IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-00151-NYW-NRN

ERIC BURNAM,
ERIN CIENFUEGOS, and
MICHELLE ERICKSON,

Plaintiffs,

v.

THE WELD COUNTY SHERIFFS,
THE DEPARTMENT OF HUMAN SERVICES OF WELD COUNTY,
THE COUNTY ATTORNEYS OFFICE OF WELD COUNTY,
ASHLEY HUGHES,
ANGELA TIMOTHY-FELICE,
DONOVAN PECORELLA,
TRAVIS DENNING,
PETE JONES,
JARED PATTERSON,
DANIEL CHAPMAN,
DANIEL TRUJILLO, and
LARRY NUEGEBAUER,

Defendants.

REPORT AND RECOMMENDATION ON
MOTION TO DISMISS PLAINTIFFS' COMPLAINT (Dkt. #12)
and
MOTION TO QUASH ALLEGED SERVICE OF PROCESS OF, OR IN ALTERNATIVE TO DISMISS, PLAINTIFFS' COMPLAINT FROM DEFENDANT PETE JONES (Dkt. #37)

N. Reid Neureiter
United States Magistrate Judge

This case is before the Court pursuant to Orders (Dkt. ##18 & 39) issued by Judge Nina Y. Wang referring two motions:

- Defendants Weld County Sheriffs, Department of Human Services of Weld County and County Attorneys Office of Weld County (collectively "County Defendants"), along with Jared Patterson, Daniel Chapman, Larry Nuegebauer, Travis Denning, Angela Timothy Fleece, and Ashley Hughes' (collectively "Individual Defendants") Motion to Dismiss Plaintiffs' Complaint (Dkt. #12). Plaintiffs Eric Burnam, Erin Cienfuegos, and Michelle Erickson (collectively "Plaintiffs"), who proceed pro se,[1] filed a response (Dkt. #23) and Defendants filed a reply (Dkt. #33).
- Defendant Pete Jones' Motion to Quash Alleged Service of Process of, or in Alternative to Dismiss, Plaintiffs' Complaint (Dkt. #37), to which Plaintiffs filed a response (Dkt. #42) and Mr. Jones a reply (Dkt. #43).

The Court has heard argument from the parties, taken judicial notice of the docket, and considered the applicable Federal Rules of Civil Procedure and case law. Now, being fully informed and for the reasons discussed below, the Court **RECOMMENDS** that subject motions (Dkt. ##12 & 37) be **GRANTED**.

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[1] Because Plaintiffs proceed pro se, the Court "review[s their] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted). However, a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *see also Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997) (court may not "supply additional factual allegations to round out a plaintiff's complaint"); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues"). A plaintiff's pro se status does not entitle him to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002).

BACKGROUND[2]

The following allegations are taken from Plaintiffs' Complaint for a Civil Case ("Complaint") (Dkt. #1), and those that are well-pled are presumed to be true for the purposes of these motions.

I. The Parties

Plaintiffs Eric Burnam, Erin Cienfuegos, and Michelle Erickson lived together at a residence in Hudson, Colorado, along with Mr. Burnam and Ms. Cienfuegos's six children. (Dkt. #1 at 10.)

Defendants Donovan Pecorella, Pete Jones, Jared Patterson, Daniel Chapman, Daniel Trujillo, and Larry Nuegebauer were members of the Weld County Sheriff's Office ("WCSO") Strike Force Task Force. (*Id.*) Defendants Pecorella, Jones, and Trujillo are no longer employed by the WCSO, and Pecorella and Truijillo have not been served in this matter. Defendant Jones argues that the purported service on him was improper.

Defendant Ashley Hughes is a Weld County Attorney who handles dependency and neglect cases. (*Id*.)

Defendant Angela Timothy-Felice is a Child Protection Permanency Caseworker for the Weld County Department of Human Services ("DHS"), and Defendant Travis Denning is a supervisor in that department. (*Id.*)

[2] All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination.

II. The December 9, 2020 Incident and Aftermath

On the morning on December 9, 2020, Defendant Timothy-Felice, accompanied by Town of Hudson police officers, showed up at Plaintiffs' residence and explained to Mr. Burnam that they needed to see his children because an anonymous tip claimed that there were "guns, methamphetamine[,] and a sex ring going on inside the home." (*Id.* at 11.) Mr. Burnam noticed Defendant Pecorella and another vehicle pull up two houses down, and Defendant Pecorella began taking pictures of Mr. Burnam's vehicles and his back yard. (*Id.*) Defendant Timothy-Felice denied knowing who Defendant Pecorella was or what he was doing. (*Id.*) Mr. Burnam confronted Mr. Pecorella, who returned to the vehicles and handed his camera to an unknown occupant in the second car. (*Id.*)

Mr. Burnam then began to drive to Lakewood, Colorado, to bring his children back and present them to Defendant Timothy-Felice. (*Id.* at 12.) He called Ms. Cienfuego, who was just arriving at the residence, to tell her what was going on, and turned around to return home when Ms. Cienfuego informed him that there were now several cars parked in front of the house. (*Id.*) When Mr. Burnam got back to the residence, he was surrounded by Defendants Pecorella, Jones, and other deputies. (*Id.*) Defendant Pecorella told Mr. Burnam he had a warrant for Burnam's arrest and then attempted to use a taser on him when Mr. Burnam protested that he had no warrants. (*Id.*) The taser malfunctioned and Mr. Burnam allowed himself to be arrested. (*Id.*)

Defendant Jones informed Mr. Burnam that the property had been under surveillance for almost 90 days but could not tell him what crime had been committed. (*Id.*)

Because Ms. Cienfuegos was also arrested on a misdemeanor warrant, the children were taken into custody by Child Protective Services. (*Id.*) When he found this out, Mr. Burnam suffered a severe panic attack and a minor heart attack and was taken to a hospital. (*Id.*)

On December 9, 2020, while Mr. Burnam was detained in the Weld County Jail, Defendants Chapman, Patterson, Trujillo, Pecorella, and Jones executed a search of the residence and confiscated around $2 million worth of property. (*Id.*) Mr. Burnam appeared in court on December 11, 2020, and was told that his bonds had been revoked at the request of the WCSO. (*Id.*)

On December 15, 2020, another search was conducted when no one was at the residence and, in addition to causing damage to the property, officers seized Mr. Burnam's 1989 Corvette, $2.3 million in gold and silver, and $5.3 million. (*Id*.)

Mr. Burnam was released on bond on December 24, 2020. (*Id*. at 14.) On December 29, 2020, on his way back from receiving a GPS ankle monitor, Mr. Burnam was pulled over by Defendants Pecorella, Chapman, Trujillo, and Patterson. (*Id.*) Mr. Burnam overheard Defendant Nuegebauer tell Defendant Pecorella to find something in Mr. Burnam's vehicle so they could take him back to jail, and Mr. Burnam was again detained because Defendants had located "a tool that was inventoried on December 9, 2020 in the same vehicle." (*Id.*)

On December 30, 2020, Mr. Burnam was charged with over 30 counts across nine different cases and was held without bond on one of the felony charges. (*Id.*) Plaintiffs' residence was again searched on January 15 and 29, 2021 for a "unidentified

child corpse." The remains from a miscarriage suffered by Ms. Cienfuegos and Mr. Burnam were exhumed. (*Id.*)

One of Mr. Burnam's children was at some point separated from his siblings and placed in the custody of biological mother, who had relinquished her parental rights in 2018. (*Id.* at 15.) Plaintiffs appear to believe the bogus anonymous tip was made by this woman in attempt to gain custody of the child and gave, in turn, the WCSO an excuse to search the property. (*Id*.) Plaintiffs allege that Defendant Hughes was aware that this tip was false.

Plaintiffs allege that all charges against Mr. Burnam were eventually dismissed in September 2022. (*Id.* at 16.) However, as discussed below, while charges relating to the December 9, 2020 search were dismissed, they were dismissed as part of a global settlement of numerous criminal cases filed against Mr. Burnam.

III. The Claims for Relief

Plaintiffs appear to assert six claims for relief under 42 U.S.C. § 1983 ("Section 1983")[3] against various County and Individual Defendants for violations of Plaintiffs' First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. (*See id.* at 8.) They seek millions of dollars in compensatory and punitive damages. (*Id*. at 17.)

THE SUBJECT MOTIONS

The Court will address Defendants' motions in turn.

[3] Section 1983 provides that "[e]very person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." Section 1983 creates a "species of tort liability" that provides relief to persons deprived of rights secured to them by the Constitution. *Carey v. Piphus*, 435 U.S. 247, 253 (1978) (quotations omitted).

I. The County and Individual Defendants' Motion to Dismiss (Dkt. #12)

The County and Individual Defendants argue that dismissal of Plaintiffs' Complaint is warranted under Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil Procedure. Additionally, Defendant Hughes argues that she is entitled to absolute immunity, and the remaining Individual Defendants argue that they are entitled to qualified immunity. The County Defendants argue that Plaintiffs have not adequately alleged municipal liability.

a. Legal Standards

1. Rule 8

Rule 8(a)(2) requires every pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "The primary purpose of these[Rule 8] provisions is rooted in fair notice: Under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.'" *Vicom, Inc. v. Harbridge Merchant Servs., Inc*., 20 F.3d 771, 775–76 (7th Cir. 1994). Rule 8(a) serves "to give opposing parties fair notice of the basis of the claim against them so that they may respond to the complaint, and to apprise the court of sufficient allegations to allow it to conclude, if the allegations are proved, that the claimant has legal right to relief." *Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan*., 891 F.2d 1473, 1480 (10th Cir. 1989). A complaint violates Rule 8 when it is "virtually impossible to understand" or "completely lacking in clarity and intelligibility." *See Mitchell v. City of Colo. Springs, Colo*., 194 F. App'x 497, 498 (10th Cir. 2006).

2. Rule 12(b)(6)

Rule 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1109. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility, in the context of a motion to dismiss, means that the plaintiff pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The *Iqbal* evaluation requires two prongs of analysis. First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id*. at 679–81. Second, the court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id*. at 681. If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. *Id*. at 679.

However, the Court need not accept conclusory allegations without supporting factual averments. *S. Disposal, Inc., v. Tex. Waste*, 161 F.3d 1259, 1262 (10th Cir.

1998). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Moreover, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does the complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citation omitted).

In evaluating a Rule 12(b)(6) motion to dismiss, the Court may consider documents incorporated by reference, documents referred to in the complaint that are central to the claims, and matters of which a court may take judicial notice. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Publicly filed court records are subject to judicial notice. *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp*., 605 F.2d 1169, 1172 (10th Cir. 1979); *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007); *Trusdale v. Bell*, 85 F. App'x 691, 693 (10th Cir. 2003).[4]

[4] In this case, Plaintiffs attached to their response a detailed "timeline" that contains numerous factual allegations that are not mentioned in the Complaint, as well as hundreds of pages of additional documentation relating to Mr. Burnam's criminal cases and the dependency and neglect proceedings. (*See* Dkt. #23-1.) But a plaintiff cannot amend his or her complaint by adding factual allegations in response to a defendant's motion to dismiss. *See Jojola v. Chavez*, 55 F.3d 488, 494 (10th Cir. 1995) (holding that when evaluating a motion to dismiss, a court is limited to assessing the legal sufficiency of the allegations contained within the four corners of the complaint) (citation omitted); *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1107 (7th Cir.1984) (holding that "it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss") (citations omitted); *Abdulina v. Eberl's Temp. Servs*., *Inc*., 79 F. Supp. 3d 1201, 1207 (D. Colo. 2015). Therefore, the Court will not consider the supplemental filing.

b. Analysis

1. Statute of Limitations

Defendants argue that most of Plaintiffs' constitutional claims are barred by the statute of limitations. The Court agrees.

"A statute of limitations defense may be appropriately resolved on a Rule 12(b) motion when the dates given in the complaint make clear that the right sued upon has been extinguished." *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 671 (10th Cir. 2016) (internal quotation marks omitted). If, from the complaint, "the dates on which the pertinent acts occurred are not in dispute, [then] the date a statute of limitations accrues is . . . a question of law" suitable for resolution at the motion to dismiss stage. *Herrera v. City of Espanola*, 32 F.4th 980, 991 (10th Cir. 2022) (quoting *Edwards v. Int'l Union, United Plant Guard Workers of Am.*, 46 F.3d 1047, 1050 (10th Cir. 1995)).

Plaintiffs' claims are brought pursuant to Section 1983, and "the relevant statute of limitations for a § 1983 claim 'is that which the State [in which the cause of action arose] provides for personal-injury torts.'" *Eden v. Webb*, No. 22-3064, 2022 WL 17576354, at *1 (10th Cir. Dec. 12, 2022) (quoting *Wallace v. Kato*, 549 U.S. 384, 387 (2007)). Although Plaintiffs assert that a three-year statute of limitations governs their claims (Dkt. #23 at 5), the applicable state statute is Colorado's general two-year statute of limitations, which provides a two-year period for a plaintiff to bring suit. *See* Colo. Rev. Stat. § 13-80-102; *Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006) ("We have made clear that the statute of limitations for § 1983 actions brought in Colorado is two years from the time the cause of action accrued.").

While state law governs the length of the limitations period applicable to Section 1983 claims, the accrual of a Section 1983 claim—when the statute of limitations begins to run—is governed by federal law. *Eden*, 2022 WL 17576354, at *1 (citing *Wallace*, 549 U.S. at 388). Determining an accrual date must "begin[] with identifying 'the specific constitutional right' alleged to have been infringed." *Herrera*, 32 F.4th at 990 n.5 (quoting *McDonough v. Smith*, 139 S. Ct. 2149, 2151 (2019)). In general, accrual occurs "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* at 990; *see also Smith v. City of Enid By & Through Enid City Comm'n*, 149 F.3d 1151, 1154 (10th Cir. 1998) ("Since the injury in a § 1983 case is the violation of a constitutional right, such claims accrue when the plaintiff knows or should know that his or her constitutional rights have been violated" (internal citations and quotation marks omitted).).

Here, Plaintiffs filed suit on January 18, 2023. Thus, any claims that accrued prior to January 18, 2021 are time-barred. "Claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur." *Beck v. City of Muskogee Police Dep't*, 195 F.3d 553, 558 (10th Cir. 1999) (quoting *Johnson v. Johnson Cnty. Comm'n Bd.,* 925 F.2d 1299, 1301 (10th Cir. 1991)). Accordingly, Plaintiffs cannot maintain any Section 1983 claims relating to the December 9, 2020 search and arrest; the December 15, 2020 search and seizure of property, the December 29, 2020 traffic stop and subsequent detention; the bringing of charges against Mr. Burnam on December 30, 2020, and the January 15, 2021 search of Plaintiffs' property.

2. Plaintiffs' First, Fifth, Sixth, and Eighth Amendment Claims

In their Complaint, Plaintiffs allege that their lawsuit "arises under the United States Constitution, particularly under the provisions of the First, Fourth, Fifth, Six[th], Eighth and Fourteenth Amendment[s]." (Dkt. #1 at 10.) But Plaintiffs' Complaint does not describe in any meaningful way how their First, Fifth, Sixth, or Eighth Amendment rights were violated, so any Section 1983 claims premised on these theories should be dismissed.

In their response, Plaintiffs claim that Defendants violated their First Amendment right to freely exercise their religion when they exhumed the miscarried baby. (Dkt. #23 at 12.) The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I. It protects against government regulation of religious belief or conduct and has been applied to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Even giving it the most liberal construction possible, a Free Exercise claim cannot be gleaned from the Complaint. In any event, neither the Complaint nor the response identifies Plaintiffs' religious beliefs or suggests that the officers who searched the property on January 29, 2021—pursuant to a valid warrant—were aware of Plaintiffs' religion or motivated by any religious animus.

Plaintiffs further claim in their response that their Eighth Amendment rights were violated because they were subjected to "unnecessary and wanton infliction of pain" and because Mr. Burnam was denied bond. (Dkt. #23 at 16.) As to the former argument, none of the Plaintiffs allege that they were subjected to any physical force at all. The only allegation is that Defendant Pecorella *attempted* to use a taser on Mr. Burnam but

did not succeed—and any claim based on December 9, 2020 events is time-barred anyway. As to the latter argument, while a claim of denial of bond may be based on the Eighth Amendment's Excessive Bail Clause, *see Masad v. Nanney*, No. 14-cv-00577-MJW, 2014 WL 4265848, at *6 (D. Colo. Aug. 27, 2014), "because tort principles apply to § 1983 claims, and because judicial officers have long been held to be superseding causes that break the chain of proximate causation," an Eighth Amendment excessive bail claim can only succeed where: (1) there is an individual defendant who "deliberately or recklessly misled the judicial officer who set bail;" and where (2) "bail would not have been unconstitutionally excessive but for the defendant's misrepresentations." *Tallie v. Crawford Cnty*., No. 22-3176-JWL-JPO, 2022 WL 17978446, at *5 (D. Kan. Dec. 28, 2022) (citations and alterations omitted). Here, Plaintiffs merely allege that "[t]he courts failed to address bond . . . leaving [Mr. Burnam] with no bond on a F-4 felony theft for 42 days." (Dkt. #1 at 14.) Thus, Plaintiffs do not allege that any of the Defendants were the reason Mr. Burnam was held without bail, which is fatal to any Eighth Amendment excessive bail claim.

Finally, Plaintiffs do not even mention the Fifth or Sixth Amendment in their response. For these reasons, any claim based on the First, Fifth, Sixth, or Eighth Amendments should be dismissed.

3. Fourth Amendment Claims

Most of Plaintiffs' Section 1983 claims brought pursuant to the Fourth Amendment are time-barred. The only event that happened after January 18, 2021 is the January 29, 2021 search of Plaintiffs' property that resulted in the exhumation of Ms. Cienfuegos' miscarriage. However, according to Plaintiffs' Complaint, this search was

conducted pursuant to a warrant. Plaintiffs do not allege that the warrant lacked probable cause or was otherwise invalid. The Fourth Amendment only proscribes searches that are unreasonable. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). Based on the allegations of the Complaint, the search at issue here was reasonable as it was conducted pursuant to a warrant, the validity of which Plaintiffs do not appear to challenge. Thus, Plaintiffs cannot maintain a Fourth Amendment claim based on the January 29, 2021 search.

To the extent that Plaintiffs' Complaint can be read to assert a Fourth Amendment[5] malicious prosecution claim, such a claim also fails. The five elements of a Fourth Amendment malicious prosecution claim under Section 1983 are "(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." *Margheim v. Buljko*, 855 F.3d 1077, 1085 (10th Cir. 2017). Ms. Cienfuegos was arrested pursuant to a misdemeanor warrant, which she does not otherwise contest, thus she cannot meet the third element of a malicious prosecution claim. As to Mr. Burnam, Defendants maintain that in September 2022, he entered guilty pleas in two cases as part of a global plea agreement and disposition of

[5] Defendants' motion suggests that the malicious prosecution claim is brought under the Fourteenth Amendment. (*See* Dkt. #12 at 10 n.3.) However, the Tenth Circuit has "repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be the Fourth Amendment's right to be free from unreasonable seizures." *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007) (quotations omitted)

all his criminal cases.[6] *See Hodgson v. Farmington City,* 675 F. App'x 838, 840-41 (10th Cir. 2017). Thus, the underlying criminal actions did not terminate in a way suggestive of Mr. Burnam's innocence and his malicious prosecution claim necessarily fails. *See Guinn v. Unknown Lakewood Police Officers*, No. 10-cv-00827-WYD-CBS, 2010 WL 4740326, at *5 (D. Colo. Sept. 30, 2010) ("A conviction for a crime cannot be considered a termination in favor of the accused, unless, for example, that conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus."), *report and recommendation adopted*, No. 10-cv-00827-WYD-CBS, 2010 WL 4740316 (D. Colo. Nov. 16, 2010).

4. Fourteenth Amendment Claims

Defendants construe Plaintiffs' Complaint to assert Fourteenth Amendment claims based on various legal theories including conspiracy, due process, and equal protection. As Plaintiffs' Complaint is not entirely clear, and Plaintiffs themselves do not seem to quarrel with this interpretation, the Court will follow suit.

A. Civil Conspiracy

To the extent that the Complaint purports to state a Section 1983 conspiracy claim, the Court agrees with Defendants that such a claim must be dismissed.

The Tenth Circuit has recognized "a § 1983 conspiracy claim"; that is, "a conspiracy to deprive a plaintiff of a constitutional or federally protected right under color of state law." *Dixon v. City of Lawton*, 898 F.2d 1443, 1449 n.6 (10th Cir. 1990). To

[6] As addressed above, the Court may take judicial notice of these prior proceedings without converting the motion to dismiss to a motion for summary judgment.

state a Section 1983 conspiracy claim, a plaintiff must allege "specific facts showing an agreement and concerted action among defendants, an agreement upon a common, unconstitutional goal, and concerted action taken to advance that goal. *Bledsoe v. Carreno*, 53 F.4th 589, 609 (10th Cir. 2022) (internal citations omitted). A plaintiff "must plead and prove not only a conspiracy, but also an actual deprivation of rights." *Snell v. Tunnell*, 920 F.2d 673, 701 (10th Cir. 1990). "[T]here is no requirement of an express agreement, nor must the conspirators know all of the details of the conspiracy," but the plaintiff "must do more than make conclusory allegations of a conspiracy." *Erickson v. City of Lakewood, Colo.*, 489 F. Supp. 3d 1192, 1203 (D. Colo. 2020).

Plaintiffs have not plausibly alleged Defendants conspired to violate their constitutional rights. Plaintiffs claim that Defendants "conspired in a scheme to traffic the minor child to [the biological mother] for helping the Weld County Sheriff gain access to the plaintiff's property for her anonymous tip." (Dkt. #1 at 15.) In other words, Plaintiffs appear to claim that Defendants, across three distinct Weld County entities (the WSCO, the DHS, and the Weld County Attorney's Office) agreed to have someone make a false tip in order to take Plaintiffs' children into custody and then search and confiscate Plaintiffs' property. But there are no specific, non-conclusory facts pled that support this kind of extensive and complex scheme. Plaintiffs completely fail to allege who conspired with whom to do what. Indeed, from Plaintiffs' own allegations, it appears that Defendant Timothy-Felice and the WCSO deputies were acting independently. According to the Complaint, Defendant Timothy-Felice arrived at the residence with police officers from the Town of Hudson, not the WCSO, and denied knowing who Defendant Pecorella was when confronted by Mr. Burnam. Moreover, Plaintiffs concede

that both Mr. Burnam and Ms. Cienfuegos were arrested by the WCSO on outstanding warrants that had nothing to do with Defendant Timothy-Felice. The Court agrees with Defendants that, at most, Plaintiffs' allegations suggest that they were the subject of two parallel investigations. Plaintiffs' Section 1983 conspiracy claim should be dismissed.

B. Due Process

The Due Process Clause has both a procedural and a substantive component. "When government action deprives a person of life, liberty, or property without fair procedures, it violates procedural due process." *United States v. Deters*, 143 F.3d 577, 582 (10th Cir. 1998). Substantive due process, on the other hand, "protects a small number of 'fundamental rights' from government interference regardless of the procedures used." *Id.* "In general, governmental action infringing upon a fundamental right will not survive judicial scrutiny unless it serves a compelling state interest and is narrowly tailored to effect that interest." *Id.*

The Complaint does not articulate how Plaintiffs' procedural due process rights were violated. In their response, they point to the children being taken into custody and one child being separated from his siblings and placed with his unfit biological mother. First, this claim is time-barred. Second, it does not state a claim.

Under the Fourteenth Amendment, parents have a protected liberty interest in the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This liberty interest is not absolute, however; the state has "a traditional and transcendent interest in protecting children from abuse." *J.B. v. Washington Cnty.*, 127 F.3d 919, 927 (10th Cir.1997) (quotation marks and citation omitted). "When a state agency seeks to remove children from the home, due process requires that the parents

receive prior notice and a hearing, except in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" *Gomes v. Wood*, 451 F.3d 1122, 1128 (10th Cir. 2006) (quoting *Spielman v. Hildebrand,* 873 F.2d 1377, 1385 (10th Cir. 1989)). Here, Defendant Timothy-Felice had a court order to see Mr. Burnam and Ms. Cienfuegos' children because there was an anonymous tip that there were "guns, methamphetamine and a sex ring going on inside the home." Then, Mr. Burnam and Ms. Cienfuegos were arrested on warrants. The decision to take the children into custody did not violate their procedural due process rights. *See id.* at 1130 ("Following the majority approach, we conclude that state officials may remove a child from the home without prior notice and a hearing when they have a reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there."). When a pre-hearing removal is justified, the state must then act promptly to provide a post-removal hearing. *Id.* at 1128. Plaintiffs do not allege anywhere that Mr. Burnam and Ms. Cienfuegos were denied a prompt post-removal hearing. Any procedural due process claim fails.

Plaintiffs also claim in their response that Mr. Burnam and Ms. Cienfuegos's substantive due process right to familial association was impinged upon by Defendants Timothy-Felice, Denning, and Hughes. This claim, assuming *arguendo* that it is even alleged in the Complaint, also fails.

First, Defendant Hudges is entitled to absolute immunity. "[P]rosecutors are entitled to absolute immunity against suits brought pursuant to § 1983 for activities intimately associated with the judicial process, such as initiating and pursuing criminal prosecutions." *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994) (cleaned up); *see*

also Warnick v. Cooley, 895 F.3d 746, 751 (10th Cir. 2018) ("[I]t is well-established law that '[p]rosecutors are entitled to absolute immunity' for anything they do in their roles as advocates, including their 'decisions to prosecute.'") (quoting *Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1164 (10th Cir. 2009)). Prosecuting attorneys are absolutely immune from suit under Section 1983 for decisions to prosecute, *Hammond v. Bales*, 843 F.2d 1320, 1321 (10th Cir. 1988), and to not prosecute, *Dohaish v. Tooley*, 670 F.2d 934, 938 (10th Cir. 1982). *See also Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) *("*If the prosecutor had absolute immunity only for the decision to prosecute and not for a decision not to prosecute, his judgment could be influenced in favor of a prosecution that sound and impersonal judgment would eschew."). Prosecutors are also entitled to immunity for any related investigatory or evidence-gathering functions undertaken in connection with the prosecutorial function. *See Scott v. Hern*, 216 F.3d 897, 909 (10th Cir. 2000) (prosecutor's immune conduct includes investigation, or lack thereof). County attorneys who prosecute child neglect and delinquency proceedings are likewise entitled to absolute immunity. *See Stepanek v. Delta Cnty*., 940 P.2d 364, 368 (Colo. 1997) (citing *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984)).

Turning to the DHS employees (Defendants Timothy-Felice and Denning), the Supreme Court recognizes a substantive due process claim for government action that deprives a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience. *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019) (citing *City of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). "Executive action that shocks the conscience requires much more than negligence." *Id.* "To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his

authority or employed it as an instrument of oppression." *Id.* (quoting *Hernandez v. Ridley*, 734 F.3d 1254, 1261 (10th Cir. 2013)).

The government's "forced separation of parent from child, even for a short time, represents a serious impingement on a parent's substantive due process right to familial association." *Id.* at 1300–01 (citation omitted). To state a right of familial association claim, a plaintiff must allege that (1) the defendant intended to deprive the parent of their protected relationship with their children, and that (2) the defendant either unduly burdened the protected relationship or effected an unwarranted intrusion into that relationship. *Id.* at 1301 (internal citations omitted).

Here, Plaintiffs do not allege conduct that shocks the conscious. First, there are no allegations that Defendant Denning personally participated in any deprivation, so any claim against him should be dismissed. *See Henry v. Storey*, 658 F.3d 1235, 1241 (10th Cir. 2011) ("Personal participation in the specific constitutional violation complained of is essential" in a Section 1983 action.). As for Defendant Timothy-Felice, during the relevant period (post-January 18, 2021), Plaintiffs appear to only allege that on September 23, 2021, she "submitted a true and correct criminal history of the anonymous tip" in the juvenile court proceedings, apparently to show that the tipper had numerous criminal convictions and was the subject of complaints to various Child Protective Services in Colorado. This does not strike the Court as egregious and outrageous behavior, and the Complaint is silent as to what happened as a result of this hearing.

Accordingly, Plaintiffs' due process claims should be dismissed under Rule 12(b)(6).

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause 'keeps governmental decision makers from treating differently persons who are in all relevant respects alike.'" *Soskin v. Reinertson*, 353 F.3d 1242, 1247 (10th Cir.2004) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)); *see also Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1233 (10th Cir. 2009) ("Equal protection 'is essentially a direction that all persons similarly situated should be treated alike.'") (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). To state a claim under Section 1983 for violation of the Equal Protection Clause, Plaintiffs must show Defendants acted under color of law and discriminated against them. They do not plausibly allege that they suffered any discrimination. This claim fails.

5. Qualified Immunity

In suits brought against officials in their individual capacities, officials may raise the defense of qualified immunity. *Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). The doctrine of qualified immunity protects government officials from individual liability while in the course of performing their official duties so long as their conduct does not violate clearly established constitutional or statutory rights*. Washington v. Unified Gov't of Wyandotte Cnty*., 847 F.3d 1192, 1197 (10th Cir. 2017). Once a defendant has asserted a defense of qualified immunity, the burden shifts to the plaintiff who must establish that (1) the defendant violated a right, and (2) the right was clearly established. *Puller v. Baca*, 781 F.3d 1190, 1196 (10th Cir. 2015). "In their discretion,

courts are free to decide which prong to address first in light of the circumstances of the particular case at hand." *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010) (quotation omitted).

In this case, Plaintiffs have failed to state any claim under Section 1983 against the Individual Defendants. Therefore, they are entitled to qualified immunity.

6. Municipal Liability

Plaintiffs assert claims against both the Individual Defendants in their official capacities and the County Defendants. "[A] section 1983 suit against a municipality and a suit against a municipal official acting in his or her official capacity are the same." *Stuart v. Jackson*, 24 F. App'x. 943, 956 (10th Cir. 2001) (quoting *Myers v. Oklahoma Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1316 n.2 (10th Cir. 1998)). Accordingly, where a plaintiff sues both the municipality and municipal official in an official capacity under the same theory of recovery, courts have dismissed the official capacity claim as "duplicative" or "redundant" of the claim against the municipal entity. *See Leadholm v. City of Commerce City*, No. 16-cv-02786-MEH, 2017 WL 1862313, at *5 (D. Colo. May 9, 2017). Thus, the official capacity claims against the Individual Defendants should be dismissed.

Turning to the claims against the County Defendants, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . 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 Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (footnote omitted). To state a claim for municipal liability, a plaintiff

must plausibly allege the existence of a municipal policy or custom and a causal link between the policy or custom and the injury alleged. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015). He must also "show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013). A municipality can be liable under Section 1983 only where the municipality itself causes the constitutional violation at issue. *Monell*, 436 U.S. at 690–91. Thus, to prove a municipality is liable under Section 1983 for the acts of one of its employees, a plaintiff must show (1) that a municipal employee committed a constitutional violation and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation. *Jiron v. City of Lakewood,* 392 F.3d 410, 419 (10th Cir. 2004).

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

Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (quotation and alteration marks omitted). Whatever species of policy or custom is alleged,

> [t]he plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 404 (1997).

Plaintiffs' claims against the County Defendants should be dismissed because they neither plausibly allege a constitutional violation nor identify any municipal policy or custom that was the moving force behind a constitutional deprivation.

II. Defendant Jones' Motion to Quash Alleged Service of Process of, or in Alternative to Dismiss, Plaintiffs' Complaint (Dkt. #37)

Defendant Jones moves to quash the alleged service of Plaintiffs' Complaint. In the alternative, he requests dismissal on the same grounds as the County and Individual Defendants. Plaintiffs' Complaint suffers the same pleading infirmities with respect to the Individual and County Defendants as it does with respect to Defendant Jones, and can be dismissed for the same reasons. However, the Court also agrees with Defendant Jones that he was not properly served under Rule 4.

Federal Rule of Civil Procedure 12(b)(5) allows for dismissal of an action without prejudice based on insufficient service of process. In opposing a motion to dismiss for insufficient process or insufficient service of process, Plaintiffs bear the burden to make a prima facie case that they have satisfied statutory and due process requirements so as to permit the court to exercise personal jurisdiction over the defendant. *Carson v. United States*, No. 21-cv-01596-PAB-STV, 2023 WL 155875, at *2 (D. Colo. Jan. 11, 2023) (citations omitted). Plaintiffs must demonstrate that the procedure employed to effect service satisfied the requirements of Fed R. Civ. P. 4. *Id.* In ruling on a Rule 12(b)(5) motion, the Court "may consider any affidavits and other documentary evidence submitted by the parties and must resolve any factual doubt in a plaintiff's favor." *Kelley v. City of Atchison, Kan.,* No. 221CV02123JARTJJ, 2021 WL 5140320, at *1 (D. Kan. Nov. 4, 2021) (internal quotation marks and citations omitted).

a. Rule 4(m)

Under Fed. R. Civ. P. 4(m), "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time" unless the plaintiff shows good cause for the delay. A court applying these rules engages in a two-part inquiry. *Id.* (citing *Sarnella v. Kuhns*, No. 17-cv-02126-WYD-STV, 2018 WL 1444210, at *2 (D. Colo. March 23, 2018)). First, the Court determines whether the plaintiff has shown good cause for his failure to timely serve the defendant. *Id*. If good cause is shown, then an extension of the time for service of process is mandatory. *Id.* If good cause is not shown, then the Court proceeds to the second step of the analysis and determines whether a permissive extension is warranted. *Id.*

Here, Plaintiffs' Complaint was filed on January 18, 2023. The deadline for service under Rule 4(m) was April 18, 2023. Plaintiffs did not file a purported Return of Service until May 18, 2023 (which, as discussed below, fails to establish that Defendant Jones was served prior to the deadline). (*See* Dkt. #27 at 7.) Thus, service was untimely.

In response, Plaintiffs cite their status as pro se parties and note that they did attempt service via U.S. mail in March 2023 (*see* Dkt. #13), although Rule 4 does not authorize service via U.S. mail under these circumstances. *See* Fed. R. Civ. P 4(e). They also sought subpoenas on April 19, 2023 (*see* Dkt. #21), but this request was denied by the Clerk of Court for procedural reasons (Dkt. #22). Although Plaintiffs' pro

se status does not excuse them from following the rules, the Court credits their good faith attempts at service and finds that dismissal under Rule 4(m) is not warranted.

b. Rule 4(e)

But Defendant Jones also raises serious concerns with how personal service was purportedly accomplished. Rule 4(e) governs service on individuals within the United States:

> Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> > (A) delivering a copy of the summons and of the complaint to the individual personally;
> >
> > (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
> >
> > (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process

Fed. R. Civ. P. 4(e).

Plaintiffs filed a Return of Service as to Defendant Jones, which was signed by Emily Philemon, a process server with On Time Legal Process Serving LLC. (Dkt. #27 at 7.) Ms. Philemon states, under penalty of perjury, that Mr. Jones was "served by refusal" at 3132 Argyll Lane, Johnstown, CO 80534 on May 10, 2023. Confusingly, Ms. Philemon gives two times for service, 11:40 a.m. and 4:10 p.m. She states Mr. Jones was sitting outside the house smoking a cigarette when "the server" arrived, and that he went inside when "the server" approached him with documents. She says Defendant

Jones refused to answer the door and "the server" left the documents on the porch. She describes Mr. Jones as 50 years old, 5'11", 270 pounds, and having grey hair and no glasses.

Mr. Jones submitted an affidavit stating that he is 6'2", 220 pounds, and has dark brown and beard, and a muscular build. (Dkt. #37-1.) He states he is a non-smoker and wears glasses, that he did not arrive home on May 10, 2023 until 4:23 p.m., and that no one approached his house after that time.

In their response, Plaintiffs include several pictures of Defendant Jones taken from the internet that they claim matches the description of the process server. Defendant Jones then replied, attaching a supplemental affidavit (Dkt. #43-1) and a video doorbell recording from his home on May 10, 2023. As to Plaintiffs' photographs, Defendant Jones admits that he appears in the first three (but not the fourth), and admits that he has a graying beard, but points out that he has dark hair in all three photos and is wearing glasses in one of the photos. He further states that the video shows him leaving the home at 9:29 a.m. and returning home at 4:23 p.m. At 11:38 a.m., an unidentified while male approached the home, rang the doorbell, knocked on the door, and left a stack of papers underneath a package next to the front door. No woman appeared at his home at any time.

The Court has reviewed the videos and is convinced that the Return of Service is unreliable, and that service has not been properly effected on Defendant Jones. The Return of Service indicates that service by refusal occurred at 11:40 a.m., which is around when the man in the video arrives at the house, but the narrative portion states that service occurred at 4:10 p.m., and the video provided by Defendant Jones shows

no evidence of any individual appearing at the front door of the home at this time. The Court can come up with a few different theories to explain the errors and discrepancies, but put simply, the Court does not believe that the Return of Service is accurate. Plaintiffs have not met their burden in proving adequate service, and the Court has no jurisdiction over Defendant Jones.

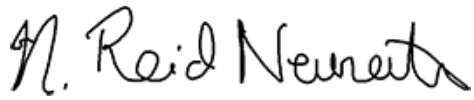
CONCLUSION

WHEREFORE, for the foregoing reasons, it is hereby **RECOMMENDED** that the Motion to Dismiss Plaintiffs' Complaint (Dkt. #12) and Motion to Quash Alleged Service of Process of, or in Alternative to Dismiss, Plaintiffs' Complaint (Dkt. #37) be **GRANTED**, and that Plaintiffs' Complaint for a Civil Case (Dkt. #1) be **DISMISSED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*,

91 F.3d 1411, 1412-13 (10th Cir. 1996).

BY THE COURT



Date: November 17, 2023
Denver, Colorado

N. Reid Neureiter
United States Magistrate Judge