2013

Richard Ortega, Plaintiff-Appellant, v. United States Immigration and Customs Enforcement, et al., Defendants-Appellants: Brief of Appellant

Patricia E. Roberts
William & Mary Law School, perobe@wm.edu

Tillman J. Breckenridge

Alison R.W. Toepp

No. 12-6608

IN THE

United States Court of Appeals for the Sixth Circuit

RICHARD ORTEGA,

Plaintiff-Appellant,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, et al.,

Defendants-Appellants.

On Appeal from the United States District Court,
Western District of Kentucky
Case No. 3:11-cv-00429-JGH

BRIEF OF APPELLANT

Patricia E. Roberts
WILLIAM & MARY LAW SCHOOL
P.O. Box 8795
Williamsburg, VA 23187
(757) 221-3821
perobe@wm.edu

Tillman J. Breckenridge
Alison R.W. Toepp
REED SMITH LLP
1301 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 414-9200
tbreckenridge@reedsmith.com

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Counsel for Appellant

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-6608 Case Name: Richard Ortega v. United States Immigration and, et al

Name of counsel: Tillman J. Breckenridge

Pursuant to 6th Cir. R. 26.1, Richard Ortega
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No; Richard Ortega is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No; there is not a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

CERTIFICATE OF SERVICE

I certify that on January 4, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tillman J. Breckenridge

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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REQUEST FOR ORAL ARGUMENT

Pursuant to 6th Cir. R. 28(b)(1)(B) and 6th Cir. R. 34(a), Ortega hereby requests that this court schedule oral argument. Richard Ortega, a third-generation American Citizen and Texas native, was taken from home confinement and put in jail because (1) United States Immigrations and Customs Enforcement issued an immigration detainer against him based solely on the fact that his name and birthdate *resembled* those of someone already deported, and (2) local authorities then seized Ortega without any process—rebuking Ortega's offer to provide his birth certificate and social security card—and put him in jail.

The district court dismissed this civil action against the ICE agent, state actors responsible, and other defendants *on the pleadings and with no evidence*, ruling that the defendants were entitled to qualified immunity. In that circumstance, dismissal is only appropriate if it is clear on the face of the complaint that there is no factual scenario under which the plaintiff can prove a clearly established right was violated. But the U.S. Supreme Court has ruled that parole or parole-like custody is so unlike institutional confinement, that there is a liberty interest in remaining outside of prison walls. Five circuits have recognized that liberty interest in the home incarceration context or substantially similar circumstances. Ortega's right not to be taken to jail was clearly established, and oral argument will aid the Court in resolving the issues in this appeal.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 because Richard Ortega's complaint asserted claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court granted defendants John Morton's, Richard Wong's, and United States Immigration and Customs Enforcement's motion to dismiss on April 27, 2012. Opinion and Order, 29R181-88.[1] The district court granted defendants John T. Cloyd's, Mark Bolton's, William Skaggs', Lori Eppler's, and Louisville/Jefferson County Metro Government's motions to dismiss on November 16, 2012. Opinion and Order, 48R336-44. The district court's November 16, 2012 order resolved all claims against all remaining parties and was thus final. Ortega filed a timely notice of appeal on December 17, 2012. Notice of Appeal, 49R345-47. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether defendants Mark Bolton, William Skaggs, Lori Eppler, and Louisville/Jefferson County Metro Government (collectively, "Metro Defendants") violated Ortega's clearly established rights to be free from unreasonable seizure and to be afforded due process of law when Metro Defendants seized Ortega from his home without a warrant and without probable cause, thereby removing him

[1] Citations to the record in this brief are indicated in the form of [district court docket number]R[district court docket "PageID" number].

from the Home Incarceration Program without providing notice and opportunity to be heard.

2. Whether Federal Defendant Cloyd violated Ortega's clearly established right to be free from unreasonable seizures and to be afforded due process upon revocation of a liberty interest when Cloyd caused Ortega to be seized from his home by issuing an unlawful ICE detainer purportedly based on Ortega having a similar, but not identical, name and birth date to an illegal alien.

STATEMENT OF THE CASE

Richard Ortega filed this action on August 3, 2011, asserting claims against federal and state actors based on his indisputably unlawful detention. Complaint, 1R1-12. On January 24, 2012, defendants ICE, John Morton, Richard Wong and Unknown Agents & Employees In The Employ of ICE (collectively, "Federal Defendants") filed a motion to dismiss, under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, contending *inter alia* that Ortega's claims were barred by sovereign and qualified immunities. Motion to Dismiss, 17R80-82; Memorandum in Support, 17-1R83-91. On April 27, 2012, the district court granted dismissal of Ortega's claims against the named Federal Defendants, and denied dismissal of Ortega's claims against the unnamed Federal Defendants. Opinion and Order, 29R181-88.

On May 17, 2012, Ortega filed his amended complaint, which was further amended on May 29, 2012. The remaining Federal Defendants again moved to dismiss the action, arguing that Ortega did not state a claim in his amended complaint, and that, in any event, these defendants were shielded from Ortega's claims because of purported qualified immunity. Motion to Dismiss, 42R267-69; Memorandum in Support, 42-1R270-78. At the same time, Metro Defendants Mark Bolton, William Skaggs, Lori Eppler, and Louisville/Jefferson County Metro Government moved to dismiss Ortega's claims against them under Rules 12(b)(1) and 12(b)(6), arguing *inter alia* that they were protected from liability because of qualified immunity. Motion to Dismiss, 40R251-52; Memorandum in Support, 40-1R253-60. On November 16, 2012, the district court granted these motions and dismissed all of Ortega's remaining claims with prejudice. Opinion and Order, 48R336-44. Ortega timely noticed this appeal. Notice of Appeal, 49R345.

STATEMENT OF FACTS

A. Ortega Is Placed in Home Incarceration.

Richard Ortega is a third-generation, American-born United States citizen. Second Amended Complaint, 38R233; Response to Motion to Dismiss, 43R280. He possesses a valid U.S. birth certificate and social security card, and has held employment with a national company for years working as an information technology professional.

In 2010, Ortega was arrested for driving under the influence. Ortega retained counsel and entered a guilty plea to the first-offender charge in March 2011. Opinion and Order, 48R337. Under his plea agreement, Ortega was sentenced to fourteen days in the Jefferson County (Kentucky) Jail. Commitment Order, 39-1R246. The totality of Ortega's sentence—reduced to 11 days due to a three-day credit he received as part of his plea—was to be served under home incarceration. Response to Motion to Dismiss, 43R280; Home Incarceration Order, 43-1R295-96. Ortega began his period home incarceration on March 18, 2011 under the supervision of the Department of Corrections, pursuant to the agreed order entered by the state court. Opinion and Order, 48R337. As part of his placement on home confinement, Ortega was permitted to go to work and regularly scheduled religious services. Home Incarceration Order, 43-1R295.

B. ICE Agent Cloyed Erroneously Issues an Illegal Alien Detainer.

John T. Cloyd, an ICE agent, erroneously issued an illegal alien detainer for Ortega (the "detainer"). Second Amended Complaint, 38R235. Cloyd purportedly issued this detainer merely because Ortega's name and birth date are similar to, but not identical to, the name and birth date belonging to a third-party alien. *Id.* Cloyd knew of the discrepancies but purposefully disregarded them when issuing the detainer for Ortega. *Id.*

C. Ortega Is Seized from His Home.

According to statements made to the media, Cloyd's issuance of the detainer triggered the Louisville Metro Department of Corrections' ("Corrections") longstanding policy to seize and incarcerate any individual currently subject to an ICE-issued detainer. Second Amended Complaint, 38R235. Consistent with that policy, the following day, Saturday March 19, 2011, having received Cloyd's detainer, corrections officers Lori Eppler and William Skaggs (the "Officers"), went to Ortega's home, handcuffed him, and took him to jail. *Id*.

When the Officers arrived at Ortega's residence, not Eppler, nor Skaggs, nor any other Corrections employee investigated Ortega's status as a United States citizen, or attempted to ascertain whether the detainer was valid before Eppler and Skaggs seized Ortega from his home. Opinion and Order, 48R340, 342. The Officers informed Ortega that they were detaining him because ICE had issued an illegal alien detainer for Ortega. Ortega was not wearing shoes and did not have his wallet on his person. The Officers permitted Ortega to retrieve his shoes before they took him into custody. However, the Officers refused Ortega's requests that he be allowed to produce his social security card, birth certificate or other identifying information that would have proven that the detainer was improperly issued. Instead, the Officers seized Ortega without a warrant and took him to jail. Second Amended Complaint, 38R234-35; Opinion and Order, 48R337.

Corrections placed Ortega in a group holding cell for four days after being seized from his home. Second Amended Complaint, 38R235. Ortega was released from the holding cell only once a judge ordered his release on March 23, 2011. Release Order, 39-2R247.

D. Procedural History.

Ortega initiated this action against two groups of defendants. One group, referred to collectively as the Federal Defendants, includes: ICE, ICE personnel John Morton and Richard Wong, and unnamed ICE agents. Complaint, 1R2-3. The second group, collectively referred to as the Metro Defendants, includes: Louisville/Jefferson County Metro Government, as operator of Metro Corrections; Mark Bolton; Lori Eppler; and Williams Skaggs. *Id*.

The Complaint alleged that the Federal Defendants (1) unlawfully caused Ortega's seizure in violation of his Fourth Amendment rights and (2) deprived Ortega of his liberty without due process of law required by the Fifth Amendment. Complaint, *Id*., at 6-10. It further alleges that the Metro Defendants (1) unreasonably seized Ortega from his home in violation of the Fourth Amendment, (2) imposed cruel and unusual punishment in violation of the Eighth Amendment, (3) violated Fourteenth Amendment due process protections, and (4) violated Fourteenth Amendment equal protection. *Id*.

The Federal Defendants moved to dismiss the original complaint based on their arguments that Ortega failed to state a claim against them and because the district court lacked subject matter jurisdiction to hear Ortega's claims. Although the district court held that the ICE-issued detainer was both a but-for and a proximate cause of Eppler's and Skaggs's seizure of Ortega from his home, it partially granted the Federal Defendants' motion and dismissed Ortega's claims against ICE, John Morton, and Richard Wong. Opinion and Order, 29R181-88. The district court further ordered discovery to reveal which ICE Agents had knowledge of or information about the ICE-issued detainer. *Id.*, at 188.

After some discovery, Ortega filed the Amended Complaint and the Second Amended Complaint to, among other things, add John T. Cloyd as a defendant. All remaining defendants then filed motions to dismiss. Metro Defendants argued that Ortega failed to state a claim upon which relief could be granted because Ortega's conditions of confinement had not changed by taking him out of the Home Incarceration Program and putting him in jail. Memorandum in Support of Motion to Dismiss, 40-1R255. They further claimed that they were entitled to qualified immunity. *Id*., at 256. Similarly, the Federal Defendants disavowed any responsibility for Ortega being taken to jail. Memorandum in Support of Motion to Dismiss, 42-1R271. In their motion to dismiss, they asserted that Cloyd's issuance of the indisputably illegal detainer did not deprive Ortega of any

constitutional rights. *Id*., at 275. They further argued that they were entitled to qualified immunity. *Id*.

The district court granted both motions to dismiss. Opinion and Order, 48R336-44. With respect to the Metro Defendants, the court ruled that removing Ortega from his home and placing him in jail was reasonable in light of the detainer, and thus the Metro Defendants were entitled to qualified immunity against Ortega's Fourth Amendment and due process claims. *Id*., at 340-42. The court further ruled that Ortega had failed to plausibly allege his equal protection and Eighth Amendment claims. With respect to Cloyd, the court ruled that he was also entitled to qualified immunity, on a theory not raised by either party or supported by evidence in any way that "[i]t is entirely plausible that ICE Agent Cloyd was unaware that he was issuing an unlawful detainer and thus could not have known that he violated Ortega's 'clearly established' right." *Id*., at 343. This appeal followed. Notice of Appeal, 49R345-47.

SUMMARY OF ARGUMENT

A third-generation American citizen, Richard Ortega—a Texan by birth—was subjected to unlawful treatment by both state and federal actors merely because his name and birth date purportedly resembled the name and birthdate of another person who had been deported. At this stage, Ortega cannot know how similar those names and birthdates were. Nor can he even see the detainer that was

issued against him. Before full discovery was taken, and without any evidentiary support, the district court dismissed this action after finding that the defendants were entitled to qualified immunity based solely on the allegations in the complaint. That was error.

United States citizens enjoy a clearly established right to their liberty unless, through due process of law, that liberty is rightfully taken. They further enjoy a clearly established right not to be seized unreasonably and without a warrant. Both clearly established rights were violated here. Moreover, it was clearly established that, at least once enrolled, Ortega had a liberty interest in *remaining* in Kentucky's Home Incarceration Program rather than being hauled off to jail. That liberty interest triggers Ortega's Fourth, Fifth, and Fourteenth Amendment rights.

Ortega's liberty interest is clearly established through decisions of the United States Supreme Court, as well as the First, Second, Seventh, Eighth, and Tenth Circuits. Five circuits have found the right against confinement in jail or prison based on the Supreme Court's decision that parole and parole-like confinement are so different from confinement in prison, that a constitutionally-protected liberty interest arises in avoiding jail when subject to those alternative conditions of confinement or restriction. As the Seventh Circuit recognized in its first case to deal with the issue specifically in a home confinement context—in which a person was taken from home confinement to jail for three days—the

constitutionally-protected liberty interest against being taken to jail, even when in home confinement is clearly established.

The distinction is clear and sensible: there is a liberty interest in *not* being in jail or prison or any other confinement run by the prison system regardless of whether one's freedom is restricted while living outside the system. When a Kentucky court decided that Ortega's first-offense driving under the influence conviction did not warrant jail time, Ortega's right against jail time was returned to him, and it could not be deprived without due process of law, nor could it be deprived in contravention of Ortega's Fourth Amendment rights. Louisville Corrections and its officers did precisely what the Constitution prohinits: they confined Ortega without due process of law. Thus, they are not entitled to qualified immunity.

ICE agent Cloyd also is not entitled to qualified immunity, given his role in the violation of Ortega's rights. He knowingly issued an unlawful ICE detainer for Ortega, purportedly based on nothing more than Ortega having a name and birth date that were similar, but not identical, to an alien in the ICE database. The district court correctly recognized that Cloyd's actions were both a but-for and proximate cause of Ortega's detention in jail. Ortega would not have been detained if Cloyd had not issued the unlawful detainer. And a reasonable jury could find that the local authorities' actions were foreseeable.

The district court, though, speculated that Cloyd may have been "unaware that he was issuing an unlawful detainer," and it was an "honest mistake" that does not constitute a Constitutional violation. Such speculation was plainly improper. The defendants presented no evidence, and this case was resolved on motions to dismiss. In these circumstances, qualified immunity must be established on the face of the complaint. Mere conjecture by the district court regarding what might have happened cannot suffice.

ARGUMENT

I. ORTEGA NEED ONLY PLEAD ACTS THAT VIOLATE CLEARLY ESTABLISHED LAW.

When qualified immunity is resolved on a motion to dismiss, the Court reviews "an assertion of qualified immunity to determine only whether the complaint 'adequately alleges the commission of acts that violated clearly established law.'" *Back v. Hall*, 537 F.3d 552, 555-56 (6th Cir. 2008). "The Federal Rules of Civil Procedure require pleadings to set forth 'a short and plain statement showing that the pleader is entitled to relief,' and nothing about the defense of qualified immunity alters this modest pleading requirement." *Id*. at 556 (citation omitted). For the district court's dismissal to be upheld, immunity must be "established on the face of the complaint." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996).

"To state a claim under 42 U.S.C. § 1983, a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the United States (2) caused by a person acting under the color of state law." *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d 556, 562 (6th Cir. 2011). Government officials may be shielded from liability for violations of § 1983 by the doctrine of qualified immunity. To determine whether a government official is entitled to qualified immunity, courts must determine: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Id.* Thus, the complaint may be dismissed "only if it is clear that no violation of a clearly established constitutional right could be found under any set of facts that could be proven consistent with the allegations or pleadings." *Jackson v. Schultz*, 429 F.3d 586, 589 (6th Cir. 2005). This Court exercises de novo review in this analysis. *Id.*, at 590. Courts apply the same analysis to claims brought under *Bivens v. Six Unknown Named Agents*. *AirTrans, Inc. v. Mead*, 389 F.3d 594, 598 (6th Cir. 2004) (addressing pleading requirements for *Bivens* claims).

In ruling on the motions to dismiss, the district court was required to read Ortega's Complaints in the light *most favorable to Ortega*. *Heyne*, 655 F.3d at 562-63 (when deciding whether a constitutional right was violated, courts must read "the complaint in the light most favorable to the plaintiff."). Because the

district court denied Ortega the opportunity to conduct discovery or build a record, this Court must "accept[] the facts alleged in the complaint as true and draw[] all reasonable inferences therefrom in the plaintiff's favor." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 677 (6th Cir. 2001).

As stated in more detail below, Ortega's allegations—viewed in the light most favorable to him—adequately support a finding for purposes of ruling on Defendants' motions to dismiss that Ortega's rights violated by the Defendants were clearly established.

II. THE METRO DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

A. Metro Defendants Violated Ortega's Clearly Established Right To Due Process By Removing Him From His Home And Detaining Him In Jail For Four Days.

Ortega has a clearly established right against being removed from home confinement and placed in jail without due process of law. The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Due process is implicated because the Metro Defendants—state actors—interfered with Ortega's constitutionally-protected liberty interest. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

Such liberty interest may arise from either the Fourteenth Amendment Due Process Clause, or from state laws or policies. *Wilkinson v. Austin*, 545 U.S. 209, 221, 224 (2005) (holding that incarcerated individuals have an established "liberty interest in avoiding assignment to [a supermax facility]); *Bd. of Pardons v. Allen*, 482 U.S. 369, 377-78, 381 (1987) (holding that a state statute created a presumption that parole release would be granted upon a prisoner meeting certain criteria and, therefore, prisoners had a liberty interest in expectation of parole release). Once a liberty interest is implicated, procedural due process requires that the individual whose liberty interests are subject to deprivation be provided notice and opportunity for a hearing. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 & n.7 (1972).

Ortega's liberty interest here was clearly defined at the time of his change from home confinement to incarceration. At the time of Ortega's removal from his home, at least the First, Second, Seventh, Eighth, and Tenth Circuits had recognized that being removed from custodial confinement outside the prison system and being placed in institutional confinement triggered a constitutionally protected liberty interest. "The passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind* of confinement." *Harper v. Young*, 64 F.3d 563, 566 (10th Cir. 1995) (finding liberty interest in pre-parole program whereby inmates are given restricted

opportunity to live and work in society, but are still in custody of the Department of Corrections) (emphasis in original). In that vein, the Second and Eighth Circuits have found a protected liberty interest in remaining in a prison work release program. *Kim v. Hurston*, 182 F.3d 113, 118-20 (2d Cir. 1999) (holding that inmates on work release are entitled to due process protections based on their clearly established liberty interest in remaining on work release); *Edwards v. Lockhart*, 908 F.2d 299, 302 (8th Cir. 1990) (noting that the key distinction for determining whether a liberty interest arose was whether inmates "remained a resident in a facility operated by their respective corrections departments").

In *Paige v. Hudson*, 341 F.3d 642 (7th Cir. 2003), the Seventh Circuit recognized a prisoner's liberty interest in participating in a county's home detention program. There, the court recognized that "[t]he difference between being confined in a jail and being confined to one's home is much greater than the difference between being a member of the general prison population and an inmate of a prison's segregation wing." *Id*. at 643-44. Similarly, the First Circuit recognized individuals had a liberty interest in continued participation in a home incarceration program. *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 890 (1st Cir. 2010) (holding "that the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement.").

Relying on these cases—all decided before the Officers took Ortega to jail—the Eastern District of Pennsylvania recognized that "the Fourteenth Amendment demands some minimal process before a state actor takes someone who is set to serve his sentence at home, on electronic monitoring, and instead puts him in prison or another form of 'institutional confinement.'" *McBride v. Cahoone*, 820 F. Supp. 2d 623, 631 (E.D. Pa. 2011). The court went on to rule that the officer responsible for the change in confinement was not entitled to qualified immunity, "even though the Third Circuit ha[d] not addressed the precise factual circumstances at issue" there. *Id*. at 636; *see also Kim*, 182 F.3d at 120 (officer moving inmate from work release program to detentions facility without due process was not entitled to qualified immunity because liberty interest was clearly established).

This Court also has recognized that a right is clearly established when generally accepted in other circuits, even if this Circuit has not ruled on the issue. *See, e.g.*, *Moldowan v. City of Warren*, 578 F.3d 351, 382 (6th Cir. 2009) (holding that forty-five years of "overwhelming" authority from other circuits recognizing Brady due process obligations for police—including "at least three circuits" that recognized such right prior to when the officer's constitutionally-infringing conduct first began—made the right at issue clearly established within the Sixth Circuit); *Daugherty v. Campbell*, 935 F.2d 780, 785-87 (6th Cir. 1991) (looking to

authority from three other circuits to "add to the admittedly sparse [Sixth Circuit] case law" pertaining to prison visitors' Fourth Amendment rights, and determining that a prison visitor has a clearly established right to be free from a visual body cavity search absent reasonable suspicion).

In any event, Kentucky law and cases from the Supreme Court and this Circuit put the Officers on notice that Ortega had a constitutionally protected liberty interest in continuing his home incarceration. The Supreme Court has recognized that there is fundamental difference between living at home with restrictions imposed by the justice system and being confined to an institution. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) ("Probation revocation, like parole revocation . . . does result in a loss of liberty."); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."). This Court has as well. *Sneed v. Donahue*, 993 F.2d 1239, 1241 (6th Cir. 1993) (recognizing parolee's "significant liberty interest in a parole, which is entitled to protection under the Due Process Clause."). Indeed, that much should be clear to anyone. "The qualitative differences in treatment experienced by one who is confined in an institution, as opposed to one who merely stays at

home, are too numerous and obvious to require elaboration." *Com. v. Kriston*, 588 A.2d 898, 899 (Pa. 1991).

Kentucky law also establishes a clear liberty interest in home confinement. The Home Incarceration Program is a statewide alternative confinement program that permits certain individuals to serve their sentences within the confines of their respective homes rather than in a traditional jail setting. KY. REV. STAT. ANN. §§ 532.200; 532.210. And Kentucky *already extended* this alternative program to Ortega. Commitment Order, 39-1R246.

Under established precedent and based on the facts in this case, Ortega was entitled to continue to serve his sentence as agreed through the Home Incarceration Program absent breaching the conditions of home incarceration. *See* KY. REV. STAT. ANN. § 532.220; Home Incarceration Order, 43-1R295-96. Ortega was already enrolled and serving sentence under this alternative program when he was seized from his home. Second Amended Complaint, 38R234-35. In fact, Ortega pled guilty to the charges he faced in exchange for placement in this alternative program that would allow him not only to serve his sentence on home confinement, but further, permitted Ortega to continue to work during the period of such confinement.

Here, Metro Defendants removed Ortega from his home, where he was serving his agreed sentence in accordance with Kentucky's Home Incarceration

Program, and subjected him to imprisonment in a group holding cell. This change in circumstances occurred not because Ortega had violated the established program conditions, but because Corrections received an ICE-issued detainer bearing Ortega's name and incarcerated Ortega without taking even the slightest steps to afford Ortega an opportunity to be heard. With an opportunity for discovery and to put on evidence, Ortega will establish that he told the Officers that he could retrieve his birth certificate and social security card to prove his citizenship *before* they took Ortega from his home. The Officers did not even afford Ortega that opportunity. Thus, they deprived him of a clearly established constitutional right, and Metro Defendants are not entitled to qualified immunity.

B. Removing Ortega From His Home Constituted An Unreasonable, Warrantless Seizure.

1. Removing Ortega From His Home Was A Seizure.

For similar reasons, the Metro Defendants violated Ortega's clearly established Fourth Amendment rights. The Fourth Amendment to the United States Constitution prohibits unreasonable seizures. *Brooks v. Rothe*, 577 F.3d 701, 706 (6th Cir. 2009) (holding that the Fourth Amendment ensures that citizens will not be subjected to "seizures without proper authorization"). A Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Scott v. Harris*, 550 U.S. 372, 381 (2007). As is discussed above at Part II.A., there is a clear liberty interest in

remaining in a home confinement program rather than being sent to jail. And a seizure occurs when there is "intentional interference with a person's liberty by physical force or a show of authority that would cause a reasonable person consciously to submit." *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008); *see also Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that the Fourth Amendment governs seizures of persons within the home).

Eppler and Skaggs intentionally took Ortega from his home and delivered him to Corrections' holding facilities. Opinion and Order, 48R337. Given the opportunity, Ortega will easily prove that they removed him in handcuffs and gave him no choice but to come with them. They only allowed Ortega to get his shoes, and Ortega was not even allowed to obtain proof of his citizenship. There can be no doubt that this was "a show of authority that would cause a reasonable person consciously to submit." *Cf. Floyd*, 518 F.3d at 406.

The district court recognized that this was a seizure, and for good reason. Opinion and Order, 29R183-86 (taking the complaint's well-pled allegations as true, the ICE-issued detainer caused Ortega's seizure from his home); Opinion and Order, 48R340 (Metro Defendants "carried out a rather routine seizure quite unaware that the information used to generate the detainer was misapplied."). Ortega enjoyed freedom of movement within his home—including the ability to eat, sleep, and attend to basic hygiene functions—in the attendant privacy that

comes with spending time in one's own home. He could also spend time with his family and go to work. Home Incarceration Order, 43-1R295. Thus, the Metro Defendants' removal of Ortega from his home terminated both Ortega's freedom of movement within his home and Ortega's ability to leave his home for essential work-life events. Second Amended Complaint, 38R234-35; Response to Motion to Dismiss, 43R291. Such action by the Metro Defendants amounts to a Fourth Amendment seizure.

The Metro Defendants' seizure of Ortega is not merely—as these defendants argued below—an extension of the initial Fourth Amendment seizure because the Metro Defendants' actions on March 19, 2011 took place after Ortega entered his guilty plea and was sentenced to home confinement. Thus, the Metro Defendants' seizure occurred well after the initial Fourth Amendment seizure dissipated. *See Aldini v. Johnson*, 609 F.3d 858, 864-67 (6th Cir. 2010) (Fourth Amendment protections against excessive force, triggered by an initial arrest, conclude at an arrestee's probable-cause hearing).

Ortega's placement in the home confinement was based on Ortega's guilty plea to charges stemming from an event in October 2010. Commitment Order, 39-1R246. In contrast, the Metro Defendants' seizure of Ortega in March 2011 was based on Cloyd's improperly-issued detainer. Second Amended Complaint, 38R234-35. Even if the Court construes Ortega's home confinement as a seizure,

the Metro Defendants' removal of Ortega from his home for purported immigration violations is sufficiently distinct from the home incarceration order to require independent evaluation.

2. The Seizure Was Unreasonable.

The Metro Defendants' seizure of Ortega was warrantless and unreasonable. No party has suggested that a warrant, or its equivalent, was issued for Ortega's arrest. *See Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) ("[a] detainer is not a criminal warrant"). And no exception to the warrant requirement exists to render this warrantless seizure a lawful or reasonable state action. *See Brigham City v. Stuart*, 547 U.S. 398, 403-04 (6th Cir. 2006) (listing exceptions to the warrant requirement); *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir. 2010) (holding that exceptions to the warrant requirement "are ultimately grounded in [the] standard" of reasonableness).

The "touchstone of the Fourth Amendment is reasonableness," which "is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). This requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see also U.S. v. Lopez-Medina*, 461 F.3d 724, 740 (6th Cir. 2006) ("The determination of 'reasonableness' depends on

a balance between the 'need to search (or seize) against the invasion which the search (or seizure) entails.'"). Ortega's strong interests in not being seized—strong enough to trigger Constitutional due process rights—already have been established. On the other hand, Metro Defendants had *no* interest in seizing Ortega from his home and putting him in jail.

While states may retain "concerns" about immigration policy, power to regulate immigration belongs to the federal government. *Arizona v. United States*, 132 S. Ct. 2492, 2500-05 (2012), (holding that state statutes that either complement or interfere with federal immigration law are unconstitutional as preempted). The Metro Defendants' legitimate interest, if any, is relegated to cooperation with federal authorities. *See id.* at 2507 (noting that a federal statute permits "state officers to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States'"). Indeed, federal regulations make that clear.

An ICE-issued detainer, standing alone, does not provide Metro Defendants with probable cause that the individual subject to the ICE-issued detainer is actually an alien not lawfully in the United States. It is only "a request that [the agency holding an alien] advise [ICE], prior to release of the alien, in order for [ICE] to arrange to assume custody." 8 C.F.R. § 287.7(a) (2011). The detainer lacks the certainty of suspicion that an arrest warrant represents. *See United States*

v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is not, standing alone, an order of custody."). As such, the request does not convey any specific degree of suspicion attached to the detainer. Under the applicable regulations, eight separate categories of officers or agents may issue a detainer "at any time," including "[i]mmigration officers who need the authority to issue detainers." 8 C.F.R. § 287.7(a), (b). This untethered ability underscores the uncertain degree of suspicion attached to any given ICE-issued detainer.

Given this regime, it is clear that the *only* governmental interest—federal or state—is to keep track of a person against whom a detainer is issued for 48 hours after its issuance. That interest is not advanced by seizing Ortega because, by participating in the Home Incarceration Program, Ortega was already in the custody of Corrections. *See Stroud v. Com.*, 922 S.W.2d 382, 384-85 (Ky. 1996) (rejecting defendant's argument that he was not in custody—and thus not subject to an escape charge—during his participation in the Home Incarceration Program, on the ground that defendant waived such challenge when he signed off on the terms and conditions of the Program); Memorandum in Support of Motion to Dismiss, 40-1R257 ("Plaintiff was in the custody of Metro Corrections to serve a sentence."). Ortega's ability to leave the home was subject to a predetermined schedule. KY. STAT. ANN. § 532.220(3); Home Incarceration Order, 43-1R295-96. Ortega's location both within and outside of the home was continuously observed

with an electronic monitoring device and verified with periodic and frequent phone calls. KY. STAT. ANN. § 532.220(6); Home Incarceration Order, 43-1R295-96. And Ortega faced prosecution for escape if he violated the condition of home confinement. KY. STAT. ANN. § 532.220(2). In short, the Metro Defendants knew where Ortega was at all times, had the means to ensure compliance, and threatened additional punishment for noncompliance with the home confinement requirement. The Metro Defendants' seizure of Ortega did nothing to assist federal immigration officials beyond what maintaining Ortega's status in home confinement would have accomplished.

The district court's ruling in this case presumes, with no analysis, that it is inherently reasonable to seize someone based on a detainer, Opinion and Order, 48R340, even though the detainer does not request or even suggest that a law enforcement agency seize anyone. The court failed to take into account the totality of the circumstances. It failed to consider the fact that Metro Defendants had no interest in seizing Ortega. And it inappropriately assumed that the Officers "had no reason to believe" ICE's detainer was unlawful, *id*. at 342 even though *no defendant* had presented a scintilla of evidence to support that assumption. As can reasonably be expected, when the Officers appeared on Ortega's doorstep and told him he was being taken to jail because of an immigration detainer, Ortega told the officers he was an American citizen and offered to prove it with his birth certificate

and Social Security card. So, the notion that the Officers did not have reason to believe the detainer was illegal is flat untrue.

None of the Metro Defendants investigated whether Ortega—who by virtue of his placement in the Home Incarceration Program was subject to the oversight of Corrections—was, in fact, an illegal alien subject to detainer or, instead, a Texas native and natural-born citizen. Had any of the Metro Defendants reviewed the information readily available to them, Ortega would not have been seized from his home on Saturday March 19, 2011.

III. FEDERAL DEFENDANT CLOYD IS NOT ENTITLED TO QUALIFIED IMMUNITY.

Agent Cloyd also bears responsibility for the violations of Ortega's rights. The qualified immunity determination is identical between claims under *Bivens v. Six Unknown Named Agents* and under 42 U.S.C. §1983. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Courts considering whether to apply the bar of qualified immunity consider two factors: (1) whether the facts indicate a constitutional violation and (2) whether that right was clearly established at the time of the alleged violation. *Cherrington v. Skeeter*, 344 F.3d 631, 636 (6th Cir. 2003). An appellate court reviews the district court's determination *de novo*. *Merriweather v. Zamora*, 569 F.3d 307, 315 (6th Cir. 2009). Cloyd is not entitled to qualified immunity because the facts alleged indicate that Cloyd knew he was issuing a detainer for the wrong person.

Part II, above, establishes that Ortega's clearly established Fourth Amendment rights were violated. For the same reasons the state actors violated Ortega's Fourteenth Amendment rights, so too did federal actor Cloyd violate Ortega's Fifth Amendment rights. Thus, the two-factor test for determining that Cloyd is not entitled to qualified immunity is satisfied if Cloyd bears responsibility for the constitutional violations. He does.

Cloyd bears responsibility if his illegal detainer was both a but-for and a proximate cause of the constitutional violations. *Powers v. Hamilton Cnty. Public Defender Com'n*, 501 F.3d 592, 608-09 (6th Cir. 2007). The district court correctly recognized that the detainer issued by Cloyd was both the but-for and proximate cause of the Metro Defendants removing Ortega from home confinement and placing him in jail. Opinion and Order, 29R183-85. As the district court held after the first motion to dismiss, "absent the detainer Metro Corrections would not have taken Ortega from his home and put him in jail." *Id*., at 184. Thus, the detainer is a but-for cause of Ortega's seizure.

Cloyd's detainer was a proximate cause of Ortega's seizure as well. Even if there is "an intervening third party" acting as "the immediate trigger for the plaintiff's injury" the defendant may still be liable if "the third party's actions were foreseeable." *Powers*, 501 F.3d at 609. A third party may exercise discretion without breaking the causal chain. *Id*. Here, as the district court also noted,

"Metro Corrections's decision to hold Ortega was a natural, foreseeable consequence of ICE's issuing the detainer." Opinion and Order, 29R185; *see also Vargas v. Swan*, 854 F.2d 1028, 1032 (7th Cir. 1988) (describing an ICE detainer as "an action that has as part of its effect the 'holding' of a prisoner.").

This district court absolved Cloyd from liability on the assumption—unsupported by evidence—that issuing the detainer on Ortega was "an unfortunate but honest mistake." Opinion and Order, 48R343. The district court stated that "[i]t is entirely plausible that ICE Agent Cloyd was unaware that he was issuing an unlawful detainer." *Id*., at 343. That was error. On a motion to dismiss, it is irrelevant that some fact not pled might be plausible. The court must take the plaintiff's facts as true. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 677 (6th Cir. 2001). Given the lack of evidentiary support or support in Ortega's allegations, the district court's theories of what Cloyd might plausibly have been thinking when he issued the unlawful detainer cannot be the basis for dismissing the causes of action against Cloyd.

Moreover, it is simply not true that Cloyd made an "honest mistake." The defendants have claimed that the detainer was issued solely based on Richard Ortega having a *similar*, but not identical, name and birth date to a previously deported alien. Because discovery was cut short, there is no way to know, at this stage, *how similar* they purport to be. Regardless, Cloyd knew that he was issuing

a detainer on someone whose name and birth date did not match the name and birthdate of the alien on which the detainer is based.

Having a similar name and birth date to an illegal alien's name and birth date did not provide Cloyd with any level of suspicion that would justify a belief that Ortega was an illegal alien. Similar names, without more, are not an indication of any illegal activity and, likewise, cannot be an objective basis for suspecting Ortega of being an illegal alien. Issuing the detainer was no mistake. It was intentional, and it exhibited an intent to detain someone based on such weak indicia of illegality as having a similar name and birthdate of someone *who already had been deported*. *Cf. Hensley v. Gassman*, 693 F.3d 681, 694 (6th Cir. 2012) (officer was not entitled to qualified immunity because it was not a "mistake" to seize property without first obtaining sufficient evidence to support belief that seizure was appropriate).

This Court has adopted standard for establishing both Fourth and Fifth Amendment violations that requires proving something more than negligence, but the Court has emphasized that this standard only requires pleading and proving "intent to commit the act, not the intent that a certain result be achieved." *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (holding that the intent to fire a gun was sufficient for liability even when the officer did not intend to shoot a person); *see also Howard v. Grinage*, 82 F.3d 1343, 1351 (6th Cir. 1996) (holding

that when no process was provided, intentionally placing a prisoner in segregation was sufficient for liability even if denying process was not intentional). Here, Cloyd intended to issue the detainer even if Cloyd did not intend to either issue the detainer for a U.S. citizen or deny him due process. This would therefore be sufficient to indicate both a Fourth and Fifth Amendment violation in the Sixth Circuit.

If Defendants' actions—and the district court's dismissal of Ortega's claims—are upheld, then ICE would have the unrestrained discretion to issue a detainer for anyone whose name bore a resemblance to someone in the ICE database regardless of their citizenship status, with full knowledge that localities might seize such individuals without investigation. ICE thus would have neither a duty to investigate the citizenship of a targeted individual before issuing an ICE detainer nor provide a citizen with an opportunity to prove his citizenship after the detainer was issued. That does not comport with even a limited view of Constitutional liberties, and it gives ICE far too much ability to continue to abuse its power.

CONCLUSION

For the foregoing reasons, the order dismissing this case should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

/s/ Tillman J. Breckenridge
Tillman J. Breckenridge
Alison R.W. Toepp
REED SMITH LLP
1301 K Street, NW
Washington, D.C. 20005
202-414-9200
tbreckenridge@reedsmith.com

Patricia E. Roberts
WILLIAM & MARY LAW SCHOOL
P.O. Box 8795
Williamsburg, VA 23187
(757) 221-3821
perobe@wm.edu

CERTIFICATE OF COMPLIANCE

This Appellant Brief complies with the type-volume limitation of 6th Cir. R. 32(b) and Fed. R. App. P. 32(a)(7)(B). This brief contains 6,917 words, excluding the table of contents, table of citations, statement with respect to oral argument, the designation of relevant district court documents and certificates of counsel.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2013, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

J. Max Weintraub
U.S. DEPARTMENT OF JUSTICE
P.O. Box 878
Washington, DC 20044
(202) 616-4900

Counsel for Appellees United States Immigration and Customs Enforcement, Unknown Agents and Employees in the Employ of U.S. Immigration and Customs Enforcement, and John Cloyd.

Stephen P. Durham
JEFFERSON COUNTY ATTORNEY'S OFFICE
531 Court Place, Suite 900
Louisville, KY 40202
(502) 574-6333

Counsel for Appellees Louisville/Jefferson County Metro Government, Mark E. Bolton, Unknown Corrections Officers in the Employ of Louisville/Jefferson Metro Corrections, William Skaggs, and Lori Eppler.

/s/ Tillman J. Breckenridge
Counsel for Appellant

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Date	Description	Docket Entry	Pagination
08/03/11	Complaint	1	1-12
01/26/12	Federal Defendants' Motion to Dismiss	17	80-82
	Memorandum in Support of Federal Defendants' Motion to Dismiss	17-1	83-91
04/27/12	Memorandum Opinion and Order	29	181-88
05/17/12	Amended Complaint	32	191-203
05/29/12	Second Amended Complaint	38	231-42
07/25/12	Metro Defendants' Motion to Take Judicial Notice	39	243-45
	Exhibit 1: Commitment Order	39-1	246
	Exhibit 2: Release Order	39-2	247
07/25/12	Metro Defendants' Motion to Dismiss	40	251-52
	Memorandum in Support of Metro Defendants' Motion to Dismiss	40-1	253-60
07/27/12	Federal Defendants' Second Motion to Dismiss	42	267-69
	Memorandum in Support of Federal Defendants' Second Motion to Dismiss	42-1	270-78
08/17/12	Plaintiff's Response to Metro Defendants' Motion to Dismiss	43	280-94
	Exhibit 1: Order of Home Incarceration	43-1	295-96
11/16/12	Memorandum Opinion and Order	48	336-44
12/17/12	Plaintiff's Notice of Appeal	49	345-47