



February 28, 2020

Chief Justice Deborah Stephens
Members of the State Supreme Court
Susan L. Carlson Clerk of the Supreme Court
P.O. Box 40929 Olympia, WA 98504-0929
supreme@courts.wa.gov

Via email

Re: Comment in support of GR 38

Dear Chief Justice Stephens, Members of the State Supreme Court, and Madam Clerk:

The American Civil Liberties Union of Washington (ACLU-WA), Northwest Immigrant Rights Project (NWIRP), and Washington Defender Association (WDA) write in strong support of GR 38. We also support the amendments to the rule put forward by the Northwest Justice Project in their comment dated January 27, 2020. The use of courthouses as a staging ground for civil arrests has a deeply problematic impact on access to justice for many Washingtonians. People and communities throughout Washington are being excluded from our justice system because of the color of their skin, the language they speak and where they were born. Those most impacted by civil arrests in Washington courthouses are leading the effort to enact GR 38. This Court Rule is essential to protect access to justice in our state and promote public safety.

There is a growing crisis in Washington. In just two years, there have been over 200 documented civil arrests at courthouses in at least 18 counties across Washington. Enforcement agents, often in plain clothes, are making civil arrests in and around courthouse grounds, creating an environment of fear and deterring people from coming to court. These warrantless, civil arrests run contrary to deeply ingrained public policy ensuring access to courts, protecting the rights of litigants and witnesses, and preserving the dignity and decorum of courts.

Courts have inherent authority to protect access to justice and the administration of justice. The Judiciary plays a critical role in promoting and protecting access to justice and the efficient administration of justice in our state.¹ Frequent arrests at state courthouses seriously threaten the integrity of a state's judicial system, which is central to our State's ability to govern. This Court Rule protects access to justice by protecting people attending court from warrantless civil arrests. The Washington Supreme Court has recognized this privilege from civil arrest for

¹ *State v. Wadsworth*, 139 Wash.2d 724, 743 (Wash. 2000).

those going to, remaining at and returning from court, for the past 100 years – it is well-settled law.²

The Judiciary also has a critical interest in the efficient functioning of its court system. Civil arrests are incredibly disruptive to our judicial system. Physical arrests in or around a courthouse spread fear and compromise public safety. Additionally, removing people before they can complete their case, pay their fees, or appear as witnesses, wastes court resources.

This Court Rule is not preempted by or in conflict with federal law. In 2019, two federal courts found that federal immigration law *incorporates* the pre-existing common law privilege against civil arrest of those present at a courthouse and those coming and going to court.³ As the federal district court in New York explained, the privilege “creates a very narrow limitation on federal enforcement authority that is tailored to protect states’ interests in managing their own judicial systems.”⁴ And because the federal Immigration and Nationality Act was enacted after this well settled and widely accepted privilege⁵ and did not abrogate that privilege,⁶ both courts found that federal law does not preempt a state’s ability to prohibit civil arrests at courthouses, for those coming to, remaining at, or going from a courthouse.⁷

We expect the federal government to comply with the Court Rule. FOIA records reveal that when New York adopted a Court Directive prohibiting warrantless civil arrests inside of courthouses, the ICE office issued a “read and heed” notice to their officers explaining the requirements and abiding by the Directive.⁸

This Court Rule does not prohibit immigration authorities from making arrests in Washington. This proposed Court Rule protects access to Washington’s courts. Adopting the proposed Court Rule does not prohibit federal, state, and local law enforcement officers from making civil or criminal arrests. Such arrests continue to be permissible where authorities obtain a judicial warrant or circumstances permit warrantless arrests under state law. Additionally, if the Court Rule is adopted, immigration authorities can continue to arrest people somewhere other than the environs of a courthouse. Immigration agents already avoid making arrests at places of

² *State ex rel. Gunn v. Superior Court of King Cty.*, 111 Wash.187 191 (Wash. 1920).

³ *See Ryan v. U.S. Immigration & Customs Enft*, 382 F. Supp. 3d 142, 158 (D. Mass. 2019); *see also, State v. U.S. Immigration & Customs Enft*, No. 19-CV-8876(JSR), 2019 WL 6906274 (S.D.N.Y. Dec. 19, 2019).

⁴ *State v. U.S. Immigration & Customs Enft*, at *11.

⁵ *Stewart v. Ramsay*, 242 U.S. 128, 130-21 (1916); *State ex rel. Gunn v. Superior Court of King Cty.*, 111 Wash.187 191 (Wash. 1920); *see also, Ryan v. U.S. Immigration & Customs Enft*, at 155-58; *State v. U.S. Immigration & Customs Enft*, at *9.

⁶ *State v. U.S. Immigration & Customs Enft*, at *11 (“this Court similarly finds no indication in the language of the [INA] that the ‘clear and manifest purpose of Congress’ was to abrogate the relevant state common law...and consequently holds that the statute incorporates the privilege.” (internal citations omitted). *See also, Ryan v. U.S. Immigration & Customs Enft*, 382 F. Supp. 3d 142, 158 (D. Mass. 2019) (“Even with the comprehensive immigration law system devised by Congress, there are some limits to how and where the government can arrest those it seeks to remove.”).

⁷ *See id.*

⁸ *See Attachment A.*

worship, hospitals, and schools because of the impact such arrests would have on those institutions and those who access them.⁹ This Court Rule simply adds courthouses to the list because of our state’s overwhelming interest in preserving access to justice.

No one should be afraid to go to court simply because of where they were born. Former Chief Justice Fairhurst has spoken out against these practices due to their impact. In letters she sent in 2017 and 2019, she stated that these arrests have “impeded the fundamental mission of our courts, which is to ensure due process and access to justice for everyone, regardless of their immigration status.”¹⁰ No one should have to choose between going to court and being arrested.

We urge the Court to adopt the amended GR 38 proposal and protect access to justice for all Washingtonians.

Sincerely,

ACLU-WA
NWIRP
WDA

⁹ See *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. Immigration and Customs Enforcement, <https://www.ice.gov/ero/enforcement/sensitive-loc>.

¹⁰ Letter from Chief Justice Mary Fairhurst to Commissioner Kevin McAleenan, US Customs and Border Protection, April 15, 2019.

Attachment A

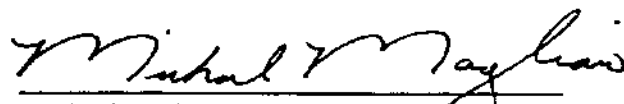


**State of New York
Unified Court System
Office of the Chief Administrative Judge**

DIRECTIVE

To: All Uniformed Personnel	Number: 1-2019 (Rev. from Memo issued 04/03/2019)
Subject: Protocol Governing Activities in Courthouses by Law Enforcement Agencies	Effective Date: April 17, 2019

1. It continues to be the policy of the Unified Court System (UCS) to permit law enforcement agencies to act in the pursuit of their official legal duties in New York State courthouses, provided that the conduct in no way disrupts or delays court operations or compromises public safety or court decorum.
2. The following protocol shall apply to representatives of law enforcement agencies who, while acting in their official capacity, enter a New York State courthouse to observe an individual or take an individual into custody but do not have a warrant issued by a judge of the Unified Court System authorizing them to do so:
 - Upon entry to a courthouse, law enforcement officials covered by this protocol shall identify themselves to uniformed UCS personnel and state their specific law enforcement purpose and the proposed enforcement action to be taken. Uniformed UCS personnel shall immediately transmit this information to an appropriate supervisor.
 - The uniformed supervisor shall inform the judge if a law enforcement agent covered by this protocol is present in the courthouse with the intent of arresting or otherwise taking into custody a party or other participant in a case before the judge. Email notification to the Department of Public Safety should be made as soon as possible.
 - Arrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest. A "judicial warrant" or "judicial order" is a warrant or order issued by a federal judge or federal magistrate judge. A UCS judge or court attorney shall review the warrant or order to confirm compliance with this requirement prior to any such arrest.
 - Absent leave of the court under extraordinary circumstances (e.g., extradition orders), no law enforcement action may be taken by a law enforcement agency in a courtroom.
 - UCS court security personnel shall file an Unusual Occurrence Report for each law enforcement action taken in a New York State courthouse by a law enforcement agency covered by this protocol. For purposes of this protocol, "law enforcement action" shall include observation of court proceedings by law enforcement agents acting in their official capacity.
 - UCS court security personnel remain responsible for ensuring public safety and decorum in the courthouse at all times. This policy and protocol is subject to modification based on changed circumstances.


Michael Magliano, Chief of Department
Revised 04/17/2019

(b)(6);(b)(7)(C)

From: (b)(6);(b)(7)(C)
Sent: Thursday, April 18, 2019 10:47 AM
To: (b)(6);(b)(7)(C)
Subject: FW: NY Court arrests
Attachments: (b)(7)(E)
Importance: High

See the attached new NYS policy with regards to arrests in courthouses and the subsequent interpretation from OCC and the FOD. Read and heed.

From: (b)(6);(b)(7)(C)
Sent: Thursday, April 18, 2019 10:12 AM
To: (b)(6);(b)(7)(C)
(b)(6);(b)(7)(C)
Subject: NY Court arrests

FYI...

From: (b)(6);(b)(7)(C)
Sent: Thursday, April 18, 2019 10:06 AM
To: (b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Subject: FW: NY Court arrests

Good morning all,

As you can see from the guidance OCC below, we are all on the same page.

We can enter the courthouse to observe, we just have to announce ourselves upon entry. To make the arrest inside the courthouse, we will need a judicial warrant. However, we are good to make the arrest outside the courthouse with or without a judicial warrant.

(b)(5)

Please advise your staff that pursuant to the directive issued by the NY Court Administrator;

Upon entry please announce yourself to the court officer and your intent; to observe or if you have a judicial warrant to make an arrest inside the courthouse.

Do not make an arrest within the courthouse without a judicial warrant.

If you're entering the courthouse "on duty & conducting official business" you must present yourself to the court officer upon entry.

Also, if your officers have any questions and/or run into any concerns - please have them call their supervisor.

Please let me know if there are any questions.

Thank you, (b)(6);(

From: (b)(6);(b)(7)(C)

Sent: Thursday, April 18, 2019 9:19 AM

To (b)(6);(b)(7)(C)

Subject: RE: NY Court arrests

Good morning (b)(6);

(b)(5);(b)(7)(E)

Thank you.

(b)(6);(b)(7)(C)

Chief Counsel
OPLA – New York
U.S. Immigration and Customs Enforcement
26 Federal Plaza, (b)(6);(b)(7)(C)

New York, NY 10278
(212) 264-(b)(6) or via SECTOR

"With honor and integrity, we will safeguard the American people, our homeland, and our values."

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From: (b)(6);(b)(7)(C)

Sent: Wednesday, April 17, 2019 4:40 PM

To: (b)(6);(b)(7)(C)

Subject: RE: NY Court arrests

(b)(6);(b)(7)(C)

Attached is the new policy from the NY Courts on court arrests.

(b)(6);(b)(7)(C)

Two legal questions – (b)(7)(E); (b)(5)

(b)(7)(E); (b)(5)

Thanks, (b)(6)

From: (b)(6);(b)(7)(C)

Sent: Wednesday, April 17, 2019 1:01 PM

To: (b)(6);(b)(7)(C)

Subject: NY Court arrests

Good afternoon (b)(6);(b)(7)(C)

FYI

(b)(5);(b)(7)(E)

Thanks, (b)(6);(b)(7)(C)

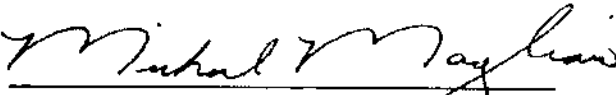


**State of New York
Unified Court System
Office of the Chief Administrative Judge**

D I R E C T I V E

To: All Uniformed Personnel	Number: 1-2019 (Rev. from Memo issued 04/03/2019)
Subject: Protocol Governing Activities in Courthouses by Law Enforcement Agencies	Effective Date: April 17, 2019

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 - The uniformed supervisor shall inform the judge if a law enforcement agent covered by this protocol is present in the courthouse with the intent of arresting or otherwise taking into custody a party or other participant in a case before the judge. Email notification to the Department of Public Safety should be made as soon as possible.
 - Arrests by agents of U.S. Immigration and Customs Enforcement may be executed inside a New York State courthouse only pursuant to a judicial warrant or judicial order authorizing the arrest. A "judicial warrant" or "judicial order" is a warrant or order issued by a federal judge or federal magistrate judge. A UCS judge or court attorney shall review the warrant or order to confirm compliance with this requirement prior to any such arrest.
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 - UCS court security personnel remain responsible for ensuring public safety and decorum in the courthouse at all times. This policy and protocol is subject to modification based on changed circumstances.


Michael Magliano, Chief of Department
Revised 04/17/2019

(b)(6);(b)(7)(C)

From:
Sent:
To:

(b)(6);(b)(7)(C)

Wednesday, April 17, 2019 3:13 PM

(b)(6);(b)(7)(C)

Cc:
Subject:

Courts

All,

(b)(5);(b)(7)(E)

Regards,

(b)(6);(b)(7)(C)

SDDO

Limoncelli, Craig V

From: (b)(6); (b)(7)(C)
Sent: Wednesday, April 17, 2019 4:06 PM
To: (b)(6); (b)(7)(C)
Cc:
Subject: Court Update

All,
(b)(5)

Regards,
(b)(6); (b)(7)(C)
SDDO

(b)(6);(b)(7)(C)

From: (b)(6);(b)(7)(C)
Sent: Wednesday, April 17, 2019 6:38 PM
To: (b)(6);(b)(7)(C)
Subject: RE: Courthouse Arrests

Thanks

Sent with BlackBerry Work
(www.blackberry.com)

From: (b)(6);(b)(7)(C)
Date: Wednesday, Apr 17, 2019, 6:15 PM
To: (b)(6);(b)(7)(C)
Subject: RE: Courthouse Arrests

10-4. My group has been so advised.

From: (b)(6);(b)(7)(C)
Sent: Wednesday, April 17, 2019 5:55 PM
To: (b)(6);(b)(7)(C)
Subject: FW: Courthouse Arrests

FYI...

Sent with BlackBerry Work
(www.blackberry.com)

From: (b)(6);(b)(7)(C)
Date: Wednesday, Apr 17, 2019, 5:22 PM
To: (b)(6);(b)(7)(C)
(b)(6);(b)(7)(C)
Subject: RE: Courthouse Arrests

All -

Attached is the policy that (b)(6) mentioned on the telecon for your information.

He has also sent it to local OCC and our HQ for consideration.

Until such time as advised differently, the below remains in effect.

Thank for notifying our staff so quickly.

(b)(6);
(b)(7)(C)

(b)(6);(b)(7)(C) DFOD

ICE-ERO-FNY

(b)(6);(b)(7)(C)

Cell: (973) 332 (b)(6)

From: (b)(6);(b)(7)(C)

Date: Wednesday, Apr 17, 2019, 15:43

To: (b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Subject: RE: Courthouse Arrests

Thanks (b)(6);(b)(7)(C)

For clarity, this is only for municipal, county, and state courts; federal courts are still on the table.

(b)(6);(b)(7)(C)

Please convey the same to your subordinates, and let me know when such has transpired.

(b)(6);(b)(7)(C)

DFOD

ICE-ERO-FNY

(b)(6);(b)(7)(C)

Cell: (973) 332 (b)(6);(C)

From: (b)(6);(b)(7)(C)

Date: Wednesday, Apr 17, 2019, 15:13

To: (b)(6);(b)(7)(C)

(b)(6);(b)(7)(C)

Subject: Courthouse Arrests

Effective immediately no administrative immigration arrests will be made on or in courthouse property. Arrests based on a criminal warrant are still allowed; the requirement to get prior DFOD approval remains in effect.

Thanks

(b)(6);(b)(7)(C)

Assistant Field Office Director
US Immigration & Customs Enforcement
Enforcement & Removal Operations
New York Field Office

(212)863 (b)(6) desk

(646)201 (b)(6) cell

(b)(6);(b)(7)(C)

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From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: ACLU-WA, NWIRP, WDA comment supporting GR 38
Date: Friday, February 28, 2020 4:22:42 PM
Attachments: [image001.png](#)
[2-28-20 ACLU NWIRP WDA GR 38 comment.pdf](#)

Forwarding

From: ACLU of WA Policy [mailto:policy@aclu-wa.org]
Sent: Friday, February 28, 2020 4:18 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: ACLU-WA, NWIRP, WDA comment supporting GR 38

Hello,

Kindly find attached the ACLU-WA, NWIRP, and WDA's comment in support of GR 38.

Best,

Medha Raman
Policy Advocacy Assistant
Pronouns: she, her

American Civil Liberties Union of Washington
PO Box 2728 Seattle, WA 98111-2728
206.624.2184 | mraman@aclu-wa.org
www.aclu-wa.org

ACLU
Washington