



September 13, 2017

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RE: Access to Detainees' Property and Medical Records at James A. Musick and Theo Lacy Facilities

Dear Sheriff Hutchens, Mr. Marin, and Mr. Quinones:

We write regarding our serious concerns about immigration detainees' access to their property and medical records at the James A. Musick and Theo Lacy Facilities operated by the Orange County Sheriff's Department ("OCSD").

We are especially concerned with reports that immigration detainees are being denied access to important documents, medical records, and other evidence that was taken from them when booked into custody. These materials are necessary for the detainees to pursue their immigration cases and obtain relief from removal so they may be able to remain living in the United States with their family and friends. Such denial of access to the detainees' property and records violates the U.S. Immigration and Customs Enforcement ("ICE") detention standards and the detainees' constitutional rights.

These concerns are particularly pertinent given the recent report of the Department of Homeland Security's Office of Inspector General, which documented that the Theo Lacy Facility is in violation of several ICE detention standards, including the lack of access to working telephones and the inability to properly document grievances from detainees to ensure resolution of their

concerns.¹ The denial of detainees' property and medical records further impede the detainees' constitutional right to adequately challenge their removal proceedings.

We urge ICE and the OCSD to take immediate steps to ensure immigration detainees at the James A. Musick and Theo Lacy Facilities receive their property and medical records necessary to pursue their immigration cases.

I. The Denial of Detainees' Access to Their Property Needed to Pursue Their Immigration Cases Violates Their Constitutional Rights and the Detention Standards

A. Immigration Detainees at the James A. Musick and Theo Lacy Facilities Have Been Denied Access to Crucial Information and Documents in Their Property

We have received numerous reports that ICE and OCSD employees have repeatedly denied immigration detainees' requests to access documents in their property at the James A. Musick and Theo Lacy Facilities. In many cases, detainees requested the documents to defend against ICE's charges of removability and obtain relief from removal to allow them to remain in the United States. In some cases, detainees were ultimately able to obtain the requested documents, but only after intervention by their attorneys. However, because most detainees cannot afford attorneys and pursue their cases pro se, they are not able to obtain the assistance of third parties to ensure access to property to which they are entitled.

These reports include:

- Jessica Reyes-Zambrano (A213-082-109): Ms. Reyes-Zambrano is an asylum seeker from Honduras. Upon booking into the James A. Musick Facility, the OCSD took possession of her property, including a list containing the contact information of her friends and family in the United States. ICE and the OCSD denied multiple requests from Ms. Reyes-Zambrano to obtain access to the list of contact information. Ms. Reyes-Zambrano required that information so she could contact her friends and family so they could provide her with evidence and support that she required for her asylum claim. Ms. Reyes-Zambrano was ultimately deported from the United States.
- Housseem Eddine Douar (A208-836-425): Mr. Douar is an asylum seeker from Algeria, who was booked into custody at the James A. Musick Facility on May 24, 2016. The OCSD took possession of his property, including a flash drive containing evidence related to his asylum case. ICE and the OCSD later denied Mr. Douar's repeated requests to access the flash drive. The flash drive was ultimately released to a pro bono attorney, who helped Mr. Douar obtain the necessary documents in the flash drive. Mr.

¹ Office of Inspector General, Department of Homeland Security, *Management Alert on Issues Requiring Immediate Action at the Theo Lacy Facility in Orange, California* 1-2, 7, 9-10 (Mar. 6, 2017), available at <https://www.oig.dhs.gov/sites/default/files/assets/Mga/2017/oig-mga-030617.pdf>

Douar was forced to request multiple delays in his removal proceedings so he could obtain access to the flash drive, unnecessarily prolonging his detention.

- An asylum seeker from Honduras who had a death certificate of a family member in her property. ICE and the OCSD denied her request for the death certificate which she wanted to use to support her asylum claim. She only obtained the death certificate after her property was returned to her when she was released from custody on bond.²
- An asylum seeker from Guatemala who had a list of contact information for friends and family in her property. ICE and the OCSD denied her requests to obtain access to the list of contact information, which she required to contact friends and family to support her asylum claim. She was ultimately deported from the United States.
- An asylum seeker who had a list of contact information of potential sponsors and family members as well as evidence in her property. The evidence included legal and identity documents as well as photographs and text messages critical to her asylum claim stored on a cell phone. ICE and the OCSD denied her requests to obtain the contact list and evidence. She eventually obtained counsel. Her counsel subsequently requested the contact list and evidence from ICE, who directed her counsel to the OCSD. The OCSD informed her counsel that its policy is not to provide any property to the detainee unless the detainee has been released from custody or the detainee's case has concluded. After repeated requests, the OCSD eventually released all of the detainee's property, including the list of contact information and evidence to her counsel. Her counsel indicated that the evidence in her property was essential to her asylum application, which the Immigration Judge later granted.

From these reports, it appears that the OCSD and ICE have a policy or practice at the James A. Musick and Theo Lacy Facilities to deny immigration detainees access to documents in their property that they need to pursue their immigration cases.

B. The Denial of the Immigration Detainees' Access to Their Property Violates the First Amendment, the Fifth Amendment, and the ICE Detention Standards

i. First Amendment Rights Violation

Detained individuals undoubtedly have a right of access to the courts.³ This right is couched within the First Amendment right to petition the government for redress of grievances.⁴ Prison

² A number of detainees who reported denial of access to their property requested anonymity due to fears that ICE or the OCSD may retaliate against them for reporting their grievances to legal service providers.

³ *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Bounds v. Smith*, 430 U.S. 817, 823 (1977).

⁴ *Id.*; see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“The right of access to the courts is indeed but one aspect of the right of petition.”); *Silva v. Di Vittorio*, 658 F.3d 1090, 1101-02 (9th Cir. 2011) (“Under the First Amendment, a prisoner has . . . a right to petition the government for a redress of his grievances.”).

officials may not “erect[] barriers that impede right of access of incarcerated persons.”⁵ The right of detainees’ access to the courts includes “the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one’s personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.”⁶ This right extends to immigration detainees in removal proceedings.⁷

The OCSD and ICE have violated the immigration detainees’ First Amendment right of access to the courts by denying their ability to access documents and evidence needed to support their immigration cases that are maintained in their property under the control of the OCSD and ICE. Without the detainees’ requested materials, they are unable to adequately pursue their immigration cases in an effort to terminate their removal proceedings or obtain relief from removal. This is especially problematic for pro se detainees and asylum seekers who have limited contacts in the United States and, therefore, have little chance of success without the evidence in their property. The OCSD and ICE have also failed to provide any reasonable justification for withholding the requested materials in the detainees’ property, and have further failed to adequately respond to the detainees’ grievances regarding the improper withholding of their property.

ii. *Fifth Amendment Rights Violation*

The Due Process Clause of the Fifth Amendment also guarantees immigration detainees the right to a “full and fair hearing” of their removal cases.⁸ This right is also set forth in the Immigration & Nationality Act.⁹ As the Ninth Circuit has explained, “[a] vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one’s behalf.”¹⁰ The right requires that individuals be afforded a reasonable opportunity to prepare their cases.¹¹ Accordingly, the right to a full and fair hearing in Immigration Court extends beyond the courtroom walls to an individual’s practical ability to present evidence. For example, the Ninth Circuit has directed that continuances be granted as needed to allow non-citizens to gather and

⁵ *Di Vittorio*, 658 F.3d at 1102; *see also Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010); *Snyder v. Nolen*, 380 F.3d 279, 290 (7th Cir. 2004); *John L. v. Adams*, 969 F.2d 228, 235 (6th Cir. 1992).

⁶ *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir. 1961).

⁷ *See, e.g., Agyeman v. Corrections Corp. of Amer.*, 390 F.3d 1101, 1104 (9th Cir. 2004); *Jones v. Blanas*, 393 F.3d 918, 924 (9th Cir. 2004); *Nat’l Ass’n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 587 (9th Cir. 1992); *Longshore*, 621 F.3d at 1317.

⁸ *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013).

⁹ 8 U.S.C. § 1229a(b)(4); *see also Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

¹⁰ *Oshodi*, 729 F.3d at 889; *see also* 8 C.F.R. § 1240.1(c) (“The immigration judge shall receive and consider material and relevant evidence . . .”).

¹¹ A full and fair hearing requires that immigration judges affirmatively elicit possibly relevant evidence to “fully develop the record” from pro se immigrants because they “often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country.” *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002).

prepare evidence in support of their cases.¹² The right to present evidence has also been held to require ICE to provide access to evidence in its possession that is relevant to a non-citizen's potential claims for relief from removal.¹³

Because immigration detainees at the James A. Musick and Theo Lacy Facilities are not permitted access to materials in their property needed to present evidence in support of their cases, the OCSD and ICE have also violated their right to a full and fair hearing in violation of the Fifth Amendment.

iii. ICE Detention Standards Violations

Immigration detainees' access to their personal property at the James A. Musick and Theo Lacy Facilities is governed by Section 8 of the 2008 ICE Performance-Based National Detention Standards ("PBNDS").¹⁴ The purpose of this detention standard—entitled "Funds and Personal Property"—is to ensure that detainees' personal property is safeguarded and controlled, and that contraband does not enter the detention facility.¹⁵ Section 8 permits immigration detainees to "keep a reasonable amount of personal property in their possession, provided it poses no threat to detainee safety or facility security."¹⁶ Detainees should also be allowed "to store excess property with a third party or, with the facility administrator's permission, in the facility's personal

¹² *Rendon v. Holder*, 603 F.3d 1104, 1110-11 (9th Cir. 2010) (denial of continuance violated due process where respondent needed time to obtain additional evidence of son's medical and educational needs and the lack of opportunities to meet those needs in country of origin); *Baires v. INS*, 856 F.2d 89, 92 (9th Cir. 1988) (denial of continuance violated right to present evidence).

¹³ *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010) (holding that because respondent "was not provided with the documents in his A-file, he was denied an opportunity to fully and fairly litigate his removal and his defensive citizenship claim"). See also *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 621 (9th Cir. 2006) (Immigration Judge violated due process by refusing to order the Immigration and Naturalization Service to produce a form, the existence or nonexistence of which was relevant to respondent's defense); *Singh v. Holder*, 405 F. App'x 193 (9th Cir. 2010) (government's failure to provide documents in its possession and Immigration Judge's refusal to grant continuance for purpose of forensic evaluation violated right to fair hearing).

¹⁴ See 2008 ICE Performance-Based National Detention Standards ("2008 ICE PBNDS"), at § 8. The OCSD's contract with ICE requires the Theo Lacy and James A. Musick Facilities to comply with ICE's 2008 Performance Based National Detention Standards. See OCSD ICE/ERO Detention Contract, http://www.ocsd.org/divisions/custody/ocsd_ice_ero_detention_contract ("OCSD provides housing and services for detainees in accordance with the 2008 Performance Based National Detention Standards (PBNDS)."). While the Orange County Board of Supervisors recently voted to expand its contract with ICE to add 120 detention beds, the expansion did not alter the OCSD's obligation to comply with the 2008 ICE PBNDS. See Attachment A at 2, Modification P00008 to Agreement, available at http://cams.ocgov.com/Web_Publisher_Sam/Agenda05_09_2017_files/images/O00417-000333A.PDF ("All other terms and conditions remain the same.").

¹⁵ 2008 ICE PBNDS, at § 8.

¹⁶ *Id.* at § 8(V)(E)(2).

property storage area.”¹⁷ Detainees are explicitly allowed to keep “[l]egal documents and papers,” among other items.¹⁸ While identity documents, such as passports and birth certificates, are held in each detainee’s A-file, OCSD and ICE staff are required to provide the detainee copies of these documents.¹⁹

The OCSD and ICE are clearly operating in violation of Section 8 of the 2008 ICE PBNDS. Immigration detainees have not been allowed access to lists of contact information, death certificates, and other documents in their property related to their immigration cases. These materials pose no threat to detainee safety or facility security, and detainees need them to be able to pursue their immigration cases.

II. The Denial of Detainees’ Access to Their Medical Records Violates Their Constitutional Rights and the Detention Standards

We have also received numerous reports that immigration detainees at the James A. Musick and Theo Lacy Facilities have been denied copies of their medical records when requested. Detainees have reported that OCSD officials will only provide medical records in response to a request from the detainees’ attorneys. The failure to provide detainees copies of their medical records violates the ICE detention standards. Furthermore, because many detainees do not have attorneys, and pursue their immigration cases pro se, the denial of access to their medical records also violates their rights under the First and Fifth Amendments.

Immigration detainees require their medical records for a variety of reasons related to their immigration cases. For example, detainees’ medical conditions or past injuries may be relevant to their asylum claims. Pro se detainees who suffer from serious mental disorders or defects require their mental health records to demonstrate that they are class members in *Franco-Gonzalez v. Sessions*, No. CV 10-02211 DMG (C.D. Cal.) and, therefore, are entitled to legal representation free-of-charge and a bond hearing after six months of detention. Detainees also require their medical records to submit at bond hearings as evidence for why bond should be granted because of the severity of their illnesses or need for outside treatment.

The 2008 ICE PBNDS clearly require the OCSD and ICE to provide medical records to detainees upon request. Section 22 states that “[c]opies of health records shall be released by the administrative health authority directly to a detainee or their designee, at no cost to the detainee, upon receipt by the administrative health authority of a written authorization from the detainee that complies with the Health Insurance Portability and Accountability Act (HIPAA).”²⁰ The detention standard adds that “[u]pon request, medical record information will be released [to the detainee] within a reasonable timeframe after receipt of an authorization.”²¹ Moreover, it is ICE’s and the OCSD’s responsibility to provide the detainees with the appropriate authorization form, including providing “non-English speaking detainees and detainees who are deaf or hard of hearing with interpretation or translation services or other assistance as needed to make the

¹⁷ *Id.*

¹⁸ *Id.* at § 8(V)(E)(4).

¹⁹ *Id.* at § 8(V)(E)(3).

²⁰ *Id.* at § 22(V)(U)(2).

²¹ *Id.*

written request and assist in transmitting the request to the facility administrative health authority.”²²

Because detainees require their medical records to obtain evidence to support their immigration cases, ICE’s and the OCSD’s denial of access to those records also violates the detainees’ First Amendment right of access to the courts and Fifth Amendment right to a full and fair immigration hearing for the reasons stated above. *See supra* Sections I(B)(i)&(ii).

* * *

We urge ICE and the OCSD management to take steps to remedy the denial of detainees’ access to their property and medical records. Specifically, ICE and the OCSD should:

1. Ensure that immigration detainees at the James A. Musick and Theo Lacy Facilities are provided access to their property needed to pursue their immigration cases in accordance with the ICE detention standards and the U.S. Constitution.
2. Ensure that immigration detainees at the James A. Musick and Theo Lacy Facilities are provided access to their medical records in accordance with the ICE detention standards and the U.S. Constitution.

We look forward to your prompt attention to these serious issues. We request that ICE and the OCSD inform us as to what steps they intend to take to address the detainees’ denial of access to their property and medical records by September 20, 2017. Should you have any questions, please contact Sameer Ahmed at sahmed@aclusocal.org or (213) 977-5284.

Sincerely,

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** Not admitted in California; admitted to practice law in New York, Massachusetts, and selected federal courts*

CC:

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²² *Id.*; *see also id.* (“Detainees who indicate they wish to obtain copies of their medical records shall be provided with the appropriate request form.”).

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