

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division**

Case No.: 1:10-cv-22829-JAL

JOSE BERNABE, AKA "JOSE
FORTUNATO PEREZ"

A Florida Resident

Petitioner,

CIVIL COMPLAINT

v.

CAPTAIN SUSAN KRONBERG, in her
official capacity as Facility Supervisor of
Metro West Detention Center,
and THE STATE OF FLORIDA,
MARC J. MOORE in his
official Capacity as Field
Office Director for Detention
and Transportation,
U.S. Immigration and Customs
Enforcement ("ICE")

Respondents.

AMENDED EXPEDITED PETITION FOR WRIT OF HABEAS CORPUS

This action is a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, in which Petitioner asks this Court to order his release from the custody of Respondent, Marc J. Moore, Field Director, Krome Service Processing Center, 18201 S.W. 12th Street, Miami, FL 33194, and/or that Respondent, Captain Susan Kronberg, Facility Supervisor of the Metro West Detention Center, be prohibited from detaining anyone beyond a 48 hour period on an "ICE ["Immigration and Customs Enforcement"] Detainer" because such custody is in violation of the Constitution and laws of the United States and the State of Florida. The Miami-Dade

Department of Corrections held Jose Bernabe since 7:10 PM on July 31, 2010, on the basis of an expired 48-hour immigration detainer pursuant to 8 C.F.R. 208.7 at the order of the Government of the United States pursuant to the aforementioned and constitutionally infirm “immigration detainer”. Subsequent to that period, Mr. Bernabe’s custody was transferred to the Government of the United States on August 11, 2010.

Habeas corpus is the proper remedy to challenge detention without lawful authority. *See* § 79.01, Fla. Stats. (2003). “The purpose of the ancient and high prerogative writ of habeas corpus is to inquire into the legality of a prisoner's present detention.” *McCrae v. Wainright*, 439 So. 2d 868, 870 (Fla. 1983).

PARTIES

1. In Florida, it is well established that “the proper respondent in a habeas corpus petition is the party that has actual custody and is in a position to physically produce the petitioner.” *Alachua Regional Juvenile Detention Center v. T.O.*, 684 So. 2d 814, 816 (Fla. 1996). In this case, the party with actual custody of Mr. Bernabe was the Facility Supervisor of the Metro West Detention Center, Captain Susan Kronberg and is now “The lodging of a detainer [pursuant to 8 C.F.R. § 287.7] ‘does not result in present confinement by the INS . . .’” *Kendall v. Immigration and Naturalization Service*, 26 F. Supp. 296, 300 (S.D.N.Y. 2003) *quoting* *Roldan v. Racette*, 984 F.2d 85, 88 (2d Cir. 1993); *accord* *Orozco v. Immigration and Naturalization Service*, 911 F.2d 539 (11th Cir. 1990); *Royer v. Immigration and Naturalization Service*, 730 So. 2d 588 (S.D.N.Y. 1990).

JURISDICTION AND VENUE

2. The Court has jurisdiction over the petition based on 28 U.S.C. §§ 1331 and 2241. The Petitioner is being held in the Custody of the United States Government.

3. Venue is proper in the Miami Division of the United States District Court for the Southern District of Florida because the Petitioner is being unlawfully detained in Miami, Florida.

STATEMENT OF FACTS

4. On July 31, 2010, Jose Bernabe was booked into the Metro West Detention Center at 7:10 PM. He entered a plea of NOT GUILTY to the offense of driving without a license in case number 2645GDZ. The charge was later dismissed by the State Attorney on August 23, 2010.
5. On August 4, 2010, Jose Bernabe was still incarcerated at the Miami-Dade County Metro West Detention Center. He posted a Two hundred and Fifty Dollar (\$250.00) bond.
6. On Sunday, August 8 Mr. Bernabe's family posted an additional Two hundred and Fifty Dollar (\$250.00) bond because he had not been released as a result of an ICE detainer.
7. According to the "Inmate Profile System" from the Miami-Dade Corrections Department Website, Jose Bernabe was on "hold for immigration." There were no other holds on Mr. Bernabe.
8. Finally, on Wednesday, August 11th, 2010 Mr. Bernabe was released from the Custody of the Miami Dade Corrections Department and transferred to the custody of the United States Government, Department of Homeland Security, Immigration and Customs Enforcement ("ICE"), Krome Service Processing Center.
9. Federal regulations (8 CFR 287.7) require that law enforcement detain an alien for a period not to exceed forty-eight hours (excluding Saturday, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien.

10. As of 12:01 a.m. on August 11, 2010, Jose Bernabe remained in the custody of the Miami-Dade Department of Corrections, Metro West Detention Center, under jail number 100060509, pursuant to the immigration detainer, beyond the forty eight hour period allowed by law.
11. As of 4:00 PM, August 24, 2010 Jose Bernabe #A28561828 remains in the custody of ICE at the Krome Service Processing Center.
12. Mr. Bernabe's only remedy for both the government of the United States and Miami Dade County's willful violation of his right is immediate release.

LEGAL AUTHORITIES

HABEAS CORPUS REMEDY

13. "[H]abeas corpus is an appropriate remedy for one held in custody in violation of the Constitution." Stack v. Boyle, 342 U.S. 1, 6 (1951). "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241.
14. Although 28 U.S.C. § 2241 does not include an express requirement that a petitioner exhaust administrative remedies, federal courts impose such a requirement when administrative remedies are available. Skinner v. Wiley, 355 F. 3d 1293, 1295 (11th Cir. 2004). Similarly, when a prisoner challenges the basis for his conviction, courts require him to exhaust his state court remedies. Thomas v. Crosby, 371 F. 3d 782, 809 (11th Cir. 2004). Petitioner in the instant case has no such remedy available. There is no administrative process to challenge his detention, since he has not been charged, tried, or sentenced – or even appeared before a judicial immigration officer.

DEPRIVATION OF LIBERTY – FOURTH, TENTH & FOURTEENTH

AMENDMENT

15. The Fourteenth Amendment to the United States Constitution states in relevant part: “No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. am. XIV. See e.g., Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that the Due Process Clause “applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (“The Fifth Amendment... protects every one [of the millions of aliens within the jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law,” including even those “whose presence in this country is unlawful.”)
9. Petitioner has been held since July 31, 2010, without any charges brought depriving him of his liberty (again he has been released on bond on a minor traffic offense) and without review of his detention by a judicial officer. It would be difficult to conceive of a more egregious due process violation and unreasonable seizure.

ARGUMENT

10. The Petitioner, Jose Bernabe, is entitled to immediate release as the Miami-Dade Department of Corrections may only maintain custody of an alien pursuant to an immigration detainer for a period not to exceed forty-eight hours, excluding Saturdays, Sundays, and legal holidays.
11. The sole basis for Jose Bernabe’s continued detention was an “Immigration Detainer.” The detainer, by its own terms, authorizes detention for not more than 48

hours, excluding weekends and holidays. (A. 1). As authority, the detainer cites “8 C.F.R. 287.7”

12. 8 C.F.R. § 287.7(d) provides:

13. (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.

(emphasis supplied).

14. One federal court described the effect of a 8 C.F.R. § 287.7 detainer as follows:

Section 287.7(a)(4)¹ requires only that the official upon whom the INS has served a detainer hold the alien, **who could otherwise no longer be lawfully detained, for up to 48 hours** in order to permit the INS to assume custody of him. It does not require INS to assume custody within that time; it merely serves as a mechanism to make assumption of custody by the INS easier.

Royer v. Immigration and Naturalization Service, 730 So. 2d 588, 591 (S.D.N.Y. 1990).

15. Jose Bernabe was arrested on July 31, 2010, and booked into the Metro West Detention Center at 7:10 PM on the same day. 8 C.F.R. § 287.7 authorized the Miami-Dade Department of Corrections to hold him for 48 hours until August 3, 2010. Since that time, the Department held Jose Bernabe with no legal authority to do so and subsequent to that time ICE detained Mr. Bernabe beyond all periods lawfully allowed.

16. Jose Bernabe was place in ICE custody on August 11, 2010.

¹ Royer dealt with a predecessor version of the regulation.

17. There being no legal authority for his detention, Jose Bernabe was and is entitled to immediate release, and this Court should issue the Writ forthwith.
18. Furthermore, Immigration and Customs Enforcement's detention of Jose Bernabe beyond the subsequent to the violation of the Department's own constitutionally infirm but declared 48 hour period would be a violation of the Fourteenth and Fourth, and Tenth Amendments.

9. **ICE Detainers are Not Arrest Warrants**

An ICE detainer is not an arrest warrant. Warrants can only be issued by judicial officers, not law enforcement agents; federal arrest warrants are issued by federal district or magistrate judges pursuant to the procedures set forth in Federal Rule of Criminal Procedure 4. In fact, an ICE detainer does not even have the force of ICE's internal administrative "arrest warrants," which may be based on suspicion of a civil, not criminal, immigration violation. Compare Form I-200 (Warrant of Arrest) with Form I-247 (Immigration Detainer – Notice of Action).

10. Furthermore, an ICE "detainer" does not resemble an ordinary criminal detainer in anything but name. Criminal detainers pertain to pending charges and are subject to extensive procedural and substantive requirements and safeguards not applied to "detainers" in the immigration context, including the requirement that a judge approve the detainer. See Fla. Stat. § 941.45 (Interstate Agreement on Detainers); see also Major Cities Chiefs Immigration Committee Recommendations, www.majorcitieschiefs.org/pdfpublic/MCC_Position_Statement_REVISED_CEF_2009.pdf, at 8 (ICE's "civil detainers do not fall within the clear criminal enforcement authority of local police

agencies and in fact lay[] a trap for unwary officers who believe them to be valid criminal warrants or detainers”).

11. ICE Detainers Cannot Support a Warrantless Arrest

Under the Fourth Amendment of the U.S. Constitution and Article I, § 12 of the Florida Constitution, absent a warrant you may not arrest or detain a person without, at minimum, ensuring that you have probable cause to believe that person has committed a crime. It is of no consequence that you may have originally taken custody of an individual based on a state criminal charge; once a person has posted bond or otherwise resolved that charge, it can no longer serve as a basis to detain. You must develop separate and independent probable cause to justify any additional detention. Cf. *State v. Diaz*, 850 So.2d 435, 437 (Fla. 2003) (once purpose for legitimate initial stop had been satisfied, further detention could not be justified). In addition to the constitutional limitations on your arrest and detention authority, Florida Statute § 901.15 further restricts the basis on which a law enforcement officer in this state may make warrantless arrests.

12. It should be clear that ICE detainers neither provide a basis for probable cause nor fall within the scope of § 901.15. The ICE detainer regulation, 8 C.F.R. § 287.7, does not specify that an ICE employee must have probable cause or satisfy any other legal standard of suspicion before issuing a detainer. Nor has ICE published any other rule or procedure explaining when and under what circumstances its employees may issue detainers. In fact, detainer documents themselves typically merely state that an “[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States” – an assertion that falls far short of alleging, much

less demonstrating, probable cause. See *Papachristou v. City of Jacksonville*, 405 U.S.156, 169 (1972) ("We allow our police to make arrests only on 'probable cause' . . . Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system.") (emphasis added). Such an investigation may not even be criminal, since unlawful presence in the United States is not, of itself, a crime. See Congressional Research Service, *Immigration Enforcement Within the United States*, www.fas.org/sgp/crs/misc/RL33351.pdf, at CRS-8 ("Being illegally present in the U.S. has always been a civil, not criminal, violation")

13. ICE Detainers Exceed Statutory Authority and Violate Due Process

Federal statutes only contemplate or authorize the issuance of an immigration detainer "[i]n the case of an alien who is arrested by a . . . State] or local law enforcement official for a violation of any law relating to controlled substances," and do not provide for an additional detention period even in such cases. 8 U.S.C. § 1357(d) (emphasis added).¹ Accord Christopher Lasch, *Enforcing The Limits Of The Executive's Authority To Issue Immigration Detainers*, 34 William Mitchell L. Rev. 164, 186-93 & n.119 (finding that 1 No other provision of the immigration code addresses or authorizes immigration detainers. Instead, Congress has carefully delineated the circumstances under which even ICE agents may make immigration arrests, see 8 U.S.C. §§ 1226(a), 1357(a)(2), and has provided state and local police with arrest authority only in particular narrow circumstances, see 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c), 1357(g). The use of detainers in non-controlled-substances cases contravenes this statutory scheme.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant Petitioner a Writ of Habeas Corpus that orders Respondent to release him from custody immediately, and should award such additional relief in favor of Petitioner as is just and proper.

Respectfully Submitted,

August 24, 2010

/s/

John de Leon

Attorney for Petitioner

Florida Bar No. 650390

Law Offices of Chavez and de Leon

5975 Sunset Drive, Suite 605

South Miami, FL 33143

Telephone: (305) 740-5347

Fax: (305) 740-5348