

**U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
HOMELAND SECURITY INVESTIGATIONS**

HSI Directive 13-01: HSI Special Agents Responding to State Crimes

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Superseded: U.S. Immigration and Customs Enforcement Office of Investigations Directive 07-001 entitled, "Office of Investigations Special Agents Responding to State Crimes," dated March 13, 2007.

Federal Enterprise Architecture Number: 306-112-002b

- 1. Purpose/Background.** The purpose of this Directive is to provide guidance to U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) Special Agents when they respond to requests for assistance from state or local law enforcement agencies. Although the core mission of HSI involves the enforcement of federal law, HSI shares an overarching interest in the enforcement of state law. The provision of limited assistance to citizens and to state and local law enforcement officers helps to promote public safety, the mission of ICE as a law enforcement agency, and comity and cooperation between federal, state, and local law enforcement agencies in their common fight against crime.
- 2. Policy.** HSI Special Agents are authorized to execute state felony arrest warrants, respond to requests for assistance by state or local law enforcement agencies, and make arrests for serious violent crimes. In such cases, except when providing investigative assistance to state and local law enforcement agencies as authorized by federal law, Special Agents are acting as state peace officers or as private citizens. (Note: This Directive does not limit the power of HSI Special Agents who have been granted the full power of a state peace officer, by statute or by cross-designation.)
- 3. Definitions.** The following definition is provided for the purposes of this Directive:

A **serious violent crime** is an offense under state law involving an imminent threat of death or great bodily harm to any person. The following are examples of state offenses meeting this definition: murder, rape, armed robbery, kidnapping, assault with a deadly weapon, an attempt to commit any of the foregoing offenses, or other similar offenses.
- 4. Responsibilities.**

 - 4.1.** The Executive Associate Director of HSI has the responsibility for ensuring that the provisions of this Directive comply with all applicable law and regulations.
 - 4.2.** The Special Agents in Charge (SACs) have the discretion to restrict arrests for serious violent crimes as deemed appropriate for Special Agents in their areas of responsibility

(AORs). SACs are also responsible for informing the Special Agents in their AORs about their Peace Officer status with respect to each State in the SACs' AOR.

4.3. The SACs are responsible for ensuring that all Special Agents under their supervision receive a copy of this Directive.

4.4. Special Agents are responsible for complying with the provisions of this Directive.

5. Procedures.

5.1. **State Arrest Authority.** Special Agents shall be permitted to use their state arrest authority to enforce state law in the following three circumstances:

- 1) Arrests for outstanding state felony warrants (see section 5.2);
- 2) Responses to lawful requests for assistance from state or local law enforcement officers (see section 5.3); and
- 3) Arrests for serious violent crimes (see section 5.4).

5.2. **Arrests for Outstanding State Felony Warrants.** There is no federal statute that authorizes HSI Special Agents to make arrests based on outstanding state warrants. Special Agents making arrests based on outstanding state warrants do so as peace officers or private citizens depending on the individual laws of the state in which the arrest was effected. Special Agents should contact the Office of the Principal Legal Advisor for state-specific guidance. An exception to the aforementioned statement is Title 18, United States Code (U.S.C.), Section 1073, Unlawful Flight to Avoid Prosecution (UFAP), where the individual to be arrested is in a state other than the one in which the warrant was issued. In all cases where the fugitive is crossing or has crossed state lines, there is probable cause to believe that the fugitive left the issuing state to avoid prosecution and is therefore subject to arrest pursuant to the UFAP statute.

- 1) If a Special Agent discovers during, and in relation to, the performance of lawful duties that an individual may be wanted under a state felony warrant, a **(b) (7)(E)** record via ^{(b) (7)(E)} furnishes the reasonable suspicion necessary to justify continued detention of the individual.
- 2) The Special Agent must immediately confirm the identity of the individual, whether or not the state felony warrant is still valid, and whether or not the state is willing to seek extradition.
- 3) If the state is willing to extradite, the individual is to be turned over to state or local officers immediately. The Special Agent or supporting personnel should document all activities per the guidance provided in the ^{(b) (7)(E)} on-line user manual for ^{(b) (7)(E)} and retain a hard copy of each page transmitted via ^{(b) (7)(E)} for the case file. In addition, the

Special Agent must document in a case file or via any authorized method, for example, an inter-office memorandum or duty agent log, the following:

- a) Date and time the state authority was contacted;
 - b) Time of arrival or response/requests from the state authority;
 - c) Name(s) of the state official(s) responding/replying to the incident;
 - d) Name(s) of the state official to whom the individual was released;
 - e) Condition of the person at the time of detainment and at the time of release; and
 - f) Other pertinent information related to the incident, for example if the individual was verbally abusive while in custody.
- 4) If the state or local officers authorize the Special Agent to continue the detention of the individual for them, the Special Agent will be acting under the authority of those state or local officers.
- 5) If the state declines to extradite, the individual must be released immediately. The Special Agent or supporting personnel must document all activities per the guidance provided in the^{(b) (7)(E)} on-line user manual for^{(b) (7)(E)} and retain a hard copy of each page transmitted via^{(b) (7)(E)} for the case file. Specifically, the Special Agent should record the following:
- a) The date and time the state authority was contacted;
 - b) The time of arrival or response or requests from the state authority;
 - c) The identity of the state official(s) responding or replying to the incident;
 - d) The condition of the person at the time of release; and
 - e) Other pertinent information related to the incident, for example if the individual was verbally abusive while in custody.
- 6) If the state that issued the felony warrant wants the individual, but the state in which the seizure is made will not accept him or her, the Special Agent should detain the individual for the federal offense of flight to avoid prosecution, 18 U.S.C. § 1073.
- 7) If 18 U.S.C. § 1073 is applicable, the Special Agent must contact the duty Assistant United States Attorney (AUSA) for the district in which the warrant was issued and determine if the AUSA will authorize the prosecution. If prosecution is authorized, the Special Agent should turn the individual over to the custody of the U.S. Marshals Service immediately. If prosecution is not authorized, the Special Agent must consult

with the local duty AUSA in the district of detention to determine the appropriate course of action, i.e., acceptance or declination of prosecution for 18 U.S.C. § 1073.

5.3. Requests for Assistance from State or Local Law Enforcement Officers.

- 1) Upon a request for assistance from a state or local law enforcement officer, a Special Agent may furnish appropriate assistance, including, as necessary, effecting an arrest for violation of state law.
- 2) A request for assistance may be implied where circumstances preclude or impair the ability of the state or local law enforcement officer to make such a request (for example, if the officer is unconscious, being held at gunpoint, or other similar circumstances).
- 3) Pursuant to the Investigative Assistance for Violent Crimes Act of 2012 (IAVCA), 6 U.S.C. § 455(d), at the request of state and local law enforcement, Special Agents may assist in the investigation of violent acts and shootings occurring in a place of public use, and in the investigation of mass killings and attempted mass killings. Mass killing is defined in the IAVCA as three or more killings in a single incident. As provided by the IAVCA, any assistance provided in this regard is presumed to be within the Special Agent's scope of federal employment. The IAVCA does not expand the jurisdiction of any federal law enforcement agency in any manner.

5.4. Arrests for Serious Violent Crimes. Upon probable cause, and where permitted by state law regarding the arrest authority of peace officers and private persons, a Special Agent may arrest a person who is in the process of committing, or has just committed, in his or her presence, a serious violent crime. The authority to make an arrest for a state offense involving a serious violent crime does not impose an obligation on the Special Agent to make any arrest.

- 1) Example. While shopping on personal time in a jewelry store, a Special Agent witnesses an attempted armed robbery of that store. The Special Agent would be authorized under this Directive to intervene in the armed robbery and arrest the perpetrator.
- 2) Example. On the way to the corner store, a Special Agent witnesses an armed carjacking. The Special Agent would be authorized under this Directive to intervene in the carjacking and arrest the perpetrator.
- 3) Example. In contrast to Example #2 above, a Special Agent who witnesses a break-in of an unoccupied vehicle would not be authorized by this Directive to intervene and arrest the perpetrator, unless lawfully and specifically requested to do so by a state or local law enforcement officer (see Section 5.3). Theft from a vehicle is not a serious violent crime under this Directive.

- 5.5. Use of Force.** In all actions taken in compliance with the provisions of this Directive, Special Agents must comply with the Interim ICE Use of Force Policy and the Interim ICE Firearms Policy, both dated July 7, 2004, or as amended or superseded.
- 5.6. Transfer of Arrestees for State Crimes.** If an HSI Special Agent arrests a person for a state offense in compliance with the provisions of this Directive, the Special Agent should expeditiously turn the arrestee over to the appropriate state or local law enforcement agency for processing under applicable state or local law.
- 5.7. Reporting of State Arrests.** Any arrest or other related action by a Special Agent in compliance with the provisions of this Directive shall be documented in writing and promptly furnished to the Special Agent's immediate supervisor.
- 5.8. Civil Litigation Arising from Arrests for State Crimes by Special Agents.** Special Agents may risk liability for making arrests for state crimes. Special Agents may face lawsuits alleging common law torts, constitutional torts, and violations of the Federal Civil Rights Act.
- 1) Common Law Torts. Common law torts can include assault, battery, false imprisonment, false arrest, or wrongful death. If the individual Special Agent is sued for a common law tort arising from actions taken within the scope of his or her employment and in compliance with the provisions of this Directive, the United States generally will be substituted as the defendant and the officer will be dismissed from the suit. See 28 U.S.C. § 2679(d)(1); United States v. Smith, 499 U.S. 160 (1991). In order to substitute the United States as the defendant in such cases, the Attorney General must certify to the court that the officer was acting within the scope of his or her employment at the time of the commission of the tort. The Attorney General's decision to certify scope of employment is subject to judicial review upon request of either the plaintiff or the officer-defendant. The Attorney General's certification is conclusive unless challenged. When the certification is challenged, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, that the officer-defendant was acting outside the scope of his or her employment. Gutierrez De Martinez v. DEA, 111 F.3d 1148 (4th Cir. 1997). If the Attorney General refuses to certify scope of office or employment under 28 U.S.C. § 2679(d), the officer-defendant may, at any time before trial, petition the court to find that he or she was acting within the scope of his or her office or employment. Upon certification by the court, the action or proceeding will be deemed an action brought against the United States. 28 U.S.C. §2679(d)(3).
 - 2) Constitutional Torts. If the individual Special Agent is sued for a constitutional tort (e.g., unreasonable search or seizure or violation of due process), the suit will remain as one against the Special Agent personally and, if proven, judgment will be rendered against the individual Special Agent, even if he or she was within the scope of his or her employment. However, qualified immunity is a defense available in these actions. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). The plaintiff alleging constitutional torts must specifically identify the constitutional right violated and must show that the constitutional right was clearly established at the time. If the plaintiff can meet this

burden, the Special Agent will still be entitled to qualified immunity if the Special Agent can demonstrate that a reasonable official, acting under the circumstances faced by the Special Agent and possessed of the same knowledge, could have believed that his or her conduct was lawful.

- 3) Federal Civil Rights Act. Special Agents may become subject to the Federal Civil Rights Act, 42 U.S.C. § 1983, when making state arrests. This statute permits a suit to be brought in state or federal courts against any officer acting under color of any state law for violating “rights, privileges, or immunities secured by the Constitution”.
- 4) Removal to Federal Court. A civil action or criminal prosecution commenced in a state court against a Special Agent for an act executed under color of office or in the performance of the Special Agent’s duties may be removed to federal court pursuant to 28 U.S.C. § 1442.

5.9. Scope of Employment Determinations. HSI will vigorously seek scope of employment protection and Department of Justice (DOJ) representation for any Special Agent in civil actions arising out of any arrest made under state law in compliance with the provisions of this Directive, provided that the Special Agent acted as a reasonably prudent officer would have acted under similar circumstances. However, neither a state’s authorization of Special Agents to make arrests for state crimes nor authorization by HSI will be dispositive in resolving the issue of whether a Special Agent has acted within the scope of his or her federal employment in effecting an arrest for a state crime. The determination as to whether a Special Agent has acted within the scope of his or her employment is made by DOJ, and the determination regarding scope of employment as to common law liability is ultimately subject to review and challenge before the courts. In the case of Special Agents providing investigative assistance to state and local law enforcement under the IAVCA (see section 5.3(3)), their actions are presumed to be within the scope of their federal office or employment.

5.10. Obtaining DOJ Representation. In all cases, to obtain a DOJ attorney to represent the Special Agent, two criteria must be satisfied **(b) (7)(E)**

(b) (7)(E)

(b) (7)(E)

5.11. Detentions and Arrest. As explained in this Directive, there are certain situations where a Special Agent is not permitted to make an arrest under state law, but is authorized to briefly detain an individual for state or local law enforcement officers. The fact that a court in a specific case may conclude that an authorized detention constituted an arrest in no way alters the propriety of the detention under this Directive if the Special Agent acted reasonably and in compliance with the provisions of this Directive and other relevant policies.

6. Recordkeeping. Appropriate documentation shall be maintained in the appropriate case file and the appropriate electronic case management system ^{(b) (7)(E)}Case Management or any successor system, **(b) (7)(E)** and/or **(b) (7)(E)**)). That information will be maintained for the records retention period specified for the case file and/or electronic recordkeeping system in which it is stored.

7. Authorities/References.

7.1. Authorities.

- 1) 6 U.S.C. § 455(d), Investigative Assistance for Violent Crimes Act of 2012.
- 2) 8 U.S.C. § 1357, Powers of Immigration Officers and Employees.
- 3) 18 U.S.C. § 1073, Unlawful Flight to Avoid Prosecution.
- 4) 19 U.S.C. § 1589a, Enforcement Authority of Customs Officers.
- 5) 28 U.S.C. § 1442, Federal Officers or Agencies Sued or Prosecuted.
- 6) 8 C.F.R. § 287.5, Exercise of Power by Immigration Officers.
- 7) The arrest authority laws of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, the Commonwealth of the Northern Mariana Islands, and Guam.

7.2. References.

- 1) United States v. Smith, 499 U.S. 160 (1991).

- 2) Harlow v. Fitzgerald, 457 U.S. 800 (1982).
- 3) Gutierrez De Martinez v. DEA, 111 F.3d 1148 (4th Cir. 1997).
- 4) 28 U.S.C. § 2671, Tort Claims Procedure, Definitions.
- 5) 28 U.S.C. § 2679(d)(1), Tort Claims Procedure, Exclusiveness of Remedy.
- 6) 42 U.S.C. § 1983, Civil Action for Deprivation of Rights.
- 7) 28 C.F.R. § 50.15(a), Representation of Federal Officials and Employees.
- 8) Interim ICE Firearms Policy, dated July 7, 2004, or as amended or superseded.
- 9) Interim ICE Use of Force Policy, dated July 7, 2004, or as amended or superseded.
- 10) TECS, National Crime Information Center On-line User Manual.

8. **Attachments.** None

9. **No Private Right.** These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.



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