

**New York City Council
Committee on Public Safety Jointly with the Committee on Justice System
Hearing re: Family Separation in Criminal Cases
February 25, 2019
Written Testimony of The Bronx Defenders
By Fallon Speaker, Eli Northrup, and Caitlin Becker**

The Bronx Defenders (“BxD”) has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support and advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 28,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, the loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

I. The Consequences of a Single Arrest.

In January of this year, police arrived at Ms. B¹’s apartment in the Bronx in response to a call regarding a domestic dispute. When they arrived, Ms. B’s husband opened the door and told the police that the two of them had gotten into an argument but that he did not intend to press charges. The police indicated that they intended to place Ms. B under arrest anyway. Ms. B recalled seeing the videos of Jazmine Headley’s arrest on the news and she was terrified of what the police would do to her child if they arrested her. Unfortunately, her worst fears were realized. Police forced their way into the apartment and aggressively pulled Ms. B’s nine-month old baby from her arms, causing the young child to cry and scream. They did not let Ms. B comfort her child nor did they assist Ms. B in making arrangements for her son’s care. Instead, the police arrested Ms. B in front of her child and charged her with endangering the welfare of her child, resisting arrest, assault, and harassment.

Exposure to toxic stress in infancy, such as witnessing a primary caregiver’s arrest, can have lifelong negative consequences for children. Babies like Ms. B’s, who have experienced a

¹ Names and identifying details have been changed to protect client confidentiality

traumatic event and abrupt separation from their parents, are more likely to exhibit difficulty with making healthy attachments, maladaptive behaviors and experience academic difficulties.²

At the criminal court arraignment Ms. B's husband was present in the courtroom and told the district attorney that he did not want an order of protection and did not believe one on behalf of their child was necessary. Despite this, and the the fact that Ms. B had no criminal record whatsoever, the district attorney asked for and the judge issued a full stay away order in favor of Ms. B's husband and their infant son. This meant that Ms. B's family was officially separated indefinitely: she could not go back to her home or see her infant son until the order of protection was modified in Family Court or the case ended.

In addition to the criminal case, the Administration for Children's Services ("ACS") was called and a case was initiated in family court for neglect. An ACS case was opened despite the fact that her husband told police that the baby was not in the room during their argument, Ms. B had no history of violence or neglect, and her child was in good health and well. The narrative put forth by ACS and the arresting police officers was that Ms. B had endangered her baby by using him as a *human shield* to prevent police from arresting her. In reality, the scene was chaotic and confusing for Ms. B. She was terrified; the officers were yelling and escalating the situation, insisting on her arrest despite her partner's assurance that he would not press charges; and they were tearing her baby out of her arms. She tried to comfort her child and protect him from a hostile and frightening situation.

This narrative followed Ms. B and, seven days later, when a Family Court judge finally heard Ms. B's case for the first time, the judge ruled that Ms. B could not be reunited with her son. Family court judges are almost always unwilling to overturn the rulings of criminal court judges issued in preceding criminal court proceedings and when an order of protection is issued in one case it has serious consequences for all subsequent proceedings.

I share this story of Ms. B, a client of the Bronx Defenders, to demonstrate that the Jazmine Headley case is far from an aberration and has not resulted in a change in the daily practices of the NYPD. In Ms. B's case, the police were aggressive and created an atmosphere of fear and confusion that caused Ms. B to react as any concerned parent would. Rather than bring reassurance and order, the police escalated the situation in a way that led our client to be traumatically separated from her newborn son. All of this could have been avoided had the police been properly trained on effectuating arrests when children are present. As public defenders, we know that these type of arrests happen all the time without any public scrutiny or outcry.

The harshness, fear, and harm created in these moments was put on display for the public on December 7th, 2018, during the arrest of Jazmine Headley in a Brooklyn Human Resources Building. While the NYPD's actions were not caught on camera in Ms. B's case, the effects are no less real. And the resulting trauma they cause is no less harmful. The fear experienced by

² McKelvey, L.M, Edge, N.C., Mesman, G.R., Whiteside-Mansell, L., & Bradley, R.H. (2018). Adverse experiences in infancy and toddlerhood: Relations to adaptive behavior and academic status in middle childhood. *Child Abuse and Neglect*, 82, 168-177.

Ms. B during this police encounter that initiated a natural reaction to protect her baby is not a fear held in isolation. It is a fear experienced by parents who encounter police officers seeking to arrest them while they are with their children on a regular basis. It is a fear that can be mitigated.

II. We must mitigate harm of arrest for parents and children by implementing child-sensitive arrest policies.

As practitioners, we see firsthand the impact an arrest can have on families, especially when a child is present. Whenever we speak with clients who have been arrested in front of their child, their first concern is always their child's wellbeing. Oftentimes, they express deep dismay or justified outrage at the police officers' handling of the situation, many of which involve aggression, violence and yelling which evokes fear in parents and children alike. Our clients' singular goal in these situations is to protect their children, yet they are often powerless to do so and any attempts to protect or even comfort their children are interpreted as failing to follow officers' directives or, worse, resisting arrest and endangering their own child's welfare.

The impact of these escalated encounters between parents and police on children is even more severe. Children who witness a parent's arrest experience short term distress and are at a higher risk for developing serious emotional and behavioral problems in life. Babies and toddlers, far from being immune from witnessing their parent be arrested or separated from their parent due to their young age, have less developed coping skills than older children and are at particular risk for experiencing negative life outcomes as a result of witnessing a parent's arrest. Beyond witnessing the arrest, young children in particular are further traumatized by the sudden separation from their primary caregivers, causing a rupture in the essential attachment relationship.³

This is a national problem. According to the National Resource Center on Children and Families of the Incarcerated, "a study conducted in 1998 estimated that of the parents arrested: 67% were handcuffed in front of their children, 27% reported weapons drawn in front of their children, 4.3% reported a physical struggle, [and] 3.2% reported the use of pepper spray."⁴ Further, studies showed that "children who witnessed an arrest of a household member were 57% more likely to have elevated posttraumatic stress symptoms compared to children who did not witness an arrest."⁵ We have an obligation to mitigate the harmful effects of a parent's arrest on their children.

On February 1, 2019, 42 human service providers, faith leaders, and advocates called on Mayor De Blasio to implement policies to safeguard children of arrested parents.⁶ (attached as Appendix A). According to this release, "As of 2016, all law enforcement officers in New York State,

³ Roberts, Y.H., Crusto, C.A., & Kaufman, J.S. (2012). Traumatic impact of familial arrest on young children. *Journal of Trauma & Treatment*, 8.

⁴ Children and Families of the Incarcerated Fact Sheet, National Resource Center on Children and Families of the Incarcerated. (2014).

⁵ *Id.*

⁶ Safeguarding Children at the Time of Arrest, February 1, 2019.

<https://www.bronxdefenders.org/letter-to-mayor-de-blasio-safeguarding-children-at-the-time-of-arrest/>

except for the NYPD and the New York State Police, receive training on how to safeguard children at the scene of arrest as part of the NYS Office of Public Safety's Basic Training.⁷⁷ We join them in urging the City and NYPD to protect children by changing the way officers interact with parents and children during arrest encounters to help minimize the trauma they experience in these moments. It is essential that arresting officers are educated on the harmful effects that witnessing a parent's arrest can have on children, and the heightened risk for long-term negative physical and emotional effects on these children. In 2016, the International Association of Chiefs of Police, in collaboration with the Department of Justice, issued a model protocol and officer training intended to protect the emotional and physical well being of children at the time of a parent's arrest.⁸ This model protocol and training includes an overview of the psychological impact of traumatic experiences on children, and provides guidance for officers about what they can do to minimize the harm. A comprehensive training curriculum with case scenarios will better prepare officers to respond to the challenges posed by the arrest of parents.

In addition to implementing training for New York City Police officers to safeguard children at the scene of the arrest, we agree with the four minimal child-sensitive principles that should guide any arrest of a parent in front of a child⁹:

- Arresting the parent out of the sight of children;
- Not handcuffing the parent in front of the child or using a siren;
- Allowing the parent access to their cell phone and extra phone calls to arrange care for the child; and
- Allowing the parent to comfort and explain to the child what is happening.

None of these principles were observed during Ms. B's arrest, and she and her family are now dealing with the devastating consequences of the police officers' mishandling of her arrest and the unnecessary separation of her and her child. As a mother, Ms. B was terrified of being arrested and the harm that would come to her son if they were separated. She wanted to ensure that her son would be safe and cared for while she was in custody. She was trying to comfort her baby and protect him, while police officers were screaming demands at her and needlessly escalating the situation. Had the officers been trained in safeguarding children at the time of a parents' arrest, the scene created at the time of Ms. Headley and Ms. B's arrests would have been very different. Rather than creating an environment of chaos and fear that escalates an already fraught situation, officers must be taught to de-escalate and better understand the positions of mothers like Ms. Headley and Ms. B who are merely trying to protect their children. They must be trained in the devastating impact of a parent's arrest on children, and work to mitigate the harm children experience when a parent is arrested.

⁷*Id.*

⁸ International Association of Chiefs of Police (2016). *Safeguarding children of arrested parents: Officer training*. Retrieved from

<https://www.theiacp.org/sites/default/files/pdf/IACPCAPOfficerTrainingFacilitatorGuideCombined.pdf>

⁹ Safeguarding Children at the Time of Arrest, February 1, 2019.

<https://www.bronxdefenders.org/letter-to-mayor-de-blasio-safeguarding-children-at-the-time-of-arrest/>

The Bronx Defenders supports the initiatives detailed in the letter to Mayor De Blasio and also supports a local law requiring NYPD to implement child-sensitive arrest policies. We believe that the drafting of such a law should include input from personally-affected individuals and families, experts in childhood trauma, human service providers, faith-based organizations, advocacy groups, and institutional public defense organizations, as well as representatives from NYPD and ACS.

III. Criminal courts are over-issuing orders of protection against parents on behalf of children, leading to unnecessary separation of families.

The harm done to Ms. B and her family was not confined to her arrest. When she was brought to Criminal Court to be formally charged, the Judge, upon the District Attorney's application, issued a full stay away order of protection preventing her from having contact with both her husband and her son. This happened despite the fact that her husband was seated in the arraignment courtroom asking that no order be issued on his behalf and that such an order would cause unnecessary and traumatic family separation. Ms. B's case is not an aberration. In order to reduce unnecessary family separation caused by arrest and incarceration, we must also address how the criminal court system regularly and unnecessarily separates families by issuing orders of protection as a matter of course in every case.

Criminal court judges are authorized by section 530.12 of the Criminal Procedure Law to issue orders of protection on behalf of family offense victims, including parents and children. The criminal court can issue temporary orders of protection during the pendency of a case and final orders upon sentencing on conviction for any crime between family members, including a parent and a child. In criminal court, temporary orders of protection are issued *pro forma* against parents on behalf of children at arraignment or against children on behalf of parents and renewed at each subsequent court appearance without the court ever holding a hearing, considering evidence, or hearing from the family members affected.

Generally the court appearance at which routine temporary orders of protection are entered or continued by criminal court judges last less than five minutes. There are no reports provided from professionals making recommendations; the child, who is separated from his parent as a result of the order, has no voice or representation in the proceedings; and, the District Attorney who makes the request almost always has no information about a concurrent family court case and a parent's progress in services required by that proceeding and has no obligation to provide any reason or information about why the order of protection is being requested.

Final orders of protection are issued upon a conviction at sentencing – usually as part of a plea agreement. A final order of protection from the criminal court can prohibit contact between a child and parent for a set period of time depending upon the charge, essentially depriving the child of any meaningful relationship with his or her parent.

The issuance of orders of protection by the criminal court in every case without any meaningful inquiry or scrutiny violates fundamental constitutional rights to family integrity and due process.

Forced parent-child separation can have profound effects on children, including the development of poor coping skills, low self esteem, and delinquent behaviors.¹⁰

The perfunctory and irresponsible manner in which family separation is caused by the criminal court is best illustrated when compared to the procedures and protections required by the Family Court Act and the Social Services Law which governs civil neglect and abuse proceedings in family court.¹¹ In civil neglect and abuse proceedings, prior to a child being separated from her parent, the law requires that a family court judge find that the child is at imminent risk of serious harm to her life or health and that it is in her best interest to be removed from his or her home. The child is represented by an attorney in the proceeding. If the parent objects to being separated from her child, the family court takes testimony and considers evidence. In subsequent proceedings, the family court continues to evaluate whether the child can be returned safely to her home. The judge has access to the most current information from the local social services agency about the parent's progress, rehabilitation and compliance with mandated services. It is contrary to both the legislative intent of New York law and to best child welfare practices to preclude the Family Court from acting on its assessment of children's best interests.

Criminal court orders of protection, on the contrary, effectively separate families without an analysis of the child's best interest. At the request of defense counsel, some criminal court judges will permit these orders to be subject to family court modification. If the order of protection is made subject to family court modification, a parent can file a petition for visitation or custody in family court or the family court judge in a concurrent neglect action can order visitation or return the child to the parent's custody. Making orders subject to family court modification, however, is in the discretion of the criminal court judge and not always granted. When the criminal court issues an order of protection on behalf of a child against her parent without allowing for modification by the family court, they are effectively separating a family and leaving a parent and child without recourse.

Even in cases where the order is made subject to modification by a family court, the existence of the criminal court order of protection greatly colors the proceeding and stacks the case against the parent. When a criminal court order of protection is in place, ACS is more likely to file a case against a parent in family court alleging neglect or abuse. Family court judges are inclined to order more restrictive visitation, such as supervised as opposed to unsupervised visitation. In some instances, family court judges have expressed reluctance and confusion as to whether they have the power to reunite a parent and her child when a criminal court order of protection is in place, even if that order is subject to family court modification. This is so, even if they find no risk to the child. In this way, criminal court orders of protection, even those that are modifiable by a family court, serve to prolong family separation when no safety risk exists.

It is imperative that criminal court judges stop issuing blanket orders of protection in these cases, and specifically where the case involves parents and children. Below we outline ways in which the courts can scale back on the routine issuance of protective orders.

¹⁰ Geller, A., Garfinkel, I., Cooper, C., & Mincy, R. (2009). Parental incarceration and child well-being: Implications for urban families. *Social Science Quarterly*, 90(5), 1186-1202.

¹¹ See SSL 384-b(1)(a)(ii)(iii).

A. Criminal courts should not issue orders of protection between parents and children as a matter of course and if necessary should issue limited orders of protection unless there is specific evidence that a child is at imminent risk of serious harm in the parent's care.

In Ms. B's case, a temporary full stay away order of protection was entered against her on behalf of her baby, without any actual evidence or proof that her son had been harmed or that she posed any risk of harm to her son. Her son sustained no injuries while she held him in the face of police aggression, and she made no threats to his safety while holding him. Arguably, the threat to both her safety and that of her son's came from the way in which the police officers escalated the situation. If the court felt that a protective order was necessary, however, despite the absence of any criminal history or allegations of neglect, the court should have issued a limited order of protection on behalf of Ms. B's son. This order could have been crafted to indicate that she could not hit, harm or harass her son and had to avoid any verbal or physical altercation in his presence. This order would have ensured her son's safety, addressed any concerns raised by the case while it progressed, and would prevent needless traumatic separation and allow Ms. B to continue to care for him.

We propose that at arraignments, criminal court judges refrain from issuing blanket temporary orders of protection and consider the obstacles and trauma faced by children and parents from arrest to reunification. Judges should presume that a limited order of protection will suffice in any case in which the prosecution is asking for an order of protection. After a careful analysis, should the Criminal Court feel that more than a limited order of protection is needed to ensure the safety of a child, then the default should be that any full stay away order of protection is (1) made subject to Family Court modification and (2) subject to regular review by the Criminal Court judge.

B. If a criminal court is going to issue a final order of protection, it should be required that the order of protection must be subject to modification by a family court.

A second issue that arises with orders of protection occurs after a client has been adjudicated guilty and is being sentenced. At this time, criminal court judges have the power to issue final orders of protection, which can last up to 10 years. One of our clients, Mr. G, came to us in Bronx Family Court after he had been arrested and tried in Manhattan Criminal Court for an unrelated charge. As a result of his prior criminal case he was ordered to comply with a five year final order of protection on behalf of his 1-year-old son. The final order of protection issued by the Criminal Court in Mr. G's case was not subject to family court modification. When Mr. G. appeared in family court to petition for visitation with his son he was informed by the Family Court Judge that the criminal court order of protection precluded the Family Court Judge from considering visitation in the child's best interest. When our office contacted Mr. G.'s criminal defense attorney to inquire about the order, we learned that no application had been made for family court modification because the attorney was unaware of the consequences that a final order of protection in that case could have on Mr. G's relationship with his son.

Two prominent issues regarding final orders of protection stand out from Mr. G's experience. The first is that final orders of protection issued by criminal courts, with no analysis of the impact on a child and that child's best interest, can result in family separation that, as discussed below, can become permanent. Without a provision for family court modification, the parent is effectively prevented from living, visiting, bonding, or communicating with their child. Typically, in the family court context, a termination of parental rights hearing involves the petitioner proving by clear and convincing evidence that a parent has permanently neglected or abandoned their child by failing to engage in services to ameliorate alleged harm, failing to plan for their child, and failing to visit regularly, and that it would be in the child's best interest to be permanently legally severed from his parent. By issuing a permanent order that can have the same or similar effects for a long period of time, without the same access to process or a hearing, the criminal court is effectively bypassing constitutional and statutory protections provided to parents and children.

IV. Termination of parental rights and the permanent dissolution of a family is too often a direct consequence of parent incarceration.

Throughout the entirety of this process, from initial arrest through sentencing, some parents remain incarcerated. Incarcerated parents face insurmountable obstacles in trying to maintain and build a relationship with their children.

Research suggests that more than 2.7 million children in the U.S. have an incarcerated parent. That is 1 in 28 children.¹² Incarcerated parents can lose their children to the child welfare system either during the initial arrest or at some point during their incarceration.

When parents lose their children to the child welfare system during the initial arrest, their children are often placed in foster care. Very little time, if any, is given to an arrested parent to make arrangements for their child in order to avoid foster care. In many cases, it is the arrest itself that triggers child welfare involvement, and ACS might allege that the child is neglected because the parent was arrested and failed to make an appropriate plan of care for the child(ren). In these instances, the parent is typically given notice of the pending family court case while in jail, is produced to appear at court proceedings, but may experience very little or no contact with their children during the initial weeks or months of incarceration.

The passage of the Adoption and Safe Families Act ("ASFA") in 1997, created a federal timeline for parents to reunify with their children. According to ASFA, parents who do not plan for their children or move towards reunification with their children for 15 out of 22 months of planning, are subject to having a petition filed to terminate their parental rights. This presumption in favor of termination is often more severe for parents who are incarcerated. According to the National Conference of State Legislatures,

¹² Children and Families of the Incarcerated Fact Sheet, National Resource Center on Children and Families of the Incarcerated. (2014).

although the Adoption and Safe Families Act does not explicitly require a termination of parental rights filing against incarcerated parents, the 15 of 22 months provision technically would apply in cases where reunification is delayed beyond 15 months due to a parent's incarceration, even if the parent is receiving services to facilitate reunification. Because the typical sentence for an incarcerated parent is from 80 to 100 months, most imprisoned parents of children in foster care are at some risk of losing their parental rights.¹³

Incarcerated parents and children are often not able to participate in regular visitation. Incarcerated parents are rarely able to participate in court mandated services such as drug treatment, parenting skills class, domestic violence classes, or anger management classes. Many are unable to receive any true therapeutic or mental health assistances outside of medication management. Thus, they are unable to address the issues and circumstances that gave rise to the child welfare proceeding and progress toward reunification in the time mandate required by ASFA.

Furthermore, incarcerated parents experience parental alienation from their children in the form of court orders designed to limit their ability to have contact with their children, such as orders of protection and diversion programs. For example, Ms. N, a client of The Bronx Defenders, was ordered by criminal court to complete a diversion program in order to avoid a sentence of two years of incarceration. The diversion program required her to enroll in an inpatient drug treatment program for a period of 18-24 months. She enrolled in the program to avoid incarceration and to rebuild her relationship with her child. She began visiting with her daughter and engaged in rehabilitative services ordered by the family court. Eventually, although the family court deemed it safe for her to have overnight visits with her daughter, she was unable to do so due to the regulations of the mandated program. Despite her best efforts, Ms. N.'s ability to reunify with her daughter was thwarted by the criminal court order. During this time, the foster care agency filed a termination of parental rights petition against her, alleging that she had permanency neglected her child because she failed to address the issue. Too often, child protective agencies and family courts quickly move to terminate the rights of incarcerated parents and those serving sentences in diversion programs like Ms. N.

We must expand the ability of incarcerated parents' ability to meaningfully participate in their children's lives during their period of confinement. According to the National Conference of State Legislatures, "research suggests that intervening in the lives of incarcerated parents and their children to preserve and strengthen positive family connections can yield positive societal benefits in the form of reduced recidivism, less intergenerational criminal justice system involvement, and promotion of healthy child development."¹⁴ Our current approach to working with incarcerated parents and children is damaging children and their families. Increased access to child-friendly visitation and regular contact between parents and children would mitigate the harm of parent-child separation.

¹³ *Children of Incarcerated Parents*. Steve Christian, March 2009.
<https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>

¹⁴ *Id.*

Some states have passed legislation to aid incarcerated parents in maintaining the right to parent their children. For example, in 2017 Oregon passed a bill of rights for children of incarcerated parents, ORS 423-160.¹⁵ This bill asserted that children of incarcerated parents have the right to “be protected from additional trauma at the time of an arrest . . . to be considered when decisions are made about the child’s parent . . . to speak with, see, and touch the incarcerated parent . . . [and] to have a lifelong relationship with the incarcerated parent.”¹⁶

This sort of legislation is a good start, but can be broadened to include more protective measures for parents and children including:

- Funding for resources to provide face-to-face, video, and telephone contact, daily;
- Funding for resources to provide incarcerated parents the option to appear in court by video when housed in a facility that does not facilitate transportation to family court;
- Funding for resources for community-based agencies to increase access to therapeutic and reunification services for incarcerated parents
- Ending full stay away orders of protection that create a barrier in family members or resources aiding in visitation for incarcerated parents and their children, not supervised by the agency;
- Mandatory review of all consequences of diversion programs for each client prior to that client accepting the program; and
- Increase access to residential treatment facilities where parents and children can reside together.

V. Conclusion

In sum, The Bronx Defenders believes that the harms that are inflicted on families from the initial arrest to the sentencing phase, must be addressed in their totality. We support both bills currently being considered by the Council (Int. 0806-2018 and Int. 1349-2019) and urge the Council to go further. We support an amendment to New York City’s Administrative Code to require police departments to implement child sensitive arrest policies. We believe practical training is necessary, as well as input from experts, community stakeholders and advocates who represent incarcerated parents and parents who face arrest, and children who have been affected by parental arrest and incarceration.

We agree that the creation of an interagency task force to address the obstacles faced by children of incarcerated parents is a good first step. We implore the Council, however, to not only consider children of incarcerated parents, but incarcerated parents and the family as a whole. We believe that current parties listed to serve on this task force is lacking in representation of necessary stakeholders. While we do believe it is important to have the NYPD and ACS at this table, we also believe it is important for the following to have a seat at the table: parents and

¹⁵ <https://www.oregonlaws.org/ors/423.160>; *see also*, Christopher Zoukos, *Children with Incarcerated Parents get Bill of Rights in Oregon*, (Oct. 24, 2017) https://www.huffingtonpost.com/entry/children-with-incarcerated-parents-get-bill-of-rights_us_59d57fbde4b03384c43e5808

¹⁶ *Id.*

children with lived experience of family separation due to arrest and incarceration, public defense institutions who represent parents who are arrested, institutions who represent children, community justice advocates, parent support coalitions, and coalitions who fight for the rights of the current and formerly incarcerated. Lastly, we do not believe that the appropriate agency to chair this taskforce is the Department of Corrections. Instead, we believe that an agency in the community and informed by the experience of children and families affected by parental incarceration would be better suited at centering the voices of those most impacted by family separation due to arrest or incarceration.