UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

CASE NO. 4:10-CV-142-D

MARK DANIEL LYTTLE, Plaintiff, v. THE UNITED STATES OF AMERICA, et al., Defendants.	)	**MEMORANDUM OF LAW IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS** Local Civil Rules 7.1, 7.2

Plaintiff Mark Daniel Lyttle ("Plaintiff" or "Mr. Lyttle") files this Memorandum of Law Opposition to the United States' Motion to Dismiss [ECF Doc. No. 47.] In its Motion to Dismiss, the United States argues that the deportation of a citizen is "unfortunate" ("United States' Br. at 1") but that a known United States citizen with a known mental impairment who was wrongfully detained, subjected to removal proceedings, and ultimately deported to Mexico with three dollars and a prison suit has no legal remedy whatsoever. At set forth herein, the United States' argument assumes disputed facts before discovery has even begun, and it flies in the face of the controlling legal authorities. Therefore, the United States' Motion to Dismiss should be denied.

BACKGROUND

Mark Lyttle is a 33-year old United States citizen born in Rowan County, North Carolina. (Amended Complaint "Am. Compl.," ¶ 7.) He was raised by his adoptive parents, Thomas Lyttle and Jeanne Lyttle, along with four siblings, two of whom are actively serving in the United States Military. (*Id.*, ¶¶ 7, 21, 111.) Mr. Lyttle has a Social Security Number, a birth certificate, and official adoption records. (*Id.*, ¶¶ 20, Exs. A, B.) Yet, on December 18, 2008,

Mr. Lyttle was escorted by federal ICE agents from Stewart Detention Center in Lumpkin, Georgia to the U.S-Mexico border in Hidalgo, Texas, where he was ordered to cross the border into Mexico on foot. (*Id.*, ¶ 101.) He spoke no Spanish, had no money, and until that point, had never been outside the United States. (*Id.*, ¶¶ 5, 7.)

Mr. Lyttle spent the next four months wandering the streets of Mexico, Honduras, Nicaragua and Guatemala. (*Id.*, ¶¶ 96, 114.) Throughout his odyssey, Mr. Lyttle would be arrested and incarcerated numerous times on the grounds that he could not produce evidence of his identity or citizenship. (*Id.*, ¶ 109.) Mr. Lyttle suffered severe physical abuse at the hands of prison guards in Honduras. (*Id.*, ¶ 107.) Ultimately, Mr. Lyttle found his way to Guatemala where he managed to locate the U.S. Embassy and an embassy employee who was willing to listen to Mr. Lyttle's remarkable story. (*Id.*, ¶ 110.) With the aid of the U.S. Embassy employee in Guatemala, Mr. Lyttle was put in touch with his family in the U.S. who arranged for his return. (*Id.*, ¶ 111.)

That Mr. Lyttle survived his 4-month ordeal in Mexico and Central America is all the more astonishing given that he is mentally disabled. (*Id.*, ¶¶ 22-24.) Mr. Lyttle in fact has a long and well-documented history of significant mental and cognitive disorders that resulted in his near constant institutionalization since adolescence. (*Id.*, ¶ 24.) Mr. Lyttle is barely literate and struggles with basic cognitive functions such as verbal expression, memory and the capacity to comprehend everyday events. (*Id.*, ¶¶ 23.) It is due to his mental disability that Mr. Lyttle was unable to effectively resist the coercive interrogations of ICE agents who apprehended Mr. Lyttle in the fall of 2008 and incorrectly identified Mr. Lyttle as "Jose Thomas," a citizen of Mexico unlawfully in the United States. (*Id.*, ¶¶ 41-45.)

Mark Lyttle was not detained and subjected to removal proceedings because of a good faith misjudgment by government officials, or due to some well-intentioned accident. Rather, as set forth in ample detail in his Amended Complaint, "…Mr. Lyttle was unlawfully detained as a result of Defendants callous disregard of his constitutional rights and their gross misconduct in the application of their statutory responsibilities." Throughout his detention and removal proceedings, Defendants disregarded, ignored and suppressed facts and evidence that should have prevented such a result.

As detailed in Plaintiff's Argument section, the United States' arguments are based on a highly selective, incomplete and in some instances inaccurate characterization of the facts alleged in Mr. Lyttle's Amended Complaint. But accepting the well-pleaded allegations in Mr. Lyttle's Amended Complaint at face value, as this Court must at the pleading stage, Defendants detained and subjected to removal proceedings a U.S. citizen whom they knew to be mentally impaired, despite his protests, and despite clear objective evidence that established Mr. Lyttle's citizenship.

ARGUMENT AND CITATION OF AUTHORITY

I. Jurisdiction is Proper As To Plaintiff's FTCA Claims.

A. The "Discretionary Function" Exception Does Not Apply To Bar Plaintiff's Claims.

The interrogation, arrest, and detention of U.S. citizens (much less U.S. citizens with mental disabilities) is obviously not part of the United States' immigration policy. The United States, however, maintains that it is exempt from liability for the grievous harms that Mr. Lyttle suffered when Defendants Dashanta Faucette, Dean Caputo, Robert Kendall and ICE Does 1-10

("Defendants") unlawfully interrogated, arrested, and detained him.[1] On the contrary, the actions challenged by Mr. Lyttle "are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *U.S. v. Gaubert*, 499 U.S. 315, 325 (1991). The "discretionary function" exception does not apply here for several reasons.

First, the discretionary function exception is not an available defense because, as a matter of law, ICE agents have absolutely no discretion to violate the constitutional rights of a U.S. citizen. The Fourth Circuit has recognized that the discretionary function exception does not apply to FTCA claims based on unconstitutional conduct. *Medina v. U.S.*, 259 F.3d 220, 225 (4th Cir. 2001) ("[f]ederal officials do not possess discretion to violate constitutional rights or federal statutes) (internal citation and quotation marks omitted). Although the court in *Medina* determined that the discretionary function exception barred the plaintiff's FTCA claims, its holding was based on the plaintiff's failure to allege a violation of the Constitution or a federal statute. *Id.* at 225. By contrast, the discretionary function exception does not apply to Mr. Lyttle's claims because Mr. Lyttle has alleged facts sufficient to establish that Defendants violated his Fourth and Fifth Amendment rights. (Am. Compl., ¶¶ 39, 49-52, 63.) As ICE's authority to interrogate, arrest, and detain is limited to *non-citizens*, Defendants' conduct was not "authorized and implemented consistent with federal law and the Constitution of the United States." *Medina*, 259 F.3d at 226. Further, Defendants' intentional discrimination and targeting of Mr. Lyttle on the basis of his race and/or ethnicity is plainly unconstitutional conduct not covered by the discretionary function exception. (Am. Compl., ¶¶ 3, 90-91.) Consequently, the United States is not shielded from liability under the discretionary function exception.

[1] Notably, the United States concedes that Mr. Lyttle was detained in ICE custody for two days following his scheduled release from Greene Correctional Institution. (Am. Compl. ¶¶ 62-63; United States' Br. at 13, n.7.)

Additionally, the discretionary function exception does not apply here given that Defendants and other IC agents possessed affirmative evidence of Mr. Lyttle's U.S. citizenship, yet disregarded it. To hold otherwise, especially at the pleadings stage, would be tantamount to ruling that government officials have "discretion" to decide whether to allow U.S. citizens to remain in this country or whether to detain and deport them to Mexico. Defendants searched federal databases on multiple occasions and discovered records verifying Mr. Lyttle's U.S. citizenship and listing his social security number. (Am. Compl., ¶¶ 47-48.) Although ICE agents may exercise a certain level of discretion in the execution of their law enforcement duties, including the investigation of potential criminal aliens subject to removal, their decision to disregard this objective evidence was patently non-discretionary, given the absence of any authority to arrest and detain a U.S. citizen. Unless this Court is prepared to hold that the arrest and detention of a U.S. citizen is itself discretionary, the United States cannot evade liability by claiming that this specific misconduct falls under the discretionary function exception.

Moreover, the United States' reliance on *Nguyen v. United States*, 65 Fed. App'x 509 (5th Cir. 2003) (*per curiam*), for the proposition that the discretionary function exception bars Mr. Lyttle's FTCA claims, is misplaced. *Nguyen* involved a legal permanent resident unaware of his eligibility for derivative citizenship. *Id.* at *1.[2] The court held that the discretionary function exception barred Nguyen's tort claims because "[n]o regulation or statute prevented the INS agents from pursuing deportation proceedings against Nguyen based on the information available

[2] *Bernado v. United States*, No. 02-0974, 2004 WL 741287 (N.D. Texas Apr. 5, 2004), cited in OC Defendants' Motion to Dismiss at 9-10, also involved a legal permanent resident who was unaware of his eligibility for derivative citizenship and was arrested, detained, and ordered deported. Because Mr. Lyttle is and always has been a U.S. citizen, and because he affirmatively asserted his U.S. citizenship to North Carolina ICE agents, his claims are dissimilar to those raised in *Nguyen* and *Bernado*. Similarly, *O'Ferrell v. United States*, 253 F.3d 1257, 1267 (11th Cir. 2001), and *Mesa v. United States*, 123 F.3d 1435, 1438 (11th Cir. 1997), are inapposite as out-of-circuit cases that did not involve allegations of unconstitutional conduct.

to them," and INS agents "had sufficient reason to believe, based on repeated admissions, explicit and implicit, by both Nguyen and his attorney, that Nguyen was an alien." *Id.* at *2. In particular, the court found that the INS agents "did not commit a constitutional violation nor did they engage in any conduct that could be described as in bad faith." *Id.*

Here, in contrast, Defendants have no jurisdiction over U.S. citizens and were not authorized to arrest, detain, and interrogate Mr. Lyttle. Furthermore, Defendants had no reason to believe that Mr. Lyttle was a non-citizen given readily available documentary (indeed, *government*) evidence of Mr. Lyttle's U.S. citizenship, the absence of documentary evidence to the contrary, and Mr. Lyttle's repeated assertions of U.S. citizenship. (Am. Compl., ¶¶ 46-47, 57, 60.) Defendants' actions in arresting and detaining Mr. Lyttle, following from their failure to investigate Mr. Lyttle's claim of U.S. citizenship and deliberate indifference towards evidence of his U.S. citizenship, is categorically outside their discretionary duties. Consequently, this Court should deny the United States' Motion to Dismiss Mr. Lyttle's FTCA claims based on the discretionary function exception.

B. The "Due Care" Exception Does Not Apply To Bar Plaintiff's Claims.

The United States contends that the false imprisonment, negligence, and intentional infliction of emotional distress claims should be dismissed pursuant to 28 U.S.C. § 2680(a), which states, in relevant part: "The provisions of this chapter . . . shall not apply to . . . a) Any claim based upon an act or omission of an employee of the defendants, exercising due care, in the execution of a statute or regulation." This argument fails for at least three reasons, as set forth herein.

1. Application of the due care exception is a factual inquiry that should not be dismissed at the pleading stage.

The due care exception does not justify a dismissal at the pleading stage where there is a dispute over material facts. *Compare Lippman v. City of Miami*, 622 F. Supp. 2d 1337, 1343 (S.D. Fla. 2008) (finding that "it would be premature to apply the due care exception as a matter of law" because the "inquiry requires an examination of the circumstances and the facts surrounding the decision to search"), *with Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1164 (1st Cir. 1987) (dismissing a claim under the due care exception because the officers acted reasonably and "the parties have agreed that there is no dispute over material facts). OC Defendants rely on a case where the plaintiff was detained, as here, pursuant to 8 U.S.C. § 1226(c)(1)(B), but that case only reinforces the prematurity of the United States' motion. *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005). In that case, the court explicitly noted that "[t]he material facts of this case are not in dispute." *Id.* at 649.

In contrast, material facts here surrounding the due care exception are in dispute. For example, the parties dispute whether Mr. Lyttle was coerced into signing a sworn statement about his citizenship. (Am. Compl., ¶ 54; United States' Br. at 20 (describing the claim as hyperbole.)) There is further disagreement over whether Mr. Lyttle ever informed officers that he was from Mexico. (*See* Am. Compl., ¶ 33; United States' Br. at 3.) Similarly, the United States claims that the Defendants "performed their usual duties," United States' Br. at 20, while Mr. Lyttle alleges that agents did not even perform the minimal inquiries required of them. (Am. Compl., ¶ 58, 60-61.) So long as these disputes over basic material facts are unresolved, it would be impossible for the Court to rule as a matter of law whether the officers acted with due care. Thus, in line with the precedent cited above—and even the precedent the United States cites—dismissal would be inappropriate.

2. The due care exception does not apply because Defendants acted without due care in applying their statutory responsibilities.

Dismissal based on the due care exception also would be inappropriate inasmuch as Mr. Lyttle has adequately alleged that Defendants acted without due care in exercising their statutory responsibilities. While the due care exception protects government behavior "in the execution of a statute", such behavior is protected only when the government official is "exercising due care." 28 U.S.C. § 2680; s*ee also*, *Buchanan v. United States*, 915 F.2d 969, 970-71 (5th Cir. 1990) ("The first clause [of § 2680], exempting actions mandated by statute or regulation, applies only if the actor has exercised due care). The United States selectively quotes case law in a way that masks this important point, arguing that the due care exception shields Defendants "[b]ecause there is no allegation...that an immigration officer 'deviated from the statute.'" (United States' Br. at 12 (quoting *Welch*, 409 F.3d at 652)). This quotation omits the first half of the *Welch* court's sentence. In full, it reads "[Plaintiff] does not claim that the INS officers carried out their responsibilities *in an inappropriate manner*, or in any way deviated from the statute[.]" 409 F.3d at 652 (emphasis added). Thus, the due care exception does not protect government officials from liability where officials carry out their statutory responsibilities in an inappropriate manner. This is in line with both the plain language of the statute and case law interpreting it. The *Welch* court noted that the purpose of the law is to prevent the use of tort action to test the legality of the law. *Welch*, 409 F.3d at 653. As the *Welch* court went on to point out, the due care exception would not bar an action against ICE officials for alleged defects in the *execution* of the statute, rather than defects in the statute itself. *Id*.

Mr. Lyttle's claim safely overcomes the due care exception hurdle because unlike the plaintiff in *Welch*, he alleges that Defendants "carried out their responsibilities in an inappropriate manner" and did not exercise due care. *Welch*, 409 F.3d at 652. Mr. Lyttle alleges

"outrageous conduct" and inappropriate interrogation and detention tactics. (Am. Compl, ¶¶ 90, 160.) Because Mr. Lyttle has adequately alleged that Defendants acted inappropriately and without due care in fulfilling their statutory obligations, the due care exception does not apply.

Welch is also inapplicable because it involved a detainee who was rightfully detained pursuant to statute. In *Welch,* the defendants properly detained a Panamanian national under 8 U.S.C. § 1226(c) after he had pled guilty to committing a felony. 409 F.3d at 650. While a court later ruled that the detention was unconstitutional for lack of a bail hearing, at no time was the detention invalid under § 1226(c). In contrast, this case involves a detention that is illegal and inappropriate under the statute itself. Thus, this case is more akin to the situation in *Nguyen v. United States*. 556 F.3d 1244, 1260 (11th Cir. 2009). The Eleventh Circuit upheld the plaintiff's FTCA claim in *Nguyen* because the plaintiff's arrest was based on negligent investigative and arrest practices. *Id*. at 1249. Similarly, Mr. Lyttle's detention was improper under the statute (even if the arresting officer believed otherwise). *See id.* As such, the court's reasoning in *Welch* does not apply, and the due care exception does not apply.

3. The due care exception does not apply to false imprisonment claims

The due care exception should not apply to false imprisonment claims under § 2680(h) of the FTCA. While § 2680(a) protects government actions taken with due care pursuant to a statute, § 2680(h), passed subsequently, states, "with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to *any claim* arising, on or after the date of the enactment of this proviso, out of . . . false imprisonment, false arrest . . ." 28 U.S.C. § 2680(h) (emphasis added).

Mr. Lyttle's FTCA claim for false imprisonment is not barred by 28 U.S.C. § 2680(a) because the law enforcement proviso of § 2680(h) supersedes the exceptions in § 2680(a). *See Nguyen v. United States*, 556 F.3d 1244, 1260 (11th Cir. 2009) ("To the extent of any conflict, the later enacted and more specific subsection (h) proviso trumps the earlier and more general subsection (a), as Congress clearly intended that it would."); *Sutton v. United States*, 819 F.2d 1289, 1297 (5th Cir. 1987); *Milligan v. United States*, No. 07-1053, 2009 WL 2905782 at *5 (M.D. Tenn. Sept. 4, 2009) ("this court finds the *Nguyen* court's analysis to be thorough and its conclusion to be persuasive"). The law enforcement proviso was passed subsequent to and is more specific than the due care exception. *Nguyen*, 556 F.3d at 1253.[3]

Though 2680(a) initially prevented a crowd of claims from passing the sovereign immunity door, 2680(h) re-opened the door for claims arising from law enforcement actions. Further, as the *Sutton* court pointed out, allowing the due care exception to supersede the law enforcement proviso turns 2680(h) into an "illusory-now you see it, now you don't-remedy." *Sutton*, 819 F.2d at 1297. The purpose of the proviso was "to subject the government to liability in *Bivens*-type actions", but applying the due care exception would mean that even *Bivens* itself "would not pass muster", meaning "the law enforcement proviso would fail to create the effective legal remedy intended by Congress." *Id*. at 1296. Thus, the due care exception does not bar Mr. Lyttle's false imprisonment claim. (Am. Compl., ¶ 148.) Ruling otherwise would

[3] The *Nguyen* court used an analogy to explain why, under canons of statutory interpretation, this specificity and more recent enactment date means that the law enforcement proviso supersedes the due care exception: "A big, burly doorman guarding the entrance to an exclusive club shouts to a large crowd of people wanting to get in that none of them may enter. Later he speaks specifically to a few people in the crowd and tells them to go on in. No one would doubt that while the general group has been barred a privileged few have been given permission to enter. So it is with § 2680." *Nguyen*, 556 F.3d at 1253.

undermine the purpose of the law enforcement proviso and would be contrary to canons of statutory interpretation.[4]

II. Plaintiff's FTCA Claims State a Claim Pursuant To Rule 12(b)(6).

A. The False Imprisonment Claim Is Viable Because Plaintiff's Detention Was Not Pursuant to Procedurally Valid Process.

Because of a substantively and procedurally defective process, Defendants "obtain[ed] custody of Mr. Lyttle from the North Carolina Defendants" and unlawfully detained him. (Am. Compl., ¶ 148.) The government's argument that mere legal process defeats a false imprisonment claim erroneously construes and applies both governing North Carolina law and the well-pleaded allegations in the amended complaint.

Under North Carolina law "[f]alse imprisonment is the illegal restraint of the person of any one against his will." *Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963) (quoting *Parrish v. Boysell Mfg. Co.*, 211 N.C. 7, 188 S.E. 817 (1936)). "Involuntary restraint and its unlawfulness are the two essential elements of the offense." *Parrish v. Boysell Mfg. Co.*, 211 N.C. 7, 188 S.E. 817, 820 (1936). A plaintiff need only prove

[4] Although the Fourth Circuit has ruled that the 2680(a) exceptions bar 2680(h) claims, these cases did not consider the statutory interpretation and congressional purpose analyses that the *Nguyen* and *Sutton* courts explored. *Medina v. United States*, 259 F.3d 220, 226 (4th Cir. 2001); *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005). The *Medina* and *Welch* courts reasoned that in passing 2680(h), Congress was aware of the effect of 2680(a) and meant these exceptions to continue to apply. *Id*. However, as the Fifth and Eleventh Circuits have noted, this reasoning renders 2680(h) meaningless. The point of 2680(h) was to waive sovereign immunity in *Bivens*-type cases, but the *Medina* approach would bar the very claims made in *Bivens*. *Sutton*, 819 F.2d at 1297. Further, using 2680(a) to bar 2680(h) claims "would . . . modify the statute by either removing the proviso . . . or by rewriting the words 'any claim' in the proviso to mean only claims based on . . . non-discretionary functions. We are not authorized to rewrite . . . statutory language in the guise of interpreting it, especially when doing so would defeat the clear purpose behind the provision." *Nguyen*, 556 F.3d at 1244. Thus, though the Fourth Circuit has occasionally reached a different result in the past, it has never applied the canons of statutory interpretation that a more specific, more recently-enacted provision trumps a more general, earlier one, nor has it analyzed the congressional purpose discussed in *Nguyen* and *Sutton*.

"(1) intentional and unlawful, (2) restraint or detainment of a person, (3) without that person's consent." *State v. Petro*, 167 N.C. App. 749, 753, 606 S.E.2d 425, 428 (N.C. Ct. App. 2005). If the process upon which an individual is detained is invalid, an action for false imprisonment will lie. *See Local 755, Int'l Broth. of Elec. Workers, AFL-CIO v. Country Club E., Inc.*, 283 N.C. 1, 8, 194 S.E.2d 848, 853 (1973) (recognizing that false imprisonment can be detention pursuant to invalid process); Restatement (Second) of Torts § 35 (1965) (Comments) ("[A]n act which makes the actor liable under this Section for a confinement otherwise than by arrest under a valid process is customarily called a false imprisonment.")

The Amended Complaint contains factual allegations sufficient to allege a claim of false imprisonment under North Carolina law. First, the Amended Complaint contains allegations sufficient to conclude that the Defendants lacked probable cause to detain Mr. Lyttle after his initial sentence expired. Second, the Amended Complaint sufficiently alleges that the whole process by which Mr. Lyttle was erroneously determined to be a foreign born citizen was fundamentally flawed and therefore unlawful.

Since the "absence of probable cause" is an element of a false imprisonment claim, *see Moore v. Evans*, 124 N.C. App. 35, 43, 476 S.E.2d 415, 422 (N.C. Ct. App. 1996), a detention without probable cause after the expiration of a lawful incarceration suffices to establish unlawfulness, *see, e.g.*, *See Harwood v. Johnson*, 326 N.C. 231, 242, 388 S.E.2d 439, 445-46 (1990) (holding that plaintiff stated a claim for false imprisonment by alleging that parole board members failed to timely release plaintiff inmate in accordance with state law); *Walker v. City of Portland*, 71 Or. App. 693, 698, 693 P.2d 1349, 1352 (Or. Ct. App. 1985) (holding that, on a false imprisonment claim, the fact that an initial detention was lawful did not preclude a finding that the original "circumstances that aroused [the officers'] suspicion dissipated, and any further

detention and inquiry was" unlawful); *Tufte v. City of Tacoma*, 71 Wash. 2d 866, 870, 431 P.2d 183, 185 (1967) ("[T]he fact that the arrest might have been lawful did not determine that the subsequent imprisonment was also entirely lawful.").

If a detention is made "without probable cause, [] the plaintiff's restraint [i]s unlawful." *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 228, 139 S.E.2d 199, 201 (1964). A lack of probable cause is illustrated by "circumstances which would seem to assure a normal person of average intelligence that the charge…had no reasonable foundation." *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E.2d 307, 308-09 (1948); *see also Carson v. Doggett*, 231 N.C. 629, 632, 58 S.E.2d 609, 611 (1950) ("[Lack of] probable cause was defined as meaning that the action was instituted without sufficient knowledge and information on the part of the defendant as would cause him or any other reasonably prudent person to believe the plaintiff to be guilty of the offense charged.") (citation and quotation marks omitted); *Mullins by Mullins v. Friend*, 116 N.C. App. 676, 683, 449 S.E.2d 227, 231 (N.C. Ct. App. 1994).

The Amended Complaint sufficiently alleges that Defendants lacked probable cause to detain Mr. Lyttle after the expiration of his previous sentence. *See also Ramirez v. United States*, 998 F. Supp. 425, 434 (D.N.J. 1998) ("Whether the INS agents had "legal justification" to detain [the Plaintiff] is intertwined with the inquiry as to whether the agents had probable cause to believe that he was the individual sought in the warrant.").[5] For example, the Amended

[5] With that case in a similar procedural posture, and confronting an equivalent state law definition of false imprisonment, the court noted that it was premature to dismiss the FTCA false imprisonment claim. *Id.* ("Because the Court has reserved judgment on this question [of legal justification] until a limited amount of discovery has been conducted, the Court will revisit the merits of this claim when it rules on the motion for summary judgment."). *Accord Wormley v. United States*, 601 F. Supp. 2d 27, 45 (D.D.C. 2009) (examining a claim for false imprisonment as a result of overdetention and noting that on 12(b)(6) motion "[t]he Court need not at this stage determine whether…plaintiff was in fact unlawfully detained [because] Plaintiff does state a claim that could *plausibly* entitle her to relief").

Complaint states that "[n]o reasonable basis existed to suspect or otherwise conclude that Mr. Lyttle was not a United States citizen." (Am. Compl., ¶ 57.) Yet despite ample evidence of Mr. Lyttle's cognitive deficits and "[n]umerous records… reveal[ing] that Mr. Lyttle was a U.S. citizen with a valid social security number," Defendants initiated deportation proceedings. (*Id.*, ¶¶ 46-47, 51.) There was no attempt made "to confirm the information contained in the documents produced as a result of the database searches," nor was an attempt made "to contact Mr. Lyttle's family…[or] to obtain Mr. Lyttle's birth certificate from North Carolina Vital Records." (*Id.*, ¶¶ 58, 61.) Further, "[n]o effort was made…to put Mr. Lyttle in touch with a legal representative familiar with deportation proceedings to protect Mr. Lyttle's rights." (*Id.*, ¶ 61.) Consequently, the Amended Complaint contains more than adequate allegations that there was a lack of probable cause to detain Mr. Lyttle, and his claim for false imprisonment should therefore not be dismissed.

Moreover, the deliberate disregard of a statutory mandate can create the requisite "unlawfulness" for a false imprisonment claim. *See Harwood v. Johnson*, 326 N.C. 231, 242, 388 S.E.2d 439, 445-46 (1990) (holding that if parole board members failed to parole an inmate by deliberately disregarding statutory guidelines governing maximum terms, they would be liable for false imprisonment); *see also Van Schaick v. United States*, 586 F. Supp. 1023, 1033 (D.S.C. 1983) (finding that officers' failure to follow statutory guidelines *after* a lawful arrest turned the subsequent detention into a false imprisonment). The Amended Complaint contains factual allegations sufficient to conclude that the whole process by which Mr. Lyttle was erroneously determined to be a foreign born citizen was fundamentally flawed; that Defendants deliberately disregarded policy directives and federal constitutional and statutory law; that there

was no reasonable foundation for the rejection of the evidence confirming Lyttle's U.S. citizenship; and that his subsequent detention was therefore unlawful. (Am. Compl., ¶¶ 38-61.)

The United States cites *Melton v. Rickman,* for the proposition that "[a] cause of action for false arrest or false imprisonment is based upon the deprivation of one's liberty without legal process." 225 N.C. 700, 703, 36 S.E.2d 276, 277 (1945). Even when there is formal legal process, however, the deficiencies in that process can make the detention unlawful and give rise to a claim for false imprisonment. *Rhodes v. Collins*, 198 N.C. 23, 150 S.E. 492, 494 (1929) (holding that a detention pursuant to a warrant issued for "slander" – where no such crime was punishable under state law – constituted false imprisonment). Officers can be held liable for false arrest or imprisonment even with a warrant if it appears on the face of the warrant that no jurisdiction exists for that offense or if the charge does not constitute a criminal offense. *Alexander v. Lindsey*, 230 N.C. 663, 667-68, 55 S.E.2d 470, 474 (1949); *see also Rhodes*, 198 N.C. 23, 150 S.E. 492. These cases make clear that an officer has at least some duty to inquire into the probable cause sufficient to justify his detention of a suspect, even where he has the "statutory and regulatory authority to arrest and detain individuals." Defs' Br. at 14; *see also Sheppard v. United States*, 537 F. Supp. 2d 785, 792 (D. Md. 2008) (allowing claim for false imprisonment to proceed under FTCA where Plaintiff was erroneously detained after his valid prison sentence had expired).

The mere cloak of legal authority is unavailable as a shield from liability for false imprisonment under the FTCA because this is precisely the situation contemplated by the waiver of immunity. 28 U.S.C. § 2680(h) (2011) (establishing that immunity is waived on claims for "false imprisonment" against "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law"); *see also* S.

Rep. No. 588, 93d Cong., 2d Sess. 3 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin. News 2789, 2791 (1974) ("The effect of this provision is to deprive the Federal Government of the defense of sovereign immunity in cases in which Federal law enforcement agents, **acting within the scope of their employment, or under color of Federal law**, commit any of the following torts: assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process.") (emphasis added). As detailed in the Amended Complaint and reiterated herein, Defendants failed to follow the protocol in place and provide the safeguards necessary for the prevention of an unwarranted and unlawful detention of a United States citizen.

Contrary to the United States' insistence that an action for false imprisonment will not lie because "[t]here can be no question that" the process Mr. Lyttle received "was procedurally valid," United States' Br. at 14, the Amended Complaint repeatedly questions the validity and constitutionality of the process. Mr. Lyttle alleges that he was "coerced and manipulated…into signing a statement" that "waiv[ed] his legal rights to a removal hearing before an immigration judge." (Am. Compl., ¶ 54.) Further, despite ample evidence of Mr. Lyttle's cognitive deficits and "[n]umerous records…reveal[ing] that Mr. Lyttle was a U.S. citizen with a valid social security number," Defendants still initiated deportation proceedings. (*Id.*, ¶¶ 46-47, 51, 54.) Not only does the Amended Complaint allege reckless disregard for Mr. Lyttle's rights as a United States citizen, it repeatedly alleges procedurally defective legal process.[6]

[6] (Am. Compl. at ¶ 44) ("Defendant Faucette failed and refused to have a witness present" during interrogation); (*id.* at ¶ 45) (after interrogation Mr. Lyttle "was not offered the opportunity to review the content of the entries written on the form by Defendant Faucette, nor was [he] informed of what Defendant Faucette had written"); (*id.* at ¶ 54) ("Disregarding Mr. Lyttle's mental disabilities and the substantial evidence of his U.S. citizenship, Defendant Faucette coerced and manipulated Mr. Lyttle into signing a statement admitting the allegations…" "Despite his serious and acknowledged mental disabilities, Mr. Lyttle received no assistance from ICE agents -- or anyone else -- in attempting to read or understand the form that he was coerced and manipulated into signing."

Finally, as noted herein, the Amended Complaint alleges that "[n]o reasonable basis existed to suspect or otherwise conclude that Mr. Lyttle was not a United States citizen." (*Id.*, ¶ 57.) There was no attempt made "to confirm the information contained in the documents produced as a result of the database searches," nor was an attempt made "to contact Mr. Lyttle's family…[or] to obtain Mr. Lyttle's birth certificate from North Carolina Vital Records[.]" (*Id.*, ¶¶ 58, 61.) "No effort was made…to put Mr. Lyttle in touch with a legal representative familiar with deportation proceedings to protect Mr. Lyttle's rights." (*Id.*, ¶ 61.) Contrary to the government's assertion, the Amended Complaint alleges a grossly defective, erroneous and invalid process.

Since these allegations must be accepted as true, the waiver of Mr. Lyttle's rights was invalid and void. (*Id.*, ¶ 59) ("Lyttle had no understanding of the consequences of signing the forms presented to him by these ICE Defendants.") As well as coercion and manipulation, the Amended Complaint alleges that Mr. Lyttle "was unable to execute a knowing, voluntary and intelligent waiver of his legal rights." (*Id.*, ¶ 93.) The Amended Complaint does anything but accept that the process was procedurally valid. (*See, e.g.*, *id.* at ¶ 87) (alleging a selection process impermissibly based on race and/or ethnicity; the unreasonable and unlawful denial of assistance for mentally ill or cognitively impaired individuals; and the unreasonable and unlawful denial of due process); *id.* at ¶ 126 *et seq.* (listing the deprivation of due process as the very first claim for relief).

Consequently, although the specific details of the procedural inadequacies of Mr. Lyttle's detention by Defendants are a matter for discovery, at this juncture Mr. Lyttle has adequately pled a claim for false imprisonment against the United States.

B. Plaintiff's Negligence Claim is Viable.

Although private persons are not responsible for enforcing the law or investigating suspected criminals or aliens, as Defendants contend (United States' Br. at 17.), the government does not enjoy immunity for "uniquely government functions." *Indian Towing Co. v. U.S.*, 350 U.S. 61, 64. As the Supreme Court has noted, "the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Rayonier, Inc. v. United States*, 352 U.S. 315, 391 (1957). Instead, the government may be liable under the Federal Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.A. § 2674.

The United States claims that there is only one analogous tort principle applicable to Mr. Lyttle's case. (United States' Br. at 18.) This is too narrow a view. The government, in so claiming, ignores the tort claim of general negligence, a long-standing and well-recognized principle in North Carolina. North Carolina law states that "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951).

When a complaint alleges general negligence under the Federal Tort Claims Act, "[t]he test is no more than whether Government agents in undertaking to perform an active course of conduct, exercised such ordinary care as is required of a reasonable, prudent person under the circumstances." *Lumsden v. United States*, 555 F. Supp. 2d 580, 589 (E.D.N.C. 2008). In *Lumsden*, the Court found that the plaintiffs had sufficiently pleaded a claim of negligence under the Federal Tort Claims Act by alleging that the Government "failed to exercise ordinary care

and skill in undertaking a course of conduct." *Id.* The Eastern District of North Carolina found that this claim of general negligence was sufficient to survive the defendant's 12(b)(6) Motion to Dismiss, regardless of whether any special duty situations, such as the United States proposes, were analogous. *Id.* at 595. In the instant case, the Amended Complaint sufficiently pleads general negligence by alleging that Defendants failed to use reasonable care in their course of conduct. (Am. Compl., ¶¶ 153-157.) Specifically, the complaint pleads that Defendants failed to exercise reasonable care in such a way that resulted in Mr. Lyttle's wrongful detention and deportation. (*Id.*, ¶ 154.) Such negligent conduct by Defendants includes Defendants' failure to review readily available documentation, failing to investigate Mr. Lyttle's claims that he was a U.S. citizen as required, manipulating Mr. Lyttle into signing Form I-826, failing to protect a mentally disabled individual from coercive interrogation tactics, failing to provide Mr. Lyttle in assistance with understanding his rights, failing to adequately train personnel, and detaining and deporting a U.S. citizen. (*Id.*, ¶ 155.)

In additional to general negligence, it is a well-recognized principle that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking," Restatement (Second) of Torts § 323 (1965). This principle has long been recognized by North Carolina courts. *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 4-5, 152 S.E.2d 485, 487 (N.C. 1967). Additionally, the Supreme Court has recognized the viability of this principle under the Federal Tort Claims Act, even where the harm suffered was not a physical injury. *See, Indian Towing Co.*, 350 U.S. at 69.

The United States and ICE have endeavored to provide a service to individuals in custody claiming to be U.S. citizens through the Hayes Memo and Morton Memo, which outline special procedures that ICE officers are required to follow when investigating someone claiming to be a U.S. citizen. (Am. Compl., ¶¶ 70-76.) This service is necessary to protect U.S. citizens from illegal deportation. By negligently failing to adhere to procedure and deporting Mr. Lyttle to Mexico, defendants greatly increased the risk of harm to Mr. Lyttle. Indeed, the Amended Complaint more than adequately alleges that Mr. Lyttle suffered a number of harms as a result of Defendants' actions in negligently deporting him. (*Id.*, ¶¶ 153-157.) The Amended Complaint also sufficiently alleges that Mr. Lyttle relied on Defendants in their provision of services, as the United States is duty bound not to deport U.S. citizens. (*Id.*, ¶ 4.)

This case is distinguishable from *Florida Auto Auction of Orlando, Inc. v. U.S.*, cited by the United States on page 17 of its Brief, in two respects. In that case, the court rejected the plaintiff's contention that the defendants had violated Restatement (Second) of Torts § 323 because the government did not render services to the plaintiffs, and the plaintiffs did not rely upon the defendants' actions. *Florida Auto Auction of Orlando, Inc. v. U.S.*, 74 F.3d 498, 504-05 (4th Cir. 1996). However, unlike the automobile regulation in that case, ICE's policies are designed to afford a specific protection to a specific set of people. Additionally, Mr. Lyttle did rely on Defendants' actions as he did not and could not contact anyone to obtain a copy of his citizenship documentation, and had to rely on ICE officials to locate the documentation. (Am. Compl., ¶ 61.) In failing to exercise reasonable care in investigating Mr. Lyttle's claims of U.S. citizenship, as they are required to do pursuant to the Hayes Memo and Morton Memo, the United States may be properly liable under the Federal Tort Claims Act.

The United States also incorrectly contends that Mr. Lyttle's case is barred by the public duty doctrine.[7] (United States' Br. at 16-17.) The public duty doctrine is not applicable in Mr. Lyttle's case. The public duty doctrine has no applicability whatsoever to claims under the Federal Tort Claims Act. The Supreme Court held that "the [Federal Tort Claims] Act requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA 'in the performance of activities which private persons do not perform.'" *United States v. Olson*, 546 U.S. 43, 46 (2005) (citations omitted). The public duty doctrine is a doctrine that applies to public entities, not private persons. As the Eastern District of North Carolina has previously held, "[t]he 'public duty' doctrine has no application to an FTCA action, however. Whether or not state or local law enforcement officers would be liable under state law on the same or analogous facts is irrelevant under the Federal Tort Claims Act." *Lumsden*, 555 F. Supp. 2d at 595.

Moreover, the public duty doctrine does not apply when government officials act in the affirmative. *Blaylock v. N. Carolina Dept. of Correction-Div. of Cmty. Corr.*, 200 N.C. App. 541, 546, 685 S.E.2d 140, 144 (N.C. Ct. App. 2009). In the instant case, the Amended Complaint adequately alleges that Defendants acted affirmatively not only by coercing and manipulating Mark Lyttle into signing Form I-186, but also by creating and sanctioning policies, patterns, practices and customs of selecting inmates to detain, interrogate and deport based on their race and/or ethnicity. (Am. Compl., ¶ 155.) The Amended Complaint also adequately alleges that Defendants acted in the affirmative by detaining, holding and deporting a U.S. Citizen. (*Id.*)

[7] Defendants also claim that Mr. Lyttle was contributorily negligent in representing that he was a Mexican citizen. The complaint adequately alleges that Mr. Lyttle never told anyone that he was a Mexican citizen, and repeatedly asserted that he was a U.S. citizen. FAC ¶ 56, 60, 65. Additionally, contributory negligence is not a bar to recovery when "the defendant has engaged in…wanton conduct." *Thompson v. Bradley*, 142 N.C. App. 636, 640-41 (N.C. Ct. App. 2001).

The public duty doctrine also does not apply where the public official's negligence is the direct cause of the plaintiff's injuries. *Moses v. Young*, 149 N.C. App. 613, 616, 561 S.E.2d 332, 334 (N.C. Ct. App. 2002). The North Carolina Court of Appeals, in so noting, determined that the public duty doctrine only applies when the official's negligence is the proximate or indirect cause of the harm. *Id*. In other words, the public duty doctrine applies only when an intervening circumstance was the direct cause of the harm to the plaintiff. The Amended Complaint adequately alleges that Mr. Lyttle was harmed directly by Defendants. (Am. Compl., ¶ 157.) *See Strickland v. University of North Carolina at Wilmington*,No. COA10-1589, at 16 (N.C. Ct. App. Jul. 19, 2011) (holding that "although UNC-W police officers may not have been the last link in the chain of causation for Plaintiff's injury, . . . the UNC-W police department was the impetus for the injurious force."). The public duty doctrine is therefore not applicable to these actions by the United States.

Additionally, the existence of a "special relationship" constitutes an exception to the public duty doctrine. *Stone v. N. Carolina Dept. of Labor*, 347 N.C. 473, 482, 495 S.E.2d 711, 717 (N.C. 1998). The North Carolina Supreme Court has recognized that the government has a "special relationship" with a person once that person is in custody. *Multiple Claimants v. N. Carolina Dept. of Health & Human Services, Div. of Facility Services, Jails & Det. Services*, 361 N.C. 372, 379, 646 S.E.2d 356, 360 (N.C. 2007) ("The special relationship exception also applies to the facts of the instant case because of the relationship between the State and inmates by reason of the inmates' inability to care for themselves. This special relationship has been recognized by both this Court and the United States Supreme Court."). *See also, Estate of Burgess ex rel. Burgess v. Hamrick*, 698 S.E.2d 697, 703 (N.C. Ct. App. 2010) *review denied*, 703 S.E.2d 444 (N.C. 2010).

The North Carolina Supreme Court in *Multiple Claimants* noted that "'statutes which create a special duty or specific obligation to a particular class of individuals' might merit different treatment than statutes that protect the general public." *Multiple Claimants*, 361 N.C. at 377, 646 S.E.2d at 359 (2007). In the instant case, the Amended Complaint adequately alleges that the negligent conduct occurred when Mr. Lyttle was in custody of ICE, an entity of the United States. As Mr. Lyttle was in custody, he was unable to care for his own mental health; neither was he able to contact anyone who might assist him. (Am. Compl. ¶ 61.) The Amended Complaint also adequately alleges that ICE directives, as articulated in the Hayes Memo and Morton Memo, are designed to protect detainees who claim to be U.S. citizens, *not* the public at large. (*Id.*, ¶¶ 70-76.) Accordingly, ICE agents had a special relationship with Mr. Lyttle and had a duty to protect him. The public duty doctrine, therefore, does not afford the United States special protection in this case.

Finally, to the extent that the United States claims that physical harm is necessary, (United States' Br. at 18), nothing in the Federal Tort Claims Act requires as much and case law suggests otherwise. *See* 28 U.S.C.A. § 2674; *see also Wormley v. United States*, 601 F.Supp.2d 27, 42-43 (D.D.C. 2009) (FTCA claim for overdetention in Federal prison). The *Klassette by Klassette* case cited by the United States does not contend that duties towards persons in custody are limited to physical harm. (*See* United States' Br. at 18) (citing *Klassette by Klassette v. Mecklenburg Cnty. Area Mental Health, Mental Retardation & Substance Abuse Auth.*, 364 S.E.2d 179 (N.C. Ct. App. 1988)). While the plaintiff in that case was physically harmed, that distinction appeared to play no role in determining the officer's liability. Regardless, the Amended Complaint sufficiently alleges that Mr. Lyttle *did* suffer physical harm, from which

Defendants unreasonably failed to protect him. (Am. Compl., ¶¶ 107-08, 163-64.) For all the reasons set forth above, Mr. Lyttle's negligence claim is viable.

C. Plaintiff's IIED Claim is Viable, and He Has Alleged Extreme and Outrageous Conduct.

Mr. Lyttle has properly pled a cause of action for intentional infliction of emotional distress. One way to claim intentional infliction of emotional distress ("IIED") is to plead "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). In his complaint, Mr. Lyttle repeatedly detailed Defendants' outrageous conduct. For example, Defendant Faucette knew Mr. Lyttle has bipolar disorder yet interrogated him without a witness and did not allow him to review her records of the interrogation before he signed them. (Am. Compl., ¶¶ 40, 44-45.). Further, the Amended Complaint alleges that Defendants Caputo, Faucette, Kendall, and/or individual ICE Doe Defendants found multiple indications of Mr. Lyttle's American citizenship, yet they continued to complete forms to detain and deport him. (*Id*., ¶¶ 47-55, 60.)

Such conduct was far more extreme than examples provided by the United States to attempt to defeat this claim. For instance, in *Dobson v. Harris*, the defendant merely "subject[ed the plaintiff] to questioning and investigation . . . ." 134 N.C. App. 573, 579, 521 S.E.2d 710, 715 (1999), *rev'd on other grounds*, 352 N.C. 77, 530 S.E.2d 829 (2000). Similarly, in *Ayerza v. Cabarrus Cnty. Dep't of Soc. Servs.*, the defendant allegedly misrepresented and "misled" the plaintiff, but the result was merely that the plaintiff would not receive "any serious consideration as an adoptive placement for [her cousins]." No. COA09-1050, 2010 WL 2367204, *2-3 (N.C. Ct. App. June 15, 2010) (unpublished). And in *Walker v. City of Durham*, a suspect was released after the defendant mishandled evidence; the plaintiff feared another attack but did not allege that

it occurred. No. COA02-1297, 2003 WL 21499222, *1, 3 (N.C. Ct. App. July 1, 2003) (unpublished).

Here, Defendants, in their treatment of Mr. Lyttle, completed forms that had the foreseeable consequence of forcing him out of the United States, his native country, and into a foreign country with little hope of speaking with others, including family members, or ever returning home. (Am. Compl., ¶¶ 49-54, 95, 97, 104.) Additionally, Defendants deliberately and recklessly ignored evidence of Mr. Lyttle's United States citizenship and his mental illness. (*Id.*, ¶¶ 46-48, 57, 104.) Indeed, the extent of Defendants' disregard for Mr. Lyttle's citizenship and efforts to deport him belie the defendant's assertion that the officers were only "following up" on a referral. (United States' Br. at 19.)

Further, the United States cites to cases that were resolved at summary judgment, by which time the plaintiffs had a chance to pursue discovery . *Dobson*, 134 N.C. App. at 578, 521 S.E.2d at 715, 714; *Foster v. Crandell*, 181 N.C. App. 152, 167-68, 638 S.E.2d 526, 537 (2007). In contrast, Mr. Lyttle has had no chance for discovery.

In addition to a plausible claim under the three elements stated in *Dickens*, Mr. Lyttle also adequately plead a cause of action for IIED based on recklessness. "[T]he claim for intentional infliction of emotional distress may . . . lie where the defendant's actions indicate a reckless indifference to the likelihood that they will cause emotional distress to the plaintiff." *Bryant v. Thalhimer Bros., Inc.*, 113 N.C. App. 1, 7, 437 S.E.2d 519, 522-253 (1993). *See also Dickens*, 302 N.C. at 452, 276 S.E.2d at 335 ("The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress.").

Significantly, even false accusations of shoplifting can be enough to claim IIED. *See Rogers v. T.J.X. Cos.*, 101 N.C. App. 99, 106-07, 398 S.E.2d 610, 614 (1990) (holding that lower

court erred in entering summary judgment against plaintiff on claim for IIED where defendant "resisted all attempts by the plaintiff to prove her innocence" and caused plaintiff to feel "'stripped of her dignity'"), *rev'd on other grounds*, 329 N.C. 226, 404 S.E.2d 664 (1991). In another case, the North Carolina Supreme Court held that a jury can properly find for plaintiffs who claimed IIED after being accused of stealing, detained for less than two hours, and subjected to a manager's "extreme and reckless" behavior. *See West v. King's Dep't Store, Inc.*, 321 N.C. 698, 700-01, 705-06, 365 S.E.2d 621, 622-23, 625-26 (N.C. 1988). Expediting Mr. Lyttle's deportation despite knowledge of his citizenship and the opportunity for more investigation, (Am. Compl., ¶¶ 47-58), is at least as reckless and outrageous as bullying shoppers.

IIED compensates for actions beyond "all bounds of decency tolerated by society . . . ." *West*, 321 N.C. at 704, 365 S.E.2d at 625. Unjustly exiling a man ought to be beyond this society's bounds.

III. The Foreign Country Exception Does Not Limit Plaintiff's FTCA Claims.

Mr. Lyttle's FTCA claims are not barred by the foreign country exception because they are based on injuries that he suffered while in the United States. Section 2680(k) is a limited exception to the waiver of sovereign immunity created by the FTCA that bars claims "arising in a foreign country." 28 U.S.C.A. § 2680(k). The Supreme Court has interpreted § 2680(k) to bar only those claims based on injuries where the "place of harm" suffered by the plaintiff is located in a foreign country. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705-12 (2004). In *Sosa*, the plaintiff was abducted from his home in Mexico, held overnight in a Mexican motel, and forcibly transported by private plane from Mexico to the United States. *Sosa*, 542 U.S. at 698. In contrast, Mr. Lyttle was seized by ICE agents in North Carolina, wrongfully detained and

interrogated in both North Carolina and Georgia, and transported by plane to Texas before illegally being expelled from the United States. (Am. Compl., ¶¶ 37-101.) As a result of these actions Mr. Lyttle has suffered *inter alia* physical and psychological injuries occasioned in the United States. (*Id.*, ¶ 130.) The injuries arising in the United States form the basis of Mr. Lyttle's FTCA claims, and therefore the foreign country exception does not bar jurisdiction.

The United States mischaracterizes the damages sought by Mr. Lyttle as being "based in large part" on injuries he sustained during the four months he spent in Central America. (United States' Br. at 22.) Rather, the principal basis for Mr. Lyttle's FTCA claims are the injuries he incurred in the United States as a result of the torts of false imprisonment, negligence, and IIED as stated in Counts 4-6 of the Amended Complaint. (Am. Compl., ¶¶ 148, 154-5, 161.) The United States misconstrues the Amended Complaint by focusing on the sixteen paragraphs that describe Mr. Lyttle's foreign injuries, (United States' Br. at 22-3 (citing to Am.Compl. ¶¶ 96-111)), while ignoring the seventy-eight paragraphs describing Mr. Lyttle's mistreatment within the borders of the United States. (Am. Compl., ¶¶ 29-95, 112-125.) The Amended Complaint clearly states that Mr. Lyttle has suffered physical and psychological harms as a consequence of this tortious mistreatment. (Am. Compl., ¶¶ 151, 157, 163-4.). These are actionable injuries pursuant to North Carolina tort law. *See generally Dickens v. Puryear*, 276 S.E.2d 325, 331 (1981) ("The tort of intentional infliction of mental distress is recognized in North Carolina); *Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963) ('False imprisonment is the illegal restraint of the person of any one against his will") (citations omitted); *Wyatt v. Gilmore*, 57 N.C. App. 57, 58, 290 S.E.2d 790, 791 (N.C. Ct. App. 1982) (tortfeasor is liable for any damage naturally resulting from his negligence). As such Mr.

Lyttle's FTCA claims in no way "depend on" the injuries he suffered in Central America as alleged by Defendants. (United States' Br. at 22.)

Admittedly, the foreign country exception operates in this case to bar certain types of damages that Mr. Lyttle otherwise would be entitled to recover, namely, those based solely on the additional injuries that he suffered at the hands of third parties in Central America. However, the United States' argument that § 2680(k) should limit damages to those based on injuries that Mr. Lyttle experienced "while in federal custody" is overbroad. (United States' Br. at 23.) For example, the foreign country exception does not restrict the damages that Mr. Lyttle may recover for injuries originating in the United States that caused harms which he continued to experience while in Central America. The Supreme Court has interpreted Congress's use of the phrase "arising in" in § 2680(k) to preclude jurisdiction only over claims based on injuries that *originated* in a foreign country. *See Sosa*, 542 U.S. at 704-05 (analogizing language of § 2680(k) to contemporary state "borrowing statutes" that preclude jurisdiction over causes of action that were time barred in the state "*where [the] cause of action arose, or accrued, or originated*") (emphasis in original) (internal citations omitted). As previously discussed, the injuries giving rise to Mr. Lyttle's FTCA claims originated in the United States as a result of his arrest, detention, interrogation, and expulsion. (Am. Compl. ¶¶ 148, 154-55, 161.) These injuries resulted in physical and psychological harms of an ongoing nature, among others. (*Id.*, ¶¶ 151, 157, 163-4.) The amount of recoverable damages to be proven at trial will encompass the ongoing suffering Mr. Lyttle experienced in relation to these injuries while in Central America.

An examination of the *Sosa* Court's reasoning further supports this position. While interpreting § 2680(k), the Court noted that the prevailing choice-of-law rules at the time the

FTCA was enacted required courts to apply the substantive law of "the place of injury to the substantive rights of the parties." *Id*. at 705-06 (internal quotations and citations omitted). To adjudicate FTCA claims based on injuries occasioned in foreign countries, American courts might have to apply foreign law. *Id.* The Supreme Court concluded that the legislative history of § 2680(k) demonstrates that such an application of foreign law is precisely what Congress intended the foreign country exception to avoid. *Id*. at 707-08. Mr. Lyttle's FTCA claims as described here do not raise the concerns expressed by the *Sosa* Court because the injuries themselves occurred in the United States. Thus, there is no possibility that choice-of-law rules might require the application of foreign law. Rather, the measurement of Mr. Lyttle's damages for the harms he continued to suffer in Central America will be determined in accordance with available remedies in state tort law. Thus, the *Sosa* Court's interpretation of the jurisdictional scope of § 2680(k) does not apply to limit categories of damages such as Mr. Lyttle's ongoing injuries occasioned in the United States.

CONCLUSION

For the foregoing reasons, Plaintiff Mark Daniel Lyttle respectfully submits that this Court should deny the United States' Motion to Dismiss.

Respectfully submitted this 25th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed the preceding ***Memorandum of Law in Opposition to United States' Motion to Dismiss*** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all parties of record.

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