

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

**LUIS ROBERTO RODRIGUEZ  
TREVINO,**

**Plaintiff,**

**v.**

**RICHARD K. JONES, et al.**

**Defendants.**

**: Case No. 1:08-cv-00339**  
**:**  
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**:**  
**: Magistrate Judge Timothy S. Black**  
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**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT (Doc.55)**

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**Memorandum**

**I. Introduction**

This civil rights action challenges a discriminatory and illegal search and seizure of Plaintiff at a construction site in Butler County, Ohio. Mr. Rodriguez Trevino was a worker at a Port Union worksite in Butler County, Ohio. Defendants Medellin and Berter were employees of the Butler County Sheriff's office. Mr. Medellin's title was "immigration specialist." Defendants were investigating "illegal immigrants" working at the site. They targeted Plaintiff and other drywall workers because of their Hispanic ethnicity and/or Mexican national origin. Mr. Rodriguez Trevino was subjected to an unreasonable seizure when he was directed to the construction trailer at the request of Defendant Medellin. The seizure continued when Defendant Medellin directed Mr. Rodriguez Trevino to enter the small room inside the construction trailer. In both instances the Plaintiff was directed to accompany or to remain in the presence of the Sheriff's employees at locations where the Plaintiff did not otherwise intend to go. At all times relevant to this case Defendants Medellin and Berter were engaging in civil enforcement of federal immigration law. They had no authority to engage in such civil enforcement of federal immigration law. Plaintiff was present in the trailer and in the small office and produced the documents that led to his arrest only because he was denied equal protection under the law and unreasonably seized by Defendants Medellin and Berter. Therefore his arrest violates the Fourth and Fourteenth Amendments to the United States Constitution.

At the time of the events in this case, Defendant Sheriff Jones, Policymaker for Defendant Butler County, had an established policy of discouraging undocumented

workers from settling and working in Butler County Ohio. Defendant Medellin was hired by Defendant Butler County approximately two months before the arrest of Plaintiff. Mr. Medellin had extensive experience enforcing the criminal and civil provisions of federal immigration law during his thirty years as a federal immigration agent. He had *no* experience or training with respect to his duties and/or the boundary of his authority as an immigration specialist at the *county* level. He had no job description. During the period that the Sheriff deployed Medellin into the community, the Sheriff was also seeking a legal opinion from the County prosecutor as to whether local law enforcement agents had authority to enforce federal immigration law. He had received no response at the time of the events of this case so he had given no guidance to Medellin. After the activities of Defendants Medellin and Berter in this case, Sheriff Jones, policymaker for Butler County, saw no basis for disciplining Medellin or Berter. In fact, to this day Defendant Medellin remains employed by Butler County as an immigration specialist and he has no job description. Defense counsel in this case insist, that on these facts, Defendants Medellin and Berter have “the authority to investigate, and even make arrests, for violations of federal law and, specifically, violations of immigration law.” R. 55: Def Motion for Summary Judgment, p.20.<sup>1</sup> This policy is wrong as a matter of law. Thus, County policy misdirected Medellin into asserting more authority than he possessed and the failure to train Medellin in the duties of a county level immigration specialist is the moving force behind his improper seizure of the plaintiff in this case. The County is therefore liable along with the individual defendants under Section 1983 for the Fourth and Fourteenth Amendment violations suffered by the Plaintiff in this case.

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<sup>1</sup> Statements made by a party-opponent in pleadings may be used against him as admissions. *Shell v. Parrish*, 448 F.2d 528, at 535 (6th Cir. 1971)(anything said by the party-opponent in a pleading may be

## **II. Statement of Facts**

### **A. Summary**

Mr. Rodriguez Trevino lived with his wife and two children in the United States for eleven years prior to his removal from this country. On January 2, 2007 Mr. Rodriguez Trevino was working as a laborer for J&A Drywall at a construction site at 8514 Port Union Road in Hamilton, Ohio. Pursuant to Butler County policy of investigating illegal immigrants working at construction sites, Defendant Medellin, a civilian working as an immigration specialist in the Butler County Sheriff's office, and Defendant Berter, a deputy sheriff in Butler County, entered the construction worksite. They directed that all of the suspected illegal immigrants (Hispanics) working for J&A Drywall gather in a construction trailer where they were individually interviewed and asked to produce identification. Mr. Rodriguez Trevino admitted he was in the country illegally and produced a valid Ohio driver's license, and two unauthentic identification documents. Mr. Rodriguez Trevino was charged with forgery and arrested. Mr. Rodriguez Trevino was later acquitted of the criminal charges. However, as a result of this seizure and arrest, Mr. Rodriguez Trevino was removed from this country. He and his family are now living in poverty in Mexico.

### **B. Butler County Hires an Immigration Specialist, Robert Medellin, and Provides no Job Description or Training.**

1. Defendant Sheriff Jones is the policy maker for Butler County with respect to law enforcement activity.<sup>2</sup>

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used against him as an admission); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)(same).  
<sup>2</sup> R.62: Jones Depo TR at 16:11-16:14.

2. Sheriff Jones decided to add the position of immigration specialist to the staff of the Butler County Sheriff's Office (BCSO) in 2006.<sup>3</sup>
3. Sheriff Jones added the position in response to complaints by constituents about the presence of undocumented persons in Butler County.<sup>4</sup>
4. The goal of the County immigration effort was to reduce the number of illegal aliens in Butler County, Ohio.<sup>5</sup>
5. There is no job description for the position of immigration specialist.<sup>6</sup>
6. Defendant Medellin was hired as an immigration specialist in October 2006.<sup>7</sup>
7. Defendant Medellin is a retired federal immigration officer with nearly 30 years experience enforcing the criminal and civil provisions of federal immigration law.<sup>8</sup>
8. Defendant Medellin had no training with respect to his duties as an immigration specialist for Butler County.<sup>9</sup>
9. The position of immigration specialist is a civilian position. The person in that position does not have arrest power.<sup>10</sup>

### **C. Medellin Pursues Immigration Investigation re Port Union Road Worksite.**

10. In December, 2006, Defendant Medellin received complaints from union workers that there was friction with undocumented workers at the worksite at 8514 Port

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<sup>3</sup> R.62: Jones Depo TR at 4:22-5:9.

<sup>4</sup> R.62: Jones Depo TR at 5:12-5:18.

<sup>5</sup> R.62: Jones Depo TR at 6:2-6:10; 28:20-29:14.

<sup>6</sup> R.60: Medellin Depo TR at 85:9-13.

<sup>7</sup> R.55-3: Medellin Affidavit ¶2.

<sup>8</sup> R.55-3: Medellin Affidavit.

<sup>9</sup> R.60: Medellin Depo TR at 96:25-97:3.

<sup>10</sup> R.60: Medellin Depo TR at 9:1-5; R.62: Jones Depo TR at 33:11-21.

- Union Road in Butler County, Ohio. R. 55: Def Motion for Summary Judgment, pp.11-12.<sup>11</sup>
11. One of the companies identified in the complaints was J & A Interior Systems aka J & A Drywall (J&A). R. 55: Def Motion for Summary Judgment, p.13.
12. Defendants Medellin and Berter went to the worksite on the morning of January 2, 2007. Medellin was wearing civilian clothes and had his badge attached to his belt. Medellin carried a concealed weapon. Berter was in uniform. R. 55: Def Motion for Summary Judgment, p.12.<sup>12</sup>
13. The alleged purpose of the visit was to educate employers as to the document requirements for legal employment, specifically, the completion of I-9 forms. R. 55: Def Motion for Summary Judgment, p.12.
14. Defendant Medellin was not going to investigate a crime. *Id.*
15. Defendant Medellin agreed that his purpose in visiting had no state law connection.<sup>13</sup>
16. The log of Defendant Medellin states that he received an anonymous tip about J&A Drywall on December 13, 2006 and that approximately 60 – 100 “illegal aliens” were working for J&A at the Port Union Distribution Center. A second tip on December 14 also claimed that illegal aliens were working at that site. Surveillance of the site was conducted by Defendant Medellin with Deputy Berter on December 27 and without deputy Berter on December 28.<sup>14</sup>

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<sup>11</sup> R.60: Medellin Depo TR at 5:20-8:14.

<sup>12</sup> R.60: Medellin Depo TR at 35:9-36:7, 38:10-17; R.60: Medellin Depo Ex.5 (Motion to Suppress TR at 27:7-19); R.60: Medellin Depo Ex.8: 1/31/07 Medellin Memo to Chief Dwyer, p.1; R.61: Berter Depo TR at 28:19-29:12.

<sup>13</sup> R.60: Medellin Depo TR at 58:4-14.

<sup>14</sup> R.60: Medellin Depo TR at 57:9-14; R.60: Medellin Depo Ex.4: Chronology, p.1 (990557).

17. Defendant Deputy Berter stated in his incident report that he was present with Defendant Medellin at the worksite on January 2, 2007 “as part of an ongoing investigation about illegal immigrants working on the construction site.”<sup>15</sup> At the preliminary hearing on charges brought against the Plaintiff, Defendant Berter testified,

We had gotten information through a confidential informant that there was possibly illegal immigrants working on the job site. So myself and Deputy (INAUDIBLE) went there to speak to the general contractor about the possibility of him having illegal immigrants working on the job site.

R.61: Berter Depo Ex.14 Preliminary hearing 1-9-07 TR at 4:10-13.

**D. Plaintiff and Other Workers Are Directed to Assemble in Trailer at Request of Defendant Medellin.**

18. Defendant Medellin spoke to Bruce Geiser of J&A and asked if he had any employees. Mr. Geiser responded that he did not have any employees, only subcontractors. R. 55: Def Motion for Summary Judgment, p.13.

19. The Defendant Medellin asked Mr. Geiser if he could speak to the J&A subcontractors regarding the I-9 forms and Geiser agreed. *Id.*

20. The log of events prepared by Defendant Medellin states that “Writer asked if it was okay to talk to the subcontractors regarding I-9 paperwork completion, and if they had any questions. Mr. Giser [sic] agreed to contact his subcontractors. Mr. Giser [sic] summoned the twenty-nine subcontractors in question to the office.”<sup>16</sup>

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<sup>15</sup> R.61: Berter Depo Ex. 11 Incident Report, p.2 (990001).

<sup>16</sup> R.60: Medellin Depo Ex.4, p.1 (990557).

21. The incident report completed by Defendant Deputy Berter states, “Upon speaking to the General Contractor all of the suspected illegal workers were brought to a construction trailer on site.”<sup>17</sup>
22. Mr. Kathman is a Project Manager at the worksite.<sup>18</sup> He is a witness identified by Defendants and they have submitted an affidavit from him in support of their motion for summary judgment. R. 55-1: Affidavit of Joe Kathman. Mr. Kathman was present in the trailer when the Defendant BCSO employees met with the workers.<sup>19</sup> He testified that there was no business purpose for the workers to gather in the trailer.<sup>20</sup> The workers were brought to the trailer by Mr. Geiser because Defendant Medellin wanted to meet with them.<sup>21</sup>
23. Defendant Medellin identified himself as an immigration specialist with the Butler County Sheriff’s Office. R. 55: Def Motion for Summary Judgment, p.15. He stated that “I may have talked about immigration. I did make the statement that I was a retired special agent with immigration, or ICE now.”<sup>22</sup>

**E. Defendant Medellin directed the Workers to show their ID.**

24. Defendant Medellin spoke in English sometimes and in Spanish to the workers.<sup>23</sup>
25. Defendant Medellin agrees that when he addressed the workers who had been directed to the trailer, he had no probable cause to arrest them for any violation of state law.<sup>24</sup>

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<sup>17</sup> R.61: Berter Depo Ex. 11, p.2 (990001).

<sup>18</sup> R.59: Kathman Depo TR at 6:10-11.

<sup>19</sup> R.59: Kathman Depo TR at 9:18-10:10; R. 55-1, Affidavit ¶¶5-11.

<sup>20</sup> R.59: Kathman Depo TR at 13:18-22.

<sup>21</sup> R.60: Medellin Depo TR at 31:16 -32:9.

<sup>22</sup> R.60: Medellin Depo TR at 36:16-18.

<sup>23</sup> R.61: Berter Depo TR at 29:24-30:3; R.60: Medellin Depo TR at 39:19-23; R.60: Medellin Depo Ex. 5, pp. 71, 81).

26. Each person was requested by Defendant Medellin to present their identification papers. R. 55: Def Motion for Summary Judgment, p.15. Mr. Kathman stated that Medellin told the workers that, “he was with the Butler County Sheriff’s Office and he was going to be taking a look at their paperwork.”<sup>25</sup> Kathman observed that the paperwork produced by the workers included “driver’s licenses and identification.”<sup>26</sup> The workers showed their papers to Mr. Medellin in the large room of the trailer while defendant Berter stood in the room. R.55-1: Kathman affidavit, ¶10.

27. Plaintiff Rodriguez Trevino said Defendant Medellin told them that “We needed to present our documents for each person.” He understood the “documents” to be “identification documents.”<sup>27</sup> Oscar Falcon, another worker directed to the trailer, stated that Defendant Medellin said he was from immigration and that he had to check identification.<sup>28</sup>

28. The incident report prepared by Defendant Deputy Berter states that, “All of the suspected illegal workers were brought to a construction trailer on site. All of the workers were asked to provide identification.”<sup>29</sup> Oscar Falcon described it as follows:

Q. When you first met Mr. Medellin in  
22 the large room, how did he introduce himself to  
23 the group?  
24 A. He said he was Mr. Medellin and he  
25 wanted to see the I.D.s.

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<sup>24</sup> R.60: Medellin Depo TR at 62:3-16.

<sup>25</sup> R.59: Kathman Depo TR at 22:1-6.

<sup>26</sup> R.59: Kathman Depo TR at 24:13-16.

<sup>27</sup> R.57: Rodriguez Trevino Depo TR at 51:17-22.

<sup>28</sup> R.58: Falcon Depo TR at 22:17-23.

<sup>29</sup> R.61: Berter Depo Ex. 11, p.2 (990001).

- 1 Q. Did he tell you why he wanted to  
2 see the I.D.s?  
3 A. Not at first he didn't tell us.  
4 Q. Did he eventually tell you?  
5 A. Because he was the Immigration.

R.58: Falcon Depo TR at 36:21-37:5.

**F. Defendant Medellin directed Plaintiff and other workers into a small room for individual interviews.**

29. At some point, in his effort to comply with the Defendants' instructions, Plaintiff asked for and was granted permission by Deputy Berter to go to his car and retrieve ID.<sup>30</sup>

30. Defendant Medellin decided to use the small room in the trailer.<sup>31</sup> Plaintiff Rodriguez Trevino and the other J&A workers were interviewed individually in the small office which was Mr. Kathman's office. R. 55: Def Motion for Summary Judgment, p.16.

31. Mr. Kathman stated that Medellin "took them back" individually to Kathman's office.<sup>32</sup> He agreed that the only reason the workers went back to the office was in compliance with a request by Mr. Medellin.<sup>33</sup>

32. Plaintiff was one of those workers who went back to the small room.<sup>34</sup> Defendant Medellin admitted that Plaintiff ("Defendant" in the criminal case) did not ask to meet with him in the small room:

THE COURT: Did this defendant ask you to  
22 have a private meeting with him so he could ask  
23 you questions?

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<sup>30</sup> R.61: Berter Depo TR at 39:18-25; R.61: Berter Depo Ex.14 Preliminary Hearing TR, p.9.

<sup>31</sup> R.60: Medellin Depo TR at 40:8-9.

<sup>32</sup> R.59: Kathman Depo TR at 23:10.

<sup>33</sup> R.59: Kathman Depo TR at 23:23 – 24:4.

<sup>34</sup> R.56: Rodriguez Trevino Depo TR at 55:2-7.

24 THE WITNESS: No.<sup>35</sup>

33. Oscar Falcon stated that he only went to the small room because he was directed

there by Mr. Medellin:

9 Q. Did you want to go to the office  
10 with Mr. Medellin?

11 A. No, actually I didn't.

12 Q. So is the only reason you went  
13 there because Mr. Medellin asked you to go  
14 there?

15 MR. YOSOWITZ: Objection. Go ahead.

16 THE WITNESS: Yes.

R.58: Falcon Depo TR at 36: 9-16.

**G. The Immigration Investigation Resulted in the discharge of 12 workers and the arrest of Plaintiff.**

34. Plaintiff and the other workers were detained at the trailer for approximately one hour.<sup>36</sup> Oscar Falcon said that the workers stayed at the trailer even after they were interviewed in the small office because “they didn’t let us leave until everybody was finished.”<sup>37</sup>

35. Following the interviews Defendant Medellin informed management that 12 of the workers were “illegal employees.” All twelve were terminated .<sup>38</sup>

36. During the individual interview of Mr. Rodriguez Trevino by Medellin in the small office Mr. Rodriguez Trevino produced identification documents to

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<sup>35</sup> R.60: Medellin Depo Ex.5 Motion to Suppress TR at 83:21-24.

<sup>36</sup> R.59: Kathman Depo TR at 37:10-37:14.

<sup>37</sup> R.58: Falcon Depo TR at 35:22-23.

<sup>38</sup> R.60: Medellin Depo Ex. 4 (990557).

Medellin and Mr. Rodriguez Trevino admitted that he was not legally present in the United States.<sup>39</sup>

37. Mr. Rodriguez Trevino was arrested for forgery but was acquitted of all charges.

R. 55: Def Motion for Summary Judgment, p.18.

#### **H. Animus against Hispanic Persons.**

38. Aside from the bosses and managers, all of the workers gathered inside the trailer were Hispanic. Of that number, some were dark skinned, some were light skinned but they were all Hispanic.<sup>40</sup>

39. Defendants concede that even though they had received “calls from individuals...concerning undocumented workers at the worksite causing friction with individuals in various trades...” (R. 55, p.11), Defendants nonetheless failed to speak to the alleged majority community victims or contact them regarding the alleged friction. Instead, based on these anonymous contacts, Defendants targeted the J&A workers who were predominantly Hispanic.

40. Defendants allegedly came to speak to the worksite manager about I-9 compliance. R. 55, p. 12. During the visit, however, Defendant Medellin did not at any point show anyone an I-9 during his contact with the workers or management staff.<sup>41</sup> Mr. Kathman never observed an I-9.<sup>42</sup>

41. Moreover, before Mr. Medellin ever asked to meet with the J&A workers he learned that all of the workers were in fact subcontractors. R. 55, p.13. Mr. Medellin had thirty years experience with I-9 compliance requirements and knew

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<sup>39</sup> R.56: Rodriguez Trevino Depo TR at 57:14-57:25

<sup>40</sup> R.58: Falcon Depo TR at 17:15-17, 34:18-35:1.

<sup>41</sup> R.60:Medellin Depo Ex.5 Motion to Suppress TR at 107:10-107:19.

that subcontractors had no duty to complete I-9s under federal law.<sup>43</sup> Therefore it is a fair inference that the alleged desire to educate the J&A workers regarding I-9 compliance was merely pretext for discrimination.

### **III. Argument.**

#### **A. Standard for Determining Summary Judgment.**

Summary judgment may be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The party moving for summary judgment has the burden of showing conclusively that no genuine issue of material fact exists. The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn there from. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993 (1962); *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995)(in resolving a motion for summary judgment, the court “must afford all reasonable inferences, and construe the evidence in the light most favorable to the non-moving party”); *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 560 (6th Cir. 2004). “If ... the defendant disputes the plaintiff’s version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of [summary judgment].”

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<sup>42</sup> R.59: Kathman Depo TR at 32:11-32:14.

<sup>43</sup> Plaintiff was unable to find an edition of the M-274 Employer’s handbook that was in effect at the time of the incident. However, Plaintiff was able to locate a ‘Handbook for Employers: Instructions for completing Form I-9 (employment Eligibility Verification Form) which was in effect November 1991 - Nov. 2007. In that handbook, it specifically states that an I-9 form is not required for independent contractors. See [www.osha.gov/pls/epub/wageindex.download?p\\_file=F6844/I9\\_Handbook.pdf](http://www.osha.gov/pls/epub/wageindex.download?p_file=F6844/I9_Handbook.pdf) and [www.uscis.gov/files/nativedocuments/m-274.pdf](http://www.uscis.gov/files/nativedocuments/m-274.pdf).

*Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). Where, as here, “the non-moving party presents direct evidence refuting the moving party’s motion for summary judgment, the court must accept the evidence as true.” *Terrance v. Northville Regional Psychiatric Hosp.*, 286 F.3d 834, 841 (6th Cir. 2002). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). Plaintiff has cross moved for summary judgment on the Fourth Amendment Claim of an unreasonable seizure with respect to Defendant Jones in his official capacity and the County (R. 66: Cross Motion for Partial Summary Judgment against Butler County) but in all other respects contested facts preclude summary judgment in this case.

#### **B. Standard for Determining Qualified Immunity.**

The Supreme Court has created a two-tiered test to determine whether or not defendants are entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001). The first question a court must answer is whether the facts alleged show the defendants’ conduct violated any constitutional rights of the Plaintiff. If that question is answered affirmatively, the court must then ask whether the right alleged was clearly established when the violation was alleged to have occurred. *Id.* at 201. The order for answering those questions was recently relaxed by the Court but the essential questions related to qualified immunity remain unchanged. *Pearson v. Callahan*, 129 S.Ct. 808 (2009). While the existence of qualified immunity is typically a question of law, the task simply cannot be done so long as the facts are in dispute. *Brandenburg v. Cureton*, 882 F.2d 211, 216 (6th Cir. 1989). Plaintiff claims that his rights under the Fourth and

Fourteenth Amendments were violated and that these rights were clearly established on January 2, 2007.

**C. Defendants Medellin and Berter are not Entitled to Qualified Immunity.**

**1. Defendants Medellin and Berter Violated Plaintiff's Constitutional Rights under the Fourth Amendment.**

The first step in addressing the individual Defendants claim of qualified immunity is determining whether they violated a constitutional right of the Plaintiff. In this case they violated rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. He was unreasonably seized on January 2, 2007.

**a. Plaintiff was Seized at the Construction Site.**

Plaintiff was seized in violation of the Fourth Amendment when Defendant Medellin directed that Plaintiff and the other workers be brought to the construction trailer, announced that he was with the Butler County Sheriff's Office, commanded that the workers show their paperwork, and brought each worker into the small office for an interview.

The Fourth Amendment states that "the right of the people to be secure... against unreasonable...seizures shall not be violated." For Fourth Amendment purposes, a person is seized "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *INS v. Delgado*, 466 U.S. 210 (1984), quoting *United States v. Mendenhall*, 466 U.S. 544, 554 (1980); *Florida v. Bostick*, 501 U.S. 429, 439 (1991); *Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005). In some cases, the Supreme Court has recast the inquiry as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate

the encounter.” *United States v. Drayton*, 536 U.S. 194, 201 (2002)(quoting *Bostick*, 501 U.S. at 436). Under either formulation of this rule, a court must consider all of the circumstances surrounding an encounter between a citizen and police.

The Sixth Circuit has also often declared that “the one occurrence which seems to distinguish ‘seizures’ from casual contacts between police and citizens is when the defendant is asked to accompany the police...to a place to which the defendant had not planned to go.” *United States v. Garcia*, 866 F.2d 147, 151 (6th Cir. 1989); *United States v. Campbell*, 486 F.3d 949, 956 (6th Cir. 2007)(quoting *Garcia*). That is, a person is seized when law enforcement asks him to go where he or she had not planned to go. *See United States v. Knox*, 839 F.2d 285 (6th Cir. 1988); *United States v. Jefferson*, 650 F.2d 854, 856 (6th Cir. 1981); *see also United States v. Saperstein*, 723 F.2d 1221, 1226 (6th Cir. 1983)(finding seizure based, in part, on fact that DEA agent requested that the defendant accompany him to the DEA office). In *United States v. Knox*, a DEA agent approached three airline travelers in an airport. The agent walked up to the three travelers and identified himself. He then requested that the three travelers accompany him to a smaller office within the larger airport. Based on these facts alone, the Sixth Circuit affirmed the lower court’s determination that this encounter was a seizure. *Knox*, 839 F.2d at 289; *see also Jefferson*, 650 F.2d at 856 (The DEA agent, “immediately after identifying himself[,] requested [the defendant] to accompany him to the baggage claims office. In these circumstances, [the defendant] could not reasonably believe that he was free to leave.”).

In this case a reasonable person in Plaintiff’s shoes would not feel free to terminate the encounter. Deputy Berter described the entire effort in his incident report

as an “immigration investigation” of “suspected illegal workers” who were “*brought to a construction trailer on site.*” He also said “All of the workers were asked to provide identification.”<sup>44</sup> Defense witness Kathman confirmed that here was no business purpose to bring the workers to the trailer and they only came to the trailer because Medellin asked to meet with them:

12 Q. Right. But if Mr. Medellin hadn't  
13 shown up that day and a uniformed officer  
14 hadn't shown up that day, would you have  
15 nonetheless gathered all those J&A workers in  
16 that trailer?

17 A. At that time, no.

18 Q. On that day. I mean was there a  
19 business purpose to gather those workers in the  
20 work trailer other than to meet with  
21 Mr. Medellin?

22 A. No.

R.59: Kathman Depo TR at 13:12-13:22.

The transfer of Plaintiff and the other workers individually to the small office was another seizure since they did not independently intend to go to that office. Mr. Kathman stated that Medellin “took them back” individually to Kathman’s office.<sup>45</sup> He agreed that the only reason the workers went back to the office was in compliance with a request by Mr. Medellin.<sup>46</sup> Oscar Falcon was asked directly whether he wanted to go to the small office and he said “no” and that he only went because he was directed there by Defendant Medellin.<sup>47</sup> Plaintiff also had no independent reason for going to the small office. Defendant Medellin conceded as much when he testified during the criminal prosecution of the Plaintiff:

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<sup>44</sup> R.60 Medellin Depo Ex. 5, p. 98:2-11 (emphasis added).

<sup>45</sup> R.59: Kathman Depo TR at 23:10.

<sup>46</sup> R.59: Kathman Depo TR at 23:23 – 24:4.

<sup>47</sup> R.58: Falcon Depo TR at 35:24-36:16.

THE COURT: Do you think it's possible that in that situation that the defendant or the other people interviewed privately could have been left with that impression that they were back there to talk to a former immigration officer who is here with a gun and a badge working for the sheriff's office to talk about immigration issues?

THE WITNESS: I understand what you are saying, and I would say that yes, I guess it could be possible...<sup>48</sup>

The fact that, after the workers were told to produce ID, Plaintiff went to his car and retrieved his ID does not change the fact that he was seized by defendants Medellin and Berter. The Sixth Circuit has also established that a seizure may occur and may continue even where a citizen is allowed to leave the presence of officers and to go to his or her car – as long as the citizen is still acting at the direction of the officers. *See Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000). In *Gardenhire v. Schubert*, police officers came to the plaintiffs' residence. The officers told the plaintiffs that they 'needed to go' to the police station. *Id.* at 312. The plaintiffs got into their own car and drove to the station, where they met the officers again. *Id.* at 309. Following other events, the plaintiffs sued, alleging a Fourth Amendment violation. In response to this claim, the defendants moved for summary judgment based on qualified immunity. *Id.* at 308. The Sixth Circuit affirmed a denial of summary judgment, noting that "a jury could find that a reasonable person in the [the plaintiffs'] position would have felt that they were not free to leave" even though the plaintiffs were not continually in the presence of the officers. *Gardenhire*, at 314. The court also stated that "[a] police officer's statement that 'you need to go' somewhere carries substantial authoritative weight...[V]ery few

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<sup>48</sup> R.60: Medellin Depo Ex.5, p. 98.

people could hear such a directive from a police officer and still think they were free to act otherwise.” *Id.* at 314. In this case plaintiff was merely complying with Defendant Medellin’s statement that he “needed” to show his identification.<sup>49</sup>

It is clear, therefore, that the Plaintiff was seized by Defendants Medellin and Berter both when he was directed at Medellin’s request to go to the trailer and when Medellin directed him to go to the small office. It was during this unconstitutional seizure that Plaintiff presented documents that caused his arrest.

The fact that this case involves undocumented workers makes no difference to the determination as to whether the Plaintiff was seized. As set out in R. 66, Plaintiff’s cross Motion for Summary Judgment on Fourth Amendment, the Defendants had no authority to enforce the civil provisions of immigration law. Even if they did, Plaintiff was seized under the Fourth Amendment. In *INS v. Delgado*, 466 U.S. 210, 218 (1984), the immigration officers interviewed the suspected undocumented workers at their work stations – the workers did not need to move anywhere in response to the immigration officer questions. This case is materially different since Plaintiff and the other workers literally left their work stations at the request of the Defendant Sheriff employees, gathered in the trailer to meet with the officers, and again moved to the small office at the direction of Defendant Medellin. This is a seizure.

**b. The Seizure of Plaintiff was Unreasonable, in Violation of Clearly Established Fourth Amendment Rights.**

The Fourth Amendment provides protection against unreasonable seizures. A seizure is unreasonable if not supported by reasonable suspicion or probable cause. *See U.S. v. Campbell*, 486 F.3d 949, 956 (6th Cir. 2007). Reasonable suspicion allows law

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<sup>49</sup> R.57: Rodriguez Trevino Depo TR at 51:17-22.

enforcement officers to “briefly detain” citizens when the officers are reasonably suspicious, founded upon objective facts, that the citizens are engaged in criminal activity. *U.S. v. Grant*, 920 F.2d 376, 384 (6th Cir. 1990). An officer’s generalized suspicion or hunch is insufficient to justify a detention. *Id.* To show that reasonable suspicion existed, the government must point to “specific and articulable facts, which taken together with rational inferences from those facts, reasonably suggest that criminal activity has occurred or is imminent.” *U.S. v. Urrieta*, 520 F.3d 569, 573 (6th Cir. 2008) (subsequent search for evidence of drug-running was unsupported by reasonable suspicion where officer initially stopped motorist for traffic violation and could not point to additional facts justifying continued detention).

The officers in *Grant* were federal immigration officers enforcing immigration laws at the time that the unreasonable search, which resulted in the discovery of narcotics, occurred. The Sixth Circuit held that these officials did not have any reason to suspect the plaintiff of being guilty of a crime when they saw him sleeping on an airplane. *Grant*, 920 F.2d at 384. Similarly here, Defendant Medellin and Berter had no reason to suspect Plaintiff and the workers of any crimes when they were rounded up and directed to the trailer and small office.

In all cases that discuss the authority of local law enforcement officers to arrest and detain aliens the police have had an independent, valid reason to initially begin the questioning. *See Gonzales*, 722 F. 2d 478 (Several incidents: police responded to complaint of 25 people loitering behind a market, police responded to complaint of fight, and police stopped people leaving post office because of suspicious behavior), *United States v. Salinas-Calderon*, 728 F. 2d. 1298 (10th Cir. 1984)(police stopped car because

driver was driving erratically, found six people hiding in the trunk), *United States v. Vasquez-Alvarez*, 176 F. 3d 1294 (10th Cir. 1999)(police questioned alien because he was suspected of drug dealing), *United States v. Santana-Garcia*, 264 F. 3d 1188 (10th Cir. 2001)(driver stopped for traffic violation); *Muehler v. Mena*, 544 U.S. 93 (2005)(cited by Defendants)(investigation of illegal weapons and gang activity). Not so in this case.

There is no evidence that the officers reasonably suspected Mr. Rodriguez Trevino, or any of the other workers, of any crimes that the agency had the authority to enforce at the time that the Defendants detained them. Indeed the Defendants do not claim they had reasonable suspicion or probable cause to gather the workers in the trailer or direct them to the small office. Instead, the individual Defendants acted pursuant to Butler County's "ongoing investigation about illegal aliens working on the construction site." There was no reason to suspect that any of the workers had violated any state criminal laws or criminal provisions of the Immigration Code. The officers admit in their incident report that this raid occurred because of an ongoing investigation of illegal aliens.

The mere fact that, *after* detaining Mr. Rodriguez Trevino and forcing him to provide identification, Defendants formed probable cause that Mr. Rodriguez Trevino's identification was a forgery is simply irrelevant. Defendants must assert some objective, specific, and articulable facts to support a reasonable suspicion to call Mr. Rodriguez Trevino into the trailer *in the first place*. Further, even if this initial detention was authorized, Defendants would have to show some further objective facts, sufficient to raise a reasonable suspicion that criminal activity was afoot, to justify further detaining Mr. Rodriguez Trevino individually in the adjacent office and subjecting him to

questioning. Defendants articulate no such facts. They had no reasonable suspicion or probable cause to support the seizure. As is clear from the cases cited, these principles were clearly established in this Circuit by January 2, 2007.

## **2. Defendants Violated Plaintiff's Right to Equal Protection under the Fourteenth Amendment.**

The Court can and should find that the Defendants violated Mr. Rodriguez Trevino's Fourteenth Amendment right to equal protection of the laws. "The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent from the Fourth Amendment protection against unreasonable searches and seizures." *United States v. Avery*, 137 F.3d 343, 352 (6th Cir. 1997). "[A]n officer's discriminatory motivations for pursuing a course of action can give rise to an Equal Protection claim, even where there are sufficient objective indicia of suspicious to justify the officer's actions under the Fourth Amendment." *Farm Labor Org. Comm. v. Ohio State Hwy. Patrol*, 308 F.3d 523, 533 (6th Cir. 2002)(citing *Whren v. United States*, 517 U.S. 806, 813 (1996)). The Sixth Circuit has acknowledged that "at least by 1992, it was clearly established that the [Fourth Amendment] prohibited racial [or ethnic] targeting in law enforcement investigations, regardless of whether an encounter was lawful under the Fourth Amendment." *Id.* at 542 (denying qualified immunity and summary judgment to a defendant state trooper who allegedly chose to investigate the immigration status of Hispanic persons only). The Fourteenth Amendment prohibits law enforcement from choosing to conduct both consensual or non-consensual interviews with persons based on the persons' race or ethnicity. *Id.* at 541.

"Selectivity in the enforcement of criminal law is .... subject to constitutional

restraint,” in that “the decision to prosecute may not be ‘deliberately based upon an unjustifiable standard such as race, religion or any other arbitrary classification,’” *Wayte v. United States*, 470 U.S. 598, 608 (1985)(quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979) and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). For a selective enforcement claim in the criminal context, a plaintiff must show that the law enforcement practice had both discriminatory purpose and discriminatory effect. *Wayte*, 470 U.S. at 608 (1985).<sup>50</sup> To show discriminatory effect, a plaintiff must provide evidence that “‘similarly situated individuals of a different race’” were not investigated. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). A plaintiff can show discriminatory effect by “naming a similarly situated individual who was not investigated or through the use of ... evidence which ‘address[es] the crucial question of whether one class is being treated differently from another class.’” *Farm Org. Comm.*, 308 F.3d at 534 (quoting *Chavez v. Ill. State Police*, 251 F.3d 612, 638 (7th Cir. 2001)).

A plaintiff can show discriminatory purpose by demonstrating that the “‘decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.’” *Id.* (quoting *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) *see also* *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009)(also citing *Feeney*). “Determining whether official action was motivated by intentional discrimination ‘demands a sensitive inquiry into such circumstances and direct evidence of intent as may be available.’” *Id.* (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Discriminatory purpose may be inferred, in part,

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<sup>50</sup> Plaintiff does not concede that this is the exact standard for a civil claim. But, as set out below, genuine material facts support Plaintiff even under this demanding standard.

from discriminatory effect: “invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact ... that the [practice] bears more heavily on one race than another.” *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Sixth Circuit has explained that, for discriminatory purpose, plaintiffs are not required “to show that the defendant had *no* race-neutral reasons for the challenged enforcement decision. Instead, it is enough to show that the challenged action was taken ‘at least *in part* ‘because of’ .... its adverse effects upon an identifiable group.” *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm’r of Mass.*, 442 U.S. at 279). “[P]roof that a decision was ‘motivated in part by a racially discriminatory purpose’” shifts the burden of establishing that “the same decision would have resulted even had the impermissible purpose not been considered” to the defendant. *Farm Labor Org. Comm.*, 308 F.3d at 539 (quoting *Arlington Heights*, 429 U.S. at 270).

The Supreme Court has held that inability to speak English can be a valid non-racial criterion for law enforcement to use in determining who to interview or investigate in certain circumstances, such as border patrol officers determining probable cause to search a private vehicle entering the U.S. *See United States v. Ortiz*, 422 U.S. 891, 897 (1975). However, the Supreme Court has also indicated that where a decision to take law enforcement action rests on a person’s ability to speak a certain language that “is closely associated with a specific ethnic group, that fact may ‘raise[] a plausible .... inference that language might not be a pretext for what in fact were race-based actions.’” *Farm Labor Organizing Committee*, 308 F.3d at 540 (quoting *Hernandez v. New York*, 500 U.S. 352, 363 (1991)). Furthermore, the Sixth Circuit has held that a jury should determine whether discriminating based on language is just a pretext for racial discrimination. *Id.* Thus,

where evidence indicates that a defendant officer discriminated based on language, rather than race, this issue should not be decided through qualified immunity or summary judgment. *Id.*

In the case at bar, Defendants' arguments are a pretext for discrimination. First, Medellin never met with the majority community persons who allegedly expressed concern about "friction" at the worksite with the undocumented workers. Rather, he simply used the alleged complaints as a basis to target the Hispanic J&A workers for investigation. Second, in their motion for summary judgment Defendants continue to claim that their purpose at the worksite was to discuss I-9 documentation. R. 55, p. 7. In fact, Medellin never showed anyone an I-9 during the visit.<sup>51</sup> Moreover, before Medellin asked that any of the J&A Drywall workers be directed to meet with him he learned that they were all subcontractors and not employees. Subcontractors are not required to complete I-9s.<sup>52</sup> Therefore the stated reason for Defendant Medellin's request to meet with the J&A workers is pretext for discrimination.

The fact that some Caucasians and African-Americans might have also come to the large trailer does not defeat discriminatory effect or purpose of Medellin's actions. Medellin interviewed no African-Americans and only one Caucasian in the smaller room, while the vast majority of those interviewed were Hispanic.<sup>53</sup> Furthermore, there were only two or three African-Americans, who left before the individual interviews in the small trailer,<sup>54</sup> and three to four Caucasians in the large trailer, compared to fourteen or

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<sup>51</sup> R. 61: Berter Depo. TR at 19:22-24. R.60: Medellin Depo Ex.5 at 107:10-19

<sup>52</sup> See sources cited *supra* note 43.

<sup>53</sup> R.60: Medellin Depo. TR at 41:6-14.

<sup>54</sup> R.60: Medellin Depo. TR at 41:6-41:8; R.58: Falcon Depo Ex.A Falcon Affidavit ¶8.

fifteen Hispanics.<sup>55</sup>

Discriminatory purpose can be reasonably inferred from the fact that the majority individuals called into the smaller room were mostly Spanish-speaking,<sup>56</sup> especially given the large Hispanic migrant labor community in Southwestern Ohio. *See Farm Labor Organizing Committee*, 308 F.3d at 540 (acknowledging close connection between Spanish language and migrant labor community composed of individuals of a specific ethnicity). In fact, Medellin admitted in the criminal case that he took the Spanish speaking workers into the back room because of their language issues:

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2 A. I felt that there was some issues regarding  
3 everyone comprehending English.

4 Q. uh-huh.

5 A. So what I did is I individually talked to  
6 them in the back of the room.

7 Q. okay.

8 A. Some in English and some in Spanish, and  
9 some of them spoke both English and Spanish. The  
10 conversations took place in English and Spanish at some  
11 point in time, both languages going back and forth.

12 Q. And that was the individuals there in the  
13 back room?

14 A. Yes.

Material facts therefore support the claim that Defendants violated the Equal Protection Clause and the right to be free of this violation was well established on January 2, 2007.

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<sup>55</sup> R.60: Medellin Depo. TR at 33:2-33:4; R.59: Kathman Depo TR at 19:3-5.

<sup>56</sup> R.60: Medellin Depo. TR at 39:19-39:21; R.60: Medellin Depo Ex.5 Motion to Suppress TR at 70:20-71:14, 82:4-17.

**D. Sheriff Jones is not Entitled to Qualified Immunity.**

As set out above, the constitutional rights of Plaintiff were violated on January 2, 2007. Contested issues of material fact preclude qualified immunity for Sheriff Jones in his individual capacity in this case. The Supreme Court recently reiterated that government supervisors are not liable under respondeat superior and can only be liable for their own misconduct. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009)(claim of discrimination).

**1. Sheriff Jones implicitly or expressly encouraged or authorized Medellin and Berter's unconstitutional conduct.**

A municipal supervisor may not be absolved of personal liability simply because he delegates responsibility of unconstitutional conduct to a subordinate. *Taylor v. Michigan Dep't of Corrs.*, 69 F.3d 76, 81 (6th Cir. 1995)(Eighth Amendment claim). The restriction on *respondeat superior* liability does not mean that a supervisor can never incur liability under § 1983 for unconstitutional conduct of subordinates. *Id.* Rather, “supervisory officials are certainly susceptible to liability under section 1983 for their misconduct in failing to adequately discharge their supervisory duties.” *Hayes v. Vessey*, 777 F.2d 1149, 1154 (6th Cir. 1985).

In *Taylor*, a mentally challenged inmate filed a § 1983 action against the prison and the prison warden after being raped in prison custody for failing to adequately protect him where there existed a substantial risk of harm to his safety. *Taylor*, 69 F.3d at 77. The prison warden argued that supervisory liability was inappropriate because he had no personal involvement in the decision to place Taylor in risk of being harmed, but had instead properly delegated the authority to his subordinates, absolving him of liability for Taylor's injuries. *Id.* at 80. The Sixth Circuit rejected the argument, and reversed the

district court's grant of summary judgment, due in significant part to evidence that established the prison warden "is not merely a supervisor, but is the official directly responsible for" adopting constitutional policies to prevent Taylor's injuries and those of other inmates similarly situated. *Id.* at 81; *see also Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992) (where supervisor "personally had a job to do, and ... did not do it" supervisor can not be absolved of personal liability under § 1983 by delegating responsibilities to subordinate).

A municipal supervisor can be held liable for the unconstitutional conduct of subordinates where there is evidence "that the supervisor encouraged the specific incident." *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984). Therefore, a plaintiff need not necessarily show that a supervisory official directly participated in the unconstitutional conduct of subordinate officials or expressly encouraged the conduct, so long as the plaintiff can show that the supervisory official "implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." *Bellamy*, 729 F.2d at 421; *see also Hicks v. Frey*, 992 F.2d 1450 (1993) (jury verdict upheld where one can at least reasonably infer that supervisory official acquiesced to unconstitutional conduct of subordinate).

It is not required that a plaintiff prove that the constitutional violation was a pattern of past misconduct. *See Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982), *cert. denied*, 459 U.S. 833 (1982). Rather, a plaintiff may prove implicit authorization simply by showing "a complete failure to train the police force, or training that is so reckless and grossly negligent that future police misconduct is almost inevitable

or would properly be characterized as substantially certain to occur.” *Id. See also, Ontha v. Rutherford County, Tennessee*, 222 Fed.Appx. 498, 504 (6th Cir. 2007).

Sheriff Jones cannot absolve himself of liability for the unconstitutional conduct of Medellin simply by showing that Medellin was qualified for the position of “Immigration Specialist.” Under Ohio law, the county sheriff makes the policy for the county with regard to the operation of his office and discharge of his duties. *Stone v. Holzberger*, 807 F.Supp. 1325, 1335 (S.D.Ohio 1992)(citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484-85 (1986)). Like the supervisory officials in *Taylor and Hill*, Sheriff Jones had a job to do and did not do it. It was the responsibility of the County Sheriff, and not the “Immigration Specialist”, to establish a constitutional policy for the County on the arrest and detention of illegal aliens found in Butler County to be followed by subordinate officers. Instead Jones set a policy that directly resulted in the violation of Plaintiff’s rights. See R. 66.

Moreover, Jones has expressly acquiesced in Medellin’s actions and adopted them as consistent with whatever training he claims to have provided and consistent with his policies.<sup>57</sup>

Furthermore, Sheriff Jones should not be absolved of liability for Medellin’s actions simply because he wasn’t present at the worksite on January 2, 2007. The Sheriff’s policy on the treatment of undocumented workers was instrumental in the constitutional violations that occurred on that day because it caused Medellin’s unconstitutional seizure of Rodriguez and other employees of J&A. See R. 66.

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<sup>57</sup> R.62: Jones Depo TR at 14:12-24.

**E. Defendant Jones' Actions as policymaker Bind the County.**

Municipalities are liable under §1983 when the execution of a government's policy or custom violates the constitutional rights of the plaintiff. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Liability may be imposed upon a municipality for longstanding practices or for single decisions made by policy makers in appropriate circumstances. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). Under Ohio law, the county sheriff makes the policy for the county with regard to the operation of his office and discharge of his duties. *Stone v. Holzberger*, 807 F.Supp. 1325 (S.D.Ohio, 1992), *See also Pembaur*, 475 U.S. at 484-85, 106 S.Ct. at 1300-01.

A local government's failure to train its employees can amount to a policy or custom actionable under § 1983 where the failure to train "evidences 'deliberate indifference' to the rights of its inhabitants." *City of Canton*, 489 U.S. at 389 (citing *Pembaur*, 475 U.S. at 483-484). The Supreme Court has recognized that deliberate indifference is found, *inter alia*, where there is a lack of adequate training in light of foreseeable consequences that could result from lack of instruction. *Id.* at 390. In *Canton*, the Supreme Court noted:

[i]t may happen that in light of the duties assigned to specific officers or employees the need for more and different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need.

Inadequate training is the cause of a constitutional violation where (1) the training program is inadequate for the tasks the officer is assigned to perform, (2) the inadequacy

was the result of the local government's deliberate indifference, and (3) the inadequacy "closely related to" or "actually caused" the injury. *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). The adequacy of the training, or lack thereof, is determined in reference to the tasks and authority delegated to official in question. *City of Canton*, 489 U.S. at 390. It is possible for a municipality to be liable for failure to train upon the first occurrence of a particular violation if the failure to train would have the "highly predictable consequence" of causing constitutional violations. *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006) citing *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003).

In sum, a municipality may be liable for failure to adequately train its officials and employees where such failure evidences deliberate indifference to the rights of individuals with whom the officials will have contact. Whether training is adequate or not should be determined in light of the particular tasks to be performed by the official in question. Additionally, the inadequacy of the training must be closely related to the ultimate injury alleged. Where the need for training is obvious, and the inadequacy of the training would have the highly predictable consequence of resulting in a constitutional violation, the municipality may be held liable for failing to train.

Defendants suggest many times in their motion for summary judgment that Defendant Medellin was "well trained," having served as a federal immigration officer. This contention misses the point. The powers vested in a federal immigration agent are much broader than those vested in a local sheriff's deputy when it comes to enforcing federal immigration law. To provide constitutionally adequate training, Defendant Jones was required to instruct Medellin regarding his role as a *county* official, unable to enforce

all provisions of federal immigration law. The evidence shows that Jones knew this and he even asked the County Prosecutor for guidelines on the authority of county officials. See R. 66. But he deployed Medellin to the field and let him seize otherwise free individuals without any County policy or training to guide Medellin's conduct (other than the fact made know in press statements and billboards that the County did not welcome illegal immigrants). Defendants admit that they were attempting to enforce federal immigration law in excess of their role as local law enforcers. Defendant Jones sought to further these efforts by hiring Defendant Medellin and deploying him among persons present in Butler County without any training as to the limitations on his role. The failure to train Medellin on the boundaries of his authority constituted an official decision by the final policy maker, the Sheriff. The Sheriff, in making this decision, was deliberately indifferent to the rights of persons with whom Medellin would come into contact. Consequently, Jones is liable in his official capacity and, in turn, the County is liable for his actions.

**F. Subsequent Indictment of Plaintiff does not Preclude the Fourth Amendment Claim.**

Defendants claim that the indictment of Plaintiff on forgery charges somehow precludes the claims in this case. See R. 55, p. 26. That is wrong as a matter of law. This case is not about whether there is probable cause for forgery. Rather it is about whether Defendants Medellin and Berter followed constitutional standards in seizing Plaintiff, interrogating Plaintiff, and extracting from him the documents that provided the evidence upon which the criminal charges were based. The Plaintiff won his criminal case in any event. Thus these issues were not fully and fairly litigated in state court.

The application of collateral estoppel or issue preclusion is governed by the law of the state in which the district court is located. *McKinley v. City of Mansfield*, 404 F.3d 418, 428 (6th Cir. 2005), cert. den'd 546 U.S. 1090 (2006). Under Ohio law, issue preclusion applies “when the fact or issue (1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.” *Thomson v. Wing*, 637 N.E.2d 917, 923 (Ohio 1994). The burden of demonstrating these requirements have been satisfied rests on the party asserting preclusion. *Knott v. Sullivan*, 418 F.3d 561, 568 (6th Cir. 2005). Defendants have not met that burden in this case.

The general rule in Ohio is not to extend preclusive effect in civil cases to issues addressed in prior criminal cases. According to the Ohio Supreme Court, “the qualitative differences between civil and criminal proceedings [including the differing standards of proof, rules of discovery, and rules of evidence] militate against giving criminal judgments preclusive effect in civil or quasi-civil litigation.” *State ex rel. Ferguson v. Court of Claims of Ohio, Victims of Crime Division*, 786 N.E.2d 43, 48 (Ohio 2003) (quoting *Walden v. Ohio*, 547 N.E.2d 962, 966-67 (Ohio 1989)). The Sixth Circuit has similarly noted that “Ohio state courts generally frown upon the use of criminal proceedings to estop parties in subsequent civil proceedings.” *Boone*, 385 F.3d at 927 (finding that the legality of the police search resulting in claimed Fourth Amendment violation was not “actually and directly at issue” in plaintiff’s criminal trial, and doubting the preclusive effect of criminal trials in civil cases generally); see also *Knott*, 418 F.3d at 568 (affirming District Court determination that issue preclusion should not apply

because “[t]he general rule in Ohio is that a judgment in a criminal proceeding cannot operate as res judicata, or collateral estoppel, in a civil action to establish any fact determined in the criminal proceeding”(citation to record omitted); *Sigley v. Kuhn*, 205 F.3d 1341 at \*3 (6th Cir. 2000)(citing *Russell v. Steck*, 851 F. Supp. 859, 868-69 (N.D. Ohio 1994)(noting that “criminal convictions under Ohio law generally do not prohibit a plaintiff from litigating facts previously determined in a criminal proceeding in a subsequent civil rights claim”).

A full and fair opportunity to litigate an issue generally includes an opportunity to appeal. *Johnson v. Watkins*, 101 F.3d 792, 793 (2d Cir. 1996). Under Ohio law orders on preliminary criminal matters are not final appealable orders and thus when a plaintiff prevails at trial he never really has an opportunity to fully and fairly litigate issues in the criminal case. See *Rush v. City of Mansfield*, No. 1:07-cv-01068-KMO, Doc. 132, at \*12 (N.D. Ohio August 11, 2008). Therefore nothing that transpired in the unsuccessful criminal prosecution of the Plaintiff precludes the civil rights claims in this case.

#### **G. Defendants are not Entitled to Summary Judgment on Issue of Causation.**

Defendants seek a determination that Plaintiff cannot recover for damages related to his removal from the United States. R. 55, p. 37. The Plaintiff was subject to removal because he was seized by defendants and arrested on January 2, 2007.<sup>58</sup> His removal is one of the foreseeable links in the chain of events that make up his injury. Causation is normally a question of fact for trial and not appropriate for summary decision. See e.g., *Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999). The Sixth Circuit has noted that proximate cause under §1983 incorporates common law causation principles. *McKinley*

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<sup>58</sup> R.65: Wilkens Depo TR at 12:7-11.

*v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005). This is consistent with a steady stream of Supreme Court decisions indicating that §1983 should be read against the background of common law tort principles. See e.g., *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Memphis Community School District v. Stachura*, 477 U.S.299, 305 (1986).

It is not unusual that a defendant who violates a plaintiff's rights will try to hide behind a series of continuing events and disclaim any responsibility for injury to the plaintiff. This issue of multiple and subsequent events is best determined by the jury. But some legal principles are clear. First, in this case Defendants blame the Plaintiff for his own injury claiming he "assumed the risk" of living in the country illegally. But there is no contributory negligence recognized in §1983 cases. Contributory negligence is never a defense to a constitutional tort case. *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982). In *Hays*, the defendant police were sued for excessive force under the 4<sup>th</sup> and 14<sup>th</sup> Amendments and §1983. They argued that the jury should have been instructed on contributory negligence because if the plaintiffs had disbursed from the rally as instructed, they would not have been beaten by the police. The Sixth Circuit held:

Contributory negligence has never been a defense to intentional tortious conduct. Such conduct differs from negligence not only in degree but in kind, and in the societal condemnation attached to intentional torts.

*Hays* at 875. The Court held that the plaintiff's alleged negligence in failing to leave the area in no way related to the allegations against the defendants in this case. *Id.* Similarly here, Plaintiff's alleged negligence in staying in the country does not insulate the Defendants in this case.

Second, using causation arguments to limit damages must start from the purpose of damages under §1983: to make victims whole and deter state actors from using a

badge of authority to deprive individuals of rights guaranteed by the Constitution. *Carey v. Phipus*, 435 U.S. 247, 253-259 (1978); *Wyatt v. Cole*, 504 U.S. 158, 161-163 (1992); *McKnight v. Rees*, 88 F.3d 417(6th Cir. 1998). This purpose is not served by narrowly construing the range of foreseeable conduct. Note, for example, in *De Shaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 201 (1989), the Court addressed causation by asking if the victim “was in a worse position than that in which he would have been had [Defendant] not acted at all.”

Typically a defendant is liable for the foreseeable conduct of subsequent actors and the mere fact that another official takes action does not provide insulation from liability or damages. *Malley v. Briggs*, 475 U.S. 335 (1986)(officer who submitted affidavit that lacked indicia of probable cause liable even though a magistrate nonetheless issued a warrant based on that affidavit). In *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987)(en banc), the Sixth Circuit held that the defendant deputy and sheriff were liable for rape of civilian by an inmate to whom they entrusted a fully equipped cruiser, stating, “The officers gave [the inmate] a car and the freedom to commit the crime.” *Id* at 281. Thus a broad range of conduct reaches the jury in 1983 cases.

In this case Butler County officials actually called federal authorities to inform them that Plaintiff was in their custody and directly assisted with the initiation of the removal proceedings.<sup>59</sup> The fact that Mr. Rodriguez Trevino ultimately with the assistance of counsel, chose to be removed “voluntarily” reflects only that various choices have consequences and all the facts related to this choice must simply be set before the jury. This is not a discrete isolated matter that lends itself to summary judgment.

## H. State Law Immunity Is Not Appropriate on These Facts.

Defendants Berter, Jones and Medellin claim immunity under O.R.C. §2744. Immunity is not available to these individuals. The conduct attributable to each of them certainly meets the definition of reckless as that term is used in O.R.C. §2744.03(A)(6)(b) and they are therefore not entitled to immunity. The Sixth Circuit recently applied O.R.C. §2744.03(A)(6)(b) to affirm the denial of summary judgment to employees in the Hamilton County Morgue. *Chesher v. Neyer*, 477 F.3d 784 (6th Cir. 2007). In that case the county coroner permitted Thomas Condon, a commercial photographer, to have access to deceased persons in the morgue. Condon proceeded to access, manipulate, photograph and view these persons without the consent of the families. The coroner and his employees claimed immunity. The District Court rejected the claim and the Sixth Circuit agreed. First the court defined reckless conduct:

Most relevant for the purposes of this appeal is the exception for acts or omissions that were committed “in a wanton or reckless manner.” Ohio Rev.Code Ann. § 2744.03(A) (6)(b). Under Ohio law, wanton and reckless conduct is defined as perversely disregarding a known risk, or acting or intentionally failing to act in contravention of a duty, knowing or having reason to know of facts which would lead a reasonable person to realize such conduct creates an unreasonable risk of harm substantially greater than the risk necessary to make the conduct negligent.

*Id.* at 797, citing *Webb v. Edwards*, 165 Ohio App.3d 158, 845 N.E.2d 530, 536 (2005).

The Court stated that the issue of recklessness is normally a question of fact to be determined by the jury:

“[w]hether such actions rises [sic] to the level of recklessness is normally a question to be determined by the trier of fact.” [citing *Thompson v. Bagley*, WL 940872 (Ohio Ct. App. Apr. 25, 2005, 11] see also *Fabrey [v. McDonald Village Police Dep’t.*, 639 N.E.2d 31,35] (noting that “the issue of wanton misconduct is

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<sup>59</sup> R.65: Wilkens Depo Ex.9 email from Lloyd Morrow; R.65: Wilkens Depo TR at 74:5-23.

normally a jury question”).

*Chesher*, at 800. In *Chesher*, one of the reckless acts was the failure of the Coroner to adequately communicate to the morgue staff the rules governing access of the photographer to the morgue:

Based on the existing record, a fact finder could reasonably determine that Condon's desire and ability to take artistic photographs amounted to a known risk. In the face of this danger, Parrott-the self-described top policymaker-permitted Condon to photograph Morgue subjects without restrictions or viable security measures in place, and failed to inform his staff that the video project had been cancelled.

*Id.* at 802. In the instant case, the actions taken to seize the Plaintiff, the pretext presented with the alleged I-9 purpose for the visit, and the wink and the nod from the Sheriff while he intimidates the County from billboards declaring war on illegal aliens similarly creates a jury question regarding recklessness and precludes summary judgment for these individuals.

Ohio state courts have also found that it is improper to grant §2744 immunity at the summary judgment stage when there are questions of material fact surrounding whether or not a law enforcement conduct is reckless. *Alley v. Bettencourt*, 134 Ohio App. 3d 303, 315 (Ohio App. 4 Dist., 1999)(no §2744 immunity when questions regarding excessive force exist as to officer conduct at arrest and when plaintiff was taken to hospital); *see also Ruth v. Jennings*, 136 Ohio App.3d 370, 376, 736 N.E.2d 917 (Ohio App. 12 Dist., 1999)(police officers not entitled to Chapter 2744 immunity because substantial questions are present regarding the reasonableness of the officers actions when the plaintiff was arrested and when the plaintiff was taken to jail, and these questions must be considered by a jury); *Estate of Graves v. Circleville*, 2008 WL 4958368 (Ohio App. 4 Dist., 2008)(officers who permitted auto to be returned to the

drunk driver who then drove drunk and killed a woman not entitled to §2744 immunity.)  
Therefore immunity under §2744 is not available.

#### **IV. Conclusion**

The Court should deny the Defendants' motion for Summary Judgment in all respects.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on November 18, 2009, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Alphonse A. Gerhardstein  
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