IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Case No. 4:10-cv-142-D

MARK DANIEL LYTTLE, **Plaintiff,** **v.** **UNITED STATES OF AMERICA, et al.,** **Defendants.**	**REPLY IN SUPPORT OF ICE DEFENDANTS' MOTION TO DISMISS**

REPLY IN SUPPORT OF THE ICE DEFENDANTS' MOTION TO DISMISS

Mark Daniel Lyttle told federal immigration officials that he was a citizen of Mexico. This claim directly corroborated information gathered by state authorities, leading the ICE defendants to charge Lyttle as a removable criminal alien. In his response brief, plaintiff seeks to recant that key admission by relying upon a host of conclusory, extraneous, and unfounded accusations. But Lyttle cannot take back specific *facts* – drawn from his own Amended Complaint and other documents that *he incorporates* – showing that the ICE defendants acted reasonably under the circumstances and in conformity with case law on point. The determinative facts are simply not in dispute, and the ICE defendants are entitled to qualified immunity.

DISCUSSION

I. THIS COURT SHOULD DECLINE TO INFER A *BIVENS* REMEDY (COUNTS 1-3)

As a threshold issue, Lyttle erroneously contends that a cause of action is available under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), unless Congress "'*explicitly*'" declares the existence of an alternative remedy. Pl.'s Opp'n at 2 (quoting

Carlson v. Green, 446 U.S. 14, 18-19 (1980)). But the Supreme Court has retreated from that narrow position and, "in most instances," refuses to extend *Bivens* – looking instead to the mere *design* of a comprehensive statutory scheme. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (collecting cases); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Indeed, the Immigration and Nationality Act (the "INA") is just such a scheme: it provides numerous avenues for relief, *see* Defs.' Memo. at 8-9, but expressly excludes district court review over constitutional claims "arising from" the "commence[ment]" of removal proceedings, 8 U.S.C §1252(g); *see also* § 1252(a)(2)(D). Those are Lyttle's claims in a nutshell.

Plaintiff's reliance on certain immigration cases that have permitted *Bivens* claims is misplaced because they "focus upon the alleged violation of . . . rights that occurred incident to the administration of the removal process," not claims arising from the decision to commence removal proceedings. *Turnbull v. United States*, No. 06-cv-858, 2007 WL 2153279, at *11 (N.D. Ohio July 23, 2007).[1] But in *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1068 (N.D. Ill. 2007), *see* Pl.'s Opp'n at 5, the court declined jurisdiction over a Fourth Amendment *Bivens* claim because the challenged arrest and ensuing three-month detention were "a direct outgrowth of the decision to commence [removal] proceedings."[2] The same is true here: Lyttle was taken into federal custody and detained solely because the ICE defendants decided to initiate removal

[1] *See, e.g., Argueta v. ICE*, No. 08-1652, 2009 WL 1307236, at *16 (D.N.J. May 6, 2009), *rev'd*, 643 F.3d 60 (3d Cir. 2011) (distinguishing detention-related claims arising from the commencement of removal proceedings from detention-related claims giving rise to removal proceedings); *accord Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 124 (D. Conn. 2010); *see also Mancha v. ICE*, No. 06-cv-2650, 2009 WL 900800, at *1 (N.D. Ga. Mar. 31, 2009) (claims did not involve removal proceedings).

[2] *See also Foster v. Townsley*, 243 F.3d 210, 214-15 (5th Cir. 2001) (declining jurisdiction over excessive force, due process, and equal protection claims brought under *Bivens* because they were "all directly connected to the execution of the deportation order"); *Guardado v. United States*, 744 F. Supp. 2d 482, 488 (E.D. Va. 2010), cited in Pl.'s Opp'n at 12.

proceedings.[3] *See* FAC ¶¶ 49-52. Lyttle then had available to him the opportunity to raise his constitutional claims to Immigration Judge Cassidy (and to the Board of Immigration Appeals and the Court of Appeals), *see* 8 U.S.C. §§ 1252(a)(D) & (b)(9); thus, he could have received meaningful redress under the INA – the end to his detention and no removal to Mexico.[4]

Lyttle also claims that the ICE defendants "have not pointed to a single case holding that *Bivens* suits are per se unavailable in fields over which Congress has plenary power, because no such case exists." Pl.'s Opp'n at 7. But in *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), cited in Defs.' Memo. at 10, the Court held that *Bivens* remedies are precluded in the military context because of "Congress'[s] activity in the field" and because "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damage remedy for [constitutional] claims by military personnel;" *accord United States v. Stanley*, 483 U.S. 669, 683-84 (1987). In the immigration field, Congress has similarly created a separate administrative system for removal proceedings, expressly precluding district courts from reviewing "any" claim "arising from" the commencement of those proceedings. 8 U.S.C. § 1252(g). While Lyttle correctly recognizes that the "Courts of Appeals have taken on an

[3]Lyttle's Fifth Amendment discrimination and due process claims are similarly precluded because they involve actions that "bear[] more than a cursory relationship to the decision to commence proceedings." *Khorrami*, 493 F. Supp. 2d at 1068; *see infra, e.g.*, Section II.C.3 (comparing Counts 1 & 3). Furthermore, the fact that Lyttle is a U.S. citizen is inconsequential: the INA governs proceedings against aliens, including "an alien falsely claiming to be a U.S. citizen," Pl.'s Opp'n at 6; it also governs proceedings against *suspected* aliens, including a U.S. citizen falsely claiming to be a foreign citizen, *see* Exhs. B, D; *cf.* 8 U.S.C. § 1252(b)(5).

[4] Contrary to plaintiff's position, *see* Pl.'s Opp'n at 5, the lack of compensatory remedies under the INA makes no difference: "The question is not what remedy the court should provide for a wrong that would otherwise go unredressed." *Bush v. Lucas*, 462 U.S. 367, 388 (1983). The critical inquiry is whether "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations." *Schweiker*, 487 U.S. at 423; *see, e.g., Zimbelman v. Savage*, 228 F.3d 36, 371 (4th Cir. 2000) (declining *Bivens* remedy even though *no* relief was available) (collecting cases); *Guardado*, 744 F. Supp. 2d at 490 (no *Bivens* claim even though the INA does not provide "money damages").

increased role in this field," Pl.'s Opp'n at 9 (collecting cases), that only proves the point: *district courts* should refrain from fashioning *Bivens* remedies in cases like this one, *see* Defs.' Memo. at 8-9 (collecting cases); *see also, e.g., Guardado*, 744 F. Supp. 2d at 488, 490.

II. THE ICE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY[5]

A. Lyttle Fails To State A Clearly Established Fourth Amendment Claim (Count 3)

As a preliminary matter, the Supreme Court and Fourth Circuit have cautioned against creating a constitutional tort remedy for malicious prosecution. *See* Defs.' Memo. at 15 (collecting cases). Plaintiff does not dispute that such claims are not viable under the Constitution, *see* Pl.'s Opp'n at 13 n.10, but instead recasts his Fourth Amendment claim as one "based not on the ICE Defendants' prosecution of him pursuant to valid legal process," *id.* In fact, though, this particular claim rests on the theory that plaintiff was unreasonably detained by the ICE defendants "well beyond the scheduled release date" from state custody. FAC ¶ 141. And Lyttle's transfer to federal custody (and thus his continued detention in Georgia) occurred only because the ICE defendants *charged* him as removable alien, *commenced* removal proceedings, and served him with *legal process*. *See* FAC ¶¶ 49-52; Exhs. D-G. Count 3 is thus nothing more than a claim for malicious prosecution.[6] *See* Defs.' Memo. at 15 (collecting cases).

Regardless of whether malicious prosecution is a freestanding claim under the Fourth Amendment, the ICE defendants do not "sidestep the question of probable cause entirely" by

[5] While the ICE defendants agree that "the facts alleged in the complaint must be taken as true," Pl.'s Opp'n at 11 (citing *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007)), Lyttle conveniently ignores the heart of the Supreme Court's formulation of plausibility pleading, requiring "'factual content' demonstrating 'more than a sheer possibility' of unconstitutional conduct." Defs.' Memo at 13 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

[6] To be clear, once plaintiff was charged as a removable criminal alien, his ensuing detention in ICE custody was under lawful authority – in fact, mandated pursuant to statute. *See* Defs.' Memo. at 14 (citing 8 U.S.C § 1226(c); *Demore v. Kim*, 538 U.S. 510, 517-18 (2003)).

analyzing Count 3 in this manner. Pl.'s Opp'n at 13 n.10. To the contrary, the ICE defendants have addressed that inquiry head-on by meticulously demonstrating that Lyttle has failed to plead the absence of probable cause; indeed, the few well-pled facts (and those incorporated by reference) show the exact opposite: the existence of probable cause. *See* Defs.' Memo. at 15-23.

1. North Carolina Officials Determined That Lyttle Was A Citizen Of Mexico

It is no small acknowledgment by Lyttle that North Carolina authorities would alert federal officials to "inmates who they '*believed* to be foreign born and non-US citizens.'" Pl.'s Opp'n at 14 n.11 (quoting FAC ¶ 29). That's exactly what happened in this case: NCDOC noted on plaintiff's "intake form" that he was an "alien" born in "Mexico." FAC ¶¶ 32-33. They subsequently "notified" ICE of this finding. *Id.* ¶ 36. Without citing a case, however, plaintiff contends that the alienage data recorded on his "booking sheet d[id] not establish probable cause to arrest and detain Mr. Lyttle." Pl.'s Opp'n at 14 n.11. But Lyttle overlooks the crucial fact that ICE may establish alienage "based on 'routine booking information' gathered by local law enforcement officials." Defs.' Memo. at 16 (quoting *Puc-Ruiz v. Holder*, 629 F.3d 771, 781 (8th Cir. 2010)); *see also United States. v. Gomez*, No. H-06-00176, 2006 WL 2248455, at *5 (S.D. Tex. Aug. 4 2006) (alienage may be ascertained from biographical data on a booking sheet "lawfully and independently" of questioning by ICE officials); *cf. United States v. Figueroa*, No. 99-6180, 2000 WL 963346, at *5 n.4 & *6 (10th Cir. July 12, 2000). The ICE defendants reasonably relied on Lyttle's criminal booking form to help establish his country of citizenship.

2. Lyttle Told Faucette That He Was Not A United States Citizen

At a minimum, Lyttle concedes that "the booking sheet provided ICE with sufficient cause to investigate Mr. Lyttle's citizenship status." Pl.'s Opp'n at 14 n.11. And that follow-up investigation provided the critical corroborating evidence: Lyttle's sworn admission of Mexican

alienage that directly matched the information on his booking sheet. *See* Exh. B. Because courts look to these admissions as proof of alienage, Lyttle's sworn statement was more than sufficient for purposes of probable cause. *See* Defs.' Memo. at 17 and 20 n.12 (collecting cases).[7]

Lyttle attempts to escape the significance of his own corroborating admission by challenging its reliability, asserting that he was "'coerced and manipulated'" into signing the sworn statement. Pl.'s Opp'n at 16 (quoting FAC ¶ 54). In short, Lyttle claims that Faucette doctored his sworn statement by recording erroneous admissions and forcing plaintiff to sign it even though he could not read or understand the form. *See id.* Although plaintiff "does not dispute that 'coercion' is a legal conclusion," *id.*, he nevertheless looks to five paragraphs in the complaint as "factual" support for this baseless claim, *id.* (citing FAC ¶¶ 40, 45, 54, 56, 59). A closer examination of those allegations shows otherwise.

First, these particular allegations do not adequately show that Faucette (or any ICE defendant) actually *knew* of plaintiff's purported cognitive impairments. *See* FAC ¶ 40 ("Faucette was aware that Mr. Lyttle was cognitively impaired and that he had, among other things, bipolar disorder."); *id.* ¶ 54 (alleging that Faucette "coerced and manipulated" Lyttle into signing the statement notwithstanding "his serious and acknowledged mental disabilities"); *id.* ¶ 59 (plaintiff suffered from "obvious cognitive and developmental limitations" and could not "comprehend" the documents). Rather, these statements are strikingly similar to the conclusory allegations rejected by the Supreme Court in *Iqbal*, 129 S. Ct. at 1951 (rejecting bare allegations

[7] Plaintiff's effort to distinguish these cases because they did not involve "the mix of "mental disability, coercion, and facial unreliability" is misleading, Pl.'s Opp'n at 15 n.13, because Lyttle himself fails to sufficiently allege that he was coerced. Absent coercion, plaintiff does not dispute that it would be reasonable for the ICE defendants to rely on his sworn statement to establish probable cause; in fact, his own case law supports this point. *See United States v. Torres-Lona*, 491 F.3d 750, 756 (8th Cir. 2007) (finding that appellee's statements of Mexican birth "might be taken as an admission that he was an undocumented alien . . . . [and] a reasonable person could have concluded that it was probable that [appellee] had unlawfully entered the country") (cited in Pl.'s Opp'n at 11.)

that petitioners "*knew of*, condoned, and willfully and maliciously agreed to subject" respondents to unconstitutional policies, because they were "conclusory and not entitled to be assumed true") (emphasis added). At most, Faucette knew of Lyttle's bipolar diagnosis (as reflected in her handwritten notes from the interview), *see* Defs.' Memo. at 19 (citing FAC ¶ 46; Exh. C), but that diagnosis alone did not call into doubt plaintiff's cognitive functioning or his ability to answer basic questions about his name, place of birth, and country of citizenship, *see id.* (collecting authorities). In fact, plaintiff never disputes that a bipolar diagnosis, by itself, is not an indicator of cognitive impairment. *See* Pl.'s Opp'n 11-18. And without knowledge of plaintiff's purported inability to comprehend the questions he was asked, there would have been no need for the ICE defendants to further assist Lyttle in doing so.[8]

Plaintiff also underestimates the importance of his criminal sentencing just three weeks prior to the time that he gave his sworn statement. *See* Pl.'s Opp'n at 16 n.14. Even if competency to undergo criminal proceedings may in some situations depend upon the presence of counsel, *see* Pl.'s Opp'n at 16-17 n.14 (discussing *Indiana v. Edwards*, 554 U.S. 164, 175 (2008)), Lyttle was required to possess, at a minimum, a reasonable level of rational competency. *See* Defs.' Memo. at 21 (collecting authorities). Thus, it was reasonable for the ICE defendants to presume that plaintiff would be capable of answering basic biographical questions. *See id.*

At any rate, Lyttle has no answer at all for the criminal court's specific finding that he did not need "[p]sychiatric and/or psychological counseling." Exh. A. And assuming the trial court misjudged Lyttle's mental condition – which plaintiff neither alleges nor argues – it would be

[8] At worst, Faucette's failure to adequately evaluate Lyttle's alleged mental incapacity was negligent conduct, which would not give rise to a constitutional tort. *See infra* Section II.B.2. Yet, as shown in detail, there was simply no reason for the ICE defendants to question Lyttle's competency. Accordingly, plaintiff's reliance on federal regulations governing the procedures for mentally incompetent individuals is misguided, *see* Pl.'s Opp'n at 15 n.12 (quoting 8 C.F.R. § 1240.10(c)), and his reliance on case law discussing the rights of mentally incompetent persons is equally misplaced, *see id.* at 14 (collecting cases).

unjust to hold the ICE defendants liable for similarly overestimating his ability to understand basic biographical questions. Absent *facts* that the ICE defendants actually knew Lyttle was unable to answer such questions, he has failed to show that they "coerced" him into signing a document that he did not understand. *See Monroe v. City of Charlottesville*, 579 F.3d 380, 387 (4th Cir. 2009) (discrediting allegations that were conclusory, irrelevant, or implausible), *cert. denied*, 130 S. Ct. 1740 (2010).

As a final matter, plaintiff challenges the reliability of his sworn statement on grounds that he signed the form with the name "Mark Lyttle" instead of "Jose Thomas." Pl.'s Opp'n at 14; *see* FAC ¶¶ 45, 56. But plaintiff's sworn statement affirms, in three locations, his use of two names – Jose Thomas *and* Mark Daniel Lyttle. *See* Exh B. The fact that he signed the form with one name instead of the other is trivial. The fact that he actually *signed* the form is not.

3. Lyttle Admitted The Charges In The Notice Of Intent

After Lyttle verified in his sworn statement that he was citizen of Mexico, he admitted yet again to being an alien when he signed the Notice of Intent and agreed to be removed. Exh. D. But in an effort to minimize the impact of this second corroborating admission, Lyttle similarly argues that the ICE defendants were "aware of [his] mental disability [and] forced him to sign a form he did not understand." Pl.'s Opp'n at 16 (citing FAC ¶¶ 54, 56). Once more, the conclusory allegations he looks to in the complaint do not add up.

Plaintiff attempts to show coercion by alleging that the ICE defendants knew of his "acknowledged" mental impairments. FAC ¶ 54. But the facts merely allege knowledge of his bipolar diagnosis alone – nothing more. *See* Defs.' Memo. at 19. And when challenged by the ICE defendants to "specify even one medical or criminal record" to show his incapacity, Defs.' Memo. at 20-21 (citing FAC ¶ 93), plaintiff fails to identify a single record, *see* Pl.'s Opp'n at

11-18. That is because Lyttle's records revealed the opposite – competency to undergo legal proceedings and a court's decision against psychiatric treatment. *See supra* Section II.A.2.

Notwithstanding plaintiff's booking sheet, sworn statement, waiver of rights, and criminal history, plaintiff argues that the ICE defendants "ignore[d] affirmative evidence" of his citizenship, including "computerized database searches" that "revealed that he was a U.S. citizen."[9] Pl's Opp'n at 17 (citing FAC ¶ 47). Granting the assumption, however, that the ICE defendants discovered inconsistent information regarding his citizenship, they still would have retained *arguable* probable cause to charge and detain plaintiff, *see* Defs.' Memo. at 22-23 (qualified immunity does not require actual probable cause), until a deciding immigration officer or an immigration judge evaluated the evidence and made a final decision on his removability, *see* 8 C.F.R. §§ 238.1(d) & (e). And Lyttle's claim that he "repeatedly told" the ICE defendants he was a U.S. citizen, *see* Pl.'s Opp'n at 17 (citing FAC ¶ 60), is similarly at odds with both his sworn statement and the Notice of Intent, thus failing to negate the existence of arguable probable cause, *see* Defs.' Memo. at 23 n.13.[10] Accordingly, even if this Court finds that the

[9] It is not clear that the ICE defendants even *knew* about these indicia of citizenship. Indeed, Lyttle merely pleads that the records searches "revealed" possible indications of his American citizenship – not that the ICE defendants actually came across these so-called indicators. "[M]ore likely," *Iqbal*, 129 S. Ct. at 1950, the records-searcher (who Lyttle fails to specifically identify, *see* FAC ¶¶ 47-48) examined Lyttle's criminal records for the sole reason of determining another critical factor: whether plaintiff qualified as an *aggravated felon* for purposes of administrative removal under 8 U.S.C. § 1226(c).

[10] Moreover, the ICE defendants were not obligated to conclusively determine plaintiff's alienage at this initial stage. *See Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (explaining that probable cause "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt"); *see also* Pl.'s Opp'n at 12 (citing *Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996) ("Probable cause must be supported by more than a mere suspicion, but evidence sufficient to convict is not required."). That task was for a final decision-maker (in this case, the immigration judge). Plaintiff's own case law supports this point. *See* Pl.'s Opp'n at 18 (quoting *U.S. ex rel. Leong v. O'Rourke*, 125 F. Supp. 769, 770-75 (W.D. Mo. 1954) (finding that petitioner was a U.S. citizen after making

combination of inculpatory and exculpatory facts did not actually rise to the level of probable cause, the ICE defendants should "not [be] denied qualified immunity for making a mistake, as long as that mistake [wa]s reasonable under the circumstances." *Smith v. Reddy*, 101 F.3d 351, 356 (4th Cir 1996). Indeed, Lyttle tacitly concedes that the ICE defendants are not required to demonstrate the existence of actual probable cause to secure qualified immunity. *See* Pl.'s Opp'n Section II.A. He also cites no case demonstrating that officials who rely on a booking sheet and multiple admissions, despite conflicting indications of citizenship, lack probable cause to initiate removal proceedings. *See id.* To the contrary, the ICE defendants have shown that booking sheets and admissions may, on their own and collectively, provide a reasonable basis to do so. *See* Defs.' Memo. at 16-17 (collecting cases).[11] Count 3 should be dismissed.

B. <u>Plaintiff Fails to State A Clearly Established Equal Protection Claim (Count 2)</u>

1. Lyttle Does Not Plead The Existence of Discriminatory Policies

Lyttle's conclusory claim that the Line-level ICE defendants acted "pursuant to policies, patterns, practices, or customs" to "detain, interrogate and deport [inmates] based on their race or ethnicity," FAC ¶ 87, is the exact type of allegation that the Supreme Court rejected in *Iqbal*. *See* Defs.' Memo. at 23-24. But when challenged to identify even one discriminatory policy alleged in the complaint, *see id.* at 24, Lyttle cites – "first and foremost" – the Hayes Memo: "That the Hayes Memo was issued at all is an indictment of the policies[,] patterns, practices and customs of ICE." Pl.'s Opp'n at 20. Because plaintiff cannot identify any specific policy

---

evidentiary and credibility determinations, but not finding that the government's decision to seek removal was made without probable cause).

[11] In *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001), the court held that a *U.S. citizen's* repeated "admissions" of alienage could be used to establish alienage, even though it was *known* that he "repeatedly lied, both under oath and not under oath, in his various immigration and deportation proceedings." Although Lyttle was, at most, known to be bipolar, he was not known to be a "*proven* liar" when claiming to be from Mexico. *Id.* (emphasis added).

causing the alleged discrimination in this case, he resorts to a memo with numerous *safeguards* issued *after* the events in North Carolina as a means to conclude that the policies previously in place were inadequate under the Fifth Amendment. *See* Defs.' Memo. at 24 and 24 n.14. This is wrong as a matter of logic, law, and the facts. Not only would evidence of remedial measures be inadmissible to show "culpable conduct," Fed. R. Evid. 407 (*see also* advisory committee's note), but the Memo does not even hint that the earlier policies were unconstitutional. Exh. H.

Although plaintiff cannot point to a single discriminatory policy, practice, or regulation, he then attempts to infer their existence by pointing to the isolated "conduct of the ICE Defendants." Pl.'s Opp'n at 20. But the alleged actions of a few individuals also say nothing about the existence of specific agency policies, and an examination of the ICE defendants' conduct actually shows that they acted lawfully. First, the allegation that Faucette "failed and refused to have a witness present" during Lyttle's interview, Pl.'s Opp'n at 20; FAC ¶ 44, does not show discriminatory behavior or any wrongful conduct, because plaintiff ignores the fact that the person signing the form was "willing to make a statement without anyone else being present." Exh. B; Defs.' Memo at 18. Lyttle then blindly repeats the allegation that he was not given the "opportunity to review the contents" of the sworn statement. Pl.'s Opp'n at 20; FAC ¶ 44, 45. But this overlooks the fact that the affidavit included specific language, *directly above plaintiff's signature*, that the signer has "read (or ha[s] had read to me) the foregoing statement" and "affirm[s] that the answers attributed to me herein are true and correct to the best of my knowledge and belief . . . ." Exh. B; Defs.' Memo at 18 n.10.[12] And the fact the plaintiff signed

[12] As the ICE defendants also explained, allegations that Lyttle gave his sworn statement without a witness and the opportunity to review it would still not show that Faucette coerced Lyttle to sign and approve the contents of the sworn statement by means of physical force or verbal threats. Defs.' Memo at 18 n.10. Nor would a departure from internal guidelines demonstrate that Lyttle was singled out solely because of his race. *See id.* (citing *Davis v. Scherer*, 468 U.S. 183, 194-196 & n.12 (1984)). Plaintiff tacitly concedes both points.

the form with "Mark Lyttle" instead of "Jose Thomas," *see* Pl.'s Opp'n at 20 (citing FAC ¶ 45), is yet another red herring. *See supra* Section II.A.2. As a final matter, Lyttle's suggestion that the ICE defendants discriminated by initiating removal proceedings with "no reasonable basis to conclude" that he was an alien, Pl.'s Opp'n at 20-21, belies the facts contained in the booking sheet, sworn statement, and Notice of Intent. *See supra* Section II.A.

2. Plaintiff Does Not Plead A Discriminatory Purpose

Lyttle then attempts to show that the ICE defendants acted with racial animus by arguing that his Hispanic appearance was "[t]he only factor that [wa]s even remotely relevant" to the ICE defendants' "erroneous identification" of plaintiff as an alien. Pl.'s Opp'n at 21. This is patently false. First, NCDOC originally identified Lyttle as an alien from Mexico – not ICE. FAC ¶¶ 30, 32-33, 36. Second, Lyttle told Faucette that he was an alien. *See id.* ¶¶ 41, 43; Exh. B. Third, plaintiff agreed to removal. *See* FAC ¶ 54; Exh. D. Moreover, the ICE defendants did not have "reason to question Mr. Lyttle's mental competence," Pl.'s Opp'n at 21, given their limited knowledge of plaintiff's bipolar diagnosis, his ability to stand trial, and a judge's order against psychiatric treatment, *see supra* Section II.A. At most, plaintiff implies that the ICE defendants were negligent in assessing his competency, but that would not give rise to a *Bivens* claim. *See* Defs.' Memo. at 25 (collecting cases).

Although further claiming that the ICE defendants "paid lip service to protocol" by disregarding the results of records searches revealing indicia of his U.S. citizenship, Pl.'s Opp'n at 21, plaintiff fails to allege a single protocol that was violated, *id.*, and fails to allege whether the records-searcher actually became *aware* of that information, *see* FAC ¶¶ 47-48. Even if the ICE defendants did come across conflicting information, however, it is misleading to say that they "ignored voluminous and *consistent* evidence of Mr. Lyttle's citizenship." Pl.'s Opp'n at 22

(emphasis added). Rather, the booking sheet and plaintiff's own admissions were compelling evidence of his alienage, and the "failure to adequately examine" records or to perform a "diligent inquiry," FAC ¶¶ 91, 94, does not prove a discriminatory purpose. Because the "'obvious alternative explanation'" for the ICE defendants' conduct was a nondiscriminatory decision to charge plaintiff based on probable cause, Count 2 should be dismissed. *Iqbal*, 129 S. Ct. at 1951 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

C. Plaintiff Fails To State A Clearly Established Due Process Claim (Count 1)

1. The ICE Defendants Did Not Deport Lyttle

By failing to address it, plaintiff concedes that his first stated theory of liability under the Due Process Clause fails. *See* Defs.' Memo. at II.C.1 (discussing FAC ¶ 127). The ICE defendants in this case simply charged Lyttle – they did not decide his case or deport him.

2. The ICE Defendants Did Not Coerce Lyttle

Lyttle's second theory of liability fares no better. *See See* Defs.' Memo. at II.C.2 (discussing FAC ¶ 128). Beyond restating the conclusory allegations that the ICE defendants "manipulated," "coerced," and "intimidate[ed]" Lyttle, and then "willfully disregarded and/or covered up" his mental disabilities, plaintiff offers no new insight to link any factual allegations in the complaint to these bare conclusions.[13] Pl.'s Opp'n at 23. Although plaintiff baldly claims that the ICE defendants were "fully aware" of his "significant mental disabilities," Pl.'s Opp'n at 24, the facts in the complaint demonstrate only their limited knowledge of Lyttle's bipolar diagnosis (as documented in Faucette's handwritten notes), *see* Defs.' Memo. at 28. Indeed, plaintiff is entirely unresponsive to the argument that the complaint fails to allege – with any

[13] Likewise, plaintiff's generalization that the ICE defendants "conspired" with NCDOC to deport a "known" U.S. citizen is not supported by a single factual allegation in the complaint. *See* Pl.'s Opp'n at 23 (citing no allegations). Rather, NCDOC identified Lyttle as a possible alien and merely notified ICE of that finding. FAC ¶¶ 29-37.

plausibility – that the ICE defendants were actually aware of his purported mental impairment. *See id.* And the fact that Lyttle was competent to undergo criminal proceedings – not to mention the judge's decision against psychiatric treatment – further belies the bare allegation that he could not understand basic questions.[14] Finally, plaintiff ignores the fact that Faucette documented Lyttle's bipolar diagnosis, FAC ¶ 46, which undermines the bald claim that she was "disregarding" or "covering up" his known mental conditions.[15] *See* Defs.' Memo. at 28.

3. Lyttle's Due Process Claim Replicates His Fourth Amendment Claim

Although the complaint states that the ICE defendants "caused [Lyttle] to be deported without reasonable basis or lawful authority," FAC ¶ 129, plaintiff now argues that this claim is "separate and distinct" from the Fourth Amendment claim, Pl.'s Opp'n at 25. But the ICE defendants "caused" his deportation only in the sense that they charged him as a removable alien based on the booking sheet and his own admissions of foreign citizenship. Thus, Count 1 should be dismissed for the same reasons that his Fourth Amendment claim fails. *See* Defs.' Memo. at 29; *supra* Section II.A.

Plaintiff also contends that "deporting a U.S. citizen is a deprivation of liberty in violation of the Fifth Amendment." Pl.'s Opp'n at 22 (citing *e.g.*, *Ho v. White*, 259 U.S. 276,

[14] Plaintiff also agrees that "a deficient mental condition is not enough, without more, to render a waiver involuntary" under the Due Process Clause. Pl.'s Opp'n at 24 (discussing *United States v. Cristobal*, 293 F.3d 134, 140-41 (4th Cir. 2002)). He suggests, however, that the ICE defendants exploited his bipolar condition by interviewing him without a witness present and failing to provide him the opportunity to review the content of his statement. *Id.* These allegations are contradicted by the documents themselves. *See infra* Section II.B.1. (citing Exh. B). Even if these allegations were true, they fall short of the physical force or verbal threats that are typical of coercion. *See Cristobol*, 293 F.3d at 140 (describing coercive tactics).

[15] The ICE defendants also did not violate protocol by allegedly failing to "provide a copy" of the sworn statement to Lyttle, *see* Pl.'s Opp'n at 23 (citing FAC ¶¶ 44-45), because plaintiff does not plead that this form was "filed with or presented to the Immigration Judge," as required under 8 C.F.R. § 1003.32(a). *See* FAC ¶¶ 44-45. Immigration officials in Georgia would have filed the form with the immigration court – not the ICE defendants here.

284-85 (1922)). This generalization understates the specific inquiry in this case, *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (constitutional question must be particularized), and is misplaced because the ICE defendants did not make the decision to deport Lyttle. Rather, they charged Lyttle based on probable cause – i.e., "reasonable basis or lawful authority" – that he was a criminal alien. Count 1 merely duplicates his malicious prosecution claim (Count 3).[16]

D. Plaintiff Has Not Alleged A Violation Of Clearly Established Law (Counts 1-3)

Although plaintiff favors the Ninth Circuit's interpretation of the qualified immunity doctrine, *see* Pl.'s Opp'n at 25 (quoting *al-Kidd v. Ashcroft*, 580 F.3d 949, 970 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011)), the Supreme Court recently reaffirmed that officials have "'breathing room to make reasonable but mistaken judgments about open legal questions,'" Defs.' Memo. at 30 (quoting *al-Kidd*, 131 S. Ct. at 2085). Even if the ICE defendants misjudged Lyttle's mental capacity (given, in part, the facts surrounding Lyttle's criminal sentencing) or failed to properly weigh conflicting evidence (given the presumptions afforded admissions of alienage), it simply cannot be said that the ICE defendants were "'plainly incompetent'" or that they "'knowingly violate[d] the law.'" *al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Smith*, 101 F.3d at 355-56.

CONCLUSION

For the foregoing reasons, the Court should grant the ICE defendants' motion to dismiss.

[16] Plaintiff also claims for the first time "that the detention of Mr. Lyttle for two days without any opportunity for a hearing establishes a separate and distinct violation of the Due Process Clause." Pl.'s Opp'n at 25. He cites no facts, offers no legal argument, and gives no context for this novel claim. *See id.* Nevertheless, because the ICE defendants charged plaintiff based on probable cause that he was removable, Lyttle was "not constitutionally entitled to a separate judicial determination that there [wa]s probable cause to detain him pending [removal proceedings]." *Baker v. McCollan*, 443 U.S. 137, 143 (1979). Once charged, his detention was "mandate[d]" until a final decision on his removability. *See Demore*, 538 U.S. at 517-18 (2003).

Respectfully submitted,

TONY WEST
Assistant Attorney General, Civil Division

C. SALVATORE D'ALESSIO, JR.
Acting Director, Torts Branch

JAMES R. WHITMAN
Trial Attorney, Torts Branch

/s/ David G. Cutler
DAVID G. CUTLER
IL Bar No. 6303130
Trial Attorney
United States Department of Justice
Torts Branch, Civil Division
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044-7146
Tel: (202) 616-0674
Fax: (202) 616-4314
E-mail:david.g.cutler@usdoj.gov

GEORGE E.B. HOLDING
United States Attorney

W. ELLIS BOYLE
Assistant United States Attorney
Civil Division
310 New Bern Avenue
Suite 800 Federal Building
Raleigh, N.C. 27601-1461
Tel: (9l9) 856-4530
Fax: (919) 856-4821
E-mail: ellis.boyle@usdoj.gov
N.C. Bar No. 33826

Attorneys for Dashanta Faucette, Dean Caputo, and Robert Kendall

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on August 17, 2011, I electronically filed the foregoing "Reply in Support of the ICE Defendants' Motion to Dismiss" using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

COUNSEL FOR PLAINTIFF:

Jeremy L. McKinney
jeremy@mckinneyandjustice.com

Ann Marie Dooley
annmarie@mckinneyandjustice.com

Michael E. Johnson
michael.johnson@troutmansanders.com

Brian P. Watt
brian.watt@troutmansanders.com

Alexandria J. Reyes
alex.reyes@troutmansanders.com

Katherine L. Parker
acluncklp@nc.rr.com

Judy Rabinovitz
jrabinovitz@aclu.org

COUNSEL FOR DEFENDANT NORTH CAROLINA DEPARTMENT OF CORRECTION:

Joseph Finarelli
jfinarelli@ncdoj.gov

/s/ David G. Cutler
DAVID G. CUTLER
IL Bar No. 6303130
Trial Attorney
United States Department of Justice
Torts Branch, Civil Division
P.O. Box 7146, Ben Franklin Station
Washington, D.C. 20044-7146
Tel: (202) 616-0674
Fax: (202) 616-4314
E-mail:david.g.cutler@usdoj.gov