



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

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Presented before

**The New York City Council Committees on Courts & Legal Services and Immigration
Oversight Hearing Evaluating Attorney Compliances with *Padilla v. Kentucky*
and Court Obstacles for Immigrants in Criminal and Summons Courts**

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My name is Sarah Vendzules and I am a supervising attorney in the Padilla Unit of the Immigration Practice at Brooklyn Defender Services (BDS). Our organization provides innovative, multi-disciplinary, and client-centered criminal defense, family defense, immigration, civil legal services, social work support, and advocacy to more than 40,000 indigent Brooklyn residents every year. I thank the New York City Council Committees on Courts & Legal Services and Immigration, and in particular Chairs Rory Lancman and Carlos Menchaca, for the opportunity to testify with respect to compliance with *Padilla v. Kentucky* and obstacles for immigrants in the Criminal and Summons Courts.

I must say at the outset that BDS is extremely thankful to the City Council and the Administration for funding the nation's first public defender system for indigent immigrants facing deportation and promoting a more fair and just process for our immigrant communities. As a result of the Council's visionary leadership, today the City can say that no New York family will have a loved one locked up and deported simply because they cannot afford an attorney. Through the New York Immigrant Family Unit Project (NYIFUP), we have been able to say to immigrant New Yorkers that yes, we can represent you if you don't have the means to pay a lawyer. With a renewed commitment of \$4.9 million this year, New York remains the national leader in ensuring that every detained immigrant facing deportation will have a lawyer if she cannot afford one, and we look forward to the continuation of this program.

Padilla v. Kentucky

On March 31, 2010, the United States Supreme Court held in *Padilla v. Kentucky* that criminal defense attorneys have a Sixth Amendment duty to advise noncitizen defendants about the immigration consequences of their criminal convictions.¹ In the Padilla era, every actor in the criminal justice system must recognize that the realities of being an immigrant in the United States can change the meaning of justice. Often, the consequences of an immigration proceeding are far more severe than those of the criminal case that precipitated it.

We at BDS have created and evolved a model for Padilla advisals and immigration representation to meet the complex and interdisciplinary demands of 21st century immigration representation. Our immigration attorneys function in an embedded capacity, as integral parts of the public defender office. They draw on its vast resources to forge creative and sophisticated solutions to immigration problems. Our immigration attorneys are present at every stage of a criminal case, beginning at the criminal court arraignment, where issue spotting can mean the difference between deportation and release. Due to the early intervention by our immigration attorneys, we are able to quickly identify the variety of options and remedies available to our clients and help them make the best decision possible among the options at hand. To accomplish this, the knowledge base of our immigration attorneys must go far beyond the immigration consequences of criminal convictions, reaching diverse areas of the law and requiring interaction with a variety of administrative agencies. We are proud to say that BDS's Padilla practice is a model program for defense offices across the country to follow.

That said, providing Padilla advice in a criminal proceeding is not, by itself, enough to protect our immigrant communities. In reality, by choosing to address certain behaviors through arrest and prosecution in criminal courts, our City and State inevitably make many immigrants extremely vulnerable to federal immigration consequences. Despite recent reforms, our City, State, and Country continue to rely on over-policing, mass incarceration and deportation in lieu of effective policies and programs to address mental illness, poverty, addiction, homelessness, and widespread invidious discrimination. These issues disproportionately impact New York's immigrant communities. For example, the ongoing war on drugs continues to ensnare large numbers of immigrants and other people of color. Many of our clients have unmet mental and physical health needs, and the resulting pain and anguish often leads to illicit drug use. Likewise, many immigrants' lack of citizenship status creates barriers to employment, education and benefits, leaving them with few options. The criminalization of poverty—the preponderance of arrests for turnstile jumping, “feet on the seat,” trespassing, and more—destabilizes vulnerable immigrants and their families and communities. Law enforcement intervention and incarceration are generally among the most expensive and least effective responses to social problems, yet they often serve as our first and only strategy.

¹ *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

Collateral Consequences of Criminal Convictions for Immigrants

The term collateral consequences can imply subordination to criminal sentences, but in reality, “collateral” consequences can be far more severe. The American Bar Association has identified 47,001 federal statutory collateral consequences of criminal convictions and an additional 1,274 here in New York.² This figure excludes non-statutory collateral consequences, such as discrimination in housing, employment, and education. Both statutory and non-statutory consequences compound the marginalization and oppression that immigrants endure in our society.

Immigration consequences are among the harshest of the so-called collateral consequences. Even non-criminal violations trigger immigration consequences, including ineligibility for Deferred Action for Childhood Arrivals (DACA) and any expanded executive action that survives legal challenges. Under the DACA guidelines, anyone with three “misdemeanors” is completely ineligible and barred from receiving DACA status. Unfortunately, because New York violations like disorderly conduct and trespass are technically punishable by over five days in jail, they are considered “misdemeanors” for federal purposes and for the purposes of DACA. These non-criminal violations are considered so minor that they frequently do not even appear on a person’s rap sheet. They are regularly offered to our clients on cases where the District Attorney’s office does not believe they can prove their case or does not believe that our clients are guilty. They are frequently the result of over-policing: our clients are arrested for minor offenses that the District Attorney’s office does not care enough about to prosecute. And yet disorderly conduct convictions stand between our clients and lawful status, work authorization, a driver’s license, a social security card, a college scholarship, protection from deportation. They literally stand between our clients and their future.

Furthermore, these same non-criminal violations, because they are federal “misdemeanors”, make our clients into enforcement priorities for the Department of Homeland Security (DHS).³ They make harmless New Yorkers—our friends, neighbors, coworkers and local small business-owners—into “criminal aliens” who, according to DHS, “should be removed.”⁴

In addition, certain other minor offenses such as unlawful possession of marijuana (a non-criminal violation) and turnstile jumping (prosecuted as “theft of services” and classified as a misdemeanor) result in mandatory incarceration in DHS’ detention facilities while undergoing immigration proceedings. New York City’s Detainer Discretion Laws were a critical step in the right direction, and we applaud our City Council’s leadership in forging these city laws that limit the circumstances under which the New York City Police Department (“NYPD”) and Department of Correction (“DOC”) will honor an ICE detainer or otherwise cooperate with federal mass deportation programs. Still, our criminal justice system continues to cause decent, hardworking immigrants to be apprehended by Immigration and Customs Enforcement.

² <http://www.abacollateralconsequences.org/map/>

³ Department of Homeland Security, “Policies for Apprehension, Detention and Removal of Undocumented Immigrants” (November 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁴ *Id.*

The following is the story of one of our clients:

Mr. A entered the U.S. for the first and only time as a lawful permanent resident in 1988 and has resided in NYC since that time. He has 5 siblings who are US citizens and both of his parents also have lawful status in the US. His entire family lives in New York, and he, himself, is a New Yorker. He has severe cognitive impairments and has also been diagnosed with several mental health disorders. Mr. A is now, as we speak, in removal proceedings based solely on convictions for crimes of poverty—petit larceny and turnstile jumping—and is subject to mandatory detention by ICE. DHS's position is that both of these convictions are “crimes involving moral turpitude,” thus warranting deportation. During his first weeks in ICE custody, Mr. A attempted to hang himself and was treated temporarily at a hospital. He was then returned to the immigration jail. The immigration judge, the Office of Chief Counsel (i.e., the immigration prosecutors), and ICE all refuse to release him. There are various forms of relief that we can pursue, such as asylum, but they are not guaranteed, and because of the backlog in immigration court he will probably be detained for a minimum of eight months.

There are a number of actions our City can and should take to lessen the harm of contact with the criminal justice system, but the fact remains that the system is largely designed to hurt people. Recent Council efforts to ‘ban the box’ and improve transparency in our criminal justice and jail systems represent meaningful progress, and certainly more can be done. However, the primary driver of reform must be restricting the use of law enforcement intervention and incarceration to a measure of last resort and reinvesting the savings produced by declining jail and prison populations into the communities from which our clients come. An estimated 7.1 million people in New York State, or 36%, have RAP sheets. This statistic exemplifies the enormous reach of the dragnet of our criminal justice system. By reducing the number of incarcerated and criminal justice-involved people, our City and State can redirect scarce resources to provide jobs, affordable and supportive housing, mental health services, school facility upgrades, and community centers to meet the needs of this population.

Access to Justice

Immigrants and non-immigrants alike suffer curtailed access to justice in New York, largely due to a weak discovery statute and the use of rampant pre-trial detention to extract pleas, though immigrants face significant additional obstacles. These are not simply theoretical matters, but highly consequential policies that ruin peoples’ lives.

Discovery

As you may know, discovery is the compulsory disclosure, by a party to a legal action, of relevant documents and information to other party. Discovery is one of the most critical components of reaching the truth and ensuring justice. Early, complete, automatic disclosure of the evidence collected by the State is vital to both fairness and efficiency in criminal justice. People accused of crimes in this state, and the attorneys who represent them, are regularly denied access to such basic materials as arrest reports. This practice cripples their ability to make informed decisions in their cases and dramatically increases the likelihood of sending innocent

people to prison. Defense attorneys often meet their indigent clients immediately before arraignment, and do not have access to any of the information that prosecutors have picked through to build their case. This imbalance continues through plea bargain negotiations or trials. It is inexcusable, outdated, and ripe for reform. In Brooklyn, the District Attorney has generally adhered to an “open file” discovery procedure that can serve as a model for a new statewide discovery law and a counterargument to the talking points of opponents of reform. However, across the river in Manhattan, the discovery practice is among the most regressive in the nation. The practice is especially harmful to immigrants for the aforementioned reasons: Even a plea to a violation can lead to detention and deportation.

Pre-Trial Detention

Tens of thousands of New Yorkers suffer the brutality of Rikers Island every year simply because they are poor and cannot afford bail. They include people with serious mental illness, people who are medically fragile, and young people. The vast majority are people of color, including 89% of those held on \$1,000 or less.⁵ Noncitizens are especially vulnerable to pre-trial detention or, worse, being swindled by a bail bonds agent and *then* brought to Rikers after a bail bond is “forfeited” and the agent keeps the fees and so-called collateral. Every day inside increases the likelihood of job loss, loss of shelter or apartment placement, mental and physical health deterioration, and even death. Many suffer the torture of solitary confinement while still “presumed innocent.” The Bureau of Justice Assistance, a division of the U.S. Department of Justice, has found that “[t]hose who are taken into custody are more likely to accept a plea and are less likely to have their charges dropped.”⁶ Of all those who receive prison and jail sentences, those who are incarcerated pre-trial receive sentences that are, on average, three times longer.⁷ It is obvious that anybody who has experienced even a day in Rikers, and who faces the prospect of months or years inside, is far more likely to accept a plea that involves an admission of guilt than somebody who can fight their case at liberty, regardless of whether or not they are in fact guilty. District Attorneys consistently exploit this leverage, which amounts to selective prosecution, yet in the more than 95% of cases that end in plea deals, judges almost never challenge the disparity in offers. (The exceptions generally occur when Assistant District Attorneys accidentally acknowledge the strategy on the record.)

Ultimately, New York should live up to the American ideal of presumed innocence and end pre-trial detention for all but the most serious cases.

Language Access

Through Mayor Bloomberg’s Executive Order No. 120 (2008) and Governor Cuomo’s Executive Order No. 26 (2011), all City and State agencies that provide direct public services are required to ensure meaningful language access and provide free translation. In practice, many non-English speaking criminal defendants must choose between court proceedings in a second or third language or waiting for hours or even days for a translator in their primary language. Many

⁵ Jamie Fellner, *The Price of Freedom* (Human Rights Watch 2010).

⁶ Lindsey Devers, Ph.D., *Plea and Charge Bargaining* (U.S. Bureau of Justice Assistance 2011).

⁷ Ram Subramanian et al., *Incarceration’s Front Door: The Misuse of Jails in America* (VERA Inst. of Justice 2015).

choose the first option and misunderstand part or all of the hearing. A related problem is that court translators do not provide their services in secure areas (also known as “the pens” where detained defendants are held when they are brought to the courthouse). This is where attorneys converse with their clients, explain the status of a case, convey offers, discuss the risks and benefits of trial, and generally help their clients make sense of an extremely complicated criminal justice system. Without translation services in these areas, attorneys must try to converse as quickly as possible in the small holding areas behind the courtrooms, while court officers wait (patiently or impatiently) to bring the next detained person down. These conversations – if they can even be called that – are limited to five minutes or less, and are not at all confidential. Furthermore, they impede access to justice for everyone as they contribute to the delays that already plague the courts. BDS works to fill the gaps by securing our own translators when possible. But this is a highly inefficient use of the City’s resources. The Courts can and should do more to ensure that everybody gets their day in court and access to their attorney in their native language.

Courthouse Arrests

BDS strongly believes that people with direct experience in the criminal justice system are best positioned to advocate for change. Our client, Clarence Threlkeld, will be testifying to travesty of courthouse arrests. He was arrested in court by ICE and detained, though his case was ultimately dismissed with prejudice. After five months in detention, the Immigration Judge found he was a U.S. citizen. While I will defer to Mr. Threlkeld on the details of the issue, I must state for the record that BDS strongly urges our City and State to do all that they can to prevent ICE from making courthouse arrests and discouraging our immigrant clients from defending themselves and seeking justice in court.

BDS has other clients who are not so fortunate as to be able to testify here today, and so we will have to be the ones to speak on their behalf. Another client, who I will call **Mr. B**, is currently sitting at the Buffalo Federal Detention Facility in upstate New York. Mr. B was brought to this country forty-eight years ago as a baby. He has been a green card holder ever since. Mr. B was arrested eighteen years ago for a burglary and served time upstate. He was released to the community and was a rehabilitation success story thanks to a variety of services provided by our State and City. Because he suffers from mental illness he was living in supportive housing and participating in a program funded by the New York State Department of Mental Health aimed a transitioning him to independent living. He had also been receiving weekly psychiatric treatment including psychotherapy and medication therapy at the New York Psychotherapy and Counseling Center, and had been attending substance abuse treatment five days a week at Housing Works. He was just about to graduate to his own apartment. One evening last February, while visiting his girlfriend who lives in a public housing project, he stopped to chat with a mutual friend in the hallway. The friend was smoking a joint. The NYPD, probably conducting a vertical patrol, encountered the two men. Though Mr. B, who is regularly drug-tested through his program, was not smoking, both were charged with marijuana possession. (This, by the way, is an extremely common situation among our clients. One person might have marijuana but six people will be charged with its possession – a boon to NYPD’s arrest numbers. These cases will almost invariably end up in an ACD or a violation, but our clients miss days of work, lose jobs, get kicked out of shelter, fail to show up to pick up their kids from school, and even – as happened to Mr. B – end up in ICE detention). Mr. B was given a desk appearance ticket. When he went to court, he noticed that two men were watching him

intently from the back of the courtroom. He waited in the courtroom for his case to be called. After several hours, he was approached by a court officer and told, “There’s someone who wants to talk to you, go outside.” Mr. B told the court officer he did not want to leave the courtroom because he was afraid of getting a warrant if his case was called in his absence. The court officer told Mr. B that a warrant was the least of his problems. Mr. B obeyed the officer and left the courtroom. The men from before, ICE agents, were waiting for him in the hallway to take him into custody. The ICE officers must have been cognizant that they had done something that was not quite above board, because they reported on their paperwork that they arrested Mr. B on the corner of Schermerhorn St. and Boerum Place, rather than inside the courthouse itself. Mr. B’s criminal case would almost certainly have been dismissed, but he never got the chance to appear on it. Instead he was given a warrant for failing to show up to court.

Because he is mentally ill, Mr. B was told by ICE that no facility in the New York City area could take him. Instead, he was sent to Batavia, NY, a six-hour drive away, and his removal proceedings were set before an immigration judge based in the detention facility. Unsurprisingly, there are very few *pro bono* attorneys willing and able to provide legal services in Batavia. Mr. B was not able to find an attorney to represent him on his case. It was only through the extreme persistence of his fiancé that he was able to find someone willing to file a change of venue motion to bring his case back to New York City. Once he was back in New York City we were able to pick up his case through NYIFUP. Because Mr. B is subject to “mandatory detention” because of his 18-year-old conviction, he has already spent six months in ICE custody and will spend six more as his hearing on relief is not scheduled until March of next year. Mr. B is far from alone. We have another client who was arrested by ICE just last month outside the Red Hook community courthouse after his monthly check-in to update the Court on the progress of his drug treatment program. These stories exemplify the harm caused by the over-policing of our communities, the sharing of information with ICE, and the intrusion of ICE into our courthouses.

Services Available to Immigrants in the Criminal Justice System

BDS’s Padilla unit has observed two critical problems in the services available to immigrants in the criminal justice system. The first is that some alternatives to incarceration (ATI’s) and other court-mandated programs require upfront guilty pleas. These pleas, often to the top charge of the complaint or indictment, must be taken as a condition of receiving treatment. For U.S. citizens this is less problematic, though not without consequences. If the client completes the program successfully, the plea will be vacated and the case will be sealed for most employers. For noncitizens, on the other hand, these pleas can lead directly to deportation. Because of the way the immigration law is written, a guilty plea that is later vacated pursuant to participation in a rehabilitative program still counts as a “conviction” for immigration purposes.⁸ We have seen instances where the District Attorney’s office and the judge were willing to allow the client to participate in a program without an upfront guilty plea. Because the program was not willing to accept the client without a plea, however, the client was faced with an impossible situation. The only way to receive much-needed treatment was to plead guilty (actual guilt, innocence, or possible defenses to the charge notwithstanding). But, by doing so, he would make himself deportable and subject to mandatory detention by ICE. This is not

⁸ INA § 101(a)(48)(A).

fair. Pleas and convictions should occur through truth-seeking hearings, not program admissions applications. Not all programs require upfront pleas; many do not. We submit that the Council should use its budgetary powers to support the universal adoption of this more just and inclusive approach.

The second problem that we have observed is that some of these program lack translation services. We have seen clients unable to participate in a program because they do not offer services in Spanish. Clients who speak less popular languages have an even more difficult time. Again, the Council should use its funding power to support programs with language access policies that mirror those of the City.

Services for Immigrant Victims of Crimes

It is a common misconception that public defenders only represent accused perpetrators of crimes, and not victims. On the contrary, perpetrators of trauma-inducing crimes are often, themselves, victims of related traumatic incidents. Perpetrators of crimes of poverty are often victims of crimes of poverty. One prevailing trope in the cycle of victimization is that people in power choose whom to treat like criminals, and when, based on a lack of understanding of the lives they have lived.

As defense attorneys, we defer to other hearing participants to provide expert testimony on the services available to immigrant victims of crimes, but we nonetheless feel obliged mention one stark example of a gap in services available to victims. This is the NYPD's refusal to certify U Visas for people with criminal histories. The U nonimmigrant status (U visa) is provided by the federal government for "victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity."⁹ The certification must be signed by a law enforcement agency. This is a threshold requirement: without a law enforcement certification a victim has no hope of securing a U visa. For cases where a perpetrator was never identified or prosecuted, the NYPD is the agency that must certify that a person has been a victim of crime and has been helpful to law enforcement. Unfortunately, the NYPD has taken it upon itself to refuse to sign certifications for victims who have also been convicted of crimes. This is not a blanket prohibition, but we have had several cases where the NYPD has refused to certify citing our clients' criminal records. Whether someone has a criminal record has absolutely nothing to do with whether he or she was a victim of crime and has cooperated with law enforcement in the investigation of that crime. The signing of a U visa certification does not guarantee that someone will receive a U visa. The applicant's complete criminal record will be sent to Immigration as part of the application. It is for Immigration to decide whether the person merits a U visa in an exercise of discretion. To deny a certification is to deny an individual the chance to make their case to Immigration. It is completely inappropriate for the NYPD and to appoint itself an arbiter of victimhood in this way. This practice is both cruel and counterproductive, as it contradicts the program's stated purpose of encouraging immigrants to aid law enforcement in fighting certain crimes.

⁹ <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

Conclusion

BDS deeply appreciates the commitment of this Council to the rights and well-being of immigrant New Yorkers. As efforts to achieve federal immigration reform stop and start, and as President Obama's executive action goes through the courts, New York City is working to expand its services and support for immigrants within the limits of its jurisdiction. Given the intransigence of ICE's aggressive apprehension and detention policies, and the agency's enforcement priorities, the most effective way to protect immigrants is to ensure they are not ensnared in the criminal justice system. As soon as somebody is arrested, the power of our City to provide meaningful opportunities for her to have a successful life in this country is greatly diminished, and the broken policies and practices of the federal government prevail. For this and many other reasons, we hope Chair Lancman, Chair Menchaca, and other Council Members will restart the conversation about decriminalization that began to gain momentum earlier this year. Visit Rikers Island unannounced, sit through arraignments, and speak with our city's public defenders, and you will see who is arrested and prosecuted and how they are treated. Ending inequality and healing the rift in the Tale of Two Cities often cited by this Administration will not be possible without ending over-criminalization.

Thank you for your consideration of my comments.