



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Ken Stolle  
Sheriff, City of Virginia Beach  
Post Office Box 6098  
Virginia Beach, Virginia 23456-9073

Dear Sheriff Stolle:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-205 of the *Code of Virginia*.

## Issues Presented

You seek guidance regarding requests from the federal Department of Immigration and Customs Enforcement (“ICE”) that a local or regional law enforcement agency continue to detain otherwise releasable prisoners because of the person’s immigration status. These requests are commonly known as “ICE detainees.” Specifically, you ask whether the local agency is required to honor an ICE detainer, has discretion to honor it or not, or alternatively, whether the agency is legally obligated to release the prisoner despite receipt of the detainer. You make these inquiries with respect to both adult and juvenile detainees.

## Response

It is my opinion that an ICE detainer is merely a request. It does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency’s receipt of an ICE detainer. If a juvenile is being held pursuant to an indeterminate commitment, the Department of Juvenile Justice (“DJJ”) may exercise its discretion to hold the juvenile until ICE officials assume custody, provided DJJ does not hold the juvenile longer than thirty-six continuous months or past his twenty-first birthday.

## Applicable Law and Discussion

As governed by federal regulation 8 C.F.R. § 287.7, an ICE detainer is a notice issued by an authorized immigration officer that “serves to advise another law enforcement agency that the Department [the Department of Homeland Security, hereinafter “DHS”] seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”<sup>1</sup> The detainer operates as “a request that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or

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<sup>1</sup> 8 C.F.R. § 287.7(a).

impossible.”<sup>2</sup> “Upon determination by [DHS] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by [DHS].”<sup>3</sup>

From the plain wording of 8 C.F.R § 287.7, a detainer serves as only a notice or request. There is no language either imposing a legal obligation on the recipient agency to detain or creating authority to detain. Moreover, federal law provides no enforcement mechanism to ensure compliance by agencies that do not honor such detainer requests. Although § 287.7 contains the mandatory word “shall,” the use of that word in context “serves only to inform an agency that otherwise decides to comply with an ICE detainer that it should hold the person no longer than 48 hours.”<sup>4</sup> Thus, the use of the word “shall” in this context does not change the nature of an ICE detainer from a request to a mandatory detention order. To the contrary, it limits the amount of time a prisoner not otherwise detained may be detained if an ICE detainer is honored.

Uniform authority from several federal courts indicates that ICE detainers constitute mere requests and neither obligate nor authorize law enforcement agencies to detain a person who is the subject of a detainer. Most notably, in a case decided in April, 2014, the United States Court of Appeals for the Third Circuit explicitly ruled that “8 C.F.R § 287.7 does not compel state or local [law enforcement agencies] 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 [law enforcement agencies].”<sup>5</sup> Other federal courts of appeals similarly have treated ICE detainers as requests, referring to them almost exclusively as such.<sup>6</sup> In addition, the United States Court of Appeals for the Fourth Circuit, which encompasses the Commonwealth of Virginia, has described ICE detainers as “a mechanism by which federal immigration authorities may request that another law enforcement agency temporarily detain an alien ‘in order to permit assumption of custody by [DHS;]’”<sup>7</sup> and the First Circuit has explained further that a “detainer is not, standing alone, an order of custody . . . [but] serves as a request that another law enforcement agency notify the INS before releasing an alien from detention.”<sup>8</sup>

Moreover, as the Third Circuit found, ICE and its precursor - the Immigration and Naturalization Service (“INS”) - have “consistently construed detainers as requests rather than mandatory orders.”<sup>9</sup> In 1994, INS wrote that, “a detainer is the mechanism by which the Service requests that the detaining agency notify the Service of the date, time, or place of release of an alien who has been arrested or convicted under

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<sup>2</sup> *Id.*

<sup>3</sup> 8 C.F.R. § 287.7(d).

<sup>4</sup> *Galaraza v. Szalczyk*, 745 F.3d 634, 640 (3rd Cir. 2014).

<sup>5</sup> *Id.* at 645.

<sup>6</sup> *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013) (noting that federal immigration officials issue detainers to local LEAs “asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released”); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012) (noting that “ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE’s custody so that he could be removed from the United States”); *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (describing the procedure under § 287.7 as “an informal [one] in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person’s death, impending release, or transfer to another institution”).

<sup>7</sup> *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009).

<sup>8</sup> *United States v. A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004).

<sup>9</sup> *Galaraza*, 745 F.3d at 641.

federal, state, or local law.”<sup>10</sup> More recently, during a congressional briefing in 2010, ICE representatives stated that “[local [law enforcement agencies] are not mandated to honor a detainer, and in some jurisdictions they do not.”<sup>11</sup> On its website, ICE currently describes a detainer simply as a notice informing a law enforcement agency that ICE intends to take custody of a person in that agency’s custody<sup>12</sup> and further serves as a request to the agency for information about an impending release so that ICE may take custody before the release and for limited continued custody of a prisoner who otherwise would be released.<sup>13</sup> As acknowledged by prior Opinions of this Office, interpretations of a law by an agency charged with administering the law, unless clearly wrong, are afforded great weight and deference.<sup>14</sup>

Based on the foregoing authorities, I conclude that an ICE detainer is merely a request and does not either impose a mandatory obligation or grant legal authority for a law enforcement agency to maintain custody of an individual who is otherwise subject to immediate release from local or state custody.

A person has a constitutional liberty interest in not being imprisoned longer than he was sentenced by the sentencing court.<sup>15</sup> Accordingly, an adult prisoner who is eligible for release from custody must be released at his eligible date notwithstanding the agency’s receipt of an ICE detainer.

With respect to a person charged as a juvenile and sentenced to confinement in a juvenile correctional facility, a court may impose, based on the attendant circumstances, one of four different types of sentences. The authority of the facility to hold the juvenile following receipt of an ICE detainer depends on which type of sentence is imposed.

Of the four types of sentences for juvenile offenders, three entail sentences for fixed periods of time.<sup>16</sup> A juvenile serving a term of confinement at a secure local detention center for a fixed sentence will

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<sup>10</sup> *Id.* (internal citation omitted).

<sup>11</sup> *Id.* at 642 (internal footnote omitted).

<sup>12</sup> ICE, ICE Detainers: Frequently Asked Questions, <http://www.ice.gov/factsheets/detainer-faq.htm> (last visited Nov. 13, 2014).

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g.*, 2002 Op. Va. Att’y Gen. 293, 294 and opinions cited therein.

<sup>15</sup> *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249-52 (1972). Incarceration beyond the termination of one’s sentence may state a claim under the Eighth Amendment. *Golson v. Dep’t of Corr.*, 914 F.2d 1491 (4th Cir. 1990). *See also Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at \*7 (D. Or. Apr. 11, 2014); *Jordan v. Shands*, 255 Va. 492, 497, 500 S.E. 2d 215, 218 (1998) (holding that the direct restraint by one person of the physical liberty of another without adequate legal justification is known in Virginia as false imprisonment, and it consists in imposing by force or threats an unlawful restraint upon a man’s freedom of locomotion).

<sup>16</sup> First, the juvenile offender may be sentenced to a specific term of confinement in a local secure detention center, up to, but not exceeding, thirty days. *See* VA. CODE ANN. §§ 16.1-278.8(16) (Supp. 2014) & 16.1-284.1 (Supp. 2014). Second, a juvenile offender may be sentenced to serve in a post-dispositional program at a local secure detention center whereby the court imposes a specific term of confinement, which shall “not exceed six months from the date the order is entered.” Section 16.1-284.1. These types of sentences are subject to monthly mandatory review hearings, which may result in the required release of the juvenile, with the remaining sentence obligation being eliminated. Section 16.1-284.1(C). Third, when the circumstances so dictate, a juvenile must be committed to DJJ’s custody as a serious offender. Sections 16.1-278.8(17) & 16.1-285.1 (2010). For this third type of sentence, the committing court “shall specify a period of commitment not to exceed seven years or the juvenile’s twenty-first birthday, whichever shall occur first. Section 16.1-285.1(C). The juvenile “shall not be released at a time earlier than that specified by the court in its dispositional order,” unless otherwise ordered by the court following a release and review hearing. Section 16.1-285.1(F). Thus, under this third type of sentence, the release of a serious offender will occur only under one of

have a definite release date, whether based on a sentence as initially imposed or a subsequent court order directing his immediate release from custody. For the same reasons that prohibit the detention of an adult inmate past his release date, a juvenile serving a fixed sentence cannot be held past the date upon which he otherwise would be released from custody.

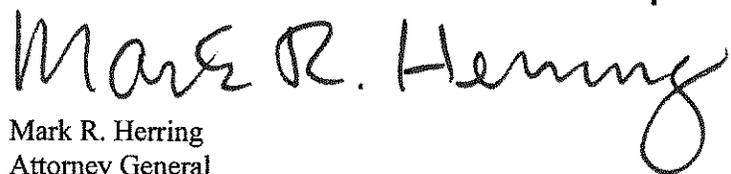
The fourth possible type of sentence for juveniles, however, does not entail a fixed term: a juvenile offender may be committed to the custody of DJJ to serve an indeterminate commitment,<sup>17</sup> the duration of which is not specifically fixed by court order. Rather, "all commitments . . . shall be for an indeterminate period having regard to the welfare of the juvenile and the interests of the public . . ." <sup>18</sup> For an indeterminately committed juvenile, DJJ "shall have the authority to discharge any juvenile or person from its custody . . . in accordance with policies and procedures established by the State Board and with other provisions of law."<sup>19</sup> The only constraints on this discretion are that "no juvenile committed . . . shall be held or detained longer than thirty-six continuous months or after such juvenile has attained the age of twenty-one years,"<sup>20</sup> otherwise, the length of an indeterminate commitment is "a matter resting solely within the discretion of [DJJ]."<sup>21</sup> Because a juvenile serving an indeterminate commitment is held pursuant to DJJ's discretion, DJJ may exercise its discretion to hold the juvenile until ICE officials assume custody of him, provided doing so does not cause DJJ to hold the juvenile beyond thirty-six continuous months or past his twenty-first birthday.<sup>22</sup>

### Conclusion

It is my opinion that an ICE detainer is merely a request. It does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency's receipt of an ICE detainer. If a juvenile is being held pursuant to an indeterminate commitment, the DJJ may exercise its discretion to hold the juvenile until ICE officials assume custody, provided DJJ does not hold the juvenile longer than thirty-six continuous months or past his twenty-first birthday.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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three specific circumstances: (1) the juvenile has served the duration of the specific period of confinement; (2) the juvenile has reached his twenty-first birthday; or (3) the committing court has ordered DJJ to release the juvenile from custody. Because none of these three types of sentences involve discretionary determinations on the part of DJJ, DJJ has no authority to continue to hold the juvenile past the set release date. In like manner, DJJ cannot hold a juvenile in a post-dispositional program past the date that he would otherwise have been released from custody.

<sup>17</sup> Section 16.1-278.8(14).

<sup>18</sup> Section 16.1-285 (2010).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Harlow v. Clatterbuck*, 230 Va. 490, 494, 339 S.E.2d 181, 184 (1986).

<sup>22</sup> Section 16.1-285.