APPENDIX

APPENDIX
TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
August 2, 2022
Cristopher Wolpert, Clerk

DAVID WELLINGTON,

Plaintiff

No. 21-2052

DC No.
1:17-CV-00732-JAP-LF

v.

FERNANDO DAZA; SPECIAL AGENT HAND; SPECIAL AGENT MARSHALL; UNKNOWN AGENT 1; UNKNOWN AGENT 2; UNKNOWN AGENT 3; UNKNOWN AGENT 4; UNKNOWN AGENT 5,

Defendant-Counterclaim
Plaintiff-Appellant,

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **ROSSMAN**, Circuit Judges

*After examining the briefs and appellate record, this

panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

David Wellington, proceeding pro se, appeals from the district court's grant of summary judgment to the defendants in his civil-rights suit. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In 2017, the Internal Revenue Service (IRS) Criminal Investigation Unit was investigating whether Mr. Wellington violated 26 U.S.C. § 7201 (attempt to evade or defeat tax) and 18 U.S.C. § 371 (conspiracy to defraud the United States). The scheme under investigation involved a business that Mr. Wellington organized, National Business Services, LCC (NBS). The government suspected that NBS advised and aided clients in creating New Mexico limited liability companies (LLCs) so that the clients could conduct financial matters without paying taxes.

On March 10, 2017, Special Agent Fernando Daza applied for a warrant to search Mr. Wellington's home in Albuquerque, New Mexico, for evidence of violations of §§ 7201 and 371. After reviewing the application, Special Agent Daza's supporting affidavit, the warrant, and its

attachments, a federal magistrate judge approved and signed the warrant.

On March 14, Special Agent Sean Marshall, Special Agent Gregory Hand, and other agents executed the warrant. One agent patted Mr. Wellington down. They told him that he could stay or go during the search. But they would not allow him to change clothes, and because he was dressed only in a t-shirt and pajama pants, he believed he had no choice but to stay. The agents seized numerous items from the house, including documents, publications, and electronic devices. Special Agent Daza filed a return and an inventory of items seized during the search.

Mr. Wellington filed suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the search of his home and seizure of his property and his person violated his rights under the Fourth and First Amendments.[1] The district

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[1] While this appeal was pending, the Supreme Court held a plaintiff had no *Bivens* remedy against a U.S. Border Patrol agent for excessive force in violation of the Fourth Amendment or retaliation in violation of the First Amendment. *See Egbert v. Boule*, 142 S. Ct. 1793, 1799-1800, 1804 (2022). We requested supplemental briefing from the parties regarding *Egbert*'s effect on this appeal, if any, as well as the effect of the parties' failure to raise in the district court the issue of whether a *Bivens* remedy exists in these circumstances.
The defendants assert that Mr. Wellington has no *Bivens* remedy for either the alleged Fourth Amendment or First Amendment violations. Although they concede that they did not raise their arguments before the district court, they urge us to reach the issues as an alternative ground for affirmance. Mr. Wellington argues that *Egbert* does not overrule *Bivens*, *see id.* at 1809 ("[T]o decide the case before us, we need not reconsider *Bivens* itself."), and that, like *Bivens*, this case involves search and seizure. He further asserts that the defendants

should not be able to question the existence of a *Bivens* cause of action for the first time on appeal.

At a minimum, *Egbert* casts grave doubt on any assumption that Mr. Wellington has a *Bivens* remedy for a First Amendment violation. *See id.* at 1807 ("[W]e have never held that *Bivens* extends to First Amendment claims .... Now presented with the question whether to extend *Bivens* to this context, we hold that there is no *Bivens* action for First Amendment retaliation." (internal quotation marks omitted)). And even though *Bivens* also involved search and seizure, *Egbert* may nevertheless affect Mr. Wellington's Fourth Amendment claims. *See id.* at 1810 (Gorsuch, J., concurring in the judgment) ("I struggle to see how this set of facts differs meaningfully from those in *Bivens* itself. . . If the costs and benefits do not justify a new *Bivens* action on facts so analogous to *Bivens* itself, it's hard to see how they ever could. And if the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no.").

But *Egbert* does not break entirely new ground; the defendants could have relied on earlier Supreme Court decisions to argue that Mr. Wellington lacks a *Bivens* remedy. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) ("The first question to be discussed is whether petitioners can be sued for damages under *Bivens* and the ensuing cases in this Court defining the reach and the limits of that precedent."). "Our adversarial system endows the parties with the opportunity—and duty—to craft their own legal theories for relief in the district court." *Richison v.* 634 F.3d 1123, 1130 (10th Cir. 2011). Thus, we generally do not entertain new arguments on appeal (although we may be more lenient when the argument is in favor of affirming, rather than reversing). *See id.* In addition, the Supreme Court decided *Egbert* after the parties had fully briefed this appeal. We are "reluctant to definitively opine on the merits [when] we are deprived of the benefit of vigorous adversarial testing of the issue, not to mention a reasoned district court decision on the subject." *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013). "Our reluctance is heightened [when the] argument involves a complicated and little-explored area of constitutional law." *Id.*

"The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts

court granted summary judgment to the agents on six out of seven claims based on qualified immunity. Ultimately the parties stipulated to dismissing the remaining claim with prejudice, and Mr. Wellington now appeals from the grant of summary judgment on the six claims.[2]

DISCUSSION

I. Legal Standards

A. Pro Se Litigants

We liberally construe Mr. Wellington's pro se filings. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). But we do not act as his counsel, and he must "follow the same rules of procedure that govern other litigants." *Id.* (internal quotation marks omitted).

B. Summary Judgment

Contrary to Mr. Wellington's assertion that the court decided "a qualified immunity dismissal motion," Aplt. Opening Br. at 12, the district court decided the issues on summary judgment, first in considering Mr. Wellington's motion for partial summary judgment and then in considering the defendants' motion for partial summary judgment. "We review a district court's grant of summary judgment de novo, applying the same standard as the district court." *Brammer-Hoelter v. Twin Peaks Charter*

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of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). We generally do not consider issues the parties failed to raise before the district court. Further, we have before us only limited supplemental briefing addressing the issue, and we can affirm the judgment on grounds considered by the district court. Therefore, as a matter of discretion, we decline to decide whether a *Bivens* cause of action exists in this case.

[2] Claim Three, which was dismissed upon stipulation, is not part of this appeal.

Acad., 492 F.3d 1192, 1201 (10th Cir. 2007).

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We review the evidence in the light most favorable to the nonmoving party[,] . . . [b]ut we need not make unreasonable inferences that are unsupported by the record." *Est. of Redd ex rel. Redd v. Love*, 848 F.3d 899, 906 (10th Cir. 2017) (internal quotation marks omitted).

Because the district court was deciding motions for summary judgment, Mr. Wellington could not simply rest on the allegations of his complaint. *See Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) ("At [the motion to dismiss] stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for objective legal reasonableness. On summary judgment, however, the plaintiff can no longer rest on the pleadings, and the court looks to the evidence before it" in conducting a qualified-immunity analysis. (citation and internal quotation marks omitted)); *Travis v. Park City Mun. Corp.*, 565 F.3d 1252, 1258 (10th Cir. 2009) (in opposing summary judgment, "the nonmoving party[] may not rest on his pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which he carries the burden of proof" (brackets and internal quotation marks omitted)).

C. Qualified Immunity

"[T]he Supreme Court has recognized that public officials enjoy qualified immunity in civil actions that are brought

against them in their individual capacities and that arise out of the performance of their duties." *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013). "And because it is the norm in private actions against public officials, officials enjoy a presumption of immunity when the defense of qualified immunity is raised." *Id.* (internal quotation marks omitted). Therefore, "[o]nce a defendant asserts qualified immunity, the burden shifts to the plaintiff to establish (1) a violation of a constitutional right (2) that was clearly established at the time of the violation." *Est. of Redd*, 848 F.3d at 906 (internal quotation marks omitted). "We may decide which of these two prongs to address first, and need not address both." *Id.*

II. Fourth Amendment Claims

Claims One, Two, Four, and Seven allege violations of Mr. Wellington's Fourth Amendment right against unreasonable searches and seizures.

The Fourth Amendment provides:

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

U.S. Const. amend. IV. Accordingly, for a warrant to be constitutional, it must satisfy three conditions: it must (1) be issued by a "neutral [and] disinterested" magistrate; (2) be supported by probable cause; and (3) "particularly describe the things to be seized, as well as the place to be

searched." *Mink v. Knox*, 613 F.3d 995, 1003 (10th Cir. 2010) (internal quotation marks omitted). "These requirements ensure that no intrusion in the way of search or seizure occurs without a careful prior determination of necessity, and preventing the specific evil of the general warrant abhorred by the colonists." *Id.* (internal quotation marks omitted). This case involves the third condition, the particularity requirement.

A. Claim One: Search And Seizure of Property

Claim One alleged that the agents willfully conducted an unreasonable general search of Mr. Wellington's residence and unreasonably seized his property. In seeking partial summary judgment, Mr. Wellington asserted that the warrant was facially invalid because it was so overbroad as to constitute a general warrant. The district court upheld the validity of the warrant and denied Mr. Wellington's motion for partial summary judgment. Later, in deciding the defendants' motion for partial summary judgment, the district court readopted its earlier ruling on the validity of the warrant. It further held that, although it would have been clear to the agents that it would be unlawful to seize items that were not described in the warrant, Mr. Wellington had not presented any evidence of any such seizures.

1. Validity of Warrant

The warrant allowed the agents to search for and seize "evidence, fruits and instrumentalities of crimes relating to violations of 26 U.S.C. §7201 (Attempt to Evade Taxes) and 18 U.S.C. § 371 (Conspiracy), for the time-period of January 1, 2005 through the present." R. Vol. 1 at 175. Among other items, it provided that such evidence would include "[b]ooks and records pertaining to National

Business Services, New Mexico Limited Liability Companies (NM LLCs), Stacy Underwood, David Wellington, Jerry Shrock, Michelle Shrock or associated companies/parties." *Id.* And it allowed the seizure of "[t]ax defier paraphernalia to include books, instruction manuals, and how to pamphlets." *Id.* at 176. Mr. Wellington argues that the warrant was so overbroad in describing the items to be seized, both with regard to subject matter and the included persons and entities, that it constituted a prohibited general warrant.[3]

"The test applied to the description of the items to be seized is a practical one. A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized." *United States v. Leary*, 846 F.2d 592, 600 (10th Cir. 1988) (internal quotation marks omitted). "Even a warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit." *Id.* (internal quotation marks

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[3] "There is a difference . . . between warrants which are 'general' and those which are 'overly broad.'" *United States v. Cotto*, 995 F.3d 786, 798 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 820 (2022). "General warrants are those that allow government officials to engage in exploratory rummaging in a person's belongings[,] . . . vest[ing] the executing officers with unbridled discretion," while "an overly broad warrant describes in both specific and inclusive general terms what is to be seized, but it authorizes the seizure of items as to which there is no probable cause." *Id.* (internal quotation marks omitted). Although Mr. Wellington complains that the warrant was overly broad, he disclaims any intent to challenge probable cause. We therefore understand him to be arguing that the breadth of the warrant was so great that it effectively was a general warrant.

omitted). But *Leary* further recognized that "the fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." *Id.* (internal quotation marks omitted).[4]

Mr. Wellington argues that both §§ 7201 and 371 are so broad that referring to them was meaningless in terms of limiting the warrant. *See id.* at 602 ("An unadorned reference to a broad federal statute does not sufficiently limit the scope of a search warrant."); *see also Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) (stating that § 371 is so broad that citing it "places no real limitation on the warrant"). It is true that these statutes reach quite far. But the criminal activity under investigation here was extensive. This court has upheld broad warrants where the underlying criminal conduct was extensive. *See United States v. Villanueva*, 821 F.3d 1226, 1238-39 (10th Cir. 2016); *United States v. Hargus*, 128 F.3d 1358, 1362-63 (10th Cir. 1997). Further, the warrant did not simply cite those statutes, but also had

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[4] "[T]he particularity of an affidavit may cure an overbroad warrant" if two requirements are met: "first, the affidavit and search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference." *Leary*, 846 F.2d at 603 (internal quotation marks omitted). The warrant involved in this case did not incorporate Special Agent Daza's affidavit by reference, and therefore we do not consider that affidavit.

limiting features, including a list of the types of documents to be seized and a date restriction. *See Leary*, 846 F.2d at 601 n.15 (suggesting the court would uphold the warrant if it had limitations); see also *In re Search of Kitty's East*, 905 F.2d 1367, 1375 (10th Cir. 1990) (noting that the warrant included limitations).[5]

Mr. Wellington further complains about "the lack of limitation on *who* the warrant pertained to," particularly the reference to unspecified New Mexico LLCs and unspecified associated companies/parties. Aplt. Opening Br. at 16. But given the extensive conspiracy under investigation, which particularly included using NBS in advising clients to form New Mexico LLCs to avoid payment of taxes, and then aiding them in forming those LLCs, he has not established that the descriptions were not "as specific as the circumstances and the nature of the activity under investigation permit." *Leary*, 846 F.2d at 600 (internal quotation marks omitted).

2. Execution of Warrant

Claim One alleged that the agents performed an unlawful "general search" and "seiz[ed] items regardless of

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[5] Mr. Wellington complains that the warrant dates back to 2005, further than the limitations periods for violations of §§ 7201 and 371. *Cf. Kitty's East*, 905 F.2d at 1375 (holding that date restriction in warrant was not overbroad where it covered periods within statute of limitations). The government argues that conduct back to 2005 is prosecutable as part of the conspiracy, and that, in any event, earlier events may be relevant to the proceedings, *see* Fed. R. Evid. 404(b)(2) (allowing introduction of other crimes, wrongs, or acts to prove matters such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident"). The government has the better part of this argument.

whether they were listed in the warrant or not." R. Vol. 1 at 25. The district court held that, once the defendants asserted qualified immunity, Mr. Wellington was required to present evidence that the government seized items that were not listed in the warrant, and he failed to do so.
Mr. Wellington argues that the defendants did not sufficiently argue this issue and did not present any facts to support a conclusion that they acted constitutionally. He further asserts that in these circumstances, "the allegations in the Complaint would have to stand as presumed true." Aplt. Opening Br. at 29. "By refusing to consider the allegations in the Complaint, the district court used an incorrect legal analysis[.]" *Id.* at 30.

The district court did not err. The defendants asserted they were entitled to qualified immunity. Thus, to overcome summary judgment, Mr. Wellington was required to show a genuine issue of material fact as to whether the defendants acted unconstitutionally (i.e., they seized items not listed in the warrant). *See Bowling v. Rector*, 584 F.3d 956, 971 (10th Cir. 2009). He did not do so.

Mr. Wellington misunderstands the shifting burdens of proof applicable in qualified-immunity cases. As explained above, once a defendant invokes qualified immunity, it becomes the *plaintiff's burden* to establish that the defendant acted unconstitutionally and in violation of clearly established law. *See Est. of Redd* 848 F.3d at 906. The defendants were not required to show their actions were constitutional; rather, he was required to show that they were not.

Moreover, Mr. Wellington incorrectly asserts that the

defendants offered no facts in support of their motion. To the contrary, the defendants attached an inventory listing the items seized, which the court could compare against the search warrant. But in any event, reversal would not be warranted even if the defendants had submitted no evidence. There is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Thus, the defendants were not required to adduce evidence to support their motion; instead, to overcome summary judgment, Mr. Wellington was required to show the existence of evidence that the agents seized materials that were outside the scope of the warrant.

Finally, as also discussed above, we reject the notion that the district court applied the wrong legal standard by not crediting the allegations in the complaint. *See Behrens*, 516 U.S. at 309; *Travis*, 565 F.3d at 1258.

B. Claim Two: Seizure of Electronics

Claim Two challenged the seizure of Mr. Wellington's computer and electronic equipment, and the copying of information therein, under the Fourth Amendment and Fed. R. Crim. P. 41. It alleged that the defendants conducted a general search and seizure of the electronics and that the information was copied in order to perform a later unrestricted search. The district court held that (1) the warrant was sufficiently particular even though it lacked specific search protocols for electronic data, and

(2) Mr. Wellington's allegations of unconstitutional searches were speculative and unsupported. "It is Plaintiff who has the burden to show a clearly established constitutional violation, and Plaintiff has failed to present any evidence to show that Defendants searched for and obtained evidence not described in the warrant." R. Vol. 1 at 243.

Similar to his arguments about the execution of the search warrant, Mr. Wellington asserts that the defendants did not present any facts about the searches that were conducted and that the district court did not rely on the allegations in his complaint. Again, however, it was his burden to establish that the defendants acted unconstitutionally, not theirs to establish that they acted constitutionally, and he had to go beyond the pleadings to satisfy that burden.

Mr. Wellington further asserts that the issue was premature, noting that he had not been able to conduct discovery. But the Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Fed. R. Civ. P. 56(d)(2) provides that the district court may "allow time to obtain affidavits or declarations *or to take discovery*" if a nonmoving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." (emphasis added). This provision "does not operate automatically. Its protections must be invoked and can be applied only if a party satisfies certain requirements." *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000). Moreover, the

defendants moved to stay discovery pending a decision on their then-soon-to-be-filed motion for summary judgment based on qualified immunity. But Mr. Wellington did not file a response to the motion to stay, thus surrendering the opportunity to inform the district court of any reasons why he needed discovery. Given that Mr. Wellington did not invoke the Rule 56(d) procedure and did not respond to the motion to stay discovery, the district court did not err in granting summary judgment without allowing discovery. *See id.* at 783-84.

C. Claim Four: Seizure of Mr. Wellington

The fourth claim alleges that the agents unconstitutionally detained Mr. Wellington while they conducted the search. The district court noted that the agents had told Mr. Wellington he was free to leave. Even assuming he was detained, however, it noted that officers have the authority to detain persons found on premises that are subject to a search warrant. *See Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Therefore, it held, Mr. Wellington failed to show the agents violated his constitutional rights.

Mr. Wellington points out that the agents would not allow him to change clothes, so that he could take advantage of the offer to allow him to leave. He therefore argues, "the real issue is whether or not it was unreasonable under the Fourth Amendment to create conditions that did not allow [him] to leave even though he was not being detained." Aplt. Opening Br. at 32. This proposition, however, is indistinguishable from asserting that the agents unconstitutionally detained him.

As the district court held, the agents had the authority to detain Mr. Wellington during the search. *See Summers*, 452 U.S. at 705 ("[A] warrant to search a house for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (footnote omitted)); *Muehler*, 544 U.S. at 98 (holding that detention of occupant in handcuffs for length of search of residence was "plainly permissible" under *Summers*).

Mr. Wellington argues that *Summers* is inapplicable because it referred to a search for "contraband," 452 U.S. at 705, which he states was not involved here. But although *Summers* declined to decide "whether the same result would be justified if the search warrant merely authorized a search for evidence," *id.* at 705 n.20, this court has extended *Summers* to warrants authorizing a search for evidence when the person seized is the subject of the investigation of criminal activity, *see United States v. Ritchie*, 35 F.3d 1477, 1483 (10th Cir. 1994).

In short, given that the agents could constitutionally have refused to let Mr. Wellington leave at all, they did not act unconstitutionally by declining his request to change clothes, even if that left him believing he had no choice but to stay. The district court appropriately applied qualified immunity to grant summary judgment to the agents on this claim.

D. Claim Seven: Deprivation of Property

The seventh claim alleges that the agents failed to return seized items, resulting in a permanent deprivation of property. The district court dismissed this claim as moot because the government returned Mr. Wellington's

property after he filed this lawsuit. Mr. Wellington's opening brief does not make any argument why Claim Seven is not moot. Accordingly, he has waived any challenge to the dismissal of Claim Seven. *See Schreiber v. Cuccinelli*, 981 F.3d 766, 778 (10th Cir. 2020) (recognizing that failure to make an argument in opening brief results in waiver), *cert. denied sub nom. Schreiber v. Renaud*, 142 S. Ct. 229 (2021).

III. First Amendment Claims.

A. Claim Five: Seizure of Publications

Claim Five alleges that the agents seized publications and literature "due solely to their content," in violation of Mr. Wellington's First Amendment rights. R. Vol. I at 27. The district court held that "the Warrant allowed agents to seize only books and printed material related to the crimes of tax evasion and related conspiracies. As instrumentalities of crime, such materials are not protected by the First Amendment." *Id.* at 245. It further noted that Mr. Wellington "presented no evidence that items seized at his residence lacked relationship to the crimes of tax evasion, attempted tax evasion, or conspiracy to commit tax evasion." *Id.*

The First Amendment does not bar the search for and seizure of materials that are evidence, fruits, and instrumentalities of crime. *See Heller v. New York*, 413 U.S. 483, 492 (1973) (recognizing that "seizing a single copy of a film" may serve "the bona fide purpose of preserving it as evidence in a criminal proceeding"). And although the Supreme Court has held that the particularity

requirement "is to be accorded the most scrupulous exactitude" when it comes to search warrants authorizing the seizure of books, based on the ideas they contain, *Stanford v. Texas*, 379 U.S. 476, 485 (1965), the warrant here sufficiently circumscribed the materials to be seized.

Mr. Wellington challenges the provision allowing the seizure of "[t]ax defier paraphernalia," R. Vol. 1 at 176, asserting that "[t]he term is not defined in any law, but is plainly aimed at publications *on the basis of their content*. In fact, it is not just the content (any 'tax' whatsoever), but on the basis of a *specific view-point*: a 'defier'," Aplt. Opening Br. at 20. Although the term is not defined by statute, it is sufficiently particular to allow agents to identify the materials to be seized. And again, although the warrant describes materials in terms of their content, it is not directed at the content per se, but because the materials are evidence, fruits, or instrumentalities of violations of §§ 7201 and 371.

Mr. Wellington also argues that he has the right to a post-seizure hearing regarding materials protected by the First Amendment. The cases he cites, however, all arise from the arena of obscenity and restraint of distribution. He has not demonstrated the expansion of that case law to seizures, pursuant to a search warrant, of particular copies of books and other materials that may be evidence, fruits, or instrumentalities of other types of crimes. *See also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (distinguishing seizure and retention of "a single copy of a book or film . . . for evidentiary purposes based on a finding of probable cause" from taking the publication "out of circulation completely [without] a determination of

obscenity after an adversary hearing").

B. Claim Six: Evidence of Associations

Finally, the sixth claim alleges that the agents seized information about Mr. Wellington's associates and contacts in violation of his First Amendment right to privacy in association. The district court held that the First Amendment does not protect against a search for items that tend to prove illegal conspiracy, and that Mr. Wellington had not presented any evidence that the agents seized information about his associates that was unrelated to attempted tax evasion and/or conspiracy.

"[The Supreme] Court has long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (internal quotation marks omitted). Nevertheless, the First Amendment right of association does not necessarily shield a defendant's associations from becoming relevant to a criminal prosecution. *See United States v. Abel*, 469 U.S. 45, 52-54 (1984) (allowing evidence that defendant and witness were members of a gang, where membership and gang's tenets of protecting each other were probative of witness's potential bias in favor of defendant); *see also Dawson v. Delaware*, 503 U.S. 159, 165 (1992) ("[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."); *Voss*, 774 F.2d at 408 ("The existence of First Amendment rights does not prevent a search when the items sought tend to prove conspirators' associations with each other or concrete legal violations."

(Logan, J., concurring)). Before this court, as before the district court, Mr. Wellington fails to identify any evidence that the agents seized information about his associates and contacts that was unrelated to attempted tax evasion or conspiracy. Instead, he points to the allegations in the complaint. As stated above, however, he cannot rely simply on the pleadings in opposing summary judgment. The district court appropriately granted summary judgment to the agents on Claim Six.

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court.
Jerome A. Holmes
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
October 3, 2022
Cristopher Wolpert, Clerk

DAVID WELLINGTON,

Plaintiff

No. 21-2052

DC No.
1:17-CV-00732-JAP-LF

v.

FERNANDO DAZA; SPECIAL AGENT HAND; SPECIAL AGENT MARSHALL; UNKNOWN AGENT 1; UNKNOWN AGENT 2; UNKNOWN AGENT 3; UNKNOWN AGENT 4; UNKNOWN AGENT 5,

Defendant-Counterclaim Plaintiff-Appellant,

ORDER

Before **HOLMES**, Chief Judge, **TYMKOVICH**, and **ROSSMAN**, Circuit Judges.

Appellants petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied

Entered for the court.
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

DAVID WELLINGTON,
Plaintiff

No. 1:17-CV-00732-JAP-LF

v.

FERNANDO DAZA; SPECIAL AGENT HAND; SPECIAL AGENT MARSHALL; JOHN/JANE DOES 1-5,
Defendants

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS MOTION FOR PARTIAL SUMMARY JUDGMENT

In this *Bivens*[1] action, Plaintiff David Wellington, acting *pro se*, alleges that a search of his residence under a search warrant, procured and executed by agents of the United States Internal Revenue Service (IRS), violated his First and Fourth Amendment rights. *See* COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES (Doc. No. 1) (Complaint). IRS Special Agents Fernando Daza (SA Daza), Sean Marshall (SA Marshall), and Gregory Hand (SA Hand) (together, Defendants) move

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[1] *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing that damages are available under 42 U.S.C. § 1983 for claims against federal law enforcement officials).

for summary judgment on six of Plaintiff's seven claims. *See* DEFENDANT DAZA, HAND, AND MARSHALL'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY (Doc. No. 53) (the Motion). The Motion is fully briefed. *See* PLAINTIFF'S RESPONSE TO DEFENDANTS' PARTIAL SUMMARY JUDGMENT MOTION ON QUALIFIED IMMUNITY (Doc. No. 60) (Response), and REPLY OF THE DEFENDANTS IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 62) (Reply). The Court will grant the Motion because Defendants are entitled to qualified immunity on the First Claim, the Second Claim, the Fourth Claim, the Fifth Claim, the Sixth Claim, and the Seventh Claim.[2]

I. STANDARD OF REVIEW

Summary judgment is appropriate if the factual record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When applying this standard, the court examines the factual record in the light most favorable to the non-movant. *Belhomme v. Widnall,* 127 F.3d 1214, 1216 (10th Cir.1997). "[T]he

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[2] In the Complaint, the claims are entitled Causes of Action. The Court has denied Plaintiff's Motion for Partial Summary Judgment. *See* MEMORANDUM OPINION AND ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. No. 46) (MOO Denying Summary Judgment). The Court has also denied Plaintiff's Motion for a Preliminary Injunction. *See* MEMORANDUM OPINION AND ORDER (Doc. No. 68). Plaintiff has appealed the denial of preliminary injunction. *See* Notice of Appeal (Doc. No. 73). In the THIRD CAUSE OF ACTION (Compl. ¶¶ 55–56) (Third Claim), Plaintiff contends that the agents who executed the warrant unreasonably patted him down for weapons in violation of plaintiff's right to be free of unreasonable searches. The Third Claim is not at issue here.

movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim." *Sigmon v. CommunityCare HMO, Inc.*, 234 F.3d 1121, 1125 (10th Cir.2000). If the moving party meets this initial burden, the nonmoving party may not rest on his pleadings but must bring forward evidence showing a genuine issue for trial as to those dispositive matters for which the nonmoving party carries the burden. *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010).

"The doctrine of qualified immunity protects public or government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*,555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Once a defendant asserts qualified immunity, the plaintiff must satisfy a "strict two-part test." *McBeth v. Himes*, 598 F.3d 708, 716 (10th Cir. 2010) (citation omitted). The plaintiff must establish that 1) the defendant violated a constitutional or statutory right and 2) the right was clearly established at the time of the defendant's conduct. *Courtney v. Oklahoma ex rel., Dep't of Pub. Safety*, 722 F.3d 1216, 1222 (10th Cir. 2013). "If the plaintiff fails to satisfy either part of this two-part inquiry, the court must grant the defendant qualified immunity." *Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1244 (10th Cir. 2008) (quotations omitted). But, if the plaintiff succeeds in carrying his two-part burden, the burden shifts to the defendant who must show there are no remaining material issues of fact that would defeat the claim of qualified

immunity. *Walton v. Gomez*, 745 F.3d 405, 412 (10th Cir. 2014).

While the Court must construe pleadings filed by a *pro se* litigant liberally, "the courts do not serve as the *pro se* litigant's advocate, and *pro se* litigants are expected to follow the Federal Rules of Civil Procedure, as all litigants must." *McDaniels v. McKinna*, 96 F. App'x 575, 578 (10th Cir. 2004). In ruling on a motion for summary judgment based on qualified immunity, the Court must keep in mind three principles. First, the Court's role is not to weigh the evidence, but to assess the threshold issue of whether a genuine issue exists as to material facts requiring a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50. Second, the Court must resolve all reasonable inferences and doubts in favor of the non-moving party, and it must construe all evidence in the light most favorable to the non-moving party. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014). Importantly however, "a plaintiff's version of the facts must find support in the record" at the summary judgment stage. *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1312 (10th Cir. 2009). Third, the court cannot decide any issues of credibility. *See Liberty Lobby*, 477 U.S. at 255. At bottom, the non-movant must present evidence "from which a jury might return a verdict in his favor." *Id.* at 257. *See Gonzales v. Bernalillo Cty. Sheriff's Dep't*, CV 16-1045 MCA/GBW, 2017 WL 3208529, at *4 (D. N.M. Apr. 4, 2017) (discussing summary judgment in qualified immunity context), *report and recommendation adopted*, CV 16-1045 MCA/GBW, 2017 WL 3207798 (D. N.M. May 31, 2017).

II. FACTUAL BACKGROUND

A. Warrant Application And Execution

On March 10, 2017, SA Daza of the Internal Revenue Service (IRS) Criminal Investigation Unit applied for a warrant to search Plaintiff's residence located at 2124 Altura Verde Ln. NE, Albuquerque, New Mexico. (UMF 1; Mot. Ex. A (Daza Aff.); Mot. Ex. B (Warrant).) United States Magistrate Judge William P. Lynch reviewed (1) the Warrant application, (2) SA Daza's supporting affidavit (Warrant Affidavit); (3) the Warrant itself; and (4) two attachments to the Warrant describing the residence and the items sought. Case No. 17-mr-0186 (Warrant Case) (UMF 2; Mot. Ex. B attachments A and B.) Magistrate Judge William P. Lynch approved and signed the Warrant on March 10, 2017. *See* Warrant Affidavit, 17-mr-00186 JHR (Doc. No. 1) (unsealed).

On March 14, 2017, SA Marshall, SA Hand, and other federal agents executed the Warrant. Plaintiff alleges that the agents told him he "could either go inside and sit, or leave[]"during the search. (*See* Compl. ¶ 30.) However, Plaintiff adds that since he was only wearing a tshirt and pajama bottoms and was not allowed to change clothes, he had no real choice but to stay. (*Id.*) One agent patted down Plaintiff for weapons. (*Id.* ¶ 27.) During the search, agents seized numerous documents, publications, and electronic storage devices. (UMF 12; Mot. Ex. B.) The Court has described in detail all of the items seized at Plaintiff's residence in its MOO Denying Summary Judgment (Doc. No. 46) at p. 10. On March 16, 2017, SA Daza filed a return and an inventory of items seized at the residence. (Mot. Ex. B (inventory).) As of February 20, 2018, all seized items had been returned to Plaintiff either in original form or in the form of electronic copies. (UMF 13; Mot. Ex. C

(Chavez Aff.)).[3]

B. Warrant Affidavit

SA Daza prepared the Warrant Affidavit based on "his personal knowledge, his review of documents and other evidence, and his conversations with other law enforcement officers." (Mot. at 4 citing Mot. Ex. B.) An attorney assigned to IRS Criminal Tax matters reviewed the Warrant Affidavit prior to its submission to Magistrate Judge Lynch. (UMF 8; Mot. Ex. B.) The Warrant Affidavit describes an investigation of "whether Stacy Underwood (UNDERWOOD) and other individuals set up and operated a tax evasion scheme which relies on the use of New Mexico Domestic Limited Liability Companies (LLCs) and bank accounts[.]" (Warr. Aff. ¶ 5.) Several facts were listed as supporting probable cause:

1. Records from the IRS indicate that Plaintiff had not filed "U.S. Individual Income tax returns for over 20 years and may have never filed." (*Id.* ¶ 14.) Underwood had not

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[3] On April 18, 2017, Plaintiff filed a Motion for Return of Property Seized Under Warrant (Warrant Case Doc. No. 6). *See* Fed. R. Crim. P. 41(g). On October 10, 2017, Magistrate Judge Jerry H. Ritter denied the motion without prejudice for lack of jurisdiction to allow Plaintiff to file a civil action for return of his property or to amend the Complaint in this case. (Warrant Case Doc. No. 14.) Plaintiff appealed Magistrate Judge Ritter's ruling to the Tenth Circuit Court of Appeals, but the appeal was dismissed for lack of jurisdiction. *In the Matter of the Search of 2124 Altura Verde Ln. NE, Albuquerque, NM 87110, Wellington v. United States*, Case No. 17-2205 (10th Cir. Jan. 8, 2018). Plaintiff filed a motion to consolidate the Warrant Case with this case. Defendants responded that on February 20, 2018, all of Plaintiff's property had been returned; therefore, the motion had become moot. Finding that the Warrant Case and this case are "dissimilar in purpose and procedure" and that the issue had become moot, the Court denied the motion to consolidate. MEMORANDUM OPINION AND ORDER (Doc. No. 38).

filed Individual Income tax returns with the IRS since tax year 2004. (*Id.* ¶ 9.)

2. In 2005, Plaintiff organized National Business Services, LLC (NBS), a New Mexico LLC, and listed Underwood as the registered agent for NBS. (*Id.* ¶ 16.) Plaintiff and Underwood used NBS: to set up LLCs; to obtain Employer Identification Numbers (EINs)[4] from the IRS for the LLCs; to open bank accounts for the LLCs using only EINs; and to instruct clients how to deposit and withdraw money from the account to avoid IRS detection. (*Id.* ¶¶ 3, 5, 6, 16–25.)

3. "The State of New Mexico does not require the organizer of an LLC to identify the owner of the LLC." (*Id.* ¶ 22.) A website associated with NBS advertised "the services provided by NBS[.]" (*Id.* ¶ 18.) The NBS website describes how to take advantage of New Mexico law to open a financial account for an LLC using only the LLCs identifying information to avoid linking the LLC to its individual owner. (*Id.* ¶ 21.) Between 2005 and 2016, Plaintiff and Underwood used NBS to organize "hundreds of New Mexico LLCs with the New Mexico Secretary of State." (*Id.*) NBS requested EINs for over 50 LLCs from the Internal Revenue Service (IRS). (*Id.* ¶ 23.)

4. NBS's website advertises a "Free Asset Protection Training Course," on how to "keep your business, income, and property affairs private[.]" (*Id.* ¶ 19.) Between 2005 and 2016, "Underwood opened at least 50 bank accounts at Bank of America for New Mexico LLCs that she organized. Underwood had signature authority on the

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[4] EINs are issued to business entities that are required to file business tax returns. (*Id.*) The EIN is used to identify the tax accounts of employers and certain other entities that have no employees. (*Id).*

accounts and sole signature authority on most of the accounts." (*Id.* ¶ 24.) The bank account documents did not identify the owner of the LLC and also did not "contain the SSN for Underwood as the individual in control of the account." As a result, the bank reported to the IRS financial information only for the LLC. (*Id.*)

5. In January 2011, Underwood set up White Top Enterprises, LLC (White Top), a New Mexico LLC owned by Jerry R. Shrock (Shrock). Shrock has not filed individual income tax returns with the IRS for the years 1998-2001; 2003-04; and 2011-2014.[5] (*Id.* ¶¶ 15, 26, & 31.) Underwood opened a bank account for White Top using only the EIN for White Top and authorizing herself as the only signatory on the account. (*Id.* ¶ 32.) Between August 2011 and June 2014, the White Top bank account received deposits of over four million dollars from Moark, LLC, a company in the egg production industry. (*Id.* ¶ 33.) IRS Special Agents learned from an interview with Moark executives that the payments were for installation of specialized equipment and that Moark considered Shrock the owner of White Top. (*Id.*) Shrock provided Moark a required IRS Form W-9[6] so that Moark could report to the

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[5] As of January 20, 2016, Shrock had an assessed balance due to the IRS in the amount of $1,485,634.00. (*Id.* ¶ 26.) The IRS filed a tax lien on Shrock in 2007 for $1,026,857.00. (*Id.* ¶ 30.) NBS assisted Shrock in forming TALC, LLC, a New Mexico LLC. In 2006, Shrock and his wife transferred real property to TALC, LLC apparently to avoid the attachment of the IRS tax lien to the property. (*Id.* ¶¶ 26–30.) As of April 2016, TALC, LLC still owned the property. (*Id.* ¶ 27.)

[6] "The purpose of the Form W-9 is to provide a person who is required to file an information return with the IRS with the correct taxpayer identification number (TIN) to report, for example, income paid, real estate transactions, mortgage interest paid, acquisition or

IRS payments made to White Top. However, the Form W-9 contained only White Top's EIN, and Shrock did not sign his name on the form but instead wrote "White Top Enterprises, LLC" on the signature line. (*Id.* ¶34.) Based on the information on White Top's W-9 Form, the IRS would link Moark's payments only to White Top's EIN and not to Shrock individually. (*Id.*)

6. Under IRS Publication 3402 (Rev. March 2010), a single member LLC is a disregarded entity for federal income tax purposes and is required to use the owner's SSN or the owner's EIN for reporting purposes. (*Id.* ¶ 35.)

7. The funds deposited into the White Top bank account were obtained through the use of debit card transactions, money orders, cash withdrawals from ATMs, and checks signed by Underwood. The funds were used to buy property, to pay credit card balances, and to pay expenses for Shrock and his wife. (*Id.* ¶¶ 37–42.)

8. Plaintiff was believed to have been residing at 2124 Altura Verde Ln. NE because (1) utility service was in Plaintiff's name (*Id.* ¶ 51); (2) Plaintiff had been served a subpoena at that address (*Id.* ¶ 52); and (3) Internet service for that address was in Plaintiff's name (*Id.* ¶ 55).

9. There were numerous messages between email accounts associated with Underwood and Plaintiff. (*Id.* ¶ 56.) Based on the information from the emails, SA Daza stated that in his experience, business owners like Plaintiff and Underwood who use email also have other business records stored on computers and electronic devices. (*Id.* ¶¶ 57–58.) Based on information from internet providers, SA Daza opined that computers containing those types of records would be located at 2124 Altura Ln.

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debt, or contributions made to an IRA." (*Id.* ¶ 34.)

NE. (*Id.* ¶ 59.)

10. Finally Daza stated

> I expect that this warrant will be executed reasonably. Reasonable execution will likely involve conducting an investigation on the scene of what computers, or storage media, must be seized or copied, and what computers or storage media need not be seized or copied. Where appropriate, officers will copy data, rather than physically seize computers, to reduce the extent of the disruption. If, after inspecting the computers, it is determined that some or all of this equipment is no longer necessary to retrieve and preserve the evidence, the government will return that equipment. (*Id.* ¶ 66.)

III. Discussion

The Court recognizes that Plaintiff's claims have not arisen in a criminal proceeding by way of a motion to suppress evidence unlawfully seized. Instead, Plaintiff chose to sue under 42 U.S.C. § 1983 and *Bivens* for civil damages and injunctive relief alleging violations of his constitutional rights. Although a criminal investigation is ongoing, Plaintiff has not been charged with a crime. In evaluating Plaintiff's civil claims, the Court recognizes that Plaintiff bears the burden of proof to defeat qualified immunity. *Cf. United States v. Wyatt*, 16-CR-00057-MSK, 2016 WL 6956632, at *4 (D. Colo. Nov. 29, 2016) (unpublished) (recognizing that "where a 4th Amendment violation occurs but suppression is not warranted, the individual may instead seek civil damages through an action under *Bivens* or 42 U.S.C. § 1983.").

A. First Cause of Action

In the FIRST CAUSE OF ACTION (Compl. ¶¶ 46–50) (First Claim), Plaintiff alleges that Defendants "collectively agreed to willfully and wantonly ... pursue a search and invasion of plaintiff's privacy and seizure of property they knew would be unlawful." (*Id.* ¶ 47.) Plaintiff further alleges that Defendants "viewed the search warrant as a mere 'ticket' and color of law to enter the property, and once inside to conduct a general search." (*Id.* ¶ 48.) After obtaining the Warrant, Defendants "conducted a general search and seizure, seizing items regardless of whether they were listed in the warrant or not." (*Id.* ¶ 48.) Plaintiff alleges that as a result the Defendants willfully "violated his Fourth Amendment right to be free from unreasonable searches and seizures, and agreed and conspired with each other to do so." (*Id.* ¶ 49.)

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and person or things to be seized." U.S. Const. amend. IV. To be valid under the Fourth Amendment, a search warrant must meet three requirements:

> (1) it must have been issued by [a] neutral, disinterested magistrate; (2) those seeking the warrant must [have] demonstrate[d] to the magistrate their probable cause to believe that the evidence sought [would] aid in a particular apprehension or conviction for a particular offense; and (3) the warrant must particularly describe the things to be seized, as well as the place to be searched.

Bowling v. Rector, 584 F.3d 956, 969 (10th Cir. 2009) (quoting *Dalia v. United States*, 441 U.S. 238; 255 (1979)).

The Warrant was issued by Magistrate Judge Lynch; therefore, the first requirement is met. In the MOO Denying Summary Judgment (*See supra* note 2), the Court denied Plaintiff's motion for summary judgment to the extent Plaintiff alleged that the Warrant was facially invalid. The Court found that, as a matter of law, the Warrant was sufficiently particular even though the Court did not take the Warrant Affidavit into consideration because it was sealed. Therefore, the third requirement has been met.

To determine whether this Warrant meets the second requirement, the Court must review the Warrant Affidavit to ensure that Magistrate Judge Lynch "had a substantial basis for concluding that probable cause existed." *United States v. Tisdale*, 248 F.3d 964, 970 (10th Cir. 2001). "Probable cause means 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Tisdale*, 248 F.3d at 970. However, a district court should give "great deference to a magistrate's finding of probable cause, reversing only if the affidavit supporting the warrant application provides 'no substantial basis for concluding that probable cause existed.'"*United States v. Roach*, 582 F.3d 1192, 1200 (10th Cir. 2009) (quoting *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000)).

At the time the Motion was filed, the Warrant Affidavit was under seal. In the Motion, Defendants assert that the Court should defer decision on probable cause until the Warrant Affidavit is unsealed. (Mot. at 12.) The Warrant Affidavit has been unsealed, and the Court now may determine probable cause. However, in footnote 2 of the

Response at pp. 2–3, Plaintiff argues:

> Since the Court's prior opinion determined the warrant was not overbroad and sufficiently particular *despite* the lack of any affidavit (Doc. 46 p. 14- 17), any arguments or evidence concerning any affidavit would be immaterial as a matter of law. Since defendant Daza's declaration in support of the motion almost exclusively only discusses review of his *affidavit and supporting documents not the warrant itself*), it should be disregarded. Also, the Complaint makes no allegations re: lack of probable cause.

Through this statement Plaintiff appears to have waived claims related to whether there was probable cause to issue the Warrant. However, the Court will address probable cause in light of Plaintiff's *pro se* status and his general attacks on the Warrant.

1. Probable Cause

The Warrant Affidavit claims that Plaintiff and Underwood formed NBS to assist Shrock and other clients to evade taxes in violation of 6 U.S.C. § 7201 (attempt to evade taxes) and 18 U.S.C. § 317 (conspiracy). The Warrant Affidavit states that Plaintiff and Underwood used NBS set up LLCs, obtain EINs, and open bank accounts for those LLCs with only the EINs to allow their individual clients to avoid IRS detection. Between 2005 and 2016, Plaintiff and Underwood organized hundreds of NM LLCs and opened bank accounts for at least fifty LLCs using an EIN only. The Warrant Affidavit identifies services provided to Shrock, including forming White Top, obtaining an EIN for White Top, and opening a bank account using only White Top's EIN. Consequently, assets deposited into the White Top account would be reported to the IRS under White

Top's EIN and not under Shrock's personal tax identification number (social security number). Deposits to the account in the amount of $4 million were used for Shrock's benefit. According to the Warrant Affidavit, Shrock has not filed individual tax returns reporting those earnings.

Probable cause exists if "facts and circumstances within the [official's] knowledge and of which [he] had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Eckert v.Dougherty*, 658 F. App'x 401, 406–07 (10th Cir. 2016). This Court concludes that an objectively reasonable official reviewing the Warrant Affidavit could easily have concluded there was probable cause to search Plaintiff's residence for documents and electronic records containing evidence of an elaborate scheme to help clients evade taxes. Therefore, Defendants are entitled to qualified immunity on the First Claim to the extent the First Claim may assert that the Warrant was not supported by probable cause.

2. Execution of The Warrant.

The Fourth Amendment protects individuals against unreasonable searches and seizures. *See* U.S. Const. amend. IV. In conducting a search, agents are limited to the scope of the applicable warrant and have a duty to execute a search in a reasonable manner. *United States v. Maestas*, 2 F.3d 1485, 1491 (10th Cir. 1993). Failure to execute a search warrant reasonably violates an individual's Fourth Amendment rights. *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985). In the First

Claim, Plaintiff asserts that SA Marshall and SA Hand performed an unlawful "general search" and seized items "regardless of whether they were listed in the warrant or not." (Compl. ¶ 48.) As stated by the Tenth Circuit,

> By 1927, the Supreme Court had held that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196 ... (1927)). And in 1990, the Court explained that "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Horton v. California*, 496 U.S. 128, 140 ... (1990)).

Bowling v. Rector, 584 F.3d at 971. Hence, it would have been clear to SA Marshall and SA Hand that seizing items not described in the Warrant was unlawful. *Id.*

In the Motion, Defendants argue: "[A]s no constitutional violation occurred in the execution of the search warrant at Plaintiff's residence, Plaintiff has not provided (and cannot provide) any controlling authority demonstrating that Defendants' particular conduct was in violation of a clearly established right[.]" (Mot. at 19.) Defendants further assert that "Defendants 'acted in an objectively reasonable manner' and are entitled to qualified immunity." (*Id.*) Finally, Defendants maintain that they "were objectively reasonable in executing a valid constitutional search warrant." (*Id.* at 20.)

In response to these arguments, Plaintiff may not rest on his pleadings, but must come forward with some evidence showing a genuine issue for trial supporting the existence of a constitutional violation. *Kannady v. City of Kiowa*, 590 F.3d at 1169 ("If the movant carries this initial burden, the nonmovant may not rest on its pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." (citation omitted)).

Plaintiff argues that Defendants failed to raise qualified immunity from Plaintiff's First Claim that Defendants executed the Warrant in violation of the Fourth Amendment. (Resp. at 3.) The Court disagrees. Defendants argued that they were "objectively reasonable in executing a valid constitutional search warrant." (Mot. at 20.) Moreover, in the Reply, Defendants argue that Plaintiff has placed no material facts in the record, except "a cursory affidavit filed alongside his Motion for a Preliminary Injunction." (Reply at 3.)[7] Therefore, Defendants raised

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[7] Plaintiff's affidavit attached to the MOTION FOR PRELIMINARY INJUNCTION (Doc. No. 51-1) contains three paragraphs. The first states that Plaintiff received no notice of "any hearing being required or afforded concerning the seizure of any publications, literature, or writings, that were seized as 'tax defier' materials on March 15, 2017." (*Id.* ¶ 1.) The second states that during the search of his residence "I overheard one agent directing a searching for 'family records'." (*Id.* ¶ 2.) The third states that Plaintiff "observed someone with a camera/ video camera, and saw them take a video of the interior of the house. No such recording appears in the warrant 'inventory'." (*Id.* ¶ 3.) The information related in this affidavit provides no support to Plaintiff in his opposition to the Defendants' Motion. Therefore, Defendants rightly argue that Plaintiff has

qualified immunity with regard to the First Claim and Plaintiff's failure to adduce evidence that the Defendant seized items beyond the scope of the Warrant.

First, it is undisputed that SA Daza was not present at the search; therefore, all claims regarding the execution of the Warrant will be dismissed against SA Daza. Second, since SA Marshall and SA Hand have asserted qualified immunity from claims related to the execution of the Warrant, it is incumbent upon Plaintiff to present evidence that items not described in the Warrant were seized. This Plaintiff has failed to do. Defendants have presented the inventory of items seized at Plaintiff's residence along with the Affidavit of SA Crystal Chavez describing the preparation of the inventory and the return of all items listed on the inventory to Plaintiff. SA Chavez included evidence that Plaintiff received the inventory and items that were returned. (*See* Mot. Ex. C (Doc. No. 53-3).) Plaintiff has presented no evidence showing that there were items seized at his residence other than those described in the Warrant. Consequently, the Court will grant qualified immunity to Defendants on the First Claim alleging unlawful execution of the Warrant.

B. Second Claim

1. Probable Cause

In his SECOND CAUSE OF ACTION (Compl. ¶¶ 51–54) (Second Claim), Plaintiff alleges that the seizure of his "computer/electronic records not only violated the Fourth

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presented no summary judgment evidence to support the denial of Defendants' Motion.

Amendment, but even Fed. R. Crim. P. 41 itself."[8] (Compl. ¶ 52.) Plaintiff alleges that SA Daza unlawfully "caused the electronic records to be copied for a later unrestricted search for anything at all." (*Id.* ¶ 53.) Plaintiff claims that the Defendants willfully "violated plaintiff's Fourth Amendment right to be free of unreasonable searches and seizures by seizing the electronic equipment and intend on continuing to violate the right by copying the electronic data for their later unrestricted browsing for absolutely anything at all." (*Id.* ¶ 54.) In the MOO Denying Summary Judgment, the Court held that even though the Warrant lacked specific search protocols for electronic data, under Tenth Circuit law the Warrant was sufficiently particular. (MOO Denying Summary Judgment at 20.) The Court also finds that the Warrant to search for and seize electronic storage devices was supported by probable cause that the computers and electronic data at Plaintiff's residence would contain evidence that Plaintiff violated 26 U.S.C. § 7201 and 18 U.S.C. § 371. *See United States v. Christie*, 717 F.3d 1156, 1166 (10th Cir. 2013). SA Daza clearly

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[8] Plaintiff does not cite a specific section of Fed. R. Crim. P. 41. The Court finds that Plaintiff has not alleged or presented facts or evidence supporting a finding that Defendants violated Rule 41; therefore, the Court will dismiss this part of the Second Claim. Specifically, Rule 41(e)(2)(B) governs warrants seeking Electronically Stored Information (ESI). This provision sets out the "seize first, search second" two-step rule created for ESI, which was developed because "computer and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location." *See* Fed. R. Crim. P. 41(e)(2) advisory committee's note. *In the Matter of Search of Info. Associated with Email Addresses Stored at Premises Controlled by the Microsoft Corp.*, 212 F. Supp. 3d 1023, 1034–35 (D. Kan. 2016).

described how Plaintiff and Underwood used email to communicate about their business, and that in his experience, Daza knew that people who use email also store documents in computers and other electronic devices. In the Warrant Affidavit, SA Daza informed Magistrate Judge Lynch of the probability that computers were in the residence by showing that the internet service to the residence was in Plaintiff's name. SA Daza outlined how Plaintiff and Underwood advertised through a website to gain clients. In sum, this information was sufficient to establish probable cause to believe evidence of tax evasion and conspiracy to commit tax evasion would be found stored in computers and electronic devices.

2. Execution of The Warrant

Plaintiff alleges that Defendants violated the Fourth Amendment when Defendants "caused the electronic records to be copied for a later unrestricted search for anything at all." (Compl. ¶ 53.) Plaintiff contends that even though Defendants were not required to include limiting protocols to use in searching electronic storage devices, "such protocols are *still required after* a seizure of electronics (and obviously before any electronics searches actually begin)." (Resp. at 4) (emphasis in original). According to Plaintiff, "[t]he question to be answered *now* is what search protocols were in fact used, if any, in the defendant(s) conducting whatever searches they made? Defense counsel presents absolutely *zero* evidence on this issue." (*Id.*) (emphasis in original). Plaintiff notes that "since *no one* has been identified as actually conducting any electronic searches, the question also arises as to whether defense counsel has any authority for making arguments for unknown, non-joined party(s)." (*Id.* note 3.) Plaintiff cites *United States v.*

Christie for the proposition that the law in this Circuit requires such "*ex post*" protocols prior to examining electronic data. 717 F.3d at 1167. However, *Christie* does not go as far as Plaintiff would like.

The court in *Christie* held that the defendant failed support her motion to suppress with any evidence that the search for evidence in her computer, which was limited by the warrant to evidence "related to the murder, neglect, and abuse of" the defendant's daughter, violated the Fourth Amendment. *Id.* at 1165–1167. The court rejected defendant's argument that the warrant itself had to contain search protocols for proper computer searches. However, the court recognized that the lack of search protocols in a warrant did not mean that the Fourth Amendment has "nothing to say on *how* a computer search should proceed." *Id.* at 1166. The court opined that "the Amendment's protection against 'unreasonable' searches surely allows courts to assess the propriety of the government's search methods (the *how*) *ex post* in light of the specific circumstances of each case." *Id.* (citing *United States v. Ramirez*, 523 U.S. 65, 71 (1998) ("The general touchstone of reasonableness...governs the method of execution of the warrant.")). The court continued: "even if courts do not specify particular search protocols up front in the warrant application process, they retain the flexibility to assess the reasonableness of the search protocols the government actually employed in its search after the fact, when the case comes to court, and in light of the totality of circumstances." *Id.* at 1167. The court in *Christie* concluded:

> To undertake any meaningful assessment of the government's search techniques in this case (the

> *how*), we would need to understand what protocols the government used, what alternatives might have reasonably existed, and why the latter rather than the former might have been more appropriate. Unfortunately, however, that we do not have in this case. Though Ms. Christie bore the burden of proof in her suppression proceeding, she offered little evidence or argument suggesting how protocols the government followed in this case were unreasonable or insufficiently particular, especially when compared with possible alternatives.

Id. at 1167. Here, Defendants maintain that Plaintiff's claims that the search of electronically stored information was unlawful are "speculative, unconfirmed allegations which are not sufficient to meet a summary judgment burden[.]" (Mot. at 10.) The Court agrees. It may be inferred that someone has searched Plaintiff's electronic storage devices and copied files from them because all of the devices have been returned to Plaintiff. Yet, Plaintiff has presented no evidence that the electronic storage devices contained information that was beyond the scope of the Warrant. Instead, Plaintiff relies on the allegations in his Complaint, which are conclusory statements that [s]ince the search warrant contained no limitations, it is the intention of defendants Daza, ..., and other unknown parties to rummage through all of the records without any restriction looking for absolutely anything." (Compl. ¶ 37.) These unsupported allegations are insufficient.

As Plaintiff points out, courts may assess the propriety of the government's search methods *ex post* in light of the specific circumstances of each case. According to Plaintiff,

this court should determine "what search protocols were in fact used, if any[.]" (Resp. at 4.) Plaintiff contends that Defendants have failed to offer evidence on that issue; therefore, "there is simply insufficient information for making any qualified immunity determination." (*Id.*) It is Plaintiff who has the burden to show a clearly established constitutional violation, and Plaintiff has failed to present any evidence to show that Defendants searched for and obtained evidence not described in the Warrant. Of course, in any criminal proceeding, electronically stored information that is beyond the scope of the Warrant, for instance, showing crimes unrelated to tax evasion or conspiracy to commit tax evasion, may be excluded. *Cf. Voss*, 774 F.2d at 405 (describing dangers of broadly worded warrants allowing the search of electronic records evincing any federal crime instead of the crime of tax fraud). However, because Plaintiff has failed to meet his burden of proof to defeat Defendants' qualified immunity, the Court will dismiss the Second Claim.

C. Fourth Claim

In the FOURTH CAUSE OF ACTION (Compl. ¶¶ 57–58) (Fourth Claim), Plaintiff accuses SA Marshall and SA Hand of violating his rights by restricting his liberty to move about the house during the execution of the Warrant. (*Id.*) As Defendants point out, Plaintiff admits that the agents executing the search warrant told him that he was free to leave the house during the search. Plaintiff counters that because he was not allowed to put on clothing, he was not really free to leave. Yet, even if Plaintiff was essentially detained during the search by not being allowed to change clothes, such a detention is constitutionally permissible. *Michigan v. Summers*, 452 U.S. 692 (1981). In *Summers* the Supreme Court held that

"a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. In *Harman v. Pollock*, 446 F.3d 1069 (10th Cir. 2006), the Tenth Circuit concluded that under *Summers* and *Muehler, et al v. Mena,* 544 U.S. 93 (2005), police officers have a "categorical" authority to detain persons found on the premises subject to a lawful search warrant for "contraband" materials. *Id.* at 1086 (citing *Summers*, 452 U.S. at 705; *Muehler*, 544 U.S. at 98). Because Plaintiff has failed to show that he was unlawfully detained during the search of his residence, the Court will grant Defendants qualified immunity on Claim Four.

D. Fifth Claim

In the FIFTH CAUSE OF ACTION (Compl. ¶¶ 59–62) (Fifth Claim), Plaintiff alleges that Defendants searched for and seized publications "based solely on their content and ideas they expressed. The defendants obtained a warrant which contained language they knew left it entirely to the discretion of the searching agents what was to be seized, and they treated it like a general warrant." (*Id.* ¶ 60.) Defendants' actions were done "in plain and clear violation of First Amendment protected Free Speech and Press constitutional limitations." (*Id.* ¶ 61.) Plaintiff claims that Defendant Daza has retained the materials "in order (at least in part) [to] engage in censorship of the materials.... [i]n plain and clear violation of the First Amendment Free Speech and Press constitutional limitations." (*Id.* ¶ 62.)

As discussed in its MOO Denying Summary Judgment, the Warrant allowed agents to seize only books and printed

material related to the crimes of tax evasion and related conspiracies. As instrumentalities of crime, such materials are not protected by the First Amendment. *Voss*, 774 F.2d at 406. In addition, Plaintiff has presented no evidence that items seized at his residence lacked relationship to the crimes of tax evasion, attempted tax evasion, or conspiracy to commit tax evasion. Therefore, the Court will grant summary judgment on the Fifth Claim and will dismiss the claim.

E. Sixth Claim

In his SIXTH CAUSE OF ACTION (Compl. ¶¶ 63–65) (Sixth Claim), Plaintiff alleges that the Defendants collectively agreed to willfully and wantonly "disregard any such limitations and search for and seize any and all information about plaintiff's 'contacts' and people he may know, regardless of purpose. This included family, friends, acquaintances, political affiliations, and anyone plaintiff might know for any purpose." (*Id.* ¶ 64.) In addition, Plaintiff claims that "defendants obtained and executed a warrant which contained language they knew was not anywhere near narrow enough to comply with the precision required by the First Amendment when Associational rights are involved. They then treated it like a general warrant, seized whatever they liked, and turned over the seized items to defendant Daza." (*Id.* ¶ 65.)

To the extent this claim seeks to invalidate the warrant for lack of particularity or probable cause, the Court will grant summary judgment in favor of Defendants. The First Amendment does not prevent a search for items that tend to prove conspirators' associations with each other for illegal purposes. *Voss*, 774 F.2d at 407 (Logan, J. concurring). Moreover, Plaintiff's claim that challenges the

manner in which the Warrant was executed will be dismissed. Plaintiff has presented no evidence that Defendants seized information about Plaintiff's associates that was unrelated to the crimes of conspiracy or tax evasion. Therefore, the Court will grant summary judgment on the Sixth Claim.

F. Seventh Claim

In the SEVENTH CAUSE OF ACTION (Compl. ¶¶ 66–68) (Seventh Claim), Plaintiff alleges that 120 [days] have passed since the search and seizure raid ... [Defendants] have made no attempt to contact plaintiff about returning any seized items still in their possession, and have no apparent intention of doing so, resulting in permanent deprivation of the property." (*Id.* ¶ 67.) Plaintiff asserts that the retention of his property "is simply unreasonable under the Fourth Amendment and in violation of it." (*Id.* ¶ 68.) This issue has been decided. The Court described in its MEMORANDUM OPINION AND ORDER (Doc. No. 38) that as of February 20, 2018, the Government had returned to Plaintiff all items seized under the Warrant either in their physical tangible form or via electronic copy on storage disks. Therefore, summary judgment will be granted and Claim Seven will be dismissed as moot.

G. Other Matters

In the Motion, Defendants renewed their request to stay discovery pending resolution of the Motion. In addition, Defendants requested that discovery be stayed until the Warrant Affidavit is unsealed. As for Plaintiff's Third Claim challenging the pat-down search of his person by agents executing the Warrant, Defendants ask the Court to allow limited discovery as to that claim. This ruling disposes of the Motion and the Warrant Affidavit has been unsealed; therefore, discovery may be appropriate on

issues related to the Third Claim. The Court will leave it to the parties to work out a discovery plan with presiding Magistrate Judge Laura Fashing.

IT IS ORDERED that DEFENDANT DAZA, HAND, AND MARSHALL'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY (Doc. No. 53) is granted, and summary judgment will be entered dismissing the First Cause of Action, the Second Cause of Action, the Fourth Cause of Action, the Fifth Cause of Action, the Sixth Cause of Action, and the Seventh Cause of Action.

/s/ James A. Parker
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

DAVID WELLINGTON,
Plaintiff

No. 1:17-CV-00732-JAP-LF

v.

FERNANDO DAZA; SPECIAL AGENT HAND; SPECIAL AGENT MARSHALL; JOHN/JANE DOES 1-5,
Defendants

FINAL JUDGMENT

On July 12, 2017, Plaintiff David Wellington, proceeding pro se, filed a *Bivens*[1] action, bringing seven claims against three named defendants—Fernando Daza, "Special Agent Marshall," and "Special Agent Hand"—and five defendants of unknown name. See COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES, Doc. 1. On April 9, 2019, the Court entered partial summary judgment in Defendants Daza's, Marshall's, and Hand's favor, dismissing all claims except Plaintiff's Third Cause of Action, which alleged a violation of Plaintiff's Fourth Amendment right based on a pat-down

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[1]See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing that damages are available under 42 U.S.C. § 1983 for claims against federal law enforcement officials).

search. See Compl. at 12; MEMORANDUM OPINION AND ORDER, Doc. 80; PARTIAL SUMMARY JUDGMENT, Doc. 81. On July 14, 2020, Plaintiff sought leave to amend his complaint to name three additional defendants he believed were involved in the search. See PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT, Doc. 116; proposed FIRST AMENDED COMPLAINT FOR DAMAGES, Doc. 116-1. On October 5, 2020, the Court granted in part and denied in part Plaintiff's motion for leave to amend.[2] See MEMORANDUM OPINION AND ORDER, Doc. 121. On October 13, 2020, Plaintiff filed his amended complaint against Sean Marshall, Michael Kuehn, Brad Palmer, and Uriah Compton, bringing a single claim for violation of Plaintiff's Fourth Amendment right. See FIRST AMENDED COMPLAINT FOR DAMAGES, Doc. 122. On April 21, 2021, Plaintiff filed a STIPULATION OF DISMISSAL, Doc. 138, under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), dismissing with prejudice "the sole remaining claim in this action" against Defendants Marshall, Kueh, Palmer, and Compton.

Because all claims brought by Plaintiff have been disposed of—by either Court ruling or stipulation of the parties—the Court, in accordance with Federal Rule of Civil Procedure 58, enters this final judgment, dismissing with prejudice all claims brought by Plaintiff in this action. IT IS SO ORDERED.

/s/ James A. Parker

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[2] The Court concluded that it would be futile to grant Plaintiff leave to amend to maintain claims against Defendants Daza and Hand, whom Plaintiff did not dispute were not involved in the search. See MEMORANDUM OPINION AND ORDER, Doc. 121 at 4.

Senior United States District Judge