MEMORANDUM

To **Sheriffs, Undersheriffs, Jail Administrators**

re **Compliance with federal detainer warrants**

Date **February 14, 2017**

From **Thomas Mitchell, NYSSA Counsel**

Introduction

At the 2017 Sheriffs' Winter Training Conference, Sheriffs discussed whether and to what extent federal immigration detainers and warrants should be honored by county jails. Suffolk County Sheriff Vincent DeMarco made a presentation to Sheriffs, reviewing an opinion issued by his county attorney, who concluded that a federal warrant provides sufficient probable cause to detain the person named in the warrant, and that the Sheriff could rely on the "fellow officer rule" to detain the subject of the order for the time period requested (not to exceed 48 hours, exclusive of Saturdays, Sundays and holidays). Since the Association had earlier recommended to Sheriffs, based on federal case law, that they should not honor federal detainers which requested continued custody for 48 hours, we were asked to review the latest court cases and documents and to recommend action to Sheriffs.

To complete this review, we considered the following:

1. Relevant federal court cases
2. Relevant state court cases
3. The opinion of the Suffolk County Attorney's Office to Sheriff DeMarco
4. The 2017 document issued by the New York State Attorney General, "Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions"
5. President Trump's Executive Order: Enhancing Public Safety in the Interior of the United States, dated January 25, 2017

We note, too, that Sheriffs around the country are facing the same issue. As we were preparing this memo, this article from PoliceOne.com came to our attention.

Summary of Association's Position

Two trial level New York State cases authorize detention of persons beyond their normal jail release date when the jail is presented with a federal detainer which includes an order of deportation or removal. However, almost all federal cases, both district and appellate level, have ruled that federal detainers are not sufficient authority for a jail to continue detention of the inmate because there is no probable cause that a crime has been committed. Federal courts in New York have not addressed the issue, but it would not be surprising if our federal courts followed the rulings of other federal courts around the country. Because of liability concerns, we cannot recommend that Sheriffs hold inmates for 48 hours (or longer) pursuant to such a federal detainer and order. Sheriffs should honor these federal detainers to hold inmates beyond their release date only after reviewing with their county

attorney the potential for county and Sheriff liability, as was done recently in Suffolk County.

Review of Federal Cases

Galarza v Szalczyk, US Court of Appeals 3rd Cir, 745 F3rd 634, 2014

Ernesto Galarza is a U.S. citizen who was arrested for a drug offense, posted bail, and instead of being released, was held in custody by Lehigh County, Pennsylvania, under an immigration detainer issued by federal immigration officials. Three days after Galarza posted bail, immigration officials learned that he was a U.S. citizen. The detainer was withdrawn and Galarza was released.

Galarza then filed a § 1983 action against the jail officials, and the the Third Circuit Court of Appeals held that immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal. The court noted that the federal detainer was not accompanied by a warrant, an affidavit of probable cause, or a removal order.

Although the federal trial court held that the relevant federal statute meant that detainers imposed mandatory obligations on state or local law enforcement agencies to follow such a detainer once it is received, this federal appellate court disagreed. It reviewed 8 C.F.R. § 287.7, which provides, in relevant part, as follows:

> (a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I–247, Immigration ***640** Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency. *A detainer serves to advise* another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. *The detainer is a request* that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
>
> ...
>
> (d) *Temporary detention at Department request.* Upon a determination by the Department 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 the Department.

The court noted that other federal appellate courts consistently referred to ICE detainers as "requests" or as part of an "informal procedure.". It said that federal law does not authorize federal officials to command state or local officials to detain suspected aliens subject to removal. Moreover, it said that the US Supreme Court has also noted that the federal law is a request for notice of a prisoner's release, not a command or even a request to local law enforcement to detain suspects on behalf of the federal government.

The court also concluded that under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.

Therefore, the court said that the county was free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza's constitutional rights. The case was remanded for a determination of damages for the unconstitutional detention of the petitioner.

Miranda-Olivares v Clackamas County, United States District Court, D. Oregon, 2014

This case involved the detention of plaintiff, Maria Miranda–Olivares in the Clackamas County Jail based solely on a federal immigration detainer (Form I–247) issued by the United States Immigration and Customs Enforcement , an agency of the Department of Homeland Security. The detainer indicated that ICE had initiated an investigation to determine whether Miranda–Olivares was subject to removal from the United States. Miranda–Olivares alleged that by keeping her in custody based on that ICE detainer, Clackamas County violated 42 USC § 1983 by depriving her of liberty with due process under the Fourteenth Amendment and her right to be free from unreasonable seizure under the Fourth Amendment, and also falsely imprisoned her in violation of Oregon law.

The immigration detainer in this case stated no basis for the investigation and was not accompanied by an arrest warrant or any other charging document. The jail had routinely, when it received an ICE detainer, held the person subject to the detainer for up to 48 hours, not including Saturdays, Sundays, and holidays, beyond the time when the person would otherwise be released, even if the person posted bail.

As in Galarza, the court said that the ICE detainer was not mandatory, and as a result, the County violated Miranda–Olivares's Fourth Amendment rights. It said that "We do not see how the detainer document can be read in any other way. It simply expresses interest and says that the INS will (we suppose, if it honestly can) obtain charging documents in due course. We see nothing in the detainer letter that would allow, much less compel, the warden to do anything but release [a detainee] at the end of his term of imprisonment."

It concluded that 8 CFR § 287.7 does not require law enforcement agencies, including jails, to detain suspected aliens upon receipt of a Form I–247 from ICE and that the jail was at liberty to refuse ICE's request to detain Miranda–Olivares if that detention violated her constitutional rights.

The court made it clear that Miranda–Olivares was not charged with a federal crime and was not subject to a warrant for arrest or order of removal or deportation by ICE. The County admitted that Miranda–Olivares was held past the time she could have posted bail and after her state charges were resolved based exclusively on the ICE detainer. But the ICE detainer alone did not demonstrate probable cause to hold Miranda–Olivares. It stated only that an investigation "has been initiated" to determine whether she was subject to removal from the United States. The ICE detainer's stated purpose of requesting the Jail to hold Miranda–Olivares custody was "to provide adequate time for ICE to assume custody" of her. Therefore, it was not reasonable for the Jail to believe it had probable cause to detain Miranda–Olivares based on the box checked on the ICE detainer, concluded the court.

In a subsequent motion, the court approved payment by the county as follows:

- Settlement to the petitioner $30,100 .00
- Attorney fees $94,531.70
- Court costs $2,841.44

Mercado v Dallas County, 2017 WL 169102, United States District Court, N.D. Texas, January 17, 2017

In this case, the plaintiffs were former detainees of the Dallas County jail. They alleged that, while they were being held in detention by Dallas County in connection with state criminal charges, they were the subjects of federal immigration detainers issued by ICE, an agency of the U.S. Department of Homeland Security ("DHS"), that requested, inter alia, that Dallas County detain them for up to 48 hours after

the time they otherwise would have been released, in order to facilitate their arrest by ICE. Each plaintiff either attempted to post bond and was denied pretrial release due to an ICE detainer or did not attempt to post bond because he believed that doing so would be futile. In addition, after each plaintiff was cleared for release, he was detained solely on the basis of the ICE detainer.

Dallas County contended that plaintiffs' "overdetention" claim did not allege a violation of the Fourth Amendment. However, the court said that the argument before it was whether, to detain a suspect, the Fourth Amendment requires probable cause to believe that the suspect has committed, is committing, or is about to commit a crime. Plaintiffs argued because immigration violations are generally civil in nature, belief that a detainee has committed a run-of-the mill immigration violation does not meet the Fourth Amendment probable cause standard; that although federal immigration officials may arrest based on probable cause to believe the suspect has committed a civil immigration violation, Dallas County cannot rely on any warrant exception and instead must satisfy the traditional criminal probable cause standard.

The court here said that the Supreme Court has defined "probable cause" as "facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense. "Probable cause exists if, under the totality of circumstances, there is a fair probability that ... an illegal act is taking place," the court said.

The parties agreed that, under Fourth Amendment, absent "probable cause," Dallas County was not permitted to detain the plaintiffs after they were otherwise eligible for release. But the court sided with the plaintiffs in holding that probable cause exists only when the arresting officer has reason to believe that the suspect has committed or is committing a criminal offense. "Generally, a reasonable belief that the suspect has committed or is committing a civil offense is insufficient to withstand Fourth Amendment scrutiny," the court said.

Further, it said that the Supreme Court has characterized deportation and removal proceedings as "civil in nature," and noted that as a general rule, it is not a crime for a removable alien to remain present in the United States.

The court held that the plaintiffs' allegations were sufficient to allege that Dallas County detained the plaintiffs after they were otherwise eligible for release, solely on the basis of Dallas County's belief that plaintiffs had committed a civil immigration offense and without probable cause to believe they had committed a criminal offense. "In other words, plaintiffs have plausibly alleged—and Dallas County does not dispute—that Dallas County detained them after they were otherwise eligible for release, without probable cause to believe they had

committed or were committing a criminal offense. These allegations plausibly allege a violation of the Fourth Amendment", concluded the court. This determination let the court to deny the county's motion to dismiss the inmates' complaint.

The court also rejected the county's arguments that the detainer was mandatory and that county officials were simply complying with federal law. It said that these detainers, as set forth in federal law and regulations, constitute only a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

It cited Galarza v. Szalczyk, and agreed with the reasoning of that court.

Other cases which agree with the rulings of Galarza, Miranda-Olivares, and Mercado include:

- Jimenez v Napolitano, United States District Court, N.D. Illinois, Eastern Division, September 30, 2014
- Lopez v Perry, 2014 WL 3046248, United States District Court, W.D. North Carolina, July 3, 2014
- Carey v Immigration and Naturalization Services, 2014 WL 2450896, United States District Court, M.D. Pennsylvania, May 29, 2014
- Morales v Chadbourne, 2017 WL 354292, United States District Court, D. Rhode Island, 01/24/2017
- Santos v Frederick Board of Commissioners, 725 F.3d 451, United States Court of Appeals, Fourth Circuit, Aug. 7, 2013. Here, the court said that local officers generally lack authority to arrest individuals suspected of civil immigration violations. It cited a US Supreme Court case noting that as a general rule, it is not a crime for a removable alien to remain present in the United States, and thus if the police stop someone based on nothing more than possible removability, the usual predicate for arrest is absent. For example, the Supreme Court held unconstitutional a provision in an Arizona statute that authorized a state officer to, without a warrant, arrest a person if the officer has probable cause to believe the person has committed any public offense that makes him removable from the United States. And, the court in Santos said that "lower federal courts have universally-and we think correctly-interpreted Arizona v. United States as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations." It said that the rationale for this rule is straightforward: a law enforcement officer may arrest a suspect only if the officer has probable cause to believe that the suspect is involved in criminal activity. Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration

violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity. Additionally, allowing local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability decisions, which often require the weighing of complex diplomatic, political, and economic considerations. It specifically held that absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not **detain** or arrest an individual solely based on known or suspected civil violations of federal immigration law.

- Melendres v Arpaio, United States Court of Appeals, Ninth Circuit, 2012. In this case, the federal appellate court said that "we have long made clear that, unlike illegal entry, mere unauthorized presence in the United States is not a crime." (Nor is there any other federal criminal statute making unlawful presence in the United States, alone, a federal crime, although an alien's willful failure to register his presence in the United States when required to do so is a crime, and other criminal statutes may be applicable in a particular circumstance.) Illegal presence is only a civil violation; it is not a crime for a removable alien to remain present in the United States. Thus, because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference that criminal activity is "afoot," citing 392 U.S. at 30, 88 S.Ct. 1868. Here, the Sheriff seized plaintiffs based on traffic violations, but the court said that any extension of their detention must be supported by additional suspicion of criminality.

Other than the two state court cases reviewed below, we have not found other federal or state court decisions which have questioned or differentiated from these federal decisions regarding whether or not counties should honor a federal detainer warrant.

Review of State Court Cases

People v Xirum, 45 Misc.3d 785, 2014)

In People v Xirum, a Kings County Supreme Court upheld the right of the NYC Department of Corrections to detain the defendant beyond the time that he would have been released, for a period of up to 48 hours as requested by ICE.

In this case, ICE had in fact obtained an order of deportation against the defendant. Rather than posting bail, and then being subject to ICE detention, the defendant

made a strategic decision to remain in jail pending the completion of criminal charges (driving without a license). While he was incarcerated and before the completion of his criminal case, the defendant filed a habeas corpus petition, arguing that any continued detention beyond his expected release date would be unconstitutional. He relied on the two federal cases which had held that ICE detainer warrants were merely "requests", and could not be used to justify continued incarceration by local jail officials.

The Kings County Supreme Court noted that the ICE detainer filed against him clearly stated that there was an order for removal or deportation for the defendant. The detainer asked that the defendant be held by NYC DOCS for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the defendant would have otherwise been released from DOCS. The court also noted that NYC DOC allows ICE to have an office at the jail, and in fact ICE was able to confirm by fingerprint match that the defendant was the correct person upon whom the order of deportation or removal had been issued and that defendant was, in fact, subject to an order of deportation or removal. Additionally, although the court said that this information was not crucial to its determination, NYC DOC also knew from ICE officials that the defendant entered the United States illegally on February 28, 2008 and was the subject of an expedited removal order on March 5, 2008.

Defendant argued that his detention by NYC DOC on the DHS detainer violated the Fourth Amendment of the United States Constitution and Article I, Section 12 of the New York State Constitution, in that the detainer itself is not a warrant, not a court order and does not confer probable cause to detain defendant. As noted, he relied on two federal cases that have held that detainers issued pursuant to 8 C.F.R. § 287.7 do not impose mandatory obligations on state and local law enforcement agencies to detain "suspected aliens subject to removal," but are simply "requests" (Galarza v. Szalczyk, 745 F.3d 634, 639–640 (3d Cir.2014) and Miranda–Olivares v. Clackamas County, 2014 U.S. Dist. LEXIS 50340, 2014 WL 1414305 (D.Ore.2014)).

The Kings County Supreme Court differentiated this case from those two federal decisions:

1. In the federal cases, the detainer form stated that ICE had reason to believe that the defendant was an alien subject to removal. However, in the present case, the detainer clearly stated that ICE had obtained an Order of Deportation or Removal from the United States for the defendant. The existence of an order, and not just a determination that the defendant might be subject to removal, was critical to this court's decision.

2. In Miranda–Olivares, defendant was arrested for violating a domestic violence restraining order and at her arraignment the court set $5000 bail. Her attempts to post the bail were thwarted by the County jail that informed her that she would not be released even if bail was posted on account of the DHS detainer, filed pursuant to 8 C.F.R. § 287.7. The detainer there stated that DHS had initiated an investigation to determine whether Miranda–Olivares was subject to removal from the United States. It stated no basis for the investigation and was not accompanied by an arrest warrant or any other charging document. Specifically, the detainer in Miranda-Olivares had a standard form checkbox to indicate that an order for deportation or removal was obtained, but this box was left unchecked. Thus, the jail officials in Miranda-Olivares has to assume that no order for deportation or removal had been obtained by federal immigration officials. The court in Miranda-Olivares concluded that since the ICE detainer stated only that an investigation had been initiated to determine whether she was subject to removal from the United States, it could not provide probable cause to detain defendant beyond her local release date. "Clearly then, the Court recognized that under a Fourth Amendment analysis, a detainer stating only that an investigation had been initiated to determine whether a subject was subject to removal from the United States is clear and distinct from the probable cause that exists when a subject is charged with a federal crime, subject to a warrant for arrest or an order of removal or deportation", the Kings County Supreme Court concluded. Additionally, this court noted that in Miranda-Olivares, the court there said that had ICE issued an order of removal or deportation for Miranda–Olivares, then the County may not have been able to exercise any discretion in its enforcement of the order.
3. Galarza was the second case relied upon by the defendant in the Kings County case. The facts before the Galarza Court were very similar to Miranda–Olivares, in that defendant Galarza did not, in fact have, nor did his detainer ever allege, that an order of removal or deportation already existed. Rather, like in Miranda–Olivares, the detainer simply described Galarza as a "suspected alien" and that an investigation had been initiated to determine whether he was subject to removal/ deportation from the United States. The Galarza court never addressed the situation found in the Kings County case, in which ICE had definitively confirmed through a fingerprint match upon issuance of the detainer that the defendant has been ordered removed or deported.

The defendant in the Kings County case also argued that the Fourth Amendment requires that an actual copy of the order of removal or deportation be attached or provided to him, but the court rejected that position. It said that "similar to the fellow officer rule that permits detention by one police officer acting on probable cause provided by another, the DOC had the right to rely upon the very federal law

enforcement agency charged under the law with the identification, apprehension, and removal of illegal aliens from the United States."

So, the court concluded that an order of removal or deportation provides the DOC with probable cause to hold defendant for DHS (ICE). Further, the court said that it was reasonable for the DOC to further hold a defendant for at most 48 hours as requested in the detainer after the conclusion of the state case in order to give DHS an opportunity to seize the subject of the deportation order. "To hold otherwise would be to encourage DHS to seize defendants out of city custody before the conclusion of their pending matters which is contrary to New York State public policy and interest in ensuring that defendants' criminal cases are completed," the court said.

It is noteworthy that this is a county Supreme Court decision; it was not appealed to the Appellate Division for review. Also, this was a motion made by the defendant in the context of his pending criminal case. NYS DOC did appear, so the argument was not limited to the position of the District Attorney and the defendant, but we do not know how strongly NYC DOC argued or felt about the case. Understanding the politics of the decision, especially in light of current immigration actions and statements by President Trump and NYC Mayor DiBlasio, we can only speculate on whether the parties would seek appellate review on a similar case if brought to court now.

Chery v Sheriff of Nassau County

In Chery v Sheriff of Nassau County (Decided Dec 3, 2015), the Nassau County Supreme Court reviewed the same issues as in the Xirum case. Justice Denise Sher agreed with the Xirum court, and held that an ICE immigration warrant, accompanied by an order of deportation or removal, was sufficient authority for the Sheriff to hold inmates beyond their regular release date (date at which bail is met or sentence is completed). Justice Sher concluded that a federal detainer was not the same as an administrative warrant with an order of deportation or removal, and made it clear that a detainer alone would not be sufficient authority to hold the defendant beyond the local release date. She agreed with the Xirum court that the warrant and order of deportation or removal did provide probable cause to the Sheriff to continue custody of the individual. She also noted that Sheriff Sposato required the warrant to be accompanied by either a warrant of arrest or a copy of the final order of removal/deportation. Justice Sher denied all relief to the petitioning inmates, except that she did order that the Sheriff provide a copy of any immigration detainer and administrative warrant to the defendants or to their defense counsel.

This case, like Xirum, was not appealed to the Appellate Division. The parties in the case were the individual inmates subject to the warrants, and the Sheriff of Nassau County.

Suffolk County Attorney Memo

Sheriff Vincent DeMarco distributed a December 2, 2016 memo from his county attorney to Sheriffs attending the 2017 winter training conference. The memo is well reasoned and based on the two New York trial level cases, reviewed above. It concludes that the Sheriff may use the "fellow officer rule" to hold inmates for a 48 hour period, as directed by the federal detainer warrant. The memo reasons that the fellow officer rule allows detention by one officer acting on probable cause provided by another, and says that the rule does allow a Sheriff to rely on the probable cause provided by federal ICE agents.

We agree that the fellow officer rule should apply to the detainer issue at hand, and that the new detainer warrants, accompanied by form DHS I-247D, are different than earlier detainer requests that were issued by ICE to Sheriffs. We still have some concerns with the federal warrants, however:

1. The warrants issued by ICE do not necessarily include a copy of the federal order for removal or deportation. In fact, the warrant, which has several checkboxes for the officer to complete, does not provide a space to state that an order of removal or deportation exists. Rather, it allows federal officers to check boxes which state that there is a charging document to initiate removal proceedings, pendency of proceedings, "failure to establish admissibility subsequent to deferred inspection", biometric confirmation that the subject is removable, and/or statements made by the subject indicating that he or she is removable. These alternatives do not amount to a determination that a federal order of removal or deportation has been issued, but nevertheless were accepted by the state cases cited above as providing sufficient probable cause that the individual was the subject to a warrant of arrest.
2. The state cases are trial level cases, and were not appealed by any party to a higher court. This of course does not make the cases unreliable, but lack of appellate review is a concern in light of the several federal district and circuit level opinions on the subject.
3. The state cases do not discuss probable cause that a crime was committed, which is the standard set by all of the federal courts that have reviewed these ICE detainers.
4. The immigration detainer form, DHS I-247D, is specifically entitled as "Immigration Detainer-Request for Voluntary Action". Most of the federal cases specifically held that ICE detainers were voluntary and not mandatory

on local police and Sheriffs, and the title of the detainer (as well as the requests in the form) underscore that distinction.

5. We understand the fellow officer rule to allow one police officer to make an arrest based on the probable cause of criminality possessed by another officer. Detention of a suspect beyond the time required to process the arrestee is not permitted, and the arresting officer must bring the arrestee to court for arraignment as in all other cases. Xirum and Chery did use the fellow officer rule to permit continued detention of the individuals alleged to be subject to an order of deportation or removal, but we have not seen other cases which extend the fellow officer rule to *detentions* for 48 hours (or longer, if there is an intervening Saturday, Sunday or holiday) and not simply arrests.
6. We also understand that the fellow officer rule has generally been applied to cases involving criminal behavior. Since a deportation or removal is a civil matter (in most cases, but can be a criminal matter based on the facts of the case), it is questionable whether appellate courts will agree that this rule should apply to permit the detention in a correctional facility of someone who has not committed a crime.

Attorney General Guidance Memo

New York Attorney General Eric Schneiderman on January 17, 2017, issued a document discussing federal detainer warrants, "Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions". The Attorney General concludes that holding an inmate beyond his or her release date, for federal detainer purposes, requires a showing of probable cause. In turn, the Attorney General concludes that probable cause can be based on only these two sources:

1) A judicial warrant, or
2) Probable cause that the individual committed a crime, or that an exception to the probable cause requirement applies.

The Attorney General cited long-established precedent from the US Supreme Court, that the existence of probable cause must be decided by a neutral and detached magistrate whenever possible. Thus, as stated by the Supreme Court in Gerstein v Pugh (420 U.S. 103, 1975), while a police officer's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest, once the suspect is in custody, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. It held that the Fourth Amendment

requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

The Attorney General also notes that unlawful presence in the US is not a crime. Based on these cases, and the fact that no crime occurs by mere presence in the country, he concluded that a warrant issued by ICE officials cannot provide probable cause that a crime was committed. Therefore, he recommended that law enforcement agencies only honor detainer warrants when accompanied by a judicial warrant, or "in other limited circumstances in which there is probable cause to believe that a crime has been committed." The Attorney General does not specify or give any examples of these other "limited" circumstances, and unfortunately does not discuss at all the two New York State cases on the subject.

Additionally, we note that the Attorney General has made several recommendations about whether local law enforcement agencies can cooperate with ICE and other federal officers regarding immigration issues. Those other recommendations are based mostly on political concerns, rather than legal ones. We have not reviewed those recommendations here but will be in a future memo to all Sheriffs. We do note also federal law (8 USC 1373) states that a Federal, State, or local government entity or official "may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual." A full copy of 8 USC 1373 can be viewed here.

President Trump's Executive Order: Enhancing Public Safety in the Interior of the United States, dated January 25, 2017

We have reviewed the Executive Order of President Trump issued on January 25, 2017. The order refers to "sanctuary jurisdictions" which are those that do not share certain immigration related information with federal authorities. The order includes a provision that "To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any ***detainers*** (emphasis added) with respect to such aliens." However, the directive regarding a reduction of federal funding to a "sanctuary" jurisdiction does not appear to apply to a county which does not honor a detainer warrant.

Association Counsel Recommendations

Based on our review, we recommend as follows:

1. Sheriffs should request a copy of a judicial warrant be attached to the federal detainer warrant. This would most clearly satisfy federal case law which has held that detainer warrants without a showing of probable cause that a crime has been committed are not sufficient to hold inmates beyond their normal release date. The lack of any federal cases which have contradicted or even questioned the decisions of Galarza, Miranda-Olivares, and Mercado persuades us that a New York federal court would follow those cases, and not the New York State cases (Xirum and Chery). Moreover, none of the parties sought appellate review of these decisions.
2. Sheriffs should not detain persons beyond their normal release date based on a federal detainer warrant, even if accompanied by an order of deportation or removal, unless there is also a judicial warrant.
3. Sheriffs who believe that persons should be detained beyond their normal release date based on a federal detainer warrant, if accompanied by an order of deportation or removal but without a judicial warrant, should seek an opinion from their county attorney, as was done in Suffolk County, so that the Sheriff will be protected from civil liability in the event that it is later determined that the federal detainer, even accompanied by an order of deportation or removal, was not sufficient authority to detain the suspect.