NO. 437 PA 18 — 26th JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

CARLOS CHAVEZ and LUIS LOPEZ, Petitioners, v. GARRY MCFADDEN, SHERIFF OF MECKLENBURG COUNTY, Respondent-Petitioner.	From: Mecklenburg County

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RESPONDENT MECKLENBURG COUNTY SHERIFF GARRY MCFADDEN'S BRIEF

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INDEX

ADDENDUM

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

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INTRODUCTION

On 4 December 2018, Garry McFadden was elected Sheriff of Mecklenburg County. The next day, Sheriff McFadden honored his campaign promise and terminated the 287(g) Agreement between the Mecklenburg County Sheriff's Office ("Sheriff's Office") and United States Immigration and Customs Enforcement ("ICE") which authorized deputy sheriffs to perform federal immigration enforcement activities. Exercising the power granted to him by the North Carolina Constitution, Sheriff McFadden also decided to stop honoring federal immigration detainers and administrative immigration arrest warrants.

Sheriff McFadden recognizes that each of the State's one hundred elected county Sheriffs has the discretion to determine the extent of his or her Office's cooperation with ICE, and that immigration issues are handled by the United States, not local governments or states.

The issue before this Court is not about whether entering into 287(g) Agreements constitutes good public policy, or any of the myriad political issues surrounding immigration. The issue before this Court is simply whether state judicial officials have the authority to rule on

the legality of ICE Administrative Immigration Arrest Warrants and Detainers either with or without a 287(g) Agreement between a local sheriff and ICE. The answer is clearly no, and the Sheriff respectfully requests that the North Carolina Court of Appeals' decision be affirmed.

STATEMENT OF THE FACTS

I. THE MECKLENBURG COUNTY SHERIFF'S OFFICE AND ICE ENTERED INTO A 287(g) MEMORANDUM OF UNDERSTANDING UNDER THE IMMIGRATION AND NATIONALITY ACT AND SHERIFF MCFADDEN TERMINATED THE AGREEMENT ON 5 DECEMBER 2018

From 2006 until 5 December 2018, ICE, a component department of the United States Department of Homeland Security ("DHS") and the Sheriff's Office entered into a written agreement pursuant to 8 U.S.C. §1357 (g)(1) ("287(g)Agreement") where ICE trained and deputized Mecklenburg County sheriff's deputies to perform immigration enforcement activities. (R S pp102-121).

Under the 287(g) agreement, deputy sheriffs performed specified functions of federal immigration officers in relation to the investigation, apprehension or detention of aliens, including serving warrants for arrest for immigration violations and detaining aliens based on those warrants. 8 U.S.C. §1357(a),(g)(1)-(8); 8 CFR § 287.5(c)(6), (e)(3).

The detention of the Petitioners occurred in 2017 when a 287(g) Agreement signed by former Sheriff Irwin Carmichael on 22 February 2017 was in effect. (R S pp 102-121) On 5 December 2018, Sheriff Garry McFadden, who defeated Sheriff Carmichael, terminated the 287(g) Agreement.

II. PETITIONERS ARE ARRESTED ON STATE CHARGES AND SERVED WITH ADMINISTRATIVE IMMIGRATION ARREST WARRANTS AND DETAINERS UNDER THE 287(g) AGREEMENT

On 5 June 2017, Petitioner Luis Lopez was arrested for common law robbery, felony conspiracy, resisting a public officer, and misdemeanor breaking and entering (R p 39). At the Mecklenburg County Jail ("Jail"), Lopez was served with a Form I-200 DHS Administrative Immigration Arrest Warrant ("Administrative Immigration Arrest Warrant"), which alleged that there was probable cause that Lopez was removable from the United States based upon execution of a charging document to initiate removal proceedings against him. (R p 58). The Administrative Immigration Arrest Warrant was served on Lopez by a sheriff's deputy working under the 287(g) Agreement. (R p 58). Along with the Administrative Immigration Arrest Warrant, the Sheriff's Office was also served with a

Form I-247A (Immigration Detainer/ Notice of Action) ("Detainer") which requested that the Sheriff's Office maintain custody of Lopez for forty-eight hours after he would otherwise be released to allow DHS to take custody of Lopez. (R p 72). A Detainer issues only when there is probable cause to believe that the subject is a removable alien, and is accompanied by an Administrative Immigration Arrest Warrant. See ICE Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers (March 24, 2017), https://www.ice.gov/detainer-policy.

On 13 August 2017, Petitioner Carlos Chavez was arrested for driving while impaired, no operator's license, interfering with emergency communication, and assault on a female. (R p 4). At the Jail, Chavez was served with an Administrative Immigration Arrest Warrant which alleged that there was probable cause to believe that Chavez was removable from the United States based upon a final order of removal against him, biometric confirmation of his identity, and statements made by Chavez. (R p 23). The Sheriff's Office was also served with a Detainer for Chavez. (R p 24).

III. PETITIONERS FILE PETITIONS FOR WRIT OF HABEAS CORPUS ON THE GROUND THAT THE ADMINISTRATIVE IMMIGRATION ARREST WARRANTS AND DETAINERS ISSUED PURSUANT TO THE 287(g)AGREEMENT DOES NOT PROVIDE AUTHORITY TO HOLD THEM

On 13 October 2017, the same day all state criminal charges were resolved against both Petitioners, the Petitioners filed Petitions for Writ of Habeas Corpus in Mecklenburg County Superior Court on the ground that the Sheriff's Office lacked the authority to hold them based on the Administrative Immigration Arrest Warrants and Detainers. (R pp 3-24, 38-58). Both Petitions stated that the Petitioners were being held on the basis of the Administrative Immigration Arrest Warrants and Detainers which were issued and served pursuant to the 287(g) Agreement between the Sheriff's Office and DHS. (R pp 15, 19, 50, 54)

On 13 October 2017, the Honorable Yvonne Mims-Evans ordered the Sheriff's Office to file a return to the Petitions. This Order was served on the Sheriff's Office at 10:23 a.m for both Petitioners. (R pp 26, 60). Prior to any return being filed, and without any notice of a hearing, Judge Mims-Evans issued a "Writ of Habeas Corpus Order for Immediate Release" ("13 October 2017 Orders") for both Petitioners at 12: 08 pm, which ordered the Sheriff's Office to release the Petitioners

from custody on the ground that "the Sheriff's Office lacks authority to arrest and hold an individual based on the I-200 form." (R pp 29-30, 63-64). The trial court held that the Petitioners were "unlawfully confined....[and] [t]he Sheriff of Mecklenburg County is ordered to immediately release [the individual Petitioner] from custody." (R pp 29-30, 63-64). The Sheriff's Office filed timely returns at 2: 58 p.m. the same day. (R pp 31-37, 65-72).

IV. THE SHERIFF'S OFFICE PETITIONS THE COURT OF APPEALS TO ISSUE A WRIT OF CERTIORARI AND WRIT OF PROHIBITION

On 6 November 2017, the Sheriff's Office petitioned the Court of Appeals to issue a writ of certiorari pursuant to N.C.R. App. P. 21, and a writ of prohibition pursuant to N.C.R. App. P. 22 to review the 13 October 2017 Orders. On 22 December 2017, the Court of Appeals granted the Petitions for Writ of Certiorari, consolidated the appeal for both Petitions, and granted the United States' motion for leave to appear and file a brief. (R pp 83-86). The Court also granted the Respondent's Petition for Writ of Prohibition, and stated:

> Pending the issuance of the mandate by this Court in these appeals, the trial court is prohibited from issuing a writ of habeas corpus ordering the release of a person detained by the Sheriff of Mecklenburg County for violations of federal

> immigration laws under authority granted to the Sheriff by a written agreement with the United States Department of Homeland Security, and prohibited from entering any orders or sanctions limiting the authority of the Sheriff and his officers or agents, or any officer or agent of the United States, from carrying out the acts permitting by the agreement between the Sheriff and the United States.
>
> (R pp 83-86).

Despite the Court of Appeals' grant of the writ of prohibition which specifically prohibited trial courts from interfering with the 287(g) Agreement, the Petitioners' trial counsel's acknowledgements that the Petitioners were being held pursuant to the 287(g) Agreement, and the fact that the 287(g) Agreement is a public record capable of judicial notice under N.C.R. Evid. 201(c), the Petitioners made extensive efforts to erase the existence of the 287(g) Agreement before the Court of Appeals. After objecting to its inclusion in the record on appeal, the parties had a judicial settlement pursuant to N.C.R. App. P. 11(c). (R S pp 94-99). On 16 March 2018, the Honorable W. Robert Bell ordered that the 287(g) Agreement be included in the 11(c) supplement. (R S pp. 100-101). On 18 April 2018, even after Judge Bell ordered the inclusion of the 287(g) Agreement, the Petitioners filed a Motion to strike the 287(g) Agreement from the Rule 11(c) supplement, and a Petition for Writ of Certiorari to review Judge Bell's Order. The Court

of Appeals denied this Petition and Motion on 4 May 2018 and 12 September 2018.

On 6 November 2018, the Court of Appeals correctly held that the trial court had no jurisdiction to release the Petitioners who were being held pursuant to the Administrative Immigration Arrest Warrants and Detainers issued and served under the 287(g)Agreement. *Chavez v. Carmichael,* -- N.C. App. --, 822 S.E.2d. 131, 141 (2018). In response to the Petitioners' repeated attempts at changing the facts of the case and making the 287(g) Agreement disappear, the Court of Appeals devoted two sentences in its sixteen page opinion and stated, in dicta, that the trial court had no jurisdiction to rule on federal immigration matters even without the 287(g) Agreement because federal courts have exclusive jurisdiction over federal immigration matters. *Id.* at 142.

The Petitioners filed a petition for certiorari on 11 December 2018, and Sheriff McFadden did not oppose the Petition.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY ADDRESSED THE MERITS OF THE CASE

A. THE ISSUE OF WHETHER A STATE TRIAL COURT CAN RULE ON THE LEGALITY OF A FEDERAL IMMIGRATION ARREST WARRANT AND DETAINER UNDER THE 287(g) AGREEMENT IS NOT MOOT

The Petitioners' argument that the Court of Appeals should not have addressed the merits of this case due to mootness is misplaced for several reasons. (Brief, pp 13-16).

First, the Court of Appeals was correct in holding that the public interest exception to mootness applies in this case. *Chavez*, 822 S.E.2d. at 137. Indeed, it cannot be seriously argued- and Petitioners do not even attempt to do so- that the issue of whether sheriffs can detain individuals who are the subject of immigration holds under a 287(g) Agreement does not "involve[] 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).

In this year's legislative session, the North Carolina General Assembly is debating House Bill 370 entitled "An Act to require Compliance with Immigration Detainers and Administrative Warrants," which would require North Carolina Sheriffs to comply with

Administrative Immigration Arrest Warrants and Detainers. https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H370v3.pdf. In addition, United States Senator Thom Tillis has introduced legislation entitled "Justice for Victims of Sanctuary Act", which would allow civil actions against law enforcement officials who do not comply with Detainers. https://www.congress.gov/bill/116th-congress/senate-bill/2059. While Sheriff McFadden has terminated the 287(g) Agreement in Mecklenburg County, there are one hundred elected Sheriffs in North Carolina, each of whom has his or her own beliefs concerning cooperation with ICE. As of July 2019, ICE has 287(g) Agreements with four North Carolina counties: Cabarrus, Gaston, Henderson, and Nash. See https://www.ice.gov/287g. Given the current political climate, it is clear that this case involves an issue of great public importance

In filing this Petition and briefs supporting this Petition, the Petitioners and amici have also demonstrated that this issue is not moot. The Petitioners and amici repeatedly acknowledge that Chavez and Lopez are no longer in DHS custody which begs the question as to why the Petitioners even sought review in this case. (Brief pp. 16 n. 7,

27 n. 13). Any ruling in their favor, as Petitioners and amici freely admit, will not benefit the Petitioners. *Id.* The answer to that rhetorical question is simple: this issue involves a matter of public interest.

Second, in addition to the public interest exception to mootness, our courts have long recognized an exception to dismissals from mootness where the issues are "capable of repetition, yet evading review." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C.App. 651, 654, 566 S.E.2d 701, 703-04 (2002). This exception applies in two instances: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* This exception applies in this case.

Given the limited forty eight hour period during which a Detainer lasts, it would be virtually impossible to litigate this issue in the appellate courts. (R pp 24, 72) In addition, the 13 October 2017 Orders were not Judge Mims-Evans' first orders on this issue. On 27 July 2017, Judge Mims-Evans ordered the Sheriff's Office to release Nivaldo

Jordao from state custody despite the fact that he was in ICE custody, but reversed her ruling on 8 September 2017 after the Sheriff's Office filed a Motion for Reconsideration. (Attachment E to Petitions 17-826, 827). In her Order on the Sheriff's Motion for Reconsideration, Judge Mims- Evans held that the Sheriff's Office was "not required to obtain Mr. Jordao's release from the custody of the Department of Homeland Security." *Id.* The Order on Reconsideration also stated that "[t]he Court had no further jurisdiction after becoming aware that the Petitioner was in the custody of DHS." *Id.*

Another Mecklenburg County Superior Court Judge, the Honorable Carla Archie denied an inmate's writ for habeas corpus on the same issue addressed by Judge-Mims Evans. (Attachment F to Petitions 17-826, 827). Even after the Court of Appeals issued its Writ prohibiting trial courts from issuing writs of habeas corpus, another Superior Court Judge addressed this issue. On 10 April 2018, in *Mejia v. Carmichael* and *Cruz v. Carmichael*, 14 CR 241397-8 and 17 CR 2273, the Honorable Daniel A. Kuehnert stated that "the undersigned could not find statutory grounds not to grant the relief [writ of habeas corpus] requested by the Petitioners," but stayed a decision pending a

ruling from the appellate courts. (App pp 42-51). Since this issue has arisen numerous times, the capable of repetition exception to mootness applies. *See Beaufort County Board of Education v. Beaufort County Board of Commissioners*, 184 N.C.App. 110, 113-115, 645 S.E.2d 857, 859-860 (2007) (holding that the capable of repetition exception to mootness applied in television station's petitions for writ of prohibition, and certiorari where defendant could attempt to repeat its conduct and subject station to same or similar action.)

The issues raised in this Petition are not moot based on both the public interest and the capable of repetition yet evading review exceptions to mootness, and the Court of Appeals did not err in considering the merits of this case.

B. THE COURT OF APPEALS' HOLDING THAT A STATE TRIAL COURT CANNOT RULE ON THE LEGALITY OF A FEDERAL IMMIGRATION ARREST WARRANT AND DETAINER IN THE ABSENCE OF A 287(g) AGREEMENT WAS DICTA

It is undisputed that the Petitioners were detained pursuant to an Administrative Immigration Arrest Warrant and Detainer issued and served pursuant to the 287(g) Agreement. (R pp 3-24, 38-58). However, appellate counsel, in an attempt to get the Court of Appeals to

resolve an issue not supported by any facts in the record, repeatedly tried to erase the existence of the 287(g) Agreement. In response to Petitioners' argument, the Court of Appeals, in two sentences of dicta, held that the trial court had no jurisdiction to rule on federal immigration matters even in the absence of a 287(g) Agreement.

It is well established that language in an opinion not necessary to the decision is dicta and later decisions are not bound thereby. *Washburn v. Washburn*, 234 N.C. 370, 372, 67 S.E.2d 264, 266 (1951). *See also Hayes v. City of Wilmington,* 243 N.C. 525, 537, 91 S.E.2d. 673, 682 (1956) ("Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings.") (internal citations omitted).

Now, after receiving an unfavorable ruling on the issue they created, the Petitioners admit that these two sentences were dicta: "[t]he Court of Appeals' erroneous decision in this regard was unnecessary to its conclusions," (Brief, p. 34). Nonetheless, the Petitioners seek to have this Court overrule this dicta despite this issue never existing under the facts of this case. This Court should decline

this invitation, and rule on the issue which was supported by the facts before the Court of Appeals.

Even if this Court wishes to address this dicta, the Court of Appeals' decision was correct. When Administrative Immigration Arrest Warrants and Detainers are used to detain individuals in non 287(g) jurisdictions, the result is the same as in 287(g) jurisdictions: state judicial officials cannot rule on the legality of federal immigration matters. *See* section III, pp. 20-44.

II. THE SHERIFF'S APPEAL IS PROPERLY BEFORE THE COURT

In an attempt to avoid the overwhelming precedent that rejects their position, the Petitioners claim that the Court of Appeals erred in its opinion because the Sheriff waived his arguments and did not preserve them. (Brief, pp 16-19). This argument is without merit for numerous reasons.

First, the issue addressed by the Sheriff in the Court of Appeals was whether the trial court had jurisdiction to rule on Administrative Immigration Arrest Warrants and Detainers issued under 287(g). As this Court has recognized, the issue of subject matter jurisdiction may be raised at any time, and cannot be waived. *Lemmerman v. A.T.*

Williams Oil. Co., 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986); *Anderson v. Atkinson*, 235 N.C. 300, 301, 69 S.E.2d. 603, 604 (1952) ("A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment, or otherwise.")

Second, the Sheriff filed Petitions for Writs of Certiorari to the Court of Appeals to review this case. As this Court has stated "no appeal lies from a judgment rendered on return to a writ of Habeas Corpus [citations omitted]...The remedy, if any, is by petition for writ of Certiorari, addressed to the sound discretion of the appellate court." *State v. Lewis*, 274 N.C. 438, 441, 164 S.E.2d. 177, 179 (1968). The Court of Appeals granted the Petitions to "review the 'Writ of Habeas Corpus Order for Immediate Release' entered in each cause by Judge Yvonne Mims Evans on 13 October 2017." (R pp 83- 86). The Court of Appeals also enjoined the trial court from issuing writs of habeas corpus ordering the release of any person detained by the Sheriff pursuant to authority granted to the Sheriff by the 287(g) Agreement. *Id.* To claim that the issue is "not preserved" is to ignore the Court of Appeal's 22 December 2017 Orders.

Last, Petitioners' claim that the issue was waived and not preserved borders on the absurd given the facts surrounding the underlying Petitions in superior court. On 13 October 2017, Judge Mims-Evans ordered the Sheriff "to immediately appear and file a return in writing pursuant to N.C.G.S. 17-14." These Orders were served at 10:23 a.m for both Petitioners, but did not list a courtroom, time to appear, or deadline for a return. (R pp 25-26, 59-60). Despite Petitioners' insinuation to the contrary (Brief, pp. 20-21), the Sheriff never received notice of any hearing, and did not fail to attend any hearing. In fact, as Petitioners' counsel conceded before the Court of Appeals, no notice was given to the Sheriff about a date, time, or courtroom for the return hearing.

Moreover, the purported hearing held by Judge Mims-Evans was conducted prior to any return filed by the Sheriff, in contravention of the North Carolina habeas statutes. N.C.G.S. 17-14 states that the Sheriff "must make a return thereto in writing." N.C.G.S. § 17-32 requires that a hearing be held after a return is filed: ("[t]he court...shall, immediately after the return thereof, examine into the

facts contained in such return.") Last, the habeas statutes also require proper notice:

> [w]hen it appears from the return to the writ that the party named therein is in custody on any process...under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it appears that the person so interested, or his attorney...has had reasonable notice of the time and place at which such writ is returnable.
>
> N.C.G.S. § 17-29.

However, prior to any return being filed, prior to the forty eight hour period provided in the Detainers expiring, and without any notice of a hearing, Judge Mims-Evans issued the 13 October 2017 Orders at 12: 08 pm. The Sheriff's Office filed timely returns at 2: 58 p.m. the same day. (R pp 31-37,65-72).

The trial court's remedy was not to hold a hearing without any proper notice before any return was filed, but to issue an attachment pursuant to N.C.G.S. § 17-16 or seek an indictment, fine, and removal from office, if the return was not filed within six hours. N.C.G.S. 17-26. Rather than complying with the statutes and allowing the Sheriff to be heard, or ensuring that an interested party, DHS, was notified about the hearing, Judge Mims-Evans simply ordered the Petitioners released

less than two hours after ordering a return. No notice of hearing was given to the Sheriff's Office or DHS. The Sheriff was not given the same basic legal rights like notice and an opportunity to be heard which are given to litigants across the State. Therefore, the Petitioners' claim that the Sheriff did not preserve his arguments by failing to attend a hearing where he received no notice to attend is disingenuous at best.

III. THE TRIAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION TO RULE ON THE LEGALITY OF ADMINISTRATIVE IMMIGRATION ARREST WARRANTS AND DETAINERS

Subject matter jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In Re. T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d. 787, 789 (2006) (internal citations omitted). When a court lacks jurisdiction, it is "without authority to enter any order granting any relief." *Swenson v. All American Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E.2d 793, 797 (1977).

As set forth in section IIIB, pages 29-44, the United States has exclusive jurisdiction over federal immigration matters. As a result, when an individual is being held by an Administrative Immigration

Arrest Warrant and a Detainer, a state judicial official cannot rule on its legality.

When an individual is being held pursuant to a 287(g) Agreement, an additional reason compels the conclusion that a state court cannot rule on the legality of an Administrative Immigration Arrest Warrant and Detainer. Under a 287(g) Agreement, state officials are acting as federal officials under federal authority, and well- established United States Supreme Court precedent from the 1800s holds that state court judges cannot issue writs where a party is confined under United States authority. *Abelman, infra, In Re Tarble, infra.*

A. UNDER A 287(g) AGREEMENT, LOCAL LAW ENFORCEMENT ACT AS FEDERAL IMMIGRATION OFFICIALS AND A STATE JUDICIAL OFFICIAL CANNOT ISSUE WRITS AGAINST FEDERAL OFFICIALS

Congress codified and consolidated the exclusive federal power over immigration in the Immigration and Nationality Act, ("INA"), 8 U.S.C. §1101 et seq, which established a comprehensive federal statutory regime for the regulation of immigration and naturalization.

The INA allows the Attorney General to enter into 287(g) Agreements with political subdivisions to assist in immigration enforcement. 8 U.S.C. §1357(g)(1) states:

> g) Performance of immigration officer functions by State officers and employees.
>
> (1) ...[T]he Attorney General may enter into a written agreement with ... any political subdivision of a State, pursuant to which an officer ... 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.

The immigration functions authorized by 8 U.S.C. § 1357(g)(1) are "consistent" with North Carolina law. N.C.G.S. § 128-1.1 provides:

> 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.

A 287(g) Agreement allows local officers to "to perform certain functions of an immigration officer within... jail/ correctional facilities," including serving Administrative Immigration Arrest Warrants and Detainers, both of which served in this case. (R S 102, 119). See 8 C.F.R. §236.1(b)(1) ("[a]t the time of the issuance of the notice to appear,

or any time thereafter...the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest.")

Under a 287(g) Agreement, certified state law enforcement officers are delegated the power and authority to perform federal immigration actions including: interrogating any person in the detention center that the officer believes to be an alien about his or her right to remain in the United States pursuant to 8 U.S.C. §1357(a)(1) and 8 C.F.R. §287.5(a)(1); serving warrants of arrests for immigration violations pursuant to 8 U.S.C. §1357(a) and 8 C.F.R. §287.5(e)(3); administering oaths and taking and considering evidence to complete required alien processing under 8 U.S.C. §1357(b) and 8 C.F.R. §287.5(a)(2); preparing charging documents pursuant to 8 U.S.C. §§1225(b)(1), 1228, 1229, 1231 (a)(5), and 8 C.F.R. §§235.3, 238.1, 239.1, and 241.8; issuing immigration detainers pursuant to 8 U.S.C. §§1226, and 1357, and 8 C.F.R. §287.7; and detaining and transporting arrested aliens to ICE approved detention facilities pursuant to 8 U.S.C. §1357(g)(1) and 8 C.F.R. §287.5(c)(6). (R S pp 119-120) (App pp).

In performing any function under a 287(g) agreement, the local officer acts under color of federal authority at the direction of the

Attorney General. 8 U.S.C. §1357(g)(3); 8 U.S.C. § 1357(g)(8) (providing that officer acting under 287(g) Agreement shall be considered acting under color of federal authority in civil actions); *Arizona v. United States*, 567 U.S. 387, 409, 132 S.Ct. 2492, 2506 (2012) ("[o]fficers covered by these agreements are subject to the Attorney General's direction and supervision.") In addition, any 287(g) agreement also requires that:

> an officer or employee ...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.

8 U.S.C. §1357(g)(2).

Courts have repeatedly held that local officers working under a 287(g) Agreement are not acting as local or state officers, as Petitioners suggest (Brief, p. 21), but are federal officials performing immigration functions under federal authority. As the Supreme Court stated in *Arizona,* 567 U.S. 387, 408, 132 S.Ct. at 2506, "[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. A principal example is when the Attorney

General has granted that authority to specific officers in a formal [287(g)] agreement with a state or local government." The Fifth Circuit recently reaffirmed this principle and stated that "under these [287(g)] agreements, state and local officials, become de facto immigration officers, competent to work on their own initiative." *City of El Cenizo, Texas v. State of Texas*, 890 F.3d. 164, 180 (5th Cir. 2018). Under the 287(g) Agreement, then, deputy sheriffs are federal immigration officers acting under federal authority.

The Fourth Circuit has also recognized that under a 287(g) Agreement, local officers become federal officers. *United States v. Sosa-Carabentes*, 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."). As the North Carolina Court of Appeals noted, local law enforcement officers become federal officers in other contexts when deputized by federal law enforcement agencies. *Chavez*, 822 S.E.2d. at 144. *See e.g. United States v. Martin*, 163 F.3d. 1212, 1214-15 (10th Cir. 1998) (local police officer deputized to participate in FBI investigation is a federal officer within meaning of federal statute prohibiting threatening to

murder federal law enforcement officer.); *United States v. Diamond*, 53 F.3d. 249, 251-252 (9th Cir. 1995) (state official deputized as United States Marshal was an officer of the United States in prosecution for assaulting a federal officer.)

Since the 1800s, it has been well-established that state court judges cannot issue writs where a party is confined under United States authority. *See McClung v. Silliman*, 19 U.S. 6, 5 L.Ed. 340 (1821)(state court could not issue mandamus against federal officer); *Ableman v. Booth,* 62 U.S. 506, 515-516, 21 How. 506 (1858) ("no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government.")

In 1871, the United States Supreme Court issued a definitive statement on this issue. In *In re Tarble*, 80 U.S. 397, 20 L.Ed. 597 (1871), 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 upon the

> application the writ should be refused. *Id.* at 409 (emphasis added).
>
> 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.' *Id.* at 410 (emphasis added).
>
> That 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. *Id.* at 411. (Emphasis added).

Since the United States Supreme Court's decision in *In Re Tarble*, the Court has reaffirmed the principle that state habeas corpus statutes cannot be used to undermine areas which are exclusively federal. For instance, in *Ex Parte Royal*, 117 U.S. 241, 249, 6 S.Ct. 734, 739 (1886), the Court stated that:

> the courts and judges of the several states...cannot, under any authority conferred by the states, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws- results from the supremacy of the constitution and laws of the United States. (internal citations omitted).

The principle that state court judges cannot issue writs for individuals detained by federal officers acting under federal authority has been followed by courts across the country. *See e.g. Spease v. Olivares*, 509 S.W.3d 512, 522 (Ct. Appeal Tx. 2016) (state court action alleging misconduct at checkpoint manned by the United States Custom and Border Protection fails because "it has been known for almost two centuries that a state court cannot issue equitable relief directing a federal officer in the performance of a federal duty."); *Special Pros. of State of New York v. U.S. Atty. for Southern Dist. of New York*, 375 F. Supp. 797, 804 (S.D.N.Y. 1974) (finding that, "[s]ince *Ableman* and *Tarble*, there has been no serious challenge to the principle that state courts possess no power to remove a person from the jurisdiction of federal courts or agencies by writ of habeas corpus.")

In this case, the Petitioners admitted that they were detained by Administrative Immigration Arrest Warrants and Detainers issued and

served pursuant to the 287(g) Agreement. (R pp 3-24, 38-58) As a result, the Sheriff's Office was acting under United States authority and Judge Mims-Evans had no authority to issue any writ ruling on the legality of such detention.

B. THE FEDERAL GOVERNMENT HAS EXCLUSIVE JURISDICTION OVER IMMIGRATION ISSUES IN BOTH 287(g) JURISDICTIONS AND NON 287(g) JURISDICTIONS

It is also clear that state judicial officials cannot rule on the legality of Administrative Immigration Arrest Warrants and Detainers even in non 287(g) jurisdictions because state officials lack jurisdiction in federal immigration matters.

The Petitioners' remarkable assertion that "[n]othing in the federal law divests the superior court of its jurisdiction [to rule on federal immigration matters]" ignores the United States Constitution and decades of United States Supreme Court precedent. (Brief, p. 33). The Supremacy Clause of the United States Constitution establishes that the Constitution and law of the United States "shall be the supreme Law of the Land." U.S. Const. Art. VI, Clause 2. The United States has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona*, 567 U.S. 394, 132 S.Ct. at 2498.

This broad authority derives from the Federal government's power "to establish an Uniform Rule of Naturalization." U.S. Const., Art. I, Section 8, Clause 4. The Supremacy Clause prevents state and local officials from taking actions or passing law to "retard, impede, burden, or in any manner control" the execution of federal law. *McCullough v. Maryland,* 17 U.S. 316, 436, 4 L.Ed. 579 (1819).

It is well-established that federal courts, not state courts, have exclusive jurisdiction over immigration issues. *Toll v. Moreno*, 458 U.S. 1, 10, 102 S.Ct. 2977, 2982 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.") This exclusive authority rests on the United States Constitution and the United States' inherent power as a sovereign to control and conduct relations with foreign nations. *Id.* at 10, 102 S.Ct. at 2982. As the United States Supreme Court stated, "[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere." *Nyquist v. Mauclet*, 432 U.S. 1, 10, 97 S.Ct. 2120, 2126 (1977) (internal citations omitted); *Plyler v. Doe*, 457 U.S. 202, 225, 102 S.Ct. 2382, 2389 (1982) ("[t]he States enjoy no power with

respect to the classification of aliens."); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21, 96 S.Ct. 1895, 1904 n. 21 (1976) ("[i]t is important to note that the authority to control immigration is not only vested solely in the Federal Government, rather than the States.... but also that the power over aliens is of a political character and therefore subject only to narrow judicial review.") (citation omitted); *Zadvydas v. Davis,* 533 U.S. 678, 711, 121 S.Ct. 2491, 2510 (2001) (Kennedy, J. , dissenting) ("Congress' power to detain aliens in connection with removal or exclusion...is part of the Legislature's considerable authority over immigration matters.")

The removal process is entrusted to the exclusive jurisdiction of the United States, not the fifty States. The detention of an individual by an Administrative Immigration Arrest Warrant and Detainer is the beginning, and an integral part, of the removal process. In *Arizona*, the Supreme Court addressed whether a provision of Arizona law which provided "state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained immigration officers" was pre-empted by the United States' power over

immigration. 567 U.S. at 408, 132 S.Ct. at 2506. The Supreme Court held that:

> By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. See, e.g., Reno v. American–Arab Anti–Discrimination Comm., 525 U.S. 471, 483–484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999); see also Brief for Former INS Commissioners 8–13. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 348, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) ("Removal decisions, including the selection of a removed alien's destination, may implicate [the Nation's] relations with foreign powers and require consideration of changing political and economic circumstances" (internal quotation marks omitted)); see also Galvan v. Press, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress ..."); Truax v. Raich, 239 U.S. 33, 42, 36 S.Ct. 7, 60 L.Ed. 131 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government"). (Emphasis added).

Id. at 409, 132 S.Ct. at 2506-7.

A state court judge, like Judge Mims-Evans, who is "decid[ing] whether an alien should be detained for being removable" violates the dictates of *Arizona*. Like the state of Arizona, a state trial court cannot decide whether someone should or should not be detained for being

removable. Under *Arizona*, that determination belongs to the federal government, and a state court has no jurisdiction through use of a habeas statute to rule on the legality of an individual's detention pursuant to an Administrative Immigration Arrest Warrant and Detainer.

1. INDIVIDUALS DETAINED BY ADMINISTRATIVE IMMIGRATION ARREST WARRANTS AND DETAINERS ARE IN FEDERAL CUSTODY

The Petitioners' claim that "they were in state custody at the time of the ruling" is without merit. (Response p. 22). While the Petitioners were physically confined at the Mecklenburg County Jail, they were not being held on state charges, but on Administrative Immigration Arrest Warrants and Detainers. They were simply confined at the Mecklenburg County Jail pursuant to a housing agreement contained in the 287(g) Agreement: "MCSO will continue to detain, for a reimbursable fee, aliens for immigration purposes, if ICE so requests, following completion of the alien's criminal incarceration." (R S p 103). This situation is no different than a local jail housing any other federal inmates. Rather than building separate federal facilities in every jurisdiction in North Carolina, the federal government contracts with

local facilities to house federal inmates. In doing so, a federal inmate does not magically transform into a state inmate.

Numerous sections of the ICE Operations Manual (revised 2016), https://www.ice.gov/detention-standards/2011, applicable to the Sheriff's Office pursuant to Section X of the 287G Agreement, (R S pp 107-108), make it clear that an inmate being held pursuant to an Administrative Immigration Arrest Warrant and Detainer, is in custody of DHS, not a local Sheriff. A local sheriff who is holding an individual under a 287(g) Agreement, or without a 287(g) Agreement, cannot transfer inmates without certain DHS documents, and DHS must approve all "facility release procedures", non-medical emergency trip requests, and "decisions to transfer." §§ 1.3, 2.1 V.H., 5.2 IV, and 7.4, V.A.1. (App pp 8-41).

Another reason compels the conclusion that individuals detained by Administrative Immigration Arrest Warrants and Detainers are in federal custody, and have no recourse under the State habeas statutes. The Sheriff is not the proper Respondent for a habeas petition, and the state habeas petitions do not apply.

In habeas cases, the correct Respondent is the "the person with the ability to produce the prisoner's body before the habeas court." *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 124 S.Ct. 2711, 2717 (2004). A Sheriff' has no power to release individuals held on Administrative Immigration Warrants and Detainers. That power belongs to an unnamed ICE or DHS official. Other state courts have held that individuals held on Administrative Immigration Arrest Warrants and Detainers are in federal custody, regardless of their place of confinement, and state habeas statutes do not apply. *See e.g. Florida Immigrant Coalition v. Mendez,* 2010 WL 4384220 at * 5 n. 6 (S.D. Fla. 2010) (Unpublished) ("If proper ICE detainers are in place for a particular detainee, the detainee cannot be released despite a state judge's order or resolution of the state charges.")[1]; *People v. Villa*, 202 P. 3d 427, 434, 45 Cal. 4th 1063, 1073 (2009) ("detention [of defendant detained on immigration hold] is directly traceable to applicable federal laws governing immigration and to the discretion of federal

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[1] This unpublished case is included in the Addendum pursuant to N.C. R. App. P. 30 (e)(3) because it has precedential value to a material issue in this case, and there are no other published cases which would serve as well.

immigration officials...and cannot be considered to be in custody for state habeas corpus purposes.")

In *Saravia v. Sessions*, 280 F.Supp.3d 1168 (N.D. Cal. 2017), the district court decided who was the proper respondent in a habeas corpus case involving undocumented minors when the minor child, A.H., was being held in a local juvenile detention facility pursuant to a contract with the United States. In addressing who is the proper respondent, the Court stated:

> A.H.... was held in a facility run by an entity other than the federal government, pursuant to a contract with the federal government. Where a petitioner is held in a facility solely pursuant to a contract, rather than by the state or federal government itself, application of the immediate custodian rule must take account of that fact. [citation omitted] Instead of naming the individual in charge of the contract facility—who may be a county official or an employee of a private nonprofit organization—a petitioner held in federal detention in a non-federal facility pursuant to a contract should sue the federal official most directly responsible for overseeing that contract facility when seeking a habeas writ. In other words, the distinction is not between a "traditional" detention and an immigration-related detention. The distinction is between a case where the detainee is held in a federal facility, and a case where the detainee is held in a facility operated by some other entity pursuant to contract with the federal government.

Id. at 1185. (emphasis added).

The district court concluded:

> But a Yolo County employee has custody of an immigration detainee like A.H. only to the extent provided by the facility's contract with the federal government. It is pursuant to the power and authority of the federal government—not Yolo County—that A.H. is in custody. So, the federal official with most immediate control over the facility holding the petitioner—that is, the federal official tasked with ensuring that Yolo County complies with the requirements of its contract with ORR—is the proper respondent.

Id. at 1186. (emphasis added).

See also Jarpa v. Mumford, 211 F.Supp.3d 706, 724 (D. Md. 2016) (in case where the Plaintiff-Petitioner, a citizen of Liberia, was being held in a county detention center and sought habeas relief, the district court stated that "[t]he DHS Secretary possesses statutory authority to affect the detention and removal of noncitizen detainees, and thus, possesses legal authority over Mr. Jarpa.").

2. STATE HABEAS STATUTES CANNOT BE USED TO UNDERMINE THE FEDERAL GOVERNMENT'S EXCLUSIVE JURISDICTION OVER IMMIGRATION ISSUES

Although the Petitions filed in the superior court admitted that the Petitioners were being held pursuant to federal authority (R pp 15, 19, 50, 54) the Petitioners now seek to engage in a debate over whether Chavez was the subject of the Administrative Immigration Arrest Warrant and Detainer, whether a 287(g) certified officer served the

Administrative Immigration Arrest Warrant and Detainer, and whether the Sheriff's Office demonstrated that the Petitioners were in federal custody. (Brief, pp 5, 12, 22, 29).

In raising these issues, the Petitioners miss the mark completely. A state court cannot review an Administrative Immigration Arrest Warrant and Detainer at all to determine if they are valid because as set forth earlier, federal courts have exclusive jurisdiction over federal immigration matters. Since the Petitions revealed that the Petitioners were being held on Administrative Immigration Arrest Warrants and Detainers, the trial court had no power to do anything further. The Petitioners cannot magically create state jurisdiction to hear immigration matters- where none lies- by collaterally attacking the underlying basis for an inmate's federal detention. To allow an individual to do so would render the concept of exclusive federal jurisdiction over immigration meaningless and allow local governments to have independent authority over immigration matters, a notion the United States Supreme Court emphatically rejected in *Arizona,* 567 U.S. at 401-402, 132 S.Ct. at 2502 (internal citations omitted.)

The 13 October 2017 Orders, through the use of the North Carolina habeas statutes, were an attempt to intervene in matters exclusively governed by federal law. Indeed, under United States Supreme Court precedent, state law is displaced when there is a framework of regulation "so pervasive ... that Congress left no room for the States to supplement it" or where there is a "federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947); *see English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275 110 L.Ed.2d 65 (1990) ("state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.")

States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. As the Supreme Court stated in *Arizona*:

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on

> a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law. 567 U.S. at 416, 132 S.Ct.at 2510 (Emphasis added)

The North Carolina habeas statutes cannot be used to determine the legality of removal proceedings because to do so would undermine federal law.

Numerous state courts have held that they lack jurisdiction to consider habeas corpus and other challenges to Administrative Immigration Arrest Warrants and Detainers. For instance, in *State v. Chavez-Juarez*, 185 Ohio App. 3d 189, 192, 923 N.E.2d. 670, 673 (2009), Chavez-Juarez sought to hold ICE officers in contempt for moving him from state jurisdiction to DHS custody based on immigration warrants. The Ohio appellate court disagreed, and held that a state court cannot adjudicate the validity of a federal detainer:

> We conclude that the trial court could not adjudicate the validity of the federal detainer, because the area of immigration and naturalization is within the exclusive jurisdiction of the federal government. If Chavez wished to challenge his detention by federal authorities, the proper avenue would have been to file a petition in the federal courts, not a motion for contempt in the state court, which does not have the power to adjudicate federal immigration issues. Whether the federal government violated Chavez's

> rights during the immigration process is a matter for federal courts, not state courts, to adjudicate. (emphasis added).

In *Ricketts v. Palm Beach County Sheriff*, 985 So.2d. 591,593 (2008), the Florida appellate court held that the trial court did not err in denying habeas relief because state court was not the proper venue to consider challenges to immigration matters:

> 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. (internal citations omitted) Once appellant posts bond on his state charges or his state sentence expires (footnote omitted),he will be "released" from state custody and then booked on the federal immigration detainer. At that point, the sheriff will not be holding appellant pursuant to state authority but pursuant to federal authority, and the legality of the detainer and the process by which he is held will be a question for the federal courts. (emphasis added).

See also Cabinet for Health and Family Services v. NBD, -- S.W. 3d--, 2019 WL 2880047 at * 5 (2019) ("The Supremacy Clause of the U.S. Constitution prohibits states from resolving immigration hearings. Rather, the proper place for such expert evidence in this case is not in any state court, but in federal immigration court."); *Frazier v. Williams*, 2019 WL 2285764 at * 1 (W.D. Penn. 2019) (" a state court cannot consider a petition for a writ of habeas corpus filed by a federal

prisoner.")[2]; 17A Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure § 4213 (3d ed.), (databased updated Nov. 2018) ("it is now ... clear that a state court cannot grant habeas corpus for the discharge of a person held in federal custody.... [I]n 1872, ... it was finally established that the state courts have no authority whatever to challenge, by habeas corpus, the legality of federal executive or judicial action holding a person in custody.") *Junior v. Lacroix*, 263 So.3d 159, 163 (2018) ("[s]imply put, irrespective of whether the challenge to the federal immigration detainer is based on an alleged due process violation or a Tenth Amendment violation, a state court cannot adjudicate the validity of a federal immigration detainer."); *Galarza v. State*, 856 N.W.2d 3 at * 3 (Ct. Appeals IA. 2013) (Unpublished) ("[a]ssuming, without holding that Hernandez is in federal custody by virtue of an ICE detainer, it follows that he must address his habeas corpus petition to his federal custodian ...

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[2] This unpublished case is included in the Addendum pursuant to N.C. R. App. P. 30 (e)(3) because it has precedential value to a material issue in this case, and there are no other published cases which would serve as well.

Hernandez cannot use the Iowa habeas law to command action by federal immigration officials.")[3]

While the Petitioners and amici bemoan the lack of available state remedies, there is habeas relief available to the Petitioners. The Petitioners' arguments can be raised in federal court, where every other immigration matter is heard. Federal courts have habeas jurisdiction to examine the statutory and constitutional bases for immigration detention unrelated to a final order of removal. *See Carbajal v. Holder*, 43 F. Supp. 3d 1184, 1186 (D. Colo. 2014) (*citing Demore v. Kim*, 538 U.S. 510, 517–18 (2003)). In addition, a detainee may bring a habeas petition in federal court if his or her confinement violates the Fifth Amendment's guarantee of due process. *See, e.g.*, *Straley v. Utah Bd. of Pardons*, 582 F.3d 1208, 1212 (10th Cir. 2009).

Indeed, if state courts could rule on federal immigration issues through the guise of habeas corpus statutes, immigration matters would essentially be controlled by the States, not the federal government. The United States Supreme Court emphatically rejected

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[3] Pursuant to N.C. R. App. P 30(e)(3), this unpublished case is being cited because it has precedential value to a material issue in this case, and no published opinion would serve as well.

this notion in *Arizona*, holding that if a portion of Arizona's immigration law would stand, "every State could give itself independent authority to prosecute federal registration violations, 'diminish[ing] the [Federal Government]'s control over enforcement' and 'detract[ing] from the 'integrated scheme of regulation' created by Congress.'" *Arizona*, 567 U.S. at 401-402, 132 S.Ct. at 2502, *citing Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 288–289, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986).

CONCLUSION

In its opinion, the Court of Appeals recognized that the trial court did exactly what courts across the country warn against: adjudicating the legality of federal immigration matters. The trial court substituted its own notion of fairness against the United States Constitution, and federal law which unambiguously provides that jurisdiction over the legality of Administrative Immigration Arrest Warrants and Detainers belongs to the United States, not North Carolina.

Sheriff McFadden respectfully requests that the Court affirm the well-reasoned decision of the North Carolina Court of Appeals.

This the 29 day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on 29 July 2019, I filed this document with the electronic filing system and have served a copy of the foregoing in the above captioned action upon the parties by depositing same in the U.S. Mail, first class postage prepaid, addressed as follows:

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CONTENTS OF APPENDIX

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 (316)

8 U.S.C.A. § 1357, 8 USCA § 1357
Current through P.L. 115-140.

APPENDIX D

STANDARD OPERATING PROCEDURE (SOP)

The purpose of this appendix is to establish standard, uniform procedures for the implementation and oversight of the 287(g) delegation of authority program within the FOD area of responsibility. This appendix can be modified only in writing and by mutual acceptance of ICE and the MCSO.

Pursuant to this MOA, the MCSO has been delegated authorities under the Jail Enforcement Officer (JEO) model as outlined below. A 287(g) JEO model is designed to identify and process aliens amenable for removal within the MCSO's jail/correctional facilities pursuant to ICE's civil immigration enforcement priorities.

Prioritization:

ICE retains sole discretion in determining how it will manage its limited resources and meet its mission requirements. To ensure resources are managed effectively, ICE requires the MCSO to also manage its resources dedicated to 287(g) authority under the MOA. To that end, the MCSO shall follow ICE's civil immigration enforcement priorities.

Authorized Functions:

Participating MCSO personnel performing immigration-related functions pursuant to this MOA will be MCSO officers assigned to detention operations supported by ICE. Those participating MCSO personnel will exercise their immigration-related authorities only during the course of their normal duties while assigned to MCSO jail/correctional facilities. Participating MCSO personnel will identify and process for removal aliens in MCSO jail/correctional facilities who fall within ICE's civil immigration enforcement priorities.

Participating MCSO personnel are delegated only those authorities listed below:

- The power and authority to interrogate any person detained in the participating law enforcement MCSO's detention center who the officer believes to be an alien about his or her right to be or remain in the United States, 8 U.S.C. § 1357(a)(1) and 8 C.F.R. § 287.5(a)(1), and to process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense;

- The power and authority to serve warrants of arrest for immigration violations pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.5(e)(3);

- The power and authority to administer oaths and to take and consider evidence, 8 U.S.C § 1357(b) and 8 C.F.R. § 287.5(a)(2), to complete required alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review;

- The power and authority to prepare charging documents, 8 U.S.C. §§ 1225(b)(1), 1228, 1229, and 1231(a)(5); 8 C.F.R. §§ 235.3, 238.1, 239.1, and 241.8, including the preparation of a Notice to Appear (NTA) or other charging document, as appropriate, for the signature of an ICE officer;

- The power and authority to issue immigration detainers, 8 U.S.C. §§ 1226 and 1357, and 8 C.F.R. § 287.7, and I-213, Record of Deportable/Inadmissible Alien, for processing aliens; and

- The power and authority to detain and transport, 8 U.S.C. § 1357(g)(1) and 8 C.F.R. § 287.5(c)(6), arrested aliens subject to removal to ICE-approved detention facilities.

As previously noted in this Appendix, ICE requires the MCSO to follow ICE's civil immigration enforcement priorities.

Additional Supervisory and Administrative Responsibilities:

Immigration enforcement activities conducted by the participating MCSO personnel will be supervised and directed by ICE supervisory officers. Participating MCSO personnel are not authorized to perform immigration officer functions except when working under the supervision or guidance of ICE. Additional supervisory and administrative responsibilities for each entity include, but are not limited to:

The MCSO shall provide notification to the ICE supervisor of any immigration detainer lodged under the authority conferred by the MOA within 24 hours.

The MCSO shall coordinate transportation of detainees processed under the authority conferred by the MOA in a timely manner, in accordance with the MOA and/or IGSA.

All alien processing in applicable ICE databases/systems and associated applications must be completed in accordance with established ICE polices and guidance.

The MCSO is responsible for ensuring proper record checks have been completed, obtaining the necessary court/conviction documents, and ensuring that the alien is served with the appropriate charging documents.

The MCSO must report all encounters with asserted or suspected claims of U.S. citizenship to the ICE FOD in Atlanta District through their chain of command within one hour of the claim. The FOD shall make the appropriate notification to ERO headquarters.

On a regular basis, the ICE supervisors are responsible for conducting an audit of the processing entries and records made by the MCSO's officers. Upon review and auditing of the entries and records, if errors are found, the ICE supervisor will communicate those errors in a timely manner to the responsible official for the MCSO and ensure that steps are taken to correct, modify, or prevent the recurrence of errors that are discovered.

1.3 Transportation (by Land)

I. Purpose and Scope

This detention standard prevents harm to the general public, detainees and staff by ensuring that vehicles used for transporting detainees are properly equipped, maintained and operated and that detainees are transported in a secure, safe and humane manner, under the supervision of trained and experienced staff.

This detention standard applies to the following types of facilities housing ICE/ERO detainees:

- Service Processing Centers (SPCs);
- Contract Detention Facilities (CDFs); and
- State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours.

Procedures in italics are specifically required for SPCs, CDFs, and Dedicated IGSA facilities. Non-dedicated IGSA facilities must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.

Various terms used in this standard may be defined in standard "7.5 Definitions."

II. Expected Outcomes

The expected outcomes of this detention standard are as follows (specific requirements are defined in "V. Expected Practices").

1. The general public, detainees and staff shall be protected from harm when detainees are transported.
2. Vehicles used for transporting detainees shall be properly equipped, maintained and operated. This includes equipment appropriate and necessary to transport detainees with disabilities and special needs.
3. Detainees shall be transported in a safe and humane manner, under the supervision of trained and experienced staff.
4. Except in emergency situations, a single officer may not transport a single detainee of the opposite gender. Further, if there is an expectation that a pat down will occur during transport an officer of the same gender as the detainee(s) must be present.
5. Reasonable accommodations shall be made for detainees with physical disabilities and/or special needs in accordance with security and safety needs and all applicable laws and regulations.
6. The facility shall provide communication assistance to detainees with disabilities and detainees who are limited in their English proficiency (LEP). The facility will provide detainees with disabilities with effective communication, which may include the provision of auxiliary aids, such as readers, materials in Braille, audio recordings, telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, and note-takers, as needed. The facility will also provide detainees who are LEP with language assistance, including bilingual staff or professional interpretation and translation services, to provide them with meaningful access to its programs and activities.

All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the population with limited English proficiency.

Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate.

III. Standards Affected

This detention standard replaces "Transportation (Land Transportation)" dated 12/2/2008.

IV. References

American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition: 4-ALDF-1B-01, 1B-03, 1B-04, 1B-05, 1B-06

ICE/ERO *Performance-based National Detention Standards 2011:*

- "1.1 Emergency Plans";
- "2.1 Admission and Release";
- "2.5 Funds and Personal Property";
- "2.9 Post Orders";
- "2.15 Use of Force and Restraints";
- "4.1 Food Service";
- "4.7 Terminal Illness, Advance Directives and Death"; and
- "7.4 Detainee Transfers."

Memorandum dated 7/14/2006 on "Escape Reporting" from the ICE/ERO Director, which specifies requirements for the reporting, tracking and investigating of the escape of an ICE/ERO detainee.

V. Expected Practices

A. Written Policy and Procedures Required

The facility administrator shall develop and implement written policy, procedures and guidelines for the transportation of detainees, including, at a minimum:

1. general policy and procedures governing safety, security, operations, communications and equipment;
2. vehicle inspections and repair;
3. vehicle occupancy;
4. the seating of detainees in transportation vehicles; and
5. procedures and necessary equipment in the event of:
   a. vehicle failure;
   b. traffic accident;
   c. severe weather or natural disaster;
   d. an emergency situation (as specified later in "S. Emergency Situations" of this standard);
   e. transport of females or minors; and
   f. transport of detainees whose disabilities or special needs preclude prolonged travel.

B. Vehicle Inspection

All vehicles used for transporting ICE/ERO detainees shall comply with annual safety inspections requirements in accordance with applicable federal and state law. Vehicles may not be used for transportation if any safety repairs are needed. Vehicles equipped with specialized gear for the transportation of detainees with physical disabilities must also undergo appropriate inspections and maintenance to ensure the equipment remains in good order.

C. Transportation Planning and Scheduling

The Field Office Director has overall responsibility for all aspects of vehicle operations.

The facility administrator (or designee) is responsible for setting schedules and monitoring vehicular

maintenance, making logistical arrangements to transport detainees, supervising and instructing personnel, and protecting detainee security. Before departure, the plans shall be revised as necessary, based on weather and road conditions and any other relevant considerations.

D. Transporting Officer Responsibilities

1. Training Required

To be assigned to a bus transporting detainees, an officer must have successfully completed the ICE/ERO bus driver training program, or a comparable approved training program, and all local state requirements for a commercial driver's license (CDL). In addition, the driver must have the appropriate state issued CDL.

Bus-driver trainees may operate the vehicle during any segment of a run when detainees are not on board, but only under the direct supervision of a certified bus instructor licensed by the state in which they reside.

2. Forms and Files

For each vehicle operator and other employees assigned to bus transportation duties, supervisors shall maintain at the official duty station a file containing:

a. certificate of completion from a bus training program, as applicable;

b. copy of the CDL;

   1) *every motor vehicle operator shall complete the following forms (or equivalent) for his/her official personnel folder (OPF): SF-47, G-392 and G-294. Every motor vehicle operator is also responsible for renewing these documents as necessary, and for providing to the OPF copies of all renewals and other changes/updates.*

3. Operating the Vehicle

The driver shall operate the vehicle in accordance with the CDL manual or the highest prevailing standard and must maintain complete control of the vehicle at all times.

Driving under the influence of drugs or alcohol is prohibited. In addition to any other random testing as part of a drug-free workplace program, all officers assigned to transportation are subject to the U.S. Department of Transportation (DOT) drug—and alcohol—testing program.

The transporting officers shall comply with all state and federal motor vehicle regulations (including DOT, Interstate Commerce Commission and Environmental Protection Agency), including, but not limited to:

a. wearing a seat belt when the vehicle is moving;

b. holding a valid state issued CDL;

c. inspecting the vehicle, using a checklist and noting any defect that may render the vehicle unsafe or inoperable;

d. transporting detainees in a safe and humane manner;

e. verifying individual identities and checking documentation when transferring or receiving detainees;

f. driving defensively, taking care to protect the vehicle and occupants, obeying traffic laws and immediately reporting damage or accidents;

g. re-inspecting the vehicle after each trip and completing a vehicle inspection report, including an odometer reading;

h. returning the vehicle keys to the control officer or supervisor, according to facility procedures;

i. recording authorized expenses (e.g., fuel, emergency services, oil) on Form G-205 or (applicable current form; in event of an update, use the "Government-owned Vehicle Record"), specifying the exact amount and the date, and keeping all receipts and submitting them along

with the appropriate form at the end of each month; and

j. Safeguarding credit cards assigned to the vehicle.

4. Driving Hours and Number of Operators

Each officer must recognize the limitations imposed by his/her own driving skills, personal distractions and environmental conditions, and must modify his/her driving accordingly. The following rules apply to all members of the vehicle crew, whether driving or not, and it is the officer's responsibility to inform a transportation supervisor if he/she is unable to make a trip because of these rules:

a. A CDL is required for each officer assigned to bus operations.

b. While operating a vehicle requiring a CDL, drivers must comply with all rules and regulations pertaining to CDL operations.

c. Drivers must be off-duty for the eight (8) hours immediately before any trip or trip segment.

d. Maximum driving time (i.e., time on the road) is governed by USDOT.

e. In an emergency or under unforeseen and adverse driving conditions only, the vehicle crew may drive as long as necessary to reach a safe and secure stopping area.

f. When vehicles without detainees travel in tandem, a single officer may be assigned to each. Unaccompanied officers may also drive empty vehicles for certain purposes, such as maintenance trips.

5. Vehicle Security

Officers shall secure a vehicle before leaving it unattended, including removing keys from the ignition immediately upon parking the vehicle.

Officers shall avoid parking in a spot where the vehicle may attract undue attention or be vulnerable to vandalism or sabotage. If officers cannot locate a parking area with adequate security, they shall contact the local law enforcement agency for advice or permission to use one of its parking places.

E. Officer Uniform and Equipment

All officers transporting ICE/ERO detainees shall wear their prescribed uniforms unless other attire is authorized by the facility administrator.

1. Every transporting officer shall wear a uniform in accordance with established procedures. Certain transportation details may require wearing of street or business attire; in these cases, the facility administrator shall establish a dress code for such occasions. The dress code shall prohibit the wearing of jumpsuits.
2. Every transporting officer shall be issued and instructed to wear a protective vest while participating in the transportation program.
3. Equipment recommended for each trip includes, but is not limited to, the following:
   a. flashlights;
   b. extra handcuffs;
   c. flex-cuffs and cutter; and
   d. other authorized intermediate force ("non-lethal," "non-deadly") weapons.

F. Pre-departure Vehicle and Security Check

Prior to departure, all officers assigned to transport detainees must be present to ensure a complete and thorough inspection and search, and shall:

1. inspect the vehicle for mechanical and electrical problems;
2. take any necessary special precautionary measures for transporting a detainee identified as a special-handling case (e.g., for reasons of security, medical, physical, psychological problems, and/or transporting juveniles) while the search is in progress;
3. test the emergency exits and test the key for every

lock located in or on the vehicle. A complete set of these keys shall travel with the vehicle at all times, in a secure place known to every transporting officer;

4. search for hidden weapons and other contraband before every trip, including the driver's compartment and glove compartment, the detainee seating area and the cargo compartment;
5. search the staging area prior to loading detainees to ensure that the area is clear of any weapons or contraband;
6. thoroughly search each detainee as he/she is about to board the vehicle; and
7. ensure that when vehicles are equipped with seatbelts, detainees are properly secured before the transport begins according to established ICE policies and procedures regarding searches.

G. Required Documents

1. Transport Documentation

No detainee may be transported to/from any facility, including Field Office detention areas, unless a Form G-391, I-216, I-203, or equivalent, is furnished, authorizing the removal. These forms must be properly signed and shall clearly indicate the name of the detainee(s), the place or places to be escorted, the purpose of the trip and other information necessary to carry out the detail efficiently.

In SPCs, CDFs, and IGSAs with a sufficient ICE/ERO onsite presence, the authorized ICE official shall check records and ascertain if the detainee has a criminal history, is dangerous or has an escape record. Any information of an adverse nature shall be clearly indicated on the G-391 and the escorting officers shall be warned to take the necessary precautions. Before beginning the detail, escorting and transportation officers shall read their instructions and clearly understand the reason that the detainee is being taken from the facility. The officers shall also discuss emergency and alternate plans with the SIEA or authorized designee before beginning the detail.

All completed G-391 forms, or equivalents shall be filed in order by month, with the previous month's forms readily available for review, and shall be retained for a minimum of three years.

2. Documents That Accompany the Detainee

The Directive on Detainee Transfers explains the files and documents that must be prepared and organized in preparation for a detainee's transfer. ICE/ERO staff of the sending facility is required to complete a Detainee Transfer Checklist to ensure all procedures are completed and place a copy in the detainee's A-file or work folder.

Standard 7.4 "Detainee Transfers" also requires that a Medical Transfer Summary accompany the detainee. If official health records accompany the detainee, they are to be placed in a sealed envelope or other container labeled with the detainee's name and A-number and marked "Confidential Medical Records."

Transportation staff may not transport a detainee without the documents as required by the Directive on Detainee Transfers and Standard 7.4 "Detainee Transfers." Staff is responsible for delivering all required documents and the transfer summary to personnel at the receiving facility.

To ensure that the receiving facility also receives the detainee's files and other required documentation:

a. transportation officers may not accept a detainee without the required documents;
b. the receiving facility may refuse to accept a detainee without the required documents; and
c. the receiving facility must report any exceptions to the Field Office and the Deputy Assistant Director, Detention Management Division.

H. Departure Scheduling and Security

The vehicle crew shall organize driving time so

detainees arrive at the designated meeting area on schedule.

Before transferring detainees from one facility to another, a designated officer shall inform the receiving office of:

1. the estimated time of departure and arrival (ETD/ETA);
2. the number of detainees in each of the following categories:
   a. new arrivals (remaining at the facility);
   b. drop-offs; and
   c. overnighters;
3. the total number of detainees;
4. any special-handling cases, with details about the special requirements (e.g., medications, restraints, special equipment); and
5. any actual or estimated delays in departure, and the accordingly revised ETA(s).

I. Transfer of Funds, Valuables and Personal Property

In accordance with standards "2.1 Admission and Release" and "2.5 Funds and Personal Property," facility staff shall inspect and inventory the personal property of detainees transferring from one facility to another.

In addition, at the originating facility:

1. Staff shall ask each detainee whether he/she has in his/her possession all funds, valuables and other personal property listed on the property inventory form:
   a. If a detainee answers "yes," he/she may board the vehicle; or
   b. If a detainee claims missing funds, valuables, or personal property, the detainee shall remain at the facility until required paperwork is completed. Photocopies of completed forms are sufficient documentation for the transfer to proceed.
2. Staff shall include, in the "checked baggage" section on each I-216, the I-77 numbers, to be verified by receiving facility staff;
3. The lead driver shall check the manifest against the number of packages by detainee name and A-number before signing the I-216 or placing the baggage on the bus.
4. In addition to the requirements of standard "2.5 Funds and Personal Property":
   a. Staff shall complete a separate I-77 for each piece of baggage, and shall record the detainee's name on the top, middle, and bottom portions; and
   b. Staff shall enact the following procedure for each piece of baggage and corresponding I-77 form, and:
      1) attach the string on the top of the I-77 to the corresponding piece of baggage, and secure the detainee's signature on the back of the I-77;
      2) attach the middle section to the copy of the I-385 that shall accompany the detainee to the final destination; and
      3) provide the bottom portion to the detainee as a receipt.

J. Loading a Vehicle

1. Security and Occupancy

Armed officers shall be posted whenever detainees enter or exit a vehicle outside a secure area.

The facility administrator shall ensure that all vehicles are assigned an occupancy rating in compliance with the U.S. Department of Transportation (DOT). The number of detainees transported may not exceed the established occupancy level.

The escorting officer/assistant driver shall instruct the detainees about rules of conduct during the trip.

The lead driver shall be responsible for managing the detainees' move from the staging area into the vehicle. The number of available officers shall determine whether detainees move at one time or in groups.

2. Items Detainees May Keep in Their Possession

Ordinarily, detainees in transport may keep the following in their possession: jewelry (wedding rings and approved religious items), eyeglasses, and receipts for property and money (G-589, I-77). However, if the transporting officers determine that any of these items may compromise officer or detainee safety, the items shall be removed from the detainee's possession and returned to the detainee or placed in an appropriate storage area.

In some instances, the vehicle crew shall safeguard and dispense prescription medicines as prescribed, noting the detainee's name, A-number, date and time(s) dispensed, and by whom. Such notes shall be attached to the detainee's medical record or A-file.

3. Count, Identification, and Seating

To confirm the identities of the detainees they are transporting, the vehicle crew shall:

a. summon the detainee, by surname, to the vehicle;

b. ask detainee to state his/her complete name;

c. compare name and face with the Booking Card (I-385) or equivalent and attached photo and the Record of Persons and Property Transferred (I-216) or equivalent. If necessary, refer to the I-385 or equivalent for additional biographical information;

d. seat each detainee in accordance with written procedures from the facility administrator, with particular attention to detainees with physical or mental health conditions, or who may need to be afforded closer observation for their own safety;

e. to transport detainees with disabilities safely and securely, transportation officers shall make reasonable accommodations for them, in so far as is practicable;

f. seat detainees in restraints (whose documents or behavior in transit indicate a security risk) in the first seats behind the security screen and record in a log maintained by the officers the detainee's name, reason for using restraints, type of restraints, and times restraints were applied and removed;

g. conduct a visual count once all passengers are seated on board, and every time before resuming the trip after the vehicle makes a scheduled or unscheduled stop; and

h. assist detainees with disabilities and special needs to their designated seat and ensure females and minors are seated according to the directives in section T of this standard.

K. Responsibilities En Route

1. Point of Contact

The next receiving office on the vehicle route serves as the contact point and is responsible for monitoring the vehicle's schedule.

Upon making contact with an arriving vehicle, the receiving officers shall certify, by signing the accompanying Form I-216, that they are taking custody of the specified detainees.

Each office shall develop and post written guidelines for tracing procedures to locate an overdue vehicle. If the vehicle does not arrive within range of the ETA, the contact point shall set the tracing procedures in motion.

2. Safety and Security

For safety purposes, all personnel shall remain seated while the vehicle is in motion.

The vehicle crew shall keep the cage doors locked whenever detainees are on board, and the assistant

driver is responsible for detainee oversight during transport. Officers must maintain a clear view of the entire vehicle compartment and remain alert for behavior that could jeopardize safety and security.

Detainees shall not have access to any personal baggage or packages while in transit (except as specified above in "Section J.2, Items Detainees May Keep in Their Possession").

A complete set of keys for every lock located in or on the vehicle shall travel with the vehicle at all times, in a secure place known to every transporting officer, and the crew shall keep bolt cutters in the forward compartment with the outer equipment for use in an emergency.

An armed officer may not enter the secure area of the vehicle. If he/she must enter that area, the officer shall first leave the weapon(s) with another officer for safekeeping or, if the vehicle is equipped with weapons lockers, in a locker.

3. Stops

During stops, which the vehicle crew shall keep to a minimum, detainees shall not leave the vehicle until the transporting officers have secured the area. When the detainees disembark, the officers shall keep them under constant observation to prevent external contact(s) and/or contraband smuggling or exchange. At least one officer shall remain in the vehicle when one or more detainees are present.

L. Meals

The vehicle crew shall provide meals and snacks during any transfer that exceeds six hours. Officers shall consider when the detainees last ate before serving meals and snacks. Special considerations shall be given to minors, pregnant female detainees, and detainees who have medical conditions.

Meal times, the number of meals, and the types of meals provided shall be recorded. Officers also shall record the identifying information of any detainee who refuses a meal and that information shall be appropriately documented.

The requirements specified in standard "4.1 Food Service" apply equally to food served in transit and in detention facilities.

In the interest of safety, detainees shall have no access to eating utensils (disposable or otherwise) while in transit.

Transporting officers shall observe safe-handling procedures at all times.

In transit, the crew shall store and serve food at the required temperatures. The crew shall maintain a constant supply of drinking water and ice in the water container(s), along with paper cups. A small number of disposable garbage receptacles (i.e., plastic bags) shall be kept in the driver's compartment, with the remainder stored in the equipment box located in the forward baggage compartment.

The food service administrator shall monitor the condition and routine cleansing and sterilizing of drinking-water containers, basins, latrines, etc., in vehicles to ensure compliance with standard "4.1 Food Service."

In an emergency, the transporting officers may purchase meals from a commercial source, obtaining receipts for later reimbursement.

M. Vehicle Communication

Every vehicle shall be equipped with a functioning two-way radio. Every crew shall also carry at least one portable radio, so that officers can maintain contact if one or more must leave the vehicle. The vehicle's communications system shall also include a cellular phone for use when radio communications are degraded (e.g., in dead zones, on different frequencies).

N. Vehicle Sanitation

Vehicles must be kept clean and sanitary at all times. The facility administrator shall establish the

procedures and schedule for sanitizing facility vehicles. Vehicle crew responsibilities include, but are not limited to:

1. dumping septic tank contents at the locations specified; and
2. maintaining an adequate supply of water and chemicals in the toilet at all times, including monitoring the inventory of chemical supplies stored in the forward baggage compartment.

O. Officer Conduct

Recognizing the effect of personal appearance, speech, conduct and demeanor in communicating the appropriate sense of authority, assigned transportation staff shall dress, speak and act with the utmost professionalism. Assigned transportation staff shall conduct themselves in a manner that reflects positively on ICE/ERO.

The vehicle crew falls under the responsibility of the Field Office Director with jurisdiction at each facility en route, whether during an intermediate stop or at the final destination. This responsibility remains in effect until the vehicle's departure, and applies only to the current trip. If problems arise, the lead driver must contact the Field Office Director, or designee.

Transportation staff shall comply with all rules and procedures governing use of government vehicles. They shall not transport any personal items other than those needed to carry out their assigned duties during the trip. The possession or use of alcoholic beverages and illegal drugs is strictly prohibited.

Using common sense, transportation staff shall handle any crises that may arise. While treating all persons with courtesy and respect, they shall not compromise security or the accomplishment of their mission.

P. Firearms Storage

Every facility administrator shall ensure that the on-site supply of gun lockers can accommodate the non-resident vehicle crews during stops at the facility.

Q. Vehicle Equipment

In SPCs and CDFs, the Field Office will provide the following equipment as appropriate for each vehicle:

1. *mobile radio(s) able to communicate on frequencies used by Border Patrol and/or other law enforcement agencies;*
2. *cellular phone (backup communication system);*
3. *in the forward baggage compartment, of buses, two equipment boxes containing:*
   a. *(in box #1:) large bolt cutters, fuses, fan belts, jack, small hand tools, flashlight, lantern, rags, disposable trash bags, broom, ground cloth, two sets of coveralls, and work gloves (fleet officer/shop supervisor maintains inventory and checks written inventory quarterly);*
   b. *(in box #2:) transmission fluid, water for radiator, oil, toilet disinfectant, extra fire extinguisher(s), road flares, and reflectors (transporting officers record amount and date used and by whom on inventory sheets kept in box #2, likewise maintaining MSDS sheets as necessary); and*
   c. *other equipment to be added as necessary (transporting officers shall provide supervisors with written notification of inventory needs, including items that need replenishing or replacing).*
4. *first-aid equipment bag (disaster kit), auxiliary to the first-aid kit in the driver's compartment (officers shall document each emergency requiring first-aid treatment, including whether and how quickly the injured individual(s) received proper medical care);*
5. *emergency blankets equal to the rated capacity of the vehicle;*
6. *boarding bag containing extra forms, a camera that produces instant photographs, film, batteries,*

and emergency phone numbers for ICE/ERO offices, local police, state police, etc.;

7. *spare tire and snow chains (if applicable);*
8. *restraining equipment, including, at a minimum:*
   a. *on buses: 50 sets of waist chains; 50 sets of leg irons; and 2 sets of leg irons modified for use as hand cuffs (extra-large); or*
   b. *on other vehicles: equipment equal to the rated capacity of the vehicle.*
9. All restraining equipment must be of high quality and must be maintained in good operating condition and kept in the forward baggage compartment with the other supplies; and
10. appropriate storage for firearms.

The vehicle crew shall determine which safety and security equipment to use in an emergency. The crew shall maintain restraints and other equipment in good working order.

R. Use of Restraints

In accordance with this standard and "2.15 Use of Force and Restraints," officers shall use authorized techniques and common sense when applying restraints. To ensure safe and humane treatment, the officers shall check the fit of restraining devices immediately after application, at every relay point, and any time the detainee complains. Properly fitting restraints do not restrict breathing or blood circulation.

The officers shall double-lock the restraining device(s) and secure the handcuffs to the waist chain. Under no circumstances shall officers attach a restraining device to an immovable object, including, but not limited to, security bars, seats, steering wheel, or any other part of a vehicle. Officers carrying firearms shall exercise caution if close contact with a detainee becomes necessary in an emergency.

Barring exigent circumstances, transporting officers shall not handcuff women or minors unless they have shown or threatened violent behavior, have a history of criminal activity, or an articulable likelihood of escape exists. If an exception arises, the officers shall document the incident, recording the facts and the reasoning behind the decision.

S. Emergency Situations

If an emergency occurs within a reasonable distance of an ICE/ERO office, assigned transportation staff shall make every effort to reach that office before taking extraordinary measures. However, if moving seems ill-advised or impossible, assigned transportation staff shall contact the office, stating their location and the nature of the problem, to ensure provisions for secure and immediate assistance.

If the situation is life-threatening, the vehicle crew shall not wait for help from an ICE/ERO office but shall take immediate action.

The facility administrator shall establish written procedures for transportation staff to follow during an en-route emergency. The written procedures shall cover the following scenarios.

1. Attack

If attacked, the vehicle crew must request assistance from the nearest law enforcement agency, continuing to drive until the vehicle becomes incapacitated. The transportation staff shall do everything possible to protect the safety of everyone in the vehicle.

2. Escape

If a detainee escapes, the assigned transportation staff shall not jeopardize the security of the remaining detainees by chasing the escapee. Instead, transportation staff shall notify the nearest ICE/ERO office, providing the escapee's name, A-number, height, weight, type of clothing, and direction of flight (if known). The office shall relay this information directly to local law enforcement

agencies.

The vehicle crew shall prepare a fully documented written report of the escape and/or attempted escape.

3. Hostages

If a hostage situation occurs on board the vehicle, at least one assigned transportation staff member shall secure the vehicle perimeter while another notifies the closest ICE/ERO office of the situation. The assigned transportation staff shall make every effort to determine who is involved and whether they are armed, relaying this information to the ICE/ERO office and local law enforcement agencies. Under no circumstances shall an assigned transportation officer bargain with or take orders from the hostage-taker(s), regardless of the status or rank of the hostage(s).

The vehicle crew shall hold all detainees on board until help arrives, in the event that the hostage-taker(s) allow(s) non-participants to disembark. Regardless of demands, the transportation staff shall not allow any hostage-taker(s) off the bus, with or without the hostages.

Because of the need to interview witnesses, examine the crime scene, etc., a hostage situation shall effectively end a transportation assignment. Once the hostage situation is resolved, assigned transportation staff shall receive instructions regarding how and where to proceed.

The vehicle crew's incident report shall note participants, witnesses and action taken.

4. Illness

If a detainee becomes ill while in transit, the assigned transportation staff shall take appropriate action and alert the receiving office in order to prepare to handle the situation.

If a detainee becomes ill while in transit and the illness requires immediate medical treatment (e.g., in the event of a heart attack), assigned transportation staff shall request assistance from the nearest medical facility, local law enforcement agencies and emergency services. The transportation staff shall initiate life-saving procedures as time-appropriate, proceeding if security permits. The closest ICE/ERO office shall prepare procurement paperwork and make arrangements for hospitalization, security, etc.

5. Death

If a detainee dies while in transit, assigned transportation staff shall notify the originating or receiving office as soon as possible and shall follow procedures specified in standard "4.7 Terminal Illness, Advance Directives and Death."

The closest ICE/ERO office shall coordinate with other agencies, including the coroner, required to be on the scene when the body is removed from the vehicle. The removal must take place in the state where death occurred. Standard "4.7 Terminal Illness, Advance Directives and Death" specifies the procedures with which assigned transportation staff must comply.

6. Fire

In case of fire in or on the vehicle, the driver shall immediately stop the vehicle. The crew shall fight the fire with the on-board equipment. If necessary, assigned transportation staff shall request assistance from the local fire department and law enforcement agency. If the fire forces evacuation of the bus, the crew is responsible for maintaining accountability and security while removing detainees in an orderly fashion.

7. Riots

If a riot, fight, or any disturbance occurs on the bus, the assistant driver shall order the detainees to cease and the driver shall attempt to move the bus to the side of the road. If necessary, the crew shall request assistance from the local law enforcement agency. Efforts shall be made to determine the instigators, number of detainees involved, names and A-

numbers.

When sufficient assistance is available, the assigned transportation staff shall attempt to regain control, using only as much force (e.g., with restraints or pepper spray) as necessary. Assigned transportation staff may not enter the screened area bearing arms.

8. Traffic Accident

The facility administrator shall establish written procedures for vehicle crews involved in traffic accidents.

After an accident, assigned transportation staff shall secure the area, request assistance from a local law enforcement agency, and obtain medical assistance for anyone injured. Regardless of the severity of the accident, the assigned transportation staff must report the accident to the local law enforcement agency and the nearest ICE/ERO office. They must also obtain a police report for the record, in case of future allegations or lawsuits against ICE/ERO or individual officers. The driver must record witnesses' names, addresses, and phone numbers on Form SF-94.

The assigned transportation staff shall discuss the issue of responsibility for the accident only with their chain of command. Upon arriving at the receiving office, the assigned transportation staff shall report the accident to the Field Office Director, or designee and prepare the required forms.

9. Vehicle Failure

The facility administrator shall develop written procedures for assigned transportation staff to follow when the vehicle develops mechanical problems en route.

Crew in an ICE/ERO-owned vehicle that develops mechanical problems en route shall attempt to isolate the problem, and shall then contact the nearest ICE/ERO office. Unless the vehicle constitutes a traffic hazard in its current location, the crew shall not move it until instructed to do so. If the assigned transportation staff fail to connect with the ICE/ERO office, they shall try to reach a local law enforcement agency.

10. Natural Disasters

The facility administrator shall develop written procedures for transportation officers to follow in the event of severe weather or a natural disaster.

In a flood, dust storm, ice storm, tornado or other natural disaster, the vehicle crew shall contact state authorities to assess road conditions along the planned route.

If driving conditions are unlikely to improve, the vehicle crew shall look for a safe area to park the vehicle and request further instructions from the receiving office.

Should it become necessary to exit the vehicle, the detainees must be directed to a safe area. In such a case, officers must maintain a heightened alertness for the duration of the emergency. When the emergency has passed, the assigned transportation staff shall return all detainees to the vehicle and conduct an accurate count.

T. Transportation of Females and Minors

The facility administrator shall develop written procedures for vehicle crews transporting females.

Except for emergent or extraordinary circumstances as approved by the Field Office Director(s), females may not be transported by bus for more than ten hours. Otherwise, transportation by auto or van is required, with frequent breaks.

Females shall be seated in the front of the vehicle.

Minors shall be separated from unrelated adults at all times during transport and seated in an area of the vehicle near officers and under their close supervision.

Assigned transportation staff shall search a detainee of the opposite sex only in extraordinary circumstances and only when a same-sex officer is not available.

When transporting detainees of the opposite gender,

assigned transportation staff shall call in their time of departure and odometer reading; and then do so again upon arrival, to account for their time.

Except in emergency situations, a single transportation staff member may not transport a single detainee of the opposite gender. Further, if there is an expectation that a pat down will occur during transport, an assigned transportation staff member of the same gender as the detainee(s) must be present.

2.1 Admission and Release

I. Purpose and Scope

This detention standard protects the community, detainees, staff, volunteers and contractors by ensuring secure and orderly operations when detainees are admitted to or released from a facility.

This detention standard applies to the following types of facilities housing ICE/ERO detainees:

- Service Processing Centers (SPCs);
- Contract Detention Facilities (CDFs); and
- State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours.

Procedures in italics are specifically required for SPCs, CDFs, and Dedicated IGSA facilities. Non-dedicated IGSA facilities must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.

Various terms used in this standard may be defined in standard "7.5 Definitions."

For all types of facilities, procedures that appear in italics with a marked (**) on the page indicate optimum levels of compliance for this standard.

II. Expected Outcomes

The expected outcomes of this detention standard are as follows (specific requirements are defined in "V. Expected Practices").

1. Each detainee shall be screened to ensure facility safety, security and good order. Searches should be conducted in the least-intrusive manner possible. Absent reasonable suspicion that a detainee is concealing contraband, detainees shall not be strip searched when entering ICE detention facilities.
2. Each detainee's personal property and valuables shall be checked for contraband, inventoried, receipted and stored.
3. Each detainee's identification documents shall be provided to ICE/ERO and, as appropriate a copy placed in the detention file.
4. Medical and mental health screening shall be conducted to identify requirements for medical care, special needs and housing, and to protect the health of others in the facility.
5. Each detainee shall undergo screening interviews and shall complete questionnaires and other forms in accordance with the PBNDS.
6. Each detainee shall be given an opportunity to shower and shall be issued clean clothing, bedding, towels, and personal hygiene items.
7. Each newly admitted detainee shall be kept separated from the general population until health, housing and custody classification is completed but not longer than 12 hours.
8. Each newly admitted detainee shall be oriented to the facility through written material on facility policies, rules, prohibited acts and procedures and, in some facilities, by viewing an orientation video.
9. The facility shall provide communication assistance to detainees with disabilities and detainees who are limited in their English proficiency (LEP). The facility will provide detainees with disabilities with effective communication, which may include the provision of auxiliary aids, such as readers, materials in Braille, audio recordings, telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, and note-takers, as needed. The facility will also provide detainees who are LEP with language assistance, including

bilingual staff or professional interpretation and translation services, to provide them with meaningful access to its programs and activities.

All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the population with limited English proficiency.

Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate.

10. Detainees shall be released, removed or transferred from a facility only when staff have followed specified procedures and completed required forms.

11. The facility shall maintain accurate records and documentation in an ICE/ERO approved electronic format on all detainees' admission, orientation, discipline and release.

Detainees shall have access to one free telephone call during the admission process as provided in the directive on "Detainee Transfers."

III. Standards Affected

This detention standard replaces "Admission and Release" dated 12/2/2008.

IV. References

American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition: 4-ALDF-2A-08, 2A-17, 2A-19, 2A-20, 2A-21, 2A-22, 2A-23, 2A-24, 2A-25, 2A-26, 2A-27, 2A-28, 2A-29, 2A-30, 2A-32, 2A-33, 2C-03, 2C-04, 2C-05, 3A-01, 4B-02, 4B-06, 4C-29, 5B-18, 6A-05, 7D-11, 7D-20.

ICE/ERO *Performance-based National Detention Standards 2011:*

- "2.2 Custody Classification System";
- "2.3 Contraband";
- "2.5 Funds and Personal Property";
- "2.10 Searches of Detainees";
- "4.5 Personal Hygiene";
- "5.6 Telephone Access"; and
- "6.1 Detainee Handbook."

"*Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*," 79 Fed. Reg. 13100 (Mar. 7, 2014).

V. Expected Practices

A. Overview of Admission, Orientation and Release

As detailed below, each facility is required to implement written policies and procedures for the intake and reception of newly arrived detainees, and to provide these detainees with information about facility policies, rules and procedures. At intake, detainees shall be searched, and their personal property and valuables checked for contraband, inventoried, receipted and stored. Each detainee's identification documents shall be secured and given to ICE/ERO. Medical screening protects the health of the detainee and others in the facility, and the detainee shall be given an opportunity to shower and shall be issued clean clothing, bedding, towels and personal hygiene items.

Each new arrival shall undergo screening interviews, and shall complete questionnaires and other forms. For safety, security and good order of the facility, each newly arrived detainee shall be kept separated from the general population until he/she is classified and housed accordingly.

Each new arrival shall be oriented to facility operations through written material in the form of an *ICE National Detention Handbook* or equivalent, covering such issues as access to health care services, sick call and grievance procedures, and

the facility's rules and prohibited acts. In some facilities, they may have an opportunity to view an orientation video.

Before a detainee's release, removal or transfer from a facility, staff must follow specified procedures and complete various forms.

B. Intake and Reception

1. Admission Processes

All facilities shall have in place a written policy and procedure related to the admissions process, which shall include intake and admissions forms and screening forms. Staff members shall be provided with adequate training on the admissions process at the facility. Admission processes for a newly admitted detainee shall include, but not be limited to:

a. recording basic personal information;

b. criminal history check;

c. photographing and fingerprinting, including notation of identifying marks or other unusual physical characteristics;

d. medical and mental health screenings; and

e. inventory of personal property.

2. Screening of Detainees

All detainees shall be screened upon admission; screening shall ordinarily include:

a. screening with a metal detector;

b. a thorough pat search; and

c. a search of each detainee's clothing (and issuance of institutional clothing).

Staff shall permit the detainee to change clothing and shower in a private room without being visually observed by staff, unless the staff member has reasonable suspicion to search the detainee in accordance with the following section on "Strip Searches" and standard "2.10 Searches of Detainees." A staff member of the same gender shall be present immediately outside the room where the detainee changes clothing and showers, with the door ajar to hear what transpires inside. The staff member must be prepared to intervene or provide assistance if he/she hears or observes any indication of a possible emergency or contraband smuggling.

To maintain standards of personal hygiene and to prevent the spread of communicable diseases and other unhealthy conditions within the housing units, where possible, every detainee shall shower before entering his/her assigned unit. During the detainee's shower, an officer of the same gender shall remain in the immediate area as described above.

3. Search of Clothing and Personal Items

Staff shall focus search efforts on commonly used hiding and smuggling places, such as pockets, waistbands, seams, collars, zipper areas, cuffs and shoe exteriors and interiors, including under the inner soles.

Staff shall also inspect all open containers, and inventory and store factory-sealed durable goods in accordance with facility procedures.

Items discovered during the search of a detainee or his/her property shall be identified as:

a. contraband, and processed in accordance with standard "2.3 Contraband"; or

b. funds, valuables or other personal property, to be kept in the detainee's possession or inventoried, receipted, stored or mailed to an address provided by the detainee, in accordance with standard "2.5 Funds and Personal Property."

4. Strip Searches

a. Description

Staff shall not routinely require a detainee to remove clothing or require a detainee to expose private parts of his/her body to search for contraband.

A strip search must take place in an area that affords privacy from other detainees and from

facility staff who are not involved in the search. Observation must be limited to members of the same sex.

The articulable facts supporting the conclusion that reasonable suspicion exists must be documented.

During all strip searches, a Form G-1025 (Record of Search) or its equivalent shall be completed.

b. Reasonable Suspicion
Officers must obtain supervisory approval before conducting strip searches during admission or release. Staff may conduct a strip search during admission and release, only when there is reasonable suspicion that contraband may be concealed on the person. "Reasonable suspicion" means suspicion based on specific and articulable facts that would lead a reasonable detention officer to believe that a specific detainee is in possession of contraband. This "reasonable suspicion" standard is a more permissive (lower) standard than the "probable cause" standard, but it nevertheless requires more than a mere hunch. It must be based on specific and articulable facts—along with reasonable inferences that may be drawn from those facts—that the officer shall document in Form 1025 (or contractor equivalent).

No simple, exact or mathematical formula for reasonable suspicion exists. In order for an officer to ascertain whether or not there is reasonable suspicion to believe that a detainee may have contraband that could pose a threat to him/herself, staff members or other detainees, the officer must review the totality of the individual's circumstances. As part of this process, an officer could consider certain factors, including but not limited to:

1) observation of unusual, surreptitious or suspicious appearance or behavior;

2) evasive or inconsistent responses to questions by law enforcement officers;

3) discovery of a weapon or other contraband during a pat search, metal detector scan or other non-intrusive search;

4) the detainee's criminal history, particularly felony or misdemeanor convictions of crimes involving violence, weapons, contraband and illegal substances. Ordinarily, convictions for minor or non-violent offenses shall not be the only basis for reasonable suspicion;

5) the detainee's detention in concurrence with an arrest for a crime of violence; or the detainee's arrest in possession of a weapon or contraband such as illegal drugs;

6) information from law enforcement databases or from other reliable sources suggesting that the detainee has affiliations with terrorist organizations, criminal gangs or organized crime; or

7) the detainee's history during confinement, particularly of violence or possession of contraband.

The lack of identity documents alone does not ordinarily constitute reasonable suspicion.

Before strip searching a detainee to search for contraband, an officer shall first attempt to resolve his/her suspicions through less intrusive means, such as a thorough examination of reasonably available ICE, CBP and other law enforcement records; a pat-down search; a detainee interview; or (where available) the use of a magnetometer or Boss chair. The officer shall document the results of those other, less intrusive, search methods on Form G-1025 (or contractor equivalent).

c. Gender of Inspector Staff of the same gender as the detainee shall perform the search, except when circumstances are such that a delay would mean the likely loss of contraband. Except in the case of an emergency or exigent circumstance, a

staff member may not perform strip searches of detainees of the opposite gender. When a member of the opposite gender from the detainee must perform a strip search, a staff member of the same sex as the detainee must be present.

When staff members of the opposite gender conduct a strip search, staff shall document the reason for the opposite-gender search in any logs used to record searches and in the detainee's detention file. Special care should be taken to ensure that transgender detainees are searched in private. ** *Whenever possible, medical personnel shall be present to observe the strip search of a transgender detainee.*

5. Search of Baggage and Personal Property

In accordance with standard "2.5 Funds and Personal Property," each facility shall have a procedure for taking inventory and receipt of detainee baggage and personal property (other than funds and valuables, which are addressed below).

Identity documents, such as passports, birth certificates and driver's licenses, shall also be inventoried and given to ICE/ERO staff.

a. Facility staff shall prepare an itemized list of the detainee's baggage and personal property using the personal property inventory form, or its equivalent. If a detainee has no baggage, staff shall use a facility container to store his/her personal property.

6. Missing Detainee Property

In accordance with standard "2.5 Funds and Personal Property," each facility shall institute procedures for inventory and receipt of detainee funds and valuables.

When a newly arrived detainee claims his/her property has been lost or left behind, staff shall complete a Form I-387, "Report of Detainee's Missing Property." IGSA facilities shall forward completed Forms I-387 to ICE/ERO.

7. Medical Screening

To protect the health of the detainee and others in the facility, each facility shall medically screen each newly arrived detainee utilizing IHSC Form 795A, or equivalent, in accordance with standard "4.3 Medical Care."

8. Establishment of a Detainee Detention File

As part of the admission process, staff shall open a detainee detention file that shall contain all paperwork generated by the detainee's stay at the facility, in accordance with standard "7.1 Detention Files."

C. Clothing and Bedding

In accordance with standard "4.5 Personal Hygiene," staff shall issue clothing and bedding items that are appropriate for the facility environment and local weather conditions.

D. Classification

In accordance with standard "2.2 Custody Classification System" staff shall use the documentation accompanying each new arrival for identification and classification purposes. If the classification staff members are not ICE/ERO employees, ICE/ERO shall provide only the information needed for classification.

Under no circumstances may non-ICE/ERO personnel have access to the detainee's A-file.

The classification process determines the appropriate level of custody for each detainee. Once this is established, staff can issue the detainee clothing or a wristband in the appropriate color for his/her classification level, if applicable.

New detainees shall remain segregated from the general population during the orientation and classification period, to the maximum extent practicable.

E. Admissions Documentation

An Order to Detain or an Order to Release the detainee (Form I-203 or I-203a), bearing the appropriate ICE/ERO Authorizing Official signature, must accompany each newly arriving detainee. Medical records and/or a book-in packet must accompany the arriving detainee, unless ICE/ERO and facility officials have authorized other arrangements. Staff shall prepare specific documents in conjunction with each new arrival to facilitate timely processing, classification, medical screening, accounting of personal effects and reporting of statistical data.

Forms requiring completion include, but are not limited to, the Alien Booking Record (Form I-385 or equivalent); the housing assignment card and any others used by the booking entity. Based on a one-on-one interview with the newly arrived detainee, the specially trained detention officer or designated medical officer shall also complete the IHSC Intake Screening Form I-795A or comparable form.

For SPCs the following criteria shall apply; CDFs and IGSAs shall develop an equivalent process for processing detainees:

The Form I-385 or equivalent, Alien Booking Record or booking card, contains blocks in which the processing officer shall enter information during the admissions process. In some circumstances, the arresting or delivering office shall enter biographical information, including name, sex, age, date of birth, birthplace, country of citizenship, A-number, medical alert, date apprehended, booking office, date of transfer and places involved in transfer (origin and destination).

If the arresting/delivering officer has not initiated a Form I-385 or equivalent, the admissions processing officer is responsible for its completion, excluding the release information. The admissions processing officer shall:

a. *circle or write the name of the facility receiving the detainee;*

b. *complete the biographical information in blocks 1, 2, 3, 4, 5 and 6 with information provided in the detainee's A-file or I-385. (The detainee's presence is not required for this step);*

c. *attach the detainee's photograph to the right of the biographical data;*

d. *record detainee responses (checking "yes" or "no") to section I interview questions covering recent doctor visits, hospital stays, drug and alcohol abuse and other physical and mental health conditions and concerns (on the forms for male detainees, strike the pregnancy question and enter "N/A");*

e. *mark the diagrams of the human anatomy, printed to the right of section I, to indicate the approximate locations of any bruises, scars, cuts and other marks and distinguishing characteristics observed on the detainee (if the officer who searches the detainee is not the officer completing the questionnaire, he/she shall likewise mark the diagram);*

f. *respond "yes" or "no" to the questions in section II, based on general observations of the detainee during the admissions process so far (e.g., compliance with orders, responsiveness, demeanor, etc.);*

g. *circle the appropriate action of the above questioning in "Section III," below:*

   1) *"General Population"—applicable when 100 percent of responses to questions in sections I and II are negative ("no" circled); this authorizes the detainee's release into the facility's general population after health screening has been completed, once the classification level is established;*

   2) *"General Population with Referral to Medical Care"—applicable when one or more responses to questions in sections I and II are positive ("yes" circled) and,*

though this could indicate any of several conditions, none causes immediate concern; the detainee's release into the facility's general population is authorized, with follow-up by the medical department;

3) *"Referral for Immediate Medical Attention"—applicable when one or more positive responses in sections I and II cause immediate concern for the detainee's physical or mental health; the officer informs the shift supervisor of the need for immediate medical attention; the shift supervisor then contacts the medical department, describes the situation and does as instructed; and*

4) *"Isolation until Medically Evaluated" — applicable when a positive response in section I or II suggests a contagious disease, or when the detainee's behavior during questioning seems threatening to self or others; the officer prepares an administrative segregation order and, in accordance with facility procedures, the detainee is placed in the Special Management Unit (SMU) pending medical review. The medical review shall take place as soon as practical, but no later than 24 hours after isolation, even if this means involving on-call medical staff.*

h. *after completing the form, provide signature and ID number in the signature block and, if the signature is illegible, neatly print name above it;*

i. *print onto a color-coded wristband, if applicable, the detainee's information, including but not limited to the following: name and A-number; housing and bunk assignment; and the Form I-77 number; and*

j. *strap the color-coded wristband, if applicable, around the detainee's wrist in a way that shall not cause circulation problems. Advise the detainee that the wristband must remain on his/her wrist until removed by an officer, and that disregarding this requirement may lead to disciplinary action.*

F. Orientation

All facilities shall have a method to provide ICE/ERO detainees an orientation to the facility as soon as practicable, in a language or manner that detainees can understand. Orientation procedures in CDFs and IGSAs must be approved in advance by the local ICE/ERO Field Office.

At SPCs, CDFs, and dedicated IGSAs, the facility administrator shall produce an orientation video that covers the required topics listed below and shall screen it for every detainee. The video shall generally be in English and Spanish and provisions shall be made for other significant segments of the population with limited English proficiency. The facility administrator shall establish procedures that ensure the availability of an interpreter for a detainee who does not speak the language(s) used in the video. The interpreter shall be available for orientation and scheduled meetings with the detainee. Outside sources may be used if necessary to ensure compliance with this requirement, consistent with security measures.

The orientation shall include the following information:

1. *an overview of the facility operations that most affect the detainees;*
2. *typical detention-case chronology (what most detainees can expect);*
3. *authority, responsibilities and duties of security officers;*
4. *procedures for the detainee to contact the deportation officer handling his/ her docket;*
5. *availability of pro bono legal services, and how to pursue such services in the facility, including accessing "Know Your Rights" presentations*

(e.g., location of current listing);

6. *standards of conduct, including acceptable and unacceptable detainee behavior, with an overview of other rules and requirements;*
7. *disciplinary procedures, including criminal prosecution, grievance procedures, appeals process;*
8. *the facility's Sexual Abuse and Assault Prevention and Intervention Program, including (at a minimum):*
   a. *self-protection;*
   b. *prevention and intervention;*
   c. *reporting sexual abuse or assault; and*
   d. *treatment and counseling.*
9. *introduction to the individual departments (e.g., recreation, medical); the various housing units; and food services, including availability of diets which satisfy religious requirements;*
10. *schedule of programs, services and daily activities, including visitation, telephone usage, mail service, religious programs, count procedures, access to and use of the law library and the general library, and sick-call procedures;*
11. *voluntary work program, with specific details including how to volunteer; and*
12. *how the detainee can file formal complaints with the DHS Office of the Inspector General (OIG).*

Facility administrators at non-dedicated facilities shall, to the extent practicable, produce an orientation video as described above and screen it for all detainees. Facility administrators at non-dedicated facilities shall screen for all detainees any orientation video provided to them by ICE/ERO.

Following the orientation, staff shall conduct a question-and-answer session. Staff shall respond to the best of their ability. Under no circumstance may staff give advice about a legal matter or recommend a professional service. Staff shall also demonstrate clearly to detainees how to use the telephone system to make telephone calls, including free telephone calls to consulates and free legal service providers.

G. Detainee Handbook

1. In accordance with standard "6.1 Detainee Handbook," every facility shall issue to each newly admitted detainee a copy of the *ICE National Detainee Handbook* (handbook) and local supplement that fully describes all policies, procedures and rules in effect at the facility.
2. The handbook and supplement shall provide a more detailed discussion of the material covered in the video overview. The handbook and supplement shall be in English and Spanish or English and provisions for written translation shall be made for other significant segments of the population with limited English proficiency. Detainees shall be allowed to keep the handbook and supplement with them in their living quarters.
3. If a detainee does not understand the language of the handbook and supplement, the facility administrator shall provide a translator or access to interpreter services as soon as possible for the purpose of orientation. When needed, and in compliance with security regulations, the facility administrator may contact an outside source.
4. As part of the admissions process, the detainee shall acknowledge receipt of the handbook and supplement by signing where indicated on the back of the Form I-385 (or on a separate form).
   a. The designated spot on the back of the Form I-385 may be a stamped entry containing the date of issue; handbook number, if applicable; initials and ID number of the issuing officer; detainee-signature line; and space for date of return and the receiving officer's initials and ID number.
   b. The stamp used for the handbook and supplement issuance may contain an identical

section for locker-key issuance.

c. If a form is used instead of a stamp or comparable notation on the back of the Form I-385, the officer must record the detainee's name and A-number in addition to the above-required information. The form is maintained in the detainee's detention file.

H. Releases

Facility staff assigned to processing must complete certain procedures before any detainee's release, removal, or transfer from the facility. Necessary steps include, but are not limited to: completing out-processing forms; closing files and fingerprinting; returning personal property; reclaiming facility-issued clothing, identification cards, handbooks, and bedding; and checking wants and warrants. ICE/ERO shall approve all facility release procedures.

1. A detainee's out-processing begins when release processing staff receive the Form I-203, "Order to Detain or Release," signed by an authorizing official.
2. The requesting ICE/ERO official is responsible for having all documentation required for the detainee's release or transfer complete and ready for use by out-processing officers.
3. After verifying the documents, the facility shall use the most expeditious communication system (e.g., public address system) to instruct the detainee to report to the nearest officer.
4. Provide detainee medications and a detailed medical care summary as described in "Medical Records" in Standard "4.3 Medical Care."
5. The officer shall check the wristband of the detainee, who reports as instructed, to verify his/her identity.
6. The officer shall advise the detainee to remove all facility-issued items, including the handbook, supplement and locker key (if issued) and personal property from the housing unit, and after doing so, to return to the officer for further instruction. If the detainee is physically unable to remove his/her facility-issued and personal items, assistance shall be provided.
7. The officer shall remove the detainee's housing-identification card from the file system and turn it over to the detainee. The detainee will then report to the processing office.
8. At this stage of the detainee's out-processing, the control officer shall remove any Form G-589 receipts from the detainee's detention file. The control officer shall give the Form G-589(s) to the shift supervisor for further action, and send the remaining documents to the processing office.
   a. The shift supervisor shall compare the information on the blue portion of the Form G-589 with that on the pink triplicate portion and, if they match in all particulars, shall remove the pink copy from its safeguards.
   b. After verifying the information on each portion of the G-589, the shift supervisor shall remove the funds and valuables from safeguards, attach the two portions of the Form G-589, make the necessary log entries, place the items in a secure container, and deliver the container to the processing officer.
9. When the detainee arrives in the processing office, the processing officer shall verify the detainee's identity, and take physical possession of the housing-identification card, handbook, supplement and locker key (if issued) handed back by the detainee. The officer shall then date and sign the back of the Form I-385 or specified form and remove the bottom portion(s) of the detainee's Form I-77(s).
   a. The Form I-77 authorizes the removal from storage of the detainee's personal property, as inventoried on the form.
   b. Before returning the property to the detainee,

the officer shall explain the form and require the detainee to sign his/her name on the bottom of the Form I-77 or on a separate piece of paper. The officer shall compare this signature with the signature on the back of the top portion of the I-77 that is attached to the property. If the signatures appear the same, the officer shall return the items to the detainee.

c. The detainee shall check his/her property against the original personal property inventory form. If all property is correctly accounted for, the detainee shall sign the inventory sheet, a copy of which the officer shall place in the detainee's detention file. The detainee shall be provided a copy of the signed form upon request.

d. If after property is checked against the detainee's property inventory sheet Form G-589, I-77 or equivalent, it is determined that property is missing or unaccounted for, the detainee shall complete a Form I-387 'Report of Detainee's Missing Property' or equivalent. The detainee shall be informed as to how the property shall be returned to him/her when/if it is located. The detainee shall be provided instructions on the appropriate office to contact in order to follow-up on the government's search for the detainee's lost property, in accordance with standard "2.5 Funds and Personal Property."

10. The detainee shall be permitted to change into his or her own clothing in a private part of the processing area, within earshot but not eyeshot. The staff shall:

a. instruct the detainee to remove all facility-issued clothing, and to dress in his/her personal clothing;

b. inspect the condition and quantity of facility-issued clothing, bedding, etc., surrendered by the detainee;

c. place the returned clothing and bedding, excluding the mattress, in the bin designated for soiled items—these shall be laundered and sanitized as appropriate before reuse;

d. set aside the plastic-covered or -sheathed mattress for rinse and wipe-down with disinfectant or other solution prescribed by the medical department; and

e. in the event property is missing, provide Form I-387 to the detainee.

11. The processing officer shall compare the blue and pink copies of the Form G-589 with the white copy presented by the detainee. If the detainee's documentation is in order, the officer shall return the detainee's funds and secure the detainee's signature, confirming receipt of the inventoried property on the blue copy of the G-589. The facility shall retain all three copies (blue, pink and white) of the closed-out G-589 in the detainee's detention file.

If the detainee claims to have lost the white portion of the Form G-589, the processing officer shall note this on the blue copy, which he/she and the detainee shall certify by signing immediately below. Staff should ensure that the content of the form is clear and that the detainee is made fully aware of what he/she is signing in a language or other manner which the detainee can understand.

I. Releases or Removals

The time, point and manner of release from a facility shall be consistent with safety considerations and shall take into account special vulnerabilities. Prior to release, the detainee shall be notified of the upcoming release and provided an opportunity to make a free phone call to facilitate release arrangements.

Facilities that are not within a reasonable walking distance of, or that are more than one mile from, public transportation shall transport detainees to

local bus/train/subway stations prior to the time the last bus/train leaves such stations for the day. If public transportation is within walking distance of the detention facility, detainees shall be provided with an information sheet that gives directions to and describes the types of transportation services available. However, facilities must provide transportation for any detainee who is not reasonably able to walk to public transportation due to age, disability, illness, mental health or other vulnerability, or as a result of weather or other environmental conditions at the time of release that may endanger the health or safety of the detainee.

Detainees will be provided with a list of legal, medical, and social services that are available in the release community, and a list of shelter services available in the immediate area along with directions to each shelter. Detainees will be released with one set of non-institutionalized, weather-appropriate clothing.

5.2 Trips for Non-medical Emergencies

I. Purpose and Scope

This detention standard permits detainees to maintain ties with their families through emergency staff-escorted trips into the community to visit critically ill members of the immediate family or to attend their funerals.

This detention standard applies to the following types of facilities housing ICE/ERO detainees:

- Service Processing Centers (SPCs);
- Contract Detention Facilities (CDFs); and
- State or local government facilities used by ERO through Intergovernmental Service Agreements (IGSAs) to hold detainees for more than 72 hours.

Procedures in italics are specifically required for SPCs, CDFs, and Dedicated IGSA facilities. Non-dedicated IGSA facilities must conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.

Various terms used in this standard may be defined in standard "7.5 Definitions."

II. Expected Outcomes

The expected outcomes of this detention standard are as follows (specific requirements are defined in "V. Expected Practices").

1. Within the constraints of safety and security, selected detainees shall be able to visit critically ill members of the immediate family, attend their funerals or attend family-related state court proceedings, while under constant staff supervision.
2. Safety and security shall be primary considerations in planning, approving and escorting a detainee out of a facility for a non-medical emergency.

III. Standards Affected

This detention standard replaces "Escorted Trips for Non-medical Emergencies" dated 12/2/2008.

IV. References

American Correctional Association, *Performance-based Standards for Adult Local Detention Facilities*, 4th Edition: 4-ALDF-1B-06.

ICE/ERO *Performance-based National Detention Standards 2011:*

- "1.3 Transportation (by Land)";
- "2.10 Searches of Detainees"; and
- "2.15 Use of Force and Restraints."

ICE Interim Use of Force Policy (7/7/2004), as amended or updated.

V. Expected Practices

A. Non-Medical Emergency Trip Requests and Approvals

On a case-by-case basis, and with approval of the respective Field Office Director, the facility administrator may allow a detainee, under ICE/ERO staff escort, to visit a critically ill member of his/her immediate family, attend an immediate family member's funeral and/or wake or attend a family-related state court proceeding.

"Immediate family member" refers to a parent (including stepparent or foster parent), brother, sister, biological or adopted child and spouse (including common-law spouse).

The Field Office Director is the approving official for non-medical emergency escorted trips from SPCs, CDFs and IGSAs, and may delegate this authority to the Assistant Field Office Director-level for any

detainee who does not require a high degree of control and supervision.

The facility administrator shall designate staff to help detainees prepare requests for non-medical emergency trip requests, according to the following stipulations.

1. That staff member shall forward the completed request to the detainee's deportation officer.
2. The deportation officer shall review the merits of the request, to include consultations with immigration enforcement agents, medical staff, the detainee's family and other persons in positions to provide relevant information.
3. On the basis of the information collected, the deportation officer shall report to the facility administrator on the appropriateness of the detainee's request and the amount of supervision the travel plan may entail.

B. Types of Trips and Travel Arrangements

1. Local Trip

A "local" trip constitutes up to and including a 10-hour absence from the facility. ICE/ERO assumes the costs, except that the detainee must pay for his/her own commercial carrier transportation (e.g., plane, train), if needed for the trip.

2. Extended Trip

An "extended" trip involves more than a 10-hour absence and may include an overnight stay. The cost of the detainee's roundtrip transportation on a commercial carrier must be prepaid by the detainee, the detainee's family or another source approved by the Field Office Director.

3. Travel Arrangements

ICE/ERO shall make all travel arrangements; however, travel involving a commercial carrier may not commence until the detainee or person acting on his/her behalf has submitted an open paid-in-full ticket or electronic-ticket voucher in the detainee's name.

As needed, ICE/ERO shall provide overnight housing in an SPC, CDF or IGSA facility.

ICE/ERO shall pay the travel costs incurred by the transporting officers.

C. Selection of Escorts

No less than two escorts are required for each trip. The Field Office Director or his/her designee shall select and assign the roles of the transporting officers (escorts) and delegate to one the decision-making authority for the trip. Ordinarily, probationary officers may not be assigned, and in no case may more than one probationary officer be on an escort team.

D. Supervision and Restraint Requirements

Except when the detainee is housed in a detention facility, transporting officers shall maintain constant and immediate visual supervision of any detainee who is under escort and shall follow the policy and procedures in the standards on "Transportation (By Land)" and "Use of Force and Restraints."

E. Training

Escort officers and others, as appropriate, shall receive training on:

1. standard "5.2 Trips for Non-medical Emergencies"; and
2. standards "1.3 Transportation (By Land)" and "2.15 Use of Force and Restraints."

F. Escort Instructions

1. Escorts shall follow the applicable policies, standards and procedures listed above in this standard.
2. Routes, meals and lodgings (if necessary) shall be arranged prior to departure.
3. Escorts shall follow the schedule included in the

trip authorization, arriving at and departing from the place(s) and event(s) listed at the specified times.

4. For security reasons, the trip route and schedule shall be confidential.
5. The responsible transporting officer shall report unexpected developments to the Control Center at the originating facility. Control Center staff shall relay the information to the highest-ranking supervisor on duty, who shall issue instructions for completion of the trip.
6. Escorts shall deny the detainee access to any intoxicant, narcotic, drug paraphernalia or drug not prescribed for his/her use by the medical staff.
7. If necessary, the transporting officers may increase the minimum restraints placed on the detainee at the outset of the trip, but at no time may reduce the minimum restraints. Since escorts may exercise no discretion in this matter and are prohibited from removing the restraints, the detainee shall visit a critically ill relative, attend a funeral or attend a family-related state court proceeding in restraints.
8. Escorts shall advise the detainee of the rules in effect during the trip, in a language or manner the detainee can understand.

   All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the population with limited English proficiency.

   Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate.
9. Among other things, the escorted detainee may not:
   a. bring discredit to ICE/ERO;
   b. violate any federal, state or local law;
   c. make unauthorized phone call(s); or
   d. arrange any visit(s) without the express permission of the facility administrator.
10. If the detainee breaches any of these rules, the responsible officer may decide to terminate the trip and immediately return to the facility.
11. Officers shall also remind the detainee that, during the trip and upon return to the facility, he/she is subject to searches in accordance with standard "2.10 Searches of Detainees," as well as tests for alcohol or drug use.
12. Officers may not accept gifts or gratuities from the detainee or any other person in appreciation for performing escort duties or for any other reason.
13. Escorts shall ensure that detainees with physical or mental disabilities are provided reasonable accommodations in accordance with security and safety concerns.

7.4 Detainee Transfers

I. Purpose and Scope

This detention standard is written to ensure that transfers of detainees from one facility to another are accomplished in a manner that ensures the safety and security of the staff, detainees, and the public; and that the process relating to transfers of detainees is carried out professionally and responsibly with respect to notifications, detainee records, and the protection of detainee funds and property.

Various terms used in this standard may be defined in standard "7.5 Definitions."

II. Expected Outcomes

The expected outcomes of this detention standard are as follows (specific requirements are defined in "V. Expected Practices").

1. Decisions to transfer detainees are made by the Field Office Director or his/her designee on the basis of complete and accurate case information and principles set forth in the ICE/ERO Detainee Transfers Directive and other applicable ICE/ERO policies. All detainee transfers and transfer determinations shall be based on a thorough and systematic review of the most current information available by ICE/ERO.
2. The legal representative-of-record shall be notified as soon as practicable, but no later than 24 hours after the detainee is transferred, in accordance with sound security practices. Contacting the legal representative-of-record will be the responsibility of ICE/ERO.
3. The detainee shall be informed of the transfer orally and in writing in a language or manner that he/she can understand, immediately prior to transport.
4. Transportation staff, as well as sending and receiving facility staff, shall have accurate and complete records for each transferred detainee.
5. Transfers of detainees shall be accomplished safely and securely.
6. Detainees shall be transferred with appropriate medication(s) and medical and referral information to ensure continuity of care with the receiving facility's medical services.
7. Transferred detainee funds, valuables and other personal property shall be safeguarded and transported in compliance with standards "1.3 Transportation (by Land)," "2.1 Admission and Release" and "2.5 Funds and Personal Property."
8. The facility shall provide communication assistance to detainees with disabilities and detainees who are limited in their English proficiency (LEP). The facility will provide detainees with disabilities with effective communication, which may include the provision of auxiliary aids, such as readers, materials in Braille, audio recordings, telephone handset amplifiers, telephones compatible with hearing aids, telecommunications devices for deaf persons (TTYs), interpreters, and note-takers, as needed. The facility will also provide detainees who are LEP with language assistance, including bilingual staff or professional interpretation and translation services, to provide them with meaningful access to its programs and activities.

   All written materials provided to detainees shall generally be translated into Spanish. Where practicable, provisions for written translation shall be made for other significant segments of the population with limited English proficiency.

   Oral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate.

III. Standards Affected

This detention standard replaces "Transfer of

Detainees" dated 12-2-2008

IV. References

American Correctional Association 4th Edition, Standards for Adult Detention Facilities: 4-ALDF-2A-23, 1B-06, 4C-05, 4C-40, 4D-27, 6A-07, 7D-19, 7D-20.

National Commission on Correctional Health Care, *Standards for Health Services in Jails (2014)*

ICE/ERO *Performance-based National Detention Standards 2011:*

- "1.3 Transportation (by Land)";
- "2.1 Admission and Release";
- "2.5 Funds and Personal Property";
- "4.3 Medical Care"; and
- "4.4 Medical Care (Women)."

ICE/ERO Detainee Transfers Directive

V. Expected Practices

A. Responsibilities of ICE/ERO

1. Decisions to transfer detainees are made by the Field Office Director or his or her designee on the basis of complete and accurate case information and principles set forth in the ICE/ERO Detainee Transfers Directive and other applicable ICE/ERO policies.
2. Attorney notifications relative to detainee transfers are the responsibility of ICE/ERO, which will make attorney notifications in accordance with the ICE Detainee Transfers Directive and other applicable ICE/ERO policies. The legal representative-of-record shall be notified as soon as practicable, but no later than 24 hours after the detainee is transferred, in accordance with sound security practices. Contacting the legal representative-of-record will be the responsibility of ICE/ERO.

B. Responsibilities of the Sending Facility - Notifications

1. Communications with ICE

   A detainee may not be transferred from any facility without the appropriate I-203 (Notice to Detain or Release) or I-216 (Record of Person and Property Transfer) that authorizes the detail. If the facility administrator or his or her designee believes that a scheduled transfer of a detainee should not take place, the facility administrator shall notify ICE/ERO prior to the transfer.

2. Detainee Notification

   Immediately prior to transfer, the sending facility shall ensure that the detainee is informed, in a language or manner he or she can understand, that he or she is being transferred to another facility and is not being removed (if applicable).

   a. The sending facility shall ensure that specific plans and time schedules are not discussed with detainees and that following notification, the detainee:

      1) is not permitted to make or receive any telephone calls until the detainee reaches the destination facility; and

      2) does not have contact with any detainee in the general population until the detainee reaches the destination facility.

   b. At the time of the transfer, the sending facility shall provide the detainee, in writing, the name, address, and telephone number of the facility to which he or she is being transferred, using the attached Detainee Transfer Notification Form.

   c. The sending facility shall ensure that the detainee acknowledges, in writing, that:

      1) he or she has received the transfer destination information;

      2) it is his or her responsibility to notify

family members if so desired, upon admission into the receiving facility; and

3) he or she may place a domestic phone call, at no expense to the detainee, upon admission into the receiving facility.

d. The sending facility will place a copy of the Detainee Transfer Notification Form in the detainee's detention file.

3. Notification to the Health Care Provider

Upon receipt of an authorization to transfer a detainee from ICE/ERO, the sending facility staff shall notify the facility health care provider so that the health care provider can prepare a medical transfer summary sheet and the detainee's full medical records to accompany the transfer. The facility health care provider shall be notified sufficiently in advance of the transfer that medical staff may determine and provide for any associated medical needs.

4. Preparation for Transfer, Notification to Escorting Officers

a. The sending facility shall ensure that a properly executed I-203 or I-216 accompanies the transfer.

b. The sending facility shall ensure that escorting officers are advised of any security considerations relative to detainees to be transported so that escorting officers can take necessary precautions.

In SPCs, CDFs, and IGSAs with a sufficient ICE/ERO onsite presence, the authorized ICE official shall check records and ascertain if the detainee has a criminal history, is dangerous or has an escape record. Any information of an adverse nature shall be clearly indicated on the G-391 and the escorting officers shall be warned to take the necessary precautions.

5. Food and Water during Transfer

Food and water shall be provided in accordance with the detention standard on transportation by land. The sending facility is responsible for the preparation and delivery of proper meals prior to departure.

C. Responsibilities of the Health Care Provider at the Sending Facility

1. Transfer of the Detainee's Medical Information

When a detainee is transferred to another detention facility, the sending facility shall ensure that a Medical Transfer Summary accompanies the detainee.

2. Medical Transfer Summary

a. The sending facility's medical staff shall prepare a Medical Transfer Summary that must accompany the detainee. The Medical Transfer Summary shall include, at a minimum, the following items:

1) patient identification;

2) tuberculosis (TB) screening results (including results date) and current TB status if TB disease is suspected or confirmed;

3) current mental, dental, and physical health status, including all significant health issues, and highlighting any potential unstable issues or conditions which require urgent follow-up;

4) current medications, with instructions for dose, frequency, etc., with specific instructions for medications that must be administered en route;

5) any past hospitalizations or major surgical procedures;

6) recent test results, as appropriate;

7) known allergies;

8) any pending medical or mental health evaluations, tests, procedures, or treatments

for a serious medical condition scheduled for the detainee at the sending facility. In the case of patients with communicable disease and/or other serious medical needs, detainees being released from ICE custody are given a list of community resources, at a minimum;

9) copies of any relevant documents as appropriate; and

10) the name and contact information of the transferring medical official.

The IHSC Form 849 or equivalent, or the Medical Transfer Summary attached as Appendix 4.3.C, which mirrors IHSC Form 849, may be used by facilities to ensure compliance with these standards.

3. Notification of Medical/Psychiatric Alerts or Holds

   Upon receiving notification that a detainee is to be transferred, appropriate medical staff at the sending facility shall notify the facility administrator of any medical/psychiatric alerts or holds that have been assigned to the detainee, as reflected in the detainee's medical records. The facility administrator shall be responsible for providing notice to ICE/ERO of any medical/psychiatric alerts or holds placed on a detainee that is to be transferred.

4. Medical Holds

   If a detainee has been placed in a medical hold status, the detainee must be evaluated and cleared by a licensed independent practitioner (LIP) prior to transfer. If the evaluation indicates that transfer is medically appropriate but that health concerns associated with the transfer remain, medical staff at the sending facility shall notify ICE and shall provide ICE requested information and other assistance, to the extent practicable, to enable ICE to make appropriate transfer determinations.

5. Medical Escort

   The CMA or designee must inform the facility administrator in writing if the detainee's medical or psychiatric condition requires a medical escort during transfer.

6. Medications

   a. Prior to transfer, medical staff shall provide the transporting officers instructions and, if applicable, medication(s) for the detainee's care in transit.

   b. Medical staff shall ensure that the detainee is transferred with, at a minimum, seven (7) days' worth of prescription medications (for TB medications, up to 15 days' supply, and for HIV/AIDS medication a 30 day supply) to guarantee the continuity of care throughout the transfer and subsequent intake process.

   c. Medication shall be:

      1) placed in a property envelope labeled with the detainee's name and A-number and appropriate administration instructions;

      2) accompany the transfer; and

      3) if unused, turned over to the receiving medical personnel.

D. Responsibilities of the Sending Facility Relative to Detainees' Property Prior to Transport

Before transferring a detainee, the sending facility's processing staff shall ensure that all funds and small valuables are properly documented on the G-589 and I-77 or equivalent.

1. Funds and Small Valuables

   Before transfer, the sending facility shall return all funds and small valuables to the detainee and close out all Forms G-589 (or local IGSA funds and valuables receipts) in accordance with the Detention Standard on Funds and Personal Property.

During transport, a detainee shall ordinarily have the following items in his or her possession; however, items that might present a security risk or are particularly bulky may be transported separately in the vehicles' storage area. Personal items include:

- Cash
- All legal material
- Small valuables such as jewelry
- Address books, phone lists, correspondence
- Dentures, prescription glasses
- Small religious items
- Photos
- Similar small personal property items.

The receiving facility shall create a new G-589 (or local IGSA funds and valuables receipt) during admissions in-processing in accordance with the Detention Standard on Funds and Personal Property.

2. Large Valuables, Excess Luggage, and Other Bulky Items

Detainee access to large items of personal property during transport is prohibited; however, ordinarily, all items stored at the sending facility shall accompany the transferee to the receiving SPC, CDF or, in most cases, the receiving IGSA facility.

If the property accompanies the detainee, in accordance with the Detention Standard on "Funds and Personal Property":

a. The sending facility shall close out all Forms G-589 (or local IGSA property receipt forms), and
b. The receiving facility shall create a new G-589 and I-77 (or local IGSA property receipt forms) during admissions in-processing.

If the receiving facility does not accept excess, oversized or bulky belongings (including, but not limited to, suitcases, cartons, televisions, etc.), the sending facility shall:

a. Arrange to store the property elsewhere; or process the excess property in accordance with ERO standard operating procedures.
b. If the detainee refuses to provide an appropriate mailing address, or is financially able but unwilling to pay for shipping, notify ICE/ERO. ICE/ERO may dispose of the property after providing the detainee written notice in accordance with the ICE/ERO standard operating procedures.
c. If the detainee cannot provide an appropriate address because one does not exist, the detainee shall keep the property receipts for the stored items, and the facility shall store the property and notify the receiving facility in writing that the transferring facility requires notice, before the detainee's release or further transfer, to ensure the detainee receives the stored property.

E. Responsibilities of the Transporting Officer

1. The transporting officer may not transport a detainee without the required documents, including:

   a. the Medical Transfer Summary; and
   b. a properly executed Form I-203 or I-216, or equivalent form.

2. The transporting officer shall review the information for completeness and to make sure that he or she has the supplies required to provide any in-transit care that is indicated.
3. Any transportation officer who reviews the Medical Transfer Summary shall protect the privacy of the detainee's medical information to the greatest extent possible, and may not share

medical information unless necessary to safely fulfill transportation responsibilities.

4. The Transporting Officer is responsible for delivering the Medical Transfer Summary to personnel at the receiving facility and shall advise them of any medications provided to the detainee in transit.
5. The receiving facility must report any exceptions to the ICE/ERO Field Office and the Deputy Assistant Director, Detention Management Division.

F. Post Transfer Activities

1. After admission into the receiving facility or Field Office, all detainees must be offered the opportunity to make one domestic three-minute phone call at no cost to the detainee.
2. The responsible processing supervisor or his/her designee shall ensure that the detainee is informed promptly that he or she may notify interested persons of the transfer. The offer to make a domestic call, as referenced above, will be documented and signed by processing staff and by the detainee. A copy of the documentation verifying that a detainee was offered a three-minute phone call will be filed in the detainee's detention folder.

DEPARTMENT OF HOMELAND SECURITY

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

DETAINEE TRANSFER NOTIFICATION

DETAINEE NAME _____ A# _____

NATIONALITY _____

TRANSFER DESTINATION

NAME OF NEW FACILITY _____

ADDRESS _____

_____

_____

TELEPHONE NUMBER _____

I hereby acknowledge that I have received the transfer destination information. I have also been notified that it is my responsibility to notify family members, if I so desire, and that I will be provided with one free phone call when I arrive at my destination.

DETAINEE SIGNATURE _____ A# _____ DATE _____

OFFICER SIGNATURE _____ DATE _____

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

RICARDO MEJIA,

Petitioner,

v.

IRWIN CARMICHAEL, Mecklenburg County Sheriff,

Respondent.

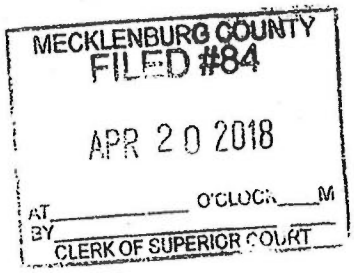
MOISES SOLANO CRUZ,

Petitioner

v.

IRWIN CARMICHAEL, Mecklenburg County Sheriff,

Respondent.



14CR241397-8, 17CR2273

ORDER

This matter was heard by the undersigned Superior Court Judge on November 30, 2017. Elizabeth Frawley and Stephanie Jackson represented the Petitioners. Sean F. Perrin represented the Respondent. Also present was Gill Beck, Assistant United States Attorney for the Western District of North Carolina. Present via telephone was Erez Reuveni, Assistant Director, Office of Immigration Litigation for the United States Department of Justice. The Court held this hearing as a follow up to the Petitioners' petitions for WRIT OF HABEAS CORPUS. After hearing arguments of counsel, the Court finds and concludes the following:

FINDINGS OF FACT - Cruz Petition

1. On November 7, 2017, Petitioner **Moises Solanao Cruz** filed a "Petition for Writ of Habeas Corpus." Cruz's petition alleged that he was being unlawfully held at the

Mecklenburg County Jail by Sheriff Irwin Carmichael. At the time of the filing of the Petition, Cruz was only being held on an I-200 Form and an I-247 Form issued by Steve LaRoccca, a program manager with Immigration and Customs Enforcement (ICE), *and who was not a federal or state judicial official*. Cruz was not being held on any state charges as of 2:30 p.m. on November 7, 2017.

2. In Cruz's case, the undersigned Superior Court Judge signed an "Order Granting the Return Forthwith," and ordered the Respondent Irwin Carmichael to file a return pursuant to N.C.G.S. § 17-14, produce the "body of the Petitioner in his custody or power," and set a return hearing for 4:45pm on November 7, 2017 in Courtroom 5350.

3. At 4:45pm, Petitioner Cruz was present in court along with Counsel Elizabeth J. Frawley and Stephanie D. Jackson. No other parties appeared. Written return was not filed. Counsel filed a Certificate of Service for the Petition and Order Granting Return Forthwith.

4. The undersigned Superior Court Judge was concerned about the quick nature of proceedings and at 5:15pm November 7th decided to hold open the hearing to 12:00PM Noon the following morning, November 8th. Therefore undersigned Superior Court Judge signed **a new order preventing transfer of Petitioner Cruz, ordering Respondent to bring Petitioner to court, and rescheduling the return hearing for November 8, 2017 at noon in Courtroom 5350.** Counsel Elizabeth J. Frawley served the order and documented service on a second Certificate of Service filed November 8, 2017. The Certificate of Service shows a copy of the Order Preventing Transfer was personally served upon the Mecklenburg County Jail at

6:12pm on November 7, 2017. Counsel further served Sheriff Irwin Carmichael and his attorney Marilyn Porter by email at 6:18pm on November 7, 2017. Counsel followed this up with personal service of the ORDER PREVENTING TRANSFER on November 8, 2017 at 10:23am. At the time of this order, service on other potentially interested parties (such as the US Attorney's office) may have occurred, but this was not determined definitively by the court.

5. Cruz *physical custody* was transferred from the jail into ICE custody and therefore out of the Mecklenburg County Sheriff's custody on November 8, 2017 at 7:57am.

6. Respondent filed a written return in the Cruz case, file stamped November 8, 2017. The Court notes that the **Sheriff and his deputies were claiming to act as federal ICE officials in detaining CRUZ from November 7th, 2017 at 6:12pm to November 8th,, 2017 at 7:57AM** pursuant to a February 28, 2017 "287g Agreement" between the Sheriff and The Department of Homeland Security (ICE), an April 10, 2017 ICE letter to the Sheriff, and as explained in a letter to the County Commissioners from the Sheriff dated April 27, 2017; these documents were provided to the court at the November 30th, 2017 hearing.

(a) However, the operable documents in both the Cruz and Mejia cases are: (1) the Form I-200, styled, WARRANT FOR ARREST OF ALIEN, which the court notes is not signed/executed by a magistrate or judge, and (2) DHS Form I-247A (3/17) styled, IMMIGRATION DETAINER – NOTICE OF ACTION, also not signed/executed by a magistrate or judge. Both forms only have a place for and were signed only by Immigration Officers. These documents were attached and received by the

Court as exhibits to the Respondent Sheriff's return in both the Cruz and Mejia cases.

7. On November 8, 2017 at Noon, Counsel for Petitioner appeared. No other parties were present.

8. The undersigned Superior Court Judge held the matter open for subsequent hearing which soon determined would be held on November 30, 2017 to join the Mejia case below and determine if a show cause should issue and to again attempt get the Respondent Sheriff and parties to come to Court and so have a proper hearing with all parties present. See also paragraphs 17 & 18 below.

FINDINGS OF FACT - Mejia Petition

9. On November 9, 2017 at 10:40AM, Petitioner Ricardo Mejia filed a "Petition for Writ of Habeas Corpus." Mejia's petition alleged that he was being unlawfully held at the Mecklenburg County Jail by Sheriff Irwin Carmichael. At the time of the filing of the Petition, Mejia was only being held on an I-200 Form and an I-247 Form issued by Steve LaRoccca, a program manager with Immigration and Customs Enforcement (ICE) *and who was not a federal or state judicial official.* **Mejia was not being held on any state charges as of 10:20 a.m. on November 9, 2017.**

10. In Mejia's case, the undersigned Superior Court Judge signed an "Order Granting the Return Forthwith," the morning of November 9th, and ordered the Petitioner to file a return pursuant to N.C.G.S. § 17-14, produce the "body of the Petitioner in his

custody or power," and set a return hearing for **4: 00 pm. on November 9, 2017 in Courtroom 5350.**

11. Mejia was physically present in the courthouse, but held in custody at the time the petition was filed on November 9th. Mejia was in custody but met with Counsel Paige W. Taylor and Elizabeth J. Frawley at this time. Court recessed at approximately noon, and counsel left the courthouse.

12. On November 9, 2017, Counsel for Petitioner submitted and filed a Certificate of Service for the Petition and Order Granting Return Forthwith.

13. On **November 9, 2017, at 2:15 p.m.,** Mejia was transferred from the Mecklenburg County Courthouse to the Mecklenburg County Jail. Mejia was then transferred out of the Mecklenburg County Jail (i.e. - out of the physical custody of the Sheriff) and into physical custody of (non-sheriff) sworn ICE agents.

14. The Court notes that the **Sheriff and his deputies were claiming to act as federal ICE officials in detaining Mejia from 10:20 AM to 2:15PM on November 9th,** 2017 pursuant to a February 28, 2017 "287g Agreement" between the Sheriff and The Department of Homeland Security (ICE), an April 10, 2017 ICE letter to the Sheriff, and as explained in a letter to the County Commissioners from the Sheriff dated April 27, 2017; these documents were provided to the court at the November 30th, 2017 hearing.

(a) However, the operable documents in both the Cruz and Mejia cases are: (1) the Form I-200, styled, WARRANT FOR ARREST OF ALIEN, which the court notes is not signed/executed by a magistrate or judge, and (2) DHS Form I-247A (3/17) styled, IMMIGRATION DETAINER – NOTICE OF ACTION, also not signed/executed

by a magistrate or judge. Both forms only have a place for and were signed only by Immigration Officers. These documents were attached and received by the Court as exhibits to the Respondent Sheriff's return in both the Cruz and Mejia cases.

15. Respondent filed a written return in the Mejia case, file stamped November 9, 2017.

16. On November 9, 2017 at 4:00pm, Counsel for Petitioner were present. No other parties appeared.

17. On or about November 9th, 2017 or a day or two earlier, the court learned of other similar cases being addressed by the N.C. Court of Appeals. These cases involved matters which came before Judge Mims Evans and possibly Judge Archie. The Court determined therefore that it was imperative to have the Sheriff, his counsel, and representatives of the US Attorney's office for the Western District be present at a final hearing. It was decided that November 30th would work best for all the parties.

18. The undersigned Superior Court Judge therefore took no action on the case on November 9th, 2017 since Cruz and Mejia were then out of reach of the Court's jurisdiction, and the court felt it would have been inappropriate to take action against the Sheriff without a hearing where he was present, therefore with consent of the parties, it was determined that a further hearing would be scheduled on November 30, 2017 which hearing would join the Mejia and Cruz cases together.

19. The court heard the matter on November 30th, 2017 with Sheriff present, counsel present for Sheriff present, Asst. US Attorney for Western District of NC present, and counsel for the Petitioners. After the hearing on November 30, 2017, the Court took this matter under advisement at the request of the Respondent as the court was

informed that a North Carolina Court of Appeals ruling was forthcoming within a week or two on almost identical issues arising out of similar Mecklenburg County matters (appealed from Judge Evans), which would likely resolve this matter and therefore, it would be premature for this court to act. This Court agreed and so: No show cause was issued.

20. On December 22, 2017, the North Carolina Court of Appeals granted the Respondent's Petitions for writ of certiorari in *Luis Lopez v. Irwin Carmichael*, COA P17-826, and *Carlos Chavez v. Carmichael*, COA P17-827, for the purpose of reviewing "Writ of Habeas Corpus Order" for immediate release entered in each case by Judge Yvonne Mims Evans on October 13, 2017. The same relief granted by Judge Yvonne Mims Evans in the Lopez and Chavez petitions was requested by the Petitioners in the instant cases. In its Order, the Court of Appeals also granted the petition for writ of prohibition and stated:

> pending the issuance of a mandate by this Court in its appeals, **the trial court is prohibited from issuing a writ habeas corpus ordering the release of a person detained by the Sheriff of Mecklenburg County for violations of federal immigration laws** under authority granted to the Sheriff by a written agreement with the United States Department of Homeland Security, and prohibited from entering any orders or sanctions limiting the authority of the Sheriff and his officers or agents, or any officer or agent of the United States from carrying out the acts permitting by the agreement the Sheriff and the United States. **(bold added)**

THE COURT CONCLUDES AS A MATTER OF LAW IN BOTH CASES AS FOLLOWS:

1. The court has proper subject matter and personal jurisdiction over the parties.

2. The undersigned could not find statutory grounds not to grant the relief requested by the Petitioners.

3. The Sheriff is subject to Chapter 17, the Habeas Corpus statutes, and the North Carolina Constitution, regardless of any agreement with federal officials to the contrary. The Sherriff cannot stop being a state official for the purpose of Chapter 17.

4. The United States Department of Homeland Security Forms I-200 and I-247, do not comply with any subsection of N.C.G.S. § 17-4. N.C.G.S. §17-4 (2-4) plainly do not apply. N.C.G.S. § 17-4(1) could apply, but petitioners were not "committed or detained by virtue of process," and the Homeland Security Forms were not "issued by a court of the United States, or a judge thereof . . .". There was no impartial judicial involvement in the issuance of the Forms relied on by Respondent.

(a) While Form I-200 is styled a "**WARRANT FOR ARREST...**", it does not meet the definition of an **"Arrest Warrant"**, see Black's Law dictionary 6th Edition (c) 1990, as it is not a written order of the court signed by a Magistrate or other neutral impartial judicial official.

5. This Court has jurisdiction over the Sheriff, Chapter 17 actions, and individual Petitioners detained by the Sheriff.

6. The Sheriff appears to have violated a direct order of the Court in not retaining the body of the Petitioners Cruz and Mejia for hearing before this State Court when such order was issued while the Sheriff had physical control and custody of the Petitioners Cruz and Mejia, and they had not yet been transferred to actual Federal authorities.

7. The court, being aware of the **Lopez and Chavez Writ of Prohibition,** concludes any action on these Cruz and Mejia cases at bar would violate the intent and spirit of the Writ, if this court took further action.

8. This court finds instructive certain dicta in the case of Lucatero v. Haynes, 2014 U.S. Dist. LEXIS 166189 (WDNC Dec. 1, 2014). In that case, Form I – 247 is deemed a request, not a directive, for law enforcement agencies which could not supersede an Order for the State Superior Court to attend a hearing such as this court was attempting to accomplish. Chief Judge Whitney in the Lucatero case further states, *"The Court recognizes that, in the event that a law enforcement agency detains an individual past his rightful release date based on the issuance of a Form I-247 detainer without first giving the individual the opportunity to show that he is not subject to deportation, then this may give rise to a claim for a violation of the individual's federal constitutional rights."*

9. This court's concern is simple. Should either Cruz or Mejia actually be or had been US Citizens at the time the Sheriff held their bodies in his physical custody and at the time this court issued its Habeas Corpus Order, Cruz and Mejia should have been presented as ordered to this court to determine, at a minimum if they claimed to be legal citizens of this county. If, on the other hand, I -247 detainers are to be treated as a "court order" for purposes of Chapter 17, even though they are not issued by a judicial official of any kind, then the legislature needs to *amend* Chapter 17 to this affect.

10. However, in light of the North Carolina Writ of Prohibition above mentioned, this courts deems it to be in the interest of justice to issue the following order. In addition, because of the importance of resolving this serious legal issue, this court concludes that an interlocutory appeal would be appropriate in these cases in order to be joined with the similar pending matters *(the Lopez* and *Chavez* cases) before the Court of Appeals.

IT IS ORDERED, ADJUDGES AND DECREED THAT:

1. The Court stays and otherwise *holds in abeyance* any further action on these two matters pending a decision in the North Carolina Court of Appeals or North Carolina Supreme Court in the *Lopez* and *Chavez* cases, and
2. In the interest of judicial economy, and because of the importance of resolving this serious legal issue, this court authorizes an interlocutory appeal in order that this case be joined with the similar pending matters *(the Lopez* and *Chavez* cases) before the Court of Appeals.

So Ordered, April 10th, 2018.

Daniel A. Kuehnert
Superior Court Judge *Presiding*

ADDENDUM

Florida Immigrant Coalition v. Mendez, 2010 WL 4384220 (S.D. Fla. 2010)

Frazier v. Williams, 2019 WL 2285764 (W.D. Penn. 2019)

Galarza v. State, 856 N.W.2d 3 (Ct. Appeals IA. 2013)

2010 WL 4384220
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

FLORIDA IMMIGRANT COALITION; El Sol, Jupiter's Neighborhood Center; and Corn Maya, Inc., Plaintiffs,
v.
Marcotulio MENDEZ, Plaintiff–Petitioner,
v.
Palm Beach County Sheriff Ric L. Bradshaw, Defendant.

No. 09–81280–CIV.
|
Oct. 28, 2010.

Attorneys and Law Firms

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Opinion

OPINION AND ORDER

KENNETH A. MARRA, District Judge.

*1 This cause is before the Court upon Defendant Ric L. Bradshaw's Motion for Summary Judgment (DE 53); Defendant's Motion in Limine and/or Motion to Strike Plaintiffs' Declaration Exhibits (DE 86) and Plaintiffs' Motion to Supplement its Opposition to Defendant's Motion for Summary Judgment (DE 87). The Court has carefully considered the motions and is otherwise fully advised in the premises.

I. Background

The facts, as culled from affidavits, exhibits, depositions, answers, answers to interrogatories and reasonably inferred therefrom in the light most favorable for the plaintiffs, for the purpose of this motion, are as follows:

Title 8, § 287.7 of the Code of Federal Regulations sets forth obligations for the Palm Beach County Sheriff's Office ("Sheriff's Office") by the Department of Homeland Security when immigration authorities place detainers on inmates:

> (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.
>
> (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.

Title 8, § 236.6 of the Code of Federal Regulations sets forth obligations for the Sheriff while detaining persons on behalf of Immigration and Custom Enforcement ("ICE"):

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the

> control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

*2 On June 4, 2008, the Fourth District Court of Appeal of Florida issued *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla.Dist.Ct.App.2008) which articulated the Palm Beach County Sheriff's Office specific procedure in place at that time in processing detainees with an I–247 detainer. *Ricketts* explained that procedure as follows:

> When subjects arrive at the jail, federal agents from ICE place in the jail record a form I–247, which is considered a detainer. This document requires the recipient to detain an alien for forty-eight hours after the alien ceases to be in custody on state charges. If a form I–203 is filed, and the alien has been released from state custody, the alien continues to be held and is considered to be in federal custody pending deportation proceedings. At that time, the alien remains in jail as a federal detainee until ICE takes custody of the alien from the sheriff. The jail receives monetary consideration pursuant to a contract with the federal government for holding federal prisoners, which consideration begins to run after the detainee is booked pursuant to the form I–203.

Id. at 592.

Captain Robert Manley, as the supervisor of intake and release at Palm Beach County's main detention center, is the person at the Sheriff's Office with the most knowledge about releasing inmates from jail and the interplay between I–247, I–203 and ICE holds and bonds. (Manley Dep. at 206, attached to DE 54–5; Manley Aff. ¶ 1, 12, attached to DE 54–4.) At all material times, he has been available to answer questions that citizens, lawyers or other interested persons may have regarding the status of detainees and to explain the nature of holds that have been placed on such detainees by other jurisdictions. (Manley Aff. ¶ 4.) Captain Manley testified that every foreign born detainee at the jail has an immigration check run on them, which is known as an "IAQ" or "Immigration Alien Query." (Manley Dep. at 209.) If there is no response to the query from the federal immigration system, the detainee would not be held. If there is a response, the Sheriff's Office will receive an I–247. (Manley Dep. at 209–10.) If ICE indicates an interest in a detainee, it has 48 hours to assume custody of that detainee after local charges are completed. ICE holds can be removed by ICE by either teletype, facsimile or in person. (Manley Aff. ¶ 7; Manley Dep. at 137–38.)

According to Captain Manley's affidavit, prior to May 2009, the Sheriff's Office had a contract with the United States Marshall and the federal government to hold and house detainees who had ICE holds placed on them. That contract expired, and effective May 12, 2009, the main detention center, which is part of the Palm Beach County jail system, no longer housed ICE detainees who also did not have state criminal charges pending. (Manley Aff. ¶ 7.)

According to Captain Manley, if a detainee has an ICE hold against them, a bond can be posted and the bond will be registered. (Manley Dep. at 47–48.) The person posting the bond would be advised that, if there is an ICE hold, the detainee would not be released. (Manley Dep. at 48.) If the ICE hold was removed, and there are no other charges or other holds, they would be released. (Manley Dep. at 84–85.) Captain Manley has written emails in response to questions by jail staff about how immigration inquires are handled. For example, on July 31, 2007, he wrote an email about how the staff was instructed to advise federal authorities when a detainee is ready for release, and that they have two hours to determine if a hold should be placed on a particular detainee. (Manley Aff. ¶ 10; July 2007 email, Ex. A attached to Manley Aff.) In a June 2008 email, Captain Manley reminded staff that subjects should not be held for more than two hours while waiting for the determination about federal holds and that the Sheriff's Office does not refuse any bonds because of holds. (Manley Aff. ¶ 11; June 2008 email, Ex. B, attached to Manley Aff.) Captain Manley has no personal knowledge of a jail staff member specifically refusing to accept any cash bond, but in order

to "protect those posting the bonds," he has made sure that there are "advisements that detainees may not be released upon the posting of cash bonds, primarily because of the variables and intricacies involved with federal ICE holds." (Manley Aff. ¶ 11.) Captain Manley's affidavit states that the jail has a proper computer system to ensure accurate inmate management. (Manely Aff. ¶ 14.)

*3 Deputy Isaias Flores was trained for at least one month pertaining to "releases" and three days in the area of bonds. (Flores Dep. at 13, attached to DE 54–6.) If an individual came to post bond for an inmate that has an ICE hold, that individual was told he or she "could post bond but [ ] the individual has a federal hold." He would not say anything about when that individual may be able to be released. (Flores Dep. at 21.) An individual does not need to be a citizen to post bond for an inmate. (Flores Dep. at 29–30.) Deputy Flores never contacted ICE to report possible immigration violations of detainees, nor had he notified ICE to place detainers on such individuals. (Flores Dep. at 32.) Captain Manley states that although the federal ICE hold lasts only 48 hours, they do not inform people posting bond of this fact. (Manley Dep. at 49.) Deputy Gerald Mitchell testified that if an individual has an ICE hold against him and a family member is trying to post bond, he would allow them to post the bond but he would also advise the family member that the detainee would not be released due to the ICE hold. (Mitchell Dep. at 16, 21, 30, 40 attached to 70–1; Manley Dep. at 129, 133, 139.) Deputy Mitchell does not know if the ICE hold goes away after a certain time period. (Mitchell Dep. at 18, 52.) Deputy Sheriff Gwen Morales testified that if someone has an immigration hold, she would tell the person trying to post a bond that there is "a hold for immigration, so there is no bond at this time." (Morales Dep. at 25.) If there is a hold, they cannot be released "until either ICE or the Feds or county comes to pick them up." (Morales Dep. at 44.) Captain Manley does advise people that they could lose the bond money. (Manley Dep. at 166–69.) Captain Manley testified that there is no difference between posting a bond for persons with or without ICE detainers, except that they would be advised of ICE holds. (Manley Dep. at 129–30.)

According to Captain Manley, the Sheriff's Office has not refused to accept bonds. Instead, detainees subject to ICE holds have chosen not to post the bonds. (Manley Dep. at 132.) Captain Manley stated that it is not a violation of the Sheriff's Office policy to advise persons posting bonds that the detainee has a federal hold. (Manley Dep. at 133–34.) In addition, it would be accurate to state that there is no bond at this time or there is no bond to post if the detainee has entered into the 48 hour time hold period. (Manley Dep. at 136.)

Mr. Mendez testified that he elected to pay a bond and that he signed the papers but he was not able to post the bond. (Mendez Dep. at 73.) Mr. Mendez, who entered the jail on May 19, 2009, was held in jail for over five months. (Mendez Dep. at 53, attached to DE 70–1; Compl. ¶ 3.) Captain Manley states that there was no unreasonable delay in processing Mr. Mendez's status at the jail and he was not aware of any staff member who refused to accept any bond pertaining to Mr. Mendez. (Manley Aff. ¶ 15.) If a person had trouble posting bond, there was a deputy sheriff sergeant on duty to field questions and Captain Manley could be contacted as well. (Manley Dep. at 150–51.)

*4 Ely Mendez accompanied Pastor Nicolas Lopez to the jail in an effort to post bond for Mr. Mendez. She testified that an officer told them that they could post the money, but if they posted the money, the money might be lost because the case was already in the hands of immigration. (Ely Mendez Dep. at 23–24, attached to DE 54–10.) Ms. Mendez also stated that an officer told her that they could not post a bond because Mr. Mendez had an immigration hold on him. (Ely Mendez Aff. ¶ 4, attached to DE 1; Ely Mendez Dep. at 18–19, 24, attached to DE 70–1.) Pastor Lopez did not hear this conversation. (Lopez Dep. at 39.) Pastor Lopez, who tried to post bond for Mr. Mendez, was told a United States citizen had to post bond. (Lopez Aff. ¶ 5, attached to DE 1.) He returned again in July to pay the bail money, and he was told there was no bail set. (Lopez Dep. at 41.) Because he could not post the bail, he left. (Lopez Dep. at 54.)

Mr. Mendez did not speak to his criminal defense attorney about any immigration detainer. (Mendez Dep. at 33.) On October 9, 2009, Mr. Mendez's felony charges were dismissed by Judge Karen Miller. (Order, attached to DE 15.) On October 16, 2009, Plaintiffs' counsel sent Defendant's counsel a letter seeking Mr. Mendez' release. (Letter, attached to DE 15.) On October 19, 2009, Mr. Mendez's criminal attorney filed an emergency motion seeking Mr. Mendez's release, which was granted the same day at 8:56 am. (Emergency Motion and Order, attached to DE 15.) Mr. Mendez was released on October 21, 2009 at 1:32 pm. (Defendant's Suggestion of Mootness, attached to DE 15.)

Daniel Cohen, an assistant public defender in the Fifteenth Judicial Circuit, has filed about 13 or 14 habeas petitions regarding ICE holds. (Cohen Dep. at 82–83.) Mr. Cohen discussed the possibility of several dozen people that could be potential plaintiffs in this case.[1] (Cohen Dep. at 33.) In addition, defendant's counsel has

stipulated that 17 writs of habeas petitions were filed against the Sheriff.[2] (Ric Bradshaw Dep. at 46, attached to DE 70–1.) Captain Manley testified that it had come to his attention that people said they were not allowed to post bond. (Manley Dep. at 143.)

The relevant habeas petitions[3] are as follows: (1) Holguy Sainthlaire's petition, dated February 11, 2008, attached the affidavits of Michelle Allen and assistant public defender Carol J. Bickerstaff. Ms. Allen states that after providing money to a bondsman, she spoke to the jail and was told bond could not be posted due to the immigration hold. Ms. Bickerstaff stated that her clients had attempted to post bonds after arrest were unable to do so by jail personnel due to the ICE holds. (Ex. 1, DE 92–1.)(2) Romualdo Gonzalez–Ignacio's petition, dated February 8, 2008, attached the affidavit of an investigator Morgan Keil from the Office of the Public Defender. He stated the supervisor of inmate records at the jail told him that Mr. Gonzalez–Ignacio was "booked for I.C.E. with no bond." (Ex. 3, DE 92–1.)(3) Melchor Andres' petition, dated November 7, 2007, included the affidavit of Marc Tracy who stated that the jail told him that Mr. Andres was "being held on misdemeanor charges and did not have a bond as he currently had an ICE detainer hold that would not permit his release at this time." (Ex. 4, DE 92–1.) (4) Rodrigue R. Joseph's petition, filed February 20, 2009, attached an affidavit from petitioner's wife which states that she was told there was no need to pay the bond because the petitioner would be taken to Krome Detention Center and then deported to Haiti. The next time she tried to post the bond, she was told even if she paid the bond, her husband would be taken to Miami. An investigator with the public defender's office, Charles J. Thompson, submitted an affidavit stating that he spoke with the Sheriff's office about bonding out an inmate, but was told he could not be bonded out because he had an ICE hold.[4] (Ex. 9, DE 93–1.)

*5 According to Mr. Cohen, if "the Sheriff's Office receives certain forms from ICE, the Sheriff thereby refuses to let the person leave the jail even if they have been ordered released by a state court judge on bond, on their recognizance even if their case is resolved and they got a time served plea ... If they are otherwise free to leave the jail by bond or other means, the Sheriff will not allow them to leave because the Sheriff believes they were bound by the request of ICE and by a contractual agreement...."[5] (Cohen Dep. at 120–21; *see also* Cohen Aff. at ¶ 2.) Mr. Cohen remembers three different Sheriff's deputies telling him that if there is an ICE hold, he would be unable to get them out.[6] (Cohen Dep. at 121–22.)

Upon reviewing Mr. Mendez's booking card, Captain Manley surmised that Mr. Mendez was originally booked on state charges, then on a failure to appear warrant and then on a federal holding charge. (Manley Dep. at 182–84.) Once a detainee is in federal custody, the Sheriff's Office cannot take any more local action. (Manley Dep. at 161.) Captain Manley was first advised of Mr. Mendez's situation when he read about it in the local paper. (Manley Dep. at 152.) He was not aware of any jail official not accepting a bond for Mr. Mendez. (Manley Aff. ¶ 15.) Captain Manley did not receive a complaint from Mr Mendez about being improperly detained. (Manley Aff. ¶ 6.)

FLIC and Corn Maya's members include persons who have been detained pursuant to immigration detainers. (Subhash Kateel Decl. ¶ ¶ 6, 9; Jeronimo Camposeco Decl. ¶ 6.) FLIC tried to assist an individual whose son was held in the Palm Beach County jail on an immigration detainer, but the organization had trouble finding him because his identity was not in the booking blotter. (Kateel Decl. ¶ 9.) Corn Maya has spent time trying to find out the whereabouts of detainees. (Camposeco Decl. ¶ 8.) El Sol has expended resources tracking down the status of detainees. (Hanson Decl. ¶ 13.) Captain Manley was not aware of any persons having trouble locating detainees held on an ICE detainer, but ICE attorneys advised him that detainers were not public information. (Manley Dep. at 177, 204.; *see also* Manley Aff. ¶ ¶ 4, 9)

Sheriff Bradshaw testified that he has no involvement in officer training. (Bradshaw Dep. at 65.) During his deposition, Sheriff Bradshaw stated that he did not know what the lawsuit was about and he asked his lawyer for the "basic concept" but did not want to know all the intricacies. He only needed to know that a lawyer was representing him. (Bradshaw Dep. at 9.) He was unaware of the *Ricketts* case and when they showed him an excerpt, he stated that he did not remember being involved in it even though he was the Sheriff on that date. (Bradshaw Dep. at 10, 26–27.) When asked if had done anything to ensure that a denial of bond did not occur, he stated that he could not do something about something he did not know about. (Bradshaw Dep. at 28.) At the time of the deposition, he had no intention of reading the complaint filed in the instant action. (Bradshaw Dep. at 60.) As far as he knows, the jail is complying with the laws and he expects his legal affairs department to inform him if there are cases he needs to know about. (Bradshaw Dep. at 58.) He does not "specifically remember" any allegations about individuals not being able to post bond in the Sheriff's Office. (Bradshaw Dep. at 25.) Sheriff Bradshaw testified that if a person has a "right to post a

bond and there is no hold on them, we go by what the law is." (Bradshaw Dep. at 32.) Sheriff Bradshaw did not personally participate in inmate management. (Manley Aff. ¶ 2.)

II. Summary Judgment Standard

*6 The Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and any doubts in this regard should be resolved against the moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.,* 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. *Id.* at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electronic Industrial Co. v. Zenith Radio Corp. .,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). According to the plain language of Fed.R.Civ.P. 56(e), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *Matsushita,* 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson,* 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir.1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." *Anderson,* 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202.

III. Discussion

Plaintiffs bring this action under 42 U.S.C. § 1983, alleging violations of the fourth and fourteenth amendments based on the following practices:

> 1) The Sheriff's wrongful confinement of pre-trial detainees with ICE detainers for lengthy periods of time without allowing them to post the bond already determined by a state court judge.
>
> 2) The Sheriff's wrongful confinement of pre-trial detainees for far longer than the ICE detainer's explicit 48–hour time limit for such detentions.

Plaintiffs have sued the Sheriff in both his individual and official capacities. (Compl.¶ 14.)

*7 When government officials are sued in their individual capacities, "qualified immunity offers complete protection as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Oliver v. Fiorino,* 586 F.3d 898, 904 (11th Cir.2009) (quoting *McCullough v. Antolini,* 559 F.3d 1201, 1205 (11th Cir.2009). Qualified immunity protects officials acting within the scope of their discretionary authority at the time of the incident. *McCullough,* 559 F.3d at 1205. The Supreme Court has established a two-part test for determining whether government officials are entitled to qualified immunity, and the district court has discretion to determine in what order to address each part. *Pearson v. Callahan,* 555 U.S. 223, ——, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009). The plaintiff must prove that (1) the government official violated his or her constitutional or statutory rights and (2) those rights were clearly established at the time the official acted. *Douglas Asphalt Co. v. Qore, Inc.,* 541 F.3d 1269, 1273 (11th Cir.2008).

Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability. *Keating v. City of Miami,* 598 F.3d 753, 762 (11th Cir.2010). "The standard by which a supervisor is held liable in [his or] her individual capacity for the actions of a subordinate is extremely rigorous." *Braddy v. Florida Dep't of Labor & Employment Sec.,* 133 F.3d 797, 802 (11th Cir.1998). "[S]upervisors can be held personally liable when either (1) the supervisor personally participates in the alleged constitutional violation, or (2)

there is a causal connection between the actions of the supervisor and the alleged constitutional violation." *Gray ex rel. Alexander v. Bostic,* 458 F.3d 1295, 1308 (11th Cir.2006) *citing Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir.1999). "Under the second method, the causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so." *Id.* (internal quotation marks omitted). "To be sufficient to notify the supervisor, the deprivations must not only be widespread, they also must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences." *Id.* (internal quotation marks omitted). Or the causal connection may be shown by evidence of a "custom or policy that results in deliberate indifference to constitutional rights or facts that support an inference that the supervisors directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *West v. Tillman,* 496 F.3d 1321, 1328 (11th Cir.2007); *see Campbell v. Johnson,* 586 F.3d 835, 840 (11th Cir.2009). The deliberate indifference standard is "a difficult burden for a plaintiff to meet." *West,* 496 F.3d at 1327.

***8** With respect to an official capacity suit against the county sheriff, the suit is essentially an action against the government entity he represents; *i.e.,* Palm Beach County. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe County,* 402 F.3d 1092, 1115 (11th Cir.2005) *citing McMillian v. Monroe County,* 520 U.S. 781, 785 n. 2, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997). "A municipality can be found liable under section 1983 only where the municipality itself causes the constitutional violation at issue. Respondent superior or vicarious liability will not attach under section 1983." *Id. citing City of Canton v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). Section 1983 liability exists only when a municipality has adopted an unconstitutional custom or policy. *Id.* When liability against a municipality is based on custom, a plaintiff must establish "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Brown v. City of Fort Lauderdale,* 923 F.2d 1474, 1481 (11th Cir.1991) (citations and quotations omitted). Such a widespread practice is "deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Id.* Moreover, "a municipality's failure to correct [ ] constitutionally offensive actions of its employees can rise to the level of a custom or policy if the municipality tacitly authorizes these actions or displays deliberate indifference towards the misconduct." *Griffin v. City of Opa–Locka,* 261 F.3d 1295, 1308 (11th Cir.2001) (internal quotation marks omitted). However, [r]andom acts or isolated incidents are insufficient to establish a custom." *Church v. City of Huntsville,* 30 F.3d 1332, 1345 (11th Cir.1994); *see also Gilmere v. City of Altanta, Ga.,* 737 F.2d 894, 904 (11th Cir.1984) ("Occasional acts of untrained policemen standing alone are not attributable to city policy or custom.") *citing Bennett v. City of Slidell,* 728 F.2d 762, 768 n. 3 (5th Cir.1984).

Viewing the facts in the light most favorable to Plaintiffs, the Court observes that Plaintiffs have presented evidence that Mr. Mendez was prevented from posting bond. In addition, they have also presented evidence, by way of the additional habeas petitions and their supporting affidavits, that a handful of other individuals were denied the opportunity to post bond.[7] Furthermore, there is deposition testimony from deputy sheriff Gwen Morales that if a detainee has an immigration hold, she would tell the person trying to post the bond that there is "a hold for immigration so there is no bond at this time." At the same time, the record evidence shows that the jail has a computer system in place to ensure accurate inmate management and that Captain Manley has written emails to his staff instructing them on how to handle immigration inquiries, including instructing his staff that the Sheriff's Office does not refuse bonds because of immigration holds. There is also record evidence that deputy sheriffs receive training about releases and the use of bonds.

***9** To establish a widespread policy or custom, the evidence must show that the violations of which Plaintiffs complain extends beyond the case of Mr. Mendez, and even beyond the case of several other individuals. Indeed, liability under section 1983 requires a high level of frequency as to the alleged constitutional violation. *See, e.g., Holloman v. Harland,* 370 F.3d 1252, 1294 (11th Cir.2004) ("Our precedents are clear that, for constitutional violations to be sufficiently "widespread" for a governmental supervisor to be held liable, they need to occur with frequency."); *Denno v. School Bd. of Volusia County, Fla.,* 218 F.3d 1267, 1277 (11th Cir.2000) (evidence of three other students who had been suspended for displaying confederate flags did not represent a widespread and persistent practice); *Brown v. Crawford,* 906 F.2d 667, 671 (11th Cir.1990) ("The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences."); *Clark v. Evans,* 840 F.2d 876, 885 (11th Cir.1988) ("[I]t is clear that four cases [alleging a prison policy of disregarding committal orders by state court judges] in four years would have been insufficient to put [the commissioner of the Department of Corrections] on notice, especially since the record is clear that such

matters were handled at lower administrative levels and would not have come to the attention of [the commissioner]."); *Owens v. City of Fort Lauderdale,* 174 F.Supp.2d 1282, 1295 ("it is the rare instance that only a couple of previous incidents will be sufficient to place a municipality on notice of 'widespread abuse' constituting deliberate indifference") .[8] This "high standard of proof is intentionally onerous for plaintiffs" to avoid subjecting a municipality or supervisor to respondeat superior liability. *Gold v. City of Miami,* 151 F.3d 1346, 1351 n. 10 (11th Cir.1998); *see also Cottone v. Jenne,* 326 F.3d 1352, 1360 (11th Cir.2003) ("The standard by which a supervisor is held liable in his individual capacity for the actions of a subordinate is extremely rigorous."). After careful review of the record, the Court finds that the evidence showing a mere handful of incidents does not constitute a widespread policy necessary to establish either supervisory or municipal liability.

In making this ruling, the Court also relies on *West v. Tillman,* 496 F.3d 1321 (11th Cir.2007). There, prison inmates brought a section 1983 action against the sheriff of a jail as well as the deputy warden, a correction officer and jail employees. The prisoners claimed that their rights were violated when the jail did not properly process court orders relating to releasing them from custody. *Id.* at 1327. As part of the claim against the supervisory defendants, the plaintiffs alleged that the supervisory defendants delayed the plaintiffs' release by failing to staff, supervise and train properly.[9] Notably, the plaintiffs did not allege that the supervisory defendants were personally involved in their over-detentions. *Id.* at 1328.

***10** With respect to the evidence regarding failure to train, the *West* Court stated that "[e]vidence that the Jail staff occasionally erred and failed to fulfill their duties as instructed is insufficient to satisfy the high standard for supervisory liability." *Id.* at 1330–31 *citing Pineda v. City of Houston,* 291 F.3d 325, 333 (5th Cir.2002) ("[P]lainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable."). Moreover, *West* stated that while the record indicated that the personnel might have benefitted from more training, the mistakes made were "in context, isolated." *Id.* at 1331. *West* went on to say that "[e]ven assuming that the [s]upervisory [d]efendants were aware that the lack of sufficient training of the records room staff could result in mistakes, no evidence exists that they were aware of the need for a different kind of training or that the training problem ... actually led regularly to over-detention of inmates." *Id. West* also noted that the record showed that the supervisory defendants provided more on-the-job training in response to the over-detention mistakes. *Id.* at 1331–32.

Next, regarding the allegations of the failure to supervise, *West* found that the record did not show that "the supervisory defendants were aware of regular, as opposed to occasional, instances of over-detention or that the [s]upervisory [d]efendants should have recognized that those instances were a result of inadequate supervision." *Id.* at 1332. Furthermore, the Court stated that even if the Sheriff was unaware of specific problems in the records department or specific over-detentions, that "does not show that he ignored his supervisory responsibilities; he has over 600 employees and has delegated daily responsibilities of the Jail to a warden." *Id.*

Here, the record evidence demonstrates that the Sheriff has delegated the responsibility for training and supervising the jail staff to Captain Manley. Captain Manley explained the computer system used by the jail to ensure accurate inmate management, his emails to staff about appropriate procedure regarding bail when a detainee has an ICE hold, and the availability of either Captain Manley or a deputy sheriff sergeant to field questions by individuals who have difficult posting bond. Significantly, the record evidence does not demonstrate anything more than the jail staff "occasionally err[ing] and fail [ing] to fulfill their duties as instructed." *Id.* at 1330.

Nonetheless, Plaintiffs contend that there are genuine issues of material fact that preclude summary judgment. To the extent that Plaintiffs rely solely on the circumstances of Mr. Mendez to defeat summary judgment, Plaintiffs are plainly wrong. *See Holloman,* 370 F.3d at 1294 ("for constitutional violations to be sufficiently 'widespread' for a governmental supervisor to be held liable, they need occur with frequency"); *Church,* 30 F.3d at 1345 (same); *Gilmere,* 737 F.2d at 904 (same). Nor would one erroneous comment by deputy Morales constitute a policy of not allowing detainees to post bond.[10] *Gilmere v. City of Altanta,* 737 F.2d at 904 ("Occasional acts of untrained policemen standing alone are not attributable to city policy or custom."); *Brown v. Crawford,* 906 F.2d at 671 ("The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.").

***11** Nor does Sheriff Bradshaw's testimony serve to advance Plaintiffs' case. The evidence must be examined with an eye towards whether there is a causal connection between the actions of the Sheriff and the alleged constitutional violation. *Gray ex rel. Alexander v. Bostic,*

458 F.3d at 1308. The high standard for supervisory liability means that the Sheriff's unawareness of specific problems regarding certain detainees and the acceptance of bail "does not show that he ignored his supervisory responsibilities," especially where the evidence illustrates he has delegated the daily responsibilities of the jail. *West,* 496 F.3d at 1332. For this reason, the Court finds that Plaintiffs have not shown that the Sheriff violated their constitutional rights. Therefore, Plaintiffs have not met their burden in showing that qualified immunity should not apply here. *See Garczynski v. Bradshaw,* 573 F.3d 1158, 1166 (11th Cir.2009) (not reaching the question of clearly established law when no constitutional violation has been found to have occurred); *McCullough v. Antolini,* 559 F.3d 1201, 1208 (11th Cir.2009) (same).

For these reasons, the Court grants Defendant's motion for summary judgment.[11]

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1) Defendant Ric L. Bradshaw's Motion for Summary Judgment (DE 53) is **GRANTED.**

2) Defendant's Motion in Limine and/or Motion to Strike Plaintiffs' Declaration Exhibits (DE 86) is **DENIED AS MOOT.**

3) Plaintiffs' Motion to Supplement its Opposition to Defendant's Motion for Summary Judgment (DE 87) is **DENIED.**

4) The Court will separately issue judgment for Defendant.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27th day of October, 2010.

All Citations

Not Reported in F.Supp.2d, 2010 WL 4384220

Footnotes

1 Mr. Cohen also made various general assertions not based on his personal knowledge and that constituted hearsay. (Cohen Dep. at 79, 118–19.)

2 Mr. Cohen's affidavit stated that he had filed 17 petitions "seeking extraordinary relief for people unlawfully arrested and detained by the Palm Beach County Sheriff's Office at the request of ICE. The latter petitions consist predominately of pleadings seeking writs of habeas corpus, and also include petitions seeking certiorari relief." (Cohen Aff. ¶ 3, attached to Compl.)

3 Plaintiffs filed a Notice to Supplement the Record (DE 92) to include these habeas petitions. At the September 28, 2010 hearing, Defendant did not object to their consideration.

4 These petitions also included unsworn or hearsay evidence. Other petitions, which are unsworn, alleged incidents wholly unsupported by affidavits. The remaining petitions do not support the claim that the Sheriff refused to accept bond money and therefore are not cited. Notably, the number of relevant petitions do not amount to 17.

5 Plaintiff also submits evidence that Mr. Cohen received reports from family members and friends that the Sheriff's Office would tell them that the detainee "was not going to be released in so many words, that it was a waste of time or waste of money and either affirmatively told them not to post bond or affirmatively discouraged them from posting bond." (Cohen Dep. at 114.) However, this evidence is hearsay and cannot be considered by the Court. Additional inadmissible hearsay presented by Plaintiff includes: (1) the assertion that El Sol is aware of different family members who were told they could not post a bond for a detainee at the Palm Beach County jail and the effect of this policy (Mary Jill Hanson Decl. ¶ ¶ 12, 15, 18); (2) Mr. Kateel's statement that a detainee's father told him that his son was reporting to him that he was being held at the Palm Beach County Jail (Kateel Decl. ¶ 9) and (3) Mr. Mendez's testimony that he encountered approximately 12 other individuals in jail who were not allowed to post bond, some of whom were held for driving without a license (Mendez Dep. at 74–75 77). *See Alvarez v. Royal Atlantic Developers, Inc.,* 610 F.3d 1253, 1268 n. 10 (11th Cir.2010) (the plaintiff's testimony about what she heard secondhand is inadmissable hearsay which cannot be used to defeat summary judgment).

6 The Court notes that both of these statements by Mr. Cohen appear to be true and consistent with federal law. If proper ICE detainers are in place for a particular detainee, the detainee cannot be released despite a state judge's order or resolution of the state charges. Thus, this evidence does not support Plaintiff's claim. *See* ***Ricketts,*** **985**

So.2d at 592–93.

7 While Plaintiffs have sought leave to supplement its opposition by filing the affidavits of Julio Cesar Gauna and Adam S. Davis (DE 87), the Court denies this motion on the basis that these affidavits fail to comply with 28 U.S.C. § 1746.

8 The Court notes that the "situation of municipal liability" is "analogous" to the question of supervisory liability. *Holloman,* 370 F.3d at 1294.

9 The plaintiffs also complained that there was a lack of a formal release policy.

10 Plaintiffs also complain about comments by jail staff made to individuals who have been provided "the opportunity to post bond for ICE detainees." (DE 70 at 9.) The Court does not see how these comments create a question of material fact regarding the alleged policy of denying individuals the ability to post bond.

11 Defendant also claims that *McKinney v. Pate* requires the Court to conclude that Plaintiffs are barred from bringing a procedural due process claim in federal court where there is an adequate state remedy. In that case, the Court held that "only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *McKinney v. Pate,* 20 F.3d 1550, 1557 (11th Cir.1994). In response, Plaintiffs cite *Ricketts* for the proposition that Mr. Mendez did not have a state remedy available to end his incarceration because his continued detention pursuant to a federal immigration detainer is a question of law for federal courts. However, that portion of the *Ricketts* opinion concerns the ability of a detainee to challenge the validity of a federal detainer, and not the ability to post bond. As the record demonstrates, Mr. Cohen, the defense attorney for Mr. Mendez, was familiar with the procedure for filing state habeas petitions and could have filed a petition for Mr. Mendez with respect to the Sheriff's alleged refusal to accept bond for Mr. Mendez. Because there is no showing that the state did not provide an adequate state remedy, or that Mr. Mendez unsuccessfully availed himself of those remedies, the procedural due process claim is barred on this ground as well.

Lastly, with respect to Defendant's argument for the application of *Younger* abstention, the Court will briefly note that Defendant has failed to show that the requested relief by Plaintiffs would result in "meticulous and burdensome federal oversight of state court or court-like functions." *Wexler v. Lepore,* 385 F.3d 1336, 1340 (11th Cir.2004); *see also O'Shea v. Littleton,* 414 U.S. 488, 501, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (the " 'periodic reporting' " system that "might be warranted would constitute a form of monitoring of the operation of state court functions that is antipathetic to established principles of comity.").

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2019 WL 2285764
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

Leroy FRAZIER, Petitioner,
v.
Mark K. WILLIAMS, Respondent.

Civil Action No. 18-247 Erie
|
Signed 05/29/2019

Attorneys and Law Firms

Leroy Frazier, Bradford, PA, pro se.

Karen Gal-Or, Michael Ivory, Michael Leo Ivory, United States Attorney's Office, Pittsburgh, PA, for Respondent.

MEMORANDUM

SUSAN PARADISE BAXTER, United States District Judge

*1 Pending before the Court is a motion (ECF No. 13) filed by federal prisoner Leroy Frazier ("Petitioner"), which this Court has construed as a motion for reconsideration under Federal Rules of Civil Procedure 59(e) or 60(b). For the reasons set forth below, the motion is denied.

I.

A. Relevant Background

Petitioner is a federal inmate who is incarcerated at the Federal Correctional Institution McKean ("FCI McKean"), which is located within the territorial boundaries of this Court. He is serving a 72-month term of imprisonment imposed by the United States District Court for the Eastern District of Pennsylvania on a conviction of one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On July 25, 2018, he filed a petition for a writ of habeas corpus in the Supreme Court of Pennsylvania. He named as Respondent the warden of FCI McKean, and sought an order directing the Respondent to immediately release him.

Petitioner was one of numerous inmates from FCI McKean who filed the same or similar petition for a writ of habeas corpus with the Supreme Court of Pennsylvania. As this Court explained in an earlier Memorandum (ECF No. 11), a state court cannot consider a petition for a writ of habeas corpus filed by a federal prisoner. 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4213 (3d ed.), Westlaw (databased updated Nov. 2018) ("it is now ... clear that a state court cannot grant habeas corpus for the discharge of a person held in federal custody.... [I]n 1872, ... it was finally established that the state courts have no authority whatever to challenge, by habeas corpus, the legality of federal executive or judicial action holding a person in custody.") (citing Tarble's Case, 13 Wall. 397, 20 L.Ed. 597 (1872); Ableman v. Booth, 21 How. 506, 16 L.Ed. 169 (1859)).

Respondent timely removed this action to this Court pursuant to 28 U.S.C. §§ 1442 and 1446. On March 25, 2019, this Court issued a final order dismissing the case because Petitioner could not pursue his claims under 28 U.S.C. § 2241. Petitioner subsequently filed a motion, which this Court has construed as a motion for reconsideration under Rule 59(e) or 60(b).[1] He makes the confounding argument that he did not file a "petition for a writ of habeas corpus" with the Supreme Court of Pennsylvania, but instead filed a "writ of habeas corpus," which he claims that court could have addressed.

II.

"[A] timely Rule 59(e) motion suspends the finality of the judgment by tolling the time for appeal" in recognition of "the inherent power that [a district court] has to rectify its own mistakes prior to the entry of judgment for a brief period of time immediately after judgment is entered." Blystone v. Horn, 664 F.3d 397, 414 (3d Cir. 2011). The standard for obtaining relief under Rule 59(e) is difficult for a party to meet. The United States Court of Appeals for the Third Circuit explained:

*2 The scope of a motion for reconsideration, we have held, is extremely limited. Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence. Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc., 602 F.3d 237, 251 (3d Cir. 2010). "Accordingly, a judgment may be altered or amended [only] if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued the challenged decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id. (quotation marks omitted).

Id. at 415-16 (first bracketed text added by the court of appeals, emphasis omitted).

"[A] Rule 60(b) motion may not be used as a substitute for an appeal, and ... legal error, without more does not warrant relief under that provision[.]" Fiorelli, 337 F.3d at 288 (internal quotation and citation omitted). As with Rule 59(e), the standard for obtaining relief under Rule 60(b) is difficult for a party to meet. It allows a party to seek relief from a final judgment under the following limited set of circumstances:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60. A movant seeking relief under Rule 60(b)(6) must "show extraordinary circumstances justifying the reopening of a final judgment." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005) (internal quotations and citations omitted). "Such circumstances will rarely occur in the habeas context." Id.

None of the grounds permitting reconsideration under either Rule 59(e) or 60(b) apply here. Accordingly, the Court denies Petitioner's motion (ECF No. 13) and, to the extent that a certificate of appealability is required, the Court denies that as well.

An appropriate order follows.

All Citations

Slip Copy, 2019 WL 2285764

Footnotes

1 "Although motions for reconsideration under" these two Rules "serve similar functions, each has a particular purpose." United States v. Fiorelli, 337 F.3d 282, 288 (3d Cir. 2003).

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856 N.W.2d 3 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

Victor Hernandez GALARZA,
Petitioner–Appellant,
v.
STATE of Iowa, Respondent–Appellee.

No. 13–0917.
|
Aug. 27, 2014.

Appeal from the Iowa District Court for Polk County, Odell G. McGhee II, District Associate Judge.
An immigrant who successfully discharged his probation from a deferred judgment appeals the dismissal of his petition seeking habeas corpus relief in connection with federal deportation consequences. **AFFIRMED.**

Attorneys and Law Firms

Benjamin D. Bergmann of Parrish, Kruidenier, Dunn, Boles, Gribble & Gentry, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Kevin Hathaway, Assistant County Attorney, for appellee.
Considered by TABOR, P.J., MULLINS, J., and GOODHUE, S.J.*

Opinion

TABOR, P.J.

*1 Victor Hernandez Galarza (Hernandez) challenges the district court's denial of his petition for writ of habeas corpus. Hernandez claims he received ineffective assistance of counsel in the form of misadvice as to the deportation consequences of his guilty plea. Because a state writ cannot reach Hernandez's federal custodian, assuming he is in federal custody, we affirm.

I. Background Facts and Proceedings.
Hernandez, an immigrant who was legally in the United States,[1] used a false social security number to obtain a certificate of title to a vehicle. As a result, the Polk County Attorney charged Hernandez with fraudulent practice in the third degree under Iowa Code section 714.11 (2011). Hernandez entered a guilty plea to a reduced charge of fraudulent practices in the fourth degree under section 714.12. The district court granted Hernandez a deferred judgment with one year of probation, a fine, and community service. After Hernandez had successfully fulfilled the conditions of the deferred judgment, the district court filed a probation discharge order, and Hernandez's conviction was expunged.

Hernandez alleges that as a consequence of his guilty plea, the U .S Immigration and Customs Enforcement (ICE) initiated deportation procedures against him.[2] The threat of deportation prompted Hernandez to file a petition for a writ of habeas corpus under Iowa Code chapter 663 or, in the alternative, for a writ of coram nobis. His petition alleged ineffective assistance of counsel in his state plea proceedings. Hernandez argued defense counsel neglected to properly advise him about the immigration consequences of the plea in violation of the standard of representation set in *Padilla v. Kentucky,* 559 U.S. 356 (2010). The district court dismissed Hernandez's petition, finding "no evidence of illegal detention." Hernandez appeals the dismissal of his habeas petition; he does not pursue the writ-of-coram-nobis ground for relief.

II. Analysis of State Habeas Claim
Because the petition for writ of habeas corpus "does not invoke the court's equitable powers," our review is not de novo. *See Cummings v. Lainson,* 33 N.W.2d 395, 397 (Iowa 1948). We review the dismissal of Hernandez's habeas petition for correction of errors at law. *See* Iowa R.App. P. 6.907.

Hernandez asserts that during the state guilty-plea proceedings his attorney did not advise him that a deferred judgment could result in deportation, a severe consequence for an immigrant. Hernandez now seeks to undo the federal consequences of his state guilty plea by challenging counsel's performance through a petition for a writ of habeas corpus under Iowa Code chapter 663 and article 1, section 13 of the Iowa Constitution.

Criminal justice is for the most part a system of pleas, not a system of trials. *Missouri v. Frye,* 132 S.Ct. 1399, 1407 (2012) (noting ninety-four percent of state convictions are the result of guilty pleas). In light of this statistic,

negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Padilla,* 559 U.S. at 373. Among the important issues for counsel to consider in negotiating a plea agreement are the collateral consequences state and federal laws increasingly impose on criminal convictions. *See Daughenbaugh v. State,* 805 N.W.2d 591, 593 (Iowa 2011).

***2** As the present appeal illustrates, deportation is one of the most serious collateral consequences for noncitizens who plead guilty to certain crimes. *See Padilla,* 559 U.S. at 364. In light of the severity of deportation—"the equivalent of banishment or exile"—the *Padilla* Court held that to satisfy the Sixth Amendment right to effective assistance, criminal defense counsel must inform their clients if a plea carries the risk of adverse immigration consequences. *Id.* at 373. The absence of that information underlies Hernandez's ineffectiveness claim against defense counsel.

Normally, if defense counsel did not provide effective assistance of counsel, a criminal defendant may challenge his or her guilty plea on direct appeal, even without filing a motion in arrest of judgment. *See State v. Kress,* 636 N.W.2d 12, 19 (Iowa 2001). A claim of ineffective assistance of counsel also may be raised via Iowa's postconviction relief chapter. Relief is available to "[a]ny person who has been convicted of, or sentenced for, a public offense and who claims ... [t]he conviction or sentence was in violation of the Constitution of the United States...." Iowa Code § 822.2.

Because the district court granted Hernandez a deferred judgment after his guilty plea, neither a direct appeal nor a postconviction relief action was available to Hernandez.[3] Hernandez could not raise his ineffective assistance claim on direct appeal. *See State v. Stressman,* 460 N.W.2d 461, 462 (Iowa 1990) ("[B]ecause a final judgment does not exist, defendant's case is not appealable by him as a matter of right."); *see also McKeever v. Gerard,* 368 N .W.2d 119 (Iowa 1985) (declining to recognize a certiorari challenge to a deferred judgment because "[a] defendant who elects to have the case eventually treated as if there were no conviction cannot simultaneously attack the case as if there had been one"). Nor could Hernandez file a postconviction relief application because he does not have a "conviction" as that term was interpreted in *Daughenbaugh.* A "conviction" under section 822.2 must be based upon an underlying criminal adjudication and entry of judgment. *Daughenbaugh,* 805 N.W.2d at 599. Upon the completion of all conditions of a *deferred* judgment, the defendant is discharged without entry of judgment. *See* Iowa Code § 907.3(1). It follows that "a guilty plea pursuant to a deferred judgment is not a conviction under Iowa's postconviction relief statute." *Daughenbaugh,* 805 N.W.2d at 598. When Hernandez fulfilled the conditions of his deferred judgment, he did not have a conviction from which he could seek relief under section 822.2.

Because the traditional routes for raising a claim of ineffective assistance are closed to him, Hernandez seizes on a footnote in *Daughenbaugh* in support of his collateral attack by writ of habeas corpus. After finding Daughenbaugh, who received a deferred judgment, was not entitled to postconviction relief, the supreme court stated: "We express no opinion upon whether or under what circumstances a guilty plea followed by a deferred judgment might be subject to collateral attack under Iowa Code chapter 663." *Daughenbaugh,* 805 N.W.2d at 599 n. 1. Chapter 663 is cross referenced in the opening provision of the postconviction relief chapter, as follows: "The provisions of section 663.1 through 663.44, inclusive, shall not apply to persons convicted of, or sentenced for, a public offense." Iowa Code § 822.1. Because a deferred judgment is not a conviction, it may be subject to a collateral attack by writ of habeas corpus under chapter 663.

***3** Habeas corpus literally means "you have the body." *Hottle v. Dist. Ct.,* 11 N.W.2d 30, 34 (Iowa 1943). A petition for writ of habeas corpus under chapter 663 is an avenue to challenge illegal restraint by the government. *Daughenbaugh,* 805 N.W.2d at 594. Our courts recognize habeas corpus as a "valuable and important right" which is essential in "guarding and preserving human liberty." *State v. Iowa Dt. Ct.,* 581 N.W.2d 640, 643 (Iowa 1998) (quoting *Peff v. Doolittle,* 15 N.W.2d 913, 915 (Iowa 1944)). Habeas corpus cannot perform the function of an appeal and may not be used as a means of reviewing legal error. *Bell v. Lainson,* 74 N.W.2d 592, 593 (Iowa 1956).

At its core, habeas is a challenge to the lawfulness of the custody imposed on the subject of the petition. *See Maleng v. Cook,* 490 U.S. 488, 490–491 (1989). This "in custody" requirement is reflected in Iowa's habeas statute, which requires a petitioner to state "[t]hat the person in whose behalf [the writ] is sought is restrained of the person's liberty, and the person by whom and the place where the person is so restrained, mentioning the names of the parties, if known, and if unknown describing them with as much particularity as practicable." Iowa Code § 663.1(1).

On appeal, Hernandez asserts his petition complied with all requirements set out in section 663.1. That assertion is inaccurate. Hernandez's habeas petition does not

specifically state how he is restrained of his liberty, where, or by whom. The petition's lack of specificity is problematic because "[t]he writ of **habeas** corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *See Braden v. 30th Judicial Circuit Ct. of Ky.*, 410 U.S. 484, 494–95 (1973). Consequently, the writ must be addressed to the immediate custodian of the defendant. *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004); *see also* Iowa Code § 663.8.

Hernandez does not contend he is in state custody, and indeed could not because his state sentence has expired. Once a state sentence has expired, the collateral consequences of the guilty plea—including the "hazards of deportation"—do not render an individual "in custody" for purposes of a state **habeas** attack on the expired sentence. *See In re Azurin*, 87 Cal.App. 4th 20, 26 (Cal.Ct.App.2001) (reversing order granting state **habeas** relief from plea when Azurin was in custody of United States Immigrant and Naturalization Service, an agency of a different sovereign).

Assuming, without holding, that Hernandez is in federal custody by virtue of an **ICE detainer**,[4] it follows that he must address his **habeas** corpus petition to his federal custodian. Historically, state courts routinely issued the writ of **habeas** corpus to achieve **jurisdiction** over prisoners in federal custody. *See* Charles Warren, *Federal and State Court Interference*, 43 Harv. L.Rev. 345, 353 (1930). But since 1871, state courts have not had the authority to do so. *In re Tarble*, 80 U.S. 397, 410 (1871) (rejecting claim that state writ of **habeas** corpus could direct delivery of a prisoner held by federal officer); *see also State v. Theoharopoulos*, 240 N.W.2d 635, 638–39 (Wis.1976) (addressing defendant's challenge to state marijuana conviction which subjected him to the penalty of deportation and noting "state **habeas** corpus appears inappropriate, because the defendant is in the custody of federal authorities"). Hernandez cannot use the Iowa **habeas** law to command action by federal immigration officials.

***4** In summary, although **habeas** corpus may, in some situations, be available under chapter 663 to challenge a deferred judgment, a state writ cannot reach Hernandez's federal custodian, if any. Accordingly, the state trial court correctly denied Hernandez's petition for **habeas** corpus relief.

AFFIRMED.

All Citations

856 N.W.2d 3 (Table), 2014 WL 4230194

Footnotes

* Senior judge assigned by order pursuant to Iowa Code section 602 .9206 (2013).

1 The trial court record includes an employment authorization card, valid for one year, issued to Hernandez by the United States Department of Homeland Security on July 6, 2011.

2 Although the **habeas** petition refers to an exhibit titled "Notice to Appear," we could not find that exhibit or any other ICE document included in the state trial court record.

3 Hernandez claims in his reply brief that he had the "bad luck" of being granted a deferred judgment, "an outcome that is entirely at the discretion of the sentencing judge." This claim is not entirely correct; a sentencing court may only defer judgment with the consent of the defendant. *See* Iowa Code § 907.3(1).

4 For federal **habeas** purposes, the Eight Circuit has ruled that filing a detainer does not amount to custody, technical or otherwise. *See Campillo v. Sullivan*, 853 F.2d 593, 596 (8th Cir.1988); *see also Galaviz–Medina v. Wooten*, 27 F.3d 487, 493 (10th Cir.1994) (noting almost all circuit courts considering the issue have determined lodging a detainer, without more, is insufficient to render an immigrant in custody).

