WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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Everything You Need to Know for Your Noncitizen Clients

If your noncitizen client is facing criminal charges or adverse findings in Family Court. Please contact the WNY Regional Immigration Assistance Center.

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We are funded by the New York State Office of Indigent Legal Services (ILS) to assist mandated representatives in the 7th and 8Th Judicial Districts in their representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. There is no fee for our service. Please consider contacting us, whether you are a criminal defense, appellate or family defense attorney, for any of the following services:

- To receive advisals on plea offers and other dispositions to reduce and alleviate the immigration consequences on a noncitizen's status
- To join you in communicating to your client the aforementioned advisal we have provided
- To assist you by providing language access to communicate with a client who does not speak English when your office does not have such capacity, or provide you with a list of referrals to interpretation/translation services
- To assist you in determining the status of a noncitizen who does not have documentation of that status available
- To communicate our advisal concerning your noncitizen client in writing or orally to opposing counsel or to a court
- To provide CLEs on the immigration consequences of crimes to your defender community
- To participate in case conferences with you and others in your office to discuss noncitizen cases in the criminal justice system
- To refer you to deportation defense services and counsel

A RETURN TO INCREASED ICE ENFORCEMENT IN CRIMINAL MATTERS: WHAT YOU SHOULD KNOW ABOUT ICE DETAINERS

By Sophie Feal, Managing Attorney, WNYRIAC*, Legal Aid Bureau of Buffalo, Inc.

*This article is based almost exclusively on a compilation of information published by the Immigrant Defense Project, a fellow RIAC in New York City. Visit their website for more important information and resources at www.immigrantdefenseproject.org

In June, the U.S. Supreme Court upheld the Biden Administration's September 2021 immigration enforcement guidelines against challenges by Texas and Louisiana. During the pendency of the litigation, the guidelines were stayed (See page 3 of our July 2023 Newsletter to read more about the guidelines). However, now, in light of the Court's ruling, we expect that criminal matters will be revisited as an enforcement priority for the Department of Homeland Security (DHS)[1]. In addition, there are reports from advocates of arrests of the asylum seekers staying in shelters, motels and hotels in New York City and other parts of the State. Common charges appear to be allegations of endangering the welfare of a child, DV-related assaults, and recently outside of Buffalo, two newly arrived asylum seekers were charged with rape. For these reasons, we are concerned about an increase in U.S Immigration and Customs Enforcement (ICE) arrests and detentions of noncitizens in New York.

ICE, a branch of the DHS, has the power to detain any noncitizen who is charged with removability (also referred to as deportability) from the United States. A noncitizen may be removable because they are undocumented, they have criminal convictions, or they have violated the terms of their immigration status. They may be detained anywhere in the country.

ICE's ability to arrest and detain a noncitizen might not be related to the criminal case in which a criminal defense or family law attorney represents them, but the outcome of a criminal case will be a decisive factor in their ability to remain in the United States. However, just because a noncitizen has been detained for removal by ICE does not mean they will be actually deported to their native country. Immigrants in removal proceedings may be eligible to apply for relief from removal and remain in the U.S., including those with criminal convictions (see here for our May 2021 Newsletter on Arrest and Detention and our June 2021 Newsletter on Hearings and Relief). Nonetheless, attorneys should avoid putting confidential information, including a client's immigration status, how they entered the country, or where they were born on the record. If necessary, ask to discuss sensitive information off the record. ICE may use these statements against noncitizens in removal proceedings.

> "When a law enforcement entity honors a detainer, they agree to transfer a noncitizen into ICE custody once their criminal custody period is over. This may even occur when a client pays bail on a pending case."

Detainers (form I-247A entitled "Notice of Action - Immigration Detainer") are the means by which ICE advises local police, probation and parole offices, and jail and prison officials that they seek to place a noncitizen in detention. Detainers are administrative forms, not judicial warrants, which request that law enforcement agencies hold noncitizens in their custody for 48 hours so that ICE can pick them up

[1] The Administration has stated, "We applaud the Supreme Court's ruling. DHS looks forward to reinstituting these Guidelines, which had been effectively applied by U.S. Immigration and Customs Enforcement (ICE) officers to focus limited resources and enforcement actions on those who pose a threat to our national security, public safety, and border security. The Guidelines enable DHS to most effectively accomplish its law enforcement mission with the authorities and resources provided by Congress."

before they are released into the community. Detainers are also called "ICE holds" or "immigration holds." According to DHS, a noncitizen is entitled to a copy of their detainer, which counsel is always encouraged to review for accuracy.

Once a noncitizen client is in ICE custody, they may not be automatically produced for their pending state criminal court appearances. However, as the defense lawyer, you play a crucial part in ensuring that your client retains the ability to fight their criminal case.

When a law enforcement entity honors a detainer, they agree to transfer a noncitizen into ICE custody once their criminal custody period is over. This may even occur when a client pays bail on a pending case. Once ICE has an immigrant in custody, they will determine whether that person is entitled to appear before an immigration judge to try to remain in the U.S., or whether the person can be deported without seeing a judge, which happens in limited cases. ICE also determines whether they want to keep the person in an immigration detention or whether they can be released. These determinations are based on a noncitizen's status, whether they have a criminal conviction, their flight risk and whether they pose a danger to the community (See our February 2023 Newsletter on Immigration Bonds).

If a person is in state custody, DOCCS is required by law to investigate where they were born and to inform ICE if they were born outside the United States. While the noncitizen is in their custody, DOCCS will notify ICE of a noncitizen's conviction and sentence, and give ICE a copy of the criminal case file and presentence investigation. DOCCS' regulations also provide for contacting ICE before releasing a noncitizen on parole.

In a noteworthy State decision, *Francis v. Demarco*, 88 N.Y.S.3d 518 (App. Div. 2018), the Second Department placed some limitations on a State official's ability to assist in effectuating immigration arrests, and therefore, afforded noncitizens an opportunity to challenge their arrest and detention. The court reasoned that,

SAVE THE DATE
IN-PERSON CLE
SEPTEMBER 30TH, 2023

The NYSBA Criminal Justice Section is hosting its Fall CLE in Albany at the Bar Center

The CLE will include the annual Court of Appeals Update with Judge Rivera and a presentation on "Hot Topics in Crimmigration" with WNYRIAC Managing Attorney, Sophie Feal, and Bronx ADA, Saad Siddiqui

Negligent ICE Detention Conditions

National Public Radio received a 1,600-page response to their Freedom of Information Act lawsuit response to their requesting for inspection reports written by experts hired by the Department of Homeland Security's Office for Civil Rights and Civil Liberties. "In examining more than two dozen [immigration detention] across 16 states from 2017 to 2019, these expert inspectors found "negligent" medical care (including mental health care), "unsafe and filthy" conditions, racist abuse of detainees, inappropriate pepper-spraying of mentally ill detainees and other problems that, in some cases, contributed to detainee deaths." One example was a man who recently had surgery, with surgical drains, and was sent back to the general population of the jail with an open wound, no bandages, and no follow-up appointment. More can be read about this FOIA here.

> "The issue before us in this proceeding is both narrow and important. We must decide whether New York law permits New York State and local law enforcement officers to effectuate civil immigration arrests. The authority of federal civil immigration officers to effectuate such arrests is not before us. Nor do we have occasion to pass upon broad issues of immigration law and policy. *Addressing only the precise question before us, and based on our analysis of the relevant statutes and precedents, we conclude that New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations…"* Id. at 532. [emphasis added].

The following, therefore, constitute violations of *Francis v. Demarco*:

- Stopping a vehicle or prolonging a traffic stop to allow time for CBP or ICE to arrive
- Conducting a *Terry* stop (a brief investigatory stop) based on suspicion of a civil immigration violation
- Extending the detention of a person due to be released from criminal custody for ICE
- "Re-writing" or re-arresting someone due to be released (e.g. on bail or following a sentence for time served) based on an ICE detainer

Francis v. Demarco does not implicate the 4th Amendment. The remedy for its violation is a writ of habeas corpus.

Nonetheless, given usual communication between law enforcement and ICE, some noncitizens are at risk of being transferred to ICE custody if they pay bail, complete a criminal sentence, or are otherwise ordered released from custody. ICE has, in the past, waited to arrest individuals outside of prisons and jails, although they are barred by State law from being in or near a New York State courthouse unless they have a judicial warrant. An administrative detainer is insufficient. Defense counsel should explain this risk to a noncitizen client so they understand that they may not get to return home as expected because those currently holding them are facilitating their transfer to an immigration detention facility.

Once the prosecution has notice that a client is in ICE custody, they must make diligent efforts to produce them. The prosecution cannot be "ready" when a defendant is in ICE custody and not produced for court. An attorney may be able to argue that the District Attorney's failure to make efforts to produce a client for prosecution is charged to the prosecution in a speedy trial motion. Under NYCPL §30.30, the fact that a defendant is absent from court does not eliminate their right to a speedy trial. Offer the court proof that a client is in ICE custody and thus, a bench warrant is inappropriate. It is the District Attorney's responsibility to ensure the production of a detained defendant in court.

A writ of *habeas corpus ad prosequendum* (NYCPL § 580.30) secures the attendance of people who are detained or incarcerated in federal custody to appear in state criminal court. The District Attorney must issue the writ, addressed to the Attorney General of the United States, explaining that the appearance of the defendant is necessary in the interest of justice and requesting they be produced on a specified date and time. While ICE advises on its website that federal agencies are not bound by state court orders, ICE will generally honor the writ of a state or local judge directing the appearance of a detainee in court.

Once the writ is obtained and ICE has approved it, counsel may contact the Field Office Director responsible for their area in writing and request that they facilitate the noncitizen's transfer to state or local custody. However, the requesting law enforcement agency must arrange for the person's transport.

In order to keep the 30.30 time running, make sure to explain how failure to produce is not a reasonable delay because the District Attorney was notified and should have filed a writ, and that the adjournment was not requested by your client. Otherwise, it may be found to be an excludable consent adjournment under §30.30(4). Consider arguing: The prosecution has a duty to exercise due diligence in ascertaining the whereabouts of your client in ICE custody; clients arrested by ICE are not absent or unavailable when the prosecution has notice of your client's location in ICE custody; after the prosecution has notice that your client is in ICE custody, they must make diligent efforts to produce the defendant; and the prosecution cannot be ready when your client is in ICE custody and not produced for court.

As required by the ABA Rules of Professional Conduct, attorneys have a duty to communicate and keep clients informed and advised of significant developments in their cases as well as to inform them of plea offers and other options. This duty continues regardless of whether a client is at liberty, in local criminal custody, or in ICE custody.

You may be able to locate a client using the ICE detainee locator found at https://locator.ice.gov/odls/#/index. However, this website can be unreliable, most commonly by indicating that someone is not detained when in fact they are. If you are having difficulty locating or meeting with your client, you can speak with their deportation officer by calling the appropriate field office with the client's A number. Locally, the number is (716) 464-5800 or Buffalo.Outreach@ice.dhs.gov. For a full list of field offices go to www.ice.gov/contact/ero.

New Case Law

The Court of Appeals for the 2d Circuit upheld the SDNY in *Farhane v. US*. This interesting case involved a naturalized citizen who sought to vacate a 2006 conviction based on the grounds that his attorney was ineffective for not warning him of the risks of civil denaturalization and possible deportation resulting from his guilty plea. The court found that civil denaturalization is a collateral consequence not covered by the Sixth Amendment as required by *Padilla.* What is unique about this matter is that though the petitioner was a citizen when he pled guilty in 2006, at the time that the offense was *committed* in 2001, he was not. During the naturalization process in 2002, he stated on two applications and in one interview under oath, that he had never knowingly committed a crime for which he had not been arrested, when in fact he had a year earlier. This was the lie that subsequently caused the de-naturalization proceedings since the petitioner had made a material misrepresentation when he sought to become a U.S. citizen. For this reason, it is critical to consider the status of a person born abroad at the time of the alleged criminal activity. For more information, see FAQ for defenders.