IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0661

AGUSTIN RAMON,

Plaintiff and Appellant,

V.

ROBY BOWE, IN HIS INDIVIDUAL CAPACITY AND HIS OFFICIAL CAPACITY AS SHERIFF OF LINCOLN COUNTY AND ADMINISTRATOR OF LINCOLN COUNTY DETENTION CENTER,[1]

Defendant and Appellee.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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[1] Pursuant to M.R.App. P. 25(3) current Lincoln County Sheriff Darren Short should be substituted on all official capacity claims against the Lincoln County Sheriff and Administrator of Lincoln County Detention Center.

COMES NOW, the Appellant, by and through his counsel of record, and hereby files and serves his brief in opposition to Appellee's Motion to Dismiss.

INTRODUCTION

Once again this Court is presented with the question of whether it will ever be in a position to decide the constitutional and statutory legality of holding people in response to federal immigration detainer requests. Lincoln County Sheriff and Jail Administrator Roby Bowe (hereinafter "the County") asks this Court to shut the courthouse doors to these vulnerable individuals by deeming this appeal moot. The County would sanction a system by which it has effectively unreviewable authority to deprive individuals who are the subjects of federal immigration detainers from meaningful legal redress. That is, any time that someone challenges whether it is legal to hold them in response to immigration detainers — detainers that ask a jail to keep them for up to 48 hours beyond when they would otherwise be released — a county can avoid review by arguing that the challenge is moot upon the person's release from the jail.[2]

This is the second time in less than two years that a similar set of facts are being presented to this Court. In *Valerio-Gonzales v. Jarrett*, 2017 Mont. LEXIS 764, 390 Mont. 427, 410 P.3d 177, the Court granted a jail administrator's Motion

[2] Moreover, a county has numerous tools at its disposal to unilaterally effectuate the transfer of a prisoner to federal custody, including voluntarily dismissing charges against an individual being held pursuant to an immigration detainer.

to Dismiss a petition for writ of habeas corpus because, following the inmate's transfer to federal custody, the court could no longer "grant effective relief on his Petition." These challenges will recur until the Court decides the legality of local and state officers holding people on the purported authority of a federal immigration detainer request. For the reasons set forth below, the Court should deny the county's Motion to Dismiss because the challenge of Appellant Agustin Ramon (hereinafter "Ramon") is not moot merely because he has left custody of the jail. Well-grounded exceptions to the mootness doctrine should allow this case to proceed to a final review on the merits of Ramon's challenge.

FACTUAL BACKGROUND

On October 30, 2018, Ramon filed a Complaint challenging the County's "policy and practice of unlawfully exceeding [its] authority under Montana law by depriving persons of their liberty on the ground that they are suspected of civil immigration violations of federal immigration law." Compl. ¶ 1, Dist.Ct.Dkt. No. 1. An immigration detainer identifies a person being held in a local jail or other state facility. It asserts that federal immigration authorities (typically Immigration and Customs Enforcement or Customs and Border Protection) believe the person may be removable from the United States and asks the jail to detain that person for an additional 48 hours after he or she would otherwise be released for ICE to take them into federal custody.

Ramon's complaint sought declaratory and injunctive relief that such detention was unlawful and unconstitutional, as well as damages, and specifically sought a declaration that "Defendant Bowe has no authority under Montana law to arrest individuals for civil immigration violations" and an injunction "from undertaking such arrests." Compl. Pr. for Relief, ¶ B, Dist.Ct.Dkt. No. 1. Ramon filed an Application for Temporary Restraining Order, Preliminary Injunction and Order to Show Cause concurrently with his Complaint.

The District Court held a show cause hearing on November 9, 2018. The parties presented evidence at the hearing via affidavits. On November 16, 2018, the District Court denied Plaintiff's Application, holding that while Ramon presented a justiciable controversy, statutory authority allows Lincoln County to re-arrest individuals pursuant to federal immigration detainer requests. Judge Cuffe specifically addressed the County's arguments that Ramon lacked standing to challenge his detention because he was required to post bail first and expose himself to detention solely on the basis of the detainer. The Court held that:

> "Defendant's argument as to standing puts Plaintiff in an untenable position. The immigration detainer requests the Lincoln County Detention Center to detain Plaintiff for up to an additional 48 hours beyond the time when he would otherwise be released from custody. After the 48 hour period expires, Plaintiff will be released or will have already been secured by an immigration officer. *Under the Defendant's argument, the matter will never be ripe or by the time a court can review the issue it will be moot*."

Dist.Ct.Dkt. No. 27 (emphasis added).

While Ramon was still in the custody of Lincoln County he appealed the District Court's Order to the Montana Supreme Court. Ramon's appeal requested expedited consideration "[b]ecause there is the possibility that transfer of Plaintiff Ramon to federal custody will impact the justiciability of this appeal [citing *Valerio Gonzales v. Jarrett*, 2017 Mont. LEXIS 764], and furthermore because, but for the immigration detainer, Plaintiff Ramon would otherwise be released on bond pending trial…". Ramon also filed a "Motion for Expedited Consideration" on December 6, 2018. The Court found "*Valerio-Gonzales* [] distinguishable from the present case" but nonetheless denied Ramon's Motion on December 11, 2018, holding that"

> "[a]lthough Ramon asserts in his recently filed motion that following any final disposition in the form of a plea agreement or trial, he will be transferred to federal custody within one or two days, it is, at best, conjecture as to when that may occur in the usual course of a felony proceeding."

December 11, 2019 Order at 2, DA 18-0661.

The County now asserts that Ramon's appeal is moot because on February 11, 2019, Ramon was ordered released from custody pursuant to the District Court's Judgment and Sentence and he is now in federal custody and in removal proceedings.

ARGUMENT

I. The County's Motion should be denied because this appeal fits the exceptions to mootness for "public interest" and for being "capable of repetition, evading review"

This court has recognized two exceptions to the mootness doctrine: (1) a "public interest exception" "where the case presents a question of public importance that will likely recur and whose answer will guide public officers in the performance of their duties," and (2) "an exception for cases involving events of short duration that are capable of repetition, yet evading review." *Gateway Opencut Mining Action Group v. Bd of County Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133 (quoting *Morawicz v. Hynes*, 501 Ill. App. 3d 142, 929 N.E. 2d 544). Both apply here.

The public interest exception is most often invoked to "guide public officers in the performance of their duties;" it does not require evaluating whether the important issue will happen again to the specific plaintiff in the litigation. *See Gateway Opencut*, 2011 MT 198, ¶ 14. The exception for capable of repetition, evading review, generally requires a "reasonable expectation that the same complaining party would be subject to the same action again," *id.*, ¶ 22, but this showing appears to be relaxed in some cases alleging unlawful detention and deprivation of liberty interests. *See infra*, Part B.

A. Counties need vital guidance regarding whether it is legal and constitutional to hold someone in response to a civil detainer request

For the public interest exception to mootness, the Court must find: (1) the existence of a question of public importance; (2) the desirability of an authoritative determination for the purpose of guiding pubic officers in the performance of their duties; and (3) the likelihood that the question will recur. *In re J.T.*, 221 Ill. 2d 338 (citing *In re Andrea F.*, 208 Ill. 2d 148, 156 (2003)). Numerous states have adopted the public interest exception to ensure important legal issues receive judicial review, and the Court should apply it here.[3]

1. The legality of detainers is a question of public importance.

An issue of substantial public interest is generally suited for review under the public interest exception. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769. The State of Montana, like many states, is forced to grapple with the harsh new immigration policies of President Trump. The Trump administration has "take[n] the shackles off" Immigration and Customs Enforcement ("ICE") officers

[3] See, e.g., *Nat'l Elect. Contractors Ass'n v. Seattle Sch. Dist.*, 66 Wn.2d 14, 400 P.2d 778 (1965) ("We are persuaded that we are justified in exercising our discretion and retaining this appeal, notwithstanding that the immediate issue of whether an injunction should have been entered in this case is now moot. It seems desirable that school districts throughout the state should have an authoritative construction of [a statute] for their guidance in like situations."); *Pallas v. Johnson*, 100 Colo. 449, 68 P.2d 559 (1937) ("If that is true, the case is moot, strictly speaking, and would be so considered unless, as here, interest of a public character may again be immediately involved in like manner. Consequently this warrants, even if it does not require, our determination in order to obviate similar future controversies and litigation."); *Couey v. Atkins*, 357 Ore. 460, 355 P.3d 866 (2015) ("there is no basis for concluding that the court lacks judicial power to hear public actions or cases that involve matters of public interest that might otherwise have been considered nonjusticiable under prior case law."); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769.

and given them expansive and often unreviewed discretion to target people for detention and deportation. Sean Spicer, Press Sec'y, White House, White House Press Briefing (Feb. 21, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13. These new directives require ICE agents to be aggressive in pursuing detainers. See Public Safety EO at § 5(a)–(c); DHS Public Safety Memo at § A (directing enforcement against aliens charged with a crime, even if not convicted, and ordering the ICE Director to develop a weekly report listing states and cities failing to enforce ICE detainers).

At the same time, numerous states across the country have ruled that detainers violate state arrest authority and/or important constitutional provisions. Courts in Minnesota, Colorado, and, most recently, the Appellate Division in New York, have joined the Supreme Judicial Council of Massachusetts in so holding. *Lunn v. Commonwealth*, 477 Mass. 517 (2017); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018); *Cisneros v. Elder*, No. 2018CV30549, 2018 WL 7142016 (Colo. D. Ct. Dec. 6, 2018); *Esparza v. County of Nobles*, No. 53-cv-18-751, 2018 WL 6263254 (Minn. D. Ct. Oct. 19, 2018); see also *Creedle v. Miami-Dade Cty.*, 2018 WL 6427713 (S.D. Fla. Nov. 9, 2018) (finding no Florida state-law authority for detainer arrests); *C.F.C. v. Miami-Dade*

Cty., No. 18-CV-22956-KMW, 2018 WL 6616030, at *11 (S.D. Fla. Dec. 14, 2018) (same).

Here in Montana, the legality of county compliance with federal immigration detainers has been challenged in three cases: *Valerio-Gonzales*, the instant action, and *Soto-Lopez v. Jarrett*, Cause No. DV-19-212B (Gallatin County, 2019). Each of these cases has garnered intense and widespread public interest. Over twenty articles have appeared in major media outlets across the state covering these cases. Where, as here, "the issue presented is of substantial public interest, a well-recognized exception exists to the general rule that a case which has become moot will be dismissed upon appeal." *Labrenz*, 411 Ill. 618

2. An authoritative determination on the legality of detainers will guide public officers in the performance of their duties.

County sheriffs and jail administrators face significant uncertainty regarding their roles and responsibilities when taking and maintaining custody of an individual subject to an immigration detainer. And for good reason. This is a confusing area of the law that heretofore has not been explored in Montana.

For example, public officers may not be aware that continued detention on an immigration detainer is a new arrest. This is because, as in other states, Montana "accord[s] 'arrest' a broad definition determined by whether a reasonable person, innocent of any crime, would have felt free to walk away under the

circumstances." *State v. Ellington*, 2006 MT 219, ¶ 14, 333 Mont. 411, 143 P.3d 119. Because continued detention pursuant to an immigration detainer constitutes a new arrest, public officials such as sheriffs or jail administrators require arrest authority granted somewhere in Montana law. See, e.g., *State v. Bradshaw* (1916), 53 Mont. 96, 161 P. at 711 (holding that a deputy sheriff's right to arrest "is vested in him by law, only under the circumstances defined in" a particular arrest statute; otherwise, "he has no power to make the arrest."). Ramon's appeal raises the important argument that such detention has no basis in state law, violates Montana's constitution, and is not authorized by any other source of law.

Indeed, local officers and agencies face a significant risk of litigation and financial liability when they honor ICE detainers. A federal district court recently ruled in favor of a large class of individuals seeking damages for being illegally held based on ICE detainers. *See Roy v. Cty. of Los Angeles*, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018). As a result, even if this court determines that Ramon's claims are moot, rendering an ultimate opinion on the legality of federal immigration detainers would provide needed guidance for public officials in the performance of their duties. *See Johnson v. Edgar*, 176 Ill.2d 499, 680 N.E.2d 1372 (1997) ("Consequently, resolution of the single subject challenge by this court will be of assistance to both the lower courts and the public officers who will be faced with questions regarding the validity of the Act's many provisions. In

short, this court's ruling will remove the uncertainty surrounding the Act and its continued validity.").

3. Challenges to detainers will continue to recur until the Court rules on their legality

As noted throughout this brief, this is not the first time that these identical claims have been presented to the Court. *Valerio-Gonzales,* 2017 Mont. LEXIS 764. Nor will be it be the last. *Soto-Lopez v. Jarrett,* Cause No. DV-19-212B (Gallatin County, 2019). According to the Transactional Records Clearinghouse maintained by Syracuse University, 135 detainers were sent to Montana counties between 2017 and 2018. https://trac.syr.edu/phptools/immigration/detain/. Because of the inherently transitory nature of pretrial custody and the likelihood that county officials will continue to voluntarily turn over inmates to federal immigration authorities, there can be no doubt that these very same issues will be presented to the court. Moreover, as long as sheriffs and jail administrators can avoid judicial review by unilaterally transferring custody of county inmates, this Court will continue to be presented with motions to dismiss of the very type filed by Lincoln County.

B. The lawfulness of holding someone, in response to a request to do so for up to 48 hours, is likely to evade review

"The exception to mootness for those actions that are capable of repetition, yet evading review, usually is applied to situations involving governmental action

where it is feared that the challenged action will be repeated." *Common Cause v. Statutory Comm. to Nominate Candidates for Comm'r of Political Practices* (1994), 263 Mont. 324, 868 P.2d 604 (quoting *Butte-Silver Bow Local Gov't v. Olsen* (1987), 228 Mont. 77, 743 P.2d 564). The exception requires that "the challenged action must be too short in duration to be fully litigated prior to cessation." *Gateway Opencut*, 2011 MT 198, ¶ 22. It also typically requires "a reasonable expectation that the same complaining party would be subject to the same action again," *id.*, but this requirement appears to be relaxed in cases raising claims of unlawful detention and violations of the constitutional liberty interest, *see, e.g., Wier v. Lincoln Cty. Sheriff's Dep't* (1996), 278 Mont. 473, 476, 925 P.2d 1172.

In *Wier*, the Court found the petitioner's habeas corpus claim not to be moot where he claimed that he was entitled to a bail determination pending appeal of his criminal case. *Wier,* 278 Mont. at 476. His case implicated basic questions of liberty — "The constitutional issue implicated here is Wier's right to a reasonable bail." *Id.* (citing U.S. Const. Amend. VIII; Art. II, Sec. 22, Mont. Const.). Because Montana law required that Wier be considered for release, the Court found the capable of repetition, evading review exception applied. *Id.* This was true even though nothing in *Wier* indicated that the petitioner had a prospect of facing the same harm again. Similarly, here Ramon pleaded a violation of his constitutional

right to bail (Compl. ¶¶ 55-58, Dist.Ct.Dkt. No. 1) and the same liberty interest is at issue. *See In re N.B.* (1980), 190 Mont. 319, 322-323 620 P.2d 1228 (applying exception where the petitioner was released from the Montana State Hospital following an involuntary commitment because "[t]he timely appeal of an order of involuntarily commitment by any of these persons before release is virtually impossible given our rules of appellate procedure."); *In re K.G.F.*, 2001 MT 140, 306 Mont. 1, 29 P.3d 485 (overruled on other grounds by *In re J.S.*, 2017 MT 214, 388 Mont. 397, 401 P.3d 197) (holding that "this controversy is not moot, even though K.G.F. is no longer subject to the 90-day commitment order."); *In re D.L.B.*, 2017 MT 106, 387 Mont. 323, 394 P.3d 169 (applying exception where "due to the urgent nature of these proceedings, facially deficient involuntary commitment orders continue to come before this Court and are indeed likely to reoccur."); *In re J.S.W.*, 2013 MT 34, 369 Mont. 12, 303 P.3d 741; *cf. State v. Bowles* (1997), 284 Mont. 490, 499, 947 P.2d 52 (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) in noting that a district court is able to review a claim that would otherwise be moot 48 hours after arrest). *See also Gerstein v. Pugh* (1975), 420 U.S. 103, 100 n.11.

Walker v. State provides another example of application of the capable or repetition exception in the detention context. *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872. In *Walker*, the Court reviewed a prisoner's challenge to

various policies and practices at Montana State Prison, including the use of Behavior Management Plans (BMPs). Walker appealed the District Court's denial of his Motion for post-conviction Relief. Notably, while the relief that Walker sought was ostensibly limited to his personal circumstances within MSP, nevertheless a finding in his favor would impact numerous inmates at MSP, and would require system-wide changes. During the pendency of his appeal, Walker was discharged from MSP. Nevertheless, the Court found that "the problems involved could otherwise evade review because BMPs are intended to last only a few days, barely enough time to file a complaint let alone for the issue to come before this Court." *Walker,* 2003 MT 134, ¶ 44. Because MSP "continues to use BMPs and there is no doubt that they could again be used in the context of inmates with serious mental health problems," the capable of repetition exception to the mootness doctrine applied. *Id.*

The situation presented here is not meaningfully different from the above cases. Lincoln County (and other counties throughout the State) continue to unlawfully hold people who, but for the federal immigration detainer request, would otherwise be released pending trial on their criminal charges. Individuals who are subject to immigration detainers are, by definition, subject to release at any time pursuant to plea agreements, voluntary dismissals by prosecutors, trials on the merits or, as in Valerio-Gonzales' case, sua sponte orders of release by

lower courts. The inherently transitory nature of the lower court criminal proceedings effectively prevents Supreme Court review of detainer challenges (even where, as here, a party requests expedited briefing).

In *Lunn v. Commonwealth*, 477 Mass. 517 (2017), the Massachusetts Supreme Court entertained a challenge to federal immigration detainers under identical circumstances:

> "Lunn's counsel informed the judge of the outstanding detainer and asked that Lunn be released from custody notwithstanding the detainer, the criminal case having been dismissed. The judge declined to act on that request. Lunn remained in the custody of the court officers; it appears that he was kept in a holding cell in the court house. Several hours later—the record before us does not specify exactly how long—department officials arrived at the court house and took Lunn into Federal custody.
>
> The following morning, February 7, 2017, Lunn's counsel filed a petition in the county court on his behalf, pursuant to G.L.c. 211, § 3, asking a single justice of this court to order the Boston Municipal Court to release him. The petition alleged, among other things, that the trial court and its court officers had no authority to hold Lunn on the Federal civil detainer after the criminal case against him had been dismissed, and that his continued detention based solely on the detainer violated the Fourth and Fourteenth Amendments to the United States Constitution and arts. 12 and 14 of the Massachusetts Declaration of Rights. By that time, however, Lunn had already been taken into Federal custody. *The single justice therefore considered the matter moot but, recognizing that the petition raised important, recurring, and time-sensitive legal issues that would likely evade review in future cases, reserved and reported the case to the full court.*"

Lunn, 477 Mass. at 520-521 (emphasis added); *see also People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 37, 88 N.Y.S.3d 518, 525 (N.Y. App. Div. 2018) (applying mootness exception where issue "(1) is likely to reoccur, either between the parties or other members of the public, (2) will typically evade review in the courts, and (3) is substantial or novel.").

II. Former Lincoln County Sheriff Roby Bowe's successor must be automatically substituted in this action.

The County asserts that, "enjoining Sheriff Bowe from relying on immigration detainers would serve no purpose. As of January 1, 2019, Darren Short is the duly elected Sheriff of Lincoln County." M.R.App.P. 25(3) provides:

> "When a public officer is a party to an appeal or other proceeding in the supreme court in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the public officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution."

Accordingly, current Lincoln County Sheriff Darren Short should be substituted for Roby Bowe on all official capacity claims.

CONCLUSION

For the foregoing reasons, Ramon respectfully requests that the Court recognize an accepted exception to the mootness doctrine, and deny the County's Motion to Dismiss.

Dated this 21st day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing BRIEF IN OPPOSITION TO MOTION TO DISMISS with the Clerk of the Montana Supreme Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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