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Protections for Non-Citizens in Custody

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Local enforcement of federal immigration law has become a focal point of this presidential administration. The current administration has directed state and local law enforcement agencies to help federal immigration officers in their immigration enforcement efforts. Immigration and Customs Enforcement (ICE) agents frequently visit county jails and state prisons trying to identify individuals that may be subject to deportation. The state of California has enacted some due process protections for non-citizens in custody.

48 Hour Custody Limitation

If a state prison or county jail chooses to comply with an immigration detainer request, it is only allowed to detain an individual for 48 business hours beyond the time the individual was set to be released from custody. If immigration officers do not take custody within the 48-hour period, the local law enforcement agency must release them. An attorney can contact the detaining authority to request that they release the individual or may file a habeas corpus petition in state court to compel the detaining authority. Failing to release an individual after the 48-hour period may subject the detaining authority to civil lawsuits.

SB 2792 Transparent Review of Unjust Transfers and Holds (TRUTH) Act

The TRUTH Act, signed by Governor Jerry Brown in September 2016, is intended to promote due process during interrogations by immigration officials. Under the TRUTH Act, if ICE issues an immigration detainer for an individual in custody they must also provide a copy of the detainer to the individual and/or their attorney. If the law enforcement agency has informed ICE of the intended release date of someone in custody, they must also provide that same notice in writing to the individual and their attorney. Additionally, local law enforcement agencies are instructed that if ICE requests to interview an inmate, the law enforcement agency must provide a written consent to the individual which states, “the purpose of the interview, that the interview is voluntary, and that they may decline to be interviewed or may choose to be interviewed only with his or her attorney present.”

AB 4 Transparency and Responsibility Using State Tools (TRUST) Act

The TRUST Act (enacted on January 1, 2014) establishes that law enforcement “shall have discretion to cooperate with federal immigration officials by detaining an individual on the basis

of an immigration hold after that individual becomes eligible for release from custody”. The TRUTH Act directs state and local law enforcement agencies to limit the use of local resources and only utilize its discretion to enforce a detainer if the individual in custody has ever been convicted of a serious or violent felony, a felony punishable by state prison, or other crime listed in the statute (ex: assault, forgery, felony possession of controlled substances, burglary). Prior to enactment of the TRUST Act, law enforcement agencies enforced detainers against individuals arrested for simple possession of a controlled substance, DUI, or minor traffic violations; even if the charges were dropped.

An immigration detainer is merely a request. A state or local law enforcement agency is not required to hold an individual for immigration officers. State and local law enforcement agencies have discretion to choose whether they want to use their resources to hold an individual for immigration officers for 48 hours.

The Department of Homeland Security started to publish the Weekly Declined Detainer Outcome Report. The report lists which law enforcement agencies did not comply with immigration detainer requests. Santa Barbara County was listed on DHS’s first published report for failing to comply with one detainer request. The Weekly Declined Detainer Outcome Report fails to list how many detainer requests were issued that week, or for how long the individual was held in custody prior to release.

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