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**PREVIEW; *Ramon v. Short*: Local Authority in the Context of
Federal Immigration Detention Requests**

Joseph D. Weaver*

The Montana Supreme Court is scheduled to hear oral arguments in this matter on Wednesday, January 8, 2019, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Alex Rate will likely appear on behalf of the Appellant. Maureen H. Lennon will likely appear on behalf of the Appellee.

I. INTRODUCTION

This case presents two significant issues. The preliminary issue is whether the mootness doctrine prevents review of the district court's refusal to enjoin the Lincoln County Sheriff from detaining an inmate pursuant to a federal immigration detainer request.¹ If the claim is not moot, or if an exception to the mootness doctrine applies, the core issue is whether Montana law authorizes the Sheriff to detain a person pursuant to a federal immigration detainer request.²

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 3, 2018, Agustin Ramon was arrested on a burglary charge and held in the Lincoln County Jail with a \$25,000 bond.³ That same day, United States Customs and Border Protection ("CBP") issued an immigration detainer request for Ramon, requesting the jail detain Ramon for up to 48 hours after he was entitled to release on the burglary charge.⁴ The detainer request stated that a border patrol agent had probable cause to believe Ramon was unlawfully present in the United States in violation of civil immigration law.⁵

On August 17, 2018, a bondsman notified Lincoln County Jail that he intended to post bond for Ramon.⁶ Jail officials notified the bondsman that he was free to post bond, but Ramon would remain detained pursuant

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¹ Appellant's Opening Brief at 2, *Ramon v. Short* (Mont. July 12, 2019) (No. DA 18-0661); Defendant and Appellee's Amended Answer Brief at 3, *Ramon v. Short* (Mont. Sept. 9, 2019) (No. DA 18-0661).

² Appellant's Opening Brief, *supra* note 1, at 2; Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 7.

³ Appellant's Opening Brief, *supra* note 1, at 2.

⁴ *Id.* at 3.

⁵ Brief of Amicus Curiae The United States in Support of Appellee Darren Short at 6, *Ramon v. Short* (Mont. Sept. 3, 2019) (No. DA 18-0661).

⁶ Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 1.

to the detainer request even if the bond were paid.⁷ The bondsman did not post bond for Ramon, and no other individual attempted to post bond.⁸

On October 30, 2018, Ramon filed a complaint in state district court alleging that his continued detention violated Montana law.⁹ Ramon applied for a temporary restraining order and preliminary injunction concurrently with his complaint.¹⁰ The district court denied his application and held that Ramon was legally detained under Montana Code Annotated § 7-32-2203(3).¹¹ Ramon remained in state custody until sentencing on February 11, 2019, at which point he was released and transferred to the custody of the Department of Homeland Security (“DHS”).¹²

Ramon timely appealed the district court’s decision.¹³ The Sheriff moved to dismiss the appeal as moot on the grounds that Ramon is no longer in the state’s custody, and, therefore, injunctive relief is impossible.¹⁴ The Montana Supreme Court denied the Sheriff’s motion to dismiss. The Court then directed the parties to submit briefs on whether an exception to the mootness doctrine applies and whether Montana law authorizes state law enforcement to extend a person’s detention pursuant to a federal detainer request.¹⁵

III. SUMMARY OF ARGUMENTS

Ramon argues the Court should hear the merits of the case because two exceptions to the mootness doctrine apply.¹⁶ First, Ramon asserts the “public interest exception” applies because the extent of Montana officers’ authority to make civil immigration arrests presents a question of exceptional public importance, and resolution of the issue is necessary to guide law enforcement in the performance of their duties.¹⁷ Second, Ramon argues the issue is not moot because it is “capable of repetition yet evading review.”¹⁸ On the merits, Ramon argues that holding a person pursuant to an immigration detainer constitutes a new arrest, and the Sheriff lacks authority to make civil immigration arrests.¹⁹

⁷ *Id.*

⁸ *Id.*

⁹ Appellant’s Opening Brief, *supra* note 1, at 4.

¹⁰ *Id.*

¹¹ *Id.*; MONT. CODE ANN. § 7–32–2203(3) (2019) (“Who may be confined in a detention center. Detention centers are used as follows: . . . for the confinement of persons committed for contempt or upon civil process or by other authority of law . . .”).

¹² Brief of Amicus Curiae The United States, *supra* note 5, at 6.

¹³ Appellant’s Opening Brief, *supra* note 1, at 5.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Appellant’s Opening Brief, *supra* note 1, at 6, 9 (citing *Gateway Opencut Mining Action Group v. Board of Cty Comm’rs*, 260 P.3d 133, 137 (Mont. 2011)).

¹⁸ *Id.* at 6 (citing *Gateway Opencut*, 260 P.3d at 137).

¹⁹ *Id.* at 7–8.

In response, the Sheriff argues that Ramon’s appeal is moot because Ramon is no longer detained in the jail, and therefore Ramon is unable to obtain injunctive relief.²⁰ The Sheriff also asserts that no exception to the mootness doctrine applies.²¹ If the Court reaches the merits of the claim, the Sheriff argues that Montana law authorizes civil detention pursuant to immigration detainer requests.²²

A. *Appellant Ramon’s Argument*

Ramon argues the Court should apply an exception to the mootness doctrine and reach the merits of his claim because Montana law enforcement needs guidance on whether it has the authority to make civil immigration arrests.²³ The extent of a sheriff’s power to deprive Montana residents of liberty is a question of utmost importance.²⁴ Without a ruling on the merits, sheriffs will continue to detain individuals pursuant to CPB detainer requests, undermining fundamental liberty interests.²⁵ Ramon argues this issue is certain to recur, as Montana counties received 135 CBP detainer requests from 2017 through 2018.²⁶ Furthermore, the issue will continue to evade review because the requested 48-hour detention period is “too short in duration” for an inmate to challenge the detention’s legality, especially on appeal, before the inmate is released from state custody and transferred to DHS.²⁷

On the merits, Ramon’s argument is twofold. First, he contends the Sheriff effectuated a new arrest by keeping Ramon in jail for a new purpose after he was otherwise entitled to release.²⁸ When jail officials told the bondsman they would not release Ramon even if his bond were posted, a “reasonable person would not have felt free to walk away under the circumstances.”²⁹ Furthermore, immigration detention constitutes arrest because it results in “actual restraint of the person to be arrested.”³⁰ Because it constitutes an arrest, the Sheriff needs authority under Montana law to effectuate the arrest.³¹ Second, Ramon argues the Sheriff does not have authority to effectuate an arrest pursuant to CBP detainers, and

²⁰ Defendant and Appellee’s Amended Answer Brief, *supra* note 1, at 2.

²¹ *Id.* at 2.

²² *Id.* at 7.

²³ Appellant’s Opening Brief, *supra* note 1, at 9.

²⁴ *Id.* at 9.

²⁵ *Id.* at 10, 13.

²⁶ *Id.* at 11 (citing Trans. Records Access Clearinghouse, Syr. Univ., *Latest Data: ICE Detainers* (Dec. 2018), <https://trac.syr.edu/phptools/immigration/detain/>).

²⁷ *Id.* at 11, 12, 13–14 (citing Gateway Opencut Mining Action Group v. Board Of Cty Comm’rs, 260 P.3d 133, 137 (Mont. 2011)).

²⁸ Appellant’s Opening Brief, *supra* note 1, at 14.

²⁹ *Id.* at 15 (citing *State v. Ellington*, 143 P.3d 119, 122 (Mont. 2006)).

³⁰ *Id.* at 15; MONT. CODE ANN. § 46-6-104 (2019).

³¹ Appellant’s Opening Brief, *supra* note 1, at 17–18 (citing *Miller v. United States*, 357 U.S. 301, 305 (1958)).

therefore, such a detention is unlawful.³² In particular, he argues the district court erroneously relied on § 7-32-2203(3) in justifying the Sheriff's arrest because the statute does not confer arrest authority. Rather, it describes who may be confined in jail *after* a valid arrest or sentence.³³

B. Appellee Sheriff Short's Argument

The Sheriff's principal argument is that Ramon's appeal is moot.³⁴ The Court is unable to grant injunctive relief from the Sheriff's detention because Ramon is no longer in the Sheriff's custody.³⁵ Therefore, the appeal is moot because it no longer presents a justiciable controversy.³⁶ The Sheriff argues the public interest exception does not apply because the claim does not involve a question of exceptional public importance.³⁷ Further, he contends the "capable of repetition yet evading review" exception requires that the *same complaining party* will be subject to the same practice again.³⁸ Since Ramon has already been released from the Sheriff's custody and transferred to DHS, it is unlikely Ramon will be subject to another immigration detainer, and therefore the exception does not apply.³⁹

If the claim is not moot, the Sheriff maintains that Ramon's detention was lawful because he did not effectuate a new arrest.⁴⁰ Specifically, he contends Ramon was never detained pursuant to the detainer request because he was never "otherwise free to leave" the state's custody.⁴¹ Rather, Ramon remained incarcerated pursuant to the state's burglary charges until sentencing, and then he was immediately released to DHS custody.⁴² Ramon never posted bond and the state's charges had not yet been resolved.⁴³ However, even if a new arrest occurred, the Sheriff argues that Montana law authorizes detention pursuant to immigration detainers because local jails may confine persons committed upon "civil process."⁴⁴ He argues immigration is a civil process under federal law, and, therefore, the Sheriff has the authority to hold inmates pursuant to detainer requests.⁴⁵

³² Appellant's Opening Brief, *supra* note 1, at 14.

³³ Appellant's Opening Brief, *supra* note 1, at 14; MONT. CODE ANN. § 7-32-2203(3) (2019).

³⁴ See generally Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 3.

³⁵ Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 3.

³⁶ *Id.*

³⁷ *Id.* at 5.

³⁸ Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 5 (citing *Zunski v. Frenchtown Rural Fire Dep't Bd. Of Trustees*, 309 P.3d 21, 25–26 (Mont. 2013)).

³⁹ *Id.* at 5–7.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 5, 7.

⁴² *Id.* at 7.

⁴³ Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 7.

⁴⁴ *Id.* at 8–9; MONT. CODE ANN. § 7-32-2203(3) (2019).

⁴⁵ Defendant and Appellee's Amended Answer Brief, *supra* note 1, at 9.

IV. ANALYSIS

A. Mootness

The Court will likely apply an exception to the mootness doctrine and reach the merits of the claim to clarify the extent of local law enforcement's authority to comply with federal immigration detainers. In particular, the Court's directive to the parties to brief the issue on the merits indicates its desire to resolve the issue.⁴⁶ The Court may determine that the issue is of exceptional public importance because it implicates detainees' fundamental liberty interests.⁴⁷ In the alternative, it may hold the issue is capable of repetition yet evading review because immigration detention will likely affect other inmates in the future, even if it no longer affects Ramon.⁴⁸ Either way, the Court will likely reach the merits of the case.

B. Immigration Detention

The threshold question on the merits is whether holding a person pursuant to an immigration detainer request constitutes a new arrest. Under Montana law, "an arrest is made by an actual restraint of the person to be arrested or by the person's submission to the custody of the person making the arrest."⁴⁹ Arrest is accorded a broad definition in Montana and is determined by whether a reasonable person would have felt free to walk away under the circumstances.⁵⁰ Ramon presents a strong argument as to why his detention constituted an arrest.⁵¹ His bondsman was notified that posting bond would be "futile" due to the immigration detainer,⁵² and the Sheriff kept the jail door locked indicating Ramon was not free to leave.⁵³

⁴⁶ Order at 2, *Ramon v. Bowe* (Mont. May 28, 2019) (No. DA 18-0661). Roby Bowe was Sheriff of Lincoln County at the time the initial complaint was filed. The current Sheriff of Lincoln County, Darren Short, has been substituted for Roby Bowe. In its Order, the Court acknowledges it is unable to enjoin the Sheriff but still directs the parties to "brief the merits of Ramon's arguments"

⁴⁷ Appellant's Opening Brief, *supra* note 1, at 10, 13.

⁴⁸ *See, e.g., Walker v. State*, 68 P.3d 872 (Mont. 2003) (Court reached the merits of former detainee's challenge to certain jail practices even after detainee was released because other inmates could be subjected to the same practices); *Wier v. Lincoln Cty. Sheriff's Dep't*, 925 P.2d 1172 (Mont. 1996) (Court reached merits of inmate's challenge to bail denial even though he had already been released); *Matter of N.B.*, 620 P.2d 1228 (Mont. 1980) (Court applied exception to mootness without considering whether the plaintiff was likely to face the challenged policy again because other Montanans were subject to the same policy).

⁴⁹ MONT. CODE ANN. § 46-6-104 (2019).

⁵⁰ *State v. Ellington*, 143 P.3d 119, 122 (Mont. 2006).

⁵¹ *See generally* Appellant's Opening Brief, *supra* note 1, at 15-17; Appellant's Reply Brief at 6-11, *Ramon v. Short* (Mont. Sept. 23, 2019) (No. DA 18-0661).

⁵² Appellant's Reply Brief, *supra* note 51, at 6.

⁵³ Appellant's Opening Brief, *supra* note 1, at 15.

In general, however, the Court may interpret immigration detainers not as new arrests, but as “temporary extension[s] of current custody.”⁵⁴ In other words, an immigration detainer merely assists CBP in effecting its own arrest procedure; after the Sheriff’s brief extension of custody, the inmate is transferred to CBP and CBP effects the new arrest under valid procedures.⁵⁵ Under either interpretation, the Court’s holding will clarify whether extension of custody constitutes arrest, whether continued detention constitutes arrest, and whether immigration detention constitutes arrest.

The next crucial determination is whether the Sheriff has authority to detain a person pursuant to CBP immigration detainers. On one hand, the Court may hold that the district court erroneously relied on § 7-32-2203(3) as granting the Sheriff authority to arrest. Even if the statute provided authority to arrest on “civil process,” it still might not authorize detention because immigration detainers do not constitute “process” under Montana law.⁵⁶ “Process means a writ or summons issued in the course of judicial proceedings.”⁵⁷ An immigration detainer is issued by DHS, not a judicial officer, and, therefore, it is not issued in the course of judicial proceedings and might not constitute a process under Montana law.⁵⁸ On the other hand, the Court may frame the Sheriff’s authority in terms of *cooperation* with a federal agency.⁵⁹ The federal government retains power over the subject of immigration and the status of aliens.⁶⁰ Local law enforcement may cooperate with DHS in the detention of aliens when that cooperation is pursuant to a request from the federal government.⁶¹ If the Court chooses this route, it will need to resolve state sovereignty and other preemption issues.⁶²

Both Ramon and the Sheriff are supported by persuasive policy considerations. Amici Curiae in support of Ramon explain that DHS has improperly issued immigration detainers to target and extradite the immigrant population in recent years, regardless of whether that

⁵⁴ See Brief of Amicus Curiae The United States, *supra* note 5, at 4, 8. DHS’s detainer form requests local law enforcement to “[m]aintain custody of the subject for a period **NOT TO EXCEED 48 HOURS** . . . beyond the time when the subject would have otherwise been released from your custody.” Department of Homeland Security Form I-247A at 1, <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (emphasis original).

⁵⁵ Brief of Amicus Curiae The United States, *supra* note 5, at 8.

⁵⁶ Appellant’s Opening Brief, *supra* note 1, at 27; Brief of Amicus Curiae Montana Association of Criminal Defense Lawyers (MTACDL) at 5–6, *Ramon v. Short* (Mont. July 19, 2019) (No. DA 18-0661).

⁵⁷ MONT. CODE ANN. § 1-1-202(5) (2019)

⁵⁸ 8 C.F.R. § 287.7(b) (2019).

⁵⁹ Brief of Amicus Curiae The United States, *supra* note 5, at 1–5.

⁶⁰ *Arizona v. United States*, 567 U.S. 387, 394 (2012).

⁶¹ *Arizona*, 567 U.S. at 410; *see also* 8 U.S.C. § 1357(g)(10) (2019).

⁶² Brief of Amicus Curiae The United States, *supra* note 5, at 8–10; Appellant’s Reply Brief, *supra* note 51, at 19–20.

population poses a threat to public safety.⁶³ For example, in Montana 54 percent of DHS immigration detainers were issued in 2012 against immigrants with no criminal convictions.⁶⁴ On the other hand, an immigration detainer demonstrates that a CBP officer has probable cause to believe an alien has violated federal immigration law and is legally subject to extradition.⁶⁵ By complying with detainer requests, a sheriff cooperates with the federal government's efforts to enforce civil immigration law.⁶⁶ Ultimately, however, when balancing the interests of individual liberty with the interest of law and enforcement, the Court tends to protect the individual liberty interests.

As such, it is anticipated that the Court will ultimately conclude that holding a person pursuant to an immigration detainer request constitutes an arrest, and the Sheriff does not have authority under Montana law to effectuate the arrest. An immigration detainer asks the Sheriff to keep someone in jail after they would otherwise be entitled to release. Such a request clearly undermines a person's liberty because they would be free to leave jail but for CBP's request for further detention. Considering Montana's broad definition of arrest, immigration detention probably constitutes arrest. Furthermore, the district court likely erred in holding that § 7-32-2203(3) provides the Sheriff with the necessary authority to effectuate an immigration detention. That statute does not confer explicit arrest authority, and the Court should interpret statutes carefully when questions of individual liberty are at stake.

V. CONCLUSION

This case concerns whether state law enforcement may extend an individual's arrest pursuant to a CBP detainer request. Before ruling on the merits, the Court must find an exception to mootness. In doing so, the Court would have an opportunity to clarify the extent of Montana law enforcements' authority regarding federal immigration detainers. The Court's holding will affect local law enforcement, detainees, and immigrants residing in Montana.

⁶³ Amici Curiae Brief in Support of Appellant's Application for Temporary Restraining Order, Preliminary Injunction, and Order to Show Cause at 3–5, *Ramon v. Short* (July 12, 2019) (No. DA 18-0661).

⁶⁴ *Id.* at 5 (citing Trans. Rec. Access Clearinghouse, Targeting of ICE Detainers Varies Widely by State and by Facility Tbl. 2 (Feb. 11, 2014), <http://trac.syr.edu/immigration/reports/343/>).

⁶⁵ 8 C.F.R. § 287.7; 8 U.S.C. § 1182, 1227.

⁶⁶ Brief of Amicus Curiae The United States, *supra* note 5, at 17–18.