# CHALLENGING EVIDENCE OF GANG-RELATED ACTIVITY AT IMMIGRATION COURT BOND HEARINGS

**Practice Note**
August 3, 2017

This note is for practitioners seeking release of an individual from immigration detention at an immigration court bond hearing where the detained person is accused of gang-related affiliation. It provides helpful case law for challenging the admissibility and evidentiary value of uncorroborated law enforcement reports of gang affiliation.

Immigration and Customs Enforcement (ICE) is targeting 16- and 17-year-olds it suspects of gang affiliation for detention pending removal proceedings.[1] ICE commonly seeks detention based on reports of being in the presence of suspected gang members, including attending the same school; possessing tattoos; and wearing apparel bearing sports-related or regional insignia from Central American countries. In addition, ICE relies on prior surveillance from local law enforcement gang units to identify targets for detention. Often, ICE attempts to justify detention at a bond hearing with an unsworn memorandum from an ICE agent tilted "Alien File Regarding Gang Affiliation."

Though hearsay evidence is not per se inadmissible at an immigration court bond hearing,[2] its admission and use must be fundamentally fair under the Due Process Clause of the Fifth Amendment.[3] When ICE submits unsworn allegations of gang-related activity without an accompanying live witness who can be cross-examined, advocates can argue that under constitutional standards of fundamental fairness such evidence is unreliable, and thus inadmissible or entitled to little weight, due to (1) lack of neutrality or accuracy by the preparing witness and (2) absence of opportunity to cross-examine the preparing witness.

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[1] Julia Edwards Ainsley, "Exclusive: U.S. immigration raids to target teenaged suspected gang members," THOMSON REUTERS, July 21, 2017, http://www.reuters.com/article/us-usa-immigration-raids-exclusive-idUSKBN1A62K6

[2] *See Matter of Devera*, 16 I. & N. Dec. 266, 268 (BIA 1977) ("The immigration judge . . . is not bound by judicial rules of evidence.").

[3] *See generally Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). *See also, e.g.*, *Banat v. Holder*, 557 F.3d 886, 890 (8th Cir. 2009) ("Due process requires that the IJ consider only evidence that is probative and its admission fundamentally fair.") (internal quotations omitted); *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008) (admissibility of evidence at immigration proceedings depends on fairness and fairness of evidence depends on and is closely related to its reliability and trustworthiness) (internal alterations removed).

Below are examples of helpful case law that support such arguments by analogy. This list is not exhaustive and advocates should always research cases that are most relevant to the detained person's individual circumstances.

**Documents on gang affiliation prepared by immigration enforcement agents are unreliable and should therefore be excluded or afforded little weight:**

- *Matter of 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.")
- *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (RAP sheets are products of "agencies whose jobs are to seek to detect and prosecute crimes" and thus "do not necessarily emanate from a neutral, reliable source")
- *Dickson v. Ashcroft*, 346 F.3d 44, 54 (2d Cir. 2003) (Because factual narratives in probation reports "are prepared by a probation officer on the basis of interviews with prosecuting attorneys, police officers, law enforcement agents, etc., they may well be inaccurate" and are "not a highly reliable basis for a decision of such importance as deportation.")
- *Prudencio v. Holder*, 669 F.3d 472, 483–84 (4th Cir. 2012) (Police reports "often contain little more than unsworn witness statements and initial impressions" and "because these submissions are generated early in an investigation, they do not account for later events, such as witness recantations, amendments, or corrections.")
- *Anim v. Mukasey*, 535 F.3d 243, 258 (4th Cir. 2008) ("General deference to the Department of State cannot substitute for an adequate evaluation of the reliability of a document, especially when the document . . . provides practically no information upon which a reliability determination can be made.")
- *Banat v. Holder*, 557 F.3d 886, 891 (8th Cir. 2009) ("Reliance on reports of investigations that do not provide sufficient information about how the investigation was conducted are fundamentally unfair.")
- *United States v. Bell*, 785 F.2d 640, 642 (8th Cir. 1986) (Police reports are "inherently . . . subjective" given the "personal and adversarial" relationship between police officers and those whom they arrest and are therefore not "reliable evidence of whether the allegations of criminal conduct they contain are true")
- *Olivas-Motta v. Holder*, 746 F.3d 907, 918–19 (9th Cir. 2013) (Kleinfeld, J., concurring) ("It has long been clear that police reports are not generally reasonable, substantial, and probative evidence of what someone did" and "something as potentially inaccurate as a police report cannot be clear and convincing evidence") (internal quotations omitted)
- *Garces v. U.S. Att'y Gen.*, 611 F.3d 1337, 1350 (11th Cir. 2010) ("Absent corroboration, the arrest reports by themselves do not offer reasonable, substantial, and probative evidence")

**Unreliable hearsay testimony on gang-affiliation is inadmissible where author is unavailable for cross-examination:**

- *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) ("[M]inimum requirements of due process include the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)") (internal quotations omitted)
- *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir.2004) ("[T]he INS may not use an affidavit from an absent witness unless the INS first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing") (internal quotations omitted)
- *Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997) ("[W]e require that the government must make a reasonable effort in INS proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her.") (internal quotations omitted)
- *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234–35 (5th Cir. 1992) ("This court squarely holds that the use of affidavits from persons who are not available for cross-examination does not satisfy the constitutional test of fundamental fairness unless the INS first establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing.")
- *Pouhova v. Holder*, 726 F.3d 1007, 1015 (7th Cir. 2013) (Even where government makes reasonable, but unsuccessful efforts to produce witness, "[w]e do not see why making an unsuccessful effort to locate a witness renders the unreliable hearsay evidence any more reliable or its use any fairer than without such effort.")

If you are considering an appeal of a negative custody determination by an immigration judge, contact the Immigrant Defense Project via https://www.immigrantdefenseproject.org/detention-litigation/.