

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

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LORETTA G. WHYTE  
CLERK

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA

Antonio Ocampo  
Prisoner/ Folder No. 2239072  
Orleans Parish Prison  
531 South Broad Street  
New Orleans, LA 70119

Petitioner,

v.

Sheriff Marlin N. Gusman,  
Orleans Parish Sheriff  
819 South Broad Street  
New Orleans, LA 70119-7418

and

Kevin Winfield, Warden  
Orleans Parish Prison  
531 South Broad Street  
New Orleans, LA 70119

Respondents.

10-4309

Case no. \_\_\_\_\_

SECT. R MAG. 5

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

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✓ Process \_\_\_\_\_  
x Dktd \_\_\_\_\_  
CtRmDep \_\_\_\_\_  
Doc. No. \_\_\_\_\_

## ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

### PRELIMINARY STATEMENT

1. Petitioner Antonio Ocampo brings this writ of habeas corpus seeking release from Orleans Parish Prison after 95 days of illegal custody in violation of his Fourth, Fifth, and Fourteenth Amendment Rights.
2. Orleans Parish Prison has held Mr. Ocampo in custody for the last 95 days pursuant to an expired immigration detainer. An immigration detainer is a document used by Immigration and Customs Enforcement (ICE) to advise a local or state law enforcement entity that ICE may desire to investigate, charge and/or detain an individual. Pursuant to federal law, a properly issued immigration detainer gives Orleans Parish Prison discretionary authority to hold an individual for a maximum of forty-eight hours.
3. After ICE declined to take physical custody of Mr. Ocampo during the 48-hours, Orleans Parish Prison continued to hold him illegally subject only to the purported authority of the expired immigration detainer.
4. Mr. Ocampo seeks his immediate release from Orleans Parish Prison from this federal court pursuant to its role in protecting the core constitutional and civil rights of persons in custody.

### JURISDICTION

5. Pursuant to 28 U.S.C. § 2241, this Court has jurisdiction over Petitioner Antonio Ocampo's writ of habeas corpus because he is in custody based solely on the purported authority of a federal immigration detainer in violation of the Fourth and Fifth Amendments to the U.S. Constitution. *See Braden v. 20<sup>th</sup> Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1972).<sup>1</sup>

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<sup>1</sup> This case is distinguished from cases where the detainee attempts to challenge the independent custody of the detainer while his criminal sentence is running. *See, e.g., Zolicoffer v. United States DOJ*, 315 F.3d 538, 540 (5th Cir. La. 2003). In this case, there Petitioner concluded his criminal sentence on August 12, 2010. Petitioner files this writ to challenge his present physical custody pursuant only to the expired immigration detainer.

6. Orleans Parish Prison is holding Petitioner under or by color of the authority of the United States. *See* 28 U.S.C. § 2241(c)(1).
7. Orleans Parish Prison is holding Mr. Ocampo in custody in violation of the laws of the United States. *See* 28 U.S.C. § 2241(c)(3).<sup>2</sup>
8. 28 U.S.C. § 2241(c)(3) was included as part of the statutory expansion of the writ of habeas corpus in the Judiciary Act of 1867 to expand federal judicial supervision over the enforcement of federal constitutional provisions, including civil and constitutional rights. *Judiciary Act, ch. 28, 1, 14 Stat. 385 (1867)*.<sup>3</sup>

### VENUE

9. Venue is proper before the U.S. District Court in the district where Petitioner Antonio Ocampo is presently held in physical custody pursuant to 28 U.S.C. § 2241 *et seq.*

### PARTIES

10. Petitioner Antonio Ocampo is an individual presently held in physical custody at Orleans Parish Prison, ICE Det. Rec. 022310, Prisoner/ Folder No. 2239072.
11. Respondent Kevin Winfield is the Warden at Orleans Parish Prison where Petitioner Antonio Ocampo is currently detained.
12. Respondent Marlin N. Gusman is the Sherriff of Orleans Parish and is responsible for the care, custody and control of all inmates at Orleans Parish

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<sup>2</sup> Because Petitioner is challenging his present physical custody pursuant to 28 U.S.C. § 2241(c)(1) and (3), he is not subject to the same procedural and exhaustion requirements as prisoners often before this Court challenging their sentences pursuant 28 U.S.C. § 2254. Furthermore while the Court may, but is not required to apply the Federal Rules Governing § 2254 Cases. *See* Fed. Rs. Governing § 2254 Cases in the U.S. Dist. Ct., Rule 1(b).

<sup>3</sup> *See* Jordon Steiker, *Incorporating the Suspension Clause: Is there a Constitutional Right to Federal Habeas Corpus for State Prisoners?* 92 Mich. L. Rev. 862, 924 discussing how the Judiciary Act of 1867 was part of a series of Congressional maneuvers designed in anticipation of Reconstruction era resistance by Southern States to offer federal review and vindication of new core civil and constitutional guarantees.

correctional facilities including Orleans Parish Prison where Petitioner Antonio Ocampo is currently detained

## **. FACTS**

### **Background Facts on Petitioner**

13. Petitioner is presently in the physical custody of Orleans Parish Prison.
14. Petitioner Antonio Ocampo completed his concurrent sentence for two counts of La. Rev. St. § 14 35, simple battery, on August 12, 2010. Petitioner does not contest his sentence for these two misdemeanors. *See Exhibit A, Declaration of Petitioner; Exhibit B, Documents showing the resolution of his criminal charges including plea and sentencing.*
15. Upon expiration of his criminal sentence, Respondents then exercised their discretionary authority to hold petitioner pursuant to a federal immigration detainer originally lodged on February 23, 2010. *See Exhibit C, Sample immigration detainer; Exhibit D, Documents showing immigration detainer Rec. 022310 lodged on Petitioner on Feb. 23, 2010.*<sup>4</sup>
16. Upon expiration of his criminal sentence on August 12, 2010, the federal immigration detainer gave Respondents discretionary authority to hold Petitioner an additional 48 hours, not including weekends and federal holidays, to allow ICE to conduct further investigate, charge, and/or detain Petitioner subject to ICE's statutory authority.
17. On August 16, 2010, Petitioner's immigration detainer expired and along with it, Respondents' discretionary authority to hold custody of Petitioner.
18. To date, ICE has not issued charging documents to begin removal proceedings against Petitioner nor has ICE taken physical custody of Petitioner from Respondents.

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<sup>4</sup> For purposes of this writ of Habeas Corpus, Petitioner does not address the legality of the immigration detainer as issued. There is no doubt that Petitioner's current custody is unlawful irrespective of the legality of the originally issued detainer. Petitioner has not seen a copy of his immigration detainer. Petitioner reserves the right to challenge the legality of that detainer in future proceedings, including before the Immigration or other court.

19. Respondents continue to unlawfully detain Petitioner pursuant to the purported authority of the expired immigration detainer.
20. On the day of filing, November 12, 2010, Petitioner remains in the custody of Orleans Parish Prison—where he has been illegally held for 95 days.
21. During the last 95 days, Petitioner has filed approximately five written complaints asking to be released. He gave each written complaint to an official at the prison. He did not receive any response. The last time he filed a written complaint was on October 26, 2010.
22. Respondents' ongoing unlawful custody of Petitioner constitutes an egregious violation of his Fourth and Fifth Amendment Rights under the United States Constitution.

#### **Background Facts on Federal Immigration Detainers**

23. The immigration laws of the United States are enforced by the Immigration and Customs Enforcement Agency ("ICE") of the Department of Homeland Security ("DHS"). When ICE investigates whether to initiate removal proceedings against a noncitizen or suspected noncitizen who is held in the custody of a state or local law enforcement agency, ICE may issue an immigration detainer (also referred to as an "immigration hold"), citing as authority 8 C.F.R. § 287.79.
24. An immigration detainer "advises" Respondents that DHS may desire to charge and/or assume custody of an individual.
25. Pursuant to federal law, a properly issued immigration detainer gives Respondents discretionary authority to hold an individual for up to 48 hours (excluding Saturdays, Sundays, and federal holidays." *See Ex. C, Sample Immigration Detainer; see, e.g., 8 C.F.R. § 287.7.* Respondents are not obligated to exercise this authority.<sup>5</sup>

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<sup>5</sup> Though the Form I-247 states that federal regulations "require" the state or local law enforcement agency to hold the individual in question, ICE's detainer policy makes clear that the decision to hold an individual on an immigration detainer for the allowable 48-hour period is discretionary and no federal regulations have ever been cited as authority for the proposition that compliance is mandatory. *See* U.S. Immigration and Customs Enforcement, INTERIM Policy #10074.1 (Aug. 2, 2010).

26. Respondents may also, in their discretion, advise ICE of the expiration of an individual's criminal custody. Respondents are not obligated to perform this notification.
27. Respondents had been notified and were aware that their discretionary authority to hold an individual pursuant to an immigration detainer was limited to at most 48 hours (excluding Saturdays, Sundays, and federal holidays).
28. An immigration detainer does not authorize Respondents to hold an individual beyond the 48 hours (excluding Saturdays, Sundays, and federal holidays). *See Ochoa v. Bass*, 181 P.3d, 727, 733 (Okla. Ct. Crim. App. 2008) (granting Petitioners' petition for Writ of Habeas Corpus where ICE failed to take physical custody within 48 hours); *see also Mulato-Gonzalez v. Sheriff, Wood County, Tex.*, 2007 U.S. Dist. Lexis 24298, \*10-11 (E.D. Tex. 2007) (accepting premise that holding petitioner after expiration of the 48-hour period would entitle petitioner to relief, but ultimately holding that because he was only held from Friday until Monday, the 48-hour period had not run, and relief was therefore not available).
29. There is no standard of proof for the issuance of an immigration detainer.
30. The issuance of an immigration detainer merely indicates the allegation by ICE that the individual subject to the detainer is a "noncitizen." An immigration detainer does not allege whether the person possesses another valid immigration status or immigration detainer whether the person is eligible for immigration relief. 8 C.F.R. § 287.7.

## **CAUSES OF ACTION**

### **FIRST CLAIM FOR RELIEF**

#### **Unlawful Detention Under the Fourth Amendment**

31. Petitioner re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.
32. The Fourth Amendment prohibits unlawful seizure and detention of individuals by the government without certain procedural protections. The

Fourth Amendment's guarantees are applied to the States through the Fourteenth Amendment.

33. Respondents' ongoing detention of Petitioner deprives him of his Fourth Amendment rights.

**SECOND CLAIM FOR RELIEF**  
**Unlawful Detention Under the Fifth Amendment**

34. Petitioner re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.
35. The Due Process Clause of the Fifth Amendment protects individuals from one of the most fundamental rights guaranteed by the constitution- freedom from arbitrary detention. The Fifth Amendment's guarantees are applied to the States through the Fourteenth Amendment.
36. Respondents' ongoing detention of Petitioner deprives him of his Fifth Amendment rights.

**THIRD CLAIM FOR RELIEF**  
**Unlawful Detention Under the Due Process Clause of the Fourteenth Amendment**

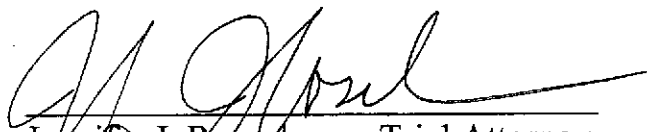
37. Petitioner re-alleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.
38. The Fourteenth Amendment to the U.S. Constitution provides: "No State shall...deprive any person of life, liberty, or property, without due process of law..."
39. Respondents' ongoing detention of Petitioner deprives him of his Fourteenth Amendment rights.

### PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests the following relief:

- a. Order Respondents to show cause, within three days, why the Writ should not issue in this action pursuant to 28 U.S.C. § 2241(c)(3);
- b. If Respondents deny the facts as set forth in this petition, permit Petitioner to conduct expedited, limited discovery on the disputed issues. *See Harris v. Nelson*, 394 U.S. 286, 299 (1969) (holding that habeas courts have power to “fashion appropriate modes of procedure” including with respect to discovery);
- c. Declare that Petitioner’s detention pursuant to an expired federal immigration detainer violates the Fourth Amendment;
- d. Declare that Petitioner’s detention pursuant to an expired federal immigration detainer violates the Fifth Amendment;
- e. To the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing at which the parties may adduce proof in support of their allegations, and order that Petitioner be made present for that hearing in person;
- f. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner’s rights under the United States Constitution and federal statutory and regulatory law; and
- g. Grant Petitioner’s reasonable attorney’s fees and costs.

Respectfully Submitted this 12th day of November 2010,



Jennifer J. Rosenbaum, Trial Attorney

*Admitted to Practice in the Eastern District of Louisiana*

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### **VERIFICATION OF PETITION**

I, Antonio Campo, certify under penalty of perjury that this Petition has been read to me in Spanish and the facts are true and correct to the best of my memory.

November 12, 2010

Antonio Ocampo  
Antonio Ocampo

### **DECLARATION OF INTERPRETER**

I, Jacinta Gonzalez, swear the following is true under penalty of perjury:

1. I am fluent in Spanish and English.
2. On November 12, 2010 I met with Mr. Antonio Ocampo while he was in custody at Orleans Parish Prison and orally interpreted this Original Petition for Writ of Habeas Corpus from English into Spanish accurately and completely.
3. Mr. Ocampo has indicated to me that the attached declaration, as translated for him into Spanish, is true and correct to the best of his knowledge.

Jacinta Gonzalez

INTERPRETOR: Jacinta Gonzalez

Signed this 12 day of November 2010.