



The California TRUST Act: A Guide for Criminal Defenders¹

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Appendix I. Enumerated Disqualifying Offenses (Statutory Language)

On October 5, 2013, Governor Brown signed AB 4, the TRUST Act,² which went into effect **January 1, 2014**. It will be codified as Gov. Code §§ 7282, 7282.5. The TRUST Act prevents local law enforcement from detaining noncitizens pursuant to an immigration “hold” or detainer beyond the time that they otherwise could be released from criminal custody. This Guide discusses how the TRUST Act works and defense strategies in light of the Act.³

For more information, sample letters, and Practice Advisories to assist in dealing with immigration holds, go to www.ilrc.org/policy-advocacy/immigration-enforcement, hereafter “**ILRC Enforcement Materials.**” For information on representing non-citizen defendants in California, see the *ILRC California Quick Reference Chart and Notes* at www.ilrc.org/crimes, hereafter “**California Chart & Notes.**”

I. OVERVIEW OF THE TRUST ACT

What is an immigration “hold” or detainer? An immigration hold is a *request*, not a mandate or a warrant, from federal immigration authorities--usually Immigration and Customs Enforcement (ICE)⁴ but also sometimes Customs & Border Protection (CBP)--to local law enforcement. It requests local law enforcement to continue to detain a noncitizen for a limited time (up to 48 hours plus weekends and federal holidays) *after* the person is eligible for release from criminal custody, to give immigration authorities time to take the person into custody.⁵

ICE issues the hold based on its preliminary belief that the person is removable (deportable).⁶ For example, ICE might believe that the person is undocumented, or is a permanent resident (“green card” holder) who is deportable because of a conviction. ICE must cancel a hold if this assessment is incorrect, and may cancel a hold based on compelling circumstances, including mental or physical illness. For information on getting an immigration hold cancelled, see *ILRC Enforcement Materials* at www.ilrc.org/policy-advocacy/immigration-enforcement.

What does the TRUST Act do? It specifically prohibits local law enforcement from detaining a noncitizen pursuant to an immigration hold, past the time the person is eligible for release from criminal custody.

Do all noncitizens get TRUST Act protection? No. If a noncitizen has certain convictions, including past convictions, or is held to answer on certain felony charges, local law enforcement is *permitted but never required* to detain the person pursuant to the immigration hold.

Can a local jurisdiction decide to grant more protection than the TRUST Act does? Yes. In fact, Santa Clara,⁷ San Francisco,⁸ and Alameda counties have enacted their own policies that provide protection beyond the TRUST Act. There is no penalty for declining to respond to an immigration hold. California Attorney General Kamala Harris clarified that immigration holds are “requests, not commands,” and that local agencies are free to create their own protocols.⁹ ICE agrees that immigration holds are mere requests.¹⁰ If you are interested in a campaign to create a local policy that provides more protection than the TRUST Act, see *ILRC Enforcement Materials, supra*.

Does qualifying for TRUST Act protection guarantee that the noncitizen will avoid immigration custody? Not necessarily. The TRUST Act bars local law enforcement from detaining a noncitizen pursuant to an immigration hold beyond the time they are otherwise eligible for release from criminal custody, but does not bar it from sharing information with ICE or other federal immigration authorities (although some jurisdictions, including Santa Clara County, have prohibited local law enforcement from spending resources on working with immigration authorities).

Which noncitizens are not protected by the TRUST Act? The Act provides that law enforcement has discretion to detain an individual pursuant to an immigration hold “only if the continued detention of the individual on the basis of the immigration hold would not violate any federal, state, or local law, or any local policy, and only under any of the following circumstances...” The “local law or policy” includes county policies that are more generous than the TRUST Act, such as those in San Francisco, Santa Clara and Alameda Counties. This means that if a local policy offers more immigration hold protection than the TRUST Act, the more protective policy governs in that jurisdiction. The “following circumstances” refer to a statutory list of disqualifying criteria, described below.

Thus, local law enforcement may choose to detain an individual in response to an immigration hold after that person is eligible for release from criminal custody, if: (1) the continued detention does not violate any law or local policy, **and** (2) one of the circumstances in the following paragraphs applies:

1. **Felony conviction (including past convictions) of:**
 - a. a serious or violent felony under PC §§ 1192.7(c) and 667.5(c);
 - b. a felony punishable by state prison (i.e., not punishable under P.C. §1170(h));¹¹ *or*
 - c. a felony that comes within categories enumerated in the TRUST Act. See **Appendix I**. This list includes many controlled substance offenses, DUI, theft, battery, child endangerment, child or elder abuse, weapons, and domestic violence offenses, as well as attempt or conspiracy to commit them. It includes felonies punishable under P.C. §1170(h).
2. **Finding of probable cause under PC § 872(a) on a felony charge involving:**
 - a. the felony offenses described in point one, above;
 - b. except that a probable cause finding is not sufficient for a domestic violence offense, unless it is a serious or violent felony under PC § 1192.7(c), 667.5(c). See **Part IV**.
3. **Misdemeanor conviction of an alternate felony/misdemeanor offense, also known as wobblers (including past convictions) if:**
 - a. the noncitizen was convicted of the offense within five years prior to the date he or she is eligible for release from criminal custody,¹² *and*
 - b. the offense comes within one of the enumerated categories described at 1.C, above, many of which are wobbler offenses.
4. Current registrant on the **California Sex or Arson Registry**;

5. ***Federal conviction (including past convictions) or federal warrant:*** Conviction of an offense in federal court that is an aggravated felony listed in 8 USC §§ 1101(a)(43)(A)-(P);¹³ or Immigration has identified the person has having an outstanding arrest warrant for a federal felony. An aggravated felony is a term of art in immigration law that may also include nonviolent misdemeanors.

CAUTION: While the TRUST Act is a valuable tool, defenders must not create defense goals solely based on avoiding the above categories. In some cases, a disposition that would be good for TRUST Act purposes would make the person deportable and/or ineligible to obtain legal status or fight a deportation case. This is an individual determination. See Part II.

II. DEFENDING YOUR CLIENT IN LIGHT OF THE TRUST ACT

It is important to understand that TRUST Act protection, and immigration consequences in general, are two separate categories. The TRUST Act may prevent local jails from detaining a noncitizen solely for immigration pick-up, but it will not confer any lawful immigration status on the person. “Immigration consequences” refers to how a criminal disposition will affect the noncitizen’s immigration status, e.g. whether it will cause him or her to lose a green card, or destroy eligibility to apply for lawful status in the future. To accurately consider both immigration consequences and TRUST Act eligibility, the steps are:

1. ***First, Analyze the Immigration Consequences of Current Charges and Prior Convictions.*** State and federal law requires defense counsel to advise a noncitizen defendant of the immigration consequences of a proposed criminal court disposition.¹⁴ To do that, you need to gather relevant information including the defendant’s immigration status and any past convictions and analyze these factors in conjunction with the current charges and any plea offers. See materials such as *California Chart & Notes, supra* and the ILRC’s sample immigration questionnaire.¹⁵ Many defender offices offer support for this task, such as consultation with an in-house expert or outside consultant.
2. ***Analyze Prior Convictions for TRUST Act eligibility.*** If your client has prior conviction(s), determine whether they have already disqualified the person from protection under the TRUST Act (or a more generous local policy). See **Part III** for a chart of dispositions that do not destroy TRUST Act eligibility.

If the person still is eligible for TRUST Act protection, do not let local law enforcement detain the person pursuant to an immigration hold if they are otherwise eligible for release from criminal custody (see *ILRC Enforcement Materials, supra*).

3. ***Analyze Current Charges; Decide Priorities.*** If the client is eligible for TRUST Act protection, but faces new charges that might exclude him or her from that protection, the analysis may be complex. There is at least one circumstance in which defense counsel should *not* seek a TRUST Act-protected disposition: if the TRUST Act related disposition would destroy current lawful immigration status or eligibility to apply for it, and lawful status is that particular defendant’s top priority. For example, DEJ will not disqualify a person from TRUST Act protection, but it is drug “conviction” for immigration purposes, causing loss of legal status (deportability) and preventing someone from obtaining legal status or other immigration benefit (inadmissibility).

In weighing TRUST Act protection versus immigration status concerns, non-citizen defendants can be grouped into three categories. Only the third group presents a potential conflict in strategy.

1. ***If the defendant has valid lawful immigration status, the goal is to preserve the status.*** If a defendant is a lawful permanent resident (green-card holder), refugee, or other person with lawful status, and the person does not have a prior conviction that destroys that status, then the defense goal is to avoid a new conviction that will destroy that status. TRUST Act eligibility is not so important, because ICE should not issue a hold on a person who has valid lawful immigration status. (If the person's status already has been or inevitably will be compromised by a conviction, see #3.)

To preserve his or her status, a permanent resident needs to avoid conviction of a deportable offense. See §N.1 Overview, at *California Chart & Notes, supra*. A person with other lawful status (e.g., refugee, asylee, TPS, etc.) may have different requirements to preserve the status. See §N.17 *Immigration Relief Toolkit*, in the *California Chart & Notes*, for information on requirements for specific status. In all cases, photocopy any immigration document the client may have.

2. ***Some defendants just want to avoid ICE, regardless of long-term immigration consequences.*** They may already be deportable for past convictions, or they may not care about getting lawful immigration status, or may have no realistic chance of qualifying. They may have illegally re-entered the U.S. after removal, so that they are at risk of federal prosecution. Advise the defendant of the immigration effect of the proposed disposition and help the defendant to make an informed decision. TRUST Act protection may be the highest priority.
3. ***Some defendants may have a conflict.*** A person who is removable (e.g., who is undocumented, or a permanent resident with a deportable conviction) may desperately want to apply for some immigration status or relief (e.g., through marriage to U.S. citizen, asylum, etc.), either now or in the future. The best outcome for them is to obtain a disposition that both preserves TRUST Act protection and does not destroy eligibility for immigration status and/or relief against deportation. **Part III** is a chart describing dispositions that do not destroy eligibility under the TRUST Act, and their immigration effect.

In some cases the client may have to choose which is more important. In these complex cases, the best course is to slow the case down and get some help. While you determine the best course, hopefully the person or their family will retain immigration counsel. Advise the client to refuse to speak with any immigration officials that the client may encounter while in custody.

You can take the first step in this analysis with only a small investment of your time. To analyze possible eligibility for relief, complete the short Questionnaire in §N.17 *Relief Toolkit* in the *California Chart & Notes, supra*, with the client. If relief is a possibility, urge the client and their family to get immigration representation, or at least expert consultation.

III. DISPOSITIONS THAT PRESERVE ELIGIBILITY FOR TRUST ACT PROTECTION AND THEIR EFFECT ON IMMIGRATION STATUS (CHART)

The left-hand column describes convictions that will not disqualify the defendant from TRUST Act protection.¹⁶ If a defendant's only convictions (including past convictions) fall within this column, and if the person is not held to answer for certain felonies (see below), the person cannot be detained pursuant to an immigration hold beyond the time that he/she is otherwise eligible for release from criminal custody.

Local policies, such as those in effect in Santa Clara and San Francisco Counties, extend protection to persons convicted of additional offenses.

The right hand-column describes how the disposition may affect current lawful immigration status, or the ability to apply for such status in the future.

TRUST Act-Protected Disposition	Immigration Effect of the Disposition
<i>Caution: Being held to answer for certain felonies before conviction of one of the below “safe” dispositions may disqualify the defendant from TRUST Act Protection</i>	The TRUST Act provides that a finding of probable cause for any of several felonies will exclude a defendant from TRUST Act protection. This may be the case even if the person is not convicted of that felony. For example, being held to answer for a drug felony or felony DUI may be a disqualifier even if the person pleads to a misdemeanor drug or DUI offense. See Part IV for defense strategies.
<i>Pre-plea diversion, formal or informal</i>	Good option: it is not a conviction for immigration purposes. Admitting being a drug abuser, e.g. to qualify for Drug Court, may make the person deportable or inadmissible, but that still is better than a conviction. The best option, which a D.A. might consider for a sympathetic defendant with a first drug charge, is to defer the plea hearing while the defendant voluntarily meets specified goals, e.g., service, counseling, and make an alternative plea or no plea once the goals are completed.
<i>Deferred Entry of Judgment</i>	Bad for immigration status. Generally this is a drug “conviction” for immigration purposes, despite state law to the contrary. The Ninth Circuit set out two instances when DEJ is not a conviction: (a) if the only penalty is an unconditionally-suspended fine ¹⁷ , and (b) in some cases, if the plea was to a first, minor drug offense pled to before July 15, 2011. ¹⁸
<i>Conviction of minor misdemeanors or infractions such as loitering, trespass, public fighting, and resisting arrest. Also misd. DUI for alcohol (not drugs), misd. hit and run, Veh C 20001(a) (failure to give registration number).</i>	Good options for immigration purposes, with the following exceptions: A few forms of relief are barred by having two or three misdemeanor convictions: Family Unity, Temporary Protected Status, and Deferred Action for Childhood Arrivals (DACA). ¹⁹ A single DUI conviction can act as a bar to DACA-eligibility. In addition, a DUI is often a serious negative factor in discretionary decisions to grant immigration status or release from immigration detention. A person is inadmissible if the lifetime total of sentences imposed for two or more convictions of any offense/s reaches five years or more.
<i>Any misdemeanor conviction that is not an alternative felony/misdemeanor offense</i> <i>But see next column*</i>	The immigration consequences of a misdemeanor depend on the specific offense. Look the offense up in the <i>California Chart & Notes</i> at www.ilrc.org/crimes to check consequences and find no- or low-consequence alternatives. Also see above regarding relief that is barred by conviction of two or three misdemeanors, regardless of offense-type. * Note: While the TRUST Act states that the only disqualifying misdemeanor conviction is of an alternate felony/misdemeanor offense where the conviction was within the preceding five years, ²⁰ it includes

	some straight misdemeanor offenses as examples in the enumerated offense section. See Appendix I . ILRC believes that this was a drafter’s error that is likely to be corrected in documented legislative history.
First and second conviction for misdemeanor or felony vandalism ²¹	A plea to P.C. § 594, with intent to annoy, is likely although not guaranteed to avoid being a crime involving moral turpitude for immigration purposes.
Felony or misdemeanor accessory after the fact	With care, P.C. §32 can be a very good immigration plea. For immigration purposes, being an accessory after the fact to a crime involving drugs or violence is not itself a conviction of a crime of violence or a deportable or inadmissible drug crime. Two caveats: The offense is an aggravated felony if a sentence of a year or more is imposed on any one count, and it is a crime involving moral turpitude if the principal’s offense is one. ²²
Misdemeanor drug offenses and misdemeanor DUI drugs	Not a good option. Even a misdemeanor drug conviction can destroy current lawful status and eligibility for relief. For defense strategies see §N.8 Drug Offenses, at the <i>California Chart & Notes, supra</i> .
Non-strike felony or misdemeanor conviction of an alternate felony/ misd, if plea withdrawn per P.C. §1203.4	While good for the TRUST Act, P.C. §1203.4 generally does not eliminate a conviction for immigration purposes. The only exceptions are (a) in some cases it will eliminate a first, minor drug offense that was pled to before July 15, 2011, ²³ and (b) it may eliminate a conviction for eligibility for Deferred Action for Childhood Arrivals (DACA).
Non-strike misdemeanor conviction of an alternate felony/misdemeanor that occurred at least five years before the date criminal custody will be terminated But see next column*	Check the <i>California Chart & Notes</i> for the immigration consequences of specific offenses. *While the Act is not specific, it appears that the five years runs back from the date that the person is eligible for release from criminal custody. ²⁴ Counsel should reduce a non-strike ²⁵ “wobbler” offense to a misdemeanor under PC § 17(b) if the conviction occurred more than five years ago. If nearly five years has passed, wait until the five-year period has lapsed before seeking release on bail or O.R.

IV. OTHER QUESTIONS: Probable Cause Hearings, Defending Juveniles, Bail, Rap Sheets, Duration of an Immigration Hold, and Out of State Convictions

What should I know about the probable cause determination for felony charges?

For certain felony charges (see **Part I**), being held to answer after a finding of probable cause in the preliminary hearing is sufficient to exclude the person from TRUST Act protection.²⁶ An exception is that a *felony domestic violence offense* will require a conviction rather than a probable cause finding, unless perhaps if it is a violent or serious felony.²⁷ Examples of domestic violence felony offenses that should require a conviction are felony Calif. P.C. §§ 273.5, or 243(d) involving a DV-type victim.²⁸

To avoid this result, try to get the felony charges reduced to a misdemeanor under P.C. §17, or bargain to substitute different felony charges, at the preliminary hearing. Further, try to obtain the person’s release

from criminal custody on bail or O.R. *before* the preliminary hearing, so that the person is out of custody by the time that the probable cause finding is made.

Defense counsel with caution may waive the preliminary hearing. Even if your client waives this hearing and later pleads to an offense that does not disqualify TRUST Act protection, the local law enforcement agency might assert that it has discretion to enforce an immigration hold, because a waiver is the same as a probable cause finding. Counsel should argue that the waiver of preliminary hearing merely waives the requirement that the judge find probable cause before the filing of the information, and thus is not a probable cause finding.²⁹ Based on legislative intent and history, the ILRC believes that a waiver should not disqualify the defendant from TRUST Act protection. Finally, it appears that a past finding of probable cause in a prior proceeding should not serve to disqualify the person from protection.³⁰

What does the TRUST Act mean for juvenile adjudications?

The TRUST Act permits, but does not require, law enforcement officials to hold juveniles pursuant to an immigration hold based upon certain sustained juvenile adjudications. Specifically, local juvenile justice officials may only hold a juvenile if the offense falls *under P.C. § 667(d)(3)*. For purposes of the TRUST Act, under P.C. § 667(d)(3), the juvenile must be at least 16 years old at the time the offense was committed and the sustained offense(s) must include a charge listed in Welfare & Institution Code § 707(b).³¹ Juveniles may also be held for immigration authorities on an immigration hold if they are current registrants on the sex or arson registry. In juvenile cases, law enforcement may choose to detain the minor pursuant to an immigration hold only in these two limited situations.

In some counties, juveniles simply are not reported to ICE, as matter of practice and policy. Defense counsel can advocate for similar policies, on the grounds that reporting juveniles to ICE violates confidentiality provisions under Cal. W & I Code §§ 827 and 828, and undermines the policy goals of W&I Code § 202 to provide treatment in the youth's best interest, and to promote rehabilitation and family reunification. Local law enforcement is free to not report any noncitizen youth and reject compliance with immigration holds in any and all circumstances. Contact the ILRC for a memo discussing these and other legal issues at the intersection of the California juvenile justice system and immigration enforcement.

A juvenile convicted as an adult is likely to be treated as an adult would for TRUST Act purposes. Defenders representing noncitizen juveniles should make every effort to keep them out of adult court, and if possible avoid § 707(b) offense in juvenile proceedings.

How long can my client be held on an immigration hold?

An immigration hold is only valid for *48 hours* after the person would otherwise be released from custody (e.g., dismissal of charges, posting of bail, completion of sentence), plus weekends and federal holidays.³² If the only grounds for detaining the client is the immigration hold (as opposed to the criminal case), and this time has expired, you can demand release by contacting the law enforcement agency with custody over the individual, by contacting ICE,³³ or by filing an emergency petition for writ of habeas corpus with the local court.³⁴ See more information on dealing with immigration holds in *ILRC Enforcement materials, supra*.

What about Bail?

If it is clear that your client does not have an immigration hold, bail out your client as soon as possible before ICE can issue a hold.

If the client is charged with certain felonies such that a probable cause finding alone will exclude the client from the TRUST Act (see Part I), seek release from criminal custody before the preliminary hearing. See *Probable Cause Determinations*, above.

If your client has an immigration hold, analyze whether or not it is wise for your client to pay bail. If the person is likely to be taken into immigration custody, posting bail or being released on O.R. could result in a transfer to immigration detention, and cause issues with both the criminal and immigration cases. A defendant may be likely to be taken into immigration custody if the TRUST Act does not apply, or if procedures at the jail are such that ICE may succeed in picking the person up even without the convenience of additional detention time pursuant to a hold.³⁵

Correcting Rap Sheets:

RAP sheets will likely be a basis for assessing potential immigration hold compliance. Because RAP sheets are often flawed, it is important to make any corrections as soon as possible to avoid improper immigration hold compliance. To do this, complete a “Claim of Alleged Inaccuracy or Incompleteness” (form BCIA 8706).³⁶ Your challenge must specifically state the basis for the claim of inaccuracy or incompleteness and include any available proof or corroboration to substantiate your claim. Mail it to the following address:

California Department of Justice
Record Review Unit
P.O. Box 903417
Sacramento, CA 94203-4170

How are out of state convictions treated under TRUST Act?

An out-of-state offense that meets the definition of a serious or violent offense under Cal. PC §§ 1192.7(c) and 667.5(c) will be treated the same as the corresponding California offense for TRUST Act purposes. It appears that no other out of state offenses will permit enforcement of an immigration hold under the TRUST Act, but this might be contested.

APPENDIX I. Enumerated Disqualifying Offenses (Statutory Language)

For the following offenses, the TRUST Act allows discretionary detention pursuant to an immigration hold if the conviction is for a **felony** at any time, or for **misdemeanor punishable as an alternative felony/misdemeanor (“wobbler”) within the preceding five years**. It also permits cooperation where there is a finding of probable cause at the preliminary hearing on felony charges of one of the below listed offenses. See Government Code §7282.5(a)(3).

The list includes much of the language of the TRUST Act. Defense counsel and advocates should argue for a narrow interpretation of these categories where possible.

Note that although some of statutes that the Act lists as examples also cover some non-wobbler misdemeanor offenses, this appears to be a drafting error, because the language and legislative history of the TRUST Act make clear that detention pursuant to an ICE hold is permitted only if the misdemeanor conviction is of a wobbler offense.³⁷ ILRC believes that this error is likely to be corrected in documented legislative history.

Crimes Against a Person, Criminal Threats & Sex Offenses

- Assault (G.C. § 7282.5(a)(3)(A))
As specified, but not limited to, P.C. §§ 217.1, 220, 240, 241.1, 241.4, 241.7, 244, 244.5, 245, 245.2, 245.3, 245.5, 4500, and 4501.
- Battery (G.C. § 7282.5(a)(3)(B)).
As specified, but not limited to P.C. §§ 242, 243.1, 243.3, 243.4, 243.6, 243.7, 243.9, 273.5, 347, 4501.1, & 4501.5.
- Use of threats (G.C. § 7282.5(a)(3)(C)).
As specified, but not limited to P.C. §§ 71, 76, 139, 140, 422, 601, and 11418.5.
- Sexual abuse, sexual exploitation, or crimes endangering children (G.C. § 7282.5(a)(3)(D)).
As specified in, but not limited to, P.C. §§ 266, 266a, 266b, 266c, 266d, 266f, 266g, 266h, 266i, 266j, 267, 269, 288, 288.5, 311.1, 311.3, 311.4, 311.10, 311.11, and 647.6.
- Child abuse or endangerment (G.C. § 7282.5(a)(3)(C)).
As specified in, but not limited to, P.C. §§ 270, 271, 271a, 273a, 273ab, 273d, 273.4, and 278.
- Crime resulting in death, or involving the personal infliction of great bodily injury (G.C. § 7282.5(a)(3)(Q)).
As specified in, but not limited to, P.C. §§ 245.6(d), 187, 191.5, 192, 192.5, 12022.7, 12022.8, and 12022.9.
- False imprisonment, slavery, and human trafficking (G.C. § 7282.5(a)(3)(T)).
As specified in, but not limited to, P.C. §§ 181, 210.5, 236, 236.1, and 4503.
- Offense requiring sex offender registration under P.C. §§ 290, 290.002, or 290.006 (G.C. § 7282.5(a)(3)(S)).
- Torture and mayhem (G.C. § 7282.5(a)(3)(V)).
As specified in, but not limited to, P.C. § 203.
- Elder and dependent adult abuse (G.C. § 7282.5(a)(3)(X)).
As specified in, but not limited to, P.C. § 368.
- Hate crime (G.C. § 7282.5(a)(3)(Y)).
As specified in, but not limited to, P.C. § 422.55.
- Crime threatening the public safety (G.C. § 7282.5(a)(3)(W)).
As specified in, but not limited to, P.C. §§ 219, 219.1, 219.2, 247.5, 404, 404.6, 405a, 451, and 11413.
- Stalking (G.C. § 7282.5(a)(3)(Z)).

As specified in, but not limited to, P.C. § 646.9.

- Rape, sodomy, oral copulation, or sexual penetration (G.C. § 7282.5(a)(3)(AC)).
As specified in, but not limited to, P.C. §§ 261(a)(2) & (6), 262(a)(1)&(4), 264.1,-286(c)&(d), 288a(c)&(d), 289(a)&(j).
- Kidnapping (G.C. § 7282.5(a)(3)(AD)).
As specified in, but not limited to, P.C. §§ 207, 209, and 209.5.

Crimes Against Property

- Burglary, robbery, theft, fraud, forgery, or embezzlement (G.C. § 7282.5(a)(3)(F)).
As specified in, but not limited to, P.C. §§ 211, 215, 459, 463, 470, 476, 487, 496, 503, 518, 530.5, 532, and 550.
- Vandalism with prior convictions (G.C. § 7282.5(a)(3)(N)).
As specified in, but not limited to, P.C. § 594.7.
- A crime threatening the public safety (G.C. § 7282.5(a)(3)(W)).
As specified in, but not limited to, P.C. §§ 219, 219.1, 219.2, 247.5, 404, 404.6, 405a, 451, and 11413.

Crimes Against Public Justice

- Obstruction of justice (G.C. § 7282.5(a)(3)(H)).
As specified in, but not limited to, P.C. §§ 69, 95, 95.1, 136.1, and 148.10.
- Bribery (G.C. § 7282.5(a)(3)(I)).
As specified in, but not limited to, P.C. §§ 67, 67.5, 68, 74, 85, 86, 92, 93, 137, 138, and 165.
- Escape, (G.C. § 7282.5(a)(3)(J)).
As specified in, but not limited to, P.C. §§ 107, 109, 110, 4530, 4530.5, 4532, 4533, 4534, 4535, and 4536.

Firearms and other weapons

- Unlawful possession or use of a weapon, firearm, explosive device, or weapon of mass destruction. (G.C. § 7282.5(a)(3)(K))
As specified in, but not limited to, P.C. §§ 171b, 171c, 171d, 246, 246.3, 247, 417, 417.3, 417.6, 417.8, 4574, 11418, 11418.1, 12021.5, 12022, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.55, 18745, 18750, 18755, and 26100 (c) and (d).
- Possession of an unlawful deadly weapon under Part 6 of the Penal Code (P.C. § 16000 et seq.) (G.C. § 7282.5(a)(3)(L)).
- Possession or use of a firearm in the commission of an offense (G.C. § 7282.5(a)(3)(R)).

Felony Drug Offenses

- Offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances (G.C. § 7282.5(a)(3)(M)).
- Felony DUI of alcohol or drugs (G.C. § 7282.5(a)(3)(G)).

Gang-related Offenses

- Gang-related offenses (G.C. § 7282.5(a)(3)(O)).
As specified in, but not limited to, P.C. §§ 186.22, 186.26, and 186.28.

Inchoate Offenses

- An attempt or a conspiracy as defined in P.C. §§ 664 or 182 to commit any of the enumerated offenses on this list (G.C. § 7282.5(a)(3)(P)).
- Soliciting the commission of a crime (G.C. § 7282.5(a)(3)(AA))
As specified in, but not limited to, P.C. §§ 286(c), 653j, and 653.23.

Criminal Profiteering

- Criminal profiteering and money laundering (G.C. § 7282.5(a)(3)(U))
As specified in, but not limited to, P.C. §§ 186.2, 186.9, and 186.10.

Offense Committed while Out on Bail

- Offense committed while on bail or released on O.R. (G.C. § 7282.5(a)(3)(AB))
As specified in, but not limited to, P.C. § 12022.1.

Vehicle Code

- Vehicle Code § 20001(c). (G.C. § 7282.5(a)(3)(AE))
- Felony DUI of alcohol or drugs (G.C. § 7282.5(a)(3)(G))

ENDNOTES

¹ Many thanks to Garrick Byers, Albert Camacho, Chris Gauger, David Marsh, Graciela Martinez, and Michael Theberge for their invaluable comments. Copyright 2013 ILRC. Defenders have permission to copy and distribute this memo.

² The TRUST Act will be codified as Government Code §§ 7282, 7282.5. The full text of the TRUST Act, including the uncodified declaration in Section 1, is available at: http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20131005_chaptered.pdf.

³ TRUST Act analysis is a two-part endeavor - analyzing prior convictions and analyzing new charges. First, is the defendant facing a qualifying felony charge? Second, in regards to the defendant's past criminal history, does the defendant have a qualifying prior conviction for a felony or misdemeanor wobbler, or a qualifying federal conviction, or is the defendant on a sex or arson registry? The defendant's prior record or status alone may be enough to cause an ICE detainer regardless of the new charge.

⁴ Border Patrol (Customs & Border Protection) and other designated agents also have authority to issue immigration holds or detainers. 8 CFR 287.7(b).

⁵ See 8 CFR 287.7(a).

⁶ While 8 CFR 287.7 provides no requirement for basis, Form I-247 states that the request is based on reason to believe the person is subject to removal.

⁷ See Resolution of the Board of Supervisors of the County of Santa Clara adding Board Policy 3.54 relating to Civil Immigration Detainer Requests, available at www.immigrantjustice.org/sites/immigrantjustice.org/files/Santa%20Clara%20County%20Detainer%20Ordinance.pdf

⁸ Due Process Ordinance for All on Civil Immigration Detainers, available at <https://sfgov.legistar.com/View.ashx?M=F&ID=2650835&GUID=9E9091EA-082D-41EB-8282-43E2BD3AC2CA>.

⁹ See Harris, "Responsibilities of Local Law Enforcement Agencies under Secure Communities" (Dec. 4, 2012) at

https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf and see discussion at <http://www.aclusc.org/california-attorney-general-immigration-holds-are-voluntary/>.

¹⁰ In a letter to Santa Clara County Counsel in 2010, ICE stated, “ICE views an immigration detainer as a *request* that a law enforcement agency maintain custody of an alien who may otherwise be released for up to 48 hours (excluding Saturdays, Sundays, and holidays). This provides ICE time to assume custody of the alien.” Letter to Miguel Marquez, County Counsel, County of Santa Clara, from David Ventura, Immigration and Customs Enforcement Assistant Director, dated approximately 2010, available upon request.

¹¹ Due to realignment, many felonies that were previously subject to state prison are now subject to county jail under P.C. § 1170(h) and thus do not come within this category. However, several of these “county jail” felonies are included in the list of enumerated offenses, which also exclude a noncitizen from TRUST Act protection. See text.

¹² The TRUST Act states that a misdemeanor is a disqualifier if the person “has been convicted within the past five years.” See § 7282.5(a)(3). Because the TRUST Act prohibits detaining a noncitizen past the time that he or she is eligible for release from criminal custody, this appears to mean five years counting backward from this date.

¹³ See analysis of which federal offenses qualify as aggravated felonies, at *Selected Immigration Consequences of Certain Federal Offenses* by the National Immigration Project, at www.nipnlg.org/legalresources/fed_chart_2010%20update.pdf. Federal aggravated felonies include almost all federal drug felonies, rape, sexual abuse of a minor, firearms offenses, and a fraud, deceit, money laundering, or tax evasion offense involving more than \$10,000. Other convictions are aggravated felonies only with a sentence of a year or more.

¹⁴ *Padilla v. Kentucky*, 130 S. Ct 1473 (2010); *People v. Soriano*, 194 Cal.App.3d 1470 (1987); *People v. Bautista*, 115 Cal.App.4th 229 (2004); *People v. Barocio*, 216 Cal.App.3d 99 (1989).

¹⁵ Sample Defendant Immigration Questionnaire available here: http://www.ilrc.org/files/documents/n.16-client_questionnaire.pdf

¹⁶ Thanks to Albert Camacho for identifying many of these offenses.

¹⁷ *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010).

¹⁸ Go to www.ilrc.org/files/documents/practice_advisory_lujan_and_nunez_10.11.pdf for an Advisory on *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc).

¹⁹ For information about these forms of relief, see § N.17 *Relief Toolkit at California Chart & Notes at* www.ilrc.org/crimes.

²⁰ The exclusion applies if the “individual has been convicted...of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony.” See GC §7282.5(a)(3). See also Assembly Floor Analysis for AB 4 (September 9, 2013) (noting that the Senate amendment added “prior misdemeanor conviction of a specified ‘wobbler’ offense”).

²¹ The TRUST Act excludes a defendant convicted of “[v]andalism with prior convictions, as specified in, but not limited to, Section 594.7 of the Penal Code.” See GC §7282.5(a)(3)(N).

²² Cal. P.C. §32 does not take on the character of the underlying drug or violent offense. *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997). The Board of Immigration Appeals held that with a one-year sentence it is an aggravated felony as obstruction of justice (*Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012)) and that it is a crime involving moral turpitude if the principal’s offense is (*Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011)). While there are extremely strong arguments that this should not be so held in the Ninth Circuit, counsel should act conservatively.

²³ See Advisory on *Nunez-Reyes v. Holder*, *supra*.

²⁴ The TRUST Act states that a misdemeanor is a disqualifier if the person “has been convicted within the past five years.” See § 7282.5(a)(3). Because the TRUST Act prohibits detaining a noncitizen past the time that he or she is eligible for release from criminal custody, this appears to mean five years counting backward from this date.

²⁵ A felony strike offense will be a “serious or violent” felony under the TRUST Act (P.C. §§ 7282, 7282.5) giving law enforcement the discretion to continue to hold individuals on an immigration hold once they are otherwise eligible for release from criminal custody. Reducing the wobbler to a misdemeanor or a dismissal will not take the offense out of the violent or serious felony category unless it falls into one of the exceptions. This is because the TRUST Act defines a conviction by referencing P.C. § 667(d). Section 667(d) lists the instances when a prior remains a felony strike conviction and includes an offense that is a felony strike on the date of conviction. While reducing the wobbler to a misdemeanor at initial sentencing will not count as a “violent or serious” felony, reducing the wobbler to a

misdemeanor or dismissing the count at a later date, however, may not be effective to take the offense out of the “violent or serious” felony category. See *People v. Superior Court (Alvarez)*, 14 Cal.4th 968, 979 (Cal. 1997), but see *People v. Barro*, 93 Cal.App.4th 62 (Ct.App.2d Dist 2001) (holding that dismissal under P.C. § 1385 eliminates the strike where the part of the plea agreement was to dismiss the count upon successful completion of probation).

²⁶ See G.C. § 7282.5(a)(5) (requiring that “the magistrate makes a finding of probable cause...pursuant to Section 872 of the Penal Code”).

²⁷ Government Code § 7282.5(a)(5) provides that a finding of probable cause in the preliminary hearing is sufficient for many felonies charges except in certain cases involving a domestic violence offense. The DV exception would certainly apply to an offense that falls within one of the enumerated offenses, e.g., assault, battery, and should also extend to DV felonies punishable by state prison. The DV exception arguably may reach violent and serious felonies so that a finding of probable cause would not be sufficient for a DV offense that is also a violent or serious felony.

²⁸ Although the Act does not define “domestic violence,” the Penal, Family, and Government Codes contain nearly identical definitions. Instead of establishing a specific offense called “domestic violence,” they define the phrase by reference to the *victim* of a crime. The Penal Code defines domestic violence as any “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” Cal. Penal Code § 13700(b); see also Cal. Fam. Code § 6211 (similar); Cal. Gov’t Code § 6205.5(b) (“‘Domestic violence’ means an act as defined in Section 6211 of the Family Code”). Abuse is defined by Cal. Penal Code 13700(a) as “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself, or herself, or another.”

²⁹ The TRUST Act requires that the “magistrate makes a finding of probable cause as to that [felony] charge pursuant to” P.C. § 872. Because P.C. § 860 does not state that waiver of the preliminary hearing is a concession on probable cause, arguably the waiver only waives the requirement that the judge find probable before the filing of the information. Thanks to Garrick Byers for this argument.

³⁰ While the Act states that an individual is not protected who “has been convicted” of certain offenses, in the past tense, the provision relating to probable cause is stated in the present tense. “(5) The individual is arrested and taken before a magistrate on a charge involving [certain felonies] and the magistrate makes a finding of probable cause as to that charge pursuant to Section 872 of the Penal Code.” See GC §7282.5(a)(5).

³¹ Although *People v. Leng* (1997) 71 Cal. App. 4th 1, provides that “[A] juvenile adjudication for an offense contained within Welfare and Institutions Code section 707, subdivision (b) may only constitute a strike if it is a serious or violent offense as defined in section 667.5 or 1192.7,” the court came to this conclusion to ensure equal protection of the law for both juveniles and adults. The TRUST Act, on the other hand, does not present similar equal protection issues as in *Leng* and therefore, presumably only requires that the juvenile be adjudicated delinquent for a section 707(b) offense to authorize continued detention on an immigration hold.

³² See 8 CFR sec. 287.7(d).

³³ In Northern California, contact Craig Meyer, Assistant ICE Field Office Director, at SanFrancisco.Outreach@ice.dhs.gov. In the Los Angeles Metropolitan and Central Coast areas, contact Robert Naranjo, Assistant ICE Field Office Director, at LosAngeles.Outreach@ice.dhs.gov. In San Diego and Imperial County, contact Kenneth C. Smith, Assistant ICE Field Office Director, at SanDiego.Outreach@ice.dhs.gov. For contacts in other jurisdictions, see the following link: <http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/contact.htm>

³⁴ Sample demand letters and motions are available at www.defendingimmigrants.org.

³⁵ Consider also working with an immigration counsel to secure bond in the immigration case, such that your client can preemptively pay the immigration bond and avoid immigration custody for any related deportation proceedings. Inform your client of the importance of attending immigration hearings. Even one missed hearing will result in an order of deportation. For more guidance on securing your client’s immigration bond, see *Criminal Defender’s Guide to Advocacy Against ICE Hold Requests*, available at <http://www.ilrc.org/policy-advocacy/immigration-enforcement>

³⁶ Available here: http://oag.ca.gov/sites/all/files/pdfs/fingerprints/forms/BCIA_8705.pdf

³⁷ The exclusion applies if the “individual has been convicted...of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony.” See GC §7282.5(a)(3). See also Assembly Floor Analysis for AB 4 (September 9, 2013) (noting that the Senate amendment added “prior misdemeanor conviction of a specified ‘wobbler’ offense”).