

July 17, 2014

Mr. Donald W. Kleine  
Douglas County Attorney  
909 Civic Center  
Omaha, Nebraska 68183-0406

**Re: Recent Federal Court Decision Finding it Unlawful for a Sheriff's Department  
to Honor ICE Detainer Requests**

Dear Mr. Kleine:

We are writing to inform you of an important ruling by a federal court, which concluded that detention pursuant to a U.S. Immigration and Customs Enforcement (“ICE”) detainer request (i.e., “ICE Hold”) violated the Fourth Amendment of the U.S. Constitution. In response to this ruling, and as of the date of this letter, over a hundred counties and cities in the States of Oregon, Washington, Colorado, California, New Mexico, Kansas, Minnesota, Wisconsin, Illinois, Arizona, Louisiana, Florida, Pennsylvania, Maryland, New Jersey, Connecticut, Massachusetts, and Rhode Island have decided to stop holding individuals on ICE detainers to avoid damages liability for complying with such requests.

In fact, Hall County Nebraska was just the latest such county to cease honoring ICE detainers. *See* Hall County Right to No Longer Accept Detainers, July 16, 2014, available at [http://www.theindependent.com/opinion/editorial/hall-county-right-to-no-longer-accept-detainers/article\\_fc0383a4-0c9f-11e4-983a-001a4bcf887a.html](http://www.theindependent.com/opinion/editorial/hall-county-right-to-no-longer-accept-detainers/article_fc0383a4-0c9f-11e4-983a-001a4bcf887a.html).

We ask that you follow suit and stop complying with ICE detainers, unless or until such detainers are accompanied by a judicial determination of probable cause to satisfy the requirements of the Fourth Amendment.

On April 11, 2014, the federal district court in Portland, Oregon issued a decision in the case of *Maria Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST (attached). The Court held that Clackamas County had violated the constitutional rights of Ms. Miranda-Olivares by detaining her without probable cause when it chose to hold her on an ICE detainer (Form I-247). The Court held that the County was liable for damages to Ms. Miranda-Olivares under 42 U.S.C. § 1983 and that the amount of damages would be set at a later date.

Significantly, the court held that continuing to detain Ms. Miranda-Olivares solely on the ICE detainer after she was eligible for release on her criminal charges constituted a new arrest, and thus required probable cause. The court concluded that the detainer did not demonstrate

probable cause to detain her. The decision makes clear that local law enforcement agencies that detain individuals on the sole authority of an ICE detainer violate the Fourth Amendment, unless there has been an independent judicial finding of probable cause to justify the detention.

ICE detainers are generally not supported by judicial determinations of probable cause; rather, they are issued by single immigration enforcement officers without any judicial involvement.<sup>1</sup> This lack of basic Fourth Amendment protections in the ICE detainer context explains why ICE has mistakenly placed so many detainers on U.S. citizens and non-removable immigrants.

In addition, the court decision in *Miranda-Olivares* specifically rejected Clackamas County's argument that the county was required to comply with ICE detainers. The court pointed to internal and public statements from ICE demonstrating that the agency recognized that ICE detainers are not mandatory but merely voluntary requests. ICE has recently reaffirmed its position that law enforcement agencies are not legally obligated to abide by detainers in a letter to Representative Adam Smith (attached). This position is also consistent with a ruling from the U.S. Court of Appeals for the Third Circuit in *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir., Mar. 4, 2014), which concluded that ICE detainers were voluntary not mandatory.

**Following the *Miranda-Olivares* decision, any law enforcement agency that maintains a policy and/or practice of detaining individuals on ICE detainers not supported by a judicial probable cause finding violates the Fourth Amendment and may be held liable for damages under 42 U.S.C. § 1983.**

In response to the *Miranda-Olivares* ruling, and as of the date of this letter, numerous counties have issued moratoriums on complying with ICE detainers, and more are expected to follow suit. *See* Associated Press, *Washington counties dropping immigrant jail holds*, Seattle Post-Intelligencer, Apr. 30, 2014; Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES, Apr. 18, 2014 (reporting that nine Oregon counties announced just days after the *Miranda-Olivares* ruling that they would no longer comply with ICE detainers).

For example, the San Miguel County Sheriff's Office in Colorado announced that under its new policy "ICE agents will be required to file an arrest warrant, signed by a U.S. Magistrate, with the Sheriff's office before the Sheriff will detain a federal prisoner." Press Release, San Miguel County<sup>2</sup> Sheriff's Office, SMSO Changes Policy on Detaining Suspected

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<sup>1</sup> Courts have repeatedly held that ICE detainers are not warrants. *Morales v. Chadbourne*, 2014 WL 554478, \*16 ("Warrants are very different from [ICE] detainers"); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) ("A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency advise [ICE], prior to release of the alien, in order for [ICE] to arrange to assume custody."). *See also Buquer*, No. 11-0708, 2013 WL 1332158 (S.D. Ind. Mar. 28, 2013) (describing seizures based on ICE detainers as warrantless arrests).

<sup>2</sup> As the Court explained in *Miranda-Olivares*, the detainer, on its own, did not demonstrate probable cause, particularly because its stated purpose was to initiate an investigation. ICE has made clear in other contexts that it does not require agents to have probable cause to believe an individual is subject to removal when they issue

Undocumented Immigrants (Apr. 29, 2014). Similarly, the Walla Walla, Washington Sheriff’s Department policy reportedly states it “shall cease to hold individuals in custody when the only authority for such custody is a request contained in a DHS ICE immigration detainer.” *See* Associated Press, *Washington counties dropping immigrant jail holds*, Seattle Post-Intelligencer, Apr. 30, 2014.

Hall County Corrections Director, Fred Ruiz, after consulting with Chief Deputy Hall County Attorney Jack Zitterkopf, jail attorney Jerry Janulewicz, and Vince Valentino, attorney for the county’s insurance carrier, reportedly concluded that if the county continued to honor ICE holds, it “could run the risk of violating the constitutionally guaranteed civil rights of noncitizens apprehended and detained beyond the statutory time allowed for their offenses.” *See* Hall County Right to No Longer Accept Detainers, July 16, 2014, available at [http://www.theindependent.com/opinion/editorial/hall-county-right-to-no-longer-accept-detainers/article\\_fc0383a4-0c9f-11e4-983a-001a4bcf887a.html](http://www.theindependent.com/opinion/editorial/hall-county-right-to-no-longer-accept-detainers/article_fc0383a4-0c9f-11e4-983a-001a4bcf887a.html)

These cities and counties join Philadelphia, Pennsylvania, and Champaign, Illinois, which—prior to the *Miranda-Olivares* ruling—had already banned compliance with immigration detainers absent a judicial probable cause determination. *See* Michael A. Nutter, Mayor, Executive Order No. 1-14, available at [http://www.ilrc.org/files/documents/philadelphia\\_executive\\_order.pdf](http://www.ilrc.org/files/documents/philadelphia_executive_order.pdf); Letter from Champaign County Sheriff Dan Walsh to ICE, March 8, 2012, available at <http://bit.ly/1fUeB5W>.

Because we understand that your agency currently has a policy or practice of detaining community members on ICE detainers without requiring a finding of probable cause by a judicial officer,<sup>3</sup> we request that you change your policy and practice to ensure that the constitutional rights of community members are not violated. We believe that only a policy that requires a judicial finding of probable cause that individuals are subject to removal from the United States before you deprive them of their liberty is sufficient to meet the minimum constitutional requirements. Please let us know if we can answer any questions. We look forward to your response.

Sincerely,

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detainers. In a recent federal lawsuit about the wrongful detention of a U.S. citizen on an ICE detainer, ICE’s attorney told the district court that ICE uses detainers as “a stop gap measure. . . to give ICE time to investigate and determine whether somebody’s an alien, and/or subject to removal, before local law enforcement releases that person from custody.” Oral Argument Transcript, ECF #79, *Galarza v. Szalczyk*, No. 10-06815 (E.D. Pa. Jan. 10, 2012). *See also* Brief of Federal Defendants, *Ortega v. ICE*, No. 12-6608 (6th Cir. filed Apr. 10, 2013) (stating, in a case involving a U.S. citizen held on a detainer, “the purpose of issuing the detainer was to allow [ICE] time to conduct an investigation that could have discovered whether Plaintiff-Appellant was removable or was, in fact, a U.S. citizen.”) (emphasis in original).

<sup>3</sup> Indeed, in response to the public records request made by the ACLU of Nebraska, we see that the Douglas County Department of Corrections honors ICE Detainer requests, and does so without payment from ICE for the full 48 period, excluding weekends, during which the request is in effect.



Immigration Legal Services, Education and Advocacy

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**/s/ Charles S. Ellison**

**Legal Director**

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Enclosures

CC: Mark Foxall, DCDC Director