



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

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*BROOKLYN DEFENDER SERVICES***

Presented before

The New York City Council

Committees on Immigration and the Justice System

Oversight Hearing on ICE Out of New York Courts

Resolution 0828-2019 regarding Protect Our Courts Act (A.2176 / S.425)

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My name is Richard Bailey. I am a Supervising Attorney in the *Padilla* Unit in the Immigration Practice at Brooklyn Defender Services (BDS). I thank the City Council Committees on Immigration and the Justice System, and in particular Chair Menchaca and Chair Lancman, for this opportunity to testify about the impact of Immigration and Customs Enforcement (ICE) in the New York City Courts.

BDS is one of the largest legal services providers in New York City, representing approximately 30,000 low-income Brooklyn residents each year who are arrested, facing child welfare allegations or challenging deportation. Since 2009, BDS has counseled, advised or represented more than 10,000 immigrant clients. About a quarter of BDS' criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of deportation or other disproportionate collateral consequences as a result of their criminal case.

BDS' *Padilla* Unit, named after the US Supreme Court case that held that effective assistance of counsel requires competent advice about the impact of a guilty plea on a defendant's immigration status, advises BDS' criminal defense attorneys and their noncitizen clients on the immigration consequences of guilty pleas to help avoid or minimize negative immigration consequences. Part of the consultation and analysis about immigration consequences in criminal proceedings involves evaluating a noncitizen defendant's exposure to being arrested by ICE, detained, and placed in immigration proceedings. These consequences often result from being charged or simply arrested on particular offenses, and occur even if the charges remain pending.

ICE in Courts

Immigration and Customs Enforcement (ICE) and its predecessor, the Immigration and Naturalization Service (INS), has long relied upon state and local criminal legal systems to find noncitizens who may be removable in order to detain them and subject them to the civil deportation process. Historically, ICE and the legacy INS would identify undocumented or deportable people in jails and prisons and issue an "immigration detainer" to hold a person for up to 48 hours beyond their mandated release time so that ICE could assume custody of the person and transfer them to an immigration detention facility.

With the NY City Council's passage of groundbreaking legislation that removed ICE from Rikers Island and prevented the NY Department of Corrections, NYPD, and Department of Probation from unlawfully detaining noncitizens without a judicial warrant, we saw a reduction in detention and deportations. However, under the Trump Administration, we are experiencing the harshest and most broad-sweeping immigration enforcement regime in modern history, as well as an unprecedented undermining of due process in immigration courts. On the national level, we are witnessing the highest rate of immigrants in detention in history at 48,000¹ and the highest immigration court backlog at over 1 million cases.²

Since we last testified about ICE arrests in courts, arrests in and around New York City courthouses have increased 1,700%, according to the Immigrant Defense Project report.³ The majority of people caught up in this wave of enforcement were reporting to court on low-level offenses, many for traffic violations. Since the beginning of 2019 alone, Brooklyn Defender Services has had more than 18 clients arrested by ICE in or outside the courthouse or in the community because of pending criminal allegations, mostly misdemeanors.

¹Patricia Alvarez, *Budget talks sticking point: How many people ICE can detain*, CNN, February 2019, available at <https://www.cnn.com/2019/02/11/politics/ice-detention-immigration/index.html>

²TRAC, Syracuse University, *Immigration Court Backlog Surpasses One Million Cases*, November 2019, available at <https://trac.syr.edu/immigration/reports/536/>

³Immigrant Defense Project, *The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*, January 2019, available at <https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf>

Since Trump took office, our immigrant clients have increasingly expressed concerns about the risks of coming to court. These clients include people with lawful status, those with citizenship claims, those seeking asylum, and naturalized citizens. They are often confused about the entanglement between ICE and the criminal legal system. They express fear of collusion between ICE and other officials, including court staff, judges, prosecutors, and even their own defense counsel. BDS's in-house immigration attorneys, who specialize in advising our clients about the immigration consequences of criminal legal system contact, are routinely required to describe to our clients the very real possibility of ICE's presence at court as well as the serious and definite risks of not appearing for their proceedings.

We are certain this fear, which is perpetuated by ICE's deliberate arrest practices, has a grave and chilling effect on immigrant communities' willingness to avail themselves of civil and criminal courts and the legal system generally. In practice, this means fewer innocent people or people with mitigating circumstances are mounting a defense against criminal allegations, potentially resulting in permanent criminal records and incarceration and/or triggering warrants; fewer cases bringing to light abuses and constitutional violations by police in immigrant communities; and fewer people exercising their legal rights in housing court to compel their landlords to repair unsafe conditions that endanger immigrants and non-immigrants alike. This chilling effect is starkly present in Family Court, where immigrant New Yorkers are afraid to show up to prosecute domestic violence, assert their parental rights or participate in visitation, custody or child support payment proceedings.

Client Stories

- Stepping onto 120 Schermerhorn Street in front of Kings County Criminal Court should be a nonevent. For Beth, an asylum-seeker, when two large men put their hands on her without identifying who they were, it catapulted her back to memories of being viciously abused – grabbed, attacked and subdued – her entire life. First by her father as a child, then her relatives when she came out as a lesbian, and most recently, by a relentlessly abusive ex-girlfriend. She never wants her 6-year-old son to feel the same sense of abandonment that haunts her, and was determined to be home when he got back from school that day. Literally grasping for her freedom, Beth clutched onto the waist of her immigration attorney who had accompanied her to court that day. In the midst of the physical scuffle, the men finally identified themselves as ICE, but only by taking out their badges and waving them around.
- Last fall, another BDS client was arrested by ICE outside Kings County Criminal Court. The client appeared for his hearing and as he was exiting the courthouse two men approached him and said they were arresting him. The client asked if they were ICE, but they did not respond. The client felt like he was being kidnapped because they did not identify themselves or show a badge.
- On another occasion, a Brooklyn Supreme Court justice excused our client's appearance for the day, but instructed the attorney to personally serve the client with an order of protection. The attorney thereafter arranged to meet her client in a McDonald's a few

blocks from the court. Unbeknownst to her, undercover ICE agents had followed her out of the courthouse. After meeting with her client and serving him with the protection order, the attorney and the client departed from the McDonald's and went their separate ways, at which point five ICE officers suddenly surrounded the client and arrested him. The client, who is married to a U.S. citizen, languished in immigration detention for more than four months before being scheduled for his first hearing in immigration court.

Recommendations

The surest way for local policymakers to protect immigrant New Yorkers from federal immigration enforcement is to set firm limits on federal intervention in the state criminal legal system. Ending so-called "Broken Windows" policing is urgent, now more than ever, as the Trump Administration uses local law enforcement actions and state-level convictions to aid in its mass deportation effort. ICE can identify and track our clients through arrest fingerprints shared by the NYPD with the National Crime Information Center database and court appearances.

Resolution 0828-2019 Regarding "Protect Our Courts Act" (A.2176 / S.425)

BDS strongly supports the "Protect Our Courts Act," which would place significant restrictions on civil arrests of those attending or traveling to or from court. ICE's courthouse arrests have undermined our clients' fundamental right to have their fair day in court. New York State Legislators have the power to enhance the safety of our courthouses and take important steps towards ensuring that all New Yorkers, regardless of immigration status, can actively participate in their own cases without the specter of fear hanging over their heads. We ask the City Council to pass Resolution 0828-2019 calling on the State Legislature to pass, and the Governor to sign, the "Protect Our Courts Act" (A.2176 / S.425), in order to protect certain interested parties or people from civil arrest while going to, remaining at, or returning from court proceedings.

In addition to the proposed resolution, we call on the Council to consider the following campaigns that would limit immigrant New Yorkers' contact with the criminal legal system:

I. End Arrests of Human Trafficking Victims and Decriminalize Sex Work

As BDS and others have reported for many years, mere arrests, even in cases that are later dismissed or resolved with a non-criminal violation, can lead to deportations, family separation, and broken communities. Courthouse arrests are just one of many ways this occurs. Diversion courts like Human Trafficking Intervention Courts (HTICs) can help to reduce the likelihood of ICE enforcement actions by encouraging less punitive dispositions, but they can also serve as a trap, prolonging court involvement with mandated services. New Yorkers should not have to fear ICE arrest at a HTIC part, but policymakers should also ask why victims of human trafficking are arrested and prosecuted at all. The same question should be asked for those who voluntarily engage in sex work, many of whom are immigrants.

Criminalization is a dangerous and inappropriate tool purportedly aimed at helping people leave the sex trade. BDS is a member of the Decrim NY Coalition, which is working to decriminalize sex trade related offenses, decarcerate people who have been arrested for sex trade related offenses, vacate criminal records related to prostitution, and protect the health and safety of those involved in the commercial sex industry by circumstance, coercion, or choice, and those exploited in all forms of labor. We encourage the City Council to work with Decrim NY to hold an oversight hearing on Comprehensive Decriminalization of the Sex Trades.

II. *Provide Equal Access to Drivers Licenses for All*

Many of our clients become entangled in the criminal and immigration legal systems simply for minor traffic violations. Currently, over 750,000 undocumented immigrant New Yorkers over the age of 16 are barred from obtaining driver's licenses due to their immigration status.⁴ Without access to licenses, immigrants are unable to register and insure their vehicles or obtain and carry valid identification. Unlicensed immigrants often risk driving to meet their basic daily and travel to school, worship, and work. Immigrants without valid identification or permission to drive fear simple interactions with police, such as a traffic violation, will put them at risk of arrest and deportation. This leads to avoiding police, even when they are a victim or witness of a crime. We call on the New York City Council to work together with the New York State Legislature and the Governor to ensure equal access to driver's licenses by passing legislation S.1747/A.3675 to ensure that standard licenses be accessible to all state residents, regardless of immigration status.

III. *Support Legalization and Regulation of Marijuana Access*

Low-level marijuana possession offenses make up the fourth and fifth most common arrest charges in New York City. The sharp racial disparities in these arrests—approximately nine-in-ten of those arrested are Black and/or Latinx—are inexcusable and the disproportionate adverse impacts, especially for immigrants, are severe. When issued a DAT or summons in lieu of arrest, our immigrant clients are placed at risk when they present at court to pay a fine—an admission of guilt—without ever speaking to an attorney or receiving a *Padilla* advisal. As a preliminary step, the Council should sign-on as a supporter of the Drug Policy Alliance's Start SMART NY campaign for state legislation enabling sensible and legal marijuana access through regulated trade that would help to economically empower those who are targeted under the current law. We thank the Council for your attention to this issue and for calling on the NYS Legislature to pass the Marihuana Regulation and Taxation Act (S.1527/A.1617) which would legalize, regulate, and tax the sale of marijuana in New York State.

⁴ New York Immigration Coalition, Green Light NY: Driving Together, available at <https://greenlightny.files.wordpress.com>

IV. *Limit Family Separation through ending Automatic Orders of Protection*

In Brooklyn Criminal Court, full Orders of Protection are typically issued at arraignments in all cases involving a domestic dispute, assault, or endangerment of a child. These routine Orders of Protection, in effect, render many clients homeless; they are unable to return home, go near, or speak to the named family member. For undocumented clients, without access to legal employment or identification, there are many barriers to accessing housing when unable to return home. This presumption of family separation is often triggered by well-meaning mandatory reporters making judgements about Black and Latinx families.

If then placed in immigration proceedings, clients who received full Orders of Protection face the bias of an immigration judge who are not be familiar with the routinized issuance of orders in Brooklyn. Immigration judges look at our clients with an idealized expectation of how Americans treat one another; a DV or endangering the welfare of a child charge are interpreted as inability to adapt to American culture. A judge may be unwilling to set Bond in a detained deportation proceeding due to an Order of Protection, which was likely set at the request of the DA and not a victim.

Conclusion

Our immigrant clients and their family members are rightly terrified to appear in court. But they cannot modify their immigration status if they have an open criminal case, and they cannot resolve their criminal or family case if they fail to appear in court. The impact of enforcement policies at the federal level are still felt every day by our immigrant clients, their families and New York City communities. New Yorkers must come together and make the necessary changes to build the sanctuary as promised.

Thank you for considering my comments. If you have any questions, please feel free to reach out to Kathleen McKenna, Policy Social Worker, at 718-254-0700 ext. 210 or kmckenna@bds.org.