NO. 437PA18-1 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

CARLOS CHAVEZ and LUIS LOPEZ,	)	
	)	
v.	)	From Mecklenburg County
	)	
IRWIN CARMICHAEL, FORMER SHERIFF OF MECKLENBURG COUNTY	)	

****

NEW BRIEF OF PETITIONERS-APPELLANTS CARLOS CHAVEZ AND LUIS LOPEZ

****

INDEX

TABLE OF CASES AND AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 4
STATEMENT OF THE FACTS 5
STANDARD OF REVIEW 11
ARGUMENT 11
I. Because the Court of Appeals issued an advisory opinion in a moot case, this Court should reverse 13
II. The decision below was wrong because the sheriff did not preserve his arguments. 16
A. The Sheriff defaulted by willfully failing to appear and to present evidence in the trial court 17
B. The trial court complied with statutory habeas procedures in the handling of the petitions. 20
III. The superior court retained jurisdiction to determine if petitioners were in lawful state custody, and correctly found no evidence of federal custody. 21
A. The trial court has the jurisdiction to review a habeas petition to determine whether the individual is in lawful state custody. 23
B. The trial court correctly determined that Mr. Chavez and Mr. Lopez were not in federal custody because the sheriff brought no evidence to support that claim. 28
1. The record lacks evidence that Mr. Chavez was in federal custody. 29
2. The record lacks evidence that Mr. Lopez was in federal custody 31
C. The record lacks the requisite evidence that certified 287(g) officers arrested Mr. Lopez and Mr. Chavez 32
IV. The Court of Appeals erred in concluding that the trial court lacked jurisdiction even if the 287(g) agreement was invalid. 33

A. The trial court had subject matter jurisdiction to review the habeas petition under state law.....35

B. The trial court correctly determined that Petitioners were not in lawful state custody because state law does not authorize detainer arrests in the absence of a 287(g) agreement.....36

1. Holding a person on an ICE detainer past the time when he or she would otherwise be released from state custody constitutes a new arrest for civil immigration purposes 36

2. North Carolina officers are not authorized to effectuate civil immigration arrests.....38

a. Federal law prohibits local officers from executing ICE administrative "warrants" in the absence of a 287(g) agreement 39

b. Absent a 287(g) agreement, local officers cannot lawfully effect civil immigration arrests 40

c. The common law grants no authority to local officers to arrest for civil immigration violations.....42

d. States that authorize immigration arrests do so explicitly 43

3. Federal law does not grant local officers the power to arrest for civil immigration violations. 44

4. Detainer arrests also violate the state constitution....45

CONCLUSION..... 45

CERTIFICATE OF COMPLIANCE..... 47

CERTIFICATE OF SERVICE 48

APPENDIX 49

TABLE OF CASES AND AUTHORITIES

Cases

Adams v. AVX Corp., 349 N.C. 676, 509 S.E.2d 411 (1998) .. 30

Anderson v. North Carolina State Bd. Of Elections, __ N.C. __, 788 S.E. 2d 179 (2016) 12-16

Arizona v. United States, 567 U.S. 387 (2012). 25, 38-40

Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56 (1933)..... 15

Chavez v. Carmichael, __ N.C. __, 822 S.E.2d 131 (2018)..... *passim*

Cisneros v. Elders, No. 18CV30549, 2018 WL 7142016 (D. Colo., El Paso Cty. Mar. 19, 2018)..... 36, 44, 45

City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018) 37, 43

Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979)..... 17

Creedle v. Gimenez, 349 F. Supp. 3d 1276 (S.D. Fla. 2018)... 37

Crowell Constructors, Inc., v. State ex rel. Cobey, 328 N.C. 563, 402 S.E.2d 407 (1991) (*per curiam)*..... 30, 33

Crumpler v. Thornburg, 92 N.C. App. 719, 375 S.E.2d 708 (1989)..... 13, 16

DeCanas v. Bica, 424 U.S. 351 (1976) 25

Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957) 15

Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) 5

Godfrey v. Zoning Bd. Of Adjustment of Union County, 317 N.C. 51, 344 S.E.2d 272 (1986) 30

Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) 38

Harris v. Pembaur, 84 N.C. App. 666, 353 S.E. 2d 673 (1987)..... 23

In re Holley, 154 N.C. 163, 69 S.E. 872 (1910) 19, 23

In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978) 13

In re Tarble, 80 U.S. 397 (1871)..... 19

In re Wright, 137 N.C. App. 104, 527 S.E.2d 70 (2000) 15

Jackson County v. Swayney, 319 N.C. 52, 352 S.E.2d 413 (1987)..... 8, 16, 27

Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960)) 15

Lunn v. Commonwealth, 477 Mass. 517, 78 N.E.3d 1143 (2017) 35-37, 44

Matter of Jackson, 84 N.C. App. 167, 352 S.E.2d 449 (1987) 8, 16, 27

Melendres v. Arpaio, 695 F.3d 990 (9th Cir. 2012) 38

Miller v. United States, 357 U.S. 301 (1958) 38

Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015) 37

Moreno v. Napolitano, 213 F. Supp. 3d 999 (N.D. Ill. 2016) . 37

Munn v. North Carolina State University, 360 N.C. 353, 626 S.E.2d 270 (2006) 17

N.C. State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989) 14

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 35, 44

Nyquist v. Mauclet, 432 U.S. 1 (1977)..... 25

Oxley v. DHS, 2018 WL 5389394 (Merit Systems Protection Board Oct. 23, 2018) 31

Plyler v. Doe, 457 U.S. 202 (1982)..... 25

Reid v. Alexander, 170 N.C. 303, 87 S.E. 125 (1915) 15

Roberts v. Madison County Realtors Ass'n, 344 N.C. 394, 474 S.E.2d 783 (1996) 13

Santos v. Frederick County Bd. of Comm'rs, 725 F.3d 451 (4th Cir. 2013)..... 32

Sharpe v. Park Newspapers of Lumberton, Inc., 317 N.C. 579, 347 S.E.2d 25 (1986)..... 15

State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994) 11, 41

State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996) 30

State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971)..... 42

State v. Herman, 221 N.C. App. 204, 726 S.E.2d 863 (2012) 41-45

State v. Herndon, 107 N.C. 934, 12 S.E. 262 (1890) 23

State v. Leach, 227 N.C. App. 399, 742 S.E.2d 608 (2013) ... 24

State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954) 42

State v. Morgan, 299 N.C. 191, 261 S.E. 827 (1980) 36

State v. Nobles, ___ N.C. App.___, 818 S.E.2d 129 (2018), *cert granted, State v. Nobles,* __ N.C. __, 820 S.E.2d 813 (Dec. 5, 2018) 26

State v. Romano, 369 N.C. 678, 800 S.E.2d 644 (2017) 17

State v. Williams, 362 N.C. 628, 669 S.E.2d 290 (2008) 11, 27

Tafflin v. Levitt, 493 U.S. 455 (1990) 26

Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1943) 15

United States v. Di Re, 332 U.S. 581 (1948) 38

Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 70 S.E.2d 578 (1952) 15

Wells v. DeMarco, 88 N.Y.S.3d 518, 168 A.D.3d 31 (N.Y. App. Div. 2018) 26, 36-37

West v. Cabell, 153 U.S. 78 (1894) 30

Williams v. Lee, 358 U.S. 217 (1959) 11, 27

Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820 (1990) 26

Statutes, Rules, and Regulations

8 C.F.R. § 236.1 ..... 26, 33, 40
8 C.F.R. § 287.5 37
8 C.F.R. § 287.8 ..... 26, 40
8 U.S.C. § 1252 39
8 U.S.C. § 1357 ..... *passim*
INA § 287 ..... *passim*
N.C. Gen. Stat. § 1-409 41
N.C. Gen. Stat. § 1-311 41
N.C. Gen. Stat. § 15A-304 41-42
N.C. Gen. Stat. § 15A-401 41
N.C. Gen. Stat. § 15A-721 43
N.C. Gen. Stat. § 15A-761 43

N.C. Gen. Stat. § 17-1 25
N.C. Gen. Stat. § 17-2 24
N.C. Gen. Stat. § 17-3 25
N.C. Gen. Stat. § 17-4 ..... 24, 35
N.C. Gen. Stat. § 17-6 24
N.C. Gen. Stat. § 17-10 24
N.C. Gen. Stat. § 17-12 21
N.C. Gen. Stat. § 17-13 20
N.C. Gen. Stat. § 128-1.1 42
N.C. Gen. Stat. § 153A-145.5 42
N.C. Gen. Stat. § 160A-205.2 42
N.C. Gen. Stat. § 162-62 42
N.C. R. App. P. 9 33
N.C. R. App. P. 10 17
Tex. Code Crim. P. 2.251(a)(1) 43
Va. Code Ann. § 19.2-81.6 43

Constitutional Provisions

N.C. Const. art. I, § 19 43-45
N.C. Const. art. I, § 20 45
N.C. Const. art. I, § 21 45
N.C. Const. art. I, § 27 45

Other Sources

Bill Ortega, *ICE Supervisors Don't Always Review Deportation Warrants*, CNN (Mar. 13, 2019) 31
Jessica Smith, *Habeas Corpus* (March, 2014), North Carolina Superior Court Judges' Benchbook 25
ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, (March 24, 2017), available at https://www.ice.gov/detainer policy 31

NO: 437PA18-1 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

****

CARLOS CHAVEZ and LUIS LOPEZ	)	
	)	From Mecklenburg County
v.	)	
	)	
IRWIN CARMICHAEL, FORMER SHERIFF OF MECKLENBURG COUNTY	)	

****

NEW BRIEF OF PETITIONERS-APPELLANTS CARLOS CHAVEZ AND LUIS LOPEZ

****

ISSUES PRESENTED

I. Whether the Court of Appeals issued an advisory opinion in a moot case?

II. Whether the decision below was wrong because the sheriff did not preserve his arguments?

III. Whether the superior court retained jurisdiction to determine if petitioners were in lawful state custody, and correctly found no evidence of federal custody?

IV. Whether the Court of Appeals erred in concluding that the trial court lacked jurisdiction even if the 287(g) agreement was invalid?

INTRODUCTION

This case presents the Court with consequential issues surrounding North Carolina courts' authority to issue writs of habeas corpus when state or local officials purport to detain a person under the authority of federal

immigration warrants or detainers. In this case, the superior court judge was correct in issuing the writ based on the record before her. However, the Court should not reach these questions because the sheriff willfully mooted the questions, and failed to preserve his current arguments by handing over Petitioners to federal officials for deportation in disobedience of the superior court's writ.

On October 13, 2017, both Carlos Chavez and Luis Lopez – having been previously arrested in separate cases – were to be freed from the custody of the Mecklenburg County Sheriff's Office.[1] Chavez's family had posted his bond that day, and the trial court had unsecured Mr. Lopez's bond. Neither man was freed. Instead, they remained in custody at the jail and were handed over to Immigration and Customs Enforcement (ICE) by the sheriff.

On the date they were to be freed, their lawyers gave the sheriff's office advance notice that they were filing emergency writs of habeas corpus, and the superior court ordered a return hearing. When the sheriff failed to appear at the hearing to justify the detention of Mr. Chavez and Mr. Lopez, the court ordered them released. The sheriff's office did not comply.

---

[1] In 2018, Sheriff Gary L. McFadden was elected. Sheriff McFadden did not oppose the petition of Mr. Chavez and Mr. Lopez for certiorari. All factual references to the conduct of the Sheriff and his office in this brief refer to the conduct of Sheriff McFadden's predecessor in office, Sheriff Irwin Carmichael.

The Court of Appeals issued a sweeping ruling that state courts lack subject matter jurisdiction over noncitizen defendants who are being held in *state* jails by *state* officers where there is a 287(g) agreement.[2] This was error. The trial court maintained subject matter jurisdiction to review Petitioners' habeas petitions under Chapter 17 of the North Carolina General Statutes, even if it ultimately may have had to deny *relief on the merits*. Because the sheriff failed to contest the hearing and show that federal authorities had taken the necessary steps to civilly arrest Petitioners for federal immigration violations, thereby effectuating a transfer to federal custody, the superior court had every authority to grant their habeas petitions.

In dicta, the Court of Appeals also stated that the superior court would have lacked jurisdiction to issue a writ of habeas corpus even if there had been no 287(g) agreement. This conclusion is also wrong and fails to account for the lack of any statutory or common-law authority authorizing North Carolina law enforcement officers to make civil arrests for the purpose of enforcing federal immigration law.

Moreover, because the sheriff failed in the first instance to respond to the writ of habeas corpus, contest the hearing, or file a return, he mooted out

[2] Section 287 of the Immigration and Nationality Act allows certain designated local officers to perform specified functions of a federal immigration officer. *See* 8 U.S.C. § 1357(g).

the issues by handing Petitioners over to ICE for deportation, and failed to preserve the arguments now presented in favor of the judgment below. Thus, this case is not the proper vehicle for resolving the weighty issues presented.

STATEMENT OF THE CASE

On 5 June 2017, Mr. Lopez was arrested in Mecklenburg County on felony arrest warrants. (R p. 39). On 13 August 2017, Mr. Chavez was arrested in Mecklenburg County on misdemeanor arrest warrants. (R p. 4). On 13 October 2017, once the basis for their state law detention had ended, Mr. Chavez and Mr. Lopez filed petitions for writ of habeas corpus in the Mecklenburg County Superior Court. (R pp. 3-24, 38-58). The Superior Court ordered the men released, but the sheriff transferred them to deportation officers. (R pp. 73, 75-81). The sheriff petitioned the Court of Appeals to issue a writ of certiorari and a writ of prohibition. The Court granted both petitions. (R pp 83-86).

On 22 January 2018, the sheriff served a proposed record on Petitioners, which included his office's § 287(g) agreement. Petitioners objected to its inclusion because the sheriff never presented it to the trial court (R S App pp. 94-95). After holding a hearing to settle the record on appeal, although the trial court found that the sheriff "had not filed the § 287(g) agreement with the trial court," it ordered the inclusion of the document. (Supp. Appx. p. 101). Mr.

Chavez and Mr. Lopez filed a motion to strike the § 287(g) agreement, which the Court of Appeals denied.

In an opinion dated 6 November 2018, the Court of Appeals dismissed the orders of the superior court to release Mr. Chavez and Mr. Lopez and directed the trial court to dismiss their habeas petitions. On 31 March 2019, this Court granted Mr. Chavez and Mr. Lopez's Petition for Discretionary Review.

STATEMENT OF THE FACTS

In August of 2017, local law enforcement arrested Carlos Chavez for various misdemeanor state-law offenses, and incarcerated him at the Mecklenburg County Jail on a cash bond that was later set at $100. (R p. 21). His jail card contained a federal I-200 form[3] entitled "Warrant for Arrest of Alien" and an I-247A Immigration Detainer,[4] requesting that the sheriff's office detain Carlos Perez-Mendez[5] for an additional forty-eight hours after all other holds have been resolved because an immigration officer had determined

[3] A Form I-200 is an administrative warrant of arrest for a civil immigration violation. ICE officers issue administrative warrants without review from a neutral magistrate. *See* 8 C.F.R. §287.5 (e)(2); *see also infra* n.13.

[4] An immigration detainer is a request from ICE asking local officers to hold a person for up to 48 hours after the person's state-law detention ends, because he or she posts bail, is acquitted, or finishes his sentence. An ICE detainer is simply a "request" and "not mandatory." *Galarza v. Szalczyk*, 745 F.3d 634, 641-43 (3d Cir. 2014).

[5] As explained in Section III.B.1, *infra*, the record does not establish Carlos Perez-Mendez as an alias for Petitioner Carlos Chavez.

there was probable cause to believe that he was removable from the United States. (R pp. 21-24). On October 13, 2017, Mr. Chavez's family posted his state bond, which put an end to any basis for his continued detention by the State of North Carolina. (R p. 4).

In June of 2017, local officers arrested Luis Lopez for various state-law offenses and incarcerated him at the Mecklenburg County Jail. (R p. 56). Because of insufficient evidence, the district attorney later dismissed all charges except one. (R p. 56). His jail card at the time contained an I-200 that lacked the signature of an authorizing immigration officer, and an I-245 form asking the sheriff's office to detain Mr. Lopez for an additional 48 hours after all other holds have been resolved. (R pp. 56-58). On October 13, 2017, the trial court unsecured Mr. Lopez's bond on the remaining charge, ending the basis for his state custody. (R p. 39).

Before any petitions had been filed, an investigator for the public defender's office notified in-house legal counsel for the sheriff's office, through an email entitled "Heads Up," that emergency petitions for writs of habeas corpus would be filed that day. (R pp. 73, 77). Counsel did not reply to this email.

At 9:14 a.m. on Friday, October 13, 2017, an assistant public defender filed the previously-noticed petitions for writ of habeas corpus, claiming the continued detention of both Mr. Chavez and Mr. Lopez violated the United

States Constitution, the North Carolina Constitution, and the North Carolina General Statutes. (R pp. 3-20, 38-55, 75).

The public defender's investigator notified the sheriff's counsel by email shortly thereafter that Mr. Chavez and Mr. Lopez had filed the petitions. (R p. 73). At 9:30 am, the attorney forwarded the email to the Sheriff, his outside counsel, a captain at the jail, and eight others, stating "I do not acknowledge receipt of any of his emails on this topic. We will see who is subject of this Writ – and what Judge signed." (R p. 73). In the same email thread, at 9:37 a.m., the captain responded that he had received word from the Clerk that the Chavez and Lopez cases were "on in [courtroom] 5350 this morning." The captain also responded, "CHAVEZ, CARLOS 451450, he was put in ICE custody this morning. I have informed Lock Up that Chavez is in ICE custody and should not go to court." (R p. 73).

The superior court ordered return hearings to occur "forthwith" as authorized under N.C. Gen. Stat. § 17-32. (R pp. 25, 59). The orders stated that the sheriff was to immediately bring Mr. Chavez and Mr. Lopez before a judge of the superior court for a return hearing and that Sheriff Carmichael was to "immediately appear and file a return in writing pursuant to N.C.G.S. 17-14." (R pp. 25, 59).[6]

[6] On August 30, 2017, during the proceedings in *State v. Nivaldo Jordao*, the superior court addressed concerns about the rushed nature of the habeas proceedings

After the superior court signed the Return Orders, the investigator went to the sheriff's office. An employee at the front desk, informed him that neither the sheriff nor his attorney were in the office. She refused to accept service of the court's orders and the petitions so Carter left copies on the front desk at 10:23 a.m. (R pp. 26, 60, 77). The investigator then went to the Mecklenburg County Jail and served copies of the orders and petitions at 10:26 a.m. by leaving copies on the front desk in the presence of a deputy. (R pp. 26, 60).

The investigator served copies of the petitions and court orders granting return upon other potentially interested parties, including the Office of the Chief Counsel for ICE by facsimile at 9:59 a.m.; outside legal counsel for the sheriff by facsimile at 10:15 a.m.; and an assistant district attorney by hand at 10:36 a.m. (R pp. 26-28, 60-62, 78).

The trial court did not hold the Return Hearings until 11:57 a.m. in Courtroom 5350. (R p. 75). At the time of this hearing, the sheriff did not appear, had not yet filed a return, and did not produce Mr. Chavez or Mr. Lopez as ordered. He also did not request any extension of time to do so or otherwise

---

with the sheriff's counsel. In effect, she explained that habeas proceedings "were by their very nature quick" and noted "the limited time frame given the nature of 48 hour detainer requirement." The court warned that the sheriff would need "to have somebody on call to file returns with very short notice" in the future if the Public Defender's Office was going to continue to file these petitions. *See* Response to Mecklenburg County Sheriff Irwin Carmichael's Petitions for Writ Of Certiorari and Writ Of Prohibition, page 8 (citing to Attachment F, Jackson Affidavit, Nos. 21-23; Attachment I, Frawley Affidavit, Nos. 42-44).

communicate with the court. Regarding Mr. Chavez or Mr. Lopez, the deputy in the courtroom simply stated about each respectively: "He's not coming, per the jail." (R p. 75).

During the return proceeding, the court inquired as to whether the public defenders had notified the sheriff of the petitions. (R p. 77). The defenders provided the court with the Certificate of Service, and informed it about the advance e-mail notices given and the many attempts they had made to notify the sheriff's office. (R p. 77). The court confirmed both Mr. Chavez's and Mr. Lopez's continued detention at Mecklenburg County Jail Central with the sheriff's deputy located in Courtroom 5350. (R p. 79). At that point, the court ruled on the matters, finding that Mr. Chavez's and Mr. Lopez's continued detention was unlawful, and ordered the sheriff to immediately release both men. (R pp. 29-30, 63-64, 81).

At 2:58 p.m. on October 13, 2017, the sheriff, through counsel, filed written returns in both cases. The sheriff released neither Mr. Chavez nor Mr. Lopez as the court had ordered, but instead held them until ICE picked them up. (R pp. 29-30, 63-64, Sheriff's Brief, p. 9).

On November 6, 2017, the sheriff filed Petitions for Writ of Certiorari seeking review of the orders, even though he had already handed Mr. Chavez and Mr. Lopez over to ICE deportation officers. He also filed Petitions for Writ

of Prohibition. On December 22, 2017, the Court of Appeals granted both petitions and consolidated the cases for appeal. (R pp. 83-86).

In an opinion dated 6 November 2018, the Court of Appeals granted the sheriff's appeal, dismissed the orders of the superior court to release Mr. Chavez and Mr. Lopez, and directed the court to dismiss their habeas petitions. After taking judicial notice of the 287(g) agreement between the sheriff and federal authorities over an objection from Petitioners, and finding that state law authorized such agreements, the Court of Appeals held that the superior court "was without jurisdiction" "to review, consider, or issue writs of habeas corpus" for Mr. Chavez and Mr. Lopez, or "to issue any orders related thereon to the Sheriff." *Chavez v. Carmichael*, __ N.C. __, 822 S.E.2d 131, 145 (2018). The Court of Appeals reasoned that an individual "cannot secure habeas corpus relief from the state court on the legality of his federal detainer" because "the area of immigration and naturalization is within the exclusive jurisdiction of the federal government." *Id.* at 141. The Court also found that the sheriff was acting as a federal officer under the 287(g) agreement. *Id.* at 145. Although unnecessary to its conclusions, the Court of Appeals went on to find that even if the 287(g) agreement was invalid, a state court was still without jurisdiction to review petitions challenging the legality of federal detainers because "it constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration." *Id.* at 142.

Lastly, the Court of Appeals took the extraordinary measure of publishing in the opinion itself that the decision be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar. *Id*. at 145.

STANDARD OF REVIEW

This Court reviews decisions of the Court of Appeals for errors of law. *See, e.g., State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). The issues raised here and below concern the subject matter jurisdiction of the state court, waiver of claims, and mootness of claims. All present questions of law and receive review de novo by this Court. *See, e.g., State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). Under de novo review this Court "considers the matter anew and freely substitutes its own judgment" for that of lower courts. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008). Findings of fact by the superior court must be honored on appeal if supported by any competent evidence. *State v. Brooks*, 337 N.C. at 140-41, 446 S.E.2d at 585.

ARGUMENT

Perhaps most fundamentally, the Court of Appeals should have declined to address the merits of a case mooted out by the sheriff's refusal to appear before the trial court and his willful disregard of the trial court's authority. As

justification, the Court of Appeals *sua sponte* invoked and relied on the public interest doctrine. But applying the doctrine here conflicts with *Anderson v. North Carolina State Bd. Of Elections,* __ N.C. __, __, 788 S.E. 2d 179, 189 (2016) and N.C. Gen. Stat. §7A-31(c)(3), which forbids appellate courts from issuing advisory opinions. The public interest exception to mootness does not apply to cases such as this, where the sheriff sought an advisory opinion after declining to appear at the hearing on the habeas petitions. Further, the Court of Appeals erred in addressing the sheriff's arguments because he intentionally failed to preserve those issues before the trial court.

Regardless, the Court of Appeals erred in finding that the trial court lacked subject matter jurisdiction to review Petitioners' habeas petitions, where Petitioners were being detained in state facilities by state officers, and that it lacked authority to grant relief where the record failed to establish federal custody. And, even though it had concluded a 287(g) agreement applied to Petitioners' detention, the Court of Appeals went on to find that, even absent such an agreement, the superior court would have lacked jurisdiction to review habeas petitions challenging detention for immigration purposes. In so ruling, the Court of Appeals ignored state law to the contrary on the way to gutting our state's habeas statute. Not only does this interpretation of first impression contravene state statutory provisions, but the Court of Appeals' published

referral to the disciplinary committees creates a visceral risk of chilling the right of habeas corpus in the courts of this state.

I. Because the Court of Appeals issued an advisory opinion in a moot case, this Court should reverse.

After refusing to respond to the noticed-writ issued by the superior court, and handing Petitioners over to ICE custody for deportation in contravention of that court's release order, the sheriff appealed the very release order it had willfully mooted in an attempt to obtain an after-the-fact advisory opinion supporting its conduct. The court below considered the merits arguments pressed by the sheriff under the public interest exception to the mootness doctrine. The application of the doctrine, which the sheriff himself never argued for, was error. Indeed, it is difficult to imagine worse-suited circumstances for application of the discretionary public-interest exception. *See Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) (noting exceptions to mootness doctrines are discretionary).

"A case is 'moot' when a determination sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. [C]ourts will not entertain or proceed with a cause merely to determine abstract propositions of law.'" *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citing *In re Peoples,* 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978)). Although an appellate court may theoretically

consider a moot case when it falls under certain exceptions, including, where it "involves a matter of public interest, is of general importance, and deserves a prompt resolution[,]" *N.C. State Bar v. Randolph,* 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989), this Court's recent precedent proves the exception to be rarely available.

Contrary to the approach of the Court of Appeals, the public interest exception does not overrule the long-standing rule, recently reaffirmed, that our state's appellate courts are not the proper forum for seeking advisory opinions. *See Anderson v. North Carolina State Bd. Of Elections,* __ N.C. at __, 788 S.E. 2d at 189. In *Anderson,* the North Carolina State Board of Elections had sought review in the North Carolina Court of Appeals of an adverse decision relating to early voting regulations in Watauga County. *Id.* at __, 788 S.E.2d at 183. The litigation became moot when the election took place with the order under challenge still in effect. *Id.*

Although the election had by then passed, the Board of Elections sought application of the public interest doctrine as an exception to the mootness doctrine. The Court declined the Board's request to apply the public-interest exception and declined review based on mootness. It held that review was not proper because our appellate courts do not exist to provide "advisory opinion[s]," or to enable litigants to "fish in judicial ponds for legal advice." *Id.* at __, 788 S.E.2d at 189 (quoting *Sharpe v. Park Newspapers of Lumberton,*

Inc., 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986)). The court continued, stating that North Carolina's appellate courts are "*unauthorized*" to provide advisory opinions. *Id.* (*citing In re Wright,* 137 N.C. App. 104, 111-112, 527 S.E.2d 70, 75 (2000); *Little v. Wachovia Bank & Trust Co.,* 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960)).

Anderson simply reaffirmed the bedrock principle that neither this Court nor our court of appeals is authorized to issue opinions "of a merely advisory nature to construe and declare the law." *Town of Tryon v. Duke Power Co.,* 222 N.C. 200, __, 22 S.E.2d 450, 452 (1943). Six decades ago, this Court explained that "the courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, … deal with theoretical problems, give advisory opinions, … provide for contingencies which may hereafter arise, or give abstract opinions." *Little*, 252 N.C. at 243, 113 S.E.2d at 700 *(citing Finch v. Honeycutt*, 246 N.C. 91, 101, 97 S.E.2d 478 (1957); *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 454, 70 S.E.2d 578 (1952); *Carolina Power & Light Co. v. Iseley*, 203 N.C. 811, 819, 167 S.E. 56 (1933); *Reid v. Alexander*, 170 N.C. 303, 304, 87 S.E. 125 (1915)).

Here, the sheriff made no effort to attend the habeas return hearing, to request an extension, or to seek reconsideration of the trial court's decision. (R. pp. 76-80). His failure to contest the issue represented a willful decision not to litigate the issue at all when it was live, and thereby failing to develop a record

in the trial court. The *Anderson* Court noted, "although 'guidance' is always useful in the election-law context, the Board's arguments fail to demonstrate why the procedural issue it raises deserve prompt resolution." __ N.C. at __, 788 S.E.2d at 189. Similarly, the issues raised by the sheriff in seeking an advisory opinion do not merit application of any exception to the mootness doctrine. Application of an exception would constitute an evisceration of the doctrine, which is what the Court of Appeals panel attempted by permitting review of the merits.

Finally, the decision to review a moot case is a discretionary one, even where the court finds an exception. *Crumpler,* 92 N.C. App. at 723, 375 S.E.2d at 711 (citing *Matter of Jackson,* 84 N.C. App. 167, 171, 352 S.E.2d 449, 453 (1987)). For the same reasons described above, and because the sheriff chose not to appear or present evidence at the superior court level, this is the last case that warrants a favorable exercise of discretion.[7]

II. The decision below was wrong because the sheriff did not preserve his arguments.

A. The sheriff defaulted by willfully failing to appear and to present evidence in the trial court.

---

[7] For example, as discussed in Section III.C, *infra*, the record does not establish who effectuated the civil immigration arrest of Mr. Chavez and Mr. Lopez and whether they were 287(g) officers. These and other critical factual questions are unresolved precisely because the sheriff refused to appear before the trial court and present evidence justifying the detention. Such fact-finding upon remand, however would be a pointless exercise because Petitioners are no longer in custody, underscoring the mootness of the case.

The Court of Appeals decision was inconsistent with both the Rules of Appellate Procedure and precedent from this Court. To preserve an issue for review, a party must present a *timely* request, objection, or motion, stating the specific grounds for the ruling desired. N.C. R. App. P. l0 (a)(l). Here, the sheriff declined to appear and raise his arguments even though he had actual notice of the hearing, as discussed in detail below. This was waiver. *See, e.g., State v. Romano*, 369 N.C. 678, 693, 800 S.E.2d 644, 654 (2017) ("[A] review of the record reveals that the State did not advance these arguments at the suppression hearing; accordingly the issues are waived and are not properly before this Court."); *Craver v. Craver,* 298 N.C. 231, 236, 258 S.E.2d 357, 362 (1979) ("The Rules of Appellate Procedure are mandatory."); *Munn v. North Carolina State University,* 360 N.C. 353, 353, 626 S.E.2d 270, 271 (2006).

The sheriff cannot claim that he did not have the opportunity to object. Emails included in the record reveal a conversation between his counsel and other members of his office, acknowledging receipt of the petition, knowledge of the date, time, and courtroom number for the hearing, and advance knowledge of the same. (R p. 73). The sheriff himself is included on the email chain, although he did not participate in the discussion. The sheriff then ignored a facially valid order from a superior court judge, something this Court should not countenance.

Because the sheriff's failure to appear, make a timely return, and present evidence was willful, the Court of Appeals erred in permitting the sheriff to raise his arguments for the first time on appeal. Moreover, the appeals court set an untenable precedent by allowing a party who declined to appear in court to present his arguments to the fact-finder to then fully litigate his issues on appeal.

The sheriff's violation has significance beyond non-compliance with appellate rules. His failure to appear or to object ties directly into the jurisdictional issues the Court confronts. In order for the federal government to claim lawful custody over Petitioners, the sheriff needed to at least make a threshold showing that the Petitioners were in ICE custody. The Court of Appeals, however, bypassed this requirement altogether by assuming the ultimate answer—that Petitioners were "individuals detained by federal officers acting under federal authority," *Chavez*, __ N.C. at __, 822 S.E.2d at 142—instead of ordering a contested hearing in the trial court on these issues.

Neither before the writ was issued nor at the return hearing did anyone from the sheriff's office come to court and justify the detention of Mr. Lopez and Mr. Chavez as proper under a valid 287(g) agreement and through the issuance of valid warrants by authorized officials. Instead, the sheriff's argument depends wholly on the belated arguments of counsel offered in appellate briefing.

The trial court was absolutely correct in ordering the release of Petitioners. The evidence in the record does not demonstrate federal custody of Petitioners. One of the administrative warrants names a different individual (R p. 23), and the other was not executed (R p. 29).

The Court of Appeals tethered its argument to *In re Tarble,* 80 U.S. 397 (1871).[8] *Chavez*, __ N.C. at __, 822 S.E.2d at 142-43. However, even there, the court recognized the necessity of a threshold showing:

> And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

Id. at 409. The writ of habeas corpus cannot be ignored because of the possibility of a valid federal detainer and administrative immigration warrant. Instead, the trial court was the place for the sheriff to make his threshold showing, and he declined to do so. The Court should not permit him to make it for the first time on appeal.

B. The trial court complied with statutory habeas procedures in the handling of the petitions.

[8] *Tarble* is about habeas petitions filed against *federal* agents, and Petitioners do not concede that *Tarble*'s rule or reasoning applies to *state* officers, even if they are acting in cooperation with the federal government.

The superior court precisely followed the procedures set out in Chapter 17 of the General Statutes governing the adjudication of writs of habeas corpus in setting a prompt hearing on the petition. *See* N.C. Gen. Stat. § 17-13 ("[W]rits of habeas corpus may be made returnable at a certain time, or *forthwith*, as the case may require.") (emphasis added); *id*. (requiring named party to respond to the Court's order to produce petitioners). The implication by the majority that perhaps Petitioners did not follow proper procedure is simply incorrect. *See Chavez,* __ N.C. at __, 822 S.E.2d at 145 (referring opinion to State Bar and Judicial Standards); *but see, id.* at __, 822 S.E.2d at 145-46 (J. Dietz, *concurring*) (indicating that the lawyers and judges did not commit misconduct).

North Carolina law required the sheriff to respond to the Court's order to produce Petitioners. *See* N.C. Gen. Stat. § 17-13, *et. seq*. N.C. Gen. Stat. § 17-13 provides, "writs of habeas corpus may be made returnable at a certain time, or *forthwith*, as the case may require." After a writ is granted, it must be served on the person having custody of the party imprisoned or restrained. The writ may be served "by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age." *Id*. § 17-12.

Following the statute, the superior court set a prompt hearing on the petition. As shown in the certificate of service, Petitioners complied with § 17-12 by delivering copies of the writ and petition to the sheriff's office and to the Mecklenburg County Jail and leaving them with employees of the sheriff's office who repeatedly refused to accept service. (R pp. 26-27, 60-61).

At the hearing, the superior court asked the assistant public defender representing Petitioners whether she had "any communication whatsoever with either the Sheriff or the Department of Homeland Security[.]" The defender outlined the efforts she had made to serve the sheriff's office, the sheriff's outside counsel, the Assistant District Attorney, and ICE. (R p. 47). Assured that the sheriff's failure to appear (by counsel or otherwise) was not for lack of service and effort to contact him, the judge then properly proceeded with the hearing, and granted the release of Mr. Chavez and Mr. Lopez.

III. The superior court retained jurisdiction to determine if Petitioners were in lawful state custody, and correctly found no evidence of federal custody.

The Court of Appeals held that the superior court was stripped of "jurisdiction to review, consider, or issue writs of habeas corpus" for two persons in the custody of the *state's own officers*, based on a belated and incorrect claim that they were, in fact, in federal custody. *Chavez*, __ N.C. at __, 822 S.E.2d at 145. That decision was wrong.

Chapter 17 of the North Carolina General Statutes *required* the trial court to determine whether Petitioners were in lawful state custody. While the trial court may not ultimately have the authority to grant *relief* if a petitioner is in federal custody, our statutes make clear that the trial court retains the *subject matter jurisdiction* to inquire into the legality of the detention where the individual is being held by state officers in a state facility. The trial court, thus, had jurisdiction to determine whether Mr. Chavez and Mr. Lopez were in lawful state custody.

To effectuate a civil immigration arrest and thereby assume federal custody of a person held in a county jail, at a minimum, 287(g)-certified officers must serve properly executed administrative warrants on the persons named in the warrants. But the administrative immigration warrants holding Mr. Chavez and Mr. Lopez raised factual questions on their face as to whether the Petitioners' federal custody had commenced. The warrant under which Petitioner Chavez was detained named another person, and Petitioner Lopez's warrant was unsigned. Further, the sheriff did not demonstrate the officers involved were acting under the 287(g) agreement. In this case where the record failed to show the facts needed to establish that the federal government assumed custody of Mr. Chavez and Mr. Lopez before the writ entered, the trial court correctly granted their petitions for writ of habeas corpus.

A. The trial court has the jurisdiction *to review* a habeas petition to determine whether the individual is in lawful state custody.

The Court of Appeals wrongly found that the trial court lacked subject matter jurisdiction to review the lawfulness of the Petitioners' custody. That inquiry falls squarely within the purview of the superior court under the North Carolina Constitution and General Statutes.

Subject matter jurisdiction refers to the power of the court to resolve the action in question. It is conferred upon the courts by either the North Carolina constitution or by statute. *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E. 2d 673, 675 (1987). The North Carolina legislature unambiguously conferred subject matter jurisdiction upon the superior courts to entertain writs of habeas corpus for persons detained in state and local facilities. Indeed, a defendant who is "imprisoned or restrained of his liberty *within this State* … on any pretense whatsoever" may challenge the lawfulness of his or her custody by "prosecut[ing] a writ of habeas corpus." N.C. Gen. Stat. § 17-3. This writ was known as the "great Writ of Right." *State v. Herndon*, 107 N.C. 934, 936, 12 S.E. 262, 269 (1890); *see also In re Holley*, 154 N.C. 163, 168, 69 S.E. 872, 874 (1910) (the writ of habeas corpus is "the most important, perhaps, in our system of government, having its origin long prior to Magna Charta").

The writ of habeas corpus is guaranteed by article I, section 21 of our state constitution [previously article I, sections 18 and 21]. Chapter 17 of our

General Statutes implements this constitutional provision, setting out the procedural requirements for the application and enforcement of the writ. *See State v. Leach*, 227 N.C. App. 399, 742 S.E.2d 608 (2013).

The legislature granted jurisdiction to hear these actions to any one of the superior court judges. N.C. Gen. Stat. § 17-6(2). The law even sets a penalty to a judge who "refuses to grant such [a] writ when legally applied for." *Id.* § 17-10 ("such judge shall forfeit to the party aggrieved … $2,500."). And N.C. Gen. Stat. § 17-2 expressly provides that "[t]he privileges of the writ of habeas corpus shall not be suspended."

The legislature specifically declined to strip subject matter jurisdiction from North Carolina courts even where the detainee seeking habeas corpus relief is in federal custody pursuant to a federal court order. N.C. Gen. Stat. § 17-4(1) states that when a person is "committed or detained by virtue of process [ ] by a court of the United States, or a judge thereof," the writ shall be denied. The law, thus, provides for a summary denial *on the merits* when the detained person is subject to a federal court order, but it does not withdraw subject matter jurisdiction from the state courts.

These provisions supplied the trial court with jurisdiction to inquire into the legality Mr. Chavez's and Mr. Lopez's detention.[9] At the time of the

[9] The Court of Appeals relied on "the federal government's exclusive federal authority over immigration matters" in concluding the trial court lacked

hearing, Petitioners were detained by the Mecklenburg County Sheriff, which obliged the trial court to grant the writ under N.C. Gen. Stat. § 17-3, 17-1.[10] For the purposes of state habeas, assuming arguendo the sheriff could be deemed to be acting as a federal officer under the 287(g) agreement, he still remained the Sheriff of Mecklenburg County. At best, he is wearing two hats, but at no point does he stop being a state official. Notwithstanding the 287(g) agreement,[11] the provisions of Chapter 17 of the General Statutes,

---

jurisdiction. *Chavez*, __ N.C. at __, 822 S.E.2d at 142. But that reasoning conflates whether federal law *preempts* substantive state statutes and regulations with whether it *divests* state courts' subject matter jurisdiction. The U.S. Supreme Court cases on which the Court of Appeals relied do not support its holding. Those cases were about the *substantive validity* of state laws and rules. *See Arizona v. United States*, 567 U.S. 387, 403, 406-07, 410 (2012) (holding preempted state statutes criminalizing failure to register as a noncitizen; criminalizing unauthorized work by noncitizens; and authorizing state and local officers to make immigration arrests); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (state statute restricting access to school for undocumented children); *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) (state statute discriminated against certain noncitizens); *DeCanas v. Bica*, 424 U.S. 351 (1976) (state statute restricting employment of certain noncitizens). In those decisions, the Court did not so much as suggest that state courts lack *jurisdiction* to consider immigration questions.

[10] "The writ refers to the judge's order requiring the custodian to respond to the petition and produce the party in court." It does not address the merits of the petition. Jessica Smith, Habeas Corpus (March 2014), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK, p. 3.

[11] Significantly, there is nothing in 8 U.S.C. § 1357(g), the statute which authorizes 287(g) agreements, that addresses what cases state courts can or cannot hear, nor does it indicate that federal court is the exclusive venue for any set of cases. Such silence does not eliminate state court jurisdiction. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) ("The omission of any . . . provision [expressly limiting state court jurisdiction] is strong, and arguably sufficient, evidence that Congress had no such intent."); *Tafflin v. Levitt*, 493 U.S. 455, 463 (1990) ("[L]egislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction").

thus, applied with full force and required the trial court to determine whether Petitioners were in lawful state custody, even if the court may have had to ultimately deny relief on the merits.

Alternatively, even if the Court of Appeals is correct that the superior court would lack jurisdiction over an individual in federal custody, the superior court would at least have jurisdiction to make that threshold factual determination. *See, e.g.*, *State v. Nobles*, ___ N.C. App.___, 818 S.E.2d 129 (2018), *cert. granted,* __ N.C. __, 820 S.E.2d 813 (Dec. 5, 2018) (affirming trial court's application of federal law to determine whether the petitioner qualified as an Indian for the purposes of subject matter jurisdiction). At a minimum, to effectuate a civil arrest and thereby assume federal custody of a person held in a county jail, 287(g)-certified officers must serve properly executed administrative warrants[12] on the persons named in the warrants. *See infra* Section IV.B.2.a; *see, e.g., also Jackson County v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987) (establishing for the first time three-prong test to determine whether state courts have subject matter jurisdiction over matters arising on

[12] Despite being titled "warrants," I-200 forms are not issued by courts; they are issued by authorized ICE agents. *See* 8 C.F.R. § 287.5(e)(2)(i)-(xlix). Thus, an I-200 is an administrative warrant, rather than a judicial one, and it is issued for civil, rather than criminal, immigration violations. *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 527, 168 A.D.3d 31, 41 (N.Y. App. Div. 2018). The I-200 states it can only be executed by a federal "immigration officer," not a local law enforcement officer. Federal regulations provide the same. *See* 8 C.F.R. § 287.5(e)(3) (listing federal officers who can execute administrative warrants); *id.* §§ 236.1(b)(1), 287.8(c)(1) (prohibiting others from executing I-200s).

Indian land).[13] As explained below, however, the record does not demonstrate that any of these requirements for federal custody were met.

In *Swayney*, the test required reviewing three criteria: "(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) the nature of the interests to be protected." 319 N.C. at 59, 352 S.E.2d at 418 (internal citations omitted).[14] Those factors had to be established before the Court could decide whether the state court could hear the claims presented. Applying the test, the *Swayney* Court held that the General Court of Justice had jurisdiction to hear some of the claims presented. Thus, even where a party argues that the trial court is preempted from hearing the case due to exclusive federal jurisdiction, the court must decide the threshold factual issue of whether the federal jurisdiction is not illusory.

Much like the initial determination by a state court judge of whether individuals who claim to be Indians "are Indians or non-Indians," *Swaney*, 319 N.C. at 59, 352 S.E.2d at 417, a prima facie determination of whether the individual is actually in immigration custody is a necessary first inquiry.

---

[13] Were the Court to agree and establish the proposed jurisdictional test for assumption of federal immigration custody, it would be appropriate to remand to the trial court to determine the factual issues in the first instance. Because Petitioners are no longer in custody, however, such factfinding would be a pointless exercise, demonstrating the mootness of the case.

[14] The test has its origins in the Williams test, set forth in *Williams v. Lee,* 358 U.S. 217, 220 (1959). In *Williams,* the Court provided a mechanism by which state courts could evaluate jurisdiction and "both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions." *Id.*

Otherwise, if a detainer is served on the wrong person, the right to the writ of habeas corpus would be suspended because the petitioner would have to go federal court to challenge his or her detention despite the fact that the sheriff was the immediate custodian. In that case, the person could be left without a remedy if the federal court deemed the person to be in state custody. Nor is it clear how the person, if indigent, would raise a challenge in federal court absent appointment of federal assigned counsel.

This is not the law of North Carolina. The Court of Appeals disregarded that jurisdiction and short-circuited the entire inquiry based on its acceptance of the sheriff's allegations purporting to establish federal jurisdiction when the record was devoid of evidence in support of those claims. This Court should reaffirm the authority of state trial courts to issue the writ of habeas corpus to state prisoners held under an empty claim of federal authority.

B. The trial court correctly determined that Mr. Chavez and Mr. Lopez were not in federal custody because the sheriff brought no evidence to support that claim.

The administrative immigration warrants purporting to hold Mr. Chavez and Mr. Lopez raised factual questions on their face as to whether they were in federal custody (where the warrant for Mr. Chavez named another person, and the warrant for Mr. Lopez was not signed). By willfully declining to appear and present evidence justifying continued detention (see R p. 73), the sheriff failed to make a record sufficient to demonstrate federal custody.

1. The record lacks evidence that Mr. Chavez was in federal custody.

The I-200 administrative warrant fails to demonstrate federal custody of Mr. Chavez. (R p. 23). The subject of the I-200 warrant served on Mr. Chavez was Carlos Perez-Mendez, who is not party to this case. (R p. 23). No witness testified or submitted an affidavit that Carlos Perez-Mendez is an alias for Carlos Chavez. The warrant does not contain any biographical data that could be compared to other evidence in the record to demonstrate they are the same person. *Id*. There is also no indication of a fingerprint match between Mr. Chavez and Perez-Mendez. Mr. Perez-Mendez and Mr. Chavez of course share a prevalent first name, but this is by no means proof of identity.

Mr. Chavez never conceded that the warrant named him. Under the pleading requirement in N.C. Gen. Stat. § 17-7, Mr. Chavez had to state to the best of his knowledge the pretense by which he was being held. Accordingly, in an affidavit, his lawyer acknowledged that his jail card contained a copy of an ICE detainer request for detention and I-200 warrant for Mr. Perez-Mendez, which appeared to be the basis for the hold of Mr. Chavez. (R p. 21). She did not say the documents named Mr. Chavez. The Court of Appeals erred to find that Mr. Chavez was detained "under *his* name 'Carlos Perez-Mendez.'" *Chavez*, __ N.C. at __, 822 S.E.2d at 135.

Although noted throughout the sheriff's brief to the Court of Appeals (*See, e.g.,* p. 16), this assumption finds no basis in the record. Statements of appellate counsel, unsupported by any record evidence, of course, are not evidence. *See, e.g., State v. Collins,* 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Similarly, "fact finding is not a function of our appellate courts." *Godfrey v. Zoning Bd. of Adjustment of Union County,* 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986); *see also, Adams v. AVX Corp.,* 349 N.C. 676, 680-81, 509 S.E.2d 411, 413 (1998).

The record thus fails to show the facts needed to establish that Mr. Chavez was in federal custody. And the Court is limited to consideration of matters included in the record. *See, e.g., Crowell Constructors, Inc., v. State ex rel. Cobey,* 328 N.C. 563, 402 S.E.2d 407 (1991) (per curiam). As a result, the trial court correctly granted his petition for writ of habeas corpus. *See, e.g., Swaney*, 319 N.C. at 59, 352 S.E.2d at 417; *West v. Cabell*, 153 U.S. 78, 86 (1894) ("The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer in making the arrest.").

2. **The record lacks evidence that Mr. Lopez was in federal custody.**

The record also fails to show the facts needed to establish a valid civil arrest effectuating Mr. Lopez's transfer to federal custody. Federal regulations allow only authorized ICE officers to issue administrative immigration warrants. *See* 8 C.F.R. § 287.5(e)(2). The administrative immigration warrant itself requires the signature of an "Authorized Immigration Officer." (R p. 58).[15]

But the warrant served here was not signed—it was simply an *attempt* at a warrant. (R p. 58).[16]

Because the document is not signed by an "Authorized Immigration Officer," it does not support the sheriff's claim that Mr. Lopez was in the custody of the federal government. The trial court thus had every authority to resolve the factual disputes in favor of a finding that federal custody did not exist, and a sound basis for ordering Mr. Lopez released.

C. The record lacks the requisite evidence that certified 287(g) officers arrested Mr. Lopez and Mr. Chavez.

---

[15] *See also* ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, p. 2 (March 24, 2017), available at https://www.ice.gov/detainer policy.

[16] Troubling reports have recently emerged that ICE officers are issuing administrative warrants after skipping entirely the warrant review process. For example, ICE documents show that "officers across the five-state region … had improperly signed warrants on behalf of their supervisors -- especially on evenings or weekends. Some supervisors *even gave their officers pre-signed blank warrants* — in effect, illegally handing them the authority to begin the deportation process." Bill Ortega, *ICE Supervisors Don't Always Review Deportation Warrants*, CNN (Mar. 13, 2019) (emphasis added). One DHS officer was found to have forged his supervisor's signature on a number of civil immigration warrants. *See Oxley v. DHS*, 2018 WL 5389394, *6-7 (Merit Systems Protection Board Oct. 23, 2018).

As stated above, to have lawfully effectuated a civil arrest and thereby assume federal custody of Petitioners, it must have been 287(g)-certified officers who arrested them. But in this case there was no evidence before the superior court judge that the particular officers who detained Petitioners were acting under a 287(g) agreement. Such an agreement is not blanket authorization for all officers within a given department to act as immigration agents. Rather, it is officer-specific, granting powers only to particular agents who have undergone the training and certification required by statute.[17] *See Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013) (finding civil immigration arrest by non-certified officer where county had a 287(g) agreement was unlawful). These powers lie with the certified officers, and cannot be transferred.

Here, the sheriff presented no evidence below that the specific officer executing the warrants on Mr. Chavez and Mr. Lopez was certified. Indeed, even when he filed his untimely return, the sheriff never attached or produced a list of deputies certified under the 287(g) agreement. No one testified at the return hearing as to whether the officers were certified. And the federal

---

[17] *See* 8 U.S.C. § 1357(g)(5) ("With respect to *each officer or employee* of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by *the individual*, the duration of the authority of *the individual*, and the position of the agency of the Attorney General who is required to supervise and direct *the individual*, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.") (emphasis added).

regulations make clear that only federally–trained officers can serve and execute these immigration warrants. 8 C.F.R. §§ 287.5(e), 236.1(b). The sheriff's assertion in his brief that the officers involved were in fact certified, (*see* p. 15), is no substitute for the record evidence on which this Court bases its review. *See, e.g., Crowell Constructors Inc.,* 328 N.C. at 563, 402 S.E.2d at 408; N.C. R. App. P. 9(c) & 9(d). And the Court of Appeals never examined whether that was true of the relevant officers—it simply assumed that was the case without evidence. *Chavez*, __ N.C. at __, 822 S.E.2d at 144. Because the sheriff did not demonstrate the officers involved were acting under the 287(g) agreement, as federally required, the state court correctly granted the petitions for writ of habeas corpus.

IV. The Court of Appeals erred in concluding that the trial court lacked jurisdiction even if the 287(g) agreement was invalid.

After taking judicial notice of the 287(g) agreement between the sheriff's office and ICE, the Court of Appeals went on to find that the trial court lacked jurisdiction to review the habeas petitions *even if* the 287(g) agreement was invalid. *See Chavez,* __ N.C. at __, 822 S.E.2d at 142. This was incorrect. As explained above, s*ee supra* Section III.A, the trial court maintained subject matter jurisdiction to review the habeas petitions under the North Carolina Constitution and General Statutes. Nothing in the federal law divests the superior court of its jurisdiction.

Further, the trial court correctly determined that Mr. Chavez and Mr. Lopez were not in lawful state custody because under North Carolina's statutory scheme, sheriffs' offices do not have any authority to detain in the absence of a 287(g) agreement. A sheriff's continued detention of an individual pursuant to an immigration detainer, after his or her state custody has ended, constitutes a new arrest. In order for local officers to perform such an arrest pursuant to a civil immigration detainer, solely because the federal authorities believe the person is subject to civil removal, there must be some authority under state law. Neither state statutes nor the common law authorize state officers to make a civil arrest in these circumstances. Likewise, no federal statute confers on state officers the power to make this kind of an arrest.

The Court of Appeals' erroneous decision in this regard was unnecessary to its conclusions, and this Court should vacate that portion of the opinion. But, in the event the Court should find otherwise, the errors in the Court of Appeals' analysis are detailed more fully below. This Court should reverse.

A. The trial court had subject matter jurisdiction to review the habeas petitions under state law.

As explained above, s*ee supra* Section III.A, the trial court maintained subject matter jurisdiction to review the habeas petitions under Chapter 17 of the North Carolina General Statutes. The superior court is not stripped of subject matter jurisdiction *even when* the individual seeking habeas corpus

relief is being held pursuant to a federal court order. N.C. Gen. Stat. § 17-4(1). Nothing in the federal law divests the superior court of its jurisdiction.

With regard to habeas petitions against non-287(g) officers, the Court of Appeals found that 8 U.S.C. § 1357(g)(10) operated to eliminate state court jurisdiction. *Chavez*, __ N.C. at__, 822 S.E.2d at 142. But that is wrong. Section 1357(g)(10), which provides that nothing else in § 1357 "shall be construed to require an agreement" for certain immigration cooperation, is a *savings clause*. As the United States has conceded in other litigation, that clause provides only that certain cooperation is not preempted by federal law. *Lunn v. Commonwealth,* 477 Mass. 517, 535, 78 N.E.3d 1143, 1159-60 (2017) (noting concession). It says nothing at all about state court jurisdiction; it certainly does not affirmatively divest such jurisdiction. *Cf. New England Power Co. v. New Hampshire*, 455 U.S. 331, 344 (1982) (preemption savings clause was not "an affirmative grant of authority"). Thus, the court plainly has jurisdiction where the habeas petition challenges an arrest made by a state officer in the absence of a 287(g) agreement.

Indeed, where state courts have addressed the question of whether state law authorizes civil detainer arrests, they have found jurisdiction over such challenges. *See, e.g., Lunn v. Commonwealth,* 477 Mass. 517, 78 N.E.3d 1143 (asserting jurisdiction over state habeas addressing whether "the State law of Massachusetts authorizes such an [immigration detainer] arrest" by local

actors); *Wells v. DeMarco*, 88 N.Y.S.3d 518, 168 A.D.3d 31 (same); *Cisneros v. Elder,* No. 18CV30549, 2018 WL 7142016 (D. Colo., El Paso Cty. Mar. 19, 2018) (same).

B. The trial court correctly determined that Petitioners were not in lawful state custody because state law does not authorize detainer arrests in the absence of a 287(g) agreement.

1. Holding a person on an ICE detainer past the time when he or she would otherwise be released from state custody constitutes a new arrest for civil immigration purposes.

In North Carolina, an arrest occurs when law enforcement officers "significantly restrict [an individual's] freedom of action." *State v. Morgan*, 299 N.C. 191, 200, 261 S.E. 827, 832-33 (1980). That is what happens when local law enforcement officers rely on an ICE detainer to keep someone in jail who would otherwise be released because the state hold has ended. The detainer asks the local officer to initiate a new period of detention for an alleged violation of civil immigration law. *See supra* n. 4. And the sheriff's personnel honor it by continuing to detain the individual who would otherwise be free to leave. Thus, holding a person pursuant to an ICE detainer is an arrest for purposes of North Carolina law.

Courts agree that holding someone on an ICE detainer constitutes a new arrest, and therefore requires state arrest authority and probable cause. *See, e.g., Lunn v. Commonwealth,* 477 Mass. at 528, 78 N.E.3d at 1153 (holding someone on a detainer "constitutes an arrest under [state] law"); *Wells v.*

DeMarco, 88 N.Y.S.3d at 526, 168 A.D.3d at 39-40 (same); *Creedle v. Gimenez*, 349 F. Supp. 3d 1276, 1307 (S.D. Fla. 2018) (same).[18] Even cases the Court of Appeals cited agree that these new detentions are arrests. *See, e.g., City of El Cenizo v. Texas*, 890 F.3d 164, 187-88 (5th Cir. 2018) (describing detainer hold as an "arrest"). Significantly, the United States too has acknowledged that detention based strictly on an immigration detainer constitutes an arrest. *Lunn*, 477 Mass. at 527, 78 N.E.3d at 1154 (citing oral argument). It is uncontroverted that the continued detention constitutes a new arrest.

Such arrests are civil in nature. Illegal presence in the country, standing alone, is not a crime; it is a civil violation that subjects the individual to removal. *See Arizona v. United States,* 567 U.S. at 407; *Melendres v. Arpaio,* 695 F.3d 990, 1000–1001 (9th Cir. 2012); 8 U.S.C. § 1227(a)(1)(B).

2. **North Carolina officers are not authorized to effectuate civil immigration arrests.**

Because detainer holds are civil immigration arrests, local officers cannot effectuate such arrests unless North Carolina law provides authority to do so. In other words, North Carolina is not the Wild West, and local law enforcement cannot just go arrest someone for being present in the country

[18] *See also Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (finding it "beyond debate" that an ICE detainer subjects a person "to a new seizure" that "must be supported by a new probable cause justification"); *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (finding that a detainer hold constitutes an "arrest" under federal law).

without authorization absent a grant of authority by both the State and the federal government to do so.[19] When local officers make an "arrest for violation of federal law," the arrest's legality "is to be determined by reference to state law." *Miller v. United States*, 357 U.S. 301, 305 (1958); *see also United States v. Di Re*, 332 U.S. 581, 589 (1948) ("[T]he law of the state where an arrest without warrant takes place determines its validity."); *Arizona*, 567 U.S. at 414–15; *Gonzales v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983) (same).

The scope of North Carolina law enforcement's arrest authority is reserved to the exclusive jurisdiction of the state. Indeed, in the limited instances where the United States Code authorizes ICE to delegate civil arrest authority to local actors, state-law authority is also required. *See* 8 U.S.C. § 1252c (granting authority to state and local law enforcement to make civil arrests of a convicted felon who illegally reenters the United States but only "to the extent permitted by relevant State and local law"); *id.* § 1357(g)(1) (permitting federal-state 287(g) agreements to authorize non-federal officials to perform immigration enforcement functions, but only "to the extent consistent with State and local law").

---

[19] Even where there is a 287(g) agreement, state courts retain authority to determine whether such agreements are "consistent with state law." 8 U.S.C. § 1357(g)(1). Indeed, the Court of Appeals found that state law authorizes immigration detainer arrests pursuant to 287(g) agreements. *Chavez,* __ N.C.at __, 822 S.E.2d at 140. But it made no similar finding for arrests where such an agreement is lacking.

North Carolina's arrest laws do not provide sheriffs with the authority to hold individuals on ICE detainers. These laws specify when local officers can make arrests, and the means by which local officers may assist federal officers, including ICE agents. Nothing in our statutory scheme or the common law authorizes local officers to execute ICE warrants or hold people on ICE detainers absent a 287(g) agreement. Detainer arrests thus exceed a local officer's arrest authority under state law, and are, thereby, unlawful.

a. Federal law prohibits local officers from executing ICE administrative "warrants" in the absence of a 287(g) agreement.

The pre-written form I-200 administrative warrant itself specifies that only an authorized "immigration officer" may execute it. (R p. 23). Because local officers whose agencies have not entered into a 287(g) agreement are not "immigration officer[s,]" they cannot execute such documents. Local officers deputized under formal 287(g) agreements may execute such warrants only after undergoing adequate training, certification, and supervision. *See* 8 U.S.C. § 1357(g)(1)-(9)*; e.g.*, R S App pp. 104-105, 119 (287(g) agreement delegating authority to serve I-200 warrants to only those officers trained and certified pursuant to the agreement).

Federal regulations confirm that local officers who are not deputized under a 287(g) agreement *cannot* execute a Form I-200 administrative warrant. Those regulations spell out precisely which immigration officers may execute

arrest warrants, all of whom must "have successfully completed basic immigration law enforcement training." 8 C.F.R. § 287.5(e)(3); *see Arizona*, 567 U.S. at 408. "Only designated immigration officers are authorized to make an arrest." 8 C.F.R. § 287.8(c)(1); *id.* § 236.1(b)(1).

b. Absent a 287(g) agreement, local officers cannot lawfully effect civil immigration arrests.

Nor does state law authorize local non-287(g) deputized officers to execute Form I-200s, because the administrative civil warrants do not fall within any of North Carolina's warrant statutes. Nowhere do our General Statutes permit immigration arrests or I-200s absent a 287(g) agreement. Thus, local officers cannot effect arrests based on Form I-200 administrative warrants. *Cf. Wells*, 88 N.Y.S.3d at 529, 168 A.D.3d at 43 (local officers did not have state-law authority to arrest based on an "administrative warrant issued by ICE").

First, the North Carolina General Assembly has explicitly delegated the authority to officers to make arrests under Chapter 15A, Article 20. That chapter allows state officers to make arrests only pursuant to warrant or when the officer has probable cause to believe the individual has committed a criminal offense. *See* N.C. Gen. Stat. § 15A-401(a), (b); § 15A-304(a) (arrest warrants must contain "a statement of the *crime*"). Moreover, Gen. Stat. § 15A-401(a), (b) appears in the "criminal procedure" portion of the code. *Cf.*

State v. Brooks, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010) (finding that because satellite-based monitoring hearings are not criminal proceedings, civil, not criminal, notice of appeal provision applies). Gen. Stat. § 15A-401(a), (b), thus, provides *criminal* arrest authority, whereas violations of immigration law are civil in nature. It therefore cannot provide authority to an officer to perform an arrest for a civil immigration violation.

Second, where the legislature has authorized *civil* arrests, it has done so separately, as part of specific arrest schemes outside the criminal code. For example, North Carolina law authorizes arrests for civil tort actions, where authorized by a judge as part of a detailed civil action scheme. *See* N.C. Gen. Stat. § 1-409 – 1-439; 1-311. Their placement in separate chapters beyond the criminal code underscores that the arrest provisions Chapter 15A, Article 20 are criminal only. These civil provisions—none of which encompass ICE detainers or ICE warrants—also highlight that where the North Carolina Legislature intends to confer civil arrest authority to state officers, it provides that authority explicitly.

Moreover, despite being titled, "warrant," the I-200 forms are not arrest warrants under North Carolina law. Only judicial officers may issue warrants of arrest. *See* N.C. Gen. Stat. § 15A-304(d). Because ICE enforcement officers issue I-200s and detainers without review by a neutral judicial officer, they do not fall within any authority that Chapter 15A could

provide. In sum, state-law warrant authorities do not justify civil detainer arrests.

c. The common law grants no authority to local officers to arrest for civil immigration violations.

In North Carolina, an "arrest without a warrant except as authorized by statute is illegal[.]" *State v. Dickens*, 278 N.C. 537, 543, 180 S.E.2d 844, 848 (1971). That is because the "common law exceptions [to arrest without a warrant] have been enacted or supplanted by statute, so that the power of arrest without warrant is now *defined and limited entirely* by legislative enactments. And the rule is that where the right and power of arrest without warrant is regulated by statute, an arrest without warrant except as authorized by statute is illegal." *State v. Mobley*, 240 N.C. 476, 480, 83 S.E.2d 100, 102-03 (1954) (emphasis added). As a result, the common law lacks any rule authorizing immigration arrests.

The legislature knows how to authorize federal-local collaboration when it desires. *See, e.g.*, N.C. Gen. Stat. § 162-62 (authorizing local officers to query ICE concerning the immigration status of persons charged with certain offenses, but *precluding* civil immigration arrests and detention); *id.* §§ 153A-145.5, 160A-205.2 (regulating localities' gathering of immigration status information); *id.* § 128-1.1(c1) (permitting 287(g) agreements). And it knows how to authorize officers to arrest and detain people on behalf of other

governments. *See* N.C. Gen. Stat. §15A-721-760 (extradition); *id.* § 15A-761-770 (interstate criminal detainers). It has simply chosen not to here. These statutes would be superfluous if local officers *already* possessed broad common-law authority to assist other sovereigns.

d. States that authorize immigration arrests do so explicitly.

Unlike North Carolina, some states *do* authorize their officers to carry out immigration arrests, even where there is no 287(g) agreement. Comparing such laws to North Carolina's further highlights the missing statutory authority the court below either silently (and erroneously) assumed existed, or failed to understand was required.

For instance, Virginia law gives peace officers the "authority to enforce immigration laws" by making certain "arrest[s]." Va. Code Ann. § 19.2-81.6. Texas law requires peace officers to "fulfill any request made in [an ICE] detainer." Tex. Code Crim. P. 2.251(a)(1); *see El Cenizo*, 890 F.3d at 188 (finding state-law arrest authority on this basis).

In states where such laws do not exist, there is no arrest authority. North Carolina plainly falls into this latter camp. The legislature has enacted a comprehensive arrest-authority scheme that omits any authority to make civil immigration arrests, where there is no 287(g) agreement.

3. **Federal law does not grant local officers the power to arrest for civil immigration violations.**

Nothing in federal law supplies the missing arrest authority that state law withholds from local officers. The Immigration and Nationality Act permits local officers to make civil immigration arrests only where—unlike in North Carolina—state law permits such arrests.

As discussed in Section IV.A, *supra*, the Court of Appeals mistakenly relied on 8 U.S.C. § 1357(g)(10) to conclude that sheriffs may cooperate with Federal immigration authorities by detaining pursuant to an immigration warrant. *Chavez,* __ N.C. at __, 822 S.E.2d at 142. But section 1357(g)(10)(B) only provides that local officers are not preempted from "cooperat[ing]" with ICE officers in certain circumstances. The lack of preemption, however, is a far cry from "an affirmative grant of authority." *New England Power Co. v. New Hampshire*, 455 U.S. at 344. It therefore "is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law."[20] *Lunn*, 477 Mass. at 535, 78 N.E.3d at 1159; *accord Wells*, 88 N.Y.S.3d at 551-52, 168 A.D.3d at 47; *Cisneros*, 2018 WL 7142016, at *12. Because state law does not

[20] Section 1357(g)(10) is also inapposite for the further reason that detainer arrests are not mere "cooperat[ion]," *id.* § 1357(g)(10)(B); they are a core "immigration officer function[]" for which the statute requires a formal agreement, supervision, and training, *id.* § 1357(g)(1)-(9).

permit non-deputized officers to effectuate civil detainer arrests, and because federal law does not supply the missing authority, such arrests are unlawful.

4. **Detainer arrests also violate the state constitution.**

In addition to violating North Carolina General Statutes, detainer arrests also violate three important rights contained in the North Carolina Constitution. *See* N.C. Const. art. I, § 19 (due process); *id*. § 27 (right to bail); *id*. § 20 (no warrantless seizures of persons). An officer violates each of these rights when he or she deprives a person of their liberty without any basis in state law. *See* Cisneros, 2018 WL 7142016, at *14 (holding that an arrest without state-law authority violated Colorado's constitutional due process, bail, and search-and-seizure rights). Thus, detainer arrests are not only ultra vires, they violate our state Constitution.

CONCLUSION

For the foregoing reasons, Mr. Chavez and Mr. Lopez respectfully request that this Court reverse the Court of Appeals and uphold the superior court's orders granting Petitioners' writs of habeas corpus.

Respectfully submitted, this the 29th day of May, 2019.

s/ Rob Heroy
Rob Heroy
Bar No. 35339

s/ Sejal Zota
Sejal Zota
Bar No. 36535

Goodman Carr, PLLC
301 S. McDowell St., #602
Charlotte, NC 28204
704-372-2770
rheroy@goodmancarr.net

Attorney at Law
54 Beverly Drive
Durham, NC 27707
919-698-5015
sejalzota@yahoo.com

I, Rob Heroy, certify that all of the attorneys listed in the signature line have authorized me to list their names on this document as if they had personally signed it.

s/ Rob Heroy

WORD COUNT

Exclusive of covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes, this brief contains 11,243 words.

This the 29th day of May, 2019

s/ Rob Heroy
Rob Heroy
Bar No. 35339
Goodman Carr, PLLC
301 S. McDowell St., #602
Charlotte, NC 28204
704-372-2770
rheroy@goodmancarr.net

CERTIFICATE OF SERVICE

I certify that I have served the foregoing OPENING BRIEF on opposing counsel by placing a copy in the United States mail, first class, postage prepaid to:

Sean F. Perrin
Bar No. 22253
Womble Bond Dickinson (US) LLP
One Wells Fargo Center
301 South College Street, Suite 3500
Charlotte, NC 28202-6037
704-331-4992
sean.perrin@wbd-us.com

Erez Reuveni
Bar No.
Joshua S. Press
Bar No.
United States Department of Justice
Office of Immigration Litigation
District Court Section
P.O. Box 868
Ben Franklin Station
Washington, DC 20044
202-307-4293
Erez.R.Reuveni@usdoj.gov
Joshua.Press@usdoj.gov

This the 29th day of May, 2019.

s/ Rob Heroy
Rob Heroy
Bar No. 35339
Goodman Carr, PLLC
301 S. McDowell St., #602
Charlotte, NC 28204
704-372-2770
rheroy@goodmancarr.net

Contents of Appendix

Chavez v. Carmichael, __ N.C. __, 822 S.E.2d 131 (2018)..... 1
Transcript of *habeas hearing* 17
I-200 forms 27
Heads up email 28
8 C.F.R. § 236.1 29
8 C.F.R. §287.5 35
8 C.F.R. § 287.8 40
8 U.S.C. § 1252 44
8 U.S.C. § 1357 53
Cisneros v. Elder, No. 18CV30549, 2018 WL 7142016 (D. Colo., El Paso Cty. Mar. 19, 2018)..... 58
Oxley v. DHS, 2018 WL 53899394 (Merit Systems Protection Board, Oct. 23, 2018) 73
Bill Ortega, *ICE Supervisors Don't Always Review Deportation Warrants*, CNN (Mar. 13, 2019)..... 91
ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers, (March 24, 2017), available at https://www.ice.gov/detainer policy 96
Jessica Smith, *Habeas Corpus* (March, 2014) North Carolina Superior Court Judges' Benchbook..... 102
Tex. Code Crim. P. 2.251(a)(1)..... 112
Va. Code Ann. § 19.2-81.6 114

822 S.E.2d 131
Court of Appeals of North Carolina.

Carlos CHAVEZ, Petitioner,
v.
Irwin CARMICHAEL, Sheriff,
Mecklenburg County, Respondent.
Luis Lopez, Petitioner,
v.
Irwin Carmichael, Sheriff,
Mecklenburg County, Respondent.

No. COA18-317
|
Filed: November 6, 2018

Synopsis

Background: Non-citizens who were subject to administrative immigration arrest warrants and immigration detainers to Immigration and Customs Enforcement (ICE) and were in sheriff's custody, filed petitions for habeas corpus. The Superior Court, Mecklenburg County, Yvonne Mims-Evans, J., granted the petitions, ordering non-citizens to be brought before a superior court for a hearing to determine the legality of their confinement, and ordered non-citizens to be released. The Court of Appeals granted sheriff's petition for writ of certiorari.

Holdings: The Court of Appeals, Tyson, J., held that:

[1] even if sheriff had turned over non-citizens to ICE, sheriff's appeal was justiciable under exception to mootness doctrine as an issue of public interest;

[2] the Court of Appeals could consider an agreement between sheriff's office and Immigration and Customs Enforcement (ICE) when reviewing sheriff's appeal;

[3] federal and state statutes permitted state and local law enforcement agencies and officials to enter into agreements with federal agencies, and thus, sheriff, whose office had entered into an agreement with ICE was permitted to perform the functions of immigration officers or assist in civil immigration detentions;

[4] federal government had the exclusive power to regulate immigration;

[5] even if sheriff and ICE did not have an agreement, superior court would not have jurisdiction to review petitions;

[6] superior court lacked jurisdiction to release non-citizens who were subject to administrative immigration arrest warrants and immigration detainers; and

[7] as an issue of first impression, sheriff was acting as a federal officer when he detained non-citizens.

Vacated and remanded.

Dietz, J., filed concurring opinion.

West Headnotes (25)

[1] Certiorari
Certiorari ineffectual or not beneficial

Even if sheriff had turned over non-citizens who were subject to administrative immigration arrest warrants and immigration detainers to Immigration and Customs Enforcement (ICE), sheriff's petition for certiorari review of orders that he release non-citizens from his custody was justiciable under exception to mootness doctrine as an issue of public interest, since it involved the question of whether state courts possessed jurisdiction to review habeas petitions of non-citizen detainees ostensibly held under the authority of the federal government.

Cases that cite this headnote

[2] Pretrial Procedure
Vexatious or fictitious suit;mootness

Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in

controversy between the parties are no longer at issue, the case should be dismissed as moot.

Cases that cite this headnote

[3] **Action**
Moot, hypothetical or abstract questions

A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.

Cases that cite this headnote

[4] **Action**
Moot, hypothetical or abstract questions

A case is justiciable when the question involves a matter of public interest.

Cases that cite this headnote

[5] **Courts**
Determination of questions of jurisdiction in general

Courts have a duty to make a determination when a case involves a matter of public interest.

Cases that cite this headnote

[6] **Appeal and Error**
Want of Actual Controversy

Under the "public interest exception to mootness," an appellate court may consider a case, even if technically moot, if it involves a matter of public interest, is of general importance, and deserves prompt resolution.

Cases that cite this headnote

[7] **Habeas Corpus**
Record

The Court of Appeals could consider an agreement between sheriff's office and Immigration and Customs Enforcement (ICE) when reviewing sheriff's appeal of orders that he release non-citizens who were subject to administrative immigration arrest warrants and immigration detainers from his custody, where agreement was properly in the record on appeal and bore upon the issue of whether the superior court possessed subject matter jurisdiction to consider non-citizens' petitions for habeas corpus and issue writs of habeas corpus.

Cases that cite this headnote

[8] **Appeal and Error**
Evidence or Other Material Not Considered Below

An appellate court may consider materials that were not before the lower tribunal to determine whether subject matter jurisdiction exists. N.C. R. Evid. 201(c).

Cases that cite this headnote

[9] **Appeal and Error**
Taking judicial notice in reviewing court

Evidence
Nature and scope in general

The device of judicial notice is available to an appellate court as well as a trial court; consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic.

Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship**
Immigration Agencies and Officers

Aliens, Immigration, and Citizenship
Officers and Agents

Federal and state statutes permitted state and local law enforcement agencies and officials to enter into agreements with federal agencies, and thus, sheriff, whose office had entered into an agreement with Immigration and Customs Enforcement (ICE) was permitted to perform the functions of immigration officers or assist in civil immigration detentions. Immigration and Nationality Act § 287, 8 U.S.C.A. §§

1357(g), 1357(g)(1); N.C. Gen. Stat. Ann. §§ 128-1.1, 128-1.1(c1), 162-62, 162-62(c).

Cases that cite this headnote

[11] **Courts**
In general;nature and source of judicial authority
Courts
Jurisdiction of Cause of Action

"Subject matter jurisdiction" refers to the power of the court to deal with the kind of action in question, and is conferred upon the courts by either the State Constitution or by statute.

Cases that cite this headnote

[12] **Courts**
Of cause of action or subject-matter
Courts
Waiver of Objections
Courts
Estoppel arising from submitting to or invoking jurisdiction
Estoppel
Particular applications

Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial.

Cases that cite this headnote

[13] **Appeal and Error**
Organization and Jurisdiction of Lower Court
Courts
Time of making objection

The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.

Cases that cite this headnote

[14] **Appeal and Error**
Subject-matter jurisdiction

The standard of review for lack of subject matter jurisdiction is de novo.

Cases that cite this headnote

[15] **Courts**
Determination of questions of jurisdiction in general

In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings.

Cases that cite this headnote

[16] **Statutes**
General and specific terms and provisions;ejusdem generis

Where two statutory provisions conflict, one of which is specific or particular and the other general, the more specific statute controls in resolving any apparent conflict.

Cases that cite this headnote

[17] **Aliens, Immigration, and Citizenship**
Power to regulate in general
Aliens, Immigration, and Citizenship
Judicial Review or Intervention
Habeas Corpus
Exclusive, Concurrent, or Conflicting Jurisdiction

Under clause of United States Constitution, federal government had the exclusive power to regulate immigration, and thus federal court had exclusive jurisdiction over immigration warrants and detainer requests, and superior court did not possess subject matter jurisdiction to consider petitions for habeas corpus brought by non-citizens who were subject to administrative immigration arrest warrants and immigration detainers. U.S. Const. art. 1, § 8, cl. 4.

Cases that cite this headnote

[18] **Aliens, Immigration, and Citizenship**
Power to regulate in general

The government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. U.S. Const. art. 1, § 8, cl. 4.

Cases that cite this headnote

[19] **Aliens, Immigration, and Citizenship**
Power to regulate in general

States
International relations;aliens

Power to regulate immigration is unquestionably exclusively a federal power. U.S. Const. art. 1, § 8, cl. 4.

Cases that cite this headnote

[20] **Aliens, Immigration, and Citizenship**
Power to regulate in general

Aliens, Immigration, and Citizenship
Judicial Review or Intervention

Courts
Exclusive or Concurrent Jurisdiction

A state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters. U.S. Const. art. 1, § 8, cl. 4.

Cases that cite this headnote

[21] **Aliens, Immigration, and Citizenship**
Power to regulate in general

Courts
Exclusive or Concurrent Jurisdiction

Habeas Corpus
Exclusive, Concurrent, or Conflicting Jurisdiction

Even if sheriff and Immigration and Customs Enforcement (ICE) did not have an agreement that sheriff could perform the functions of immigration officers or assist in civil immigration detentions, superior court would not have jurisdiction to review petitions for habeas corpus brought by non-citizens who were subject to administrative immigration arrest warrants and immigration detainers, since jurisdiction would constitute prohibited interference with the federal government's supremacy and exclusive control over matters of immigration. U.S. Const. art. 1, § 8, cl. 4; U.S. Const. art. 6, cl. 2; Immigration and Nationality Act § 287, 8 U.S.C.A. § 1357(g)(10)(A)-(B).

Cases that cite this headnote

[22] **Aliens, Immigration, and Citizenship**
Judicial Review or Intervention

Courts
Exclusive or Concurrent Jurisdiction

Superior court lacked jurisdiction to release non-citizens who were subject to administrative immigration arrest warrants and immigration detainers and were in sheriff's custody, since they were federal detainees. U.S. Const. art. 1, § 8, cl. 4; U.S. Const. art. 6, cl. 2.

Cases that cite this headnote

[23] **Habeas Corpus**
Persons in federal custody

If a prisoner's habeas petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted authority of the United States, the state court must refuse to issue a writ of habeas corpus.

Cases that cite this headnote

[24] **Aliens, Immigration, and Citizenship**
Officers and Agents

Aliens, Immigration, and Citizenship
Arrest warrants

As an issue of first impression, sheriff, whose office had entered into an agreement with Immigration and Customs Enforcement (ICE), was acting as a federal officer when he detained non-citizens who were subject to administrative immigration arrest warrants and immigration detainers, since

under agreement sheriff's office was deputized or empowered by the Department of Homeland Security (DHS) and ICE to perform immigration functions. Immigration and Nationality Act § 287, 8 U.S.C.A. § 1357(g)(1).

Cases that cite this headnote

[25] Appeal and Error
Jurisdiction

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.

Cases that cite this headnote

***134** Appeal by respondent from orders entered 13 October 2017 by Judge Yvonne Mims-Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2017. Mecklenburg County, Nos. 17 CR 230629-30, 16 CR 244165

Attorneys and Law Firms

National Immigration Project of the National Lawyers Guild, by Sejal Zota, and Goodman Carr, PLLC, by Rob Heroy, Charlotte, for petitioners Luis Lopez and Carlos Chavez.

Womble Bond Dickenson (US) LLP, by Sean F. Perrin, Charlotte, for respondent.

U.S. Department of Justice Civil Division, by Trial Attorney Joshua S. Press, for amicus curiae United States Department of Justice.

Opinion

TYSON, Judge.

Mecklenburg County Sheriff Irwin Carmichael ("the Sheriff") appeals, in his official capacity, from two orders of the superior court ordering the Sheriff to release two individuals from his custody. We vacate the superior court's orders and remand to the superior court to dismiss the *habeas corpus* petitions for lack of subject matter jurisdiction.

I. Background

A. *287(g) Agreement and ICE Detainer Requests*

The Sheriff and Immigration and Customs Enforcement ("ICE"), an agency under the jurisdiction and authority of the United States Department of Homeland Security ("DHS"), entered into a written agreement (the "287(g) Agreement") on 28 February 2017 pursuant to 8 U.S.C. § 1357(g)(1).

The federal Immigration and Nationality Act ("INA") authorizes DHS to enter into formal cooperative agreements, like the 287(g) Agreement, with state and local law enforcement agencies and officials. *See* 8 U.S.C. § 1357(g). Under these agreements, state and local authorities and their officers are subject to the supervision of the Secretary of Homeland Security and are authorized to perform specific immigration enforcement functions, including, in part, investigating, apprehending, and detaining illegal aliens. 8 U.S.C. §§ 1357(g)(1)-(9). In the absence of a formal cooperative agreement, the United States Code additionally provides local authorities may still "communicate with [ICE] regarding the immigration status of any individual ... or otherwise cooperate with [ICE] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(A)-(B).

Upon request from DHS, state and local law enforcement may "participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities." *Id.* However, state and local officers may not make unilateral decisions concerning immigration enforcement under the INA. *Id.*

Federal agencies and officers issue a Form I-247 detainer regarding an alien to request the cooperation and assistance of state and local authorities. 8 C.F.R. § 287.7(a), (d). An immigration detainer notifies a state or locality that ICE intends to take custody of an alien when the alien is released from that jurisdiction's custody. *Id.* ICE requests the state or local authority's cooperate by notifying ***135** ICE of the alien's release date and by

holding the alien for up to 48 hours thereafter for ICE to take custody. *Id.* In addition to detainers, ICE officers may also issue administrative warrants based upon ICE's determination that probable cause exists to remove the alien from the United States. *Lopez-Lopez v. Cty. of Allegan*, 321 F.Supp.3d 794, 799 (W.D. Mich. 2018) (citing *Abel v. United States*, 362 U.S. 217, 233-34, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960) and 8 U.S.C. § 1226(a)).

B. *Chavez and Lopez' Habeas Petitions*

1. Luiz Lopez

On 5 June 2017, Luiz Lopez ("Lopez") was arrested for common law robbery, felony conspiracy, resisting a public officer, and misdemeanor breaking and entering. Lopez was incarcerated at the Mecklenburg County Jail under the Sheriff's custody. Later that day, following his arrest, Lopez was served with a Form I-200 administrative immigration arrest warrant issued by DHS. Also the same day, the Sheriff's office was served with a Form I-247A immigration detainer issued by DHS. The Form I-247A requested the Sheriff to maintain custody of Lopez for up 48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of Lopez. Lopez was held in jail on the state charges under a $400 secured bond.

2. Carlos Chavez

On 13 August 2017, Carlos Chavez ("Chavez") was arrested for driving while impaired, no operator's license, interfering with emergency communications, and assault on a female, and was detained at the Mecklenburg County Jail. That same day, Chavez, under his name "Carlos Perez-Mendez," was served with a Form I-200 administrative immigration warrant issued by DHS.

The Sheriff's office was served with a Form I-247A immigration detainer, issued by DHS, requesting the Sheriff to detain "Carlos Perez-Mendez" for up to 48 hours after he would otherwise be released from the state's jurisdiction to allow DHS to take physical custody of him. Chavez was held in jail for the state charges on a $100 cash bond.

At approximately 9:00 a.m., on 13 October 2017, Lopez' release from jail on state criminal matters was resolved when his $400 secured bond was purportedly made unsecured by a bond modification form. That same day, Chavez posted bond on his state criminal charges. The Sheriff continued to detain Lopez and Chavez ("Petitioners") at the county jail pursuant to the Form I-247A immigration detainers and I-200 arrest warrants issued by DHS.

At 9:13 a.m. on 13 October 2017, Chavez and Lopez filed petitions for writs of *habeas corpus* in the Mecklenburg County Superior Court. Petitioners recited three identical grounds to assert their continued detention was unlawful: (1) "the detainer lacks probable cause, is not a warrant, and has not been reviewed by a judicial official therefore violating [Petitioners'] Fourth Amendment rights under the United States Constitution and ... North Carolina Constitution"; (2) "[the Sheriff] lacks authority under North Carolina General Statutes to continue to detain [Petitioners] after all warrants and sentences have been served"; and (3) "[the Sheriff's] honoring of ICE's request for detention violates the anti-commandeering principles of the Tenth Amendment...." In his petition for writ of *habeas corpus,* Chavez alleged that he was held at the county jail pursuant to the immigration detainer and administrative warrant listing his name as "Carlos Perez-Mendez."

Later that morning, the superior court granted both Petitioners' petitions for writs of *habeas corpus*, and entered return orders, which ordered that the Petitioners "be immediately brought before a judge of Superior Court for a return hearing pursuant to N.C.G.S. 17-32 to determine the legality of [their] confinement." The trial court also ordered the Sheriff to "immediately appear and file [returns] in writing pursuant to N.C.G.S. 17-14."

Based upon our review of a chain of emails included in the record on appeal, Mecklenburg County Public Defender's Office Investigator, Joe Carter, notified Marilyn Porter, in-house legal counsel for the Sheriff's office, the petitions for writs of *habeas corpus* had ***136** been filed. At 9:30 a.m. on October 13, Porter forwarded Carter's email to the Sheriff; Sean Perrin, outside legal counsel for the Sheriff; and eight other individuals affiliated with the Sheriff's office. Porter stated in her email that "I do not acknowledge receipt of any of [Carter's] emails on this

topic. We will see who is the subject of this Writ—and what Judge signed."

In the same chain of emails, Sheriff's Captain Donald Belk responded he had received notice from the clerk of court that Petitioners' "cases are on in 5350 this morning." Belk also wrote, "CHAVEZ, CARLOS 451450, he was put in ICE custody this morning. I have informed Lock Up that Chavez is in ICE custody and should not go to court." Belk's email also stated, "LOPEZ, LUIS 346623, he is in STATE custody."

After the superior court signed its return orders, Public Defender Investigator Carter went to the Sheriff's office. An employee at the front desk informed him that neither the Sheriff nor his in-house counsel, Porter, were present at the office. The front desk receptionist refused to accept service of the superior court's return orders and the Petitioners' *habeas* petitions. Carter left copies of the orders and petitions on the Sheriff's front desk at 10:23 a.m. Carter then went to the county jail and left copies of the orders and petitions with a sheriff's deputy at 10:26 a.m.

At 11:57 a.m. that morning and without notice of the hearing to the Sheriff, the superior court began a purported return hearing on Petitioners' *habeas* petitions. The Sheriff did not appear at the hearing, did not produce Petitioners before the court, and had not yet filed returns pursuant to N.C. Gen. Stat. § 17-14 (2017).

During the return hearing, Petitioners' counsel provided the court with Carter's certificates of service of the Petitioners' *habeas* petitions and the court's return orders. Petitioners' counsel informed the court about the email sent by Carter to the Sheriff's in-house counsel, Porter, earlier that day. The court ruled Petitioners' continued detention was unlawful and ordered the Sheriff to immediately release Petitioners.

Later that day, after the superior court had ordered Petitioners to be released, counsel for the Sheriff timely filed written returns for both Petitioners' cases within the limits allowed by N.C. Gen. Stat. § 17-26 (2017). Before the superior court issued its orders to release Petitioners, the Sheriff's office had turned physical custody of both Petitioners over to ICE officers.

On 6 November 2017, the Sheriff filed petitions for writs of certiorari with this Court to seek review of the superior court's 13 October 2017 orders. The Sheriff also filed petitions for a writ of prohibition to prevent the superior court from ruling on *habeas corpus* petitions filed in state court, premised upon the Sheriff's alleged lack of authority to detain alien inmates subject to federal immigration warrants and detainer requests. On 22 December 2017, this Court allowed the Sheriff's petitions for writs of certiorari and writ of prohibition.

On 22 January 2018, the Sheriff served a proposed record on appeal. Petitioners objected to inclusion of two documents, a version of the Form I-200 immigration arrest warrant for Lopez signed by a DHS immigration officer and the 287(g) Agreement between ICE and the Sheriff's office. The trial court held a hearing to settle the record on appeal. The trial court ordered the 287(g) Agreement to be included in the record on appeal and the signed Form I-200 warrant for Lopez not to be included.

The record on appeal was filed and docketed with this Court on 27 March 2018. Prior to the Sheriff submitting his brief, Petitioners filed a motion to strike the 287(g) Agreement and a petition for writ of certiorari challenging the trial court's order, which had settled the record on appeal. By an order issued 4 May 2018, this Court denied Petitioners' petition for writ of certiorari "without prejudice to assert argument in direct appeal." Petitioners' motion to strike the 287(g) Agreement from the record on appeal was dismissed by an order of this Court entered 12 September 2018.

On 27 April 2018, the United States filed a motion for leave to file an *amicus curiae* brief. By an order dated 1 May 2018, this ***137** Court allowed the United States' ("*Amicus")* motion.

On 27 April 2018, the Sheriff filed his appellate brief. Included in the appendix to the brief was a copy of the ICE Operations Manual. On 2 July 2018, Petitioners filed a motion to strike the ICE Operations Manual from the Sheriff's brief. This Court denied Petitioners' motion to strike the ICE Operations Manual by an order entered 12 September 2018.

II. Jurisdiction

Jurisdiction to review this appeal lies with this Court pursuant to the Court's order granting the Sheriff's petitions for writs of certiorari and prohibition entered 22 December 2017. N.C. Gen. Stat. § 1-269 (2017).

III. Analysis

The Sheriff, Petitioners, and *Amicus* all present the same arguments with regard to both Petitioners. We review the parties' arguments as applying to both of the superior court's orders.

The Sheriff argues the superior court was without jurisdiction to consider Petitioners' petitions for writs of *habeas corpus*, or to issue the writs, because of the federal government's exclusive control over immigration under the United States Constitution, the authority delegated to him under the 287(g) Agreement, and under the administrative warrants and immigration detainers issued against Petitioners. *See* 8 U.S.C. § 1357(g)(10)(A)-(B).

A. *Mootness*

[1] Petitioners initially argue the cases are moot, because the Sheriff has turned Petitioners over to the physical custody of ICE. The Sheriff argues that even if the cases are moot, the issues fall within an exception to the mootness doctrine.

[2] **[3]** "Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed [as moot.]" *In re Peoples,* 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted).

[4] **[5]** The issues in the case before us are justiciable where the question involves is a "matter of public interest." *Matthews v. Dep't of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). "In such cases the courts have a duty to make a determination." *Id.* (citation omitted).

[6] Even if the Sheriff is not likely to be subject to further *habeas* petitions filed by Chavez and Lopez or orders issued thereon, this matter involves an issue of federal and state jurisdiction to invoke the "public interest" exception to mootness. Under the "public interest" exception to mootness, an appellate court may consider a case, even if technically moot, if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). Our appellate courts have previously applied the "public interest" exception to otherwise moot cases of clear and far-reaching significance, for members of the public beyond just the parties in the immediate case. *See, e.g.*, *Granville Cty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) (applying the "public interest" exception to review case involving location of hazardous waste facilities); *In re Brooks*, 143 N.C. App. 601, 605-06, 548 S.E.2d 748, 751-52 (2001) (applying the "public interest" exception to police officers' challenge of a State Bureau of Investigation procedure for handling personnel files containing "highly personal information" and recognizing that "the issues presented ... could have implications reaching far beyond the law enforcement community").

Similar to the procedural posture of the Sheriff's appeal, this Court applied the "capable of repetition, but evading review" as well as the "public interest" exception in *State v. Corkum* to review a defendant's otherwise moot appeal, which was before this Court on a writ of certiorari. ***138** *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of felon's confinement credit under structured sentencing under the Justice Reinvestment Act of 2011 required review because "all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge's discretion from being resolved").

The Sheriff's appeal presents significant issues of public interest because it involves the question of whether our state courts possess jurisdiction to review *habeas* petitions of alien detainees ostensibly held under the authority of the federal government. This issue potentially impacts *habeas* petitions filed by suspected illegal aliens held under 48-hour ICE detainers directed towards the Sheriff and the many other court and local law enforcement officials across the state. The Sheriff's filings show that several

other *habeas* petitions filed by ICE detainees were pending and acted upon, but held in abeyance after a writ of prohibition was issued by this Court. Prompt resolution of this issue is essential because it is likely other *habeas* petitions will be filed in our state courts, which impacts ICE's ability to enforce federal immigration law.

Resolution of the Sheriff's appeal potentially affects many other detainees, local law enforcement agencies, ICE, and other court and public officers and employees. For the reasons above and in the interest of the public, we review the Sheriff's appeal. *See Randolph*, 325 N.C. at 701, 386 S.E.2d at 186; *Corkum*, 224 N.C. App. at 132, 735 S.E.2d at 423.

B. *Judicial Notice of 287(g) Agreement*

[7] The Sheriff included the 287(g) Agreement between his office and ICE in the record to this Court to support his arguments on appeal. Notwithstanding the multiple prior rulings on this issue, Petitioners argue this Court should not consider the 287(g) Agreement between the Sheriff and ICE in deciding the matter because the 287(g) Agreement was not submitted to the superior court.

[8] **[9]** As previously ruled upon by the superior court and this Court, the 287(g) Agreement is properly in the record on appeal and bears upon the issue of whether the superior court possessed subject matter jurisdiction to consider the petitions and issue these writs of *habeas corpus.* An appellate court may also consider materials that were not before the lower tribunal to determine whether subject matter jurisdiction exists. *See N.C. ex rel Utils. Comm'n. v. S. Bell Tel.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323-24 (1976); N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017) ("A court may take judicial notice, whether requested or not").

> The device of judicial notice is available to an appellate court as well as a trial court. This Court has recognized in the past that important public documents will be judicially noticed. Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic[.]

S. Bell, 289 N.C. at 288, 221 S.E.2d at 323-24 (internal quotation and citations omitted).

In *Bell*, the Supreme Court of North Carolina judicially noticed an order from the Utilities Commission to assess whether an appeal by a telephone company was moot. *Id.*; *see also State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 381, 239 S.E.2d 48, 58 (1977) (taking judicial notice of the North Carolina Rate Bureau's filing with the Commissioner of Insurance).

The 287(g) Agreement between the Sheriff and ICE is a controlling public document. ICE maintains listings and links to all the current 287(g) agreements it has entered into with local law enforcement entities across the United States on its website, including the 28 February 2017 Agreement with the Sheriff. *See* U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/287g (last visited Oct. 18, 2018).

As part of the record on appeal and as verified above, we review the 287(g) Agreement, as an applicable public document, for the purpose of considering the trial court's subject matter jurisdiction to rule upon Petitioners' *habeas* petitions. *See* ***139** *S. Bell*, 289 N.C. at 288, 221 S.E.2d at 323-24. Petitioners' argument that we should not consider the 287(g) Agreement because it was not presented to the superior court is wholly without merit and is dismissed.

C. *Superior Court Lacked Subject-Matter Jurisdiction*

[10] The Sheriff and *Amicus* assert the superior court lacked subject matter jurisdiction to review Petitioners' *habeas* petitions, issue writs of *habeas corpus*, and order Petitioners' release. The Sheriff' argues the superior court "had no jurisdiction to rule on immigration matters under the guise of using this state's habeas corpus statutes, because immigration matters are exclusively federal in nature." Petitioners respond and assert the superior court had jurisdiction to issue the writs of *habeas corpus* because "the Sheriff and his deputies did not act under color of federal law."

[11] **[12]** **[13]** "Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] ... is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citation omitted). Whether subject matter jurisdiction exists over a matter is firmly established:

> Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial. The issue of subject matter jurisdiction may be considered by the court at any time, and may be raised for the first time on appeal.

In re T.B., 177 N.C. App. 790, 791, 629 S.E.2d 895, 896-97 (2006) (citations and internal quotation marks omitted).

[14] **[15]** "The standard of review for lack of subject matter jurisdiction is *de novo*." *Keith v. Wallerich*, 201 N.C. App. 550, 554, 687 S.E.2d 299, 302 (2009). "In determining whether subject matter jurisdiction exists, a court may consider matters outside of the pleadings." *Id.*

Before addressing the Sheriff's argument, we initially address Petitioners' contention that the superior court could exercise subject matter jurisdiction on these matters. Petitioners argue "North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]"

Pursuant to 8 U.S.C. § 1357(g)(1):

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer ... of the State ..., who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or *detention of aliens* in the United States ... may carry out such function at the expense of the State ... *to the extent consistent with State and local law.* (emphasis supplied).

The General Assembly of North Carolina expressly enacted statutory authority for state and local law enforcement agencies and officials to enter into 287(g) agreements with federal agencies. The applicable statute states:

> *Where authorized by federal law*, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency. *State and local law enforcement officers authorized under this provision are authorized to hold any office or position with the applicable federal agency* required to perform the described functions. (emphasis supplied).

N.C. Gen. Stat. § 128-1.1(c1) (2017). 8 U.S.C. § 1357(g)(1) permits the Attorney General to enter into agreements with local law enforcement officers to authorize them to "perform a function of an immigration officer" to the extent consistent with state law.

Petitioners contend N.C. Gen. Stat. § 162-62 prevents local law enforcement officers from performing the functions of immigration officers or to assist DHS in civil immigration detentions. N.C. Gen. Stat. § 162-62 (2017) provides:

> (a) When any person charged with a felony or an impaired driving offense is confined for any period in a county jail ... the administrator ... shall attempt to determine ***140** if the prisoner is a legal resident of

> the United States by an inquiry of the prisoner, or by examination of any relevant documents, or both.
>
> (b) *If the administrator ... is unable to determine if that prisoner is a legal resident or citizen of the United States ... the administrator ...* ***shall*** *make a query of Immigration and Customs Enforcement of the United States Department of Homeland Security.* If the prisoner has not been lawfully admitted to the United States, the United States Department of Homeland Security will have been notified of the prisoner's status and confinement at the facility by its receipt of the query from the facility.
>
> (c) Nothing in this section shall be construed to deny bond to a prisoner or to prevent a prisoner from being released from confinement *when that prisoner is otherwise eligible for release.* (Emphasis supplied).

Petitioners purport to characterize N.C. Gen. Stat. § 162-62(c) as forbidding sheriffs from detaining prisoners who are subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Petitioners' assertion of the applicability of this statute is incorrect.

N.C. Gen. Stat. § 162-62 specifically refers to a sheriff's *duty to inquire* into a prisoner's immigration status and, if that prisoner is within the country unlawfully, mandates the sheriff "shall" notify DHS of the prisoner's "status and confinement." *Id.* N.C. Gen. Stat. § 162-62 does not refer to a 287(g) agreement, federal immigration detainer requests, administrative warrants or prevent a sheriff from performing immigration functions pursuant to a 287(g) agreement, or under color of federal law. *See id.*

N.C. Gen. Stat. § 162-62(c) only provides that "*[n]othing in this section* shall be construed ... to prevent a prisoner from being released from confinement when that prisoner *is otherwise eligible for release*." (Emphasis supplied). This statute does not mandate a prisoner must be released from confinement, only that nothing in that specific section dealing with reporting a prisoner's immigration status shall prevent a prisoner from being released when they are "otherwise eligible." *Id.*

N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements under 8 U.S.C. § 1357(g) and perform the functions of immigration officers, including detention of aliens. No conflict exists in the statutes between N.C. Gen. Stat. §§ 162-62 and 128-1.1.

[16] Even though Petitioners assert these two statutes are inconsistent, N.C. Gen. Stat. § 128-1.1 controls over N.C. Gen. Stat. § 162-62, as the more specific statute. "[W]here two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

N.C. Gen. Stat. § 128-1.1 specifically authorizes state and local law enforcement agencies to enter into agreements with the federal government to perform the functions of immigration officers under 8 U.S.C. § 1357(g), as present here. The express language of 8 U.S.C. § 1357(g)(1) lists the "detention of aliens within the United States" as one of the "function[s] of an immigration officer."

N.C. Gen. Stat. § 162-62 does not specifically regulate the conduct of sheriffs acting as immigration officers pursuant to a 287(g) agreement under 8 U.S.C. § 1357(g), or under color of federal law. Instead, N.C. Gen. Stat. § 162-62 imposes a specific and mandatory duty upon North Carolina sheriffs, as administrators of county jails, to inquire, verify, and report a detained prisoner's immigration status. N.C. Gen. Stat. § 162-62.

Contrary to Petitioners' argument, North Carolina law does not forbid state and local law enforcement officers from performing the functions of federal immigration officers, but the policy of North Carolina as enacted by the General Assembly, expressly authorizes sheriffs to enter into 287(g) agreements to permit them to perform such functions. *See* N.C. Gen. Stat. § 128-1.1. We reject and ***141** overrule their contention that "North Carolina law does not permit civil immigration detention, even where there is a 287(g) agreement[.]"

D. *Federal Government's Supreme and Exclusive Authority over Immigration*

[17] The Sheriff contends the superior court did not possess subject matter jurisdiction in these cases. We agree.

The Supremacy Clause of the Constitution of the United States establishes that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Nearly 200 years ago, the Supreme Court of the United States held the Supremacy Clause prevents state and local officials from taking actions or passing laws to "retard, impede, burden, or in any manner control" the execution of federal law. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436, 4 L.Ed. 579 (1819).

[18] **[19]** "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394, 132 S.Ct. 2492, 2498, 183 L.Ed.2d 351, 366 (2012). This broad authority derives from the federal government's delegated and enumerated constitutional power "[t]o establish an uniform Rule of Naturalization[.]" U.S. Const. art. I, § 8, cl. 4. "Power to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), *superseded by statute on other grounds as recognized in Arizona*, 567 U.S. at 404, 132 S.Ct. at 2504, 183 L.Ed.2d at 372.

The Sheriff cites several other states' appellate court decisions, which hold state courts lack jurisdiction to consider petitions for writs of *habeas corpus* and other challenges to a detainee's detention pursuant to the federal immigration authority. *See Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008); *State v. Chavez-Juarez,* 185 Ohio App. 3d 189, 192, 923 N.E.2d 670, 673 (2009).

In *Ricketts*, the Court of Appeals of Florida addressed a similar situation to the instant case. Ricketts was arrested on a state criminal charge and detained by the sheriff. *Ricketts*, 985 So.2d at 591. His bond was set at $1,000; however, the sheriff refused to accept the bond and release Ricketts, due to a federal immigration hold issued by ICE. *Id.* As in the present case, Ricketts first sought *habeas corpus* relief in state court. *Id.* at 592. The trial court denied all relief, reasoning that the issues were within the exclusive jurisdiction of the federal government. *Id.*

On appeal, the Court of Appeals of Florida agreed with the trial court "that appellant cannot secure *habeas corpus* relief from the state court on the legality of his federal detainer." *Id.* The court reasoned that the constitutionality of his detention pursuant to the immigration hold "is a question of law for the federal courts." *Id.* at 592-93. The court further explained that "a state court cannot adjudicate the validity of the federal detainer, as the area of immigration and naturalization is within the exclusive jurisdiction of the federal government." *Id.* at 593 (citing *Plyler v. Doe*, 457 U.S. 202, 225, 102 S.Ct. 2382, 2398–99, 72 L.Ed.2d 786, 804 (1982); and *DeCanas*, 424 U.S. at 354, 96 S.Ct. at 935–36, 47 L.Ed.2d at 43 ("Power to regulate immigration is unquestionably exclusively a federal power")).

The Court of Appeals of Ohio followed the Florida Court of Appeals' decision in *Ricketts* and reached a similar conclusion in *Chavez-Juarez*. Chavez was arrested for operating a vehicle under the influence of alcohol. *Chavez-Juarez*, 185 Ohio App.3d at 193, 923 N.E.2d at 673. After arraignment, the state court ordered Chavez released; however, he was held pursuant to a federal immigration detainer, was turned over to ICE, and deported to Mexico. *Id.* at 193-94, 923 N.E.2d at 674. His attorney filed a motion to have ICE officers held in contempt for violating the state court's release order. *Id.* at 194, 923 N.E.2d at 674.

The trial court concluded that it lacked jurisdiction over ICE and denied the contempt motion, because the federal courts have pre-emptive jurisdiction over immigration issues. *Id.* at 199, 923 N.E.2d at 679. The Ohio Court of Appeals recognized "Control over immigration and naturalization is entrusted ***142** exclusively to the Federal Government, and a State has no power to interfere." *Id.* (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 10, 97 S.Ct. 2120, 53 L.Ed.2d 63 (1977)).

The Ohio Court of Appeals affirmed the trial court's denial of the contempt motion, and stated:

> Under federal regulation, the Clark County Sheriff's Office was required to hold Chavez for 48 hours to allow ICE to assume custody. Chavez's affidavit indicates that he was held in state custody for approximately 48 hours after the trial court released him on his own recognizance. If Chavez wished to challenge his detention, the proper avenue at that

> point would have been to file a petition in the federal courts, not an action in contempt with the state court, which did not have the power to adjudicate federal immigration issues.

Id. at 202, 923 N.E.2d at 680.

We find the reasoning in both *Ricketts* and *Chavez-Juarez* persuasive and their applications of federal immigration law to state proceedings to be correct.

[20] A state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters. *See Plyler,* 457 U.S. at 225, 102 S.Ct. at 2398–99, 72 L.Ed.2d at 804; *DeCanas*, 424 U.S. at 354, 96 S.Ct. at 935–36, 47 L.Ed.2d at 43. The superior court did not possess subject matter jurisdiction, or any other basis, to receive and review the merits of Petitioners' *habeas* petitions, or issue orders other than to dismiss for lack of jurisdiction, as it necessarily involved reviewing and ruling on the legality of ICE's immigration warrants and detainer requests.

E. *State Court Lacks Jurisdiction Even Without Formal Agreement*

[21] Even if the express 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law permits and empowers state and local authorities and officers to "communicate with [ICE] regarding the immigration status of any individual ... or otherwise to cooperate with [ICE] in the identification, apprehension, *detention*, or removal of aliens not lawfully present in the United States" in the absence of a formal agreement. 8 U.S.C. § 1357(g)(10)(A)-(B) (emphasis supplied).

A state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration. *See* U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. VI, cl. 2; *Nyquist*, 432 U.S. at 10, 97 S.Ct. at 2125–26, 53 L.Ed.2d at 63; *Plyler,* 457 U.S. at 225, 102 S.Ct. at 2398–99, 72 L.Ed.2d at 804; *DeCanas*, 424 U.S. at 354, 96 S.Ct. at 935–36, 47 L.Ed.2d at 43.

F. *State Court Lacks Jurisdiction to Order Release of Federal Detainees*

[22] An additional compelling reason that prohibits the superior court from exercising jurisdiction to issue *habeas* writs to alien petitioners, is a state court's inability to grant *habeas* relief to individuals detained by federal officers acting under federal authority.

Nearly 160 years ago, the Supreme Court of the United States held in *Ableman v. Booth* that "No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them." *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524, 16 L.Ed. 169 (1859).

The Supreme Court of the United States reaffirmed this principle in *In re Tarble*, in which the Court stated:

> State judges and state courts, authorized by laws of their states to issue writs of *habeas corpus*, have, undoubtedly, a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, *unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear* ***143** *upon the application, the writ should be refused.*
>
> ...
>
> *But, after the return is made, and the state judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further.* They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under state authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, *their tribunals alone* can punish him. If he

> is wrongfully imprisoned, *their judicial tribunals can release* him and afford him redress.
>
> ...
>
> [*T*]*hat the state judge or state court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States;* that is, an authority the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned, *it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.*

In re Tarble, 80 U.S. (13 Wall). 397, 409-11, 20 L.Ed. 597, 601-02 (1871) (emphasis supplied) (citations omitted).

[23] In sum, if a prisoner's *habeas* petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of *habeas corpus*. *See id.*

It is undisputed the Sheriff's continued detention of Petitioners, after they were otherwise released from state custody, was pursuant to the federal authority delegated to his office under the 287(g) Agreement. Appendix B of the 287(g) Agreement states, in relevant part:

> This Memorandum of Agreement (MOA) is between the U.S. Department of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) and the Law Enforcement [Mecklenburg County Sheriff's Office] (MCSO), pursuant to which selected MCSO personnel are authorized to perform immigration enforcement duties in specific situations *under Federal authority*. (Emphasis supplied).

Although the 287(g) Agreement was not attached to Petitioners' *habeas* petitions, the petitions indicated to the court the Sheriff was acting under color of federal authority, if not actual federal authority. Petitioners' petitions acknowledge and specifically assert the Sheriff was purporting to act under the authority of the United States by detaining them after they would have otherwise been released from custody for their state criminal charges.

Petitioners' petitions both acknowledge and assert the Sheriff was detaining them "at the behest of the federal government." Petitioners' *habeas* petitions refer to the 287(g) Agreement. Copies of the Form I-200 immigration arrest warrant and Form I-247A detainer request were attached to Chavez's *habeas* petition submitted to the superior court.

A copy of the Form I-200 warrant was attached to Lopez's *habeas* petition, and the petition itself refers to the existence of the Form I-247A detainer, stating: "the jail records, which have been viewed by counsel, indicate that there is an immigration detainer lodged against [Lopez] pursuant to a Form I-247[.]"

Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under a 287(g) agreement. The statute provides: "In performing a function under this subsection [§ 1357(g)], an officer or employee of a State or political subdivision of a State *shall be subject to the direction and supervision of the Attorney General* [*of the United States.*]" 8 U.S.C. § 1357(g)(3) (emphasis supplied).

***144** The Sheriff was acting under the actual authority of the United States by detaining Petitioners under the immigration enforcement authority delegated to him under the 287(g) Agreement, and under color of federal authority provided by the administrative warrants and Form I-247A detainer requests for Petitioners issued by ICE. Petitioners' own *habeas* petitions also indicate the Sheriff was acting under color of federal authority for purposes of the prohibitions against interference by state courts and state and local officials. *See Tarble*, 80 U.S. (13 Wall) at 409, 20 L.Ed. at 601.

[24] The next issue is whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining Petitioners pursuant to the detainer requests and administrative warrants. *See id.* After careful review

of state and federal authorities, no court has apparently decided the issue of whether a state or local law enforcement officer is considered a federal officer when they are performing immigration functions authorized under a 287(g) Agreement.

In contexts other than immigration enforcement, several federal district courts and United States courts of appeal for various circuits have held state and local law enforcement officers are "federal officers" when they have been authorized or deputized by federal law enforcement agencies, such as the Drug Enforcement Agency, Federal Bureau of Investigation, and the United States Marshals Service. *United States v. Martin*, 163 F.3d 1212, 1214-15 (10th Cir.1998) (holding that local police officer deputized to participate in a FBI narcotics investigation is a federal officer within the meaning of 18 U.S.C. § 115(a)(1)(B) [defining the crime of threatening to murder a federal law enforcement officer]); *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir.1988) (holding that local police officer deputized to participate in a DEA investigation is a federal officer within the meaning of 18 U.S.C. § 111 [defining the crime of assault on a federal official]); *United States v. Diamond*, 53 F.3d 249, 251-52 (9th Cir.1995) (holding that a state official specially deputized as a U.S. Marshal was an officer of the United States even though he was not technically a federal employee); *DeMayo v. Nugent*, 475 F.Supp.2d 110, 115 (D. Mass. 2007) ("State police officers deputized as federal agents under the DEA constitute federal agents acting under federal law"), *rev'd on other grounds*, 517 F.3d 11 (1st Cir.2008).

The United States Court of Appeals for the Fourth Circuit specifically recognized an employee of the State of North Carolina as being a federal officer for purposes of the assault on an federal officer statute, when the state employee was assisting the Internal Revenue Service. *United States v. Chunn*, 347 F.2d 717, 721 (4th Cir.1965). The Fourth Circuit has also held that under a 287(g) Agreement, local law enforcement officers effectively become federal officers of ICE, as they are deputized to perform immigration-related enforcement functions. *United States v. Sosa-Carabantes,* 561 F.3d 256, 257 (4th Cir.2009) ("The 287(g) Program permits ICE to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement." (citing 8 U.S.C. § 1357(g)(1))).

The United States Court of Appeals for the Fifth Circuit recently stated, "Under [287(g) agreements], state and local officials become de facto immigration officers[.]" *City of El Cenizo v. Texas*, 890 F.3d 164, 180 (5th Cir.2018); *see also People ex rel. Norfleet v. Staton*, 73 N.C. 546, 550 (1875) ("[T]here is no difference between the acts of *de facto* and *de jure* officers so far as the public and third persons are concerned").

To the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find these federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants. *See Martin*, 163 F.3d at 1214-15; *Torres*, 862 F.2d at 1030; *Sosa-Carabantes*, 561 F.3d at 257; *El Cenizo*, 890 F.3d at 180.

Petitioners' *habeas* petitions clearly disclosed Petitioners were being detained under express, and color of, federal authority by the Sheriff, who was acting as a *de facto* ***145** federal officer. *See El Cenizo*, 890 F.3d at 180. Under the rule enunciated by the Supreme Court of the United States in *Ableman* and expanded upon in *Tarble*, the superior court was without jurisdiction, or any other basis, to receive, review, or consider Petitioners' *habeas* petitions, other than to dismiss for want of jurisdiction, to hear or issue writs of *habeas corpus*, or intervene or interfere with Petitioner's detention in any capacity. *Ableman,* 62 U.S. (21 How.) at 524, 16 L.Ed. at 176; *Tarble*, 80 U.S. (13 Wall.) at 409, 20 L.Ed. at 607.

[25] The superior court should have dismissed Petitioners' petitions for writs of *habeas corpus. See* N.C. Gen. Stat. § 17-4(4) (2017) ("Application to prosecute the writ [of *habeas corpus*] shall be denied ... [w]here no probable ground for relief is shown in the application."). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). The orders of the superior court, which purported to order the release of Petitioners, are vacated. *Id.*

The proper jurisdiction and venues where Petitioners may file their *habeas* petitions is in the appropriate federal

tribunal. *See* 28 U.S.C. § 2241(a); *Tarble*, 80 U.S. (13 Wall.) at 411, 20 L.Ed. at 602 ("If a party thus held be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release").

IV. Conclusion

The superior court lacked any legitimate basis and was without jurisdiction to review, consider, or issue writs of *habeas corpus* for alien Petitioners not in state custody and held under federal authority, or to issue any orders related thereon to the Sheriff. State or local officials and employees purporting to intervene or act constitutes a prohibited interference with the federal government's supreme and exclusive authority over the regulation of immigration and alienage. *See* U.S. Const. art. I, § 8, cl. 4; *Ableman,* 62 U.S. (21 How.) at 524, 16 L.Ed. 169; *Tarble*, 80 U.S. at 409, 20 L.Ed. at 607.

The superior court was on notice the Petitioners were detained under the express, and color of, exclusive federal authority. The Sheriff was acting as a federal officer under the statutorily authorized and executed 287(g) Agreement. The orders appealed from are vacated for lack of jurisdiction and remanded to the trial court with instructions to dismiss Petitioners' *habeas* petitions.

A certified copy of this opinion and order shall be delivered to the Judicial Standards Commission and to the Disciplinary Hearing Commission of the North Carolina State Bar. *It is so ordered.*

VACATED and REMANDED.

Judge BERGER concurs.

Judge DIETZ concurs with separate opinion.

DIETZ, Judge, concurring.

I concur in the majority opinion. I write separately to address the majority's language ordering a certified copy of this opinion to be delivered to the ethical bodies that oversee lawyers and judges. Last year, this Court entered a writ of prohibition barring the trial court from issuing any further writs of habeas corpus on this issue. Based on timeframes discussed at oral argument, and the fact that at least one trial judge entered an order addressing the merits of a similar habeas petition while the writ of prohibition was in effect (although that judge properly held the order in abeyance pending the outcome of this appeal), this Court is concerned that our writ of prohibition may not have been followed with respect to other undocumented immigrants involved in other habeas cases not before the Court. The majority thus orders a copy of the opinion to be sent to the State Bar's Disciplinary Hearing Commission and the Judicial Standards Commission so that these governing bodies are aware of it, should there be any allegations that this Court's writ of prohibition was ignored. But I recognize that this language in the majority opinion can be misinterpreted as a suggestion that lawyers or judges involved in the ***146** proceedings described in this opinion committed misconduct. To be clear, they did not.

All Citations

822 S.E.2d 131

End of Document

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

* *

STATE OF NORTH CAROLINA	)	
	)	Mecklenburg County
versus	)	
	)	17 CRS 230629-30
CARLOS CHAVEZ and	)	& 16 CRS 244165
LUIS LOPEZ,	)	
Defendants.	)	

* *

TRANSCRIPT

Friday, October 13, 2017

* *

Transcript of proceedings in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, at the October 9, 2017 Session, before the Honorable Yvonne Mims Evans, Judge Presiding, from a recording made by the Office of the Mecklenburg County Clerk of Superior Court.

APPEARANCES:

Elizabeth Frawley
Assistant Public Defender
700 East Fourth Street
Charlotte, NC 28202
on behalf of the Defendants

David E. Jester, CVR-M
Court Reporting Manager
229 Kinton Drive
Fuquay-Varina, NC 27526

(The cases of the State of North Carolina versus Carlos Chavez, Mecklenburg County case 17 CRS 230-629-30, and State of North Carolina versus Luis Lopez, Mecklenburg County case 16 CRS 244165, were called for hearing beginning at 11:57 AM on Friday, October 13, 2017.)

THE COURT: All right. Now we're here in the matter, first, of Louis Lopez versus Irwin Carmichael, Sheriff of Mecklenburg County, and he filed a petition for writ of habeas corpus at 9:14 AM on October 13th, 2017. This petition was served on the Sheriff at 10:23 AM. Is the Petitioner present?

THE BAILIFF: No, ma'am.

THE COURT: Okay. And why not?

THE BAILIFF: The only report we got was he's not coming, and that's all the information we were able to receive.

THE COURT: Okay. All right. Then with respect to the petition for writ of habeas corpus of Carlos Chavez, that petition was also filed at 9:14 this morning, and it was served on the Sheriff at 10:23 AM. Is Mr. Chavez here?

THE BAILIFF: No, ma'am.

THE COURT: And what's the word on him?

THE BAILIFF: He's not coming, per the jail.

THE COURT: Yes, ma'am.

MS. FRAWLEY: Your Honor, first and foremost, I would ask you to note that we did hand up a Certificate of Service. Do you have a copy of the petition up there, as well, Your Honor?

MS. FRAWLEY: Wonderful.

Your Honor, I believe the next step would be for someone from the Sheriff's Office to appear and file a written return. I think that's what the content of the order says. Given that the Sheriff's Office has failed to appear and file a written return, after being appropriately served, I think we would first need to ask for a default judgment and ask that they be released. The Sheriff's Department has not shown that they are lawfully detaining these individuals, which they have not brought over to court despite Your Honor's order for them to do so.

(Pause.)

THE COURT: And let me note for the record that the Petition was also served on the Department of Homeland Security via fax at 9:59 AM in both of these petitions, in both cases.

(Pause.)

THE COURT: Have you had any communication whatsoever with either the Sheriff or the Department of Homeland Security with respect to these petitioners?

MS. FRAWLEY: We have had some communication with the Sheriff's Department, Your Honor. You know I approached Your Honor expecting to have these petitions and asking you if you would like us to hear it Wednesday afternoon or if you would prefer us to bring it today.

Our investigator did inform the Sheriff's Department, Ms. Marilyn Porter *(phonetic)*, that we intended to file a habeas petition this morning. So they were aware that there would be something happening today. They were not aware which particular petitioners it would be.

This morning, that same investigator went to serve the Sheriff's Department. They went to the Sheriff's Department, and I believe he spoke with– it's on the Certificate of Service, Your Honor.

(Pause.)

MS. FRAWLEY: Anabelle Sionn *(phonetic)*, who was at the front desk. At that time, Ms. Sionn informed him that neither Irwin Carmichael nor Marilyn Porter, his attorney, was present, and he did leave a copy at the front desk, with the front desk declining to accept it through the glass window.

THE COURT: Uh-huh *(yes)*.

MS. FRAWLEY: So we have made every attempt possible to serve and notify the Sheriff's Department of these, including advance notice that something would be

happening today. It is their declining to accept those petitions.

Further, Your Honor, Sean Perrin has been the attorney in the past to appear on these charges. He was also faxed a copy of the order at, I believe, 10:30 today. We did attempt to fax it once earlier in the day, around 10:19, and were unable to receive a fax confirmation. For that reason, we re-faxed it, and it went through with a fax confirmation at 10:30.

So notification has been sent to the parties, Your Honor. I did speak with the Assistant District Attorney, who was served on this matter, and she said that she was-- she wanted to make sure Sean Perrin had contact and had information about this. I'm not sure what efforts she made to reach out to him, but we did provide the Assistant District Attorney with a copy of the Certificate of Service and fax confirmations, as well.

THE COURT: Okay. And to your knowledge, are these two men still in the Mecklenburg County Jail?

MS. FRAWLEY: To my knowledge, yes, Your Honor.

THE COURT: And----

MS. FRAWLEY: But my knowledge was at 9:00 AM this morning. I have not double-checked within the past three hours.

THE COURT: Madame Sheriff, can you determine that

these two men are still in the custody of the Mecklenburg County Jail?

THE BAILIFF: If you give me five minutes, I can *(inaudible)*.

THE COURT: Can you look on your computer?

THE BAILIFF: Yes, ma'am.

(Pause.)

MS. FRAWLEY: According to the Sheriff's website, Your Honor, Carlos Chavez is showing as in jail at this point.

(Pause.)

MS. FRAWLEY: And as is Mr. Luis Lopez.

(Pause.)

THE COURT: Let me hear it from her.

MS. FRAWLEY: Understandable, Your Honor.

(Pause.)

THE BAILIFF: *(Inaudible)*. Luis Antonia Lopez, yes, he's still in our custody.

MS. FRAWLEY: Oh, 451- 450.

THE BAILIFF: 450?

MS. FRAWLEY: 450. Yes.

THE BAILIFF: Carlos Chavez.

MS. FRAWLEY: Yes.

THE BAILIFF: Yes, he's still in our custody.

THE COURT: Okay. Thank you. And tell me once

again what it is you say needs to happen now?

MS. FRAWLEY: Your Honor, I think we have made a facial showing that they're unlawfully detained. If they were– at this point, the Sheriff's Department was ordered to respond and file a return and show their reason for holding these individuals. Without them filing a return to show their reason for holding these individuals, I believe they haven't shown that the individuals are lawfully detained and therefore that an order for their release is warranted.

THE COURT: Do you have an order prepared?

MS. FRAWLEY: I do have an order prepared, Your Honor.

THE COURT: Let me take a look at it please.

MS. FRAWLEY: I will say that the order contemplated a little more of a hearing. May I approach?

THE COURT: Yes.

MS. FRAWLEY: So it might be *(inaudible)*.

(Pause.)

THE COURT: Well, has 48 hours expired?

MS. FRAWLEY: No, Your Honor. 48 hours has not expired since 9:00 AM this morning. I believe it's the issue again with whether or not they can continue to be held without proper documentation of– without proper documentation.

THE COURT: And we don't have evidence of proper

documentation?

MS. FRAWLEY: Correct, Your Honor. Of a proper warrant.

(Pause.)

THE COURT: All right. Their release is authorized.

MS. FRAWLEY: Thank you, Your Honor. May I approach to make a few copies?

THE COURT: Yes.

(Pause.)

MS. FRAWLEY: And *(inaudible)*?

THE COURT: Pardon?

MS. FRAWLEY: May I have these file-stamped?

THE COURT: Yes.

And have you put these in their shucks, these petitions?

MS. FRAWLEY: I have not. I'll do that.

THE COURT: Okay. So this is *(inaudible)*. Okay.

(Pause.)

THE COURT: Okay. All right. Madame Sheriff, we're in recess.

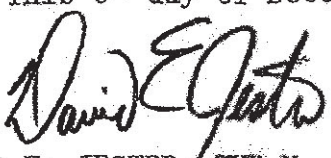
(The recording ended at 12:10 PM.)

END OF TRANSCRIPT.

CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings at the October 9, 2017 Session of Mecklenburg County Superior Court is a true and accurate transcript of the proceedings from a recording made by the Office of the Mecklenburg County Clerk of Superior Court and transcribed by me. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This 6th day of December, 2017.



DAVID E. JESTER, CVR-M
Court Reporting Manager
229 Kinton Drive
Fuquay-Varina, NC 27526
919-890-1601
David.E.Jester@nccourts.org

U.S. DEPARTMENT OF HOMELAND SECURITY **Warrant for Arrest of Alien**

File No. 200 614 501

Date: 08/13/2017

To: Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations

I have determined that there is probable cause to believe that PEREZ-MENDEZ, CARLOS is removable from the United States. This determination is based upon:

☑ the execution of a charging document to initiate removal proceedings against the subject;

☐ the pendency of ongoing removal proceedings against the subject;

☐ the failure to establish admissibility subsequent to deferred inspection;

☑ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or

☑ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

(Signature of Authorized Immigration Officer)

S 2188 LAROCCA - Program Manager

(Printed Name and Title of Authorized Immigration Officer)

Certificate of Service

I hereby certify that the Warrant for Arrest of Alien was served by me at Charlotte North Carolina (Location)

on PEREZ-MENDEZ, CARLOS (Name of Alien) on August 13, 2017 (Date of Service), and the contents of this notice were read to him or her in the SPANISH (Language) language.

J 00419 GOODWIN
DIO

Name and Signature of Officer

Name or Number of Interpreter (If applicable)

Form I-200 (Rev. 09/16)

U.S. DEPARTMENT OF HOMELAND SECURITY **Warrant for Arrest of Alien**

File No. 088 235 840

Date: 06/05/2017

To: Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations

I have determined that there is probable cause to believe that LOPEZ FLORES, LUIS is removable from the United States. This determination is based upon:

☑ the execution of a charging document to initiate removal proceedings against the subject;

☐ the pendency of ongoing removal proceedings against the subject;

☐ the failure to establish admissibility subsequent to deferred inspection;

☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or

☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

(Signature of Authorized Immigration Officer)

S 2188 LAROCCA - Program Manager
(Printed Name and Title of Authorized Immigration Officer)

Certificate of Service

I hereby certify that the Warrant for Arrest of Alien was served by me at CHARLOTTE, NORTH CAROLINA (Location)

on LOPEZ FLORES, LUIS (Name of Alien) on June 5, 2017 (Date of Service), and the contents of this notice were read to him or her in the ENGLISH (Language) language.

C 03032 SMITH
DIO

Name and Signature of Officer

Name or Number of Interpreter (if applicable)

DEFENDANT'S EXHIBIT

Form I-200 (Rev. 09/16)

Re: Heads up-Important (secure delivery)

Stitt, Daniel <Daniel.Stitt@mecklenburgcountync.gov>

Today, 9:55 AM

Belk, Donald <Donald.Belk@mecklenburgcountync.gov>; Porter, Marilyn <Marilyn.Porter@mecklenburgcountync.gov>; Carmicha+9 more

Reply all |

FYI this guy is prior MCSO 287g encounter from 2007.

Sent from my iPhone

On Oct 13, 2017, at 9:37 AM, Belk, Donald <Donald.Belk@mecklenburgcountync.gov> wrote:

Just got word also from the Clerk, the Clerk advised that the cases are on in 5350 this morning.

LOPEZ, LUIS 346623, he is in STATE custody.

CHAVEZ, CARLOS 451450, he was put in ICE custody this morning. I have informed Lock Up that Chavez is in ICE custody and should not go to court.

LOPEZ, LUIS ANTONIO [illegible]   Hsng MCSC-4T-06-26   PID 0000346623
[illegible] [illegible]   Type STATE   SID [illegible]
[illegible]   NC   [illegible]   Class Medium   ICE-A [illegible]
Worker

R/S Age DOB   Hgt Wgt Eyes Hair   Arrest Numbers
H/M 26 06/13/1991   5 7 150 BRO BLK   [illegible]

Committed: 06/[illegible]/2017   By: [illegible]

Released To: ________ Date: ________ Time: ________ CO: ________

I certify that I have been released from the custody of the Mecklenburg County Jail on the date listed below.

Sign: ____________________ Date: ____________________

I certify that medical staff discussed with me the process to obtain my prescribed medicine.

Sign: ____________________ Date: ____________________

[illegible]	HOLD	ICE					
Order Status:	ACTIVE		BOND				CNTY
[illegible]	HOLD	[illegible]					
Order Status:	ACTIVE		BOND				CNTY
15CR[illegible]	OFA	FTA	221400	BREAKING OR ENTERING (M)			
Order Status:	ACTIVE		[illegible]	$[illegible].00		SEC	CNTY
17CR221162	ORD	REL	122[illegible]	COMMON LAW ROBBERY			
Order Status:	INACTIVE					VD	CNTY
17CR221161	ORD	REL	531000	RESISTING PUBLIC OFFICER			
Order Status:	INACTIVE					VD	CNTY
17CR221160	ORD	REL	9R1000	FELONY CONSPIRACY			
Order Status:	INACTIVE					VD	CNTY

<image002.jpg>

From: Porter, Marilyn
Sent: Friday, October 13, 2017 9:30 AM
To: Carmichael, Irwin H.; Plummer, Thomas; Collins, Rodney; SPerrin@wcsr.com; White, Telisa; Hill, David; Hicks, Aujiena; Eason, Jeffrey; Stitt, Daniel; Cantpe, Jeffrey; Belk, Donald
Subject: Fwd: Heads up-Important

See below email just sent to me by PDO Investigator- I do not acknowledge receipt of any of his emails on this topic. We will see who is subject of this Writ- and what Judge signed-

Sent from my iPhone

to the alien's application for admission) the endorsement on the visa shall be corrected and the alien shall be admitted as a lawful permanent resident without conditions, if otherwise admissible.

(c) *Expired conditional permanent resident status.* The lawful permanent resident alien status of a conditional resident automatically terminates if the conditional basis of such status is not removed by the Service through approval of a Form I–751, Petition to Remove the Conditions on Residence or, in the case of an alien entrepreneur (as defined in section 216A(f)(1) of the Act), Form I–829, Petition by Entrepreneur to Remove Conditions. Therefore, an alien who is seeking admission as a returning resident subsequent to the second anniversary of the date on which conditional residence was obtained (except as provided in §211.1(b)(1) of this chapter) and whose conditional basis of such residence has not been removed pursuant to section 216(c) or 216A(c) of the Act, whichever is applicable, shall be placed under removal proceedings. However, in a case where conditional residence was based on a marriage, removal proceedings may be terminated and the alien may be admitted as a returning resident if the required Form I–751 is filed jointly, or by the alien alone (if appropriate), and approved by the Service. In the case of an alien entrepreneur, removal proceedings may be terminated and the alien admitted as a returning resident if the required Form I–829 is filed by the alien entrepreneur and approved by the Service.

[62 FR 10360, Mar. 6, 1997]

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

Subpart A—Detention of Aliens Prior to Order of Removal

Sec.

236.1 Apprehension, custody, and detention.
236.2 Confined aliens, incompetents, and minors.
236.3 Detention and release of juveniles.
236.4 Removal of S–5, S–6, and S–7 nonimmigrants.
236.5 Fingerprints and photographs.
236.6 Information regarding detainees.
236.7–236.9 [Reserved]

Subpart B—Family Unity Program

236.10 Description of program.
236.11 Definitions.
236.12 Eligibility.
236.13 Ineligible aliens.
236.14 Filing.
236.15 Voluntary departure and eligibility for employment.
236.16 Travel outside the United States.
236.17 Eligibility for Federal financial assistance programs.
236.18 Termination of Family Unity Program benefits.

AUTHORITY: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

SOURCE: 62 FR 10360, Mar. 6, 1997, unless otherwise noted.

Subpart A—Detention of Aliens Prior to Order of Removal

§ 236.1 Apprehension, custody, and detention.

(a) *Detainers.* The issuance of a detainer under this section shall be governed by the provisions of §287.7 of this chapter.

(b) *Warrant of arrest*—(1) *In general.* At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I–200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in §287.5(e)(2) of this chapter and may be served only by those immigration officers listed in §287.5(e)(3) of this chapter.

(2) If, after the issuance of a warrant of arrest, a determination is made not to serve it, any officer authorized to issue such warrant may authorize its cancellation.

(c) *Custody issues and release procedures*—(1) *In general.* (i) After the expiration of the Transition Period Custody Rules (TPCR) set forth in section 303(b)(3) of Div. C of Pub. L. 104–208, no alien described in section 236(c)(1) of the Act may be released from custody during removal proceedings except pursuant to section 236(c)(2) of the Act.

(ii) Paragraph (c)(2) through (c)(8) of this section shall govern custody determinations for aliens subject to the TPCR while they remain in effect. For purposes of this section, an alien ''subject to the TPCR'' is an alien described in section 303(b)(3)(A) of Div. C of Pub. L. 104–208 who is in deportation proceedings, subject to a final order of deportation, or in removal proceedings. The TPCR do not apply to aliens in exclusion proceedings under former section 236 of the Act, aliens in expedited removal proceedings under section 235(b)(1) of the Act, or aliens subject to a final order of removal.

(2) *Aliens not lawfully admitted.* Subject to paragraph (c)(6)(i) of this section, but notwithstanding any other provision within this section, an alien subject to the TPCR who is not lawfully admitted is not eligible to be considered for release from custody.

(i) An alien who remains in status as an alien lawfully admitted for permanent residence, conditionally admitted for permanent residence, or lawfully admitted for temporary residence is ''lawfully admitted'' for purposes of this section.

(ii) An alien in removal proceedings, in deportation proceedings, or subject to a final order of deportation, and not described in paragraph (c)(2)(i) of this section, is not ''lawfully admitted'' for purposes of this section unless the alien last entered the United States lawfully and is not presently an applicant for admission to the United States.

(3) *Criminal aliens eligible to be considered for release.* Except as provided in this section, or otherwise provided by law, an alien subject to the TPCR may be considered for release from custody if lawfully admitted. Such an alien must first demonstrate, by clear and convincing evidence, that release would not pose a danger to the safety of other persons or of property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding (including any appearance required by the Service or EOIR) in order to be considered for release in the exercise of discretion.

(4) *Criminal aliens ineligible to be considered for release except in certain special circumstances.* An alien, other than an alien lawfully admitted for permanent residence, subject to section 303(b)(3)(A) (ii) or (iii) of Div. C. of Pub. L. 104–208 is ineligible to be considered for release if the alien:

(i) Is described in section 241(a)(2)(C) of the Act (as in effect prior to April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(B), (E)(ii) or (F) of the Act (as in effect on April 1, 1997);

(ii) Has been convicted of a crime described in section 101(a)(43)(G) of the Act (as in effect on April 1, 1997) or a crime or crimes involving moral turpitude related to property, and sentenced therefor (including in the aggregate) to at least 3 years' imprisonment;

(iii) Has failed to appear for an immigration proceeding without reasonable cause or has been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued);

(iv) Has been convicted of a crime described in section 101(a)(43)(Q) or (T) of the Act (as in effect on April 1, 1997);

(v) Has been convicted in a criminal proceeding of a violation of section 273, 274, 274C, 276, or 277 of the Act, or has admitted the factual elements of such a violation;

(vi) Has overstayed a period granted for voluntary departure;

(vii) Has failed to surrender or report for removal pursuant to an order of exclusion, deportation, or removal;

(viii) Does not wish to pursue, or is statutorily ineligible for, any form of relief from exclusion, deportation, or removal under this chapter or the Act; or

(ix) Is described in paragraphs (c)(5)(i)(A), (B), or (C) of this section but has not been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, unless the alien was lawfully admitted and has not, since the commencement of proceedings and within the 10 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or

cancelled as improvidently issued). An alien eligible to be considered for release under this paragraph must meet the burdens described in paragraph (c)(3) of this section in order to be released from custody in the exercise of discretion.

(5) *Criminal aliens ineligible to be considered for release.* (i) A criminal alien subject to section 303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104–208 is ineligible to be considered for release if the alien has been sentenced, including in the aggregate but not including any portions suspended, to at least 2 years' imprisonment, and the alien

(A) Is described in section 237(a)(2)(D)(i) or (ii) of the Act (as in effect on April 1, 1997), or has been convicted of a crime described in section 101(a)(43)(A), (C), (E)(i), (H), (I), (K)(iii), or (L) of the Act (as in effect on April 1, 1997);

(B) Is described in section 237(a)(2)(A)(iv) of the Act; or

(C) Has escaped or attempted to escape from the lawful custody of a local, State, or Federal prison, agency, or officer within the United States.

(ii) Notwithstanding paragraph (c)(5)(i) of this section, a permanent resident alien who has not, since the commencement of proceedings and within the 15 years prior thereto, been convicted of a crime, failed to comply with an order to surrender or a period of voluntary departure, or been subject to a bench warrant or similar legal process (unless quashed, withdrawn, or cancelled as improvidently issued), may be considered for release under paragraph (c)(3) of this section.

(6) *Unremovable aliens and certain long-term detainees.* (i) If the district director determines that an alien subject to section 303(b)(3)(A)(ii) or (iii) of Div. C of Pub. L. 104–208 cannot be removed from the United States because the designated country of removal or deportation will not accept the alien's return, the district director may, in the exercise of discretion, consider release of the alien from custody upon such terms and conditions as the district director may prescribe, without regard to paragraphs (c)(2), (c)(4), and (c)(5) of this section.

(ii) The district director may also, notwithstanding paragraph (c)(5) of this section, consider release from custody, upon such terms and conditions as the district director may prescribe, of any alien described in paragraph (c)(2)(ii) of this section who has been in the Service's custody for six months pursuant to a final order of deportation terminating the alien's status as a lawful permanent resident.

(iii) The district director may release an alien from custody under this paragraph only in accordance with the standards set forth in paragraph (c)(3) of this section and any other applicable provisions of law.

(iv) The district director's custody decision under this paragraph shall not be subject to redetermination by an immigration judge, but, in the case of a custody decision under paragraph (c)(6)(ii) of this section, may be appealed to the Board of Immigration Appeals pursuant to paragraph (d)(3)(iii) of this section.

(7) *Construction.* A reference in this section to a provision in section 241 of the Act as in effect prior to April 1, 1997, shall be deemed to include a reference to the corresponding provision in section 237 of the Act as in effect on April 1, 1997. A reference in this section to a ''crime'' shall be considered to include a reference to a conspiracy or attempt to commit such a crime. In calculating the 10-year period specified in paragraph (c)(4) of this section and the 15-year period specified in paragraph (c)(5) of this section, no period during which the alien was detained or incarcerated shall count toward the total. References in paragraph (c)(6)(i) of this section to the ''district director'' shall be deemed to include a reference to any official designated by the Commissioner to exercise custody authority over aliens covered by that paragraph. Nothing in this part shall be construed as prohibiting an alien from seeking reconsideration of the Service's determination that the alien is within a category barred from release under this part.

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the

satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

(9) When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled.

(10) The provisions of §103.6 of this chapter shall apply to any bonds authorized. Subject to the provisions of this section, the provisions of §3.19 of this chapter shall govern availability to the respondent of recourse to other administrative authority for release from custody.

(11) An immigration judge may not exercise the authority provided in this section, and the review process described in paragraph (d) of this section shall not apply, with respect to any alien beyond the custody jurisdiction of the immigration judge as provided in §3.19(h) of this chapter.

(d) *Appeals from custody decisions*—(1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in §3.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

(2) *Application to the district director.* After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

(3) *Appeal to the Board of Immigration Appeals.* An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with §3.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) *Effect of filing an appeal.* The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in §3.19(i)), nor stay the administrative proceedings or removal.

(e) *Privilege of communication.* Every detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States. Existing treaties with the following countries require immediate communication with appropriate consular or diplomatic officers whenever nationals of the following countries are detained in removal proceedings, whether or not requested by the alien and even if the alien requests that no communication be undertaken in his or her behalf. When notifying consular or diplomatic officials, Service officers shall not reveal the fact that any detained alien has applied for asylum or withholding of removal.

Algeria[1]

[1] Arrangements with the countries listed in 8 CFR 236.1(e) provide that U.S. authorities shall notify responsible representatives

Antigua and Barbuda
Armenia
Azerbaijan
Bahamas, The
Barbados
Belarus
Belize
Brunei
Bulgaria
China (People's Republic of)[2]
Costa Rica
Cyprus
Czech Republic
Dominica
Fiji
Gambia, The
Georgia
Ghana
Grenada
Guyana
Hong Kong[3]
Hungary
Jamaica
Kazakhstan
Kiribati
Kuwait
Kyrgyzstan
Malaysia
Malta
Mauritius
Moldova
Mongolia
Nigeria
Philippines
Poland[4]
Romania
Russian Federation
St. Kitts and Nevis
St. Lucia
St. Vincent/Grenadines
Seychelles
Sierra Leone
Singapore
Slovak Republic
Tajikistan
Tanzania
Tonga
Trinidad and Tobago
Tunisia
Turkmenistan
Tuvalu
Ukraine
United Kingdom[5]
U.S.S.R.[6]
Uzbekistan
Zambia
Zimbabwe

(f) *Notification to Executive Office for Immigration Review of change in custody status*. The Service shall notify the Immigration Court having administrative control over the Record of Proceeding of any change in custody location or of release from, or subsequent taking into, Service custody of a respondent/applicant pursuant to §3.19(g) of this chapter.

(g) *Notice of custody determination*—(1) *In general*. At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, an immigration official may issue a Form I–286, Notice of Custody Determination. A notice of custody determination may be issued by those immigration officials listed in 8 CFR 287.5(e)(2) and may

within 72 hours of the arrest or detention of one of their nationals.

[2]Notification is not mandatory in the case of any person who carries a ''Republic of China'' passport issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office (''TECRO''), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

[3]Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or ''S.A.R.'' Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports—i.e., immediately, and in any event, within four days of the arrest or detention.

[4]Consular communication is not mandatory for any Polish national who has been admitted for permanent residence in the United States. Such notification should only be provided upon request by a Polish national with permanent residency in the United States.

[5]United Kingdom includes England, Scotland, Wales, Northern Ireland and Islands and the British dependencies of Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[6]All U.S.S.R. successor states are covered by this agreement. They are: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Although the U.S.S.R. no longer exists, the U.S.S.R is listed here, because some nationals of its successor states may still be traveling on a U.S.S.R. passport. Mandatory consular notification applies to any national of such a state, including one traveling on a U.S.S.R. passport.

be served by those immigration officials listed in 8 CFR 287.5(e)(3), or other officers or employees of the Department or the United States who are delegated the authority to do so pursuant to 8 CFR 2.1.

(2) *Cancellation.* If after the issuance of a notice of custody determination, a determination is made not to serve it, any official authorized to issue such notice may authorize its cancellation.

[62 FR 10360, Mar. 6, 1997; 62 FR 15363, Apr. 1, 1997, as amended at 63 FR 27449, May 19, 1998; 65 FR 80294, Dec. 21, 2000; 70 FR 67088, Nov. 4, 2005; 72 FR 1924, Jan. 17, 2007]

§ 236.2 Confined aliens, incompetents, and minors.

(a) *Service.* If the respondent is confined, or if he or she is an incompetent, or a minor under the age of 14, the notice to appear, and the warrant of arrest, if issued, shall be served in the manner prescribed in §239.1 of this chapter upon the person or persons specified by 8 CFR 103.8(c).

(b) *Service custody and cost of maintenance.* An alien confined because of physical or mental disability in an institution or hospital shall not be accepted into physical custody by the Service until an order of removal has been entered and the Service is ready to remove the alien. When such an alien is an inmate of a public or private institution at the time of the commencement of the removal proceedings, expenses for the maintenance of the alien shall not be incurred by the Government until he or she is taken into physical custody by the Service.

[62 FR 10360, Mar. 6, 1997, as amended at 76 FR 53790, Aug. 29, 2011]

§ 236.3 Detention and release of juveniles.

(a) *Juveniles.* A juvenile is defined as an alien under the age of 18 years.

(b) *Release.* Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i) A parent;

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in Service detention or outside the United States, the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the Director of the Office of Juvenile Affairs, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1)(i) through (b)(1)(iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(c) *Juvenile coordinator.* The case of a juvenile for whom detention is determined to be necessary should be referred to the ''Juvenile Coordinator,'' whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility

distance required to enable him/her to testify in person.

(b) *Form of subpoena.* All subpoenas shall be issued on Form I–138.

(1) *Criminal or civil investigations.* The subpoena shall command the person or entity to which it is addressed to attend and to give testimony at a time or place specified. A subpoena shall also command the person or entity to which it is addressed to produce the books, papers, or documents specified in the subpoena. A subpoena may direct the taking of a deposition before an officer of the Service.

(2) *Proceedings other than naturalization proceedings.* Every subpoena issued under the provisions of this section shall state the title of the proceeding and shall command the person to whom it is directed to attend and to give testimony at a time and place specified. A subpoena shall also command the person to whom it is directed to produce the books, papers, or documents specified in the subpoena. A subpoena may direct the making of a deposition before an officer of the Service.

(c) *Service.* A subpoena issued under this section may be served by any person, over 18 years of age not a party to the case, designated to make such service by the District Director, Deputy District Director, Chief Patrol Agent, Deputy Chief Patrol Agent, Assistant Chief Patrol Agent, Patrol Agent in Charge, Officer in Charge, Assistant District Director, Investigations, Supervisory Criminal Investigator (Anti-Smuggling), Regional Director, and Office of Professional Responsibility, having administrative jurisdiction over the office in which the subpoena is issued. Service of the subpoena shall be made by delivering a copy thereof to the person named therein and by tendering to him/her the fee for one day's attendance and the mileage allowed by law by the United States District Court for the district in which the testimony is to be taken. When the subpoena is issued on behalf of the Service, fee and mileage need not be tendered at the time of service. A record of such service shall be made and attached to the original copy of the subpoena.

(d) *Invoking aid of court.* If a witness neglects or refuses to appear and testify as directed by the subpoena served upon him or her in accordance with the provisions of this section, the officer or immigration judge issuing the subpoena shall request the United States Attorney for the district in which the subpoena was issued to report such neglect or refusal to the United States District Court and to request such court to issue an order requiring the witness to appear and testify and to produce the books, papers, or documents designated in the subpoena.

[50 FR 30134, July 24, 1985; 50 FR 47205, Nov. 15, 1985, as amended at 60 FR 56937, Nov. 13, 1995; 62 FR 10390, Mar. 6, 1997]

§ 287.5 Exercise of power by immigration officers.

(a) *Power and authority to interrogate and administer oaths.* Any immigration officer as defined in § 103.1(q) of this chapter is hereby authorized and designated to exercise anywhere in or outside the United States the power conferred by:

(1) Section 287(a)(1) of the Act to interrogate, without warrant, any alien or person believed to be an alien concerning his or her right to be, or to remain, in the United States, and

(2) Section 287(b) of the Act to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States; or concerning any matter which is material or relevant to the enforcement of the Act and the administration of the Immigration and Naturalization Service.

(b) *Power and authority to patrol the border.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to patrol the border conferred by section 287(a)(3) of the Act:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Immigration inspectors (seaport operations only);

(4) Adjudications officers and deportation officers when in the uniform of an immigration inspector and performing inspections or supervising

other immigration inspectors performing inspections (seaport operations only);

(5) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(6) Immigration officers who need the authority to patrol the border under section 287(a)(3) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(c) *Power and authority to arrest*—(1) *Arrests of aliens under section 287(a)(2) of the Act for immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors;

(v) Adjudications officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(vii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(2) *Arrests of persons under section 287(a)(4) of the Act for felonies regulating the admission or removal of aliens.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(4) of the Act and in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors;

(v) Adjudications officers;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(vii) Immigration officers who need the authority to arrest persons under section 287(a)(4) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(3) *Arrests of persons under section 287(a)(5)(A) of the Act for any offense against the United States.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(A) of the Act and in accordance with § 287.8(c):

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Immigration inspectors (permanent full-time immigration inspectors only);

(v) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(vi) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(vii) Immigration officers who need the authority to arrest persons under section 287(a)(5)(A) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(4) *Arrests of persons under section 287(a)(5)(B) of the Act for any felony.* (i) Section 287(a)(5)(B) of the Act authorizes designated immigration officers, as listed in paragraph (c)(4)(iii) of this section, to arrest persons, without warrant, for any felony cognizable under the laws of the United States if:

(A) The immigration officer has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony;

(B) The immigration officer is performing duties relating to the enforcement of the immigration laws at the time of the arrest;

(C) There is a likelihood of the person escaping before a warrant can be obtained for his or her arrest; and

(D) The immigration officer has been certified as successfully completing a training program that covers such arrests and the standards with respect to the enforcement activities of the Service as defined in § 287.8.

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(5)(B) of the Act and in accordance with § 287.8(c):

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Immigration inspectors (permanent full-time immigration inspectors only);

(E) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 287(a)(5)(B) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(iii) Notwithstanding the authorization and designation set forth in paragraph (c)(4)(ii) of this section, no immigration officer is authorized to make an arrest for any felony under the authority of section 287(a)(5)(B) of the Act until such time as he or she has been certified by the Director of Training as successfully completing a training course encompassing such arrests and the standards for enforcement activities as defined in § 287.8. Such certification shall be valid for the duration of the immigration officer's continuous employment, unless it is suspended or revoked by the Commissioner or the Commissioner's designee for just cause.

(5) *Arrests of persons under section 274(a) of the Act who bring in, transport, or harbor certain aliens, or induce them to enter.* (i) Section 274(a) of the Act authorizes designated immigration officers, as listed in paragraph (c)(5)(ii) of this section, to arrest persons who bring in, transport, or harbor aliens, or induce them to enter the United States in violation of law. When making an arrest, the designated immigration officer shall adhere to the provisions of the enforcement standard governing the conduct of arrests in § 287.8(c).

(ii) The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power conferred by section 274(a) of the Act:

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Immigration inspectors;

(E) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(F) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(G) Immigration officers who need the authority to arrest persons under section 274(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(6) *Custody and transportation of previously arrested persons.* In addition to the authority to arrest pursuant to a warrant of arrest in paragraph (e)(3)(iv) of this section, detention enforcement officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to take and maintain custody of and transport any person who has been arrested by an immigration officer pursuant to paragraphs (c)(1) through (c)(5) of this section.

(d) *Power and authority to conduct searches.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to conduct searches conferred by section 287(c) of the Act:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(7) Immigration officers who need the authority to conduct searches under section 287(c) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner.

(e) *Power and authority to execute warrants*—(1) *Search warrants.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to execute a search warrant:

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph, and

(iv) Immigration officers who need the authority to execute search warrants under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(2) *Issuance of arrest warrants for immigration violations.* A warrant of arrest may be issued only by the following immigration officers:

(i) District directors (except foreign);

(ii) Deputy district directors (except foreign);

(iii) Assistant district directors for investigations;

(iv) Deputy assistant district directors for investigations;

(v) Assistant district directors for deportation;

(vi) Deputy assistant district directors for deportation;

(vii) Assistant district directors for examinations;

(viii) Deputy assistant district directors for examinations;

(ix) Officers in charge (except foreign);

(x) Assistant officers in charge (except foreign);

(xi) Chief patrol agents;

(xii) Deputy chief patrol agents;

(xiii) Associate chief patrol agents;

(xiv) Assistant chief patrol agents;

(xv) Patrol agents in charge;

(xvi) The Assistant Commissioner, Investigations;

(xvii) Institutional Hearing Program directors;

(xviii) Area port directors;

(xix) Port directors; or

(xx) Deputy port directors.

(3) *Service of warrant of arrests for immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power pursuant to section 287(a) of the Act to execute warrants of arrest for administrative immigration violations issued under section 236 of the Act or to execute warrants of criminal arrest issued under the authority of the United States:

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Detention enforcement officers (warrants of arrest for administrative immigration violations only);

(v) Immigration inspectors;

(vi) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(viii) Immigration officers who need the authority to execute arrest warrants for immigration violations under

section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner, for warrants of arrest for administrative immigration violations, and with the approval of the Deputy Attorney General, for warrants of criminal arrest.

(4) *Service of warrant of arrests for non-immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power to execute warrants of criminal arrest for non-immigration violations issued under the authority of the United States:

(i) Border patrol agents, including aircraft pilots;

(ii) Special agents;

(iii) Deportation officers;

(iv) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(v) Immigration officers who need the authority to execute warrants of arrest for non-immigration violations under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

(f) *Power and authority to carry firearms.* The following immigration officers who have successfully completed basic immigration enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to carry firearms provided that they are individually qualified by training and experience to handle and safely operate the firearms they are permitted to carry, maintain proficiency in the use of such firearms, and adhere to the provisions of the enforcement standard governing the use of force in § 287.8(a):

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Detention enforcement officers;

(5) Immigration inspectors;

(6) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to carry firearms under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner with the approval of the Deputy Attorney General.

[59 FR 42415, Aug. 17, 1994, as amended at 62 FR 10390, Mar. 6, 1997]

§ 287.6 Proof of official records.

(a) *Domestic.* In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

(b) *Foreign: Countries not Signatories to Convention.* (1) In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by an officer so authorized. This attested copy in turn may but need not be certified by any authorized foreign officer both as to the genuineness of the signature of the attesting officer and as to his/her official position. The signature and official position of this certifying foreign officer may then likewise be certified by any other foreign officer so authorized, thereby creating a chain of certificates.

(2) The attested copy, with the additional foreign certificates if any, must be certified by an officer in the Foreign Service of the United States, stationed in the foreign country where the record is kept. This officer must certify the genuineness of the signature and the official position either of (i) the attesting officer; or (ii) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of

custody of the record or by an authorized deputy.

[50 FR 37834, Sept. 18, 1985, as amended at 54 FR 39337, Sept. 26, 1989; 54 FR 48851, Nov. 28, 1989]

§ 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) *Detainers in general.* Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) *Authority to issue detainers.* The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.

(c) *Availability of records.* In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall 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 the Department.

(e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

[68 FR 35279, June 13, 2003, as amended at 76 FR 53797, Aug. 29, 2011]

§ 287.8 Standards for enforcement activities.

The following standards for enforcement activities contained in this section must be adhered to by every immigration officer involved in enforcement activities. Any violation of this section shall be reported to the Office of the Inspector General or such other entity as may be provided for in 8 CFR 287.10.

(a) *Use of force*—(1) *Non-deadly force.* (i) Non-deadly force is any use of force other than that which is considered deadly force as defined in paragraph (a)(2) of this section.

(ii) Non-deadly force may be used only when a designated immigration officer, as listed in paragraph (a)(1)(iv) of this section, has reasonable grounds to believe that such force is necessary.

(iii) A designated immigration officer shall always use the minimum non-deadly force necessary to accomplish the officer's mission and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect, prisoner, or assailant.

(iv) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to use non-deadly force should circumstances warrant it:

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Detention enforcement officers or immigration enforcement agents;

(E) Immigration inspectors;

(F) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(G) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(H) Immigration officers who need the authority to use non-deadly force under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary for ICE.

(2) *Deadly force.* (i) Deadly force is any use of force that is likely to cause death or serious physical injury.

(ii) Deadly force may be used only when a designated immigration officer, as listed in paragraph (a)(2)(iii) of this section, has reasonable grounds to believe that such force is necessary to protect the designated immigration officer or other persons from the imminent danger of death or serious physical injury.

(iii) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power conferred by section 287(a) of the Act to use deadly force should circumstances warrant it:

(A) Border patrol agents, including aircraft pilots;

(B) Special agents;

(C) Deportation officers;

(D) Detention enforcement officers or immigration enforcement agents;

(E) Immigration inspectors;

(F) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;

(G) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed above; and

(H) Immigration officers who need the authority to use deadly force under section 287(a) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary for ICE.

(b) *Interrogation and detention not amounting to arrest.* (1) Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away.

(2) If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.

(3) Information obtained from this questioning may provide the basis for a subsequent arrest, which must be effected only by a designated immigration officer, as listed in 8 CFR 287.5(c). The conduct of arrests is specified in paragraph (c) of this section.

(c) *Conduct of arrests*—(1) *Authority.* Only designated immigration officers are authorized to make an arrest. The list of designated immigration officers varies depending on the type of arrest as listed in 8 CFR 287.5(c)(1) through (c)(5).

(2) *General procedures.* (i) An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States.

(ii) A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe

that the person is likely to escape before a warrant can be obtained.

(iii) At the time of the arrest, the designated immigration officer shall, as soon as it is practical and safe to do so:

(A) Identify himself or herself as an immigration officer who is authorized to execute an arrest; and

(B) State that the person is under arrest and the reason for the arrest.

(iv) With respect to an alien arrested and administratively charged with being in the United States in violation of law, the arresting officer shall adhere to the procedures set forth in 8 CFR 287.3 if the arrest is made without a warrant.

(v) With respect to a person arrested and charged with a criminal violation of the laws of the United States, the arresting officer shall advise the person of the appropriate rights as required by law at the time of the arrest, or as soon thereafter as practicable. It is the duty of the immigration officer to assure that the warnings are given in a language the subject understands, and that the subject acknowledges that the warnings are understood. The fact that a person has been advised of his or her rights shall be documented on appropriate Department forms and made a part of the arrest record.

(vi) Every person arrested and charged with a criminal violation of the laws of the United States shall be brought without unnecessary delay before a United States magistrate judge, a United States district judge or, if necessary, a judicial officer empowered in accordance with 18 U.S.C. 3041 to commit persons charged with such crimes. Accordingly, the immigration officer shall contact an Assistant United States Attorney to arrange for an initial appearance.

(vii) The use of threats, coercion, or physical abuse by the designated immigration officer to induce a suspect to waive his or her rights or to make a statement is prohibited.

(d) *Transportation*—(1) *Vehicle transportation.* All persons will be transported in a manner that ensures the safety of the persons being transported. When persons arrested or detained are being transported by vehicle, each person will be searched as thoroughly as circumstances permit before being placed in the vehicle. The person being transported shall not be handcuffed to the frame or any part of the moving vehicle or an object in the moving vehicle. The person being transported shall not be left unattended during transport unless the immigration officer needs to perform a law enforcement function.

(2) *Airline transportation.* Escorting officers must abide by all Federal Aviation Administration, Transportation Security Administration, and airline carrier rules and regulations pertaining to weapons and the transportation of prisoners.

(e) *Vehicular pursuit.* (1) A vehicular pursuit is an active attempt by a designated immigration officer, as listed in paragraph (e)(2) of this section, in a designated pursuit vehicle to apprehend fleeing suspects who are attempting to avoid apprehension. A designated pursuit vehicle is defined as a vehicle equipped with emergency lights and siren, placed in or on the vehicle, that emit audible and visual signals in order to warn others that emergency law enforcement activities are in progress.

(2) The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to initiate a vehicular pursuit:

(i) Border patrol agents, including aircraft pilots;

(ii) Supervisory personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(iii) Immigration officers who need the authority to initiate a vehicular pursuit in order to effectively accomplish their individual mission and who are designated, individually or as a class, by the Commissioner of CBP or the Assistant Secretary for ICE.

(f) *Site inspections.* (1) Site inspections are Border and Transportation Security Directorate enforcement activities undertaken to locate and identify aliens illegally in the United States, or aliens engaged in unauthorized employment, at locations where there is a reasonable suspicion, based on articulable facts, that such aliens are present.

(2) An immigration officer may not enter into the non-public areas of a

business, a residence including the curtilage of such residence, or a farm or other outdoor agricultural operation, except as provided in section 287(a)(3) of the Act, for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer's report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained.

(3) Adequate records must be maintained noting the results of every site inspection, including those where no illegal aliens are located.

(4) Nothing in this section prohibits an immigration officer from entering into any area of a business or other activity to which the general public has access or onto open fields that are not farms or other outdoor agricultural operations without a warrant, consent, or any particularized suspicion in order to question any person whom the officer believes to be an alien concerning his or her right to be or remain in the United States.

(g) *Guidelines.* The criminal law enforcement authorities authorized under this part will be exercised in a manner consistent with all applicable guidelines and policies of the Department of Justice and the Department of Homeland Security.

[68 FR 35280, June 13, 2003]

§ 287.9 Criminal search warrant and firearms policies.

(a) A search warrant should be obtained prior to conducting a search in a criminal investigation unless a specific exception to the warrant requirement is authorized by statute or recognized by the courts. Such exceptions may include, for example, the consent of the person to be searched, exigent circumstances, searches incident to a lawful arrest, and border searches. The Commissioner of CBP and the Assistant Secretary of ICE shall promulgate guidelines governing officers' conduct relating to search and seizure.

(b) In using a firearm, an immigration officer shall adhere to the standard of conduct set forth in 8 CFR 287.8(a)(2). An immigration officer may carry only firearms (whether Department issued or personally owned) that have been approved pursuant to guidelines promulgated by the Commissioner of CBP or the Assistant Secretary for ICE. These officials shall promulgate guidelines with respect to:

(1) Investigative procedures to be followed after a shooting incident involving an officer;

(2) Loss or theft of an approved firearm;

(3) Maintenance of records with respect to the issuance of firearms and ammunition; and

(4) Procedures for the proper care, storage, and maintenance of firearms, ammunition, and related equipment.

[59 FR 42420, Aug. 17, 1994, as amended at 68 FR 35280, June 13, 2003]

§ 287.10 Expedited internal review process.

(a) *Violations of standards for enforcement activities.* Alleged violations of the standards for enforcement activities established in accordance with the provisions of § 287.8 shall be investigated expeditiously consistent with the policies and procedures of the Department of Homeland Security and pursuant to any guidelines issued by the Secretary.

(b) *Complaints.* Any persons wishing to lodge a complaint pertaining to violations of enforcement standards contained in § 287.8 may contact the Department of Homeland Security, Office of the Inspector General, 245 Murray Drive—Building 410, Washington, DC, 20548, or telephone 1–800–323–8603. With respect to employees of the former INS, persons may contact the Office of Internal Audit, Bureau of Immigration and Customs Enforcement, 425 I Street NW., Washington, DC, 20536.

(c) *Expedited processing of complaints.* When an allegation or complaint of violation of § 287.8 is lodged against an employee or officer of the Department, the allegation or complaint shall be referred promptly for investigation in accordance with the policies and procedures of the Department. At the conclusion of an investigation of an allegation or complaint of violation of

KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedUnconstitutional as Applied by Thuraissigiam v. U.S. Department of Homeland Security, 9th Cir.(Cal.), Mar. 07, 2019

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part V. Adjustment and Change of Status (Refs & Annos)

8 U.S.C.A. § 1252

§ 1252. Judicial review of orders of removal

Effective: May 11, 2005
Currentness

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e).

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of Title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1), the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for

good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B), that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that--

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of Title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) during the criminal proceeding.

(8) Construction

This subsection--

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) [1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of Title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal--

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may--

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of--

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of--

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner--

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1).

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 5, § 242, 66 Stat. 208; Sept. 3, 1954, c. 1263, § 17, 68 Stat. 1232; Pub.L. 97-116, § 18(h)(1), Dec. 29, 1981, 95 Stat. 1620; Pub.L. 98-473, Title II, § 220(b), Oct. 12, 1984, 98 Stat. 2028; Pub.L. 99-603, Title VII, § 701, Nov. 6, 1986, 100 Stat. 3445; Pub.L. 100-525, § 9(n), Oct. 24, 1988, 102 Stat. 2620; Pub.L. 100-690, Title VII, § 7343(a), Nov. 18, 1988, 102 Stat. 4470; Pub.L. 101-649, Title V, §§ 504(a), 545(e), Title VI, § 603(b)(2), Nov. 29, 1990, 104 Stat. 5049, 5066, 5085; Pub.L. 102-232, Title III, §§ 306(a)(4), (c)(7), 307(m)(2), 309(b)(9), Dec. 12, 1991, 105 Stat. 1751, 1753, 1757, 1759; Pub.L. 103-322, Title II, § 20301(a), Title XIII, § 130001(a), Sept. 13, 1994, 108 Stat. 1823, 2023; Pub.L. 103-416, Title II, §§ 219(h), 224(b), Oct. 25, 1994, 108 Stat. 4317, 4324; Pub.L. 104-132, Title IV, §§ 436(a), (b)(1), 438(a), 440(c), (h), Apr. 24, 1996, 110 Stat. 1275, 1277, 1279; Pub.L. 104-208, Div. C, Title III, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6), Sept. 30, 1996, 110 Stat. 3009-607, 3009-612, 3009-625, 3009-645; Pub.L. 109-13, Div. B, Title I, §§ 101(e), (f), 106(a), May 11, 2005, 119 Stat. 305, 310.)

Notes of Decisions (2038)

Footnotes

1 So in original. Section 1253 of this title was amended by Pub.L. 104-208, Div. C, Title III, § 307(a), Sept. 30, 1996, 110 Stat. 3009-612, and as so amended, no longer contains a subsec. (g); provisions similar to those contained in former 8 U.S.C.A. § 1253(g) are now contained in 8 U.S.C.A. § 1253(d).

8 U.S.C.A. § 1252, 8 USCA § 1252
Current through P.L. 116-18

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part IX. Miscellaneous

8 U.S.C.A. § 1357

§ 1357. Powers of immigration officers and employees

Effective: August 12, 2006
Currentness

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of Title 28) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of Title 18.

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a), an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 1229a of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

(h) Protecting abused juveniles

An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 9, § 287, 66 Stat. 233; Pub.L. 94-550, § 7, Oct. 18, 1976, 90 Stat. 2535; Pub.L. 99-570, Title I, § 1751(d), Oct. 27, 1986, 100 Stat. 3207-47; Pub.L. 99-603, Title I, § 116, Nov. 6, 1986, 100 Stat. 3384; Pub.L. 100-525, §§ 2(e), 5, Oct. 24, 1988, 102 Stat. 2610, 2615; Pub.L. 101-649, Title V, § 503(a), (b)(1), Nov. 29, 1990, 104 Stat. 5048, 5049; Pub.L. 102-232, Title III, § 306(a)(3), Dec. 12, 1991, 105 Stat. 1751; Pub.L. 104-208, Div. C, Title I, § 133, Title III, § 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i), Sept. 30, 1996, 110 Stat. 3009-563, 3009-618, 3009-619, 3009-623; Pub.L. 109-162, Title VIII, § 826, Jan. 5, 2006, 119 Stat. 3065; Pub.L. 109-271, § 6(g), Aug. 12, 2006, 120 Stat. 763.)

Notes of Decisions (318)

8 U.S.C.A. § 1357, 8 USCA § 1357
Current through P.L. 115-188. Also includes P.L. 115-190, 115-191, and 115-193. Title 26 current through P.L. 115-193.

End of Document

2018 WL 7142016 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
El Paso County

Saul CISNEROS, Rut Noemi Chavez Rodriguez, On behalf of themselves and all others similarly situated,
Plaintiffs,
v.
Bill ELDER, in his official capacity as Sheriff of El Paso County, Colorado.

No. 2018CV30549.
December 6, 2018.

Order Granting Summary Judgment

Eric Bently, Judge.

***1** Div.: 8

Courtroom: W550

Before the Court is Plaintiffs' motion for summary judgment. The Court has reviewed the motion, Sheriff Elder's response, and Plaintiffs' reply, along with the parties' Amended Stipulations filed September 20, 2018 (the Stipulations), the case file, and applicable law.

The parties have elected to forego trial and to submit the motion upon the stipulated documentary record. They agree that the Stipulations address the totality of the factual issues in the case, that the issues before the Court are purely issues of law, and that the case should be resolved as a matter of law.

INTRODUCTION

This is a case of first impression in Colorado. While it is litigated on a largely blank legal canvas in this state, the issues have been hotly litigated in recent years in federal and state courts across the country. The subject is the extent and means by which federal immigration authorities may recruit state and local law enforcement to assist them in enforcement of the nation's immigration laws.

In carrying out their mandate to remove persons who are in our country illegally, federal immigration authorities rely heavily on local law enforcement. A central part of this assistance is provided by local sheriffs, who routinely exchange information with immigration authorities as to the identity of individuals in local jails and who may then be asked by immigration authorities to detain such individuals beyond their release dates so they can be picked up by immigration authorities and held pending proceedings to remove them from the United States.

Such detentions are known as 'immigration holds." "immigration detainers," or "ICE holds." They constitute a central part of the national strategy on immigration enforcement, while also raising civil liberties concerns. The legality of that practice in Colorado is the subject of this case. The case addresses, specifically, whether a Colorado sheriff has authority under Colorado and/or federal law to continue to detain inmates at the county jail, at the request of federal immigration authorities but without the participation of a judge, for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases, so they can be picked up by immigration authorities. The Plaintiffs are two classes of inmates and pretrial detainees at the El Paso County jail who are subject to ICE detainer requests. No published Colorado case

addresses the issue.

Most sheriffs' offices around Colorado stopped honoring immigration detainers in recent years after receiving cease-and-desist letters from the ACLU. Sheriff Elder, through counsel, informed the Court in March that El Paso County is one of only two counties that still honor ICE detainer requests. The one other county known to the Court is Teller County. A case similar to this one is pending there, and the Court in that case ruled preliminarily in favor of the sheriff. (*Salinas v. Mikesell*, case no. 2018CV30057 (trial set for June 2019).) Clearly, the issues are ones on which reasonable minds may differ. Resolution of one of these cases by a higher court is needed in order to provide certainty in this area to Colorado's sheriffs and the immigrant population.

PROCEDURAL BACKGROUND

***2** The case was initiated in February 2018 by the two named Plaintiffs, Saul Cisneros and Rut Noemi Chavez Rodriguez. Cisneros and Chavez were pretrial detainees in the custody of the El Paso County Sheriff's Office ("EPSO" or "Sheriff's Office"). Both Plaintiffs attempted to post their court-ordered bond but were informed by the Sheriff's Office that they would not be released because federal immigration authorities had imposed an "ICE hold." Both Plaintiffs were then detained for months per the ICE hold. They were not released until this Court issued a preliminary injunction on March 19, 2018 restraining the practice until trial on the merits (the "PI Order").

On March 15, 2018, shortly before the preliminary injunction hearing, the Sheriff's Office issued Directive Number 18-02, titled "Change in Ice Procedures." As explained more fully below, this directive belatedly changed existing EPSO policy to conform to a 2017 change in policy by U.S. Immigration and Customs Enforcement (ICE). The new policy, which is effective nationwide, requires an ICE official to appear in person to serve ICE forms on detainees before they can be transferred to federal custody, and limits the "ICE hold" period (which had previously been indefinite) to a maximum of 48 hours after conclusion of state-law authority. As ICE detainees, these individuals may be housed in the El Paso County jail (the "Jail") pursuant to El Paso County's housing agreement with ICE (the Intergovernmental Services Agreement, or "IGSA"), pending completion of federal removal proceedings.

Upon the Court's issuance of the PI Order on March 19, 2018, Sheriff Elder ceased his practice of honoring immigration detainers, pending resolution of this case. He has, however, publicly expressed his intention to resume the ICE hold practice in the event he prevails in court.

Sheriff Elder promptly filed a petition with the Colorado Supreme Court pursuant to C.A.R. 21, seeking emergency review of the preliminary injunction. The Supreme Court denied that petition on April 12, 2018. (2018SA71).

On May 1, 2018, the Court granted Plaintiffs" motion to certify two classes of inmates at the Jail. The classes are composed of all current and future prisoners in the Jail, including pretrial detainees for whom bond has been set, who are or will be subject to immigration detainers and/or administrative warrants sent by ICE. In granting the motion, the Court rejected Sheriff Elder's contention that Plaintiffs' claims had become moot as a result of the PI Order, the Sheriff's temporary abandonment of the challenged practices, or the release of the two named Plaintiffs.

On May 8, 201 8, the Court denied Sheriff Elder's motion seeking to compel joinder of ICE as a party. The United States had filed a Statement of Interest (an amicus brief) in opposition to the preliminary injunction, but since that time it has not participated in the case.

STIPULATED FACTS

I adopt the Stipulations, as well as the affidavits and documentary record referenced therein and the factual summary set forth on pages 2-6 of Plaintiffs' motion. In short, the Stipulations establish the following undisputed facts:

A. The Immigration Detainer Forms.

Immigration enforcement officers employed by ICE request the Sheriff's Office to continue to detain prisoners after state law authority to detain has ended. The requesting documents are the three standardized ICE forms described below, none of which is reviewed, approved, or signed by a judicial officer:

1. Immigration Detainer (ICE Form I-247A).

This form identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. It asks the jail to continue to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to allow time for ICE to take the prisoner into federal custody.

2. Administrative Warrant (ICE Form I-200).

***3** This form names a particular prisoner, asserts that ICE has grounds to believe he or she is removable from the United States, and directs federal immigration officers to arrest the person. Although this form is called a "warrant," it is not reviewed, approved, or signed by a judicial officer, as a warrant normally would be.

3. Tracking Form (ICE Form I-203).

This form is used to track detainees housed in local jails; it accompanies ICE detainees when ICE officers place them in, or remove them from, a detention facility. Although this form bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved or signed by a judicial officer, and it confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody.

B. The Intergovernmental Services Agreement (IGSA).

DHS and El Paso County are parties to the IGSA, a contract that authorizes the Sheriff to house ICE detainees in the Jail, in ICE's custody and at ICE's expense. The contract applies only to persons who are already in the physical custody of ICE officers when they arrive at the Jail. It is stipulated that the named Plaintiffs, Cisneros and Chavez, were not held pursuant to the IGSA; the IGSA is not a so-called "287(g) agreement" (discussed below); and El Paso County does not currently have a 287(g) agreement with ICE, although it previously had one from 2013 to 2015.

C. The Challenged Practices at the Time This Lawsuit Was Filed.

At the time this lawsuit was filed on February 27, 2018, it was EPSO's policy and practice to refuse to release prisoners who had posted bond, completed their sentence, or resolved their criminal case whenever ICE had faxed or emailed an immigration detainer (Form I-247A) and an administrative warrant (Form I-200).

EPSO used the term "ICE hold" to indicate that: (1) for a particular prisoner, ICE had sent Form I-247A and/or I-200; (2) EPSO would contact ICE to notify it of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE if the prisoner posted bond, completed his/her sentence, or otherwise resolved his/her criminal charges. Even when a prisoner did not have an "ICE hold," Sheriff Elder's written policies required deputies to delay the processing of bond paperwork when the prisoner was a "foreign born national."

D. Effect of the Challenged Practices on the Plaintiffs.

Sheriff Elder's use of ICE holds caused the named Plaintiffs to be detained for months after they would otherwise have been released on bond.

On November 24, 2017, Saul Cisneros was booked into the Jail and charged with two misdemeanor offenses. The court set his bond at $2,000. On November 28, 2017, his daughter went to the Jail to post bond for her father. She posted the money, but her father was not released because an ICE hold had been imposed. He was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

The other named Plaintiff, Rut Noemi Chavez Rodriguez, was arrested and booked into the Jail on November 18, 2017, and her bond was set at $1,000. ICE sent Forms I-247A and I-200, and the Jail placed an ICE hold on her. Friends from her church went repeatedly to the Jail and tried to bail her out, but were told the Jail would not release her on bond because an immigration hold had been imposed. Like Cisneros, she was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

***4** The Sheriff's treatment of Cisneros and Chavez was representative of the office's ICE hold practices with respect to the Plaintiff classes. The Stipulations provide numerous examples of how ICE holds were applied to other detainees.

E. The Challenged Practices as of March 8, 2018.

On March 15, 2018, four days before the preliminary injunction hearing, EPSO approved Directive Number 18-02, "Change in Ice Procedures." This change was made after a meeting with ICE supervisors on March 8, 2018, where EPSO staff learned for the first time that ICE had changed its procedure and practice in 2017. (EPSO started following the new procedures on March 8th, even though the written procedures were not in place until the 15th.)

EPSO Directive 18-02 ended EPSC's practice of transferring inmates to what it called "IGSA holds" and housing them under the IGSA when ICE sent the Jail the detainer forms. Under the new policy, an ICE agent is required to appear in person to serve the papers on the detainee within 48 hours of the inmate's release date or posting of bond. Once the ICE appears and serves the papers, the inmate is deemed to have been transferred to federal custody, and he or she may either be housed at the Jail per the IGSA or taken to a federal facility. If the ICE agent fails to show up within that 48-hour period, the inmate is released.

F. The Challenged Practices Since the Preliminary Injunction Was Issued.

Upon the Court's issuance of the PI Order on March 19, 2018, the named Plaintiffs, Cisneros and Chavez, were released, and Sheriff Elder ceased his practice of ICE holds pending resolution of this case. Sheriff's Office personnel still communicate with ICE and let ICE know when undocumented inmates are about to leave the Jail, but the Sheriff does not detain inmates past their release dates at this time.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56. The burden is on the moving party to establish that no genuine issue of fact exists. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

PERMANENT INJUNCTION STANDARD

A court of equity has the power to restrain unlawful actions of executive officials. *See County of Denver v. Pitcher*, 129 P. 1015, 1023 (Colo. 1913) (holding that equity courts may enjoin illegal acts in excess of authority).

The requirements for a permanent injunction are similar to those for a preliminary injunction; however, the elements are somewhat simplified, and the applicant is required to show actual success on the merits rather than merely a reasonable probability of success. The moving party must show that: (1) it has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Dallman v. Ritter*, 225 P.3d 610, 621 & n.11 (Colo. 2010).

ANALYSIS: LAWFULNESS OF THE ICE HOLD PROCEDURE

***5** The issue before the Court is whether Sheriff Elder has authority under Colorado and/or federal law – based on receipt and service of the above-described ICE documents – to hold Plaintiffs at ICE's request for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases.

Plaintiffs contend the 48-hour ICE holds are unlawful, as they are authorized by neither state nor federal law. Sheriff Elder responds that his office's practice is lawful for at least three separate reasons: (1) the 48-hour hold is not an arrest, but is rather a short-term detention akin to a *Terry* stop; (2) EPSO has authority to hold inmates for 48 hours under Colorado law, including his inherent authority as a Colorado sheriff; and (3) EPSO has authority to cooperate with immigration agents under the federal Immigration and Nationality Act, section 287(g).

For the reasons set forth below, I conclude the Sheriff's ICE hold practice is not authorized by either Colorado or federal law.

A. ICE Immigration Detainers are Requests, not Commands. The Choice, and the Legal Responsibility, are the Sheriff's.

As a threshold matter, it is fundamental – and Sheriff Elder has stipulated (Stip. 11) – that the ICE forms at issue constitute requests from ICE, not commands; and thus Sheriff Elder is under no compulsion to comply with them.

Whereas ICE administrative warrants "command" federal immigration officers to arrest suspected illegal immigrants and take them into custody (*see* Ex. 2), ICE detainers are directed to local law enforcement agencies and simply "request"' their assistance in detaining a non-citizen. *See* Ex. 1 ("IT IS THEREFORE REQUESTED THAT YOU: … Maintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from

your custody …"). This is a change from previous versions of the detainer form, which used to "require" such assistance. (Stip. 11.)

The reason ICE administrative warrants only "request," and do not "command," the cooperation of local officials, is that to issue commands to state or local officials would be unconstitutional. *See Galarza v. Szalczyk*, 745 F.3d 634, 643 (3rd Cir. 2014). As the *Galarza* court explained, if detainers were regarded as commands from the federal government to state or local officials, they would violate the Tenth Amendment's anti-commandeering principle. *Id.*; *and see Printz v. United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States").

Thus, federal immigration authorities cannot order, and are not ordering, Sheriff Elder to hold inmates beyond the term of their release. They are merely requesting that he do so. Whether he does so is his choice, and it is he who is legally responsible for the decision. That point was made particularly clear early in this case, when Sheriff Elder invited, and then attempted to force, ICE to defend its practices in this Court, without success.

B. Continued Detention After a Prisoner is Eligible for Release is the Equivalent of a New Arrest.

Sheriff Elder now contends that the 48-hour hold is not a new arrest, but is more akin to the kind of short-term investigative detention known as a *Terry* stop.[1] However, he is unable to cite any legal authority that supports his position, and ample authority compels the opposite conclusion.

1. Continued detention constitutes a new arrest.

***6** A detainer is, of course, different from a typical arrest: the person being detained is already in custody. No reported Colorado opinion addresses whether continued detention under an immigration detainer constitutes an arrest. However, courts in other jurisdictions have (uniformly, to the Court's knowledge) concluded there is no difference for constitutional purposes.

A "seizure" occurs in Colorado when a police officer restrains the liberty of a person. *People v. Marujo*, 192 P.3d 1003, 1005 (Colo. 2008). The seizure can amount to an investigatory stop, requiring only reasonable suspicion, if it is limited, brief, and non-intrusive; or to an arrest, requiring probable cause, if it is more extensive. *People v. Cervantes-Arredondo*, 17 P.3d 141, 146 (Colo. 2001).

Numerous federal courts have held that, when an inmate is entitled to release but is instead held in custody for a new reason, the continued detention constitutes a new seizure under the Fourth Amendment. *See Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification"); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-AB (FFMx), 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018) (same); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1249-50 (E.D. Wash. 2017) (same, citing additional federal cases). *Compare Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1065 (D. Ariz. 2018) (relied on by Elder and cited in the Teller County ruling) ("the Court does not necessarily disagree with Plaintiff's premise – that continued detention is tantamount to an arrest").

Likewise, the few courts that have addressed the issue under the laws of other states have concluded that continued detention under an ICE detainer constitutes a new arrest. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1153-54 (Mass. 2017) (continued detention of inmate on immigration detainer after he was entitled to release was "plainly an arrest" under Massachusetts law); *People ex rel. Wells v. DeMarco*, No. 2017-12806, 2018 WL 5931308, at *4-5 (N.Y. App. Div. Nov. 14, 2018) (when inmate was retained in custody per ICE detainer after his release date, he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment).

I conclude that continued detention of an inmate under an immigration detainer, after the inmate has reached his or her release date, constitutes an arrest under Colorado law and a seizure under the Fourth Amendment. Federal precedent is generally considered highly persuasive authority in the Fourth Amendment arena. *See People v. Schaufele*, 325 P.3d 1060, 1067 (Colo. 2014) ("the Supreme Court has cautioned against permutations by each state supreme court that would apply federal constitutional law in a way that 'would change the uniform 'law of the land' into a crazy quilt'"). There is no doubt that continued detention restrains the liberty of an inmate who is otherwise free to go. Because an inmate is being kept in custody for a new purpose after he was entitled to release, he is subject to a new seizure that is the equivalent of a new arrest.

This should be distinguished from the situation that occurs, for instance, when a prisoner who is already in ICE custody is housed in the local jail. *See Abriq v. Metro. Gov't of Nashville,* 2018 WL 4561246, at *3 (M.D. Term. Sep. 17, 2018) (local officials did not arrest or seize the plaintiff when they detained him in local jail, because he was already in ICE custody). "[M]erely transferring custody of that individual from one law enforcement agency to another deprives him of nothing he has not already lost." 17.5. *ex rel. Vanorsby v. Acevedo*, No. 11 C 7384, 2012 WL 3686787, at *5 (N.D. Ill. Aug. 24, 2012), For that reason, the Plaintiffs in this case have not challenged Sheriff Elder's housing of ICE detainees at the Jail under the IGSA. What they challenge is the Sheriff's continued detention of prisoners who have posted bond, completed their sentence, or are otherwise entitled to immediate release under Colorado law.

2. Continued detention is not comparable to a *Terry* stop.

***7** Sheriff Elder contends that the 48-hour ICE holds at issue are equivalent to a brief investigatory stop (a "*Terry* stop") rather than an arrest – that they involve a limited intrusion on the inmate's liberty that is reasonable, limited in time, and appropriate in light of the interests at stake.

A warrantless seizure is unreasonable unless it falls within an "established and clearly articulated exception[] to the warrant requirement." *People v. Rodriguez*, 945 P.2d 1351, 1359 (Colo. 1997). A *Terry* stop, which is recognized as one such exception, "is a brief investigatory stop supported by a reasonable suspicion of criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968); *Rodriguez*, 945 P.2d at 1359. A *Terry* stop must be "brief in duration, limited in scope, and narrow in purpose." *Id.* at 1359, 1362. Sheriff Elder's 48-hour holds do not satisfy any of these three essential elements.

The duration of reasonable *Terry* stops is typically measured in minutes, not hours or days. *See Rodriguez*, 945 P.2d at 1362-63 (90 minutes exceeded parameters of permissible investigative stop); *People v. Hazelhurst*, 662 P.2d 1081, 1086 (Colo. 1983) (20-to-30 minute detention exceeded scope of a *Terry* stop); *United States v. Tucker*, 610 F.2d 1007, 1011-13 (2d Cir. 1979) (detention in a police station "holding pen" for "several hours" was an arrest, not a *Terry* stop).

Moreover, the purpose of a *Terry* stop is to investigate – specifically, to conduct a brief investigation with a limited scope, in order to quickly confirm or dispel the reasonable suspicion of criminal activity that justified the intrusion. *Rodriguez*, 945 P.2d at 1362. In contrast, the purpose of a 48-hour ICE hold is not to investigate, but solely to detain. ICE does not ask the Sheriff to investigate, for instance, whether the Plaintiffs are removable, and it has not trained or deputized Sheriff's personnel to do so; it solely requests that the named individuals be jailed for up to 48 additional hours so ICE can serve them with documents and take them into federal custody. This continued detention beyond an inmate's release date is not a brief investigative stop; as discussed above, the courts have found it to be an arrest. *See* cases cited *supra*; *and see Lunn*, 78 N.E. 3d at 1153 (rejecting the investigative-stop argument); *Morales*, 793 F.3d at 215-16 (same).

C. Colorado Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner after his or her Release Date.

Sheriff Elder contends that EPSO has authority to hold inmates for 48 hours under Colorado law, based on (a) his inherent authority as a sheriff and (b) a statute that authorizes him to house federal prisoners in the Jail. Previously, in response to Plaintiffs' motion for a preliminary injunction, he raised a third argument, namely that he had authority to conduct ICE holds

under Colorado's arrest statute. I will address the issue of statutory authority first, and then inherent authority. While Sheriff Elder no longer contends that Colorado's arrest statute authorizes continued detention, it is necessary to start there, as the arrest statute delineates the authority of Colorado peace officers to make arrests.

1. Statutory authority.

a. Colorado's Arrest Statute (C.R.S. § 16-3-102).

Colorado's arrest statute provides, in full, as follows:
(1) A peace officer may arrest a person when:

***8** (a) He has a warrant commanding that such person be arrested; or

(b) Any crime has been or is being committed by such person in his presence; or

(c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

C.R.S. § 16-3-102.

No part of the statute provides authority for an arrest under the circumstances here.

As to (1)(a), the forms ICE faxes to the jail are not warrants under Colorado law. A "warrant" is "a written order issued by a judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." C.R.S. § 16-1-104(18). As Sheriff Elder admits (Stip. 7), none of the ICE forms at issue are reviewed, approved, or signed by a judicial officer, as the statute requires; they are issued, instead, by ICE enforcement officers. Thus, continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest.

A warrantless arrest is presumed to be unconstitutional. *People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). When peace officers make an arrest without a warrant, the government bears the burden of rebutting that presumption and demonstrating that the arrest fits within a recognized exception to the warrant requirement. *Id.* Sheriff Elder cannot, and has not attempted to, meet that burden.

Under subsection (1)(c), a peace officer may make a warrantless arrest only when he has "probable cause to believe an offense was committed" and probable cause to believe that the suspect committed it. Sheriff Elder argued previously that the arrest statute provides authority for his policy, but he has now abandoned that argument, as he must. As this Court previously found, an "offense," as used in the warrantless-arrest statute, means a crime, not a civil offense. *See* C.R.S. § 18-3-104(1) ("The terms 'offense' and 'crime' are synonymous"); C.R.S. 16-1-105(2) (definitions in C.R.S. Title 18 (the criminal code) also apply in C.R.S. Title 16 (the code of criminal procedure)).

The parties agree that deportation proceedings are civil, not criminal proceedings. Stip. 10. *And see Arizona v. United States*, 567 U.S. 387, 396, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States"; the federal administrative process for removing someone from the United States "is a civil, not criminal matter"); *Lunn*, 78 N.E. 3d at 1146 ("The removal process is *not* a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime").

Thus, the ICE forms at issue provide the Sheriff with, at best, probable cause to believe an individual is subject to a civil deportation proceeding, but *not* with "probable cause to believe an offense was committed." Thus, a federal officer's finding

that an individual may be removable from the United States does not authorize the Sheriff, under the warrantless-arrest statute, to deprive that individual of liberty.[2]

b. The federal prisoners statute (C.R.S. § 17-26-123).

***9** Sheriff Elder also relies on a statute that authorizes him to house federal prisoners in the county jail. C.R.S. § 17-26-123 ("Federal Prisoners-Expense") provides, in material part;

> It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and to confine every such person in the jail until he is duly discharged, the United States paying all the expenses …

Sheriff Elder contends that this statute, in addition to expressly granting him the power to detain federal prisoners, also implicitly authorizes him to temporarily detain individuals at the request of federal immigration authorities. The contention is unpersuasive. By its plain language, the purpose of this statute is to authorize sheriffs to house federal prisoners in local jails once they have been "duly committed thereto for any offense against the United States, by any court or officer of the United States," and to allocate the expense of confinement to the United States. It does not purport to address the power at issue here, namely the power to detain inmates beyond their release dates when they have *not* been "duly committed thereto." Further, the statute authorizes confinement only for an "offense against the United States." As noted above, "offense" is defined in Titles 16 and 18 to mean a crime. Sheriff Elder has provided no reason to believe it means anything different in this context.

2. Inherent Authority.

Sheriff Elder contends he has the inherent authority, as the county's chief law enforcement officer, to hold inmates for 48 hours beyond their release date at ICE's request. He contends this authority is inherent in his power to protect the citizens of his county, and particularly those lawfully present, from illegal activity by non-citizens; and he contends that the practice is an appropriate way of reducing the risk to the community that could occur if arrests had to be carried out in public.

Colorado sheriffs are limited to the express powers granted them by the Legislature and the implied powers "reasonably necessary to execute those express powers." *People v. Buckallew,* 848 P.2d 904, 908 (Colo. 1993). Powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." *Id.; see also Douglass v. Kelton,* 610 P.2d 1067, 1069 (Colo. 1980) (holding that sheriff and other public officials "have only such power and authority as are clearly conferred by law"; refusing to infer authority to issue concealed-carry permits).

For elaboration on this issue, both sides cite Colorado Attorney General Formal Opinion No. 99-7, 1999 WL 33100121 (Sept. 8, 1999), which was issued after several Colorado sheriffs sought guidance on their authority to act in response to potentially catastrophic Y2K computer failures.

As the AG Opinion makes clear, the duties and powers of the sheriff extend far back in the English common law, even predating the Magna Carta. However, in Colorado, the office of sheriff is created by the state constitution (specifically, Article XIV, Section 8), and sheriffs' powers and duties are defined by statute. AG Opinion No. 99-7, at *3-4.

***10** Sheriffs' peace-keeping duties, the Opinion notes, are codified in various statutes, including C.R.S. § 30-10-516 (sheriffs may keep the peace), 16-3-102 (arrest), and § 16-3-110 (peace officer duties). "The sheriff typically enforces the laws by issuing summons or making arrests for violations of criminal statutes," and "[t]he sheriff's use of authority beyond the arrest

power must be found in a specific statute." AG Opinion No. 99-7, at *4.

As the Colorado Supreme Court has made clear, "the authority of peace officers to effectuate arrests is now defined by legislation." *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983). The scope of the arrest power is defined primarily in Article 3, Part 1, of Title 16, of the Colorado Revised Statutes ("Authority of Peace Officer to Make an Arrest"). 16-3-101 to 16-3-110, with the primary statute being C.R.S. 16-3-102, as discussed above.

The legislature has expressly recognized certain other limited circumstances in which the power to detain is appropriate; but in each case, a statute spells out the scope and limits of that power. No Colorado statute currently authorizes sheriffs to enforce civil immigration law or even to cooperate with its enforcement. Under these circumstances, absent a statutory grant of authority, the Court is reluctant to create an arrest power through inference. *Accord Lunn, supra*, 78 N.E. 3d at 1157 ("we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest – without the protections afforded to other arrestees under Massachusetts law – under the amorphous rubric of 'implicit' or 'inherent' authority"); *People ex rel. Wells, supra*, 2018 WL 5931308, at *6 ("We decline … to intrude upon a carefully crafted, comprehensive, and balanced legislative determination as to the proper scope of the police power to effectuate arrests …").

Notably, Colorado used to have a statute that authorized, and indeed required, local law enforcement to assist the immigration authorities in detaining suspected illegal immigrants. In 2006, Colorado enacted SB-90, which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law. *See* C.R.S. § 29-29-101-103 (repealed). In 2013, the Legislature repealed the statute in its entirety, declaring that "[t]he requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust." Colo. HB 13-1258 (April 26, 2013). Absent the re-enactment of a comparable statute conferring the power of arrest on sheriffs in the immigration context, Sheriff Elder lacks the authority to detain individuals beyond their legally mandated release dates.

As to Sheriff Elder's contention that failing to recognize his inherent authority will expose the community to risk, he has provided no evidence. Public debate on immigration enforcement rightly focuses on public safety. All counties in Colorado, with two or three exceptions, have ceased their practice of honoring ICE hold requests. Had that change in practice created public safety issues, there would no doubt be evidence to show for it, whether in the form of data or, at the least, affidavits from other sheriffs. However, Sheriff Elder has submitted no evidence whatsoever on the subject, and he cannot raise a genuine issue of material fact by mere argument of counsel.

D. Federal Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner After his or her Release Date.

***11** Sheriff Elder contends that the INA, and specifically section 287(g)(10) of the Act, codified as 8 U.S.C. § 1357(g)(10), provides authority for 48-hour ICE holds.

Section 287 of the INA delineates the powers of federal immigration officers, including the power to arrest and detain suspected non-citizens pending removal proceedings. A subsection, section 287(g), addresses the extent to which the federal government may delegate those powers to state and local officers and employees. Delegation is accomplished through a written agreement known as a "287(g) agreement," entered into between the United States Attorney General and a state or local government. Under such an agreement, state or local officers who have been certified to be trained in enforcement of the federal immigration laws may perform the functions of immigration officers "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). The Sheriff s Office entered into a 287(g) agreement with ICE in 2013, but the agreement was terminated in 2015, and the parties currently do not have such an agreement, (Stip. 22; Exs. D & E.)

Given that the Sheriff's Office is currently not operating under a 287(g) agreement with ICE, Sheriff Elder now relies on a separate part of section 287(g), namely subsection 287(g)(10), which states:
(10) Nothing in this subsection shall be construed to require an agreement under this subsection [i.e., a 287(g) agreement] in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting

knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

Sheriff Elder contends that this provision provides him with authority not only to communicate and coordinate with ICE, but also to "cooperate" with ICE in the "apprehension [and] detention" of illegal non-citizens by imposing a 48-hour ICE hold on inmates otherwise subject to release from the Jail. This is a plausible contention, at the least, and one on which courts may reasonably differ. I will address first the express language of the statute and then the contention that the ICE holds constitute lawful "cooperation" or "operational support" as envisioned by the statute.

1. Express statutory authorization.

The initial question is whether, as Sheriff Elder suggests, the express language of section 287(g)(10) affirmatively grants him the power to cooperate with ICE in the arrest and detention of suspected non-citizens. It does not.

The language of the statute is not that of authorization: it does not say that local governments "may" cooperate with ICE by arresting and detaining; it simply says that nothing in the statute prevents them from doing so. It does not affirmatively grant the authority to arrest, but rather makes clear that arrests by local officials, when done in cooperation with federal immigration officials, "are a permissible form of State participation in the Federal immigration arena that would not be preempted by Federal law." *Lunn*, 78 N.E.3d at 1159; *accord Ochoa*, 266 F. Supp. 3d 1237, 1249, 1253-55.

***12** The fact that section 287(g)(10) is not an affirmative grant of arrest authority is underscored when one compares it to the remainder of section 287(g), which lays out the specifics of what must be done by way of a written agreement, training, and certification before local officers will be allowed to enforce federal immigration laws. *See* 8 U.S.C. 1357(g)(1)-(9). *And see Lunn*, 78 N.E.3d at 1159-60 ("[i]n those limited instances where the Act affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in section 1357(g)(10)") (citing 8 U.S.C. 1103(a)(10), 1252c, 1324(c), and 1357(g)(1)-(9)).

In short, section 287(g)(10) does not prevent states from making arrests in conjunction with federal immigration officers, but neither does it affirmatively authorize it. As the *Lunn* court explained, section 287(g)(10) "simply makes clear that State and local authorities may continue to cooperate with Federal immigration officers in immigration enforcement *to the extent they are authorized to do so by their State law* and choose to do so." *Lunn*, 78 N.E.3d at 1159 (emphasis added); *and see Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells*, 2018 WL 5931308, at *7. As I have previously found, Colorado law does not provide the necessary authorization.

2. "Cooperation" or "Operational Support"

Notwithstanding the above, there is no question that section 287(g) contemplates communication and cooperation between federal and state officials in immigration enforcement, even in the absence of a written 287(g) agreement. Sheriff Elder contends, and some courts appear to agree, that the statute's reference to cooperation provides implicit authorization for cooperative actions such as honoring ICE detainer requests.

The leading case on federal-state cooperation in immigration enforcement is *Arizona v. United States*, 567 U.S. 387 (2012). The case addressed, and largely overturned on preemption grounds, an Arizona statute that enlisted state and local law enforcement to the front lines of immigration enforcement. One provision (Section 6) authorized state officers to make

warrantless arrests of persons if they had probable cause to believe such persons were removable from the country. The Court overturned that provision, finding that such a broad grant of authority improperly invaded the province of federal immigration officials. *Id.* at 407-10.

The Court addressed the scope of "cooperation" contemplated by section 287(g)(10) and found that, while "[t]here may be some ambiguity as to what constitutes cooperation" under that section, no reading of that term would allow state officers to arrest aliens unilaterally, without direction from federal officers. The Court noted several examples of cooperation that would arguably be permissible, including participating in a joint task force with federal officers, providing operational support in executing a warrant, and allowing federal access to detainees held in state facilities. *Id.* at 410. Sheriff Elder contends that the 48-hour holds requested by ICE are permissible because they fall within the scope of "cooperation" or "operational support" approved in *Arizona.*

Whether 48-hour ICE holds are comparable to the kinds of "cooperation" or "operational support" described in *Arizona* is a difficult question, but it is not one this Court is required to answer. The sole issue addressed by the Supreme Court in *Arizona* was preemption. The Court addressed whether Arizona's grant of immigration enforcement authority to state officers infringed on the broad immigration powers granted to federal officials by the Constitution and the INA. Preemption, however, is only step one of the analysis. Even were this Court to conclude that 48-hour ICE holds fall on the permitted side of the preemption line, the Court would still need to address step two: that is, I would still need to find that Colorado law affirmatively grants Sheriff Elder the authority to detain inmates on ICE holds. *See Lunn*, 78 N.E.3d at 1157-60; *Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells*, 2018 WL 5931308, at *8. As set forth above, Colorado law does not provide that authority.

E. Miscellaneous Contentions.

***13** Sheriff Elder raises a number of additional contentions, of which I will address the most significant.

(a) *Lopez-Lopez*. Sheriff Elder relies heavily on a recent case, *Lopez-Lopez v. Cty. of Allegan*, 2018 WL 3407695 (W.D. Mich. July 13, 2018). (The court in the Teller County case mentioned above also relied heavily on *Lopez-Lopez* in its order denying a motion for a preliminary injunction based on similar facts. *Salinas v. Mikesell*, 2018CV30057, Order issued 8/19/18.)

The *Lopez-Lopez* case addressed the legality of an ICE detention in which ICE's recent forms (the same ones at issue in this case) were used. The facts are comparable to the facts of this case. Mr. Lopez-Lopez had been arrested on an outstanding warrant for a probation violation and booked into the county jail, and his family posted bond. The county sheriff, having received an I-247A detainer and an I-200 warrant from ICE, maintained custody of Mr. Lopez-Lopez until the next morning, when an ICE officer served the ICE forms on him and took him into custody. The court found that the sheriff's cooperation "with the federal government's request (as allowed pursuant to sec. 1357(g)(10)) 'by providing operational support' by holding [Mr. Lopez-Lopez] until ICE could take custody of him the following day … did not run afoul of the Fourth Amendment prohibition against unreasonable seizures." *Id.* at *5-6.

Lopez-Lopez is not on point, in that it does not address the claims that have been raised in this case. The claim in that case was solely that the ICE detention violated the Fourth Amendment. The court appeared to assume that the sheriff's cooperation fell within the "operational support" contemplated by section 287(g)(10) and *Arizona*, but that assumption was dicta on an issue that the plaintiff had not expressly raised and that the court did not explore beyond the sentence quoted above. The court did not address the claim raised in this case, which is that the Sheriff lacks authority under state law to continue to detain the Plaintiffs.

(b) *Revised ICE Forms*. Sheriff Elder also contends, again citing *Lopez-Lopez*, that ICE's recent revisions to its detainer forms dispel the issues caused by prior version of those forms. (Resp. at 6-8; *Lopez-Lopez*, 2018 WL 3407695, at *3–5.) This contention fails, because this Court's reasoning is based on its review of the current ICE forms, and not on prior versions. As discussed above, none of the current ICE forms amounts to a warrant under Colorado law, because none has been reviewed and approved by a neutral magistrate. *See Lunn*, 78 N.E.3d at 1151 n.17 & 1155 n.21. As the *Lunn* court explained, these

forms "do not transform the removal process into a criminal process, nor do they change the fact that [state] officers have no common-law authority to make civil arrests." *Id.* at 1155 n.21.

(c) *Roy v. County of Los Angeles*. Sheriff Elder also contends (Response, pp. 18-20) that review by a neutral magistrate is not required in the detainer context. As discussed above, that is true for ICE officers, but it is not true for Colorado sheriffs acting pursuant to Colorado law. *See supra*, sections B and C. The Sheriff relies here on *Roy v. Cty. of Los Angeles*, 2017 WL 2559616 (C.D. Cal. June 12, 2017). That case is not on point, for the reasons set forth on page 13 of Plaintiffs' Reply.

***14** (d) *City of El Cenizo v. Texas*. Elder also cites another recent decision, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), in which the Fifth Circuit upheld a Texas statute that required local law enforcement agencies to honor ICE detainers. The Fifth Circuit, like the *Lopez-Lopez* court, concluded that the "cooperation" referenced in 1357(g)(10) includes honoring ICE detainers; and accordingly it found the Texas statute did not offend principles of preemption. 890 F.3d at 185-89. The key distinction from the facts of this case was that the very Texas statute that was challenged provided the state-law authority to honor the ICE detainers that is missing from this case.

As noted above, Colorado had a somewhat similar statute from 2006 to 2013, when it was repealed based on the legislature's finding that enlisting local law enforcement to assist in immigration enforcement had undermined public trust. The Colorado legislature could re-enact that statute, or a similar one, if it wished; and, if it did so, it could supply the state law authorization that is currently missing. Likewise, Sheriff Elder could re-enter into the formal 287(g) agreement his office previously enjoyed with ICE; and doing so could arguably supply the missing authority to honor ICE's detainer requests (an issue that is not before this Court). Until one or the other of those circumstances conies about, I conclude that Sheriff Elder lacks authority under either Colorado or federal law to continue to detain the Plaintiffs after they have posted bond or otherwise resolved their criminal cases.

CONTINUED DETENTION WOULD BE IN VIOLATION OF THE COLORADO CONSTITUTION

By continuing to detain the Plaintiffs without legal authority, Sheriff Elder would violate several provisions of the Colorado Constitution, as set out in Plaintiffs' motion. Sheriff Elder did not contest these conclusions. Accordingly, I find he has conceded the issue, and I adopt the reasoning set forth on pages 16-19 of Plaintiffs' motion.

First, by depriving the Plaintiffs of liberty without legal authority, Sheriff Elder carries out unlawful warrantless arrests that constitute unreasonable seizures, in violation of Article II, Section 7.

Second, by failing to release the Plaintiffs after they have posted or offered to post bond, Sheriff Elder violates their right to bail under Article II, Section 19.

Third, Sheriff Elder has deprived the Plaintiffs of their due process rights, in violation of Article II, Section 25.

The Sheriff, in short, has committed, and threatens to commit, multiple constitutional violations. Plaintiffs therefore have established actual success on the merits.

PLAINTIFFS SATISFY THE REQUIREMENTS FOR A PERMANANT INJUNCTION

Having established actual success on the merits, the Plaintiffs also satisfy the remaining three elements for permanent injunctive relief.

A. Plaintiffs and Class Members Suffered and Will Suffer Irreparable Injury Unless the Injunction Issues.

Plaintiffs and class members have a right to release upon posting of bond, completion of their sentence, or when state-law authority to hold them has otherwise expired. Sheriff Elder's refusal to release them has deprived them of liberty without legal basis. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *accord United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) (unnecessary incarceration is a deprivation of liberty that "clearly constitutes irreparable harm."). Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty.

B. The Threatened Injury Outweighs Any Harm the Injunction May Cause.

***15** The balance of equities strongly favors Plaintiffs and the classes. Under Colorado law, Plaintiffs and bond class members have a right to release when they post the bond set by the state court. The low bonds set for the Plaintiffs demonstrated that the judges did not regard them as flight risks or dangers to public safety. And the Sheriff has no legitimate interest in imprisoning other class members after the state-law authority to detain them has expired.

By contrast, Sheriff Elder will not be harmed by releasing Plaintiffs and class members on bond or freeing them when state law detention authority ends. He will be complying with Colorado law, which is in his interest. And he may continue to cooperate with ICE, if he chooses, within the bounds of the law. The Sheriff may continue to contact ICE and let it know when a prisoner is about to leave the Jail. (This is the Sheriff's current practice, *see* Stip. 54.)

C. A Permanent Injunction Will Serve the Public Interest.

Protection of constitutional rights advances the public interest. *See, e.g., Awad v. Ziriax*, 670 F.3d 1111,1131 (10th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights").

The injunction is also consistent with the Colorado legislature's declaration in 2013, when it repealed the statute that had required local law enforcement to cooperate with federal immigration authorities: 'The requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust.'" H.B. 13-1258 (April 26, 2013).

PLAINTIFFS SATISFY THE REQUIREMENTS FOR MANDAMUS RELIEF AND ARE ENTITLED TO A DECLARATORY JUDGMENT

Because Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended, Plaintiffs are entitled to mandamus relief. And because Plaintiffs prevailed on the merits, they are also entitled to the declaratory relief they seek in their Complaint. Sheriff Elder did not contest these conclusions, and accordingly I find he has conceded the issue, and I adopt the reasoning set forth on pages 22-24 of Plaintiffs' motion.

CONCLUSION

For the reasons set forth above, the Court FINDS that there are no material facts in dispute and summary judgment is appropriate in Plaintiffs' favor as a matter of law.

It is hereby ORDERED:

(A) Summary judgment enters in favor of the named Plaintiffs and the Plaintiff classes and against Sheriff Elder, determining

that the challenged practices exceed his authority and are unconstitutional; this conclusion necessarily applies not only to Sheriff Elder's practices as of March 8, 2018, but also to the broader practices that were in place at the time this case was filed;

(B) Plaintiffs' request for a permanent injunction is GRANTED. Sheriff Elder is ENJOINED from engaging in the challenged practices, as described in paragraph (D) below;

(C) Mandamus relief is awarded, as requested; and

(D) A judgment shall enter, declaring that Sheriff Elder:
(1) exceeds his authority under Colorado law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; violates the Colorado constitutional right to be free of unreasonable seizures when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case;

***16** (2) violates the Colorado constitutional right to due process of law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; and

(3) violates the Colorado constitutional right to bail when he relies on ICE detainers or ICE administrative warrants as grounds for refusing to release pretrial detainees who post bond.

Within 7 days, counsel shall confer and then jointly submit a proposed order of judgment.

DONE and ORDERED December 6, 2018.

BY THE COURT

<<signature>>

Eric Bentley

DISTRICT COURT JUDGE

Footnotes

1 This contention differs from Sheriff Elder's initial position in the case, when he conceded, for purposes of the preliminary injunction motion, that the 48-hour hold constituted an arrest. The change in position is notable largely to illustrate the way in which the legal arguments in this case continue to be a moving target. Courts around the country are grappling actively with related issues, and the legal landscape is evolving at a rapid pace.

2 The ICE forms also raise the issue of whether Sheriff Elder may rely on an immigration officer's finding of probable cause, as set forth on the form simply through a checked box without case-specific findings. The Sheriff contended previously that he may rely on that finding pursuant to the "fellow officer rule" or "collective knowledge doctrine," which generally allows a law enforcement officer to rely on information known to another officer. *See People v. Washington*, 865 P.2d 145 (Colo. 1994). Plaintiffs disagreed. This is not an issue the Court needs to resolve, as, even if this Court were to find the "fellow officer rule" applicable, that would not resolve the other issues addressed herein.

2018 WL 5389394 (PERSONNET)

Merit Systems Protection Board - Initial Decisions

OXLEY, BRENT
V.
DEPARTMENT OF HOMELAND SECURITY

No. DA-0752-18-0406-I-1
October 23, 2018

Before: MALOUF, MARIE A., ALJ

+---+
| **CAUTION!** |
| MSPB INITIAL DECISIONS ARE **NOT PRECEDENTIAL** |
| AND CANNOT BE CITED AS SUCH IN SUBMISSIONS |
| TO THE BOARD OR THE FEDERAL COURTS. |
+---+

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

_____

)
)
BRENT OXLEY,) DOCKET NUMBER
APPELLANT,) DA-0752-18-0406-I-1
)
V.)
)
DEPARTMENT OF HOMELAND SECURITY,) DATE: OCTOBER 23, 2018
AGENCY.)
)
_____)

LeAnn Mezzacapo, Oakdale, Louisiana, for the appellant.

Kate C. Brownlee, Esquire, New Orleans, Louisiana, for the agency and Michelle M. Murray, Esquire, Washington, D.C., for the agency.

BEFORE

Marie A. Malouf
Administrative Judge

INITIAL DECISION

INTRODUCTION

On June 25, 2018, Brent Oxley appealed the action of the Department of Homeland Security, Bureau of Immigrations and Customs Enforcement (ICE), which removed him from his position, effective May 29, 2018. The Board has jurisdiction over this timely-filed appeal pursuant to 5 U.S.C. §§ 7511-7513. At the appellant's request, a hearing was held.

Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

The agency bears the burden of proving its charge by preponderant evidence.

The appellant was employed as Deportation Officer (DO) in the agency's Enforcement and Removal Operations (ERO) office in Little Rock, Arkansas. Initial Appeal File (IAF), Tab 9 at 24. The appellant was removed from his position for: (1) lack of candor; (2) misuse of a government-owned vehicle; and (3) conduct unbecoming. [1] IAF, Tab 9 at 26-31. The agency bears the burden of proving its charges by preponderant evidence. [2] 5 U.S.C. § 7701(c)(1)(b). The agency must also show that its action was taken for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981).

The agency proved charge one by preponderant evidence.

In its first charge, the agency alleged that the appellant engaged in conduct that constituted a lack of candor. IAF, Tab 93-94. A charge of lack of candor 'is a broader and more flexible concept' than falsification. *Ludlum v. Department of Justice*, 278 F.3d 1280, 1284 (Fed. Cir. 2002). It may involve a failure to disclose something that, under the circumstances, should have been disclosed in order to make a given statement accurate and complete. *Id.* Although lack of candor does not require an 'affirmative misrepresentation,' it 'necessarily involves an element of deception.' *Id.* at 1284-85. An agency alleging lack of candor must prove the following elements: (1) that the employee gave incorrect or incomplete information; and (2) that he did so knowingly. *See Fargnoli v. Department of Commerce*, 123 M.S.P.R. 330, ; 17 (2016).

The agency's lack of candor charge listed six specifications. The first five specifications arose out the appellant's action signing his supervisor's name to I-200, 'Warrant for Arrest of Alien' forms (I-200 or warrant). The agency charged:

SPECIFICATION 1: On November 28, 2017, you forged SDDO Shane Ober's signature on a Form I-200, Warrant of Arrest. The signature you wrote was knowingly forged.

SPECIFICATION 2: On September 25, 2017, you forged SDDO Ober's signature on two Form I-200, Warrants of Arrest. The signatures you wrote were knowingly forged.

SPECIFICATION 3: On December 12, 2017, you forged SDDO Ober's signature on a Form I-200, Warrant of Arrest. The signature you wrote was knowingly forged.

SPECIFICATION 4: On December 20,2017, you forged SDDO Ober's signature on a Form I-200, Warrant of Arrest. The signature you wrote was knowingly forged.

SPECIFICATION 5: On January 2, 2018, you forged SDDO Ober's signature on a Form I-200, Warrant of Arrest. The signature you wrote was knowingly forged.

IAF, Tab 9 at 93-94.

On appeal, the appellant asserted that he signed the I-200s as instructed by his supervisor. IAF, Tab 1 at 6. He noted that when questioned by an agency investigator about the documents, he admitted that he had signed them. *Id.* He related that he was never advised that he lacked the authority to sign the I-200s and there was confusion about who had authority to sign the forms. *Id.*

The record reflects that on March 24, 2017, ICE Acting Director, Thomas D. Homan sent a message notifying all employees that he had issued a new directive regarding detainers of aliens. IAF, Tab 18 at 80. Homan's message provided, in relevant part:

Pursuant to this new directive, although not legally required, all detainers issued to removable aliens moving forward must be accompanied by: (1) Form I-200 (Warrant for Arrest of Alien), signed by an authorized immigration officer; or (2) Form I-205 (Warrant of Removal), signed by an authorized immigration officer. This requirement is intended to ensure compliance with the decision of the U.S. District Court for the Northern District of Illinois, which found that detention pursuant to an ICE detainer constitutes a warrantless arrest and that section 287(a)(2) of the Immigration and Nationality Act only authorizes a warrantless arrest if there is reason to believe the alien will escape before an arrest warrant can be secured. *See Moreno v. Napolitano*, --- F. Supp. 3d ---, 2016 WL 5720465, at *8 (N.D. Ill. Sept. 30, 2016). Although the district court's decision is legally binding on ICE only in the Chicago Area of Responsibility, the requirement that a detainer be accompanied by Form I-200 or Form I-205, as a matter of policy, will help mitigate future litigation risk and will further our efforts to ensure that our law enforcement partners will honor our detainers.

IAF, Tab 18 at 81.

David Rivera, New Orleans Field Office Director (FOD), explained that an I-200 is a warrant that is used to demonstrate probable cause for an alien's arrest [3] and it is used with an Immigration Form I-247 detainer request. [4] HCD. Rivera stated that the authority to sign I-200s has been delegated to supervisors. *Id.* Rivera explained that aliens and states were challenging detainers based on the failure to identify probable cause. *Id.* Therefore, in April 2017, the agency chose to add the I-200 probable cause document when it issues an I-247 detainer in order to give the custodial law enforcement agency the authority to hold the alien for ICE. *Id.* He said that custodial agents rely on the I-200 to show an arrest is legitimate. *Id.* He explained that in any setting where a governmental action limits freedom, it is important to document the probable cause and it is crucial not to violate an alien's 4th amendment rights. *Id.* According to Rivera, under the agency's policy, an I-247 must be accompanied by I-200 or I-205. Rivera testified that in a custodial setting, the warrant (I-200) is served on the custodial agency. Rivera related that the new detainer policy did not change how I-200s are created and the requirement for supervisor to sign is the same. *Id.* Rivera stated that an I-205 is the document used for removal of an alien after processing is completed and it documents the removal of an alien in compliance with a judge's order. *Id.* Rivera related that any immigration officer may sign an I-205. *Id.*; *see* 8 C.F.R. § 241. Rivera testified that he expects officers to know the difference between an I-200 and I-205. *Id.*

Brandon Shane Ober testified that he is a Supervisory Detention and Deportation Office (SDDO) and he supervises seven DOs and one Enforcement Removal Assistant (ERA). HCD. He reported that he started supervising the appellant in October 2015. *Id.* Ober stated that prior to becoming a DO, the appellant was an Immigration Enforcement Agent. *Id.* Ober explained that in order to become a DO, the appellant had to apply for the position and obtain 40 hours of single track career training. *Id.*

Ober reported that, in March or April 2017, the agency established a new detainer policy which required that all detainers be accompanied by an I-200 arrest warrant signed by an authorized immigration officer. HCD. Ober related that only SDDOs and higher level employees have the authority to sign an I-200. *Id.* He stated that employees were notified of the policy change and provided a copy of the agency's detainer guide and sample documents. *Id.* He said that he also sent an email to his subordinate employees, including the appellant, advising them of the policy change. *Id.*; *see* IAF, Tab 18 at 79-81. Ober related that after the new detainer policy was issued, he held a meeting with his officers and explained who

had authority to sign forms and what name to put on each form. *Id.* Ober said that he did not hold any additional training concerning the I-200s, and he acknowledged that the emails sent to employees did not specifically define who was an 'authorized immigration' officer for the purpose of signing an I-200. *Id.* Ober reported that he and the appellant attended training in April 2017, which included information on the requirements for I-200s. *Id.* He stated that the attendees were provided a copy of the training materials which included a slide on who has signature authority for I-200s. [5] *Id.* Ober confirmed that a copy of the training materials is contained in the record. *Id.*; *see* IAF, Tab 18 at 25-77.

Ober testified that, after the policy change, the Little Rock office created a supervisory duty roster to take calls from DOs in the field, so that supervisors could authorize DOs to sign I-200s with the supervisor's name. *Id.* He testified that all DOs had access to the roster and he never told any of his employees he did not want to be bothered about signing I-200s. *Id.* Ober related that he reviews ten to twelve I-200s a week. HCD. He said that he signs an I-200 after he determines that the document meets the agency's requirements. *Id.* Ober confirmed that he provided an electronically signed I-200 to the DOs under his supervision. He explained that he provided the electronically signed I-200 to use in the event that he was not available to sign it. He stated that for those forms, he expected the DO to email him a copy for his review. He related that he believed the electronically-signed I-200 was valid because he reviewed the email copy. Ober denied that the electronically signed I-200 was a grant to the officers to sign his name. IAF, Tab 24 at 10.

Ober reported that he was advised that an alien in custody in Little Rock's jurisdiction was also wanted in Texas so he reviewed the alien's file. According to Ober's testimony upon review of the detainer documents, he discovered that the appellant had signed Ober's name on the I-200. Ober stated that he had not authorized the appellant to sign the document. *Id.* He stated that he was surprised to see the forged signature and he went to Darrell Woods, the Assistant Field Office Director (AFOD), to discuss it and to ask how to proceed. *Id.* Ober reported that he also talked with an Employee Relations Specialist about what he discovered, but he did not discuss the matter with anyone else. *Id.* Ober said that he found his signature forged on additional documents and he reported his findings to the agency's Joint Intake Center (JIC). *Id.*

Ober testified that he did not authorize the appellant to sign his name on any of the I-200s that were identified in his notice to the JIC. HCD. Ober stated that he did not tell the appellant that he had found the forged documents. *Id.* He explained that he believed that the appellant's actions constituted a willful violation of the training provided to him. *Id.* Ober stated that given the appellant's length of service, his training, and the law, the appellant could not have believed that his actions were appropriate. *Id.*

Ober confirmed that he told his subordinates that when they became journeyman level they would have the authority to sign forms. HCD. He related, however, that he told employees that they could sign I-205s, but not I-200s, unless they had a delegation from the FOD when they are acting as the SDDO. *Id.*

Charles Davis testified that he is a GS-11 DO. HCD. He related that during his training at the Academy, he was taught that I-200s have to be signed by the supervisor. *Id.* He confirmed that the agency sent notification and emails concerning the new detainer policy in March 2017, but he did not recall any specific training or office meetings when policy changed. *Id.* He stated that the procedures for the I-200s did not change after the new policy was instituted. *Id.* He explained that he knew that he could not sign I-200s because he was not a journeyman. *Id.* He stated, however, that at the time, he believed that when he became a journeyman DO, he would be able to sign the I-200s because journeymen could sign other documents. *Id.* He said that based on his discussions with other officers after the appellant's removal, he concluded that there was widespread confusion about who could sign I-200s. *Id.* He asserted his conclusion is supported by the fact that in June 2018, the FOD sent out a memorandum concerning signature authority for I-200s. *Id.*

Jeffrey Hellekson, a DO, testified that the agency's policy required that detainers be accompanied by I-200s and the I-200s had to be signed by supervisors. HCD. He reported that he attended a meeting in August or September 2017 where Ober discussed which forms officers were permitted to sign, and during the meeting employees were specifically

informed that DOs could not sign I-200s. *Id.* He stated that the appellant was at the meeting. Hellekson said that he can't speak to whether other officers were confused about the signature authority for I-200s, but no one asked questions about the signature authority. Rather, there were questions about the single career track. Hellekson related that, in the past, he signed I-200 warrants, but only when he was designated as acting SDDO. *Id.*

Hellekson confirmed that he received an I-200 electronically signed by Ober. HCD. He explained that when an employee is assigned periodic on-duty calls and the employee is not able to reach a supervisor the employee could, in an emergency, use the electronically signed I-200. *Id.* He stated that on such an occasion, he sent Ober an email copy. *Id.*

Craig Canino testified that he has been a DO in the Little Rock office since 2008. HCD. He confirmed that the agency's 2017 policy change required that an I-200 accompany a detainer. *Id.* He said that he attended an office meeting where I-205s were discussed, but he did not recall a discussion of I-200s. *Id.* Canino stated that a DO does not have the authority to sign an I-200 and that is the way it has always been. *Id.* Further, he said that journeyman level officers are not allowed to sign the I-200s. He explained that when an I-200 prints out with a detainer (an I-247), he signs the I-247 and he seeks Ober for signature. *Id.* Canino reported that Ober has the right to question officers about the information on the forms, but generally Ober trusts his officers and they do not have to bring a synopsis. *Id.* Canino confirmed that he used an I-200 electronically signed by Ober when he was the duty officer and he had to issue an I-200. *Id.* He said that on such occasions, he emailed the information to Ober and he generally included a synopsis. *Id.* Canino testified that as journeyman level officer, he understood that he has delegated authority to sign I-205s. *Id.* He stated that on those occasions when he was authorized to sign on behalf of the FOD, he put his initials by the signature. *Id.* Canino related that he believed the signature authority for I-200s is set out by law or regulation. *Id.*

Woods testified that employees received career track training. HCD. He reported that journeyman level employees can sign multiple documents, but not I-200s. *Id.* Woods explained that for an I-200 to be legally sufficient, it must be signed by the appropriate official. *Id.*

Jaime Crespo-Pagan testified that he is an SDDO in New Orleans Louisiana. HCD. He confirmed that he conducted training in Little Rock, Arkansas, and the training included information about I-200s and who has the authority to sign those. *Id.* He explained that he instructed the officers using a powerpoint presentation that was given to him at the academy. *Id.* He stated that the powerpoint information notified employees that only SDDOs or employees above the SDDO level could sign I-200s. *Id.* He confirmed that the powerpoint slides are contained in the record. *Id.*; *see* IAF, Tab 18 at 25-77.

Amy Hoffman testified that she has worked as a DO in the Little Rock Office since 2015. HCD. She stated that she is familiar with agency's new detainer policy which requires an I-200 or I-205 to be provided when ICE asks a custodial agency to turn over an individual to ICE. *Id.* She related that at the time the policy was implemented, employees received an email from headquarters, but she did not recall any formal training on the change. *Id.* Further, she said that she did not know whether her supervisor resent the email. *Id.* According to Hoffman's testimony, employees had training as part of the Single Career Track initiative, and during the training, employees were informed what forms could be signed and which could not be signed. *Id.* Hoffman explained that the new policy did not really change the way they did business because local law enforcement agencies cooperated with ICE. *Id.* She stated that the new policy just meant that the DOs had to send an extra piece of paper with the detainer. *Id.* She noted that when the DO printed out the detainer, the I-200 was printed with it. *Id.* Hoffman testified that she was not authorized to sign that I-200. *Id.* She related that the DOs filled in the I-200, and took it to the SDDO for signature. *Id.* Hoffman said that she received an email with an I-200 electronically signed by Ober, but there was no explanation on how to use it and she thought she could use the electronic form anytime she wanted. *Id.* Hoffman stated that a journeyman level DO is not authorized to sign an I-200 unless they have been designated as an acting SDDO. *Id.* Hoffman testified that she has never known the appellant to lie. HCD. She opined that if someone had told the appellant that he was not allowed to sign I-200s, he would have stopped. *Id.*

The appellant testified that he started work as an IEA in 2009, and he received training at the Academy. HCD. He related that the Academy training included some information about detainers and he received additional on-the-job training when he arrived at the Little Rock office. *Id.* The appellant reported that he became a DO in September 2015 and he attended career track training in 2017. *Id.* He confirmed that there was a meeting in the office in August 2017, but he stated that I-200s were not discussed and he is not aware of any meeting held in September 2017. *Id.* The appellant related that he does not remember whether he read the information that was sent out with the policy change. *Id.* He said that if he had any confusion about the policy, he would have asked questions. *Id.* The appellant testified that during the summer of 2017, there was training on I-200s, but there were no instructions or discussions with Ober prior to that training. *Id.*

The appellant stated that DOs have warrantless arrest authority and on his credentials it says that he has warrantless arrest authority. HCD. He reported that, as IEA and DO, he processed hundreds of arrests and he had the highest number of arrests in the office. *Id.* He acknowledged that his name was never an authorized name on I-200s. *Id.* He contended, however, that the I-200 warrants for arrest were not legal documents because Homan's notice stated that the I-200s were not legally required. *Id.* He said he considered the I-200s to be administrative documents. The appellant related that prior to 2017, only I-247s were sent and ICE took aliens into custody, and brought them to the office for interviews. *Id.* He said that prior to policy change, an I-200 was served on the detainee at the end of processing, and the I-200s were usually not signed by the supervisor. *Id.* The appellant reported that the process for completing an I-200 warrant has not changed since he started with the agency and that process was not changed by the new detainer policy. *Id.*

The appellant testified that in the past, Ober told him that once he became a journeyman level, the appellant would have the authority to sign I-200s. HCD. He said that prior to his promotion to the journeyman level, he was required to obtain Ober's signature on the I-200s. *Id.* The appellant related that Ober provided an electronically-signed I-200, but it did not have any instructions. [6] *Id.* The appellant stated that he had verbal and implied consent from Ober because the electronically-signed I-200, meant that Ober did not want to be bothered about signing I-200s. *Id.* The appellant explained that he did not want to use the electronically-signed form because it did not look professional. *Id.* He said he used the I-200 that was printed out with the forms and gave the document to a supervisor to sign. *Id.* The appellant asserted that it was Ober's responsibility to make sure that the appellant's paperwork was correct, and to give it back to the appellant if there were problems. *Id.*

The appellant denied that he forged anything; rather, he stated that he was doing solely what he was instructed to do. *Id.* He asserted that he did not have anything to gain by signing the I-200s and he never tried to conceal the fact that he signed the I-200s. *Id.* The appellant testified that he first learned that he could not sign I-200s on February 2018. *Id.* The appellant stated that, if the agency had notified him that he was not allowed to sign the I-200s, he would not have signed them. *Id.*

Based on the totality of the evidence before me, I find that the appellant's actions signing Ober's name to the identified I-200s constituted a lack of candor. I find that the appellant's testimony, that because he was a journeyman level DO he could sign the I-200s, and that no one ever told him he was not authorized to sign the I-200s, is not credible. Under the agency's regulations, the appellant did not have authority to sign the I-200s. *See* **8 C.F.R. § 287.5(e)(2)**. I find it inherently implausible that given the appellant's training and length of service the appellant could have believed that he had the authority to sign I-200s. Further, the testimony of the witnesses shows that the other DOs in the Little Rock office knew they did not have the authority to sign I-200s, and that the training provided to employees and the meeting held by Ober in 2017, notified employees that only SDDOs and employees at a higher level had authorization to sign the I-200s. I find the appellant's claims that the I-200s did not constitute a legal document, that Ober did not want to be 'bothered' with signing the I-200s, and that Ober 'instructed' him to sign the I-200s, are not supported by the evidence. Other employees testified that supervisors had the authority to sign the I-200s and when they sought and received authorization from a supervisor to sign the I-200s on the supervisor's behalf, the employees recorded their initials to show that they had signed the supervisor's name with permission. The appellant did not assert that he sought Ober's authorization to sign the I-200s at issue, and it is not apparent from the documents that the appellant signed them. Rather, a review of the warrant for

arrest would lead a reader to believe that Ober had reviewed and signed the warrants. I find that the appellant gave incorrect information on the I-200s when he signed Ober's name and he did so knowingly. *See Fargnoli*, 123 M.S.P.R. 330, ; 17. Accordingly, I find that the agency has proven specifications 1-5 by preponderant evidence.

In specification six, the agency alleged that the appellant lacked candor when he responded to questions about his interactions with ERA Andre Arevalos. The agency asserted that on May 23, 2017, as part of the management inquiry investigation, the appellant was questioned about events that transpired between him and Arevalos on October 7, 2016. Specifically, the agency contended that the appellant was asked whether he called Arevalos a 'snitch' or made a comment that the appellant did not have Arevalos' back. The agency asserted that the appellant denied making the comments, even though he knew that he had, in fact, made the comments. *Id.*

The appellant denied that he engaged in a lack of candor when answering questions about statements he made to Arevalos. IAF, Tab 1 at 6. He explained that when asked whether he had made such statements, he did not deny making the statements; rather, he responded that he did not remember making such statements. *Id.*

The investigative report reflects that the appellant told the investigator that he did not recall accusing Arevalos of reporting him to the JIC. IAF, Tab 11 at 71-72. The investigator's report also reflects that the appellant denied calling Arevalos a 'snitch' and that the appellant said he did not recall making a statement about not having Arevalos' back. *Id.* at 72.

Upon consideration of the record as a whole, I find that the appellant made the comments to Arevalos as set out in the specification. I also find, however, that the appellant told the investigator that he did not recall making the specific statements attributed to him in the specification. The investigator's report substantiates the appellant's claim that he informed the investigator that he could not recall exactly what he said during the October 7, 2016 incident. Under the circumstance, I find that the agency failed to establish that the appellant provided incorrect information by denying that he made the statements. Rather, the appellant said that he could not recall and his assertions are supported by the summary provided by the investigator. Specification six is not sustained.

I have sustained five of the six specifications under Charge one. Where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army,* 918 F.2d 170, 172 (Fed. Cir. 1990). Accordingly, the agency's charge of lack of candor is sustained.

The agency failed to prove that the appellant misused a GOV.

Under charge two, misuse of a GOV, the deciding official sustained only specification two:

SPECIFICATION 2: During an unspecified time period, you repeatedly drove your assigned GOV to obtain lunch during duty hours. These uses were without written authorization.

IAF, Tab 9 at 94.

The appellant asserted that every employee and supervisor at his office routinely used their GOVs to go to lunch and none of those employees had written authorization to use a GOV to go to lunch. IAF, Tab 1 at 6. The appellant contended that the agency subjected him to disparate treatment. *Id.*

In August 2017, the agency issued a document setting out the general rule for use of GOVs and answers to frequently asked questions about GOVs. That document provides, in relevant part:

General Rule: All ICE vehicles - whether owned, leased, or rented - are for 'Official Use' only. This means ICE vehicles can only be used when the use is mission-related or essential to the successful completion of the agency's function, activity, or operation. 'Official purposes' does *not* include transportation of an employee between his or her home and place of employment unless the employee has advance written home-to-work authorization. Vehicles may also be used on TDY for both official and a few limited personal purposes. Further, federal law provides that willful improper use of a government vehicle will result in the federal employee's suspension from duty without pay for at least a month, a longer period of time, or may be summarily removed from office.

IAF, Tab 18 at 18. The questions and answers included the following:

2. Can I use an ICE vehicle to go to lunch (or another meal)?

Maybe. As there is no formal policy on this issue, OPLA recommends that employees should not use a government-owned vehicle to pick up meals (e.g. lunch or dinner) en route from their homes to work or from work to their homes. Also, during the regular business day, the rules vary by location:

· Field. Generally, ICE employees conducting official duties inthe field can be authorized by their supervisors to stop for meals at eating establishments using an ICE vehicle. The intent is to allow ICE personnel who are working away from their duty locations for an extended period the opportunity to obtain meals. Similarly, ICE personnel located in a field office who do not have reasonable access to an eating establishment and who do not have access to a personal vehicle may use an ICE vehicle to obtain a meal within reasonably close proximity to the field office. However, employees may not stop at a private residence to eat and may not stop for personal shopping purposes.

Id. The agency's Fleet Management Handbook identifies impermissible uses. IAF, Tab 18 at 121. The handbook provides that when an employee is not on temporary duty, it is not permissible to use the GOV to obtain lunch or to commute to and from work without written justification and authorization. *Id.* It is undisputed that the appellant had authorization to use a GOV to go to and from work. At issue is whether the appellant's use of his GOV to go to lunch constituted misuse of the GOV.

Rivera, the deciding official, testified that he sustained only specification two of this charge. HCD. Rivera testified that the appellant was authorized to use a GOV to perform his duties. *Id.* Rivera confirmed that the appellant could use his GOV for non-duty tasks, such as picking up food and going to the gym for health improvement, but such use was limited to travel within a reasonable distance of the duty location. *Id.* Rivera opined that normally, an employee should discuss the allowable travel distance with his/her supervisor, normally within reasonable distance from location. *Id.* Rivera stated that the appellant had notice of the GOV requirements through the agency's Fleet Management Handbook. *Id.* He explained that he sustained specification two because the evidence showed the appellant misused his GOV to obtain lunch from an establishment that required a 26 mile trip. *Id.*

Ober testified that he has never given training on use of a GOV. HCD. He related that he believed that 5-10 miles is a reasonable distance to travel to obtain lunch, but he never told his subordinates what constituted a reasonable distance. *Id.* He reported that the nearest restaurant is approximately 5-6 miles away. *Id.* He said that he believed he had driven his GOV 5-10 miles to obtain lunch. *Id.* He confirmed that he had driven his GOV to the Tokyo House restaurant, but he did not know how far it is from the office. *Id.* Ober testified that he was not aware that the appellant was driving his GOV 13 miles one-way for lunch. *Id.*

Davis testified that he had a 'home to work' GOV vehicle. HCD. He said that he did not receive training on use of the GOV, and he was never told what constituted a reasonable distance to travel for lunch. *Id.* He related that it would depend on the office location and noted that there are limited options around the Little Rock office. *Id.* He reported that he believed a reasonable distance to travel for lunch in his GOV is 15 miles. *Id.*

Hellekson testified that he has 'home to work' authorization for a GOV, and he uses his GOV to go to lunch 3-4 times a week. HCD. He related that, prior to the appellant's removal, he was not told what constituted a reasonable distance to travel for lunch, but 5-10 miles was considered reasonable. *Id.* He stated that, recently, employees were advised that a reasonable distance to travel for lunch is a couple of miles. *Id.* He reported that there are not a lot of options for lunch around the office but no one is driving more than one to two miles for lunch anymore. *Id.*

Darrell Woods testified that he is the Assistant Field Office Director (AFOD) of Little Rock office. HCD. With regard to the use of a GOV to obtain lunch, Woods related that he has not set a specific distance for his employees because each office is situated in a different area. *Id.* He explained that a reasonable distance is determined by considering what a reasonable person looking at it from the outside what think is reasonable. *Id.* He stated that he assumed supervisors inform their subordinates of the agency's policy. *Id.* He reported that, recently, FOD Rivera issued a reminder to employees concerning use of GOVs. *Id.* He confirmed, however, that Rivera's message did not identify a specific distance that would be considered reasonable. *Id.* He said he believed that about 15-20 minutes would be reasonable time to travel and distance would be variable, but 15 miles might be a reasonable distance. *Id.*

Hoffman testified that she has had a 'home to work' GOV since she started work. HCD. She reported that she did not receive any training or instruction when got her GOV. *Id.* She related that some officers pack their lunches and some go out for lunch. *Id.* Further, she explained that if the officers are out working a case, they might stop for lunch. *Id.* She said that other officers take their GOVs for lunch and they inform their supervisors that they are going to lunch. *Id.* Hoffman stated that she considered 12-13 miles one-way to be a reasonable distance to travel to obtain lunch. *Id.* She explained that when she goes out to lunch, she generally goes to the Tokyo House restaurant that is 12 miles from the office and it takes about 15 minutes to get there. *Id.* Hoffman related that she was never told what distance or time was allowed; she was only told that it had to be reasonable. *Id.* She reported that she is also allowed to use her GOV to go to the gym on the way to work, after duty hours, or in middle of day. *Id.*

The appellant testified that he was authorized to use a GOV, but he did not receive any training concerning use of the GOV. HCD. He confirmed that he received a copy of the agency's 'Fleet Management Guide,' but stated that he is not familiar with it, and he never got instruction from a supervisor about use of GOV. *Id.*; *see* IAF, Tab 18 at 121. He said that there is no public transportation available near the office and the nearest restaurant is a McDonald's restaurant which is a few miles away. *Id.* The appellant related that he was never told what constituted a 'reasonable distance' to travel for lunch. *Id.* He stated that he used his GOV to obtain lunch; it was a common practice for employees in his office to use GOVs to go to lunch; and it was common for employees to go farther than 5-10 miles to obtain lunch. *Id.* The appellant reported that Ober used his GOV to go to the Tokyo House restaurant which is 12 miles from the office. *Id.* According to the appellant's testimony, he used his GOV to go to lunch at Zaxby's in Jacksonville, Arkansas. *Id.* He said that Zaxby's is 'right down the interstate,' and it took only 10-15 minutes to drive there. *Id.* He stated that he was never told that the distance or time was too great, that he needed to take less time or go less distance; or that he needed to stop going to lunch. *Id.* He explained that if he had been instructed to stop, he would have immediately complied. *Id.*

The appellant did not dispute that he used his GOV to travel for lunch, that he sometimes went to a restaurant that was approximately 13 miles away, and that he did not have written authorization to use his GOV to obtain lunch. The testimony of the witnesses established, however, that the agency did not provide training to employees to explain the limitations for use of the GOV to obtain lunch. The witness testimony and the agency's documentary evidence show that the agency permits use of GOVs to obtain lunch under some circumstances. The record reflects that the agency did not inform the employees in the Little Rock office what distance to obtain lunch was reasonable. Although the evidence shows that the appellant used his GOV to go to lunch and that he did not have written authorization, I find that the agency failed to establish that his actions constituted misuse of the GOV. It is undisputed that the agency's policy provides that 'ICE personnel located in a field office who do not have reasonable access to an eating establishment and who do not have access to a personal vehicle may use an ICE vehicle to obtain a meal within reasonably close proximity

to the field office.' Based on the evidence before me and in the absence of notice to employees of what constituted a reasonable distance, I find that the appellant's use was within the agency's established policy. Accordingly, the charge of misuse of the GOV is not sustained.

The agency established by preponderant evidence that the appellant engaged in conduct unbecoming.

The agency's final charge arose out of interactions between the appellant and ERA Andre Arevalos. To prove a charge of conduct unbecoming a federal employee, the agency is required to demonstrate that the appellant engaged in the underlying conduct alleged in support of the broad label. *See Scheffler v. Department of the Army*, 117 M.S.P.R. 499, ; 4 (2012); *Raco v. Social Security Administration*, 117 M.S.P.R. 1, ; 7 (2011). Under the charge of conduct unbecoming, the agency set out three specifications.

SPECIFICATION 1: On or around June I, 2016, you told Enforcement and Removal Agent (ERA) Arevalos 'don't touch me' and made a comment about ERA Arevalos spreading his diabetes to you.

IAF, Tab 9 at 95.

Arevalos testified that he is ERA in the Little Rock office. HCD. He said that he and the appellant had a good relationship until Arevalos witnessed the appellant using his credentials to get a meal. *Id.* He said that he lost respect for the appellant at that point. *Id.* Arevalos reported that an incident occurred at work when he was going down the stairs, and the appellant was sitting on the stairway. Arevalos said that he let the appellant know he was coming down the stairs, but the appellant did not move and Arevalos had to put his hand on the appellant's shoulder to steady himself. According to Arevalos' testimony, the appellant shrugged his shoulder and stated, 'Don't touch me,' and said he did not want to catch Arevalos' disability of diabetes. *Id.* Arevalos related that another person, Anel Barragan, overheard the comment and she told the appellant that it was uncalled for. *Id.* When the appellant stated that he was referring to something else, Barragan demanded that he apologize to Arevalos, but the appellant did not apologize. *Id.* Arevalos confirmed that he never told the appellant that he had diabetes, but he had told his supervisors. *Id.*

Hellekson testified that he was aware there were issues between the appellant and Arevalos. HCD. Hellekson related that he had seen Arevalos test his blood sugar at the office. *Id.* He said that he heard about the incident where Arevalos was going down the stairs and the appellant told Arevalos not to touch him and made a comment about Arevalos' diabetes. *Id.* Hellekson stated, however, that he never witnessed the appellant making any inappropriate comments toward Arevalos. *Id.*

Anel Barragan, a contract employee with the Little Rock office, was interviewed during the management inquiry. IAF, Tab 11 at 74. Barragan informed the investigator that in June 2016, she witnessed a verbal altercation involving Arevalos who was descending the stairs in the Little Rock office and the appellant who was sitting on a stair step in the stairway. *Id.* at 76. She explained that the appellant was sitting on the steps and talking to her. *Id.* Barragan stated she saw Arevalos descend the stairs and it looked like he might fall when he put out his hand and touched the appellant's shoulder in what appeared to be an attempt to stabilize himself. *Id.* She related that the appellant stated to ERA Arevalos, 'don't touch me, I don't want to catch your diabetes.' *Id.* Barragan said that she confronted the appellant because the appellant's statement was in a hostile tone of voice, and definitely not in a joking manner. *Id.*

The appellant testified that Arevalos started working in December 2015, and at first, they had a friendly relationship. HCD. The appellant said he was not aware that Arevalos has a disability or diabetes. *Id.* The appellant stated that Arevalos did not talk with him about any problems. *Id.* The appellant denied that he made any comments about Arevalos' diabetes or that he told Arevalos not to touch him. *Id.* Further, the appellant stated that he was never 'specifically' told that Arevalos has diabetes. *Id.* The appellant testified that his supervisor did not ask about the comments. *Id.* He stated that he believed Arevalos made baseless claims in order to get a transfer from the Little Rock office. *Id.* According to

the appellant's testimony, the employees in the office were split and Morales, Ober, Hellekson, and Arevalos went to lunch together. *Id.*

I find that the agency established by preponderant evidence that the appellant made the statements set out in this specification. I have considered the appellant's denial, but find that it is unpersuasive. Based on my observation of Arevalos during his testimony, I find Arevalos' testimony on this specification to be credible. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Arevalos testified in a straightforward and direct manner. His testimony was given without any equivocation or evidence of evasion. The appellant's testimony, on the other hand, appeared to be contrived. For example, the appellant asserted that he could not have made the statement because no one ever 'specifically' told him that Arevalos had diabetes. Even if the appellant was never 'specifically' told that Arevalos had diabetes, that fact would not preclude the appellant from making the statement. The appellant could have knowledge of Arevalos' medical condition from observation or overhearing comments or conversations. For example, Hellekson testified that he saw Arevalos test his blood sugar in the office. Moreover, it is undisputed that employees in the office knew Arevalos was a disabled veteran and thus the appellant was aware that Arevalos had a disabling condition. Arevalos' report of the exchange was corroborated by Barragan's statement to the investigator and the incident was known to other employees. Based on the evidence before me, I find that the agency established by preponderant evidence that the appellant made the statement as set out in this specification. Further, I find that the appellant's statement constituted conduct unbecoming.

Specifications two and three arose out of an October 7, 2016 incident involving the appellant and Arevalos. The agency alleged:

SPECIFICATION 2: On October 7, 2016, you struck ERA Arevalos with an office door.

SPECIFICATION 3: On October 7, 2016, you told ERA Arevalos, 'I will never have your back,' and you called ERA Arevalos a 'snitch.'

IAF, Tab 9 at 95.

Arevalos testified that on October 7, 2016, the appellant hit him with the door. HCD. He said that the building has a small entry area and a metal door that allows entry to the secure area. *Id.* He was outside in the entry area assisting another employee when the appellant came into the building. *Id.* Arevalos said that the appellant opened the door the full width and pinned Arevalos behind the door. *Id.* He reported that he asked the appellant if it was really necessary and the appellant replied that he had not hit Arevalos with the door. *Id.* According to Arevalos' testimony after an exchange, he and the appellant went to AFOD Woods' office and Morales walked into the office and asked whether the AFOD needed assistance. *Id.* Arevalos related that he and the appellant were both yelling, but they both sat down, and Morales shut the door and asked what was going on. *Id.* Arevalos testified that the appellant said that because Arevalos was not law enforcement, he would not have Arevalos' back and that before Arevalos came to the office, everything was perfect. *Id.* The appellant also stated that Arevalos 'JICd' him and Arevalos denied that he had reported the appellant to the JIC. *Id.*

Albert Morales testified that he was a DO in the Little Rock office and Ober was his supervisor. HCD. He reported that he worked with both the appellant and Arevalos and he witnessed the incident involving the appellant and Arevalos on October 7, 2016. *Id.*; *see* IAF, Tab 17 at 5. Morales related that he was sitting in his office when he heard loud voices. *Id.* He said that Arevalos accused the appellant of striking him and the appellant denied it, but the appellant then recanted and told Arevalo to 'get over it.' *Id.* Morales stated that he asked the appellant why he did it and the appellant replied that he was upset. *Id.* Morales testified that the appellant called Arevalos a 'snitch;' stated that Arevalos was not an officer; that he could not respect Arevalos as an officer; and that the appellant would never have Arevalos' back because Arevalos was not an officer. *Id.* He testified that, although he did not put it all in his memorandum for the record, he did put it in his affidavit and he stands by the statements he made in both. *Id.*

Hellekson testified that he was aware of the incident when the appellant may have hit Arevalos with the door. *Id.* Hellekson related that he was sitting around the corner from the door when he heard the commotion. *Id.* He said that Arevalos accused the appellant of hitting him with the door and the appellant denied it. *Id.* During the management investigation, Hellekson reported that in October 2016, he had a conversation with the appellant and during that conversation, the appellant stated that everything in the office had changed since Arevalos' arrival, and that Arevalos and Morales 'JICd' everyone. IAF, Tab 11 at 65.

Woods testified that Arevalos complained about the way the appellant was treating him and there were issues that had been addressed in the past. HCD. Woods related that on October 7, 2016, Arevalos, the appellant, and Morales came into his office. *Id.* He stated that Arevalos said that the appellant hit him with the door. According to Woods' testimony, the appellant and Arevalos were upset and they had a heated exchange. *Id.* Woods reported that the appellant said that he did not think he hit Arevalos; that he was not aware of doing so; and if he did hit Arevalos, he was sorry. *Id.* He confirmed that the appellant later complained that he tried to shake Arevalos' hand, but Arevalos refused. *Id.*

During the management investigation, Woods reported that during the discussion on October 7, 2016, Arevalos said the appellant did not respect him and the appellant replied that Arevalos was just an ERA and needed to do his job. IAF, Tab 11 at 68. Woods also related that the appellant told Arevalos that he would never have Arevalos' back. *Id.* Woods told the investigator that Morales left Woods' office, but Woods asked the appellant to remain in order to talk with him about his concerns. *Id.* at 69. Woods reported that the appellant said Arevalos was causing problems in the office and that everything was good before Arevalos arrived. *Id.* Woods stated that the appellant complained that Arevalos 'JIC's' everything and he referred to Arevalos as a snitch. *Id.* Woods related at the end of their conversation, the appellant said in a sarcastic manner that if he did hit Arevalos with the door, then he was sorry. *Id.*

Hoffman testified that there were issues between the appellant and Arevalos and there are issues between Arevalos and other people. HCD. She has never heard the appellant make any inappropriate comments to Arevalos. *Id.* Hoffman said that there was an office meeting in December 2016 where Arevalos told everyone that he is disabled veteran. *Id.* She said the appellant told her of the accusation that he hit Arevalos with door and she suggested that he ask management to review videotape of the area. [7] *Id.*

The appellant testified that one day as he was returning from lunch, Arevalos was standing at the door. HCD. The appellant related that after he walked through the door, Arevalos said, 'We are settling this right now.' *Id.* According to the appellant, they went to Woods' office and Morales followed them into the office. *Id.* The appellant reported that he did not recall making any comment about Arevalos being a 'snitch' or that he would never have Arevalos' back. *Id.* He stated that he was offended by Arevalos' demeanor, explaining that Arevalos came over to him and pointed his finger at the appellant. *Id.* The appellant testified that he did not know whether he hit Arevalos with the door, but he went to Arevalos the next day; told him that they needed to work together; and offered to shake hands, but Arevalos would not even shake hands. *Id.* The appellant asserted that Arevalos' claims were absurd and noted that Arevalos had problems with other agency employees. *Id.*

I find that the totality of the evidence before me establishes that the appellant hit Arevalos with the door as alleged in specification two, and that the appellant made the comments set out in specification three. Arevalos' testimony concerning the door hitting him was direct, candid, and credible. *Hillen*, 35 M.S.P.R. at 458-62. The appellant initially denied that he hit Arevalos when opening the door, but he then appeared to equivocate by saying that if he did hit Arevalos, he was sorry. There is nothing to establish that the appellant intended to hit Arevalos with the door and, under the circumstances, I find that such an inadvertent contact does not constituted conduct unbecoming. Specification two is not sustained.

With regard to specification three, however, I find that the appellant made the comments set out in the specification and that such comments constituted conduct unbecoming. Morales, Woods, and Arevalos credibly testified that the

appellant made the comments. The appellant did not deny making the comments, rather, he stated that he did not recall them. Arevalos testified that he interacts with individuals who are coming into the office, that there may be emotionally charged exchanges, and that it is important to know that if a situation develops that requires assistance, his co-workers, including the appellant, will provide assistance and support. The record shows that agency employees are required to report misconduct. The appellant's accusations that Arevalos was a 'snitch' or that Arevalos should not have reported misconduct to the JIC, were inappropriate. Moreover, such comments to a co-worker could have a chilling effect on the agency's ability to take proper action when employees engage in misconduct. Based on the evidence before me, I find that the appellant's comments constituted conduct unbecoming. Specification three is sustained.

I have sustained two of the three specifications under the charge of conduct unbecoming. Where more than one event or factual specification supports a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army,* 918 F.2d 170, 172 (Fed. Cir. 1990). Charge three is sustained.

The penalty is reasonable and promotes the efficiency of the service.

An adverse action, such as removal, may be taken by an agency only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). The Board has held that disciplinary action is warranted based on sustained charges of lack of candor, misuse of a government vehicle, and conduct unbecoming. *See* In assessing whether a particular penalty promotes the efficiency of the service, however, it must appear that the penalty takes reasonable account of all relevant mitigating factors in a particular case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 299 (1981).

The appellant contended that although Arevalos had problems with other agency employees and contractors, only the appellant was singled out for his interactions with Arevalos. IAF, Tab 1 at 6. The appellant asserted, 'This is clear disparate treatment.' *Id.*

Rivera, New Orleans FOD, testified that he was the deciding official in this case. HCD. He stated that in making his decision, he considered the proposal notice, the appellant's reply, the investigative file, and the *Douglas* factors. *Id.* He related that he sustained all the specifications under charges 1 and 4, and specification 2 of charge 3. Rivera stated that if the misuse and conduct unbecoming charges were the only charges that were sustained, he would have considered a penalty less than removal.

Rivera testified that the appellant admitted to forging Ober's name. HCD. He stated that the appellant did not have Ober's permission to sign the I-200s and the appellant bypassed the requisite review process. *Id.* Rivera noted that Ober denied providing consent to the appellant to sign the I-200 and Rivera believed Ober based on his experience with Ober. *Id.* Rivera said that he did not believe the appellant's claim that he thought he could sign the I-200 because the appellant had training on how to properly complete I-200s. *Id.* He said that in 2015, the appellant had single career track training that included the requirements for I-200s. *Id.* He said that such training was a requirement to allow an employee to move from a GS-9 to a GS-12 position. *Id.*

With regard to the *Douglas* factors, Rivera testified that the appellant's repeated signatures on the I-200s were serious violations of an alien's civil rights. HCD. River stated that it was serious misconduct, it circumvented the system and violated aliens' rights, it could affect public trust, it could have resulted in a criminal alien being released; and it could have subjected agency to lawsuits and the custodial agents being sued. *Id.* Rivera opined that the appellant's lack of judgment with regard to the other conduct also called into question his ability to perform in the GS-12 DO positon. *Id.* He reported that the appellant's lack of candor would preclude him from testifying under *Henthorn* and *Giglio*.[8] Rivera related that he considered the potential for rehabilitation, but noted that the appellant failed to take responsibility for his actions. *Id.* He said that he considered a lesser penalty but he did not think a demotion would be appropriate. He identified his *Douglas* factor analysis. *Id.*; *see* IAF, Tab 9 at 33-37.

I have sustained two of the agency's charges. When the Board does not sustain all of the agency's charges, the Board will carefully consider whether the sustained charges merit the penalty imposed by the agency. *See Boo v. Department of Homeland Security*, 122 M.S.P.R. 100, ; 17 (2014). In this appeal, there are some mitigating factors which include the appellant's length of service, the lack of prior discipline, and his good performance. I have also considered the appellant's claim that he was subjected to disparate treatment. Upon consideration, however, I find that the sustained charges are serious and militate against mitigating the penalty. Further, I find that the appellant failed to show that there were any agency employees who were charged with the same misconduct and whom the agency treated more favorably. I find that Rivera properly exercised his discretion in determining that removal is an appropriate penalty in this case. Accordingly, I find that the penalty of removal is not unreasonable. When the agency's selection of a penalty is not unreasonable, it must be accorded deference by the Board. *See Beard v. General Services Administration*, 801 F.2d 1318, 1322 (Fed. Cir. 1986).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD _____
Marie A. Malouf
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on November 27, 2018, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the 'Notice of Appeal Rights' section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled 'Notice of Appeal Rights,' which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the 'Notice to Appellant' section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within 60 calendar days of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals for the Federal Circuit 717 Madison Place, N.W. Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's 'Guide for Pro Se Petitioners and Appellants,' which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision-including a disposition of your discrimination claims-by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within 30 calendar days after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within 30 calendar days after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations Equal Employment Opportunity Commission P.O. Box 77960 Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations Equal Employment Opportunity
Commission 131 M Street, N.E. Suite 5SW12G Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and you wish to challenge the Board's rulings on your whistleblower claims only, excluding all other issues, then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals for the Federal Circuit 717 Madison Place, N.W. Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's 'Guide for Pro Se Petitioners and Appellants,' which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

Footnotes

1 The agency's proposal notice set out four charges. IAF, Tab 1 at 8-15. The deciding official only sustained three of the charges. Id. at 16.

2 Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.4(q).

3 An example of an I-200 is contained in the record. See IAF, Tab 18 at 21.

4 The I-247 is used to request the custodial agent to hold the alien for ICE. See Rivera's testimony, HCD.

5 The training material specifically identified 8 C.F.R. § 287 as the primary regulation setting out the grant of authority to deportation officers to carry out law enforcement duties. IAF, Tab 18 at 62. Further, the training noted that the authority to issue an administrative warrant of arrest is limited to employees who are SDDOs and employees at a higher level than an SDDO. Id. at 72; see **8 C.F.R. § 287.5(e)(2)**.

6 The appellant acknowledged that the agency established an SDDO roster so DOs could contact a supervisor for signatures. HCD. He said, however, that he assumed that the SDDO roster was only for those DOs who were not journeymen. Id.

7 Woods informed the management inquiry investigator that there was no video of the incident because no camera was in place to record the interior office front door. IAF, Tab 11 at 69.

8 During training, officers are notified that the United States Supreme Court's ruling in United States v. Giglio requires the government to disclose information that tends to impeach any government trial witness, including law enforcement officers. IAF, Tab 23 at 93-94. Officers were informed that such impeachment information is any information that contradicts a witness or which may tend to make the witness seem less believable. Id. Officers must tell the Assistant U.S. Attorney (AUSA) about potential Giglio information so AUSAs can decide what must be disclosed. Id. Such impeachment information includes a find of a lack of candor during an administrative inquiry. Id. The agency's training module informed trainees that Giglio material in an employee's file could lead to the loss of the employee's job because, if their testimony as a witness is subject to impeachment based on past misconduct, the employee cannot be an effective witness. Id.

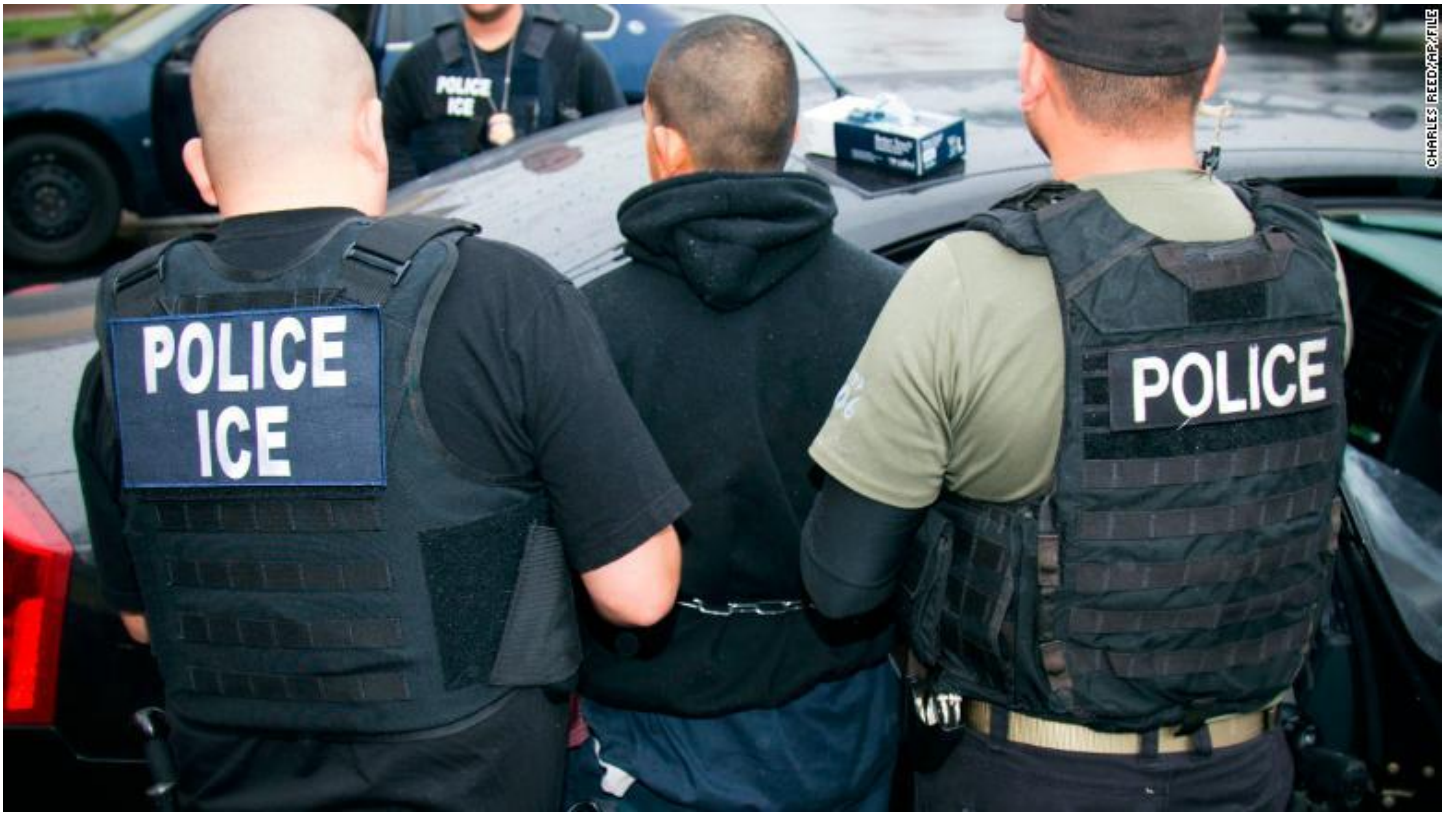
2018 WL 5389394 (PERSONNET)

End of Document

ICE supervisors sometimes skip required review of detention warrants, emails show

By Bob Ortega, CNN Investigates

Updated 7:03 AM ET, Wed March 13, 2019



(CNN) — Brent Oxley, an Immigration and Customs Enforcement deportation officer in Little Rock, Arkansas, was happy in his work, which he says "gave me the feeling that I was helping protect my country." A big part of his job: Look through rosters from local jails for people who might be deportable, ask for them to be held for ICE to pick up, then go get them.

But last May, ICE fired Oxley, for a variety of charges that included forging his supervisor's signature on arrest warrants for undocumented immigrants. Federal immigration law requires each warrant to be signed by an authorized supervisor. By signing them himself, an ICE administrator wrote to Oxley, he had exposed ICE to the possibility of "numerous unlawful detention lawsuits" over illegal arrests, had they not reissued the warrants.

Oxley challenged his termination, convinced he had not been alone in skipping the warrant-review process, which could be inconvenient when supervisors weren't in the office and the 48-hour time limit to release people was nearing its end. And he turned up evidence he was right.

Internal emails and other ICE documents he obtained through a Freedom of Information Act request, since reviewed by CNN, show that other officers across the five-state region where Oxley worked had improperly signed warrants on behalf of their supervisors -- especially on evenings or weekends. Some supervisors even gave their officers pre-signed blank warrants — in effect, illegally handing them the authority to begin the deportation process.

Unlike Oxley, who outright forged his supervisor's signature, the other officers generally signed for their supervisors after getting their permission via text or phone. But in such cases -- or when officers were given blank, pre-signed

Brent Oxley, who was fired from ICE in part for improperly signing detention warrants, at his graduation from the ICE Academy in Georgia, in January 2010.

Legally, the signature on a warrant attests that an authorized supervisor reviewed it and determined that there was probable cause to believe the person named was deportable. The Immigration and Naturalization Act doesn't offer the option of letting unauthorized officers sign for supervisors.

Two other ICE employees told CNN that they're aware of similar incidents of supervisors elsewhere in the country providing pre-signed blank warrants or telling officers to sign for them without full review, and that the practice is ongoing.

Lawyers and advocates interviewed by CNN expressed surprise about the improperly signed warrants, which could be used to challenge individual deportation orders at immigration hearings.

"If there's evidence of that, that's a big deal," said Jeremy McKinney, a member of the executive committee of the American Immigration Lawyers Association, whose members represent clients in deportations and immigration matters.

"That's the root of an illegal arrest."

More broadly, improperly signed warrants could become a point of contention in several ongoing lawsuits over ICE's practice of asking law enforcement to hold undocumented immigrants in detention up to 48 hours longer than they otherwise would. With each such request, called a detainer, ICE sends along a warrant.

"This is very relevant to those cases," said Lena Graber, staff attorney at the Immigrant Legal Resource Center, in San Francisco. "When we think about what a warrant is, it's based on preapproval from a neutral party determining that there are facts supporting an arrest. When there isn't even an administrative review, that's pretty egregious."

A new front in the battle over detainers

ICE's practice of asking law enforcement to hold immigrants -- some being released from jail or prison, some picked up by sheriffs or police without ever being charged with a crime -- has long been a source of concern for civil rights groups and city governments. Many jurisdictions have refused to comply with the requests, and immigrant-rights groups have sued the agency over the practice multiple times.

Two years ago, in an attempt to address those concerns and to conform with court rulings, ICE implemented a new rule that required that every detainer be accompanied by a warrant, and that authorized supervisors review and sign the warrants.

But the policy immediately came under fire from the ICE union. Supervisors weren't always around when warrants needed to be signed. According to National ICE Council President Chris Crane, who is also an ICE deportation officer, some supervisors handled that by telling officers to sign warrants themselves or by pre-signing blank warrants, which undermined the intent of requiring higher-level scrutiny. Officers were frustrated by other cases that hit the 48-hour limit to hold suspected undocumented immigrants, Crane said: "It took so long for supervisors to respond that the criminals were being released by jails before a warrant and detainer could be obtained."

Related Article: Massachusetts court: State officers cannot hold immigrants for

"We believe that hundreds if not thousands of violations of this policy have taken place," Crane told CNN. He believes the infractions are still happening across the country, far beyond the

documents.

One ICE deportation officer in the Northwestern United States, who asked not to be named because he wasn't authorized to speak for the agency, said his supervisors were not reviewing and signing individual warrants, called I-200s, as prescribed.

"I've had two supervisors since the memo came out. Both do it different ways, neither in the way that's outlined in the policy," the officer said. "My first supervisor would just sign the I-200s; he'd leave them blank and I would fill in the name later. My current supervisor tells us to sign his name for him." Most supervisors in that office do the same, he added.

"There's zero review," the officer said. "They trust me and everybody on my team. They don't review any of it. [The warrants] are only reviewed when [the detainees] are already in our custody and we place the files in front of them."

ICE spokesman Vincent Picard acknowledged that federal law requires a supervisor to review and sign each warrant. But despite examples to the contrary cited by CNN, he dismissed the notion that improper signing of the warrants is widespread.

Picard said that ICE leaders "are not aware of any widespread confusion or instances of improperly issued warrants." ICE deportation officers get training on the use of warrants during basic training, he said, and receive refreshers on the policy "as part of their professional development."

"We have no evidence beyond the ICE union's defense of a terminated employee that indicates ICE Deportation Officers are violating the law or associated policy," Picard wrote in an emailed response to CNN. "If the union is aware of other employees who have violated the law by forging supervisory signatures on warrants, they should immediately be reported to the ICE Office of Professional Responsibility."

Related Article: This year saw the most people in immigration detention since 2001

Picard also said that to deal with the scarcity of supervisors on nights and weekends, "ICE Field Offices instituted a number of solutions, all of which have been deemed legally sufficient." He declined to share with CNN any written legal guidance for ICE agents on those solutions.

"Providing flexibility to officers in the field, such as getting verbal authorization from a supervisor to file a warrant, is legally sufficient in the same way that a magistrate can verbally approve a criminal warrant," he added.

Out of 14 immigration attorneys across the country contacted by CNN, none was previously aware of ICE supervisors asking officers to sign warrants for them or providing pre-signed blank warrants. All 14 said they believed such practices may make the warrants invalid.

'You can sign for me'

The emails and documents that Oxley uncovered from the New Orleans office region show how officers and supervisors were struggling with the policy -- and sometimes skirting the law as a result.

On June 18 of last year, an ICE removals supervisor in Mobile, Alabama, emailed a higher-up asking how to handle the issue of the warrants, which the agency calls I-200s. His office was seeing supervisors "be on leave when assigned duty, not have capability of signing 200's, or just not doing it until days later or at all over the weekend until Monday morning. Obviously, that has led to verbal approvals to 'sign for me 200's,'" he wrote. He cited an email that day from one of his officers, saying, "FYI, I didn't get back a signed 200 all weekend due to the duty [supervisor] not able to send me one back. Verbal approvals via text."

After Oxley was terminated in May 2018, union Executive Vice President LeAnn Mezzacapo warned the head of the New Orleans field office that she was hearing of a "panic in the field with other officers (and supervisors) who have been doing the exact things he was fired for."

"I understand you are aware of the extent of the problems now, so maybe we can have a candid call about how to fix the problems," Mezzacapo wrote.

In fact, Oxley went further than colleagues who got supervisors' signoff permission via text or phone call. "Pretty much ... from the get-go, from when the policy came out," he told CNN, he put his supervisor's signature on warrants directly himself, rather than wait for his supervisor to sign them.

Related Article: Exclusive: Senators ask DHS to crack down on alleged coerced labor in immigrant detention centers

"You look every day to see who's locked up in the jails -- it's racial profiling, really. You're looking for odd names: a Carlos Lopez, not a John Smith," Oxley said. "We were putting detainers on every illegal alien coming across the radar."

He said that when he started signing the warrants himself, "I just did that, figuring it was permissible." But he conceded that his supervisor was right in saying it wasn't. Oxley's termination letter cited five instances of him forging his supervisor's signature on warrants, but Oxley said those were not the only instances.

Still, he said, the emails he obtained showed him he was not the only one signing improperly on a supervisor's behalf. "I found out that people all throughout the field office had been doing it, and that on the record, the warrants were legally insufficient," he said.

In a ruling for a government board that upheld Oxley's termination, Administrative Judge Marie Malouf confirmed there were examples of supervisors giving officers pre-signed warrants, leaving the detainer decision in their hands. She wrote that Oxley's supervisor testified that he "provided an electronically signed I-200 to the DOs [deportation officers] under his supervision. He explained that he provided the electronically signed I-200 to use in the event he was not available to sign it," with the understanding that officers would contact him for approval before using them. Another officer, however, testified that she was given no guidance on checking with supervisors before using pre-signed I-200s.

All the same, Malouf upheld Oxley's termination -- in part because she said that, unlike other agents, he hadn't gotten permission from his supervisor before signing the warrants.

Oxley now works as a schoolteacher in South Carolina. He is pursuing an Equal Employment Opportunity Commission complaint, seeking reinstatement.

Crane, at the National ICE Council, said he is considering sending a complaint to Homeland Security's Office of Inspector General that unauthorized officers are continuing to sign warrants. "ICE is flat-out lying about this," he said.

The improperly signed warrants mean that some undocumented immigrants may already have been deported without ever knowing there could be a legal problem with their detention. But Graber, at the Immigrant Legal Resource Center, said the internal emails may not provide enough information to dispute specific warrants from the past. "It looks pretty uphill to do anything, since the names are redacted," she said. "The likelihood that all the pieces fit together to find the person and file the motions for that to happen seems very low."

them -- and their efforts may expose whether the problem has, as Crane said, extended nationwide. "To the extent there are cases, and there are quite a number, that are challenging detainer practices," said Jennie Pasquarella, senior staff attorney for the ACLU of Southern California, "this is going to be explored in discovery."

Do you have information to share about the use of ICE warrants? Email this reporter at Bob.Ortega@turner.com.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Policy Number 10074.2: **Issuance of Immigration Detainers by ICE Immigration Officers**

Issue Date: March 24, 2017
Effective Date: April 2, 2017
Superseded: Interim Policy No. 10074.1: *Detainers* (Aug. 2, 2010)
Federal Enterprise Architecture Number: 306-112-002b

1. **Purpose/Background.** This Directive establishes U.S. Immigration and Customs Enforcement (ICE) policy and procedures regarding the issuance of civil immigration detainers to federal, state, local, and tribal law enforcement agencies (LEAs). ICE issues detainers to federal, state, local, and tribal LEAs to provide notice of its intent to assume custody of a removable alien detained in federal, state, local, or tribal custody. The Department of Homeland Security's (Department or DHS) detainer authority, codified in section 287.7 of title 8 of the Code of Federal Regulations (C.F.R.), arises from the Secretary of Homeland Security's power under section 103(a)(3) of the Immigration and Nationality Act (INA) to provide regulations "necessary to carry out his authority," and from ICE's general authority to arrest and detain aliens subject to removal or removal proceedings, pursuant to sections 236, 241, and 287 of the INA. The use of immigration detainers, however, long pre-dates any reference to detainers in the statute or regulations.[1] In fact, the former Immigration and Naturalization Service first used the Form I-247 as early as 1952.

   Detainers enable ICE to judiciously deploy its investigative, detention, and removal resources consistent with the immigration enforcement priorities of the Department and the executive branch of the U.S. Government. Detainers also allow ICE immigration officers to avoid the risks to public safety and officer safety associated with arrests outside the custodial environment.

2. **Policy.** It is ICE policy to ensure that ICE immigration officers exercise detainer authority in a manner consistent with all legal requirements and in a manner that ensures ICE's LEA partners may honor detainers.

2.1. The consolidated detainer form, Form I-247A (Immigration Detainer – Notice of Action), attached to this Directive shall be used as of the effective date of this Directive. Form I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request

[1] *See, e.g.*, *Chung Young Chew v. Boyd*, 309 F.2d 857 (9th Cir. 1962); *Rinaldi v. United States*, 484 F. Supp. 916 (S.D.N.Y. 1977); *Slavik v. Miller*, 89 F. Supp. 575 (W.D. Pa. 1950), *aff'd*, 184 F.2d 575 (3d Cir. 1950), *cert. denied*, 340 U.S. 955 (1951); *Matter of Lehder*, 15 I&N Dec. 159 (BIA 1975).

for Voluntary Notification of Release of Suspected Priority Alien), and Form I-247X (Request for Voluntary Transfer), may no longer be issued. Detainers issued on prior versions of the detainer form remain active and need not be replaced with a Form I-247A. *See* Attachment 8.4 for guidance on how to complete the Form I-274A.

2.2. Only ICE immigration officers, including designated officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA, may issue immigration detainers.

2.3. Regardless of whether a federal, state, local, or tribal LEA regularly cooperates with DHS immigration detainers, ICE immigration officers shall issue a detainer to the LEA for an alien in the LEA's custody after the alien is arrested for a criminal offense and the officer has probable cause to believe that the subject is an alien who is removable from the United States.

2.4. ICE immigration officers must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer with a federal, state, local, or tribal LEA. Further, as a matter of policy, all detainers issued by ICE must be accompanied by either: (1) a properly completed Form I-200 (Warrant for Arrest of Alien) signed by an authorized ICE immigration officer; or (2) a properly completed Form I-205 (Warrant of Removal/Deportation) signed by an authorized ICE immigration officer.[2]

2.5. Except for circumstances in which the alien is detained in ICE custody at the time the detainer is issued, an ICE immigration officer shall not issue an immigration detainer to an LEA unless the LEA has arrested the alien for a criminal offense in an exercise of the LEA's independent arrest authority.[3] ICE Immigration officers shall not issue an immigration detainer for an alien who has been temporarily detained or stopped, but not arrested, by another LEA. This does not preclude the LEA from temporarily detaining an alien while an ICE immigration officer responds to the scene.

2.6. An ICE immigration officer may not issue a detainer based upon the initiation of an investigation to determine whether the subject is a removable alien. An ICE immigration officer may not establish probable cause of alienage and removability, for purposes of detainer issuance, solely based on evidence of foreign birth and the absence of records in available databases ("foreign-born-no match").

---

[2] Although ICE maintains that this is not legally required, ICE is implementing this warrant measure as a nationwide policy in light of one district court's ruling that detention pursuant to an ICE detainer constitutes a warrantless arrest and that section 287(a)(2) of the INA only authorizes a warrantless arrest if there is reason to believe the alien will escape before an arrest warrant can be secured. *See Moreno v. Napolitano*, --- F. Supp. 3d ---, 2016 WL 5720465, at *8 (N.D. Ill. Sept. 30, 2016).

[3] Box 2 on Form I-247A (Immigration Detainer – Notice of Action) is used by ICE to ensure that an alien detained in ICE's custody is returned to ICE custody after being transferred to another LEA for a proceeding or investigation. Such detainers may be issued prior to the other LEA assuming custody of the subject of the detainer.

2.7. ICE immigration officers must promptly assume custody of an alien who is the subject of an immigration detainer. Further, ICE immigration officers should assume custody of an alien subject as soon as practicable, and as close as possible to the time at which the alien would otherwise have been released by the relevant LEA, but in no circumstances more than 48 hours after such time. If it becomes apparent that ICE cannot assume custody of the alien within 48 hours of when he or she would otherwise be released, the ICE immigration officer should immediately cancel the detainer.

2.8. In some cases, after issuing an immigration detainer for an individual in the custody of a federal, state, local, or tribal LEA, ICE may determine that it will not assume custody of the subject. In these cases, the ICE immigration officer must cancel the immigration detainer as soon as such determination is made.

2.9. As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a U.S. citizen.[4]

3. Definitions. The following definitions apply only for purposes of this directive.

3.1. Detainer. A notice that ICE issues to a federal, state, local, or tribal LEA to inform the LEA that ICE intends to assume custody of a removable alien in the LEA's custody.

3.2. ICE Immigration Officer. The term "ICE immigration officer" means Enforcement and Removal Operations (ERO) deportation officers and Homeland Security Investigations (HSI) special agents, including supervisory and managerial personnel who are responsible for supervising authorized immigration officers, as well as designated officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA. *See* 8 C.F.R. § 287.7(b).

3.3. Probable Cause. The facts and circumstances within the officer's knowledge and of which they have reasonably trustworthy information that are sufficient in themselves to warrant a person of reasonable caution in the belief that an individual is a removable alien.

4. Responsibilities.

4.1. All ICE employees are responsible for complying with the policy and procedures set forth in this Directive.

4.2. ICE immigration officers, including designated immigration officers of a state or political subdivision of a state authorized to perform certain immigration officer functions under section 287(g) of the INA, are responsible for issuing and executing

[4] ICE immigration officers must comply with requirements of ICE Policy No. 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015), when issuing detainers. In particular, footnote 1 of that policy specifically applies to prior versions of the detainer "and/or any successor form serving the same or substantially similar" purpose.

immigration detainers in accordance with the policy and procedures set forth in this Directive.

4.3. **ICE ERO Assistant Directors, Deputy Assistant Directors, Field Office Directors (FODs), and the Directors of the National Criminal Analysis and Targeting Center, the Pacific Enforcement Response Center, and the Law Enforcement Support Center,** and their designees, as well as the **ICE HSI Assistant Director for Domestic Operations** and **ICE HSI Special Agents in Charge (SACs)** and their designees, are responsible for disseminating and ensuring compliance with this Directive.

5. **Procedures.**

5.1. **Establishing Probable Cause.**

As a matter of policy, a detainer must be supported by probable cause based upon one of the following four categories of information:

1) A final order of removal against the alien;

2) The pendency of ongoing removal proceedings against the alien, including cases in which DHS has issued a charging document and served the charging document on the alien;

3) Biometric confirmation of the alien's identity and a records match in federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks lawful immigration status or, notwithstanding such status, is removable under U.S. immigration law; and/or

4) Statements made voluntarily by the alien to an ICE immigration officer and/or other reliable evidence that indicate the alien either lacks lawful immigration status or, notwithstanding such status, is removable under U.S. immigration law.

An ICE immigration officer may not issue a detainer prior to establishing probable cause to believe that the subject is a removable alien. Further, an ICE immigration officer may not issue a detainer based upon the initiation of an investigation to determine whether the subject is a removable alien. The pendency of ongoing removal proceedings refers to cases in which DHS has issued a charging document and served the charging document on the alien. As a matter of policy, an ICE immigration officer may not establish probable cause of alienage and removability, for purposes of detainer issuance, solely based on evidence of foreign birth and the absence of records in available databases ("foreign-born-no match").

5.2. **Issuing an Immigration Detainer and Administrative Warrant.** All immigration detainers (Form I-247A Immigration Detainer – Notice of Action) must be accompanied by either Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation).

1) If the subject of the detainer is a removable alien who is not yet subject to a final order of removal, the ICE immigration officer who issues the detainer shall attach a Form I-200 (Warrant for Arrest of Alien) to the detainer.

   a. The Form I-200 shall be issued by any of the supervisory immigration officials listed at 8 C.F.R. § 287.5(e)(2).

2) If the subject of the detainer is also the subject of a final order of removal, including where the alien is subject to reinstatement of removal under section 241(a)(5) of the INA, the ICE immigration officer who issues the detainer shall attach a Form I-205 (Warrant of Removal/Deportation) to the immigration detainer.

   a. The Form I-205 shall be issued by any of the supervisory immigration officials listed in 8 C.F.R. § 241.2(a)(1).

5.3. Declined Immigration Detainers. When ICE becomes aware that an LEA failed to honor an immigration detainer issued by ICE, the ICE immigration officer shall document the declined detainer in the ENFORCE Alien Removal Module (EARM) through the use of the detainer lift code of "A – Declined by LEA."

5.4. Cancelling an Immigration Detainer. If after issuing an immigration detainer ICE determines that it will not assume custody of the subject, the ICE immigration officer must cancel the immigration detainer.

1) Form I-247A shall be issued to the relevant LEA requesting cancellation of the detainer; and

2) All cancelled detainers shall be documented in EARM through the use of the detainer lift code of "L - Lifted", or using another case-specific lift code requiring the cancellation of the detainer (e.g. "D – Died", "N – Alien not subject to deportation").

6. Recordkeeping. ICE maintains records generated pursuant to this policy, specifically Forms I-247A (Immigration Detainer-Notice of Action), Forms I-200 (Warrant for Arrest of Alien) and Forms I-205 (Warrant of Removal/Deportation) in the Alien File.

7. Authorities/References.

7.1. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, as amended (codified at 8 U.S.C. §§ 1101 *et seq.*).

7.2. 8 C.F.R. §§ 236.1, 241.2, 287.3, 287.5, 287.7.

7.3. *Moreno v. Napolitano*, --- F. Supp. 3d ---, 2016 WL 5720465 (N.D. Ill. Sept. 30, 2016).

7.4. Executive Order 13768, *Enhancing Public Safety in the Interior of the United States* (Jan. 25, 2017).

7.5. Memorandum from DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017).

7.6. ICE Policy No. 16001.2, *Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE* (Nov. 10, 2015).

7.7. ICE Policy No. 13001.1, *State Personnel Designated to Act as Immigration Officers for Immigration Enforcement Purposes* (Dec. 4, 2008).

8. Attachments.

8.1. Form I-247A (Immigration Detainer – Notice of Action).

8.2. Form I-200 (Warrant for Arrest of Alien).

8.3. Form I-205 (Warrant of Removal/Deportation).

8.4. ICE Guidance For Completing the Form I-247A.

9. No Private Right Statement. This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity by any party in any criminal, civil, or administrative matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

HABEAS CORPUS

Jessica Smith, UNC School of Government (Mar. 2014)

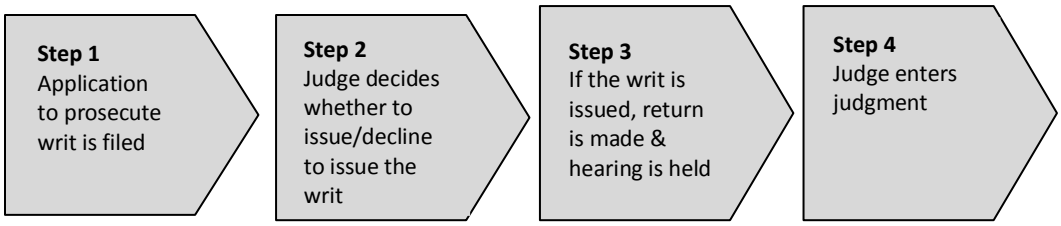
Contents

I. Generally 1
II. The Application for The Writ 2
A. Who May Apply 2
B. Appropriate Court 2
C. Form 2
D. Court May Act Sua Sponte 2
III. Assessing The Application 3
A. When The Application Must Be Denied 3
B. Court's Order 3
IV. Issuing The Writ 3
A. Time for Granting The Application and Penalties 3
B. Form of The Writ 4
C. Service of Writ 4
V. Return and Production of Party 4
A. Return 4
B. Production of Person Detained 4
C. Failure to Obey and "Conniving" 4
VI. Proceedings after Return 4
A. Additional Notice 4
B. Hearing 5
C. Judgment 5
D. Alternative Proceedings 7
VII. Appeal 7
VIII. Capital Cases 7
Appendix A: Sample Writ 8
Appendix B: Sample Judgment Denying Relief 9
Appendix C: Sample Judgment Granting Relief 10

I. Generally. Habeas corpus is a procedure by which a person may challenge an imprisonment or a restraint on his or her liberty "for any criminal or supposed criminal matter, or on any pretense whatsoever." G.S. 17-3; N.C. CONST. art. I § 21. One example of a scenario when habeas might be appropriate is when a person has been taken into and has remained in police custody for weeks without being charged with a crime. As discussed below, habeas is not the proper procedure for challenging a detention pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction. It is not a substitute for an appeal, Matter of Imprisonment of Stevens, 28 N.C. App. 471, 473 (1976), or a proper procedure for deciding an issue that is properly presented to the jury in a pending criminal case. State v. Chapman, __ N.C. App. __, 747 S.E.2d 114, 116-17 (2013) (the trial court exceeded its authority by dismissing capital murder charges against a defendant who was being held without bond on grounds that twins who were in utero at the time of the mother's shooting were not born alive and thus could not have been murdered; the question of whether the twins were born alive should be decided by the jury in the pending murder case, not by a judge in a pre-trial habeas proceeding).

The basic steps involved in the habeas process are illustrated in Figure 1 below, and are discussed in the sections that follow.

Figure 1. Steps in The Habeas Process



II. The Application for The Writ

A. Who May Apply. An application to prosecute a writ of habeas corpus may be made by the person imprisoned or restrained ("the party") or by "any person in his behalf." G.S. 17-5.

B. Appropriate Court. An application may be made to any justice or judge in the appellate division or to any superior court judge, "either during a session or in vacation." G.S. 17-6. For the special rules that apply in capital cases, see section VIII, below.

C. Form. The application must be in writing and signed by the applicant. G.S. 17-6. The facts set forth in the application must be verified under oath. G.S. 17-7. According to G.S. 17-7, the application must:

- Name the party imprisoned or restrained;
- State that the party is imprisoned or restrained of his or her liberty;
- Name the place where the party is imprisoned or restrained;
- Name the officer or person who has imprisoned or restrained the party ("the custodian");
- Describe the party and/or custodian if their names are unknown;
- State the "cause or pretense" of the imprisonment or restraint;
- Attach a copy of any applicable warrant or process, state that a copy was demanded and refused, or provide a "sufficient reason" why a demand for a copy could not be made;
- State why the imprisonment or restraint is illegal; and
- State that, to the applicant's knowledge, the legality of the imprisonment or restraint has not already been determined by writ of habeas corpus.

The court of appeals has noted that G.S. 17-7 "clearly places the burden on the applicant to make an evidentiary forecast establishing that he or she is entitled to habeas corpus relief." State v. Leach, __ N.C. App. __, 742 S.E.2d 608, 616 (2013) (the defendant failed to make the required showing).

D. Court May Act Sua Sponte. If the appellate or superior court division, or any judge of either division, "has evidence from [a] judicial proceeding before [the]

court or judge that any person . . . is illegally imprisoned or restrained of his [or her] liberty," the court or judge has a duty to issue a writ of habeas corpus, even if no application is made. G.S. 17-8.

III. Assessing The Application. When assessing the application for the writ, the trial court must make two inquiries:

- whether the application is in proper form and
- whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged.

State v. Leach, __ N.C. App. __, 742 S.E.2d 608, 613 (2013). "In making this determination, the trial court is simply required to examine the face of the . . . application, including any supporting documentation, and decide whether the necessary preliminary showing has been made." *Id.* The form of the application is discussed in section II.C above.

A. When The Application Must Be Denied. G.S. 17-4 provides that an application must be denied in the following circumstances:

- When the party is committed or detained pursuant to process issued by a U.S. court or judge, in cases in which such courts or judges have exclusive jurisdiction;
- When the party is committed or detained by virtue of a final order, judgment, or decree of a competent tribunal, or by virtue of an execution issued upon such final order, judgment or decree, *see* State v. Barrier, 348 S.E.2d 345 (N.C. 1986) (mem. order denying an application to prosecute a writ where "the petitioner is seeking to test his commitment by virtue of a judgment of a competent tribunal of criminal jurisdiction"); or
- When no probable ground for relief is shown in the application.

The statute also provides that the writ shall be denied when a party has willfully neglected, for two whole sessions after imprisonment, to apply for the writ to the superior court of the county in which he or she is imprisoned and that person is not entitled to habeas corpus in vacation. G.S. 17-4. Presumably, such a person may secure relief if a proper application is made in session.

B. Court's Order. The court may rule on the application summarily; it need not make findings of fact or conclusions of law. *Leach*, __ N.C. App. at __, 742 S.E.2d at 613 (reasoning that the question at this point is a legal one, not a factual one). The procedure for issuing the writ is discussed in section IV below.

IV. Issuing The Writ. The writ refers to the judge's order requiring the custodian to respond to the petition and produce the party in court. The writ does not release the party from imprisonment or restraint; if appropriate, that is done by the judgment, discussed below.

A. Time for Granting The Application and Penalties. When an application is properly presented, the writ must be granted without delay. G.S. 17-9. If a judge refuses to grant a writ, "such judge shall forfeit . . . [$2,500]." G.S. 17-10.

B. Form of The Writ

1. **Sample Writ.** A sample writ is provided in Appendix A.
2. **Defects.** A writ may not be disobeyed on grounds of defect in form. G.S. 17-11.
3. **Naming Custodian and Party.** The writ is sufficient if it names the custodian by the name of his or her office or by natural name. G.S. 17-11. If those names are unknown, the custodian may be "described by an assumed appellation." *Id.* The writ is sufficient as long as the party is designated by name. *Id.* If the party's name is uncertain or unknown, the party may be described "by an assumed appellation or in any other way, so as to designate the person intended." *Id.*
4. **Setting Time for Return.** Return of the writ refers to the custodian's response and production of the party before the court. The judge may set the time for return for a specific date or immediately, "as the case may require." G.S. 17-13. For the special rules about the return that apply in capital cases, see section VIII, below.

C. Service of Writ. G.S. 17-12 sets out the requirements for service of the writ. Typically service is done by a Sheriff or Deputy Sheriff.

V. Return and Production of Party

A. Return

1. **Form.** The custodian must make a return in writing. G.S. 17-14. Except when that person is a sworn public officer acting in an official capacity, the return must be verified by oath. *Id.*
2. **Contents.** G.S. 17-14 provides that the return must state:

   - Whether the person has the party in or her custody or under his or her power or restraint;
   - If so, the authority for the imprisonment or restraint;
   - If the party is detained by virtue of a writ, warrant, or other written authority, a copy of that document must be attached to the return and the original must be produced in court;
   - If the person on whom the writ is served had custody of the party but has transferred custody to someone else, the return must state to whom, when, for what cause, and by what authority the transfer occurred.

B. Production of Person Detained. If required by the writ, the custodian must produce the party in his or her custody, except in the event of sickness. G.S. 17-15. In cases of sickness, the judge can proceed in the party's absence. G.S. 17-37.

C. Failure to Obey and "Conniving". The statute has provisions for dealing with the custodian's refusal to obey the writ, a judge's conniving at an insufficient return, for the making of false returns, and other disobedience to the writ. G.S. 17-16 through 17-28.

VI. Proceedings after Return

A. Additional Notice

1. **To Interested Parties.** If the return indicates that someone else has an interest in continuing the party's imprisonment or restraint, no discharge order can be made until reasonable notice of the proceeding is given to that person or that person's lawyer. G.S. 17-29.
2. **To District Attorney.** If the return indicates that the party is detained because of a criminal accusation, the court can require notice to the district attorney of the district in which the party is detained. G.S. 17-30.

B. Hearing

1. **Summary Proceeding.** Once the party is brought before the judge, the judge "shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice appertains in delivering, bailing or remanding such party." G.S. 17-32. The summary nature of the proceedings "reflects the fact that their principal object is a release of a party from illegal restraint and that such proceedings would lose many of their most beneficial results if they were not summary and prompt." State v. Leach, __ N.C. App. __, 742 S.E.2d 608, 612 (2013) (quotation omitted). However, the proceedings "should not be perfunctory and merely formal." *Id.* (quotation omitted).
2. **Relevant Determination.** The "sole question for determination" at the hearing "is whether petitioner is then being unlawfully restrained of his liberty." State v. Chapman, __ N.C. App. __, 747 S.E.2d 114, 116 (quotation omitted); *see also Leach,* __ N.C. App. at __, 742 S.E.2d at 612.
3. **Counsel.** An indigent is entitled to counsel at a habeas hearing. G.S. 7A-451(a)(2).
4. **Evidence.** At the hearing, relevant facts "may be established by evidence like any other disputed fact." *Leach*, __ N.C. App. at __, 742 S.E.2d at 612 (quotation omitted). The statute provides that any party may procure the attendance of witnesses at the hearing by subpoena. G.S. 17-31.

C. Judgment. After the hearing, the court has several options to implement its legal determination as to whether the defendant has been unlawfully restrained. They include:

- discharging the defendant
- modifying the defendant's custody, or
- remanding the defendant to custody.

Each of these options is discussed in the sections that follow.

1. **Discharge.** G.S. 17-33 provides that the court must discharge the defendant in certain circumstances, illustrated in Figure 2 below.

Figure 2. When the Defendant Must Be Discharged.

Statutory Basis	Notes
No cause shown for imprisonment or restraint	For example, (1) when the defendant has been held in jail for ten days and no charges have been filed; or (2) when the defendant is imprisoned on a judgment finding him or her in contempt of court but the issuing court had no jurisdiction to render judgment. *Cf.* In re Palmer, 265 N.C. 485, 486, 144 S.E.2d 413, 415 (1965) (question at a habeas hearing challenging imprisonment for contempt "is whether, on the record, the court which imposed the sentence had jurisdiction and acted within its lawful authority").
Process has been issued but the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person	For example, the defendant has been charged with a crime that did not occur in North Carolina.
Process has been issued and although the original imprisonment was lawful, some act, omission or event, has occurred entitling the party to be discharged	For example, an allegation the person has recovered from a mental disease after commitment. In re Harris, 241 N.C. 179, 181, 84 S.E.2d 808, 809 (1954) (suggesting that habeas is the proper avenue for asserting such a claim). Relief is not available under this provision in connection with a prisoner's "challenge to an administrative decision, such as the denial of parole or the rescission of a [Mutual Agreement Parole Program (MAPP)] contract, unless the inmate has exhausted any available administrative remedies and unless some clear constitutional violation has occurred." State v. Leach, __ N.C. App. __, 742 S.E.2d 608, 615-16 (2013) (citing similar cases).
Process has been issued but it is defective in some manner, rendering it void	
Process has been issued in a proper form but it is not allowed by law	For example, an arrest warrant was issued for an infraction. G.S.15A-304.
Process has been issued but the person having the custody of the party under such process is not the person empowered by law to detain the party	
Process has been issued but it is not authorized by any judgment, order or decree of any court or by any provision of law	

Source: G.S. 17-33.

2. **Custody Modification.** If the party has been legally committed but the commitment is irregular, the judge can correct the irregularity e.g., by setting bail or committing the party to the proper custodian. G.S. 17-35.
3. **Remand to Custody.** Pursuant to G.S. 17-34, the judge must remand the party if it appears that he or she is detained:

   - By virtue of process issued by any U.S. court or judge, in a case where such court or judge has exclusive jurisdiction;
   - By virtue of the final judgment or decree of any competent court, or of any execution issued upon such judgment or decree;

- For any contempt specially and plainly charged in the commitment by some court, officer, or body having authority to commit for the contempt; or
- That the time during which the party may be legally detained has not expired.

4. **Costs.** G.S. 6-21 provides that costs in habeas proceedings "shall be taxed against either party, or apportioned among the parties, in the discretion of the court."

5. **Sample Judgment.** Sample judgments are provided in Appendices B and C.

D. **Alternative Proceedings.** Occasionally, a petition for habeas corpus will raise a valid issue but the issue is not one that warrants relief through habeas. For example, the party might correctly argue that he or she is entitled to be discharged from imprisonment because the judge incorrectly calculated the prior record level. In these circumstances, the judge has a few options. One is to exercise the authority granted in G.S. 15A-1420(d), allowing a judge to order relief on his or her own motion for appropriate relief. Another option is to appoint counsel to file a motion for appropriate relief raising the issue identified and all other relevant issues. It would be inadvisable to "convert" the party's habeas petition into a motion for appropriate relief, as that may inadvertently result in procedural default of other meritorious claims. Finally, for capital cases, see section VIII, below.

VII. **Appeal.** Appellate review of a trial court's judgment on a writ of habeas corpus is by writ of certiorari. State v. Niccum, 293 N.C. 276, 278, 238 S.E.2d 141, 143 (1977). The decision whether to summarily deny the application or issue the writ is reviewed de novo. State v. Leach, __ N.C. App. __, 742 S.E.2d 608 613 (2013).

VIII. **Capital Cases.** If the application for a writ of habeas corpus is in a capital case, Rule 25 of the General Rules of Practice for the Superior and District Courts applies. In short, Section (5) of that rule requires that in capital cases, meritorious challenges must be presented to the senior resident superior court judge or his or her designee. Specifically, the rule states that if the application "raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted," the judge must make it "returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee." *Id*. Section (5) also provides that if the application "raises a meritorious non-jurisdictional challenge to the applicant's conviction and sentence," the judge must "refer the matter to the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief." *Id*.

Appendix A: Sample Writ

IN THE MATTER OF)
)
)
)
)
_____
Party Imprisoned or Restrained

WRIT OF HABEAS CORPUS
(G.S. Ch. 17)

TO [*custodian of party imprisoned or restrained*]:

You are ordered to bring [*name of party imprisoned or restrained*], by whatever name he/she may be called, before Judge [*name judge*], on [*insert time and date*], [*insert court and place*], together with the official records of his/her confinement.

This, the ____ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge

TO THE SHERIFF OF [*name county*] COUNTY:

You are hereby ordered to serve the foregoing writ of habeas corpus upon [*name custodian of party imprisoned or restrained*].

THE HONORABLE _____
Superior Court Judge

RETURN

RECEIVED on the ____ day of _____, 20___. Served by reading and delivering a copy to _____ on the _____ day of _____, 20___.

_____
Sheriff/Deputy Sheriff

[Note: If the order is returnable before another judge, the issuing judge should notify the second judge.]

Appendix B: Sample Judgment Denying Relief

IN THE MATTER OF	)	
	)	**JUDGMENT UPON WRIT OF**
	)	**HABEAS CORPUS**
	)	(G.S. Ch. 17)
_____	)	
Petitioner		

This matter was heard on [*date*] in the [*name county*] County Superior Court upon a writ of habeas corpus concerning the imprisonment of the petitioner, and a return to the writ filed by [*name custodian*], the officer having custody of the petitioner.

The petitioner, the petitioner's attorney, [*attorney's name and address*], and the above-mentioned custodian were present.

Upon examination of the return and all records attached thereto, and hearing all of the evidence, the court finds that the petitioner is confined by virtue of [*make findings of fact concerning confinement*].

The court concludes as a matter of law that the petitioner is confined by virtue of a lawful [*identify document, order, etc.*] of a court of competent jurisdiction; that the petitioner is not unlawfully restrained of [*his or her*] liberty; that the time during which the petitioner may be legally detained has not expired; that the allegations set forth in the petition do not constitute probable grounds for relief, either in fact or in law, by way of habeas corpus; and that the petition shall be denied.

THEREFORE IT IS ORDERED that

1. The petitioner's petition be denied;

2. The petitioner be remanded to the custodian in whose custody [*he or she*] was when the writ was issued; and

3. A copy of this judgment be forwarded to the petitioner, the petitioner's attorney named above, the District Attorney, and the custodian of the facility where the petitioner is confined.

This, the ___ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge

Appendix C: Sample Judgment Granting Relief

IN THE MATTER OF	)	**JUDGMENT UPON WRIT OF HABEAS CORPUS** (G.S. Ch. 17)
_____ Petitioner	)	

This matter was heard on [*date*] in the [*name county*] County Superior Court upon a writ of habeas corpus concerning the imprisonment of the petitioner, and a return to the writ filed by [*name custodian*], the officer having custody of the petitioner.

The petitioner, the petitioner's attorney, [*attorney's name and address*], and the above-mentioned custodian were present.

Upon examination of the return and all records attached thereto, and hearing all of the evidence, the court finds that [*make findings of fact concerning imprisonment or restraint*].

The court concludes as a matter of law that [*make conclusions regarding the illegality of the petitioner's imprisonment or restraint e.g., specifying the jurisdictional defect in the process, order, etc. resulting in the petitioner's confinement*]; and that the petition shall be granted.

THEREFORE IT IS ORDERED that

1. The petitioner's petition be granted;

2. The custodian named above immediately discharge the petitioner from custody [*Note: you have authority to modify custody as an alternative to discharge, if appropriate e.g., if petitioner is entitled to conditions of pretrial release but not to complete discharge*]; and

3. A copy of this judgment be forwarded to the petitioner, the petitioner's attorney named above, the District Attorney, and the custodian of the facility where the petitioner is confined.

This, the ___ day of _____, 20___.

THE HONORABLE _____
Superior Court Judge

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedNegative Treatment Reconsidered by City of El Cenizo, Texas v. Texas, 5th Cir.(Tex.), May 08, 2018
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure of 1965
Introductory
Chapter Two. General Duties of Officers (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 2.251

Art. 2.251. Duties Related to Immigration Detainer Requests

Effective: September 1, 2017

Currentness

(a) A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement shall:

(1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and

(2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

(b) A law enforcement agency is not required to perform a duty imposed by Subsection (a) with respect to a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification.

Credits

Added by Acts 2017, 85th Leg., ch. 4 (S.B. 4), § 2.01, eff. Sept. 1, 2017.

Notes of Decisions (8)

Vernon's Ann. Texas C. C. P. Art. 2.251, TX CRIM PRO Art. 2.251

Current to legislation effective May 20, 2019, of the 2019 Regular Session of the 86th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

West's Annotated Code of Virginia
Title 19.2. Criminal Procedure (Refs & Annos)
Chapter 7. Arrest (Refs & Annos)

VA Code Ann. § 19.2-81.6

§ 19.2-81.6. Authority of law-enforcement officers to arrest illegal aliens

Currentness

All law-enforcement officers enumerated in § 19.2-81 shall have the authority to enforce immigration laws of the United States, pursuant to the provisions of this section. Any law-enforcement officer enumerated in § 19.2-81 may, in the course of acting upon reasonable suspicion that an individual has committed or is committing a crime, arrest the individual without a warrant upon receiving confirmation from the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security that the individual (i) is an alien illegally present in the United States, and (ii) has previously been convicted of a felony in the United States and deported or left the United States after such conviction. Upon receiving such confirmation, the officer shall take the individual forthwith before a magistrate or other issuing authority and proceed pursuant to § 19.2-82.

Credits

Acts 2004, c. 360; Acts 2004, c. 412.

Notes of Decisions (1)

VA Code Ann. § 19.2-81.6, VA ST § 19.2-81.6
The statutes and Constitution are current through the End of 2018 Reg. Sess. and 2018 Sp. Sess. I and include 2019 Reg. Sess. cc. 11, 17, 18, 49, 100, 164, 225, 282 (part), 441, 464, 600, 653, 654, 826, 840& 847.

End of Document