment burden of establishing that there are no genuine issues of material fact for jury resolution and that defendant is entitled to judgment as a matter of law. *See Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) ("If the plaintiff successfully establishes the violation of a clearly established right, the burden shifts to the defendant, who must prove that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law." (internal quotation marks omitted)); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001) (quoting *Medina*); *see also Gallegos v. City & County of Denver*, 984 F.2d 358, 361 (10th Cir.1993) ("Only after plaintiff has met this initial [two-part qualified immunity] burden does the burden shift to

> defendants to prove that no genuine issue of material fact exists."). . . .

Id. at 1326-27 (footnote omitted) (italics in original). Even if the plaintiff crosses the initial hurdle and the burden shifts to the defendant to show that no genuine issue of material facts exist, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380.

III. Qualified immunity.

"Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244-1245 (2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, ___, 131 S. Ct. 2074, 2085 (2011) (further internal quotation marks omitted)).

> Where the alleged Fourth Amendment violation involves a search or seizure pursuant to a warrant, the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner or, as we have sometimes put it, in "objective good faith." *United States v. Leon*, 468 U.S. 897, 922-923, 104 S.Ct. 3405, 82 L. Ed. 2d 677 (1984). Nonetheless,

under our precedents, the fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness. Rather, we have recognized an exception allowing suit when "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." *Malley*, 475 U.S., at 341, 106 S. Ct. 1092. The "shield of immunity" otherwise conferred by the warrant, *id.*, at 345, 106 S. Ct. 1092, will be lost, for example, where the warrant was "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S., at 923, 104 S.Ct. 3405 (internal quotation marks omitted).

Our precedents make clear, however, that the threshold for establishing this exception is a high one, and it should be. As we explained in *Leon*, "[i]n the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination" because "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id*., at 921, 104 S. Ct. 3405; see also *Malley, supra*, at 346, n. 9, 106 S.Ct. 1092 ("It is a sound presumption that the magistrate is more qualified than the police officer to make a probable cause determination, and it goes without saying that where a magistrate acts

> mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable" (internal quotation marks and citation omitted)).

Id. at 1245 (footnotes omitted). "[T]he inquiry under our precedents is whether 'a reasonably well-trained officer in petitioner's position would have known that *his affidavit* failed to establish probable cause." *Malley*, 475 U.S., at 345, 106 S.Ct. 1092 (emphasis added)." *Id.* at 1248 n.6. "The fact that the officers secured [ ] approvals [for a warrant from the district attorney] is certainly pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause." *Id.* at 1250. Thus, under the principle of "arguable probable cause," "[e]ven law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Cortez v. McCauley*, 478 F.3d 1108, 1120 & n. 15 (10th Cir. 2007) (en banc).

IV. Fourth Amendment – Probable cause.

> The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. And this 'means less than evidence which would justify condemnation' or conviction. . . . Probable cause exists where the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of

> reasonable caution in the belief that an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1946) (internal quotation marks and citations omitted) (parentheticals in original). "[A]n arrest is valid and does not violate the Fourth Amendment if the warrant underlying it was supported by probable cause at the time of its issuance; this holds true even if later events establish that the target of the warrant should not have been arrested." *Beard v. City of Northglenn*, 24 F.3d 110, 114 (10th Cir. 1994).

> When the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." This does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks v. Delaware, 438 U.S. 154, 164-65 (1978) (internal quotation marks and bracket omitted). Thus, "the Fourth Amendment's warrant requirement is violated when 'a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit' if the false statement is necessary to a finding of probable

cause." *Clanton v. Cooper*, 129 F.3d 1147, 1154 (10th Cir. 1997) (quoting *Franks*, 438 U.S. at 155-56).)

Similarly, a plaintiff alleging that his constitutional right to due process was violated by a malicious prosecution must show, as an essential element of his claim that "there was no probable cause to support the original arrest, continued confinement, or prosecution." *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *see Kerns v. Bader*, 663 F.3d 1173, 1190 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 645, 184 L. Ed. 2d 457, 81 USLW 3286 (Nov 26, 2012) (concluding that "[t]he existence of probable cause disposes of all of [plaintiff's federal] claims [for false arrest/imprisonment and malicious prosecution]").

V. Excessive force.

"To establish a constitutional violation [for excessive force], the plaintiff must demonstrate the force used was objectively unreasonable." *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1259 (10th Cir. 2008). "We assess objective reasonableness based on whether the totality of the circumstances justified the use of force, and pay careful attention to the facts and circumstances of the particular case." *Id.* at 1260 (internal quotation marks omitted). "In determining whether a plaintiff's constitutional rights were violated we ordinarily, as here, adopt plaintiff's version of the facts, insofar as it is supported by the record." *Thomson*, 584 F.3d at 1318. "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 v. Connor*, 490 U.S. 386, 396 (1989). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97. But in responding to a summary judgment motion, the plaintiff must show more than just a de minimus injury caused by the excessive use of force. *See Koch v. City of Del City*, 660 F.3d 1228, 1247-48 (10th Cir. 2011) (stating, in affirming grant of qualified immunity on summary-judgment, that "to succeed on her claim, Ms. Koch must show an actual injury that is not de minimis").

UNDISPUTED FACTS

"On December 5, 2009, Plaintiff [Melissa Stonecipher, using the name] Melissa Ann Johnson made a multiple purchase of twelve handguns" from a firearms dealer in Alamogordo, New Mexico. *See* Doc. 90-1 at 6 (Warrant ¶ 4)[3]. She also made two other

[3] The Plaintiffs generally do not dispute the material factual background leading up to the afternoon of Anthony's arrest that supports probable cause, other than to argue that Anthony's domestic-violence conviction should not have been counted as a conviction for the purpose of determining whether he is barred from possessing firearms under 18 U.S.C. § 922(g)(9), and to say that they cannot confirm or deny the actions SA Valles took, and the advice AUSA Ron Jennings gave to SA Valles, before SA

(Continued on following page)

handgun purchases during a 10-month period. *See id.* But Melissa had married Anthony in August, 2007 and had legally changed her name to Melissa Stonecipher in July 2009, so she did not use her legal name for the purchases made after July 2009. *See id.* at ¶ 5; *see* Am. Compl. (Doc. 5) at 4, ¶ 15. The same firearms dealer had refused to sell guns to Anthony on August 9, 2007, after conducting a "National Instant Criminal Background Check System (NICS)" and finding a domestic-assault conviction. Doc. 90-1 at 6, ¶ 6. On January 1, 2010, Anthony and Melissa were at a party at the VFW, where Anthony offered to sell handguns to Matt Crecilius, the Flight Chief of the Air Force's 49th Security Squadron. *See id.* at 6-7, ¶ 7. Crecilius reported the incident to SA Valles, an employee of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). *See id.* at 6, ¶ 7. SA Valles began an investigation into Anthony's criminal history. SA Valles obtained certified court documents establishing that Anthony pleaded guilty on April 16, 2007 in Missouri to the misdemeanor charge

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Valles applied for the warrant and filed the criminal complaint. *See* Doc. 101 at 4, 9-23. The documents that SA Valles obtained, however, are dated, *see, e.g.*, Doc. 91-1 at 20 (NICS report showing a "print date" of "December 8, 2009), thus there is no genuine issue of material fact regarding when he obtained them during his investigation. The Court also notes that, while the Plaintiffs' response brief at times contends that certain facts set forth by the Defendants are disputed, Plaintiffs sometimes do not support bald contentions with affidavits or other admissible evidence. *See, e.g.* Doc. 101 at 16, ¶¶ 23, 25; *id.* at 17, ¶¶ 29, 30; *id.* at 18, ¶ 35; *id.* at 21, ¶ 54.

of "Domestic Assault – 3d Degree." Doc. 110-1 at 4 (certified copy of docket sheet and judgment); Doc. 90-1 at 7, ¶ 8. The Missouri Court imposed a "[s]uspended imposition of sentence" consisting of one year of supervised probation. *See* Doc. 110-1 at 4. On April 16, 2008, after Anthony successfully "served term of probation and paid all monies due[, the] court [ ] discharge[d him] from probation." *Id.* at 6. SA Valles also obtained an NICS report showing that Anthony had been denied the right to purchase a gun in 2007, *see* Doc. 91-1 at 19-25 & 91-2 at 1; Doc. 101 at 11, ¶ 6 (admitting that Anthony had been denied the purchase of a gun from a federally-licensed dealer), and a 12/8/2009 NCIC report, *see* Doc. 91-2 at 2-5. The NICS denial report states: "Subject has been convicted of a Misdemeanor Crime of Domestic Violence." Doc. 91-1 at 20. The words "COURT ACTION: GUILTY – SIS" are found on page 8 of the NICS denial report and on page 3 of the NCIC report; and at the bottom of the last page of each report it says: "SUSPENDED IMPOSITION OF SENTENCE DISPOSITIONS ARE NOT CONVICTIONS AND ARE CLOSED RECORDS WHEN PROBATION IS COMPLETED." Doc. 91-2 at 1, 5. Nowhere on the reports, however, do they indicate that "SIS" means "SUSPENDED IMPOSITION OF SENTENCE."

After obtaining these documents, SA Valles and SA Joel Marquez, an ATF explosions specialist, conferred with Assistant United States Attorney (AUSA) Ron Jennings to obtain Jenning's legal determination whether Anthony's 2007 conviction would legally bar

Anthony from possessing firearms under 18 U.S.C. § 922(g)(9), which prohibits anyone

> who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

On February 1, 2010, after reviewing Anthony's misdemeanor information; the judgment and sentence; the NICS denial report, and the NCIC report, AUSA Jennings advised SA Valles and SA Marquez that Anthony was, in fact, prohibited from possessing firearms pursuant to § 922(g)(9). Doc. 90-4 at 2-3 (Jennings Aff. at ¶¶ 3-11); Doc. 91-1 at 2-3 (Valles Aff. ¶¶ 6-11); Doc. 90-3 at (Marquez Aff. at ¶¶ 5-8).

On March 8, 2010, Crecilius met with Anthony, who again offered to sell Crecilius two handguns. Doc. 90-1 at 7, ¶ 9. On March 16, 2010, SA Valles and SA John Estrada, pretending to be related to Crecilius, accompanied Crecilius to Anthony's and Melissa's house and purchased a handgun and two exploding targets. *See id.* at 7-8, ¶¶ 10-11, 14. The handgun was one of the many handguns that Melissa had purchased on December 5, 2009. *See id.* at 9, ¶ 17; Doc. 101 at 17, ¶ 28. Anthony also showed SA Valles and SA Estrada his firearms inventory and "physically demonstrated how his AK-47 could be easily converted to a machine gun with a paperclip." Doc. 91-1 at 4, ¶ 14 (Valles Aff.); Doc. 90-9 at 2, ¶ 8;

and see Doc. 101 at 16, ¶ 23 (stating that "Plaintiff vigorously disputes that he 'demonstrated' how he could easily make an illegal conversion, only that he stated that he possessed the knowledge on how to do so," but failing to support that statement with an affidavit). Anthony also showed the agents a Hi-Point carbine rifle that he claimed to have unintentionally converted to be fully automatic by polishing the sear, although he declined to sell it at that time. Doc. 90-1 at 8, ¶ 12. On May 5, 2010, however, Anthony offered to sell the carbine to SA Valles. *See id.* at 10, ¶ 23. SA Valles established that Anthony bought and sold guns, gun parts, and ammunition on the website gunbroker.com, and he identified two guns that Anthony sold to a dealer in Texas. *See id.* at 9, ¶¶ 19-20. SA Valles also confirmed that neither Anthony nor Melissa had a Federal Firearms License, nor had they registered any gun with the National Firearms and Transfer Record. *See* 91-1 at 5, ¶¶ 23-24.

Between May 13-17, 2010, AUSA Jennings reviewed and approved SA Valles' affidavit and application for a search warrant for the Stoneciphers' house. *See* Doc. 90-4 at 3, ¶¶ 12-16 (AUSA Jennings Aff.). SA Valles did not mention in his affidavit that the Missouri judgment stated that there was a "suspended imposition of sentence," because SA Valles did not know that those words "had any legal significance as to a conviction" when a defendant had pleaded guilty to a crime. Doc. 91-1 at 11, ¶ 59 (SA Valles Aff.). On May 17, 2010, a federal magistrate judge granted SA Valles' application for a search warrant based on

SA Valles' belief that Anthony had violated 18 U.S.C. § 922(g)(9). *See* Doc. 90-1 at 1, 13. On May 18, 2010, SA Valles, along with other ATF agents, executed the warrant, searched the Stoneciphers' residence and arrested Anthony.

After he had been arrested, and during the course of the search, Anthony asked for, and was granted, permission to retrieve documents from a filing cabinet, including a letter signed by James Cooksey, Anthony's purported attorney in the Missouri domestic-violence case. *See* Doc. 91-1 at 8, ¶¶ 42-43. The letter, dated April 16, 2007, noted that Anthony had "pled guilty to the charge of Domestic Assault," but informed Anthony that, "if . . . you serve out your probation . . . you do not have a conviction on your record." Doc. 23-2 at 1 (letter from Cooksey). Anthony read at least part of the letter aloud to SA Valles and SA Estrada and perhaps to other agents, and SA Valles read the letter himself. *See* Doc. 101 at 27, ¶ 12; Doc. 91-1 at 8, ¶¶ 42-43. But because Cooksey's statement conflicted with the legal determination made by AUSA Jennings, SA Valles and the other agents continued with the arrest and search. *See* Doc. 91-1 at 8, ¶ 43 (Valles Aff.); Doc. 90-9 at 6, ¶¶ 27-28 (Estrada Aff.). ATF officers took all of the documents that Anthony produced, including an NCIC report dated 1/26/2007. This report was compiled after Anthony had been arrested but before he pleaded guilty; it therefore showed "0" convictions and did not include the disposition of the case. *See* Doc. 24-1 at 1-3 (NCIC report Anthony submitted to prior

summary judgment record). The NCIC report contained the language quoted *supra* about suspended impositions of sentences not being convictions, but it did not indicate that a suspended imposition of sentence had been imposed in Anthony's case. *See id.* SA Valles and SA Estrada swear, and Anthony does not contradict the sworn testimony, that Anthony "did not read any other document to the ATF agents or specifically reference any other document to the ATF agents at the time of his arrest and/or search of his premises." Doc. 91-1 at 8, ¶ 44 (Valles Aff.); Doc. 90-9 at 6, ¶ 29 (Estrada Aff.). Thus, the agents who conducted the search and arrested Anthony all swear that they "believed they had probable cause to arrest Anthony Stonecipher based on information furnished to them by SA Valles, their knowledge of ATF's investigation that Mr. Stonecipher was unlawfully in possession of a firearm, and that he was unlawfully manufacturing and selling explosives." Jorgensen Aff. at ¶¶ 18-19; King Aff. at ¶¶ 18-19; McCarthy Aff. at ¶¶ 15-16; Tabullo Aff. at ¶¶ 17-18.

SA Valles informed AUSA Jennings of the letter, and Jennings advised him that more investigation should be conducted into the letter and Missouri law, thus SA Valles, with Jennings' review and approval, filed a criminal complaint against Anthony for violation of 18 U.S.C. § 922(g)(9). *See* Doc. 91-1 at 9, ¶¶ 48-51. AUSA Jennings made the decision to prosecute Anthony. *See* Doc. 90-4 at 4, ¶¶ 20-21.

> On May 25, 2010, the prosecuting United States Attorney advised Magistrate Judge

> Lourdes A. Martinez that Anthony Stonecipher did not have a conviction for domestic violence, and she dismissed the single charge against him for violating 18 U.S.C. § 922(g)(9). Doc. 23, Ex. 3 (Clerk's Minutes).
>
> Plaintiffs subsequently filed this action against both state and federal law enforcement, alleging violations of their civil rights, as guaranteed by the Fourth and Fourteenth Amendments, and state-law tort claims. With few exceptions, the Complaint fails to specify the individual actions of the law enforcement officers, but instead generally directs the separate counts at all defendants.

March 28, 2013 Memorandum Opinion and Order ("MOO") at 2 (footnote omitted).

ANALYSIS

Plaintiffs contend that the Court should reach the same result in regard to this motion as it did in resolving the Defendants' previous motions to dismiss, stating that "nothing has changed" since the Court issued its January 5, 2012 MOO. Doc. 119 at 3-4, 7. But the Defendants have now alternatively also moved for summary judgment and supplied additional undisputed factual information, and the Court previously noted that, "[a]t this stage of the proceedings, it is unclear whether Agent Valles omitted the information about Anthony Stonecipher's SIS out of mere negligence or whether the omission was intentional or the result of a reckless disregard for the

truth." January 5, 2012 MOO at 11. Accepting the Plaintiffs' allegations as true, the Court denied the prior motion to dismiss in part and granted it in part. *See id.* As noted, the Court is analyzing the motion at bar under the standards for summary judgment.

I. Defendants are entitled to qualified immunity on Counts I-IV.

Counts I-IV allege unconstitutional entry and search of the Stoneciphers' home and unlawful/unconstitutional seizure, arrest and prosecution of Anthony. Defendants contend that they are entitled to qualified immunity on these claims because:

> (1) the ATF investigation showed Plaintiff Anthony Stonecipher was in violation of Federal explosives laws, that he had a prior adverse MCDV judgment, and that he demonstrated for ATF agents how he converted a firearm to be fully automatic; (2) the search warrant and supporting probable cause affidavit, and the criminal complaint and supporting affidavit were reviewed by an Assistant United States Attorney prior to being presented to the Court; and (3) the ATF agents acted pursuant to a lawful, constitutional, and facially valid warrant.

Doc. 90 at 19. To overcome the defense of qualified immunity, Anthony and Melissa must show that their "factual allegations are sufficiently grounded in the record such that they may permissibly comprise the universe of facts that will serve as the foundation for

answering the legal question" whether the Defendants violated their constitutional rights. *Thomson*, 584 F.3d at 1326. Further, they also must set forth facts, grounded in the record, showing that the actions of each individual agent violated clearly established law and were objectively unreasonable. *See Brown v. Montoya*, 662 F.3d 1152, 1163 (10th Cir. 2011) ("Personal liability for Constitutional violations must be based on personal involvement in the alleged constitutional violation.") (internal quotation marks omitted).

Anthony and Melissa contend that the search of their home, Anthony's arrest and prosecution, and Melissa's seizure during the time the search was conducted were unlawful and unconstitutional because "SA Valles intentionally misinformed the Court that Plaintiff Anthony Stonecipher had been convicted of a domestic assault charge in Missouri, which would prohibit him from owning or transferring a firearm under 18 U.S.C. § 922(g)(9)" when "no such certified copy of a conviction exists or existed," thus the search, seizure, arrest and prosecution were not supported by probable cause. Doc. 101 at 4. But the Stoneciphers must "make a substantial showing" that SA Valles included "deliberate falsehood[s]" in his affidavit or acted in "reckless disregard for truth," *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990); *Clanton*, 129 F.3d at 1154, and they have not made such a showing. The court documents that SA Valles saw before he submitted his affidavit for a search warrant conclusively show that Anthony pleaded guilty to a

misdemeanor domestic-violence charge. *See* Doc. 110-1 at 4. Although the docket sheet shows that the Missouri court imposed a "[s]uspended imposition of sentence" consisting of one year of supervised probation, *see id*., nowhere on the docket sheet does it indicate the legal significance of such a sentence on the conviction. Similarly, the NICS denial report that SA Valles obtained based the denial of a gun sale to Anthony on the factual finding that "Subject has been convicted of a Misdemeanor Crime of Domestic Violence." Doc. 91-1 at 20. And although the words "COURT ACTION: GUILTY – SIS" are found on page 8 of the NICS denial report and on page 3 of the NCIC report; and at the bottom of the last page of each report it says: "SUSPENDED IMPOSITION OF SENTENCE DISPOSITIONS ARE NOT CONVICTIONS AND ARE CLOSED RECORDS WHEN PROBATION IS COMPLETED." Doc. 91-2 at 1, 5, nowhere on the reports does they indicate that "SIS" means a "SUSPENDED IMPOSITION OF SENTENCE." SA Valles, who is not an attorney, swears that he was not aware of the legal significance of the term "SIS," or "suspended imposition of sentence," and, critically, it is undisputed that SA Valles reasonably sought the professional opinion of AUSA Jennings to determine the legal significance of Anthony's 2007 guilty plea and sentence. It is further undisputed that AUSA Jennings advised Valles that the Missouri conviction was, in fact, sufficient for purposes of barring Anthony from possessing firearms under federal law after reviewing everything that SA Valles had seen. As in *Messerschmidt,* SA Valles'

detailed warrant application truthfully laid out the pertinent legal facts *as he reasonably understood them to be* after being advised by AUSA Jennings. The fact that SA Valles sought and obtained approval of the warrant application from the AUSA before submitting it to the magistrate judge supports the conclusion that, as a matter of law, Valles reasonably believed that the warrant was supported by probable cause. *Cf. Messerschmidt*, 132 S. Ct. at 1249. SA Valles "took every step that could reasonably be expected of [him]." *Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984). In light of these facts, it cannot be said that SA Valles' " warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable," *Malley v. Briggs*, 475 U.S. 335, 244-45 (1989), or that "no officer of reasonable competence would have requested the warrant," *id*. at 346, n. 9. "Indeed, a contrary conclusion would mean not only that [SA Valles was] plainly incompetent," but that AUSA Jennings was, as well. *Messerschmidt*, 132 S. Ct. at 1249 (internal quotation marks and citation omitted).

The Stoneciphers' bald statement that "[a]ccording to the Missouri Court, Plaintiff did not have any weapons restrictions placed upon him, so long as he abided by a no-contact order with his former wife," Doc. 101 at 4-5, is not supported by the certified copy of the Missouri judgment, which is silent regarding weapons restrictions. Similarly, their statement that Anthony's "misdemeanor domestic assault charge, follow[ed] a verbal altercation with his former wife," *id.*

at 4, is contradicted by the 2009 NICS report, which states that Anthony's former wife "reported she was thrown to the ground by her husband." Doc. 91-1 at 22.

Citing to documents attached at Docket number 24 in this case, the Stoneciphers argue that SA Valles and the other Defendants did not have probable cause to continue the search or to arrest Anthony after Anthony read parts of the letter from his attorney to the agents during the search, and after they saw the NICS report and NCIC report that showed "0" convictions. Doc. 101 at 5. They also contend that the "Missouri State Highway Patrol Criminal History Record" attached to their Response to the Federal Defendants first Motion to Dismiss "also warned any reviewing official that 'suspended imposition of sentence dispositions are not convictions and become closed records when probation is completed or finally terminated,' " and that "a redacted and unofficial copy of the Plaintiff's FBI report was attached in the response, definitively demonstrating that Plaintiff has never been convicted of any crime, as available to the responding ATF agents, before, during, and after the arrest." Doc. 101 at 5. The Court notes, however, that Anthony does not rebut SA Valles' and SA Estrada's testimony that Anthony did not read aloud from any document other than his attorney's letter at the time the search was being conducted, and that he also did not point to anything in any other document indicating that his domestic-violence conviction – upon satisfactory completion of probation – would no longer be legally considered as a conviction. Doc. 91-1

at 8, ¶ 44 (Valles Aff.); Doc. 90-9 at 6, ¶ 29 (Estrada Aff.). As noted, *supra*, the NCIC report Anthony apparently had at his house was dated 1/26/2007 – **before** Anthony pleaded guilty and before any ruling had been made regarding his arrest, so the fact that there was a "0" under the section for convictions in that report had no legal significance whatsoever at that time. *See* Doc. 24-1 at 1-3. Further, Anthony has submitted nothing to show that either the Missouri State Highway Patrol Criminal Report, which was created on August 21, 2010, *see* Doc. 24-2 at 1-6, or the FBI report, which was created on 8/25/2010, *see* Doc. 24-3 at 3, have any relevance to the issue of what SA Valles or the other officers knew or should have known on or before May 18, 2010, when they conducted the search and arrested Anthony. *See Beard*, 24 F.3d at 114 (noting that probable cause must support a warrant "at the time of its issuance . . . even if later events establish that the target of the warrant should not have been arrested"). In short, the Stonecipher' conclusion that, despite AUSA Jennings' legal advice to the contrary, SA Valles and the other officers knew or were recklessly unaware that they lacked probable cause to search the Stoneciphers' home and arrest Anthony is unsupported. The contention that the agents independently understood the legal significance of a suspended imposition of sentence on a domestic-violence conviction from another state is contrary to the undisputed record, and the Defendants are entitled to qualified immunity.

II. Defendants are entitled to qualified immunity on Count V.

Anthony's First Amended Complaint (which is incorporated into his Second Amended Complaint) factually alleges that, during his arrest, Anthony was "turn[ing] to leave back to the safety of his own home" when he "was taken to the dirt and handcuffed, causing injury to his back." Doc. 5 at 8, ¶ 41. He concludes in Count V of his Amended Complaint that "Defendants used excessive force against Plaintiff Anthony Stonecipher when they took him to the ground outside his home, at gunpoint, with fully automatic weapons," causing him to suffer undescribed "physical injury." *Id.* at 15, ¶¶ 98, 99.

Defendants contend that Anthony did not allege sufficient facts in his Amended Complaint to support a claim for excessive force, and, alternatively, they submit affidavits regarding the amount of force used. The agents' affidavits state that Anthony got down on the ground as instructed, without any physical force applied by ATF agents; that Agent Tabullo patted Anthony down and handcuffed Anthony with his hands behind his back; and that when Anthony complained that the handcuffs caused his shoulder to hurt, an agent immediately re-handcuffed him with his hands in the front. *See* Doc. 90-5 at 2, ¶¶ 7-8 (Jorgensen Aff.); Doc. 90-6 at 2, ¶¶ 7-9 (King Aff.); Doc. 90-7 at 2, ¶¶ 7-9 (McCarthy Aff.); Doc. 90-8 at 2, ¶ 7 (Tabullo Aff.). Anthony swears in his affidavit filed in response to this motion for summary judgment that he "began kneeling toward the ground, as

ordered," but that "several officers then . . . handled [him] in a forcible way, pushing [him] toward the ground;" and that an unknown officer "placed his knee or hand on [Anthony's] back, causing [his] back injury." Doc. 101 at 26, ¶¶ 4, 5 (Anthony's Aff.).

Anthony's sparse allegations in his Amended Complaint and affidavit, taken as true, however, do not "demonstrate the force used was objectively unreasonable," *Estate of Larsen*, 511 F.3d at 1259, or that his injury was more than de minimus, *Koch*, 660 F.3d at 1247-48. "Should the officers move for qualified immunity on an excessive force claim, a plaintiff is required to show that the force used was impermissible (a constitutional violation) and that objectively reasonable officers could not have not thought the force constitutionally permissible (violates clearly established law)." *Cortez*, 478 F.3d at 1128 ("We have little difficulty concluding that a small amount of force, like grabbing Rick Cortez and placing him in the patrol car, is permissible in effecting an arrest under the Fourth Amendment."). As noted, the Amended Complaint and affidavit state that Anthony was "turn[ing] to leave back to the safety of his own home" just before he was "pushed" to the ground. Doc. 5 at 8, ¶ 41; Doc. 101 at 26, ¶ 4. There are no allegations that the Defendants tackled Anthony or threw him to the ground or used any force in "placing" the knee or hand on his back. Further, the Amended Complaint alludes to the incident "exacerbat[ing]" a previous back injury for which Anthony already took prescription medication, Doc. 5 at 5, ¶ 45, which

indicates that the placing of the officer's hand or knee on Anthony's back did not cause the injury, but only increased his preexisting pain. Anthony does not allege that the Defendants knew about his pre-existing back injury. "We assess objective reasonableness based on whether the totality of the circumstances justified the use of force, and pay careful attention to the facts and circumstances of the particular case." *Estate of Larsen*, 511 F.3d at 1260.

> 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 388. As a matter of law, under the circumstances as described by Anthony, where it appears that he was trying to get back into his house after seeing the agents, it was not objectively unreasonable for the agents to push him toward the ground and for one agent to "place" his hand or knee on Anthony's back to keep him there while handcuffing him. Doc. 101 at 26, ¶ 4. The Defendants are entitled to qualified immunity on the excessive-force claim.

III. Defendants are entitled to qualified immunity on Count VI.

Melissa's Fourth-Amendment claim for unlawful seizure and false arrest is based solely on her legal conclusion that her "seizure and detention . . . was without reasonable suspicion and without probable cause to believe that Plaintiff was engaging in criminal activity." Doc. 5 at 16, ¶ 102. The Court has already concluded that the agents reasonably believed that they had probable cause to search the Stoneciphers' house.

In *Michigan v. Summers*, the United States Supreme Court held that officers executing a search warrant for contraband have authority "to detain the occupants of the premises while a proper search is conducted" for the duration of the search, including occupants who are not suspected of committing the crime associated with the search warrant. 452 U.S. 692, 705 (1981). An officer's authority to detain an occupant of a house being searched does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.* n.19. Applying *Summers* to a case in which officers were investigating a gang-related, drive-by shooting and searching for weapons and evidence of gang membership at a house where at least one armed male gang member resided, and where the officers seized at gunpoint, detained, and handcuffed a female occupant who was not a suspect during the duration of the search, the Supreme Court held:

Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed.2d 443 (1989) ("Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). Indeed, *Summers* itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation." 452 U.S., at 703, 101 S. Ct. 2587.

The officers' use of force in the form of [correctly-applied] handcuffs to effectuate Mena's detention in the garage . . . was reasonable because the governmental interests outweigh the marginal intrusion. . . .

. . . . The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. *Cf. Summers, supra*, at 702-703, 101 S. Ct. 2587 (recognizing the execution of a warrant to search for drugs "may give rise to sudden violence or frantic efforts to conceal or destroy evidence"). Though this safety risk inherent in

> executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

Muehler v. Mena, 544 U.S. 93, 98-100 (2005).

It is undisputed that the ATF agents, who knew that the Stoneciphers had multiple firearms in the house and that Melissa had purchased many of them, patted down Melissa to make sure she did not have a weapon, handcuffed her, and took her outside, but she was not handcuffed during the entire duration of the search and she was never formally arrested or charged with any crime. *See* Jorgensen Aff. at 3, ¶¶ 12-17; King Aff. at 3, ¶¶ 11-16; Estrada Aff. at 5, ¶ 24; Valles Aff. at 7, ¶ 39. Melissa does not contradict this testimony, stating only in her affidavit that "[b]ecause of the presence of several armed intruders in [her] home, [she] did not feel safe to leave the premises." Doc. 101 at 31, ¶ 1. The Court concludes that the Defendants are entitled to qualified immunity on this Count because there are no allegations to support a claim that the officers violated Melissa's constitutional rights.

IV. Defendants are entitled to qualified immunity on Count IX.

Plaintiffs contend that all of the Defendants violated their First-Amendment rights because their "actions in wrongfully arresting and charging Plaintiffs without probable cause were undertaken in retaliation

for [Anthony's] exercise of his protected right to freedom of speech." Doc. 5 at 18, ¶ 123. The Amended Complaint contends that the agents' "actions were undertaken following, and in response to, Plaintiffs' statements made in refusing to answer the officers' questions, asserting their Second Amendment rights," and because Anthony "informed them he had never been convicted of a crime, reading out loud his NCIC report" and "a letter from his Missouri criminal defense attorney." *Id.* at ¶¶ 124, 126-127. Plaintiffs' contentions are belied by the record.

Defendants contend that Melissa lacks standing to bring a *Bivens* claim for retaliation for exercising her First-Amendment rights because she" fails to allege any speech, fails to allege she was injured in any way, and fails to allege what action Federal Defendants took in retaliation for said speech." Doc. 90 at 52. Alternatively, they contend that she fails to state a cognizable retaliation claim for the same reasons. *See id.* The Court agrees.

> To establish a First Amendment retaliation claim, a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct.

Nielander v. Bd. of Cnty. Comm'rs, 582 F.3d 1155, 1165 (10th Cir. 2009). Melissa does not submit any

evidence, through an affidavit or otherwise, showing that she engaged in protected speech, and the Court has held that her detention during the search pursuant to a warrant was lawful and reasonable. The Defendants are entitled to qualified immunity on this claim.

Anthony's claim also fails. Defendants present as an undisputed fact that, immediately after he was handcuffed, and before he asked to be permitted to find the letter, "Mr. Stonecipher was placed under arrest and placed into the rear of a police car. Jorgensen Decl. at ¶¶ 6, 8; King Decl. at ¶ 8; McCarthy Decl. at ¶¶ 6, 8; Tabullo Decl. at ¶ 6." Doc. 90 at 12, ¶ 49; *and see* Doc. 101 at 20, ¶ 49 ("Plaintiffs do not dispute ¶49 of Defendants' Statement of Undisputed Material Fact").

The Defendants also submit undisputed evidence that, after Anthony was re-handcuffed,

> SA Valles and SA Estrada transferred Anthony Stonecipher from the police car to their government vehicle. Immediately upon entering the [government vehicle] Mr. Stonecipher was read his Miranda rights. Mr. Stonecipher also read his Miranda rights himself from ATF Form 3200.4. Only after Mr. Stonecipher signed the waiver did ATF agents begin to interview him. Valles Decl. at ¶¶ 35, 38; SA Estrada Decl. at ¶¶ 22-23.
>
> 57. After he was arrested, but during the course of the search, Anthony Stonecipher

> retrieved a letter from a filing cabinet in his sun room.

Doc. 90 at 13, ¶¶ 56-57; Doc. 101 at 21, ¶¶ 56-57. Thus, Anthony was arrested *before* he obtained and read the letter to the agents. Further, Defendants have established that AUSA Jennings, and not SA Valles, made the decision to go forward with Anthony's prosecution after SA Valles informed AUSA Jennings of the letter and the NCIC reports, thus SA Valles is not liable for Jennings' decision to prosecute. Anthony has presented no evidence of any kind that Anthony was arrested *after* he refused to answer questions or invoked his Second-Amendment rights, nor can he establish that SA Valles or any other Defendant caused his unlawful prosecution by withholding critical information that would exonerate Anthony. As a matter of law, Defendants are entitled to qualified immunity on Count IX.

IT IS ORDERED that the Defendants' motion for summary judgment [Doc.90] is GRANTED and the Stoneciphers' remaining claims are dismissed with prejudice.

/s/ Judith C. Herrera
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ANTHONY and MELISSA STONECIPHER,

Plaintiffs,

v.

SPECIAL AGENTS Carlos VALLES, John ESTRADA, David TABULLO, McCARTHY, KING, JORGENSEN, Bureau of Alcohol, Tobacco, Firearms, and Explosives; Alamogordo City Police Department Officer Luis HERRERA, United States Marshals John DOEs, Doña Ana County Sheriff's Officers John DOEs, BOARD OF COUNTY COMMISSIONERS OF DOÑA ANA COUNTY, UNITED STATES OF AMERICA,

Defendants.

Civ. No. 11-417 BB/GBW

MEMORANDUM OPINION

(Filed Jan. 5, 2012)

THIS MATTER is before the Court for consideration of (1) a motion to dismiss Count VII for lack of subject matter jurisdiction filed by the United States [Doc. 21], (2) a partial motion to dismiss for failure to state a claim filed by various agents of the Bureau of

Alcohol, Tobacco, Firearms, and Explosives ("ATF") [Doc. 19], and (3) a motion to dismiss filed by two Doña Ana County Sheriff's officers (the "Deputies) and the Board of County Commissioners of Doña Ana County (the "County") [Doc. 34]. Having considered the submissions of the parties and the applicable law, the Court will issue an order consistent with this opinion.

Factual Background

On May 17, 2010, Special Agent Carlos Valles submitted an application for a search warrant with the United States District Court for the District of New Mexico. Doc. 23, Ex. 1. On the face of the warrant, Agent Valles indicated that the search related to an alleged violation of one statute: 18 U.S.C. § 922(g)(9) (prohibiting any person convicted of a misdemeanor crime of domestic violence from shipping or transporting in interstate or foreign commerce a firearm). *Id.* In the warrant application, Agent Valles described an investigation ATF had conducted into suspected firearms and explosives violations concerning the Plaintiffs, Anthony and Melissa Stonecipher. *Id.* at pp. 5-6. Specifically, Agent Valles stated that Anthony Stonecipher had been convicted of a domestic-assault misdemeanor on April 16, 2007. *Id.* at p. 6, ¶ 6. To verify this conviction, Agent Valles sought and received a certified copy of a judgment and sentence from the 14th Judicial Circuit Court, County of Randolph, Missouri. *Id.* at p. 7, ¶ 8. Because Valles sold two guns through an online website,

"gunbroker.com," Agent Valles believed that Anthony Stonecipher had violated 18 U.S.C. § 922(g)(9). *Id.* at p. 9, ¶ 20. Agent Valles also believed that Stonecipher had violated 28 U.S.C. § 5845(d) for receiving or possessing a firearm not registered to him in the National Firearms Registration and Transfer Record. *Id.* at pp. 7-8, ¶ 27.

In the warrant application, Agent Valles also detailed facts concerning Anthony Stonecipher's sale and manufacture of exploding targets. *Id.* at p. 4, ¶ 14. Agent Valles explained that Anthony Stonecipher had sold him two 12-ounce soda cans filled with explosive material. *Id.* at ¶ 15. Agent Valles sent these two cans to ATF's Forensic Science Laboratory which confirmed that they were filled with explosive material. *Id.* at ¶ 16. He further stated that he would be requesting ATF's determination as to whether the exploding targets fit the criteria of a destructive device as defined in 26 U.S.C. § 5845(f). *Id.* Based on this information, Agent Valles believed that Anthony Stonecipher had violated 18 U.S.C. § 842(a)(1) (prohibiting persons from engaging in the business of importing, manufacturing, or dealing in explosive materials without a license). *Id.* at pp. 7-8, ¶ 27.

On May 17, 2010, United States Magistrate Judge Karen Molzen issued a federal search warrant to Agent Valles. Doc. 23, Ex. 1, p. 13. The search warrant identified the Stoneciphers' residence in Attachment A as the place to be searched. *Id.* at p.2. The warrant also incorporated Attachment B which described the items to be seized. *Id.* at pp. 3-4. Among

other things, Attachment B listed all firearms and explosive materials related to the listed violations. *Id.*

The next day, Agent Valles along with five other named ATF agents (collectively the "Agents"), two Doña Ana County Sheriff's officers (the "Deputies), an officer from the Alamagordo City Police Department, and unknown United States Marshals executed the search warrant at the Stoneciphers' residence in Otero County. According to the Complaint, these "defendants" took Anthony Stonecipher down to the dirt outside the residence and handcuffed him. Doc. 18, ¶ 41. The defendants then seized Mrs. Stonecipher, pointed weapons in her face, extracted her from the residence, and handcuffed her. *Id.* at ¶¶ 36-38. The defendants then proceeded to search the residence and allegedly seized items that went beyond the search warrant, including personal adult toys, computer files, and family photographs. *Id.* at ¶ 33. According to the Complaint, the Deputies also allegedly searched the residence with trained narcotics dogs, (*id.* at 148-49), despite the fact that the search warrant did not authorize a search for drugs or narcotics (doc. 23, Ex. 1, p. 3-4).

While the defendants were searching the residence, Anthony Stonecipher allegedly told Agent Valles and "many other agents" that he had a Suspended Imposition of Sentence ("SIS"), not a conviction for domestic assault. Doc. 18, at ¶ 52. Anthony also read to the Agents a letter from his attorney and a National Criminal Information Center ("NCIC") report stating that Anthony did not have a conviction

for domestic assault and thus did not have a firearms disability. *Id.* Agent Valles apparently responded that "attorneys are often wrong" and proceeded to arrest Anthony Stonecipher and continue the search of the residence. *Id.* at ¶ 53. The Complaint also alleges that the defendants did not leave a copy of the probable cause statement, oath, or affirmation supporting the search warrant. Doc. 18, ¶ 90.

After the search was completed, the defendants transported Anthony Stonecipher to the Doña Ana County Detention Center (the "Detention Center"). There, according to the Complaint, Anthony Stonecipher was subjected to a strip search. *Id.* at ¶ 46. He was also denied his prescription medication, *id.* at ¶ 13, and the mandated phone calls at the Detention Center, *id.* at ¶ 134.

On May 25, 2010, Magistrate Judge Lourdes A. Martinez dismissed the single charge against Anthony Stonecipher for violating 18 U.S.C. § 922(g)(9). Doc. 23, Ex. 3. The prosecuting United States attorney agreed that Anthony only had a SIS which did not result in a firearms disability. Doc. 23, Ex. 3 (*United States v. Stonecipher*, 2:10-MJ-1487 (D. N.M.), Criminal Clerk Minutes, dated May 25, 2010).

Plaintiffs subsequently filed the instant civil action. Plaintiffs bring a mix of eleven claims against the Agents, Deputies, ATF, the United States,[1] the

[1] Although the Plaintiffs did not name the United States as a defendant, the United States has been substituted into these

(Continued on following page)

County, an officer with the City of Alamogordo police department, the City of Alamogordo,[2] and unknown United States Marshals.[3] With few exceptions, the Complaint does not specify which law enforcement officers did what, but instead directs the separate counts at all defendants. Nine of the Counts (Counts I, II, III, IV, V, VI, VIII, IX, and X) are based on federal law, while the remaining two counts (Counts VII and XI) are based on state law.

I. United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction

On May 13, 2011, the United States removed the case to federal court and substituted itself as a defendant with respect to the common law torts alleged against the Agents in Count VII.[4] The United States

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proceedings with respect to Plaintiffs' common law tort claims against the Agents.

[2] On December 14, 2011, the parties entered into a stipulation dismissing the City of Alamorgordo. Doc. 54.

[3] The Plaintiffs have amended the complaint twice. The Second Amended Complaint references the allegations in the First Amended Complaint and adds some factual allegations concerning claims against the Deputies and the County. Doc. 18. Because the Second Amended Complaint incorporates by reference paragraphs 1-146 of the First Amended Complaint, the Court will cite paragraphs 1-146 of the First Amended Complaint as though they were paragraphs 1-146 of the Second Amended Complaint.

[4] The United States Attorney certified that the Agents were acting within the scope of their employment. The Complaint

(Continued on following page)

now moves to dismiss Count VII for lack of subject matter jurisdiction.

A. Standard of Review

The federal courts are courts of limited jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to move to dismiss a claim for "lack of jurisdiction over the subject matter." Here, the United States brings a factual attack on the Complaint's allegations as to subject matter jurisdiction. Doc. 22, at p.4; *see Holt v. United States*, 46 F. 3d 1000, 1002 (10th Cir. 1995). Because this attack is not intertwined with the merits of the case, the instant motion remains a motion to dismiss pursuant to rule 12(b)(1). *Id.* at 1003.

B. Analysis

The state-law tort claims against the United States must be dismissed based on sovereign immunity. It is a well-established principle that "[a]s a sovereign, the United States 'is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit.'" *Lee v. United States*, 980 F.2d 1337, 1340 (10th Cir. 1992) (quoting *United States v.*

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similarly acknowledges that all of the Agents were acting in the scope of their employment. Doc. 18, ¶¶ 2, 3, 5.

Sherwood, 312 U.S. 584, 586 (1941)). The Federal Tort Claims Act ("FTCA") provides a limited waiver for actions against the United States sounding in tort. 28 U.S.C. §§ 1346(b), 2671-2680. Section 2675(a) requires that claims for damages against the government be presented to the appropriate federal agency by filing "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Bradley v. U.S. ex rel. Veterans Admin*., 951 F.2d 268, 270 (10th Cir. 1991). In the present case, Plaintiffs do not allege that they ever filed an administrative claim with the ATF pursuant to the procedure set forth in section 2675(a). Eleaner R. Loos, associate chief counsel for the litigation division of ATF, further certifies that there are no records of any tort claim filed by Plaintiffs with ATF. Doc. 22, Ex. 4, ¶4 (affidavit of Eleaner Loss). Plaintiffs' failure to file such a claim precludes this Court from exercising jurisdiction. *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies."); *Powell v. Nunley*, 2009 WL 743045, *2 (W.D. Okla. 2009) (dismissing two *Bivens* claims against ATF agents for failure to exhaust administrative remedies).

Plaintiffs dispute this result on the grounds that they have alleged intentional state-law torts against the United States and Agents that fall outside of the

FTCA.[5] Plaintiffs thus appear to argue that they did not have to comply with the procedural requirements of the FTCA. This argument is unavailing for two reasons. First, Section 2680(h) states that the FTCA applies "to acts or omissions of investigative or law enforcement officers of the United States Government . . . arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. §2680(h). To the extent Plaintiffs' state-law tort claims fit within this list of wrongful acts, Plaintiffs have failed to exhaust their administrative remedies as required by the FTCA. Alternatively, to the extent Plaintiffs' state-law tort claims do not fit within this list and thus fall outside of the FTCA, Plaintiffs lack a waiver of sovereign immunity. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent waiver, sovereign immunity shields federal government and its agencies from suit."). Either way, this Court lacks jurisdiction over Plaintiffs' state-law tort claims against the United States and the Agents.

[5] Plaintiffs also appear to argue that the New Mexico Tort Claims Act ("NMTCA") waives the sovereign immunity of the United States. Doc. 26, at 12. The NMTCA, however, has no effect on the sovereign immunity of the United States or its officers as only Congress can waive the federal government's sovereign immunity. *Wagoner County Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009); *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002).

II. Agents' Partial Motion to Dismiss Federal Constitutional Claims

Pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs bring a series of claims against the Agents for violating their constitutional rights under the First, Second, and Fourth Amendments. The Plaintiffs also bring a set of claims against the Agents for violating their constitutional rights under the New Mexico State Constitution.

A. Standard of Review and Materials Reviewed in the Instant Partial Motion to Dismiss

Under rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The nature of a Rule 12(b)(6) motion tests the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994). The sufficiency of a complaint is a question of law, and when considering and addressing a rule 12(b)(6) motion, a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the non-moving party, and draw all reasonable inferences in the plaintiff's favor. *See Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006); *Hous. Auth. of Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991).

A complaint challenged by a rule 12(b)(6) motion to dismiss does not require detailed factual allegations, but a plaintiff's obligation to set forth the grounds of his or her entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*; *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) ("The [Supreme] Court explained that a plaintiff must 'nudge his claims across the line from conceivable to plausible' in order to survive a motion to dismiss.") (quoting *Twombly*, 550 U.S. at 570).

Generally, in ruling on a rule 12(b)(6) motion to dismiss, a court must review the sufficiency of the complaint based on its contents alone. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010); *Mobley*, 40 F.3d at 340. There are, however, a few recognized exceptions to this restriction. *Id.* "In addition to the complaint, the district court may consider documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). Here, the complaint references the search warrant issued by Magistrate Judge Molzen. Doc. 18, ¶ 30. The complaint also implicitly references the search warrant application and the affidavit offered by

Agent Valles. *Id.* Because there is no dispute regarding the authenticity of these documents, and because these documents are central to Plaintiffs' claims, the Court will consider them in evaluating the sufficiency the Complaint. *Jacobsen*, 287 F.3d at 941; *GFF Corp. v. Assoc. Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *Emert v. Warner*, 2009 WL 310814, *3 (D. Colo. 2009).

The Court also takes judicial notice of the related court proceedings, and in particular the Court's order in *United States v. Stonecipher*, 2:10-MJ-1487 (D. NM), dismissing the criminal charge brought against Plaintiff Anthony Stonecipher under 18 U.S.C. §922(g)(9). *Gee*, 627 F.3d at 1186; *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("federal courts, in appropriate circumstances, may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue").

B. Fourth Amendment

The Agents move to dismiss Counts I-IV and VI[6] on the grounds that they had a valid warrant and acted with probable cause to believe that Plaintiff Anthony Stonecipher had committed a crime; thus, the Agents claim that they were legally justified in

[6] The Agents do not move to dismiss Count V alleging use of excessive force.

entering the residence, conducting the search, detaining the Stoneciphers, and initiating the criminal process. Moreover, even if the search warrant was invalid due to faulty information provided by Valles concerning Anthony Stonecipher's alleged conviction for domestic assault, the Agents argue that they are entitled to qualified immunity.

To defeat the defense of qualified immunity, Plaintiffs must meet the Tenth Circuit's "heavy two-part burden." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (quotations omitted). First, the Plaintiffs must come forward with allegations sufficient to show "that the defendants' actions violated a constitutional or statutory right." *Id.* Then, the Plaintiffs must establish that "the right at issue was clearly established at the time of the defendants' alleged unlawful conduct." *Id.* The Court applies this two-step inquiry to determine whether the five counts brought by Plaintiffs under the Fourth Amendment survive the Agents' motion to dismiss.

First, the Plaintiffs have established that the Agents violated their constitutional right to be free from unreasonable searches and seizures. The Fourth Amendment generally prohibits law enforcement from conducting a search without a valid warrant supported by probable cause. *U.S. v. Olguin-Rivera*, 168 F.3d 1203, 1204-1205 (10th Cir. 1999) (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) and *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). Probable cause, in turn, requires "more than mere suspicion but less evidence than is necessary to

convict." *United States v. Burns*, 624 F.2d 95, 99 (10th Cir. 1980). An affidavit in support of a search warrant must contain facts sufficient to lead a prudent person to believe that a search would uncover contraband or evidence of criminal activity. *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). Whether a warrant is supported by probable cause is a question of law. *United States v. Gonzales*, 399 F.3d 1225, 1228 (10th Cir. 2005).

In the instant case, Magistrate Judge Molzen issued a search warrant for the Stoneciphers' residence. Doc. 23, Ex. 1, at 13.[7] The warrant also identified the items to be seized in Attachment B. *Id.* Nonetheless, the Plaintiffs allege that the search warrant lacked probable cause because Agent Valles provided unreliable and faulty information in his application for the search warrant. Doc 18, at ¶ 89. More specifically, Plaintiffs claim that Agent Valles intentionally or with reckless disregard for the truth stated that Anthony Stonecipher had a prior conviction for domestic assault, thereby establishing probable cause for a violation of 18 U.S.C. § 922(g)(9) (possession of a firearm by a prohibited person). *Id.* Factually, however, Plaintiffs allege that Anthony

[7] While the Plaintiffs allege that the Agents conducted a residential search pursuant to a "facially defective" warrant, (Doc. 18, ¶¶ 71, 72), these allegations are conclusory and devoid of factual development. Accordingly, the Court will not consider them in the instant motion to dismiss, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), but rather will focus on whether the warrant lacked probable cause.

Stonecipher was not convicted of any such crime, but rather agreed to a Suspended Imposition of Sentence ("SIS"). Moreover, Plaintiffs note that Anthony Stonecipher's SIS does not count as a disabling conviction for the purposes of 18 U.S.C. § 922(g)(9), a point confirmed by the Court when it dismissed the charge against Anthony Stonecipher. *See* Doc. 23, Ex. 3 (*United States v. Stonecipher*, 2:10-MJ-1487 (D. N.M.), Criminal Clerk Minutes, dated May 25, 2010). Plaintiffs thus contend that the information regarding Anthony Stonecipher's SIS vitiates probable cause for the search warrant. Accordingly, Plaintiffs claim that the Agents unlawfully entered the residence, conducted the search, detained the Stoneciphers, and initiated the criminal process without a valid warrant or probable cause.

The Agents respond that Valles simply made a mistaken conclusion of law regarding Anthony Stonecipher's prohibited status. The Agents further argue that Valles did not learn about this mistake until the Court determined on May 25, 2010 that Anthony Stonecipher's SIS did not constitute a disabling conviction under 18 U.S.C. § 922(g)(9). Thus, the Agents argue that Valles' mere negligence or mistake of law does not invalidate the search warrant or the search performed on May 18. Rather, the Agents maintain that Valles had probable cause – at the time of the search – to believe that Anthony Stonecipher had violated § 922(g)(9). Thus, even if Agent Valles was ultimately wrong about Anthony Stonecipher's alleged conviction, the Agents are entitled to qualified

immunity and thus not liable. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that, under the doctrine of qualified immunity, "law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials . . . should not be held personally liable.").

Qualified immunity allows "ample room for mistaken judgments" protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986). Allegations of negligent or innocent mistakes are insufficient to invalidate a warrant; the affiant must omit material information knowingly, intentionally, or in reckless disregard for the truth. *Bruner v. Baker*, 506 F.3d 1021, 1027 (10th Cir. 2007). At this stage of the proceedings, it is unclear whether Agent Valles omitted the information about Anthony Stonecipher's SIS out of mere negligence or whether the omission was intentional or the result of a reckless disregard for the truth. Accepting the allegations in the Complaint as true, *see Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006), the Court will assume, for the purpose of this analysis only, that Agent Valles intentionally or with reckless disregard for the truth stated that Anthony Stonecipher had a conviction for domestic assault and omitted the fact that the charge was actually a SIS.

The issue then is whether the omitted information, if included, would negate probable cause for the search of the Stoneciphers' residence. *United*

States v. Basham, 268 F.3d 1199, 1204 (10th Cir. 2001) ("Where a false statement is made in an affidavit for a search warrant, the search warrant must be voided if the affidavit's remaining content is insufficient to establish probable cause."); *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). Thus, Agent Valles' affidavit must be read as if it mentioned the fact that Anthony Stonecipher had a SIS and excluded the allegation that he had a conviction for domestic assault. Both parties agree that a SIS does not result in a firearms disability that would provide probable cause for a violation of 18 U.S.C. §922(g)(9). *See United States v. Stonecipher*, 2:10-MJ-1487 (D. N.M.). Moreover, even examining "the totality of the circumstances set forth" in Valles' affidavit, *see Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Court is unable to find a "substantial basis for concluding that probable cause existed." *United States v. Rowland*, 145 F.3d 1194, 1204 (10th Cir. 1998) (quotations omitted).[8] Accordingly, the Court concludes that the

[8] The Agents argue that Valles' affidavit also establishes probable cause to believe that Anthony Stonecipher violated 18 U.S.C. § 841 (manufacturing explosives without a license), § 842 (distributing explosives without a license), and 26 U.S.C. §§ 5845 and 5861 for possessing firearms in violation of the National Firearms Act. The Agents thus argue that they had probable cause, independent of Valles' inaccurate statement about Anthony Stonecipher's alleged prior conviction for domestic assault, to search the residence. The Agents, however, fail to fully develop this argument in their partial motion to dismiss or identify the evidence in Valles' affidavit establishing probable

(Continued on following page)

Complaint is sufficient to set forth a claim that the Agents violated Plaintiffs' Fourth Amendment rights by entering the residence, conducting a search, detaining the Stoneciphers, and instigating the criminal process without a valid warrant or probable cause.

The Plaintiffs have also demonstrated that the Agents violated clearly established law by searching the residence pursuant to a search warrant lacking probable cause. *See Manzanares v. Higdon*, 575 F.3d 1135, 1146 (10th Cir. 2009) ("It has been clear for nearly thirty years that a warrantless entry into a home is presumptively unreasonable."). Moreover, Agent Valles' inclusion of material false statements or omissions in the search warrant affidavit, if ultimately true, violated clearly established law. *Franks*, 438 U.S. at 155-56 (holding that if it is established that a false statement made knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search warrant affidavit, the warrant must be voided if the false statement was

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cause for these additional violations. For example, it is unclear how Anthony Stonecipher's "offer" to sell exploding targets to Valles establishes probable cause for a violation of 18 U.S.C. §§ 841, 842. Significantly, at the time Agent Valles submitted the warrant application to Magistrate Judge Molzen, he had yet to receive confirmation from the ATF that the soda can fit the criteria of a destructive device as defined in 26 U.S.C. § 5845(f). Doc. 23, Ex. 1, p. 5, ¶ 16. Similarly, it is unclear how Anthony Stonecipher's "discussion" with Agent Valles about how to convert a semi-automatic firearms into automatic firearms provides probable cause for a violation of any of the listed statutes in the warrant application.

necessary to the finding of probable cause); *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990) ("we hold that at the time defendant submitted his affidavit and arrested plaintiff [in 1986], it was a clearly established violation of plaintiff's Fourth and Fourteenth Amendment rights to knowingly or recklessly omit from an arrest affidavit information which, if included, would have vitiated probable cause"). Therefore, the Court concludes that Plaintiffs have overcome the defense of qualified immunity; thus, Count I-IV and VI survive the Agents' motion to dismiss.

Nonetheless, the Agents argue that they acted in good faith and relied on Magistrate Judge Molzen's determination of probable cause. Because their good faith reliance on the warrant would make any seized evidence admissible, *see United States v. Leon*, 468 U.S. 897 (1984), the Agents argue that their good faith precludes a finding that the search violated the Fourth Amendment. This argument is based on the Agent's position that Valles conducted due diligence in the investigation of the Stoneciphers and honestly believed the information he presented to Magistrate Judge Molzen. Doc. 23, at p. 8.

The Supreme Court, however, made it clear that *Leon*'s good-faith exception does not apply "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 U.S. at 923. Here, the Plaintiffs have alleged that Agent Valles intentionally or with reckless disregard for the

truth submitted false or inaccurate information in his affidavit for the search warrant. Because the Court must accept these allegations as true at this stage of the proceedings, the Court concludes that the Agent Valles cannot rely on *Leon*'s good-faith exception as a basis to dismiss Counts I-IV and VI. Similarly, the Court concludes that the remaining Agents cannot rely on *Leon*'s good faith exception to dismiss Counts I-IV and VI.[9]

[9] Notably, the remaining Agents do not separately argue that they are entitled to *Leon*'s good-faith exception. *See*, *e.g.*, Doc. 23, p. 8; Doc. 30, pp. 3-4. Accordingly, the Court declines to distinguish between Agent Valles and the remaining Agents for the purposes of determining whether *Leon*'s good-faith exception warrants dismissal of Counts I-IV and VI. In fact, even if the remaining Agents did argue that they were separately entitled to *Leon*'s good-faith exception, such an argument would be unavailing in light of the allegations in the Complaint. Specifically, the Complaint alleges that Anthony Stonecipher told Agent Valles and "many other agents" that he was not prohibited from possessing a firearm because he had a SIS, not a conviction for domestic assault. Doc. 18, ¶ 52. Anthony Stonecipher also read to "many other Agents" the letter from his attorney and his NCIC report confirming that he had a SIS. *Id.* Accepting these allegations as true, the remaining Agents (i.e., the "many other agents") knew that Anthony Stonecipher had not violated 18 U.S.C. § 922(g)(g). Accepting these allegations as true, the remaining Agents arguably should have realized that there was "no reasonable grounds for believing that the warrant was properly issued." *Leon*, 468 U.S. at 923. Thus, they would not be entitled to *Leon*'s good-faith exception for the purposes of the instant motion to dismiss.

C. Second Amendment

In Count VIII, Plaintiffs allege that the Agents deprived them of their Second Amendment right to bear arms. *See Heller v. District of Columbia*, 554 U.S. 570 (2008). The basis of their claim is that they "had the right to legally possess that which was considered contraband by agents." Doc. 18, ¶¶ 117-18. The Plaintiffs, however, fail to cite any cases extending a *Bivens* cause of action to the Second Amendment. To the contrary, since recognizing a cause of action for Fourth Amendment violations in *Bivens*, 403 U.S. at 388, the Supreme Court has only created two more non-statutory, *Bivens* actions for constitutional violations: (1) for unlawful discrimination under the equal protection components of the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228, 236 (1979); and (2) for Eighth Amendment violations caused by prison officials, *Carlson v. Green*, 446 U.S. 14 (1980). The Supreme Court has rejected all other attempts to expand *Bivens*.

Recently, in *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007), the Court discussed the two-step process for determining whether to recognize a *Bivens* remedy: first, the court must examine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages"; and second, the court "must make the kind of remedial determination that is appropriate for a common-law tribunal, paying

particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* Based on this two-step process, the *Wilkie* Court ultimately declined to permit a *Bivens* remedy for a Fifth Amendment retaliation claim brought against Bureau of Land Management officials. *Id.* at 562.

Applying *Wilkie*'s first step to the instant case, the Court is not convinced that a *Bivens* remedy should be afforded to Plaintiffs. Other existing remedies are readily available to the Plaintiffs. For example, if the Agents knew that Anthony Stonecipher did not have a disabling conviction but nonetheless seized his weapons – precisely what the Plaintiffs allege in the Complaint – then Plaintiffs would have a *Bivens* claim under the Fourth Amendment for an illegal seizure of the firearms. Because the Plaintiffs already have an avenue for redress, the Court declines to extend *Bivens* to the instant case. *See Lundstrom v. Romero*, 616 F.3d 1108, 1125 (10th Cir. 2010) ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability."); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 69 (2001).

Even if there was a *Bivens* cause of action for the deprivation of Second Amendment rights, however, Plaintiffs have failed to overcome the hurdle of qualified immunity and demonstrate that the Agents violated a clearly established constitutional right. As explained in *Wilson v. Layne*, "'clearly established' for

purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" 526 U.S. 603, 614-15 (1999) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Here, Plaintiffs argue that the Agents violated their right to bear arms as clearly established in *Heller*. The question though is not whether there is a general right to bear arms, as established in *Heller*, but more specifically whether the Agents should reasonably have known that seizure of Plaintiffs' weapons deprived him of his constitutional right to bear arms. Plaintiffs have failed to cite any case-law establishing such a violation. Because the Court is not convinced that the right was clearly established at the time of the incident, the Agents are entitled to qualified immunity, further justifying dismissal of Count VIII.

D. First Amendment

In Count IX, Plaintiffs claim that the Agents violated their First Amendment right to free speech. Specifically, Plaintiffs allege that the Agents wrongfully arrested them and subsequently prosecuted Anthony Stonecipher in retaliation for their refusal to answer the Agents' questions, for asserting their Second Amendment rights, and for challenging the propriety of the search on the grounds that Anthony Stonecipher only had a SIS, not a disabling conviction for domestic assault. Because the Agents raise the defense of qualified immunity, the Plaintiffs must

demonstrate that the Agents violated a constitutional right and that the right was clearly established at the time of the allegedly unlawful conduct. *Medina*, 252 F.3d at 1128.[10]

"To establish a First Amendment retaliation claim, a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a

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[10] Although the Agents argue that a *Bivens* cause of action does not extend to the Second Amendment, *see supra* section II.C, they do not challenge Plaintiffs' First Amendment claim on the grounds that it is not cognizable under *Bivens*. In the recent decision of *Iqbal*, *supra*, 129 S. Ct. at 1948, however, the U.S. Supreme Court "assume[d], without deciding, that respondents' First Amendment claim [wa]s actionable under *Bivens*." The *Iqbal* Court further noted that it had not extended *Bivens* liability to First Amendment retaliation claims. *Id.* (citing *Bush v. Lucas*, 462 U.S. 367 (1983)). As a result of *Iqbal*, courts have expressed concern that "it is far from clear that a *Bivens* action can arise out of an alleged First Amendment violation." *Eusi v. Martinez*, 2011 WL 4502063, *2 n. 5 (D. Colo. 2011). What is more, one court recently refused to extend *Bivens* to a prisoner's First Amendment claim for denial of access to the courts. *See Allmon v. Wiley*, 2011 WL 4501941, *4 (D. Colo. 2011).

The Tenth Circuit, however, has expressly extended *Bivens* beyond the Fourth Amendment to include causes of action based on the First Amendment. *Nat'l Commodity and Barter Ass'n v. Archer*, 31 F.3d 1521, 1527 (10th Cir. 1994) (holding "that if claims of violations of First or Fourth Amendment rights are proven, then a *Bivens* remedy may be afforded to the plaintiffs for recovery of damages for such constitutional wrongs"). Because the Agents have failed to cite any binding authority to the contrary, this Court will proceed on the assumption that *Bivens* extends to the Plaintiffs' First Amendment claim against the Agents.

person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Nielander v. Bd. of Cnty. Commis*, 582 F.3d 1155, 1165 (10th Cir.2009). The Agents do not move to dismiss Count IX on the grounds that the Plaintiffs have failed to establish the first two *Nielander* factors. Rather, the Agents move to dismiss on the grounds that the Plaintiffs have failed to establish a causal connection between the Stoneciphers' speech and the Agents' allegedly retaliatory conduct. *Id.* Quite simply, the Agents argue that they obtained a search warrant, had a predetermined plan to search the residence, and thus would have arrested the Stoneciphers and charged Anthony Stonecipher under 18 U.S.C. §922(g)(9) regardless of what he or his wife said during the search. The Agents thus urge us to conclude that the Stoneciphers' speech, even if protected, cannot possibly be a "substantial[ ] motivat[ion]" for their conduct as required by the third *Nielander* factor. *Id.*

The Complaint, however, alleges that the Agents charged Anthony Stonecipher under 18 U.S.C. § 922(g)(9) in retaliation for his free speech and without probable cause. Doc. 18, at ¶123. These allegations are sufficient to allege a causal connection for the purposes of a First Amendment claim. *See Hartman v. Moore*, 547 U.S. 250, 259 (2006) (holding that the absence of probable cause is a necessary element of a retaliatory prosecution case). The Complaint also alleges that the Agents arrested the Stoneciphers in retaliation

for Anthony Stonecipher's comments challenging the search. *Id.* at ¶ 123. Thus, even if the Agents did have a valid search warrant and probable cause to arrest, they could still be liable for the arrest it was nonetheless retaliatory as alleged by the Plaintiffs. *Howards v. McLaughlin*, 634 F.3d 1131, 1146 (10th Cir. 2011) (The Tenth Circuit has "recognized in the context of an arrest that '[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.'") (quoting *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir.1990)). As the Court must accept the allegations in the Complaint as true, the Court concludes that the Plaintiffs have established a claim that the Agents violated their First Amendment right.

The Plaintiffs must also establish that the Agents violated a clearly established right to overcome the defense of qualified immunity. The Tenth Circuit has previously held that First-Amendment retaliation claims are clearly established. *See Buck v. City of Albuquerque*, 549 F.3d 1269, 1293 (10th Cir. 2008); *Mimics, Inc. v. Village of Angel Fire*, 394 F.3d 836, 848 (10th Cir. 2005) ("It has long been clearly established that the First Amendment bars retaliation for protected speech and association.") (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)). Accepting the allegations in the Complaint as true, namely that the Agents retaliated against the Stoneciphers for their protected speech, it would not have been reasonable for the Agents to believe that their conduct did

not infringe on the Plaintiffs' First Amendment rights. The Court, therefore, finds that Plaintiffs have pleaded adequate facts to satisfy the second part of defeating a qualified immunity defense. Accordingly, Count IX survives the Agents' motion to dismiss.

E. State Constitutional Claim Against the Agents

Count XI alleges a series of state constitutional claims against the collective defendants, including the Agents. In certain circumstances, federal officials may be held personally liable for monetary damages arising out of their commission of constitutional violations. *See Bivens*, 403 U.S. at 388. A *Bivens* claim arises when a federal government official, acting under color of federal law, violates an individual's rights under the United States Constitution. *Id.* A *Bivens* remedy does not, however, extend to the claims brought by the Plaintiffs under the New Mexico State Constitution. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Burman v. Streeval*, 2011 WL 3562999, at *3 (N.D. Ohio Aug. 11, 2011). Accordingly, the Court dismisses Count XI for failure to state a claim against the Agents.

III. Motion to Dismiss the Deputies and County

Pursuant to 42 U.S.C. § 1983, Plaintiffs allege a series of federal claims against the Deputies and the County. The Plaintiffs also allege a series of state tort and constitutional claims against the Deputies and

County under the New Mexico Tort Claims Act ("NMTCA").

A. The Deputies

The Deputies move to dismiss all of the counts in the Complaint – except Counts III and X[11] – on the grounds that the blanket allegations against "all defendants" are insufficient to state a claim for relief under § 1983. To withstand a motion to dismiss, a complaint must contain enough allegations of fact "to state a claim to relief that is plausible on its face." *Twombly*, 550 U. S. at 570. This plausibility requirement provides "not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3. In § 1983 cases, "it is particularly important . . . that the complaint make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state." *Robbins v. Oklahoma*, 519 F.3d 1242, 1249 (10th Cir. 2008) (citing *Twombly*, 550 U.S. at 565 n. 10). Based on this standard, the Tenth Circuit dismissed a § 1983 claim requesting damages for violations of the plaintiff's due process rights because the complaint used "the collective term 'Defendants'" and, as a

[11] Count III of the Complaint is directed solely at Agent Valles, (Doc. 18, ¶78)), and thus does not implicate the Deputies. Similarly, Count X is only directed at the Detention Center. *Id.* at ¶ 140.

result, "it [was] impossible for any of these individuals [defendants] to ascertain what particular unconstitutional acts they [were] alleged to have committed." *Id.* at 1250.

Alternatively, the Deputies move to dismiss the federal claims on the grounds of qualified immunity. While the Stoneciphers sued the federal officers under *Bivens* and the Deputies under § 1983, "the qualified immunity analysis is identical under either." *Wilson*, *supra*, 526 U.S. at 609. Thus, because the Deputies have raised the defense of qualified immunity, the Plaintiffs must allege claims sufficient to meet the Tenth Circuit's "heavy two-part burden." *Cram*, *supra*, 252 F.3d at 1128. With these principles in mind, the Court turns to the Complaint in the instant case.

1. Count I (Unreasonable Seizure and False Arrest): Count I fails to identify the constitutional violation committed by each deputy. It alleges that Anthony Stonecipher was detained and subsequently arrested without probable cause, (doc. 18, at ¶63), and that 'defendants' seized items from Plaintiffs' residence without authority. *Id.* at ¶65. Due to the use of the collective term 'defendants,' the Complaint fails to adequately specify which Deputies, if any, seized and detained Anthony Stonecipher. The Complaint also fails to specify which Deputies, if any, unlawfully

seized items from Plaintiffs' residence.[12] As a result, Count I falls short of the standard set forth in *Twombly*, 550 U.S. at 570, and *Robbins*, 519 F.3d at 1250; thus, the Court will grant the Deputies' motion to dismiss Count I.

Even if Count I identified the Deputies who participated in Anthony Stonecipher's detention, those Deputies are entitled to qualified immunity because they reasonably relied on the search warrant prepared by Agent Valles. In *Ramirez v. Butte-Silver Bow County*, 298 F.3d 1022, 1027-28 (9th Cir. 2002),[13] the Ninth Circuit confronted a scenario where an ATF officer obtained a warrant and led other ATF agents in a search of the identified property. *Id.* at 1025. Ultimately, however, the warrant turned out to be invalid due to a facial defect. *Id.* at 1026. While the Ninth Circuit denied the lead ATF agent qualified immunity due to the flawed warrant, it nonetheless held that the remaining ATF line agents were enti-

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[12] In their response to the Deputies' motion to dismiss, Plaintiffs allege that the Deputies retrieved several items outside the scope of the warrant, including intimate photos, a Kama Sutra book, photos of Anthony Stonecipher, medical records stored on his computer, and inert submunitions. Doc. 44, pp. 19-20. These factual allegations do not appear in the first or second amended complaint; thus, they fail to provide the Deputies with fair notice of who did what, *see Twombly*, 550 U.S. at 555 n.3. The Plaintiffs may petition the Court for leave to amend the Complaint yet again pursuant to Fed. R. Civ. Pro. 15(a)(2).

[13] While *Ramirez* is not binding on this Court, it was cited favorably by the Tenth Circuit in *Marshall v. Columbia Lee Regional Hospital*, 345 F.3d 1157, 1179 (10th Cir. 2003).

tled to rely on the representations of their leader regarding the validity of a warrant. *Id.* at 1028. Importantly, the Ninth Circuit noted that the ATF "line officers conducting [the] search cannot reasonably have been expected to know that [the warrant] was defective." *Id.* Accordingly, the Ninth Circuit held that the ATF line officers reasonably relied on the warrant and were entitled to qualified immunity. *Id.*

The instant case is on all fours with *Ramirez*. As noted previously, Agent Valles obtained the search warrant, but in doing so allegedly misinformed Magistrate Judge Molzen about Anthony Stonecipher's prior conviction. As a result, the search may have been conducted pursuant to a warrant lacking probable cause for a violation of 18 U.S.C. § 922(g)(9). However, there are no allegations in the Complaint that the Deputies helped obtain the search warrant, provided false information to Magistrate Judge Molzen, or otherwise knew that Anthony Stonecipher had not been convicted of a misdemeanor.[14] Similarly, there are no allegations that the Deputies shared authority over the search with Agent Valles. Rather, just like the line officers in *Ramirez*, the Deputies in this case were merely assisting Agent Valles in the execution of

[14] The Complaint alleges that Anthony Stonecipher told "Agent Valles, [Agent] Estrada, and many other agents" that he had a SIS, not a conviction for domestic assault. Doc. 18, ¶ 52. There are no allegations, however, that Anthony Stonecipher informed any named Deputies about his lack of a conviction or firearms disability.

the warrant. They were thus entitled to reasonably rely on the search warrant issued by Magistrate Judge Molzen, *Ramirez*, 298 F.3d at 1028, and detain Anthony Stonecipher incident to the search for firearms, *Muehler v. Mena*, 544 U.S. 93, 98 (2005) ("officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.' ") (quoting *Michigan v. Summers*, 452 U.S. 692, 705 (1981)); *United States v. Sanchez*, 555 F.3d 910, 918 (10th Cir. 2009); *see also Salmon v. Schwarz*, 948 F.2d 1131, 1140-41 (10th Cir. 1991) (holding that an FBI agent who had no role in preparing the affidavit for an arrest warrant enjoyed qualified immunity with respect to the execution of the facially valid warrant).

The Plaintiffs, however, argue that the detention of Anthony Stonecipher ripened into a full custodial arrest without probable cause, thereby violating the Fourth Amendment. "A police officer may arrest a person without a warrant if he has probable cause to believe that person committed a crime." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995); *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). "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." *Jones v. City and County of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988). Here, the Deputies assisted the Agents in executing the search warrant, which itself was based on

Magistrate Judge Molzen's determination that probable cause existed for a violation of 18 U.S.C. § 922(g)(9). There are no allegations that the Deputies knew or should have known that the warrant was based on faulty information, thereby vitiating probable cause for a violation of 18 U.S.C. § 922(g)(9). Thus, the Deputies had reasonably trusty information to believe that Anthony Stonecipher had committed an offense, thereby justifying the arrest. *Id.* Because the Deputies' conduct did not violate the Fourth Amendment, they are entitled to qualified immunity.

2. Count II (Unreasonable Search): Count II alleges that the "defendants" unreasonably searched Plaintiffs' residence without reasonable suspicion or probable cause. Doc. 18, ¶ 69. In support of this allegation, the Complaint states that the Deputies conducted a search of the interior of the home for drugs or narcotics, even though the warrant did not authorize a search for such items. *Id.* at ¶ 150. The Complaint further alleges that the Deputies exceeded the scope of their authority by failing to receive consent to enter Otero County and conduct a residential search. *Id.* at ¶ 160. Because these allegations provide the Deputies with fair notice of the federal claims against them, the Court concludes that the allegations in Count II are adequate to satisfy the pleading standard articulated in *Twombly* and *Robbins*.

The issue then is whether the Deputies are entitled to qualified immunity regarding Count II. As

noted above, the Deputies are entitled to qualified immunity in executing the search warrant prepared by Agent Valles. *See Ramirez*, 298 F.3d at 1028; *Salmon*, 948 F.2d at 1140-41. Thus, to the extent Count II is directed at the Deputies, it stands or falls on the allegation that the Deputies exceeded the scope of their granted authority by conducting a search outside of Doña Ana County, (doc. 18, ¶¶ 72, 160), and searched for items outside the scope of the warrant, (*id.* at ¶ 150).

Plaintiffs first argue that the Deputies exceeded their authority by operating outside of their jurisdiction and without authorization from the Otero County Sheriff's Department. In *United States v. Medlin*, 842 F.2d 1194, 1196 (10th Cir. 1988), the Tenth Circuit stated that local law enforcement officers routinely aid ATF agents in the execution of federal search warrants and "such a practice is within the prerogative of ATF agents, has been condoned by the courts, and is permitted by statute." The Tenth Circuit further noted that "18 U.S.C. § 3105 does not require that a person assisting an officer in the execution of a warrant be an officer acting within his or her jurisdiction." *Id.* Here, the search warrant was directed to "Any authorized law enforcement officer," Doc. 51, Ex. A, and was executed by Agent Valles with the assistance of the other named Agents, the Deputies, and the remaining "law enforcement officers." Because the Deputies acted in concert with Agent Valles, the Deputies' mere presence in Otero County, even though outside of their jurisdiction, does not

render their conduct unreasonable, let alone warrant denying them qualified immunity. *Medlin*, 842 F.2d at 1196-97.

Plaintiffs also claim that the Deputies exceeded the scope of the search warrant by showing up at the residence with trained narcotics dogs, (doc. 18, ¶¶ 148-49), and subsequently conducting a search of the home for drugs and narcotics, (*id.* at ¶ 150). The scope of a search warrant is determined by employing "a standard of practical accuracy rather than technical precision." *United States v. Ortega-Jimenez*, 232 F.3d 1325, 1328 (10th Cir. 2000) (internal quotation marks omitted). Here, the warrant authorized a search of the residence for firearms, explosives, and related materials, but not drugs or narcotics. This reading is supported by Agent Valles' affidavit offered in support of the search warrant application, which does not mention drugs or narcotics. *Id.* at 1329. Thus, accepting as true the allegation that the Deputies searched the premise for drugs or narcotics, the Court concludes that Count II alleges a plausible violation of the Plaintiffs' Fourth Amendment rights. *United States v. Robertson*, 21 F.3d 1030, 1033 (10th Cir. 1994) ("A search is 'confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.'") (quoting *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985)). Moreover, as it would have been clear to a reasonable officer in May of 2010 that exceeding the scope of a search warrant was unlawful, *see United States v. Angelos*, 433 F.3d 738, 745-46 (10th Cir.

2006), the constitutional right at issue was clearly established at the time of the Deputies' conduct. Thus, the Court concludes that Count II states a claim for relief which overcomes the Deputies' defense of qualified immunity.

3. Count IV (Unlawful Entry): Count IV alleges that the defendants, including the two Deputies, unlawfully entered the Stoneciphers' residence. Doc. 18, ¶¶ 148-49. As noted previously, however, the Deputies were entitled to reasonably rely on the search warrant prepared by Agent Valles and enter the residence. *See Salmon*, 948 F.2d at 1140-41; *Ramirez*, 298 F.3d at 1027-28.

4. Count V (Excessive Force): Count V alleges that the Defendants used excessive force when they took Anthony Stonecipher to the ground, at gunpoint, outside the residence. Doc. 18, ¶98. It is unclear which deputy, if any, committed this act. Count V thus fails to adequately allege a claim against the Deputies and is thus dismissed pursuant to *Twombly*, 550 U.S. at 570, and *Robbins*, 519 F.3d at 1250.

5. Count VI (Unreasonable Seizure and Wrongful Arrest): The Complaint alleges that the "defendants" seized Melissa Stonecipher, pointed several assault weapons at her during the seizure, extracted her out of the house, and placed her in handcuffs for at least three hours. Doc. 18, at ¶¶35-38. Again, it is unclear which deputy, if any, committed these acts. Count VI thus fails to adequately allege a claim against the Deputies and is thus

dismissed. *Twombly*, 550 U.S. at 570; *Robbins*, 519 F.3d at 1250.

Even if the allegations in Count VI were adequate to state a claim against the Deputies, they are entitled to qualified immunity. The Tenth Circuit has instructed courts to engage in a two-step inquiry to determine whether a detention amounts to an unlawful seizure under the Fourth Amendment. First, the Court "must ascertain whether the detention was justified at its inception." *Gallegos v. City of Colorado*, 114 F.3d 1024, 1028 (10th Cir. 1997). "The second step in determining the reasonableness of an investigative detention consists of determining whether the officers' actions are "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 1028.

The Court finds the Complaint fails to allege a violation of the Fourth Amendment. To begin with, the Deputies were justified in detaining Mrs. Stonecipher incident to the search warrant prepared by Agent Valles. As noted previously, the Deputies relied in good faith on the search warrant prepared by Agent Valles and issued by Magistrate Judge Molzen. *United States v. Williams*, 897 F.2d 1034, 1038-39 (10th Cir. 1990). There are no allegations that the Deputies were told or otherwise knew that the search warrant was based on unreliable information. Thus, the Deputies did not act unreasonably in detaining Mrs. Stonecipher, an occupant of the premises, incident to the search. *Summers*, 452 U.S. at 705 (holding that officers executing a search warrant for

contraband have limited authority "to detain the occupants of the premises while a proper search is conducted."); *Sanchez*, 555 F.3d at 918.

Mrs. Stonecipher, however, argues that her detention ripened into a formal arrest and thus was unreasonable under the second step of *Gallegos*. In support of this argument, Mrs. Stonecipher emphasizes the fact that she was threatened by the Deputies' search dogs and confined for the duration of the search – at least three hours. Mrs. Stonecipher thus claims that the detention was not a limited detention as permitted by *Summers,* but rather a full-custodial arrest without probable cause and in violation of the Fourth Amendment.

Mrs. Stonecipher's argument fails as a matter of law in light of the Supreme Court's decision in *Muehler v. Mena*, 544 U.S. 93 (2005). There, a SWAT team executed a search warrant on the house where Ms. Mena was sleeping. *Id.* at 95-96. The SWAT team entered her bedroom, handcuffed her at gunpoint, and confined her in a backyard garage for the duration of the search, which lasted two or three hours. *Id.* at 96, 100. Because "[a]n officer's authority to detain incident to a search is categorical[,]" the Court held that Mena's "detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search." *Id.* at 96. Here, the Deputies reasonably relied on the warrant prepared by Agent Valles for the Stonecipher's residence. Even though the Deputies

are accused of detaining Mrs. Stonecipher for the duration of the search, their conduct easily fits within the conduct deemed reasonable in *Muehler*. Moreover, contrary to Mrs. Stonecipher's argument, the presence of the Deputies' search dogs did not constitute an unreasonable show of force.[15] Accordingly, given the facts of *Meuhler* and its categorical holding, the Court is unable to conclude that the Deputies' detention of Mrs. Stonecipher ripened into an unreasonable arrest or otherwise violated the Fourth Amendment. The Deputies are thus entitled to qualified immunity on Count VI.

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[15] Plaintiffs appear to argue that the threatening presence of the Deputies' search dogs constituted an unreasonable show of force under *Holland v. Harrington*, 268 F.3d 1179, 1187 (10th Cir. 2001). *Holland* involved a SWAT team detaining, at gunpoint, several bystanders' children who were not suspected of a crime, all in the course of executing a misdemeanor warrant. *Id.* at 1183, 1192-93. The Tenth Circuit explained, "while the SWAT Team's initial show of force may have been reasonable under the circumstances, continuing to hold the children directly at gunpoint after the officers had gained complete control of the situation outside the residence was not justified under the circumstances at that point." *Id.* at 1193. In the instant case, however, the Complaint does not specifically allege that a particular deputy or any deputy at all pointed a firearm at Mrs. Stonecipher. Contrary to Mrs. Stonecipher's argument then, the presence of the search dogs actually suggests that the Deputies used a reasonable amount of force in detaining Mrs. Stonecipher. This is particularly true given that the Supreme Court in *Muehler* found reasonable the SWAT team's detention of Ms. Mena at gunpoint – a much greater show of force than the mere presence of the search dogs alleged in the instant Complaint. 544 U.S. at 96.

6. Count VII (State-Law Tort Claims): Count VII of Plaintiffs' complaint alleges state-law tort claims, including battery, false imprisonment, invasion of privacy, intentional infliction of emotional distress, and trespass. Doc. 18, ¶¶ 97-101. Plaintiffs direct these claims broadly at the defendants and fails to identify which deputies committed what acts. Count VII thus fails to adequately allege a claim against the Deputies and is thus dismissed. *Twombly*, 550 U.S. at 570; *Robbins*, 519 F.3d at 1250.[16]

7. Count VIII (Second Amendment Claim): In Count VIII, Plaintiffs allege that the defendants deprived them of their Second Amendment right to bear arms. *See Heller*, 554 U.S. at 570. None of the allegations in Count VIII are specific to the Deputies, but rather are directed solely at the Agents. Doc. 18, ¶¶ 117-18. The Court thus concludes that the Plaintiffs have failed to state a Second Amendment claim against the Deputies, *see Iqbal*, 129 S. Ct. at 1949.

Even if the Complaint did state a claim against the Deputies, Plaintiffs have failed to meet the "heavy two-part burden" necessary to defeat the defense of

[16] The parties agree that notice is not required for claims brought under the NMTCA against officers acting in their individual capacity. *See Niederstadt v. Town of Carrizozo*, 182 P.3d 769, 789 (N.M. App. 2008) ("Significantly, the notice provision says nothing about persons who claim damages from or file actions solely against individual governmental employees."). Thus, because the Complaint alleges claims against the Deputies in their individual capacities, Doc. 18, ¶ 6, the Court will not dismiss Count VII for failure to provide notice.

qualified immunity. *Cram*, 252 F.3d at 1128. Specifically, as noted previously, Plaintiffs have failed to demonstrate the right at issue was clearly established at the time of the alleged violation. *See supra* section II.D.

7. Count IX (First Amendment Claim): In Count IX, Plaintiffs claim that the defendants violated their First Amendment right to free speech. Unlike the Agents, the Deputies do not move to dismiss this count on the grounds that Plaintiffs have failed to establish the element of causation necessary to a First Amendment retaliation claim. *See supra* section II.C. Rather, the Deputies argue that Count IX, by using the collective term "defendants," fails to adequately state a claim against the Deputies. The Court agrees based on the standard announced in *Twombly*, 550 U.S. at 570, and *Robbins*, 519 F.3d at 1250. Furthermore, the factual allegations in support of Count IX only appear to be directed at the agents. *See, e.g.*, Doc. 18, ¶ 52 (alleging that Anthony Stonecipher told "Defendant Carlos Valles, John Estrada, and many other agents" that he did not have a prior conviction). As a result, the pleaded factual content fails to support a First Amendment claim against the Deputies. *Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do") (quotations omitted). The Court thus grants the Deputies' motion to dismiss Count IX.

8. Count XI (State Constitutional Claims): The Deputies move to dismiss the state constitutional claims for failure to state a claim and on the grounds of qualified immunity. The Court, however, recognized that the Plaintiffs have a valid federal claim against the Deputies for an unreasonable search. *See supra* Section III.A.2. Accordingly, because the Complaint alleges a parallel violation of the Plaintiffs' rights under Article II, section 10 of the New Mexico State Constitution, the Court will deny the Deputies' motion to dismiss Count XI.

B. The County

The County moves to dismiss the federal claims brought against it under § 1983 as well as the state constitutional and tort claims brought against it under the NMTCA.

1. Section 1983 Claims: Plaintiffs seek to impose liability on the County under § 1983 in Counts II and X of the Complaint. Doc. 18,¶¶ 74, 132-41, 154-59. Specifically, Count II alleges that the County is liable for the strip search of Anthony Stonecipher at the Detention Center while Count X alleges that the conditions at the Detention Center rise to the level of cruel and unusual punishment. The Complaint, however, does not name any individual detention officers as a defendant. The issue then is whether the Complaint alleges the existence of a County policy or custom that caused the constitutional violations.

Municipal governments may incur liability under § 1983 when "the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). Because vicarious liability will not open a municipality to liability simply when one of its officers has committed a constitutional violation, *id.* at 694, "[i]t is only when the execution of the government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citation omitted). Here, the Complaint alleges that the Detention Center denied Anthony Stonecipher his three mandatory phone calls and prescription medications. Doc. 18, ¶¶134, 137, 154-59. The Complaint further alleges that the Detention Center conducted a gratuitous strip search of Anthony Stonecipher. *Id.* at ¶¶ 74, 138. While the Complaint alleges that the Detention Center was the proximate cause of Athony Stonecipher's injuries, it fails to identify any policy or custom adopted or promulgated by the County that caused the alleged constitutional violations in Counts II and X.

2. State Claims Under the NMTCA: Count VII alleges state-law tort claims, including battery, false imprisonment, invasion of privacy, intentional infliction of emotional distress, and trespass. Doc. 18, ¶¶ 97-101. Count XI also alleges a series of state constitutional claims against the collective defendants.

Plaintiffs direct both of these claims against the County under the NMTCA, which "provides governmental entities and public employees acting in their official capacities with immunity from tort suits unless the Act sets out a specific waiver of that immunity." *Weinstein v. City of Santa Fe ex rel. Santa Fe Police Dep't*, 916 P.2d 1313, 1316 (N.M. 1996). The NMTCA also waives immunity for "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico." NMSA 1978, § 41-4-12.

In order to be entitled to file suit against the County under the NMTCA, Plaintiffs must have given prior proper notice to the Doña Ana County Clerk within ninety days of the occurrence giving rise to their alleged claims, "unless the government entity had actual notice of the occurrence." NMSA 1978, §41-4-16. Plaintiffs do not allege that they gave notice to the County or that the County had actual notice of the occurrences giving rise to the claims in Count VII or XI.

Fed. R. Civ. P. 9(c) provides, "[i]n pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed." This sentence implies a requirement that the Complaint generally plead compliance with conditions precedent. Moreover, the Tenth Circuit has dismissed a claim for failure to plead compliance with the Colorado Governmental Immunity Act's notice provision. *Aspen Orthopaedics & Sports Medicine, LLC v. Aspen Valley Hospital District*, 353 F.3d 832,

841-42 (10th Cir. 2003) ("In the context of a motion to dismiss, pleading compliance with the notice provisions of the CGIA is de facto jurisdictional."). Accordingly, because the Complaint fails to generally allege compliance with the notice requirements of the NMTCA, the Court will dismiss the state law claims in County VII and XI insofar as they are directed at the County. *Id.* at 41-4-16(B); *City of Las Cruces v. Garcia*, 102 N.M. 25, 27 (N.M. 1984).

Dated this 5th day of January, 2012.

/s/ Bruce D. Black
BRUCE D. BLACK
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANTHONY STONECIPHER, et al., Plaintiffs-Appellants v. SPECIAL AGENTS CARLOS VALLES, et al., Defendants-Appellees	No. 13-2124

ORDER

(Filed Jul. 30, 2014)

Before **KELLY**, **TYMKOVICH**, and **McHUGH**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

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