

**Written Comments of The Bronx Defenders
New York City Council Committee on Immigration
Jointly with the Committee on Courts and Legal Services**

**Oversight Hearing: Evaluating Attorney Compliances with Padilla v. Kentucky and
Court Obstacles for Immigrants in Criminal and Summons Courts**

October 19, 2015

My name is Jodi Morales, and I am a Criminal Defense Attorney at The Bronx Defenders. I am here today with my colleague, Sarah Deri Oshiro, who is a Supervising Immigration Attorney at our office. We submit these joint comments on behalf of The Bronx Defenders and thank the City Council for the opportunity to testify. We hereby make recommendations for continued support of our model which grants early access to immigration counsel for non-citizens facing criminal charges.

Located in the heart of the South Bronx, The Bronx Defenders provides high caliber, holistic and client centered representation to indigent people facing a myriad obstacles stemming from court involvement. The Bronx Defenders is comprised of eleven interdisciplinary teams staffed by criminal defense attorneys, family court attorneys, immigration and general civil attorneys, investigators, social workers and other social services advocates. Through our team-based model, each client of The Bronx Defenders has seamless access to multiple advocates and services to meet his or her legal and non-legal needs. The primary goal of our holistic defense model is to address the effects of criminal justice involvement—whether the risk of deportation, the loss of employment, housing or public benefits, or removal of children from the home, to name just a few. Instead of referring to these outcomes as “collateral consequences,” we use the term “enmeshed penalties,” which better reflects the grave risks and realities that our

clients face from the moment of arrest. Today, I'd like to focus my testimony on how our team-based advocacy works with the Padilla mandate.

Our team-based immigration attorneys make ourselves available via email, phone, and text at all hours of the day and night to allow our criminal defense attorneys and clients to have immediate access to immigration counsel from the moment of the pre-arraignment interview. Our defense lawyers are trained to gather the precise information that is necessary to properly advise clients about potential immigration consequences. A “checklist” system modeled on best practices developed for hospitals ensures that all non-citizen clients are identified and offered specialized advice. Immigration attorneys are “on-call” to provide this advice during every arraignment shift. Working together, each non-citizen client, criminal defense attorney and immigration attorney reviews the client’s complete immigration background and criminal history, identifies the risks of deportation stemming from past or present criminal justice involvement, and ultimately reduces the chance of triggering a deportation case that could otherwise tear our client from his family and community.

During my eight-year tenure at The Bronx Defenders I have represented countless individuals facing the risk of deportation as a result of criminal court involvement. As such, I am in the unique position to discuss how our model has been instrumental in ensuring that families remain in tact while ensuring the public’s confidence in our system.

One example of how our model tracks the mandate set forth by the Supreme Court in *Padilla v. Kentucky*, is the story of my young client Justice. Justice is a young man from Ghana who came to the United States to study business. He entered lawfully,

with a green card. He was on track to graduating from college when he was arrested following a dispute with his ex-girlfriend and charged with a felony. At his arraignment bail was set. Justice spent nearly a year in jail while his family gathered enough money to bail him out.

While Justice remained incarcerated, I together with the immigration attorney assigned to my team, were able to brain-storm and ultimately advocate for a unique disposition that would allow Justice to avoid deportation and would enable him to get back on track to graduate college as quickly as possible.

Justice's immigration attorney was a key component on his defense team. She helped me negotiate a plea with the district attorney which was accepted and honored by the Court. Justice pled to a lesser charge and was sentenced to a term of 364 days in jail – in his case, the equivalent of time served. A 364-day sentence protected Justice from harsh and often counterintuitive consequences he would have faced under federal immigration law which renders non-citizens deportable in many cases where their sentence exceeds 364 days. Had Justice accepted the initial plea offer of two years jail, he would have inevitably been deported and his dreams of graduating with a college degree would have been shattered. Justice's story amplifies the importance of a model where attorneys with different skill sets collaborate and develop creative strategies for advocacy in an effort to mitigate harsh penalties for non-citizens. I saw firsthand how for Justice, avoiding deportation – which would have been an enmeshed penalty of his criminal justice involvement – was his number one goal, above and beyond all others. I have represented hundreds of clients over the years for whom the enmeshed penalty of

deportation would have far exceeded the scope of their criminal cases and who have assigned the same order of priorities to their representation as Justice did.

At the Bronx Defenders we are proud to have pioneered the interdisciplinary, team-based model that has allowed us to provide the kind of holistic representation we were able to provide to Justice long before the Supreme Court issued its mandate requiring immigration advice by criminal defense counsel in Padilla. Through our model, we have been providing immigration advice to non-citizen clients facing criminal charges since 2002.

The Bronx Defenders is also grateful for the City Council's support, specifically the support of Speaker Melissa Mark-Viverito, in passing the detainer discretion law. By no longer honoring detainer requests and by removing ICE from the City Jails, I am now able to provide the most robust criminal defense representation possible without worrying that my clients will end up deported merely because they cannot post bail. I have represented dozens of individuals over the past year who, but for our City's progressive legislation, would have ended up in Immigration detention following the resolution of their criminal cases. Instead, they are home with their families. On behalf of my clients, I would like to thank the Council for their passage of this law.

Ms. Morales has testified about The Bronx Defenders' groundbreaking holistic defense model which, among other things, has allowed our staff to provide comprehensive services to non-citizen clients for almost fifteen years. In the six years I have worked in our immigration practice I have advised hundreds of non-citizen clients facing criminal justice involvement about the potential immigration consequences, and

have represented dozens more who are in deportation proceedings in immigration court. I have also watched our practice dramatically grow in size, thanks, in part, to the generous support of the New York City Council.

Together we continue to advise many thousands of foreign-born indigent clients that our office represents in criminal and family court proceedings each year. We represent those same clients who are referred by their criminal or family court attorneys in any immigration matters they may need assistance with, often after determining, through our one-on-one client interviews, that they qualify for certain benefits they may not have previously been aware of.

In addition to our team-based advocacy work, together with the Legal Aid Society and Brooklyn Defender Services, The Bronx Defenders is one of the institutional providers of removal defense for New Yorkers before the Varick Street and New Jersey immigration courts, via the New York Immigrant Family Unity Project (NYIFUP). The Bronx Defenders thanks the Council for its generous support of NYIFUP which has allowed New York City to launch the United States' first and only assigned counsel program for indigent non-citizens in deportation proceedings, and serves as a national model.

Notwithstanding our office's robust immigration practice that Ms. Morales described, there are still ways in which representation of non-citizens who are ensnared in the criminal justice system could be improved. Certain offenses routinely charged via summonses or Desk Appearance Tickets can have grave consequences for non-citizens. For example, marijuana or fare-beating convictions can subject a green card holder to deportation notwithstanding his family, length of residency in the United States,

employment history or connections to the community. My client Ariel entered on a green card when he was just seven years old. Yet after traveling abroad on business trip, he was apprehended by ICE upon return to JFK airport and detained for 11 months while fighting his deportation case. It was his misdemeanor marijuana conviction that made him subject to removal. Luis, another client who suffers from debilitating mental illness, spent over a year in Immigration custody because of two fare-beating convictions from the 1990s, even though he had been a Lawful Permanent Resident for decades as well. They luckily won their cases and were allowed to stay in the US, but not everyone is so lucky; and the collective years they spent in immigration custody while fighting their cases can never be returned.

People routinely plead guilty in special courtrooms dedicated to processing Desk Appearance Tickets or summonses. Although there have been efforts at police reform, Desk Appearance Ticket volume is not down, which has consequences. There is judicial pressure to resolve cases at initial appearances, be it arraignment, summons, or Desk Appearance Ticket courtrooms. Yet as Ariel and Luis's cases show, a quickly-obtained disposition for even the most minor offense can have devastating, life-long consequences on New Yorkers' lives. Moreover, there are thousands of New Yorkers who may be eligible for some of the Deferred Action programs created by President Obama, be it Deferred Action for Childhood Arrivals or Deferred Action for Parental Accountability. Certain minor offenses, including violations of the City's administrative code, which are routinely handled in Summons Courts, could disqualify these individuals from protection under these programs.

Truly protecting the rights of immigrant New Yorkers requires a careful, nuanced analysis of what effect a disposition could have on people's immigration status. Requiring defense counsel to resolve literally hundreds of cases in a shift at a Summons Court or Desk Appearance Ticket court without having an immigration attorney present in that room carries grave consequences for this portion of our population. Therefore, a next step in best practices would be to have immigration attorneys present in every arraignment part, Summons Court or Desk Appearance Ticket court, so that every single noncitizen who comes through the system has the opportunity to have a face-to-face meeting with immigration counsel. Decriminalization of low-level conduct is another solution, as it would result in fewer New Yorkers being funneled through Desk Appearance Ticket and Summons Courts facing charges that could make them subject to deportation. Slowing down the speed of Summons Court and Desk Appearance Ticket Courts would have tangible results too.

Another way in which New York's criminal justice system could better protect noncitizens is by improving judicial diversion options in drug treatment courts. Generally speaking, judicial diversion programs allow defendants to plead guilty with the promise of vacatur or a reduction of conviction upon successful completion of a court-mandated rehabilitation program. However, federal immigration laws define the term "conviction" with sweeping, broad language, such that those individuals may still remain "convicted" of whatever crime they originally plead guilty to, notwithstanding a later-vacated or reduced plea.

Although the New York state legislature created a special carve-out provision to protect those are likely to face "severe collateral consequences" by not requiring them to

enter an up-front, guilty plea in “exceptional circumstances¹,” in practice, what we see playing out in courtrooms on a day-to-day basis is that our noncitizen clients are not able to avail themselves of this special protection. There is a lack of awareness and understanding among prosecutors and the judiciary of the importance of allowing noncitizen New Yorkers to access diversion programs in a meaningful way that does not put their immigration status in jeopardy.

Sadly, I have represented countless men and women who are subject to deportation due solely to offenses stemming from their drug addiction, largely for drug possession convictions. Their stories are tragic, and, simply stated, New York could offer better, more meaningful access to treatment or diversion program options for noncitizens struggling with drug addiction.

The Bronx Defenders has boldly redefined public defense in countless ways. Requiring attorneys to treat clients as whole people rather than “cases” is the true promise of *Padilla*. We will continue to push the envelope and creatively envision how to provide the most robust representation of citizen and non-citizen clients alike in order to ensure that New York City’s families are kept together and able to thrive. Ms. Morales and I would like to thank the Council, specifically the Committee on Immigration and Committee on Courts and Legal Services, for the opportunity to testify today.

¹ New York Criminal and Procedure Law § 216.05(4)(b).