

## WESTERN NEW YORK IMMIGRATION ASSISTANCE CENTER

May 2017  
Volume 2, Issue 5

*We are funded by the New York State Office of Indigent Legal Services (through Erie County) to assist you in your representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in Padilla v. Kentucky, 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. Our Center was established so that we can share our knowledge of immigration law with public defenders and 18b providers to help you determine the immigration consequences of any particular case you may be handling. There is no fee for our services.*

# Immigration Issues for the Noncitizen Defendant

Thank you to Jerry Ader and all who attended last month's training at the County Courts Facility in Batavia. We look forward to hearing from you with your technical assistance calls.

## Contact Information

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## Upcoming CLE Trainings

**June 2, 2017** from 1 to 3pm in the Hoag Library Curtis Community Room, Albion, for public defenders and assigned counsel in Orleans and Niagara counties.

**June 23, 2017** from 1 to 3 pm in the Ontario County Safety Training Facility for public defenders and assigned counsel in Yates, Ontario and Wayne counties.

**July 28, 2017** from 1 to 3 pm in the Erie County Bar Association Sun Room Auditorium for public defenders and assigned counsel in Erie county.

These CLEs are free. To register, email your contact information and affiliation to [mvaleri@ecbavlp.com](mailto:mvaleri@ecbavlp.com) with date you will attend.

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## WNY IMMIGRATION ASSISTANCE CENTER

A joint collaboration between the Erie County Bar Association Volunteer Lawyers Project, Inc. and The Legal Aid Society of Rochester, New York.

## INTERSECTION OF IMMIGRATION ENFORCEMENT AND SEARCH AND SEIZURE

By **WEDADE ABDALLAH, ESQ.**, Immigration Program Director at The Legal Aid Society of Rochester, New York

On January 27, 2017, President Trump issued the “Enhancing Public Safety in the Interior of the United States” executive order. Under this order, Immigration and Customs Enforcement (ICE) agents are to actively seek any person who is in violation of the immigration laws for arrest, detention and removal from the United States.

In some cases, prior to arrest, ICE agents will seek an administrative warrant for a person they believe to be an immigration law violator. These “warrants” are not warrants as we understand them in the criminal context.

First, they are not issued upon probable cause. Second, they are not signed by a judge. Third, they cannot authorize the search of property, or the seizure of a person inside of their home. Fourth, they authorize arrest for civil violations only. Fifth, they do not authorize arrest by state and local law enforcement.<sup>1</sup> Rather, an ICE warrant is an administrative document issued by ICE supervising officers without any review by a neutral magistrate. These warrants may only be issued and executed by certain immigration officers enumerated by federal regulations.<sup>2</sup>

These distinctions become crucial in a criminal case if, for example, a client arrested on an ICE warrant is found with contraband on their person, or if the warrant was used to search property. Because ICE warrants are not issued upon probable cause, if a client is arrested in this manner, and subsequently charged with a crime, defense counsel has a basis to challenge the fruits of that search or seizure on Fourth Amendment grounds.

The Fourth Amendment right to be free from unreasonable search and seizure by the government applies to all individuals present in the United States. This is true regardless of a person’s immigration status.

ICE warrants cannot be used to investigate criminal activity. If a client is charged with a crime after an arrest on an ICE warrant, defense counsel must first determine what the motive was of the ICE officials who made the arrest. The question then becomes whether they were exercising their power in the

lawful discharge of their own responsibilities, or if they were serving as an agent for law enforcement in building a criminal prosecution against an individual (*Abel v. United States*, 362 US 217 (1960)).

Because these warrants are only directed at individuals, they may never be used to enter property where the individual has a reasonable expectation of privacy. However, this limitation is vitiated if a person consents to the officer’s entry.

Street stops and automobile stops pose the greatest risk for those who are targets of ICE warrants since when a person is stopped by the police, it is automatic for the officer to conduct a name-based search of the individual. Almost all law enforcement agencies have immediate access to the FBI’s National Crime Information Center database. This database includes information on a subject’s criminal history, and notice of any outstanding criminal warrants. ICE warrants are also included in this database.

If a local law enforcement officer becomes aware that there is an ICE warrant for an individual, they are not authorized to detain that person based solely on this information because local police agencies are not authorized to enforce civil immigration violations (*Arizona v. United States*, 132 S.Ct 2492 (2012)). Also, the police may arrest a suspect only if there is probable cause to believe that the suspect is involved in criminal activity. Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not provide a law enforcement officer probable cause to believe that the individual is engaged in criminal activity.

If the person making the arrest is authorized by law to enforce the warrant and in doing so discovers criminality, counsel can argue that civil warrants are not a substitute for probable cause (*US v. Sanford*, 493 F.Supp 78 (D.D.C. 1980)); (*People v. Stadtmire*, 52 Ad2d 853 (N.Y. App. Div. 1976)).

As more arrests of this nature take place, defense counsel should be prepared to litigate the issue in criminal court. The case law on this subject is limited in New York. However, as opposed to federal courts, New York courts offer greater protections to individuals in issues of search or seizure. Defense counsel should rely on New York jurisprudence in arguing these matters.

### Footnotes

<sup>1</sup> There is a limited exception for local police who receive training and certification to carry out duties of immigration officer (8 USC 1357[g]).

<sup>2</sup> 8 CFR 287.5(e)(2)(3)