

Legal Services of New Jersey
By: Shira Wisotsky, Esq.
Attorney ID No. 243172017
100 Metroplex Drive, Suite 402
Edison, New Jersey 08818-1357
Phone Number: 908-882-2665
SWisotsky@lsnj.org

STATE OF NEW JERSEY,
Respondent,

v.

FERNANDO J. GARCIA-
MORONTA
Appellant

Supreme Court Docket No. 090118
CRIMINAL ACTION

On Appeal From:
Superior Court of New Jersey,
Appellate Division
Honorable Judges
Katie A. Gummer
Adam E. Jacobs
Docket No.: AM-000105-24

Motion to Appear as *Amicus Curiae* and Participate in Oral Argument

TO: Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
25 W. Market Street - 8th Floor, North Wing
Trenton, N.J. 08625-0970

William A. Daniel
Union County Prosecutor's Office
32 Rahway Avenue
Elizabeth, NJ 07202
Attorney for the State-Respondent

Eric Mark
96 Summer Ave
Newark, NJ 07104
Attorney for the Defendant-Appellant

PLEASE TAKE NOTICE that, pursuant to R. 1:13-9, Legal Services of New Jersey applies for leave to appear as *amicus curiae* in the above matter for the purpose of submitting the attached brief and participating in oral argument. This motion and brief are being timely filed by the deadline of July 28, 2025.



Shira Wisotsky (NJ 243172017)
Raquiba Huq (NJ 030952007)
Dawn K. Miller (NJ 002521987)
Legal Services of New Jersey
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
SWisotsky@lsnj.org
908-882-2665

Dated: July 28, 2025

Certification of Shira Wisotsky, Esq., in Support of Legal Services of New Jersey Motion to Participate as *Amicus Curiae*

Identity of Applicant

1. Legal Services of New Jersey (“LSNJ”) is the non-profit corporation that provides statewide support and coordination for the network of local Legal Services programs in New Jersey providing legal assistance to low-income people in civil matters. LSNJ seeks to ensure the delivery of quality legal representation, and to see that local Legal Services programs have the maximum possible resources to provide that representation.

2. LSNJ frequently participates as *amicus curiae* in cases involving issues of major significance to the State’s low-income population. In so doing, it presents perspectives of low-income people as a group or class, rather than the views or interests of the individual litigants.

3. Legal Services of New Jersey’s Immigration Representation Project (“IRP”) has been providing advice, pro se assistance, and direct representation to New Jersey’s immigrant communities since 1998. At the heart of the IRP’s work has been a focus on the most vulnerable populations of immigrants, and as such, the unit has specialized in serving New Jerseyans in civil immigration detention and/or in removal proceedings for almost thirty years.

4. Currently, the IRP consists of twenty-one attorneys, eleven paralegals, and two administrative assistants. The senior and supervising attorneys have immigration representation experience ranging from 18 to 31 years.

5. LSNJ's IRP attorneys were among the first to start visiting individuals held by federal immigration authorities when detention began in New Jersey after the seminal federal immigration legal changes of 1996, as well as after detention started rapidly expanding following the events of September 11, 2001.

6. Since 2001, LSNJ has had a consistent presence in the various private and locally contracted immigration detention centers that have operated in the State—and, in recent years, out-of-state.

7. Since November 2018, LSNJ has administered the Detention and Deportation Defense Initiative ("DDDI") grant from the State of New Jersey that funds staff at LSNJ and three partner organizations to provide pro bono legal services to New Jersey residents detained by ICE, regardless of detention location. The state recently renewed its funding for DDDI for its eighth year.

Issues to be Addressed and Public Interests Served

8. The Court is currently considering the use of bench warrants for noncitizens in immigration detention, and whether and when trial courts may utilize virtual court proceedings.

9. LSNJ will illustrate how the Court's decision in this case will have significant impact on low-income noncitizen defendants in Immigration and Customs Enforcement ("ICE") custody.

10. LSNJ will discuss the impact of this Court's decision on both state-court criminal proceedings and on a person's ability to seek release from immigration detention and immigration relief.

Special Interest and Expertise

11. With respect to LSNJ's special interest and expertise in support of the motion for leave to appear as *amicus curiae*, LSNJ incorporates, by reference, the factual assertions in the introductory statement of the attached proposed brief.

CERTIFICATION

I certify that to the best of my knowledge all of the foregoing statements and in the attached brief are true and accurate. I am aware that if any of the statements are willfully false, I am subject to punishment.

DATED: July 28, 2025



By: Shira Wisotsky
Attorney ID No. 243172017
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
Phone Number: 908-882-2665
SWisotsky@lsnj.org

STATE OF NEW JERSEY,
Respondent,

v.

FERNANDO J. GARCIA-MORONTA
Appellant.

Supreme Court Docket No. 090118

CRIMINAL ACTION

On Appeal From:
Superior Court of New Jersey,
Appellate Division
Honorable Judges
Katie A. Gummer
Adam E. Jacobs
Docket No.: AM-000105-24

BRIEF OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

Shira Wisotsky (NJ 243172017)
Raquiba Huq (NJ 030952007)
Dawn K. Miller (NJ 002521987)
Legal Services of New Jersey
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
SWisotsky@lsnj.org
908-882-2665

TABLE OF CONTENTS

Preliminary Statement.....	1
ARGUMENT	2
I. The vast majority of people who ICE apprehends in New Jersey who have some prior contact with the criminal legal system, have open criminal matters when ICE brings them into detention.....	4
II. Unresolved criminal charges can have an enormous detrimental impact on a non-citizen's ability to obtain release from detention or immigration relief, and automatic bench warrants create enormous obstacles to resolving criminal charges.	12
III. New Jersey residents in immigration detention can have significant difficulties accessing New Jersey State courts.....	15
IV. The Federal and State Constitutions require a criminal defendant's presence in court.....	20
Conclusion	22

TABLE OF AUTHORITIES

Cases

<u>Asolo v. Prim</u> , No. 21CV50059, 2021 WL 3472635 (N.D. Ill. Aug. 6, 2021)....	7, 16
<u>Borbot v. Warden Hudson Cnty. Corr. Facility</u> , 906 F.3d 274 (3d Cir. 2018). 13, 14, 21	
<u>Borough of Duryea v. Guarnieri</u> , 564 U.S. 379 (2011).....	21
<u>Bounds v. Smith</u> , 430 U.S. 817 (1977).....	21
<u>Commonwealth v. Erilus</u> , 113 N.E.3d 935, 2018 WL 6005059 (Mass. App. Div. Nov. 16, 2018).....	16
<u>Doe v. Dep't of Homeland Sec.</u> , No. 24-CV-00259, 2025 WL 949846 (W.D. Pa. Mar. 28, 2025).....	18
<u>Doe v. U.S. Dep't Homeland Sec.</u> , No. 24-CV-00259, 2025 WL 360534 (W.D. Pa. Jan. 31, 2025).....	18
<u>Figueroa v. McDonald</u> , 680 F. Supp. 3d 18 (D. Mass. 2018).....	16
<u>Foreman v. Lowe</u> , 261 F. App'x 401 (3d Cir. 2008) (summary order).....	21
<u>Garcia v. Valdez</u> , No. 14-02533-MWF (AS), 2021 WL 3918134 (C.D. Cal. Aug. 12, 2021).....	16
<u>In re C-V-T-</u> , 22 I. & N. Dec. 7 (BIA 1998).....	15
<u>Matter of Arai</u> , 13 I. & N. Dec. 494, (BIA 1970).....	15
<u>Matter of Castillo-Perez</u> , 27 I. & N. Dec. 664 (A.G. 2019).....	15
<u>Matter of Grijalva</u> , 19 I. & N. Dec. 713 (B.I.A. 1998).....	15
<u>Matter of Guerra</u> , 24 I. & N. Dec. 37 (B.I.A. 2006).....	iv, 13, 14, 21
<u>Matter of Mendez-Moralez</u> , 21 I. & N. Dec. 296 (BIA 1996).....	15
<u>Matter of Pula</u> , 19 I. & N. Dec. 467 (BIA 1987).....	15
<u>Matter of Siniauskas</u> , 27 I. & N. Dec. 207, 209 (B.I.A. 2018).....	13, 14, 21
<u>Matter of Urena</u> , 25 I. & N. Dec. 140 (B.I.A. Nov. 17, 2009).....	13, 14, 21
<u>Pensiamento v. McDonald</u> , 315 F. Supp. 3d 684 (D. Mass. 2018).....	16
<u>Procunier v. Martinez</u> , 416 U.S. 396 (1974).....	21
<u>See Matter of Teixeira</u> , 21 I. & N. Dec. 316 (B.I.A. 1996).....	15
<u>State v. A.M.</u> , 252 N.J. 432 (2023).....	21
<u>State v. Juracan-Juracan</u> , 255 N.J. 241 (2023).....	21
<u>State v. Lopez-Carrera</u> , 245 N.J. 596 (2021).....	20
<u>State v. Ramirez</u> , 252 N.J. 277 (2022).....	21

<u>Vargas v. Wolf</u> , No. 2:19-cv-02135-KJD-DJA, 2020 WL 1929842 (D. Nev. Apr. 21, 2020).....	6
<u>Velasco Lopez v. Decker</u> , 978 F.3d 842 (2d Cir. 2020).	6

Statutes

8 U.S.C. § 1158.....	14
8 U.S.C. § 1182.....	14
8 U.S.C. § 1226(a)	12, 13
8 U.S.C. § 1229b.....	14
8 U.S.C. § 1229c	15
8 U.S.C. § 1255.....	14
Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).	14
N.J.S.A. 2C:1-4.....	9

Regulations

8 C.F.R. § 236.1(d)(1)	13
------------------------------	----

Other Authorities

Complaint at ECF No. 1, 92-137, <u>Legal Servs. of N.J. v. Immig. & Customs Enft.</u> , No. 23-CV-22222 (D.N.J.).	19
Complaint, ECF No. 1, <u>Doe v. U.S. Dep’t Homeland Sec.</u> , No. 24-CV-00259 (W.D. Pa.)	19, 20
ECF No. 77, <u>Doe v. U.S. Dep’t Homeland Sec.</u> , No. 24-CV-00259 (W.D. Pa.)	22
Pls.’ Opp. Partial Mot. to Dismiss, ECF No. 1, 27-30, <u>Doe v. U.S. Dep’t Homeland Sec.</u> , No. 24-CV-00259 (W.D. Pa.).....	19

Constitutional Provisions

<u>N.J. Const.</u> art. I, ¶ 22.	21
--	----

PRELIMINARY STATEMENT

All people charged with crimes in New Jersey Superior and Municipal Courts have the right to be heard and to have their cases proceed. Unfortunately, due to the complicated interplay between the federal and state systems, many people Immigration and Customs Enforcement (“ICE”) detains with unresolved criminal charges in New Jersey are denied that right because of the policies of federal immigration authorities combined with a lack of clarity around production requirements for state-court criminal proceedings. Issuance of a bench warrant as a detainer for noncitizens in immigration detention exacerbates the difficulties in resolving charges, which can have enormous consequence for a noncitizen’s ability to seek release from detention and relief from an immigration court. Additionally, issuing bench warrants or otherwise pausing criminal cases while a non-citizen is in immigration custody can lead to a host of federal and state constitutional complications in the state-court criminal proceedings.

Given LSNJ’s position and experience working with people whom Immigration Customs and Enforcement (ICE) apprehends in New Jersey, our participation in this case will serve the public interest by providing insight and perspective as to the ways our clients and other low-income individuals will be affected by the Court’s decision. We are uniquely situated to provide important context for the question before the Court including information on where New

Jerseyans may currently be held by ICE; the challenges an individual in ICE custody faces in terms of being able to appear in-person in NJ for criminal court proceedings – especially for preliminary appearances such as arraignments; and the impact a bench warrant may have on a person’s immigration bond and relief proceedings.

ARGUMENT

Legal Services of New Jersey’s Immigration Representation Project (“IRP”) has been providing advice, pro se assistance, and direct representation to New Jersey’s immigrant communities since 1998. At the heart of the IRP’s work has been a focus on the most vulnerable populations of immigrants, and as such, the unit has specialized in serving New Jerseyans in civil immigration detention and/or in removal proceedings for almost thirty years.¹

LSNJ has had a consistent presence in the various private and locally contracted immigration detention centers that have operated in the State—and, in recent years, out-of-state. For instance, from 2006-2022, LSNJ was the sole New Jersey provider of the U.S. Department of Justice’s Legal Orientation Program (“LOP”), providing know your rights presentations, individual legal orientations, and pro se services to adults detained in New Jersey. Since November 2018, LSNJ has administered the Detention and Deportation Defense Initiative (“DDDI”) grant

¹ Currently, the IRP consists of twenty-one attorneys, eleven paralegals, and two administrative assistants. The senior and supervising attorneys have immigration representation experience ranging from 18 to 31 years.

from the State of New Jersey that funds staff at LSNJ and three partner organizations to provide pro bono legal services to New Jersey residents detained by ICE, regardless of detention location.

Through our detention work, we encounter low-income individuals at the outset of their placement into ICE custody, often within days of them arriving at an ICE facility. Since the effective date of the Criminal Justice Reform Act (“CJRA”) in January 2017, a significant percentage of the people we meet and serve were recently transferred into ICE custody from criminal custody. While we do not practice criminal defense, our immigration work is inextricably linked with the criminal legal system. We frequently advise non-citizen defendants and their attorneys on the potential immigration consequences of pending criminal charges.

We thus routinely provide immigration advice and representation to low-income individuals detained by ICE who have unresolved criminal cases throughout New Jersey, and witness firsthand the systemic issues that people face when trying to resolve open criminal matters in New Jersey from within ICE custody. We have pushed forward both advocacy and litigation to address some of these issues. Based on our experience and expertise, we share three points that we believe are of critical contextual importance to the question before the Court: namely, the scope of the people impacted by this appeal; how the issues presented impact immigration

detention and relief; and how the issues presented impact constitutional rights in state-court criminal proceedings.

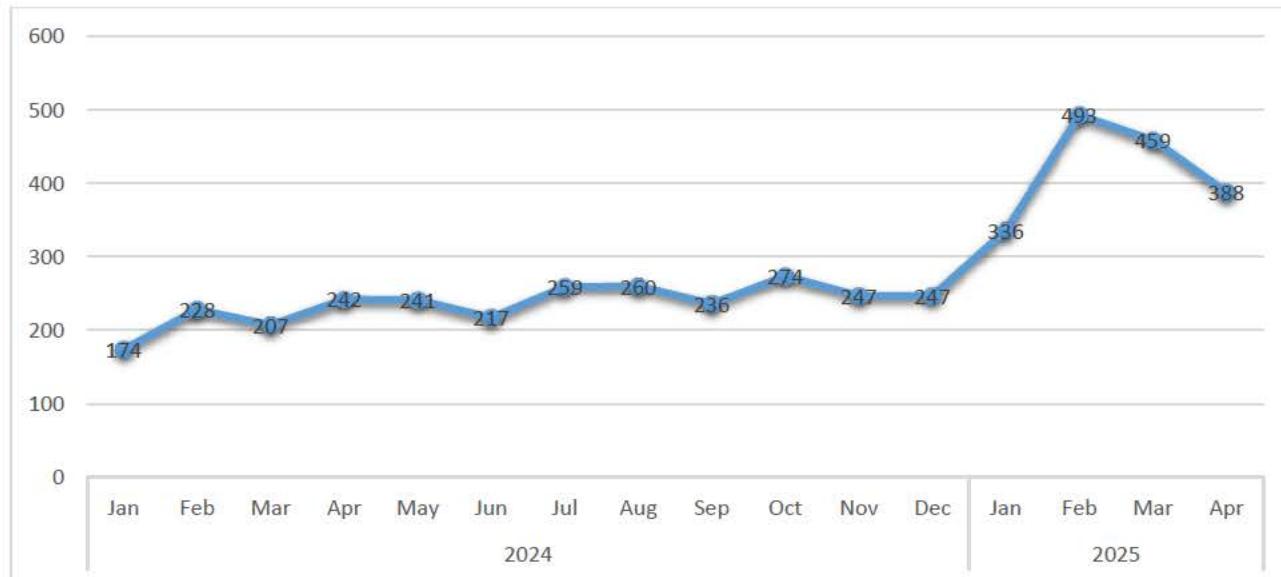
I. The vast majority of people who ICE apprehends in New Jersey who have some prior contact with the criminal legal system, have open criminal matters when ICE brings them into detention.

On May 20, 2025, as part of Freedom of Information Act (“FOIA”) litigation initiated by LSNJ against ICE, Legal Services of N.J. v. Immigr. & Customs Enft., No. 23-CV-22222 (D.N.J.), ICE produced a dataset of every person detained in New Jersey and in Pennsylvania from January 1, 2024, through May 15, 2025 (the “dataset”). The dataset includes 52,376 data points about 15,690 individuals. It also includes unique identifiers assigned to each detained individual for tracking purposes; demographic information; the apprehension landmark, or the geographic descriptor associated with where the person was apprehended by ICE; the date and time the individual was initially booked into ICE detention, and of any subsequent transfer or release; the detention facilities in which the person was detained; and information about pending criminal charges and criminal convictions.

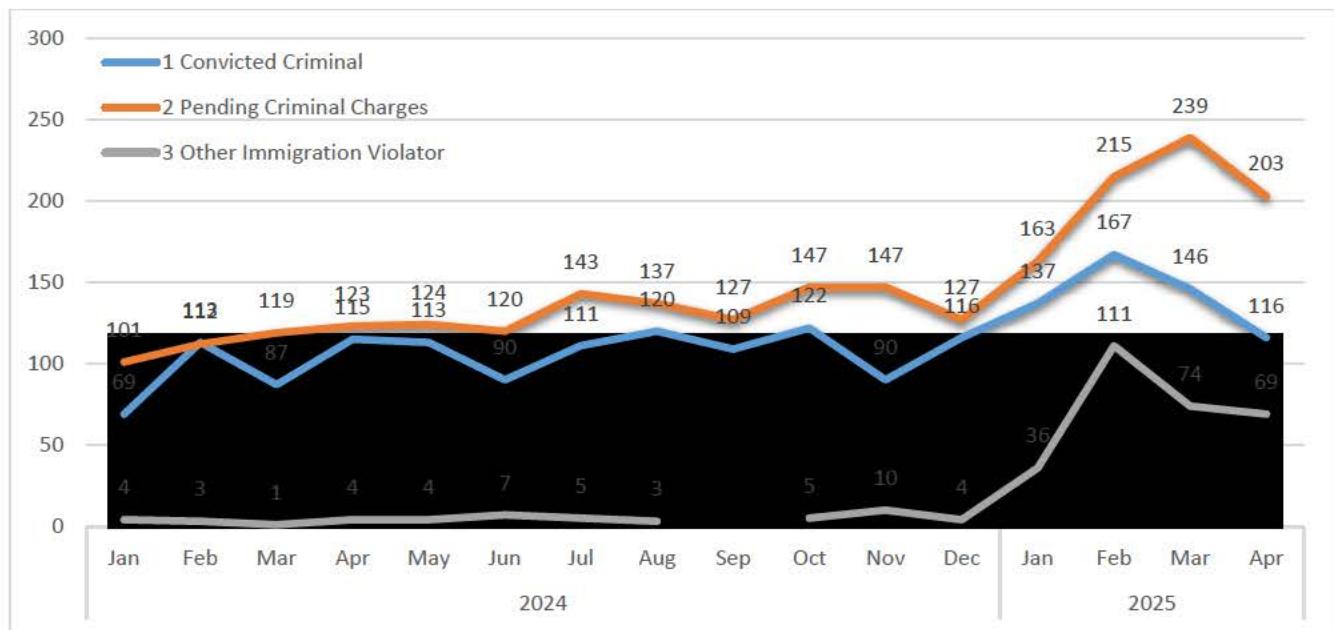
ICE apprehended in New Jersey and then detained 5,201 people during the period from January 1, 2024 to May 15, 2025. The apprehension landmark information allows LSNJ to extrapolate where the person was initially apprehended as the descriptors often refer to specific local entities such as County Jails (e.g., “ESSEX COUNTY JAIL”), municipal police departments (e.g., “NEWARK PD”),

or geographic areas (e.g., “CUMBERLAND COUNTY, NEW JERSEY”). In prior versions of the dataset, obtained through the same litigation, ICE also included a field called “Apprehension Site,” which grouped apprehension landmarks into larger and more standardized categories that generally reflected an ICE office or program area, such as “NEWARK, NJ, DOCKET CONTROL OFFICE.” Although that information was not included in the dataset, LSNJ was able to reliably use the prior datasets to code apprehension landmarks in New Jersey not otherwise specified in the title. It is from that dataset and analysis that the facts and figures in this section are derived.

ICE apprehends hundreds of people in New Jersey each month who they then detain:



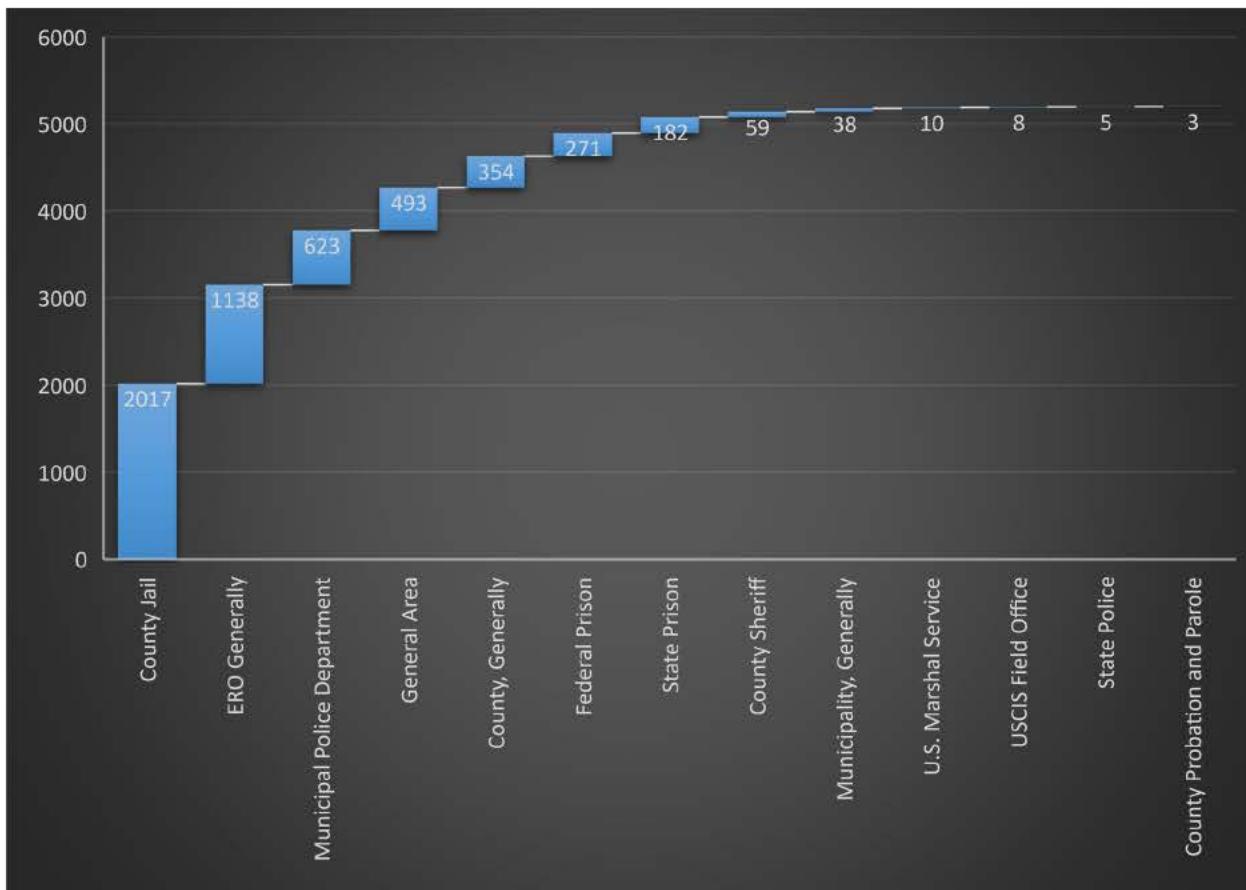
Many of the people apprehended by ICE in New Jersey have unresolved criminal charges.



ICE codes people *either* as a “convicted criminal” or as someone with “pending criminal charges.” While it cannot be discerned from the dataset whether someone has a prior conviction *and* an unresolved criminal charge, the plurality of people apprehended by ICE in New Jersey are apprehended at a County Jail, likely following a Superior Court Judge ordering release from State custody. In fact, the most frequent location of apprehension by ICE was at the Essex County Jail (555 people), followed by the nondescript categories of general enforcement and removal operations (“ERO”) in Newark and Mount Laurel, and then the Hudson County Jail (313 people).²

² ICE frequently apprehends noncitizens immediately following release from state custody. See, e.g., Velasco Lopez v. Decker, 978 F.3d 842, 847 (2d Cir. 2020) (noting noncitizen transfer to ICE custody day after arrest); Vargas v. Wolf, No. 2:19-cv-02135-KJD-DJA, 2020 WL 1929842, at *1 (D. Nev. Apr. 21, 2020) (detailing ICE detention though the state did not seek pre-trial detention and the judge released her

Aggregating the different types of location landmarks within New Jersey appears as follows:



ICE apprehended at least 2,098 people with pending criminal charges in New Jersey during this period. The top twenty most serious charged unresolved charges, organized from most frequent to least frequent, were as follows:

Most Serious Criminal (MS) Charge	Count
Aggravated Assault ³	651

on a personal recognizance bond); Asolo v. Prim, No. 21CV50059, 2021 WL 3472635, at *1–2 (N.D. Ill. Aug. 6, 2021) (outlining ICE apprehension immediately following state court release on bond).

³ LSNJ aggregated all aggravated assault charges into one category. The subcategories are as follows: police officer-weapon (listed twice: 2, 4); police

Simple Assault	600
Assault	165
Burglary ⁴	107
Larceny ⁵	81
Robbery ⁶	64
Possession Of Weapon	56
Threat Terroristic State Offenses	52
Shoplifting	52
Domestic Violence	49
Resisting Officer	36
Cruelty Toward Child	33
Fraud ⁷	25
Drug Possession	25
Receive Stolen Property	24
Conspiracy [use when no underlying offense, such as 18 U.S.C. SEC. 371]	21
Driving Under Influence Liquor	20
Sexual Exploitation of Minor	19
Weapon Offense	18
Illegal Entry	18

officer-strongarm (listed twice: 4, 29); non-family-weapon (108); non-family-strongarm (135); non-family-gun (5); gun (5); family-weapon (55); family-strongarm (224); family-gun (1).

⁴ LSNJ aggregated this category. Ninety of the 107 were simple burglary charges, while several were no forced entry at a residence (1), no forced entry at a non-residence (2), forced entry at a residence (7), and forced entry at a non-residence (7).

⁵ LSNJ aggregated this category. Seventy-nine were larceny charges while the remainder were subcategories parts from vehicle (1) and from mails (1).

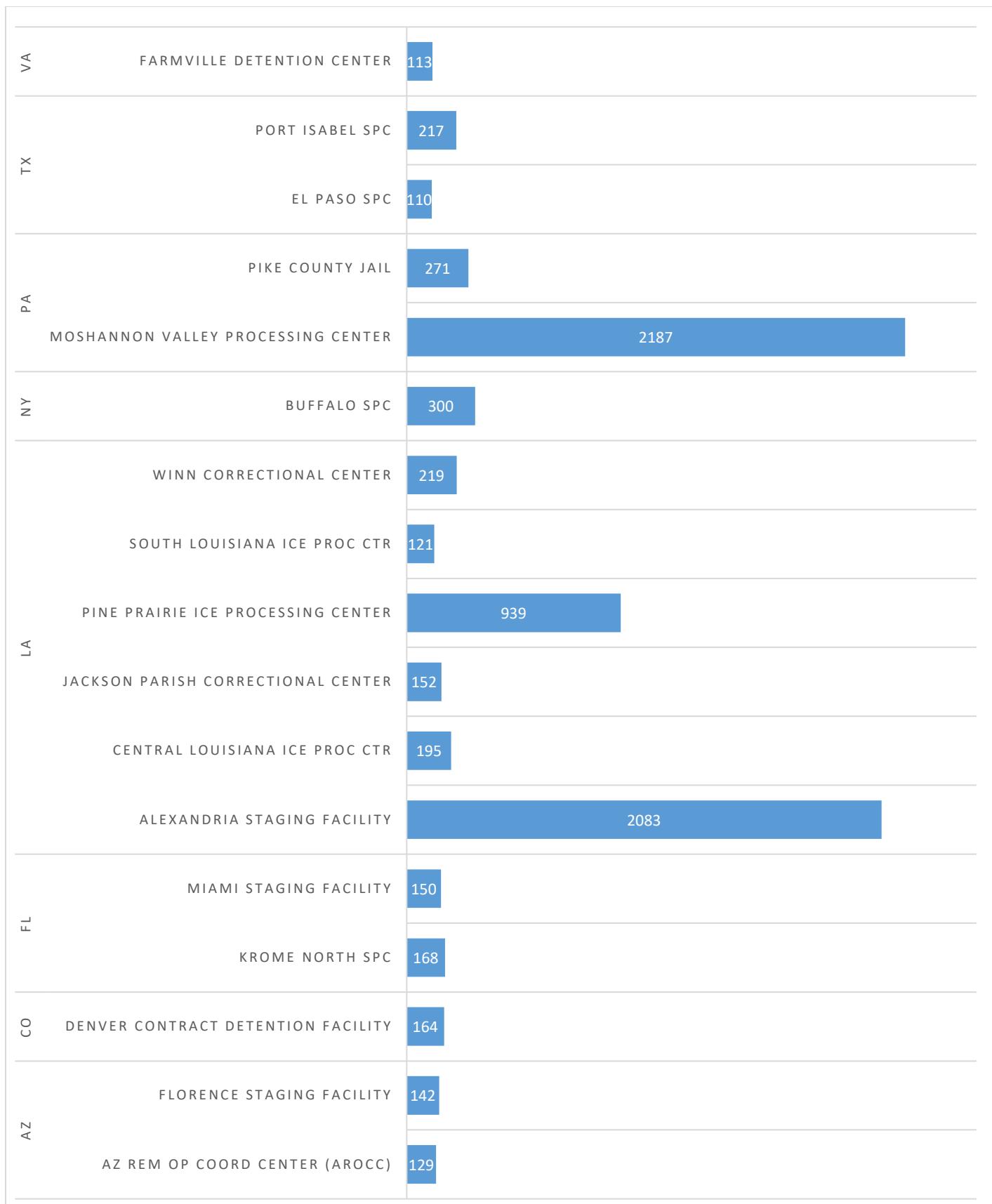
⁶ LSNJ aggregated this category. Fifty-two were simple robbery charges, while the remainder were subcategories of five or less of street-weapon, street-strongarm, residence-gun, business-strongarm, and business weapon.

⁷ LSNJ aggregated this category. Six charges were for fraud, and the rest were for subcategories false statement (12), illegal use credit cards (2), impersonating (4), and swindle (1).

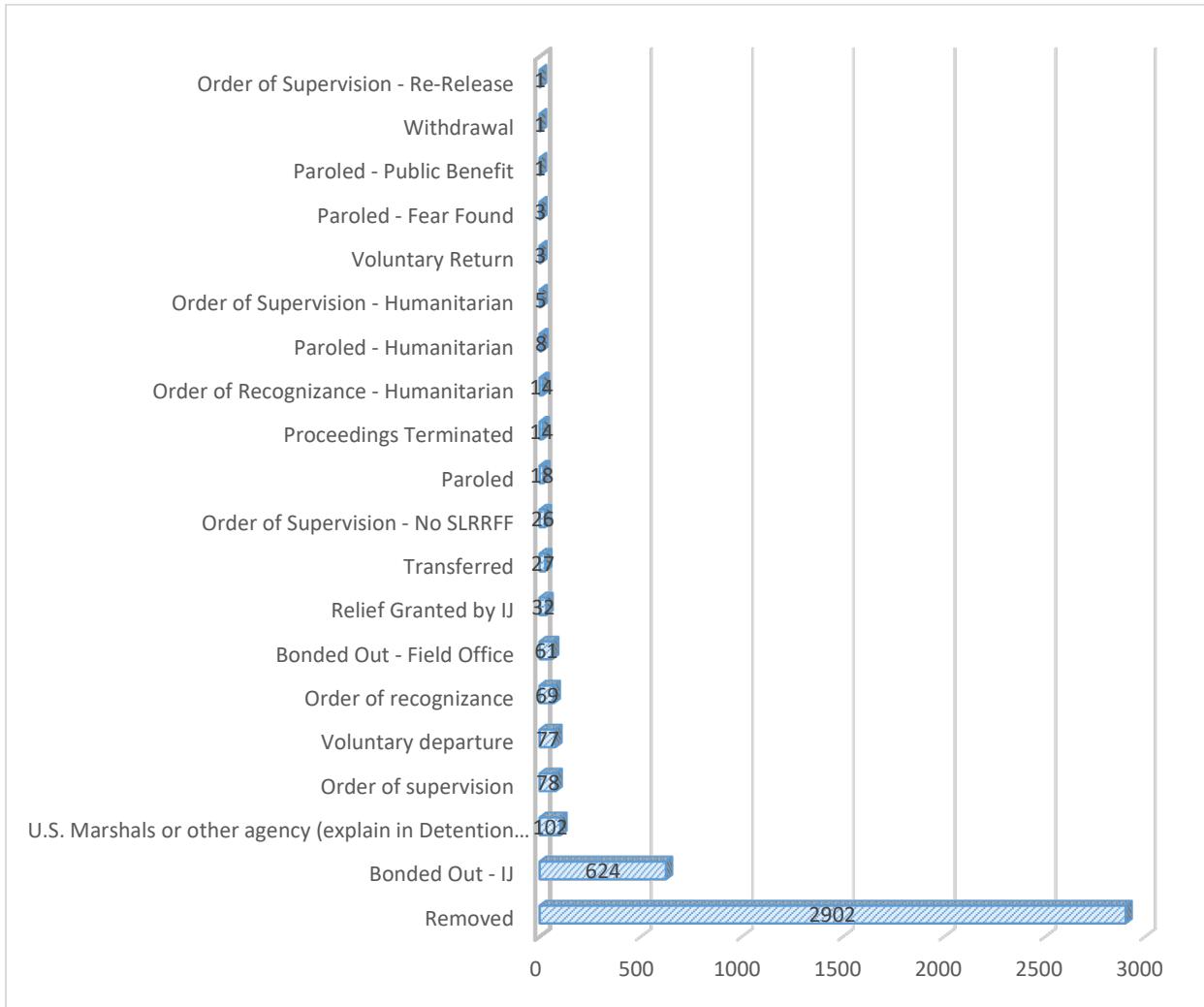
Extrapolating from the list of the most serious charges at the time the individual was brought into custody, it is clear that significant numbers of pending cases can be found in both Municipal Courts and Superior Courts across the State. See generally N.J.S.A. 2C:1-4.

Out of the 2,098 individuals who were apprehended in New Jersey with unresolved criminal charges, only *twenty-nine* of them also had a conviction date. While this dataset does not permit LSNJ to isolate the data to pending charges in New Jersey only, or to control for charges brought against an individual that were dismissed or led to an acquittal, this number does permit an inference that very few noncitizens with unresolved charges detained in New Jersey are able to resolve state-court charges during the time that they are in detention.

ICE frequently detains people it apprehends in New Jersey in detention facilities hundreds—if not thousands—of miles away from their communities, loved ones, attorneys, and the New Jersey court system. Looking at detention stays of people apprehended in New Jersey (accounting for transfers and multiple stays at the same facility for a single/discrete individual), detention facilities that accounted for more than one hundred stays each include the following:



Most people who are apprehended in New Jersey and then detained are released from detention only upon removal from the United States—deportation.



Of the 4,066 people with final release reasons listed—the people apprehended in New Jersey but no longer detained at the time the dataset was created—2,902 of those people were removed. Only fourteen of those nearly 3,000 people had a final conviction date listed.

II. Unresolved criminal charges can have an enormous detrimental impact on a non-citizen's ability to obtain release from detention or immigration relief, and automatic bench warrants create enormous obstacles to resolving criminal charges.

Issuance of a bench warrant as a detainer while someone is in immigration detention frequently removes a case from the criminal court calendar entirely, thus halting proceedings. Without any pending hearings public defenders are often not assigned, and even with counsel there is significant extra work to calendar hearings and move cases along. Criminal charges against people in immigration custody can thus languish in the court system for years.

At the same time, the ability to access courts and resolve pending criminal charges significantly improves a person's ability to seek release from detention and relief from an immigration judge, and the denial of access to courts worsens their ability to seek relief. Section 1226 of 8 U.S.C. allows ICE to detain noncitizens during the pendency of removal proceedings. For many people held in immigration detention, ICE has discretion to detain or release individuals during the pendency of removal proceedings. When detention is not legally required, ICE has discretion to either continue detention or release the individual on bond or conditional parole. 8 U.S.C. § 1226(a). Unless other information is available, ICE officials often rely on uncorroborated arrest records from unresolved criminal cases to justify detention.

When detention is discretionary, a person detained can challenge it at a bond hearing before an immigration judge. The immigration judge may order release on

bond only if the judge finds that the noncitizen does not pose a flight risk or present a danger to the community. 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(d)(1); see also Matter of Urena, 25 I. & N. Dec. 140, 140 (B.I.A. Nov. 17, 2009) (“[O]nly if [a noncitizen] has established that he would not pose a danger to property or persons should an Immigration Judge decide the amount of bond necessary to ensure the [noncitizen’s] presence at proceedings to remove him from the United States.”). Unlike in criminal proceedings, however, the burden of proof lies with the individual in detention, and not with the government. Borbot v. Warden Hudson Cnty. Corr. Facility, 906 F.3d 274, 279 (3d Cir. 2018). Immigration judges can consider allegations in unresolved criminal matters, and routinely request and review police records when considering bond and other discretionary relief when criminal charges remain pending. See, e.g., Matter of Siniauskas, 27 I. & N. Dec. 207, 209 (B.I.A. 2018); Matter of Guerra, 24 I. & N. Dec. 37, 40-41 (B.I.A. 2006). Open criminal charges negatively affect immigration judges’ discretion concerning danger to the community, and a bench warrant can also weigh against the burden of showing that an individual is not a flight risk. Therefore, detained noncitizens who can successfully defend themselves in criminal court have a higher chance of securing bond. Conversely, detained noncitizens with pending charges frequently cannot effectively refute the allegations in the police report or criminal complaint in the

context of an immigration bond hearing. Bench warrants prevent noncitizens from defending themselves and create the appearance of flight risk.

Additionally, the dismissal, downgrading, or other resolution of charges while a noncitizen is detained can determine whether that individual is subject to mandatory or discretionary detention. For example, in January 2025, Congress passed the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025); 8 U.S.C. § 1226(c)(1)(E), amending the Illegal Immigration Reform and Responsibility Act of 1996 (“IIRIRA”), to mandate detention for noncitizens charged as inadmissible under Sections 1182(a)(6)(A) (the inadmissibility ground for a noncitizen “present in the United States without being admitted or paroled”), 1182(a)(6)(C) (the inadmissibility ground for misrepresentation), or 1182(a)(7) (the inadmissibility ground for lacking valid documentation) when the individual has been arrested for, charged with, or convicted of certain crimes. If charges are dismissed, a noncitizen who would otherwise be considered discretionarily detainable would have a strong argument for release from detention. See generally 8 U.S.C. § 1226(c)(1)(E).

Unresolved criminal cases can also negatively impact noncitizens’ applications for immigration relief. Most relief applications that allow noncitizens to remain in the country are discretionary in nature. See 8 U.S.C. § 1158(a) (asylum); 8 U.S.C. § 1229b (cancellation of removal and status adjustment of an inadmissible or deportable noncitizen); 8 U.S.C. § 1255 (lawful permanent residents); 8 U.S.C.

§ 1229c (voluntary departure). As such, individuals seeking discretionary relief must both demonstrate statutory eligibility and convince the court to exercise discretion to grant relief and permit them to remain in this country. Immigration judges are tasked with considering a wide range of factors in determining whether discretion should be exercised. See, e.g., In re C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998) (summarizing discretionary considerations for adjudicating INA 240A(a) applications); Matter of Castillo-Perez, 27 I. & N. Dec. 664, 664 (A.G. 2019) (INA 240A(b) applications); Matter of Pula, 19 I. & N. Dec. 467, 473-74 (BIA 1987) (asylum applications); Matter of Arai, 13 I. & N. Dec. 494, 495-96 (BIA 1970) (adjustment of status applications); Matter of Mendez-Moralez, 21 I. & N. Dec. 296, 301 (BIA 1996) (INA 212(h) inadmissibility waiver applications). As in bond application proceedings, the Federal Rules of Evidence do not apply in immigration proceedings. See Matter of Teixeira, 21 I. & N. Dec. 316, 321 (B.I.A. 1996); Matter of Grijalva, 19 I. & N. Dec. 713, 722 (B.I.A. 1998). A judge may consider records from unresolved criminal cases, which judges frequently weigh against a grant of discretionary relief.

III. New Jersey residents in immigration detention can have significant difficulties accessing New Jersey State courts.

As previously described, people ICE detain with unresolved state-court criminal charges in New Jersey are frequently transferred out-of-state and hundreds of miles away from New Jersey. Travel from the detention facility to courts in New

Jersey could take hours by car or plane, even without the added security precautions and detours inherent to a nationwide federal detention system. Travel within the nationwide federal detention system and to New Jersey also requires interstate transport—either by local New Jersey officials or by federal immigration officers.

ICE generally has a consistent practice of refusing to transport people in their custody for state-court criminal proceedings. See, e.g., Figueroa v. McDonald, 680 F. Supp. 3d 18, 20-21 (D. Mass. 2018) (ordering ICE to transport noncitizen from immigration detention to hearings for state-court criminal charges because “ICE was refusing to transport him to his criminal proceedings in state court”); Pensiamento v. McDonald, 315 F. Supp. 3d 684, 686 (D. Mass. 2018) (same); Asolo, 2021 WL 3472635, at *8 (alleging in motion for emergent relief that “ICE refuses to take him to his hearings”); Garcia v. Valdez, No. 14-02533-MWF (AS), 2021 WL 3918134, at *3-4 (C.D. Cal. Aug. 12, 2021) (claiming ICE “refused to allow Plaintiff to be transported from [immigration detention] to Superior Court” and “consistently refused to allow Plaintiff to be transported” to criminal proceedings); Commonwealth v. Erilus, 113 N.E.3d 935, 2018 WL 6005059, at *2 (Mass. App. Div. Nov. 16, 2018) (“The defendant did not appear because he was in ICE custody, and ICE refused to transport him to the hearing or to allow him to participate by videoconference.”). Therefore, the process to effectuate in-person criminal court appearances for individuals detained by ICE can pose insurmountable obstacles. For

instance, at the Moshannon Valley Processing Center (“Moshannon”) in Phillipsburg, PA, the only way ICE will allow for in-person appearances in NJ courts is if individuals (1) secure a writ from a New Jersey judge requiring transport to New Jersey; (2) secure transport by local officials from the location of their detention to New Jersey; and (3) ensure that local officials in New Jersey agree to detain them on for the duration of proceedings. See generally Complaint, ECF No. 1, Doe v. U.S. Dep’t Homeland Sec., No. 24-CV-00259 (W.D. Pa.).⁸ This in-person writ process is unsurprisingly difficult, if not impossible, to navigate by indigent individuals in detention, who are largely unrepresented by defense counsel at the time of their initial criminal court hearings, and who otherwise face significant barriers in being able to make contact with state and municipal courts via phone.

Historically, ICE regularly makes the people it detains unavailable for state court criminal proceedings via alternative means, like virtual ones. See, e.g., Complaint at ECF No. 1, 92-137, Legal Servs. of N.J. v. Immig. & Customs Enft., No. 23-CV-22222 (D.N.J.) (emails from immigration detention staff pertaining to the denial of virtual production of noncitizens for state-court criminal proceedings). This policy, however, has been challenged with regard to at least one facility where

⁸ A live issue in the Doe v. D.H.S. litigation is whether ICE’s in-person writ policy that requires New Jersey to expend state resources in service of federal immigration detention violates the Tenth Amendment. See Pls.’ Opp. Partial Mot. to Dismiss, ECF No. 1, 27-30, Doe v. U.S. Dep’t Homeland Sec., No. 24-CV-00259 (W.D. Pa.)

New Jerseyans are held. For instance, in September 2024, LSNJ and co-counsel filed a putative class action lawsuit on behalf of noncitizens with unresolved criminal charges in New Jersey and detained at Moshannon⁹ and the American Friends Service Committee's Immigrant Rights Program, alleging that the policy and practice of refusing to permit virtual production violated the constitutional and statutory rights of noncitizens in detention. Complaint, ECF No. 1 at 37, Doe v. U.S. Dep't Homeland Sec., No. 24-CV-00259 (W.D. Pa.). On January 31, 2025, the District Court decided plaintiffs' preliminary injunction motion, finding that

ICE cannot voluntarily take control over an individual and then say it cannot abide by the laws of the United States as they apply to that individual. The Court understands that Defendants have a duty to process detainees' immigration matters, but there is no acceptable reasoning that this is to be done at the sacrifice of constitutional rights. Nor have Defendants presented any testimony that convinces this Court that detainees are being provided an ascertainable opportunity to attend criminal hearings.

[Doe v. U.S. Dep't Homeland Sec., No. 24-CV-00259, 2025 WL 360534, at *9 (W.D. Pa. Jan. 31, 2025); see also Doe., No. 24-CV-00259, 2025 WL 949846, at *8 (W.D. Pa. Mar. 28, 2025 (clarifying order applied to entire putative class).)]

In deciding the motion, the District Court reiterated verbatim from plaintiffs' pleadings the litany of constitutional violations that occur when a person in immigration detention is unable to be produced for state-court criminal proceedings:

⁹ Although the immigration landscape is rapidly changing, at the time of filing the plurality of noncitizen New Jersey residents detained by ICE were held at Moshannon.

a. When an individual is prevented from speaking out in their own defense or from submitting a petition to a court, they are unable to exercise their rights as provided by the First Amendment. b. When an individual is prevented from participating in a criminal case against them, they are unable to confront their accuser, as provided by the Confrontation Clause of the Sixth Amendment. c. When an individual is prevented from participating in a criminal case against them, and that case is paused, they are unable to vindicate their rights to a speedy trial, as provided under the Sixth Amendment. d. When an individual is prevented from participating in a criminal case against them, they are deprived of their constitutional rights to testify on their own behalf, should they wish to do so, as provided by the Sixth and Fourteenth Amendments. e. When an indigent individual is prevented from participating in a criminal case against them and thus cannot access public defense counsel, they are deprived of their right to counsel under the Fifth and Sixth Amendments. f. When an individual is prevented from attending a plea hearing or sentencing they are deprived of their right of allocution. g. When an individual is prevented from attending the significant stages of criminal court proceedings they are deprived of their right to the privilege of presence and the ability to participate in the charges against them, as provided by the Due Process Clauses. h. Even in instances where an individual is facing charges that risk jail time of one year or less under N.J.S.A. 2C:43-8 (describing risk of imprisonment for disorderly persons offenses and petty disorderly persons offenses), federal and state constitutional due process rights attach. The refusal to provide access to court for people facing disorderly persons and petty disorderly persons charges in New Jersey is a denial of that individual's federal and state constitutional due process rights, in addition to the rights enumerated above.

[Doe, 2025 WL 360534, at *4 (record citation omitted).]

The District Court thus ordered that Moshannon “immediately function in compliance with the tenants of the United States Constitution and the civil rights attributable thereunder.” ECF No. 77, Doe v. U.S. Dep’t Homeland Sec., No. 24-CV-00259 (W.D. Pa.).

The District Court’s injunction provides access to virtual means to New Jersey state-court criminal proceedings for many detained noncitizens. It also provides a pathway for advocates to argue for the production of people detained elsewhere in the country. However, even after the injunction, a bench warrant can still prevent access, and thus all of the constitutional risks highlighted by the District Court can be exacerbated for noncitizens in detention with unresolved charges in New Jersey if a bench warrant is issued for failure to appear in-person at an initial arraignment hearing.

IV. The Federal and State Constitutions require a criminal defendant’s presence in court.

“Our criminal justice system functions best when the State has an opportunity to present its proofs to try to enforce the law, when defendants who stand accused can defend themselves in court, and when victims and witnesses can be heard and treated with dignity and respect.” State v. Lopez-Carrera, 245 N.J. 596, 603 (2021). That is particularly true when the criminal defendant is in immigration detention and contending with dual federal and state systems. See id.

Issuance of a bench warrant as a detainer while someone is in immigration detention frequently removes a case from the calendar entirely, thus halting the criminal legal system and stopping it from functioning for the criminal defendant and victims and witnesses. That is particularly troubling because “[i]t is . . . established beyond doubt that prisoners have a constitutional right of access to the

courts.” Bounds v. Smith, 430 U.S. 817, 821–22 (1977); Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011) (First Amendment); Procunier v. Martinez, 416 U.S. 396, 419 (1974) (due process). Access to the courts safeguards the right of all individuals in custody, including noncitizens, Foreman v. Lowe, 261 F. App’x 401, 404 (3d Cir. 2008) (summary order). Taking a case off-calendar also circumvents the federal and state constitutional rights that attach in New Jersey criminal-court proceedings, like “the right to a fair trial, the right of confrontation, [] the right to counsel,” State v. Juracan-Juracan, 255 N.J. 241, 251 (2023) (citing U.S. Const. amend. VI; N.J. Const., art. I, ¶ 10), and the right to compulsory process, State v. Ramirez, 252 N.J. 277, 304 (2022).¹⁰

There is no need for a trial court to issue a bench warrant when an individual is in immigration detention. The trial court has other options available to them, including issuing a writ for in-person production or utilizing virtual means of production, an option now available to many detained noncitizens with unresolved criminal charges in New Jersey. Whether a criminal court appearance can proceed

¹⁰ Delay or pause of a criminal case also has significant impact on people who allege that they have been the victims of a crime in New Jersey. The New Jersey Constitution provides that alleged crime victims “shall be treated with fairness, compassion and respect by the criminal justice system.” N.J. Const. art. I, ¶ 22. This Court has also emphasized that “changes in the law [have] steadily strengthened the rights of victims to participate in criminal proceedings.” State v. A.M., 252 N.J. 432, 453 (2023). When a matter cannot be heard, the alleged victim’s right to participate in criminal proceedings is frustrated.

virtually is a fact-specific determination that is contingent on the circumstances of the criminal defendant and the type of hearing the court is holding. Particularly, a court should consider whether there are alternative means to secure production that will permit the full participation of the impacted parties. The issuance of a bench warrant as a detainer, without any specific showing of willfulness or lack of cooperation on the part of a criminal defendant in immigration custody, however, does not permit that type of determination. Rather, it curtails any further action on a criminal case, denying the rights of criminal defendants and victims alike.

CONCLUSION

For the foregoing reasons, LSNJ joins Petitioner and urges this Court to reverse the decision of the Appellate Division, and clarify that trial courts may not automatically issue bench warrants for people in ICE detention but must explore alternative options for production to ensure the constitutional rights of criminal defendants with unresolved charges in its court system.

Respectfully submitted,



Shira Wisotsky (NJ 243172017)
Raquiba Huq (NJ 030952007)
Dawn K. Miller (NJ 002521987)
Legal Services of New Jersey
100 Metroplex Drive, Suite 402, P.O. Box 1357
Edison, New Jersey 08818-1357
SWisotsky@lsnj.org
908-882-2665