

WRITTEN TESTIMONY OF THE BRONX DEFENDERS

**New York City Council's Committee on Immigration
Hearing Regarding Int. No. ___, *A Local Law to amend the administrative code of
the city of New York, in relation to persons not to be detained by the police
department,*
and
Int. No. ___, *A Local Law to amend the administrative code of the city of New
York, in relation to persons not to be detained by the department of correction.*
October 15, 2014**

My name is Genia Blaser and I am an attorney in the Civil Action Practice at The Bronx Defenders. I submit these comments on behalf of the Bronx Defenders and thank the City Council for both the opportunity to testify and also for their ongoing support of non-citizen New Yorkers.

The Bronx Defenders is a holistic, community-based public defender office located in the South Bronx. We provide client-centered criminal, civil, and family defense legal services to low-income Bronx residents and to detained non-citizens in removal proceedings. Working collaboratively with our clients, The Bronx Defenders seeks to end cycles of poverty, addiction, violence, family separation, and court involvement. Today our staff of over 200 represents 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. Our Immigration Practice works closely alongside criminal defense attorneys and other advocates to advise non-citizen clients of the draconian immigration consequences of contacts with the criminal justice system. Additionally, we represent clients in Immigration Court and fight to keep them here in the United States with their families. Many of these clients end up in immigration custody as a result of contacts with the criminal justice system.

Through its collaborative and holistic Immigration and Criminal Defense Practices, The Bronx Defenders is in the unique position to witness firsthand how the current policies of the New York Police Department ("NYPD"), the Department of Corrections ("DOC"), and Immigration and Customs Enforcement ("ICE") have devastating and unjust consequences to non-citizen New Yorkers, their families, and their communities. Under the current policy, when ICE has lodged a detainer against a non-citizen, the NYPD and DOC inform ICE when that individual's criminal matter is resolved and the individual is then released directly into ICE custody. There are very few exceptions to this rule. This policy, although a crucial first step toward shielding non-citizens from ICE, still leaves out thousands of New Yorkers who are not eligible under its narrow protections. Due to its narrow scope, the current policy has led to a lack of due process for non-citizens facing criminal charges, the suffering of their family members, and an overall lack of trust in the

police and the criminal justice system by immigrant communities. Thankfully, the current policy has paved the way for the introduction of new legislation that will extend protections to a large majority of New Yorkers who were ineligible under the previous law.

Non-Citizens Receive Unequal Treatment in the Criminal Justice System under Current Detainer Policies

I. Non-Citizens Are Often Unable to Access Their Due Process Rights in Criminal Proceedings

Every day, advocates at our office witness firsthand how the promise of due process held out by the 5th Amendment is unrealized by our non-citizen clients solely because of immigration status. Whenever ICE has lodged a detainer against a non-citizen client and the client's criminal case carries potential immigration consequences, that client is unable to access the same Due Process rights as a US citizen client would, regardless of the seriousness of the charge he is facing. Once ICE has lodged a detainer against a non-citizen, that individual must decide whether to prioritize his criminal or his immigration matters. This very difficult decision is often made within the first few minutes of meeting with a criminal attorney and learning that ICE has lodged a detainer. Most clients choose to fight for their right to stay in this country. For an undocumented client who faces open criminal charges – no matter how minor or serious the charges – this frequently means waiting in jail for months awaiting the resolution of his case so that he will be eligible to be released under the current detainer policy. Criminal attorneys fight to resolve these cases with dismissals or non-criminal resolutions in order to preserve eligibility under the current detainer policy, but our clients have often wasted months in jail before the District Attorney will agree to this. The majority of the time these clients are incarcerated on low amounts of bail, which their families and communities would pay were there not the threat of the clients being turned over to ICE.

Client examples:

Mario, an undocumented client who fled violence in Honduras at the age of 17 to come to the US, was arrested on felony criminal charges after an argument with his girlfriend and a detainer was lodged at arraignments. The criminal case was not presented to a Grand Jury by the 180.80 day. Had Mario been a US citizen, he would have been released from jail on that day but because of the detainer and his open felony charges, Mario's criminal defense attorney had to advocate with the judge to set bail so that he would not go into ICE custody. The District Attorney never presented the felony charges to a Grand Jury and instead waited for the 30.30 time to expire before dismissing the case, even after the criminal attorney informed the District Attorney that the client remained incarcerated because of the detainer and that the complaining witness had told our investigator that she did not want to continue with the case. Mario, who had no criminal record, had two young children in the US whom he had previously been supporting. He was unable to see or contact them throughout

the case due to an Order of Protection held by their mother, the complaining witness. Mario was incarcerated for four months before his case was dismissed and he was released under the DOC law.

Nancy, a Spanish-speaking visa overstayer from the Dominican Republic with an infant son, was arrested after she called the police when her ex-boyfriend, who is the father of her son, attacked her. When the police arrived, Nancy's ex-boyfriend, who speaks English, told them that she was the one who attacked him. Nancy had never been arrested before and was in shock when she was handcuffed and put in the police car. She was panicking about who would care for her seven-month-old son, for whom she was the primary caregiver. When she appeared before a judge at arraignments and learned that there was an ICE detainer and that she would not be going home if she wanted to avoid being deported, Nancy fell to the ground. She agreed to have her criminal defense attorney set bail, even after the criminal judge planned to release her on her own recognizance, so that she would not be turned over to ICE. Once she arrived at Rikers, however, she realized that she could not be apart from her son. She told her family to pay bail, which they did. Yet instead of being released to take care of her son, Nancy was turned over to ICE because she still faced open criminal cases. Ultimately, Nancy was released on an order of supervision by ICE so that she could care for her son, but she is currently in deportation proceedings. Her criminal case was dismissed at the next court date following her arraignment.

Similarly, our non-citizen clients are faced with deciding whether to fight their criminal cases or to plead guilty with the sole purpose of avoiding being turned over to ICE and ending up in deportation proceedings. In essence, the current detainer policy forces our clients to choose between defending themselves in the criminal process and pleading guilty – even where there are strong and viable defenses in their criminal cases – exclusively to avoid being in deportation proceedings. US citizen clients are not faced with this situation. They are able to decide whether to defend themselves against the criminal charges or to plead guilty based on the merits and strengths of their criminal cases.

Many of our non-citizen clients who choose to prioritize their immigration situations remain incarcerated on open cases as a result – even on minor charges such as turnstile jumping, driving on a suspended license, low-level marijuana possession, and trespass. These cases often remain open for months while clients' criminal attorneys fight to resolve the cases in ways that will leave them eligible to be released under the current detainer policy. These cases backlog an already overburdened and broken criminal justice system. We have seen that cases for clients who have ICE detainers – especially when they are facing minor charges – often take longer to resolve than cases for clients who are not incarcerated pretrial.

Client example:

Fernando, a young Mexican client, was arrested after returning home from his job in construction when he was illegally stopped and frisked and then accused of carrying a gravity knife (also known as a switchblade). Our clients who work in construction who are arrested are frequently charged with possessing gravity knives, even though the knives they carry to use in cutting through drywall do not meet the legal definition of a gravity knife.¹ Fernando had no prior criminal record, lived with his undocumented wife and young children, and was the main breadwinner of the family. At arraignments, the District Attorney offered Fernando a plea bargain of a non-criminal disposition: disorderly conduct. Because there was an ICE detainer, however, and thus a concern that Fernando would be immediately turned over to ICE if his case was resolved at arraignments, Fernando was forced to decide whether to prioritize his liberty or potential immigration consequences. Fernando spent a week at Rikers while we investigated his immigration history to ensure that he would be eligible under the current detainer policy once his case was resolved. A week later, Fernando pled guilty to disorderly conduct – same plea that was offered at arraignments – in order to avoid entering into ICE custody and facing deportation, even though the knife that he was carrying was not a gravity knife and the stop by the police had not been legal. Although Fernando only spent a week at Rikers, we have clients who have been incarcerated for months on similarly minor charges.

Our non-citizen clients who are complaining witnesses in criminal cases are also forced to decide between pursuing their rights to pursue prosecution in the criminal process and withdrawing their charges based on their own open criminal cases where there are ICE detainers. Often, when one individual calls the police against another but both parties make accusations against the other, the police will arrest both parties. This is called a cross-complaint because both parties have complaints against the other for the same incident. Sometimes both of the cases are dismissed in what is called a “cross-drop.” Other times, depending on the strength of the allegations and the cooperation of the complaining witness, the case against one party will go forward. Non-citizens with ICE detainers who have cross-complaints are forced to choose between cooperating with the District Attorney on allegations that they made against another person or dismissing the charges so that they can be released under the current detainer policy.

Client example:

Gregory, a visa overstay from Jamaica who was about to start the process of applying for a green card through his US citizen wife, was arrested after he called the police to file a complaint against a man who assaulted him, causing him to have staples put in his head. Unbeknownst to Gregory, his assailant called the police accusing Gregory of

¹ For recent documentation of this problem see: Campbell, John, “How a '50s-Era New York Knife Law Has Landed Thousands in Jail,” *The Village Voice*, Oct. 7, 2014; available at: <http://blogs.villagevoice.com/runninscared/2014/10/nyc-gravity-knife-law-arrests.php?page=all>

assault while Gregory was in the hospital. Gregory had been unable to call the police himself because he was in the midst of receiving emergency medical attention. Both parties were arrested by the police. When Gregory appeared at arraignments, he discovered that ICE had lodged a detainer against him. Gregory now faced the decision of whether to pursue the criminal charges against his assailant or to agree to a “cross-drop.” In essence, Gregory had to decide whether he wanted to fight the false charges against him or walk away from prosecuting the man who violently attacked him. Although Gregory had a strong case against his assailant – especially given the severity of his injuries – Gregory agreed to drop the charges against his assailant in exchange for the dismissal of his case so that he would be eligible for release under the current detainer policy. Gregory spent two weeks at Rikers while his wife and family agonized over the fact that Gregory could be facing deportation if he chose to go forward with the charges against his assailant. Had Gregory been a US citizen, his family would have immediately paid his bail so that he could receive proper medical treatment for his head injury and avoid deciding between pursuing his criminal case and addressing potential immigration consequences.

II. Non-citizens with Detainers are Unable to Take Advantage of Programs and Treatment Options Because of the Threat of Being Released to ICE

By barring non-citizens from having their sentences withheld, ICE detainers often prevent individuals who struggle with drug addiction or mental illness from participating in treatment programs. Non-citizen clients for whom enrollment in a treatment program would be beneficial are unable to do so during the course of their criminal cases because release from DOC would mean being turned over to ICE. Many non-citizen clients opt to plead guilty merely for the purpose of preserving eligibility under the detainer policy, even if it is detrimental to them on a personal level.

Client examples:

As a child growing up in Honduras, Jesus’s safety and health were placed in constant jeopardy. He experienced levels of corporal punishment that amount to torture. Jesus crossed the United States border nearly ten years ago and became part of the undocumented population. When he was arrested on misdemeanor charges following an argument with the mother of his children, Jesus’s life fell apart. The threat of an immigration detainer foreclosed for Jesus a number of resolutions available to all other defendants in the criminal justice system. After the Assistant District Attorney and presiding judge ignored any and all mitigating details about Jesus, he received a 60-day jail sentence, followed by an immigration detainer. He spent an additional six months in immigration detention as his attorneys advocated for the Immigration Judge to set bond in his case and his family worked to gather the money they needed to pay his bond. More than two years later, Jesus’s case is still languishing in Immigration

Court as he waits for a decision on his application for asylum and for designation as a survivor of domestic violence.

Carlos, an undocumented man from Mexico, had been living in the United States with no criminal history for over a decade when the estranged mother of his children made false allegations that he had physically and sexually abused one of their children. Carlos had been separated from the mother of his children for a while but he financially supported his children and saw them whenever he could. Carlos was arrested on felony charges and an ICE detainer was lodged against him because he was undocumented. There was also a concurrent Family Court investigation stemming from the allegations, which were determined to be unfounded and were ultimately dismissed. Carlos's criminal charges were reduced and he sat in DOC custody for over five months until the District Attorney finally offered him a non-criminal disposition that would allow him to be released under the DOC law. Had Carlos not been incarcerated, the District Attorney would have offered this disposition earlier under the condition that he complete an anger management program prior to taking a plea. This option, of course, was not available since Carlos was incarcerated. Although Carlos maintained his innocence throughout his criminal case, when the District Attorney finally offered a non-criminal disposition without the requirement of first completing an anger management program, he decided to plead guilty to preserve his eligibility under the DOC law and to avoid spending more time in DOC custody. Because of his guilty plea, however, Carlos's children have an Order of Protection against him and he has had to go to Family Court to try and modify the terms of it. He has also had physical and mental health consequences as a result of his months of incarceration.

III. Non-citizens who Have Criminal Records or Prior Orders of Deportation are not Eligible for Release Under Current Detainer Policy Regardless of the Outcome of Their Criminal Case.

Likewise, non-citizen clients with prior orders of deportation or prior criminal convictions must fight their criminal cases knowing that regardless of the outcomes, they will be released to ICE to face deportation. Under the current detainer policy, unless a non-citizen has a misdemeanor conviction from 10 years ago, he will be released to ICE no matter the outcome of the current criminal case. Similarly, non-citizens who have prior orders of deportation, regardless of how old the orders are and the circumstances surrounding the orders, will be turned over to ICE. These clients are faced with the decision to either sit in DOC custody and fight their cases knowing that they will go into ICE custody or to take pleas early on in their cases in order to avoid spending months in jail followed by months in immigration detention.

Client examples:

Jose, Ecuadorian client who was ordered deported in absentia in 1992, was arrested after his school-age son swiped him into the subway station using a student metro

card. Because of Jose's old order of deportation, ICE lodged a detainer and Jose did not qualify under the current DOC policy regardless of the ultimate outcome of his criminal case and regardless of the fact that Jose had no criminal history. At arraignments, the District Attorney offered Jose to resolve his case with an ACD. However, Jose's criminal defense attorney advised him not to resolve the criminal case so that the attorney could determine if there were any grounds to reopen Jose's old deportation order and avoid having Jose enter Immigration custody. After learning that his options were to either sit in criminal custody and wait for a copy of his immigration file to investigate if there were legal grounds to reopen his order of deportation or to resolve the criminal case and go into ICE custody to be deported, Jose initially decided to sit in jail and wait for us to receive his immigration file, which can take months. After a few weeks of sitting in jail and waiting, however, Jose changed his mind and decided that he would rather be deported than sit in jail for months and months with only the slight chance that he could avoid being turned over to immigration custody. Jose resolved his criminal case with an ACD, was released to ICE custody, and was deported.

Antonio, a Dominican client who had been a lawful permanent resident for many years before being ordered deported in 1996 for an old drug conviction, was rearrested on charges of misdemeanor drug possession and gambling charges. A detainer was lodged because of his previous order of deportation. Antonio made the difficult decision to remain in DOC custody in order to allow his immigration counsel to investigate his immigration history and explore if there were any options to reopen his previous order of deportation. This process took almost eight months. Antonio was incarcerated this entire time, separated from his family, which included two teenage children who were terrified that their father would be deported. Eventually counsel was able to obtain a copy of Antonio's file and discovered that there were viable legal grounds to reopen his previous order of deportation. A few months after Antonio's arrest, the District Attorney made immigration-safe plea offers. Antonio had to wait for a motion to reopen his deportation order to be filed before resolving his criminal case so that he would not automatically be deported. Once the motion was filed, Antonio resolved his cases with non-criminal dispositions and entered Immigration custody. Antonio's motion to reopen was granted and he pursued his strong application for a pardon in deportation proceedings.

Salvador, a long-time lawful permanent resident from the Dominican Republic with diabetes and other health ailments, was arrested for low-level marijuana possession. Because of his criminal history – Salvador had a few misdemeanor convictions for trespass and shoplifting – ICE lodged a detainer against him. Salvador learned that he was deportable regardless of the outcome of his criminal case, and that he would be released to ICE once his family paid bail or upon the resolution of his case. Salvador and his entire family were shocked by this news. Salvador had a long work history in the United States and two US citizen children, both of whom were adults. Salvador felt like he had no options: he could either waste away at Rikers, where he was not receiving the appropriate medication for his diabetes, or he could just resolve his criminal case and go into deportation proceedings. Salvador's immigration counsel

advised him to resolve the criminal case in the best way possible so that it would leave him eligible for the pardon for which he would qualify in deportation proceedings. After three months of going back and forth about what to do, Salvador decided to plead guilty to misdemeanor marijuana possession, solely so that he could go into immigration custody and fight his deportation case. Salvador was lucky that he had such a strong immigration case and after a few months in immigration detention, he won his case. In total, Salvador spent almost a year incarcerated.

IV. Non-citizens with Mental Illness face DOC Incarceration or Immigration Detention, Neither of Which Is Equipped to Provide Adequate Mental Health Services.

Finally, current detainer policies have a devastating impact on non-citizens who suffer from mental health symptoms. These individuals are in a wholly unjust situation: they remain incarcerated in DOC custody – often without adequate mental health treatment² – to either await eligibility under the current DOC law or decide to resolve their criminal cases knowing that they will go into immigration custody, where they will also be without adequate mental health treatment, all the while facing deportation.

Recent articles and reports have shed light as to the widespread concerns of the quality of mental health services at the DOC and the potential for future federal investigation not only as to the adequacy of the services provided but also to the treatment of this population by the corrections officers. Many non-citizens in DOC custody have chronic mental illnesses that require various forms of treatment, none of which is provided adequately in DOC or Immigration custody. Instead of providing mental health treatment in DOC custody, inmates are often physically abused by the guards if they ask for mental treatment.³ In some situations, inmates have attempted suicide and instead of receiving treatment, they are physically beaten and/or are tucked away in solitary confinement where they are unable to access treatment.⁴ These clients leave DOC custody with unimaginable emotional scars, and physical scars, for how they were treated while under the care of the City.⁵ We have had clients who, upon release from DOC custody, have gone directly to psychiatric wards for treatment because of the lack of treatment they received for their mental health symptoms while in DOC custody.

Under the proposed bill, our clients who suffer from mental health symptoms and have ICE detainers will no longer be forced to make this impossible decision and can

² For recent articles on this, see: Winerip, Michael and Schwartz, Michael, “Rikers: Where Mental Illness Meets Brutality in Jail,” *The New York Times*, July 14, 2014; available at: http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?_r=0; and Gonnerman, Jennifer, “Before the Law,” *The New Yorker*, October 6, 2014; available at <http://www.newyorker.com/magazine/2014/10/06/law-3>.

³ *Id.*

⁴ See Winerip and Schwartz, “Rikers: Where Mental Illness Meets Brutality in Jail.”

⁵ See, Gonnerman, Jennifer, “Before the Law.”

prioritize their mental health while they fight their criminal cases without worrying about being turned over to ICE at the end of their case.

Client example:

Jorge, a Mexican client with no prior criminal history was arrested and charged with forcible touching to a stranger on the street. A detainer was lodged and upon interviewing Jorge to advise him on his criminal and immigration options, counsel discovered that Jorge had previously been diagnosed with schizophrenia and was receiving no medication through DOC even though he had been hospitalized in the weeks leading to his arrest. Jorge, a monolingual Spanish-speaker, had been unable to communicate with the medical staff at DOC. Counsel had to reach out to DOC with a list of medications given to Jorge's family from his doctor so that he could receive some of the necessary treatment for his mental illness. In the meantime, Jorge's criminal case dragged on for months because the District Attorney initially offered a non-criminal disposition provided that part of the sentence would be Jorge's completion of a sex abuse program. It was very difficult for Jorge's criminal attorney and social worker to find a program that would accept an undocumented, monolingual Spanish-speaker, but they were able to find one that had open space. After Jorge's advocates provided the District Attorney with the necessary information, the District Attorney then withdrew the offer. With no other safe immigration options an after four months of sitting in DOC custody, Jorge decided to take the risk of trial in the hopes that he would be acquitted and avoid being turned over to ICE. At trial, Jorge was convicted of a B misdemeanor and was released into ICE custody. Upon Jorge's release to ICE, immigration counsel contacted ICE about her concerns over Jorge's mental health and lack of appropriate treatment in while in ICE custody. ICE released Jorge under an Order of Supervision so that he could receive the necessary mental health treatment that he had been unable to receive for four months and would be unable to receive in ICE custody. Jorge is currently in deportation proceedings with no options except to apply for humanitarian-based relief because of the discrimination in Mexico against individuals with mental illness.

We applaud the Committee on Immigration and Council Members who have introduced this bill recognizing that under current policy, non-citizen New Yorkers are not allowed the same constitutional rights as citizens are in the criminal justice system. This proposed bill will allow all New Yorkers – regardless of their immigration status – to choose to fight their criminal cases or to accept plea bargains without having to risk entering ICE custody. It will also allow non-citizens to fight their cases without being incarcerated pretrial.

Thank You.