STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00579

RAFAEL PEPEN

v.

DAVID DIONNE, SUPERINTENDENT OF THE HILLSBOROUGH COUNTY DEPARTMENT OF CORRECTIONS

PETITIONER'S PRE-EVIDENTIARY HEARING BRIEF

NOW COMES the Petitioner, Rafael Pepen, and respectfully submits this Brief in advance of the February 3, 2020 evidentiary hearing in this case. This hearing is specifically limited to the question of whether this case is moot.

INTRODUCTION

This case is about whether New Hampshire law provides authority for the Hillsborough County Department of Corrections ("the Department") to detain, arrest, and hold immigrants based on a federal civil immigration detainer and/or I-200 form beyond the time that they would otherwise be entitled to be released from custody. The text of the detainers themselves ask local jails like the Department to "[m]aintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, *beyond the time when the subject would have otherwise been released from your custody* to allow DHS to take custody of the subject." (latter emphasis added).[1] Thus, ICE's detainers themselves ask local jails like the Department to prolong the detention of immigrants—a request that, if complied with, violates New Hampshire law for the reasons explained in the Petitioner's January 28, 2020 response to the United States's Statement of Interest. To be clear, this case does *not* challenge the Department's acknowledged

[1] *See* I-247, https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

practice of notifying ICE when the subject of the detainer is about to be released from custody. But, as will be addressed at the February 3, 2020 evidentiary hearing, Petitioner contends that the Department's cooperation with ICE goes far beyond mere notification. As discussed in more detail below, Petitioner alleges that this cooperation includes prolonged detention for which there is no New Hampshire authority.[2]

I. The Question of Mootness

The Department appears to maintain that this case is moot because Mr. Pepen (i) is no longer in the Department's custody and (ii) was never held under the detainer. As to any contention that this case is moot because Mr. Pepen is no longer in the Department's custody, this Court should, as explained in Petitioner's July 16, 2019 Objection to the Department's Motion to Dismiss, reach the legal merits of this case. This is because this case satisfies both the "capable of repetition yet evading review" and "pressing public interest" exceptions to mootness.

This is the classic case that satisfies these mootness exceptions where one is challenging a brief period of detention. Indeed, mootness principles are more permissive under the New Hampshire Constitution, than under the federal Constitution. *See State v. Gagne*, 129 N.H. 93, 96 (1986) ("Further, the Gagne case raises an issue which is 'capable of repetition, yet evading review.' Although a decision by this court will not affect the proceedings pending against Gagne, future defendants in a similar situation could be subjected to like constitutional deprivations. The issue is therefore not moot."); *Gentry v. Warden, N. N.H. Correctional Facility*, 163 N.H. 280, 281 n.1 (2012) ("Despite [petitioner's completion of maximum sentence], we do not regard the case as moot, because, given the short ninety-day recommitment mandated by the statute, the petitioner's

[2] The Department complains that Petitioner's counsel did not advise the Court of his removal. No notice was required. People residing outside the United States can, of course, still be parties in litigation in the United States, and the Department had cited no rule to the contrary.

position that his is entitled to have the period of pre-hearing incarceration deducted from the sentence is clearly capable of repetition yet evading review."); *Sullivan v. Town of Hampton Bd. of Selectmen*, 153 N.H. 690, 692 (2006) ("[a] decision upon the merits may be justified where there is a pressing public interest involved, or future litigation may be avoided"); *see also Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 695 (2007) (finding sufficient interest in challenge to revocation of concealed carry permit to justify an exception to mootness). Just over one month ago, the New Hampshire Supreme affirmed these exceptions to mootness in addressing an important question of how to interpret New Hampshire new bail statute. *See State v. Hill*, No. 2018-0637, 2019 N.H. LEXIS 248, at *1 (Dec. 13, 2019) (in appeal by defendant of order releasing her before trial on the condition that she pay $10,000 cash bail, concluding that the case was not moot even though the defendant had pled guilty and resolved the case because the case "presents legal issues that are of pressing public interest and are capable of repetition yet evading review"). Moreover, courts in other states have agreed that the importance of this identical immigration issue under their respective state laws presents a reason to address this issue. *See, e.g., People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 526 (N.Y.A.D. 2d 2018) (declining to dismiss a challenge to state officials' practice of holding people on immigration detainers on mootness grounds noting "The issues presented are both novel and significant."); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1148 (Mass 2017) (noting the petition raised "important" issues).

Petitioner anticipates that the focus of the February 3, 2020 evidentiary hearing will be on whether the Department actually held Mr. Pepen pursuant to a detainer and/or I-200 form beyond the time that he would otherwise have been entitled to be released. As Superintendent David Dionne succinctly testified at deposition: "We don't hold anybody for ICE." Dionne Tr. 22:3 ("We don't hold anybody for ICE"), 30:16-18 ("Q. Since January 1, 2017, has the department ever

held anyone for ICE? A. No."). This fundamental and threshold question of whether the Department actually detained Mr. Pepen and others on the basis of a federal civil immigration detainer/I-200 beyond the time that they would otherwise be entitled to be released from custody is hotly disputed by the parties (though there is no dispute that the Department held Mr. Pepen after his criminal case was dismissed and released him directly into ICE's custody). As explained below, the facts demonstrate that the Department detained Mr. Pepen and others under federal civil immigration detainers and/or I-200 forms.

II. The Facts Will Demonstrate That This Case is not Moot.

A. Mr. Pepen Was Held for ICE

The record will demonstrate that—as in *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017)—the Department held Mr. Pepen for ICE beyond the time that he was eligible for release after his case was nolle prossed on the morning of July 5, 2019. That day, the Department prolonged Mr. Pepen's detention for at least approximately 35 minutes (from 12:40 p.m. to 1:16 p.m. when ICE took him into custody).

To be clear—contrary to the Department's assertion that Mr. Pepen was held pursuant to the standard release process where an inmate is further detained, in part, to determine if holds exist—the Department did *not* hold Mr. Pepen and prolong his detention to determine if he had any holds. This is because the Department *immediately* knew about the immigration detainer, even before Mr. Pepen's arrival at the facility on approximately 12:40 p.m. The booking officer—Officer John Leduc who was deposed in this case—even told either the courthouse staff or the sheriff by telephone that Mr. Pepen was *not* "cleared to go," at least in part, because he had an ICE detainer. As Officer Leduc testified: "[P]rior to him returning to the facility I was called by somebody from the courthouse and they discussed whether or not he [Mr. Pepen] was cleared to

go. *So we talked about, you know, the docket numbers and all that stuff from the court and then when—when they said, He's clear to go, I said, Well, he has an ICE detainer*. I said, He also went in county orange, so he's gonna have to come back any." Leduc. TR. 36:9-16 (emphasis added). Moreover, Officer Leduc called ICE immediately upon Mr. Pepen's arrival to the Jail at approximately 12:40 p.m. *See* Leduc Tr. 36:4-7 ("Q. Okay. And so it looks like you called immigration within about two minutes of him arriving; is that right? A. Yeah, I'd say it's accurate."). Mr. Pepen was not cleared to go at least in part because he was the subject of an ICE detainer. This direct testimony from the Department should end the matter.

This habeas corpus action was filed on approximately 12:15 p.m., before this case purportedly became moot at 1:16 p.m. when ICE arrived and took Mr. Pepen into custody.

B. Mr. Pepen's Detention for ICE is Consistent with How the Department Has Treated Other Immigrants.

The Department's prolonged detention of Mr. Pepen was consistent with the Department's practice of holding individuals subject to immigration detainers for ICE. In discovery, this practice has been demonstrated in multiple ways.

First, between approximately January 2017 and August 2019, the Department has held 53 individuals—including Mr. Pepen—who were the subject of immigration detainers issued by ICE. *All* 53 were ultimately released by the Department directly into ICE custody. The Department released *none* to the street before ICE arrived. *See* Pinciaro I Tr. 13:19-21 ("Q. Of those 53 inmates were any of them released to the street? A. Not to my knowledge, no."), 14:8-12 (same); Dionne Tr. 26:2-10 ("Q. In the time that—since January 1 of 2017 to present, are you aware of any inmates subject to an ICE hold who were released … to the street? A. None that I'm aware."); Leduc Tr. 17:23-18:5 ("Do you ever remember having an inmate with an ICE detainer who was released and not taken immediately into custody by ICE? A. No."), 32:17-19. As in Mr. Pepen's case, ICE (or

sometimes the Strafford County Department of Corrections which contracts with ICE) picked up each individual in a secure location that is made available to law enforcement and not generally open to the general public (aside from tours)—a location different from the location where inmates are released to the streets. *See* Dionne Tr. 27:7-10 ("Inmates who are released to ICE use different exits from the facility than inmates who are released to the street? A. That is correct."); Leduc Tr. 43:1-14 ("Q. And is that the door that people are—when they're released from jail that they go out of? A. No, it's not."). The presence of ICE was not coincidental. As part of the release process, the Department calls ICE "right away" to notify ICE prior to release because it treats an immigration detainer as a "hold" and this is how they handle all "holds." *See* Dionne Tr. 15:3-8 ("A. The policy is anybody who has a hold on them, you call them and notify them if they're going to be released. Q. Okay. Including ICE? A. ICE, and every other place that has a hold on them."); Leduc Tr. 17:5-11 ("Q. Okay. When you look for everything, does that include detainers from ICE? A. Correct. Q. And what happens if in your review of the file you see an ICE detainer? A. We will call immigration and let them know that this inmate is going to be released."), 27:21-28:14 (noting policy to call ICE "right away, and then we start the release process"). To be sure, the Department has testified that it would release an immigrant who was subject to a detainer if ICE had not arrived, that it does not wait to release a person until ICE arrives, and that the presence of ICE does not impact the timing of an immigrant's release. But the Department's own actions disprove these contentions. The Department has, since January 2017, *never* released an immigrant subject to an ICE detainer into the street before ICE arrived. Instead, the facts show that it has engaged in a coordinated effort to hold immigrants and only release them after ICE arrives.

Second—and dispositively—the Department has testified that it treats immigration detainers no different from any other detainer, hold, or warrant. Dionne Tr. 32:11-13 ("Q: Are

immigration detainers treated like all other detainers. A: Yes."). Thus, like how the Department handles a hold from another law enforcement agency, the Department holds an individual subject to an immigration detainer until ICE arrives. The Department further testified that its electronic system designed to track inmates frequently indicates "no bond-bail" when an immigrant is subject to an ICE detainer, even where the inmate is eligible for bail. Pinciaro I Tr. 17:2-4 ("Q. Okay. So it's a notification that could just mean ICE detainer? A. Yeah."). In short, the Department, in deference to ICE and its status as a law enforcement agency, treats an immigration detainer like a request from any other law enforcement agency. In its detainer, ICE asks the Department to prolong an inmate's detention up to 48 hours "beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject." The Department is more than willing to comply with this request.

Third, while the Department steadfastly claims in the face of conflicting evidence that it "doesn't hold anybody for ICE," the Department has never issued a written policy to this effect to corrections officers, including after this lawsuit was filed in July 2019. The Department has also *never* communicated to staff that release inmates this purported "don't hold immigrants for ICE" policy that Superintendent Dionne proffered at deposition. Nor has the Department provided training to its corrections officers on federal civil immigration detainers and how they may be different from other criminal holds. *See* Dionne Tr. 32:5-10 ("Q. Has there ever been any in-service training on immigration detainers? A. Training, not that I'm aware of, no."), 35:22-36:9 ("Q. [ ] Are [booking officers] trained specifically on ICE detainers? A. No."); Pinciaro I Tr. 12:17-19 ("Q. And have you taken any training or education on immigration detainers? A. No."); Leduc 28:15-18 ("Q. Okay. Have you ever received any formal training on ICE detainers? A. No."). Surely, if the Department truly had a "we don't hold people for ICE" policy, the Department

would have communicated that policy to corrections officers, including through training. But no policy exists. As a result, a contrary practice has emerged where corrections officers prolong the detention of immigrants for ICE because they view a detainer no different from an arrest warrant from another jurisdiction. The end result has been that 53 individuals, including Mr. Pepen, have been held for ICE over a nearly three-year period.

Petitioner also expects that the evidence will demonstrate that at least three other residents of the Hillsborough County House of Corrections were detained at least one day beyond when they should have been released—and in one case, in excess of 40 days—before they were ultimately turned over to ICE. For example, Reynaldo Emilio Mejia was released to ICE on November 13, 2017 when on November 9, 2017, he was sentenced to all-suspended time. *See* Pinciaro II Tr. 5-7 ("Q: And if you turn to the second sheet, it says release date 11/13/17, 11:04; is that right? A: Yes. . . .Q: And on this charge, the defendant was sentenced to 12 months House of Corrections, all suspended; is that right? A: Yes. Q: And the date of that order is 11/9/2017? A: Yes."). Another inmate, Kongchay Sarivong, was released to ICE on September 29, 2017 after being sentenced to suspended jail time on August 11, 2017. *Id.*, p. 28 ("Q: So this person was sentenced to suspended time August 11, 2017? A: Yes. Q: But was not released for over a month and a half later? A: Yes."). A third resident, Leonardo Marcelino Da Silva, was released to ICE on June 11, 2019 but had been given personal recognizance bond the day before. *See id.* p. 14 ("Q: So that was my next question, but my first question is they were released on June 11, 2019? A: Correct. Q: One day after they posted bond? A: Correct").

CONCLUSION

For the foregoing reasons, and as will be demonstrated at the February 3, 2020 evidentiary hearing in this case, this case is not moot.

Respectfully submitted,

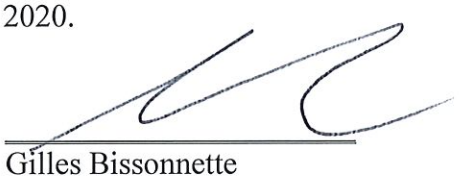
RAFAEL PEPEN,

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry Klementowicz (N.H. Bar No. 21177)
SangYeob Kim (N.H. Bar No. 266657)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org
sangyeob@aclu-nh.org

February 3, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on counsel for the Respondent on this date, February 3, 2020.



Gilles Bissonnette