

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA**

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Antonio Ocampo,

Petitioner

v.

Case no. \_\_\_\_\_

Sheriff Marlin N. Gusman,  
Orleans Parish Sheriff, et al.,

Respondents.

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**MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY  
RESTRAINING ORDER CONTEMPORANEOUSLY FILED WITH  
PETITION FOR WRIT OF HABEAS CORPUS**

**INTRODUCTION**

Without his presence- i.e. the body protected by the writ of habeas corpus-- there is no way for this Court to resolve Petitioner's Petition for writ of habeas corpus on the merits. Yet as evidence herein shows, when Respondents' past, similar unconstitutional custody was exposed through an administrative complaint to a federal agency, Respondents attempted to hide their egregious civil rights

violations by unlawfully transferring the individual who filed the complaint to ICE custody based on the expired detainer. In that case, the unlawful transfer ultimately blocked the ability of the detained individual to participate in the ongoing federal civil rights investigation.

Petitioner Antonio Ocampo thus hereby moves this Court to immediately take action to protect his ability to proceed with this petition for writ- specifically to temporarily restrain Respondents from effecting similar retaliation against him which would result in irreparable harm. He hereby moves this Court to immediately (1) enter an order declaring that transfer subject to an expired Immigration Detainer would be unlawful and (2) temporarily restraining Respondents from any lawful but discretionary transfer to ICE custody during the pendency of his writ petition.

The question before this Court is not so much whether Petitioner will prevail on the law but whether Petitioner will secure the release he deserves or whether he will suffer irreparable harm through a retaliatory transfer to federal immigration authorities in advance of this Court's order after a show cause hearing. For the reasons more fully described herein, Petitioner is likely to prevail on the merits and ensuring the writ is resolved on the merits is in the public interest. Petitioner would suffer irreparable harm if the transfer to federal detention were effected while Respondent would not be harmed and would merely be restrained from changing

the status quo. This Court should therefore grant this temporary restraining order until this Court holds a hearing to show cause where Petitioner and Respondents are both fully able to participate. *See First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993) ("[R]estraining orders should be limited to preserving the status quo so long as is necessary to hold a hearing.").

### LEGAL STANDARD

In support of this motion for a temporary restraining order, Petitioner makes a cumulative showing that (1) he will likely prevail on the merits, (2) he faces a substantial threat of irreparable harm if the restraining order is not granted, (3) the Respondent will not be harmed by the order, and (4) the restraining order will ensure this Court can decide the writ petition on the merits which serves the public interest. *Fed. R. Civ. Proc.* 65; *see, e.g., Miss. Power and Light Co. v. U.S. Gas Pipeline*, 760 F.2d 618, 621 (5th Cir. 1985).

### ARGUMENT

#### Petitioner Is Likely to Prevail on the Merits of his Petition for Writ of Habeas Corpus

Petitioner's contemporaneously filed petition for writ of habeas corpus shows that he is likely to succeed on the merits. Petitioner has been unlawfully detained for 95 days solely pursuant to an expired Immigration Detainer. Federal

law limits custody pursuant to an Immigration Detainer to 48 hours maximum. *See* 8 C.F.R. 287.8 and *Exhibit C to Petition*, Sample Immigration Detainer.

Petitioner Faces a Substantial Threat of Irreparable Harm if the Restraining Order Is Not Granted

Petitioner seeks a declaration that a transfer based on his long expired Immigration Detainer would be illegal as well as an order from this Court, restraining Respondents from any lawful but discretionary action to transfer him to ICE detention before this Court conducts the show cause hearing and in retaliation for filing this petition. If this Court does not restrain such a transfer, Petitioner would suffer irreparable harm because he would not be able to pursue this petition. His body and presence are the evidence of egregious civil rights violations.

Evidence provided herein shows that Respondents have taken these retaliatory actions in at least one prior case. When a similarly situated individual raised a formal complaint about unlawful custody pursuant to an Immigration Detainer, Respondents immediately effected an unlawful transfer of him to ICE detention pursuant to the expired immigration detainer, resulting in his rapid transfer to a remote immigration detention facility, limiting his ability to pursue the investigation of his unlawful detention as well making it difficult to fight for his release from immigration detention and his removal from the country. Without a

restraining order, Respondents will likely take the same actions against Petitioner.<sup>1</sup> With such a transfer, Respondents would cause Petitioner irreparable harm by blocking his release and limiting the Court's access to Petitioner himself-- the evidence of their egregious civil rights violations.

Petitioner relies on his own declaration, attached as Exhibit A to his petition, and the Declaration of Jacinta Gonazles, Attached as Exhibit A to this Memorandum, to show that his fear goes beyond "speculative injury." *See U.S. v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001). Petitioner has a well founded fear of the transfer because Respondents acted to transfer a similarly situated complainant. *See Exhibit A, Declaration of Jacinta Gonzalez*. While in the custody of Orleans Parish Prison, Mr. Erik Toledo filed an administrative complaint requesting release from unlawful custody due to an expired immigration detainer. *Id.* Instead of being released, Respondents immediately transferred Respondent to the custody of ICE, who detained him in Basile, Louisiana and swiftly removed him from the United States. *Id.* After his transfer from Orleans Parish Prison, Mr. Toledo was unable to continue to pursue his administrative complaint or obtain counsel to litigate his detention or removal given the remote location of the immigration detention facility. *Id.* As Petitioner's case shows, without his ongoing

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<sup>1</sup> There is no evidence that a transfer to ICE custody would be valid. In his declaration, Petitioner states that he has never been interviewed by a federal immigration official, and there is no evidentiary standard for lodging an Immigration Detainer. Given the situation, however, there is a strong likelihood that Petitioner could be transferred and left to fight the resulting detention and immigration charges from a remote detention facility far away from his counsel.

participation, the illegal and unconstitutional actions by Orleans Parish Prison continue.

Granting Petitioner's Restraining Order Does Not Harm Respondent

Granting Petitioner's Restraining Order does not harm Respondent. As Petitioner's Immigration Detainer is expired, there is no existing authority for a transfer. A declaration that transfer pursuant to an expired Immigration Detainer would merely clarify legal obligations of Respondents. Respondents cannot be harmed by being forced to obey the law's commands.

Furthermore, even with a valid immigration detainer, Respondents are not required to effect any transfer of an individual—they do so only at their discretion. Thus restraining Respondents from affecting any legal, but discretionary, transfer will in no way harm them.

While not a dispositive prong of this analysis, Petitioner also emphasizes that granting his restraining order also does not harm the federal government's interest in enforcing the nation's immigration laws. ICE acted by opting not to charge or detain Petitioner during the period in which the detainer was arguably valid.<sup>2</sup>

Restraining a transfer to ICE custody rooted in illegal custody does not block ICE from further seeking to investigate, charge, and/or detain Petitioner in the future,

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<sup>2</sup> For purposes of this writ of Habeas Corpus, Petitioner does not address the legality of the Immigration Detainer as issued. There is no doubt, however, that Petitioner's current custody is unlawful irrespective of the legality of the originally issued detainer. Petitioner has not seen a copy of his Immigration Detainer. Petitioner reserves the right to challenge the legality of that detainer in future proceedings, including before the Immigration or other court.

should ICE possess valid and non-retaliatory authority pursuant to its statutes—including information that has been acquired without violating Petitioner's civil rights. ICE's own removal proceedings suppress evidence that has been obtained through egregious violations of civil rights. *See, e.g., Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994).

Granting Petitioner's Restraining Order Serves the Public Interest.

Petitioner's case exposes an egregious violation of civil rights that has both an individual and community effect. Petitioner has been detained for a full 95 days without any legal authority for this detention. He has been irreparably harmed and the community suffers when it cannot feel confident that law enforcement will detain people only when allowed by law. Ensuring this Court can resolve this petition on the merits is the strongest way to provide remedy to this Petitioner and show the broader community the promise of the Fourth and Fifth Amendments.

The Court Should Enter the Temporary Restraining Order Without Notice to Respondents.

Petitioner respectfully submits that this Court should enter this temporary restraining order immediately, before giving notice to Respondents. The Order is necessary to ensure Petitioner can fully participate and protect his rights in these ongoing proceedings. Past conduct by Respondent, as presented in the sworn affidavit, evidences that if Respondents receive notice, they may cause irreparable harm by transferring Respondent outside the jurisdiction of this Court.

## CONCLUSION

For the reasons described herein, Petitioner hereby moves this Court to immediately (1) enter an order declaring that transfer subject to an expired Immigration Detainer would be unlawful and (2) temporarily restraining Respondents from any lawful but discretionary transfer to ICE custody until this Court holds a hearing to show cause in which Petitioner and Respondents are able to fully and equally participate.

Respectfully Submitted for ex parte consideration this 12 day of November 2010,



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