IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0661

AGUSTIN RAMON,

Plaintiff and Appellant,

V.

DARREN SHORT, IN HIS OFFICIAL CAPACITY AS SHERIFF OF LINCOLN COUNTY AND ADMINISTRATOR OF LINCOLN COUNTY DETENTION CENTER,

Defendant and Appellee.

BRIEF OF *AMICUS CURIAE* MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (MTACDL)

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ARGUMENT

Montana's detention center statutes do not provide sheriffs with the authority to arrest individuals for alleged violations of federal civil law. Like other states across the country, Montana regulates the circumstances in which local law enforcement officers can make arrests separately from its regulations on the use of its detention centers or county jails. Montana's law on who may be held its detention centers is irrelevant to the sheriff's power to arrest those individuals. Section I.

For more than a century, section 7-32-2203(3) of the Montana Code has required a judicial order for sheriffs to hold people on federal civil charges in the county jails.[1] This requirement embodies historical common law constraints on civil arrest authority, now codified in the state's statutes. The requirement of a judicial order also mirrors the same long-standing prerequisite present in most other states in the country. Throughout this history, Montana's statute concerning the use of its county jails for individuals committed by "civil process or other authority of law", has remained unchanged. That statute neither permits sheriffs to arrest people for

[1] In 1989 all references to county jails in Montana's statutes were amended to "detention centers." *See* An Act Generally Revising the Laws Relating to Jails, Jail Administrators, and Inmates, 1989 Mont. Laws 1095. Because both labels to refer to the same type of facility, the terms "detention center" and "county jail" are used interchangeably here.

alleged violations of federal civil immigration laws nor to hold those individuals without a judicial order. Section II.

An immigration detainer, with or without an administrative warrant, does not constitute process or a judicial order as defined and required by Montana law. Consequently, the state's detention center statute, on which the district court relied, fails to authorize local law enforcement officers to hold people based on federal immigration detainers. Section III.

I. MONTANA'S DETENTION CENTER STATUTES DO NOT CONFER ARREST AUTHORITY ON LOCAL LAW ENFORCEMENT OFFICERS

Montana's statutes regulating its detention centers concern only the use and administration of the detention centers for individuals already arrested and committed to them. *See* MONT. CODE ANN. §§ 7-32-2201-2255. These laws sit apart from Montana's detailed statutory scheme that describe the precise circumstances in which local law enforcement officers can effectuate civil and criminal arrests. *See* Appellant's Opening Br. at 24-26 & nn. 8, 9 (describing the state's various statutes authorizing arrests for civil and criminal purposes, including on behalf of other jurisdictions).

The state's detention center statutes date back to 1865. An Act Concerning Jails and Prisoners Thereof, § 3, 1864 Mont. Laws 402. These statutes included a provision for "persons committed under the authority of the United States." *Id.* § 8.

Montana's law on the use of its county jails was part of a nationwide response to the appeal by Congress for States to open their jails to federal prisoners. Act of Sept. 23, 1789, ch. 27, 1 Stat. 96 (1789)[2]; *Majors v. Lewis & Clark Cty.*, (1921) 60 Mont. 608, 201 P. 268, 269 (describing the state's acquiescence to Congress's request). Congress needed to fix a basic problem: there were federal courts and U.S. marshals to enforce federal law, but the federal government had nowhere to put its prisoners. LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 402 (1948). Every state, with the exception of Georgia, complied with Congress's request. *Id.* at 402 n.44; *see also Printz v. United States*, 521 U.S. 898, 909-10 (1997) (discussing Congress's assumption in this Act that it could not command into service the States' executive powers and emphasizing that Congress's response to Georgia's

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[2] The full text provided:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it be recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of the gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such States respectively; the United States to pay for the use and keeping of such gaols, at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such prisoner shall be therein confined; and also to support such of said prisoners as shall be committed for offences.

Act of Sept. 23, 1789, ch. 27, 1 Stat. 96 (1789).

refusal was to rent its own jails rather than force compliance). Forty-one states continue to have laws that stem from this early act of Congress and regulate the use of local jails to hold individuals committed into custody under federal law. Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085, 1119-21, Appendix (2019) (cataloging States' responses to Congress's request and their failure to authorize local enforcement of immigration detainers) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299745. Montana's statutes, along with those in nearly every other state, created new authority to hold individuals for violations of federal law in county jails under certain conditions, *see infra* section II.

The new state laws did not, however, confer additional arrest authority on sheriffs and other law enforcement officers. Rather, the statutes simply governed the obligation of the sheriff or other jail administrators to accept people committed into custody by federal officials and the obligation of the federal government to pay for their custody. *Id.* at 1121 (discussing the lack of arrest power embodied by these custody statutes), 1109-18 (analyzing the source of historical arrest authority separately).

Montana's provision on the use of its detention centers, section 7-32-2203, has no bearing on the authority of sheriffs and other law enforcement officers to

arrest the individuals held in those detention centers. To the extent Montana's legislature has conferred that authority, with its accompanying conditions, it has done so elsewhere in the state's statutes.

II. SECTION 7-32-2203(3) HAS REQUIRED A JUDICIAL ORDER TO HOLD PEOPLE CHARGED WITH FEDERAL CIVIL VIOLATIONS FOR MORE THAN A CENTURY.

The district court concluded that section 7-32-2203(3) provides the Lincoln County Sheriff with authority to enforce federal immigration detainers. *Ramon v. Bowe*, Cause No. DV-18-218, slip op. at 6 (Mont. 19th Dist. Ct. November 16, 2018). The district court cited the same conclusion reached by another district court in *Valerio-Gonzalez v. Jarrett*, Cause No. DV 17-688B, slip op. at 6. (Mont. 18th Dist. Ct. October 5, 2017). A century of Montana law, however, demonstrates that section 2203(3)'s reference to "civil process or other authority of law" requires a judicial order to hold someone on the basis of federal civil charges.

Montana's law on the use of its detention centers was first enacted in 1895 in nearly identical form and provided:

> The common jails in the several counties of this State are kept by the sheriffs of the counties in which they are respectively situated, and are used as follows:
> (1) For the detention of persons committed in order to secure their attendance as witnesses in criminal cases.
> (2) For the detention of persons charged with crime and committed for trial.

> (3) For the confinement of persons committed for contempt, or upon civil process, or by other authority of law.
> (4) For the confinement of persons sentenced to imprisonment therein up on conviction of a crime.

Complete Codes and Statutes of the State of Montana in Force July 1, 1895, Section IV, Penal Code Act of Montana, Part III, State Prisons, County Jails and Reform Schools, Title II, County Jails § 3022 (Wilbur F. Sanders, ed. 1895). The 1895 legislature defined "process" as "a writ or summons issued in the course of judicial proceedings." Complete Codes and Statutes of the State of Montana in Force July 1, 1895, Section IV, Penal Code Act of Montana, Preliminary Provisions, § 7(15) (Wilbur F. Sanders, ed. 1895). Montana statutes continue to define "process" as "a writ or summons issued in the course of judicial proceedings" and require the review and direction of a court. MONT. CODE ANN. §§ 1-1-202(5); 7-32-2131(4)(b) (specifying that "judicial officers" issue "process"), 25-3-101 ("process" includes "all writs, warrants, summonses, and orders of courts of justice or judicial officers."). Thus, from the beginning, "civil process," as required by section 7-32-2203(3) and its precursors, signified a document issued by a court or judicial officer.

The requirement for a judicial order also applies to the requirement for "other authority of law" in section 7-32-3303(3). *See* Appellant's Opening Br. at 27 (explaining that this residual clause must be read consistent with the kinds of judicial orders that proceed it). That reading is reinforced by the statute's history, particularly

in the context of housing federal prisoners in the jail. At the time Montana's statute on the use of its county jails was first enacted, an accompanying statute in the same chapter on county jails specifically addressed the conditions required for holding federal prisoners, stating:

> The sheriff must receive, and keep in the county jail, any prisoner committed thereto *by process or order issued under the authority of the United States*, until he is discharged according to law, as if he had been committed *under process* issued under the authority of this State; provision being made by the United States for the support of such prisoner.

Complete Codes and Statutes of the State of Montana in Force July 1, 1895, Section IV, Penal Code Act of Montana, Part III, State Prisons, County Jails and Reform Schools, Title II, County Jails § 3026 (emphases added). A person held in Montana's county jails under the authority of the United States had to be accompanied by process or order. Historically, the Montana Supreme Court has read the statute concerning federal prisoners together with the statute defining the use of the state's county jails. *Majors v. Cty. of Lewis and Clark*, (1921) 60 Mont. 608, 615, 201 Pac. 268; *see also* Mont. Rev. Codes 1921 § 12468 (1927 Supplement) (citing *Majors v. Cty. of Lewis and Clark*, 60 Mont. at 615 in the historical notes to the statute on the use of the county jails). Since enactment, section 7-32-2203(3)'s reference to "civil process or other authority of law" has necessitated a court directive.

The long-standing requirement for a judicial order in section 7-32-2203(3) is especially clear with respect to holding someone based on a federal civil immigration violation. The statute on federal prisoners and the statute on the use of the state's detention centers were both adopted from California. *See, e.g.*, Mont. Rev. Codes 1921 §§ 12468 (citing the history of the statute as "En. Sec. 3022, Pen. C. 1895; re-en. Sec. 9759, Rev. C. 1907. *Cal. Pen. C. Sec. 1597*."), 12472 (citing history as "En. Sec. 3026, Pen. C. 1895; re-en. Sec. 9763, Rev. C. 1907. *Cal. Pen. C. Sec. 1601*.") (emphases added). *See also* ROBERT WHELAN, MEREDITH HOFFMAN, & STEPHEN R. JORDAN, A GUIDE TO MONTANA LEGAL RESEARCH 21-22 (State Law Library of Montana 2003) (explaining that at the first territorial legislature, "many of the laws were taken from the Laws of California of 1851"), https://courts.mt.gov/Portals/189/library/guides/guide.pdf. Additionally, in the Revised Codes of Montana of 1907, California cases interpreting that state's parallel jail statutes are referenced in the annotations to Montana's detention center laws. *See, e.g.*, Mont. Rev. Codes 1907 §§ 9763 (citing *People v. Ah Teung*, 92 Cal. 422, 28 Pac. 577 (1891), 9773 (citing *Sonoma Co. v. Santa Rose*, 102 Cal. 430, 36 Pac. 810 (1894)). The notes to Montana's detention center statute governing federal prisoners specifically referenced a California Supreme Court decision interpreting its identical provision in the context of immigration law. Mont. Rev. Codes 1907 § 9763 (citing *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577 (1891)).

In *People v. Ah Teung*, the 1891 California Supreme Court considered the meaning of California's jail statute on federal prisoners as applied to immigrants detained under the Chinese Exclusion Act. *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577 (1891). Mr. Ah Teung was accused of assisting another Chinese immigrant, Lee Yick, with escaping from the Alameda County jail. *Id.* The question for the court was whether the custody of Lee Yick was lawful; if not, Mr. Ah Teung could not be guilty of the crime of assisting in his escape. *Id.* at 421-23. Lee Yick had been brought before a U.S. court commissioner[3] on charges of violating federal immigration law. *Id.* At the conclusion of the proceeding, that commissioner declared that Mr. Yick was present in the country in violation of the Chinese Exclusion Act and he was committed to the Alameda County jail. *Id.* at 422. The court found that "[n]o formal judgment was ever made or given upon this 'finding,'"

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[3] U.S. court commissioners served federal courts as judicial officers in positions that became U.S. magistrate judges. In 1793, Congress "drawing on the English and colonial tradition of having local magistrates and justices of the peace serve as committing officers, . . . authorized federal circuit courts to appoint 'discreet persons learned in the law' [and] to accept bail for them." *See* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGE SYSTEM 3, 3 n.9 (Fed. Bar Ass'n White Paper 2014) (citing Act of March 2, 1793, ch. 22, § 4, 1 Stat. 334 (1793)). These individuals absorbed more duties—issuing arrest and search warrants, and holding people for trial—as their role developed into the commissioner system. The system was reconstituted through the Act of May 28, 1896 and U.S. commissioners became U.S. magistrate judges. *Id.* at 3 n.11. U.S. magistrate judges are federal judicial officers, 28 U.S.C. § 632, vested with the same powers granted to U.S. commissioners, 28 U.S.C. § 636.

for Mr. Yick "nor order or direction given by the commissioner or any court." *Id.* at 422.

The California Supreme Court had to decide whether the U.S. commissioner's finding alone satisfied the requirement for "process or order" so that the county jailer was required to take custody of Mr. Yick as a federal prisoner. *Id.* The court's response was, "We think not." *Id.* at 423-24. Only a "certified copy of the judgment" from the U.S. court or its commissioner could serve as the "process or order" that the California law required. *Id.* at 423. According to the California Supreme Court, "the finding of the United States court commissioner, before referred to, is not equivalent to such an order, and without such order" the county deputy sheriff had no authority to hold Mr. Yick in the county jail. *Id.* at 423-24.

Montana's legislature retained the language of "process or order issued under the authority of the United States" after California's Supreme Court construed that same phrase and that court's decision was referenced in Montana's detention center statutes. Mont. Rev. Codes 1907 § 9763 (citing *People v. Ah Teung*, 92 Cal. 421, 28 Pac. 577 (1891).The language survived as that provision was merged with another in 1971, An Act Relating to Fees Allowed to Sheriffs for Board of Prisoners, 1971 Mont. Laws 1544, and persisted throughout amendments to increase payment rates and to allow for private party jailers. *See, e.g.*, An Act to Revise the Fee for Housing Federal and State Prisoners in County Jails, 1979 Mont. Laws 1792; An Act

Allowing Counties to Establish and Fill the Position of Jail Administrator or to Enter Agreements Under Which Private Parties Will Build, Maintain, or Operate Jails, 1985 Mont. Laws 835. Throughout the last century, the Montana legislature has affirmed the requirement for a judicial order to hold someone on a federal immigration charge. *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶ 14, 362 Mont. 1, 6, 261 P.3d 570, 574 (citing Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* vol. 2B, § 49:5, 32-34 (7th ed., Thomson-Reuters/West 2008)("Judicial construction of a statute becomes part of the legislation from the time of its enactment.")); *see also Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 19-20, 221 P.3d 666, 670 ("[Courts] may also consider similar statutes from other jurisdictions . . . for guidance in interpreting a statute.").[4]

[4] The detention center statute concerning federal prisoners was repealed in 1989 as part of the legislature's restructuring to allow for multi-jurisdiction detention centers and to consolidate payment and contracting procedures for renting out space in the state's detention centers. *See* 52 Op. Att'y Gen. Mont. No. 4, LEXIS 9 (Dec. 3, 2007) (discussing the purpose and function of the statutory amendments); *City of Hardin v. State*, Cause No. BVD-2007-955, slip op. (Mont. 1st Dist. June 5, 2008) (same). The goal of the amendments was limited and did not include abandoning century-old requirements for a judicial order or expanding the scope of section 7-32-2203(3) to create broad new civil arrest authority, while leaving that text untouched. *See* 52 Op. Att'y Gen. Mont. No. 4, LEXIS 9 (Dec. 3, 2007); *City of Hardin*, Cause No. BVD-2007-955 at Lexis 171.

Though California is the only state that has interpreted its statute governing custody of federal prisoners in the immigration context, the general requirement for a judicially issued document to hold federal prisoners in local jails is consistent across nearly all States and all iterations of these statutes. Evans, *supra* at 1123-33. Some state statutes required action by federal courts explicitly; others—like California's and the numerous western states that adopted that version—referred to "process or order," requiring a court-issued document of some kind. *Id.* at 1123-28. A final group referred more generally to prisoners committed under the authority of the United States, but this language was also generally interpreted to require a directive from a court. *Id.* at 1128-33. Montana's historical requirement of a judicial order to hold people on federal civil charges mirrors the nationwide standard.

Further, the requirement for judicial process or order in Montana's detention center statutes is consistent with common law. Sheriffs were limited at common law in their power to make civil arrests by the requirement that the arrest was directed by a court. *Id.* at 1109-18. They had the power and duty to execute the mandates of the courts and to keep securely in confinement all such prisoners committed to his charge "by civil or criminal process emanating from courts of adequate

jurisdiction."[5] The sheriff's common law authority to effectuate civil arrests stemmed from the duty to execute the mandates of the courts and hold those committed to him under civil process.[6] But this authority was limited to arrests ordered by a court during the pendency of a civil proceeding to assure its progress or at its conclusion to enforce a judgment.[7] The sheriff's authority to effect a civil arrest depended on possessing judicial process[8] directing him to do so to enforce compliance with a court order.[9] These constraints on a sheriff's authority to effectuate civil arrests have been codified in Montana's statutes. *See* Appellant's Opening Br. at 25-26 & nn. 8, 9 (reviewing the requirements for a court order to

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[5] WILLIAM L. MURFEE, A TREATISE ON THE LAW OF THE SHERIFFS AND OTHER MINISTERIAL OFFICERS § 40 (Eugene McQuillin ed., St. Louis, Gilbert Book Co. 2d ed. 1890) (hereinafter "MURFEE").

[6] *Id.* §§ 40, 100-01.

[7] *Id.* § 118a (describing the *capias ad respondendum* authorizing arrest for contempt of court in English common law); *see also id.* §§ 205 (describing state statutes authorizing and limiting arrests in civil matters which circumscribe common law arrest authority for civil matters), 340-362 (describing other forms of civil intermediate process that authorize arrest). The same conditions apply to final civil process as apply to intermediate civil process. *Id.* § 293.

[8] Under common law, process meant "something issuing out of a court or from a judge." MURFEE § 117a. The term was commonly used to encompass "the writs issuing out of any court to bring the party to answer, or for execution" including civil and criminal proceedings. *Id*.

[9] *Id.* § 151.

authorize civil arrests with limited exceptions specified by statute). The state's detention center statutes and civil arrest statutes embody this common law tradition.

Since 1895, section 7-32-2203(3) of the Montana Code on the use of its detention centers (or county jails) for individuals "committed for contempt or upon civil process or other authority of law" has remained unchanged. Throughout this time, this subsection and its precursors were part of a statutory scheme that required judicial orders for federal civil detention. The demand for a judicial order reflects the same requirement present in similar statutes across the country as well as historical common law constraints on civil arrest authority. Informed by this history and by its own terms, section 7-32-2203(3) does not permit sheriffs to arrest people for allegedly violating federal civil immigration laws nor does it allow sheriffs hold those individuals without a judicial order.

III. IMMIGRATION DETAINERS AND ADMINISTRATIVE WARRANTS DO NOT MEET MONTANA'S STANDARD FOR PROCESS OR JUDICIAL ORDER AS REQUIRED BY § 7-32-2203(3).

An immigration detainer, with or without an administrative warrant, does not satisfy Montana law's requirement for process or order. By regulation, an immigration detainer is issued by an enforcement officer within the U.S. Department of Homeland Security (DHS). 8 C.F.R. § 287.7(b) (2018). The detainer is neither reviewed nor issued by a judicial officer. The same is true for administrative warrants of arrest based on alleged violations of the civil immigration laws. 8 C.F.R.

§§ 287.5(e)(2), 236.1(b)(1) (2018). These too come directly from DHS officers without any verification or order by a judicial officer. No administrative warrant was present here, *see* Appellant's Opening Br. at 6-7, but DHS often issues an administrative warrant (form I-200) alongside an immigration detainer.[10]

Because immigration detainers and administrative warrants issued by an ICE or CBP officer are not issued in the course of judicial proceedings, by judicial officers, and are not orders from a court of justice, they cannot constitute "civil process" for purposes of section 7-32-2203(3). *See* MONT. CODE ANN. §§ 1-1-202(5), 7-32-2131(4)(b), 25-3-101. These documents also fall short of the requirement for court-issued process or order that section 7-32-2203(3) has required to hold someone on federal civil charges under "other authority of law" since 1895. To conclude otherwise would break with more than a century of history and create a new civil arrest power far broader than the courts and legislature have recognized in the past.

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[10] ICE Policy Directive 10074.2, *Issuance of Immigration Detainers by ICE Immigration Officers* (Dep't Homeland Sec. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and conclude that Montana's detention center statutes do not authorize the Sheriff to arrest people based on immigration detainers. Further, for the additional reasons discussed in section II of Appellant's Opening Brief, the Court should hold that the Sheriff lacks authority under Montana law to arrest people based on an immigration detainer request.

Dated this 19th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, Colin M. Stephens, certifies that the foregoing complies with the requirements of Montana Rules of Appellate Procedure 11 and 12. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with typeface consisting of fourteen characters per inch. The total word count is 5,000 words or fewer, excluding caption, table of contents, table of authorities, signature block and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

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