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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

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COMMONWEALTH OF MASSACHUSETTS *
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v. * Docket No. SJC-12276
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SREYNOUN LUNN *
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ORAL ARGUMENT

BEFORE THE HONORABLE CHIEF JUSTICE RALPH D. GANTS, JUSTICE BARBARA A. LENK, JUSTICE GERALDINE S. HINES, JUSTICE FRANK M. GAZIANO, JUSTICE DAVID A. LOWY, JUSTICE KIMBERLY S. BUDD, JUSTICE ELSPETH B. CYPHER

APPEARANCES:

For the United States:
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By: Joshua Press, Esq.

Boston, Massachusetts
April 4, 2017

Cambridge Transcriptions
Approved Court Transcriber

(Court called to order.)

CHIEF JUSTICE GANTS: Mr. Press, welcome. You may proceed.

MR. PRESS: Thank you. May it please the court, Joshua Press, here on behalf of the United States. Your Honors, we're here this morning based on a case where it seems like no one actually wants to talk about the appellant, Mr. Lunn. Mr. Lunn came here in 1985 as a refugee and obtained lawful permanent resident status in the early '90s.

Unfortunately, however, he has acquired quite a bit of a criminal record since the early 2000s, and on that basis was ordered deported nine years ago. Lost his lawful permanent resident status and was ordered deported to Cambodia. Now, based on certain Supreme Court case law and federal statutes his detention was limited because Cambodia would not accept him back into their country.

And since that time, he has been ordered on supervised release as it were. Unfortunately, however, that matter of grace to release him -- while on that release, he has chosen to apparently commit further crimes and was again arrested late last year. Now, when that happens --

CHIEF JUSTICE GANTS: That further crimes, he was found not guilty.

MR. PRESS: Yes. I'm actually referring to other

crimes in California after his -- well, previously. Nevertheless, when that happens -- I don't actually; I don't think he was found not guilty. I think the Commonwealth chose not to prosecute in this particular instance.

JUSTICE LENK: But he was not found guilty.

MR. PRESS: Right, it simply --

JUSTICE LENK: There was not a criminal conviction in Massachusetts on which he was being held.

MR. PRESS: Right. And there just no -- no prosecution further.

JUSTICE LENK: While I have this opportunity, let me ask you. In your brief, you refer to him repeatedly as a criminal alien and yet this is an arrest on the basis of a civil immigration offense.

MR. PRESS: Yes.

JUSTICE LENK: So he's not in that sense -- this is not a criminal immigration offense.

MR. PRESS: He's a criminal alien based on his prior convictions and order of removal.

JUSTICE LENK: That's why you refer to him that way? Not by virtue of the offense itself.

MR. PRESS: Of the instant criminal offense that he was picked up and the civil offense of violating his --

JUSTICE LENK: The civil -- it's the civil immigration

offense that is the subject of this ICE detainer, is it not?

MR. PRESS: Yes. Nevertheless, he's still a criminal alien based on his prior convictions.

JUSTICE CYPHER: Is criminal alien, something that's defined in the federal statutes?

MR. PRESS: No. No. It's simply the reason why he was ordered removed nine years ago.

JUSTICE CYPHER: So what does it mean to be a criminal alien?

MR. PRESS: Well, essentially an alien who has committed an aggravated felony, and on that basis ordered removed or deported, as it were.

CHIEF JUSTICE GANTS: But you're not suggesting -- I don't think, perhaps you are -- that the authority of a state law enforcement officer to detain somebody depends upon the reason for the detainer. That if this person were being deported and had an order of deportation for reasons unrelated to any prior conviction, you're not suggesting that that changes the authority of the state law enforcement officer to hold that person pursuant to the detainer are you?

MR. PRESS: No. No. Of course the detainers have specific identified reasons to hold --

CHIEF JUSTICE GANTS: Right. Right, but it's not

limited to those who have been convicted of crimes.

MR. PRESS: No. No.

CHIEF JUSTICE GANTS: So let me ask you if there is a detainer for an individual, and let's assume the sheriff calls up ICE and says, "This individual for whom I have a detainer is to be released at 2:00 p.m. today." And at 2:00 p.m., there's nobody from ICE who is there. And if that sheriff, pursuant to the detainer holds that person for 48 hours, what is that? What do you call that thing which holds him in custody for up to 48 hours after he otherwise would be released?

MR. PRESS: Well, that's in our view a matter of comity and respecting the federal authority to process that alien depending on the basis for why the detainer was issued.

CHIEF JUSTICE GANTS: Constitutionally you refer to it simply as a matter of comity, that we're going to cooperate with the state by holding somebody for up to 48 hours. You don't characterize it in any Constitutional sense as a seizure?

MR. PRESS: Well, it is a seizure and it is an arrest.

CHIEF JUSTICE GANTS: Okay. So it is an arrest.

MR. PRESS: Yes.

CHIEF JUSTICE GANTS: All right. And do you agree that there needs to be state law. There needs to be state

law which authorizes a state law enforcement official to make that arrest?

MR. PRESS: Yes. Now, that will vary from state to state, obviously. Certain states are much more aggressive in limiting the police power and specifically the power of their police and officers to make arrests.

JUSTICE HINES: So why isn't our state law the answer to the question? They don't have the authority to do it, end of story.

MR. PRESS: Well, we believe this is a matter of first impression for this court. From our perspective all states have inherent authority to, from our view, police their sovereignty. And Mr. Lunn is someone who has no right to be within the United States, much less the Commonwealth. And he's only here -- or he was only at large as it were, as a matter of grace from the federal government.

JUSTICE HINES: Well, let me take the focus off Mr. Lunn, because when we took this case we have the right, even though it's moot as to Mr. Lunn. We have the right to look at the whole picture.

MR. PRESS: Sure.

JUSTICE HINES: And if this issue is capable of repetition and escaping review. We're entitled to look at that.

MR. PRESS: Sure.

JUSTICE HINES: And to consider the whole picture. So whether Mr. Lunn is a criminal alien as you call it or whatever it is, that's kind of beside the point. The real issue is what can the Feds demand of the state given the state of our law.

MR. PRESS: Well, I want to be very crystal clear here. There are no federal demands being made through this procedure. This is a request as a matter of comity from one law enforcement agency to another to hold -- number one, to provide notice of the release of that alien or number two, to hold him up to 48 hours to effectuate the detention and eventual removal of that alien from the United States.

Now, there are and there will be of course, from state-to-state, different restrictions placed on state officers. I understand in this -- in the Commonwealth, for example, 48 hours is too long. 24 hours is the rule, and we have no quarrel with that. That's why in this case Mr. Lunn was picked up within hours of the Commonwealth declining to prosecute.

JUSTICE LENK: You know I'm -- as I understand in your argument that you're saying that every state may do this.

MR. PRESS: Yes.

JUSTICE LENK: The federal government cannot require it but every state may and that every state has the

authority to do it depending upon the state.

MR. PRESS: Yes.

JUSTICE LENK: The question then for us is what in our state law does permit this. And I don't see anything in your brief that suggests what that might be.

MR. PRESS: Well, we are not experts in Massachusetts law and therefore we did not want to comment specifically on that. I will say that the Department of Justice's position on this is that inherent within the sovereignty and --

JUSTICE LENK: Can, but we don't. I know that you're saying that we can do it or every state can do it. We may have the authority to do this, but the question is do we have the authority under our own state law to do it. Not could the legislature do this, but has it?

MR. PRESS: Well, I guess the question I would have back to that is has it done what exactly? Now, from my understanding of the Constitution of the Commonwealth, it was written by John Adams essentially in 1780s --

JUSTICE LENK: Before the -- yes, before the federal Constitution.

MR. PRESS: Yes, and President Adams, very good draftsman, of course, did --

JUSTICE LENK: We like him.

JUSTICE GAZIANO: That's why we named the building

after him.

MR. PRESS: Right. No, we of course respect him and his work.

JUSTICE GAZIANO: I'm glad you recognize that.

MR. PRESS: Yes. My understanding more specifically of the Commonwealth's Constitution is that in the late eighteenth century, the Commonwealth did enact statutes barring certain aliens from the Commonwealth based on that Constitution. And so there -- that would seem to indicate that they had exercised their inherent authority derived from the sovereignty that President Adams had written into the Commonwealth's Constitution for such purposes. Now, Arizona v. Gant and other case law has probably modified that a bit.

JUSTICE GAZIANO: I wanted to ask you about the Arizona case because what you said in response to a few questions is that we have the inherent authority to police our sovereignty and you conceded that the hold is an arrest.

MR. PRESS: Yes.

JUSTICE GAZIANO: The Arizona case talks about federal preemption and that states can't arrest aliens. So how are those two thoughts consistent?

MR. PRESS: Right. States cannot on their own enact policies to go beyond federal law. In Arizona SB1070 was

an extremely aggressive and essentially licensed state officials on their own without federal requests for assistance or any sort of direction or supervision by ICE. For example to make arrests and to detain on their own and then make their own investigation into that suspect's citizenship status. That was well beyond what the federal government had chosen to pursue. And that is why the federal government brought that case.

JUSTICE GAZIANO: But isn't that your position, that inherent authority position? So if we say that there's inherent authority, our state police officers that are in the back can go out under inherent authority and enforce the immigration laws.

MR. PRESS: Not beyond the federal governments direction or request for assistance, which is what we have, in this case. Which is the policy, as we understand it, that is being challenged? The detainers themselves are requests by ICE to local officials to hold an alien based on biometric information that the state has uploaded to the FBI. And we have sent back to the state officials.

As in this case, Mr. Lunn has a final order of removal. We know this because the fingerprints that were obtained and then sent to the FBI and then sent to the department of Homeland Security confirmed that this is the person that you have in your custody. We have identified

him as Sreynoun Lunn.

Our records indicate that he was ordered removed from this country nine years ago. By the way, he was out on supervised release. He has not checked in. It appears that he might be up to no good. He has now become a priority again for deportation from this country. And that's all that really happened in this case, and that's really what we're talking about with the revised forms that DHS has now put out.

JUSTICE BUDD: But just going back to what you're looking from our Commonwealth to do, it sounds like you're saying that we don't need any special legislation to hold a criminal alien. We can just do it, is that correct?

MR. PRESS: Well, I would hesitate to say -- to make that the sort of conclusion of criminal alien just based on, as in this case there was no conviction.

JUSTICE BUDD: Well, anybody that you're looking to have ICE detain or an ICE detainer on.

MR. PRESS: Right.

JUSTICE BUDD: We can just hold them because we've got that authority, we've got that power.

MR. PRESS: You have that power, and as we understand it, no law has circumscribed the state or the Commonwealth's power to cooperate with the federal government in these matters. Without having any sort of

identified limit, then if the Commonwealth or its officers or in this case the Boston Municipal Court wants to cooperate with the federal government, we don't see any particular reason why that could not happen in this case.

CHIEF JUSTICE GANTS: This inherent authority, are you saying that the state inherently has the ability to pass legislation authorizing it? Or are you saying that there is Constitutional authority in the absence of any legislative act that would permit this type of arrest?

MR. PRESS: Well, what we're saying is that there's certain room for play in the joints here and if the Commonwealth wants to pursue --

CHIEF JUSTICE GANTS: What does that mean?

MR. PRESS: What does that mean? Well, good question. If the Commonwealth wants to pursue --

CHIEF JUSTICE GANTS: I don't think John Adams used that term in our Constitution.

JUSTICE LENK: No, he didn't.

MR. PRESS: Right. There were a lot of terms he never used. But if the Commonwealth wants to pursue specific legislation, that's one route to go. In this case, I believe the Boston Municipal Court ordered his brief detention until ICE could pick him up. I assume based on its own inherent authority, as a court.

CHIEF JUSTICE GANTS: There may be some confusion as

to exactly what he did as to whether he meant he was going to decline to act and that was interpreted as having ordered it. But that essentially is neither here nor there. But let's go back to my question as to what is this thing that you say is inherent authority?

And I'm trying to understand whether you're saying that the state has the inherent authority to enact legislation authorizing state law enforcement officers to make these arrests. Or whether you're saying that there is inherent authority somewhere, perhaps in our Constitution, perhaps elsewhere that says that these officers have that authority in the absence of any legislative action.

MR. PRESS: Well, they have that authority, as we understand it, in the absence of any specific legislative authorization simply based on their being coordinate law enforcement agency and their willingness to work with the federal government to effectuate the removal.

JUSTICE HINES: Is that an arrest? Isn't that an arrest so that Constitutional guarantees would apply too? If the judge in the BMC said "We're done with you, we have nothing else but this ICE detainer so you can't go until the 48 hours are up." Now wouldn't Constitutional protections attach to that?

MR. PRESS: Yes. Both federal and Commonwealth Constitution protections. Yes.

JUSTICE HINES: So how is it that we can just hold that person without a magistrate, without probable cause, without any of that?

MR. PRESS: Well, that's a good question with respect to the Fourth Amendment. In the immigration context, I want to be very clear here. That the Supreme Court -- no court has ever required a neutral and detached magistrate to make immigration decisions to hold an alien or to issue an immigration administration warrant.

JUSTICE HINES: Okay. That's immigration officials not state officials, right?

MR. PRESS: Right. State officials can choose to cooperate --

JUSTICE HINES: Okay. But we're talking about state officials here.

MR. PRESS: And I'm talking about if state officials choose to cooperate with the federal government based on their request. They have that authority and we haven't seen anything specifically taking that authority away from them. From our perspective. And this is not just a matter isolated to the Commonwealth; this is for all of the states.

JUSTICE GAZIANO: You could solve this problem by obtaining arrest warrants from magistrate, correct?

MR. PRESS: Well, not from magistrate. It would

depend on what you mean by magistrates. In the immigration context --

JUSTICE GAZIANO: I understand your argument, but as we talked about in the last argument or the last lawyer, there are lots of states -- and you saw the laundry list of them -- that say we're not going to do this absent a warrant. And it's now -- its incumbent upon Department of Homeland Security to seek criminal warrants when they want -- when they really want people, correct? Is that's what is happening around the country?

MR. PRESS: There is no mechanism for criminal warrants, as it were, issued by either a magistrate judge or district court judge or anything like that. These have always been -- I mean for decades administrative warrants issued by supervisors at ICE and before that supervisors in INS.

JUSTICE GAZIANO: I guess the question I'm asking you is what's happening in all these other states that have already said we're not going to cooperate?

MR. PRESS: What is happening?

JUSTICE GAZIANO: Yeah.

MR. PRESS: Well, the federal government is currently working with them to try to facilitate better cooperation. I know that Secretary Kelly is currently meeting with -- by currently I mean recently has met with multiple city and

local officials on this issue to try to encourage better cooperation with the local enforcement agencies.

CHIEF JUSTICE GANTS: Let's go back to inherent authority.

MR. PRESS: Sure.

CHIEF JUSTICE GANTS: I'm trying to understand its limits. It's limited to immigration? It's not with regard to criminal matters?

MR. PRESS: No. Local agencies can also cooperate with --

CHIEF JUSTICE GANTS: If an FBI agent calls up somebody and says, I know you're about release John Smith. I think he committed a bank robbery. I don't have a warrant. I don't have a criminal complaint, but I want you to hold him for two days until I can get there. There is authority to do that because of comity?

MR. PRESS: Well, in this case we have an order of removal. The more appropriate analog would be an order of conviction and judgment. And an order of directing -- or I guess I suppose a request asking that the FBI can pick them up to bring them into federal custody to effectuate that judgment.

CHIEF JUSTICE GANTS: Well, certainly, if you had a court order you could -- pursuant to interstate agreement on detainers -- you could do it. But you don't have any

judicial officer involved in this, you have an ICE officer who is certifying this. Not even certifying it, just declaring it. It's not under oath.

MR. PRESS: Well, we did have an immigration judge in 2008 ordered him removed, and he never chose to appeal that decision.

CHIEF JUSTICE GANTS: All right. So now, let's just -- at the end of the 20, 48 hours, you say maybe 24 hours, ICE doesn't show up. The authority ends?

MR. PRESS: Yes.

CHIEF JUSTICE GANTS: And that person who was arrested then becomes un-arrested?

MR. PRESS: Yes.

CHIEF JUSTICE GANTS: Any documentation to reflect the fact that he had been arrested and un-arrested?

MR. PRESS: No. From our perspective, if he re-offends and this sort of process comes up all over again and ICE chooses to pick him up that would be one thing or ICE could make an arrest in the field if they still have probable cause to believe that that person is a removable alien. There are a whole host of factors that could come into that decision making process.

CHIEF JUSTICE GANTS: Is there any, is there any other under our state law -- is there any other context that would permit the state law enforcement officer to arrest

somebody then un-arrest him 48 hours and there be no record of that arrest and that un-arrest?

MR. PRESS: Well, from my understanding -- limited understand of Massachusetts case law, brief arrests do occur and perhaps they don't get processed. Those individuals don't get booked but people are arrested temporarily then released.

CHIEF JUSTICE GANTS: For 24 to 48 hours?

MR. PRESS: Well, 48 hours obviously would be problematic.

CHIEF JUSTICE GANTS: But that's what the detainer asks for.

MR. PRESS: That is what the detainer asks for as a maximum as a ceiling, yes. It does not ask for anything more than that. That's to comply with the Constitutional boundaries. The federal Constitutional boundaries.

CHIEF JUSTICE GANTS: And just to be clear, with regard to a sheriff who has a detainer and says I would prefer not to make that telephone call to ICE at 2:00 p.m. I simply don't wish to do that. There is nothing unlawful about that sheriff choosing not to honor that detainer?

MR. PRESS: There's nothing Constitutionally offensive. I do want to emphasize that --

CHIEF JUSTICE GANTS: Is there anything -- the question was whether it's unlawful for that sheriff to not

honor that detainer which you characterize as a voluntary request?

MR. PRESS: No. The sheriff would not be violating any criminal or civil immigration laws in that respect. There would of course be friction if this were done as a matter of policy. That's what we're trying to prevent. That's why Secretary Kelly, for example, is going around the country trying to encourage more local enforcement agencies to work with the Department of Homeland Security in these matters.

CHIEF JUSTICE GANTS: Okay. But I'm not speaking about friction or comity. I'm asking whether it's unlawful and I gather the answer is no. It's not unlawful to do that.

MR. PRESS: No. That would present a different Tenth Amendment concerns than really what our issue here.

CHIEF JUSTICE GANTS: Meaning that if it were not voluntary, there would be a Tenth Amendment concern for essentially the commandeering of state law enforcement officers to make arrests at the request of a federal officer?

MR. PRESS: Yes. Yes. Nevertheless, the issue of cooperation is an important one both to the Commonwealth and to the United States. It's not uncommon for DHS to hold aliens and then for the Commonwealth to ask that ICE

facilitate their return to Commonwealth custody temporarily, for example to testify in a criminal trial or things of that nature.

JUSTICE GAZIANO: There's a process that accompanies that though right. There's a subpoena, there legal process?

MR. PRESS: Yes. And that's what we're trying to do now with the new I form 247-A to have administrative warrants accompany the detainer request themselves to provide assurance to local enforcement agencies such that that adequate process or that adequate levels of process are being gone through to assure the local enforcement agencies.

JUSTICE CYPHER: Who issues those administrative warrants specifically?

MR. PRESS: ICE supervisors.

JUSTICE CYPHER: ICE supervisors. They're not judicial officers?

MR. PRESS: Well, they're not judicial magistrates if that's what you're asking. And that sort of goes to the decades of case law on this specific issue.

JUSTICE CYPHER: But they're not -- they are ICE officials. They're not judicial, they're not magistrates, they're not in the court system.

MR. PRESS: Right. One other important wrinkle to

that -- I also want to note that immigration judges themselves work for the Department of Justice. They are executive officials.

JUSTICE LENK: Not Article Three judges. They're not Article Three judges.

MR. PRESS: Correct. Neither are in fact most magistrate judges within the federal court system. Nevertheless, we do want to continue to have a cooperative relationship with the Commonwealth. That's extremely important to the United States and that's why we've chosen to come here today and I thank you for the honor.

CHIEF JUSTICE GANTS: Before you go, let me just make clear, make sure I understand your position. Let us imagine that you prevail here today. And let us imagine that we say that there is inherent authority for a sheriff or law enforcement officer to hold somebody for up to 24 or 48 hours.

And let's imagine the state legislature were to say "No, we expressly do not give that authority. We basically say they have no such authority." Are you in the same position? Is the inherent authority, such that it can be -- it cannot be overridden by a state legislature?

MR. PRESS: That would present different preemption issues more akin to the Arizona case. Of course, in the Arizona case the problem was over-aggressive enforcement.

CHIEF JUSTICE GANTS: This is a stamp legislation, which is saying we don't want law enforcement officers to at all be involved in this.

MR. PRESS: -- would not cooperate.

CHIEF JUSTICE GANTS: How would that involve a preemption issue?

MR. PRESS: Well, that would be an affirmance by the General Court to not cooperate in any manner with --

CHIEF JUSTICE GANTS: Oh, no. No. I'm just saying not -- didn't say not cooperate, they simply would say that do not authorize the arrest of these individuals which is the issue before us today.

MR. PRESS: So the overdetention?

CHIEF JUSTICE GANTS: The -- what you have conceded is effectively an arrest.

MR. PRESS: Yes.

CHIEF JUSTICE GANTS: With regard to a civil immigration matter, they would say we do, we express -- if there was any doubt before we make it quite clear that we do not grant state law enforcement officers that authority. They do not have the authority to make those arrests.

They can continue to call up ICE and say in my example, at 2:00 p.m. we're going to release him if you wish to be here you -- he'll be released at that time. That's fine. But the state legislature in my hypothetical

says we do not wish to grant state law enforcement officers that authority.

Does that -- is your position same that the state legislation cannot do that? Or is it your view that it can?

MR. PRESS: Well, depending on the specifics of your hypothetical I don't want to quarrel with it. I think that that would probably be okay under the currently existing federal case law. If that were simply a prohibition on the overdetention level of cooperation.

CHIEF JUSTICE GANTS: So you're saying then that this inherent authority is essentially an implicit, that the legislation implicitly or through some other means has implicitly given that authority that we must discern something that the legislation has done which has given them that authority.

MR. PRESS: Well, yes. That's why it's inherent. It's -- and that's sort of --

CHIEF JUSTICE GANTS: You say inherent. Inherent in what? Inherent in our Constitution, inherent in natural law, where does the inherency come from?

MR. PRESS: It's within the Constitution itself and the concept of sovereignty that was at play in the eighteenth and nineteenth centuries. It's more --

CHIEF JUSTICE GANTS: And where, point to me where in

John Adams' Constitution we should look for that.

MR. PRESS: Well, that's not there specifically from my understanding. Just as it's not specifically in the federal Constitution either. The concept of sovereignty and the preliminary power, authority that's the basis for federal immigration authority has been read in simply as a matter of understanding of what sovereignty was derived from the people, which is in the Massachusetts Constitution and is in the United States Constitution.

CHIEF JUSTICE GANTS: All right. Thank you.

MR. PRESS: No further questions. Thank you.

(End of requested portion.)

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