HOW TO AVOID MANDATORY ICE DETENTION

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How to Avoid Mandatory ICE Detention:

A Guide for California Defenders and Removal Defense Advocates

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IMPORTANT UPDATE: On March 19, 2019 the Supreme Court overturned the Ninth Circuit decision in *Preap v Johnson,* 831 F.3d 1193 (9th Cir. 2016). *Preap* had held that mandatory detention applies only if the person is transferred to ICE directly from jail that was imposed for a conviction that triggers mandatory detention. Assume that this protection no longer applies. We will update this advisory to include the *Preap* change and other developments in the near future.

(Note also that an earlier posted version of this advisory had indicated that conviction of a deportable firearms offense is not a basis for mandatory detention. That is not correct.)

I. OVERVIEW

What is mandatory detention? Noncitizens with certain criminal records are subject to mandatory immigration detention under INA § 236(c), 8 USC § 1226(c). This means that they do not even have the right to a bond *hearing*. They will remain detained during their entire immigration case, which can take weeks, months, or sometimes years.

To whom does it apply? Generally, noncitizens are subject to mandatory detention if:

1) Their criminal record brings them within one of these categories:

    a) They *were admitted* into the United States in any status, and now are *deportable* for certain crimes (with two beneficial exceptions: the domestic violence deportation ground does not apply, and a single moral turpitude conviction must have a year's sentence imposed, not a potential sentence of a year), ***or***

    b) They were *not admitted* to the United States and now are *inadmissible* for certain crimes

2) ***And,*** they were arrested by ICE directly from criminal custody **and** that custody was for an offense that subjects the person to mandatory detention.

This means that there are at least two ways to avoid mandatory detention: (1) plead to an offense that does not trigger mandatory detention (or in removal proceedings, argue that the existing conviction does not do this), or (2) avoid going directly into ICE custody from jail, if jail was based on a triggering offense.

Any statutory exceptions to removal grounds are incorporated along with the grounds. The petty offense and youthful offender exceptions apply to the moral turpitude inadmissibility ground. The exception for a single incident involving possession of 30 grams or less of marijuana applies to the controlled substance deportation ground.[1] A person who comes within these exceptions is not subject to mandatory detention.

Remember that a noncitizen who is not removable cannot be detained by ICE at all. Our concern here is with undocumented people, permanent residents who may be removable, and people with other forms of lawful status or benefits that may have been compromised by a conviction or other factor. We are not concerned with a permanent resident who has not yet become deportable, even if the person has other, non-deportable convictions, and even if the person has been charged with (but not convicted of) a new, deportable offense.

What can criminal defenders do? For noncitizen defendants, criminal defenders strive to get a disposition that avoids making the person removable and/or that does not destroy eligibility to apply for some immigration relief. This is the classic "crim/imm" defense.

Unfortunately, if the person is subject to mandatory detention, that good work can go to waste. Immigrants in detention have a low chance of winning their cases, even with strong legal arguments and good equities. Among other factors, they are very likely to be unrepresented; to be detained hundreds of miles from home, in bad conditions; and to go through video hearings in a removal proceeding whose focus is to compel deportation.

Defenders can help avoid detention in two ways. First, they can make avoiding mandatory detention one of the defense goals. Often the goals of a good crim/imm defense and avoiding mandatory detention are perfectly in line – much of crim/imm defense is based on avoiding inadmissibility and deportability. But in some cases, the issues are more complex and it is wise to seek expert advice. See Part III. Second, defenders can work to lower the probability that defendants will be arrested by ICE directly from jail. See Part IV.

[1] See INA § 212(a)(2)(A)(ii), 8 USC § 1182(a)(2)(A)(ii) (moral turpitude inadmissibility ground exceptions); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (controlled substance deportation ground and exception).

What can removal defense advocates do? ICE may allege that clients are subject to mandatory detention at the initial ICE arrest or later in front of the immigration judge. Advocates should always do their own analysis and push back on ICE's assessment wherever possible. These arguments rely on a skilled crim/imm analysis as well as a knowledge of mandatory detention rules, and advocates should seek expert help if needed. See Parts III, IV.

If we avoid mandatory detention, is the client guaranteed to get release on bond? No! Avoiding mandatory detention means that the person can get a bond *hearing* before an immigration judge. Unfortunately, thousands of people get a bond hearing but don't get a bond, or get a bond they have difficulty paying.[2] This is especially true under the Trump administration. Still, may people – especially those with positive equities, eligibility for relief, and representation – are released in bond hearings and it is far better to have that opportunity.

In a bond hearing the immigration judge should weigh positive and negative factors to make an individual finding as to whether the person is a danger to the public or a flight risk. Family ties, ties to the community, employment, good behavior, and especially being *eligible for relief* are key positive factors. Negative factors include criminal convictions and immigration misconduct, especially recent events. Certain convictions are especially bad: a recent conviction of drunk driving will be is a serious negative factor.[3] For more information, see the online ILRC Guide, *Representing Clients in Bond Hearings* (2017).[4]

II. Mandatory Detention: Current Rules and Pending Litigation

Access to Bond Hearing. Mandatory detention has become even more horrible than it previously was. Until recently, *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-77 (9th Cir. 2015) provided that everyone in the Ninth Circuit, including those subject to mandatory detention, is entitled to a bond hearing after sixth months in ICE custody. But the United States Supreme Court reversed *Rodriguez* and held that the mandatory detention statute itself does not provide the right to periodic bond hearings. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), interpreting INA § 236(c), 8 USC § 1226(c).

For the time being, this means that persons in ICE custody who are subject to mandatory detention will not have access to bond hearings *until* their removal case is on appeal at the Ninth Circuit, which could take years. *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), provides bond hearings

[2] However, a newer case, *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), holds that immigration judges and ICE must consider a respondent's ability to pay.

[3] See, e.g., discussion in *Matter of Siniauskus,* 27 I&N Dec. 207 (BIA 2018) (finding that drunk driving poses a serious threat to safety, and holding that multiple convictions for DUI with injury 10 years ago, coupled with a current arrest for DUI with injury, show that the respondent is a danger to the community and that no bond should be set).

[4] See the bond hearing Guide at www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf

at this stage. Additionally, individuals in "withholding-only" proceedings[5] should receive bond hearings under *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), as *Jennings* did not repeal *Diouf*.[6]

The only good news from *Rodriguez* is that the Court remanded the case back to the Ninth Circuit to consider whether the Fifth Amendment Due Process Clause requires a hearing during prolonged detention. Litigators for immigrants are working to get a more just rule.

For information on representing immigrants in bond hearings after *Jennings*, see recent Practice Advisory. [7]

Special rule for California Central District. Owing to a permanent injunction in California's Central District, individuals in that district will for the time being continue to receive hearings after six months of detention -- in other words, *Rodriguez* hearings.[8] The Central District of California includes the following counties: Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Riverside, and Ventura Counties.

Released directly to ICE Custody from Jail; *Preap v. Johnson*. In the Ninth Circuit, people are subject to mandatory detention only if ICE takes them into its custody directly from criminal custody that was imposed for an offense that triggered mandatory detention. But if instead there was a gap between release from jail and ICE arrest, mandatory detention does not apply, no matter what the conviction is. *Preap v Johnson,* 831 F.3d 1193 (9th Cir. 2016). However, the United States Supreme Court accepted *certiori* on *Preap* and will decide the case in the 2018-2019 term. See Part IV.

III. Defense: Avoid a Mandatory Defense Conviction

One way to avoid mandatory detention is to plead to an offense that does not trigger it. If you already understand the crimes removal grounds, making this analysis is fairly simple.

First, determine whether the person is subject to the ***deportability grounds*** (because the person has been "admitted" to the United States in some way) or the ***inadmissibility grounds*** (because the person has not been admitted). An "admission" has a technical legal definition in immigration law and is often counter-intuitive. A person who has entered the United States with a green card or other visa has been "admitted." But some people who have entered lawfully (such as those who have been paroled in) have not been "admitted." Similarly, some grants of immigration status in the United States, such as receiving a green card, a U visa, or (in the Sixth and Ninth Circuits) temporary protected status are considered an "admission," whereas others, such as asylum and special immigrant juvenile status, are not. Because of this, it is critical to know exactly how your client entered and what form of status they have received.

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[5] There is a circuit split regarding which statute governs the detention of this population. In *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017), the Ninth Circuit held that 8 U.S.C. § 1231(a)(6) controls. The Second Circuit, however, found that that 8 U.S.C. § 1231 applies. *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016).

[6] A class action was recently filed in California's Northern District, challenging the Government's practice of denying bond hearings in withholding-only proceedings. *Aleman Gonzalez* v. *Sessions*, No. 3:18-CV-01869-JSC (N.D. Cal. filed March 27, 2018).

[7] Please see *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez*, ACLU, ACLU Southern CA, Mills Legal Clinic of Stanford Law School (March 21, 2018) at https://www.aclu.org/other/practice-advisory-prolonged-detention-challenges-after-jennings-v-rodriguez

[8] See discussion of *Rodriguez v. Marin*, No. CV 07-3229 (March 5, 2018), in *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez* (Part II.A), cited above.

Second, see if the person actually comes within the crimes grounds of inadmissibility or of deportability, whichever applies.

a. People who were ***admitted*** to the United States in any status, or who adjusted status within the U.S., are subject to ***deportation grounds***. Mandatory detention is triggered if they have "committed any offense covered in" INA § 237(a)(2) (the crimes deportation grounds), with these two beneficial changes:

   - If there is just one CIMT conviction, it must have a sentence *imposed* of 365 days or more, not just a *potential* 365 days as it says in the deportation ground. The person must have committed the offense within five years after the date of admission.
     - **Tip:** If a California misdemeanor (which includes a felony reduced to a misdemeanor) has a sentence of exactly 365 days imposed, try to reduce the imposed sentence by one day, under Pen C § 18.5(b).
   - Being deportable under any prong of the domestic violence ground does *not* trigger mandatory detention.[9]
     - **Exception:** Remember the exception for possession of marijuana that is 30 grams or less. Your client will not be subject to mandatory detention and will not be deportable!

b. Persons who were ***not admitted*** are subject to ***inadmissibility grounds***. Mandatory detention is triggered if they have "committed any offense covered in" INA § 212(a)(2) (crimes grounds of inadmissibility).
   - Exception: The petty offense[10] and youthful offender exceptions[11] to the moral turpitude inadmissibility ground apply.

c. People rendered inadmissible or deportable under terrorism grounds also are subject to mandatory detention.

Example: I am an LPR, and it is four years after my admission in any status. I am convicted of felony California Pen C § 273.5 (domestic assault with traumatic injury), with a sentence imposed of 180 days. This conviction makes me deportable under the domestic violence ground. Also, if the § 273.5 conviction is a crime involving moral turpitude (CIMT),[12] it will make me deportable under the CIMT ground because I

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[9] See INA § 236(c)(1)(B), (C), 8 USC § 1226(c)(1)(B), (C).

[10] For the petty offense exception, (1) The noncitizen must have committed only one CIMT (ever); (2) The noncitizen must not have been "sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed)" 6 and (3) The offense must have a maximum possible sentence of one year. INA § 212(a)(2)(A)(ii)(II), 8 USC § 1182(a)(2)(A)(ii)(II).

[11] This exception applies to a person who committed only one CIMT, while under age 18, and was convicted as an adult, where the conviction and release from resulting imprisonment occurred at least five years ago. INA § 212(a)(2)(A)(ii)(I), 8 USC § 1182(a)(2)(A)(ii)(I).

[12] Advocates in removal proceedings may argue that no Pen C § 273.5 is a CIMT. The Ninth Circuit held that the minimum conduct to commit the offense (where the victim and defendant shared a past co-habiting relationship) is not a CIMT. *Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009). Advocates may argue that 273.5 is not "divisible" as to the victim/defendant relationship. But criminal defenders should assume conservatively that § 273.5 *will* be held a CIMT unless there is a specific plea to a past co-habiting relationship. See generally, "How to Use the Categorical Approach Now" (2017) at https://www.ilrc.org/how-use-categorical-approach-now

committed it within five years after my admission and (because it is a felony) it has a potential sentence of a year or more. If ICE takes me into custody directly from jail, will the conviction trigger mandatory detention?

No. The § 273.5 makes me deportable under the domestic violence ground, but that by itself does not trigger mandatory detention (because INA § 236(c) does not include the domestic violence deportation grounds). Assuming § 273.5 is a CIMT, even if I have one CIMT conviction committed within five years of admission, the sentence imposed is only 180 days, not 365 days. That does not trigger mandatory detention either (because INA § 236(c) provides that a sentence of a year or more must be imposed for a single CIMT). I can get a bond hearing before an immigration judge and at least try to win release on bond.

Example: I was admitted on a border crossing card and I overstayed my time years ago. (In other words, I have been admitted and am subject to deportation grounds). I was convicted of my second petty theft. If ICE picks me up right from jail, will I subject to mandatory detention?

Yes, because two CIMTs makes a person deportable. Mandatory detention is triggered by all the crimes deportation grounds at INA § 237(a)(2), except (a) the domestic violence ground and (b) the deportation ground relating to *one* CIMT, where it requires a sentence of a year or more imposed.

Other factors. Remember that even where mandatory detention does not apply, the person might not succeed in getting released from detention. And other factors may affect the case on the ground – for example, whether the person has protection under SB 54 that limit jailors' ability to help ICE take the person into custody (see Part IV, below), whether the person can get counsel, their knowledge of legal self-defense, their equities, and other issues.

Example: I am an undocumented person who entered without inspection many years ago, so I am subject to the grounds of inadmissibility. I was convicted of a misdemeanor DUI. My case is a fortunately/ unfortunately story that could go in different directions.

Fortunately, a DUI does not make me inadmissible for crimes, so even if ICE picks me up directly from jail I will not be subject to mandatory detention and I will have a right to a bond hearing.

Unfortunately, I may well not be granted bond at the hearing, because a DUI is considered a very serious negative factor.

Fortunately, ICE might not pick me up from jail at all because misdemeanor DUI does not destroy my SB 54 protection,[13] so the Sheriff cannot reveal my release date to ICE (unless the Sheriff argues that this information is publically available for all inmates) and cannot facilitate my transfer to ICE.

[13] Under SB 54/California Values Act, local law enforcement cannot share a person's release date with ICE unless the person's criminal record brings them within an exception. A "straight" (non-wobbler) misdemeanor such as misdemeanor DUI does not bring them within the exception. See *ILRC Practice Advisory: SB 54 and the California Values Act: A Guide for Criminal Defenders* at https://www.ilrc.org/sb-54-and-california-values-act-guide-criminal-defenders

Unfortunately, ICE may come to arrest me at my home or work. Fortunately, if I have received red card and "Know Your Rights" information[14] I might be able to resist them.

Fortunately, I may be eligible for relief. Unfortunately, if I am not released on bond I will have to pursue that relief while detained in terrible conditions, and the case could take months or even years.

Unfortunately, my lawful permanent resident mother is on dialysis and I am her only caretaker. Fortunately, that could help in getting a bond.

Fortunately, if I am in California I might get free representation by a nonprofit advocate. Unfortunately, if I am detained and transferred out of state, it is likely that I will have no lawyer.

IV. Defense: Avoid Being Taken Directly to ICE from Criminal Custody (Jail), Where Criminal Custody Was for a Triggering Offense

Under INA § 236(c)(1), mandatory detention applies if ICE takes certain deportable or inadmissible people into custody "when the alien is released" from criminal custody. The Ninth Circuit and some other courts have interpreted this language to mean that ICE must take the person into its custody *directly* from criminal custody (jail) that was imposed for an offense that triggered mandatory detention. If instead there was a gap between release from jail and ICE arrest, mandatory detention does not apply. *Preap v Johnson,* 831 F.3d 1193 (9th Cir. 2016). (But see below about Supreme Court review of *Preap*).

Example: I am an LPR who is convicted of my fourth CIMT. This renders me deportable under § 237(a)(2) and is a triggering offense for mandatory detention. I am released from jail. ICE finds and arrests me two days later. Am I subject to mandatory detention?

No. They can detain me, but under *Preap v. Johnson* I am not subject to mandatory detention because there was a gap between release from jail and arrest by ICE. I have a right to a bond hearing.

Some people in California will not be taken into ICE custody directly from jail, for a variety of reasons. For example, the case may be so minor that they never are booked into jail, or ICE might lack a strong presence in the area and not get to them. Also, while all defendants' fingerprints are sent to immigration authorities, in cases where the person has had no prior contact with Immigration, the fingerprints alone do not establish that the person is not a citizen. ICE may try to interview the person in jail, but California has enacted some due process protections that require the person to sign written consent before seeing ICE without a lawyer, under the TRUTH Act.[15]

Furthermore, California has passed laws that limit how much local law enforcement (sheriffs, probation, prosecution, police) can cooperate to help ICE arrest people directly from jail. The laws are sometimes referred

[14] Any noncitizen who might be removable should understand their basic Fourth and Fifth Amendment rights to refuse to talk to immigration officials. Defenders, advocates, and community members can go to www.ilrc.org/red-card where they will find materials in English and other languages to assist them. They can order laminated, wallet-sized "red cards" in bulk, or simply download and print out the red card text for free. There also is a graphic in multiple languages describing how to use the red card.

[15] Govt C §7283 et seq.

to as "SB 54," and they include the California Values Act and the TRUST Act. California jailors never are permitted to hold people for an extra 48 hours after they would otherwise be released from jail, to help ICE pick them up (an ICE hold request). They also are not permitted to share a defendant's release date with ICE or to facilitate transportation directly from jail to ICE – although there are many exceptions to this protection, based on the person's criminal record. Some cities and counties have created their own protections that are stronger than SB 54. For more information on SB 54 as well as local policies, see online resources.[16]

Unfortunately, the current Preap rule might change. The Supreme Court took up the *Preap* case and will consider the issue in its 2018-2019 session. It will resolve a split between various courts that have ruled differently in mandatory detention cases on the issue of how long a "gap" in time must occur between the person's release from jail and ICE pick-up, and whether a gap is required at all. Unless and until the Supreme Court overrules it, the *Preap* ruling applies in the Ninth Circuit. Removal defense advocates should aggressively argue *Preap.*

[16] www.ilrc.org/local-enforcement and www.iceoutofca.org/ca-values-act-sb54