2018 WL 7142016 (Colo.Dist.Ct.) (Trial Order)
District Court of Colorado.
El Paso County

Saul CISNEROS, Rut Noemi Chavez Rodriguez, On behalf of themselves and all others similarly situated,
Plaintiffs,
v.
Bill ELDER, in his official capacity as Sheriff of El Paso County, Colorado.

No. 2018CV30549.
December 6, 2018.

Order Granting Summary Judgment

Eric Bently, Judge.

***1** Div.: 8

Courtroom: W550

Before the Court is Plaintiffs' motion for summary judgment. The Court has reviewed the motion, Sheriff Elder's response, and Plaintiffs' reply, along with the parties' Amended Stipulations filed September 20, 2018 (the Stipulations), the case file, and applicable law.

The parties have elected to forego trial and to submit the motion upon the stipulated documentary record. They agree that the Stipulations address the totality of the factual issues in the case, that the issues before the Court are purely issues of law, and that the case should be resolved as a matter of law.

INTRODUCTION

This is a case of first impression in Colorado. While it is litigated on a largely blank legal canvas in this state, the issues have been hotly litigated in recent years in federal and state courts across the country. The subject is the extent and means by which federal immigration authorities may recruit state and local law enforcement to assist them in enforcement of the nation's immigration laws.

In carrying out their mandate to remove persons who are in our country illegally, federal immigration authorities rely heavily on local law enforcement. A central part of this assistance is provided by local sheriffs, who routinely exchange information with immigration authorities as to the identity of individuals in local jails and who may then be asked by immigration authorities to detain such individuals beyond their release dates so they can be picked up by immigration authorities and held pending proceedings to remove them from the United States.

Such detentions are known as 'immigration holds." "immigration detainers," or "ICE holds." They constitute a central part of the national strategy on immigration enforcement, while also raising civil liberties concerns. The legality of that practice in Colorado is the subject of this case. The case addresses, specifically, whether a Colorado sheriff has authority under Colorado and/or federal law to continue to detain inmates at the county jail, at the request of federal immigration authorities but without the participation of a judge, for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases, so they can be picked up by immigration authorities. The Plaintiffs are two classes of inmates and pretrial detainees at the El Paso County jail who are subject to ICE detainer requests. No published Colorado case addresses the issue.

Most sheriffs' offices around Colorado stopped honoring immigration detainers in recent years after receiving cease-and-desist letters from the ACLU. Sheriff Elder, through counsel, informed the Court in March that El Paso County is one of only two counties that still honor ICE detainer requests. The one other county known to the Court is Teller County. A case similar to this one is pending there, and the Court in that case ruled preliminarily in favor of the sheriff. (*Salinas v. Mikesell*, case no. 2018CV30057 (trial set for June 2019).) Clearly, the issues are ones on which reasonable minds may differ. Resolution of one of these cases by a higher court is needed in order to provide certainty in this area to Colorado's sheriffs and the immigrant population.

PROCEDURAL BACKGROUND

***2** The case was initiated in February 2018 by the two named Plaintiffs, Saul Cisneros and Rut Noemi Chavez Rodriguez. Cisneros and Chavez were pretrial detainees in the custody of the El Paso County Sheriff's Office ("EPSO" or "Sheriff's Office"). Both Plaintiffs attempted to post their court-ordered bond but were informed by the Sheriff's Office that they would not be released because federal immigration authorities had imposed an "ICE hold." Both Plaintiffs were then detained for months per the ICE hold. They were not released until this Court issued a preliminary injunction on March 19, 2018 restraining the practice until trial on the merits (the "PI Order").

On March 15, 2018, shortly before the preliminary injunction hearing, the Sheriff's Office issued Directive Number 18-02, titled "Change in Ice Procedures." As explained more fully below, this directive belatedly changed existing EPSO policy to conform to a 2017 change in policy by U.S. Immigration and Customs Enforcement (ICE). The new policy, which is effective nationwide, requires an ICE official to appear in person to serve ICE forms on detainees before they can be transferred to federal custody, and limits the "ICE hold" period (which had previously been indefinite) to a maximum of 48 hours after conclusion of state-law authority. As ICE detainees, these individuals may be housed in the El Paso County jail (the "Jail") pursuant to El Paso County's housing agreement with ICE (the Intergovernmental Services Agreement, or "IGSA"), pending completion of federal removal proceedings.

Upon the Court's issuance of the PI Order on March 19, 2018, Sheriff Elder ceased his practice of honoring immigration detainers, pending resolution of this case. He has, however, publicly expressed his intention to resume the ICE hold practice in the event he prevails in court.

Sheriff Elder promptly filed a petition with the Colorado Supreme Court pursuant to C.A.R. 21, seeking emergency review of the preliminary injunction. The Supreme Court denied that petition on April 12, 2018. (2018SA71).

On May 1, 2018, the Court granted Plaintiffs" motion to certify two classes of inmates at the Jail. The classes are composed of all current and future prisoners in the Jail, including pretrial detainees for whom bond has been set, who are or will be subject to immigration detainers and/or administrative warrants sent by ICE. In granting the motion, the Court rejected Sheriff Elder's contention that Plaintiffs' claims had become moot as a result of the PI Order, the Sheriff's temporary abandonment of the challenged practices, or the release of the two named Plaintiffs.

On May 8, 201 8, the Court denied Sheriff Elder's motion seeking to compel joinder of ICE as a party. The United States had filed a Statement of Interest (an amicus brief) in opposition to the preliminary injunction, but since that time it has not participated in the case.

STIPULATED FACTS

I adopt the Stipulations, as well as the affidavits and documentary record referenced therein and the factual summary set forth on pages 2-6 of Plaintiffs' motion. In short, the Stipulations establish the following undisputed facts:

A. The Immigration Detainer Forms.

Immigration enforcement officers employed by ICE request the Sheriff's Office to continue to detain prisoners after state law authority to detain has ended. The requesting documents are the three standardized ICE forms described below, none of which is reviewed, approved, or signed by a judicial officer:

1. Immigration Detainer (ICE Form I-247A).

This form identifies a prisoner being held in a local jail and asserts that ICE believes the prisoner may be removable from the United States. It asks the jail to continue to detain that prisoner for an additional 48 hours after he or she would otherwise be released, to allow time for ICE to take the prisoner into federal custody.

2. Administrative Warrant (ICE Form I-200).

***3** This form names a particular prisoner, asserts that ICE has grounds to believe he or she is removable from the United States, and directs federal immigration officers to arrest the person. Although this form is called a "warrant," it is not reviewed, approved, or signed by a judicial officer, as a warrant normally would be.

3. Tracking Form (ICE Form I-203).

This form is used to track detainees housed in local jails; it accompanies ICE detainees when ICE officers place them in, or remove them from, a detention facility. Although this form bears the title "Order to Detain or Release Alien," it is not reviewed, authorized, approved or signed by a judicial officer, and it confers no authority on a Colorado sheriff to initiate custody of an individual who is not already in federal custody.

B. The Intergovernmental Services Agreement (IGSA).

DHS and El Paso County are parties to the IGSA, a contract that authorizes the Sheriff to house ICE detainees in the Jail, in ICE's custody and at ICE's expense. The contract applies only to persons who are already in the physical custody of ICE officers when they arrive at the Jail. It is stipulated that the named Plaintiffs, Cisneros and Chavez, were not held pursuant to the IGSA; the IGSA is not a so-called "287(g) agreement" (discussed below); and El Paso County does not currently have a 287(g) agreement with ICE, although it previously had one from 2013 to 2015.

C. The Challenged Practices at the Time This Lawsuit Was Filed.

At the time this lawsuit was filed on February 27, 2018, it was EPSO's policy and practice to refuse to release prisoners who had posted bond, completed their sentence, or resolved their criminal case whenever ICE had faxed or emailed an immigration detainer (Form I-247A) and an administrative warrant (Form I-200).

EPSO used the term "ICE hold" to indicate that: (1) for a particular prisoner, ICE had sent Form I-247A and/or I-200; (2) EPSO would contact ICE to notify it of the prisoner's release date and time; and (3) EPSO would continue to hold the prisoner for ICE if the prisoner posted bond, completed his/her sentence, or otherwise resolved his/her criminal charges. Even

when a prisoner did not have an "ICE hold," Sheriff Elder's written policies required deputies to delay the processing of bond paperwork when the prisoner was a "foreign born national."

D. Effect of the Challenged Practices on the Plaintiffs.

Sheriff Elder's use of ICE holds caused the named Plaintiffs to be detained for months after they would otherwise have been released on bond.

On November 24, 2017, Saul Cisneros was booked into the Jail and charged with two misdemeanor offenses. The court set his bond at $2,000. On November 28, 2017, his daughter went to the Jail to post bond for her father. She posted the money, but her father was not released because an ICE hold had been imposed. He was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

The other named Plaintiff, Rut Noemi Chavez Rodriguez, was arrested and booked into the Jail on November 18, 2017, and her bond was set at $1,000. ICE sent Forms I-247A and I-200, and the Jail placed an ICE hold on her. Friends from her church went repeatedly to the Jail and tried to bail her out, but were told the Jail would not release her on bond because an immigration hold had been imposed. Like Cisneros, she was held in the Jail on the ICE hold until after the Court issued its preliminary injunction on March 19, 2018.

***4** The Sheriff's treatment of Cisneros and Chavez was representative of the office's ICE hold practices with respect to the Plaintiff classes. The Stipulations provide numerous examples of how ICE holds were applied to other detainees.

E. The Challenged Practices as of March 8, 2018.

On March 15, 2018, four days before the preliminary injunction hearing, EPSO approved Directive Number 18-02, "Change in Ice Procedures." This change was made after a meeting with ICE supervisors on March 8, 2018, where EPSO staff learned for the first time that ICE had changed its procedure and practice in 2017. (EPSO started following the new procedures on March 8th, even though the written procedures were not in place until the 15th.)

EPSO Directive 18-02 ended EPSC's practice of transferring inmates to what it called "IGSA holds" and housing them under the IGSA when ICE sent the Jail the detainer forms. Under the new policy, an ICE agent is required to appear in person to serve the papers on the detainee within 48 hours of the inmate's release date or posting of bond. Once the ICE appears and serves the papers, the inmate is deemed to have been transferred to federal custody, and he or she may either be housed at the Jail per the IGSA or taken to a federal facility. If the ICE agent fails to show up within that 48-hour period, the inmate is released.

F. The Challenged Practices Since the Preliminary Injunction Was Issued.

Upon the Court's issuance of the PI Order on March 19, 2018, the named Plaintiffs, Cisneros and Chavez, were released, and Sheriff Elder ceased his practice of ICE holds pending resolution of this case. Sheriff's Office personnel still communicate with ICE and let ICE know when undocumented inmates are about to leave the Jail, but the Sheriff does not detain inmates past their release dates at this time.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56. The burden is on the moving party to establish that no genuine issue of fact exists. The nonmoving party is entitled to the benefit of all favorable inferences that may be drawn, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Martini v. Smith,* 42 P.3d 629, 632 (Colo. 2002).

PERMANENT INJUNCTION STANDARD

A court of equity has the power to restrain unlawful actions of executive officials. *See County of Denver v. Pitcher*, 129 P. 1015, 1023 (Colo. 1913) (holding that equity courts may enjoin illegal acts in excess of authority).

The requirements for a permanent injunction are similar to those for a preliminary injunction; however, the elements are somewhat simplified, and the applicant is required to show actual success on the merits rather than merely a reasonable probability of success. The moving party must show that: (1) it has achieved actual success on the merits; (2) irreparable harm will result unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause to the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Dallman v. Ritter,* 225 P.3d 610, 621 & n.11 (Colo. 2010).

ANALYSIS: LAWFULNESS OF THE ICE HOLD PROCEDURE

***5** The issue before the Court is whether Sheriff Elder has authority under Colorado and/or federal law – based on receipt and service of the above-described ICE documents – to hold Plaintiffs at ICE's request for up to 48 hours after they have posted bond, completed their sentence, or otherwise resolved their criminal cases.

Plaintiffs contend the 48-hour ICE holds are unlawful, as they are authorized by neither state nor federal law. Sheriff Elder responds that his office's practice is lawful for at least three separate reasons: (1) the 48-hour hold is not an arrest, but is rather a short-term detention akin to a *Terry* stop; (2) EPSO has authority to hold inmates for 48 hours under Colorado law, including his inherent authority as a Colorado sheriff; and (3) EPSO has authority to cooperate with immigration agents under the federal Immigration and Nationality Act, section 287(g).

For the reasons set forth below, I conclude the Sheriff's ICE hold practice is not authorized by either Colorado or federal law.

A. ICE Immigration Detainers are Requests, not Commands. The Choice, and the Legal Responsibility, are the Sheriff's.

As a threshold matter, it is fundamental – and Sheriff Elder has stipulated (Stip. 11) – that the ICE forms at issue constitute requests from ICE, not commands; and thus Sheriff Elder is under no compulsion to comply with them.

Whereas ICE administrative warrants "command" federal immigration officers to arrest suspected illegal immigrants and take them into custody (*see* Ex. 2), ICE detainers are directed to local law enforcement agencies and simply "request"' their assistance in detaining a non-citizen. *See* Ex. 1 ("IT IS THEREFORE REQUESTED THAT YOU: … Maintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody …"). This is a change from previous versions of the detainer form, which used to "require" such assistance. (Stip. 11.)

The reason ICE administrative warrants only "request," and do not "command," the cooperation of local officials, is that to issue commands to state or local officials would be unconstitutional. *See Galarza v. Szalczyk*, 745 F.3d 634, 643 (3rd Cir.

2014). As the *Galarza* court explained, if detainers were regarded as commands from the federal government to state or local officials, they would violate the Tenth Amendment's anti-commandeering principle. *Id.*; *and see Printz v. United States*, 521 U.S. 898, 922 (1997) ("The power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States").

Thus, federal immigration authorities cannot order, and are not ordering, Sheriff Elder to hold inmates beyond the term of their release. They are merely requesting that he do so. Whether he does so is his choice, and it is he who is legally responsible for the decision. That point was made particularly clear early in this case, when Sheriff Elder invited, and then attempted to force, ICE to defend its practices in this Court, without success.

B. Continued Detention After a Prisoner is Eligible for Release is the Equivalent of a New Arrest.

Sheriff Elder now contends that the 48-hour hold is not a new arrest, but is more akin to the kind of short-term investigative detention known as a *Terry* stop.[1] However, he is unable to cite any legal authority that supports his position, and ample authority compels the opposite conclusion.

1. Continued detention constitutes a new arrest.

***6** A detainer is, of course, different from a typical arrest: the person being detained is already in custody. No reported Colorado opinion addresses whether continued detention under an immigration detainer constitutes an arrest. However, courts in other jurisdictions have (uniformly, to the Court's knowledge) concluded there is no difference for constitutional purposes.

A "seizure" occurs in Colorado when a police officer restrains the liberty of a person. *People v. Marujo,* 192 P.3d 1003, 1005 (Colo. 2008). The seizure can amount to an investigatory stop, requiring only reasonable suspicion, if it is limited, brief, and non-intrusive; or to an arrest, requiring probable cause, if it is more extensive. *People v. Cervantes-Arredondo,* 17 P.3d 141, 146 (Colo. 2001).

Numerous federal courts have held that, when an inmate is entitled to release but is instead held in custody for a new reason, the continued detention constitutes a new seizure under the Fourth Amendment. *See Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification"); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-AB (FFMx), 2018 WL 914773, at *23 (C.D. Cal. Feb. 7, 2018) (same); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1249-50 (E.D. Wash. 2017) (same, citing additional federal cases). *Compare Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1065 (D. Ariz. 2018) (relied on by Elder and cited in the Teller County ruling) ("the Court does not necessarily disagree with Plaintiff's premise – that continued detention is tantamount to an arrest").

Likewise, the few courts that have addressed the issue under the laws of other states have concluded that continued detention under an ICE detainer constitutes a new arrest. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1153-54 (Mass. 2017) (continued detention of inmate on immigration detainer after he was entitled to release was "plainly an arrest" under Massachusetts law); *People ex rel. Wells v. DeMarco,* No. 2017-12806, 2018 WL 5931308, at *4-5 (N.Y. App. Div. Nov. 14, 2018) (when inmate was retained in custody per ICE detainer after his release date, he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment).

I conclude that continued detention of an inmate under an immigration detainer, after the inmate has reached his or her release date, constitutes an arrest under Colorado law and a seizure under the Fourth Amendment. Federal precedent is generally considered highly persuasive authority in the Fourth Amendment arena. *See People v. Schaufele*, 325 P.3d 1060, 1067 (Colo. 2014) ("the Supreme Court has cautioned against permutations by each state supreme court that would apply federal constitutional law in a way that 'would change the uniform 'law of the land' into a crazy quilt'"). There is no doubt

that continued detention restrains the liberty of an inmate who is otherwise free to go. Because an inmate is being kept in custody for a new purpose after he was entitled to release, he is subject to a new seizure that is the equivalent of a new arrest.

This should be distinguished from the situation that occurs, for instance, when a prisoner who is already in ICE custody is housed in the local jail. *See Abriq v. Metro. Gov't of Nashville,* 2018 WL 4561246, at *3 (M.D. Term. Sep. 17, 2018) (local officials did not arrest or seize the plaintiff when they detained him in local jail, because he was already in ICE custody). "[M]erely transferring custody of that individual from one law enforcement agency to another deprives him of nothing he has not already lost." 17.5. *ex rel. Vanorsby v. Acevedo*, No. 11 C 7384, 2012 WL 3686787, at *5 (N.D. Ill. Aug. 24, 2012), For that reason, the Plaintiffs in this case have not challenged Sheriff Elder's housing of ICE detainees at the Jail under the IGSA. What they challenge is the Sheriff's continued detention of prisoners who have posted bond, completed their sentence, or are otherwise entitled to immediate release under Colorado law.

2. Continued detention is not comparable to a *Terry* stop.

***7** Sheriff Elder contends that the 48-hour ICE holds at issue are equivalent to a brief investigatory stop (a "*Terry* stop") rather than an arrest – that they involve a limited intrusion on the inmate's liberty that is reasonable, limited in time, and appropriate in light of the interests at stake.

A warrantless seizure is unreasonable unless it falls within an "established and clearly articulated exception[] to the warrant requirement." *People v. Rodriguez*, 945 P.2d 1351, 1359 (Colo. 1997). A *Terry* stop, which is recognized as one such exception, "is a brief investigatory stop supported by a reasonable suspicion of criminal activity." *Terry v. Ohio*, 392 U.S. 1 (1968); *Rodriguez*, 945 P.2d at 1359. A *Terry* stop must be "brief in duration, limited in scope, and narrow in purpose." *Id.* at 1359, 1362. Sheriff Elder's 48-hour holds do not satisfy any of these three essential elements.

The duration of reasonable *Terry* stops is typically measured in minutes, not hours or days. *See Rodriguez*, 945 P.2d at 1362-63 (90 minutes exceeded parameters of permissible investigative stop); *People v. Hazelhurst*, 662 P.2d 1081, 1086 (Colo. 1983) (20-to-30 minute detention exceeded scope of a *Terry* stop); *United States v. Tucker*, 610 F.2d 1007, 1011-13 (2d Cir. 1979) (detention in a police station "holding pen" for "several hours" was an arrest, not a *Terry* stop).

Moreover, the purpose of a *Terry* stop is to investigate – specifically, to conduct a brief investigation with a limited scope, in order to quickly confirm or dispel the reasonable suspicion of criminal activity that justified the intrusion. *Rodriguez*, 945 P.2d at 1362. In contrast, the purpose of a 48-hour ICE hold is not to investigate, but solely to detain. ICE does not ask the Sheriff to investigate, for instance, whether the Plaintiffs are removable, and it has not trained or deputized Sheriff's personnel to do so; it solely requests that the named individuals be jailed for up to 48 additional hours so ICE can serve them with documents and take them into federal custody. This continued detention beyond an inmate's release date is not a brief investigative stop; as discussed above, the courts have found it to be an arrest. *See* cases cited *supra*; *and see Lunn*, 78 N.E. 3d at 1153 (rejecting the investigative-stop argument); *Morales,* 793 F.3d at 215-16 (same).

C. Colorado Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner after his or her Release Date.

Sheriff Elder contends that EPSO has authority to hold inmates for 48 hours under Colorado law, based on (a) his inherent authority as a sheriff and (b) a statute that authorizes him to house federal prisoners in the Jail. Previously, in response to Plaintiffs' motion for a preliminary injunction, he raised a third argument, namely that he had authority to conduct ICE holds under Colorado's arrest statute. I will address the issue of statutory authority first, and then inherent authority. While Sheriff Elder no longer contends that Colorado's arrest statute authorizes continued detention, it is necessary to start there, as the arrest statute delineates the authority of Colorado peace officers to make arrests.

1. Statutory authority.

a. Colorado's Arrest Statute (C.R.S. § 16-3-102).

Colorado's arrest statute provides, in full, as follows:
(1) A peace officer may arrest a person when:

***8** (a) He has a warrant commanding that such person be arrested; or

(b) Any crime has been or is being committed by such person in his presence; or

(c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested.

C.R.S. § 16-3-102.

No part of the statute provides authority for an arrest under the circumstances here.

As to (1)(a), the forms ICE faxes to the jail are not warrants under Colorado law. A "warrant" is "a written order issued by a judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." C.R.S. § 16-1-104(18). As Sheriff Elder admits (Stip. 7), none of the ICE forms at issue are reviewed, approved, or signed by a judicial officer, as the statute requires; they are issued, instead, by ICE enforcement officers. Thus, continued detention of a local inmate at the request of federal immigration authorities, beyond when he or she would otherwise be released, constitutes a warrantless arrest.

A warrantless arrest is presumed to be unconstitutional. *People v. Burns*, 615 P.2d 686, 688 (Colo. 1980). When peace officers make an arrest without a warrant, the government bears the burden of rebutting that presumption and demonstrating that the arrest fits within a recognized exception to the warrant requirement. *Id.* Sheriff Elder cannot, and has not attempted to, meet that burden.

Under subsection (1)(c), a peace officer may make a warrantless arrest only when he has "probable cause to believe an offense was committed" and probable cause to believe that the suspect committed it. Sheriff Elder argued previously that the arrest statute provides authority for his policy, but he has now abandoned that argument, as he must. As this Court previously found, an "offense," as used in the warrantless-arrest statute, means a crime, not a civil offense. *See* C.R.S. § 18-3-104(1) ("The terms 'offense' and 'crime' are synonymous"); C.R.S. 16-1-105(2) (definitions in C.R.S. Title 18 (the criminal code) also apply in C.R.S. Title 16 (the code of criminal procedure)).

The parties agree that deportation proceedings are civil, not criminal proceedings. Stip. 10. *And see Arizona v. United States*, 567 U.S. 387, 396, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States"; the federal administrative process for removing someone from the United States "is a civil, not criminal matter"); *Lunn*, 78 N.E. 3d at 1146 ("The removal process is *not* a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime").

Thus, the ICE forms at issue provide the Sheriff with, at best, probable cause to believe an individual is subject to a civil deportation proceeding, but *not* with "probable cause to believe an offense was committed." Thus, a federal officer's finding that an individual may be removable from the United States does not authorize the Sheriff, under the warrantless-arrest statute, to deprive that individual of liberty.[2]

b. The federal prisoners statute (C.R.S. § 17-26-123).

***9** Sheriff Elder also relies on a statute that authorizes him to house federal prisoners in the county jail. C.R.S. § 17-26-123 ("Federal Prisoners-Expense") provides, in material part;

> It is the duty of the keeper of each county jail to receive into the jail every person duly committed thereto for any offense against the United States, by any court or officer of the United States, and to confine every such person in the jail until he is duly discharged, the United States paying all the expenses …

Sheriff Elder contends that this statute, in addition to expressly granting him the power to detain federal prisoners, also implicitly authorizes him to temporarily detain individuals at the request of federal immigration authorities. The contention is unpersuasive. By its plain language, the purpose of this statute is to authorize sheriffs to house federal prisoners in local jails once they have been "duly committed thereto for any offense against the United States, by any court or officer of the United States," and to allocate the expense of confinement to the United States. It does not purport to address the power at issue here, namely the power to detain inmates beyond their release dates when they have *not* been "duly committed thereto." Further, the statute authorizes confinement only for an "offense against the United States." As noted above, "offense" is defined in Titles 16 and 18 to mean a crime. Sheriff Elder has provided no reason to believe it means anything different in this context.

2. Inherent Authority.

Sheriff Elder contends he has the inherent authority, as the county's chief law enforcement officer, to hold inmates for 48 hours beyond their release date at ICE's request. He contends this authority is inherent in his power to protect the citizens of his county, and particularly those lawfully present, from illegal activity by non-citizens; and he contends that the practice is an appropriate way of reducing the risk to the community that could occur if arrests had to be carried out in public.

Colorado sheriffs are limited to the express powers granted them by the Legislature and the implied powers "reasonably necessary to execute those express powers." *People v. Buckallew,* 848 P.2d 904, 908 (Colo. 1993). Powers will be implied only when the sheriff cannot "fully perform his functions without the implied power." *Id.; see also Douglass v. Kelton,* 610 P.2d 1067, 1069 (Colo. 1980) (holding that sheriff and other public officials "have only such power and authority as are clearly conferred by law"; refusing to infer authority to issue concealed-carry permits).

For elaboration on this issue, both sides cite Colorado Attorney General Formal Opinion No. 99-7, 1999 WL 33100121 (Sept. 8, 1999), which was issued after several Colorado sheriffs sought guidance on their authority to act in response to potentially catastrophic Y2K computer failures.

As the AG Opinion makes clear, the duties and powers of the sheriff extend far back in the English common law, even predating the Magna Carta. However, in Colorado, the office of sheriff is created by the state constitution (specifically, Article XIV, Section 8), and sheriffs' powers and duties are defined by statute. AG Opinion No. 99-7, at *3-4.

***10** Sheriffs' peace-keeping duties, the Opinion notes, are codified in various statutes, including C.R.S. § 30-10-516 (sheriffs may keep the peace), 16-3-102 (arrest), and § 16-3-110 (peace officer duties). "The sheriff typically enforces the laws by issuing summons or making arrests for violations of criminal statutes," and "[t]he sheriff's use of authority beyond the arrest power must be found in a specific statute." AG Opinion No. 99-7, at *4.

As the Colorado Supreme Court has made clear, "the authority of peace officers to effectuate arrests is now defined by legislation." *People v. Hamilton*, 666 P.2d 152, 154 (Colo. 1983). The scope of the arrest power is defined primarily in Article 3, Part 1, of Title 16, of the Colorado Revised Statutes ("Authority of Peace Officer to Make an Arrest"). 16-3-101 to 16-3-110, with the primary statute being C.R.S. 16-3-102, as discussed above.

The legislature has expressly recognized certain other limited circumstances in which the power to detain is appropriate; but

in each case, a statute spells out the scope and limits of that power. No Colorado statute currently authorizes sheriffs to enforce civil immigration law or even to cooperate with its enforcement. Under these circumstances, absent a statutory grant of authority, the Court is reluctant to create an arrest power through inference. *Accord Lunn, supra*, 78 N.E. 3d at 1157 ("we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest – without the protections afforded to other arrestees under Massachusetts law – under the amorphous rubric of 'implicit' or 'inherent' authority"); *People ex rel. Wells, supra*, 2018 WL 5931308, at *6 ("We decline … to intrude upon a carefully crafted, comprehensive, and balanced legislative determination as to the proper scope of the police power to effectuate arrests …").

Notably, Colorado used to have a statute that authorized, and indeed required, local law enforcement to assist the immigration authorities in detaining suspected illegal immigrants. In 2006, Colorado enacted SB-90, which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law. *See* C.R.S. § 29-29-101-103 (repealed). In 2013, the Legislature repealed the statute in its entirety, declaring that "[t]he requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust." Colo. HB 13-1258 (April 26, 2013). Absent the re-enactment of a comparable statute conferring the power of arrest on sheriffs in the immigration context, Sheriff Elder lacks the authority to detain individuals beyond their legally mandated release dates.

As to Sheriff Elder's contention that failing to recognize his inherent authority will expose the community to risk, he has provided no evidence. Public debate on immigration enforcement rightly focuses on public safety. All counties in Colorado, with two or three exceptions, have ceased their practice of honoring ICE hold requests. Had that change in practice created public safety issues, there would no doubt be evidence to show for it, whether in the form of data or, at the least, affidavits from other sheriffs. However, Sheriff Elder has submitted no evidence whatsoever on the subject, and he cannot raise a genuine issue of material fact by mere argument of counsel.

D. Federal Law Does Not Authorize the Sheriff to Continue to Detain a Prisoner After his or her Release Date.

***11** Sheriff Elder contends that the INA, and specifically section 287(g)(10) of the Act, codified as 8 U.S.C. § 1357(g)(10), provides authority for 48-hour ICE holds.

Section 287 of the INA delineates the powers of federal immigration officers, including the power to arrest and detain suspected non-citizens pending removal proceedings. A subsection, section 287(g), addresses the extent to which the federal government may delegate those powers to state and local officers and employees. Delegation is accomplished through a written agreement known as a "287(g) agreement," entered into between the United States Attorney General and a state or local government. Under such an agreement, state or local officers who have been certified to be trained in enforcement of the federal immigration laws may perform the functions of immigration officers "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). The Sheriff s Office entered into a 287(g) agreement with ICE in 2013, but the agreement was terminated in 2015, and the parties currently do not have such an agreement, (Stip. 22; Exs. D & E.)

Given that the Sheriff's Office is currently not operating under a 287(g) agreement with ICE, Sheriff Elder now relies on a separate part of section 287(g), namely subsection 287(g)(10), which states:
(10) Nothing in this subsection shall be construed to require an agreement under this subsection [i.e., a 287(g) agreement] in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

Sheriff Elder contends that this provision provides him with authority not only to communicate and coordinate with ICE, but also to "cooperate" with ICE in the "apprehension [and] detention" of illegal non-citizens by imposing a 48-hour ICE hold on inmates otherwise subject to release from the Jail. This is a plausible contention, at the least, and one on which courts may reasonably differ. I will address first the express language of the statute and then the contention that the ICE holds constitute lawful "cooperation" or "operational support" as envisioned by the statute.

1. Express statutory authorization.

The initial question is whether, as Sheriff Elder suggests, the express language of section 287(g)(10) affirmatively grants him the power to cooperate with ICE in the arrest and detention of suspected non-citizens. It does not.

The language of the statute is not that of authorization: it does not say that local governments "may" cooperate with ICE by arresting and detaining; it simply says that nothing in the statute prevents them from doing so. It does not affirmatively grant the authority to arrest, but rather makes clear that arrests by local officials, when done in cooperation with federal immigration officials, "are a permissible form of State participation in the Federal immigration arena that would not be preempted by Federal law." *Lunn*, 78 N.E.3d at 1159; *accord Ochoa*, 266 F. Supp. 3d 1237, 1249, 1253-55.

***12** The fact that section 287(g)(10) is not an affirmative grant of arrest authority is underscored when one compares it to the remainder of section 287(g), which lays out the specifics of what must be done by way of a written agreement, training, and certification before local officers will be allowed to enforce federal immigration laws. *See* 8 U.S.C. 1357(g)(1)-(9). *And see Lunn*, 78 N.E.3d at 1159-60 ("[i]n those limited instances where the Act affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in section 1357(g)(10)") (citing 8 U.S.C. 1103(a)(10), 1252c, 1324(c), and 1357(g)(1)-(9)).

In short, section 287(g)(10) does not prevent states from making arrests in conjunction with federal immigration officers, but neither does it affirmatively authorize it. As the *Lunn* court explained, section 287(g)(10) "simply makes clear that State and local authorities may continue to cooperate with Federal immigration officers in immigration enforcement *to the extent they are authorized to do so by their State law* and choose to do so." *Lunn*, 78 N.E.3d at 1159 (emphasis added); *and see Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells,* 2018 WL 5931308, at *7. As I have previously found, Colorado law does not provide the necessary authorization.

2. "Cooperation" or "Operational Support"

Notwithstanding the above, there is no question that section 287(g) contemplates communication and cooperation between federal and state officials in immigration enforcement, even in the absence of a written 287(g) agreement. Sheriff Elder contends, and some courts appear to agree, that the statute's reference to cooperation provides implicit authorization for cooperative actions such as honoring ICE detainer requests.

The leading case on federal-state cooperation in immigration enforcement is *Arizona v. United States*, 567 U.S. 387 (2012). The case addressed, and largely overturned on preemption grounds, an Arizona statute that enlisted state and local law enforcement to the front lines of immigration enforcement. One provision (Section 6) authorized state officers to make warrantless arrests of persons if they had probable cause to believe such persons were removable from the country. The Court overturned that provision, finding that such a broad grant of authority improperly invaded the province of federal immigration officials. *Id.* at 407-10.

The Court addressed the scope of "cooperation" contemplated by section 287(g)(10) and found that, while "[t]here may be some ambiguity as to what constitutes cooperation" under that section, no reading of that term would allow state officers to arrest aliens unilaterally, without direction from federal officers. The Court noted several examples of cooperation that would arguably be permissible, including participating in a joint task force with federal officers, providing operational support in executing a warrant, and allowing federal access to detainees held in state facilities. *Id.* at 410. Sheriff Elder contends that the

48-hour holds requested by ICE are permissible because they fall within the scope of "cooperation" or "operational support" approved in *Arizona.*

Whether 48-hour ICE holds are comparable to the kinds of "cooperation" or "operational support" described in *Arizona* is a difficult question, but it is not one this Court is required to answer. The sole issue addressed by the Supreme Court in *Arizona* was preemption. The Court addressed whether Arizona's grant of immigration enforcement authority to state officers infringed on the broad immigration powers granted to federal officials by the Constitution and the INA. Preemption, however, is only step one of the analysis. Even were this Court to conclude that 48-hour ICE holds fall on the permitted side of the preemption line, the Court would still need to address step two: that is, I would still need to find that Colorado law affirmatively grants Sheriff Elder the authority to detain inmates on ICE holds. *See Lunn*, 78 N.E.3d at 1157-60; *Ochoa*, 266 F. Supp. 3d at 1254-55; *People ex rel. Wells,* 2018 WL 5931308, at *8. As set forth above, Colorado law does not provide that authority.

E. Miscellaneous Contentions.

***13** Sheriff Elder raises a number of additional contentions, of which I will address the most significant.

(a) *Lopez-Lopez*. Sheriff Elder relies heavily on a recent case, *Lopez-Lopez v. Cty. of Allegan*, 2018 WL 3407695 (W.D. Mich. July 13, 2018). (The court in the Teller County case mentioned above also relied heavily on *Lopez-Lopez* in its order denying a motion for a preliminary injunction based on similar facts. *Salinas v. Mikesell*, 2018CV30057, Order issued 8/19/18.)

The *Lopez-Lopez* case addressed the legality of an ICE detention in which ICE's recent forms (the same ones at issue in this case) were used. The facts are comparable to the facts of this case. Mr. Lopez-Lopez had been arrested on an outstanding warrant for a probation violation and booked into the county jail, and his family posted bond. The county sheriff, having received an I-247A detainer and an I-200 warrant from ICE, maintained custody of Mr. Lopez-Lopez until the next morning, when an ICE officer served the ICE forms on him and took him into custody. The court found that the sheriff's cooperation "with the federal government's request (as allowed pursuant to sec. 1357(g)(10)) 'by providing operational support' by holding [Mr. Lopez-Lopez] until ICE could take custody of him the following day … did not run afoul of the Fourth Amendment prohibition against unreasonable seizures." *Id.* at *5-6.

Lopez-Lopez is not on point, in that it does not address the claims that have been raised in this case. The claim in that case was solely that the ICE detention violated the Fourth Amendment. The court appeared to assume that the sheriff's cooperation fell within the "operational support" contemplated by section 287(g)(10) and *Arizona*, but that assumption was dicta on an issue that the plaintiff had not expressly raised and that the court did not explore beyond the sentence quoted above. The court did not address the claim raised in this case, which is that the Sheriff lacks authority under state law to continue to detain the Plaintiffs.

(b) *Revised ICE Forms*. Sheriff Elder also contends, again citing *Lopez-Lopez,* that ICE's recent revisions to its detainer forms dispel the issues caused by prior version of those forms. (Resp. at 6-8; *Lopez-Lopez*, 2018 WL 3407695, at *3–5.) This contention fails, because this Court's reasoning is based on its review of the current ICE forms, and not on prior versions. As discussed above, none of the current ICE forms amounts to a warrant under Colorado law, because none has been reviewed and approved by a neutral magistrate. *See Lunn*, 78 N.E.3d at 1151 n.17 & 1155 n.21. As the *Lunn* court explained, these forms "do not transform the removal process into a criminal process, nor do they change the fact that [state] officers have no common-law authority to make civil arrests." *Id.* at 1155 n.21.

(c) *Roy v. County of Los Angeles*. Sheriff Elder also contends (Response, pp. 18-20) that review by a neutral magistrate is not required in the detainer context. As discussed above, that is true for ICE officers, but it is not true for Colorado sheriffs acting pursuant to Colorado law. *See supra,* sections B and C. The Sheriff relies here on *Roy v. Cty. of Los Angeles*, 2017 WL 2559616 (C.D. Cal. June 12, 2017). That case is not on point, for the reasons set forth on page 13 of Plaintiffs' Reply.

***14** (d) *City of El Cenizo v. Texas*. Elder also cites another recent decision, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir.

2018), in which the Fifth Circuit upheld a Texas statute that required local law enforcement agencies to honor ICE detainers. The Fifth Circuit, like the *Lopez-Lopez* court, concluded that the "cooperation" referenced in 1357(g)(10) includes honoring ICE detainers; and accordingly it found the Texas statute did not offend principles of preemption. 890 F.3d at 185-89. The key distinction from the facts of this case was that the very Texas statute that was challenged provided the state-law authority to honor the ICE detainers that is missing from this case.

As noted above, Colorado had a somewhat similar statute from 2006 to 2013, when it was repealed based on the legislature's finding that enlisting local law enforcement to assist in immigration enforcement had undermined public trust. The Colorado legislature could re-enact that statute, or a similar one, if it wished; and, if it did so, it could supply the state law authorization that is currently missing. Likewise, Sheriff Elder could re-enter into the formal 287(g) agreement his office previously enjoyed with ICE; and doing so could arguably supply the missing authority to honor ICE's detainer requests (an issue that is not before this Court). Until one or the other of those circumstances conies about, I conclude that Sheriff Elder lacks authority under either Colorado or federal law to continue to detain the Plaintiffs after they have posted bond or otherwise resolved their criminal cases.

CONTINUED DETENTION WOULD BE IN VIOLATION OF THE COLORADO CONSTITUTION

By continuing to detain the Plaintiffs without legal authority, Sheriff Elder would violate several provisions of the Colorado Constitution, as set out in Plaintiffs' motion. Sheriff Elder did not contest these conclusions. Accordingly, I find he has conceded the issue, and I adopt the reasoning set forth on pages 16-19 of Plaintiffs' motion.

First, by depriving the Plaintiffs of liberty without legal authority, Sheriff Elder carries out unlawful warrantless arrests that constitute unreasonable seizures, in violation of Article II, Section 7.

Second, by failing to release the Plaintiffs after they have posted or offered to post bond, Sheriff Elder violates their right to bail under Article II, Section 19.

Third, Sheriff Elder has deprived the Plaintiffs of their due process rights, in violation of Article II, Section 25.

The Sheriff, in short, has committed, and threatens to commit, multiple constitutional violations. Plaintiffs therefore have established actual success on the merits.

PLAINTIFFS SATISFY THE REQUIREMENTS FOR A PERMANANT INJUNCTION

Having established actual success on the merits, the Plaintiffs also satisfy the remaining three elements for permanent injunctive relief.

A. Plaintiffs and Class Members Suffered and Will Suffer Irreparable Injury Unless the Injunction Issues.

Plaintiffs and class members have a right to release upon posting of bond, completion of their sentence, or when state-law authority to hold them has otherwise expired. Sheriff Elder's refusal to release them has deprived them of liberty without legal basis. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *accord United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) (unnecessary incarceration is a deprivation of liberty that "clearly constitutes irreparable harm."). Few injuries are more real, immediate, or irreparable than being deprived of one's personal liberty.

B. The Threatened Injury Outweighs Any Harm the Injunction May Cause.

***15** The balance of equities strongly favors Plaintiffs and the classes. Under Colorado law, Plaintiffs and bond class members have a right to release when they post the bond set by the state court. The low bonds set for the Plaintiffs demonstrated that the judges did not regard them as flight risks or dangers to public safety. And the Sheriff has no legitimate interest in imprisoning other class members after the state-law authority to detain them has expired.

By contrast, Sheriff Elder will not be harmed by releasing Plaintiffs and class members on bond or freeing them when state law detention authority ends. He will be complying with Colorado law, which is in his interest. And he may continue to cooperate with ICE, if he chooses, within the bounds of the law. The Sheriff may continue to contact ICE and let it know when a prisoner is about to leave the Jail. (This is the Sheriff's current practice, *see* Stip. 54.)

C. A Permanent Injunction Will Serve the Public Interest.

Protection of constitutional rights advances the public interest. *See*, *e.g.*, *Awad v. Ziriax*, 670 F.3d 1111,1131 (10th Cir. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights").

The injunction is also consistent with the Colorado legislature's declaration in 2013, when it repealed the statute that had required local law enforcement to cooperate with federal immigration authorities: 'The requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust."' H.B. 13-1258 (April 26, 2013).

PLAINTIFFS SATISFY THE REQUIREMENTS FOR MANDAMUS RELIEF AND ARE ENTITLED TO A DECLARATORY JUDGMENT

Because Sheriff Elder has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended, Plaintiffs are entitled to mandamus relief. And because Plaintiffs prevailed on the merits, they are also entitled to the declaratory relief they seek in their Complaint. Sheriff Elder did not contest these conclusions, and accordingly I find he has conceded the issue, and I adopt the reasoning set forth on pages 22-24 of Plaintiffs' motion.

CONCLUSION

For the reasons set forth above, the Court FINDS that there are no material facts in dispute and summary judgment is appropriate in Plaintiffs' favor as a matter of law.

It is hereby ORDERED:

(A) Summary judgment enters in favor of the named Plaintiffs and the Plaintiff classes and against Sheriff Elder, determining that the challenged practices exceed his authority and are unconstitutional; this conclusion necessarily applies not only to Sheriff Elder's practices as of March 8, 2018, but also to the broader practices that were in place at the time this case was filed;

(B) Plaintiffs' request for a permanent injunction is GRANTED. Sheriff Elder is ENJOINED from engaging in the challenged practices, as described in paragraph (D) below;

(C) Mandamus relief is awarded, as requested; and

(D) A judgment shall enter, declaring that Sheriff Elder:

(1) exceeds his authority under Colorado law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; violates the Colorado constitutional right to be free of unreasonable seizures when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case;

***16** (2) violates the Colorado constitutional right to due process of law when he relies on ICE detainers or ICE administrative warrants or I-203 Forms, or any combination thereof, as grounds for refusing to release prisoners who post bond, complete their sentence, or otherwise resolve their state criminal case; and

(3) violates the Colorado constitutional right to bail when he relies on ICE detainers or ICE administrative warrants as grounds for refusing to release pretrial detainees who post bond.

Within 7 days, counsel shall confer and then jointly submit a proposed order of judgment.

DONE and ORDERED December 6, 2018.

BY THE COURT

<<signature>>

Eric Bentley

DISTRICT COURT JUDGE

Footnotes

[1] This contention differs from Sheriff Elder's initial position in the case, when he conceded, for purposes of the preliminary injunction motion, that the 48-hour hold constituted an arrest. The change in position is notable largely to illustrate the way in which the legal arguments in this case continue to be a moving target. Courts around the country are grappling actively with related issues, and the legal landscape is evolving at a rapid pace.

[2] The ICE forms also raise the issue of whether Sheriff Elder may rely on an immigration officer's finding of probable cause, as set forth on the form simply through a checked box without case-specific findings. The Sheriff contended previously that he may rely on that finding pursuant to the "fellow officer rule" or "collective knowledge doctrine," which generally allows a law enforcement officer to rely on information known to another officer. *See People v. Washington*, 865 P.2d 145 (Colo. 1994). Plaintiffs disagreed. This is not an issue the Court needs to resolve, as, even if this Court were to find the "fellow officer rule" applicable, that would not resolve the other issues addressed herein.