

Written Testimony
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I. INTRODUCTION

This written testimony addresses the subject of Due Process Violations during the detention and removal of immigrants and U.S. citizens by Immigration and Customs Enforcement. The observations and opinions contained herein are solely those of the Florence Immigrant and Refugee Rights Project and do not necessarily reflect the views of any other organization, foundation, or contributor.

A. *About the Florence Project*

The Florence Immigrant and Refugee Rights Project (“the Florence Project”) is a non-profit organization dedicated to protecting the rights of immigrants, refugees and U.S. citizens detained by Immigration and Customs Enforcement in Arizona. In 2007, the Florence Project provided legal orientation presentations and other services to over eight thousand people in removal proceedings. The following written testimony reflects the stories of our clients, the observations of the Florence Project staff, and our subsequent conclusions.

B. *Due Process in Removal Proceedings*

As a branch of the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”) is responsible for providing interior enforcement of the nation’s immigration laws. This enforcement often takes the form of detaining and deporting individuals

suspected of being in violation of immigration laws. In order to determine whether an individual has violated immigration laws, some immigrants are put into “removal proceedings” before an immigration judge, while others are statutorily deported or excluded by DHS. Those who are put into removal proceedings have the opportunity to contest their removal or apply for relief from deportation before an immigration judge, while others may be summarily removed by DHS without such an opportunity. It is the opinion of the Florence Project that many of the policies, regulations, and practices used in the detention and removal of persons from the United States represent a systemic violation of the constitutional guarantee of due process

In *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001), the U.S. Supreme Court emphasized that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." However, the Florence Project has noted the continual erosion of this constitutionally-mandated right. In its efforts to provide national security in insecure times, ICE has not only swept up persons who are present in the U.S. in violation of immigration laws, but also persons who are not deportable, persons who are U.S. citizens by virtue of birth or derivative status, and persons who are otherwise eligible to remain in the U.S. While some of these individuals have access to resources that allow them to reclaim these rights, many do not, and, as always, due process remains most elusive to vulnerable populations such as children, the mentally ill, racial and ethnic minorities, people who cannot afford lawyers, and those without family support.

This testimony uses the stories of our clients to illustrate some of the most common and disturbing due process violations that the Florence Project has witnessed in the context of the arrest, detention, and deportation of immigrants and U.S. citizens in Arizona. Except where permission has been given, all names have been changed.

II. DUE PROCESS DURING APPREHENSION AND ARREST

A. *Profiling*

When enforcement resources are stretched thin, profiling is sometimes used as a shortcut to apprehend subjects perceived to be non-U.S. citizens. The intense pressure on ICE to enforce the nation's immigration laws often leads to the arrest of persons on the basis of race, language, surname, or other factors that are unreliable in determining immigration status.

Javier Rodriguez was born at his parents' home in El Paso, Texas and grew up in the U.S. but was never issued a birth certificate. After a minor criminal conviction, he was told by his probation officer that she would have to report him to ICE for deportation. When Javier informed her that he was, in fact, a U.S. citizen, the probation officer replied, "I know, I'm sorry, but I have to cover my ass." Javier was detained in Eloy, Arizona for six months while he sought to prove his citizenship.

While individuals with strong resources and support systems are often able to secure their release from detention (or avoid incarceration altogether), those without assistance from family or friends – or even those who are unable to contact family or friends – are at a severe disadvantage. If persons with no access to outside support are incarcerated as a result of profiling, it is often extremely difficult for them to access the resources necessary to ensure their constitutional protections.

Thomas Warziniak was born in Minnesota, grew up in the South, and never traveled outside the U.S. After serving a sentence in a Colorado county jail for a minor criminal conviction, he was told that he would be transferred to Florence, Arizona for deportation, reportedly because he had a "foreign-sounding name." Thomas had lost touch with his family and did not have a copy of his birth certificate. While in Florence, he was told that it cost \$30 to order a copy of his birth certificate. When a Florence Project attorney first spoke with Thomas, he reported that he was working in the kitchen for a dollar a day to earn enough money to order his birth certificate. He had accumulated eight dollars and was hoping to earn the rest before his next hearing.

B. Enforcement of Federal Immigration Law by Local Authorities

When local law enforcement untrained in immigration issues attempt to enforce complex immigration laws,¹ errors often result. Sometimes these errors can lead to the detention of persons who are not deportable; other times, these mistakes can cause grave, long-term harm to the person involved.

Rosa has been a lawful permanent resident since 1989. In the fall of 2006, local police went to her house on a report of a domestic disturbance and asked to see proof of her immigration status. When Rosa produced her permanent resident card, the officer pronounced it a “fake” and arrested her on charges of forgery. After ICE confirmed that Rosa was indeed a permanent resident, charges were dropped and Rosa was released. However, the local police department maintained that the card was forged and refused to release it. Rosa was unable to apply for a job or demonstrate eligibility for low-income housing for over a year. Due to lack of income, Rosa could not afford to pay the \$370 fee to replace the card. Only after aggressive advocacy by the Florence Project did local officials confirm with ICE that the card was in fact valid and release it to Rosa.

C. Expedited Removal

Under a practice known as “expedited removal,” some persons apprehended within a certain distance of the border after illegally entering the U.S. are only entitled to see an immigration judge if they express a fear of returning to their country.² However, people who meet these criteria are frequently subject to intense pressure from ICE and the Border Patrol to waive their right to apply for political asylum.

Brenda fled El Salvador after being threatened by gangs and was arrested by Border Patrol after crossing the U.S./Mexico border. During her interrogation, Border Patrol presented her with a paper that had two statements written on it: one expressing a fear of returning to El Salvador and a desire to see an immigration judge, and the other stating no fear of returning to El Salvador and a waiver of her right to see an immigration judge. When the officers presented her with the paper, there was already an “X” marked in the box before the sentence stating that she was not afraid to return to El Salvador. The officers told her to sign the paper at the bottom. Brenda lied and said she could not read

¹ Under section 287(g) of the Immigration and Nationality Act, the Attorney General is permitted to enter into written agreements with states that allow a state officer or employee to perform the functions of an immigration officer.

² 8 C.F.R. § 235.3(b)(4).

or write, and she repeatedly expressed a fear of returning to El Salvador. The officers kept pressuring her to sign, even showing her how to make an “X” with the pen on the signature line. They told her she would spend a long time in jail if she tried to fight her case. Eventually Brenda relented and signed the form.

D. Transfer of Custody

If a person in criminal custody is believed to be subject to deportation, ICE may issue a detainer requesting that the facility notify ICE when the person is scheduled to be released.³ Under federal regulations, a facility may hold an individual for up to 48 hours beyond his or her scheduled release in order to give ICE a chance to assume custody.⁴ However, this 48-hour rule is routinely violated when ICE fails to show within the allotted time and the person continues to be held by the facility, sometimes for extended periods of time.

Paul was scheduled to be released from the Yavapai County Jail in Arizona on November 7, 2008. ICE filed a detainer and was required to assume custody of Paul on November 9. However, Paul continued to be incarcerated by the state until November 14, when ICE finally arrived to pick him up. During this week, Paul repeatedly asked to be released but was told that he was being held for ICE, even though the authority to hold him had long expired.

III. DUE PROCESS IN DETENTION

A. Transfer to Isolated Areas

While many immigrants live in heavily-populated urban areas on either coast, ICE detention centers are often located in central, isolated portions of the country far from an individual’s home. As a result, persons may be arrested by ICE in one place and transported thousands of miles away to a detention center in which the person has limited access to legal counsel, documents, witnesses, and family and friends. In most cases where a person is

³ 8 C.F.R. § 287.7(a).

⁴ 8 C.F.R. § 287.7(d).

presenting a claim to citizenship or other forms of relief, immigration cases are heavily dependent on documents such as birth certificates, tax receipts, pay stubs, and school records – all of which are difficult to obtain when a person is incarcerated in a remote area far from home. While most civil parties have the option to move for a change of venue based on witnesses, convenience, or other factors, immigration judges routinely deny motions for a change of venue based on cost and inconvenience to ICE, rather than to the person being deported. If the person is transported thousands of miles away from home and later released from ICE custody, she or he will merely be dropped off at a local bus station, with no resources to pay for the return trip.

John is a lawful permanent resident who lived in Fresno, California with his U.S. citizen wife and three U.S. citizen children, all under the age of ten. After John was convicted of being under the influence of drugs, he was transferred directly to an ICE detention center in Eloy, Arizona. John was eligible to apply for a waiver of deportation based on hardship to his family. However, without John's income, John's family was struggling financially and faced foreclosure on their house. John's wife could not get time off from her job at Safeway and didn't have money to travel to Arizona with her three children. With no witnesses to testify at his hearing, John could not prove sufficient hardship and was denied the deportation waiver.

Frequently, ICE will begin removal proceedings in one state and later transfer detainees to remote locations in other states. This often occurs despite the fact that the person has already hired a local attorney to represent him or her in court. Immigration judges commonly deny motions to return venue to the original location, requiring the lawyer to either withdraw from the case or make frequent, expensive trips to the new location, with limited access to the client between visits.

In November 2007, approximately 350 people were transferred from the San Pedro facility in California to Arizona and Texas. Many of these transferees had already retained counsel from the Los Angeles area, and their attorneys were not notified of the transfer beforehand and were subsequently unable to contact their clients. In one case, a mentally ill client with a history of psychosis attempted suicide soon after his transfer and was put into special segregation, where he was unable to contact his family or receive any visits, calls, or letters from his attorney for over a month.

Immigration law contains subtle variations between different circuit courts of appeal. The determination of whether or not a person can be deported may ultimately depend on the circuit in which the person is located. Immigration attorneys often advise clients on legal strategies based on the law in their particular circuits, and clients act in reliance on this advice. However, since a person is subject to the circuit law in which he or she is located during removal proceedings, a transfer to another circuit will render this legal advice ineffective, if not outright harmful.

Jim is a lawful permanent resident who was charged with a crime in Queens, New York. Based on his public defender's discussion with an immigration lawyer, Jim was informed that he would not be deported if he accepted the offered plea, and he did so in reliance on this advice. When Jim was transferred to Eloy, Arizona, however, the case law was unfavorable to his legal argument, and an immigration judge ordered him deported.

B. No Preliminary Hearing

When a person is detained in criminal custody, most courts require that a preliminary hearing be held within 48 hours of the arrest to determine whether there is probable cause to believe that the person committed the crime in question.⁵ By contrast, immigration law requires no such preliminary hearing, and persons in Arizona immigration courts commonly wait several weeks or even a month before seeing a judge for the first time. Although a person may request a bond hearing to challenge his or her placement in immigration custody,⁶ even a finding by the judge that the person is not subject to deportation may fail to result in the individual's release.

Michael was detained in Eloy, Arizona despite the fact that he had automatically acquired U.S. citizenship through his father. When Michael asked for a custody hearing, the judge agreed that Michael was a citizen and granted him a \$1500 bond, stating that he did not have the power to release Michael on his own recognizance. Michael could not pay the \$1500 bond and remained in detention for seven months during ICE's appeal of the judge's decision.

⁵ *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

⁶ See *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

C. *Inability to Obtain Legal Documentation*

Presenting a case in immigration court usually requires the submission of extensive documentation, including birth certificates, letters from family and friends, tax returns, pay stubs, school records, affidavits, articles on country conditions, and other evidence. Even with the assistance of family and friends, gathering these documents can be nearly impossible for a person who is detained thousands of miles from home.

Gerardo sought asylum in immigration court based on his fear of return to his country. The judge told Gerardo that he would be required to present evidence based on the alleged persecution he had suffered.⁷ Gerardo repeatedly attempted to call his family from the detention center to get copies of his medical records demonstrating that he had been physically abused. However, every time he tried to call, the facility's phone dropped the call.

D. *Lack of Access to Basic Legal Necessities*

Approximately 90%⁸ of detained persons in removal proceedings do not have sufficient funds to hire an attorney, leaving them to prepare documents and make complicated legal arguments on their own. However, detainees often lack access to even the most basic of materials required to prepare and present their legal cases. This problem is especially prevalent in contract facilities holding both immigration detainees and inmates serving prison sentences.

In Pinal County Jail in Florence, Arizona, which currently holds approximately four hundred and fifty immigration detainees, individuals were not permitted to have pens pursuant to jail rules. Lack of access to pens made it impossible to fill out the application forms for relief from deportation as required by the immigration judge. After several months, jail officials permitted detainees to "check out" writing instruments, but detainees are still prohibited from keeping pens in their cells. One detainee was recently placed on disciplinary lockdown for 24 hours when authorities discovered a pen in his cell.

⁷ Under the Real ID Act of 2005 (Pub. Law No. 109-13), immigration judges and even ICE attorneys can require an asylum applicant to produce corroborating evidence of his or her asylum claim unless the judge is convinced that such evidence is unavailable.

⁸ Elizabeth Amon, *INS Fails to See the Light*, National L.J., March 5, 2001.

Similar problems exist with lack of access to copy machines, working telephones, and legal reference materials.

In early February 2008, David was ordered by the immigration judge to present a supplemental brief on the legal issues in his case. Although ICE detention standards mandate access to a law library, when David sought to make use of the facility's library in order to prepare his brief, he was told that it had been "shut down."

Even when a facility maintains a law library, certain persons within the detention center often have little or no access to it.

In Pinal County Jail in Florence, Arizona, detainees have limited access to legal reference materials on immigration law. In facilities in Florence and Eloy, Arizona, persons detained in medical and segregated custody are not permitted to use the law library. Although children are frequently expected to represent themselves in court, they have no access to law libraries. In Eloy, Arizona, over two hundred women are severely restricted from using the law library since it is being used by male detainees.

Detainees often have legal documents when they arrive at the facility and are frequently served with an immigration charging document, known as a "Notice to Appear," soon after their arrival. However, these documents are regularly kept in the individual's property in a separate part of the facility and are difficult to access by the detainee. These legal documents may ultimately prove vital to the person's case.

Isaac was charged with entering the U.S. without having been inspected or admitted. He conceded this charge but maintained that he had since been granted lawful permanent residence and was entitled to remain in the U.S. Isaac insisted that his permanent resident card was being kept in his property and repeatedly tried to gain access to it. After six months of detention, he was finally allowed to access his property, at which time it was confirmed that his permanent residence card was in his property. Only after much prodding by Florence Project attorneys did ICE verify through their database that Isaac was a permanent resident and concede that he was not deportable.

At the appellate level, detainees frequently conduct their cases by mail, with limited access to overnight delivery services such as Fed Ex. Errors in the mail system of the immigration appeals court, along with delays in many detention facilities, can be fatal to a client's case.

Alfonso filed an appeal with the Board of Immigration Appeals and was awaiting a transcript of his proceedings in order to write his brief. Although transcripts and due dates are usually sent out three weeks before the briefing deadline, Alfonso's mail was delayed. When he finally received the transcript and due date for his brief, he discovered that the brief was due in Virginia the next day. Due to the fact that he was detained, Alfonso could not submit his brief on time and was unable even to ask for an extension before the deadline expired.

E. Lack of Access to Attorneys

Even when persons hire attorneys or have the opportunity to receive advice from other legal providers, delays and limited access are common. Detention officials regularly deny access to lawyers if the facility is on lockdown or the individual is confined in a medical unit, in solitary confinement, or on suicide watch. The Florence Project often encounters obstacles in its requests to provide orientation presentations and conduct legal visits.

In November 2007, several Florence Project attorneys attempted to present their scheduled legal orientation to individuals who were attending their first court the next day. Facility officials refused to permit the detainees to walk through the prison yard to attend the orientation, claiming that they could not allow the detainees to walk unsupervised through the morning fog.

F. Detention without Charges

A bedrock principle of American law holds that it is unconstitutional to detain individuals without charges. However, the practice of incarcerating immigrants without a Notice to Appear or other charging document is common in immigration proceedings.

In Arizona, ICE policy interprets immigration law to mean that refugees who have not adjusted their status to that of a lawful permanent resident within one year of their arrival can be detained while their applications for resident status are pending with the U.S. Customs and Immigration Service. Until recently, no expedited track for the processing of applications from these detained refugees existed, and refugees were commonly detained without any immigration charges for a year or more while their applications were adjudicated. While an expedited track has since been established, unadjusted refugees are still routinely held for six months or more without charges or the ability to receive a bond determination from an immigration judge.

Even a decision by the immigration judge that a person is not deportable or has been granted relief may not result in a person's release. If ICE is unable to sustain the lodged charges, it frequently moves to dismiss the case without prejudice and detains the person for days or weeks before filing new charges. In *Eloy and Florence*, a person who has had his or her deportation proceedings terminated or has been granted asylum or other forms of relief from deportation can continue to be detained if ICE chooses to appeal or even reserves the right to appeal.

Victor is a lawful permanent resident who was suspected of drug trafficking. After the immigration judge at Eloy determined that there was no evidence to support this charge, ICE filed an appeal of the judge's decision. While in detention, Victor's nine-month old son was discovered to have a hole in his heart and was hospitalized in intensive care in Tucson. Despite having won his case, Victor desperately tried to abandon both his case and his permanent residence so he could be deported and illegally reenter to see his son in the hospital.

Even after a deportation case has been dismissed, ICE frequently continues to hold individuals for days or even weeks without charges if they believe they will be able to bring new charges or evidence in the foreseeable future.

Charlie is a lawful permanent resident detained at Eloy, Arizona who argued that ICE had presented insufficient evidence to prove that he was deportable. After six months, ICE filed a motion to dismiss the case without prejudice, which the immigration judge granted. Instead of being released, Charlie spent a month being detained with no charges. Eventually, ICE refiled the same charges but presented no new evidence in support of them. Charlie was detained for an additional month until the immigration judge terminated proceedings for the second time.

G. Children

Despite the landmark *Flores* settlement that established minimum standards for the treatment of minors during detention and deportation,⁹ children are routinely detained and removed in violation of due process considerations. Children as young as six months old may be

⁹ *Flores v. Meese*, No. 85-4544 (C.D. Cal. 1997).

placed in shelters; on average, their cases last between one and one-and-a-half years. During this time, they have no right to appointed counsel, nor to a guardian ad litem. Minors may also be subject to practices such as reinstatement of removal and voluntary return in which they have no right to see an immigration judge. When they do see an immigration judge, many children are forced to represent themselves on complicated legal issues with no access to law libraries or legal advice. Even when the child is able to retain a lawyer, the lawyer may not be permitted to accompany the child to certain interviews with ICE officials, such as interviews regarding whether the child is eligible to apply for various forms of political asylum.

Miguel is a 15 year-old indigenous boy from Guatemala who speaks limited Spanish. He was interviewed to determine whether he was eligible to apply for political asylum by an ICE official who did not speak Spanish. He asked his case worker at the shelter to write on his deportation paperwork that he wanted to see a judge. Instead of seeing the judge, Miguel was deported several days later.

It is common for minors who are apprehended by ICE to be wrongly labeled as adults and detained in adult detention facilities, often alongside persons with criminal histories. Once a child has been deemed to be an adult, ICE usually requires a birth certificate in order to transfer the child to juvenile custody; however, such transfers rarely occur since most children do not travel with their birth certificates. Furthermore, children who are put in adult proceedings are unable to take advantage of certain procedural safeguards, such as the right to avoid a form of accelerated deportation called “expedited removal” in which there is no right to apply for relief from an immigration judge.

Carlos came to the U.S. at the age of sixteen, fleeing severe and ongoing physical and sexual abuse. After he was transferred to an adult facility, he informed an official that he was not an adult. Instead of being moved to a juvenile facility, he was placed in solitary confinement. Although Carlos was eligible to apply for asylum as well as a special visa for children who have been abused, neglected or abandoned, he was never taken to see an immigration judge. He had no money and was unable to make phone calls or otherwise seek assistance. Carlos was eventually deported and ended up in the same abusive situation from which he originally fled.

Even when children are accompanied to the U.S. by their parents, they are often separated and detained in different locations with no way to communicate with one another. This is particularly problematic since a child's deportation case may be dependent on the parent's, yet no avenues exist for the child to agree to the parent's legal decision or even be made aware of it.

Gabriela crossed the border with her mother, but after their arrest, they were detained at facilities sixty miles apart with no ability to communicate. Gabriela informed a Florence Project attorney that she wished to apply for political asylum; however, her mother had already signed paperwork accepting deportation for them both. They were eventually deported together and Gabriela had no opportunity to apply for asylum.

H. ICE Denial of Bond

In certain cases, regulations allow ICE to overrule an immigration judge's decision to grant bond.¹⁰ Called "automatic stays," these regulations effectively allow ICE to disregard the traditional hierarchy of U.S. courts and exercise a "veto power" over the decision of the judge.

Daniel was granted a waiver of deportation in 2004 after being convicted of several minor but deportable crimes. In 2007, ICE again detained Daniel, claiming that he could be deported for the same crimes for which he was already granted a waiver. When ICE failed to submit evidence of any new convictions since 2004, the judge granted Daniel a bond. ICE subsequently filed an "automatic stay" that deprived Daniel of the right to pay the bond.

Even when ICE does not file an automatic stay, it may arbitrarily decide to reject a person's efforts to pay his or her bond, even a bond imposed by a federal judge.

Adam was detained in Eloy, Arizona for over four years while his case was on appeal. During this time, the U.S. District Court of Arizona granted his petition for habeas corpus and ordered ICE to provide Adam with a bond hearing in front of an immigration judge. After the immigration judge granted Adam a bond, ICE refused to allow him to post the bond and be released, arguing that the District Court had only ordered ICE to *provide* a bond hearing, not to accept the bond when it was actually paid.

¹⁰ 8 C.F.R. § 1003.19(i)(2).

I. Coerciveness of Detention

The physical, financial, and emotional strains on a detainee and his or her family often become so intense that many people choose to accept deportation rather than endure weeks, months, and even years in immigration custody. This frequently happens in spite of the fact that the individual is not deportable or is eligible for relief from deportation under the law.

Kim was a lawful permanent resident charged with removability for the conviction of two crimes involving moral turpitude, one of which involved stealing ham for a sandwich. He was granted a waiver of deportation by the immigration judge, and ICE appealed. During the appeal, the immigration judge granted Kim a bond and his local church gathered the money to pay it; however, ICE placed an automatic stay on the bond, which prevented him from being released. Although represented by a Florence Project attorney on appeal, Kim could no longer tolerate being incarcerated and wrote several letters directly to the appeals court asking to abandon his lawful permanent resident status and be deported immediately. His attorney was not aware of these letters and had already submitted a brief when she was informed that the appeals court was granting his request to abandon his permanent residence.

IV. DUE PROCESS IN IMMIGRATION COURT

A. Persons Detained who are Not Removable

Although ICE may charge that a person is deportable, many people are able to successfully rebut this charge by proving they have a right to remain in the U.S. One of the most common ways immigrants can remain in the U.S. is by proving that they are, in fact, U.S. citizens. U.S. citizenship is conveyed by birth, naturalization, or acquisition or derivation through a U.S. citizen parent. *On average, the Florence Project encounters between forty to fifty cases a month of people in immigration detention who have potentially valid claims to U.S. citizenship.* These individuals will commonly be detained for weeks, months, and even years while attempting to prove their citizenship. While some are ultimately successful, others often abandon their cases in the face of what can feel like indefinite detention.

Joseph was born in the Sudan and had a claim to derivative U.S. citizenship based on the fact that his parents had naturalized before his eighteenth birthday. When Joseph submitted his original birth certificate from the Sudan along with a translation from the original Arabic, ICE requested the right to submit its own Arabic translation. While Joseph's translation correctly interpreted the date of "2/10/85" as "October 2, 1985" based on the Arabic practice of listing the day first, the ICE translation incorrectly interpreted the date as "February 10, 1985," despite the fact that this contradicted another part of the birth certificate that listed the "Date of birth in letters" as October 2, 1985. The judge accused Joseph of "playing fast and loose with numbers" and ordered him deported after over a year in removal proceedings. Disgusted, Joseph waived his right to appeal. Only upon the insistent urging of a Florence Project attorney did Joseph agree to be represented by an attorney and file a motion to reopen his case. Upon submitting a new translation from an Arabic professor, the judge finally recognized the error and terminated deportation proceedings. Despite the ruling, ICE did not release Joseph until forty days after the judge's decision.

Even if a person does not have a claim to U.S. citizenship, he or she may still be able to assert a right to remain legally in the United States. For instance, while lawful permanent residents can be deported for committing certain crimes, ICE is often overly aggressive in charging which crimes can actually result in deportation. In 2007, at Eloy alone, the Florence Project assisted 73 permanent residents who were ultimately found not to be removable despite being charged with removability by ICE.

Nicholas was arrested for a DUI and sentenced to a work furlough program. One day when he was scheduled to return to serve his time, he had to take his son to the emergency room and reported to the jail fifteen minutes late. He was ultimately convicted of Escape from Jail and transferred to ICE custody. ICE charged that his offense was an aggravated felony and that he could be deported for life with no chance to remain in the U.S. An immigration judge determined that Escape from Jail was not an aggravated felony and terminated his deportation proceedings; ICE appealed. Although the appeals court ultimately agreed with the judge, Nicholas was detained for a total of ten months. During these ten months, Nicholas lost his job, his U.S. citizen wife and five children were evicted from their home, and his two oldest sons were forced to drop out of school in order to take jobs and support the family.

Sometimes deportation proceedings are merely the result of an egregious error. While such errors can often be resolved quickly with the help of an attorney or outside support, the

consequences for detainees and their families who do not have access to such resources can be permanent and devastating.

Ming Duch was a lawful permanent resident who was put into deportation proceedings on the basis of two alleged convictions for domestic violence against his wife, Judy. Throughout his deportation proceedings, Ming insisted that he was never convicted of domestic violence and did not have a wife named Judy. The immigration judge found Ming deportable and denied his application for a waiver of deportation based on Ming's failure to take responsibility for his crime and lack of rehabilitation. When Ming turned to a Florence Project attorney for help, the attorney discovered that the dot-matrix print on Ming's papers made an "O" look like a "D" and that the conviction documents actually referred to a person named "Ming Ouch." ICE had argued that Ming should still be deported, maintaining that "Ouch" was simply Ming's alias. However, an investigation revealed differences in dates of birth, Social Security numbers, and handwriting samples between the two people. The judge finally agreed to reopen Ming's case after an official in California confirmed that a person named Ming Ouch had been reporting for probation in San Francisco during the five months that Ming Duch was detained in Arizona.

B. Judges Barred from Making Individualized Determinations on Custody

In determining whether an individual should be released on bond, judges have historically relied on the twin considerations of flight risk and danger to society. However, certain categories of persons in removal proceedings may be denied bond based on factors entirely unrelated to these considerations. Persons detained at the border, known as "arriving aliens," are ineligible for bond even if they can prove that their entire family resides in the U.S. and there is a very small chance that they will abscond.¹¹ Furthermore, section 236(c) of the Immigration and Nationality Act mandates that an individual convicted of certain nonviolent crimes be denied bond regardless of whether the crime is an indication of flight risk or danger to society.

Raymond is a lawful permanent resident who was put into removal proceedings for a single possession of drug paraphernalia. Raymond's family all live in the U.S., and his son, Shawn, is a third-grader with severe autism. Shawn is enrolled in a special school but has frequent bouts of uncontrollable behavior; when this occurs, Raymond is the only

¹¹ 8 C.F.R. § 1003.19(h)(1)(i)(B).

person who can usually calm him down. Raymond was eligible for a waiver of deportation and had strong chances of winning this waiver. However, despite the fact that Raymond's conviction did not suggest that he would be a flight risk or a danger to society, and despite the hardship to Shawn and the rest of Raymond's family, the immigration judge was statutorily bound to deny Raymond's request for bond. He was detained for a total of eight months before ultimately winning his case.

C. Lack of Legal Competency

Over 90% of persons detained in immigration custody are unable to afford a lawyer to represent them.¹² The majority lack English skills, have limited formal education, and have received no training in immigration law. Nevertheless, they are responsible to enter pleadings, contest charges, gather evidence, cross-examine witnesses, write motions and briefs, and make legal arguments before an immigration judge. Not surprisingly, many of them are at a painful disadvantage when trying to present their cases to judges and opposing counsel who possess years of experience in immigration law. Immigration law is often compared in its complexity to the tax code, and there are many issues on which case law does not yet exist. When a novel legal issue arises, busy and overworked judges often rely on ICE attorneys to brief the issue without the benefit of an opposing point of view.

Sara grew up in a small indigenous village in Guatemala, had a second grade education, and suffered years of abuse and domestic violence from her U.S. citizen husband. A Florence Project attorney informed Sara that she was eligible to apply for a less-common form of immigration status based on the abuse she had suffered from her husband, and the attorney even wrote down the name of the relief for which she was applying so she could repeat it to the judge. In court, Sara was so terrified of offending the judge that she was unable to ask for an application for the status and instead went along with everything the judge said. Only after three hearings did Sara work up the nerve to ask for the application, at which time the judge told her that such a form of relief didn't exist.

D. Persons with Mental Illness

¹² Elizabeth Amon, *INS Fails to See the Light*, National L.J., March 5, 2001.

A significant percentage of persons in immigration custody suffer from mental illness, at times so severe that the person is periodically transferred to psychiatric hospitals between hearings. The mere fact that a person is ruled “incompetent” does not prevent removal proceedings from going forward. Mentally ill persons do not receive appointed counsel and are forced to represent themselves before an immigration judge. The only provision made for mentally ill detainees is the right to have a friend, caretaker, or custodian appear in court with the detainee. In most cases, this consists only of the detainee’s Notice to Appear being served on the warden of the facility and does not result in the appearance of anyone in court on the detainee’s behalf.

Anna suffers from psychosis and schizophrenia and is currently representing herself before the immigration judge. She repeatedly states that she was born in France, that former president John F. Kennedy is her father, and that the Pope is also her father. Despite the obvious unreliability of the latter two statements, ICE has used the former to charge her with removability. ICE does not claim to know when and where she entered the U.S. and has presented no evidence – apart from her statement – that she is a citizen of France.

E. Lack of Interpretation

While interpreters are available to facilitate communication with non-English speaking persons during immigration hearings, immigrants are commonly served with a Notice to Appear, application forms, and other documents in English without an accompanying translation. Despite local court rules mandating that documents be served in advance, ICE often submits key evidence the day of the hearing, forcing the person to make crucial legal decisions based on documents that the individual cannot read or otherwise have interpreted to him or her in court.

Martha was a lawful permanent resident who was allegedly convicted of several counts of shoplifting. She denied the allegation and charges of removal. The day of her final hearing, ICE submitted documents supposedly proving her conviction, which she was unable to read and to which she did not object. Based on these documents, the immigration judge ordered her deported. When she was represented by a Florence

Project attorney on appeal, the appeals court found that the documents were, in fact, insufficient to prove that she was deportable for the conviction.

At times, an immigration court may not be able to obtain an interpreter for the court proceedings at all. Failure to obtain this interpreter does not prevent the removal hearing from going forward.

Robert was born in the Marshall Islands and only spoke Marshallese. When he appeared in immigration court, the interpretation service used by the court was unable to find a Marshallese interpreter. Robert's case was reset every month, despite the fact that the interpreter service had repeatedly informed the judge that it would not be able to obtain a Marshallese interpreter. After eight months of incarceration, Robert agreed to try to conduct his hearing in broken English and was ordered removed by the immigration judge.

F. Extreme Delays

As pressure mounts to remove people found in violation of immigration laws, the dockets of immigration judges have become increasingly packed, forcing detainees to be incarcerated for longer and longer periods of time while their cases are being decided. Although the Supreme Court has found that six months is a reasonable period of time to complete removal proceedings, including an appeal,¹³ the average application for a waiver of deportation at Eloy will commonly last ten months, without appeal. Compounding the delays is a requirement for background checks on all persons applying for relief from deportation, which can easily add several more months to a person's time in detention.

Frank is a lawful permanent resident in his sixties who suffers from jaundice and liver failure. He was placed in removal proceedings for a conviction of simple drug possession. The judge informed Frank that he would grant him a waiver of deportation, but the judge was required to wait for the completion of background checks before releasing Frank. Because of Frank's medical condition, the FBI could not verify the ink impression made from his fingerprints despite taking his fingerprints on three separate occasions. Due to the fingerprint problems, Frank was detained an extra six months following the judge's grant of his waiver.

¹³ *Demore v. Kim*, 538 U.S. 510, 530 (2003).

Due to the complicated nature of immigration law, even seemingly straightforward cases can require years to sort out in appellate court. During this time, ICE may sometimes employ dilatory tactics despite the fact that the person in question is incarcerated.

Eric is a lawful permanent resident from the Philippines who was convicted of joyriding. His case is currently pending at the Ninth Circuit and he has been detained in immigration custody for four and a half years. During his case at the Ninth Circuit, ICE has requested a total of eleven continuances, some based on potential writs of certiorari to the Supreme Court that have not yet been filed. Eric's father lives in California and has been diagnosed with terminal cancer. Eric's one wish is to be released in order to see his father before he dies.

G. No Release during ICE Appeal

Even if an immigration judge decides that a person is not deportable or grants the person relief from deportation, the individual will continue to be detained if ICE files an appeal of the judge's decision. In certain types of cases, such as protection under the Convention Against Torture, ICE appeals almost every case. Frequently, persons who are otherwise eligible to fight their cases and have strong claims for relief are discouraged from doing so given the probability of continued detention even after their case is granted.

Bertrand fled Haiti after a military coup ousting former president Jean-Paul Aristide and applied for asylum based on the fact that his father, a personal bodyguard for Aristide, was shot. He has been granted protection under the Convention Against Torture once and political asylum twice. Every time he is granted relief by the immigration judge, ICE has appealed. As a result, he has been detained in immigration custody for a total of four and a half years.

V. RECOMMENDATIONS

In light of these consistent and widespread violations of due process that are occurring in the U.S. system of detention and deportation, the Florence Project makes the following recommendations:

- ***Implement and mandate existing ICE detention standards***

ICE has created an extensive and comprehensive set of standards for the treatment of persons who are detained during removal proceedings.¹⁴ Many of these standards address the lack of access to telephones, basic legal necessities, and other concerns expressed in this testimony. However, these standards are not currently enforceable and thus are widely ignored, particularly when persons are detained in local and county jails. Implementation and enforcement of ICE detention standards would provide significantly more protection for immigrants and U.S. citizens in deportation proceedings.

- ***Explore more cost-effective alternatives to detention***

The widespread use of detention is a recent phenomenon and reflects political pressure rather than necessity. Feasible and cost-effective alternatives to detention, such as ankle monitors, currently exist and provide similar levels of security without the exorbitant costs and due process concerns of detention.

- ***Immediately provide appointed counsel in immigration proceedings for children and the mentally ill, and consider the development of a “public defender system” for persons who are detained while their cases are before an immigration judge***

Current policy holds that persons in removal proceedings are not entitled to free legal counsel since immigration proceedings are “civil” rather than “criminal.” However, this distinction is illusory since the right to free counsel in criminal proceedings only attaches when a person is subject to a punishment of imprisonment.¹⁵ Since persons in removal proceedings are subject to weeks, months, and even years of incarceration, it is unclear why they should not be afforded a similar right to free counsel.

¹⁴ See <http://www.ice.gov/partners/dro/opsmanual/index.htm>.

- ***Repeal section 236(c) on the Immigration and Nationality Act to reinstate power to immigration judges to make individualized determinations on custody issues***

The passage of section 236(c) stripped immigration judges of the discretion to grant bond to detainees based on the traditional considerations of danger to society and flight risk. Since bond is more appropriately determined using these considerations, and since the bases for denial of a bond in section 236(c) do not necessarily bear any relation to whether a person is a danger or a flight risk, section 236(c) should be repealed.

- ***Require ICE to present evidence of removability at the time a person is detained***

Similar to criminal rules of procedure, ICE should be required to present evidence that a person is removable at the time he or she is detained. This requirement would also save significant funds in housing costs since people would not be required to stay in detention while ICE is preparing a case against them.

- ***Set deadlines for compliance with the Flores settlement and exempt children from coercive practices such as reinstatement of removal and voluntary return***

Many of the provisions of the landmark *Flores* settlement have yet to be fully implemented, subjecting minors to continued hardship in their detention conditions. Furthermore, children should not be made to endure the inherently coercive practices of reinstatement of removal, pressure from ICE to sign orders of voluntary return, or the expedited removal that can result from children being wrongly classified as adults.

- ***Repeal section 287(g) of the Immigration and Nationality Act allowing local authorities to enforce immigration law***

¹⁵ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367, 373-74, 59 L.Ed. 2d 383, 99 S.Ct. 1158 (1979)

Without meaningful and ongoing training in immigration law, it is impossible for local law enforcement to avoid committing significant numbers of due process violations.

Section 287(g) should be repealed in order to restrict the complicated enforcement of immigration law to those who are adequately trained to do it.

- ***Require ICE to detain individuals and file charges in the state where the person resides***

ICE's preference of transferring people to large detention facilities in remote locations for their removal proceedings should not trump the rights of individuals to have their cases heard in a more appropriate venue with access to witnesses and family support. Since ICE has the option to file removal charges in any of over two hundred immigration courts located throughout the country, it is unclear why ICE would be unduly burdened by initiating and maintaining a person's case in the court closest to his or her home.

- ***Implement mandatory custody review by an immigration judge for cases that have exceeded six months***

Due to overwhelmed dockets and lack of resources, the practice of concluding removal proceedings during the presumptively-reasonable six-month period established by the Supreme Court is uncommon for those who contest removability or apply for relief from deportation. Immigration judges should be required to conduct a mandatory custody review every six months in order to assure that cases that stretch on for years will not violate the principles set out in *Demore v. Kim*.¹⁶

¹⁶ *Demore v. Kim*, 538 U.S. 510, 530 (2003).

VI. CONCLUSION

The stories above represent a small fraction of the troubling cases that Florence Project staff members encounter on a regular basis. In confronting these cases, we have come to a disturbing and inevitable conclusion – that under the current detention and deportation system, immigrants and U.S. citizens are frequently denied access to Due Process under the Constitution of the United States. While the current wave of fierce sentiment surrounding the issue of immigration may make it difficult to advocate for more rights for immigrants, the genius of our Constitution lies in its objective and dispassionate defense of the rights of *all* persons within the United States. We recognize that this Subcommittee faces very difficult decisions on the issue of immigration; however, we publicly affirm our clients' inherent dignity and worth and remain staunchly committed to the principle of due process for all persons subject to U.S. law.