IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RAMON MENDOZA,

Plaintiff,

v.

JUSTIN OSTERBERG, individually; JOHN DOES, #1-5; JEFF DAVIS, Sarpy County, Nebraska Sheriff; JOHN DOES, #6-10, and SARPY COUNTY, NEBRASKA,

Defendants.

8:13CV65

MEMORANDUM AND ORDER

This matter is before the court on motions for summary judgment filed by defendants Jeff Davis and Sarpy County, Nebraska (hereinafter, collectively, "the county defendants"), Filing No. 169, and by defendant Justin Osterberg and John Does #1-5,[1] (hereinafter "the federal defendant"), Filing No. 175. This is an action for deprivation of civil rights and conspiracy under 42 U.S.C. §§ 1983, 1985(3), and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).[2] The plaintiff also asserts a tort claim against the county defendants under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901, *et seq*. ("PSTCA").

Plaintiff Ramon Mendoza is a citizen of the United States who alleges he was kept in custody pursuant to a United States Immigration and Customs Enforcement ("ICE") detainer beyond the time he was entitled to be released. The plaintiff asserts

[1] In his brief, the plaintiff states that his claims against John Does #1-5 will be dismissed. *See* Filing No. 188, Plaintiff's Brief (Restricted) at 18. The court will construe the statement as a motion to dismiss and will grant the motion.

[2] As a general rule, *Bivens* claims and § 1983 claims are almost identical and involve the same analysis. *See Gordon v. Hanson,* 168 F.3d 1109, 1113 (8th Cir. 1999)

that he was arrested on misdemeanor charges and unlawfully detained by federal and state officials for three days based on an improper immigration detainer issued on March 5, 2010, and withdrawn on March 8, 2010. He alleges that his wife provided or attempted to provide proof of his citizenship to the county defendants during that time.

Defendant Jeff Davis is the sheriff of Sarpy County, Nebraska. Defendants John Does #1-5 are unnamed employees of the Sarpy County Sherriff's Office and/or the Sarpy County Jail. Defendant Justin Osterberg is an ICE employee.

In their motion, the county defendants assert that defendant Jeff Davis, in his individual capacity, is entitled to qualified immunity from suit with respect to all claims asserted under 42 U.S.C. §1983. They contend the undisputed evidence shows he was not personally involved in the conduct at issue and that the plaintiff has not shown he is liable for failure to properly train and supervise subordinates and failure to implement proper policies. Next, they argue that all state law claims against the defendants Sarpy County, Nebraska and Jeff Davis are barred under the Political Subdivisions Tort Claims Act's two-year statute of limitations and its' exemptions for discretionary functions and for claims of false arrest, false imprisonment, and malicious prosecution. *See* Neb. Rev. Stat. §§ 13-919(1), 13-910(1), (2), and (7). The county defendants also argue plaintiff's §1983 and §1985 claims lack evidentiary support and are unsupported by applicable law.

Defendant Osterberg also asserts that the undisputed facts establish that he is entitled to qualified immunity with respect to the plaintiff's claims. He argues that there is no evidence that the plaintiff's three-day detention at Sarpy County jail violated any of the plaintiff's constitutional rights. Further, he argues that a summary judgment of

dismissal should be granted on plaintiff's § 1985(3) conspiracy claim because undisputed evidence shows that Defendant Osterberg and the Sarpy County employees did not reach any agreement with respect to the issuance of the detainer. Also, he argues that the Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, and its implementing regulations provide a comprehensive remedial process for individuals who are placed under ICE detainers.

In opposition to the motions, the plaintiff asserts that the defendants are not entitled to qualified immunity. He first argues that the evidence shows that the defendants violated his constitutional rights.[3] Further, he argues that the defendants are not entitled to qualified immunity on his claims because there are genuine disputes concerning predicate facts material to the qualified immunity issue. He argues that there is evidence from which a rational factfinder could find a "meeting of the minds" between Osterberg, Davis and Sarpy County that resulted in his unlawful detention as

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[3] The rights that the plaintiff contends are at issue are as follows:

> As a United States citizen Mendoza has clearly established rights. He has a liberty interest in being free from questioning and detention based solely on race or nationality, without probable cause that he has committed a crime. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L.Ed.3d 607 (1975). He has the right to remain free of arrest or seizure without probable cause. U.S. Const. Amend. IV; *Stoner v. Watlingten*, 735 F.3d 799 (8th Cir. 2013). He has the right to post reasonable bail for his release from jail pending adjudication of a non-capital offense. U.S. Const. Amend. VIII; Neb. Const. art. I, §9; *State ex rel. Partin v. Jensen*, 203 Neb. 441, 279 N.W.2d 120 (1979). He has the right to be free of incarceration absent a criminal conviction. *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004). He has the right to be free from racial profiling, or selective enforcement of the law, a violation of the Equal Protection Clause. *United States v. Coney*, 456 F.3d 850, 856 (8th Cir. 2006); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D. Pa. Mar.30, 2012). And ICE and other law enforcement officers cannot deprive Mendoza of any clearly established constitutional or statutory right without due process of law. *Ng Fung Ho v. White*, 259 U.S. 276, 42 S. Ct. 492, 66 L. Ed. 938 (1922); *Lyttle v. United States*, 867 F.Supp.2d 1256, 1286 (M.D. Ga. 2012).

Filing No. 188, Plaintiff's Brief (Restricted) at 52-53.

an American citizen. Further, he argues that defendant Davis is not entitled to qualified immunity on the plaintiff's claims of failure to properly train and supervise subordinates and failure to implement proper policies.

I. FACTS

The court's factual findings are gleaned from the parties' respective statements of undisputed facts and from the evidence submitted in connection with the motions. *See* Filing No. 174, County Defendants' Brief (Restricted) at 3-45; Filing No. 188, Plaintiff's Brief (Restricted) at 3-51; Filing No. 180, Defendant Osterberg's Brief (Restricted) at 2-19.[4] The court has assumed the veracity of the plaintiff's submissions in connection with this motion and has drawn any conflicting inferences to be drawn from the evidence in favor of the plaintiff.

Viewing the evidence in the light most favorable to the plaintiff, the undisputed evidence shows that the plaintiff is a citizen of the United States. Filing Nos. 187-2 to 187-7, Exs. 2 – 7 (Restricted). Mendoza became an American citizen on April 27, 2001 in Omaha, nine years before the events at issue in this case. *Id.*, Ex. 2.

Mendoza was naturalized with his full birth name, Ramon Mendoza Gallegos. Filing No. 187-2, Ex. 2 (Restricted). In everyday American life, Mendoza commonly refers to himself with an abbreviated form, "Ramon Mendoza." Filing No. 187-10, Ex. 10, Deposition of Ramon Mendoza ("Mendoza Dep.") (Restricted) at 248-49; *see* Filing

[4] The county defendants have submitted a statement of undisputed facts consisting of 171 separately numbered paragraphs. Filing No. 174, County Defendants' Brief (Restricted) at 3-45. Defendant Osterberg has submitted a statement of undisputed facts consisting of 67 separately numbered paragraphs. *See* Filing No. 180, Defendant Osterberg's Brief (Restricted) at 2-19. The plaintiff submits 137 separately numbered paragraphs disputing and supplementing the defendants' assertions. Filing No. 188, Plaintiff's Brief (Restricted) at 3-51. The plaintiff disputes 103 paragraphs of the county defendants' submission and 32 paragraphs of the federal defendant's submission. *Id.*

No. 187-3 – 187-7, Exs. 3 – 7 (Restricted). His parent's names were Salvador Mendoza and Maria Gallegos. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 32. Mendoza has a valid United States passport, and a Social Security card and number issued to him by the federal Social Security Administration. Filing No. 187-5 and 187-6, Exs. 5 and 6 (Restricted). Mendoza has never used the name "Ramon Mendoza Gutierrez." Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 31. He did not know of any person by that name until after the events at issue in this case. *Id.*

Mendoza has never been charged with, or convicted of, a state or federal felony. He has several convictions for driving-related offenses. *Id.* at 85. There were no outstanding warrants for his arrest at any time relevant to this case. *Id.* He had, however, been charged with several misdemeanor offenses, including driving while intoxicated, and had previously been incarcerated in Sarpy County jail on two occasions. Filing No. 172-14, Affidavit of Greg London ("London Aff.") (Restricted) at 2-3.

At about 4:00 p.m. on Friday, March 5, 2010, Mendoza was driving his niece's automobile, a 2003 Oldsmobile Aurora, equipped with hand-written "in-transit" stickers on the right rear window, near 719 North Washington St. in Papillion, Sarpy County, Nebraska. *Id.* at 114; Filing No. 187-15, Ex. 15, Deposition of Richard Mendoza ("Richard Mendoza Dep.") (Restricted) at 23, 103. Papillion Police Department ("PPD") officers pulled the plaintiff over. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 49. The plaintiff did not have a driver's license or registration for the vehicle. *Id.* at 172 (Restricted). Mendoza's 17-year-old son, Richard, had hung a boxing medal from the rearview mirror. Filing No. 187-15, Ex. 15, Richard Mendoza Dep. (Restricted) at 23,

103. The medal was small, a little bigger than a quarter. *Id.* at 103-04. A cloth Mexican flag blanket, folded flat, lay on the interior shelf abutting the vehicle's rear window. *Id.* at 104-05. Ramon Mendoza testified that he was told by the officer that he had been pulled over because "of what was hanging on the rear mirror." Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 49. The record also shows that the officer did not see the "in transit" stickers on the vehicle until he approached the car. Filing No. 173-9, Affidavit of Alyce Liken ("Liken Aff."), Exs. A and B, PPD Incident Reports (Restricted) at 1.

The officers determined that Mendoza did not have a current driver's license or proof of automobile insurance.[5] *Id.* Mendoza was arrested for driving on a revoked license, handcuffed and placed in the police cruiser. *Id.* at 1-2. Review of the audiotape of the incident reflects that the officers demonstrated a professional approach to a rather profane Mendoza and shows that the officers told the plaintiff that he would be ticketed and released. Filing No. 173-11, Affidavit of Todd Dudas (Dudas Aff.), Ex. A, CD/ROM containing audio and video recordings from PPD traffic stop of plaintiff Mendoza on March 5, 2010 ("traffic stop CD") (Restricted).

The officers allowed Mendoza to make a phone call to his son. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 50. His son, Richard Mendoza, was at home with his younger siblings when his father called him and asked him to come to get the car. Filing No. 187-15, Ex. 15, Richard Mendoza Dep. (Restricted) at 24. Richard went to the scene and was told by the officers that his dad was going to jail because he did

[5] This evidence is corroborated by the audiotape of the incident. *See* Filing No. 173-11, Affidavit of Todd Dudas, Ex. A, CD/ROM containing audio and video recordings from PPD traffic stop of plaintiff Mendoza on March 5, 2010. The audiotape generally corroborates the officers' incident reports.

not have a license. *Id.* They asked him to follow them to the police station in the car. *Id.* Richard asked the officers if he could speak to his father and the officers replied that he could not, but that his father was just going to get a ticket. *Id.* at 84. Richard drove to the Sarpy County jail in the Aurora, following the PPD police car. *Id.* at 24, 84-85.

The plaintiff was booked on state charges of driving under revocation of license, no proof of insurance, and obstructed view. Filing No. 187-28, Ex. 28, Plaintiff's Sarpy County jail inmate file for imprisonment period of March 5-8, 2010 ("Sarpy 2010 records") (Restricted) at 31; Filing No. 173-10, Liken Aff., Ex. B, Citation (Restricted). Mendoza testified that he was told at the jail that he would be ticketed, and would be allowed to be released without posting a bond. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 63.

Sarpy County Sheriff Deputy Gary Lyle was at the intake desk. Filing No. 187-16, Ex. 16, Deposition of Gary Lyle ("Lyle Dep.") (Restricted) at 16, 83-84. Lyle and Mendoza communicated with each other in English and had no trouble understanding each other. *Id.* at 83-84; *see also* Filing No. 173-11, Dudas Aff., traffic stop CD (Restricted). Mendoza provided Lyle with his name, address, telephone number, and other information. Filing No. 187-16, Ex. 16, Lyle Dep. (Restricted) at 16, 83-84; Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 207. Mendoza misstated the last digit of his Social Security number. *Id.* (acknowledging he provided his Social Security number to the booking officer and made a mistake); Filing No. 173-11, Dudas Aff., traffic stop CD (Restricted).[6] On the PPD audio recording, an officer can be heard stating to

[6] The audio recording confirms that Mendoza told an officer that his Social Security number ended in -8044. Filing No. 173-11, Dudas Aff., traffic stop CD (Restricted). Records also reflect that

Mendoza, “What do you mean you don’t know where you were born?” and “[i]f you’re going to be difficult you will just have to wait.” Filing No. 173-11, Dudas Aff., CD (audio part 2) (Restricted) at 50:47-51:14. Officers can be heard conversing with each other about the plaintiff in connection with his having a gun permit, carrying cash, and owning a restaurant, and at one point an officer comments, apparently with reference to a badge, "it could be something from the old country." *Id.* at 52:11-53:20.

Deputy Lyle’s shift ended, so he did not complete the intake sheet. Filing No. 187-17, Ex. 17, Deposition of Daniel S. Titus ("Titus Dep.") (Restricted) at 40. After the shift change, Sarpy County Sheriff’s Deputy Dan Titus resumed the intake questionnaire with Mendoza. *Id.* Titus had no specific recollection of the encounter, but identified his handwriting on an intake form indicating that Mendoza was not a citizen and Mendoza's language was Spanish. *Id.* at 52. Titus and Mendoza conversed in English. *Id.* at 53. Deputy Titus does not recall asking Mendoza about his citizenship. *Id.* at 53-54. Titus does not know why he would have circled "no" on the intake form under U.S. citizenship. *Id.*

At his deposition, Mendoza stated that he did not inform the arresting and booking officers that he was a U.S. citizen because they never asked. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 37. He testified that he never circled the response "no" to the citizenship question on a form when he was arrested, nor did he tell any officer that he was not a U.S. citizen. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 34, 36. Mendoza signed the intake form that stated that his language

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Mendoza reported three different Social Security numbers at his various intakes in 2006, 2008, and 2010. Filing No. 172-15, Affidavit of Greg London (Restricted) at 1; Filing No. 172-17, Affidavit of Greg London (Restricted) at 1; Filing No. 187-28, Ex. 28, Sarpy 2010 records (Restricted) at 1.

was Spanish and that he was not a U.S. citizen. Filing No. 172-27, Mendoza Dep. (Restricted) at 37-38; Filing No. 172-28 at p. 3, Dep. Exs., Intake Form (Restricted) at 2; Filing No. 173-9, Liken Aff., Ex. A, PPD Incident report (Restricted) at 2. The audiotape recording confirms that Mendoza did not state that he was a U.S. citizen. Filing No. 173-11, traffic stop CD (audio part 2) (Restricted).

The PPD officers asked Mendoza to sign 48-hour waiver form, waiving his right to appear before a judge expeditiously. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 249; *see id.*, Ex. 28, Sarpy 2010 records (Restricted) at 43; Filing No. 173-11, Dudas Aff., Ex. A, CD (audio part 2) (Restricted) at 55:34. Mendoza signed the form as "Ramon Mendoza." Filing No. 187-28, Ex. 28, Sarpy 2010 records (Restricted) at 43. Mendoza testified that neither the PPD officers nor Sarpy County jail staff advised Mendoza of the statutory and constitutional rights he purportedly waived by signing the form. Filing No. 187-10, Ex. 10, Mendoza Dep. (Restricted) at 249.

Jail policy mandates that when an inmate is booked at the Sarpy County jail, booking staff "shall" check and update the inmate's records from prior periods of incarceration there. Filing No. 172-7, Ex. 3, Affidavit of Bob Williamson ("Williamson Aff.") (Restricted) at 7; Filing No. 172-13, Williamson Aff., Ex. F, Standard Operating Procedure (Restricted). Mendoza had served short sentences at the Sarpy County jail in 2008 and 2006 for misdemeanor convictions. Filing No. 172-14, London Aff. (Restricted) at 2-3.[7] When Mendoza was booked on March 5, 2010, the jail had records from those sentences. *Id.* at 2; Filing No. 172-15, London Aff., Ex. A, 2006 record

[7] Greg London is the jail captain and is responsible for the jail, and would have reported to Deputy Chief Mike Jones and to Sheriff Jeff Davis at the time. Filing No. 187-13, Ex. 13, Deposition of Greg London ("London Dep.") (Restricted) at 10.

(Restricted); Filing No. 172-16, London Aff., Ex. B, 2008 record (Restricted); Filing No. 172-17, London Aff., Ex. C, 2008 record (Restricted). They showed the same vital information about Mendoza for each period: same name, address, date of birth, place of birth, language (English), United States citizenship and fingerprints. *Id.* The jail's records from Mendoza's 2008 incarceration showed that the jail had contacted ICE, and ICE expressly confirmed that Mendoza was an American citizen. Filing No. 172-7, Williamson Aff. (Restricted) at 5. This confirmation was incorporated into a booking screen with Mendoza's photograph in the jail records. *Id.*; Filing No. 172-9, Williamson Aff., Ex. B (Restricted).

Classifications Deputy Bob Williamson testified that he had typed and entered the comment "9-5-08 U.S. Citizen per ICE. 822" in the "notes" field on the "booking information" screen in the records of Mendoza's 2008 incarceration. Filing No. 172-7, Williamson Aff. (Restricted) at 5. He stated that the reason he "entered the notation on that particular 'miscellaneous' screen in the 'notes' field is because there is no 'auto-populated' field designated in the booking software concerning an inmate's citizenship status." *Id.* The comment would have been migrated over to another booking software that the Sarpy County jail began to use in May of 2010, but neither the new software nor the Jail Manager software has a specific designated field that relates to an individual's citizenship. *Id.*

Williamson also testified that in March of 2010, access to the Jail Manager booking software was controlled by individual log-ins and passwords, and with varying levels of access to the information. *Id.* The access of Deputies and Sergeants was limited to a few basic screens in "read only" format, whereas full access to all screens

with ability to change information was available only to the booking clerks, classifications deputies, and information systems personnel. *Id.* Williamson did not believe that the "miscellaneous screen" in Jail Manager was accessible to a deputy/sergeant in March 2010. *Id.* Also, what was called the "miscellaneous" screen containing a "notes" field in the Jail Manager software was near the end of the sequential order of screens that could potentially be accessed, and such screen was not usually accessed in the usual booking or release processes. *Id.* Accordingly, he testified that he "would not expect the booking clerk(s) who participated in entering Plaintiff Mendoza's information into that system in March of 2010 to have ever seen [his] past 2008 comment entered in the 'notes' field on the 'miscellaneous' screen." *Id.* at 8.

Mary Brust Sortino, a civilian employee of the Sarpy County Sheriff's Department, testified she has been a civilian booking clerk at the jail for about seven years. Filing No. 187-20, Ex. 20, Deposition of Mary Sortino (Restricted) at 37, 25. Sortino accessed the National Crime Information Center ("NCIC") database, and printed a report on Mendoza.[8] *Id.* at 37. Booking clerk Sortino testified that she would have contacted ICE regarding Plaintiff because his intake sheet indicates that he is not a United States citizen. Filing No. 172-32, Affidavit of Brandy Johnson ("Johnson Aff."), Ex. I, Sortino Dep. (Restricted) at 47, 88-90.

Sarpy County jail staff obtained Mendoza's fingerprints using a digital scanner. Filing No. 187, Ex. 17, Titus Dep. (Restricted) at 65-68. Unbeknownst to Mendoza, the

[8] The NCIC database is a computerized database available to law enforcement that shows details of an individual's criminal history and other identifying information such as FBI numbers and state identification numbers, as well as related information such as addresses, aliases, fingerprint descriptions, physical descriptions including scars, citizenship status, A numbers, and motor vehicle driving abstracts. Filing No. 187, Ex. 28; Ex. 20, 37:1-57:25 (Restricted)).

booking clerks misidentified him as "Ramon Mendoza Gutierrez" on the fingerprint form. Mendoza signed the fingerprint form digitally as "Ramon Mendoza." Filing No. 187-21, Ex. 21, Deposition of Kathleen Meinstad (Restricted) at 125-27. The mechanism Mendoza used to sign the form did not allow him to see his fingerprints, or the incorrect identification that the booking staff had inserted. Filing No. 187-17, Ex. 17, Titus Dep. (Restricted) at 68.

The record shows that booking clerk Mary Sortino called ICE at 6:08 p.m. on March 5, 2010. Filing No. 172-24, Johnson Aff., Ex. B, Telephone Records (Restricted) at 2; Filing No. 172-32, Johnson Aff., Ex. I, Sortino Dep. (Restricted) at 45. At approximately 6:19 p.m. on March 5, 2010, she conducted the initial NCIC database "KQ1" search on Plaintiff's name of "Mendoza, Ramon," date of birth "8/31/1964," and gender "male." Filing No. 172-31, Johnson Aff., Ex. H, Deposition of Brandi Chase ("Chase Dep.") (Restricted) at 109-113; Filing No. 187-32, Ex. I, Sortino Dep. (Restricted) at 53-54; 56, 65. The NCIC run conducted by Sortino contained several possible individuals with the same or similar names and dates of birth as entered by Sortino. Filing No. 172-31, Johnson Aff., Ex. H, Chase Dep. (Restricted) at 121-22, 124, 135.

The report contained a State of Nebraska driving history abstract for Ramon Mendoza. Filing No. 187-20, Ex. 20, Sortino Dep. (Restricted) at 57. That listing showed Mendoza's address in Papillion, Nebraska, and prior convictions in Sarpy County for driving-related offenses. *Id.* at 57-58. The Papillion address shown matched the address on Mendoza's intake sheet. *Id.*; *see* Ex. 28, Sarpy 2010 records at 1, 13-14. Another name listed was Ramon Mendoza Gallegos. Filing No. 187-20, Sortino

Dep. (Restricted) at 123; Filing No. 187-28, Ex 28, Sarpy 2010 records (Restricted) at 15. The NCIC report showed that Ramon Mendoza Gallegos had the same FBI number, state identification number, Social Security number and birthdate (August 31, 1964) as the record for an individual listed as Ramon Mendoza. Filing No. 187-20, Ex. 20, Sortino Dep. (Restricted) at 57; Filing No. 187-28, Sarpy 2010 records (Restricted) at 14-15. The Mendoza Gallegos listing showed a birthplace of Mexico and had no notation of citizenship. *Id.* at 15. Another listing was for "Ramon Mendoza Gutierrez," with an alias of "Ramon Mendoza," showing a birthdate of August 31, 1964 and listing the same Social Security number as that listed under Ramon Mendoza, along with another Social Security number, but a different FBI number. *Id.* There is evidence that an FBI number and A-number were added into the software to Mendoza's electronic records for 2008 at some time after the incidents at issue herein and would not have been in Mendoza's electronic 2008 records on March 5, 2010. Filing No. 172-7, Williamson Aff. (Restricted) at 6.

After she printed the report for the NCIC inquiry, Sortino made inquiry on an FBI "QR" database, which shows outstanding warrants for an individual. Filing No. 172-32, Johnson Aff., Ex. I, Sortino Dep. (Restricted) at 63; Filing No. 187-28, Ex. 28, Sarpy 2010 records (Restricted) at 22-25. Information in that rap sheet is based only on the FBI number in the request. Filing No. 187-28, Ex. 28, Sarpy 2010 records (Restricted) at 22. The response to the inquiry indicates that Ramon Mendoza Gutierrez had outstanding warrants and a lengthy criminal record. *Id.* at 22-25. At the time she was deposed in this case, Sortino had no independent memory of the plaintiff or the incidents at issue. Filing No. 172-32, Johnson Aff., Ex. I, Sortino Dep. (Restricted) at

33, 56. Records show, however, that Sortino entered the FBI number for Ramon Mendoza Gutierrez, rather than Ramon Mendoza-Gallegos. *Id.* at 22; Filing No. 172-32, Sortino Dep. (Restricted) at 63.

Booking clerk Brandi Chase testified that Sarpy County jail booking staff are instructed to contact ICE to investigate for a detainer if an inmate either does not provide a Social Security number or if he or she states that he or she had been born outside the United States. Filing No. 187, Ex. 19, Chase Dep. (Restricted) at 42-43, 45. Chase stated that if the inmate had a foreign country of birth, but asserted he or she was an American citizen, and had a Social Security number, she would still contact ICE. *Id.* at 47.

Defendant Justin Osterberg, a law enforcement officer employed by ICE testified that on the evening of March 5, 2010, he was the on-call immigrations and enforcement agent (IEA), and it was his first day of ever handling the after-hours, on-call duty from his home in Cedar Rapids, Iowa. Filing No. 187-11, Deposition of Jerome Osterberg ("Osterberg Dep.") (Restricted) at 6, 16-17. On March 5, 2010, calls to the ICE toll-free number would automatically route to his cell phone. *Id.* at 22. Osterberg testified that he has a specific recollection of speaking to Ramon Mendoza by phone on the evening of March 5, 2010. *Id.* at 72-73, 272. He remembered asking Mendoza his name, Social Security number, and parents' names. *Id.* at 76-77. He believed Mendoza told him that Mendoza's mother's maiden name was Gallegos. *Id.* at 77. He did not believe that he asked Mendoza about citizenship because none of the information he had been provided indicated that he needed to. *Id.* at 76-77. Osterberg explained that "[u]p until that point all the people that [he'd] ever encountered with or—ever have encountered

that were United States citizens have always come out right off the bat saying they're a citizen, why are you talking to me." *Id*. at 82. He testified Mendoza stated that he had been born in Mexico. *Id.* at 77.

Osterberg had never met or conversed with any Sarpy County booking clerks prior to the weekend of March 5, 2010. *Id.* at 253. He stated that generally his investigation and issuance of a detainer begins with a call from a jail. *Id.* at 69. The information he obtains from the jail is the inmate's name, date of birth, what country they claim to be from, and what their current charges are. *Id.* at 70. He then speaks to the inmate and obtains the inmate's Social Security number, parents' names, marital status, children's names and employment. *Id.* at 72. Osterberg testified that he made a total of two calls to the Law Enforcement Services Center ("LESC") regarding the plaintiff, and during the first initial call, after he communicated information about plaintiff to the LESC, the LESC advised him that it had located two A-files, one created under the name “Ramon Mendoza Gallegos,” which showed a legal permanent resident status, and another created under the name “Ramon Mendoza Gutierrez,” who was a deportable felon with no legal status in the United States. *Id.* at 285.

Osterberg testified that he issued the detainer for Ramon Mendoza Gutierrez because he believed that he had probable cause to do so, based on the very close similarities in identifiers between the two A-files described to him by LESC staff, and because he knew, based on his training and experience as an ICE agent, that a single individual might have more than one A-number and that identity theft is common by individuals residing in the United States illegally. *Id.* at 13-14, 132, 145-146, 149-51, 154-556, 165-168, 264-65, 287. He believed that the person in Sarpy County custody

was the deportable felon described to him by the LESC, and he believed the two individuals in the LESC records were the same person. *Id.* at 135. He did not have access to any documents sent by Sarpy County since all were sent to his office. *Id.* at 124, 291. That weekend he did not compare the NCIC printouts which contained physical descriptions for both. *Id.* The record shows the plaintiff's is 6' tall, weighing 200 pounds. Filing No. 187-28, Sarpy County inmate file at 27. The printout shows the deportable felon, Mr. Mendoza Gutierrez, as 5'11' and 130 pounds. *Id.* at 33. It also describes identifiable scars on the two individuals that do not match. *Id.*

Osterberg stated that he went to his office early on the following Monday morning and contacted Sarpy County to get fingerprints. *Id.* at 229. He ran the prints through the IDENT AFIS system, found the plaintiff was a permanent resident and found they did not match and then sent a fax cancelling the detainer. *Id.* at 224, 237. Sarpy County jail officials have never had access to the Department of Homeland Security United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program's Automated Biometric Identification System (IDENT). Filing No. 173-13, Affidavit of Mike Jones (Restricted) at 5.

Jail staff never provided Mendoza with a copy of the ICE detainer, ICE policies or procedures, detainee request forms, envelopes or a writing instrument. Filing No. 172-33, Johnson Aff., Ex. J, Meinstad Dep. (Restricted). Mendoza was confined in the locked H-6 cell with three other ICE detainees. Filing No. 172-14, London Aff. (Restricted) at 2. There was a telephone in or near the cell. *Id.* at 3. Mendoza called his wife Laura and son Richard several times. Filing No. 187, Ex. 15, Richard Mendoza Dep. (Restricted) at 40; Ex. 10, Mendoza Dep. (Restricted) at 61, 263.

Sarpy County jail is a locked facility. Filing No. 187-12, Ex. 12, Davis Dep. (Restricted) at 2. Members of the public are generally not allowed in the intake area. *Id.* Access is controlled by mater control unit employees and communication with those individuals is via intercom. *Id.* at 81-84. The jail's booking clerks, intake deputies and deputy guards cannot see or hear what occurs in the lobby that is open 24 hours a day, seven days a week. Filing No. 187-12, Ex. 12, Davis Dep. (Restricted) at 77-86.

Laura Mendoza, Ramon Mendoza's wife, testified she brought her husband's identification documents to the Sarpy County jail at about 7:00 p.m. on Friday, March 5, 2010. Filing No. 187-14, Ex. 14, Deposition of Laura Mendoza ("Laura Mendoza Dep.") (Restricted) at 137. She communicated to a jail employee through an intercom. *Id.* She held the documents up to a camera in the waiting area. *Id.* at 39. She did the same thing on Saturday. *Id.* On Sunday, March 8, 2010, she spoke to a jail employee through a glass partition, held the documents up to the glass and showed them to the employee. *Id.* at 142. She stated the employee told her "they had found the guy that there were looking for and he committed several crimes." *Id.* at 141. Richard Mendoza corroborated Mrs. Mendoza's testimony. Filing No. 187-15, Richard Mendoza Dep. (Restricted) at 47. Ms. Sortino testified she was not aware that the Mendoza family had brought documents to the jail. Filing No. 187-20, Ex. 20, Sortino Dep. (Restricted) at 66-68. Ramon Mendoza testified that an officer with missing fingers told him that his wife had been at the jail with his passport. Filing No. 187-10, Mendoza Dep. (Restricted) at 232. Mendoza also testified that the guard told Mendoza that he could find out more information with Immigration on Monday since it was a weekend. *Id.* at

67. Mendoza was released from the Sarpy County jail around 9:30 a.m. on March 8, 2010. Filing No. 187-28, Ex. 28, Sarpy 2010 records (Restricted) at 31.

The record shows that the Sarpy County jail accepts reimbursement payments for holding inmates on ICE detainers. Filing No. 187-26, Ex. 26, "*Frequently Asked Questions on the State Criminal Alien Assistance Program (SCAAP)*" (Restricted); Filing No. 187-12, Davis Dep. (Restricted) at 48-49. Sheriff Davis characterized the payments as offsets or reimbursements for housing prisoners. Filing No. 187- 12, Davis Dep. (Restricted) at 48-50, 124. Captain Greg London testified that matters related to reimbursement are handled by the County Information Technology (IT) Department. Filing No. 173-2, Johnson Aff., Ex. M, London Dep. (Restricted) at 57. Sheriff Davis testified that the SCAAP funding did not provide any incentive to hold more ICE detainees. Filing No. 173-1, Johnson Aff., Ex. L, Davis Dep. (Restricted) at 159. The plaintiff has pointed to no evidence showing that any of the non-supervisory jail staff were even aware of the existence of SCAAP funds.

II. LAW

A. Qualified Immunity

Public officials are immune from suit if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A plaintiff seeking damages under 42 U.S.C. § 1983 must show first that the defendant's conduct violated a constitutional right and, second, that the right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Mead v. Palmer*, 794 F.3d 932, 935-36 (8th Cir. 2015) (stating that in determining whether defendants should receive qualified immunity,

courts evaluate (1) whether the facts, construed in the light most favorable to the plaintiff, establish a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the alleged violation, such that a reasonable official would have known that her actions were unlawful). In making this determination, courts must afford the plaintiff all reasonable inferences to be drawn from the record. *Solomon v. Petray*, 795 F.3d 777, 786 (8th Cir. 2015). A court may "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson*, 555 U.S. at 236.

"[D]istrict courts must carefully conduct 'a thorough qualified immunity analysis' before denying or granting summary judgment on this issue, including "findings of fact and conclusions of law, similar by analogy to [Federal Rule of Civil Procedure] 52(a)(2)," sufficient for [the Appeals] court effectively to 'fulfill our function of review.'" *Ransom v. Grisafe*, 790 F.3d 804, 815 (8th Cir. 2015) (Riley, J., concurring) (quoting *Robbins v. Becker*, 715 F.3d 691, 694 & n.2 (8th Cir. 2013) (alterations in original)), *cert. denied,* No. 15-647, 2016 WL 100445 (U.S. Jan. 11, 2016). To be thorough, the determination may not be abbreviated or terse and must lay out the fact findings and law step-by-step. *Id.*

"For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wright v. United States*, No. 14-3606, 2015 WL 9310298, at *5 (8th Cir. Dec. 23, 2015) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "'This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'" *Id.* (quoting *Anderson*, 483 U.S. at

640). "But it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson*, 483 U.S. at 640 (citations omitted)). "Petitioners can show a clearly established right through 'cases of controlling authority in their jurisdiction at the time of the incident' or through a 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Id.* (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). "The pertinent inquiry is whether the state of the law at the time gave the official 'fair warning' that such conduct was unlawful in the situation he confronted." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Whether the right at issue was clearly established is a question of law for the court to decide. *Id.*

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, —-, 131 S. Ct. 2074, 2085 (2011). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 341(1986)). "To overcome qualified immunity, a plaintiff must be able to prove that 'every reasonable official would have understood that what he is doing violates' a constitutional right[.]" *Story v. Foote*, 782 F.3d 968, 970 (8th Cir. 2015) (quoting *al–Kidd,* 563 U.S. at ——, 131 S. Ct. at 2083).

B. Fourth Amendment – traffic stop and illegal detention

Under the Fourth Amendment, individuals have the right to remain free of arrest or seizure without probable cause. U.S. Const. Amend. IV; *Stoner v. Watlingten*, 735

F.3d 799, 803-04 (8th Cir. 2013).[9] The constitutionality of a traffic stop depends upon whether the officer had an objectively reasonable belief that a law had been violated. *United States v. Washington*, 455 F.3d 824, 827 (8th Cir. 2006). The subjective intent of the police officer is not relevant. *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001); *Whren v. United States*, 517 U.S. 806, 818 (1996). "'[A]ny traffic violation, even a minor one, gives an officer probable cause to stop the violator. If the officer has probable cause to stop the violator, the stop is objectively reasonable and any ulterior motivation on the officer's part is irrelevant.'" *Conrad v. Davis*, 120 F.3d 92, 96 (8th Cir.1997) (quoting *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996)).

The Fourth Amendment commands that searches and seizures be reasonable and the permissibility of a particular law enforcement practice is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. *Wright*, No. 14-3606, 2015 WL 9310298, at *7. For Fourth Amendment purposes, reasonableness is evaluated from the perspective of a reasonable officer on the scene, not from the more comfortable view of hindsight. *Id.* at *8.

[9] In connection with his Fourth Amendment argument, the plaintiff argues that "[h]e has the right to post reasonable bail for his release from jail pending adjudication of a non-capital offense" and he has "the right to be free of incarceration absent a criminal conviction." *See infra* at 3 n.3. Those rights are not at issue under these facts. Mendoza was released on his own recognizance after the detainer was cancelled, and was incarcerated over the weekend pending his preliminary hearing on misdemeanor charges.

In the case of a charge of alleged illegal detention, the officers are entitled to qualified immunity if there was "arguable probable cause" to detain the plaintiff. *Ransom,* 790 F.3d at 813. Law enforcement officers are immune from suit if they had "a mistaken but objectively reasonable belief" that an accused had committed a criminal offense. *McCabe v. Parker*, 608 F.3d 1068, 1078 (8th Cir. 2010); *Ransom,* 790 F.3d at 813. An officer's subjective belief about the existence of probable cause is not relevant to the analysis. *Ransom*, 790 F.3d at 813; *Bridgewater v. Caples*, 23 F.3d 1447, 1449 (8th Cir.1994).

"When an officer is faced with conflicting information that cannot be immediately resolved, . . . he may have arguable probable cause to arrest a suspect." *Ransom,* 790 F.3d at 813 (quoting *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011)). "Changes in objective evidence may be relevant: 'an investigative stop must cease once reasonable suspicion or probable cause dissipates.'" *Id.* at 814; *see United States v. Watts*, 7 F.3d 122, 126 (8th Cir. 1993). Whether probable cause has dissipated requires examination of the objective facts known to the detaining officers. *Ransom*, 790 F.3d at 813-14.

The Supreme Court recognizes that "the lapse of a certain amount of time" is a factor in assessing the existence of a constitutional encroachment. *See Baker v. McCollan*, 443 U.S. 137, 145-46 (1979) (stating that "mere detention pursuant to a valid arrest but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law,'" but finding that a three-day detention of a man mistaken as his brother on a warrant that conformed to the requirements of the Fourth Amendment and was supported by

probable cause did not amount to a Constitutional violation). Generally, continuing to hold an individual "once it has been determined that there was no lawful basis for the initial seizure is unlawful within the meaning of the Fourth Amendment." *Hill v. Scott*, 349 F.3d 1068, 1074 (8th Cir. 2003) (quoting *Rogers v. Powell*, 120 F.3d 446, 456 (3d Cir. 1997)). Nevertheless, a separate, independent basis may support continued detention. *Hill*, 349 F.3d at 1074; *see Wright,* No. 14-3606, 2015 WL 9310298, at *7.

It was clearly established well before 2010 that "immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention." *Morales v. Chadbourne*, 793 F.3d 208, 215 (1st Cir. 2015). Under 8 C.F.R. § 287.7, an ICE official is authorized to issue a detainer to another law enforcement agency to "seek[ ] custody of an alien presently in custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a); *see Morales*, 793 F.3d at 214. "[T]he sole purpose of a detainer is to request the continued detention of an alien so that ICE officials may assume custody of that alien and investigate whether to initiate removal proceedings against her." *Morales*, 793 F.3d at 214-15. "Once the alien has completed her criminal custody and is 'not otherwise detained by a criminal justice agency,' the detainer instructs the agency to 'maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays[,] in order to permit assumption of custody by [ICE].'" *Id.* at 214 (quoting § 287.7(d)). "Statutory authority for warrantless enforcement actions, including the issuance of detainers, is provided in 8 U.S.C. § 1357." *Id.* (stating that "[w]ithout a warrant, immigration officers are authorized to arrest an alien only if they have "reason to believe

that the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest.") (quoting 8 U.S.C. § 1357(a)(2)). The "reason to believe" standard is "considered the equivalent of probable cause." *Id.* at 216.

C. Fourteenth Amendment

"[T]he Constitution prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S. 806, 813 (1996). The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. *Id.* To prevail on a claim of racially-based selective enforcement, "the plaintiff must normally prove that similarly situated individuals were not stopped or arrested in order to show the requisite discriminatory effect and purpose." *Johnson v. Crooks*, 326 F.3d 995, 1000 (8th Cir. 2003); *United States v. Gomez Serena*, 368 F.3d 1037, 1040–41 (8th Cir.2004) (rejecting defendant's racial profiling argument when officer had reasonable and articulable suspicion that traffic violation had occurred).

D. Due Process

"The Fourteenth Amendment guarantees '[s]ubstantive due process[, which] prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'" *Moran v. Clarke*, 296 F.3d 638, 643 (8th Cir. 2002) (en banc) (quoting *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir.1998) (en banc) (alteration in *Moran*)). "To that end, the Fourteenth Amendment prohibits 'conduct that is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, [or is] offensive to human dignity."'" *Id.*

(quoting *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989) (alteration in *Weimer*)). Acts arising out of a defendant's deliberate indifference will not sustain a substantive due process claim, but "'conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.'" *Id.* at 647 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

If a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process. *Lewis*, 523 U.S. at 842. Seizures and pretrial detentions are better addressed under the Fourth Amendment and not substantive due process. *Clarke*, 296 F.3d at 646-47.

The "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 328 (1986). *Bivens*, like Section 1983, imposes liability for violation of Constitutional rights, not for violations of duties of care arising out of tort law. *Baker,* 443 U.S. at 146 (involving mistaken arrest of an individual on a warrant for his brother who falsified identification documents); *see also Lane v. Sarpy County*, 165 F.3d 623, 624 (8th Cir.1999) (no due process claim where officers mistakenly arrest and detain for six hours an individual believed to be a different individual with the same name).

In order to assert a claim for a violation of procedural due process rights, a plaintiff must establish that state law would not have afforded them an adequate post-deprivation tort remedy. *See Zinermon v. Burch*, 494 U.S. 113, 130 & n. 15 (1990); *Parrish v. Mallinger*, 133 F.3d 612, 615–16 (8th Cir.1998).

E. Civil Rights Conspiracy

To prevail on a claim of conspiracy to deprive an individual of his constitutional rights, the individual "must show '[(1)] that the defendant conspired with others to deprive him . . . of a constitutional right; [(2)] that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and [(3)] that the overt act injured the plaintiff.'" *Solomon,* 795 F.3d at 789 (quoting *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999)). Because "the elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided . . . [t]he court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy." *Id.* at 789-90 (quoting *White v. McKinley*, 519 F.3d 806, 816 (8th Cir. 2008)).

F. Supervisory Liability

Government officials are personally liable only for their own misconduct. *Parrish v. Ball*, 594 F.3d 993, 1001 (8th Cir. 2010). Thus, "[t]he doctrine of qualified immunity requires 'an *individualized* analysis of *each* officer's alleged conduct.'" *Walton v. Dawson*, 752 F.3d 1109, 1125 (8th Cir. 2014) (quoting *Roberts v. City of Omaha*, 723 F.3d 966, 974 (8th Cir. 2013) (emphasis added in *Walton*)). "[I]t is well established that a municipality [or county] cannot be held liable on a respondeat superior theory, that is, solely because it employs a tortfeasor." *Atkinson v. City of Mountain View,* 709 F.3d 1201, 1214 (8th Cir. 2013). "[A plaintiff] 'must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations' or 'that

the supervisor actually knew of, and was deliberately indifferent to or tacitly authorized, the unconstitutional acts.'" *Saylor v. Nebraska*, No. 14-3889, 2016 WL 362230, at *4 (8th Cir. Jan. 29, 2016) (quoting *McDowell v. Jones*, 990 F.2d 433, 435 (8th Cir. 1993)). When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts. *Livers v. Schenck*, 700 F.3d 340, 355 (8th Cir. 2012); *S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015). This rigorous standard requires proof that the supervisor had notice of a pattern of conduct by the subordinate that violated a clearly established constitutional right and allegations of generalized notice are insufficient. *S.M.*, 808 F.3d at 340. To impose supervisory liability, other misconduct must be very similar to the conduct giving rise to liability. *Id.*

G. Supplemental Jurisdiction

Once the court has established original jurisdiction over some claims, it may exercise supplemental jurisdiction over specified additional state law claims which it would otherwise have no independent basis for jurisdiction. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349-50 (1988); *see* 28 U.S.C. § 1367(a) (providing that the district courts shall have supplemental jurisdiction over related state law claims that form part of the same case or controversy as the original jurisdiction). Under 28 U.S.C. § 1367(c)(3), the court may decline to exercise supplemental jurisdiction where the court has dismissed all claims over which it has original jurisdiction. *Mountain Home Flight Serv., Inc. v. Baxter Cnty., Ark.*, 758 F.3d 1038, 1045 (8th Cir. 2014). While this

determination is a matter of discretion for the court, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ.*, 484 U.S. at 350 n. 7.

III. DISCUSSION

Viewing the evidence in the light most favorable to the plaintiff, the court finds that the facts do not establish the violation of a constitutional right. The evidence shows that Ramon Mendoza was properly stopped for a minor traffic violation-having an obstructed view. The plaintiff does not challenge that fact. Thereafter, he was properly arrested on a charge of operating a motor vehicle on a revoked license.

Although he was first told he would be given a ticket and released on his own recognizance, a county employee's later search of a computerized criminal history database revealed information that indicated that the plaintiff could be a dangerous illegal alien. That information was relayed to an ICE agent, who, based on the reports in another database, also determined that the plaintiff could be an illegal alien. The information contained in the databases, though ultimately found to be incorrect, furnished the arguable probable cause to detain the plaintiff.

The court's exhaustive review of the evidence shows that Mendoza was not subjected to an unreasonable seizure. The county defendants' performance of their duties as intake and/or booking clerks could arguably be found wanting. However, those actions have not been shown to be anything more than multiple innocent mistakes. The county defendants' actions do not show "plain incompetence" or any

knowing violation of the law. These are the sort of reasonable, but mistaken judgments that are insulated from liability under the qualified immunity doctrine.

Although the plaintiff was detained on information that turned out to be incorrect, the plaintiff's predicament was partly of his own making. The evidence shows that he furnished the law enforcement officers no driver's license or identification and provided the wrong Social Security number. Further, throughout the lengthy booking process, he never asserted his citizenship nor did he identify himself as a U.S. citizen to the ICE agent. Although information about the plaintiff's citizenship could have been found in the computerized records of the plaintiff's earlier incarcerations, the evidence shows that the information was not easy to access, and in the absence of the plaintiff's assertion of citizenship, it was not unreasonable for the county employees not to have uncovered the information.

The County employees' failure to uncover the evidence of the plaintiff's actual citizenship within the County's computerized records system has not been shown to be careless, reckless, or deliberately indifferent. The employees' actions were not that unusual in the context of automated record-keeping systems. The evidence shows that a crucial fact—the notation regarding the plaintiff's citizenship—did not appear on a screen, or in a field, that would normally be accessed in the course of booking. Also, the NCIC database contained information that an individual who shared several identifying characteristics with the plaintiff was a deportable alien. There has been no showing, such as proof of widespread inaccuracies in the recordkeeping system itself, that the employees were unreasonable in relying on either their own historical records or the NCIC database. A more careful or thorough review of the prior incarceration

records would have been preferred, but the County employees' errors, or oversights, are not the sort of mistakes that make them "plainly incompetent." The mistakes are simply not of constitutional magnitude.

Assuming the truth of the evidence of Mendoza's wife's and son's attempts to furnish Mendoza's citizenship documents to jail personnel, the court finds the County's reluctance or refusal to receive or consider those documents may have been inconsiderate, rude, thoughtless or imprudent, but did not rise to the level of a constitutional violation. The County defendants are running a jail and have legitimate security concerns. Further, it is not unusual for reduced services to be available from a governmental agency on a weekend. Finally, the County defendants were justified in relying upon a detainer placed by ICE officials.

The court finds the ICE agent's investigation was authorized by applicable federal and state laws and, although a minimalist inquiry at best, it does not rise to the level of being unreasonable under the circumstances. The ICE agent had arguable probable cause to believe the person detained at Sarpy County jail was not a citizen based on the information provided to him by the County defendants, LESC and the plaintiff. He was entitled to rely on the information relayed to him from the NCIS and LESC databases, absent a showing that those sources of information were inaccurate or unreliable. Again, the plaintiff did not identify himself as a U.S. citizen to the agent. Based on the agent's experience, it was reasonable for the officer to infer that the individual in custody was not a citizen. The information from the LESC that there was an individual with similar identifying characteristics was probable cause to suspect that

the individual listed could be the same person. These events took place on a weekend when the agent did not have full access to law enforcement resources.

Significantly, the ICE agent took the first opportunity he had to confirm the plaintiff's identity via a fingerprint comparison on the following Monday morning. It is not unreasonable for fingerprint comparison resources not to be available to an agent at home on a weekend. Immigration regulations, in fact, contemplate such a scenario in specifying that the 48-hour detainer period does not include Saturdays, Sundays, or holidays. As soon as the ICE agent became aware that the individual detained was not a removable alien, he cancelled the detainer. The cancellation of the detainer occurred well within the "48 hours, excluding Saturdays, Sundays, and holidays" which is provided for ICE to take custody of an individual it believes is a removable alien. *See* 8 C.F.R. § 287.7(d).

Under the circumstances, the temporary detention of the plaintiff, a citizen who had been validly arrested for driving under revocation, for the period of the weekend so that defendant officers could investigate his citizenship status is not an unreasonable seizure under the Fourth Amendment. The length of the detention, balanced against governmental interests, was not overly long and the regrettable mistakes in properly identifying Mendoza were rectified at the earliest opportunity.

With respect to the plaintiff's asserted due process claims, the court finds Mendoza's substantive due process claim fails because it is "covered" under the Fourth Amendment. In any event, the plaintiff has not shown the sort of conscience-shocking behavior that meets the threshold for imposition of liability under the substantive prong of the Fourteenth Amendment. The plaintiff relies on the defendants' alleged

conspiratorial plan—the long-standing cooperation between Sarpy County and ICE—to support his conscience-shocking behavior claim. However, as discussed below, the plaintiff has not produced evidence sufficient to support any reasonable inference of a conspiracy. The plaintiff has not shown that the defendants' conduct was conscience-shocking in the constitutional sense of that term.

The facts presented do not support a claim for any violation of procedural due process rights. It appears that the plaintiff received all the process that was due. The plaintiff does not challenge the procedures afforded to him in connection with the misdemeanor charges. To the extent a procedural due process claim is asserted, the claim fails because the plaintiff has not established that state law would not have afforded him an adequate post-deprivation tort remedy. Indeed, his pendent state and federal tort law claims tend to establish that adequate post-deprivation remedies are available.

With respect to the plaintiff's conspiracy claim, there is no evidence, circumstantial or otherwise, from which the court can infer a conspiracy or any discriminatory animus. An arrangement for reimbursement of costs incurred in connection with housing illegal aliens does not equate to a conspiratorial agreement. The plaintiff has presented no evidence of the necessary meeting of the minds or concerted action from which to infer a conspiracy, nor has he presented evidence of overt acts in furtherance of the conspiracy.

Also, the evidence, including audio and video evidence, does not reveal any racial animus. The plaintiff was generally treated respectfully. One officer seemed impatient at one point and raised his voice in response to the plaintiff's recalcitrance or

confusion with respect to his city of birth, and an officer can be heard on the audio making an offhand reference to "the old country." Those actions, though arguably brusque or rude, do not amount to evidence of discrimination. Nor has the plaintiff shown selective enforcement so as to amount to a Fourteenth Amendment violation. The plaintiff was stopped for a legitimate traffic infraction. He was arrested for driving on a revoked license. He has offered no evidence that PPD officers treat non-Hispanic persons any differently for similar traffic infractions.

In light of the finding that the plaintiff has not shown the violation of a constitutional right, the court need not address the issue of supervisory liability, but notes that the plaintiff has not presented evidence, expert or otherwise, that Sheriff Davis's policies and/or training are constitutionally deficient.

The evidence in this case amounts only to an arguable claim for negligence. The court is mindful however, that inaccurate data stored in law enforcement databases constitutes a serious potential threat to citizens' constitutional rights, particularly when innocent citizens may be detained, searched, handcuffed, arrested, and prosecuted simply because of bureaucratic inaccuracies. This danger can be magnified by the information-sharing common to most law enforcement agencies. The plaintiff here was plainly inconvenienced, embarrassed, and distressed by the defendants' less-than-thorough investigations, but his plight is simply not severe enough to amount to a constitutional tort. The plaintiff was detained for a matter of days and the mistake was rectified at the earliest opportunity. Also, the plaintiff put himself in jeopardy of arrest and misidentification by driving in an unlawful manner, without registration, proof of ownership, driver’s license or valid photo identification. Many citizens, naturalized or

otherwise, are arrested, misidentified and held in custody pending correct identification. The law requires apprehension and arrest of fugitives. Unfortunately, mistakes occur in even the best of circumstances. Law enforcement officers, on the other hand, should be aware that they could face constitutional consequences if negligent data entry errors rise to the level of reckless or intentional disregard or deliberate indifference to constitutional rights.

IT IS ORDERED:

1. Defendants John Does # 1-5 are hereby dismissed on plaintiff's motion.

2. The motion for summary judgment filed by defendants Jeff Davis and Sarpy County, Nebraska (Filing No. 169) is granted.

3. Defendant Justin Osterberg's motion for summary judgment (Filing No. 175) is granted.

4. A Judgment in conformity with this Memorandum and Order will issue this date.

Dated this 3rd day of March, 2016.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge