

ICE DETAINERS AND POSTING BAIL: THE ROAD TO MORE LAWSUITS IN NORTH CAROLINA JURISDICTIONS WITH 287(G) AGREEMENTS

JASMINE BURGESS†

I. INTRODUCTION

With a new election year comes new faces in political offices. That idea is not lost on sheriff's offices across the country. With a new sheriff comes new policies, new attitudes, and new philosophies, hopefully for the benefit of the community she serves. This was especially true in 2018 with the newly elected sheriffs in counties across North Carolina. After campaigns pledging to no longer comply with ICE detainers and to terminate 287(g) agreements, candidates for sheriff in Wake, Durham, and Mecklenburg counties were looking to change the face of immigration enforcement in their respective jurisdictions.¹

In September 1996, Congress authorized the executive branch to delegate immigration enforcement activities to state and local government agencies.² In response, the Immigration and Nationality Act was supplemented by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which included section 287(g).³ This section permitted the Department

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1. Virginia Bridges, *11 Released from Durham Jail After Sheriff Ends Policy of Honoring Immigration Holds*, HERALD-SUN (Durham) (Dec. 14, 2018, 4:45 PM), <https://www.herald-sun.com/news/local/article223117890.html>.

2. *Delegation of Immigration Authority Section 287(g) Immigration & Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/287g> (last updated Aug. 10, 2018).

3. *Id.*

of Homeland Security's Immigration and Customs Enforcement ("ICE") to enter into memorandums of agreement ("MOA") with state and local law enforcement agencies, allowing them to function as immigration officers.⁴ Until recently, ICE was engaged in MOAs with seventy-eight law enforcement agencies in twenty states.⁵ In North Carolina, ICE was engaged in MOAs in six local jurisdictions: Cabarrus, Gaston, Henderson, Mecklenburg, Nash, and Wake counties.⁶ However, this has changed with the election of the new Sheriffs in Mecklenburg and Wake counties, who each pledged to terminate the 287(g) agreement in their jurisdiction.⁷ Additionally, the new sheriff in Durham County sought to discontinue compliance with ICE detainees.⁸

As a show of commitment to this pledge, multiple individuals held under ICE detainees were released from custody after a newly elected sheriff took office.⁹ Although good news for the immigration community, this follow-through on these campaign promises does not exempt these counties from potential lawsuits for the unlawful detention that may have occurred by not accepting bail.¹⁰ Sheriffs' offices in other states have examined this issue, and valid and successful arguments have been filed.¹¹ This comment will address the elements of an argument one could make to file suit in North Carolina against the sheriff's offices in Wake or Durham County if it is found that her Fourth Amendment rights were violated. I propose that valid arguments can be made in North Carolina jurisdictions in the novel case of

4. *Id.*

5. *Id.*

6. *Id.*

7. *Sheriff McFadden Begins Tenure by Ending ICE's 287(g) Program in Mecklenburg County*, WSOCTV (Dec. 7, 2018, 3:15 PM), <https://www.wsoctv.com/news/local/sheriff-mcfadden-begins-tenure-by-ending-ices-287-g-program-in-mecklenburg-county/883744300>; Michael Perchick, *New Wake County Sheriff Vows to End Cooperation with Feds Over Deportation*, ABC 11 (Nov. 7, 2018), <https://abc11.com/politics/new-wake-county-sheriff-vows-to-end-cooperation-with-feds-over-deportation/4643615>.

8. *Sheriff Birkhead Ends Practice of Honoring Ice Detainers*, OFF. DURHAM COUNTY SHERIFF (Dec. 7, 2018), <https://www.dconc.gov/Home/Components/News/News/5940>.

9. Bridges, *supra* note 1; Candace Sweat, *16 Released from Jail After Wake Sheriff Ends Participation in Immigration Program*, WRAL NEWS (Dec. 18, 2018), <https://www.wral.com/16-released-from-jail-after-wake-sheriff-ends-participation-in-immigration-program/18073661>.

10. *See, e.g.*, Letter from Rita Bettis, Legal Dir., ACLU of Iowa, to Sheriff McCarthy, Polk Cty. Sheriff (Apr. 25, 2014), <https://www.aclu-ia.org/sites/default/files/iowa/wp-content/uploads/2014/05/Merged-ICE-Detainer-Letters-April-25-2014.pdf>.

11. *See infra* Part II.A.

jails refusing to accept an individual's bail because they are held on an ICE detainer. These cases may arise in North Carolina jurisdictions that have illegally detained individuals pursuant to an ICE detainer through cooperation with a 287(g) agreement.

In Part Two, I will begin by providing a brief overview of the Immigration and Nationality Act of 1965 ("INA"). I will then discuss the rise of immigration enforcement and the shift of enforcement from an administrative context to the criminal context. Next, I will cover the rise of 287(g) agreements and ICE detainees. Part Three will provide an analysis of two necessary elements in a lawsuit over the illegal detention of an individual after his or her bail has been refused. This section will examine cases in other jurisdictions that have addressed the issue. Part Four will conclude this comment by recapping the arguments analyzed in Part Three. This part will also note some jurisdictions that have not only refused to comply with ICE detainees but also have decided to terminate their 287(g) agreements altogether.

II. BACKGROUND OF THE INA AND THE RISE OF 287(G) AGREEMENTS

A. *The History of the INA*

Prior to the implementation of the Immigration and Nationality Act of 1952, immigration laws were not in one central location but rather in a variety of statutes.¹² In 1965, President Lyndon B. Johnson signed the new INA into law.¹³ Among other things, it repealed the national origin quotas implemented in the 1920s.¹⁴ It instead created a "preference system based on immigrants' family relationships with United States citizens or permanent residents."¹⁵ Today, for those seeking admission, there are five family-based categories and five employment-based

12. *Immigration & Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Feb. 19, 2019).

13. Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POL'Y INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states>.

14. *Id.* ("The quota for each country was set at [two] percent of the foreign-born population of that nationality as enumerated in the 1890 census. The formula was designed to favor Western and Northern European countries and drastically limit admission of immigrants from Asia, Africa, the Middle East, and Southern and Eastern Europe.").

15. *Id.*

categories.¹⁶ With newfound legislation to regulate immigration into the United States, the country then needed a way to identify those who were not legally present in the United States.

B. The Rise of Interior Immigration Enforcement

Prior to 2003, both interior immigration enforcement and border enforcement were controlled by the Immigration and Naturalization Service—a part of the Department of Justice.¹⁷ However, this changed after the terrorist attacks of September 11, 2001.¹⁸ Within a year, Congress passed the Homeland Security Act of 2002,¹⁹ creating the Department of Homeland Security (“DHS”).²⁰ The INA was now to be administered by DHS,²¹ which directed United States Citizenship and Immigration Services to “oversee lawful immigration into [this country].”²² DHS absorbed the departments that previously oversaw enforcement and services functions: the Immigration & Naturalization Service and the United States Customs Service.²³ DHS divided up the duties of these agencies and created three new agencies, one of which is ICE.²⁴ ICE was given authority in both the civil and criminal context to “better protect national security and strengthen public safety.”²⁵ This responsibility includes interior immigration enforcement.²⁶ Other responsibilities of ICE include preventing terrorism and the trafficking of people and goods.²⁷

16. *Id.*

17. *U.S. Immigration Since 1965*, HIST., <https://www.history.com/topics/immigration/us-immigration-since-1965> (last updated Aug. 21, 2018).

18. *Celebrating the History of ICE*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/features/history> (last updated Dec. 7, 2017).

19. *Id.*

20. *Id.*

21. *See id.*

22. *Citizenship & Immigration Services Overview*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.dhs.gov/topic/overview> (last updated Aug. 13, 2018).

23. *Celebrating the History of ICE*, *supra* note 18.

24. *Id.*

25. *Id.*

26. *What We Do*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/overview> (last updated Dec. 4, 2018).

27. *Id.*

C. Immigration Enforcement in the Criminal Context

Historically, immigration enforcement, including the removal or deportation of immigrants who were not authorized to be in the United States, was an administrative function with no punishment imposed.²⁸ In fact, being present in the United States illegally is not a crime.²⁹ Over time, immigration enforcement has increasingly been linked to the criminal justice system.³⁰ Despite multiple studies that show “immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime,” policymakers have continued to link higher immigration levels—be it legal or illegal immigration—with higher crime levels.³¹ The following graphs from the American Immigration Council show the negative correlation between immigrant population in America and crime rates:³²

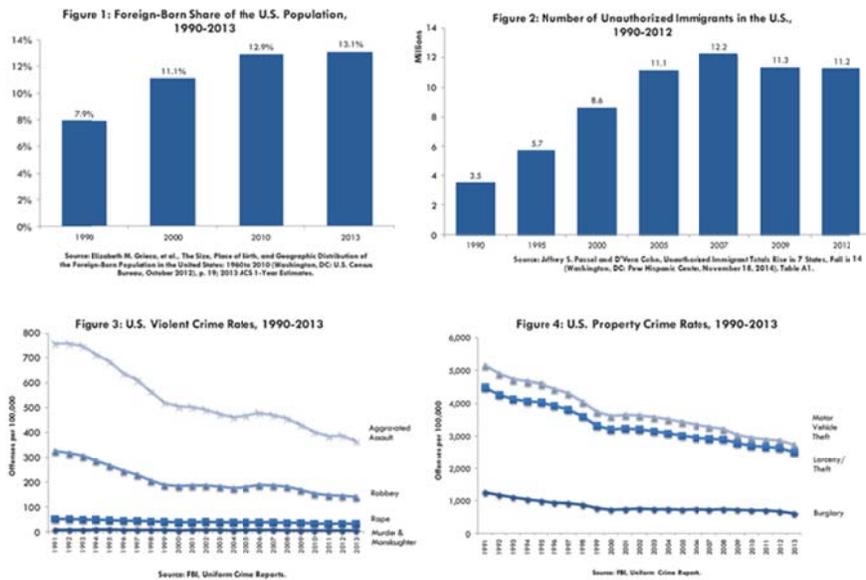
28. *Deportation*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/tools/glossary/deportation> (last visited Dec. 4, 2018).

29. ACLU IMMIGRANTS’ RIGHTS PROJECT, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 1 (Feb. 2010), https://www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf.

30. *See* AM. IMMIGR. COUNCIL, PROSECUTING MIGRANTS FOR COMING TO THE UNITED STATES 1 (May 1, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.

31. WALTER EWING ET AL., AM. IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 3 (2015), <https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states>.

32. *Id.* at 5.



Further, when immigration rates rise, violent crime rates are shown to decrease.³³ In fact, foreign-born men between the ages of eighteen and thirty-nine are five times less likely to be incarcerated than native-born men.³⁴ However, this inaccurate linkage of immigration and crime rates has morphed into policies and laws that incorporate the criminal justice system into immigration enforcement.³⁵ Local law enforcement agencies have been enlisted to assist ICE with its responsibilities regarding immigration enforcement.³⁶

D. The Creation of 287(g) Agreements

As part of interior immigration enforcement, ICE works with federal, state, and local jurisdictions to enforce immigration

33. ACLU IMMIGRANTS' RIGHTS PROJECT, *supra* note 29, at 4.

34. *Id.*

35. *Id.*

36. U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 2.; *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

laws.³⁷ The 287(g) agreements that were established in the IIRIRA were a big enhancement from joining these forces.³⁸ This section of the IIRIRA states in pertinent part:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to extent consistent with State and local law.³⁹

In plain language, this statute permits trained officers in local jurisdictions to question, detain, and make recommendations about detention of individuals who are in the United States illegally. Originally, 287(g) agreements were meant to target undocumented immigrants convicted of serious and violent crimes.⁴⁰ However, as the agreements began to be implemented, they were used to target immigrants based on their status alone.⁴¹

When the 287(g) agreements were first implemented, there were three different models.⁴² The first was the “task force” model, which allowed deputized officers to “question and arrest individuals they believed violated federal immigration laws”

37. See U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 2.; *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

38. See U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 2.; *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

39. 8 U.S.C. § 1357(g)(1) (2018).

40. DEBORAH M. WEISSMAN ET AL., *THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA* 8 (2009), <https://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>.

41. *Id.*

42. LAW ENF'T IMMIGR. TASK FORCE, *A PATH TO PUBLIC SAFETY: BACKGROUND ON 287(G) AGREEMENTS* 2 (2017), <https://leitf.org/wp-content/uploads/2017/09/Path-to-Public-Safety-Background-on-%C2%A7-287g-Agreements.pdf>. [hereinafter *A PATH TO PUBLIC SAFETY*]; *The 287(g) Program: An Overview*, *supra* note 36.

during their routine activities.⁴³ The second, known as the “jail enforcement” model, permitted deputized officers to interrogate arrested and detained individuals who they believed were non-citizens.⁴⁴ Finally, the “hybrid” model combined elements of both of these models.⁴⁵ During the Obama administration, both the task force and hybrid models were discontinued.⁴⁶

The terms of the 287(g) agreements vary, ranging from interviewing individuals to determine their immigration status to issuing immigration detainers to initiate removal proceedings.⁴⁷ One of the biggest areas of concern with the agreements are the detainers issued for suspected unauthorized citizens.⁴⁸ An immigration detainer is a formal request, which can be initiated by deputized officials, that allows local law enforcement to hold an individual who has been arrested until custody can be exchanged to ICE officials.⁴⁹ The detainers present various constitutional issues, such as Fourth Amendment and Fifth Amendment concerns.⁵⁰ Specifically, these issues come into play when United States citizens are detained for wrongfully being labeled as unauthorized immigrants.⁵¹

Although IIRIRA was enacted in 1996, the first 287(g) agreement was not signed until 2002 in Florida.⁵² The program has continuously grown over the years.⁵³ In 2009, amid criticism that the 287(g) agreements, *inter alia*, did not provide adequate

43. See A PATH TO PUBLIC SAFETY, *supra* note 42; *The 287(g) Program: An Overview*, *supra* note 36.

44. See A PATH TO PUBLIC SAFETY, *supra* note 42; *The 287(g) Program: An Overview*, *supra* note 36.

45. See A PATH TO PUBLIC SAFETY, *supra* note 42; *The 287(g) Program: An Overview*, *supra* note 36.

46. A PATH TO PUBLIC SAFETY, *supra* note 42, at 2.

47. Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 281 (2018).

48. *The 287(g) Program: An Overview*, *supra* note 36, at 4.

49. *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf.

50. See AM. IMMIGR. LAWYERS ASS'N & NAT'L IMMIGRANT JUSTICE CTR., IMMIGRATION AND CUSTOMS ENFORCEMENT'S DETAINER PROGRAM OPERATES UNLAWFULLY DESPITE NOMINAL CHANGES 3–5 (2017), <https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/201701/ICE%20detainer%20program%20unlawful%20policy%20brief%20NIJC%20%26%20AILA%202016%2001%2018.pdf>.

51. See *Immigration Detainers: An Overview*, *supra* note 49.

52. Muzaffar Chishti & Claire Bergeron, *Signs of Change in Immigration Enforcement Policies Emerging from DHS*, MIGRATION POL'Y INST. (Mar. 16, 2009), <https://www.migrationpolicy.org/article/signs-change-immigration-enforcement-policies-emerging-dhs>.

53. *Id.*

guidance and supervision to state and local law enforcement agencies,⁵⁴ ICE revised the 287(g) agreements by:

Implement[ing] comprehensive guidelines for ICE field offices that supervise 287(g) partnerships, prioritizing the arrest and detention of criminal aliens . . . Deploy[ing] additional supervisors to the field to ensure greater oversight over 287(g) operations . . . [and] [e]stablish[ing] an Internal Advisory Committee, which includes the DHS CRCL, to review and assess ICE field office recommendations about pending 287(g) applications.⁵⁵

Under the current administration, 287(g) agreements have expanded: In January 2017, President Trump issued an Executive Order calling for the expansion of 287(g) agreements.⁵⁶ Twenty-nine additional jurisdictions entered into a 287(g) agreement in 2017.⁵⁷ According to the ICE website, there are currently 287(g) agreements active with seventy-eight law enforcement agencies in twenty states.⁵⁸ In North Carolina, six jurisdictions have entered into 287(g) agreements with ICE.⁵⁹ The following map shows the number of signed 287(g) agreements as of the beginning of 2018.⁶⁰

54. *Id.*

55. *Updated Facts on ICE's 287(g) Program*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/factsheets/287g-reform> (last updated Jan. 10, 2018).

56. Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

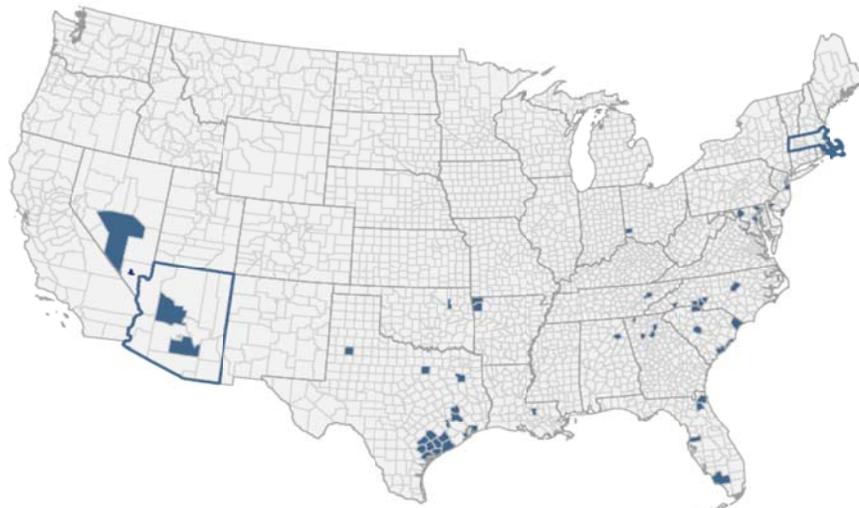
57. NICOLE PRCHAL SVAJLENKA, WHAT'S AT STAKE: IMMIGRANT IMPACTS IN 287(G) JURISDICTIONS, CTR. FOR AM. PROGRESS 1 (Mar. 2018), <https://cdn.americanprogress.org/content/uploads/2018/03/19143533/287gJurisdictions-report.pdf>.

58. U.S. IMMIGRATION & CUSTOMS ENF'T, *supra* note 2.

59. *Id.*

60. SVAJLENKA, *supra* note 57, at 9.

Jurisdictions with signed 287(g) agreements, as of January 1, 2018



Note: Jurisdictions with 287(g) agreements are blue. Arizona and Massachusetts, the two states with 287(g) agreements, are outlined in blue.
Source: U.S. Immigration and Customs Enforcement, "287(g) Results and Participating Entities," available at <https://www.ice.gov/287g> (last accessed January 2018).

Proponents of the 287(g) program state that it is a “useful force multiplier that helps catch dangerous criminals” and that it provides “seamless transfer of deportable individuals held in criminal detention to ICE [custody] for removal proceedings.”⁶¹ Advocates for this program also say it “deters crime and has led to the removal of repeat offenders from local communities.”⁶² Critics of the program note that most of the immigrants that are detained through the agreements are low level offenders—either arrested for low level misdemeanors or traffic infractions.⁶³ Additionally, some jurisdictions have found that the benefits of the program do not outweigh the costs of implementing it.⁶⁴ Critics also note concern with the undermining of trust between police departments and immigrant communities.⁶⁵

E. New Sheriffs and New Policies

As noted above, there have been issues with 287(g) agreements across the country since they were implemented.⁶⁶ This holds true for the implementation of these agreements in

61. A PATH TO PUBLIC SAFETY, *supra* note 42, at 3.

62. Chishti & Bergeron, *supra* note 52.

63. A PATH TO PUBLIC SAFETY, *supra* note 42, at 3.

64. *Id.* at 4.

65. *Id.*

66. *Immigration Detainers: An Overview*, *supra* note 49.

North Carolina. The campaigns for the newly elected sheriffs in Wake, Durham, and Mecklenburg counties were geared toward pledging to terminate 287(g) agreements in their jurisdictions or no longer complying with ICE detainers.⁶⁷ After assuming office, the newly elected sheriffs in Wake and Durham counties each sought to release individuals currently being held solely under an ICE detainer.⁶⁸ In Durham County, eleven individuals were released, while in Wake County sixteen individuals were released.⁶⁹ However, further investigation into these cases could uncover that, while in custody, some of these individuals attempted to post bail but were not allowed to because of the ICE detainer. In that case, a valid claim for a Fourth Amendment violation could be filed against the county.

F. Fourth Amendment Violations

Individuals illegally held under an ICE detainer by local law enforcement, such as a Sheriff's Office, may have a valid Fourth Amendment violation claim if the local law enforcement officials lacked probable cause to detain these individuals. Pursuant to the Fourth Amendment of the United States Constitution, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."⁷⁰ As will be discussed later in this comment, ICE detainers may be issued without probable cause to hold an individual, and complying with these requests leaves jurisdictions vulnerable to lawsuits.

III. NORTH CAROLINA JURISDICTIONS REFUSING TO ACCEPT BAIL TO COMPLY WITH ICE DETAINERS ARE SUBJECT TO VIOLATING INDIVIDUALS' FOURTH AMENDMENT RIGHTS

A. A Showing of Widespread, Consistent Conduct of

67. Cullen Browder, *Wake, Durham Sheriffs Move Away from Immigration Programs*, WRAL NEWS (Dec. 7, 2018), <https://www.wral.com/wake-durham-sheriffs-move-away-from-immigration-programs/18047645>; *Mecklenburg County Sheriff Announces End to Agreement With ICE*, WCNC (Dec. 5, 2018, 1:37 PM), <https://www.wcnc.com/article/news/local/mecklenburg-county-sheriff-announces-end-to-agreement-with-ice/275-621224969>.

68. See Browder, *supra* note 67; *Mecklenburg County Sheriff Announces End to Agreement With ICE*, *supra* note 67; see also Bridges, *supra* note 1; Sweat, *supra* note 9.

69. Bridges, *supra* note 1; Sweat, *supra* note 9.

70. U.S. CONST. amend. IV.

*Refusing to Accept Bail Can Be a Valid Argument in a
Fourth Amendment Claim*

Individuals denied the ability to post bail in North Carolina—due to being held pursuant to an ICE detainer—can file a claim alleging a violation of their Fourth Amendment rights if they present evidence that this is widespread conduct throughout the Sheriff’s Office. In 2010, the Florida Immigrant Coalition and Marcotulio Mendez filed a lawsuit against Palm Beach County.⁷¹ In the complaint, the Coalition alleged that Mr. Mendez was arrested for charges of fleeing and alluding, resisting arrest without violence, and driving without a license.⁷² On the same day as his arrest, Mendez had two people post bond for his release from jail.⁷³ The bond was not accepted, as they were told that an ICE detainer had been issued against Mendez.⁷⁴ Because Mendez remained in Palm Beach County custody, the “48-hour” “clock” on his ICE detainer did not begin.⁷⁵ In July, Mendez’s friend again attempted to pay his bond and was told there was no bail set.⁷⁶ Ultimately, Mendez remained in custody from May 14 to October 21, 2009.⁷⁷ He filed suit against the sheriff alleging Fourth and Fourteenth Amendment violations.⁷⁸ The challenged practices included the “Sheriff’s wrongful confinement of pre-trial detainees with ICE detainers for lengthy periods of time without allowing them to post bond already determined by the state court judge,” and the “Sheriff’s wrongful confinement of pre-trial detainees for far longer than the ICE detainer’s explicit 48-hour time limit for such detentions.”⁷⁹

The claims were ultimately dismissed on summary judgment, as the sheriff raised the defense of qualified immunity.⁸⁰ The district court issued an unpublished opinion reasoning that appropriate procedures were distributed to jail

71. Fla. Immigrant Coal. v. Palm Beach Cty. Sheriff, No. 09-81280-CIV, 2010 WL 2163401 (S.D. Fla. May 26, 2010).

72. *Id.* at *1.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at *2.

77. *Id.*

78. *Id.* at *1. Multiple community organizations that assist the immigrant population joined in the suit, as they had several clients that were similarly situated. *See id.* at *2–3.

79. *Id.* at *1.

80. Fla. Immigrant Coal. v. Palm Beach Cty. Sheriff, No. 09-81280-CIV, 2010 WL 4384220, at *11 (S.D. Fla. Oct. 28, 2010).

staff, and the staff “occasionally err[ed]” in fulfilling their duties, which led to the prolonged custody of Mendez and the other individuals.⁸¹ The court noted that there must be more than mere isolated occurrences to overcome the qualified immunity defense and a showing that the constitutional violation is widespread is needed to hold a supervisor liable.⁸²

A similar claim was brought in Oregon in 2015 by Maria Miranda-Olivares; however, in this instance, the plaintiff was granted summary judgment.⁸³ On March 12, 2012, after Miranda-Olivares was arrested for violation of a domestic violence restraining order, the Clackamas County Sheriff’s Office informed ICE that she was in the jail.⁸⁴ The next morning the jail received an immigrant detainer requesting that she be detained for forty-eight hours to allow ICE time to take custody of her, pursuant to the 287(g) agreement between ICE and the Sheriff’s Department.⁸⁵ After being arraigned on March 14, 2012, Miranda-Olivares was given a \$500 bond.⁸⁶ Between March 16 and 30, 2012, her sister attempted to pay the bond; however, she was told multiple times by the jail staff—even a sheriff’s deputy—that Miranda-Olivares would not be released, even if the bail was posted, due to the ICE detainer.⁸⁷ Based on the statements made by the jail staff, her family did not post the bail.⁸⁸ Consequently, she remained in custody until she pled guilty to one of the charges on March 29, 2012, and received credit for time served.⁸⁹ At that time, the forty-eight hour clock for the ICE detainer would have expired.⁹⁰ Instead of being released, the Sheriff’s Office maintained custody of Ms. Miranda-Olivares for an additional nineteen hours, after which she was released to the custody of the Department of Homeland Security agents.⁹¹

81. *Id.* at *10.

82. *Id.* at *9.

83. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *1 (D. Or. Apr. 11, 2014).

84. *Id.* (stating that it is county policy “of notifying ICE when a foreign-born person is brought to the Jail on a warrant or probable cause charge.”).

85. *Id.*

86. *Id.* at *2.

87. *Id.*

88. *Id.*

89. *Id.* at *3.

90. *Id.*

91. *Id.*

Miranda-Olivares filed suit against Clackamas County alleging a violation of, *inter alia*, her Fourth Amendment rights.⁹² The complaint alleged Fourth Amendment violations when the County refused to “release her during the two weeks that she could have posted bail and by continuing to incarcerate her for nineteen hours after her release from the state charges.”⁹³ In this case, the court granted summary judgment in favor of the detainee.⁹⁴ The difference between her case and Mendez’s was the sheriff’s departments’ interpretations of their 287(g) agreements and compliance with ICE detainers.⁹⁵ The Clackamas County Sheriff’s Department interpreted compliance with ICE detainers pursuant to their 287(g) agreement as mandatory.⁹⁶ The court held that the County misinterpreted the nature of ICE detainers by reasoning that they are mandatory.⁹⁷ The court noted that the 287(g) provision of the INA does not “mandate detention” by local law enforcement but merely requests compliance with ICE detainers.⁹⁸ Thus, Clackamas County’s “custom and practice” to hold her beyond the date she was eligible to be released, based solely on an ICE detainer, violated Miranda-Olivares’ Fourth Amendment rights.⁹⁹

Applying this court’s reasoning in North Carolina, it is possible that valid claims could be brought in Wake and Durham counties if the individuals who were recently released after being held based on ICE detainers were restricted from posting bail and it is shown that this practice is widespread throughout the sheriff’s departments. This scenario can be compared to the unlawful practices of the Alamance County Sheriff’s Office (“ACSO”), operating under its 287(g) agreement, that were uncovered by the Department of Justice in 2012.¹⁰⁰ The Justice Department investigation found that ACSO engaged in a “pattern or practice” of discriminatory law enforcement activities after they entered into a 287(g) agreement with the DHS.¹⁰¹ One of these practices could

92. *Id.* at *1.

93. *Id.* at *9.

94. *See id.* at *4–8.

95. *Id.* at *4.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *5, 8.

100. *Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff’s Office*, U.S. DEP’T JUST. (Sept. 18, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-alamance-county-nc-sheriff-s-office>.

101. Complaint ¶ 5, U.S. v. Johnson, No. 1:12-cv-01349 (M.D.N.C. Dec. 20, 2012).

be cause for a Fourth Amendment violation. The Justice Department asserted that ACSO officers automatically referred Latino arrestees to ICE investigators at the Alamance County Jail.¹⁰² After entering into its MOA with ICE, an ACSO officer would escort inmates to a 287(g) officer or ICE officer to verify their immigration status if they were suspected to be a non-citizen.¹⁰³ This would occur even if the inmate had posted bond.¹⁰⁴

If these individuals were not allowed to leave until they spoke with the 287(g) officer or ICE official, a Fourth Amendment claim could be valid as they would still be considered in custody even after posting bond. Further, once these individuals posted bail but were found to be non-citizens, compliance with an ICE detainer would have been unconstitutional as the individuals would no longer have been in custody. A look at the procedures used in Wake and Durham counties could show that some of these individuals were being held only pursuant to an ICE detainer despite being able and willing to post bail. If this was the pattern or practice in those jurisdictions, it could amount to a Fourth Amendment claim for relief.

B. Evidence of Continued Detention Without Probable Cause Can Be Used to Prove a Fourth Amendment Violation when Bail is Not Accepted by the Jail

If an individual in Wake or Durham County was not permitted to post bail but continued to be held solely based on an ICE detainer without probable cause for the continued detention, that could give rise to a Fourth Amendment violation. An issuance of an ICE detainer does not directly amount to ICE having probable cause.¹⁰⁵ Some detainers are issued for investigative purposes to look into the individuals citizenship status, while others are issued to initiate removal proceedings.¹⁰⁶ In *Miranda-Olivares*, the court determined that her continued detention was not based on the initial arrest but on the new seizures that

102. *Id.* ¶ 47–48

103. *Id.* ¶ 49.

104. *Id.*

105. *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017) (“[C]ivil detainer requests are often not supported by an individualized determination of probable cause that a crime has been committed.”).

106. LENA GRABER & AMY SCHNITZER, THE BAIL REFORM ACT AND RELEASE FROM CRIMINAL AND IMMIGRATION CUSTODY FOR FEDERAL CRIMINAL DEFENDANTS, NAT’L IMMIGR. PROJECT 5 n.25, 11–12 (June 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_Jun_federal-bail.pdf.

occurred after her initial arrest.¹⁰⁷ In its reasoning the court relied on *Vanke v. Block*, where a Los Angeles County jail extended a detainee's confinement after the court had ordered his release.¹⁰⁸ In that case, the court separated the reasons for continued confinement into two categories: administrative delays and investigative delays.¹⁰⁹ The court further concluded that investigative delays constituted a seizure and were governed by the Fourth Amendment.¹¹⁰

Likewise, in *Miranda-Olivares*, the judge set bail during the pre-trial release arraignment.¹¹¹ Clackamas County conceded that Miranda-Olivares would have posted bail and been released from custody; however, due to the County's policy of complying with ICE detainers, she remained in custody.¹¹² Further, once her charges were adjudicated, she remained in custody for an additional nineteen hours based on the ICE detainer, which amounted to an additional seizure.¹¹³ The court categorized all of these seizures as investigative delays subject to Fourth Amendment protections because the ICE detainer specifically stated that DHS had "initiated an investigation to determine whether [Miranda-Olivares] is subject to removal from the United States."¹¹⁴ As such, the court surmised that these seizures had no legal authority as the ICE detainers provided no probable cause to justify a continued detention.¹¹⁵ Thus, the court found that this was clearly a violation of Miranda-Olivares' Fourth Amendment rights and granted her summary judgment.¹¹⁶

A recent case in Mecklenburg County, North Carolina, illustrated the proper way in which bonds were accepted by the jail while an ICE detainer was in place.¹¹⁷ In *Chavez v. Carmichael*, Luiz Lopez and Carlos Chavez were arrested in Mecklenburg and ICE

107. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014).

108. *Vanke v. Block*, No. CV 98-4222 DDP 1998 U.S. Dist. LEXIS 23488, at *32 (C.D. Cal. Nov. 5, 1998).

109. *Id.* at *3.

110. *Id.* at *50-51.

111. *Miranda-Olivares*, 2014 WL 1414305, at *10.

112. *Id.*

113. *Id.* at *9.

114. *Id.* at *1, *9.

115. *Id.* at *10.

116. *Id.* at *11.

117. *See Chavez v. Carmichael*, No. COA18-317, 2018 N.C. App. LEXIS 1095, at *3-4 (N.C. Ct. App. Nov. 6, 2018).

detainers were subsequently issued.¹¹⁸ For Lopez, bail was set at \$400 secured bond; for Chavez, bail was set at \$100 cash bond.¹¹⁹ After being incarcerated for four and two months respectively, the \$400 secured bond was made unsecured and Lopez was released from jail on the criminal charges, while Chavez posted bail on his charges.¹²⁰ However, the Sheriff continued to hold both individuals in custody pursuant to the ICE detainers.¹²¹

Examining the cases in Wake and Durham counties may show that this proper practice is not being used. If that is the case, and individuals were held pursuant to investigative ICE detainers and their bail was refused by the jail, Fourth Amendment claims could be warranted.

IV. CONCLUSION

Across the country, sheriff's departments are refusing to accept bail payments for individuals who are being held pursuant to an ICE detainer.¹²² This practice can lead to constitutional violations. If bail is refused due to an ICE detainer being in place and it is shown to be a widespread pattern or practice within the office, a county can be held liable.¹²³ Further, if the ICE detainer is investigative in nature and bail is not permitted to be posted, Fourth Amendment violations can be implicated.¹²⁴ Complying with ICE detainers is not mandatory and local jurisdictions, specifically in North Carolina, open themselves up to lawsuits when constitutional rights are violated.¹²⁵ With the recent release of the individuals held pursuant to ICE detainers in Wake and Durham counties, further investigation could reveal that these issues were present in these jurisdictions and could warrant litigation. However, more information is needed to determine if a violation exists and to what extent it occurred.

Local jurisdictions across the country have begun to see the issues with entering into a 287(g) agreement and complying with

118. *Id.* An administrative immigration warrant was also issued for Mr. Chavez under the name Carlos Perez-Mendez. *Id.* at *4.

119. *Id.* at *4.

120. *Id.* at *5.

121. *Id.*

122. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 2.

123. *See* Brown v. Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991).

124. *See, e.g.*, Vanke v. Block, No. CV 98-4222 DDP 1998 U.S. Dist. LEXIS 23488, at *53 (C.D. Cal. Nov. 5, 1998).

125. *See, e.g.*, Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *6 (D. Or. Apr. 11, 2014).

ICE detainees.¹²⁶ In North Carolina, newly elected sheriffs in both Wake County and Mecklenburg County terminated their agreements with ICE in December 2018.¹²⁷ In other states such as Colorado, Oregon, Pennsylvania, and California, sheriff's offices have refused to comply with ICE detainees.¹²⁸ Hopefully, this shift in local law enforcement agencies refusing to assist ICE with immigration enforcement will continue and the Fourth Amendment rights of these individuals will be preserved.

126. Letter from Mark Silverstein, Legal Dir., ACLU of Colo. & Rebecca Wallace, Staff Attorney, ACLU of Colo., to Colo. Sheriffs Complying with Immigration Detainers (Apr. 29, 2014), <http://static.aclu-co.org/wp-content/uploads/2014/05/ACLU-Letter-to-Colorado-Sheriffs.pdf>.

127. Daniel Nichanian, *North Carolina's Two Largest Counties Quit ICE Program. Will a Third Follow?*, THE APPEAL: POL. REP. (Dec. 13, 2018), <https://www.appealpolitics.org/2018/north-carolina-287g/>.

128. See Letter from Mark Silverstein & Rebecca Wallace, *supra* note 126.