



October 7, 2014

Gina Carey, Executive Director  
Prosecutors Advisory Council  
Office of the Attorney General  
1024 Capital Center Drive  
Frankfort, KY 40601-8204  
email: gcarey@prosecutors.ky.gov

*Via first-class and electronic mail*

RE: Recent Efforts By ICE To Enlist Aid Of Kentucky Prosecutors

Dear Director Carey,

On behalf of the AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, we write to alert the Prosecutors Advisory Council of recent efforts by the Immigration and Customs Enforcement agency (ICE) to enlist the aid of prosecutors in convincing judges to include in their release-from-custody orders language that, we believe, would have the effect of unlawfully detaining criminal defendants in affected cases. For the reasons that follow, we believe that any effort by Kentucky's Commonwealth and County Attorneys to advocate for the inclusion of such language is inconsistent with their ethical obligations under Kentucky's Rules of Professional Conduct. And we further believe that the suggested language, if included, would result in significant and widespread civil liberties violations throughout the Commonwealth. Thus, we respectfully request that the Prosecutors Advisory Council take immediate action to alert Kentucky's Commonwealth and County Attorneys about this issue, and to provide those offices with appropriate guidance so that they may avoid improperly advocating for the inclusion of language that would have the effect of violating defendants' civil liberties.

Specifically, recent court decisions have clarified that ICE detainers (I-247) are *non-mandatory requests* by the federal government that do not compel local

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AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY  
315 GUTHRIE STREET SUITE 300 LOUISVILLE, KY 40202-3820 | T 502-581-9746 | F 502-589-9687 | WWW.ACLU-KY.ORG

officials to act<sup>1</sup>, *nor do they provide any independent legal basis to support an individual's detention.*<sup>2</sup> On June 25, 2014, the ACLU OF KENTUCKY sent a letter to Kentucky's jailers in which we highlighted these recent decisions, recommended that policy changes be made to avoid detaining individuals solely on the basis of ICE detainers, and offered to assist in drafting new policies consistent with our recommendation. Following receipt of our letter, many jailers contacted the Kentucky Association of Counties (KACo) to inquire about our analysis and conclusions. And as a result, KACo issued its own recommendation on September 15th, ostensibly agreeing with the ACLU OF KENTUCKY, stating that Kentucky's "jails [should] not hold a person beyond their release date solely on the basis of an ICE detainer *as the county and jailer could be held liable for unlawful imprisonment.*" (Emphasis added).

However, in an apparent attempt to combat the growing reluctance of jail officials to comply with immigration detainers, ICE Agent John T. Cloyd has solicited the assistance of Kentucky prosecutors to advocate for including language in courts' release-from-custody orders that would have the same effect. Specifically, Agent Cloyd contacted the offices of the Jefferson County Commonwealth and County Attorneys in August requesting that they seek to convince courts to include language in release-from-custody orders (in cases where an I-247 has been issued) that would command jail officials to release those defendants *only to the custody of ICE*. According to Agent Cloyd, doing so would ensure that Louisville Metro Department of Corrections (LMDC) would detain those individuals until such time as ICE could mobilize its limited resources to pick-up the individual. *See attached EMAIL FROM JOHN T. CLOYD (Aug. 8, 2014)*. Moreover, Agent Cloyd further noted that "[o]ther counties such as Oldham and Shelby are" *already including such language on their release-from-custody orders. Id.* at 3.

Fortunately, Jefferson County's Commonwealth and County Attorneys declined to participate in Agent Cloyd's scheme citing the potential liability that may flow from their advocating for the detention of individuals beyond that which is

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<sup>1</sup> *Galarza v. Szalcyk*, 745 F.3d 634, 645 (3rd Cir. Mar. 4, 2014) ("... 8 C.F.R. § 287.7 *does not compel* state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as *requests* to local LEAs.") (emphasis added). *See also Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *Morales v. Chadbourne*, CA 12-301-M, 2014 WL 554478 \*15 (D.R.I. Feb. 12, 2014) (denying Rhode Island Department of Corrections' motion to dismiss in which RIDOC asserted that it was required to comply with immigration detainers and thus not liable for any unlawful detention that resulted); *Printz v. United States*, 521 U.S. 898, 925-35 (1997) (Tenth Amendment bars the federal government from commanding state officers to do federal business).

<sup>2</sup> *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014).



authorized by the state criminal charges. *See attached* EMAIL FROM THOMAS B. WINE (stating that the Jefferson Commonwealth Attorney's office "will not request judges include the 'hold for ICE' language" suggested by Agent Cloyd)(August 8, 2014); *see also attached* EMAIL FROM SUSAN ELY (explaining that ICE detainers are merely "civil requests" and directing Assistant County Attorneys to "NOT ... request that judges write on a defendant's release Order release to ICE only")(emphasis in original)(Sept. 18, 2014).<sup>3</sup> However, the suggested "release to ICE only" language, if utilized in other counties, has obvious and alarming implications for individuals' civil liberties, including their rights under the Fourth and Fourteenth Amendments. Moreover, we believe that prosecutors' and judges' ethical duties would likely preclude them from advocating for the inclusion, or adoption of such language given that the release condition would be unsupported by any legal basis within the court's jurisdiction. *See* KRPC 3.130-3.1 (prohibiting attorneys from asserting an issue absent "a basis in law and fact ... that is not frivolous"). *See also* IN RE THE MATTER OF: REBECCA S. WARD, *Agreed Order of Suspension* (JCC May 12, 2014)(finding violation of judicial canons for, *inter alia*, detaining individuals in two cases "without legal basis ... for U.S. Immigration and Customs Enforcement").

Because of the importance of this issue upon individuals' civil liberties in the Commonwealth, particularly in light of Agent Cloyd's apparent assertion that *two counties are already engaging in this practice*, the ACLU OF KENTUCKY urges the Prosecutors Advisory Council to take action at its October 16th meeting to recommend that Kentucky's prosecutors avoid (or immediately discontinue) advocating for courts to include "release to ICE only" language in their release-from-custody orders.

Thank you in advance for your consideration and I look forward to the Council's decision and your reply.

Sincerely,



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William E. Sharp, Legal Dir.  
Enid Trucios-Haynes, Board Pres.  
Kate Miller, Program Dir.  
ACLU OF KENTUCKY

cc: Members, Prosecutors Advisory Council  
Chief Justice John Minton, Supreme Court of Kentucky  
Ed Monahan, Dept. of Public Advocacy  
John Cloyd, ICE

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<sup>3</sup> The enclosed emails cited in this letter were obtained from the Office of the Jefferson County Attorney on October 3, 2014 pursuant to an Open Records Act request.

## Geiser, Ingrid

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**From:** Cloyd, John T <John.T.Cloyd@ice.dhs.gov>  
**Sent:** Friday, August 08, 2014 11:05 AM  
**To:** Geiser, Ingrid  
**Cc:** Wells, Molinda  
**Subject:** ICE Detainers  
**Attachments:** image001.png; 20140807114851139.pdf

EMAIL I WAS TALKING ABOUT: I did send this to Susan Fly too. I was hoping she would forward it to everyone.

LMDC (recently) only honors ICE detainers for 2-3 hrs. ICE Louisville is a 8a-4p operation. When LMDC calls or emails ICE Louisville on a Friday night for one of us to come get a subject with an ICE detainer, chances are they get released. Our holding facilities (BOONE OR GRAYSON CO) are at least 1 1/2 to 2 hrs (one way) from each of our houses. It just makes it impossible to stop what we are doing to go get a subject with that kind of time frame.

Attached is a Release from Custody form. It came from Circuit Court. Someone wrote on the bottom of it "Release to ICE only" and LMDC honored that. They would not let her go until I picked her up. I was wondering if you could forward this email to ALL the prosecutors; if it is something you all are willing to do. If a subject has an ICE detainer, and the prosecutors could ensure this is written on the custody release form, ICE would be able to app their intended subjects and hopefully remove some of these criminals.

If there are any questions about whether a subject has an ICE Detainer or not, they could call me 312-498-2165 or the LMDC websites shows ICE holds: [mugshots.louisvilleky.gov](http://mugshots.louisvilleky.gov)

EXAMPLE:





2005 - 2011  
LOUISVILLE, KY 40202  
LMD0100010001@LOUISVILLEKY.GOV

Home Report

Booking # : 201423131 || Booking Dt/Tm - 02/06/2014 13:24

Inmate Details	Physical Detail	
<b>GRACIDA, OSCAR</b>	Hair Shade : Dark	Booking # :
Inmate No : 00587606	Facial Hair : GOATEE	Booking Date-Time
Gender : MALE	Eye Color : Brown	Release Date-Time
BirthDate : ██████████	Complexion : LIGHT BROWN	
Age : 29	Hair Length : Short	
Race : Hispanic		
BirthPlace :		
Height(ft.) : 5'10"		
Weight(lbs.) : 200		

Charge Detail :

Charge Code	Description	Case Number	Amount	Balance
02407	HARASSMENT - PHYSICAL CONTACT - NO INJURY	13M017802	CASH	\$500.00
02906	SERVING BENCH WARRANT FOR COURT	13M017802		
89098	IMMIGRATIONS AND NATURALIZATION DETAINER	*****ICE HOLD*****		

Back to Search

If this could be done, I would greatly appreciate it. Other counties such as Oldham and Shelby are doing this too.

Thank you in advance,

John Cloyd

312-498-2165

-----Original Message-----

From: [blank@blank.nul](mailto:blank@blank.nul) [mailto:[blank@blank.nul](mailto:blank@blank.nul)]

Sent: Thursday, August 07, 2014 11:36 AM

To: Cloyd, John T

Subject: Message from "RNP00267332FCB9"

This E-mail was sent from "RNP00267332FCB9" (Aficio MP C5501).

Scan Date: 08.07.2014 11:48:51 (-0400)

Queries to: [blank@blank.nul](mailto:blank@blank.nul)

## Ely, Susan

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**From:** Hardesty, Julie  
**Sent:** Wednesday, August 13, 2014 9:29 AM  
**To:** Ely, Susan  
**Subject:** FW: ICE Detainers  
**Attachments:** 20140807114851139.pdf

fyi

**From:** Thomas B. Wine [<mailto:tbwine@louisvilleprosecutor.com>]  
**Sent:** Friday, August 08, 2014 5:45 PM  
**To:** O'Connell, Mike; Hardesty, Julie  
**Cc:** Mark Miller  
**Subject:** FW: ICE Detainers

Mike and Julie,

I am forwarding to you a copy of an email from John Cloyd. I believe he sent the same email to Susan Ely. I'm only resend his email to put my response in context. I also discussed the matter with Director Mark Bolton of LMDC. Mr. Bolton had several concerns about the request that we encourage Judges to include "Hold for Ice" on any release involving our cases. I understand that ICE operates under some tough circumstances. However, until further notice, I have instructed our prosecutors not to ask judges to include any language that orders an inmate be held for pick up by ICE.

In response to his email, I sent the following message:

Mr. Cloyd,

I received a copy of the email you sent to some of our prosecutors as to ICE detainees and prisoners in the Louisville Metro Department of Corrections who are about to be released on bond, serve out of a sentence, or other forms of release. While I am not unsympathetic to the constraints you are faced with, I am also concerned about what liabilities we may face when requesting individuals be held beyond the release on state charges. I have been informed there is pending litigation against Metro Corrections for failing to timely release an ICE detainee.

Until there is further review by our office and discussions with the concerned parties, the Jefferson County Office of Commonwealth's Attorney will not request judges include the " hold for ICE" language you noted in the release order signed by Judge Charles Cunningham.

Perhaps I'll see you at the St. Joe festival.

Have a great weekend.

Tom

**Thomas B. Wine**

COMMONWEALTH'S ATTORNEY

Office of Commonwealth's Attorney

514 W. Liberty Street

Louisville, Kentucky

40202

(502) - 595-2340

(502)-595-4650 (FAX)



**Ely, Susan**

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**From:** Ely, Susan  
**Sent:** Thursday, September 18, 2014 12:36 PM  
**To:** Arnold, Carey; Brown, Chris M; Cooper, Roger; Davis, Karen; Dyke, Ann S; Earley, Adrienne; Fleck, Robert; Geiser, Ingrid; Jones, Susan M; Metzmeier, Jeff; Richwalsky, Paul W; Schroering, Rebecca F.; Smith, Claudia; Ward, John P; Welch, Matthew; Wyman, Benjamin; Frazier, Tracey; Higgins, James; Howard, Robbie J; Juanso, Tommy; Porter, Joshua R; Baltimore, Deandrea L; Cooper, Jackson C; Gaines, Lonita K; Lafollette, John; Lile, Ashley R.; Pierce, Jillian; Pyc, Joanne; Southard, Cristin A; 'Yannelli, Danielle'; Ambrose, Anthony; Barry, Mark D; Bergeron, Andre L; Berman, Sandy L; Black, Brian; Cooley, Amelia; Eckert, Martha; Fields, Elizabeth; Hartley, Allison D; Henault, Cherry G; Hilbert, Stephanie; Hoerter, Patrick C; Langford, Lisa; Manning, Pete F; McCauley, Tim S; Meihaus, Zac; Miller, Andrew A; Miller, Norma C; Niemi, Bruce A; Price, Karl; Rochester, Pamela J; Ryan, Jonathan C; Schneider, Josh; Shunnarah, Nader G.; VanBogaert, Vivian; Weatherholt, Emily T; Wolf, Amber B; Wolford, Jude  
**Cc:** Hardesty, Julie  
**Subject:** ICE Detainers

Good afternoon.

In early August, John Cloyd from ICE sent me an email requesting that I ask staff to begin requesting that judges write on jail Release Orders "Release to ICE only" for Defendants who have ICE holds. Mr. Cloyd was concerned that ICE detainers only authorize Corrections to hold the person for up to 48 hours after the state commitment ends, and there are times, particularly on weekends or when he and his co-workers are out of county, when meeting that deadline is difficult or even impossible. Mr. Cloyd sent an example of an Order from Circuit Court where the Judge wrote that exact language on the Release. Before making that request to you, we consulted with Corrections and Steve Durham for an opinion. After that consultation, we concluded we could and should not grant Mr. Cloyd's request. Thus, no email to staff was sent.

We have been informed that there is pending litigation against Corrections for failing to timely release an ICE detainee once his state commitment ended. Without getting into much detail, the ICE holds are not criminal detainers- they are civil "requests" that the agency having custody of the named person hold the individual for up to 48 hours after the state commitment ends so ICE may take that time to determine whether the individual will be taken into ICE custody.

Even though you were never directed to begin doing so, I want to make certain that you know NOT to request that judges write on a defendant's release Order "release to ICE only."

Please let me know if you have any questions.

**Susan Ely**  
**Director of Criminal Prosecution**

**Office of**  
**Mike O'Connell**  
**Jefferson County Attorney**

