



TESTIMONY OF:

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I. Introduction

My name is Nyasa Hickey. I am the supervising attorney of the Padilla Unit and Youth and Communities Project at Brooklyn Defender Services (BDS). I thank the City Council for this opportunity to testify about the impact of increased immigration enforcement and the need for significantly increased funding in order to meet the needs of the communities we serve.

BDS is the largest legal services provider in Brooklyn, representing nearly 40,000 low-income New Yorkers each year who are arrested, charged with abuse or neglect of their children or face deportation. Since 2009, BDS has counseled, advised or represented more than 7,500 immigrant clients. In 2016 alone, we handled more than 1500 immigration matters across a full spectrum of services. Our immigration practice is composed of 17 full-time immigration attorneys, two law graduates, five paralegals accredited by the Board of Immigration Appeals, one full-time and one part time social worker, two legal assistants and two Immigrant Justice Corp Legal Fellows representing more than 1,000 immigrant New Yorkers every year. We are a Board of Immigration Appeals-recognized legal service provider.

Our three immigration practice areas include:

- **The BDS Padilla Unit** advises BDS’s criminal defense attorneys and their noncitizen clients on the immigration consequences of guilty pleas to help avoid or minimize negative immigration consequences. About a quarter of BDS’s 35,000 criminal defense clients are foreign-born, roughly half of whom are not naturalized citizens and therefore at risk of deportation or loss of opportunity to obtain lawful immigration status as a result of their criminal case. Our six criminal-immigration specialists provide support and expertise on more than 1000 cases that survive arraignment involving non-citizen clients and our Padilla specialists are called at least once, and often multiple times, in each arraignment shift to advise on the ramification of a plea offer at arraignment.
- **The New York Immigrant Family Unity Project (NYIFUP)** is New York City’s groundbreaking, first-in-the nation program providing quality counsel to immigrant New Yorkers who are detained and facing deportation and separation from their families and communities. BDS is proud to be a NYIFUP provider, along with The Bronx Defenders (BXD) and The Legal Aid Society (LAS). Since the project’s inception three years ago, BDS NYIFUP attorneys have defended more than 700 people in deportation proceedings. As of December 2015, 52 percent of pilot clients have been reunited with their families. NYIFUP attorneys have won 71 percent of their trials. NYIFUP is projected to increase the percentage of immigrants who will win the right to remain in the United States by 1,000 percent, compared with prior success rates for detained, unrepresented immigrants.
- **BDS’s Immigrant Youth and Communities Project** has represented thousands of Brooklyn immigrants in their applications for lawful immigration status and in defending against deportation in non-detained removal proceedings. Highlights of our work include assisting more than 320 young clients in their pursuit of Special Immigrant Juvenile Status (SIJS), Adjustment of Status, U visas, Deferred Action for Childhood Arrivals (DACA) and other immigration benefits or removal defense, and assisting more than 1,000 Haitian New Yorkers with their applications for Temporary Protected Status, work authorization, and other immigration benefits or removal defense.

II. Client Stories

The following three client stories¹ illustrates how coordination between all of BDS’ practice areas is critical for protecting immigrant New Yorkers from deportation and its attendant collateral consequences. Public defender offices like BDS are uniquely situated to advocate for New Yorkers whose criminal or family court involvement threatens their ability to modify their immigration status and lawfully remain in New York with their children and families.

¹ All names have been changed to protect our clients’ identities.

Our civil justice team helps mitigate collateral consequences for NYIFUP clients.

Ray Browning is a permanent resident who has called Crown Heights, Brooklyn home since he was seven years old and had never returned to Guyana, where he was born. Immigration and Customs Enforcement (ICE) detained him outside his home and charged him as deportable based on a single 17-year old non-violent offense for which he had served 30 days in jail. Mr. Browning has a close-knit and loving family that includes his adult siblings and his U.S. citizen fiancée and stepdaughter, all of whom depended on him financially and emotionally. His detention devastated him and his family, and his fiancée was served an eviction notice when she fell behind on her rent. Mr. Browning was assigned a NYIFUP attorney who was able to harness the family's strong support to litigate his case as fast as possible when the judge appeared sympathetic to the case. His NYIFUP attorney collaborated with a Padilla attorney to investigate potential avenues of relief and prepare for trial. His NYIFUP attorney accepted an expedited trial date, prepared a large evidence submission in under two weeks, prepared the client and witnesses on the weekend, and won the client's case less than a month after his first court appearance, allowing Mr. Browning to reunite with his family for Thanksgiving. In addition, our civil justice team worked with Mr. Browning's fiancée to avoid eviction and clear the arrears that accumulated when Mr. Browning was detained and unable to help pay the rent. Mr. Browning and his family were able to remain in their home and Mr. Browning is now back at his job so that he can support his family.

Our family defense practice is an invaluable resource for our clients who are facing loss of their children because of immigration detention.

BDS first represented Larry Lewis in a misdemeanor criminal case in 2012. Mr. Lewis is originally from the Caribbean and has been a lawful permanent resident (LPR) of the U.S. for nearly thirty years. Our Padilla team worked with his criminal defense attorney to ensure a plea that would not further threaten his immigration status. Nonetheless, ICE detained Mr. Lewis at the conclusion of his criminal case because of two twenty-year-old misdemeanor convictions that made him deportable. After negotiating with ICE attorneys, Mr. Lewis's BDS Padilla attorney obtained bond and his release from detention. Yet while Mr. Lewis had been incarcerated, his children had been placed in foster care. BDS's Family Defense Practice stepped in as assigned counsel to ensure that Mr. Lewis could obtain visitation with his children and maintain their loving relationship. While out on bond, Mr. Lewis's Padilla attorney began preparing for a 212(c) waiver application (a special immigration waiver for LPRs whose prior deportable convictions are from 1997 or earlier) and impending trial before the Immigration Court. Immigration judges have discretion to issue the relief and therefore, the waiver application requires the LPR to present sufficient positive equities to outweigh negative factors.

Thanks to a BDS immigration practice social worker, Mr. Lewis' case grew stronger with a report demonstrating his good character and positive relationship with his children. Fortunately for Mr. Lewis and his family, his Padilla attorney was able to show the judge that Mr. Lewis warranted the grant of the waiver. The judge's approval of the 212(c) waiver allows Mr. Lewis to remain in the U.S. with his family and maintain his status as lawful permanent resident.

Another BDS client was able to avoid deportation because of our "Padilla plus" assistance.

Maria Lodi came to the U.S. as a teenager and is now a CUNY graduate with a bachelor's degree in science and the mother of two USC children, including one child who is severely autistic and non-verbal. She fled her native Nigeria where she faced terrible stigma and persecution related to her mental illness. Once in the U.S., she filed an asylum claim, but was denied because at that time mental illness was not a cognizable reason for relief and an immigration judge order her removed. In 2012, she came to BDS for a misdemeanor charge that stemmed from her mental illness and the stress of caring for her two sons. Our Padilla team worked with her criminal defense attorney to ensure an immigration-safe disposition. We also realized that she had a pending DACA application while the criminal case was ongoing. We amended the DACA application to address the arrest and disposition and her DACA was granted. Ms. Lodi then married a U.S. citizen, so we filed a motion to reopen the order of removal and negotiated a termination of the proceedings for adjustment. During the pendency of the adjustment application, Ms. Lodi was hospitalized twice due to mental health breakdowns. Both times, the BDS team appeared at her civil commitment hearing and ultimately helped her to be released from the hospital and properly prepped in time for her adjustment interview. The adjustment application was granted and in January of 2017 she was granted a green card.

While hundreds of our Padilla clients have the potential to modify their status, we are unable to take on the majority of their cases because we lack the capacity. Cases like Ms. Lodi's last for many years and may require significant resources, as her story shows. It is critical that the City fund immigration cases for people caught in the "justice trap" – to ensure that our community members can modify their status, remaining in their homes and with their families and precluding the collateral consequences we saw in Mr. Browning and Mr. Lewis's cases. Public defenders can take on and often favorably resolve the cases that other organizations cannot, cases that pose extra challenges because of the client's criminal court or family court involvement; cases that are now a priority for deportation under the new immigration enforcement scheme.

III. The Effect of Increased Enforcement on our Immigration Practice

The need for City support of immigration legal services has never been more acute. The President's Executive Order upends the prior enforcement priorities for undocumented people and people with legal immigration status alike. It used to be that some immigrants who were convicted of minor crimes were not deemed enforcement priorities. In addition, non-citizens were not considered priorities just by virtue of having been accused of a crime. After the new executive order, anyone with any criminal history or open charge is a priority, as well as anyone who has committed acts that constitute a chargeable criminal offense.

The recent change in rhetoric and enforcement has sown fear and confusion in our immigrant clients and impacted all three of our immigration practice areas.

a. Criminal defense/Padilla unit:

i. NYPD fingerprinting and Broken Windows policy leads ICE directly to our clients

NYPD's policy is to fingerprint anyone who is arrested, even if only for a low-level offense like fare evasion. Some police armed with tablets are even fingerprinting people in their neighborhoods, without even making an arrest that leads to a trip to the precinct and processing at Central Booking.² Fingerprints collected by the NYPD are transmitted to the FBI, who in turn can share them with the Department of Homeland Security, potentially leading to an arrest by ICE and deportation. Even if a district attorney declines to press charges, an immigrant is put at immediate risk of being found by ICE. Broken windows policing, or the criminalization of the most minor offenses, even without a resulting conviction, thus directly sends thousands of immigrants and their fingerprints to the federal government every year.

Over the past three years, the BDS immigration practice has represented dozens of detained clients in deportation proceedings for underlying "crimes" like possession of small amounts of marijuana, turnstile jumping, and possession of "gravity knives" (really work tools carried by laborers, often required by their union contracts, and purchased legally at major retailers like Home Depot). Many of these clients are legal permanent residents who had been living in the U.S. for dozens of years with these minor convictions on their record before they were swept up by ICE.

ii. Once in court, we are far more limited in our ability to provide Padilla advice to non-citizen clients.

The current state of affairs endangers our ability to provide effective counsel under the standard articulated in *Padilla v. Kentucky*. In 2010, the U.S. Supreme Court held in *Padilla* that the Sixth Amendment requires criminal defense counsel to provide

² Tatiana Schlossberg, *New York City Police to Be Equipped with Smartphones and Tablets*, N.Y. TIMES, Oct. 24, 2014, available at <https://www.nytimes.com/2014/10/24/nyregion/new-york-city-police-to-be-equipped-with-smartphones-and-tablets.html>.

affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.³ One in four of BDS's criminal defense clients are not U.S. citizens and, under the president's new enforcement priorities, they are all now priorities for deportation by virtue of having been arrested.

ICE regularly arrested our clients in Brooklyn courtrooms in recent years but as a result of anti-immigrant rhetoric and broad enforcement against immigrant communities, courthouse arrests are receiving much more media attention in 2017. The vulnerability of our non-citizens clients in court settings instills fear in our clients, thus making them even more reluctant to appear in court to deal with their ongoing criminal case. The burgeoning fear of increased use of courthouse arrests is particularly troubling because our clients cannot modify their immigration status if they have an open criminal case, and they cannot resolve their criminal or family case if they fail to appear in court.

Our internal records indicate more than one dozen BDS clients have been arrested in Brooklyn courthouses and taken into ICE custody in the past four years. A BDS client from Guatemala had the story of her courthouse arrest chronicled in the *N.Y. Times* in 2014.⁴ Most recently, in November 2016, a criminal defense client who was receiving treatment services through the Brooklyn Mental Health Court was arrested by ICE in the hallway of Brooklyn Supreme Court while he waited with his attorney for his case to be called. Our client had been reporting regularly to the criminal court for the past six months in accordance with his mental health court treatment plan. Our client has mental health diagnoses and had been hospitalized just prior to his ICE arrest in relation to his diagnoses.

b. Federal Immigration Court

i. *Rising caseloads*

This month, the immigration docket at the federal courthouse at Varick Street added a third intake day, increasing our monthly intake by 50% (up to 90 cases per month across all NYIFUP providers from a previous 60 cases per month). The courts are moving so quickly with cases that we cannot pick up cases fast enough. If intake numbers remain constant as they are now for the rest of the fiscal year, we will exceed our case target numbers by 180 to 250 cases by July 2017. And so far, these are cases that were brought into the system during the Obama administration. We have not yet seen the people who were arrested by ICE after President Trump took over. The third intake day is already exceeding our capacity to serve our existing clients, yet we expect further increased caseloads as we begin to see the results of the new enforcement priorities.

To make matters worse, not only are we seeing more cases, but we see that ICE has become harsher towards our clients than they were even just last year.

³ *Padilla v. Commonwealth of Kentucky*, 559 U.S. 356 (2010).

⁴ Kirk Semple, *Advocates Seek to Make Courthouses Off Limits for Immigration Officials*, N.Y. TIMES, May 26, 2014, available at <https://www.nytimes.com/2014/05/27/nyregion/advocates-seek-to-make-courthouses-off-limits-for-immigration-officials.html>.

ii. Asylum seekers no longer being released on bond

For existing cases, we are seeing decreases in the use of prosecutorial discretion and discretionary release. Before last week, we had not had an asylum seeker released on bond in more than six weeks. It appears that the White House's January 25 executive order on border enforcement had the effect of ICE refusing to release detained asylum seekers even where they had passed an initial screening interview and had a sponsor or family member with lawful status ready to house and support them. We have had a few releases since starting to file federal habeas corpus litigation against this practice, but remain concerned that going forward ICE's default will be to detain everyone, including asylum seekers, parents, and victims of violence and trauma, and to fight release however we seek it.

iii. ICE targeting people who won relief but have not yet received their visas or green cards

We are also seeing that NYIFUP clients who have been granted relief but have not yet received their green cards are being sought out by ICE and re-arrested. For example, we represent a 16-year-old client from Central America who has an approved Special Immigrant Juvenile Status (SIJS) application who was arrested by the ICE gang unit and is now in secure detention. While his SIJS application was approved, he has not yet received his visa number from USCIS. It is unclear to us why he was taken into detention by ICE, as he was not arrested by the NYPD or did not try to re-enter the U.S., two reasons that people are sometimes re-detained after release.

iv. Arrests in the courthouses

Our immigration clients, like our criminal defense clients, are scared to go to court. ICE agents now roam the hallways and last fall we often observed ICE agents arresting people in the courts. This was uncommon in recent years. For example, we represent a client who was re-detained by ICE when he appeared for an immigration court date last year. How can we adequately counsel our clients about the importance of attending their immigration court appearances to fight against deportation when they face the threat of coercive immigration detention every time they enter the courthouse doors?

v. ICE OSUP check-ins

In some cases, ICE may decide not to execute a final removal order and might instead issue an "Order of Supervision," or OSUP. A "post-order-of-removal" Order of Supervision may be issued under limited circumstances, such as when ICE determines the individual cannot be removed due to his or her country's refusal to accept them, or when it is otherwise impracticable or contrary to the public interest to remove the individual. An Order of Supervision is considered to be a "humanitarian act" on the part of ICE, and may be available if the non-citizen is the primary care giver to a child with a medical condition, or if they themselves are receiving medical treatment for a serious

condition, etc. The Order of Supervision will direct the non-citizen to appear at regular ICE check-ins, usually every few months and at least once a year.

Our clients who have been attending regular OSUP check-ins for years are now terrified to appear before ICE. One of our NYIFUP clients who was released from detention because he had a heart attack while in custody was recently hospitalized because of the stress and fear of deportation. Clients who previously checked in once or twice a year are now being asked to return in a couple of weeks or a month with their passports, ostensibly to facilitate deportation.

Our attorneys and office staff who are already overworked are doing their best to accompany our clients to OSUP check-ins, but we simply do not have the capacity to meet the need and quell the well-founded fears of our clients and threats of detention and deportation.

c. In the Community

i. *Clamoring for Know Your Rights*

Since the presidential election last fall, our office has received increasing requests from the community to present Know Your Rights trainings to the community. Since the first immigration Executive Order was announced we are now receiving near daily requests for assistance from elected officials, community-based organizations, city agencies, religious institutions and the press. We are doing our best to meet the demand, but regularly have to turn down requests because we do not have the capacity.

ii. *Daily Calls from Current and Former Clients*

All of our attorneys and paralegals have seen a huge increase of panicked calls from our clients, current and former, about what to do if ICE is at their door, whether or not they can travel, what they should be doing with their US citizen children, whether they should appear in court, requesting immigration legal services for their loved ones, and more.

In short, our communities are in crisis and need the support of legal service providers more than ever. We want to continue to support all of our former and current clients, as well as serve more people, but our capacity is limited by the resources currently available to us.

IV. Increased Need for FY2018

a. *NYIFUP*

NYIFUP attorneys have never been more important. We are a human shield for our clients, doing everything in our power to show them compassion in a system that increasingly views our clients as deportable others – “criminals” or “aliens” with rights

that can and are regularly trampled on. Even when we lose our client's case, we provide them with the opportunity to share their story with the prosecutor and judge and make the case why they deserve to remain in this city with their family and community.

Furthermore, NYIFUP has created a sea change in improved outcomes for detained immigrants. Prior to NYIFUP, a meager 3% of unrepresented detained immigrants won their removal cases. During the NYIFUP study period, over 30% of NYIFUP clients won their removal cases. Meaning that for every ten individuals who NYIFUP spares from deportation, nine would have been deported without NYIFUP. We know from the NYIRS study that release is a huge factor in ultimate success and that the financial and human benefits of being able to reunite families are unquestionable. Thus, it is critically important that NYIFUP wins release for approximately 30% of its clients as compared to only 14% of unrepresented immigrants who were able to win release prior to NYIFUP.

The Council's commitment to universal representation for every detained person who meets the income requirements of NYIFUP is critical to ensure that every person who comes before immigration court in New York City is afforded the right to make their case, no matter their background. We have had cases with clients convicted of crimes that we later successfully vacated because they were innocent or wrongly charged. By building trust and rapport with our clients, many of whom are survivors of incredible violence and trauma back in their home countries, we investigate and present evidence about why our clients' "criminal acts" are often the direct result of the trauma they have suffered. We have uncovered that many clients were actually U.S. citizens, but often never had the resources or tools to find the evidence to prove their citizenship until they were appointed a NYIFUP attorney. NYIFUP is the strongest example of our City's commitment to immigrant New Yorkers, made stronger still by your commitment to universal representation – the belief that all people are worthy of representation.

This year, City-wide NYIFUP providers are jointly asking for a significant increase in funding so that we can continue to provide superior legal representation to detained people facing deportation in New York City. Since the pilot program's inception in 2013, we have had to limit the parameters of the program because we have not had the capacity to serve all of the detained people who appear at intake in Varick Street. We fear that the numbers of New Yorkers requiring detained deportation defense services will jump significantly in the months to come based on increased intake numbers since the new federal administration took office in January. This is our highest priority, as NYIFUP attorneys, social workers and paralegals are already working beyond capacity in the courts and the communities to quell fear and provide legal advice to people rightfully fearful of deportation.

The NYIFUP Coalition jointly requests \$12,000,000 to fully fund the New York Immigrant Family Unity Project in FY2018 to ensure that every detained New Yorker has legal representation when facing deportation.

b. Continuous representation for Padilla client stuck in the justice trap

More than 20% of our criminal defense clients were born outside of the U.S. We meet and exceed the obligations required by the U.S. Constitution under *Padilla*, however we are not able to provide Padilla representation plus further immigration representation to all of the non-citizen clients whose immigration status is affected because they are caught in the justice trap. Many non-citizen clients who we represent in criminal or family defense cases would benefit from our continuous representation in affirmative or defensive immigration cases, including clients that may have straightforward applications that are complicated merely on the basis of an arrest or justice system involvement.

Last year, in 2016, we were able to provide these Padilla plus integrated immigration services to 216 clients referred to my team from other practice areas. We believe that we have double that number of clients who could benefit from Padilla plus additional immigration services, if not more. Indeed, we used to have a waitlist for these services but no longer keep one because, unless a case is an emergency, we do not have the capacity to take on additional representation.

The most efficient way for the City to fund immigration legal services for people with criminal and family court involvement is to fund continuous representation for Padilla clients through the criminal and family defense contracts negotiated and administered by the Mayor's Office of Criminal Justice (MOCJ). As noted above, we are unable to serve hundreds of non-citizen justice trapped clients who come through our doors every year because we do not have the in-house resources to help all of our clients address their unique immigration needs.

The Padilla plus integrated immigration services that we did last year was funded jointly by Immigrant Justice Corp, the New York State Office of Indigent Legal Services, the federally funded Community Service Block Grant administered by HRA, and City Council. First of all, these funding sources each have their own limitations and, like all of the service providers here today, we spend a significant amount of time applying for and reporting on various small funding sources. Instead, if we are able to negotiate Padilla plus integrated immigration services into our MOCJ defender contracts as critical to minimizing collateral consequences in the same way that social workers and housing attorneys are, we will be better able to serve our clients stuck in the justice trap and maintain a continuity of representation that is impossible with year-to-year funding streams.

c. Immigrant Opportunities Initiative (IOI)

Even if the Mayor's Office of Criminal Justice does not fund Padilla plus integrated immigration services representation through our criminal and family defense contracts, the City Council and the Mayor can demonstrate their commitment to untangling immigrant New Yorkers from the cycle of the justice trap by granting our request for IOI funds.

This year Brooklyn Defender Services requests \$200,000 for our Immigrant Youth and Communities Project to provide immigration legal services to low-income Brooklyn youth and adults. With IOI funding, BDS can maintain and grow our Project staff to provide community education, legal screening, advice and full representation to low-income Brooklyn immigrant youth and adults borough wide, in their pursuit of affirmative immigration benefits such as citizenship, lawful permanent residence, asylum, Special Immigrant Juvenile Status, special trafficking and victims' visas, VAWA relief, TPS, and DACA, and in their defense against deportation in non-detained deportation proceedings. Over the past few months, our office has received increasing requests from the community to present Know Your Rights trainings, immigrant family emergency preparation guidance and free legal services to the community. Yet since the first immigration Executive Order was announced we are now receiving near daily requests for assistance from elected officials, community-based organizations, city agencies, religious institutions and the press. We want to increase our capacity to serve New York's diverse immigrant communities, but we require a significant increase in funding to allow us to take on even more cases outside of our criminal, family and deportation defense caseloads.

We ask that the Council support our IOI ask of \$200,000 to expand our ability to provide integrated immigration legal services to our criminal and family defense clients caught in the justice trap and to provide Know Your Rights trainings and legal screenings to low-income New Yorkers.

Conclusion

We believe that New York can truly become a sanctuary city, but we require significantly more funding if we are to serve the influx of community members who are already desperate for free legal services, must less the thousands more who will need our support if current enforcement trends continue. The way to help protect the rights of New Yorkers is by ending Broken Windows policing, removing ICE from our courthouses, shelters and other city buildings, and providing immigrant communities with education, legal counsel and support. BDS works to support immigrants and their families and communities every day, but the need for our services and the services provided by the dozens of other legal service providers and grassroots organizations is more acute than ever. We hope that you will support our budget asks and enable us to continue to ensure the best possible outcomes for our most vulnerable clients and their families.