COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

SJC-12276

COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee,

V.

SREYNUON LUNN, ET AL.,

Petitioner-Appellant

ON REPORT OF LEGAL ISSUES FOR CRIMINAL DEFENDANTS SUBJECT TO ICE DETAINERS

BRIEF OF *AMICUS CURIAE* BOSTON UNIVERSITY SCHOOL OF LAW CRIMINAL CLINIC DEFENDERS IN SUPPORT OF PETITIONER

Elizabeth Hennessey-Severson
3:03 Student Attorney
eshs@bu.edu
Natalia Mercado Violand
3:03 Student Attorney
nmercado@bu.edu
Vidhi Bamzai
3:03 Student Attorney
vidbam@bu.edu
Travis Lynch
3:03 Student Attorney
thlynch@bu.edu
Karen Pita Loor
BBO# 625035
loork@bu.edu
765 Commonwealth Avenue
Boston, MA 02215

DATED: March 20, 2017

Table of Contents

Page

Table of Authorities. ii

Statement of Interest of *Amicus Curiae*. 1

Background. 2

Summary of Argument. 14

Argument. 17

I. MASSACHUSETTS GOVERNMENT OFFICIALS VIOLATE CRIMINAL DEFENDANTS' PRESUMPTIVE RIGHT TO RELEASE WHEN THEY VOLUNTARILY COMPLY WITH ICE DETAINER REQUESTS TO HOLD INDIVIDUALS. 17

a. Massachusetts law follows federal precedent, which mandates the presumption of release for criminal defendants. 19

b. The presumption of release for criminal defendants under Massachusetts law and the procedural safeguards protecting the right to release are deeply undermined when state and local authorities choose to honor ICE detainer requests. 25

II. THE DECISION TO ENFORCE ICE DETAINER REQUESTS DEPRIVES CRIMINAL DEFENDANTS OF ACCESS TO THEIR CRIMINAL DEFENSE ATTORNEYS, VIOLATING THEIR RIGHT TO EFFECTIVE COUNSEL UNDER THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION. 38

CONCLUSION. 48

CERTIFICATE OF SERVICE. 50

Table of Authorities

Federal Cases — Page

Adams v. United States, 317 U.S. 269 (1942) 45

Atkins v. Michigan, 644 F.2d 543 (6th Cir.1981) . . 36

Stack v. Boyle, 342 U.S. 1 (1951) 19

Gerstein v. Pugh, 420 U.S. 103 (1975) 24

McMann v. Richardson, 397 U.S. 759 (1970) . . . 39, 48

Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015) 24

Padilla v. Kentucky, 559 U.S. 356 (2010) 39, 41, 48

Strickland v. Washington, 466 U.S. 668 (1984) . . . . . *passim*

United States v. Barrera-Omana, 638 F. Supp.2d 1108 (D. Minn. 2009) 27

United States v. Salerno, 481 U.S. 739 (1987) . . . . . *passim*

State Cases

Aime v. Commonwealth, 414 Mass. 667 (1993) . . . . . *passim*

Big Louie Bail Bonds, LLC v. State, 78 A.3d 387 (Md. 2013) 30

Delaney v. Commonwealth, 415 Mass. 490 (1993) . . . 21

Commonwealth v. Bautista, 459 Mass. 306 (2011) . . .30

Commonwealth v. Bernier, 359 Mass. 13 (1971) 40

Commonwealth v. Dodge, 428 Mass. 860 (1999) 21

Commonwealth v. Pagan, 445 Mass. 315 (2005) 21

Commonwealth v. Saferian, 366 Mass. 89 (1974) . . . 40

Fishman v. Brooks, 396 Mass. 643 (1986) 41

Mendonza v. Commonwealth, 423 Mass. 771 (1996) 21, 33, 34, 37

Paquette v. Commonwealth, 440 Mass. 121 (2003) . . .21

People v. American Surety Ins. Co., 77 Cal. App. 4th 1063 (Cal. App. Ct. 2000) 30

Querubin v. Commonwealth, 440 Mass. 108 (2003) 23, 31

Simpson v. Owens, 85 P.3d 478 (Ariz. Ct. App. 2004) 37

State v. Poon, 581 A.2d 883 (N.J. Super. App. Div. 1990) 30

State v. Two Jinn, Inc., 264 P.3d 66 (Idaho 2011) 29

State v. Ventura, 952 A.2d 1049 (N.J. 2008) 29

Federal Statutes
Immigration and Nationality Act, § 287(d)(codified as amended 8 U.S.C. § 1357(d)(2006)). 1

Massachusetts Statutes
G.L. c. 276, § 58. . . . . *passim*

G.L. c. 276 § 70. 30

Other Authorities
Peter W. Agnes, Jr., The Rights of a Person Who is Arrested, (MCLE 2012) 41

American Bar Association, Criminal Justice Standards for Defense Function, (2015 4th ed.) 44

Eric Blumenson, Massachusetts Criminal Trial Practice (4th ed. 2012) 33

Shira Diner, Arraignment and Bail, in Massachusetts District Court Criminal Defense Manual (4th ed. 2016) 23

The Committee for Public Counsel Services, Practice Advisory on Challenging the Enforcement of ICE Detainers, (2015) 25

The Committee for Public Counsel Services, CPCS Assigned Counsel Manual. 42

The Committee for Public Counsel Services Answering Gideon's Call Project (2012-DB-BX-0010), Final Report: National Recommendations (Dec. 2014), https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Final-Report-Recommendations.pdf 11

The Committee for Public Counsel Services Answering Gideon's Call Project (2012-DB-BX-0010) Attorney Workload Assessment (Oct. 2014). https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf 12

Department of Homeland Security, Office of the Inspector General, Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers(Nov. 2009) https://www.oig.dhs.gov/assets/Mgmt/OIG_10-13_Nov09.pdf 9

Human Rights Watch, A Costly Move: Massachusetts, First Circuit, Data and Findings, (June 7, 2011), https://www.hrw.org/video-photos/interactive/2011/06/07/costly-move 7, ...45

4 William R. LaFave, Criminal Procedure (Jerold H. Israel et. al. eds., 4th ed. 2015) 36, 38

National Immigrant Justice Center, Immigration Detainers, available at http://www.immigrantjustice.org/issues/immigration-detainers 6, ...25, 26

National Immigration Project, The Bail Reform Act and Release from Criminal and Immigration Custody for Federal Criminal Defendants, June 2013, 1:42. . . . . 15, 25

National Immigration Project, Understanding Immigration Detainers: An Overview for Defense Counsel, (2011) 27, 28, 31

Joseph R. Nolan & Laurie J. Sartorio, § 32. Bail, 32 Mass. Prac., Criminal Law (3d ed.) 33

U.S. Immigration and Customs Enforcement, About the Detainee Locator/FAQs, U.S. Department of Homeland Security, https://locator.ice.gov/odls/about.jsp. 8

U.S Immigration and Customs Enforcement, What We Do, https://locator.ice.gov/odls/homePage.do. 8, 46

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae is Boston University School of Law Criminal Defense Clinic under the supervision of Professor Karen Pita Loor.[1] As a law school clinic, *amicus* has first-hand experience representing over 44 clients on an annual basis. The clinic's clients have sought direct assistance with immigration issues as a result of ICE detainers issued during their criminal trial proceedings.

Amicus offers this brief to share its view on the effects of immigration detainers, as defined in Section 287(d) of the Immigration and Nationality Act § 287(d)(codified as amended 8 U.S.C. §1357(d) (2006)), on noncitizen criminal defendants and criminal law proceedings. *Amicus* believes that this case raises critical questions about access to a just process. The 48-hour detainers issued in criminal trial proceedings not only violate Massachusetts's laws, but also deny defendants rights granted in the

---

[1] Professor Loor teaches, researches, and represents parties in the areas of Criminal and Immigration Law. Throughout her career as a defense attorney, Professor Loor has represented several immigrant clients, and she is thus particularly familiar and concerned with the challenges this vulnerable population faces in the criminal system.

United States Constitution. To assist this Court in its deliberations, *amicus* provides information and analysis on how its ruling affects the rights of defendants in criminal cases with a pending immigration detainer.

BACKGROUND

Amicus, Boston University School of Law Criminal Law Defense Clinic, represents clients in criminal law proceedings that sometimes face immigration concerns, including ICE detainers issued during their criminal law proceedings.

One such example is Ms. X[2], who sought services from the clinic regarding a shoplifting by concealing charge that was ultimately dismissed. Aff. Of. Karen Pita Loor. 2:1. Mar. 17, 2017. At her arraignment, on October 11th, 2011, Ms. X was released on personal recognizance to return to a pre-trial hearing the following month. Id. at 2:2. However, she was held and picked up by ICE due to an ICE detainer from Chicago. Id. Once Ms. X was in ICE custody, the 3:03 student attorney, Matthew Shultz, attempted to give Ms. X the competent and effective representation she

---

[2] A pseudonym is used to protect the confidentiality of the client's information.

was due in her criminal proceedings. Id. at 2:3. This proved impossible as Ms. X was often difficult to locate. Id. Student Attorney Schultz attempted to contact South Bay House of Corrections, and was told she was not there. Id. The student attorney called the U.S. Marshalls who could not locate Ms. X because of issues accessing the ICE computer system. Id. After calling Plymouth and Bristol, Burlington, ICE and the U.S. Marshals, Student Attorney Schultz was unable to find the defendant, id., and ultimately contacted the PAIR project, Political Asylum/Immigration Representation Project, for further advice on finding his client. Id. at 3:4. Despite the student attorney's efforts, it was not until a PAIR project representative went to South Bay HOC, at the request of the BU Criminal Defense Clinic supervising attorney, that Ms. X was located and the student attorney was able to plan to meet with her. Id. Due to these systemic challenges and lack of coordination between state agencies and ICE detention centers, Ms. X had no communication with her defense counsel for over twenty days after her arraignment. Id. at 3:5. This is contrary to the practice of BU Defenders, who are required to meet with detained

clients within two days of arraignment. Id. Further, this meeting was only nine days before Ms. X's pre-trial hearing, which was scheduled for November 10th, 2011. Id. at 3-4:6. At that pre-trial hearing, Ms. X was not in court. Id. Student Attorney Shultz communicated he had met with Ms. X at an ICE detention center a week prior and Judge Somerville issued a new pre-trial hearing date, January 30th, 2012. Id. Ultimately, Ms. X was not present in court for her second pre-trial hearing and that judge continued the case until January 30th. Id.

A week prior to rescheduled hearing, Student Attorney Shultz consulted the ICE Detainee Locator to check on Ms. X's status. Id. at 4:7. The ICE Detainee Locator listed the Ms. X was released form custody within the past 60 days which could mean that she was either released or deported. Id. Only four days prior to the hearing, Student Attorney Schultz confirmed that Ms. X had been deported on December 2nd, 2011. Id. At the pre-trial hearing on January 30th, 2012 Judge Forde issued a continuance for April 3rd. Id. On April 3rd, 2012, Ms. X's case was dismissed. Id.

These challenges are not unique to the clients with immigration detainers represented by *Amicus*. The de facto bail detention and functional denial of competent counsel is not unique to the clinic's clients. Rather, this is state-wide and nation-wide issue as the next sections describe.

A. Information regarding de facto detention of criminal defendants with ICE detainer.

ICE detainers impose a de facto denial of bail on criminal defendants. Noncitizen Criminal defendants with ICE detainers are sometimes advised by criminal defense counsel to remain in pretrial detention instead of posting bail, due to fear that those who post bail will be taken into ICE detention. Aff. of James Caramanica, President of Bristol County Bar Advocates, Inc. In Supp. of Mot. to Intervene. 3:8. Feb. 23rd, 2017. ICE detainers often result in courts raising and denying bail because they are concerned the defendant will be taken into ICE custody or deported and thus involuntarily fail to appear in further proceedings. Aff. of Lena Graber, In Supp. of Mot. to Intervene. 10-11:24. Feb. 23rd, 2017.

Noncitizen defendants with ICE detainers have a losing choice of whether to risk paying bail, since

there is a high likelihood that they would be detained by ICE even if theoretically released in the criminal matter. When noncitizen criminal defendants do not post bail due to the high cost or due to an ICE detainer pending against them, they remain in custody even though they would have regularly been released in their criminal matter. Aff. Of M. Barush, 3:4. Noncitizen criminal defendants often do not wish to enter ICE custody for fear of deportation, and thus choose to endure extended pretrial detention. Id.

The challenges of ICE detainers regarding bail and pretrial detention are also prevalent nation-wide. Individuals with detainers are more likely to receive higher criminal bonds, no bonds, or choose not to pay a criminal bond for fear of forfeiting the bond money, all of which lead to longer detention at local expense. National Immigrant Justice Center, Immigration Detainers, http://www.immigrantjustice.org/issues/immigration-detainers attached as Exhibit A. Judges feel that the detainer provides a disincentive to attend criminal court if released from custody, thereby prompting a judge to revoke or set higher bail. Id. These circumstances increase the amount of time families are

separated and heighten financial strain on families because of the resources required to secure bail and account for lost wages while incarcerated. Id. Moreover, many individuals subject to detainers choose not to pay bail because they will be transferred to ICE custody and thus unable to attend their next hearing, forfeiting their bail money. Id.

B. Information regarding lack of access to competent defense counsel for criminal defendant in ICE custody.

Once in ICE detention, a defendant's access to criminal defense counsel is severely limited or foreclosed. In the worst scenario, Massachusetts defendants may be transferred out of state while in ICE detention, which renders unfeasible communication with counsel in the criminal matter. Once a defendant is put in ICE Custody, she may be transferred anywhere in the country, making it difficult or impossible for a defendant to have access to her criminal defense counsel. Over the course of a ten-year study, ICE detention centers in Massachusetts transferred detainees to the following top states: Pennsylvania (accounting for 3,318 transfers), Louisiana (2,077), Texas (930), Connecticut (818), Rhode Island (736). A Costly Move: Massachusetts, First Circuit, Data and

Findings, HUMAN RIGHTS WATCH (June 7, 2011), https://www.hrw.org/video-photos/interactive/2011/06/07/costly-move attached as Exhibit B. See also Aff. Of Sarah Sherman-Stokes. 2:1. Mar. 16, 2017. (Stating that during attorney's time working for PAIR Project, she had clients who were transported to New Orleans, Louisiana, after initial detention in Massachusetts).

Additionally, ICE does not provide information about transfers that are planned or in progress, making it problematic for criminal defense attorneys to find their clients. When detainees are transferred across state lines, attorneys are rarely notified. Aff. Of M. Barusch. 2:2. Mar. 2, 2017. It is only when a defendant is booked into another ICE detention facility, that their location information is updated in the system. U.S. Immigration and Customs Enforcement, About the Detainee Locator/FAQs, U.S. Department of Homeland Security, https://locator.ice.gov/odls/about.jsp. Criminal counsel can only access the detainee locator with the defendant's alien number or biographical information like date and country of birth. U.S Immigration and Customs Enforcement, What We Do,

https://locator.ice.gov/odls/homePage.do. The name must be the exact match. Id. This proves difficult if not impossible because the defendant may not even know or have communicated to defense counsel their alien number, as in Ms. X's case, or has not shared exact biographical information with criminal counsel prior to being in immigration custody.

Further, ICE does not reveal whether a person is removed; the system only reveals if a person is currently in ICE custody or released within 60 days. Id. Recently, the number of detainee transfers has increased because of insufficient bed space in some facilities. Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers, DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL (Nov. 2009) https://www.oig.dhs.gov/assets/Mgmt/OIG_10-13_Nov09.pdf attached as Exhibit C. Most detainees transferred due to overcrowding are sent from eastern, western, and northern state detention facilities to locations in the southern and southwestern United States. Id.

A study by Human Rights Watch conducted 1998-2010, shows that 52 percent of detainees experienced at least one such transfer in 2009, a percentage that

has tripled between 2004-2009. A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States, HUMAN RIGHTS WATCH (June 14, 2011), https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united attached at Exhibit D. In total, two million detainee transfers occurred over the period of the study, and over 46 percent of transferred detainees were moved at least two times, with 3,400 people transferred 10 times or more. Id. One egregious case involved a detainee who was transferred 66 times. Id. The distance of the transfer presents a grave concern. On average, each transferred detainee traveled 370 miles, and one frequent transfer route (between Pennsylvania and Texas) covered 1,642 miles. Id. Long-distance and repetitive transfers have dire consequences for immigrants' rights to adequate representation in criminal matters because transfers render attorney-client relationships unworkable.

ICE detention, even within Massachusetts, limits frequency of communication and increases the time and resources required for attorneys to communicate with

their clients. Aff. of Jennifer Sunderland, President of Bristol County Bar Advocates, Inc. In Supp. of Mot. to Intervene. 3:6. Feb. 23rd, 2017. Attorneys exhaust their time and resources in representing noncitizen criminal defendants with ICE detainers. In Massachusetts, Committee of Public Counsel Services (CPCS) coordinates mostly legal representation to indigent persons throughout the state. The Committee for Public Counsel Services Answering Gideon's Call Project (2012-DB-BX-0010), Final Report: National Recommendations, 1, 2 (Dec. 2014), https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Final-Report-Recommendations.pdf attached as Exhibit E. Representation is provided by salaried staff attorneys and certified private bar advocates. Id. In total, CPCS oversees approximately 450 staff attorneys and over three thousand bar advocates, handling a total of approximately 250,000-300,000 cases. Id. Clearly CPCS attorneys and bar advocates are overburdened with cases. Because neither type of attorney has endless time and resources, the cases of defendants in ICE custody -- where communication is exponentially more burdensome -- likely suffer. In addition, bar

advocates are further limited by a cap on billable hours. The Committee for Public Counsel Services Answering Gideon's Call Project (2012-DB-BX-0010) Attorney Workload Assessment, 2 (Oct. 2014). https://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf attached as Exhibit F (stating that attorneys that acquire cases through CPCS must comply with a limit of billable hours). For example, bar advocates who have practiced over two years may bill up to 1650 hours per year. Id. at 16. Bar advocates will not be paid for any time billed in excess of the annual limit. Id. In the cost benefit analysis, bar advocates may neglect communicating with defendants in ICE custody.

Even when defendants are in ICE detention within the state, their attorneys may still have to travel many miles to ICE detention centers. See Aff. of Jennifer Sunderland at 4:7. (stating that it takes Attorney Sunderland one and half hours to get to the Dartmouth detention facility); See also Aff. of James Caramanica, President of Bristol County Bar Advocates, Inc. In Supp. of Mot. to Intervene. 4:13. Feb. 23rd, 2017 (declaring that a quick phone call or hour long meeting in an office is replaced with a jail visit

that takes "several hours to due to travel, security checks, and other delays"). Investigation is significantly curtailed because attorneys are not able to discuss new developments with their clients. Aff. of James Caramanica, President of Bristol County Bar Advocates, Inc. In Supp. of Mot. to Intervene. 4:14. Feb. 23rd, 2017. Thus, the client's attorney is not able to solicit input with respect to key facts in the investigation. Id. A criminal defense attorney may not even be aware that a defendant she is representing is in ICE custody, and therefore, the attorney is unable to attempt to secure her client's transportation to state court hearings. Id. at 5-6:16. Feb. 23rd, 2017. In the rare occurrence that a defendant is brought into court to enter a plea, there have been instances where, once the defendant enters a plea, she is deported the next day. Id.

Regardless if they are held within state or transferred out of state, noncitizen criminal defendants in federal custody are functionally denied effective representation in their criminal case when state and local actors comply with ICE detainer requests.

SUMMARY OF ARGUMENT

Without procedural safeguards or a compelling state interest, the choice to enforce ICE detainers frustrates the fundamental rights of criminal defendants by replacing the presumption of release with a default detention based on unrelated civil immigration request by a federal government agency. The right to release, established by legislation and common law, and the right to the effective assistance of counsel, under the 6th Amendment of the United States Constitution, are firmly cemented, critical features of American jurisprudence. As such, Massachusetts courts have a history of honoring their duty to protect these rights, and in this case, that requires the definitive prohibition of state and local enforcement of ICE detainers.

By voluntarily honoring ICE detainer requests to hold criminal defendants past when they would otherwise be released, state and local courts and law enforcement agencies within the Commonwealth of Massachusetts violate criminal defendants' rights under both state and federal laws. Massachusetts bail statutes and legal precedent, as well as the federal Bail Reform Act and constitutional jurisprudence,

specifically mandate the presumptive right to release for defendants throughout the pendency of their criminal proceedings. (pp. 17-18).

There are two relevant occasions under Massachusetts law where the state's compelling competing interests may encroach on a criminal defendant's presumptive right to release. State bail statute G.L. c. 276, §58 allows for the imposition of bail for defendants found to pose a flight risk, and for the sole purpose of securing that defendant's return to court for future proceedings, and G.L. c. 276, §58A permits pretrial preventive detention in cases where the court determines that release would likely endanger other members of society. (pp. 19-22)

Both statutes provide for a multitude of procedural safeguards intended to protect defendants' liberty interests and to prevent the wrongful infliction of punishment before any determination of guilt has been established in the criminal matter. A non-exhaustive list of safeguards applicable to §§ 58 and 58A include: a required finding of probable cause by a neutral magistrate, a hearing at which defendants are entitled to the assistance of counsel and the ability for defendants to participate and inquire into the

charges alleged, and a burden of proof wielded by the Commonwealth, to establish sufficient facts, based on statutorily delineated factors for consideration, so the court may make a determination that no other conditions of release would reasonably ensure the defendant's presence or the safety of others. (pp. 20-24, 30-38)

By seeking to further detain criminal defendants who would otherwise be released under Massachusetts law, ICE detainer requests ask state and local authorities to abandon the fundamental liberty interests of criminal defendants based solely on a civil immigration form that lacks the procedural safeguards required to legitimize such infringement.

State and local enforcement of ICE detainers also seriously encroaches on a criminal defendant's right to the effective assistance of counsel throughout the entirety of a criminal case, under the 6th Amendment to the U.S. Constitution. Once held on an ICE detainer, a criminal defendant often goes on to face detention in ICE custody, which triggers the creation of myriad barriers between the defendant and her criminal defense attorney. (p. 41-48)

Once in ICE custody, detainees are transferred to detention centers, many of which are out-of-state. Criminal defense attorneys are frequently unaware of their clients' transfers, and without very specific biographical information about their clients, locating and communicating with clients becomes nearly impossible. Even when defendants are detained within the state, the burdens associated with ICE detention severely harm communication and the attorney-client relationship. When attorney-client communication is curtailed or non-existent, counsel is precluded from providing the effective representation mandated by the 6th Amendment to the Constitution. The obstacles accompanying ICE detention begin with state and local enforcement of ICE detainers, and the decision to hold criminal defendants past when they would otherwise be released. (pp. 46-49)

ARGUMENT

I. MASSACHUSETTS GOVERNMENT OFFICIALS VIOLATE CRIMINAL DEFENDANTS' PRESUMPTIVE RIGHT TO RELEASE WHEN THEY VOLUNTARILY COMPLY WITH ICE DETAINER REQUESTS TO HOLD INDIVIDUALS

Massachusetts statutory and case law reflect a criminal defendant's fundamental right to be free from governmental restraint pending trial. ICE detainers

violate criminal defendants' right to pretrial release by replacing the firmly established presumption of release with a default detention on the basis of an unrelated civil immigration request. In order to infringe upon a criminal defendant's right to release, State and federal law command the prosecution to overcome comprehensive procedural hurdles. Thus, the choice by state and local agencies to enforce ICE detainer requests within the Commonwealth curtails the fundamental rights of defendants by failing to conform to procedural requirements in violation of state and federal law. Given the new presidential administration's enhanced enforcement efforts, ICE detainer requests are likely to increase, thus the petition before this Court presents an issue of grave and increasing importance.[3]

---

[3] On January 25, 2017, the President of the United States issued an Executive Order, "Enhancing Public Safety in the Interior of the United States," which suggests that ICE will be engaging in enhanced immigration enforcement efforts which will lead to more detainers. See 1/25/2017 Executive Order, §§7-8 (ordering the hiring of thousands of immigration officers with the power of issuing ICE detainers under §287 of the INA (8 U.S.C. 1357) and directing Secretary "to authorize State and local law enforcement officials...to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United

A. Massachusetts law follows federal precedent, which mandates the presumption of release for criminal defendants

The presumption of pretrial liberty has deep roots in American jurisprudence. "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction...Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Stack v. Boyle, 342 U.S. 1, 4 (1951); See Petitioner's Brief, at 45, citing Aime v. Commonwealth, 414 Mass. 667, 676 (1993) ("The right to be free from governmental detention and

---

States," under INA §287(g)), available at: https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united; 2/20/2017 Department of Homeland Security Memo re Implementation of 1/25/17 Executive Order, "Enforcement of the Immigration Laws to Serve the National Interest," p. 2 (Department personnel to prioritize, "regardless of the basis of removability," the detention of immigrants with criminal histories or pending charges or anyone, who "in the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security."), available at: https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf?mbid=synd_msnnews.

restraint is firmly embedded in the history of Anglo-American law").

The United States Supreme Court ruled in United States v. Salerno that the pre-trial detention mechanisms of the Federal Bail Reform Act are constitutional because the statute's "careful delineation of the circumstances under which detention will be permitted" is narrowly tailored "on a particularly acute problem in which the government interests are overwhelming." 481 U.S. 739, 750-51 (1987). Subsequently, this Court stated that any state detention scheme must provide "safeguards similar to those which Congress incorporated into the Bail Reform Act." Aime, 414 Mass. at 680.

Massachusetts statutory and common law preserve a criminal defendant's right to pretrial liberty. The Massachusetts bail statute, G.L. c. 276, § 58, establishes the statutory presumption of release on personal recognizance, without surety, during the pendency of criminal charges. Furthermore, under the state bail statute, a criminal defendant may only be denied bail under specific, narrowly construed circumstances, intended to ensure her appearance for trial. G.L. c. 276, § 58 ("A justice or a clerk or

assistant clerk of the district court...shall admit such person to bail on his personal recognizance without surety unless...such a release will not reasonably assure the appearance of the person before the court") (emphasis added); Delaney v. Commonwealth, 415 Mass. 490, 495 (1993) ("Legislature intended §58 to protect the rights of the defendant by establishing a presumption that he or she will be admitted to bail on personal recognizance without surety and by delineating carefully the circumstances under which bail may be denied"); See Commonwealth v. Pagan, 445 Mass. 315 (2005) (Court must make bail determination based on likelihood of whether defendant will return to court).

The Massachusetts bail statute thus establishes a criminal defendant's right to release, whereby the "preferred disposition" is release on personal recognizance. Commonwealth v. Dodge, 428 Mass. 860, 865 (1999), citing Mendonza v. Commonwealth, 423 Mass. 771, 774 (1996); G.L c. 276, § 58. The bail statute was intended to establish a defendant's right to release, not to give the courts broad discretion to deny bail. Paquette v. Commonwealth, 440 Mass. 121, 126 (2003), and cases cited. Only after a neutral

magistrate considering delineated factors in G.L. c. 276, §58 finds that no conditions of release will "reasonably assure the appearance of the person before the court," or "that such release will endanger the safety of any other person or the community," can the government overcome the presumption of release. G.L. c. 276 §58, §58A.

In Aime, this Court was confronted with the 1992 amendments[4] to the Massachusetts bail statute, which would have afforded judicial officers wide discretion to detain criminal defendants based on their own predictive determinations of the danger particular defendants would pose to society upon release. 414 Mass. at 676. Concluding that the 1992 amendments were unconstitutional, this Court found that the amendments' predictive detention schemes infringed on

---

[4] "The 1992 amendments provide that an official authorized to admit a prisoner or an arrested person to bail...may refuse to release that person if the judicial officer determines, in the exercise of his or her discretion, that 'such release will endanger the safety of any other person or the community.'" Aime, 414 Mass. at 668, quoting St.1992, c. 201, § 3, amending G.L. c. 276, § 58 (1990 ed.). "The amendments also mandate the judicial officer take into account the 'nature and seriousness of the danger to any person or to the community that would be posed by the prisoner's release' when determining the amount of bail." Id., citing St.1992, c. 201, § 4.

"the individual interest in freedom from detention" (at 676), noting that "[f]ederal constitutional jurisprudence firmly establishes the rule that 'in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'" Aime, 414 Mass. at 677, citing Foucha v. Louisiana, quoting Salerno, 481 U.S. at 755; See Aime, 414 Mass. at 674 n. 10, citing Michael H. v. Gerald D., 491 U.S. 110, 127 n. 6 (1989)(opinion of Scalia, J.) ("Even under the narrowest mode of analysis...the right to freedom from physical restraint has been held to be a "core" right in substantive due process analysis").

The fundamental right to release is firmly established under Massachusetts law, which allows for the imposition of bail only where the court, after full consideration of the factors outlined in G.L. c. 276, § 58, determines that bail is necessary to ensure a defendant's presence at future proceedings. §6.3.1, Shira Diner, Arraignment and Bail, in Massachusetts District Court Criminal Defense Manual (4th ed. 2016); Querubin v. Commonwealth, 440 Mass. 108, 113 (2003). In making a bail determination, Massachusetts law prohibits the court's consideration of a defendant's

potential to present a danger to others upon release.[5] Id. at 4. Indeed, "dangerousness" considerations may only encroach on a criminal defendant's right to release after the court makes a formal determination in a separate hearing, governed by procedural safeguards. G.L. c. 276, § 58A; See Petitioner's Brief, p. 30 ("The guarantee of a judicial determination of probable cause extends to 'any significant pretrial restraint of liberty,'" citing Gerstein v. Pugh, 420 U.S. 103, 125 (1975), "including detention on an immigration detainer," citing Morales v. Chadbourne, 793 F.3d 208, 215 (1st Cir. 2015). Furthermore, as noted by Petitioners, the very form that ICE agents use to issue detainers "fails to provide particularized facts or circumstances, but instead speaks in general, conclusory, and sometimes contradictory terms," and thus does not establish any modicum of probable cause in its own terms. Petitioner's Brief, at 12, 37-44. Indeed, detainers rarely give any factual basis for detention at all, and "most detainers do not include any information to

[5] Exception in the case of domestic violence, where "dangerousness" may be considered upon motion by the Commonwealth.

support ICE's assertion that the client may be subject to removal." CPCS Practice Advisory on Challenging the Enforcement of ICE Detainers, 4 (2015).

B. The presumption of release for criminal defendants under Massachusetts law and the procedural safeguards protecting the right to release are deeply undermined when state and local authorities choose to honor ICE detainer requests

Despite the fundamental right to release, ICE detainers often create a default detention or de facto denial of bail, since due to the fear that posting bail will only lead to being held by a detainer, criminal defendants often have no viable choice but to remain in pretrial detention. See Aff. of James Caramanica, President of Bristol County Bar Advocates, Inc. In Supp. of Mot. to Intervene. 3:8. Feb. 23rd, 2017 (noncitizens are often advised not to post bail due to ICE detainer); NLG National Immigration Project, The Bail Reform Act and Release from Criminal and Immigration Custody for Federal Criminal Defendants, June 2013, 1:42 ("noncitizen defendants who do make bail are often transferred to immigration custody instead of being released. This practice is so common that some noncitizens do not seek bail because they fear such a transfer"); National Immigrant

Justice Center, Immigration Detainers, available at http://www.immigrantjustice.org/issues/immigration-detainers (many criminal defendants subject to ICE detainers choose not to pay bail because they will be transferred to ICE custody and fear that their failure to appear will result in the forfeiture of their bail money).

Similarly, ICE detainers also frequently result in courts raising bail or denying bail altogether, over concerns that defendants will be detained and therefore involuntarily fail to appear in future proceedings. Aff. of Lena Graber, In Supp. of Mot. to Intervene. 10-11:24. Feb. 23rd, 2017; See National Immigrant Justice Center, Immigration Detainers, available at http://www.immigrantjustice.org/issues/immigration-detainers (Judges across the U.S. are revoking or setting higher bail because they feel that ICE detainers provide a disincentive to attend criminal court if released from custody).

This practice violates the presumption of release on a defendant's "own recognizance" and further frustrates the Massachusetts bail statute by determining a bail consideration based on the

existence of an ICE detainer, which lies entirely outside of the carefully delineated factors in the statute. See G.L. c.276, § 58 (under the statute, without more, not even a defendant's potential to endanger the community could be used in this way to create a default denial of bail); United States v. Barrera-Omana, 638 F. Supp.2d 1108, 1112 (D. Minn. 2009) (consideration of ICE detainers should be excluded from bail determinations, since an alternative interpretation negates statutory language requiring individualized assessment of defendants before the court); Understanding Immigration Detainers: An Overview for Defense Counsel, National Immigration Project, p.16 (2011) ("Traditional rules governing bail determinations do not include considerations of citizenship, nationality or immigration status; they do not permit an unbounded inquiry"). Bail determination factors focus on the defendant's individual characteristics,[6] therefore refusal to set bail or setting bail at an unreasonably high amount because of an existing ICE detainer

[6] Flight risk factors include "family ties, employment history, criminal record, and connection to the community." Understanding Immigration Detainers, at 18.

"curtails the defendant's constitutional right based on what ICE may do in the future." Understanding Immigration Detainers, at 18. Indeed, under this Court's ruling in Aime, the overbroad issuance and enforcement of ICE detainers is precisely the kind of "scattershot attempt to incapacitate those who are merely suspected" of being removable. 414 Mass. at 682, quoting Salerno, 481 U.S. at 750; see Understanding Immigration Detainers, at 9 (On detainer form I-247, ICE typically checks box indicating that "'[i]nvestigation has been initiated into whether this person is removable,' which itself demonstrates that person's removability is undetermined").

It contravenes the bail statute itself for a court to impose higher bail based on what a third party may or may not decide to do later. Understanding Immigration Detainers, at 18. ICE has been known to issue detainers broadly, extending to circumstances where an agent simply wishes to begin an investigation on removability; thus the existence of the detainer does not mean that ICE will actually take custody. Understanding Immigration Detainers, at 9 ("The presence of a detainer does not mean that ICE will assume custody"); See Petitioner's Brief at 44 ("In

the absence of specific, particularized facts to establish that there is probable cause to believe the object of the detainer is subject to removal, detention based on an ICE detainer violates art. 14 and the Fourth Amendment"). Accordingly, Massachusetts criminal defense attorneys have expressed great concern over the prolonged detention of their clients - often well beyond 48 hours - as a result of state and local Massachusetts courts and law enforcement agencies deciding to honor ICE detainers. See Aff. of Lena Graber, In Supp. of Mot. to Intervene. 10:24. Feb. 23rd, 2017 (reporting, "dozens, possibly hundreds, of cases of jails holding people...for weeks and even months beyond when they should have been released, solely on the basis of ICE detainers").

While there is no consensus in courts across the United States about whether deportation is grounds for remitting forfeited bail,[7] in Massachusetts, ICE

---

[7] Compare State v. Ventura, 952 A.2d 1049 (N.J. 2008)(affirming denial of bail remission where defendant failed to appear because deported from United States by federal government) and State v. Two Jinn, Inc., 264 P.3d 66 (Id. 2011)(holding that because bail agent knew defendant was an undocumented immigrant subject to deportation, deportation was not

detainers create a default detention scheme by providing strong disincentives for sureties who would otherwise post bail, since they cannot be sure to recover the posted bail if the defendant cannot appear due to his or detention in ICE custody.

In Commonwealth v. Bautista, this Court held that where a defendant is a noncitizen, a surety may be required to assume the risk that the defendant will be deported, resulting in the defendant losing the ability to recover bail posted on her behalf. 459 Mass. 306, 316 (2011). The burden of proof to show that the defendant's nonappearance is due to her detention in ICE custody falls on the surety for purposes of recovering bail. G.L. c. 276, § 70. Also in Bautista, this Court held that a surety failed to prove that the defendant was unable to appear in the state proceeding because he was in federal detention at the time. 459 Mass. 306 at 315-16; see

---

a grounds for remission of bail when defendant failed to appear) with Big Louie Bail Bonds, LLC v. State, 78 A.3d 387 (Md. 2013)(holding that deportation is an "act of law" that made bond forfeiture inappropriate) and People v. American Surety Ins. Co., 77 Cal. App. 4th 1063 (Cal. App. Ct. 2000)(holding that deportation was grounds to exonerate bail); see also State v. Poon, 581 A.2d 883 (N.J. Super. App. Div. 1990)(declining to adopt a per se rule).

Understanding Immigration Detainers, at 21 (common occurrence for defendants with ICE detainers to face the prospect of forfeiting bail).

By creating so many hurdles between a defendant and her right to release, state and local enforcement of ICE detainers fundamentally diminishes the rights of criminal defendants, since state detention schemes may only usurp an individual's fundamental right to release where such schemes are narrowly tailored to meet a legitimate government interest. See Aime, 414 Mass. at 677-78 ("Freedom from governmental restraint lies at the heart of our system of government and is undoubtedly a fundamental right...The State, however, may impose a regulatory restraint on the individual in narrowly-circumscribed situations"). The government can only overcome the defendant's right to release following an arrest upon a Court determination by the preponderance of the evidence that a defendant "poses a serious flight risk" and "no condition or combination of conditions will reasonably assure [her] appearance," such a defendant may be denied bail. Querubin 440 Mass. at 119-20; See Salerno, 481 U.S. at 749 ("an arrestee may be incarcerated until trial if he presents a risk of flight").

The Massachusetts bail statute provides procedural safeguards that protect against pretrial detention, and bail can only be set to ensure a person's presence in court. G.L. c. 276, § 58; Arraignment and Bail, §6.3.1. In order to overcome the accused's presumption of release, the statute requires a finding of probable cause, a hearing at which the defendant has the right to be represented by appointed counsel as well as opportunity to participate and inquire into the matter of bail, and the determination by a neutral magistrate as to "whether release will reasonably assure the appearance of the person before the court." G.L. c. 276, § 58. In making a determination of whether bail is necessary to ensure a person's return to court, the judge may consider the factors listed in §58, including "the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, financial resources, employment record and history of mental illness," as well as the person's criminal history. Id. These limitations within the statute protect the defendant's right to release. And restraints on pretrial liberty may only be imposed in cases where the state's

narrowly tailored, legitimate interest outweighs the defendant's right to release. Id.

Section 58A of the Massachusetts bail statute also permits denial of pretrial release after the Court makes reaches a determination of "dangerousness." The threshold question in each determination of preventive detention is whether the defendant has already committed a predicate offense under §58A(1), which then triggers the Commonwealth's right to move for a hearing on "dangerousness." Blumenson, Ch. 9, Pretrial Release, Bail, and Pretrial Detention, p. 17. (2011). Under G.L. 276 §58A, only after a hearing, where the Commonwealth has the burden of proving "by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community," may the court detain a criminal defendant prior to trial, who would otherwise be released. Joseph R. Nolan & Laurie J. Sartorio, § 32. Bail, 32 Mass. Prac., Criminal Law § 32 (3d ed.); See Mendonza, 423 Mass. at 771, 774, citing G.L. c. 276, § 58A(2) ("Only if such release will not reasonably assure the presence of the arrested person at trial or the safety of any other persons may the judge impose the least restrictive conditions proposed

to him necessary to provide such assurance"); Id., citing G.L. c. 276, § 58A(3) and (4) ("The judge at the hearing must find the requisite dangerousness by clear and convincing evidence").

Accordingly, under Massachusetts law, in order to overcome a criminal defendant's presumptive right to release on the grounds of predictive dangerousness, the Commonwealth must adhere to the procedural requirements as assessed in Salerno. See Mendonza, 423 Mass. at 785 (deprivation of liberty requires, at a minimum, notice and opportunity for a hearing); Id. at 786 (amendment to Massachusetts bail statute ruled constitutional where determination re preventive detention based on dangerousness "allows at least as ample an opportunity for testing of, and response to, the Commonwealth's showing of dangerousness" as in Salerno).

In Mendonza, this Court recognized the "heavy burden" that a preventive detention scheme must undergo to validate usurpation of a criminal defendant's right to release. See 423 Mass. 771, 780 (1996) ("We are not inclined to believe that the Supreme Court in Salerno wished to allow any and all loss of liberty to be justified by a prediction of

dangerousness with only generalized due process safeguards"); Id. at 773 (to keep defendant in pretrial detention, prosecution "must show good cause," and "the judge must in each case make a specific finding indicating what such cause is"). Thus, detention statutes that fail to adhere to the procedural safeguards as set forth in the Bail Reform Act, and as required by Salerno and Aime, create default preventive detention schemes, which violate criminal defendants' right to pretrial release. See id.

Here, the government's interest in enforcing ICE detainers is unclear and has not been articulated either by the federal government or a state or local government representative. Their presumed interest in suspicions over a person's removability, however, cannot outweigh a criminal defendant's fundamental right to pretrial liberty, since the detention scheme is not narrowly construed, the government is not required to demonstrate probable cause for the basis of such detention, and at no point does a neutral decision maker establish that no alternative to detention will suffice to achieve the governmental interest sought. See Salerno, 481 U.S. 739, 750. Not

only are none of the required pretrial detention procedural protections in place for the enforcement of ICE detainers, under Massachusetts law there is also no authority to deprive criminal defendants of their pretrial right to release for the sole purpose of a civil federal immigration detainer. See Petitioner's Brief, at 18, FN 4 ("Massachusetts statutes are peppered with specific provisions authorizing arrest for specific criminal offenses...A thorough review of Massachusetts statutes uncovered no authority to arrest solely for civil immigration violations and undersigned counsel are aware of no such authority"). Even if a narrow exception to a defendant's right to release were appropriate in the case of ICE detainers, the Commonwealth would still be required to provide a fair adjudicatory procedure in order to surpass the established hurdles that protect an individual's right to pretrial liberty. See William R. LaFave, Crim. Proc. § 12.3(d) Jerold H. Israel et. al. eds., 4th ed. 2015), citing Atkins v. Michigan, 644 F.2d 543 (6th Cir.1981) ("though charge against defendant in state court placed him in exception category of state constitutional right to bail, it is still true 'that if his liberty is to be denied, it must be done

pursuant to an adjudicatory procedure that does not violate the standards for due process'"); Simpson v. Owens, 85 P.3d 478, (Ariz. Ct. App. 2004) ("where defendant charged with sex offense for which bail can be denied if proof evident and presumption great, denial of bail on basis of prosecutor's avowals and without a hearing violated due process; what needed are procedures itemized in Salerno").

In failing to provide the required procedural safeguards under §§ 58 and 58A of the Massachusetts bail statute, ICE detainers violate the highest law in the Commonwealth, since "the Declaration of Rights...allows preventive detention in carefully circumscribed circumstances and subject to quite demanding procedures. The Commonwealth's burden to prove dangerousness by clear and convincing evidence is an important part of those procedures." Mendonza, 423 Mass. 771, 790. Furthermore, the enforcement of ICE detainers likely violates the federal Bail Reform Act itself. See Aime, Footnote 16, quoting, S.Rep. No. 225, 98th Cong., 2d Sess. 8, reprinted in 1984 U.S.C.C.A.N. 3182, 3191.17 ("The Senate Report on the Bail Reform Act stated that, while the committee on the judiciary 'is satisfied that pretrial detention is

not per se unconstitutional,' the Committee 'recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect'").

Thus, even if the enforcement of ICE detainers could pass the federal and state constitutional hurdle of establishing a legitimate and narrowly construed government interest (which has yet to be seen), the local enforcement of this detention scheme would still face a fatal error in its failure to provide the clearly-established procedural safeguards, which were designed to protect criminal defendants' fundamental right to pretrial liberty. See LaFave, Crim. Proc. § 12.3(d) (4th ed.)

II. THE DECISION TO ENFORCE ICE DETAINER REQUESTS DEPRIVES CRIMINAL DEFENDANTS OF ACCESS TO THEIR CRIMINAL DEFENSE ATTORNEYS, VIOLATING THEIR RIGHT TO EFFECTIVE COUNSEL UNDER THE 6TH AMENDMENT OF THE UNITED STATES CONSTITUTION

When ICE detainers are voluntarily enforced by state and local custodians, defendants' 6th Amendment right to the effective assistance of counsel in criminal proceedings is greatly diminished, since as

soon as individuals are taken into ICE custody it becomes increasingly difficult or impossible for defendants to access their criminal defense attorneys.

The 6th Amendment right to counsel would be an empty promise unless it guaranteed effective counsel. See McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel"). Further, effective assistance of counsel extends beyond formal court hearings, reaching all stages of criminal proceedings, including investigation, pretrial communication and planning, trial preparation, negotiation, and all other stages. See e.g. Strickland v. Washington, 466 U.S. 668, 680 (1984)("the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options"); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel").

Under Strickland, the Court assesses an attorney's representation under the "reasonably effective assistance" standard, whereby "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 687-88. As a result of this Court's rulings in Commonwealth v. Bernier and Commonwealth v. Saferian, Massachusetts law guarantees criminal defendants higher professional standards for measuring the effective assistance of counsel, as compared to the constitutional floor set by Strickland. See 359 Mass. 13, 17 (1971) (effective assistance means "counsel reasonably likely to render *and rendering* effective assistance"); 366 Mass. 89, 96 (1974). In Saferian, this Court outlined the procedure by which Massachusetts courts must make determinations regarding effective assistance, stating that the process requires "a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel-behavior of counsel falling measurably below they [sic] which might be expected from an ordinary fallible lawyer." 366 Mass. at 96.

Thus, where the Supreme Court employed its objective reasonableness test in assessing effective assistance of counsel, by requiring a higher standard, Massachusetts followed in its tradition of providing more expansive constitutional safeguards for its criminal defendants. See id.; Peter W. Agnes, Jr., The Rights of a Person Who is Arrested, §1.4 (MCLE 2012)("The SJC has determined that the requirements of Article 12 of the Declaration of Rights exceed those under the federal constitution").

In evaluating whether criminal counsel's representation is ineffective, the Court may find guidance in the Massachusetts Rules of Professional Responsibility and practitioner's guides. See Fishman v. Brooks, 396 Mass. 643, 649 (1986) (where the Court stated a violation of an ethical rule intended to protect client "may be some evidence of the attorney's negligence"). See also Padilla, 559 U.S. at 367-68 (where the U.S. Supreme Court reviewed criminal practice advisories to conclude the scope of duties of a criminal defense attorney to noncitizen defendants). Under Rule 1.4 of the Massachusetts Rules of Professional Conduct, a lawyer has the duty to "keep a client reasonably informed about the status of a

matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." MA Rule 1.4 (a-b); see CPCS Assigned Counsel Manual Ch 4., Criminal Performance Standards 1.C. (defense counsel has duty of "keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client"). ICE detention makes compliance with these rules difficult or impossible for defense attorneys because it renders communication with their clients unacceptably limited.

In practice, criminal defendants who are in ICE custody as the result of an immigration detainer do not receive effective representation since the very nature of ICE detention makes it unfeasible for criminal defense attorneys to maintain the required standards for competence and diligence. The main barrier between criminal defendants with ICE detainers and their ability to access effective counsel results from the fact that, once an individual is taken into ICE custody from a local or state court or law enforcement agency, the defendant's criminal defense

attorney may be unable to communicate with the detainee for prolonged periods of time, if ever again.

After being "released" on her own recognizance, Ms. X[8] was held for additional time beyond her bail hearing due to local law enforcement's voluntary decision to comply with an ICE detainer request. Aff. of Karen Pita Loor, March 17, 2017. Although Ms. X's student attorney made countless attempts to locate his client, utilizing every available method of inquiry, 20 days passed before a third party located Ms. X in ICE custody. Id. To provide clients with effective representation, "BU Criminal Law Clinic 3:03 Student Attorneys' practice is to meet with their detained clients within two days of arraignment." Id. Similarly, the CPCS Assigned Counsel Manual states that assigned counsel in Massachusetts is required to see a detained client within three days, but in no instance longer than a week, after initial detention. CPCS Assigned Counsel Manual Ch 4., Criminal Performance Standards I.C. 2 attached as Exhibit G. ICE detention resulting from an ICE detainer request makes compliance with this practice standard extremely

---

[8] A pseudonym is used to protect the confidentiality of the client's information.

onerous, since even locating a client within the ICE detention system is a burdensome task in itself, and attorneys must frequently travel far distances to visit with detained clients. Aff. of Karen Pita Loor, March 17, 2017. A criminal defendant's inability to speak to her lawyer regarding pending criminal proceedings that concern her fundamental interest in liberty is a clear violation of a defendant's 6th Amendment right to effective assistance of counsel. See Strickland, 466 U.S. at 688 (effective counsel requires the "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution"); See Standard 4-1.3, American Bar Association, Criminal Justice Standards for Defense Function, (2015 4th ed.) (effective assistance necessitates "duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes").

Most egregiously, when criminal defendants in ICE custody are transferred out of state, they are functionally denied counsel, since transfer halts

existing communication with criminal defense counsel. See Strickland, 466 U.S. at 685, quoting Adams v. United States, 317 U.S. 269, 275 (1942) ("access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled" under the 6th Amendment). During a ten-year study, Massachusetts ICE detention centers transferred thousands of detainees out of state. A Costly Move: Massachusetts, First Circuit, Data and Findings, Human Rights Watch (June 7, 2001), https://www.hrw.org/video-photos/interactive/2011/06/07/costly-move attached as Exhibit B. According to the study, as many as 2,077 detainees were transferred as far as Louisiana, and another 930 were sent to Texas. Id.; see Aff. Of Sarah Sherman-Stokes. 2:1. Mar. 16, 2017 (recounts in her professional experience, multiple clients initially taken into ICE custody in Massachusetts being transferred to an ICE detention center in New Orleans, Louisiana); See Aff. Of M. Barusch. 1:2. Mar. 2, 2017 (recounts experience with clients being transferred outside of New England area). Although under ICE protocol criminal defense attorneys are to be informed of a client's transfer 24 hours after it

takes place, they are not told the location where a client is transferred, and are sometimes not contacted. See Aff. Of M. Barusch. 2:2. Mar. 2, 2017 ("Attorneys are not informed when a client is transferred or deported, so keeping track of a client can be very difficult"). After a detainee is transferred, data regarding her location is uploaded onto the ICE website, into a detainee locator tool. U.S Immigration & Customs Enforcement, What We Do, available at https://locator.ice.gov/odls/homePage.do. However, in order to locate a client, the name inputted must be an exact match, and a defense attorney must have access to information such as the client's "alien number" and date and country of birth. Id. Accordingly, it can be very difficult, and is sometimes impossible, for an attorney to locate and communicate with her client after a transfer takes place, since this kind of information is not always shared prior to transfer. See Aff. Of M. Barusch. 1:2. Mar. 2, 2017 (difficulty communicating effectively when clients transferred out of state and nothing in attorney's power to prevent transfer).

If criminal defendants are able to communicate with their attorneys while in ICE custody, the

communication is limited at best, since they are forced to communicate in person at the ICE detention facility, rather than via telephone, text messages, emails, letters, or at court proceedings since defendants are not transported back for state court hearings. See Affidavits of James Caramanica, Victoria Spetter, Claire Ward, Jennifer Sunderland, Joshua Werner, Dorian Page. Furthermore, clients are frequently held in detention centers that are far away from their criminal court jurisdiction, making frequent trips unsustainable for their criminal defense attorneys, and further curtailing defendants' ability to access the main resource in the preparation of their defense: their attorney. See id.; Strickland, 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions" for purposes of determining the effectiveness of counsel).

Additionally, because of language barriers, and the limited interpreter options available at the detention facility, clients are sometimes prevented from meeting with their attorneys on the date scheduled, establishing another roadblock for criminal

defendants stemming from the choice to implement ICE detainer requests. Aff. of Victoria Spetter. 4-5:7. Feb. 23, 2017.

As demonstrated, ICE detention curtails a defendant's access to her counsel in varying degrees and thus renders representation, of even the best meaning counsel, ineffective and unacceptable to the Sixth Amendment. Voluntarily complying with ICE detainers sends defendants with pending criminal cases into ICE detention and therefore severely limits the extent to which they may access their attorney to prepare their defense. As such, complying with ICE detention requests diminishes criminal defendants' constitutional right to the effective assistance of counsel, and should therefore be a prohibited practice in the state of Massachusetts. See Padilla, 559 U.S. at 374, quoting Richardson, 397 U.S., at 771 ("It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.'") (emphasis added).

CONCLUSION

Based on the foregoing arguments and authorities, the Boston University School of Law Criminal Defense

Clinic respectfully requests this Court to find that it is unconstitutional for Massachusetts courts and law enforcement agencies to honor ICE detainer requests by detaining individuals in custody past when they would otherwise be released.

Respectfully submitted,

Karen Pita ~~Loor~~
BBO# 625035
Clinical Associate Professor
Boston University School of Law Criminal Defense Clinic
765 Commonwealth Ave.
Boston, MA 02215
(617) 353-3131
loork@bu.edu

Dated: March 20, 2017

Certificate of Service

I, Karen Pita Loor, hereby certify that on this 20th day of March, 2017, I served the within brief by causing two copies thereof to be delivered by first class mail to counsel for Plaintiffs-Appellees:

Jessica V. Barnett,
Assistant Attorney General
One Ashburton Place,
Boston, MA 02108
Commonwealth of Massachusetts,

John P. Zanini,
Assistant District Attorney,
Office of the District Attorney/Suffolk Appellate Unit Chief
One Bulfinch Place
Boston, MA 02114

And counsel for Defendants-Appellants:

Emma C. Winger,
Alyssa Hackett,
Mark Fleming,
Committee for Public Counsel Services,
21 McGrath Highway, 2nd floor
Somerville, MA 02143.

Allen H. Forbes
Suffolk County Sheriff's Department
200 Nashua Street
Boston, MA 02114

Signed under penalties of perjury.

Karen Pita Loor

Commonwealth of Massachusetts
Supreme Judicial Court

SUFFOLK, ss. No. SJC-12267

COMMONWEALTH OF MASSACHUSETTS

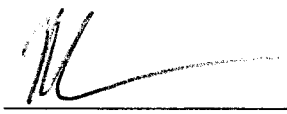
v.

SREYNUON LUNN

AFFIDAVIT OF M. BARUSCH

My name is M. Barusch. I work as a staff attorney at the Committee for Public Counsel Services, in the Boston Superior Court Trial Unit. My professional address is One Congress Street, Suite 102, Boston, Massachusetts, 02114.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.



M. Barusch

STATE OF MASSACHUSETTS
COUNTY OF Suffolk

1. I have been a staff attorney at the Committee for Public Counsel Services ("CPCS") representing indigent criminal defendants since 2011.
2. I have represented several clients who have been subject to ICE detainers. Depending on the court and judge, these may or may not be enforced. In my experience, these detainers lead to situations that can make it difficult to effectively communicate with my clients regarding the remaining criminal charges or probation violations pending against them.
3. I have represented clients and am aware of other attorneys who have represented clients who entered federal custody as a result of an ICE detainer. When in federal immigration custody, some detainees are transferred to immigration detainers across state lines including outside of the Massachusetts/Rhode Island area. When a client is transferred to an immigration detention facility that is outside of Massachusetts or Rhode Island, it is very difficult for me to communicate effectively with my clients, and ensure that they receive their Sixth Amendment right to confront witnesses. This is because it

is virtually impossible to bring a client into court once they are taken into federal custody and transferred outside of South Bay (Suffolk County House of Corrections). To my knowledge and based on my experience, there is nothing a defendant or defense attorney can do to ensure the person remains at South Bay. Prosecutors and United States Attorneys can work together to bring a defendant in ICE custody into state trial proceedings if they choose to do so, but a court issuing a habeas to bring the defendant to court seems to have no effect on any facility other than South Bay.

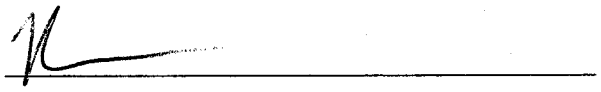
4. Once clients have entered federal custody through ICE detainers, they may be transferred to different facilities or deported at the government's discretion. Attorneys are not informed when a client is transferred or deported, so keeping track of a client can be very difficult. If I don't know where my client is, I cannot provide him/her with the counsel he/she is entitled to. Often, clients are transferred to facilities that are an

unreasonable distance away, so I am unable to communicate with clients in person.

5. Additionally, I have had clients who refuse to post bail that they could otherwise afford when they know there is an ICE detainer lodged against them. As a result, my clients remain in state custody in a correctional facility, even though they have the ability to be released. These clients do not wish to enter ICE custody for fear of deportation, and thus choose to endure extended state custody.

6. Lastly, it is my understanding that defendants may post bail or receive personal recognizance when in custody at the police station, but ICE is informed. When the defendant is at arraignment or another court date, ICE can choose to be present, and takes defendants into custody immediately as defendants walk out of the courthouse. ICE has taken multiple clients of mine in the hallways of East Boston courthouse and outside the building of the East Boston courthouse.

Signed under the pains and penalties of perjury, this 20th day of March, 2017.



M. Barusch
BBO # 676916

Commonwealth of Massachusetts
Supreme Judicial Court

SUFFOLK, ss. No. SJC-12267

COMMONWEALTH OF MASSACHUSETTS

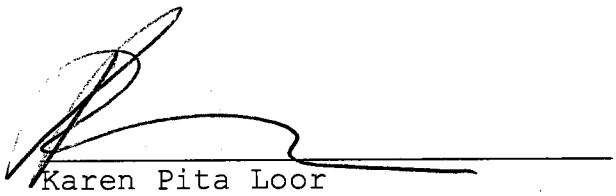
v.

SREYNUON LUNN

AFFIDAVIT OF KAREN PITA LOOR

My name is Karen Pita Loor. I work as a Clinical Associate Professor of Law at the Boston University School of Law. My professional address is 765 Commonwealth Avenue, Boston, Massachusetts, 02215.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.



Karen Pita Loor

STATE OF MASSACHUSETTS
COUNTY OF Suffolk

1. In 2011, Boston University School of Law Criminal Law Clinic was appointed to represent Ms. X in a criminal matter in the Boston Municipal Court. Ms. X was charged with one charge of shoplifting by concealing charge that was ultimately dismissed. I was the clinical instructor that supervised Matthew Schultz, the 3:03 Student Attorney that represented Ms. X in that criminal matter.
2. At Ms. X's arraignment, on October 11th, 2011, Ms. X was released on personal recognizance. However, she was held and picked up by ICE due to an ICE detainer from Chicago.
3. While Ms. X was in ICE custody, Mr. Shultz attempted to provide Ms. X the competent and effective representation she was due but this was impossible, as the client was often difficult to locate. Mr. Shultz sought to locate Ms. X by contacting South Bay House of Corrections, but he was informed that she was not there. Mr. Shultz thereafter contacted the U.S. Marshalls to inquire about Ms. X's location, who were unable to find her because of issues accessing the ICE computer system. Ultimately, Mr. Shultz was

unable to find Ms. X, despite calling Plymouth and Bristol, Burlington, ICE and the U.S. Marshalls.

4. Ultimately, through the Criminal Clinic, student attorneys reached out to the Political Asylum/Immigration Representation Project ("PAIR") to obtain assistance with locating Ms.X. Among these organizations were. At my request, PAIR sent a representative to South Bay HOC. The PAIR representative located Ms. X at South Bay. At this point, the student attorney met with Ms. X.

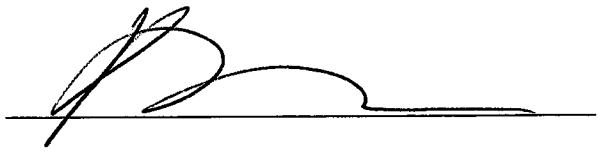
5. As a result of these systemic challenges and the lack of coordination between state agencies and ICE detention centers, Ms. X was unable to communicate with her criminal defense counsel for over twenty days. BU Criminal Law Clinic 3:03 Student Attorneys' practice is to meet with their detained clients within two days of arraignment. The reason for this practice is to provide clients with pending criminal cases competent and effective representation.

6. The meeting between Ms. X and her criminal counsel occurred only nine days before Ms. X's

pre-trial hearing, which was scheduled for November 10th, 2011. Ms. X was not in court at that pre-trial hearing, and Judge Somerville stated he had no information before him stating that Ms. X was in ICE custody. Mr. Shultz informed Judge Somerville that he had met with Ms. X a week prior. The judge issued a new pre-trial hearing date, January 30th, 2012. Ultimately, Ms. X was not present in court for her second pre-trail hearing and the judge continued the case until January 30th.

7. A week prior to the rescheduled hearing, Mr. Shultz consulted the ICE Detainee Locator to check on Ms. X's status. The Locator listed that Ms. X was released from custody at some point in the past 60 days which could mean one of two things - that she was either released or deported. The Clinic found out only four days prior to the hearing, that Ms. X had been deported on December 2nd, 2011. At the pre-trial hearing on January 30th, Judge Forde issued a continuance for April 3rd. The case was then dismissed on April 3rd.

Signed under the pains and penalties of perjury, this 17th day of March, 2017.



Karen Pita Loor
BBO # 625035

Commonwealth of Massachusetts
Supreme Judicial Court

SUFFOLK, ss. No. SJC-12267

COMMONWEALTH OF MASSACHUSETTS

v.

SREYNUON LUNN

AFFIDAVIT OF SARAH SHERMAN-STOKES

My name is Sarah Sherman-Stokes. I work as a Clinical Instructor at the Boston University School of Law. My professional address is 765 Commonwealth Avenue, Boston, Massachusetts, 02215.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Sarah Sherman-Stokes

STATE OF MASSACHUSETTS
COUNT OF Suffolk

1. On Wednesday, March 8, 2017, I met with students of the Boston University School of Law Criminal Clinic to discuss experiences I have had with ICE detainers and ICE custody through my work with the Boston University School of Law. During this meeting, I stated that I was aware of ICE transfer of detainees across state lines. I previously worked with the Political Asylum/Immigration Representation Project ("PAIR Project"). During my time with PAIR Project, I had clients who were transported to New Orleans, Louisiana, after initial detention in Massachusetts.

2. I also told the group of students that it is my understanding that individuals detained in Massachusetts are primarily detained in the Suffolk County House of Corrections, Plymouth County Correctional Facility, Bristol County House of Corrections, and Norfolk County Correctional Center. I also stated that in my experience, ICE detainers are enforced in Plymouth and Bristol Counties. Additionally, I have personally seen ICE detainers that contain

inaccurate or incorrect information being offered as a basis for the detainer.

3. Lastly, I shared background information regarding immigration procedures in Boston and the greater New England area, emphasizing that the Boston Immigration Court serves almost all of New England.

Signed under the pains and penalties of perjury, this 17th day of March, 2017.

Sarah Sherman Stokes
BBO # 682322

EXHIBIT A

IMMIGRATION DETAINERS

What are immigration detainers?

When a local law enforcement agency (LEA) arrests an individual whom Immigration and Customs Enforcement (ICE) believes may be deportable, ICE often issues an immigration detainer, or hold, which instructs the local police to hold the individual for up to 48 hours (excluding weekends and holidays) so that ICE may assume physical custody of the individual. Detainers are not arrest warrants and do not provide probable cause for arrest. ICE does not compensate law enforcement for the additional cost associated with honoring immigration detainers, creating a significant financial burden on local residents.[1] Through the use of detainers and programs like Secure Communities, ICE has dramatically increased its interior immigration enforcement.

Why are detainers harmful?

Some claim that detainers and programs facilitating LEA participation in immigration enforcement (e.g. Secure Communities and 287(g)) make communities safer. However, in the first six months of 2013, less than one in nine (10.8%) detainers met ICE's stated goal of pursuing individuals who pose a serious threat to public safety or national security.[2] 62% of individuals had no criminal convictions or only minor offenses, such as traffic infractions. Participation in immigration enforcement severely hinders the work of local police and diverts personnel and financial resources from the goal of upholding public safety and addressing real, dangerous crime.

LEA participation in immigration enforcement destroys trust with immigrant communities and makes our communities less safe by discouraging immigrants from reporting criminal activity, or cooperating in the investigation and prosecution of crimes. Some LEAs, including the Major Cities Chiefs Association, have come out in opposition against laws that promote LEA participation in immigration enforcement for this very reason.

Detainers incur costly expenses to LEAs. Although the Department of Justice's State Criminal Alien Assistance Program (SCAAP) reimburses a small fraction of the cost to local jails for holding some individuals, the funds are not sufficient and many individuals subject to detainers are not covered by SCAAP, meaning that taxpayer dollars are used to cover the costs of participating localities. Two recent studies conducted in Travis County, Texas and New York City have found that individuals with immigration detainers lodged against them on average spend an extra 43 to 72 days, respectively, in pre-trial custody compared to individuals without detainers. Localities receive little to no compensation from the federal government for these significant added expenses.

Detainers violate the Fourth and Fifth Amendments because DHS (1) does not have the required procedures in place to make probable cause determinations before issuing detainers; (2) does not notify individuals that detainers have been issued against them; and (3) provides no means by which individuals can challenge their extended detention.

In August 2011, NIJC filed a class action lawsuit against DHS challenging the agency's unconstitutional use of immigration detainers. The two named Plaintiffs, a U.S. citizen and a lawful permanent resident (LPR), were wrongfully held on immigration detainers because DHS was not complying with the Fourth and Fifth Amendment in its use of immigration detainers.From fiscal year 2008 through the start of fiscal year 2012, at least 834 U.S. citizens and 28,489 LPRs were issued detainers.

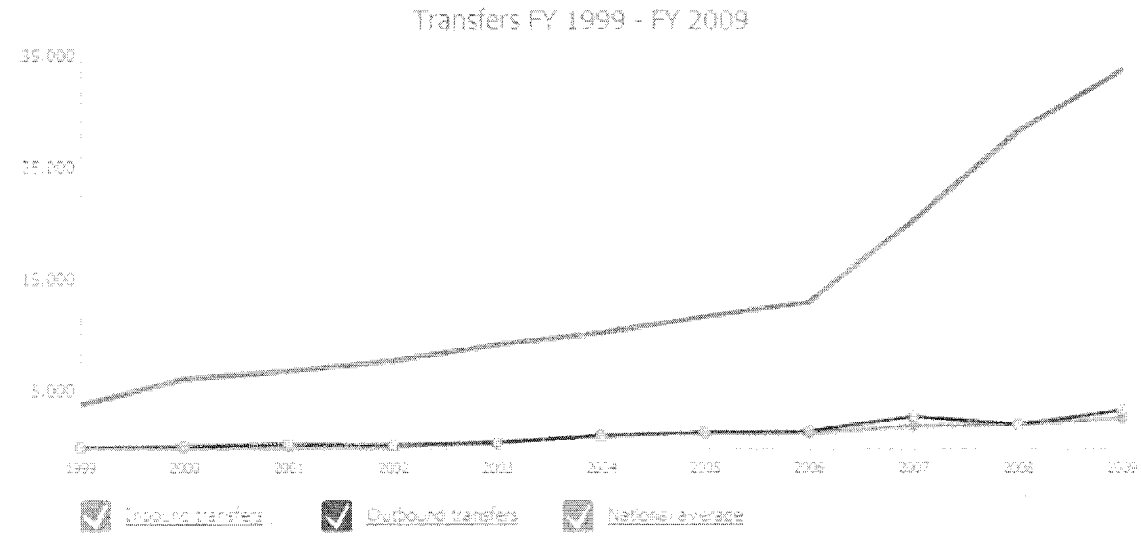
Detainers increase the likelihood of racial profiling, as officers may use "foreign-sounding" last names, place of birth, or racial appearance as reasons to report an individual for investigation.

Individuals with detainers are more likely to receive higher criminal bonds, no bonds, or choose not to pay a criminal bond for fear of forfeiting the bond money, all of which lead to longer detention at local expense. Judges may feel that the detainer provides a disincentive to attend criminal court if released from custody, thereby prompting a judge to revoke bail or set higher bail. This, in turn, increases the amount of time families are separated and places a higher financial strain on families, both due to the efforts to acquire bail as well as the limited income due to an individual's inability to work while incarcerated. Moreover, many individuals subject to detainers choose not to pay bail because they will be transferred to ICE custody and thus will not be able to attend their next hearing, thus forfeiting their bail money.

Source: *Immigration Detainers*, NATIONAL IMMIGRANT JUSTICE CENTER, http://www.immigrantjustice.org/issues/immigration-detainers.

Exhibit B

MASSACHUSETTS First Circuit



↓ INBOUND: TOP STATES

RHODE ISLAND [2,085]

NEW HAMPSHIRE [1,363]

CONNECTICUT [910]

MAINE [785]

VERMONT [754]

↑ OUTBOUND: TOP STATES

PENNSYLVANIA [3,318]

LOUISIANA [2,077]

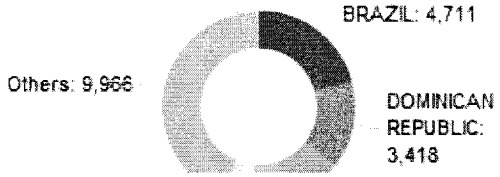
TEXAS [930]

CONNECTICUT [818]

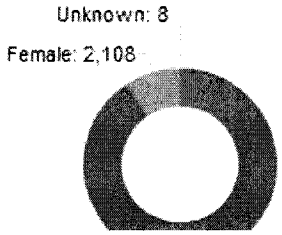
RHODE ISLAND [736]

DEMOGRAPHICS OF INDIVIDUALS THAT FIRST ENTER IMMIGRATION DETEN

Nationalities

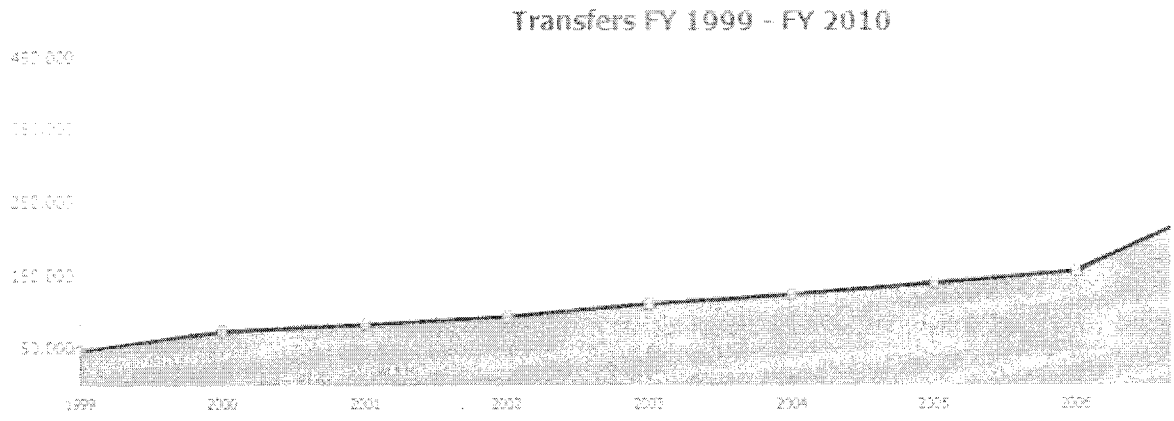


Gender



Detained immigrants facing deportation in the United States, including legal permanent resider are being transferred, often repeatedly, to remote detention centers by US Immigration and Cu separate detained immigrants from the attorneys and evidence they need to defend against dep fair treatment in court, slow asylum or deportation proceedings, and prolong the time immigra

Human Rights Watch has analyzed over 5 million records to gain information on the over 2 mi occurred between 1998 and 2010.



Data and Findings

Department of Homeland Security
Office of Inspector General

Exhibit C

Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers

OIG-10-13

November 2009

App 5

Office of Inspector General

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 10, 2009

MEMORANDUM FOR: John T. Morton
Assistant Secretary
U.S. Immigration and Customs Enforcement

FROM: Richard L. Skinner
Inspector General

SUBJECT: *Letter Report: Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers (OIG-10-13)*

We reviewed Immigration and Customs Enforcement (ICE) detainee transfer policies and procedures in response to a request from nongovernmental organizations. These organizations reported that some transfers have not complied with ICE National Detention Standards and have created hardships for detainees. Our objective was to determine whether ICE detention officers properly justify detainee transfers according to ICE's standards.

Transfer determinations made by ICE officers at the detention facilities are not conducted according to a consistent process. This leads to errors, delays, and confusion for detainees, their families, and legal representatives. Communication and coordination with the Department of Justice's Executive Office for Immigration Review (EOIR) immigration courts regarding detainee status can also be improved to eliminate confusion and delays. We are recommending that ICE establish a national standard for reviewing each detainee's administrative file prior to a transfer determination, and that it develop protocols with EOIR court administrators for exchanging hearing and transfer schedules.

The report contains two recommendations. ICE concurred with both recommendations. The full text of ICE's comments can be found in Appendix B. Within 90 days of the date of this memorandum, please provide our office with management's official response to the final report. The response should indicate corrective actions planned or taken; other supporting information; and, where appropriate, dates for achieving actions and the official responsible for implementation of the actions.

We trust our recommendations will be of assistance as you conduct detention and removal operations and provide custody management during removal proceedings.

Should you have any questions, please call me, or your staff may contact Carlton I. Mann, Assistant Inspector General for Inspections, at (202) 254-4100.

Background

The Immigration and Customs Enforcement (ICE) Office of Detention and Removal Operations (DRO) is responsible for arresting, detaining, and removing inadmissible and deportable noncitizens (aliens) from the United States. This includes aliens who are inadmissible or removable under the *Immigration and Nationality Act* (INA), guilty of certain crimes, in violation of the status in which they were admitted to the United States, or who have final orders of removal. Under the INA, certain inadmissible or removable aliens are subject to mandatory detention. Those not subject to mandatory detention may be detained, paroled, or released on bond or recognizance until a removal determination is complete.

Since its creation in 2003, ICE has detained more than 1.7 million individuals. ICE estimates that during FY 2009, more than 442,000 detainees will spend time in ICE custody, more than double its first year of operations. ICE transfers detainees to other detention facilities to prepare for final removal, reduce overcrowding, or meet the specialized needs of the detainee. Recently, the number of detainee transfers has increased because of insufficient bed space in some facilities. Most detainees transferred owing to overcrowding are sent from eastern, western, and northern state detention facilities to locations in the southern and southwestern United States. In FY 2008, ICE had an average daily detention population of 31,244. Currently, ICE has a total bed capacity of 33,400 through use of its own service processing centers, contracted facilities, and local jails under Inter-governmental Service Agreements.

ICE National Detention Standards outline the policy, applicability, standards, and procedures for the transfer of a detainee. ICE must consider the detainee's security requirements, medical needs, legal representation, and requests for a change in venue for the removal proceeding.[1] The detention standards state that ICE shall consider alternatives to transfer, especially when the detainee is represented by legal counsel and where immigration proceedings are ongoing. Legal representatives are required to notify ICE and the immigration court that they are the alien's legal counsel or representative.[2] The standards require that ICE notify the detainee's legal counsel no later than 24 hours after a transfer to another detention facility.

The Notice to Appear informs the alien of the reasons for arrest, the right to representation by counsel at no cost to the government, and the time and location of a removal proceeding. According to federal regulations, DRO must determine within 48 hours of an alien's arrest whether to issue a Notice to Appear and warrant of arrest and whether the alien will remain in custody or be released on bond or recognizance. In addition to the reasons for arrest and right to representation, a Notice to Appear must contain proof that the alien received the Notice to Appear, confirm that the alien received

[1] On September 12, 2008, ICE introduced new Performance-Based National Detention Standards and was implementing these new standards at detention facilities over a 12 month period.

[2] For ICE, this is Form G-28; for the Executive Office for Immigration Review, this is Form E-28.

a list of free (pro bono) legal services available in the district where the hearing will be held, and indicate the immigration court in which it is filed. At ICE's discretion, the Notice to Appear may indicate that the notice of the time and place of the removal proceeding will be given to the respondent once ICE has filed the Notice to Appear with an immigration court.

Filing the Notice to Appear with the immigration court establishes jurisdiction for the removal proceeding. ICE is not required to file the Notice to Appear with the immigration court within a specified time after it has been served. ICE may decide for operational or other reasons to transfer a detainee from the jurisdiction where the detainee was arrested to a detention facility outside of that jurisdiction. For those detainees, ICE files the Notice to Appear with the immigration court that has jurisdiction over the receiving detention facility.

Immigration judges from the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR) conduct removal proceedings. Detainees and legal counsel have the right to examine evidence against them, present evidence, and cross-examine witnesses. Detainees may challenge their detention by requesting that an immigration judge with jurisdiction over the place of detention review and reassess ICE's custody or bond determination. Aliens determined to be inadmissible or removable may apply to the immigration court for relief, and may appeal a removal order with the DOJ Board of Immigration Appeals or the United States Court of Appeals. In FY 2008, 220 judges assigned to 56 immigration courts received 291,781 cases. An increase in cases and only a modest increase in immigration judges has created case backlogs and longer detainee wait times for proceedings. Because of the high case volume and logistical issues, many detainees appear before the court via a videoconference link from their detention facility.

Results of Review

ICE/DRO Can Improve the Detainee Transfer Process

A detainee's Alien File (A-File) is an important part of the transfer process. The A-File contains information regarding the detainee and his or her movement through the detention process. ICE detention officers review documentation in an A-File to make a determination regarding a detainee transfer. ICE detention standards state that, before transferring a detainee, ICE "shall consider alternatives to transfer, especially when the detainee is represented by legal counsel and where immigration proceedings are ongoing."

Detention officers at five ICE Field Offices we visited do not consistently determine whether detainees have legal representation or a scheduled court proceeding when transferring detainees. EOIR judges and ICE detention officers in transferring jurisdictions and the judges and officers at receiving facilities said detainees with legal representation and scheduled court proceedings are being transferred to detention facilities outside of the scheduling court's jurisdiction. At one location, court and detention officers estimated that this occurs at least once a week.

ICE officials said that the transfer of detainees who already have a scheduled court hearing occurs because ICE has not received the EOIR notification of the detainee's scheduled court appearance. ICE officials also said that inadvertent detainee transfers occur when the detainee's legal counsel submits a request for a custody or bond hearing with the immigration court before submitting a Form G-28, Notice of Entry of Appearance as Attorney or Representative, which announces the detainee's legal representative. In these cases, ICE said it is not aware that a detainee has legal representation or a scheduled court appearance at the time of transfer.

The detention officers we interviewed were knowledgeable of the ICE detention standards. However, they were not consistently given written guidance regarding what specific information to assess in the detainee's A-file before making a transfer determination. ICE officials said that, based on geographic and other factors, directors of ICE Field Offices have discretion regarding the guidance and procedures they use to manage detainee transfer determinations. Transfer determinations at the ICE Field Offices we visited were not consistent. This has resulted in detainees being transferred without required A-File documentation, or with pending or outstanding warrants, criminal prosecutions, or custody determinations. ICE officers told us that some transferred detainees arrive at facilities:

- Without being served an NTA;
- Without proper security classification;
- With active arrest warrants in the previous jurisdiction;
- With pending criminal prosecutions in the previous jurisdiction;
- With final orders for removal that are past 90-day deadlines;
- With 6-month post-removal-order custody determinations that are past deadlines;
- With a high probability of being granted bond;
- With incomplete A-file documentation, including files without detainee photographs or conviction records; and
- With late or no notification of the transfer location to the immigration court or the detainee's legal representative.

Staff at ICE Field Offices receiving transferred detainees said that the receipt of incomplete A-Files has led to errors, delays, and confusion for detainees, their families, legal representatives, and the EOIR courts. When the detainee's location changes, Notice to Appear information on court proceedings and legal services becomes outdated or incorrect. Transfers may also create delays in filing the Notice to Appear with an immigration court, prolonging the time the detainee remains in detention.

Detainees transferred with scheduled court appearances have their proceedings (1) rescheduled to a date after the detainee is returned to the original court's jurisdiction; (2) conducted in absentia or by videoconference; or (3) withdrawn by legal counsel and re-filed in the jurisdiction where the detainee is currently being held. Returning detainees to the jurisdictions where a Notice to Appear was first served or re-filing bond or custody

determinations creates unnecessary cost and additional time in detention. Officials at one Field Office estimated that they return detainees to the sending jurisdiction two or three times per week.

When ICE transfers detainees far from where they were originally detained, their legal counsel may request a release from representation because the distance and travel time or cost make representation impractical. Transferred detainees have had difficulty or delays arranging for legal representation, particularly when they require pro bono representation. Difficulty arranging for counsel or accessing evidence may result in delayed court proceedings. Access to personal records, evidence, and witnesses to support bond or custody redeterminations, removal, relief, or appeal proceedings can also be problematic in these cases.

In June 2008, after detainees' legal representatives informed the Philadelphia Field Office director of concerns regarding transfers, the office developed a written protocol to guide transfer decisions. The protocol establishes that:

- Notices to Appear for aliens detained in the ICE Philadelphia Area of Responsibility and held in York, PA, will be served at the York EOIR court. ICE will not transfer these detainees prior to a judge's decision.
- Detainees from the ICE Philadelphia Area of Responsibility with final orders of removal will be held in York, PA, when the detainee has:

    1. Ties or family in the ICE Philadelphia Area of Responsibility. Detainees considered to have ties include those who are legal permanent residents or have local residences, employment, or relatives;
    2. An attorney of record with Form G-28 on file; or
    3. Pending hearings, or when detainees are eligible for bond and there is a high probability that EOIR will grant bond.

The Philadelphia Field Office director, a representative from the legal community, and EOIR personnel said this protocol has helped eliminate many of the problems regarding detainee transfers. ICE officers who process detainees at later stages in the transfer process said that, as a result of this protocol, required documentation is less frequently missing from Philadelphia Field Office A-files. This protocol could serve as a best practice for all ICE Field Offices to ensure a standard A-file review prior to detainee transfer.

Some immigration courts and Field Offices have developed localized methods of communication and coordination for custody hearings and detainee transfers. Under these arrangements, EOIR provides ICE staff with court docket calendars that list all custody hearings. When notified in advance, ICE can cancel transfers of detainees with a scheduled hearing. ICE also provides courts with lists of detainees scheduled for transfer. This helps avoid scheduling custody hearings for detainees who are in the process of transfer to another facility.

Recommendations

We recommend that the Assistant Secretary, ICE:

Recommendation 1: Establish a national standard for reviewing A-files prior to transferring a detainee.

Recommendation 2: Implement a policy requiring Field Offices to develop protocols with EOIR court administrators for exchanging custody hearing and detainee transfer schedules.

Management Comments and OIG Analysis

We obtained written comments on our draft report from the Director of the ICE Audit Liaison Office and made changes where appropriate. We have included a copy of the written comments in Appendix A.

ICE concurred with both of our recommendations. ICE intends to publish two advisories to all Field Office Directors: (1) to ensure the most current information pertaining to the detained alien is forwarded to the receiving law enforcement official in accordance with National Detention Standards; and (2) to reinforce the need to coordinate with EOIR court administrators. We consider both recommendations resolved and open.

The intent of recommendation 1 is to ensure that ICE conducts a consistent and thorough review of the most current information pertaining to the detainee prior to a transfer determination. Therefore, in its planned advisory, ICE should stress that the detention officer responsible for the transfer determination will require the detainee's most current information in order to make the decision to transfer the detainee.

ICE plans to publish an advisory from the DRO Director to Field Office Directors to satisfy the intent of recommendation 2. The advisory will reinforce the need for Field Office Directors to coordinate with EOIR court administrators. The advisory should stress the need for a regular exchange of timely and accurate information useful to both ICE and EOIR. We agree with ICE that information sharing with EOIR should take place after considering and the detainee's physical safety and any law enforcement-related security interests.

ICE should provide the OIG with the full text of the advisories once they are published.

Appendix A
Purpose, Scope, and Methodology

We reviewed U.S. Immigration and Customs Enforcement (ICE) Office of Detention and Removal policies and procedures related to transferring detainees in response to a request from representatives of nongovernmental legal organizations. These organizations reported that ICE does not adhere to its detention standards when transferring detainees. They contend that such transfers disrupt and delay removal proceedings, creating hardships for detainees.

Our objective was to determine whether immigration detention facilities properly justify detainee transfers according to ICE's *Detention Operations Manual.*

We performed fieldwork from October 2008 to February 2009. We visited ICE Office of Detention and Removal Field Offices in Washington, DC; Philadelphia, PA; Newark, NJ; New York, NY; and San Antonio, TX. We visited and observed operations at detention facilities in New York, NY; Elizabeth, NJ; York, PA; and Pearsall, TX. We visited administrative offices and observed immigration proceedings at Department of Justice Executive Office of Immigration Review (EOIR) immigration courts in New York, NY; Elizabeth, NJ; York, PA; and San Antonio, TX. During these visits, we interviewed and collected data from ICE Field Office directors, ICE detention and deportation officers and staff, EOIR immigration judges and court administrators, government lawyers, and immigration attorneys representing detainees.

We conducted our review under the authority of the *Inspector General Act of 1978,* as amended, and according to the *Quality Standards for Inspections* issued by the Council of Inspectors General on Integrity and Efficiency.

Appendix B
Management Comments to the Draft Letter Report

Office of the Assistant Secretary
U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

September 18, 2009

MEMORANDUM FOR: Carl Mann
Office of Inspector General

FROM: Robert F. De Antonio
Director
Audit Liaison Office

SUBJECT: ICE Response to Office of Inspector General Draft Report: "Immigration and Customs Enforcement Policies and Procedures to Detainee Transfers"

U.S. Immigration and Customs Enforcement (ICE) appreciates the opportunity to comment and respond to the two recommendations in the subject Office of Inspector General (OIG) draft report.

OIG Recommendation 1: "Establish a national standard for reviewing A-files prior to transferring a detainee."

ICE Response to Recommendation 1: ICE concurs with this recommendation. The Detainee Transfer ICE National Detention Standard (NDS) was created, in part, to establish a uniform method of reviewing A-files prior to detainee transfers.

The Detainee Transfer NDS, Section III – D, "Preparation and Transfer of Records," requires that alien files (A-files) be reviewed prior to a detainee's transfer to ensure the most-current information pertaining to the detained alien is forwarded to the receiving law enforcement official so as to preserve acceptable standards for custodial stewardship. The NDS is currently in effect in all Intergovernmental Service Agreement facilities.

Further, the ICE Performance-Based National Detention Standards (PBNDS), Part I – Emergency Plans, Section V, G. 2, which is currently in effect in all Service Processing Centers, provides for the same requirement.

Appendix B
Management Comments to the Draft Letter Report

To ensure compliance with these procedural requirements, The Director of the ICE Office of Detention and Removal Operations (DRO) will publish an advisory to all DRO Field Office Directors and subordinate supervisors to remind the field personnel of their obligation to meet these specific requirements, or alternatively, if they are unable to meet these requirements, to take corrective action as appropriate to address any instance of non-compliance with agency policies, procedures and standards, including those outlined within the ICE NDS and PBNDS.

Please consider this recommendation as resolved and open pending the publishing of the advisory. A copy of the advisory will be provided to OIG within 90 days of the publishing of the OIG's final report on this matter.

OIG Recommendation 2: "Implement a policy requiring Field Offices to develop protocols with EOIR court administrators for exchanging custody hearing and detainee transfer schedules."

ICE Response to Recommendation 2: ICE concurs with this recommendation. To address this issue, the DRO Director will publish an advisory to Field Office Directors that will reinforce the need to coordinate with EOIR court administrators. To this end, information sharing will continue to be permitted as necessary for this purpose, but at the discretion of the Field Office directors after considering the individual's physical safety and any law enforcement-related security interests.

Please consider this recommendation resolved and open pending the dissemination of the memorandum. A copy of the advisory will be provided to OIG within 90 days of the publishing of the OIG's final report on this matter.

Should you have any questions or concerns, please contact OIG Audit Portfolio Manager Margurite Barnes by telephone at (202) 732-4161 or by e-mail at Margurite.Barnes@dhs.gov.

Appendix C
Major Contributors to This Report

Bill McCarron, Chief Inspector
Jim O'Keefe, Senior Inspector
Preston Jacobs, Inspector
Jennifer Burba, Inspector

Appendix D
Report Distribution

Department of Homeland Security
Secretary
Deputy Secretary
Chief of Staff for Operations
Chief of Staff for Policy
Deputy Chiefs of Staff
General Counsel
Executive Secretary
Director, GAO/OIG Liaison Office
Under Secretary, Management
Assistant Secretary for Office of Policy
Assistant Secretary for Office of Public Affairs
Assistant Secretary for Office of Legislative Affairs
Chief Information Officer
Chief Information Security Officer
ICE Audit Liaison

Office of Management and Budget
Chief, Homeland Security Branch DHS OIG Budget Examiner

Congress
Congressional Oversight and Appropriations Committees, as appropriate

ADDITIONAL INFORMATION AND COPIES

To obtain additional copies of this report, please call the Office of Inspector General (OIG) at (202) 254-4100, fax your request to (202) 254-4305, or visit the OIG web site at www.dhs.gov/oig.

OIG HOTLINE

To report alleged fraud, waste, abuse or mismanagement, or any other kind of criminal or noncriminal misconduct relative to department programs or operations:

- Call our Hotline at 1-800-323-8603;
- Fax the complaint directly to us at (202) 254-4292;
- Email us at DHSOIGHOTLINE@dhs.gov; or
- Write to us at:
  DHS Office of Inspector General/MAIL STOP 2600,
  Attention: Office of Investigations - Hotline,
  245 Murray Drive, SW, Building 410,
  Washington, DC 20528.

The OIG seeks to protect the identity of each writer and caller.

EXHIBIT D

HUMAN RIGHTS WATCH

JUNE 14, 2011

A Costly Move

Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States

I. Summary

JUNE 14, 2011

US: Bounced Around the Country

Detained Immigrants Moved Repeatedly, Impeding Hearings, New 1998-2010 Data Reveal

> The transfers are devastating, absolutely devastating. [Detainees] are loaded onto a plane in the middle of the night. They have no idea where they are, no idea what [US] state they are in.
>
> —Rebecca Schreve, immigration attorney, El Paso, Texas, January 29, 2009

Every year, US Immigration and Customs Enforcement (ICE) detains hundreds of thousands of immigrants, including legal permanent residents, refugees, and undocumented persons, while their asylum or deportation cases move through the immigration courts. Detainees can be held for anywhere from a few weeks to a few years while their cases proceed. With close to 400,000 immigrants in detention each year, space in detention centers, especially

near cities where immigrants live, has not kept pace. In addition, ICE has built a detention system, relying on subcontracts with state jails and prisons, which cannot operate without shuffling detainees among hundreds of facilities located throughout the United States.

As a result, most detainees will be loaded at some point during their detention onto a government-contracted car, bus, or airplane and transferred from one detention center to another: 52 percent of detainees experienced at least one such transfer in 2009. And numbers are growing: between 2004 and 2009, the number of transfers tripled. In total, some 2 million detainee transfers occurred between 1998 and 2010.

This report updates Human Rights Watch's 2009 report, *Locked Up Far Away*, with recent data analysis that tracks the beginning and ending points of each immigrant's detention odyssey from 1998-2010. It shows that over 46 percent of transferred detainees were moved at least two times, with 3,400 people transferred 10 times or more. One egregious case involved a detainee who was transferred 66 times. On average, each transferred detainee traveled 370 miles, and one frequent transfer route (between Pennsylvania and Texas) covered 1,642 miles. Such long-distance and repetitive transfers have dire consequences for immigrants' rights to fair immigration proceedings. They can render attorney-client relationships unworkable, separate immigrants from the evidence they need to present in court, and make family visits so costly that they rarely—if ever—occur.

Few Americans or their elected representatives grasp the full scope of immigration detention in the US. Even fewer are aware of the chaos that ensues when immigrant detainees are moved around, sometimes repeatedly, between distant detention centers at great cost to themselves, their families, and US taxpayers.

Human Rights Watch estimates that the transportation costs alone for the 2 million transfers that occurred in the 12 years covered by this report amounted to US$366 million. However, transferred detainees spend on average more than three times longer in detention than immigrants who are not transferred, suggesting that the most significant financial costs may come from court delays and unnecessarily long periods of detention.

Detainee transfers, a seemingly mundane aspect of the widespread detention of immigrants in the US, happen so regularly and across such large distances they raise serious human rights concerns that intensify as transfers become more common and happen repeatedly to the same person. Indeed, several important rights are being lost in the shuffle, including:

- **The right to access an attorney at no cost to the government**: Under US and international human rights law, detained immigrants have the right to have an attorney of their choice represent them in deportation hearings, at no cost to the US government. Immigrants have a much better chance of finding a low-cost attorney when they stay close to their communities of origin. Once transferred, many volunteer or pro bono attorneys must withdraw from a case because representation across such large distances becomes impossible. In addition, many detainees cannot find an attorney prior to transfer. Their chances of securing representation are often worse in their new locations: the largest numbers of interstate transfers go to Louisiana, Mississippi, and Texas, states that collectively have the worst ratio of transferred immigrant detainees to immigration attorneys in the country (510 to 1).

- **Curtailing the ability of detainees to defend their rights**: Under US and international human rights law, detained immigrants have the right to present evidence in their defense. But when they are transferred,

immigrants are often so far away from their evidence and witnesses that their ability to defend themselves in deportation proceedings is severely curtailed. One transfer is enough to wreak havoc on a detainee's ability to defend his rights in court.

- **Undermining the fairness with which detainees are treated:** Fairness is at stake when detainees are transferred from one jurisdiction with laws that are more protective of their rights, to another where the laws are more hostile. The Federal Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) has jurisdiction over the largest number of detainees (about 175,000) transferred between states. These transfers are of particular concern because that court is widely known for decisions that are hostile to non-citizens.

- **Impeding detainees' ability to challenge detention:** International human rights and US law require that persons deprived of their liberty should be able to challenge the lawfulness of their detentions. Transfers often occur before a detainee has had a bond hearing, where a court determines whether detention is necessary in a particular case. One of the primary methods by which a detainee can show he should be released from detention is presenting evidence of family relationships and community ties that will not make him a risk of flight from court. But after transfer detainees are often so far away from such witnesses that they cannot convince the court of their intentions to cooperate with immigration authorities and appear for their hearings. Transferred detainees spend on average three times longer in detention than those who are never transferred, and they are less likely to prevail in their bond hearings.

ICE's current internal policy on transfers, called the Performance Based National Detention Standards (PBNDS), states that "the determining factor in deciding whether or not to transfer a detainee is whether the transfer is required for [ICE's] operational needs."[1]According to ICE, any limits on its power to transfer detainees would curtail its ability to make the best and most cost-effective use of the detention beds it can access nationwide.

Even so, starting in October 2009, ICE has announced several reforms intended to alleviate some causes and manifestations of immigrant detainee transfers, including moving towards a more "civil" detention system that decreases reliance on subcontracting with state jails and prisons, locating facilities in regions where they are needed, and reducing transfers.[2]

In a time of fiscal challenges, the efficiency concerns expressed by ICE are important but should not come at the expense of basic human rights. This is especially true for detainees with attorneys to consult, defenses to mount in their deportation or asylum hearings, and witnesses and evidence to present at trial. Some detainees may not have such issues at stake. But for those who do, the US government and its immigration enforcement agency must act with restraint.

Moreover, with the exception of ICE's plans to expand bed space in a criminal jail and residential facility in New Jersey, such reforms have yet to be implemented. Nor have they curbed the rising tide of detainee transfers. Even the New Jersey plans rely heavily on an existing state criminal jail and criminal residential facilities, which has long been associated with increased transfers: as the state's need to house criminal inmates ebbs and flows, immigrant detainees are shuffled around accordingly. In fact, data in this report show that most (57 percent) detainee transfers occur to and from such subcontracted state jails and prisons. Such jails and prisons are not under the direct management of ICE, which means that the agency has less control over the conditions in which immigrants are held, and less ability to resist when a state jail warden asks that detainees be transferred out.[3]

Despite its stated intention to alter its reliance upon detainee transfers, ICE has also so far rejected recommendations to place regulatory or legislative constraints on its transfer power.

Some transfers are inevitable: any governmental authority that holds people in custody, particularly one responsible for detaining hundreds of thousands of people in hundreds of institutions, will sometimes need to transport detainees between facilities. For example, inmate transfers are relatively common, even required, in state and federal prisons to minimize overcrowding, respond to medical needs, or properly house inmates according to their security classifications.

However, transfers in state and federal prisons are much better regulated and rights-protective than transfers in the civil immigration detention system, where there are few, if any, checks on the decisions of officials to move detainees. The different ways in which the US criminal justice and immigration systems treat transfers is doubly troubling because immigration detainees, unlike prisoners, are technically not being punished.

In addition, while any plan to reduce transfers will undoubtedly require better allocation of detention space near the locations where immigrants are apprehended, there are also good reasons to use alternatives to detention and avoid curtailing liberty whenever possible. Reducing detainee transfers is not justification for increasing overall numbers of detainees.

As an agency charged with enforcing the laws of the United States, ICE should not operate a system of detention that is completely dependent upon widespread, multiple, and long-distance transfers: in other words, it should not rely on a system of detention that violates detainees' rights. If ICE worked to emulate the best practices on inmate transfers set by state and federal prison systems, it would reduce the chaos and limit harmful rights abuses.

Transfers do not need to stop entirely in order for ICE to uphold US and human rights law: they merely need to be curtailed through the establishment of enforceable guidelines, regulations, and reasonable legislative restraints imposed by the US Congress. In a time of budget constraints, if state and local prisons can handle inmate transfers without putting basic rights to fair treatment at risk, the federal government ought to be able to do the same.

Related Content

JUNE 14, 2011 | News Release

US: Bounced Around the Country

JUNE 8, 2011 | Interactive

A Costly Move - Dashboard

II. Recommendations

To the United States Congress

- Place reasonable checks on the transfer authority of Immigration and Customs Enforcement (ICE) by amending the Immigration and Nationality Act to require that the Notice to Appear be filed with the immigration court nearest to the location where the non-citizen is arrested and within 48 hours of his or her arrest, or within 72 hours in exceptional or emergency cases.

To the Assistant Secretary for Immigration and Customs Enforcement (ICE)

- Promulgate regulations requiring ICE detention officers and trial attorneys to file the Notice to Appear with the immigration court nearest to the location where the non-citizen is arrested and within 48 hours of his or her arrest, or within 72 hours in exceptional or emergency cases.

- Promulgate regulations prohibiting transfer until after detainees have a bond hearing.

- Reduce transfers of immigration detainees by:
    - Building new detention facilities or contracting for new detention bed space in locations close to places with large immigrant populations, where most immigration arrests occur.

    - Ensuring that new detention facilities are under ICE's full operational control so that the agency is not obliged to transfer detainees from sub-contracted local prisons or jails whenever the facility so requests.

    - Requiring use of alternatives to detention such as monitoring of released detainees when and where possible.

- Address deprivation of access to counsel that is caused by transfers by:
    - Building new detention facilities or contracting for new immigration detention bed space in locations where there is a significant immigration bar or legal services community.

    - Revising the 2008 Performance Based National Detention Standards (PBNDS) to require ICE/Detention and Removal Operations (ICE/DRO) to refrain from transferring detainees who are represented by local counsel, unless ICE/DRO determines that: (1) the transfer is necessary to provide adequate medical or mental health care to the detainee; (2) the detainee specifically requests such a transfer; (3) the transfer is necessary to protect the safety and security of the detainee, detention personnel, or other detainees located in the pre-transfer facility; or (4) the transfer is necessary to comply with a change of venue ordered by the Executive Office for Immigration Review.

    - Amending the "Detainee Transfer Checklist" appended to the PBNDS to include a list of criteria that ICE/DRO must consider in determining whether a detainee has a pre-existing relationship with local counsel, and requiring that ICE/DRO record one or more of the four reasons enumerated above for transfer of a detainee with retained counsel and communicate the reason(s) to that counsel.

    - Reinstating the prior transfer standard that required notification to counsel "once the detainee is en route to the new detention location," and require that all such notifications are completed within 24 hours of the time the detainee is placed in transit.

    - Collaborating with the Executive Office for Immigration Review to pilot new projects providing low-cost, pro bono, and/or government-appointed legal services to immigrants held in remote detention facilities.

- Remedy interference with detainees' bond hearings caused by transfers by:
    - Amending the Detainee Transfer Checklist appended to the PBNDS to include a list of criteria that ICE/DRO must consider in order to determine whether a detainee has received a bond hearing, or has been found ineligible for such a hearing by an immigration judge, or has consented to transfer without such a hearing.

- Pursuing placement of the detainee in alternative to detention programs prior to transfer.

- Reduce interference with detainees' capacity to defend against deportation caused by transfers by:
  - Revising the PBNDS to require ICE/DRO to refrain from transferring detainees who have family members, community ties, or other key witnesses present in the local area, unless ICE/DRO determines that: (1) the transfer is necessary to provide medical or mental health care to the detainee; (2) the detainee specifically requests such a transfer; (3) the transfer is necessary to protect the safety and security of the detainee, detention personnel, or other detainees located in the pre-transfer facility; or (4) the transfer is necessary to comply with a change of venue ordered by the Executive Office for Immigration Review.

  - Amending the Detainee Transfer Checklist appended to the PBNDS to include designation of one or more of the four reasons enumerated above for transferring detainees away from family members, community ties, or other key witnesses present in the local area.

- Ensure that transfer of detainees does not interfere with the ability of counsel and family members to communicate with detainees by:
  - Revising the PBNDS to provide that if a detainee who has been transferred is unable to make a telephone call at his or her own expense within 12 hours of arrival at a new location, the detainee is permitted to make a domestic telephone call at the federal government's expense.

- Improve agency accountability and management practices, as well as accurate accounting of operational costs involved in transfers by:
  - Requiring detention operations personnel to promptly enter the date of transfer, originating facility, receiving facility, reasons for transfer, and counsel notification into the Deportable Alien Control System, or any successor system used by ICE to track the location of detainees.

  - Including costs associated with inter-facility transfers of detainees as a category distinct from transfers made to complete removals from the US in the agency's annual financial reporting.

To the Assistant Secretary for ICE, and the Director of the Office of Refugee Resettlement (ORR)

- Address interference with counsel and other detrimental legal outcomes caused by the transfers of unaccompanied minors by:
  - Providing age-appropriate Office of Refugee Resettlement (ORR) facilities for all unaccompanied minors near their counsel or in locations where there is access to counsel, and, in the case of unaccompanied minors who have resided in the US for longer than one year, near their former place of residence in the US.

To the Executive Office for Immigration Review

- Issue guidance for immigration judges requiring them to allow appearances by detainees' counsel via video or telephone whenever a detainee has been transferred away from local counsel, family members, community ties,

or other key witnesses.

- Issue guidance for immigration judges that prioritizes in-person testimony, but when such testimony is not possible, requires judges to allow video or telephonic appearances by detainees themselves, family members, and other key witnesses. Any decision to disallow these types of appearances should be noted on the record along with the reason for the decision.

- Issue guidance requiring immigration judges who are considering change of venue motions to weigh whether a requested change of venue would result in a change in law that is unfavorable to the detainee.

- Maintain statistics on the total number of motions to change venue filed by the government versus those filed by non-citizens, and the number granted in each category.

- Issue guidance for immigration judges that strongly discourages them from changing venue away from a location where the detainee has counsel, family members, community ties, or other key witnesses, unless the detainee so requests or consents, or unless other justifications exist for such a motion apart from ICE agency convenience. Such guidance should also encourage changes of venue to locations where the detainee has counsel, family members, community ties, or other key witnesses.

III. Background

ICE Internal Policy on Transfers

As an agency responsible for the custody and care of hundreds of thousands of people, it is clear that ICE will sometimes need to transfer immigrant detainees. The question is whether all or most of the 2.04 million transfers that have occurred over the past 12 years were truly necessary, especially in light of how transfers interfere with

immigrants' rights to access counsel and to fair immigration procedures.

While ICE has repeatedly indicated willingness to reduce its reliance on transfers, it has not made any official policy changes to translate those intentions into reality—other than a plan to increase immigration bed space at criminal facilities in Essex, New Jersey.[4]And the agency has remained staunchly opposed to placing regulatory or legislative checks on its transfer power, which would be enforceable through the courts.[5]

In August 2009 ICE announced a range of policy reforms intended to shift away from the punitive model for immigration detention towards a more "civil" system. The agency indicated its intention to:

> ...move away from our present decentralized, jail-oriented approach to a system wholly designed for and based on ICE's civil detention authorities. The system will no longer rely primarily on excess capacity in penal institutions. In the next three to five years, ICE will design facilities located and operated for immigration detention purposes.[6]

A report issued in October 2009 amplified the rationales for ICE detention reform. In that report, Special Advisor to ICE Dora Schriro recommended that "[d]etainees who are represented by counsel should not be transferred outside the area unless there are exigent health or safety reasons, and when this occurs, the attorney should be notified promptly."[7]

While many organizations concerned about immigration detention welcomed such recommendations, ICE made no internal policy reforms in line with these statements that would stem the tide of detainee transfers.

In December 2009 Human Rights Watch published *Locked Up Far Away*, which documented 1.6 million transfer movements of immigrant detainees. We intensified advocacy efforts with ICE, asking it to impose some reasonable limits on the transfers of immigrant detainees by changing the agency's internal policies on transfers. While enforceable regulatory or legislative checks on the use of transfers would be the most protective solutions to this problem, ICE has refused to promulgate enforceable regulations on detention conditions and operations.[8]Congress has not acted either. We therefore pressed ICE to make internal policy reforms to its PBNDS.

On February 22, 2010, three months after publication of *Locked Up Far Away*, ICE wrote to Human Rights Watch announcing the agency's intention to "minimize the number of detainee transfers to the greatest extent possible."[9] The agency made similar announcements in various meetings with advocates around the country, suggesting that it would reduce its reliance on transfers. Subsequently, in July 2010, ICE implemented an important reform for transferred detainees: it established an online detainee locator system.[10]This reform was recommended in our previous report and had been a chief goal of immigrants' rights advocates around the country for years. Before, attorneys and family members would spend stressful hours and days searching for clients and loved ones after a transfer. This online system now allows detainees to be located relatively quickly, and is an important rights-protective achievement for ICE. However, while detainees can now be located more readily, we remain concerned that the agency has still not made any formal internal policy changes aimed at reducing detainee transfers, other than repeatedly announcing its intention to do so.

Therefore, with the assistance of the Transactional Records Access Clearinghouse at Syracuse University (TRAC), we filed a follow-up request for data about detainee transfers under the Freedom of Information Act (FOIA) in February 2010. We specifically requested data that would allow us to determine the starting and ending location for each transferred detainee. In November 2010 we received data from ICE in response to our request.

As we commenced analyzing data, we continued to press ICE to change its policies on detainee transfers. In November 2010 we wrote to ICE and to the labor union representing government workers in detention centers, after ICE alleged that contract bargaining issues with the union were delaying improvements to ICE's detainee transfer policies.[11]

Subsequently, in February 2011, we wrote to Secretary of Homeland Security Janet Napolitano to ask for an improved policy on transfers. While ICE continues to signal that improvements to its internal transfer policies are forthcoming, almost two years after the initial promise of reform, no significant policy changes have been made.

The Impact of Transfers on Detainees' Rights

The current US approach to immigration detainee transfers interferes with several important detainee rights. To understand the conditions immigration detainees face, it is instructive to compare their situation to that of federal and state prisoners.

In the US criminal justice system, pretrial detainees enjoy the right, protected by the Sixth Amendment to the US Constitution, to face trial in the jurisdiction in which their crimes allegedly occurred.[12]Immigrant detainees enjoy no comparable right to face deportation proceedings in the jurisdiction in which they are alleged to have violated immigration law, and are routinely transferred far away from key witnesses and evidence in their trials. In all but rare cases, a transfer of a criminal inmate occurs once an individual has been convicted and sentenced and is no longer in need of direct access to his attorney during his initial criminal trial. Immigrant detainees can be, and often are, transferred away from their attorneys at any point in their immigration proceedings.

Immigrant detainees, unlike criminal defendants, have no right to a court-appointed attorney. In 2010, 57 percent of non-citizens appeared in immigration court without counsel.[13]In some urban areas, immigrants can benefit from an active cadre of attorneys willing to represent them at low or no cost, in other words on a pro bonobasis. While it is beyond this report's scope to draw a direct causal relationship between transfers of detainees and their inability to secure counsel to represent them in immigration court, it is clear that detainees are often transferred hundreds or thousands of miles from families and home communities before they have been able to secure legal representation.

Almost invariably, there are fewer prospects for finding an attorney in the remote locations to which they are transferred. Our data analysis shows that detainees are transferred, on average, 369 miles, with one frequent transfer pattern crossing 1,642 miles. Detainees transferred long distances must therefore often go through the entire complex process of defending their rights in immigration court without legal counsel.[14] One detainee told Human Rights Watch:

> In New York when I was detained, I was about to get an attorney through one of the churches, but that went away once they sent me here to New Mexico.... All my evidence and stuff that I

> need is right there in New York. I've been trying to get all my case information from New York ... writing to ICE to get my records. But they won't give me my records; they haven't given me nothing. I'm just representing myself with no evidence to present.[15]

A detainee who was transferred 1,400 miles away to a detention facility in Texas after a few weeks in a detention center in southern California said the difference for him was "like the difference between heaven and earth." He said: "At least in California I had a better chance. I could hire a[n] attorney to represent me. Now, here, I have no chance other than what the grace of God gives me."[16]

For the relatively fortunate detainees who can afford attorneys or secure pro bono attorneys, transfers severely disrupt the attorney-client relationship because attorneys are rarely, if ever, informed of their clients' transfers. Attorneys with decades of experience told us that they had not once received prior notice from ICE of an impending transfer. ICE often relies on detainees themselves to notify attorneys, but the transfers arise suddenly and detainees are routinely prevented from or are otherwise unable to make the necessary call. As a result, attorneys have to search the online detainee locator for their clients' new locations. Once a transferred client is found, the challenges inherent in conducting legal representation across thousands of miles can completely sever the attorney-client relationship. This is especially true when the same person is transferred repeatedly. Data analyzed in this report show that 46 percent of detainees experience two or more transfers. As one attorney said:

> I have never represented someone who has not been in more than three detention facilities. Could be El Paso, Texas, a facility in Arizona, or they send people to Hawaii.... I have been practicing immigration law for more than a decade. Never once have I been notified of [my client's] transfer. Never.[17]

Even when an attorney is willing to attempt long distance representation, the issue is entirely subject to the discretion of immigration judges, whose varying rules about phone or video appearances can make it impossible for attorneys to represent their clients. In other cases, detainees must struggle to pay for their attorneys to fly to their new locations for court dates, or search, usually in vain, for local counsel to represent them. Transfers create such significant obstacles to existing attorney-client relationships that ICE's special advisor, Dora Schriro, recommended in her October 2009 report that detainees who have retained counsel should not be transferred unless there are exigent health or safety reasons.[18]

Although most detained non-citizens have the right to a timely "bond hearing"—a hearing examining the lawfulness of detention (a right protected under US and human rights law)—our research shows that ICE's policy of transferring detainees without taking into account their scheduled bond hearings interferes with those hearings.[19]In addition, transferred detainees are often unable to produce the kinds of witnesses (such as family members or employers) that are necessary to obtain bond, which means that they usually remain in detention. In fact, data contained in this report show that transferred immigrants spend on average three times as long in detention as their counterparts who are never transferred.

Once they are transferred, most non-citizens must proceed with their deportation cases in the new, post-transfer location. Some may ask the court to change venue back to the pre-transfer location, where evidence, witnesses, and their attorneys are more accessible. Unfortunately, it is very difficult for a non-citizen detainee to win a change of venue motion.

Transfers can also have a devastating impact on detainees' ability to defend against deportation, despite their right to present a defense.[20] The long-distance and multiple transfers documented in this report often make it impossible for non-citizens to produce evidence or witnesses relevant to their defense. A legal permanent resident from the Dominican Republic who had been living in Philadelphia but was transferred to Texas said:

> I had to call to try to get the police records myself. It took a lot of time. The judge got mad that I kept asking for more time. But eventually they arrived. I tried to put on the case myself. I lost. [21]

In addition, the transfer of detainees often literally changes the law applied to them. This is because, prior to transfers, ICE often does not serve detained immigrants with charging documents (known as an NTAs, or Notices to Appear), thus establishing the law and court to hear their case. While NTAs are generally supposed to be filed within 48 hours, in practice there is no legally enforceable deadline, illustrated by the "many detainees identified by NGOs and attorneys who are sitting in detention for days, weeks, and sometimes months at a time without having received an NTA."[22]

Thus, immigrants taken into custody in one place, for example, Pennsylvania, may spend days or weeks there before being transferred to, for example, Texas: if ICE waits until after transfer to file the NTA, not just the detainee, but the entire matter—including the law applied to the detainee's case—is transferred to Texas. This can have a devastating impact on a detainee's ability to defend against deportation because the act of sending a detainee from one jurisdiction to another can determine whether the law applied to her case will recognize her status as a refugee or permit her to ask an immigration judge to allow her to remain in the United States.[23]As the data analysis in this report shows, most interstate transfers end up in states within the jurisdiction of the Fifth Circuit Court of Appeals, which is known for its decisions hostile to the claims of immigrants.

Transfer can pose unique problems for detainees who are children, without a parent or custodian to offer them guidance and protection.[24]ICE is required to send these unaccompanied minors as soon as possible to a specialist facility run by the Office of Refugee Resettlement (ORR) that is the least restrictive, smallest, and most child-friendly facility available. Placing children in these facilities is a laudable goal, and one that protects many of their rights as children. Unfortunately, there are very few ORR facilities in the US. Therefore, children are often transferred even further than their adult counterparts, away from attorneys willing to represent them and from communities that might offer them support. The delays and interference with counsel caused by these long-distance transfers of children can cause them to lose out on important immigration benefits available to them only as long as they are minors, such as qualifying for Special Immigrant Juvenile Status, which would allow them to remain legally in the United States.

Finally, the long-distance transfer of immigrants to remote locations takes an emotional toll on detainees and their loved ones.[25] Physical separation from family when immigrants are detained in remote locations, impossible for relatives to reach, creates severe emotional and psychological suffering. A sister of a transferred detainee told Human

> Ever since they sent him there [to New Mexico], it's been a nightmare. My mother has blood pressure problems.... [His wife] has been terrified. She cries every night. And his baby asks for him, asks for "Papa." He kisses his photo. He starts crying as soon as he hears his father's voice on the phone even though he is only one.... Last week [my brother] called to say he can't do it anymore. He's going to sign the paper agreeing to his deportation. [26]

Given the serious implications for the fair treatment of detainees created by transfers, it is disturbing that the practice of transfers of immigrant detainees, including multiple and long-distance transports, continues unabated. Our analysis of data on the scope and frequency of detainee transfers follows.

IV. Data on Detainee Transfers

Number, Gender, and Nationality of Transferred Detainees

The data represent all 2,271,911 non-citizens held in ICE detention between October 1, 1998 and April 30, 2010. These non-citizens account for 2,869,323 episodes of detention, as some individuals were detained by ICE multiple times. The data show that 1,159,568, or 40 percent of all detainees, experienced at least one transfer during their detention (they are referred to here as "transferred detainees"). Over 46 percent of transferred detainees (505,787 detainees) were transferred two or more times. We found that 16.7 percent of transferred detainees experienced three or more transfers, with over 3,400 detainees experiencing 10 or more transfers. One detainee was transferred between facilities 66 times.

Most (1,045,620) transferred detainees were male, 113,814 were female, and 134 were listed as unknown gender. Most transferred detainees were from Mexico (511,945), Honduras (133,062), and Guatemala (131,691). Shockingly, 38 were from the United States (2 females, 36 males). Why so many of those transferred were listed as being United States nationals is beyond the scope of our analysis. However, we note that previous analysis performed by Human Rights Watch on ICE datasets has revealed serious problems with ICE data management.[27]Moreover, our recent research into the experiences of detainees with mental disabilities revealed several troubling cases of US citizens who were kept in immigration detention for years, and experienced multiple transfers during their time in detention, despite the fact that their US citizenship should have negated any ICE involvement.[28]

Transfers over Time

As shown in Figure 1, below, transfers have increased steadily over time. Cumulatively, between the beginning of fiscal year 1999 and April 2010, 41 percent of all detention episodes included at least one transfer between facilities. In fiscal year 1999, 23 percent of detention episodes included one or more transfers between facilities, but in fiscal year 2009, 52 percent of detention episodes included one or more transfers. Figure 2 illustrates the percentage of detention episodes experiencing transfer between 1998 and 2010. Table 1 shows the total number of transfer movements for each year between 1998 and 2010.

Figure 1

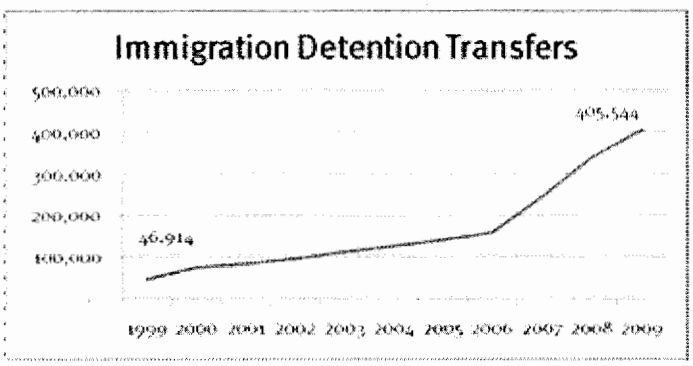


Figure 2

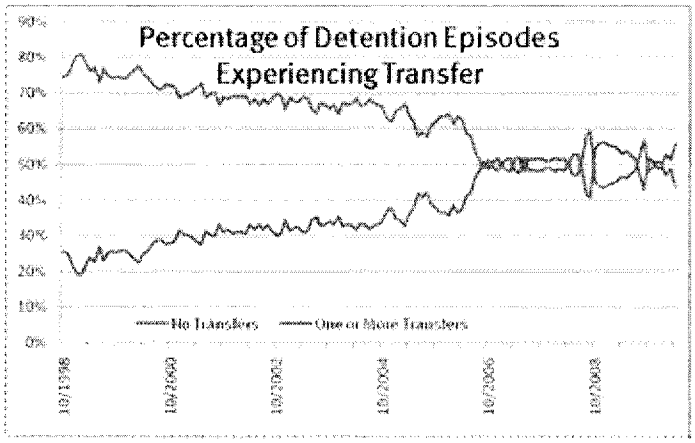


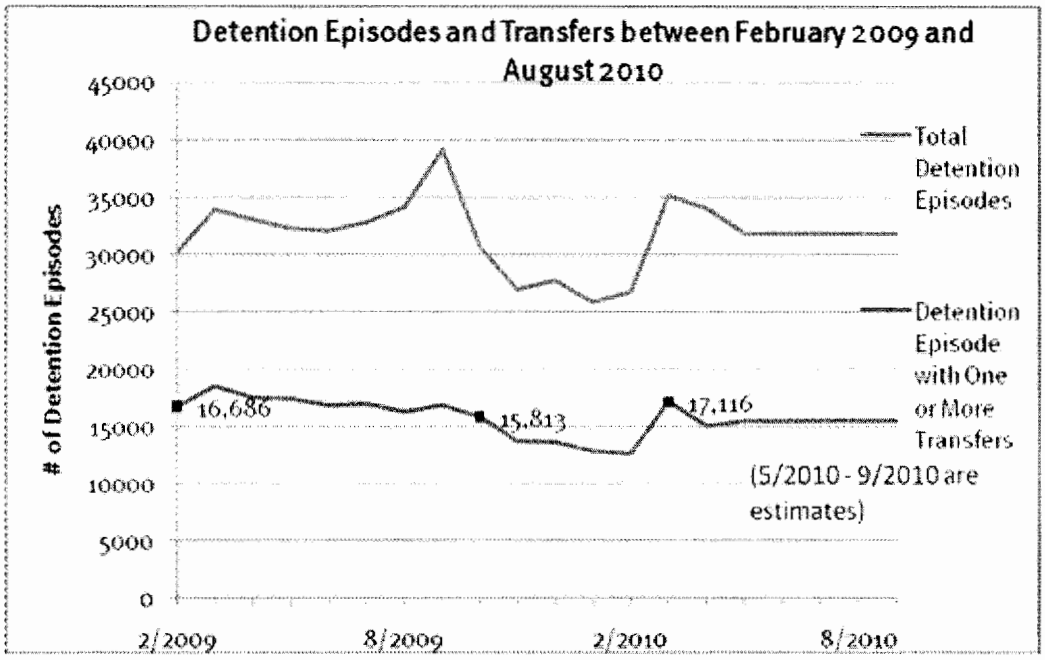
Table 1 – Total Transfer Movements by Fiscal Year

Total Transfer Movements by Fiscal Year	
1999	46,914
2000	74,077
2001	83,361
2002	94,243
2003	112,098
2004	124,899
2005	141,321
2006	157,560
2007	244,901
2008	340,385
2009	405,544
2010 (10/2009-04/2010)	214,800
FY 2010 **Estimate**	380,196
Total	2,040,103

* These are only transfers between facilities. Additionally, there were 99,607 movements identified in the dataset as transfers, but which were actually intra-facility movements in which the detainee never left a particular detention facility.

In February 2009 ICE wrote to Human Rights Watch to state its intention to minimize detainee transfers. As shown in Figure 3, below, other than a peak in March 2010, which also saw an overall increase in detention episodes, the number and rate of detention episodes utilizing transfers has decreased slightly since ICE stated its intention to reduce transfers in February 2009. While this may show an informal commitment to reducing the practice, there have been no official policy reforms aimed at reducing transfers. This very slight decrease is therefore unlikely to indicate a continuing trend.

Figure 3



Geographical Distances Covered

The dataset contained a total of 2,040,103 movements of detainees between detention facilities (referred to here as "transfer movements"), corresponding to 1.07 million individual transferred detainees.[29] Of these transfer movements, 564,209 (27 percent) were interstate.

Perhaps the most important finding of our data analysis is the ongoing use of long-distance transfers for detainees. As Table 2 below shows, transfers between Pennsylvania and Texas were thethird most frequent type of transfer used, requiring detainees to travel 1,642 miles. In addition, large numbers of detainees were moved between North Carolina and Georgia, between Pennsylvania and Louisiana, and between southern California and Arizona. Such long-distance transfers cannot realistically be accomplished without use of an airplane. The 99 longest transfer segments originated or ended in Guam, Hawaii, Alaska, or Puerto Rico. The longest continental US transfers occurred between Florida and Washington.

Table 2 — Ten Most Frequent Interstate Transfer Movements[30]

	Originating			Receiving			Distance
# of Transfers	Facility	State	Circuit	Facility	State	Circuit	Miles
15,959	MECKLENBURG CO JAIL	NC	4th Cir.	STEWART DETENTION CENTER	GA	11th Cir.	315.44
11,581	LOS CUSTODY CASE HOLDING FAC., SAN PEDRO	CA	9th Cir.	ELOY FEDERAL CONTRACT FAC.	AZ	9th Cir.	394.82
11,363	YORK COUNTY JAIL	PA	3rd Cir.	HARLINGEN STAGING FACILITY	TX	5th Cir.	1642.28
8,806	VARICK STREET SPC	NY	2nd Cir.	YORK COUNTY JAIL	PA	3rd Cir.	124.13
7,320	ALAMANCE CO. DET. FACILITY	NC	4th Cir.	STEWART DETENTION CENTER	GA	11th Cir.	414.51
7,060	LOS CUSTODY CASE HOLDING FAC., SAN PEDRO	CA	9th Cir.	FLORENCE STAGING FACILITY	AZ	9th Cir.	400.98
6,529	PORTLAND DISTRICT OFFICE	OR	9th Cir.	NORTHWEST DET. CENTER	WA	9th Cir.	115.73
5,553	OTERO COUNTY PRISON FACILITY	NM	10th Cir.	EL PASO SPC	TX	5th Cir.	19.65
5,350	EL PASO SPC	TX	5th Cir.	OTERO COUNTY PRISON FACILITY	NM	10th Cir.	19.65
5,074	COLUMBIA COUNTY JAIL	OR	9th Cir.	NORTHWEST DET. CENTER	WA	9th Cir.	98.56

Since many detainees were transferred multiple times during each period spent in detention, transfers are best counted and measured per detention episode. For all transferred detainees, the average distance transferred per detention episode was 369.81 miles. As shown in Figure 4, there is what approximates a bell curve when examining distance as related to the number of transfers, where distance traveled seems to peak around 10 transfers. It is unknown why average distance moved decreases when detainees experience more than 10 transfers. It is possible that when detainees experience this number of transfers, they are being frequently transferred over short distances.

Figure 4

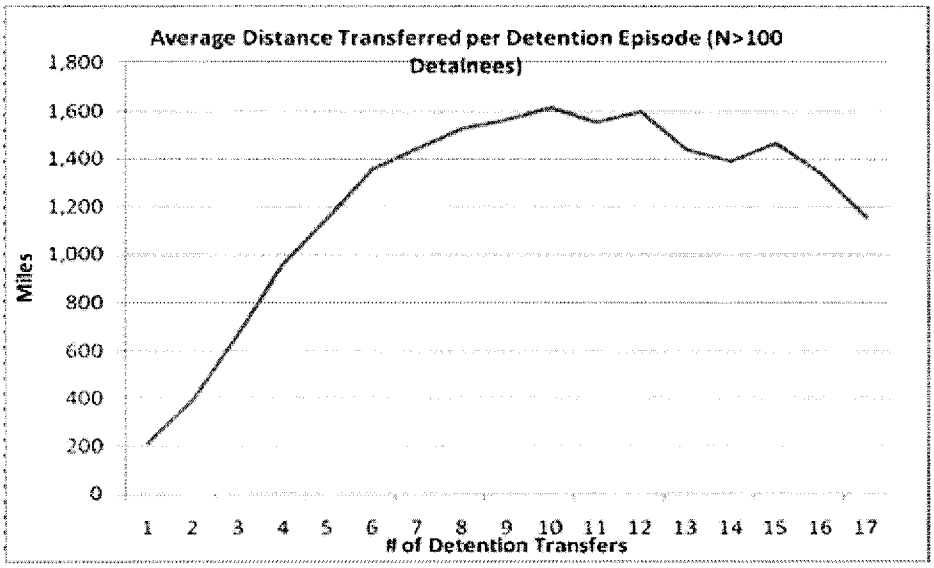


Table 3 – Top 10 Facilities Utilizing Transfers

Originating Facility	State	Circuit	Total Transfer Actions	# of Facilities Transferring To	Total Outbound Transfers	# of Facilities Receiving From	Total Inbound Transfers
Los Custody Case Holding Facility, SAN PEDRO	CA	9th Cir.	283,218	301	150,200	251	133,018
FLORENCE STAGING FACILITY	AZ	9th Cir.	205,673	212	120,744	271	84,929
HARLINGEN STAGING FACILITY	TX	9th Cir.	179,190	181	112,890	197	66,300
MIRA LOMA DET. CENTER	CA	9th Cir.	119,118	97	56,433	94	62,685
FLORENCE SPC	AZ	9th Cir.	111,553	141	28,508	150	83,045
YORK COUNTY JAIL	PA	3rd Cir.	100,776	184	42,869	225	57,907
WILLACY COUNTY DETENTION CENTER	TX	5th Cir.	97,040	66	29,585	102	67,455
LAREDO CONTRACT DET. FACILITY	TX	5th Cir.	76,069	126	59,627	165	16,442
SOUTH TEXAS DETENTION COMPLEX	TX	5th Cir.	74,023	92	17,780	194	56,243
HOUSTON CONTRACT DET. FACILITY	TX	5th Cir.	71,456	141	25,507	314	45,949

Table 4 shows the variation between the states that received transfers and those from which transfers originated. Only Pennsylvania, Texas, New York, and Alabama were in the top ten states for both receiving and sending transfers. Louisiana received 19 percent while California sent 12 percent of interstate transfers.

Table 4 – Top Ten Originating/Receiving States for Detainee Transfers

Originating State	# of Tranfers	% of Originating Transfers	Receiving State	# of Transfers	% of Receiving Transfers
CALIFORNIA	70,002	12%	LOUISIANA	104,703	19%
PENNSYLVANIA	42,166	7%	ARIZONA	79,030	14%
NEW YORK	37,978	7%	TEXAS	77,784	14%
NORTH CAROLINA	35,299	6%	GEORGIA	48,383	9%
TEXAS	28,452	5%	PENNSYLVANIA	35,827	6%
ALABAMA	26,689	5%	WASHINGTON	27,172	5%
OREGON	23,751	4%	ALABAMA	26,765	5%
NEW JERSEY	22,923	4%	NEW MEXICO	23,158	4%
FLORIDA	22,043	4%	NEW YORK	15,646	3%
LOUISIANA	19,146	3%	ILLINOIS	15,160	3%

Intra- and Inter-Federal Circuit Court Transfers

Most transfers (84.8 percent) were between facilities within the jurisdiction of the same Federal Circuit Court of Appeals (which defines the applicable law for each detainee's case). For example, of the 483,425 transfers originating in the Fifth Circuit, 93 percent were to other Fifth Circuit facilities. As shown in Table 5, most circuits originate and receive about the same percentage of transfers.

However, when examining only interstate transfers, shown in Figure 5 below, we find the Fifth Circuit receives, by a large margin, the most interstate transfers. Originating circuits are color-coded.

Table 5 – Transfers Originating in, and Received by, Each Circuit Court

	Originating		Received	
Court Circuit	**Number**	**Percent**	**Number**	**Percent**
D.C. Circuit	189	0%	89	0%
First Circuit	31,378	2%	40,143	2%
Second Circuit	41,541	2%	66,287	3%
Third Circuit	108,344	5%	126,855	6%
Fourth Circuit	47,509	2%	104,738	5%
Fifth Circuit	617,586	30%	483,457	24%
Sixth Circuit	45,035	2%	73,624	4%
Seventh Circuit	51,993	3%	47,177	2%
Eighth Circuit	43,422	2%	58,927	3%
Ninth Circuit	756,531	37%	760,606	37%
Tenth Circuit	90,677	4%	90,898	4%
Eleventh Circuit	205,895	10%	187,275	9%
Unknown	3	0%	27	0%
Total	2,040,103		2,040,103	

Figure 5 – Interstate Transfers by Circuit Court

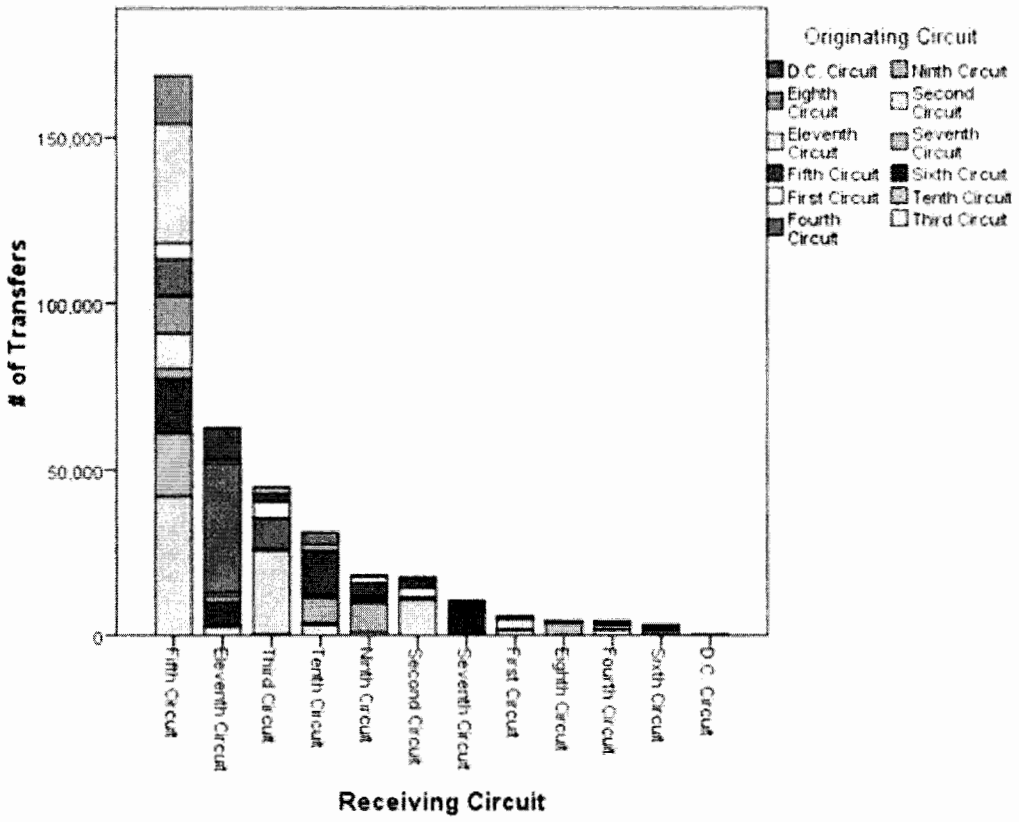


Table 6 below shows that the Fifth Circuit is the federal circuit court district with the worst ratio in the country (510:1) for immigration attorneys to received transferred detainees (as measured by the number of attorneys in the circuit who are members of the American Immigration Lawyers Association).

Table 6 – Ratio of Attorneys to Transferred Detainees by Federal Circuit Court Districts

Circuit	Rank by Transferred Detainee to Attorney Ratio	Received Transfers 1998 – 2010	AILA Members as of May 2011	Transferred Detainee to AILA Member Ratio
5th	12	483,457	947	510.51
9th	11	760,606	2674	284.45
10th	10	90,898	424	214.38
3rd	9	126,855	634	200.09
11th	8	187,275	1242	150.79
8th	7	58,927	455	129.51
4th	6	104,738	812	128.99
6th	5	73,624	646	113.97
7th	4	47,177	633	74.53
1st	3	40,143	557	72.07
2nd	2	66,287	1576	42.06
D.C.	1	89	307	0.29

Source for AILA membership numbers: email from Amanda Walkins, Member Outreach Associate, American Immigration Lawyers Association to Human Rights Watch, May 2, 2011.

Facility Type

More than half of all transfers involved a facility that has an Intergovernmental Service Agreement with ICE to hold immigration detainees. These facilities are most commonly state or local criminal jails and prisons, intended to house people awaiting criminal trial or persons serving criminal punishments. After analyzing transfers by facility type, Table 7 shows that the breakdown of facilities involved in transfers is almost identical between originating and receiving facilities.

Table 7 – Number of Transfers by Facility Type

	Facility Type	# of Transfers	% of Transfers
Originating	Intergovernmental Service Agreement (state or local jail or prison)	1,155,342	57%
	Holding/Staging Facility	599,309	29%
	ICE Service Processing Center	190,792	9%
	Contract Detention Facility	62,958	3%
	Federal Bureau of Prisons	12,541	1%
	Juvenile Facility	11,478	1%
	Other Facility Type	7,683	0%
	Total	2,040,103	
Receiving	Intergovernmental Service Agreement (state or local jail or prison)	1,131,567	55%
	Holding/Staging Facility	414,006	20%
	ICE Service Processing Center	264,813	13%
	Contract Detention Facility	172,612	8%
	Federal Bureau of Prisons	33,320	2%
	Juvenile Facility	14,242	1%
	Other Facility Type	9,543	0%
	Total	2,040,103	

Length of Detention

The length of detention was determined using the dates on which detainees entered (were booked into) and left (were booked out of) detention. Individuals that experienced transfers were held on average over three times as long as those that were never transferred, either measured by the mean or median days in detention, as illustrated in Table 8. [31]

Table 8 – Length of Detention for Transferred and Never-Transferred Detainees

	Mean Days in Detention	Median Days in Detention
Never Transferred	19.77	5
One or More Transfers	64.9	28

Female detainees (median: 13 days, mean: 33 days) and male detainees (median: 14 days, mean: 39 days) were held in detention for similar lengths of time. When examining length of detention by nationality, Table 9 shows that there were clear differences, as citizens of countries such as Vietnam and Haiti were held for over five times as long as Mexican nationals. This is likely a result of diplomatic and humanitarian problems causing delays in deportations to those countries.

Table 9 – Length of Detention by Country

Length of Detention by Country (n > 10,000 Detainees)			
Nationality	Mean Days in Detention	Median Days in Detention	# of Detainees
Vietnam	153.32	108	11,040
Haiti	117.25	48	23,238
Jamaica	106.99	58	27,865
China	98.69	38	40,392
India	87.35	29	11,996
Philippines	82.44	34	10,924
Cuba	78.51	5	66,530
Nicaragua	63.77	37	19,341
Peru	51.56	30	12,931
El Salvador	51.29	33	185,377
Columbia	48.99	27	34,304
Dominican Republic	47.90	22	62,705
Ecuador	42.79	29	24,994
Brazil	41.70	30	42,888
Guatemala	38.80	24	209,182
Honduras	38.14	24	224,879
Mexico	22.10	6	1,595,735

Deportation or Termination of Detention for Transferred Detainees

The dataset contained a variable coded as "release reason," which described the reason for each detainee's departure from immigration detention. Of the 2,271,911 detainees contained in the dataset (both transferred and never transferred), 62 percent, or 1,413,500, were ultimately deported.[32]

The next most common reason for the termination of detention was voluntary departure, in which 343,557 people agreed to leave the US voluntarily. Another 421,538 people were released to undergo their immigration court proceedings outside of the confines of detention, either on bond, on an order of recognizance, or on an order of supervision.[33]

Some 44,110 people had their cases terminated. Many things can lead to termination of a case. One documented in our previous research is the termination of the cases of people with mental disabilities who have been transferred multiple times between detention facilities over many months or years. Ultimately, some of these cases are terminated by judges who decide they cannot continue with the deportation of someone with serious disabilities.

For another 33,439 detainees, their odyssey in immigration detention did not end during the time period. This group lacked a book-out date, or release code, or had a final movement recorded as another transfer. Of this group, 35 percent had already experienced at least one transfer during their current stay in immigration detention.

Finally, 206 immigrant detainees died, and 940 escaped from immigration detention.[34]

As shown in Table 10, detainees who were never transferred had more favorable reasons for their release from detention than those who experienced one or more transfers. Among detainees who were never transferred, 54 percent were ultimately deported, whereas 74 percent of transferred detainees were deported. In addition, a larger percentage of immigrant detainees who were never transferred (16 percent) were released on orders of voluntary departure, as compared with 6 percent of those who were transferred.

Finally, a larger percentage of detainees who were never transferred (16 percent) as compared with those who were transferred (14 percent) benefitted from bond or other forms of release from detention while their immigration court proceedings were still ongoing. The ability to remain near communities of support may help explain why more detainees who were never transferred were able to benefit from release from detention while their court cases were still underway. Judges may only order release for persons who are not considered at risk of absconding from proceedings, and this is often proved through strong ties to the community, which transferred detainees rarely have in their post-transfer locations.

Table 10 – Release Reason for Transferred Detainees Compared with Never Transferred[35]

Release Reason	Never Transferred	% of Never Transferred	Experienced One or More Transfers	% of Transferred
Deported/Removed	910,818	54%	840,254	74%
Voluntary departure	274,685	16%	68,872	6%
Released with Proceedings Ongoing	270,074	16%	151,464	14%
U.S. Marshals or Other Agency	87,832	5%	25,580	2%

Paroled	64,748	4%	17,144	2%
Outstanding Detention Hanging Closure	39,365	2%	12,469	1%
Proceedings Terminated	25,241	1%	18,869	2%
Withdrawal	11,443	1%	747	0%

Cost Analysis

ICE provides no publicly available analysis of the savings or costs associated with detainee transfers. There is no public accounting for the costs of bed space in every part of the country in which ICE operates or subcontracts for detention space. The agency also does not provide information on the rationales for transfers in particular cases, which might help the agency and others to better understand the savings or costs associated with its practices.

For example, although none of the detainees interviewed for our 2009 report *Locked Up Far Away* had been transferred for medical reasons, it is certainly the case that some percentage of transfers are completed in order to provide immigrant detainees with necessary medical care, and that providing such care prevents illness, loss of life, and costly lawsuits. However, there is no way to estimate these savings since the agency does not make public, or even record in a centralized database, the reasons for detainee transfers.[36]

Therefore, while we have no way to estimate savings associated with transfers, we can roughly estimate some transportation costs associated with transfers, based on information provided to Human Rights Watch by the US Marshals Service and the IRS. Two cost estimates were used, assuming air travel was used for transfers greater than 475 miles and ground transportation used for transfers less than 475 miles. Further details on the information used for these calculations can be found in the Methodology section.

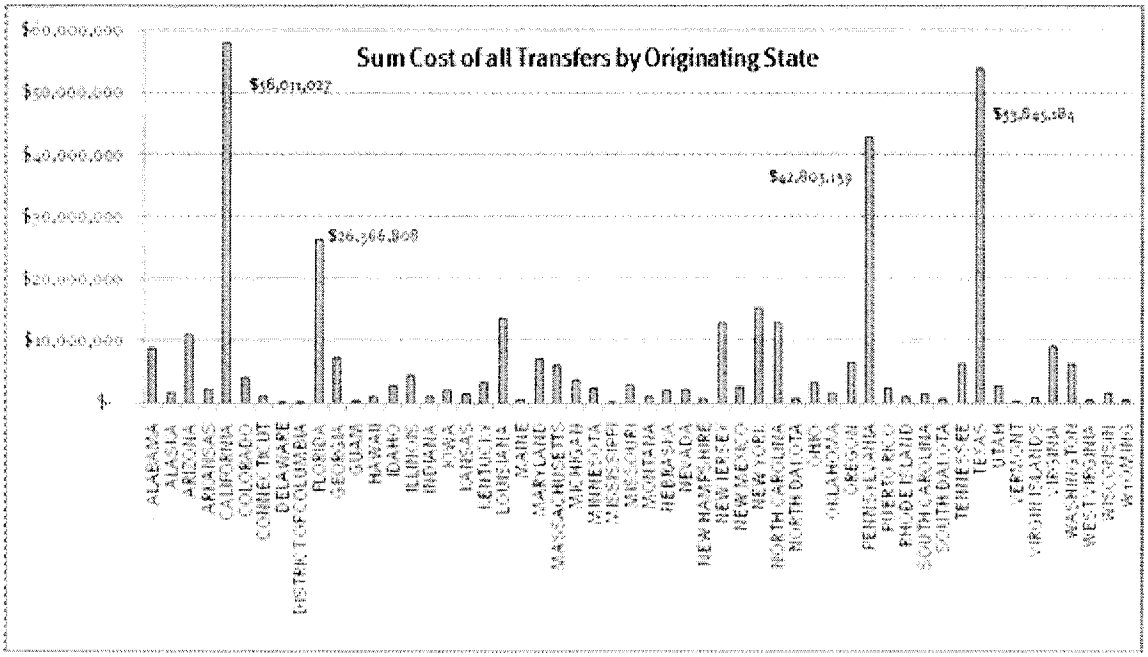
According to our estimates, the over two million transfers that occurred between October 1998 and April 2010 cost approximately $366,832,842 in total. We believe that these transport costs only represent a fraction of the total costs of transfers: since transferred detainees spend on average more than three times longer in detention than those who are not transferred, the most significant financial costs may come from court delays and unnecessarily long periods of detention.

As illustrated in Table 11, the most costly transfer "segment" has been from York County Jail in Pennsylvania to Harlingen Staging Facility in Texas. Over 11,000 transfers have been sent the 1,642 miles from Pennsylvania to Texas, costing an estimated $13.2 million. The most costly single transfer movements have occurred between Guam and the continental US. These transfers are nearly 8,000 miles long and likely cost several thousand dollars per detainee. Figure 6 provides the costs of transfers originating from each of the 50 states.

Table 11 – Most Costly Transfer Segments

Originating Facility	Originating State	Receiving Facility	Receiving State	# of Transfers	Length (mi.)	Cost per Transfer	Cost for all Transfers
YORK COUNTY JAIL	PA	HARLINGEN STAGING FACILITY	TX	11,363	1,642.28	$ 1,169.55	$ 13,289,596.65
MECKLENBURG CO. JAIL	NC	STEWART DETENTION CENTER	GA	15,959	315.44	$ 325.95	$ 5,201,836.05
LOS CUSTODY CASE HOLDING FACILITY, SAN PEDRO	CA	ELOY FEDERAL CONTRACT FAC	AZ	11,581	394.82	$ 407.98	$ 4,724,811.38
LOS CUSTODY CASE HOLDING FACILITY, SAN PEDRO	CA	MIRA LOMA DET. CENTER	CA	50,289	66.13	$ 68.33	$ 3,436,247.37
YORK COUNTY JAIL	PA	PINE PRAIRIE CORRECTIONAL CENTER	LA	3,957	1,192.02	$ 848.90	$ 4,359,097.30
ALAMANCE CO. DET. FACILITY	NC	STEWART DETENTION CENTER	GA	7,320	414.51	$ 428.33	$ 3,135,375.60
MIRA LOMA DET. CENTER	CA	LOS CUST CASE	CA	45,879	66.13	$ 68.33	$ 3,134,912.07
YORK COUNTY JAIL	PA	JENA/LASALLE DETENTION FACILITY	LA	3,815	1,136.78	$ 809.56	$ 3,088,471.40
LOS CUSTODY CASE HOLDING FACILITY, SAN PEDRO	CA	FLORENCE STAGING FACILITY	AZ	7,060	400.98	$ 414.35	$ 2,925,311.00
YORK COUNTY JAIL	PA	OTERO CO. PROCESSING CENTER	NM	2,246	1,804.73	$ 1,285.24	$ 2,886,049.04
Most Costly Transfer Segments (per Segment)							
OSBORN CORR. INST.	CT	DEPARTMENT OF CORRECTIONS	GUAM	1	7,925.57	$ 5,644.21	$ 5,644.21
HOWARD COUNTY DET. CENTER	MD	DEPARTMENT OF CORRECTIONS	GUAM	1	7,914.54	$ 5,636.36	$ 5,636.36
DEPARTMENT OF YOUTH AFFAIRS	GUAM	BERKS COUNTY FAMILY SHELTER	PA	1	7,883.01	$ 5,613.90	$ 5,613.90
DEPARTMENT OF CORRECTIONS	GUAM	BERKS COUNTY FAMILY SHELTER	PA	1	7,881.05	$ 5,612.51	$ 5,612.51
NOL D D & P	LA	DEPARTMENT OF CORRECTIONS	GUAM	3	7,705.43	$ 5,487.44	$ 16,462.32
DEPARTMENT OF YOUTH AFFAIRS	GUAM	SOUTHWEST YOUTH VILLAGE	IN	1	7,496.3	$ 5,338.51	$ 5,338.51
HOUSTON CONTRACT DET. FAC.	TX	DEPARTMENT OF CORRECTIONS	GUAM	7	7,429	$ 5,290.58	$ 37,034.06
DEPARTMENT OF YOUTH AFFAIRS	GUAM	JUVENILE FACILITY/ HEARTLAND	IL	9	7,361.82	$ 5,242.74	$ 47,184.66
GARVIN COUNTY JAIL	OK	DEPARTMENT OF CORRECTIONS	GUAM	1	7,179.42	$ 5,112.84	$ 5,112.84
JEFFERSON COUNTY JAIL	OK	DEPARTMENT OF CORRECTIONS	GUAM	2	7,358.41	$ 5,097.88	$ 10,195.76

Figure 6



As noted above, our conservative estimate of $366 million dollars for detainee transfers between 1998 and 2010 does not include other costs that may be associated with transfers, such as flights made by carriers more costly than the Justice Prisoner and Alien Transportation System (JPATS); personnel time spent on paperwork or other administrative tasks; costs of additional court time, court delays, or lengthened detention caused by transfers; costs associated with needless transfers of persons who are found to be eligible for bond and therefore are unnecessarily detained; or costs associated with duplicative medical screenings or tests. Therefore, without better public information on ICE's operational budget related to transfers, it is impossible to conclude whether transfers result in net costs or savings for the agency.

V. Methodology

The data provided in response to the original Freedom of Information Act (FOIA) request arrived from ICE on a single data disc and contained 5,061,411 comma-separated value records, comprising 1.16 GB of data.

ICE did not provide a data key or code book for deciphering the data. After exploring the database, researchers determined that of the 18 included variables, five variables were either completely empty or contained major data entry flaws. For example, the variable "Apprehension Date" has a large percentage of entries (over 120,000 people) with the same date of apprehension: 1/1/2001. This is clearly a result of a data management error such as a wrongly labeled bulk import.

Researchers found that each row of data was based upon a single action (transfer or deportation or other release) or segment of someone's detention, not a single person's history. After further analysis, researchers were able to use consistencies among several variables to determine the ordering of the database. With the ordering of the database known, we were able isolate individuals' histories within ICE detention by identifying the individual non-citizen that corresponded to each row of data.

Our analysis relied on descriptive statistics, including frequencies and cross-tabulations. Distance estimates were developed by determining latitudes and longitudes of each detention facility and computing the distance between each facility. Cost estimates were developed using data provided by the US Marshals Service on cost per flight hour per seat for transfers conducted by the Justice Prisoner and Alien Transportation System (JPATS). The US Marshals Service provided six years of estimates for flights using different sizes of airplane frames. We averaged these estimates to produce an average per transfer cost.

The last date included in the database was May 25, 2010, which corresponds to 64 percent of fiscal year 2010. Therefore, we developed estimates for the remainder of FY2010. Estimated FY2010 will be labeled "Estimated." Because the volume of ICE actions follows an annual pattern, with drops in enforcement actions around the fiscal year changeover, we did not use a linear rate for estimates. Rather, estimates were developed by using rate ratios determined using data from 2007 through 2009 in an attempt to improve accuracy. These ratios compared the volume of ICE detentions, transfers, and deportations from October through April to May through September. A ratio of 1:1 would mean that the volume from October to April would equal the volume from May to September. The averaged ratio of the previous three fiscal years was applied to the October through April 2010 data to estimate the aggregate sums for the remainder of 2010.

For cost estimates, two formulas were used to calculate the approximate cost per transferred detainee:

- For each ICE detainee transferred 475 miles or more, we assumed air travel and calculated the cost as:[37] cost = [(C / 525) x $373.88].

- For each detainee transferred under 475 miles, the following formula was applied:[38]
- cost = [(mileage traveled / 60) x $32 per hour for 2 guards] + (mileage traveled x $0.50 per mile).

Data that the Department of Homeland Security provided has not been altered for our analysis. Any errors within the dataset, including user-generated errors such as mislabeling in data entry, would have occurred before the dataset was received. Because original files on each deportee are not accessible, it is impossible to double check the data entry for errors. Therefore the analysis uses data that ICE provided, regardless of any potential errors.

Acknowledgments

This report was researched and written by Alison Parker, director of the US program of Human Rights Watch. The data analysis contained in the report was performed by Brian Root, consultant to the US program, and Enrique Piraces, senior online strategist for Human Rights Watch. The report was edited by Antonio Ginatta, advocacy director of the US program; Clive Baldwin, senior legal advisor; and Danielle Haas, senior editor. Layout and production were coordinated by Grace Choi, publications director, Fitzroy Hepkins, mail manager, and Elena Vanko, US program associate.

Human Rights Watch is enormously grateful to Sue Long and David Burnham at the Transactional Records Access Clearinghouse at Syracuse University for their extraordinary expertise and professionalism in helping us to prepare the FOIA request, and to consider best approaches in analyzing the data. Finally, we would like to thank ICE for sending us the data we requested.

Corrections

The June 14 report, A Costly Move, stated in the summary that "over 46 percent of detainees were transferred at least two times, with 3,400 people transferred 10 times or more." The corrected version reads that "over 46 percent of transferred detainees were moved at least two times, with 3,400 people transferred 10 times or more."

Region / Country United States, Immigration

Topic Migrants, Migrants

EXHIBIT E

The Committee for Public Counsel Services
Answering Gideon's Call Project (2012-DB-BX-0010)

Final Report:
National Recommendations

December 2014

CENTER
FOR
COURT
INNOVATION

Ziyad Hopkins, Esq., Committee for Public Counsel Services
Melissa Labriola, Ph.D, Center for Court Innovation

Acknowledgements

The Committee for Public Counsel Services (CPCS) and Center for Court Innovation (CCI) wish to recognize the many people who participated in this strategic planning and capacity building project generously funded by Bureau of Justice Assistance of the U.S. Department of Justice through *Answering Gideon's Call: Improving Indigent Defense Delivery Systems Program* (2012-DB-BX-0010). First, we express gratitude to the scores of trial attorneys, investigators, social service advocates, social workers, and support staff across CPCS' trial court offices throughout the Commonwealth of Massachusetts, all of whom contributed time and thought into reflecting on the importance of their work in representing poor people facing deprivations of liberty. Second, the Senior Management team at CPCS was extremely supportive of this work and was essential in facilitating the process. The Senior Management team members are Anthony Benedetti, Chief Counsel; Lisa Hewitt, General Counsel; Susan Burstein, Chief Financial Officer; Daniel Saroff, Chief Information Officer; Nancy Bennett, Private Counsel Division (adult criminal); Joshua Dohan, Youth Advocacy Division; Mike Dsida, Child and Family Law Division; Randy Gioia, Public Defender Division; Mark Larsen, Mental Health Litigation Division; and Donna Leete, Human Resources. In addition, the National Legal Aid and Defender Association provided encouragement and aid, including sharing the efforts and experiences, formally and informally, of other jurisdictions through the Research Development and Analysis subcommittee and its members. Finally, we would like to thank our additional partners at the Center for Court Innovation for their invaluable assistance throughout this project, including Norman Reiss, Christine Sisario, Valerie Raine, and Michael Rempel. This project would not have been possible without the support of the Bureau of Justice Assistance (BJA) of the U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the authors and do not necessarily reflect the positions or policies of the U.S. Department of Justice. For correspondence, please contact Ziyad Hopkins at zhopkins@publiccounsel.net.

Table of Contents

Acknowledgements i

I. Introduction 1

II. Project Setting: The Committee for Public Counsel Services 2

III. Identifying Performance Indicators through Best Practices 3

IV. Data Collection Systems 8

V. Evaluation Recommendations 12

VI. Workload Assessment 17

VII. Conclusion 21

I. Introduction

In accordance with current trends promoting the greater use of evidence-based practice in the criminal justice system, the Bureau of Justice Assistance of the U.S. Department of Justice recently funded several public defender agencies to take concrete steps towards improving the quality of indigent defense services. Among those funded, the Committee for Public Counsel Services (CPCS), which serves as Massachusetts' statewide public defender agency, partnered with the Center for Court Innovation (CCI) to complete a statewide strategic planning and capacity building project. The project was designed to combine the interdisciplinary expertise of public defenders regarding known best practices in indigent defense representation; researchers regarding the translation of best practice knowledge into quantifiable performance indicators; and technology experts regarding the needs of public defender management information systems.

Specifically, the current project sought to build capacity within four distinct indigent defense practice areas: (1) adult criminal defense; (2) juvenile delinquency proceedings; (3) child care and protection; and (4) mental health. For each practice area, the project pursued six goals:

1. Identify and articulate best practices;
2. Identify key performance indicators that correspond to the best practices;
3. Assess the capacity of existing CPCS case tracking, case management, and other data collection systems to collect and report on the identified performance indicators;
4. Craft a proposal for improving or replacing existing case tracking, case management and other data collection systems, as needed;
5. Propose an evaluation plan for CPCS indigent defense delivery systems that takes into account the above findings, including both substantive need and practical feasibility; and
6. Develop a case weighting system for the purpose of more accurately evaluating the capacity of an attorney to provide high-quality representation in each practice area (and also to provide high-quality representation for different case types within each area).

The project includes six specific products reflecting these six goals: two final documents respectively presenting best practices and performance measures; and four reports respectively addressing CPCS' current data collection systems; recommendations for future systems; evaluation plans; and methods and findings from an original case weighting study.[1] The current report consolidates the major methods, lessons, and recommendations from the six more in-depth products. The goal is to aid other indigent defense agencies in implementing their own self-assessment process. Moreover, we do not assume that other agencies will reach identical conclusions as CPCS. Rather, we assume that the current undertaking might provide a valuable model for other agencies interested in similar self-reflection.

[1] All products of this project, *Answering Gideon's Call Project* (2012-DB-BX-0010), are on file with the Committee for Public Counsel Services. Selected documents are also available at http://www.publiccounsel.net/cfo/bja-gideon/.

II. Project Setting:
The Committee for Public Counsel Services

In Massachusetts, the Committee for Public Counsel Services (CPCS) coordinates the delivery of both criminal and certain noncriminal legal representation to indigent persons throughout the state. Representation is provided by salaried public counsel (staff attorneys) and certified private attorney bar advocates (private counsel). In total, CPCS oversees approximately 450 staff attorneys and over three thousand private counsel, handling a total of approximately 250,000-300,000 cases per year in ten distinct areas of law: trial and appellate work for individuals facing criminal charges originating in district, superior and juvenile courts (including youthful offender cases and grant of conditional liberty proceedings); child welfare or termination of parental rights cases (care and protection); status offenses cases (CHiNS, now CRA); mental health civil commitments; mental health guardianship proceedings; sexually dangerous person commitments; sex offender registry proceedings; as well as an immigration impact unit, and a federally funded innocence program.

The focus of the current project was on four umbrella practice areas in which staff attorneys represent clients: (1) adult criminal, (2) juvenile delinquency (including youthful offender); (3) child care and protection (including status offenses); and (4) mental health (including both civil commitment and guardianship cases). Over the thirty year agency history, CPCS has well established best practice standards for each of these four practice areas. However, at the outset of the current project, the agency found that it had a compelling need to finalize best practice and performance indicator lists and associated documentation; as well to implement data collection systems to better inform and guide self-assessment efforts and statewide policy advocacy. Moreover, agency-wide data collection is currently limited, fragmented and not conducive to the meaningful evaluation and self-assessment necessary to ensure quality representation.

III. Identifying Performance Indicators through Best Practices

> Recommendation #1: The iterative process of identifying measurable and quantifiable performance indicators about quality indigent representation is an opportunity to reflect on, and coalesce around, values, ideals and standards that drive a practice. Using the methodology and framework in Massachusetts, more jurisdictions should engage in the process of selecting best practice indicators and share their work in this area to work towards national indicators to ensure quality representation.

Like many other indigent representation organizations, CPCS has developed and established best practice standards for conducting indigent defense representation. The challenge in identifying performance indicators that reflect these standards is to ensure that while there is a framework for structured decision-making, each individual attorney is empowered and entrusted to exercise professional judgment. Even within each legal discipline, the variation in clients, facts and circumstances impact the appropriate course of action. Nonetheless, our guiding premise was that individual variations in what a client needs should not preclude establishing general standards and performance indicators that, while not applicable in each and every case, provide an apt description in most cases of what public defenders are seeking to achieve in their work.

Accordingly, the team engaged in a multi-pronged approach to identify meaningful performance indicators in general as well as within each of the four practice areas of interest.

1. The team reviewed existing standards and best practices with in-house experts at CPCS who work within the four major practice areas: (1) adult criminal, (2) juvenile delinquency, (3) child care and protection, and (4) mental health. See, Committee for Public Counsel Services, Assigned Counsel Manual (www.publiccounsel.net).
2. The project team met with leading trial attorneys from each of the practice areas to discuss their work, identifying their approach to their clients and cases, including the motivations and reasons behind their activities, as well as the logistical factors that present challenges to meeting best practices.
3. The team compared best practice standards from other jurisdictions and national organizations to CPCS standards to ensure that the CPCS standards were comprehensive and reflected the insight—and indeed even wording—of other jurisdictions, including the National Legal Aid and Defender Association's Compendium of Standards for Indigent Defense Systems.
4. The team incorporated insight from the vast array of training materials (including checklists to identify and address certain issues, client and case intake interview forms, sample motions, mock examinations, and other practice aides) for each of the practice areas.
5. The team looked to the various internal protocols used by supervisors for staff and private attorney qualitative evaluations.

The main challenge that emerged from the discussions in all practice areas was the difficulty in quantifying work that is both qualitative in nature and inherently contextual. Many of the markers of quality representation cannot be quantified—the non-judgmental client interview; the precise cross-examination; the development of positive relationships with court personnel. The complex social and legal circumstances of CPCS clients, including different court practices from county to county, coupled with a client-centered and directed approach to case strategy impact staff activity and case results. For example, in the care and protection context, a parent client may choose not to argue for reunification—often assumed to be the desired legal outcome-- if the client believes the children should actually be raised by a member of the extended family. Similarly, a criminal defendant may choose a trial leading to a sentence much longer than was offered in an attractive plea offer or accept a plea offer in a strong defense case. In a civil commitment case, the effects of a long past verdict of "not guilty by reason of insanity" linger in a court's fact finding.

Performance Indicators

When turning to articulate a final list of best practices of indigent representation, the project team identified eight common principles that cross each practice area, establishing a common foundation to link all of the case types, both within and across the practice areas. The team used this rubric to draft, in consultation with each practice area, performance indicators. It also identified a number of data points about caseload, staff activity and outcomes to provide insight into the extent to which CPCS can understand and provide quality representation. In anticipation of assessment and evaluation needs, the final version of the performance indicators included two additional categories of data elements about clients and their cases at *intake* and *post-representation* for a total of ten categories of data to assess and evaluate quality indigent representation.[2]

The principles of best practice were created to encompass a wide variety of case types. Some—perhaps many—of the individual indicators may be relevant outside of Massachusetts. However, what is thoroughly generalizable beyond Massachusetts is the process undertaken: a systemic process of reflection to develop indicators helps to coalesce a community of indigent defense practice. The tables below summarize the eight best practices and some of the suggested data points and indicators agencies could use to measure those practices.

Nurture the attorney client relationship	
Explanation	Each attorney must strive to establish and maintain a collaborative and trusting relationship with the client so that s/he can meaningfully participate in developing, and continually re-assessing, the most persuasive case strategy, including a theory of the case and a theory of disposition and/or post-case plan.

[2] The full document, *Best Practices, Objectives and Performance Indicators* (November 2014), is available at http://www.publiccounsel.net/cfo/bja-gideon/. *The Committee for Public Counsel Services Assigned Counsel Manual* is available at http://www.publiccounsel.net/assigned-counsel-manual/.

Suggested Data and Indicators	• Time from court appointment of counsel[3] to first (face to face) private client contact • Ratio of out of court, private in person client contact to in court dates for client • Ratio of any client contact to in court dates for client • Time between out of court, private in person client contacts • Time between date of disposition in court to most recent in person private client contact before disposition

Protect and promote the client(s) during the pendency of the case	
Explanation	Each attorney, in consultation with the client, must minimize the harm of a pending case to the client by protecting the client's immediate liberty interests as well as promoting the client's interests in collateral matters that impact the course or outcome of the case strategy.
Suggested Data and Indicators	• Results from initial decisions that impact client's liberty[4] position • Time (and ratio to length of case) in altered liberty status during pendency of case • Clients with defense team that includes social service advocate[5] • Number of collateral contacts (made on behalf of client)

Evaluate the government's case	
Explanation	Each attorney must understand and analyze the government's case to develop the most persuasive theory of the case, ensuring that any affirmative requests for additional information, formal or informal, align with the case strategy.
Suggested Data and Indicators	• Time to receipt of discovery items and/or to completion of government discovery obligations[6] • Number of court events involving discovery issues

[3] In Massachusetts, counsel is appointed and present at the client's first appearance in court, either as a result of a summons, filing of petition or arrest. This measure assumes that the appointment of specific attorney (or office) is made at least by the commencement of legal proceedings in the court of jurisdiction. Physical presence of counsel at, and participation in, the first appearance is a best practice for indigent representation.

[4] The immediate liberty interest at stake for cases involving criminal charges is pre-trial detention while for cases involving allegations of child abuse or neglect, it is the child placement decision. In civil commitment cases, the right to choose one's own medical treatment is at stake.

[5] CPCS attorneys work with staff social service advocates and/or social workers. They are considered part of the defense team. Other jurisdictions may use different job titles for a person whose function is to identify and facilitate access to services designed to address a client's need and/or capitalize on the client's strength with the intent to impact the legal outcome of the client's case(s).

[6] In Massachusetts, for care and protection cases, discovery is ongoing, although there are certain items and regular reports which should be provided to counsel in a timely fashion. Counsel in these cases may have to advocate for disclosure.

	• Types of discovery [categories of witnesses (police, civilian); forensics; seized evidence; statements; identification procedures; records]

Independently investigate the government's case	
Explanation	Each attorney must independently seek evidence that challenges the government's case to develop the most persuasive theory of the case.
Suggested Data and Indicators	• Number cases with investigator and days to engagement of investigator (for criminal cases) • Number of witnesses interviewed by defense team • Number of records collected (third party, relating to allegations) • Number of cases with discovery providing to government/opposing party

Initiate challenges to the government's case	
Explanation	Each attorney must identify procedural, jurisdictional, statutory, common law and constitutional challenges to limit the strength of the government's case and pursue them to the extent that they align with the most persuasive case strategy.
Suggested Data and Indicators	• Number of Motions to Dismiss with court ruling • Number of Motions to Suppress with court ruling (for criminal cases)

Develop a theory of disposition	
Explanation	Each attorney must develop the most persuasive dispositional, or post-case, plan by investigating the client's background and by counseling and assisting the client to work towards reasonable dispositional, and/or post-case, goals.
Suggested Data and Indicators	• Number of clients with defense team social service advocate • Number of records collected (belonging to client, relating to dispositional theory) • Number of dispositional reports/sentencing memorandum provided to court • Number of cases disposed by plea before first trial date

Fully prepare to persuade the finders of fact/law to adopt the theory of the case	
Explanation	Each attorney must strive to persuade the finder of fact/law to accept the theory of the case, and, if applicable, a theory of disposition.

Suggested Data and Indicators	• Number of cases dismissed without trial/admission on trial date • Number of cases disposed by plea/stipulation on trial date • Number of trials/hearing on the merits • After trial/hearing on the merits, number of acquittals (by charge and case for criminal cases); no violation (for probation cases); dismissals (for care and protection cases); denials (for civil commitment cases) • Sentence lengths (in absolute terms and as proportion of maximum sentence); Child custody orders (for care and protection cases)

Affirm the continuing duty of loyalty	
Explanation	Each attorney must ensure that the client understands the ramifications of the legal outcome of the case and offer guidance, support and assistance for the client's post-case goals.
Suggested Data and Indicators	• Number of cases with post-disposition client contact • Number of clients with post-dispositional court filings

IV. Data Collection Systems

Recommendation #2: A better supported defense-oriented data collection system, with access to data held by other stakeholders in the justice system, will enhance the ability to collect and analyze more relevant data efficiently.

Recommendation #3: Increase funding to develop and implement affordable and sustainable web-based case management systems to improve and maintain data quality about indigent representation.

The ability to collect and analyze data efficiently for self-assessment and evaluation will improve with a unified case management system that contains a user-friendly interface for data entry and that can also automatically import data held by other stakeholders in the justice system. CPCS, like many large and fast growing organizations, uses a variety of data collections systems, including various software applications and practices resulting in a patchwork of procedures and tools. Data is collected and managed on a purpose-specific basis. Even within CPCS, the same data is often collected for different purposes and kept in redundant locations. The data sprawl is compounded, additionally, by the fact that unlike some jurisdictions, CPCS has limited direct access to data from other stakeholders in the justice system (trial courts, jails, prisons, police departments, and prosecutors), resulting in additional duplicate data entry if CPCS wishes to track case processing basics like charges, dispositions, sentences, release status, and key dates throughout the processing of each case. The *Gideon* Project technology team determined that the ideal case management system, applicable to other indigent defense organizations, should be based on the following ten principles listed in the table below.

Principle	Explanation
Interoperability	Open data standards provide consistent meaning to data shared among different information systems, programs, and agencies throughout the court system. The data in a system must be structured and defined to ensure the capacity to exchange information with databases outside CPCS in a secure and reliable manner (e.g., courts, prisons, jails, prosecutors' offices), as well with CPCS private counsel billing system.
Modularity	The system should be built using three modular components: the database; a user interface; and a clear set of technical rules (or "APIs") to exchange data between the database and the user interface (as well as any relevant external systems). The technology choice(s) for the components can then be made independently, providing flexibility in the continued maintenance and development of the system.
Centralization	The system must have a well-documented, with on-going training and improvement, workflow for all of the roles and responsibilities of the

	various staff members so that it can be used organization-wide and across all practice areas, limiting 'double entry'/duplication of data, both for user ease and data quality.
Security	Access to the system must be tightly controlled and restricted to authenticated users, which will require a system administration component to create, edit, and manage account IDs and passwords using industry standard protocol. Security should also include an ability to limit and audit user access to various parts of the system.
User permissions	The system should allow for different levels of direct data access based on user role and permissions. Given the complexity of CPCS' internal structure and conflict/ethical concerns, designated, non-technical staff should be able to manage user settings and permissions to allow for rule-based and *ad hoc* partitioning and sharing of data.
Remote Access	The interface must allow for effective remote access for field staff (managers, attorneys, investigators, social service advocates/social workers), including specific design for mobile interface on smartphones and tablets.
Document Management	It should contain full document storage, search, and production capacity for multiple file types (including audio and video); template management; document creation; workflow processes (including e-filing and capacity to securely share documents with users and non-users); and metadata about each document to search for documents within the system, as well as to report on certain indicators.
Practice aids	The system should include built in, or links to, practice area and litigation resources (e.g., training, case law, statutes, maps, vouchers, word processing, email, calendar, etc.).
Reports	Staff will be encouraged to use the system if it can display robust, dashboard-driven analysis and reports on performance indicators and workload (including case weighting).
Sustainability	The particular platforms and technology choices for the new system must be made with the assumption that the system will need to be maintained and developed by a revolving staff with a varied skill set. Any system must contain clear documentation for incoming IT staff. Technology choices should include consideration of future workforce availability as well. On-going training and documentation for users is essential to ensure data quality.

There are two essential avenues for improving public defender information systems, each with important advantages and shortcomings: (1) adapting an existing off-the-shelf system (which typically involves purchasing it from a private, often for profit, consulting agency); or (2) creating an entirely new system either in-house or through the use of consultants (which can increase customization but may take far more time and labor costs to produce).

Prospects for Adapting Off-the-Shelf Database Solutions

While there are private vendors who offer solutions to case management it is difficult for many organizations to receive committed funding to purchase these products, which include a necessary investment, also, of time and staff resources to customize the software. Local staff must be recruited to identify and describe the most efficient workflow practices in the constraints of each jurisdiction. In addition, each jurisdiction's leadership must work with other local justice partners for inter-agency planning and project management around data sharing agreements and protocols. While these systems can be cost-prohibitive, they are generally relatively quick to implementation assuming the capacity of indigent organizations to meaningfully participate in the implementation process.

Prospects for Developing an Entirely New Database Solution

While taking more time, the alternative to a customizable off the shelf system is to develop internal applications for data collection. In the course of the team's assessment of CPCS' data collection systems, other similar organizations shared their experiences in developing or adopting effective case management systems. For those with internally developed systems, various public defender organizations have offered to share their own systems, but often they are built, or integrate, proprietary software. As an alternative to a customized system that includes proprietary components, a true open source indigent defense case management community could work towards offering low cost solutions to organizations across the country, including the standardization of data across jurisdictions. Open source programming offers a number of advantages, including tapping otherwise unavailable resources. The code of open source software is made publicly available for any indigent defense organization to use.

An advantage of developing a data management system on the open source model (i.e., through a new system that does *not* depend on or integrate any proprietary or for-profit components) is that, in the long run, it is likely to be the most economical. With a commitment to open source programming, the "tech community" can be engaged—namely, the open source community and civic programmers in particular. There already exists a vibrant community of individuals lobbying to open up the government in the sense of open standards and open source. To date this has been embraced most vigorously by the executive branch of the federal government. *See*, e.g., http://www.whitehouse.gov/open/about. Municipalities have followed motion on the federal level, and partnerships have been forged between government and civic-minded programmers. *See*, e.g., http://codeforamerica.org/about/. The justice system, however, has lagged behind. However, open law movements like "Law.Gov" are working to bring about better access to legal materials and the justice system through the use of technology. *See*, e.g., https://law.resource.org/index.law.gov.html. The *Gideon* Project has found that, students and faculty from CPCS area universities—Northeastern University School of Law's NuLawLab, Suffolk University Law School's Institute on Law Practice Technology & Innovation, and Harvard University's Berkman Center for Internet & Society, Wentworth Institute of Technology, Massachusetts Institute of Technology—are more apt to join an open source based approach to improving an essential government service. An open source approach structurally and philosophically maximizes resources by appealing not only to the limited mission of the indigent representation, but also to those motivated by open source ideals. An open source case

management system based on open standards can serve multiple missions, however its success depends upon making these clear and leveraging them to recruit and grow a community of developers (technology specialists and attorneys) committed to its realization.

As this discussion makes clear, an original customized database solution that is expressly designed to meet the needs of CPCS specifically or of comparable public defender organizations generally has great long-term advantages. Nonetheless, production of such a solution is a potentially long-term undertaking. In short, there remain real trade-offs between developing a new open source solution and adapting an extant off-the-shelf product.

V. Evaluation Recommendations

Recommendation #5: A small group of performance monitoring measures will focus data collection efforts, allow for meaningful self-assessment and prepare for future impact evaluation of indigent representation.

Recommendation #6: Each indigent representation organization should articulate a select group of action and outcome measures that can be internally reviewed and analyzed with the goal of improving the quality of indigent representation.

The ability to perform program evaluation has been lacking in the operation of indigent defense systems across the country. In the past, indigent defense has focused on measuring the resources available to attorneys to perform their work, such as access to investigators or attorney workloads. While these efforts have been valuable, they have fallen short, because they do not measure indigent defense processes and outcomes. Moreover, it is difficult, if not impossible, to identify best practices or quantify the benefits of indigent defense to the court system or the community without identifying and quantifying system outcomes. We may find out how many investigators indigent defense attorneys use, how often these attorneys make various types of motions or applications, and how often attorneys meet with clients at various stages of the process, but we also want to test how these processes relate to positive legal case outcomes and/or positive personal outcomes for the clients. In short, *we want both to identify the indigent defense practices that we think are important, based on prior knowledge about what makes for high quality representation—and then we want to test to what degree different practices truly prove to be important empirically.*

Action Research

Performance monitoring includes "*action research*," the routine tracking of the most essential performance indicators for a program or agency. Such monitoring is designed to provide immediate and useful feedback about everyday program operations and performance. Even with limited resources, agencies can use data productively to monitor their everyday operations, identify areas of success, and bring to light problem areas or ways to improve. A recommended format for presenting information is a regular statistical report that simply includes core quantitative data on performance measures of interest (i.e., it is not necessary for any staff member to write an accompanying narrative). Through regular reporting, trends over time can also be identified. Management staff can then discuss the implications of the data through in-person management/performance review meetings or other forms of consultation and deliberation.

Researchers from CCI worked closely with CPCS attorneys in identifying the key indicators (based on best practices) that they would like to prioritize for data collection and evaluation

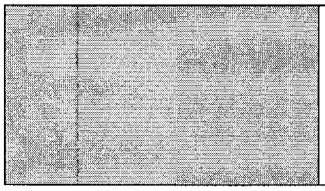
purposes. While the full best practices and associated performance indicators document is extensive and inclusive, the task for the performance monitoring component was to narrow down that larger list of indicators to only indicators with the greatest priority. Each practice area extracted key indicators in the areas of caseload, client profile, case processing, in-court action, and out-of-court action.[7]

	Action Research
Intake Data	• Volume by type of case (#) • Disposed at arraignment/initial hearing (%)Volume by client (#) • Client demographics (% by race/ethnicity, age, sex) • Interpreter needed (%)

Staff Activity (court and case specific related best practices)	• Distribution of number of days from first appearance to assignment of attorney (#)
	• Average days from assignment to first (private, in person) contact (#)
	• Same attorney from first assignment by CPCS through disposition (%)
	• Result of first appearance, (detained/placed outside home)(%)
	• Average days of pretrial detention/out of home placement (#)
	• Average age (in days) of pending cases (#)
	• Motions (including responses/oppositions) (# and % of cases)
	• Trials
	  ○ Bench (# and % of cases)
	  ○ Jury (for criminal/juvenile cases) (# and % of cases)
	• Open cases with investigator involved (staff or hired)
	  ○ Witness(es) interviewed (%)
	  ○ Visit crime scene (%)
	  ○ Testifies in court (%)

Staff Activity (client related best practices)	• Client Contacts
	  ○ Out of court, in-person client contacts by any CPCS staff member
	  ▪ Office (#/%)
	  ▪ Detention/placement location (#/%)
	  ▪ Home (of client) (#/%)
	  ▪ Other Face to face (#/%)
	  ○ Out of court, NOT in-person contacts (email, phone, text, etc.) (#/%)
	• Clients for whom Social Service Advocate (SSA) engaged
	  ○ Client contacts from SSA (#/%)

[7] The full report, *Evaluation Proposal* (November 2014), is available at http://www.publiccounsel.net/cfo/bja-gideon/.

	○ External to CPCS collateral contact from SSA (e.g., school, work, health care, family, etc.) (% of cases) ○ Client contacts from SSA (#/%) and collateral contacts by attorney

With proper data collection tools, analyses can be done in-house and most frequently would use purely descriptive methods—i.e., reporting the numbers or percentages of cases where the various events took place that are indicated in the performance measures sampled above or listed in the appendices. Choosing objectives and performance indicators that are easy to collect and important for the agency can provide immediate and useful feedback about everyday program operations and performance. Analyzing this data over a period of time can provide a snapshot of how and where practices might be changing. The analysis would reveal the current state of CPCS—or any indigent representation practice, including variation in best practices. We recommend a quarterly or bi-annual report for each practice area that presents this information that can be easily disseminated to attorneys in the agency for review, as well as for use to inform other justice stakeholders about the needs and opportunities for quality indigent representation.

Case Outcome Research

Case outcome research works in parallel to, and is another component of performance monitoring—except that it focuses solely on case outcomes—i.e., the desired results that flow from the work performed by the defense team. It should be emphasized that, if there are occurrences of system performance failure, it does not mean that the failure is the fault of the individual attorney. Individuals work within a system, and there are many factors that influence system outcomes that are beyond the control of the individual. Even more pertinent, system problems often require system-level solutions. The identification of these system problems, however, is a necessary first step. These can be both short- and long-term outcomes. In basic outcome monitoring, it can be useful to look at trends over time. We recommend that this type of data collection and evaluation be done jointly with the collection of action indicators to provide a full picture of best practices. Senior staff at CPCS narrowed down key case outcomes of interest.

The case outcome indicators are quantitative in nature. Similar to the process indicators, the first step is to ensure that proper data collection and tools are determined and finalized so that each practice and each attorney can easily and consistently input this information. Again, similar to performance measures, with proper data collection tools, data analysis can be done in-house and would be purely descriptive methods. We recommend these indicators be included in any quarterly or bi-annual report. It would be possible to also present this information by case type to see if different types of cases are receiving different outcomes based on various variables, such as court of origin, office, or executive branch agency. As procedures for data collection, analyses and dissemination are finalized; exact methods for how the data will be displayed and analyzed will be determined. These indicators can provide immediate and useful feedback about everyday program operations and performance, including the variation in best practices.

	Outcome Research
Case Specific	• Client not detained pre-trial/Placement decisions about children (%) • Charge(s)/petitions dismissed prior to trial(#/%) • Charges acquitted/dismissals/denials after trial (#/%) • Pleas/admissions to reduced charge(s)/stipulations/uncontested hearings (#/%) • Sentences (% each of custody, probation(community based supervision)/Child custody orders

Impact Research

Impact research measures the difference between what happened with the program or its activities and what would have happened without it. It answers the question, "How much (if any) of the change or positive outcomes observed in the target population occurred because of the program or particular (e.g., indigent defense representation) activities of interest?" Rigorous research designs and research expertise are needed for this level of evaluation. It is the most complex and intensive type of evaluation, incorporating methods such as random selection, control and comparison groups. Impact evaluation efforts follow from consistent and sustained data collection for the purposes of action and outcome research.

Although most of the impact items on this list are quantitative in nature, in Massachusetts, there was widespread agreement that a key goal of quality indigent representation is to provide a client with a voice. This idea encapsulates the theory of procedural justice. Procedural justice suggests that how litigants regard the justice system is tied more to the perceived fairness of the *process* than to the perceived fairness of the *outcome*. In other words, even litigants who "lose" their cases rate the system favorably if they feel that the outcome is arrived at fairly. The influence of procedural justice on litigant perceptions and future behavior has been analyzed in a variety of court contexts—drug courts, community courts, family courts, and small claims courts[8]. The findings from these studies have been consistent: Courts that exhibit procedural justice elements produce more satisfied and compliant litigants. This research raises several important questions: What is the role of defense attorneys in procedural justice? How can attorneys enhance procedural justice? Are there specific practices that attorneys can implement in order to improve perceptions of fairness?

	Impact Research
Public Defender Division and Youth Advocacy Division	• Client satisfaction with representation • Clients not under any criminal justice/juvenile supervision • Clients not incarcerated past minimum sentence/projected GCL date (suggests successful parole)

[8] See: Thibault, J.W. and L. Walker. 1975. Procedural Justice: A Psychological Perspective Hillsdale, NJ: Lawrence Erlbaum; Tyler, T.R. 1990 Why People Obey the Law. Yale University Press New Haven: London; Tyler, T. R. 1997. "Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform". American Journal of Comparative Law, 45: 871-904; Tyler, T.R. and Y.J. Huo. 2002. Trust in the Law. New York, NY: Russell Sage Foundation.

	• Clients without new arrests • Clients without new admissions/convictions • Clients engaged in pro-social activities post disposition/incarceration • Reduce erroneous legal outcomes • Reduce collateral costs • Safer communities
Children and Family Law Division	• Client satisfaction with representation • Clients not under juvenile/criminal justice supervision • Clients without subsequent care and protection petitions • Clients not involved in child welfare system (beyond expressed wishes) • Reduce erroneous legal outcomes • Reduce collateral costs • Safer communities
Mental Health Litigation Division	• Client satisfaction with representation • Clients without subsequent petitions (re-commit or new) • Clients not supervised by criminal justice system • Re-commitment petitions filed upon expiration of commitment order • New commitment petition (e.g., new petition after discharge) • Re-hospitalized (voluntary) after discharge • Reduce erroneous legal outcomes • Reduce collateral costs • Safer communities

For the most part, the quantitative dependent and independent variables needed for an evaluation of this kind will be collected as part of the action and case outcome reporting. With consistent and accurate data collection, experience reviewing and analyzing regular reports, indigent defense organizations will be able to work with researchers to develop additional research questions of interest and identify key variables and methodologies for analyses.

For example, in researching the role of defense counsel in promoting procedural justice, the indicators that are qualitative in nature, such as client satisfaction, will in turn lead to a different collection method. Collection methods may include one-on-one interviews with management and/or on the ground attorneys, investigation management and staff, legal support staff, operations personnel, and clients. We also recommend focus groups or roundtable discussions with various groups of interest. Qualitative methods are commonly used in evaluations in order to explore specific facets of programs and to give voice to participants' experiences. These methods provide in-depth information that can enhance the quality of programs or services.

VI. Workload Assessment

Recommendation #4: With the growing body of workload studies from around the country, technical and financial assistance should be provided to indigent defense representation organizations to engage in workload assessments relevant to local conditions.

The *Gideon* Project team conducted a workload assessment to develop a case weighting model for the purpose of more accurately evaluating the capacity of an attorney to provide high-quality representation. CPCS needed a foundation to understand the reasonable work capacity of its staff.[9] The primary goals of the workload assessment were to:

- Develop a clear measure of attorney workload in all public defender offices throughout the four key practice areas (over five different office types);
- Provide a basis to understand the allocation of attorney resources; and
- Establish a transparent model to use in assessing the levels of attorney resources necessary to provide effective assistance of counsel to clients of all Massachusetts public defender offices and appointed private counsel.

Based on previous work done by the National Center for State Courts, the team used a multi-faceted, iterative, and highly participatory data collection strategy. The model was anchored in two components:

1. A time study based on private counsel billing data designed to assess the amount of time attorneys currently spend on cases of various types and on key tasks that apply to each type of case—in other words, a measure of current practice.
2. A systematic qualitative review process used to elicit expert opinion on how current practice can be adjusted to better enable attorneys to provide effective assistance of counsel to indigent clients across Massachusetts. This review process included a time sufficiency survey administered to staff attorneys and Delphi groups made up of current staff attorneys, including some who had practiced as private bar advocates.

The first project component (the time study) utilized hard empirical data to determine, empirically, the quantity of time public defenders are spending right now to represent each of 16 distinct types of cases on a per case basis. (The 16 case types are indicated in the table below.) However, public defenders at CPCS made clear to the research team that, in general, they believe that they at times are unable to afford cases the quantity of time that might truly merit in an ideal world, due to staffing and resources shortages. Therefore, in order to determine how much time attorneys *should* spend on each of the same 16 case types, the estimates obtained from empirical data were used as a starting point—but modified based on the results of a representative survey of CPCS attorneys and, ultimately, based on Delphi groups that brought together select attorneys

[9] The full report, *Answering Gideon's Call Project: Attorney Workload Assessment* (October 2014), is available at http://www.publiccounsel.net/cfo/bja-gideon/

for a highly focused in-person discussion designed to yield consensus on revised time estimates. (Delphi groups are not the same as focus groups in that Delphi groups do not allow for an open-ended discussion; instead, they involve a highly focused and heavily moderated discussion, coupled with multiple rounds of secret ballot voting, designed to zero in on and yield concrete consensus conclusions by the assembled experts—in this case, CPCS public defenders.)

Importantly, in a traditional "time study," attorneys would be asked to document their time in five-minute intervals over a period of time. Instead of this method, which proved practically unfeasible, we produced the preliminary case weights based purely on quantitative billing data from the private counsel with whom CPCS contracts to represent a large number of indigent defendants within each practice area. We essentially summed all annual case-related time entered by private attorneys and divided that by the number of annual closed cases.

The preliminary case weights generated during the modified time study provide a baseline time that CPCS private attorneys currently spend defending various types of cases. As noted above, researchers wanted to take this one step further and provide CPCS a range of case weight time to incorporate how much time attorneys *should* allocate for each case type. To assess whether current practice allows adequate time for quality performance, Delphi Groups were convened. The purpose of Delphi groups is to reach a consensus about case weights from an experienced team of attorneys during a structured discussion that included a review of the data from the preliminary case weight analysis. The case weights are expressed in terms of the average amount of time an attorney needs to complete representation for each of the case types. The following table illustrates the preliminary and quality adjusted case weights. (Quality adjusted case weights are, essentially, adjusted based on consensus decisions reached in the Delphi groups.)

Case Type	Preliminary Case Weight (hours)	Quality Adjusted Case Weight (hours)
PDD-District		
Bail Only	1.39	2.19
Probation- District	6.12	8.26
Misdemeanor	11.98	16.78
OUI	15.96	19.69
Concurrent Felonies 265	16.24	24.13
Concurrent Felonies not 265	12.81	19.12
PDD-Superior		
Probation - Superior	8.98	9.17
Nonconcurrent Felonies 265	54.57	76.36
Nonconcurrent Felonies not 265	29.69	42.25
Youth Advocacy Division		
Bail Only	1.39	2.3
Probation - Juvenile	8.24	16.25
Non-Presumptive YO	13.98	34.77
Presumptive YO	57.36	112.4
Child and Family Law Division		
Status Offenses	19.88	22.51
Care & Protection	59.64	84.45
Mental Health Litigation Division		
Civil Commitments	10.16	16.97

Murder was included in Superior Court felony and not adjusted seperately.

Next, the total annual case time available to attorneys was calculated. FTE attorney year value was calculated to yield the number of full caseload attorneys (FCA) required to handle the practice area's caseload.[10] FTE of 1,662 hours was determined by summing the number of work hours available in each year for direct case related work.

The team analyzed the ratio of case types in the staff attorney caseload for Fiscal Year 2013 (July 1, 2012 through June 30, 2013), the same period from which the time study data was analyzed, in order to arrive at a weighted average case weight for each practice area. In order to arrive at a weighted average for a practice area caseload, the total hours needed for each case type opened in the fiscal year was summed and then divided by the total number of cases. By understanding the ratio of case types within each division, it is possible to project the number of cases that can be handled by CPCS staff attorneys. Based on this weighted average derived from the Fiscal Year 2013 caseload, CPCS can monitor caseloads to ensure that assignments do not exceed levels which ensure quality representation. The actual number of cases any individual attorney handles, however, may differ based on the particular mix of case types in an individual caseload. Given that CPCS oversees an effective and experienced panel of private attorneys, the agency has the capacity to spread cases over a cadre of attorneys, public and private to ensure that attorneys have sufficient time to provide quality representation. The following table, based on 1,662 case available hours over the course of a year, shows the number of new cases an attorney could be assigned based both on the preliminary and quality adjusted case weights:

Case Available Hours for a Full Caseload Attorney (FCA): 1662		
Practice Area	**Prelim. Case Weight (based on FY13 case ratios)**	**Annual New Cases/FCA**
CAFL	43.26	38
Mental Health	10.16	164
PDD District	11.61	143
PDD Superior	31.54	53
YAD	14.98	111
Practice Area	**Quality Adjusted Case Weight (based on FY13 case ratios)**	**Annual New Cases/FCA**
CAFL	58.95	28
Mental Health	16.97	98
PDD District	18.03	92
PDD Superior	53.57	31
YAD	33.35	50

The workload assessment provides CPCS with an empirically based, state specific documented model that can be used to estimate staffing needs and caseload ranges from which departures can be understood. Based on qualitative assessments of individual caseloads, supervisors can adjust

[10] A full time attorney may not be assigned a full caseload based on other job responsibilities, such as training or supervision, so the number of attorneys will be greater than full caseload attorneys.

caseloads to reflect best practices. Caseload targets based on the range of each case type weight can be used to ensure resource equity between offices and practice areas. Additional data collection could also provide more insight into the factors that impact quality representation, including case types, client characteristics and staff workflow that might suggest a reduction or increase of case assignments.

The process of case weighting allowed CPCS and its practice areas to reflect on best practices as well as workplace satisfaction as it seeks to ensure quality representation within its budgetary constraints. A manageable caseload for each attorney encourages talent retention, helping to bring down the costs of training as well as case processing. Nevertheless, any caseload protocol should be used a guide, not a rule. During the course of this process, it has become clear that there can be multiple individual factors which impact the workload.

Different jurisdictions have engaged in a similar case weighting exercise and workload analysis.[11] Each jurisdiction offers varied case weights, reflective of local practice and circumstances. The growing body of time-based case weight studies from around the country provides a frame of reference to plan for quality representation by controlling caseloads. Based on the premise that a healthy and vibrant indigent defense bar is civic value, the workload of attorneys is an important measure of quality representation. The *Gideon* Project team's national recommendation is that technical and financial assistance should be provided to indigent defense representation organizations to engage in workload assessments.[12]

---

[11] American Bar Association, *The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards* (2014); Rand Corporation, *Case Weights for Federal Defender Organizations* (2011); National Center for State Courts, *Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment-Final Report* (2010); Neely, Elizabeth, *Lancaster County Public Defender Workload Assessment*, University of Nebraska Public Policy Center (2008); National Center for State Courts, *A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorney's Offices, and the New Mexico Public Defender Department- Final Report* (2007); and National Center for State Courts, *Maryland Attorney and Staff Workload Assessment* (2005).

[12] Trial courts throughout the United States, and indeed even different courts within a single jurisdiction, benefit from workload assessments. *See, e.g.*, http://www.ncsc.org/Topics/Court-Management/Workload-and-Resource-Assessment/Resource-Guide.aspx (a resource compiling over one hundred workload assessments conducted for trial courts in the United States by the National Center for State Courts).

VII. Conclusion

The goal of the larger project that the Center for Court Innovation and Committee for Public Counsel Services embarked upon was to review and improve data collection, performance monitoring, and evaluation capacity at the CPCS. Multiple deliverables have been created, including performance indicators, data reports, workload analysis report and an evaluation proposal. Finalizing performance indicators was a necessary first step in achieving both a realistic assessment of data capacity as well as evaluation capacity. We believe that the first step is for CPCS, and other similarly situation indigent representation organizations, to develop a quarterly or annual statistical report that lists out the very most critical performance measures and outcome indicators of the data that can most readily be collected, tracked and analyzed for the purposes of self-assessment. The next step is then to enhance data collection capacity to collect more indicators that are critical to a fuller understanding of the practice, and to advance plans to evaluate which indicators—or which concrete indigent defense representation activities—truly comprise evidence-based practices. We believe the lessons learned during this intensive self-reflective process provides invaluable recommendations to the field as a whole as indigent defense services embark on similar journeys.

EXHIBIT F

V. Policies and Procedures Governing Billing and Compensation

Revised November, 2011

Assigned Counsel Manual Table of Contents
CPCS Home Page

CHAPTER CONTENTS

1. Compensation
2. Publication of Policies of the Committee for Public Counsel Services
3. Prohibition From Being Privately Retained on the Previously Assigned Case
4. Representation of CPCS Clients on Unrelated Cases
5. Collateral Representation
6. CAFL Post-Disposition Related Matters
7. Notices of Assignment of Counsel
8. Attorney Vendor Customer Instructions
9. Indigent Court Costs Vendor Requirements
10. Attorney Certification Requirements
11. Bail-Only Cases
12. Late Bills
13. Representation-Concluded Bills
14. Determining When Representation Is Concluded
15. Probation Surrenders
16. Caseload Limits
17. Billable Hours Limit Per Fiscal Year
18. Monthly Interim Billing
19. Eight-Hour Daily Billing Limit
20. Two-County Limit
21. Bilingual Attorneys
22. Children and Family Law Cases: Pending Caseload Limit
23. Children and Family Law Cases: Client Contact Certification
24. Submission of Bills and Record-Keeping Requirements
25. Associates and Paralegals
26. Office-Related Expenses
27. Client Personal Expenses
28. Travel Expenses
29. Other Expenses
30. Expenses: Documentation Required
31. Expenses: Billing Instructions
32. No-Case Duty-Days
33. Compensation Rates
34. Docket Entry and Documentation Requirements
35. Continuing Legal Education
36. 1350 Hour Rule
37. CPCS Attorney Payment Schedule
38. Appendix A: Sample Time Record (pdf version)
39. Appendix B: Sample CAFL Time Record (pdf version)

1. Compensation

The attorney shall not accept any compensation or other consideration for assigned representation except through the Committee for Public Counsel Services. This rule applies to both indigent cases and marginally indigent cases.

2. Publication of Policies of the Committee for Public Counsel Services

All attorneys receiving case assignments through the Committee for Public Counsel Services must regularly review the CPCS website, www.publiccounsel.net, for updates of CPCS policies, procedures, and guidelines. New and revised policies are posted on the website continuously. Notice of new and revised policies and procedures are also posted periodically on E-Bill.

All attorneys receiving case assignments through CPCS will receive the CPCS Criminal Training Bulletin and/or the Children and Family Law Newsletter. Attorneys are expected to apprise themselves of all CPCS rules and policies published in this Manual, in the Training Bulletin and CAFL Newsletter, and on the CPCS website, www.publiccounsel.net. Attorneys are also responsible for apprising themselves of the information contained in notices posted on E-Bill.

3. Prohibition From Being Privately Retained on the Previously Assigned Case

The attorney may **not** be privately retained in a case in which s/he was previously assigned. The purpose of this rule is to prevent the appearance of impropriety, conflict of interest, solicitation, or fraud upon the court.

A. Exceptions to this general rule are outlined below:

1. Non-Indigent Client - Bail-Only Assignment

   If the client was originally found to be **not** indigent, but counsel was nevertheless assigned by the court at arraignment for bail purposes only, then the attorney may be privately retained by the client at the request of the client. In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

2. Originally Indigent Client - Intervening Determination of Non- Indigency

   If the client was originally found indigent and the attorney was assigned by the court, but during the course of the representation, the court makes a

subsequent determination that the client is **not** indigent, then the attorney may be privately retained by the client at that time, at the request of the client; **provided, however, in proceedings pursuant to G.L. c. 111, §§ 94C and 94G; c. 123; c. 123A; and c. 190B** where a subsequent determination that the client is not indigent is made **prior to the commencement of a hearing**, the attorney may be privately retained by the client at the client's request, unless the court directs the attorney to continue to represent the client at public expense or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court; and provided further, that where a subsequent determination that the client is not indigent is made **after the commencement of a hearing**, the attorney shall continue to represent the client at public expense or, in proceedings under G.L. c. 190B, from the assets of the client or another party at a rate set by the court. See also SJC Rule 3:10, § 5.

3. Care & Protection Assignment Prior to Indigency Determination

If a client in a Care & Protection case was assigned counsel upon filing of the petition before an indigency determination was made, and the court subsequently found the client to be not indigent and struck the appearance of counsel, then the attorney may be privately retained by the client, at the request of the client.

In such cases, the attorney shall fully explain to the client that representation of the client on such matters may create the appearance of impropriety, solicitation, or overreaching by the attorney. If the client continues to request to retain the attorney privately on the case, the attorney shall obtain a written informed consent signed by the client, stating the client's understanding of his/her right to seek other counsel for the private case.

B. The following matters are distinct from the underlying case and are not encompassed by the prohibition against being privately retained on a previously assigned case by the assigned client.

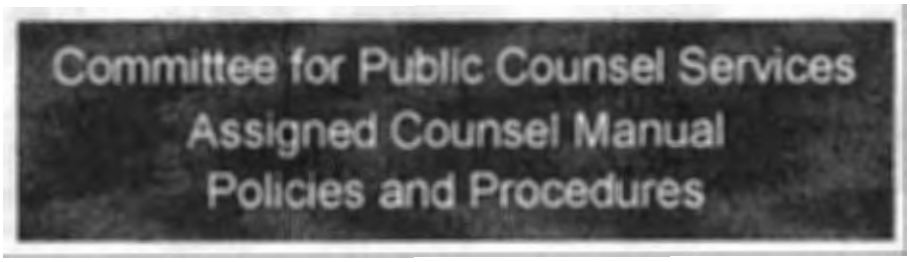
1. Parole Hearings

An attorney who was assigned to represent an indigent client on a criminal matter that resulted in conviction and incarceration, may at a later date be privately retained by the client to represent the client at the parole hearing.

2. SORB cases

An attorney who was assigned to represent an indigent client on a criminal matter involving a sex offense that resulted in conviction, and which later gives rise to a separate Sex Offender Registry Board case, may at a later date be privately retained by the client to represent the client in the

EXHIBIT G



IV. CRIMINAL: PERFORMANCE STANDARDS AND COMPLAINT PROCEDURES

CRIMINAL DISTRICT COURT JURISDICTION, SUPERIOR COURT JURISDICTION, AND MURDER CASES

Part I: Performance Standards Governing Representation of Indigents in Criminal Cases

Part II: Performance Standards Governing Representation of Indigent Juveniles in Delinquency, Youthful Offender, and Criminal Cases

Part III: Performance Standards Governing Representation of Indigent Juveniles in Department of Youth Services Grant of Conditional Liberty Revocation Cases

Part IV: Performance Standards Governing the Representation of Clients on Criminal Appeals and Post-Conviction Matters

---

PART I:

PERFORMANCE STANDARDS GOVERNING REPRESENTATION OF INDIGENTS IN CRIMINAL CASES

These standards are intended for use by the Committee for Public Counsel Services in evaluating, supervising and training counsel assigned pursuant to G.L. c.211D. Counsel assigned pursuant to G.L. c.211D must comply with these standards and the Massachusetts Rules of Professional Conduct. In evaluating the performance or conduct of counsel, the Committee for Public Counsel Services will apply these standards and the Massachusetts Rules of Professional Conduct, as well as all CPCS policies and procedures included in this manual and other CPCS publications.

Chapter Contents

I. GENERAL PRINCIPLES OF REPRESENTATION

II. PRELIMINARY PROCEEDINGS AND PREPARATION

III. PROBABLE CAUSE HEARINGS

IV. PRETRIAL PREPARATION

V. DISPOSITIONS BY PLEA OR ADMISSION

VI. TRIAL PROCEEDINGS

VII. SENTENCING

VIII. POST-TRIAL PROCEEDINGS

IX. ADDENDUM TO CPCS PERFORMANCE GUIDELINES GOVERNING CRIMINAL CASES

X. PERFORMANCE STANDARDS GOVERNING CRIMINAL CASES IN DRUG COURTS

I. GENERAL PRINCIPLES OF REPRESENTATION

A. Role of Defense Counsel

Counsel's role in the criminal justice system is to ensure that the interests and rights of the client are fully protected and advanced. Counsel's personal opinion of the client's guilt is totally irrelevant. The client's financial status is of no significance. Indigent clients are entitled to the same zealous representation as clients capable of paying an attorney. Counsel must know and adhere to all applicable ethical opinions and standards and comply with the rules of the court. Where appropriate, counsel may consider a legal challenge to inappropriate rules and/or opinions. If in doubt about ethical issues in a case, counsel should seek guidance from other experienced counsel or from the Board of Bar Overseers. Counsel shall interpret any good-faith ambiguities in the light most favorable to the client.

B. Education, Training and Experience of Defense Counsel

To provide competent representation, counsel must be familiar with Massachusetts criminal law and procedure, including changes and developments in the law. It is counsel's obligation to remain current with changes in the statutory and decisional law. Counsel should participate in skills training and education programs in order to maintain and enhance skills. Prior to undertaking the defense of one accused of a crime, counsel should have sufficient experience to provide competent representation for the case. Counsel should accept the more serious and complex criminal cases only after having had experience and/or training in less complex criminal matters. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal

representation, including information about practices of judges, prosecutors, probation officers, and other court personnel.

C. General Duties of Defense Counsel

1. Counsel's primary and most fundamental responsibility is to promote and protect the client's interest. This includes honoring the attorney/client privilege, respecting the client at all times, and keeping the client informed of the progress of the case. If personal reactions make it impossible for counsel to fulfill the duty of zealous representation, he or she has a duty to refrain from representing the client.
2. In order to properly prepare the client's case and to apprise the client of the progress of the case, counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. When counsel is assigned to represent a new client and the client is held in custody (e.g. in jail, house of correction, prison or other place of commitment for alcohol/drug or mental health evaluation), counsel should visit the client within three business days of receiving the assignment. Visiting the client means going to the client's place of confinement. Meeting with the client at the courthouse is not a substitute for a visit to the place of confinement, which is necessary to establish the attorney client relationship and to provide the same zealous representation as that provided to paying clients.

   In those instances when it will not be possible for counsel to see a new in-custody client within three business days of assignment, the attorney must: (1) write to the client within three business days of receiving the assignment and advise the client that s/he has been assigned to the representation and also inform the client of the date upon which counsel will visit the client; and (2) if appropriate, provide the client with a copy of discovery received in the case. Under no circumstances should an initial visit to a new in-custody client be delayed more than one week from the date of assignment. Counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise counsel of the evidence and defenses in his/her case.

   In order to advise the client about decisions to assert or waive rights to prepare the client to testify at any hearing, and to apprise the client of the progress of the case, counsel must meet with the client as needed and at reasonable intervals in private at counsel's office or at the client's place of confinement throughout the pendency of the case, and until the representation has concluded.

3. Counsel has an obligation to make available sufficient time, resources, knowledge and experience to afford competent representation of a client in a particular matter before agreeing to act as counsel or accepting appointment. Counsel must maintain an appropriate, professional office in which to consult

with clients and witnesses and must maintain a system for receiving regular collect telephone calls from incarcerated clients. Counsel must provide incarcerated clients with directions on how to contact the office via collect telephone calls (e.g. what days and/or hours calls will be accepted).

4. Counsel has an obligation to keep and maintain a thorough, organized, and current file on each client. As part of this file, counsel should maintain a "running sheet" or log which records information such as information obtained during all interviews of the client; interviews of witnesses, interviews of family members, friends and employers; client's background and history; court dates and events; contact with investigators and results of investigations; conversations with the prosecutor regarding discovery, dispositional issues including plea offers, trial issues; conversations with the probation officer; lobby conferences or conversations with a judge; conversations with police officers or commonwealth investigators; telephone conversations regarding the case; conversations, consultation and evaluation by experts, etc.
5. Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client. Such conflicts should be avoided where possible or addressed in a timely manner.
6. The attorney shall explain to the client those decisions that ultimately must be made by the client and the advantages and disadvantages inherent in these choices. These decisions are whether to plead guilty or not guilty and to change such plea; whether to be tried by a jury or a court; whether to testify at trial; whether to appeal, and whether to waive his/her right to a speedy trial.
7. The attorney should explain that final decisions concerning trial strategy, after full consultation with the client, and after investigation of the applicable facts and law, are ultimately to be made by the attorney. The client should be made aware that the attorney is primarily responsible for deciding what motions to file, which witnesses to call, what questions to ask, and what other evidence to present. Implicit in the exercise of the attorney's decision-making role in this regard is consideration of the client's input and full disclosure by the attorney to the client of the factors considered by the attorney in making the decisions. Counsel should inform the client of an attorney's ethical obligation, informed by professional judgment, not to present frivolous matters or unfounded actions.
8. Counsel's obligation to the client continues on all matters until and unless another attorney is assigned and/or files an appearance. Counsel should fully cooperate with successor counsel and must, upon request, promptly provide successor counsel with the client's entire case file, including work product.
9. Counsel should be aware of and protect the client's right to a speedy trial, unless strategic considerations warrant otherwise.
10. Unless the prejudice outweighs the benefits, counsel should seek any necessary recess or continuance of any proceeding for which counsel is inadequately prepared. Counsel should follow appropriate court practices to minimize inconvenience to any individuals.

11. Consistent with the obligations and constraints of both court and ethical rules, counsel should make reasonable efforts to seek the most advantageous forum for the client's case, e.g., motions to change venue, etc
12. Where counsel is unable to communicate with the client because of language differences, the attorney shall take whatever steps are necessary to fully explain the proceedings. Such steps would include obtaining funds for an interpreter to assist with pre-trial preparation, interviews, and investigation as well as in-court proceedings.
13. Where counsel is unable to communicate with the client because of mental disability, the attorney shall obtain expert assistance for an evaluation of the client to determine what steps, if any, can be taken to improve communication and understanding to acceptable levels. If no steps can be taken, counsel should address the court on the issue of the client's competence.
14. Counsel should be prompt for all court appearances and appointments and, if a delay is unavoidable, should take necessary steps to inform the client and the court, and to minimize the inconvenience to others.

II. PRELIMINARY PROCEEDINGS & PREPARATION

A. Arraignment

1. Counsel should be familiar with the bail laws, including the legal standards the court may consider in setting the conditions of release (G.L. c.276, §58) as well as the procedure for appeal of the court's decision. If the nature of the offense and/or the client's record indicate that the client may not be released on personal recognizance, counsel should insist on an opportunity to interview the client and conduct an appropriate investigation before the court considers setting bail. Before interviewing the client, counsel should examine the complaint and/or indictment and inform the client of the exact charges, should review the police report(s) and should review the client's probation record paying particular attention to any convictions, incarcerations, defaults, pending cases, open probation matters and open restraining orders.
2. Counsel should be familiar with the law regarding pre-trial detention on the grounds of "dangerousness" (G.L. c. 276, §58A). If the Commonwealth moves for a hearing to determine whether or not the client should be detained, counsel should determine whether or not there is a legal basis for such a motion. Counsel should seek to minimize the amount of time the client is held prior to a detention hearing. In preparing for a detention hearing, counsel should consider the wisdom and consequences of summonsing witnesses including the complainant.[1]

[1] If counsel is not eligible to handle the case-in-chief, s/he should seek assignment to eligible counsel prior to the detention hearing.