UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ALEXEY SAMOKHIN Petitioner	)	
vs.	)	CASE #: 0:25-cv-60333-DMM
BROWARD TRANSITIONAL CENTER et al Respondents	)	

EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO) AND/OR PRELIMINARY INJUNCTIVE RELIEF

Now comes Petitioner and respectfully moves for the Court's Order temporary restraining and/or preliminary enjoining the Respondent Director, Miami Field Office, U.S. Immigration and Customs and Enforcement, from removing him from this country until the time this Court resolves all issues presented in his habeas petition and decides whether to grant or deny him any relief. In support of this motion the Petitioner submits the following brief.

Respectfully submitted by

ALEXEY SAMOKHIN

BRIEF IN SUPPORT OF THE MOTION.

Last Tuesday, an ICE officer John Mansey told the Petitioner that his agency bought him a plane ticket for the first week of this month and that he would be deported back to Russia on that day. *See* Petitioner's Affidavit in the Exhibit. Although the officer did not provide a specific day or explanation for his agency's decision, the Petitioner believes it was for his recently protected speech activity that he expressed in the form of filing his habeas petition in this Court. *Ibid.*

ARGUMENT

I. JURISDICTION

A. This Court Has Subject Matter Jurisdiction In This Case.

This Court has subject-matter jurisdiction over the instant petition and action under 28 U.S.C. § 2241(c)(1) and (3), Art. I, § 9, Cl. 2 of the United States Constitution ("Suspension Clause"), and 28 U.S.C. § 1331, as Petitioner is in the custody of the United States Department of Homeland Security ("DHS"), acting under the color of authority, by Respondents, agents of the United States.

Despite the provisions of INA § 236(e), codified at 8 U.S.C. § 1226(e), which bar federal courts from reviewing discretionary decisions regarding parole and bond "under this section," it is well-settled that INA § 236(e) does not serve to bar federal courts from reviewing questions of statutory construction or Constitutional claims such as mandatory detention under the statutory writ of habeas corpus, 28 U.S.C. §2241. *See Demore v. Kim,* 123 S.Ct. 1708, 1713 (2003)

(INA §236(e) does not bar habeas jurisdiction in absence of specific provision barring habeas and because petitioner lodged a constitutional challenge to legislation); *Zadvydas v. Davis,* 533 U.S. 678, 686-89, 121 S.Ct. 2491, 2497-98 (2001) (INA 236(e), 242(a)(2)(B)(ii), 242(a)(2)(C), 242(g) did not bar habeas jurisdiction for challenge to post-removal detention); *Haitian Refugee Ctr., Inc. v. Nelson,* 872 F.2d 1555, 1560 n. 9 (11th Cir. 1989) (holding that federal courts also have jurisdiction to review allegations that agency officials have acted outside their statutory authority); *Gonzalez v. O'Connell,* 355 F.3d 1010, 1014-15 (7th Cir. XXXX) (Habeas jurisdiction to challenge mandatory detention even where the predicate issue to the constitutional claim was a statutory claim); *Aguilar v. Lewis,* 50 F. Supp.2d 539, 542-43 (E.D. Va. 1999) (INA §236(e) bars discretionary decisions not statutory interpretation); *Velasquez v. Reno,* 37 F. Supp.2d 663, 667-70 (D.N.J. 1999) (INA §236(e) barring review of detention decisions does not foreclose habeas challenge to application of statute). Moreover, INA §242(g) does not bar review of detention decisions; nor does INA §242(b)(9) or INA §242(a)(2)(B)(ii). *Zhislin v. Reno,* 195 F.3d 810 (6th Cir. 1999) (INA § 242(g) as interpreted by *Reno v. American- Arab Anti-Discrimination Comm.*, 119 S.Ct. 936, 943 (1999) does not bar review of challenge to indefinite detention); *Parra v. Perryman,* 172 F.3d 954 (7th Cir. 1999) (In light of *American Arab* INA §242(g) does not bar habeas to review detention issue); *Sillah v. Davis,* 252 F. Supp.2d 589, 593-97 (W.D. Tenn. 2003)

(INA §242(a)(2)(B)(ii) does not preclude habeas jurisdiction to challenge revocation of parole); *Bouayad v. Holmes,* 74 F. Supp.2d 471, 473-74 (E.D. Pa. 1999) (Government conceded that habeas jurisdiction existed to challenge mandatory detention and the court determined that neither INA § 236(e) nor INA § 242(b)(9) preclude jurisdiction over detention); *Kiareldeen v. Reno,* 71 F. Supp.2d 402, 405-07 (D. N.J. 1999) (Neither INA § 236(e) nor § 242(g) bars habeas jurisdiction to review detention based upon secret evidence); *Alikhani v. Fasano,* 70 F. Supp.2d 1124, 1126-30 (S.D. Cal. 1999) (INA §§242(g), 242(b)(9) and 236(e) do not bar challenge to statutory and constitutional challenge to mandatory detention).

In *INS v. St. Cyr*, 533 U.S. 289, 302 (2001), the Supreme Court held that habeas is still available to challenge the legality of the Service's deportation and removal orders because the Constitution requires habeas review to extend to claims of erroneous application or interpretation of statutes. *See Calcano-Martinez v. I.N.S.*, 533 U.S. 338 (2001) (holding that aliens may bring their statutory and constitutional claims in district court by filing a habeas petition although such claims brought in petitions for review with courts of appeals would be dismissed for lack of jurisdiction); *Bejacmar v. Ashcroft*, 291 F.3d 735, 736 (11th Cir. 2002) (abandoning its reasoning in *Richardson v. Reno,* 180 F.3d 1311 (11th Cir. 1998), *cert. denied,* 120 S.Ct. 1529 (2000), and finding that "*St. Cyr* removes the last statutory pillar supporting our circuit's earlier conclusion that IIRIRA repealed district court jurisdiction in habeas cases")

Similarly, in *Zadvydas v. Davis*, 533 U.S. 678, 694-97, 121 S.Ct. 2491 2501-02 (2001), resident aliens who had been ordered removed brought habeas petitions challenging their detention during a period of custody beyond the 90-day removal period. In that case, the Supreme Court stated as follows regarding habeas jurisdiction: "We note at the outset that the primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear these cases." *Id.* at 687 (citing Section 2241(c)(3), authorizing any person to claim in federal court that he or she is being held "in custody in violation of the Constitution or laws. . .of the United States"). With respect to the alien's important Constitutional claims, the Court found that

> [a] statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "deprivf e]" any person . . . of . . . liberty . . . . without due process of law." Freedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And this Court has said that government detention violates that clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, supra, at 80, 112 S.Ct. 1780, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention--at least as administered under this statute.

Id. at 690 (emphasis added).

Here, Petitioner challenges: (1) the Respondent's initial and prolonged detention as a basis to deny the Petitioner his liberty in violation of the Due Process Clause of the Fourth and Fifth Amendments (2) his counsel's ineffective assistance in violation of his right under Sixth Amendment, which resulted in the immigration court's removal order and finality of that order issued against the Petitioner. *See* Doc.1, Attachment 1.

The Petitioner has absolutely no criminal record in the United States. The only charge in his Notice to Appear (NTA) issued June 10, 2024, the charging document issued by the Respondent's agent, concerned the Petitioner's overstay of his B-2 visitor's authorization, *see* NTA at Doc. 7, Exhibit 4 which had a plausible explanation in the form of his timely application for asylum and withholding of the instant removal, *see* Immigration Judge's Written Decision at Doc.1, Attachment 1, page 7 ("Respondent's application is timely"), because of his belief that "[m]igrants "in the country, who file affirmatively for asylum, ,,,, never encounter any of the statutory provisions governing removal." *See East Bay Sanctuary Covenant v. Trump* - 950 F. 3d 1242, 1270 - 9th Circuit Court, 2020.

B. Exhaustion of Administrative Remedies Is Not Required in This Case.

"Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan,* 503 U.S. 140, 144, 112 S.Ct. 1081 (1992); *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 (11th Cir. 1989)

("We note at the outset that the application of the judicial exhaustion doctrine is subject to the discretion of the trial court.") (citing *Panola Land Buyers Ass'n v. Shuman,* 762 F.2d 1550, 1556-57 (11th Cir. 1985); *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1034 (5th Cir. 1982) ("the exhaustion requirement is not a jurisdictional prerequisite but a matter committed to the sound discretion of the trial court"). Here, Congress has not specifically mandated exhaustion before judicial review of custody determinations. Because exhaustion is not required by statute, sound judicial discretion must govern this Court's decision of whether to exercise jurisdiction absent exhaustion. *See McCarthy,* 503 U.S. at 144. Exercise of such sound judicial discretion is warranted here because there is an abundant body of law that supports this Court's jurisdiction over this case absent exhaustion.

First, exhaustion does not apply where, as here, a petition challenges only the agency action collateral to removal proceedings, such as prolonged detention without bond hearing. *Welch v. Reno,* 101 F.Supp.2d 347, 351 (D. Md. 2000) (Statutory exhaustion only for review of final orders of removal); *Aguilar v. Lewis,* 50 F.Supp.2d 539, 541 (E.D. Va. 1999) (No federal statute imposes an exhaustion requirement concerning bond); *Rowe v. INS,* 45 F. Supp. 2d 144, 145-46 (D. Mass. 1999) (and cases cited therein); *Pastor-Camarena v. Smith,* 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) (and cases cited therein); *Montero v. Cobb*, 937 F. Supp. 88, 90-91 (D. Mass. 1976). *Alikhani v. Fasano,* 70 F.Supp.2d 1124, 1129- 30 (S.D. Cal. 1999). The instant petition only seeks review of the IJ's bond determination, and not of a final order of removal.

In addition, exhaustion is not required "where [, as here,] an agency's exercise of authority is clearly at odds with the specific language of the statute." *McClendon v. Jackson Television Inc.*, 603 F.2d 1174, 1177 (5th Cir. 1979). Here, the Petitioner nonfrivolously alleged that the Respondent's agency detained him without issuing him a warrant or having a probable cause, which action directly contravenes the specific language of Immigration and Nationality Act § 236(a), ("[o]n a warrant issued by the Attorney General, an alien may arrested and detained..."). *See* 8 U.S.C. § 1226(a).

Finally, exhaustion of administrative remedies would be futile in this case because the Respondent has no jurisdiction to adjudicate constitutional issues raised in the petition. *See Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976) (A constitutional challenge to administrative action does not require exhaustion.); *Jean v. Nelson*, 727 F.2d 957, 981 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992 (1985) (allowing exception to exhaustion requirement where remaining administrative remedies could not cure alleged defect in agency procedures); *Ramirez Osorio v. INS*, 745 F.2d 937, 939 (5th Cir. 1984) (holding that "exhaustion is not required when administrative remedies are inadequate"); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033-36 (5th Cir. 1982) (same). Some courts have held that, notwithstanding the constitutional claims, exhaustion is still required if the claims involve a procedural error that is correctable by the administrative tribunal. *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987); *Dhangu v. INS*, 812 F.2d 455, 460 (9th Cir.1987).

It should be noted that the instant case is distinguishable from *Boz v. United States*, 248 F.3d 1299 (11th Cir. 2001), wherein the Eleventh Circuit affirmed the district court's dismissal of a habeas petition for lack of jurisdiction on the ground that the petitioner failed to exhausted the administrative remedies available to him. However, *Boz* does not apply here because that case involved the post-removal mandatory detention of criminal aliens under INA § 236(c) and § 241, where administrative remedies were available to the petitioner, 90-days after issuance of his final order of removal.

To the contrary, the instant case involves non-mandatory detention of a non-criminal alien under INA § 237(a). *See* NTA at Doc. 7, Exhibit 4. Here, the Petitioner "need not exhaust his administrative remedies" because the only available administrative remedy, appeal to the BIA, would be futile as it "will not provide relief commensurate with the claim" raised in the instant case. *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 (11th Cir. 1989). In addition, the continuing validity of *Boz* is in doubt in light of *Zadvydas v. Davis*, 533 U.S. 678, 701, 121 S.Ct. 2491 (2001). Subsequent to *Boz*, the Supreme Court in *Zadvydas* held that detention of permanent resident aliens beyond six months following issuance of an alien's final order of removal is presumptively unreasonable. *Zadvydas*, 533 U.S at 701-02. In *Boz*, the petitioner had been held in post-removal detention for approximately three (3) years. *Boz*, 248 F.3d at 1300.

C. This Court Has Authority to Grant the Instant Motion.

This Court has the discretion to enter a temporary restraining order and a preliminary injunction. *See Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1561-1562 (11th Cir. 1989). In order for preliminary relief to issue, the movant must establish the following: (1) a substantial likelihood that the movants will ultimately prevail on the merits; (2) that he will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs the potential harm to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *Id.* As discussed below, all of these factors heavily weigh in the Petitioner's favor in the instant case.

II. The Petitioner Will Prevail on the Merits Of His Claims.

A. Violation of Due Process of the Fourth Amendment.

1. Immigration detainers are not a legally valid basis for detention.

Several federal courts reviewed the legality of immigration detainers and found that holding someone on a detainer after they have concluded their local or state custody constitutes a new arrest that must meet Fourth Amendment requirements. *See Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) *aff'd in part, dismissed in part*, 793 F.3d 208, 215-216 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D.Or. April 11, 2014); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010).

An immigration detainer is a voluntary request that does not impose any obligation on the receiving jurisdiction. Therefore a jail cannot evade responsibility for unlawful detention by claiming the federal government obligated them to hold the person on an immigration detainer. *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (local law enforcement agencies are free to disregard detainers and cannot use them as a defense of unlawful detention); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 40 (D.R.I. 2014), aff'd in part, dismissed in part, 793 F.3d 208 (1st Cir. 2015) ("The language of both the regulations and case law persuade the Court that detainers are not mandatory and the RIDOC should not have reasonably concluded as such."); *Villars v. Kubiatowski*, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) (federal courts and all relevant federal agencies and departments consider ICE detainers to be requests).

A jail must have a warrant or probable cause of a new offense to detain a person after they would otherwise be released from custody. *See, e.g.*, 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."); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010) ("Plaintiff was kept in formal detention for at least several hours longer due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless arrest.").

Even a few minutes of detention may be a Fourth Amendment violation if there is no sufficient justification for detaining the person or prolonging the stop. *See Rodriguez v. United States*, 135 S.Ct. 1609 (2015); *Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (delaying release to investigate immigration status raises constitutional concerns). An immigration detainer is not a warrant, and the initiation of investigation indicated on a detainer does not, federal courts have found, provide a legal basis for detention. *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) (finding immigration detainer for investigation is a "facially invalid request to detain"*); Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317- ST at *17 (D.Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause, based on an immigration detainer); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010). *See also* Christopher N. Lasch, Federal Immigration Detainers After Arizona v. United States, 46 Loy. L.A. L. Rev. 629, 686 fn. 308 (2013) (explaining how immigration detainers are different from administrative immigration warrants).

Here, the Respondent did not provide "a new probable cause justification" for the initial detention in either the NTA or a warrant that the Petitioner has not yet received. Therefore, the Court should find that the Respondent's action can not be sustained.

2. Local jails that hold individuals on immigration detainers have been held liable for violating the Fourth Amendment.

Local jails and sheriffs have been held liable for unlawful detention and violation of the detainee's Fourth Amendment rights because of unlawful detention based on ICE holds. *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014) (holding county liable for unlawful detention based solely on an immigration detainer). *See also Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. *filed* Jan. 16, 2007) (settled for money damages); *Cacho v. Gusman*, No. 11-0225 (E.D. La. *filed* February 2, 2011) (same); *Quezada v. Mink*, No. 10-0879 (D. Co. *filed* Apr. 21, 2010) (same); *Ramos-Macario v. Jones*, No. 10-0813 (M.D. Tenn. *filed* Aug. 30, 2010) (same). Moreover, many jails have been held liable or forced to settle with U.S. citizens that they unlawfully held on immigration detainers. *See, e.g., Galarza v. Szalczyk*, No. 10-06815 *10 (E.D. Pa. *filed* Sept. 28 2012), *Mendoza v. Osterberg*, 2014 WL 3784141 (District of Nebraska, 2014); *Castillo v. Swarski*, No. C08-5683 (W.D.Wa. Nov. 13, 2008); *Wiltshire v. United States*, Nos. 09-4745, 09-5787 (E.D. Pa. Oct. 16, 2009); *Jimenez v. United States*, No. 11-1582 (S.D. Ind. filed Nov. 30, 2011).

Here, the Respondent Warden, Broward Transitional Center is holding the Petitioner exclusively upon request from immigration officials. Therefore, that Respondent could also be found liable for unlawful detention.

3. As a new arrest, detention on ICE detainers implicates other fundamental constitutional and statutory requirements arising from the Fourth Amendment.

Arrests for suspected violations of federal immigration law, which include detention in a local jail based on an ICE detainer, must meet Fourth Amendment requirements. *See Morales v. Chadbourne*, 793 F.3d 208, 215 (1st Cir. 2015) ("It was thus clearly established well before [plaintiff] was detained in 2009 [on an immigration detainer] that immigration stops and arrests were subject to the same Fourth Amendment requirements that apply to other stops and arrests . . ."). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) (Fourth Amendment applies to immigration stops); *Uroza v. Salt Lake Cnty.*, No. 11-cv-713, 2013 WL 653968, at *6 (D. Utah Feb. 21, 2013) ("The proposition that immigration enforcement agents need probable cause to arrest pursuant to 8 U.S.C. § 1357(a)(2) and in accordance with the Fourth Amendment has been established in the Tenth Circuit since 1969.").

Because holding someone on an immigration detainer beyond their release date is a new arrest, the various requirements of the Fourth Amendment apply. This includes the requirement of probable cause or a warrant issued by a neutral magistrate, and in the case of a warrantless arrest, the requirement that the detainee be brought before a neutral magistrate within 48 hours of arrest. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975).

In addition, the Immigration and Nationality Act provides warrantless civil immigration arrest authority to immigration officials only when the individual is likely to escape before a warrant can be obtained. 8 U.S.C. § 1357(a); *Arizona v. United States*, 132 S.Ct. 2492, 2505-07 (2012).

4. Detainer is not a Warrant and Lacks Sufficient Probable Cause.

In 2015, ICE changed its detainer forms because of the above court decisions, adding language regarding probable cause to the new I-247D form. Whether the boilerplate checkboxes claiming probable cause can meet the standard of "particularized suspicion" that is central to the Fourth Amendment is still in question. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). *See also Vohra*, 2010 U.S. Dist. LEXIS 34363 at 29 (doubting that an admission of foreign birth and lack of database results showing legal status amounted to probable cause for immigration arrest).

Certainly there is still no procedure under which a detainer is based on oath or affirmation and reviewed by a neutral magistrate, as is required under the Fourth Amendment to issue a valid warrant. U.S. CONST. amend. IV ("... no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975).

Therefore, immigration detainers are still not warrants, and any detention based on an immigration detainer is a warrantless arrest. *See Morales,* 996 F. Supp. 2d at 39; *Miranda Olivares*, No. 3:12-cv-02317-ST at 29; *Vohra*, 2010 U.S. Dist. LEXIS 34363 at 24. As such warrantless arrest authority is limited by both immigration law and the Fourth Amendment.

5. Fourth Amendment Requires Review by a Neutral Magistrate .

Bedrock Constitutional principles require that a person arrested without a warrant must be brought before a judge or neutral magistrate within 48 hours. *Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). *See also Arias v. Rogers*, 676 F.2d 1139, 1142-43 (7th Cir. 1982) (finding, pursuant to 8 U.S.C. § 1357(a)(2) and the Fourth Amendment, that subsequent to a warrantless immigration arrest, an arrestee must be brought without unnecessary delay before an immigration adjudicator for a probable cause hearing). There is no reason that individuals subjected to warrantless arrest based on an immigration detainer would be different. *See Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 918-19 (S.D. Ind. 2011) (preliminary injunction), *affirmed in Buquer*, No. 1:11-cv-00708, 2013 WL 1332158, at 10 (permanently enjoining Indiana state law that allowed local jails to detain based on immigration holds, finding that it violates the Fourth Amendment because, among other reasons...)

But currently both local agencies and ICE fail to obtain any neutral review of these arrests. Local jails make the arrest and then merely transfer the person to a different enforcement agency: ICE. ICE brings arrested immigrants into its own custody and provides no hearing to review the basis for arrest before a neutral adjudicator of any kind. Rather than a judge, another ICE officer conducts an "examination" of the arrestee, and decides whether to continue to detain the person. 8 C.F.R. § 287.3(a).[1]

Supreme Court precedent clearly requires an independent or neutral evaluation, not merely a different officer or agency. *Gerstein*, 420 U.S. at 114; *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972) ("[S]omeone independent of the police and prosecution must determine probable cause."); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). *See also Lopez v. City of Chicago*, 464 F.3d 711, 718 (7th Cir. 2006) ("[W]hether the arresting officer opts to obtain a warrant in advance or present a person arrested without a warrant for a prompt after-the-fact *Gerstein* hearing, the Fourth Amendment requires a *judicial* determination of probable cause."); *Crane v. Texas*, 759 F.2d 412, 422 (5th Cir. 1985) (finding Dallas County's capias warrant procedures invalid for lack of issuance "after a determination by a neutral magistrate of probable cause").

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[1] Immigration judges have authority to grant bond, but not to review the basis for the arrest in the manner of a probable cause hearing, or even to review a written statement from ICE about the basis for arrest. Immigration judges do not issue or review immigration detainers.

Therefore, local jails who arrest people on immigration detainers without bringing them before a judge appear to be violating the inmates' Fourth Amendment rights. It is also unlikely that ICE's own procedures pass Constitutional muster. *Id.*

6. Detainer Exceeds Statutory Arrest Authority.

Arrest on a detainer without a warrant exceeds the statutory arrest authority in the Immigration and Nationality Act. The INA provides that "[a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant— to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation *and is likely to escape before a warrant can be obtained for his arrest.*" 8 U.S.C. § 1357(a)(2) (emphasis added). This requirement of a determination of the risk of escape is not just verbiage. The Supreme Court held officers to this constraint in *Arizona v. United States*, finding that Arizona's enforcement statute was preempted because it purported to give Arizona law enforcement unlimited warrantless arrest authority, exceeding ICE's own warrantless arrest authority, which is limited to situations when there is a likelihood of escape before a warrant can be obtained. *Arizona*, 132 S.Ct. at 2505-07. (If no federal warrant has been issued, . . . [ICE] officers have more limited authority.").

Therefore, under the INA, ICE may only make warrantless arrests when (1) it has probable cause for the arrest and (2) it has determined the subject "is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2)"). *See e.g., De La Paz v. Coy*, 786 F.3d 367, 376 (5th Cir. 2015) ("[E]ven if an agent has reasonable belief, before making an arrest, there must also be "a likelihood of the person escaping before a warrant can be obtained for his arrest."); *United States v. Cantu*, 519 F.2d 494, 496-97 (7th Cir. 1975) (holding that the statutory requirement of likelihood of escape in 8 U.S.C. § 1357 "is always seriously applied"); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (holding that the statute requires an individualized determination of flight risk); *Westover v. Reno*, 202 F.3d 475, 479-80 (1st Cir. 2000) (commenting that an immigration arrest was "in direct violation" of § 1357(a)(2) because "[w]hile INS agents may have had probable cause to arrest Westover by the time they took her into custody, there is no evidence that Westover was likely to escape before a warrant could be obtained for her arrest"). A person detained in a jail is not likely to escape before a warrant can be obtained. They cannot go anywhere. Thus arresting such a person without a warrant exceeds the statutory requirements and limitations for immigration arrests. *Arizona*, 132 S.Ct. at 2505- 07. ICE cannot delegate arrest power to local law enforcement agencies that the agency itself does not have.

7. Due Process Requires Notice and an Opportunity to be Heard.

Finally, a person whose liberty is restrained must have notice and an opportunity to challenge their detention. *See, e.g., Zinermon v. Burch*, 494 U.S. 113 (1990). Holding people on detainers also fails this basic due process requirement. Although immigration detainer forms request the receiving agency to serve a copy of the form on the subject, this is rarely actually done, and many jails lack any procedures to review the validity or the choice to comply with a detainer. But local jails may be liable for due process violations where they fail to provide notice of the lodging of an immigration detainer or an opportunity to challenge it. *See Morales v. Chadbourne*, 996 F. Supp. 2d 19, (D.R.I. 2014).

B. Ineffective assistance of counsel and due process.

Noncitizens facing removal from the United States must be afforded a fundamentally fair hearing. Many courts have held that access to counsel and the right to seek a remedy when counsel does not provide effective assistance are critical elements of a fair hearing. With respect to deficient performance, or ineffectiveness, this means first "asking if competent counsel would have acted otherwise." *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004). Noncitizens may have received deficient representation if attorneys or their staff, for example: made admissions or advised a client to forfeit the right to appeal with no apparent tactical advantage, *see Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920-21 (9th Cir. 2015); *Mai v. Gonzales*, 473 F.3d 162, 166-67 (5th Cir. 2006).

Most courts of appeals recognize a due process right to effective assistance of counsel in removal proceedings. *See Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *Iavorski v. INS*, 232 F.3d 124, 128-29 (2d Cir. 2000); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Allabani v. Gonzales*, 402 F.3d 668, 676 (6th Cir. 2005); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Osei v. INS*, 305 F.3d 1205, 1208 (10th Cir. 2002); *Dakane v. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005); *cf. Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) ("[The Fifth Circuit] has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment.").

Here, the Petitioner nonfrivolously alleged that his attorney "conceded the factual allegations contained in the NTA and conceded the sole charge of removability" without his knowledge or consent. *See* Habeas Petition at Doc.1. He also alleged that his attorney advised him not to appeal the immigration judge's decision without a valid reason. *Ibid* at page 2.

Therefore, with an effective assistance of counsel, whose appointment the Petitioner will later seek from this Court under the authority of *Thomas v. Searls* - 515 F. Supp. 3d 34 - District Court, WD New York, 2021, the Petitioner will likely succeed on the merits of his claims. Although the Petitioner has never been convicted of any crime and does not have the benefit of a counsel yet, he directs this Court's attention to another federal court's decision on granting TRO to a criminal alien in order to further support his case in the attachment below.

WHEREFORE. The Court should grant this motion.

Respectfully submitted by

ALEXEY SAMOKHIN

CERTIFICATE OF SERVICE.

I, the undersigned, certify that I served or caused to be served the foregoing motion by sending its copy to the following recipient:

Mary Beth Ricke
ASSISTANT U.S. ATTORNEY
E- mail: Mary.Ricke@usdoj.gov
99N.E.4 th Street, Suite 300
Miami, Florida 33132
Counsel for Respondents.

Respectfully submitted by

ALEXEY SAMOKHIN

AFFIDAVIT.

I, Alexey Samokhin, hereby state, under penalty of perjury, that last Tuesday an ICE Officer John Mansey told me that his agency bought me a plane ticket and that I would be deported on the first week of March, which day and reason he did not specify. However, a month ago, another officer asked me to sign papers extending my detention for two more months, which I declined. I believe that ICE decided to deport me sooner, because I filed a habeas petition in a federal court.

Name: Alexey Samokhin

Date: 03.02.2025

Signature: _____

EXHIBIT.

Southern District of Florida

1 LBS 1 OF 1
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