

Matter of Chery v Sheriff of Nassau County
2015 NY Slip Op 32774(U)
December 3, 2015
Supreme Court, Nassau County
Docket Number: 8100/15
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

In the Matter of the Application of
JOSUE CHERY, STEVENSON PIERRE-LOUIS,
MELVIN REYES and RONALDO UMEJANA,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules and a Declaratory Judgment Pursuant to
Article 3001 of the Civil Practice Law and Rules

- against -

SHERIFF OF NASSAU COUNTY, MICHAEL J.
SPOSATO,

Respondent.

TRIAL/IAS PART 36
NASSAU COUNTY

Index No.: 8100/15
Motion Seq. No.: 01
Motion Date: 10/01/15
XXX

The following papers have been read on this application:

	Papers Numbered
Order to Show Cause, Verified Petition, Affidavit and Exhibits	1
Verified Answer and Objections in Points of Law and Exhibits	2
Reply Affidavit and Exhibits	3
Sur-Reply and Exhibits	4

Upon the foregoing papers, it is ordered that the application is decided as follows:

Petitioners move, pursuant to CPLR Articles 63 and 78 and CPLR § 3001, for a order enjoining, restraining and prohibiting respondent from detaining petitioners beyond their judicially-authorized release based on the filing of Department of Homeland Security ("DHS") Forms I-247 and I-247D, Immigration Detainer, as well as Form I-205, Warrant of

Removal/Deportation, and Form I-200, Warrant for Arrest of Alien by Immigration and Customs Enforcement (“ICE”) agents. Respondent opposes the application.

Counsel for petitioners submits that “[t]his is a special proceeding pursuant to, *inter alia*, CPLR Article 78, and an action seeking a declaratory judgment, pursuant to CPLR Article 3001, by four current inmates at the Nassau County Correctional Facility seeking urgent redress of an unlawful policy and unconstitutional actions of the Respondent Michael J. Sposato, Sheriff of Nassau County. Under the Sheriff’s unlawful policy and actions, which directly applies (*sic*) to each Petitioner, the Sheriff’s Department holds inmates beyond the date they are required to be released due to judicial orders setting bail that Petitioners can post or the completion of their sentences based on the filing of a non-judicial ‘hold’ request by immigration officials....

Accordingly, this Verified Petition seeks an order and judgment pursuant to Articles 78 and 3001 of the Civil Practice Law and Rules: (1) Issuing a writ of mandamus to compel and mandamus to review on the basis that: (a) Respondent has continued to detain inmates beyond their judicially-authorized release based on the filing by Immigration and Customs Enforcement (‘ICE’) of Department of Homeland Security (‘DHS’) Forms I-247 and I-274D, Immigration Detainer; I-205, Warrant of Removal/Deportation; and I-200, Warrant for Arrest for Alien ...; and (b) Respondent has refused to provide defense counsel with a copy of Forms I-247, I-247D, and I-200 filed against Petitioners. Additionally, this Verified Petition seeks an order and judgment pursuant to Article 3001 of the Civil Practice Law and Rules: (2) Directing Respondent not to honor the immigration detainers, and permanently enjoining same; (3) Directing Respondent to provide a copy of any immigration detainer and administrative warrant filed against inmates of the Nassau County Correctional Center to the defendants and/or their defense counsel upon the

filing of such forms with the Nassau jail;....”

Counsel for petitioners asserts that “[t]he Sheriff’s policy of holding inmates beyond their judicially-ordered release dates on account of non-judicial and warrantless ICE holds is unlawful and violates Petitioners’ rights under the State and Federal Constitution against unreasonable searches and seizures, arrest without a warrant, and the protections of due process. Additionally, notwithstanding due and repeated demand therefore, Respondent has refused to provide defense counsel representing inmates, including Petitioners, with a copy of Forms I-247, I-247D, I-205 and I-200 filed against counsel’s clients.”

Counsel for petitioner further submits that “U.S. immigrations agents in ICE routinely file DHS Form I-247, Immigration Detainer, also known as an ‘immigration hold’ or an ‘ICE detainer,’ with local law enforcement agencies. An ICE detainer is a request by an immigration officer for a law enforcement agency to detain a person who is currently in its custody for up to 48 hours, excluding weekends and holidays, so that ICE can assume custody of and potentially initiate civil immigration proceedings against the individual. An ICE detainer is often accompanied by DHS Form I-205, Warrant of Removal/Deportation. Neither the ICE detainer nor the immigration ‘warrant’ is a judicial warrant; they are not court orders; they are not reviewed, signed, or ordered by a judge.... ICE detainers do not require state officers to take any action. ICE ‘views an immigration detainer as a request’ and has assured Congress that detainers ‘are not mandatory as a matter of law.’”

Counsel for petitioners argues that detaining petitioners without a valid warrant and without probable cause is a violation of petitioners’ rights under the Fourth Amendment of the United States Constitution and Article I, Section 12, of the New York State Constitution.

Counsel contends that “[n]either the ICE detainer nor the accompanying administrative ‘warrant’ constitute a judicial warrant, and neither document includes sufficient information to establish probable cause for the continued detention of any inmate without a judicial warrant.... ICE detainers do not establish probable cause that a crime has been committed such that a law enforcement agency has authority to detain them for criminal proceedings. DHS Form I-247 is a boilerplate document that contains a list of conclusory statements, each of which is accompanied by a box that can be checked off if the immigration officer who prepares the form has ‘reason to believe’ that the statement might apply to the individual listed on the form.”

Counsel for petitioners also argues that detaining petitioners beyond the termination of their criminal cases will violate their Fourteenth Amendment substantive and procedural due process rights and that the Nassau County Sheriff’s Department does not have authority under either federal or local law to detain petitioners for a civil immigration matter.

In opposition to the motion, counsel for respondent argues that the detention of petitioners by the Nassau County Sheriff’s Department is not based on immigration detainers, but rather administrative warrants, which are not unlawful and unconstitutional. Counsel submits that, “[d]espite Petitioners’ contention, The Nassau County Sheriff’s Department does not detain any individuals pursuant to an ICE detainer. If however, an administrative warrant was issued, as is the case for all Petitioners here, the Nassau County Sheriff’s Department would detain an individual pursuant to the warrant. As Petitioners point out, the U.S. Supreme Court has long held that the Fourth Amendment requires judicial warrants to be issued by a neutral and detached magistrate. [citations omitted]. However, the U.S. Supreme Court has upheld the validity of arrests made pursuant to administrative warrants. [citation omitted].... [T]he Court makes clear that there a long-standing, constitutionally valid statutes providing for deportation which

authorize the arrest of deportable aliens by order of an executive official. [citation omitted].

These orders from ICE come in the form of a warrant, which, unlike the ICE detainers, indicate that the federal agency has probable cause to arrest the individual.... Since the U.S. Supreme Court has determined that arrests made pursuant to an administrative warrant are valid, the Nassau County Sheriff's Department would be well within the confines of the law to continue the detention of an inmate pursuant to an administrative warrant issued by an authorized federal agent. Therefore, because the Sheriff's department does not hold any inmates pursuant to the ICE detainers, but rather to validly issued administrative warrants, the Petition should be dismissed." See Respondent's Affirmation in Opposition Exhibit B.

Counsel for respondent adds that "[a]t issue in the present action are not 'judicial warrants' but, rather, administrative warrants duly issued pursuant to 8 CFR 287. Administrative warrants are not held to the same Fourth Amendment standards as judicial warrants.... [T]he Warrants to Arrest and Warrant for Removal/Deportation ... do not contravene the United States or New York State Constitutions and are neither unconstitutional nor unlawful. In addition, pursuant to New York Correction Law § 500-g, a Chief Executive Officer of a local law enforcement agency, is authorized to take custody of a federal prisoner."

This Court finds that petitioners' constitutional arguments fail on their merits based upon the fact that an Order of Deportation or Removal from the United States does, in fact, provide respondent with lawful authority to detain petitioners. See *People v. Xirum*, 45 Misc.3d 785, 993 N.Y.S.2d 627 (Supreme Court Kings County 2014). In *People v. Xirum, supra*, the Court held that "the cases relied upon by defendant most heavily, *Miranda-Olivares v. Clackamas County*, [citation omitted] and *Galarza v. Szalczyk*, [citation omitted] fully support [the] conclusion [above]." In the instant matter, *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305

(D.Ore. 2014) and *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir.2014) are the same two cases relied upon by petitioners in support of their motion.

The I-247 Forms that are the subject of this action set forth the basis for ICE's probable cause determination as to each of the petitioners. *See* Respondent's Affirmation in Opposition Exhibit A. Petitioner Josue Cherry is believed to be an alien subject to removal because he "has three or more misdemeanor convictions." *Id.* Petitioner Stevenson Pierre-Louis is an "immigration enforcement priority" because he "has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;" "has been convicted of a 'significant misdemeanor,' as defined under DHS policy;" and "has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents." *Id.* Petitioner Ronaldo Umejana ("Umejana") is an "immigration enforcement priority" because he "has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents." *Id.* Additionally, on July 17, 2014, a final order of removal was issued against petitioner Umejana by U.S. Immigration Judge Aviva L. Poczter. *See* Respondent's Affirmation in Opposition Exhibit C. Petitioner Melvin Reyes ("Reyes") is an "immigration enforcement priority" because he "has been convicted of a 'significant misdemeanor,' as defined under DHS policy." *Id.* Additionally, pursuant to the I-247 Form, removal proceedings against petitioner Reyes were pending at the time said I-247 Form was filed. *Id.*

The Court further notes that respondent requires that I-247 filings be accompanied by either a Warrant for Arrest or a Final Order of Removal/Deportation. *See* Respondent's

Affirmation in Opposition Exhibit B.

In *People v. Xirum*, the Court found that in *Miranda-Olivares v. Clackamas County*, *supra*, “the court recognized that under a Fourth Amendment analysis, a detainer stating only that an investigation had been initiated to determine *whether* a subject was subject to removal from the United States is clear and distinct from the probable cause that exists when a subject is charged with a federal crime, subject to a warrant for arrest or *an order of removal or deportation.*” *People v. Xirum, supra* at 790 citing *Miranda-Olivares v. Clackamas County, supra*.

This Court concurs with the holding of *People v. Xirum, supra*, that “[t]he Fourth Amendment requires that seizures be objectively reasonable in light of the facts and circumstances [citation omitted]. Having held that an order of removal or deportation provides [respondent] with probable cause to hold a defendant for DHS, this court cannot say that under a Fourth Amendment analysis it is unreasonable for [respondent] to further hold defendant for *at most 48 hours* as requested in the detainer after the conclusion of the state case in order to give DHS an opportunity to seize the subject of the deportation order. To hold otherwise would encourage DHS to seize defendants out of [county] custody before the conclusion of their pending matters which is contrary to New York State public policy and interest in ensuring that defendants’ criminal cases are completed.” *People v. Xirum, supra* at 791.

This Court does note, though, that the I-247 Forms indicate that respondent is to “[s]erve a copy of this form on the subject.” *See* Respondent’s Affirmation in Opposition Exhibit A.

The Court has considered petitioners’ remaining contentions and concludes that they are lacking in merit.

Therefore, based upon the above, the branches of petitioners' motion, pursuant to CPLR Article 78, for a order "(1) Issuing a writ of mandamus to compel and mandamus to review on the basis that: (a) Respondent has continued to detain inmates beyond their judicially-authorized release based on the filing by Immigration and Customs Enforcement ('ICE') of Department of Homeland Security ('DHS') Forms I-247 and I-274D, Immigration Detainer; I-205, Warrant of Removal/Deportation; and I-200, Warrant for Arrest for Alien ...; and (b) Respondent has refused to provide defense counsel with a copy of Forms I-247, I-247D, and I-200 filed against Petitioners" is hereby **DENIED in its entirety.**

The branch of petitioners' motion, pursuant to CPLR § 3001, for an order "[d]irecting Respondent not to honor the immigration detainers, and permanently enjoining same" is hereby **DENIED.**

The branch of petitioners' motion, pursuant to CPLR § 3001, for an order "[d]irecting Respondent to provide a copy of any immigration detainer and administrative warrant filed against inmates of the Nassau County Correctional Center to the defendants and/or their defense counsel upon the filing of such forms with the Nassau jail" is hereby **GRANTED.**

This constitutes the Decision and Order of this Court.

ENTER:


 DENISE L. SHER, A.J.S.C.

XXX
 ENTERED

DEC 08 2015

NASSAU COUNTY
 COUNTY CLERK'S OFFICE

Dated: Mineola, New York
 December 3, 2015