

Prejudicial and Unreliable

THE ROLE OF POLICE REPORTS IN U.S. IMMIGRATION DETENTION & DEPORTATION DECISIONS



The U.S. immigration system routinely detains and deports immigrants based on their prior contact with the U.S. criminal legal system. This punishment, although defined by law as “civil” in nature, deprives immigrants of liberty and livelihood — with catastrophic economic and emotional tolls on their families and communities.¹ The weighty decision of whether a person is detained or deported is often based on the contents of a single document: a police report.

Police reports play a central role in the decisions made in immigration court by judges and in prosecutorial decisions made by Immigration Customs Enforcement (ICE) and Customs Border Protection (CBP) officers. The overuse of these inherently unreliable and prejudicial documents throughout the immigration system violates fundamental notions of due process, egregiously prejudices immigrants, exacerbates racial bias, and delegitimizes the enforcement of civil immigration laws.

In part one, this brief offers background on the use of police reports in the immigration system. It describes: 1) the well-accepted unreliable and prejudicial nature of police reports; 2) how immigration officers and judges nevertheless use police reports to make detention and deportation decisions; and 3) the racial injustice that results from reliance on police reports in immigration decision-making.

Drawing from the National Immigrant Justice Center’s experience and interviews with legal service providers nationwide, part two describes four primary ways that reliance on police reports in the immigration system egregiously prejudices immigrants. Finally, we recommend policies that the Department of Justice (DOJ) and the Department of Homeland Security (DHS) must urgently adopt to mitigate these harms.*

NATIONAL IMMIGRANT JUSTICE CENTER

A HEARTLAND ALLIANCE PROGRAM

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* The authors interviewed staff at the National Immigrant Justice Center (NIJC) and seven additional immigrant legal service organizations in February 2022, to obtain a snapshot of the realities and challenges resulting from the use of police reports in immigration decision-making. The organizations interviewed were: Bronx Defenders, Capital Area Immigrants’ Rights (CAIR) Coalition, Southern Poverty Law Center (SPLC), Committee for Public Counsel Services, Las Americas Immigrant Advocacy Center, Legal Aid Justice Center (LAJC), and The Refugee and Immigrant Center for Education and Legal Services (RAICES). The findings and recommendations in this brief are based on the information provided in these interviews.

I. THE UNRELIABLE AND PREJUDICIAL NATURE OF POLICE REPORTS AND THEIR USE IN THE IMMIGRATION SYSTEM

What is a police report?

In the criminal legal system, police officers prepare reports early in an investigation into a criminal incident. They typically include information observed or obtained by an individual or group of officers at the scene which are used to justify an arrest.² In other words, police reports are narrative descriptions that establish “probable cause” for arrest. In instances where there is no arrest, police reports may be used as the basis for further investigation and offer a starting point for theories of what happened in an alleged criminal incident.³

Police reports are inherently unreliable and prejudicial due to the circumstances in which they are written and the adversarial nature of the criminal legal system.

Nearly every federal circuit court of appeals and Congress has recognized the inherently unreliable or prejudicial nature of police reports for revealing what actually occurred in any given incident.⁴

Police reports are largely unreliable regarding the truth of what occurred during an alleged incident for many reasons. First, the officers writing the reports almost always lack personal knowledge

of the incident, having usually arrived on the scene after the alleged incident.⁵ The information in a police report also is largely based on conversations officers have with others who also may not have first-hand knowledge of an incident. This may include onlookers, alleged witnesses, or individuals associated with a victim who sometimes have their own motivations for exaggerating or offering misleading statements.⁶ While local jurisdictions vary in their specific policies and practices regarding police reports, typically officers writing reports are not required to fact-check them, corroborate witness statements, or receive any higher-level review of their contents.

Second, police reports are written early in a criminal investigation based on initial impressions in a case. As the Fourth Circuit Court of Appeals wrote, the reports “do not account for later events, such as witness recantations, amendments or corrections.”⁷ If a police report does lead to a prosecution, preliminary hearings and/or criminal trials include witnesses, victim and expert testimony, and cross-examination that all serve to narrow or rebut the information first laid out in the police report. Even in cases settled via plea bargaining, there is significant investigation and litigation to clarify and narrow the facts at hand. A police report may have unsubstantiated allegations that are often quite different than the



corroborated facts ultimately used in plea bargaining or established at trial.

Third and relatedly, police reports are considered “hearsay” evidence because they are written by officers whose credibility has not been evaluated in court under oath through trial or cross-examination.⁸ Hearsay evidence is generally inadmissible in civil and criminal courts.⁹ As one Ninth Circuit Court of Appeals judge explained, police reports “are not especially useful instruments for finding out what persons charged actually did.” This is because the “defects of hearsay, double hearsay, and triple hearsay apply, since people may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported. People sometimes lie or exaggerate when they talk to the police.”¹⁰ Partly for this reason, Congress drafted a rule in the Federal Rules of Evidence that specifically excludes police reports from being used against defendants in a criminal trial.¹¹ In instances where a police report is admissible under an exception, a defendant usually will have a Sixth Amendment right to cross-examine in court the officer who wrote the report or witnesses from the report.¹² This Sixth Amendment right to confront does not extend to immigration court.¹³

Finally, police reports are inherently unreliable and prejudicial due to the adversarial nature of criminal prosecutions, which pit accused criminal defendants against prosecutors and police.¹⁴ The confrontational posture of criminal prosecutions creates incentives for police officers to draft police reports in a manner that helps advance prosecutorial goals and litigation — and sometimes to lie.¹⁵ As scholar Mary Holper explains, “the way police record facts creates the framework for how judges, prosecutors, and defense attorneys think about a case.”¹⁶ For example, in a suppression hearing, police officers may be required to justify possibly unlawful searches and arrests they undertook related to a criminal incident, motivating them to report information that supports those actions, even if the information is untrue.¹⁷ Police reports should be viewed more like “advocacy pieces,” according to the Seventh Circuit Court of Appeals, as an officer writing one “may have many reasons to present events in a non-neutral light and cannot be assumed to have recorded

the relevant events in an entirely neutral way.”¹⁸

The insight that police reports offer is limited to what a police officer observed or recorded, as judges on the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals concur.¹⁹ In short, information in a police report cannot be assumed to be true or reliable.

How are police reports used in the immigration system?

Police reports are used routinely in nearly all immigration decisions where the adjudicator has discretion.

Despite being recognized as prejudicial and unreliable in the criminal legal system, the words of a local police officer weigh heavily in life-altering deportation and detention decisions in the immigration system. Immigration judges and officers most frequently consider the contents of police reports when making determinations as to whether a person merits a positive exercise of discretion, including an immigration officer’s decision whether to undertake an enforcement action or an immigration judge’s decision whether to grant relief from removal that will allow a person to remain lawfully in the United States. Police reports play a critical if not determinative role in four key areas of immigration decision-making that have profound effects on immigrant families and communities, including the three described below.[†]

■ Immigration bond and custody decisions

First, immigration judges regularly use police reports in bond hearings for people in ICE detention during their immigration proceedings. In these immigration bond hearings, the detained immigrant bears the burden of proving to an

† This brief does not address the use of police reports in decisions made by United States Citizenship and Immigration Services (USCIS) on applications for relief, lawful status or benefits. However, just as in other areas of immigration decision-making, police reports play a significant role in these weighty USCIS decisions which impact immigrants and their families.

immigration judge that they are not a danger to the community or a flight risk.²⁰ Bond decisions are highly discretionary and under current law immigration judges may consider police reports — even from dismissed or pending charges — to draw negative inferences regarding a person's danger to the community or flight risk.²¹ Immigration judges frequently deny bond or set extremely high bond based on a police report without hearing any testimony or rebuttal evidence; these hearings may last no longer than a few minutes.

Similarly, when ICE officials make a preliminary decision to detain an individual or a subsequent decision to continue their detention, they often rely on police reports from an individual's prior convictions and/or arrests to justify detention.²² When rendering these agency-level custody determinations, ICE officers are not required to disclose the evidence they relied on to the individuals being detained, meaning that a person may face prolonged civil detention based on a police report they have never seen.

Discretionary applications for relief from removal in immigration court

Second, immigration judges use police reports frequently when determining whether to grant discretionary “relief from removal” that will allow a person to escape deportation and remain lawfully in the United States.²³ Many types of relief from removal require the applicant to meet two burdens: first, the applicant must demonstrate that they meet certain factors making them eligible for immigration relief pursuant to federal immigration law; second, if deemed eligible, they must subsequently prove that they merit a positive exercise of discretion. Immigration judges frequently rely on police reports at both steps of this process.

In order to demonstrate eligibility for relief, for example, applicants for asylum must show that they have not been convicted of a “particularly serious crime.”²⁴ Case law permits immigration judges to consider a wide range of factors in determining whether a conviction is a particularly serious crime, including “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances

of the crime indicate that the [respondent] is a danger to the community.”²⁵ Judges frequently look to police reports to determine these factors, without soliciting rebuttal evidence from the applicant.

As another example, long-time lawful permanent residents facing deportation due to criminal convictions must demonstrate statutory eligibility for a type of relief called “cancellation of removal,” based on duration of residence and categorization of their criminal conviction.²⁶ In these cancellation of removal cases, police reports are used not only for this eligibility determination, but then again during the discretionary part of the decision, when a judge determines if the person deserves relief.

Exercises of prosecutorial discretion in ICE enforcement actions

Like immigration judges, DHS officials regularly use police reports when considering requests for “prosecutorial discretion” from individuals facing detention and deportation.²⁷ Like any enforcement agency, ICE maintains vast discretionary authority to determine when to undertake enforcement actions. ICE’s approach to the exercise of prosecutorial discretion varies widely based on the political landscape; under the Biden administration, ICE attorneys and officers are instructed to follow a set of enforcement priorities announced in September 2021.²⁸ Agency officials are encouraged to utilize this guidance when undertaking a range of enforcement-related decisions, including whether to detain, initiate removal proceedings, contest or stipulate to relief from removal, and/or effectuate deportation.[‡]

Before an individual is considered for an exercise of prosecutorial discretion, an ICE official must determine whether they are a current “priority” for immigration enforcement based on factors including whether they pose a “public safety threat.”²⁹

[‡] At the time of release of this brief, the September 2021 immigration enforcement priorities referenced here were enjoined by a federal court and subject to ongoing litigation in the Circuit Courts of Appeals. Nevertheless, DHS agencies continue to make decisions regarding detention and deportation with significant discretion and on a case-by-case basis. Police reports play a critical role in these decisions.

ICE officials are instructed to consider not only the fact of an offense, but also the gravity, nature, and seriousness of offenses in a person's criminal record.³⁰ This emphasis on case-by-case decision-making with a focus on the details of a person's prior criminal history results in overuse of police reports by DHS officials, despite their frequently demonstrated lack of understanding of basic criminal procedure and the unreliability of such reports.

How does the use of police reports in immigration decision-making prejudice Black and Brown immigrants?

Black and Brown immigrants bear the brunt of the harms that arise from overreliance on police reports in immigration decision-making. In general, Black and Brown immigrants are more likely to suffer from detention and deportation at the hands of the immigration system. The U.S. immigration system's reliance on contact with the criminal legal system to decide whom to detain and deport imports the racial disparities and biases of that system into nearly all aspects of immigration decision-making. Police reports are a mechanism through which these racial disparities are transferred between the systems.

- **Black and Brown immigrants are more likely to have police reports in their files due to racial disparities in the criminal legal system and the over-policing of Black and Brown communities.**

Scores of studies confirm that Black and Brown individuals are disproportionately stopped, arrested, and racially profiled by police.³¹ A Black person in the U.S. is five times more likely to be stopped without just cause than a white person, and Black motorists are 20 percent more likely on average to be stopped than white drivers.³² During traffic stops, Black and Hispanic motorists are consistently more likely to be searched than white motorists³³ and Black and Brown people are also disproportionately and unjustly targeted for minor and non-violent offenses.³⁴ These disparities in contact with police mean that Black and Brown people are more likely to have prior police reports — despite studies showing that

they have the same likelihood of committing crimes.³⁵

The immigration system ignores these well-documented racial disparities regarding policing and nevertheless relies upon police reports to make life altering decisions to deport and detain. In practice, this means that Black and Brown immigrants are not only more likely to be stopped, arrested and receive criminal convictions in their local communities, but also subsequently to face detention and deportation based on police reports from those prior interactions with the criminal legal system.

- **The racial biases that lead to discriminatory policing are likely reflected in the contents of police reports.**

Discriminatory policing in the criminal legal system is a product of both historical racist policies and implicit racial biases.³⁶ The latter are likely to infect police reports, adding to their unreliability and prejudicial nature.

Implicit racial biases have been proven to impact how police officers interpret events. Implicit bias is the unconscious, unknowing differential treatment of another person based on discriminatory factors, including race.³⁷ These "hidden biases" are pervasive and operate largely under the scope of human consciousness.³⁸ They influence the way individuals see and treat each other, even when they believe they are being fair.³⁹ For example, studies show that police officers are more likely to report that Black faces look like criminals, and to think about crime when in the presence of Black Americans or conversely to focus on Black Americans when they are thinking about crime.⁴⁰ These stereotypes about Black Americans and crime subconsciously influence police officers in their interpretations of criminal incidents.⁴¹

Research shows that implicit biases most influence judgment and behavior when a situation is ambiguous.⁴² People rely more on prejudice and stereotypes when attempting to resolve uncertain circumstances, as police officers are required to do in the initial stages of a criminal incident when they write a police report. For example, police officers might interpret reported ambiguous be-

Why do federal courts fail to protect immigrants from the harmful use of police reports in immigration decision-making?

While guardrails and defined legal standards mitigate the prejudicial nature of police reports in every stage of the criminal legal system, the law and federal courts offer little protection from the use of police reports for immigrants facing detention and deportation in the immigration system.

First, individuals in immigration proceedings are not entitled to protections offered to criminal defendants under the Sixth Amendment of the constitution — including the right to confront a witness.⁴³ This means that immigrants in removal proceedings do not have a right to cross-examine the witnesses who make statements in police reports, or the police officers who write the reports that are used to make deportation and detention decisions.⁴⁴

Second, because immigration proceedings and decisions are considered civil and administrative, they are not governed by the Federal Rules of Evidence. As such, hearsay evidence is typically admissible in immigration court unless it is found to be “fundamentally unfair.”⁴⁵ Despite acknowledging their prejudicial and unreliable nature in the criminal legal system, many federal courts of appeals have held that police reports are admissible hearsay evidence in discretionary immigration proceedings.⁴⁶ This includes police reports that did not result in an actual conviction or where the immigrant disputes the facts in the police report.⁴⁷

A closer look at the circuit court of appeals cases on police reports sheds some light on why federal courts generally uphold the use of police reports in discretionary immigration decisions, but simultaneously acknowledge those same reports to be unreliable and prejudicial in other contexts like the criminal system. By the time a removal case is on appeal to the federal court, most immigrants have already admitted to several facts in the police report regardless of the veracity of those facts for the very reasons discussed throughout this policy brief, namely fear that the immigration judge will hold it against them if they dispute the report and fail to “show remorse.” Therefore, the question of the overall reliability of the police report is rarely dispositive on appeal, since the individual in the case has already admitted to facts in the report.⁴⁸

As legal scholar Holper explains: “The fact pattern of a non-citizen admitting to wrongdoing, yet expressing remorse, is common and perhaps strategically wise when a noncitizen is begging for mercy, as he is when he asks for a discretionary waiver. Yet, such concessions of guilt by the non-citizen relieve immigration judges and reviewing courts of the need to determine whether the police report is reliable.”⁴⁹

Additionally, under the Immigration and Naturalization Act (INA), federal courts are precluded all together from judicial review of discretionary decisions made in immigration court. Although the federal courts are still permitted to consider squarely legal issues that arise in discretionary immigration decisions, such as hearsay or confrontation rights, reviewing courts “have refused to decide these legal questions because they arise in the context of a discretionary decision.”⁵⁰ In other words, the law preventing federal courts from reviewing immigration decision-making translates to an overall unwillingness to grapple with legal questions around due process that arise in the context of those decisions.

havior by a Black person as more threatening or aggressive in a police report.⁵¹ Although research on implicit racial bias in policing largely focuses on biases against Black people, several studies indicate that Latinos are similarly stereotyped by police officers.⁵²

The immigration system's overreliance on police reports blatantly ignores the evidence and

research showing significant racial disparities in policing generally and the racial biases likely to infect police reports. Neither immigration judges nor DHS decision-makers receive training to mitigate these disparities and they are not required by policy or rule to undertake analysis of how racial biases may impact the contents of a police report used to justify detention and deportation.

II. RELIANCE ON POLICE REPORTS TO MAKE WEIGHTY DEPORTATION AND DETENTION DECISIONS EGREGIOUSLY PREJUDICES IMMIGRANTS

The National Immigrant Justice Center (NIJC) provides legal services to thousands of individuals facing detention and deportation each year. We interviewed staff at seven legal service providers as well as NIJC's own legal services team to gather qualitative data on how the use of police reports in immigration decision-making impacts immigrants navigating the system. The resounding conclusion is that the overreliance on police reports to make weighty decisions prejudices immigrants in egregious ways.

Problem 1: Immigration decision-makers overwhelmingly believe the contents of police reports to be true despite their prejudicial & unreliable nature.

In practice, most immigration judges and DHS officials treat allegations contained in police reports as the truth. This presumption of reliability is highly prejudicial to immigrants almost every time a police report is used in immigration decision-making. According to every legal service provider NIJC interviewed, because immigration judges and DHS officials treat police reports as reliable and truthful documents, nearly any unsubstantiated information showing or even implying criminal involvement or association is taken to be true and construed against the immigrant.⁵³ This is nearly always the case regardless

of the final disposition in the criminal case (e.g., no charges filed, case dismissed, some charges thrown out) or whether the facts pled to or proven at trial differ from those alleged in the police report.

Unsurprisingly, unsubstantiated information in police reports often colors an immigration judge or adjudicator's overall view of a client throughout proceedings, with judges taking the allegations as an overall indication of criminality or unworthiness. As an attorney at the Capital Area Immigrants' Rights (CAIR) Coalition stated: "police reports often include dramatized narratives that can paint clients in a bad light and make adjudicators biased against our client even when the contents of the police report are not relevant to the client's case for relief."⁵⁴

Immigration decision-makers' reliance on allegations in police reports persists even in instances where allegations are obviously unreliable. In the case of NIJC client Samuel[§], an immigration judge treated the information in a police report as reliable even though the reporting police officer could not speak Spanish to communicate with the alleged victim and witnesses, and instead used Google Translate and a bilingual minor who was nearby to interpret. In this case, statements gleaned from haphazard and inaccurate translation by a sole police officer put Samuel at risk of

§ This name and nearly all names used in this brief are pseudonyms to protect the privacy of those whose cases and stories are included as examples.

being denied eligibility for asylum and therefore at risk of deportation back to harm.

Similarly, an immigration judge almost denied bond for detained NIJC client Luis based on information in a police report which mistakenly identified Luis as the driver in a driving under the influence (DUI) incident, when he was in fact the passenger. The police officer had failed to interview Luis for the report, depriving him of the opportunity to correct the inaccuracy prior to his wrongful DUI arrest. Upon release from criminal jail for the DUI arrest, ICE arrested Luis and transferred him to immigration detention. When he finally appeared for his bond hearing, the immigration judge refused to believe that Luis was a passenger and not the driver — giving the inaccurate police report a presumption of reliability. The judge finally accepted that the police report was possibly unreliable, and that Luis was not the driver, only after NIJC produced hospital records showing that the injuries Luis sustained were those of a passenger. While the judge ultimately granted bond, Luis spent three months in detention due to the police report. His daughter and wife, who suffers from bipolar disorder and cannot maintain employment, endured significant trauma and financial challenges because of Luis's unnecessary detention.

The presumption of reliability is particularly

prejudicial where police reports are used to support allegations of gang affiliation or gang membership. In one case from CAIR Coalition, an immigration judge used witness statements alleging gang affiliation from a police report even though no charges or convictions were brought related to gangs, and the police report itself was for an incident unrelated to a gang.⁵⁵ In many cases, police reports imply or insinuate that an individual is associated with a gang through descriptions of an area or environment where an incident occurred, and judges or DHS officials will cherry-pick these statements from the report and use them as evidence of gang affiliation or gang membership.

Finally, legal service providers report that DHS officials and some immigration judges regularly use police reports to impeach immigrants in removal proceedings — using the reports affirmatively to attack the general credibility of individuals as they testify to other matters in a case.⁵⁶ In these cases, rather than submitting the police report to the court by the filing deadline for evidence, DHS officials pull it out during the hearing only in time to cross-examine an individual. In one NIJC case, an immigration judge “skimmed” a police report while a client testified and then used it to confront the client, aggressively questioning them on statements in a report the client had not seen or read.



Problem 2: Immigration decision-makers give extraordinary weight to police reports and almost nothing else is sufficient in practice to refute its contents.

Not only do immigration decision-makers frequently take all allegations in a police report to be true, but they also attribute overwhelming weight to those reports. Even when attorneys or advocates provide a substantial amount of testimony and evidence to refute unsubstantiated allegations in a police report, according to every legal service provider interviewed, the information in the police report is still often construed against their clients. As an attorney from CAIR Coalition described: “If we present evidence, including declarations and testimony, undermining the veracity of the police report, [immigration decision-makers] should have to actually weigh that against the police report. As it currently stands, if our client testifies to something contrary to the police report, it is the client’s credibility that is damaged, not the report’s.”⁵⁷

In immigration court, the substantial weight given to police reports is particularly prejudicial in bond hearings where immigrant respondents bear the burden of proving that they are not a danger to their community. Legal service providers reported that in bond hearings some immigration judges refuse to even allow into the record affidavits from the detained immigrant refuting the contents of a police report. When judges do permit the introduction of such an affidavit, they rarely find it credible. This prejudice against people facing removal proceedings is particularly glaring since the police officer who drafted the report is not subject to cross-examination and will almost certainly never set foot in immigration court to be assessed for credibility. On the other hand, judges and DHS can cross-examine respondents on their versions of events. The immigrant respondent’s affidavit carries a greater amount of reliability and yet is given almost no credibility or weight.

In the context of prosecutorial discretion decisions, legal service providers reported that DHS

officials pull police reports from local jurisdictions on their own without notice to the immigrant or the immigrant’s attorney or the opportunity to refute unsubstantiated allegations in the report.⁵⁸ In the rare instance where an individual is permitted to refute the contents of a report, legal service providers reported that their rebuttal appears to make no difference in the outcome.⁵⁹ As an attorney from Committee for Public Counsel Services stated, DHS officials are “true believers” when it comes to police reports.⁶⁰

Immigration adjudicators’ attribution of truth to allegations in police reports is so durable that, in practice, attorneys sometimes advise their clients against challenging the allegations because the judge or adjudicator will simply assume they are lying. According to the attorney from Committee for Public Counsel Services: “when a respondent tries to dispute what is in the police report, the judge or DHS charge that he is not taking responsibility for his actions. This leaves respondents with no choice but to feign remorse, try to show rehabilitation (often for something they didn’t even do or do not need to be rehabilitated from) and then beg forgiveness.”

Problem 3: Immigration decision-makers regularly use police reports from unresolved, ongoing criminal cases and from cases where there was only an arrest and no conviction.

Immigration decision-makers use police reports largely without considering the overall context and procedure of a criminal case. The lack of faith and credit given to the procedures and decisions of the criminal legal system are especially prejudicial and egregious when adjudicators rely on police reports in cases with unresolved charges or charges that have resulted in a dismissal or plea.

■ Use of police reports from pending criminal cases in immigration bond hearings

Immigration decision-makers regularly rely on police reports from criminal cases that are pending and still being litigated in criminal court — partic-

ularly in bond hearings. In many cases, ICE arrests immigrants immediately upon their release from criminal custody, even when their release is on order of a criminal court judge who has found they do not pose a flight risk or risk to the community. When an individual appears for their immigration bond hearing, the immigration judge often presumes reliability of the police report from the pending criminal case, finding the individual to be a danger to the community and ordering them to remain detained through the course of immigration proceedings. Judges and DHS officials who rely on police reports in unresolved cases ignore that the criminal legal system has

yet to make a final decision regarding guilt and that charges could be dropped, or the individual could be found not guilty.

The practice of using police reports from pending criminal cases also unjustly implicates immigrants' Fifth Amendment rights against self-incrimination. A criminal defense attorney may reasonably advise their client not to testify in immigration court regarding the circumstances in a pending criminal case to avoid those statements being used against them later in criminal court. However, legal service providers report that when immigrants in proceedings assert their Fifth

Unjustly cited police report leads to Alma's unnecessary detention and family separation

In one case from the Alameda County Public Defender's Office in California, local police arrested 51-year-old Alma in her home where they found drugs. Alma reported that the drugs belonged to the father of her U.S. citizen daughter who lived in the home. Nevertheless, based on the police report, the prosecutor charged Alma, the father of her child, and three others with possession for sale of controlled substances and endangerment to a child. This was the first arrest Alma faced in her 18 years residing in the United States since arriving from Mexico. Alma earned a living to support herself and her children by selling tamales in her community with a small business loan. She reported at the time of her arrest that her husband could be verbally abusive and aggressive; in at least one instance, family members called police to protect her from him.

Soon after Alma's arrest, a criminal judge determined she did not present a danger to her community and ordered her release from jail. However, upon her release from criminal custody, ICE officers — in collaboration with local police — immediately arrested Alma, detained her, and initiated removal proceedings. At her bond hearing, Alma's immigration attorney informed the immigration judge that under advice from her criminal defense counsel, she would assert her Fifth Amendment right not to testify regarding the circumstances leading up to her arrest and pending charges.

The immigration judge permitted Alma's counsel to summarize the salient facts in her case rather than take live testimony. Despite Alma's submission of overwhelming evidence of her community ties and family support, the judge denied her bond, treating the information alleged in the police report from her pending case as true and essentially making a negative inference based on her assertion of her Fifth Amendment rights. Because of the judge's reliance on the police report in her pending criminal case, Alma remained stuck in immigration detention and could not appear in her criminal proceedings to challenge the very allegations that were used to justify her immigration detention.

Alma spent over three months in detention. During her detention, her nine-year-old daughter's father fled the area, leaving her daughter to suffer the trauma of separation from both parents. The prosecutor dismissed Alma's criminal case soon after a federal court found that Alma's constitutional rights had been violated at her immigration bond hearing.

Amendment right not to testify, immigration judges often construe the action as an admission of guilt and, even more damning, a refusal to show remorse. Immigration judges in these cases typically deny bond. Instead, if the immigrant decides to disregard advice of criminal legal counsel and offer testimony on the pending criminal case to convince a judge to grant bond, they place themselves at risk in their criminal proceedings. Every legal service provider interviewed commented on the egregious Fifth Amendment violations their clients face because of immigration judges' reliance on police reports from pending criminal cases.

■ Use of police reports where there was only an arrest, or where charges were dismissed

All legal service providers also reported immigration decision-makers using police reports from arrests that never turned into actual charges or full criminal cases, or where the charges filed were

ultimately dismissed. In other words, even when the criminal system does not have sufficient evidence to bring or finish a case, immigration judges will use unsubstantiated facts in police reports from mere arrests to make weighty decisions, especially in bond hearings and in discretionary deportation decisions.

Although police reports from arrests that do not result in convictions are permitted for use in immigration decision-making,⁶¹ the Board of Immigration Appeals (BIA) has warned against giving too much weight to such reports.⁶² Additionally, several federal courts of appeals have reiterated in the criminal legal context that a "mere arrest ... is not evidence that the person arrested actually committed any criminal conduct. This is because arrest happens to the innocent as well as the guilty."⁶³ An individual "cannot be deprived of liberty based upon mere speculation...a bare arrest record — without more — does not justify an assumption that a defendant has committed other crimes."⁶⁴

Ousman's detention and deportation fight continues years after arrest charges dismissed

In the case of Ousman, a Bronx Defenders client, a judge denied him a waiver to gain permanent lawful status because of several old police reports, most of which never resulted in convictions.⁶⁵ A Black immigrant from Gambia, Ousman arrived to the United States when he was six years old and grew up in an over-policed area of New York City.⁶⁶ His record consisted of eight arrests — only one of which resulted in an actual conviction. Nevertheless, the judge in his immigration case requested the reports from all eight arrests, including one from when he was still a juvenile. Throughout his case, the judge remained laser-focused on these police reports from Ousman's past, continually referring to his "lengthy" criminal history, even though nearly all the arrests resulted in dismissed charges or acquittal.⁶⁷ The judge made clear that he assumed Ousman was guilty of certain charges in the arrest records, despite the charges being dismissed.⁶⁸

With eight police reports under review, the judge ultimately denied Ousman a hardship-based waiver. Ousman's numerous rehabilitative efforts — including working in a community garden, landing a paid internship, and earning his GED certificate after the birth of his daughter — could not overcome the weight of the pre-existing police reports from these mere arrests.⁶⁹ As a result, Ousman spent three years in immigration detention, even after receiving a gubernatorial pardon from the New York governor for his sole conviction.⁷⁰ Today Ousman is appealing the judge's decision, continuing his fight to remain in the United States with his loved ones.

Problem 4: Immigration adjudicators make an adverse inference against immigrants if they refuse or fail to submit a police report.

Considering the various ways police reports prejudice immigrants, most legal service providers report that they would prefer not to submit such reports at all for their clients. However, some judges and agency guidelines for prosecutorial discretion requests require submission of police reports, both for discretionary decision-making and to make specific legal findings. For example, some judges refuse to make bond decisions until a police report is submitted. Other judges continue cases repeatedly until a police report is submitted. In instances where DHS officials or judges allow cases to move forward without the submission of a police report, they often hold the

omission against the person and rule adversely.

Requiring police reports to be submitted into the record often delays cases because the process for obtaining police reports can be extremely onerous. Police reports are generated at the county level and not all counties make such reports easily accessible. Immigration legal service providers who do not regularly work within the criminal legal system often lack access to the databases and resources to find those reports. While DHS is sometimes required to submit the report or does so anyway, in other cases immigrants are the ones required to locate and submit a report. In cases where DHS produces the report, immigrants and their attorneys do not always see the report prior to its use in decision-making — making it impossible to even attempt to refute alleged facts that later get used against the immigrant.

III. NIJC RECOMMENDATIONS TO MITIGATE THE UNJUST HARMs TO IMMIGRANTS FROM RELIANCE ON POLICE REPORTS

NIJC urges DOJ and DHS to take the following actions immediately to mitigate the worst harms of reliance on police reports in the immigration system.⁷¹ Each of the recommendations described below should be implemented through appropriate agency mechanisms including ICE OPLA guidance to ICE attorneys, EOIR and DHS policy memorandums, and changes to the immigration court practice manual.⁷²

1. Mandate immediate training for immigration judges and all DHS officials regarding the prejudicial and unreliable nature of police reports.

Immigration judges and DHS officials should be required to attend training regarding the

unreliable nature of police reports, the implicit and explicit racial biases that may infect those reports, and basic criminal procedure to underscore the context in which reports are written. The curriculum for such training should include specific examples of police reports and should be developed with input from a range of stakeholders including those representing immigrants in removal proceedings.

2. Establish a presumption of unreliability for police reports that can only be overcome with additional, corroborating evidence.

The agencies should work with immigration judges and DHS officials to shift the current presumption of reliability and truth given to police reports to a presumption of unreliability. In practice, this means that decision-makers should request corroborating evidence before accepting information in a police report, and explain why a particular allegation in a police report is adopted as truth when contradicted by testimony of the person facing detention and/or deportation.

⁷¹ While federal courts permit immigration judges to use police reports in making discretionary decisions, DOJ and DHS have the authority to mitigate the harms of reliance on police reports and delineate boundaries for use of those reports. This brief offers recommendations that would place guardrails on the manner in which police reports are used in the immigration system.

3. Provide people facing deportation and detention the right to refute any police report used against them through submission of a written affidavit and/or live testimony that immigration decision-makers must engage with when making a detention or deportation decision.

At bare minimum, a person facing detention or deportation should have the right to submit an affidavit or live testimony presenting their version of the facts of a prior criminal incident being used against them. Decision-makers should be required to enter into the court record or an individual's file any specific allegations they rely upon from a police report in making their decision when those allegations contradict the person's testimony and provide a justification for such reliance despite the contradictions. This analysis is particularly important since the facts in the police report cannot be subject to cross-examination in the same manner as the written or live testimony of the person facing detention or deportation.

4. End or strongly discourage use of police reports from ongoing, pending criminal cases in immigration decision-making.

The use of police reports from ongoing criminal cases puts people facing detention and deportation in the untenable position of being unable to appear for future criminal proceedings to challenge the very allegations used to justify their continued immigration detention. Ending the use of police reports from ongoing criminal litigation is essential to protect immigrants' Fifth Amendment rights and to give basic faith and credit to the criminal legal process.

5. End or strongly discourage use of police reports from criminal cases where there was only an arrest and no conviction. At the very least, ensure such reports are given significantly less weight by immigration decision-makers.

Police reports from criminal cases where charges were dismissed, never filed, or where an individual was acquitted should not be used against peo-

ple facing detention and deportation. U.S. immigration law's statutory enmeshment with criminal law is based on actual convictions that trigger deportation and detention — not arrests. Even where discretionary decision-making requires an inquiry into the overall positive equities in an individual's case, police reports from arrests have no place. In any instance where a police report from an arrest not resulting in conviction is considered, DHS and DOJ should ensure that decision-makers afford that report minimal weight. The BIA itself has cautioned against assigning significant weight to police reports where there is no conviction and/or no other corroborating evidence in discretionary immigration decisions.⁷²

6. End or strongly discourage use of police reports as impeachment evidence by immigration judges.

Immigration judges and DHS officials should not use police reports to impeach or undermine the overall credibility of a person in immigration proceedings, particularly since most people facing detention or deportation do not have an opportunity to review such reports prior to their use. At the very least, DHS and DOJ must provide access to any police report used for purposes of impeachment prior to its use so that the person and any legal counsel are familiar with the contents of that report prior to its use against the person facing detention and deportation.

7. End or strongly discourage adverse inferences against a person facing detention or deportation based on their inability or failure to produce a police report.

People facing detention and deportation should not be penalized for the cumbersome and challenging nature of locating and finding police reports from local jurisdictions. When a police report is not submitted, immigration decision-makers must make decisions based on the evidence before them and not weigh the lack of a report against the individual.

CONCLUSION

NIJC urges the administration to take immediate steps to mitigate the ongoing harms of over-reliance on police reports in immigration decision-making. The significant weight and presumption of reliability given to police reports across the immigration system flagrantly disregards their acknowledged unreliable and prejudicial nature and the racial biases they often reflect. Decision-makers use police reports from ongoing criminal cases and unresolved charges with the same weight and reliability as all other police reports and without regard for basic procedure in the criminal legal system. These practices undermine due process and fairness and disparately impact Black and Brown immigrants.

Currently, immigration decision-makers receive no training or guidance on whether and how to use these documents in a manner that mitigates the prejudice and harm to immigrants as they fight to prevent detention and deportation. In fact, there are no policies whatsoever on the use of police reports in the immigration system. If the U.S. government continues to tear immigrants away from their livelihoods and families for violations of civil immigration law based on these reports, it must adopt the recommendations offered here by NIJC and echoed by the experiences of immigration legal service providers and their clients nationwide.

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ENDNOTES

1. The U.S. Supreme Court acknowledged the harsh and severe nature of deportation and its intimate connection to the criminal legal system in *Padilla v. Kentucky* where it held that immigrants have a Sixth Amendment right to be advised of the immigration consequences of pleading guilty in criminal cases. Other than this right, immigrants are not afforded most constitutional and other criminal procedural rights in the U.S. immigration system despite the punitive nature of detention and deportation. *Padilla v. Kentucky*, 559 U.S. 356 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'").
2. See, e.g., *Prudencio v. Holder*, 669 F.3d 472, 483-84 (4th Cir. 2012) (stating that police reports "often contain little more than unsworn witness statements and initial impressions" and since they are "generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections.").
3. See *Olivas-Motta v. Holder*, 746 F.3d 907, 918-19 (9th Cir. 2013) (Kleinfeld concurring); see also Mary Holper, "Confronting Cops in Immigration Court," Wm. & Mary Bill of Rts. J. (2015) at 684.
4. See, e.g., *Padmore v. Holder*, 609 F.3d 62, 69 (2d Cir. 2010) ("We have previously expressed concern, albeit in a different context, regarding the reliance on the particular circumstances of a petitioner's

- arrest..."); *Prudencio*, 669 F.3d at 483-84 ("[P]olice reports and warrant applications, often contain little more than unsworn witness statements and initial impressions."); *U.S. v. Quezada*, 754 F.2d 1190, 1193 (5th Cir. 1985) ("The law enforcement exception in Rule 803(8)(B) is based in part on the presumed unreliability of observations made by law enforcement officials at the scene of a crime..."); *U.S. v. Russell*, 156 F.3d 687, 690 (6th Cir. 1998) ("[W]e are also mindful that police investigative reports used against a defendant in a criminal trial are generally regarded as unreliable and are excluded as a matter of law as inadmissible hearsay at trial."); *U.S. v. Jordan*, 742 F.3d 276, 280 (7th Cir. 2014) ("Police reports are not presumed to be categorically reliable..."); *U.S. v. Coleman*, 7 F.4th 740, 747 (8th Cir. 2021) ("We have also questioned the reliability of police reports."); *Olivas-Motta*, 746 F.3d at 918 (Kleinfeld, J. concurring) ("It has long been clear that police reports are not generally 'reasonable, substantial, and probative evidence' of what someone did..."); *U.S. v. Padilla*, 793 F. App'x 749, 756 (10th Cir. 2019) ("police reports are not inherently reliable," and "[n]ot every police report satisfies the reliability floor."); *U.S. v. Brown*, 9 F.3d 907, 911 (11th Cir. 1993) ("Congress was aware of the inherent bias that might exist in reports prepared by law enforcement officials in anticipation of trial. Congress, therefore, excluded such matters from the public records exception."); see also Advisory Committee's Notes on Federal Rules of Evidence, Note to Paragraph (8) of Rule 803, 56 F.R.D., 13 ("[T]he rule with respect to evaluative reports . . . is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.") [hereinafter "Advisory Committee's Notes"]).
5. See *Olivas-Motta*, 746 F.3d at 918-19 (Kleinfeld, J. concurring); see also *U.S. v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013) ("While police reports may be demonstrably reliable evidence of the fact that an arrest was made, they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true.").
 6. See *Olivas-Motta* 746 F.3d at 918-19 (Kleinfeld, J. concurring) ("[P]eople may speak to the police despite lack of personal knowledge and lack of adequate observation, may be misunderstood, and what they say may be misreported. People sometimes lie or exaggerate when they talk to the police."); see also *Prudencio*, 669 F.3d at 483-84.
 7. *Prudencio*, 669 F.3d at 483-84.
 8. See Holper, *supra* note 3, at 682. Stating that "Congress, when adopting the [Federal Rules of Evidence], specifically exclude[d] police reports from the public records exception to the hearsay rule when used against criminal defendants."; see also S. Rep. No. 93-1277, 17 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7064. Stating that "Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases."
 9. See, e.g., *U.S. v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994) ("Hearsay is generally inadmissible because 'the statement is inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined."); see also Holper, *supra* note 3, at 686.
 10. *Olivas-Motta*, 746 F.3d at 918-19 (Kleinfeld, J. concurring).
 11. Federal Rules of Evidence, Rule 803(8)(A)(ii) ("in a criminal case, a matter observed by law-enforcement personnel" does not qualify under the public records exception to the hearsay rule); see also H.R. Rep. No. 93-1597 (1974) (Conf. Rep.), reprinted in 1974 U.S.C.C.A.N. 7098, 7111 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcomm. on Crim. Just., Upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration, stating "Police reports, especially in criminal cases, tend to be one-sided and self-serving. They are frequently prepared for the use of prosecutors, who use such reports in deciding whether to prosecute."); S. Rep. No. 93-1277, *supra* note 8, at 17.
 12. See *Crawford v. Washington*, 448 U.S. 56 (1980) (holding that the confrontation clause in the Sixth Amendment guarantees a criminal defendant the opportunity to cross-examine someone who makes a hearsay statement that is used against the defendant); see also *U.S. v. Lundstrom*, 880 F.3d 423, 442 (8th Cir. 2018); *U.S. v. Garcia*, 282 F.App'x 14, 23 (2d Cir. 2008); *U.S. v. Sokolow*, 91 F.3d 296, 405 (3d Cir. 1996); *U.S. v. Hayes*, 861 F.2d 1225, 1320 (10th Cir. 1988) (various courts holding that police reports are admissible where the person who authored the report testifies to meet confrontation rights under the Sixth Amendment).
 13. See, e.g., *Fangjian Song v. Whitaker*, 750 F. App'x 1, 3 (2d Cir. 2018) ("Sixth Amendment rights do not apply in removal proceedings, which are civil in

- nature."); *Emile v. I.N.S.*, 244 F.3d 183, 189 (1st Cir. 2001) ("Since deportation is civil, the Confrontation Clause does not apply.").
14. See *U.S. v. Enterline*, 894 F.2d at 290 ("[P]olice reports are not reliable evidence of whether the allegations of criminal conduct they contain are true;" "[M]atters observed by the police at the scene of the crime ... are potentially unreliable since they are made in an adversary setting and are often subjective evaluations of whether a crime was committed."); see also *U.S. v. Weiland*, 420 F.3d 1062, 1075 (9th Cir. 2005) ("[P]olice officers' reports of their contemporaneous observations of crime ... might be biased by the adversarial nature of the report.").
 15. See *Jordan*, 742 F.3d at 280 ("Police reports are not presumed to be categorically reliable... [P]olice reports can be adversarial in nature, arising from a confrontation between a suspect and a police officer. They can also be advocacy pieces, written for prosecutors to use in deciding whether or how to charge a suspect. A police officer thus may have many reasons to present events in a non-neutral light and cannot be assumed to have recorded the relevant events in an entirely neutral way. Even the most candid witness will naturally remember and recount events in a light that supports the story he is trying to tell."); see also *U.S. v. Crockton*, 224 F. App'x 227, 231 (4th Cir. 2007) ("Police investigative reports are inadmissible because they are generally crafted with an eye toward prosecution.").
 16. Holper, *supra* note 3, at 686.
 17. *Id.*
 18. *Olivas-Motta*, 746 F.3d at 918-19 (Kleinfeld, J. concurring); see also Advisory Committee's Notes, *supra* note 4, at 313; Holper, *supra* note 3, at 685-86.
 19. See, e.g., *Padmore*, 609 F.3d at 69; *Prudencio*, 669 F.3d at 483-84; *Quezada*, 754 F.2d at 1193; *Russell*, 156 F.3d at 690; *Jordan*, 742 F.3d at 280; *Coleman*, 7 F.4th at 747; *Enterline*, 894 F.2d at 290; *Olivas-Motta*, 746 F.3d at 918 (Kleinfeld, J. concurring); *Padilla*, 793 F. App'x at 756; *Brown*, 9 F.3d at 911; see also Advisory Committee's Notes, *supra* note 4, at 313.
 20. See *In Re Guerra*, 24 I&N Dec. 37, 40 (BIA 2006); *In re Patel*, 15 I&N Dec. 666, 667 (BIA 1976).
 21. See, e.g., *In Re Guerra*, 24 I&N Dec. (upholding the immigration judge's denial of bond for a person who had been charged with drug trafficking, but had not been convicted); *Thomas v. Garland*, 25 F.4th 50, 54 (1st Cir. 2022) ("[W]e have repeatedly held that an immigration court may generally consider a police report when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction."); *Martinez-Corona v. Garland*, No. 19-72569, 2021 WL 4868357, at *1 (9th Cir. Oct. 19, 2021) ("[E]vidence of criminal conduct may be considered in some circumstances even without a later conviction."); *Tenorio v. Holder*, 603 F. App'x 283, 287 (5th Cir. 2015); *Parcham v. I.N.S.*, 769 F.2d 1001, 1005 (4th Cir. 1985).
 22. This is based both on the extensive experience of NIJC attorneys representing individuals in their immigration proceedings as well as the interviews conducted with legal service providers nationwide for this brief.
 23. Asylum, cancellation of removal, adjustment of status, and voluntary departure are common forms of discretionary relief regularly considered in immigration court. See 8 U.S.C. § 1158 (2012) (asylum); § 1229b (cancellation of removal); § 1229c (voluntary departure); § 1255 (adjustment of status).
 24. See 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1231(b)(3)(B)(ii).
 25. See *In re Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982) (noting that for particularly serious crime determination, a judge must consider "the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community"); see also *In re N-A-M*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of B-Z-R*, 28 I&N Dec. 563, 564 (AG 2022) (citing *Matter of L-S*, 22 I&N Dec. 645, 649 (BIA 1999)).
 26. See 8 U.S.C. § 1229a(a) (2012); *In re C-V-T*, 22 I&N Dec. 7, 11-12 (BIA 1998) (laying out factors for the balancing test that judges must use when considering whether a noncitizen merits cancellation of removal in the exercise of discretion).
 27. Requests for prosecutorial discretion include requests to ICE Enforcement and Removal Operations (ERO) for release from detention; requests to ICE Office of the Principal Legal Advisor (OPLA) to join motions to re-open immigration proceedings; and requests to ICE Office of the Principal Legal Advisor (OPLA) to terminate or end immigration proceedings.
 28. See Memorandum from Secretary Mayorkas to Tae Johnson, Acting Director of Immigration and Customs Enforcement, "Guidelines for the Enforcement of Civil Immigration Law," (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>; Memorandum from Kerry E. Doyle, Principal Legal Advisor of Immigration and Customs En-

- forcement, to all Office of the Principal Legal Advisor Attorneys, "Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion," (Apr. 3, 2022), https://www.ice.gov/doclib/about/offices/opla/OP-LA-immigration-enforcement_guidanceApr2022.pdf [hereinafter "OPLA Guidance Memo"].
29. See OPLA Guidance Memo, *supra* note 28, at 2-3.
30. See OPLA Guidance Memo, *supra* note 28, at 4-5.
31. Regarding racial disparities in arrest rates see, e.g., Lorie Fridell & Hyeyoung Lim, "Assessing the racial aspects of police force using the implicit- and counter-bias perspectives," 44 J. Crim. Just., 36 (2016); Engel & Johnson, "Toward a better understanding of racial and ethnic disparities in search and seizure rates," J. of Crim. Just. (2006); Gelman, Fagan, & Kiss, "An analysis of the New York city police department's 'stop-and-frisk' policy in the context of claims of racial bias," J. of Am. Stats. Ass'n. (2007). Regarding racial disparities in traffic and pedestrian stops by police officers see, e.g., Lange, Johnson, & Voas, "Testing the racial profiling hypothesis for seemingly disparate traffic stops on the New Jersey turnpike," Just. Quarterly (2005); Lundman & Kaufman, "Driving while black: Effects of race, ethnicity, and gender on citizen self-reports of traffic stops and police actions," J. of Criminology (2003). Regarding racial disparities in general police surveillance see, e.g., Meehan & Ponder, "Race and place: The ecology of racial profiling African American motorists," Just. Quarterly (2002).
32. NAACP, "Toolkit: Criminal Justice Fact Sheet," <https://naacp.org/resources/criminal-justice-fact-sheet>; Pierson, Simoui, Overgoor, Corbett-Davies, Jenson, Shoemaker, Ramachandran, Barghouty, Phillips, Shroff, & Goel, "A large-scale analysis of racial disparities in police stops across the United States," 4 Nat. Hum. Behav. (2020), <https://openpolicing.stanford.edu/findings>.
33. Pierson et al., *supra* note 32. Finding that "Across 21 states collecting substantive data, Black and Hispanic motorists are consistently more likely to be searched during a traffic stop than white motorists" and "police require less evidence during a traffic stop to search Black and Hispanic drivers than to search white drivers."
34. In one 12-year study from the John Jay College of Criminal Justice, 51% of the New York city's population was Black or Hispanic, yet 82% of those arrested for misdemeanors were Black or Hispanic, as were 81% of those who received court summons for low level violations such as public consumption of alcohol, disorderly conduct or bicycling on the sidewalk. Chauhan, Fera, Welsh, Balazon, & Misshula, "Trends in Misdemeanor Arrests in New York," Report presented to the Citizens Crime Comm'n (2014).
35. "5% of illicit drug users are African American, yet African Americans represent 29% of those arrested and 33% of those incarcerated for drug offenses." NAACP, *supra* note 32.
36. Staats, Capatosto, Tenney, & Mamo, "State of the science: Implicit bias review," Kirwan Inst. (2017). Stating that "The adverse experiences and outcomes related to criminal justice involvement for marginalized groups can be the result of (1) unconscious discrimination; and/or (2) historic policies and related structural dynamics."
37. Christine Jolls & Cass R. Sunstein, "The Law of Implicit Bias," 4 Cal. L. Rev. 969 (July 2006).
38. Bailey Maryfield, "Implicit Racial Bias," Just. Res. Stat. Ass'n (December 2018), <https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf>.
39. *Id.*
40. Spencer, Charbonneau, & Glaser, "Implicit bias and policing," 10(1) Soc. & Pers. Psychol. Compass 50 (2016).
41. *Id.* Stating that "Implicit biases (e.g., stereotypes linking Blacks with crime or with related traits like violence or hostility) influence judgments through processes of misattribution and disambiguation." and "Consequently, biases (like any preconceptions) held by the police almost certainly cause racially discriminatory decisions about whom to investigate (stop, question, search) and how to interpret their behavior, and therefore partially account for disparities in criminal justice outcomes."
42. *Id.*
43. See, e.g., *Fangjian Song*, 750 F. App'x at 2 ("Sixth Amendment rights do not apply in removal proceedings, which are civil in nature"); *Emile*, 244 F.3d at 189 ("Since deportation is civil, the Confrontation Clause does not apply."); see also Holper, *supra* note 3 at 691-96.
44. Mary Holper offers three legal grounds which she argues should be used to extend Sixth Amendment rights in immigration proceedings, considering the extensive use of police reports against immigrants facing deportation and detention. First, since deportation has been recognized by the U.S. Supreme Court as a form of punishment, full Sixth Amendment protections including the right to confront a witness should extend to immigration proceedings;

- second, since deportation proceedings are civil in nature, the case-by-case balancing test used under the Due Process Clause of the Fifth Amendment should guarantee the right to confront and cross-examine police officers; and, third, since deportation has been considered “quasi-criminal,” a heightened form of procedural protections should extend. Holper, *supra* note 3 at 707-27.
45. *Gu v. Gonzales*, 454 F.3d 1014, 1021 (9th Cir. 2006); *see also Vladimirov v. Lynch*, 805 F.3d 955, 964 (10th Cir. 2015) (“Where hearsay evidence is ‘seemingly reliable,’ it should not be rejected solely because it is hearsay.”).
46. See, e.g., *Padmore*, 609 F.3d at 69; *Prudencio*, 669 F.3d at 483-84; *Quezada*, 754 F.2d at 1193; *Russell*, 156 F.3d at 690; *Jordan*, 742 F.3d at 280; *Coleman*, 7 F.4th at 747; *Enterline*, 894 F.2d at 290; *Olivas-Motta*, 746 F.3d at 918 (Kleinfeld, J. concurring); *Padilla*, 793 F. App’x at 756; *Brown*, 9 F.3d at 911; *see also* Advisory Committee’s Notes, *supra* note 4, at 313.
47. See, e.g., *In Re Guerra*, 24 I&N Dec. (upholding the immigration judge’s denial of bond for a person who had been charged with drug trafficking, but had not been convicted); *Thomas*, 25 F.4th at 54 (“[W]e have repeatedly held that an immigration court may generally consider a police report when making a discretionary immigration decision, even if an arrest did not result in a charge or conviction.”); *Martinez-Corona*, No. 19-72569, 2021 WL 4868357, at *1 (“[E]vidence of criminal conduct may be considered in some circumstances even without a later conviction.”); *Tenorio*, 603 F. App’x at 287; *Parcham*, 769 F.2d at 1005.
48. Holper, *supra* note 3 at 702-3.
49. *Id.* at 702.
50. *Id.* at 703.
51. Fridell & Lim, *supra* note 31, at 36. Stating that “As suggested by the judge in the NYPD stop and frisk case, officers might interpret ambiguous behavior on the part of Blacks as more threatening or aggressive and might, in turn, respond in a more aggressive fashion.” These same biases lead to the well-documented, disproportionate use of force against Black Americans by police officers. See Center for Policing Equity, “The science of justice: Race, arrests, and police use of force,” U. of Cal. (2016); Nat’l Initiative for Building Cmty., Trust, & Just., “Resources: Implicit Bias,” at <https://trustandjustice.org/resources/intervention/implicit-bias>; Eberhardt, Goff, Purdie, & Davies, “Seeing black: Race, crime, and visual processing,” 87(6) J. of Pers. & Soc. Psychol. 876 (2004).
52. Jones-Brown, Gill, & Trone, “Stop, Question, and Frisk Policing Practices in New York City: A Primer,” John Jay Coll. of Crim. Just. (March 2010); Fairchild & Cozens, “Chicano, Hispanic, or Mexican American: What’s in a name?,” 3(2) Hisp. J. of Behav. Sci., 191-198 (1981); Niemann, Jennings, Rozelle, Baxter, & Sullivan, “Use of free responses and cluster analysis to determine stereotypes of eight groups.” 20(4) Pers and Soc. Psych. Bull., 379–390 (1994).
53. NIJC interviewed eight legal providers from across the country. This included NIJC’s own legal services team as well as: Bronx Defenders, Capital Area Immigrants’ Rights (CAIR) Coalition, Southern Poverty Law Center (SPLC), Committee for Public Counsel Services, Las Americas Immigrant Advocacy Center, Legal Aid Justice Center (LAJC), and The Refugee and Immigrant Center for Education and Legal Services (RAICES). These interviews were conducted by video and through written responses in February 2022.
54. February 2022 CAIR Coalition response to NIJC survey on use of police reports.
55. *Id.*
56. Four legal service providers interviewed by NIJC reported the problem of use of police reports as impeachment evidence. This includes NIJC’s legal services team, CAIR Coalition, Bronx Defenders and Committee for Public Counsel Services.
57. February 2022 CAIR Coalition response to NIJC survey on use of police reports.
58. Three legal service providers reported this problem in response to NIJC’s survey on police reports in the immigration system. This includes NIJC’s own legal services team, Las Americas, CAIR Coalition, and Bronx Defenders.
59. Five legal service providers reported that immigration decision-makers almost never take their client’s word over that of a police report. This includes NIJC’s legal services team, CAIR Coalition, Bronx Defenders, LAJC and SPLC.
60. February 2022 Committee for Public Counsel Services response to NIJC survey on use of police reports.
61. See, e.g., *Thomas*, 25 F.4th at 54 (internal citations omitted); *Martinez-Corona*, No. 19-72569, 2021 WL 4868357 at *1; *Tenorio*, 603 F. App’x at 287 (internal citations omitted).
62. *In re Arreguin de Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995) (“[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or

- corroborating evidence of the allegations contained therein.”). In this case, the BIA still considered the police report at issue, but gave it “little weight” in its analysis.
63. *U.S. v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (internal citations omitted); see also *U.S. v. Torres-Meléndez*, 28 F.4th 339 (1st Cir. 2022); *U.S. v. Johnson*, 648 F.3d 273, 276-78 (5th Cir. 2011) (internal citations omitted); *U.S. v. Drain*, 740 F.3d 426, 432 (7th Cir. 2014).
 64. *U.S. v. Berry*, 553 F.3d 273, 284 (3d Cir. 2009).
 65. *Darboe v. Barr*, No. 19-3956 & 20-2427 (2d Cir. filed Dec. 17, 2020).
 66. Brief for Petitioner at 7, *Darboe v. Barr*, No. 19-3956 & 20-2427 (2d Cir. filed Dec. 17, 2020).
 67. *Id.* at 18.
 68. *Id.* at 51.
 69. *Id.* at 12.
 70. *Id.* at 1.
 71. Federal courts permit immigration judges to use police reports in making discretionary decisions. See, e.g., *Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015); *Padmore*, 609 F.3d at 69, *Ho-Sue v. Att'y Gen. of United States*, 739 F. App'x 733, 737 (3d Cir. 2018); *Jama v. Wilkinson*, 990 F.3d 1109, 1116 (8th Cir. 2021) (internal citations omitted); *Zamarripa-Castaneda v. Barr*, 831 F. App'x 910, 916 (10th Cir. 2020). Nevertheless, DOJ and DHS can mitigate the harms of reliance on these reports through the policy recommendations offered in this brief.
 72. *In re Arreguin de Rodriguez*, 21 I&N Dec. at 42.

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