

**STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 06-CV-02061-LTB-MJW

MERCEDES ARCHULETA,

Plaintiff,

vs.

MICHELLE WAGNER, a detective with the Lakewood Police Department, in her individual capacity;

D.L. MANDELKO, a jailer with the Jefferson County Jail, in her individual capacity;

SHAYNE BUTLER, an officer with the Colorado Highway Patrol, in his individual capacity;
and

TED MINK, JEFFERSON COUNTY SHERIFF, in his official capacity.

Defendants.

**PLAINTIFF MERCEDES ARCHULETA'S OMNIBUS RESPONSE TO DEFENDANTS
TED MINK'S, D.L MANDELKO'S AND SHANE BUTLER'S MOTIONS TO DISMISS**

Plaintiff Mercedes Archuleta, by and through her undersigned counsel, hereby submits this omnibus response to (1) Defendant Shane Butler's Motion to Dismiss, and (2) Defendant Jefferson County Sheriff Ted Mink's and Jefferson County Deputy Sheriff Mandelko's Motion to Dismiss.¹

I. INTRODUCTION

Mrs. Archuleta's claims are based on clearly established law: It is clearly established that an officer may not seize a car passenger without any reasonable suspicion that they are engaged

¹ Defendant Wagner, the Lakewood detective who obtained the constitutionally-deficient and invalid warrant for Mrs. Archuleta's arrest, answered the Complaint and did not file a motion to dismiss.

in criminal activity, nor may he arrest her in an extraordinary manner, unusually harmful to her privacy interests. It is clearly established that a jailer may not jail someone who they know and acknowledge to be innocent, particularly on an invalid warrant. It is clearly established that a jailer may not strip search an arrestee charged with a minor municipal crime when there is no reason to believe that they have concealed weapons or contraband inside their body. The facts in the Complaint state a claim that the defendants violated each one of these prohibitions.

In response, the defendants allege facts not in the complaint and make some startling assertions:

Defendant Butler suggests that he can seize a car passenger without reasonable and articulable suspicion that she committed a crime. Defendant Butler further argues that his arrest of Mrs. Archuleta was reasonable as a matter of law, even though he arrested Mrs. Archuleta while she was nursing her infant, refused her repeated requests to tie her blouse and cover her partially exposed breasts, and pressed his chest against her partially exposed breasts in the patrol car.

Defendant Mandelko claims that it is acceptable for her to knowingly jail (and strip search) a person who she acknowledges to be innocent and arrested on an erroneous warrant. Finally, Defendants Mink and Mandelko argue that it is *per se* reasonable to strip a person charged with violating a municipal ordinance prohibiting harassment, even when there is no reason to believe that a strip search will uncover anything and the person searched will not be put in the general jail population

The Court should reject these claims, reject the defendant's attempts to introduce facts not in the complaint, and deny the motions to dismiss.

II. GOVERNING LEGAL STANDARDS

A. Motion to Dismiss

In deciding a motion to dismiss, the court must accept all well-pled facts as true, and view those facts in the light most favorable to the non-moving party. *E.g. Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006) (citing *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998)). The court may dismiss only if it appears beyond all doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Id.* There is no heightened pleading standard on the plaintiff when the defendants file motions to dismiss based on qualified immunity; the general Rule 12(b)(6) standard applies. *Id.* (citing *Currier v. Doran*, 242 F.3d 905, 916-17 (10th Cir. 2001)).

Although the defendants recite the relevant standard for a motion to dismiss, their motions fail to accept the well-pled facts of the Complaint, and certainly do not view the facts in the light most favorable to Mrs. Archuleta. The Court should reject the defendants' effort to rely on unsupported allegations contrary to the facts set forth in the Complaint and their effort to construe the facts in the light most favorable to themselves.

B. Claim of Qualified Immunity

Defendant Mandelko, a deputy sheriff at the Jefferson County Detention Facility, and Defendant Butler, the highway patrolman who arrested Mrs. Archuleta, claim that they are entitled to qualified immunity and that Mrs. Archuleta can prove no set of facts that would entitle her to relief against them. When a defendant pleads qualified immunity, the plaintiff must show “(1) that the defendant’s actions violated a constitutional or statutory right, and (2) that the rights alleged to be violated were clearly established at the time of the conduct at issue.” *Anderson v.*

Blake, 469 F.3d 910, 913 (10th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). A plaintiff may establish that a right is clearly established by reference to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits. *Id.* at 914. To show that a right is clearly established, a plaintiff need show only that the right is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Id.* at 913 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). There need not be a precise factual correspondence between earlier cases and the facts of the case at hand; general statements of the law are capable of giving a fair and clear warning. *Id.* at 913-14 (quoting *Hope*, 536 U.S. at 741). A general constitutional rule that has already been established can “apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.” *Id.* at 914 (brackets in original) (quoting *Hope* 536 U.S. at 741).

Defendant Mink, sued in his official capacity as the sheriff of Jefferson County with official responsibility for the operation of the Jefferson County Detention Facility, is not entitled to assert a “qualified immunity” defense. *Beedle v. Wilson*, 422 F.3d 1059, 1069 (10th Cir. 2005); *Moore v. City of Wynnewood*, 57 F.3d 924, 929 n.4 (10th Cir. 1995). For Defendant Mink, Plaintiff need only demonstrate that, viewing the facts in the light most favorable to her, she may be able to prove a set of facts demonstrating that Jefferson County’s strip search policy is unconstitutional.

III. ARGUMENT

A. Construing the Facts in the Light Most Favorable to Plaintiff, Archuleta's Claims Against Defendant Butler Should Not Be Dismissed

1. Archuleta Has Stated a Claim for Relief Against Butler for his Unlawful Seizure Before the Discovery of the Erroneous Warrant

Mrs. Archuleta's Second Claim for Relief is based on officer Butler's seizure of Mrs. Archuleta when he took and retained her driver's license for more than a half hour, without any reasonable and articulable suspicion that she was engaged in criminal activity. It is clearly established that an officer cannot seize an individual when he lacks any reasonable suspicion that the person is engaged in criminal activity. *U.S. v. Davis*, 94 F.3d 1465, 1468 (10th Cir. 1996) ("A seizure by means of an investigative detention is constitutional only if supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity.") (internal citations and quotations omitted); *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Therefore, Butler's claim for qualified immunity must be denied.

Defendant Butler pulled Mrs. Archuleta's husband over for a traffic infraction and immediately demanded both her husband's driver's license and Mrs. Archuleta's license as well. Butler does not address (or even acknowledge) this critical fact. Instead, contrary to governing law, Butler seeks to contradict or ignore it, suggesting that he waited to demand Mrs. Archuleta's license until after a computer check erroneously listed Mr. Archuleta's license as suspended. This is not true, as the Complaint makes clear. Complaint ¶ 54. Butler seized Mrs. Archuleta's license (as well as her husband's) immediately upon pulling over the car. He also demanded that the family write down each of their children's names and birthdates on a notepad. Complaint ¶¶ 53-56. Mrs. Archuleta did not voluntarily give her license to Defendant Butler, and he did not

inform her of the reason for the demand or her right to refuse. Complaint ¶ 108. After Mrs. Archuleta surrendered her license, Butler retained the license for more than thirty minutes. *Id.* at ¶ 109. Moreover, while Butler had the license, two more patrol cars arrived at the scene. *Id.*

Under these circumstances, it is well settled that Defendant Butler seized Mrs. Archuleta, both by demanding her license and by retaining it for more than thirty minutes. A police-citizen encounter is a seizure when a reasonable person in the circumstances would not feel free to decline the officer's requests or otherwise terminate the encounter. *E.g. Florida v. Bostick*, 501 U.S. 429, 436 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). Among the circumstances that indicate a seizure are the threatening presence of several officers, the use of language or tone of voice indicating that compliance with the officer's request might be compelled, and the failure of the officers to inform the suspect that he is free to leave. *Mendenhall*, 446 U.S. at 554 (listing factors); *Florida v. Royer*, 460 U.S. 491, 501, 503 (1983) (twice noting the fact that the police did not tell the suspect he was free to leave in determining that he had been seized).

As is apparent from the facts recited above, all three of these factors are present in this case. Significantly, Defendant Butler seized Mrs. Archuleta's license and did not return it. In the Tenth Circuit, as elsewhere, a police officer effects a seizure by taking a person's license and not returning it. *See United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995) ("What began as a consensual encounter quickly became an investigative detention once the agents

received [the defendant's] driver's license and did not return it."); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994) ("This Circuit follows the bright-line rule that an encounter initiated by a traffic stop may not be deemed consensual unless the driver's documents have been returned to him."), *overruled on other grounds by United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995); *see also People v. Jackson*, 39 P.3d 1174, 1188 (Colo. 2002) (collecting state and federal authority). This doctrine applies even when the person seized is not driving a car and their license is not legally required in order to lawfully leave the scene. *See Lambert*, 46 F.3d at 1068.

In light of this case law, Butler does not seriously contend that he did not seize Mrs. Archuleta. Rather, notwithstanding Mrs. Archuleta's allegation to the contrary, *see* Complaint ¶ 110, Butler argues that his seizure of Mrs. Archuleta was justified by an objectively reasonable suspicion that *she* was engaged in illegal activity. *See* Butler Br. at 11. There is no factual support for this assertion, and it fails to accept the well-pled facts in the Complaint. Indeed, all of the cases cited by Defendant Butler are based on independent suspicion that the passenger was engaged in illegal activity or do not involve the seizure of the passenger at all. *See United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995) (discussing officer's retention of the driver's license (not the passenger's) after stop for speeding while the officer checked on the status of the license); *United States v. Padilla-Michel*, 52 F.Appx 450, 452 (10th Cir. 2002) (unpublished)² (officer's "brief questioning" of passengers in vehicle justified by odor of marijuana emanating from vehicle); *United States v. Zubia-Melendez*, 263 F.3d 1155, 1161-62 (10th Cir. 2001)

² Unpublished cases cited for the first time in this brief are attached as Exhibit A. Unpublished cases cited in and included as attachments to the defendants' opening briefs, like *Padilla-Michel*, are not included.

(officer could ask passenger for his name and name of the driver when driver had no license or other ID; officer not entitled to detain the passenger for further investigation until he developed a reasonable and articulable suspicion that the passenger was engaged in criminal activity); *United States v. Galindo-Gonzales*, 142 F.2d 1217, 1224 (10th Cir. 1998) (officers entitled to question the *driver* about the identity of his passengers where driver lacked proof of ownership of his car).

Defendant Butler suggests that he was entitled to seize Mrs. Archuleta because a child in the Archuleta's car was not properly restrained. *See* Butler Br. at 12; Complaint ¶ 52. However, an unrestrained child gave Butler no cause to believe that Mrs. Archuleta was engaged in illegal activity. The relevant Colorado statute places the legal responsibility for restraining children on the driver, not the passengers of a vehicle. *See* Colo. Rev. Stat. § 42-4-236(2)(c) ("It is the responsibility of the driver transporting children, subject to the requirements of this section, to ensure that such children are provided with and that they properly use a child restraint system or a safety belt system.") (emphasis added). Colorado case law interpreting the statute confirms that this statute applies only to the driver of a vehicle, not to passengers -- even if those passengers are parents of the unrestrained children. *See Wark v. McClellan*, 68 P.3d 574, 580 (Colo. Ct. App. 2003) (holding that Colo. Rev. Stat. § 42-4-236(2)(c), "which provides that a driver must restrain child passengers, specifically applies to the driver of the vehicle, not parents who, as here, were passengers in the vehicle"). Since Mrs. Archuleta was not the driver, Butler could not lawfully detain her for a traffic violation that she could not have committed.

Butler also suggests that he properly demanded Mrs. Archuleta's license because he might "potentially allow" her to drive away with the children, and so was required to investigate

whether she was a licensed driver or “otherwise posed a danger” to the children. Butler Br. at 12. This argument is inconsistent with the fact that Butler demanded Mrs. Archuleta’s license before he discovered that Mr. Archuleta’s license had been incorrectly suspended. Complaint ¶ 54. Butler again fails to accept the facts pled in the Complaint and seeks to construe the facts in the light most favorable to himself, rather than the Plaintiff. Because Defendant Butler seized Mrs. Archuleta’s license and took it back to his patrol car without any reasonable suspicion that Mrs. Archuleta was engaged in criminal activity, Butler’s motion to dismiss the unlawful detention claim should be denied. *E.g., Davis*, 94 F.3d at 1468; *Sokolow*, 490 U.S. at 7.

2. Archuleta Has Stated a Claim for Relief Against Butler for the Manner of the Arrest

Mrs. Archuleta’s Third Claim for Relief is based on the unreasonable manner in which officer Butler arrested Mrs. Archuleta: among other things, screaming at the family at the outset of the arrest, hauling her from the family car with her shirt open and breasts partially exposed, while she was feeding her infant child, refusing her repeated requests to tie her shirt, pressing his chest into her exposed breast in the patrol car, leaving her minor children on the side of a dangerous highway in harm’s way, and driving her to jail with her shirt still open and breasts partially exposed. Complaint ¶¶ 58-68, 116-118.

A seizure violates the Fourth Amendment if the officer’s actions were “‘objectively [un]reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 387, 397 (1989). Seizures are unreasonable for purposes of the Fourth Amendment if “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.” *Whren v.*

United States, 517 U.S. 806, 818 (1996); accord *Ames v. Brown*, No. 05-6389, 2006 WL 1875374 at *3 (10th Cir. July 7, 2006) (unpublished) (“A detention in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged, or if it involves an undue invasion of privacy.”) (quoting *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)). Seizures that implicate the constitutional right to bodily privacy are subject to special scrutiny. *Ames*, 2006 WL 1875374 at *3 (“Where a suspect’s constitutional right to bodily privacy is implicated, the reasonableness of the seizure or search receives special scrutiny.”) (citing *Cottrell v. Kaysville City*, 994 F. 2d 730, 734 (10th Cir. 1993)).

Here, there are abundant facts which demonstrate that Butler’s arrest was unreasonable and unusually harmful to Mrs. Archuleta’s privacy interests. Butler arrested Mrs. Archuleta while she was in the midst of nursing her infant son -- screaming at her husband to take the child so that he could arrest Mrs. Archuleta. Complaint ¶¶ 57, 59, 116. Mrs. Archuleta handed off her baby, but Butler did not give her time to tie her blouse, which was open to facilitate nursing her baby, partially exposing her breasts. *Id.* at ¶¶ 60, 116. Butler ignored and refused Mrs. Archuleta’s repeated requests to cover her breasts as he proceeded to arrest Mrs. Archuleta in front of her children. *Id.* at ¶¶ 62, 65, 116. When Mrs. Archuleta asked why Butler was doing this to her, he shouted “You need to be silent!” *Id.* at ¶ 62. Mrs. Archuleta did not fight or struggle as Butler arrested her. *Id.* at ¶ 119.

After cuffing Mrs. Archuleta in front of her family, Butler walked Mrs. Archuleta to the patrol car, with her breasts still partially exposed. *Id.* at ¶ 66. Butler put Mrs. Archuleta in the front passenger seat. Inside the car, Butler sat in the driver’s seat and leaned across Mrs.

Archuleta, whose shirt was still open, pressing his chest against her partially exposed breasts while he fastened her seat belt. *Id.* at ¶¶ 66, 117. While in the patrol car, Mrs. Archuleta made numerous requests that she be allowed to tie up her blouse and cover her breasts. *Id.* at ¶¶ 70, 118. Butler refused, and proceeded to drive Mrs. Archuleta to the Jefferson County jail with her shirt open and breasts partially exposed. *Id.* Finally, at the Jefferson County Detention Facility, Butler walked Mrs. Archuleta in front of the building and released her hands, allowing her to close her shirt. *Id.* at ¶ 71. As a result, Mrs. Archuleta was deeply humiliated by being publicly exposed in front of her family, Defendant Butler, other officers, passing motorists, and anyone standing outside or near the jail. *Id.* at ¶ 120.

Notwithstanding this conduct, Butler claims that his arrest was reasonable as a matter of law and that there are no set of facts that would demonstrate that his arrest was unreasonable. In support, Butler cites *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), claiming that Mrs. Archuleta's arrest was no more humiliating or traumatic than the arrest of the plaintiff in that case. Butler Br. at 15, 20-22. This argument strains credulity. The *Atwater* arrest was garden-variety. Mrs. Atwater was arrested for driving without a seatbelt, handcuffed, placed in a squad car, taken to the local jail, and booked. *Atwater*, 532 U.S. at 354-55. Atwater's claim was based primarily on her contention that the officer could not permissibly arrest her for the petty offense of driving without a seatbelt, an offense punishable only by fine, not that he arrested her in an unreasonable manner. In the words of the Supreme Court, her arrest "was no more 'harmful to . . . privacy or . . . physical interests' than the normal custodial arrest." *Id.* (alterations to quotation in original). There was no allegation that the arresting officer did anything that was

harmful to Mrs. Atwater's privacy interests. Plainly, Defendant Butler's arrest was substantially more extraordinary and harmful to Mrs. Archuleta's privacy interests than the arrest in *Atwater*.

Indeed, in cases where the police have conducted an arrest in a manner unusually harmful to the arrestees' privacy interests, the courts have had little trouble finding that the conduct is not protected by qualified immunity. For example, in *Ames v. Brown*, the Tenth Circuit denied qualified immunity on summary judgment to an officer who removed a suspect's pants after arresting him but then refused to permit him to cover up, even while he was transported to jail. 2006 WL 1875374 at *3-5. Applying "special scrutiny" to an arrest that implicated the arrestee's right to bodily privacy, the Court considered a number of factors in determining that a jury could find that the officer conducted the search in an unreasonable manner. *Id.* at *3. Among these, the "most compelling" was the fact that the officer did not supply the plaintiff with any means of covering himself, instead causing him to stand naked in front of a trailer home while the police conducted a search. *Id.* at *5.

Similarly, in *Armstead v. Township of Upper Dublin*, No. 03-CV-3608, 2004 WL 2743451 (E.D.Pa. Nov. 23, 2004), the court denied summary judgment to an officer who, *inter alia*, arrested a half-naked suspect in his bedroom but refused to permit the suspect to don pants, instead marching him out of the house to the patrol car. *Id.* at *6. Like *Ames*, the *Armstead* court had little trouble concluding that a jury could find that the search was unreasonable.

Mrs. Archuleta's arrest was not garden-variety. It was humiliating, terrifying, and unreasonable. Viewing the facts in the light most favorable to the Plaintiff, the claim against Defendant Butler for the manner of the arrest is not subject to dismissal on the pleadings.

B. Construing the Facts in the Light Most Favorable to Plaintiff, Archuleta's Claims Against Defendants Mink and Mandelko Should Not Be Dismissed

1. Archuleta Has Stated a Claim for Relief Against Mandelko for Deprivation of Liberty Without Due Process of Law and Unlawful Seizure

Mrs. Archuleta's Fourth Claim for Relief is based, among other things, on the fact that Defendant Mandelko repeatedly acknowledged that Mrs. Archuleta was the wrong person but nonetheless booked, strip searched, and jailed her, all without taking any action to secure Mrs. Archuleta's release. It is clearly established that officers may not detain a person that they know and acknowledge to be innocent. Consequently, Mandelko's argument that she had no independent duty to *investigate* Mrs. Archuleta's claims of mistake are beside the point. Archuleta has not asserted a "failure to investigate" claim as Mandelko suggests. Instead, Mrs. Archuleta states a claim because Mandelko acknowledged that the warrant and police records contained material mistakes and that Archuleta was not the right person. Complaint ¶¶ 5, 75-85, 126-128. In these circumstances, qualified immunity is not available.

When Mrs. Archuleta arrived at the Jefferson County Detention Facility, she explained to Mandelko that there had been a mistake, and that she was not the person wanted for the harassment charge. Complaint ¶¶ 74, 126. In response, Mandelko reviewed the police records and questioned Mrs. Archuleta about the discrepancies between the written and photographic description of the suspect in the computer records and Ms. Archuleta's appearance. *Id.* at ¶¶ 75, 127. After determining that Mrs. Archuleta did not match the computer records, Mandelko turned to the jail receptionist and stated "this isn't her," *id.* at ¶ 75, and later told Archuleta that "I know you're innocent hon." *Id.* at ¶ 83. In addition, Mandelko repeatedly told Mrs. Archuleta

that she knew Mrs. Archuleta was the wrong person and treated her in a manner indicating that she knew that Mrs. Archuleta was not the wanted suspect. *Id.* at ¶ 128. Nonetheless, despite these facts, Defendant Mandelko proceeded to process Mrs. Archuleta into the jail.

Contrary to the governing standard, Mandelko's motion to dismiss does not acknowledge or accept these facts. Instead, Mandelko simply asserts that she has no constitutional duty to independently *investigate* claims of innocence. Jeffco. Br. at p. 7-10 (relying on *Baker v. McCollan*, 443 U.S. 137 (1979)). Archuleta has no quarrel with *Baker* and has not asserted a failure-to-investigate claim. Rather, Archuleta asserts a claim against Mandelko for wrongful detention because Mandelko acknowledged that Archuleta was innocent, knew that there were mistakes in the police record and warrant, but jailed and strip searched Archuleta nonetheless. Complaint ¶¶ 75-85, 126-130.

It is clearly established that a police officer may not knowingly detain an innocent person, and many courts have expressly rejected the claim that *Baker* applies to such detentions. The fact that a constitutionally deficient and erroneous warrant had been issued, does not insulate an officer who knows that she has an innocent person, but jails them anyway. For example, in *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992), the Fifth Circuit held that *Baker* does not bar a claim against a police officer who failed to take action after he knew or should have known that he had arrested the wrong person. In that case, a police officer arrested the plaintiff, Sanders, pursuant to a valid warrant. After the arrest, the officer discovered "exonerative evidence indicating that he had arrested the wrong man," but failed to take any action in response. *Id.* at 1162. Sanders filed a section 1983 suit against the officer, but the district court

dismissed, relying on *Baker* for the proposition that the officer was under no obligation to embark on an investigation to clear Sanders of the charges. The Fifth Circuit reversed, holding that *Baker* does not shield a police officer from liability where he failed to take action after he knew or should have known that he arrested the wrong man pursuant to a warrant:

We note that *Baker* imposes no impediment to Sanders' claim because the thrust of his contention is not that Lt. McCoy failed to take affirmative steps to investigate Sanders' innocence, but rather, that Lt. McCoy failed to release him even after he knew (or should have known) that Sanders had been misidentified. It is no answer that Lt. McCoy could not have terminated the proceedings unilaterally once the wheels of the criminal justice system were already in motion.

Id at 1162 (internal citations omitted). Other cases are in accord. *See, e.g., Sanders v. City of Flatwoods*, 935 F.2d 271, 1991 WL 100588,*2 (6th Cir. 1991) (table, text in Westlaw) (holding that plaintiff adequately stated a claim that was not barred by *Baker* because she was “not alleging that the officer failed to conduct an inquiry into the question of mistaken identity” but rather that “the officer knew she was the wrong person”); *Powe v. City of Chicago*, 664 F.2d 639, 651-52 (7th Cir. 1981) (“Nothing in *Baker* compels the conclusion that the validity of the arrest renders utterly unassailable the continued detention of the arrestee after it is discovered that he is not the person sought.”); *Gay v. Wall*, 761 F.2 175, 178 (4th Cir. 1985) (holding that plaintiff adequately stated a claim where officers detained him when they had knowledge that he was the wrong person, and noting that “[s]uch a claim is not precluded by *Baker*, because that case does not involve actual knowledge of the defendant’s innocence”).

The cases on which Mandelko relies do not support a conclusion that an officer may detain an individual who she knows is the wrong person, particularly when she knows that the

warrant was invalid or in error. Mandelko seeks to rely on cases that address straightforward failure-to-investigate claims, or officers who took action after determining that they had arrested the wrong person, not a detention, jailing, and strip search after acknowledging that “I know you’re innocent” and “this isn’t her.” Complaint ¶¶ 83, 75. Consequently, those cases are irrelevant to the question at hand. *See Lewis v. City of Nampa, Idaho*, No. 04-502, 2006 WL 318812 (D. Idaho Feb. 8, 2006) (plaintiff complained of failure to investigate his claims that the Louisiana restraining order pursuant to which he was arrested had been dissolved); *Robbins v. Benton County*, No. 05-246, 2006 WL 2038272 (E.D. Wash. July 20, 2006) (slip op.) (plaintiff complained of failure to investigate his claim that warrant pursuant to which he was arrested had been quashed; defendants did not have knowledge that warrant was quashed); *Almeida v. Sheahan*, No. 98 C 1550, 1998 WL 781109 (N.D. Ill. 1998) (unpublished) (plaintiff complained of failure to investigate his claims that he was not the person identified in arrest warrant); *Panfil v. City of Chicago*, 45 F.App’x. 528, 534 (7th Cir. 2002) (plaintiff complained that jail failed to investigate his claim that he was arrested on warrant issued for his twin); *Brown v. Patterson*, 823 F.2d 167 (7th Cir. 1987) (plaintiff arrested pursuant to warrant issued for a third person; no suggestion that the police knew or acknowledged that they had the wrong person); *Brady v. Dill*, 187 F.3d 104, 109 (1st Cir. 1999) (finding no constitutional violation when officers, upon discovering that wrong person had been arrested, summoned the bail commissioner at midnight on Saturday to issue a personal recognizance bond and tried to secure an attorney for plaintiff on Sunday); *Young v. City of Little Rock*, 249 F.3d 730, 735 (8th Cir. 2001) (finding officers entitled to qualified immunity because “the situation was equivocal” as to whether a mistake had been made in the arrest, but noting that “[i]f we were faced head on with the question whether the

Fourth Amendment was violated, this distinction [whether the defendants knew that they had the wrong woman] might well prove dispositive”).

Here, Mandelko acknowledged that Archuleta was the wrong person, knew that the warrant and police records were mistaken, told a colleague “this isn’t her,” told Archuleta that “I know you’re innocent,” but decided to simply jail and strip search her. Complaint ¶¶ 75-85, 126-130. The Constitution does not allow an officer to hide behind the shield of a constitutionally-deficient arrest warrant when they know the warrant is mistaken and that they have the wrong person. Construing the facts in the light most favorable to the plaintiff, Mandelko cannot satisfy the high burden of proving that there are no facts that would entitle Mrs. Archuleta to relief. The motion to dismiss the unlawful seizure claim should be denied.

2. Archuleta Has Stated A Claim for Relief Against Mink and Mandelko for the Illegal Strip Search

Mrs. Archuleta’s Fifth Claim for Relief is based on the illegal strip search at the Jefferson County Detention Facility. Because Archuleta sued Mink in his official capacity as the sheriff of Jefferson County, he may not assert the defense of qualified immunity. *E.g., Beedle*, 422 F.3d at 1069. Consequently, as to Mink, the question is whether Mrs. Archuleta has stated a claim that the County’s strip search policy and the strip search here could be unconstitutional.

The Tenth Circuit has recognized that a strip search is “an invasion of personal rights of the first magnitude” and “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.” *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993) (quoting *Mary Beth G. v. City of Chicago*, 723

F.2d 1263, 1272 (7th Cir. 1983)). The Tenth Circuit described “the indignity individuals arrested for minor offenses experience” as follows:

The experience of disrobing and exposing one’s self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event.

Id. at 396 (quoting *John Does 1-100 v. Boyd*, 613 F.Supp. 1514, 1522 (D.Minn. 1985)).

Here, the County’s apparent policy of conducting strip searches of all people accused of minor municipal offenses, like the Lakewood ordinance prohibiting “harassment,” when a detainee will not be placed in the general prison population, has been subject to multiple pat-down searches, and is not likely to possess weapons or contraband, Complaint ¶¶ 136-138, is not consistent with constitutional requirements or Tenth Circuit law. *See, e.g., Chapman*, 989 F.2d at 394-396 (holding unconstitutional an across-the-board strip search policy where “officials had no reasonable suspicion that these particular detainees were carrying or concealing weapons or contraband”); *Foote v. Spiegel*, 118 F.3d 114, 1425 (10th Cir. 1997) (rejecting *per se* rule permitting search of every person arrested for driving under the influence of drugs); *Cottrell*, 994 F.2d 730, 734 (10th Cir. 1993) (fact that detainee arrested for driving under the influence of drugs is insufficient to render the strip search reasonable as a matter of law). In addition, Defendant Mandelko’s strip search of plaintiff, where she acknowledged that she had the wrong person, and did not have any reasonable suspicion that Mrs. Archuleta was concealing weapons

or contraband on her person, and knew that Mrs. Archuleta would not be placed in the general prison population, violated clearly established law. Complaint ¶¶ 74-75, 140-143.

Although Mink and Mandelko repeatedly assert that Mrs. Archuleta was charged with the crime of “domestic violence,” Jeffco. Br. at 3, 4, 6, 11, 12, in actual fact, Mrs. Archuleta was “charged” with violating a Lakewood municipal ordinance prohibiting “harassment.” Complaint ¶ 46; *see* Lakewood Municipal Code § 9.50.040, *available at* <http://www.lakewood.org/index.cfm?&include=/CC/CityCode/codelist.cfm>). There is no independent Lakewood offense for the crime of “domestic violence.” *Id.* The alleged “crime” was harassment, and the fact that the wrongly-issued warrant was for harassment against a purported same-sex partner has no bearing on the propriety of the County’s strip search policy.³ The Tenth Circuit’s authority belies Mandelko and Mink’s assertion that they had a *per se* justification to strip search Mrs. Archuleta based on the municipal “harassment” charge against her.

Among other conduct, the Lakewood “harassment” ordinance prohibits directing obscene language or an obscene gesture to another person with the intent to harass, annoy, or alarm them, or making “repeated communication at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another’s home or other private property.” *Id.* § 9.50.040(A)(8). The ordinance even prohibits following a person in a public place. Indeed,

³ Under Colorado state law, “domestic violence” is defined to include “any other crime against a person or against property or any municipal ordinance violation against a person or against property, when used as a method of coercion, control, punishment, intimidation, or revenge directed against a person with whom the actor is or has been involved in an intimate relationship.” Colo. Rev. Stat. § 18-6-800.3 (2006). Therefore, despite the Defendants’ repeated use of the “domestic violence” terminology, there is nothing about the definition that would justify a *per se* strip search policy like that of Jefferson County.

the most “violent” violation of the ordinance occurs when a person “strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact” with the intent to harass, annoy, or alarm them.⁴ *Id.* § 9.50.040(A)(1).

Because the Lakewood harassment offenses “are not offenses associated with the concealment of weapons or contraband in a body cavity,” *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984), the alleged violation of this municipal ordinance cannot give rise to the *per se*

⁴ The complete text of the Lakewood ordinance harassment provision is as follows:

9.50.040 Harassment.

A. A person commits harassment if, with intent to harass, annoy, or alarm another person, he:

1. Strikes, shoves, kicks, or otherwise touches a person or subjects him to physical contact; or
2. In a public place directs obscene language or makes an obscene gesture to or at another person; or
3. Follows a person in or about a public place; or
4. Initiates communication with a person, anonymously or otherwise in writing, in a manner intended to harass or threaten bodily harm or property damage, or makes any comment, request, suggestion, or proposal in writing which is obscene; or
5. Initiates communication with a person, anonymously or otherwise by telephone, computer, computer network, or computer system in a manner intended to harass or threaten bodily injury or property damage, or makes any comment, request, suggestion, or proposal by telephone, computer, computer network, or computer system that is obscene; or
6. Makes a telephone call or causes a telephone to ring repeatedly, whether or not a conversation ensues, with no purpose of legitimate conversation; or
7. Repeatedly insults, taunts, challenges, or makes communications in offensively coarse language to another in a manner likely to provoke a violent or disorderly response, or
8. Makes repeated communication at inconvenient hours that invade the privacy of another and interfere in the use and enjoyment of another's home or other private property; or
9. Makes a credible threat to another person.

B. As used in this section, unless the context otherwise requires, "obscene" means a patently offensive description of ultimate sexual acts or solicitation to commit ultimate sexual acts, whether or not said ultimate sexual acts are normal or perverted, actual or simulated, including masturbation, cunnilingus, fellatio, anilingus, or excretory functions.

C. Any act prohibited by subdivision (4), (5), (6), or (8) of this subsection (A) may be deemed to have occurred or to have been committed at the place at which the writing, telephone call, electronic mail, or other electronic communication was either made or received.

D. "Credible threat" means a threat or physical action that would cause a reasonable person to be in fear for the person's life or safety or the safety of his immediate family.

E. "Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

Lakewood Municipal Code § 9.50.040, *available at*

<http://www.lakewood.org/index.cfm?&include=/CC/CityCode/codelist.cfm>.

conclusion that a person is likely to be carrying weapons or contraband. Indeed, they are not crimes associated with the use of a weapon (or other contraband) at all. In circumstances like these, the Tenth Circuit has rejected a *per se* rule that the mere crime charged, standing alone, will justify a strip search. *See, e.g., id.; Foote*, 118 F.3d at 1425; *see also Cottrell*, 994 F.2d at 734-35.

For example, in *Foote*, 118 F.3d 114, the police arrested a woman for driving under the influence of drugs. At the jail, the police strip searched her, ostensibly to search for drugs. The Court ruled that the strip search was unreasonable, because the drug crime gave no reason to believe that the plaintiff had concealed drugs inside her person:

The belief that Foote had drugs hidden in a body cavity because she was suspected of driving while under the influence of drugs . . . was unreasonable. Foote was not suspected of trying to smuggle contraband into a prison or smuggle cocaine or heroin through customs; she was suspected of driving while under the influence of marijuana.

Id. at 1426.

In holding the strip search unconstitutional in *Foote*, the Tenth Circuit considered the fact that (1) the plaintiff was not placed in the general prison population; (2) the police already frisked the plaintiff before strip searching her; (3) the plaintiff was wearing “light summer clothing” such that “[a]lmost anything the strip search could have revealed would already have been discovered in the pat-down search”; and (4) before being pulled over, plaintiff had no particular reason to expect that she would be searched and consequently had no reason to conceal contraband in a body cavity. *Foote*, 118 F.3d at 1425-26.

Other Tenth Circuit cases have found similar factors relevant in determining that a strip search is illegal. *See, e.g., Hill*, 735 F.2d at 394 (relevant factors in finding search to be illegal include the fact that plaintiff was arrested while driving to work, was only briefly intermingled with the general prison population, crime charged was not associated with the concealment of weapons or contraband in a body cavity, and strip search would not have uncovered more than a frisk); *Cottrell*, 994 F.2d at 734-35 (relevant factors in finding search illegal include fact that plaintiff was never placed in the general jail population, jailer did not believe that plaintiff posed a risk, and plaintiff was wearing “light summer clothes” and had been frisked, so that strip search would not have uncovered more than the frisk).

All of these factors demonstrate that the strip search policy that led to Mrs. Archuleta being strip searched is unconstitutional and unreasonable. Mrs. Archuleta was not intermingled with the general prison population; instead, she was confined in a cell by herself. Complaint ¶ 141. Mrs. Archuleta was frisked on three separate occasions before she was strip searched. Complaint ¶ 142. Moreover, like the plaintiff in *Foote*, Mrs. Archuleta was dressed in “light summer clothing” -- shorts and a sleeveless blouse. Complaint ¶ 75. Therefore, “[a]most anything the strip search could have revealed would already have been discovered in the pat-down search.” *Foote*, 118 F.3d at 1425. Also like the plaintiff in *Foote*, Mrs. Archuleta had no reason to believe that she would be arrested and searched, and therefore, no reason to hide weapons or contraband. *See* Complaint ¶¶ 50, 57 (Archuleta arrested while taking her son to work and nursing her baby). Just as there was no reason to believe that the plaintiff in *Foote* would “routinely carry a personal stash in a body cavity,” *Foote*, 118 F.3d at 1426, the crime that Mrs. Archuleta was “charged” with -- the municipal ordinance of harassment -- also is not

associated with the concealment of weapons or other contraband in a body cavity. *See Hill*, 735 F.2d at 394; *Cottrell*, 994 F.2d at 735 (considering whether the crime charged is associated with such concealment).

The cases cited by Mandelko and Mink (all of which are from other circuits, and some of which are inconsistent with Tenth Circuit authority) do not support Jefferson County's strip search policy or the strip search in this case.

- The plaintiff in *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005) was charged with "family violence battery," defined as "intentionally causing *substantial physical harm* or *visible bodily harm* to a past or present spouse." *Id.* at 1249, n.2 (emphasis added) (quotations omitted). This is not analogous to the Lakewood municipal ordinance prohibiting harassment. Moreover, unlike Mrs. Archuleta, the detainee in *Hicks* "was about to be placed in the Jail's general population." *Id.* at 1251. Finally, there is no suggestion that the detainee in *Hicks* was frisked at all (certainly not three times) or that she was wearing light clothing that would reveal any weapon or contraband.
- In *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the court denied qualified immunity to county officials on a strip search, even when the detainee was being placed in the general jail population, because "there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail." *Id.* at 1255. The court does not endorse a *per se* strip search policy for municipal misdemeanors, clearly distinguishing between persons charged with misdemeanors or other minor offenses (like Mrs. Archuleta) and persons charged with felonies or other serious crimes "of which violence is an element." *Id.* at 1255.
- Unlike the present case, the defendant in *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) was charged with a felony and was intermingled with the general prison population. *Id.* at 1447. The case makes clear that if the detainee were charged with a less serious crime, the strip search would be highly questionable. *Id.* at 1446-47.
- Finally, the plaintiff in *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958 (6th Cir. 1987) was charged with menacing, a Class B misdemeanor -- "intentionally plac[ing] another person in reasonable apprehension of *imminent physical injury*," *id.* at 958 (emphasis added), and "an offense that is associated with weapons," *id.* at 958-59 -- a serious crime that is not akin to the Lakewood municipal offense of harassment. Moreover, the strip search policy in *Dobrowolskyj* was enacted pursuant to a consent decree approved by the district court in a prior case. Finally, the court placed substantial

weight on the fact that the plaintiff was not strip searched until he was about to be moved into contact with the general jail population. *Id.* at 959.

These cases do not contradict the Tenth Circuit law that prohibits a *per se* strip search policy for minor offenses, particularly in circumstances like those present in this case, where a nursing mother is arrested in the passenger seat, while her husband is driving her son to work, she is subject to multiple pat-down searches, has her blouse left open during the trip to the jail, is wearing light summer clothing, and is not put in the general jail population. Accordingly, Archuleta has adequately stated claim that the Jefferson County strip search policy for arrestees does not satisfy constitutional standards.

In addition, as to Defendant Mandelko, at the time of the strip search, she already acknowledged that Mrs. Archuleta was the wrong person and that the warrant contained critical errors. Complaint ¶¶ 76, 140. Since there was no basis to believe that Mrs. Archuleta was involved in any crime, let alone a violent one, the “charges” against Mrs. Archuleta would not warrant a reasonable jailer to believe that Mrs. Archuleta might be concealing weapons or other contraband on or in her person. Furthermore, during the search, when Mrs. Archuleta’s breast milk began to flow and she tried to stop the flow, Mandelko shouted at her to keep her hands away from her breasts. *Id.* at ¶ 81. Mandelko joked with another jailer about the milk, and Mrs. Archuleta was then given a cut-up maxi pad, handled by both a mail jailer and Mandelko, to soak up the milk. *Id.* at 82. This strip search was conducted in a manner particularly humiliating and harmful to Mrs. Archuleta’s privacy interests. Defendant Mandelko is not entitled to qualified immunity and Archuleta has adequately stated a claim against both Mandelko and Sheriff Mink for the unlawful strip search.

Conclusion

Mrs. Archuleta has lived a nightmare. She was wrongfully seized by a patrolman who did not have reasonable and articulable suspicion that she was engaged in criminal activity. The patrolman arrested her in an extraordinary manner that was unusually harmful to her physical and privacy interests. When she arrived at the jail, the Jefferson County deputy sheriff correctly determined that the warrant upon which Mrs. Archuleta was arrested was mistaken and that she was innocent, but chose to jail her anyway. Finally, pursuant to Jefferson County policy, Mrs. Archuleta, an innocent woman wrongfully arrested for the municipal crime of harassment, pursuant to a constitutionally-deficient warrant, was strip searched and humiliated.

Mrs. Archuleta has adequately stated a claim for relief against each of the defendants. Construing the facts in the light most favorable to the plaintiff, qualified immunity is not available to the individual defendants. The motions to dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2007, I electronically filed and served the foregoing **PLAINTIFF MERCEDES ARCHULETA'S OMNIBUS RESPONSE TO DEFENDANTS TED MINK'S, D.L MANDELKO'S AND SHANE BUTLER'S MOTIONS TO DISMISS** using the CM/ECF system to the following:

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