UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Sergio BRIZUELA, on behalf of himself and all others similarly situated, *Petitioner*, v. Jose FELICIANO, Warden, New Haven Correctional Center; Leo C. ARNONE, Commissioner, Connecticut Department of Correction; Connecticut Department of Correction. *Respondents*.	Case No. _____ Date: February 13, 2012

PETITIONER'S MOTION FOR CLASS CERTIFICATION OR REPRESENTATIVE HABEAS ACTION

1. Petitioner Sergio Brizuela is presently detained by Respondents solely on the basis of an immigration detainer. He and other members of the proposed class bring this petition for a writ of habeas corpus or, in the alternative a complaint for declaratory and injunctive relief, to prohibit the pattern and practice of the Connecticut Department of Correction and other Respondents of detaining class members after the conclusion of their criminal sentence or other criminal proceedings, solely on the basis of an immigration detainer.

2. An immigration detainer is an administrative notice, not a warrant or judicial order. It provides no basis in law for Respondents to continue the confinement in state facilities of the class members after they have completed the term of their criminal sentence or period of pretrial confinement. See Complaint at ¶¶ 7-9.

3. DHS asserts that local law enforcement officials have an obligation under federal

regulation to detain the individual named in the detainer for up to 48 hours, excluding weekends and holidays. See 8 CFR § 287.7; Form I-247, "Immigration Detainer – Notice of Action." That immigration detainer is the sole basis for the CTDOC's custody over Petitioner.

4. Respondents have a pattern, practice, custom, and policy of continuing the detention of Connecticut state prisoners after the conclusion of their state criminal custody solely on the basis of DHS issuance of an immigration detainer, and hundreds of Connecticut prisoners are continued in state custody each year pursuant to Respondents' policy.

5. Individuals subject to an ICE detainer in Connecticut are typically confined by Respondents for 1-5 days each before ICE eventually takes physical and legal custody of the individual. Upon information and belief, DHS does not reimburse the State of Connecticut for the cost of detaining persons held solely on the basis of an immigration detainer, nor indemnify Respondents for liabilities they may incur based on injuries suffered by persons held by Respondents solely on the basis of an immigration detainer.

6. Such relatively short periods of detention are particularly difficult for these persons to successfully challenge independently. For example, in the past six months, at least two individuals detained by Respondents Feliciano and Arnone solely on the basis of an immigration detainer have filed petitions for writs of habeas corpus in U.S. District Court, but those petitions have been rendered moot by Respondents' transfer, within days, of the petitioner to the physical and legal custody of DHS. That such detention is similarly repeated for hundreds of persons in Connecticut each year makes class treatment appropriate.

7. Petitioner and the proposed class, by and through their attorneys, hereby respectfully move this Court for an order certifying a representative class of Petitioners, pursuant to United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974). Petitioner asks this Court to certify a

class consisting of all current and future individuals in the custody of Respondent Connecticut Department of Correction ("CTDOC") whose lawful state custody has expired or will expire but whom CTDOC continues to detain solely on the basis of an immigration detainer issued pursuant to 8 C.F.R. § 287.7(d).

8. Petitioner intends to supplement this motion promptly with briefing and evidentiary support.

9. The Second Circuit has recognized that representative habeas actions are appropriate in certain circumstances. United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1125-26 (2d Cir. 1974). The Sero court allowed the petitioner to represent a class of young adults serving state sentences for misdemeanors who were challenging the length of those sentences. Id. Because Rule 23 of the Federal Rules of Civil Procedure is not directly applicable to a habeas class action, the Second Circuit fashioned procedures appropriate for such an action pursuant to the All Writs Act, 28 U.S.C. § 1651. See Harris v. Nelson, 394 U.S. 286, 299 (1969) (courts may use "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage" in the habeas context). Accordingly, the Second Circuit allowed the case to proceed as "a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure." Sero, 506 F.2d at 1125.

10. The Second Circuit articulated a number of reasons why it found class action treatment appropriate in the habeas context, all of which are present in the instant action as well.

11. First, the challenge brought by the class was "applicable on behalf of the entire class, uncluttered by subsidiary issues." Sero, 506 F.2d at 1126.

12. Second, citing the likelihood that many of the class would be illiterate or lack sufficient education, as well as the probability that many would not have the assistance of counsel in filing

habeas applications, the Second Circuit found that "more than a few [class members] would otherwise never receive the relief here sought on their behalf." Id.

13. Third, the Second Circuit found considerations of judicial economy persuasive, as a representative habeas action would avoid "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue."[1] Id.

14. Each of these conditions is present in the instant case, which therefore counsels in favor of this Court recognizing representative habeas action status. First, this case addresses the narrow question of the legality of administrative immigration detainers, a question which applies equally to all members of the putative class: all are held in CTDOC custody solely based on an administrative immigration detainer issued by the U.S. Department of Homeland Security ("DHS") following the resolution of their state criminal charges.

15. Second, many of those against whom these administrative detainers are lodged are immigrants, including legal permanent residents and others with lawful immigration status. Comp. at ¶¶ 13. Because of this, there is a high likelihood that those against whom immigration detainers are lodged will have an unsophisticated command of English. *Id.* ¶ 13. For the same reason, members of the proposed class will likely have an insufficient understanding the U.S. judicial system. *Id.* ¶ 13. Together, these create a high probability that the putative class members will lack the ability to obtain the assistance of counsel in challenging their detention based on an immigration detainer, even if they were able to determine that such detention were susceptible to legal challenge.

16. Moreover, the relatively short nature of detention based on an immigration detainer

[1] In this respect, the Second Circuit also mentioned saving the "expense which would be incurred in appointing counsel for each individual who proceeded on his own." Sero, 506 F.2d at 1126. Counsel is not appointed for individuals held in Connecticut state custody pursuant solely to an immigration detainer challenging the fact of their detention. Because of this, there is no cost to appointing counsel in the first instance, and allowing a representative habeas action does not change that.

makes the likelihood of successfully securing counsel and challenging detention even more remote. Even more than in Sero, this strongly suggests that "more than a few would otherwise never receive the relief here sought on their behalf." Sero, 506 F.2d at 1126. .

17. Third, the same justifications motivating the Sero court regarding judicial economy are applicable here: allowing a representative habeas action to proceed would avoid "[t]he considerable expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue." Id. In sum, as in Sero, the "unusual circumstances" of this case warrant its treatment as a representative habeas action. Id. at 1125.

18. The Sero court held that courts should consider an "analogous procedure" to Fed. R. Civ. P. 23 when certifying a representative habeas action. Id.

19. Since Sero, the Second Circuit and its sister circuits have consistently turned to Rule 23 when reviewing the certification of representative habeas actions. See, e.g., Martin v. Strasburg, 689 F.2d 365, 374 (2d Cir. 1982) rev'd on other grounds sub nom. Schall v. Martin, 467 U.S. 253 (1984); see also Bijeol v. Benson, 513 F.2d 965, 968 (7th Cir. 1975) (reviewing representative habeas certification according to Rule 23); United States ex. rel. Morgan v. Sielaff, 546 F.2d 218, 221 (7th Cir. 1975) (same and affirming Bijeol); Rodriguez v. Hayes, 591 F.3d 1105, 1121-26 (9th Cir. 2009) (applying Rule 23 requirements to representative habeas action); Ali v. Ashcroft 346 F.3d 873, 890 (9th Cir. 2003) (same), vacated on other grounds by Ali v. Gonzales, 421 F.3d 765 (9th Cir. 2003); Nguyen Da Yen v. Kissinger, 528 F.2d 1194-1202-04 (9th Cir. 1975); Napier v. Gertrude, 542 F.2d 825, 827 n.2 (10th Cir. 1976) (same).

20. District courts both within and outside the Second Circuit have certified representative habeas actions per the requirements of Rule 23. Bertrand v. Sava, 535 F. Supp. 1020, 1024-25 (S.D.N.Y. 1982) rev'd on other grounds, 684 F.2d 204 (2d Cir. 1982); Solomon v. Zenk, 04-CV-

2214, 2004 WL 2370651 (E.D.N.Y. Oct. 22, 2004) (noting the Second Circuit has "approved habeas corpus class actions"); Streicher v. Prescott, 103 F.R.D. 559 (D.D.C. 1984) (applying Rule 23 to representative habeas action); Fernandez-Roque v. Smith, 91 F.R.D. 117 (N.D. Ga. 1981) (same); Kazarov v. Achim, 2003 WL 22956006, at *3 n.8 (N.D. Ill. 2003) (same); Adderly v. Wainwright, 58 F.R.D. 389, 400 (M.D. Fla. 1972) (same).

21. The representative class proposed meets the four prerequisites for class certification enumerated in Fed. R. Civ. P. 23(a).

22. This Court can certify this representative habeas action consistent with the numerosity requirement of Rule 23(a)(1). The proposed class is "so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), and in some cases near impossible.

23. The Sero court emphasized that the proposed class members in that case, exceeding 500 in number, "far surpass the requirements of numerousness which have been imposed in more straight-forward civil actions." 506 F.2d at 1126 (citing Cypress v. Newport News Gen & Nonsectarian Hosp. Assn., 375 F.2d 648 (4th Cir. 1967) and Citizens Banking Co. v. Monticello State Bank, 143 F.2d 261 (8th Cir. 1944) for proposition that numerosity requirements were satisfied by classes containing eighteen and forty members, respectively).

24. Upon information and belief, CTDOC holds hundreds of persons each year solely on the basis of an immigration detainer, typically for 1-5 days until ICE officials arrive to take physical and legal custody of the subject of the detainer. Comp. ¶ 14.

25. Upon information and belief, in a single day in December 2011, for instance, there were approximately 130 pretrial detainees and approximately 360 postconviction detainees in CTDOC custody with immigration detainers lodged against them. Comp. ¶ 30a. These numbers exceed the numerosity requirement for analogous actions under Rule 23(a)(1).

26. The Second Circuit also emphasized in Sero that class certification was supported by the fact that many of the class members were "unidentifiable at the time the action was commenced." Id. This same consideration applies with special force in the context of immigration detainers, given the difficulty of obtaining any information on individuals held on detainers and accessing known detainees at multiple facilities within the often short time span between issuance of the detainer and the individual's physical transfer to ICE custody, typically 1-5 days after the conclusion of the criminal sentence or pre-trial confinement.

27. This Court can certify this representative habeas action consistent with the commonality and typicality requirements of Rule 23(a)(2) and (a)(3). All members of the proposed class share common questions of law and fact.

28. The claims of named Petitioner Sergio Brizuela are typical of the claims of the class as a whole, as required for traditional class actions by Fed R. Civ. P. 23(a)(2) and (3). As in Sero, Petitioner and the proposed class present "clear and unitary allegation[s]," 506 F.2d at 1127, on behalf of all members of the class, "uncluttered by subsidiary issues" Id. at 1126.

29. The facts of Mr. Brizuela's situation are common to all class members: he is currently held at a CTDOC facility despite the fact that the authority to detain him under state criminal law has expired upon the resolution of his criminal case, including the conclusion of his sentence on February 10, 2012.

30. Petitioner and the proposed class share legal claims and request the same relief: release from unlawful detention in CTDOC facilities pursuant to an immigration detainer. Mr. Brizuela alleges "that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented … irrespective of minor variations in the fact patterns underlying individual claims," thus satisfying the typicality requirement. Robidoux v. Celani,

987 F.2d 931, 936 (2d Cir. 1993).

31. This Court can certify this representative habeas action consistent with the adequacy requirement of Rule 23(a)(4). Mr. Brizuela, through undersigned counsel, "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Attorneys and law student interns of the Jerome N. Frank Legal Services Organization have extensive experience litigating complex federal civil rights cases and habeas corpus actions, particularly those involving the Immigration and Naturalization Act, the rights of noncitizens, and constitutional claims. The attorneys and clinic students will "vigorously prosecute[] the claim on behalf of the other members" of the class. Sero, 561 F.2d 1127.

32. This Court can certify this representative habeas action consistent with the requirements of Rule 23(b)(1). If proposed class members habeas petitions were individually adjudicated, there would be a risk of "inconsistent or varying adjudications" with respect to proposed class members' constitutional claims that would subsequently lead to "inconsistent or varying adjudications" for Respondents. Fed. R. Civ. P. 23(b)(1)(A). Inconsistent adjudications could force the Department of Correction to implement an uneven policy with respect to federal immigration detainers that would vary by correctional facility.

33. In the alternative, this Court can certify this representative habeas action consistent with the requirements of Rule 23(b)(2).

34. Respondents have "acted or refused to act on grounds that apply generally to the class" by detaining Petitioner and members of the proposed class after the expiration of their criminal custody and solely on the grounds of an illegal immigration detainer. Fed. R. Civ. P. 23(b)(2). Final relief is "appropriate respecting the class as a whole" to ensure that Petitioner and the proposed class, a group of individuals who are held on an immigration detainer for a short period

of time, are subject to a consistent state policy with respect to federal immigration detainers regardless of the correctional facility where they are held. Id.

35. Petitioner respectfully seeks leave to supplement this motion promptly with a fuller briefing and evidentiary presentation.

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New Haven, Connecticut

Respectfully submitted,

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