Queens County Indictment No. QN 10508/92
New York County Indictment No. 5387/06
Chemung County Indictment No. 2009-189

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MICHAEL THOMAS a/k/a NEIL ADAMS,

Defendant-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

RICHARD DIAZ,

Defendant-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JUAN JOSE PEQUE a/k/a JUAN JOSE PEQUE SICAJAN,

Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR Part 500.1(f), *amicus curiae* the Immigrant Defense Project states that it is a nonprofit organization whose parent corporation is the Fund for the City of New York, a nonprofit corporation organized under the laws of New York State and exempt from taxation under 26 U.S.C. § 501(c)(3). The Immigrant Defense Project has no other parents, subsidiaries, or affiliates.

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PRELIMINARY STATEMENT

Amicus curiae the Immigrant Defense Project ("IDP") respectfully submits this brief in support of Defendants-Appellants to assist the Court by making three points relevant to the questions presented in these cases that are not addressed or fully addressed in the parties' briefs.[1] These points support the conclusions that deportation may no longer be considered a mere "collateral" consequence of a criminal conviction in New York State; deportation has become a sufficiently definite, immediate, and largely automatic consequence of conviction that constitutional due process requires automatic vacatur of a noncitizen defendant's plea-based conviction where a trial court fails to warn a noncitizen defendant about its possibility; and the Court should overrule *People v. Ford*, 86 N.Y.2d 397 (1995), to the extent it holds otherwise. These conclusions do not require the Court to overrule or modify any other aspect of *Ford* or other precedents that apply the "direct" versus "collateral" distinction to other contexts in determining the consequences about which a trial court must advise a defendant pleading guilty. However, they do require the Court to reclassify deportation as a direct consequence or, in the alternative, adopt the U.S. Supreme Court's conclusion that deportation is a "unique" consequence for which the direct versus

[1] "Defendants-Appellants" refers to Michael Thomas, Richard Diaz, and Juan Jose Peque, whose appeals are being decided in the above-captioned cases.

collateral distinction is "ill-suited" and inapplicable. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

Point I below shows that the Court may reexamine and overrule its holding in *Ford* because of significant changes in relevant state and federal law that have occurred since *Ford* was decided nearly twenty years ago. These changes include New York's establishment in 1995 of the Institutional Removal Program ("IRP"), a comprehensive federal-state initiative to maximize the number of noncitizens in state prison who are expeditiously processed for deportation while serving their sentences and released by the New York State Department of Correctional and Community Supervision ("DOCCS") directly to U.S. Immigration Customs Enforcement ("ICE"). From 2003 to 2012, more than 13,000 noncitizens were released to ICE under IRP—representing 74 percent, or the overwhelming majority, of noncitizens released from state prison in New York during those years. Also, they include New York's enactment of the Sentencing Reform Act of 1995, which authorizes the New York State Parole Board to release directly to ICE noncitizens who have been convicted of nonviolent felony offenses,

and have a final order of deportation, prior to their earliest possible release date (known as Early Conditional Parole for Deportation Only ("ECPDO")).[2]

At the federal level, these changes include the U.S. Supreme Court's decision in *Padilla*, which concluded that deportation cannot be considered a collateral consequence of conviction because it "is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." 130 S. Ct. at 1480. In addition, they include the U.S. Congress' enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which came into effect on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which generally came into effect on April 1, 1997.[3] By greatly expanding the criminal offenses that subject an immigrant to mandatory detention and deportation, and drastically curtailing the U.S. Attorney General's authority to grant discretionary relief from deportation, these acts have considerably increased

[2] Sentencing Reform Act of 1995, 1995 N.Y. Laws 126.

[3] AEDPA, Pub. L. No. 104-132, 110 Stat. 1214; IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546.

the probability that immigrants with criminal convictions will be deported.[4] Together, these changes have closely integrated New York's criminal justice and the federal immigration systems, and have directly linked deportation with state criminal convictions for the vast majority of noncitizens who enter a felony plea in New York today.

Point II explains how these changes—none of which are addressed in *Ford*'s cursory discussion of deportation—demonstrate that deportation may no longer be fairly considered a collateral consequence of a noncitizen defendant's criminal conviction. The IRP's expedited procedures, authorized by federal law, for deporting the vast majority of noncitizens in state prison; its integration of the federal immigration and state criminal justice systems; New York's statutory allowance of ECPDO pre-parole eligibility releases to ICE; the significant expansion under AEDPA and IIRIRA of the criminal offenses that trigger mandatory deportation; and those acts' elimination of all but the most narrow exceptions to mandatory deportation, show that deportation as a consequence of a

[4] AEDPA and IIRIRA also caused a change in nomenclature by replacing the term "deportation" with "removal" and distinguishing between acts that render a noncitizen either "deportable" or "inadmissible," both of which can result in a noncitizen's removal from the United States. IDP generally uses the term "deportation" herein to mean "removal" unless stated otherwise.

criminal conviction has become sufficiently "definite, immediate and largely automatic" in New York that it should be treated as a direct, or at least a unique, consequence that falls within the ambit of due process. *Ford*, 86 N.Y.2d at 403.

Finally, Point III shows that the Court should hold that due process requires automatic vacatur of a plea-based conviction for a felony offense where a trial court fails to notify a noncitizen defendant pleading guilty about the possibility of deportation. In *People v. Catu*, 4 N.Y.3d 242 (2005), and *People v. Van Deusen*, 7 N.Y.3d 744 (2006), the Court required automatic vacatur for a failure to adequately notify a defendant about postrelease supervision, and the rationale of those decisions applies with equal force in this context. Nevertheless, a trial court may easily fulfill its constitutional duty and notify a noncitizen defendant about the possibility of deportation by providing the statutory notification of N.Y. Crim. Proc. Law § 220.50(7) to all noncitizen defendants pleading guilty to a felony offense.[5]

[5] IDP focuses its arguments on felony offenses because those are the offenses at issue in these cases. However, the arguments herein apply to many misdemeanor offenses as well.

INTEREST OF *AMICUS CURIAE*

IDP is a New York-based nonprofit legal resource and training center that promotes fundamental fairness for immigrants accused or convicted of crimes. A nationally recognized expert on issues that lie at the intersection of criminal and immigration law, IDP seeks to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system by working to transform unjust deportation laws and policies, and to provide legal information to judges, criminal defense and immigration lawyers, and immigrants. Since 1997, IDP and its former parent organization, the New York State Defenders Association ("NYSDA"), have published and regularly updated the only legal treatise specifically geared toward New York defense counsel representing immigrant defendants: Manuel D. Vargas, *Representing Immigrant Defendants in New York* (5th ed. 2011).[6] IDP has a keen interest in the present cases because its mission

[6] The Respondent in *Thomas* misconstrues IDP's manual *Representing Immigrant Defendants in New York* in arguing that it somehow demonstrates deportation is not practically inevitable for the vast majority of noncitizens in New York convicted of a felony offense. While the manual identifies possible forms of relief from deportation available to certain limited categories of individuals, this does not mean that even these individuals are not deportable. In general, it means that the government may exercise its discretion not to remove an individual and, in some cases, could later withdraw from that exercise of discretion. Moreover, despite the fact that there are arguments to be raised against deportation or for relief from deportation in specific cases, the reality is that initiation of deportation proceedings against noncitizens in prison has now become virtually certain; deportation is ordered in most cases; and the overwhelming

encompasses the strengthening of constitutional due process protections for immigrant criminal defendants. This includes advocating recognition of a trial court's constitutional duty to ensure that before a noncitizen, like each of Defendants-Appellants, pleads guilty to a criminal offense, he or she is warned that deportation, exclusion from admission to the United States, or denial of naturalization is a possible consequence of a proposed plea.

Numerous courts, including this Court and the U.S. Supreme Court, have accepted and relied on *amicus curiae* briefs submitted by IDP (on its own or through NYSDA) in many key cases involving the interplay of criminal and immigration laws. *See, e.g.*, Brief for IDP *et al*. as *Amici Curiae* Supporting Petitioner, *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (No. 11-820); Brief for IDP *et al*. as *Amici Curiae* Supporting Petitioner, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651); Brief for IDP *et al*. as *Amici Curiae* Supporting Respondent, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited in *St. Cyr*, 533 U.S. 323 n.50); Brief for IDP *et al*. as *Amici Curiae* Supporting Defendants-Appellants, *People v. Ventura*, 17 N.Y.3d 675 (2011) (Nos. 160, 161).

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majority of deportation proceedings involving individuals with felony convictions result in deportation orders with no relief available or, even if relief is available, no relief granted.

ARGUMENT

I. Significant Changes In The Law Justify The Court Reexamining And Overruling *People v. Ford*

Significant changes in the law, developing ideas of justice, and better reasoning may justify the Court overruling a court-made rule, particularly in constitutional cases like these where individual rights are at stake and the policies underlying *stare decisis* have diminished force. *See, e.g.*, *People v. Taylor*, 9 N.Y.3d 129, 148-49 (2007) (precedent may be overruled for "'sound reasons'" (citation omitted)); *id.* at 156 (Smith, J., concurring) (precedent should be respected in the absence of significant changes "either in the law or the law's effect on the community"); *People v. Bing*, 76 N.Y.2d 331, 338 (1990) ("[T]he 'lessons of experience and the force of better reasoning'" may justify overturning precedent) (citation omitted)); *People v. Hobson*, 39 N.Y.2d 479, 487 (1976) (*stare decisis* does not prevent courts from rejecting "obsolete doctrine which has lost its touch with reality"); *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957) (overruling court-made rule "out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing").

The Court has long recognized that *stare decisis* is a "principle of policy" only and not a "mechanical formula of adherence" to precedent. *Bing*, 76 N.Y.2d at 338 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). The goals of *stare decisis*—promoting stability in the law and the legitimacy of the courts—may be achieved by a general preference for not disturbing settled points of law, but not by a reflexive fidelity to outmoded decisions. *See Thunig*, 2 N.Y.2d at 667 (*stare decisis* not intended "to effect a 'petrifying rigidity'"). In some cases, these policy goals are best served by the Court modifying or overturning a precedent that, "although well established, [is] found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society." *Hobson*, 39 N.Y.2d at 489; *see also People v. Damiano*, 87 N.Y.2d 477, 489 (1996) (Simons, J., concurring) ("*Stare decisis* is not an inflexible doctrine, of course, and rules long settled . . . are always open to reexamination if there is some evidence that the policy concerns underlying them are outdated."); *Bing*, 76 N.Y.2d at 338 ("Precedents remain precedents . . . not because they are established but because they serve the underlying 'nature and object of the law itself', reason and the power to advance justice (*see*, Von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 Harv. L. Rev. 409, 414

(1924)."). This is especially true in cases involving constitutional rights, where *stare decisis* is not rigidly applied "because an error in constitutional interpretation, if not corrected by the courts, cannot be corrected at all except through the difficult process of constitutional amendment." *Taylor*, 9 N.Y.3d at 156 (Smith, J., concurring).[7]

Applying these principles in cases delineating the due process rights of criminal defendants, the Court has not hesitated to modify its precedents to ensure that constitutional law remains just, reasonable, consistent, and responsive to modern concepts of fundamental fairness. *See Bing*, 76 N.Y.2d at 347-49 (overturning nine-year-old rule governing right to counsel where experience showed it was unworkable and "presse[d] reason to the limit"). In *Hobson*, the Court rejected a then-recent line of its own cases limiting the constitutional right to counsel where older precedent differed and the "stability" of the newer cases had been "undermined" by a federal district court decision, affirmed by the Second

[7] *See also id.* at 149 ("[A] court should 'not . . . apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases.'" (citation omitted)); *Hobson*, 39 N.Y.2d at 488-89 ("[T]he principle is well established that in cases interpreting the Constitution courts will . . . if convinced of prior error, correct the error."); *People v. Berrios*, 28 N.Y.2d 361, 371 (1971) (Fuld, C.J., dissenting) ("[I]f a court-made rule, in its actual operation, impinges on an individual's constitutional rights or otherwise offends against concepts of fair dealing, it should be discarded.").

Circuit, that "adopted the reasoning of the dissenters in State court as a statement of Federal constitutional principles." 39 N.Y.2d at 486. In choosing between the two precedents, the Court sided with the precedent that was "intrinsically sounder" and "verified by experience," *id.* at 487, and better "reasoned and consciously developed." *Id.* at 490. In *People v. Ressler*, the Court relied on significant changes in the federal law of double jeopardy, including a U.S. Supreme Court decision that "laid down a different rule for the Federal courts" than that followed by New York State courts, to discard its decades-long precedent that a defendant who obtained a new trial on appeal from a conviction of a lesser degree of a crime could be convicted at retrial of the greater degree. 17 N.Y.2d 174, 179-81 (1966); *see also id.* at 181-82 (Burke, J., concurring) ("[B]ecause of changing conditions the concept of double jeopardy should develop responsively to the changing ideas of justice" and "[m]odern concepts of fundamental fairness.").

Similarly, in the present cases, significant changes in state and federal laws affecting the rights of noncitizen criminal defendants, developing ideas of justice, and sounder reasoning justify the Court overruling its nearly two-decades-old decision in *Ford* that trial courts are not constitutionally required to notify noncitizens pleading guilty about the possibility of deportation. 86 N.Y.2d at 403.

Foremost, as Appellants-Defendants demonstrate, in *Padilla* the U.S. Supreme Court squarely rejected the reasoning of *Ford*. *Padilla* has irremediably undermined *Ford*'s validity by declining to categorize deportation as a collateral consequence; holding defense counsel must advise noncitizen clients about the risk of deportation; and overruling the contrary federal case law on which *Ford* relied. *See Ford*, 86 N.Y.2d at 403 ("[T]he Federal courts have consistently held that [because deportation is a collateral consequence] the trial court need not, before accepting a plea of guilty, advise a defendant of the possibility of deportation." (citing, e.g., *U.S. v. Parrino*, 212 F.2d 919, 921 (2d Cir. 1954)).

In short, *Padilla* has overtaken *Ford*, and for good reason. *Padilla*'s detailed analysis of the significance of deportation as a consequence of conviction; the effect of deportation on a noncitizen's calculus in deciding whether to plead guilty; and the intimate relation between deportation and the criminal process, is much more thorough, sound, and in touch with current legal realities than the outdated, surface discussion of deportation in *Ford*. *See Padilla*, 130 S. Ct. at 1478-83; *Ford*, 86 N.Y.2d at 403. *See also Hobson*, 39 N.Y.2d at 490 ("[A] precedent is less binding" where it is not "the result of a reasoned and painstaking analysis."). During the Court's current term, Chief Judge Lippman adverted to the

fundamental change wrought by *Padilla*: "[I]t is now clear that a defendant's understanding of what would under the *Ford* dichotomy be deemed a collateral plea consequence may yet be highly material to a plea's constitutional validity (*see Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1486 (2010))." *People v. Belliard*, 20 N.Y.3d 381, 391 (2013) (Lippman, C.J., dissenting).

In addition to *Padilla*, as explained in Point II below, New York's vigorous implementation of IRP and pursuit of ECPDO early releases directly to ICE, and Congress' enactment of sweeping amendments to federal immigration law in 1996, have dramatically changed the legal landscape for noncitizens in New York convicted of criminal offenses since *Ford*. These changes have caused deportation to become a definite, immediate, and largely automatic consequence of conviction for a wide range of felony convictions in New York, and a consequence that is far too important to be left out of a noncitizen's plea allocution without violating notions of due process. *See Padilla*, 130 S. Ct. at 1481 ("[R]ecent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders.").

For the reasons stated above, the Court should reexamine and overrule its holding in *Ford*.

II. Deportation Has Become A Sufficiently Definite, Immediate, And Largely Automatic Consequence of Conviction That Trial Courts Should Be Constitutionally Required To Notify Noncitizens About Its Possibility Before Accepting A Plea of Guilty To A Felony Offense

In *Padilla*, the U.S. Supreme Court rejected application of the direct versus collateral distinction in holding that deportation as a consequence of conviction is too severe and serious a penalty to be "categorically removed from the ambit of the Sixth Amendment right to counsel." 130 S. Ct. at 1482. By itself, this decision warrants the Court holding in these cases that deportation may no longer be labeled a collateral consequence about which a trial court need not warn a noncitizen pleading guilty. IDP supports Appellants-Defendants' arguments to this effect and does not repeat them here. Instead, IDP explains how New York's implementation of IRP, its authorization of ECPDO releases under the authority of the Sentencing Reform Act of 1995, and the federal government's enactment of AEDPA and IIRIRA, have "dramatically raised the stakes of a noncitizen's criminal conviction," *Padilla*, 130 S. Ct. at 1480, and have caused deportation to become a direct consequence of most felony convictions in New York.

A. Expedited Deportation Proceedings Authorized By Federal Law And New York's "Institutional Removal Program" Have Made Deportation A Definite And Immediate Consequence of Conviction for The Vast Majority of Noncitizens In New York State Prison Since 1995

In 1995, New York established the Institutional Removal Program to "maximiz[e] the number of [noncitizens in state prison] deported from the United States." *Research Report: The Foreign-Born Under Custody Population & The IRP* ("*2012 IRP Report*"), DOCCS, 8 (2012), http://www.doccs.ny.gov/Research/annotate.asp#foreign.[8] The IRP is a federal-state partnership between DOCCS, ICE, and the U.S. Department of Justice Executive Office for Immigration Review ("EOIR").[9] It was established pursuant to a congressional directive that the federal government track deportable noncitizens in prison and complete deportation proceedings against them as promptly as possible. *See, e.g.*, 8 U.S.C. § 1228(a). The IRP expeditiously

[8] *See also* David Patterson & Sean M. Byrne, *NYS Criminal Justice Crimestat Report* 76-77 (2009) ("The Institutional Removal Program (IRP) is a joint DOCS and ICE initiative established in 1995 to process convicted [noncitizens] for deportation while they are serving prison sentences.").

[9] EOIR is the body charged by the U.S. Attorney General with adjudicating deportation cases and consists principally of the corps of Immigration Judges and the Board of Immigration Appeals. *See generally* 8 C.F.R. §§ 1003.1, 1003.9. ICE serves a prosecutorial function in cases adjudicated by EOIR and is represented in immigration court by its Office of Chief Counsel. *See generally* 8 C.F.R. §§ 239.1, 1240.2.

processes noncitizens in state prison for deportation and seeks to generate deportation orders prior to a noncitizen being released from DOCCS custody such that they may be released directly to ICE for deportation. *2012 IRP Report* at 1. IRP has led to the release of 13,313 noncitizens directly to ICE between 2003 and 2012, which represents 74 percent of the noncitizens released from DOCCS custody during that time. *Id.* at 11. In addition, since New York began implementing ECPDO releases in 1995 as a result of the Sentencing Reform Act of 1995, as a result of the Sentencing Reform Act of 1995, DOCCS has released 2,273 noncitizens convicted of nonviolent offenses directly to ICE on an average of *more than two years* before completion of their minimum terms of imprisonment. *Id.* at 1, 9.

To expedite deportation proceedings in state prison, DOCCS reception centers schedule ICE interviews for noncitizen inmates almost immediately—i.e., within *three or four days*—after they are received into custody. *Research in Brief: Department Procedures For Processing Criminal Aliens*, DOCCS, 1 (2013), http://www.doccs.ny.gov/Research/annotate.asp#foreign. The interviews allow ICE to immediately determine the status of each noncitizen inmate and issue an immigration detainer, reinstate an existing deportation order,

or take other appropriate action. *Id.*[10] New York law contains a separate requirement that DOCCS investigate and notify ICE of all noncitizen inmates "within three months after admission" to a DOCCS facility. N.Y. Correct. Law § 147.

After the initial interview, ICE may administratively deport a noncitizen without a hearing before an immigration judge if he or she has been convicted of an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43), and has not been lawfully admitted to the United States. 8 U.S.C. § 1228(b). Lawfully admitted noncitizens are entitled to deportation hearings in immigration court, but the proceedings are limited and noncitizen respondents are "not at all similarly situated to a defendant in a federal criminal prosecution." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013). For example, they "have little ability to collect evidence" while in prison, *id.* at 1690, and are not guaranteed legal representation (and are typically unrepresented). 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 1240.3; Hon. Dana Leigh Marks & Hon. Denise Noonan Slavin, *A View Through The*

[10] An immigration detainer "is a notice that [the Department of Homeland Security] issues to federal, state and local law enforcement agencies" to inform the agencies that "ICE intends to assume custody of an individual in the [agency's] custody." *ICE Detainers: Frequently Asked Questions*, ICE, http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last visited July 25, 2013).

Looking Glass: How Crimes Appear from The Immigration Court Perspective, 39 Fordham Urb. L.J. 91, 95 (2012) ("60% of respondents [in immigration court] are unrepresented, a figure which rises to 84% when non-detained cases are taken out of the calculation." (footnote omitted)).

Moreover, deportation hearings, many of which DOCCS and the EOIR have been conducting via video teleconferencing since 1999, are cursory and typically last only *fifteen minutes*. *Research in Brief: Televideo Deportation Hearings*, DOCCS (2012), http://www.doccs.ny.gov/Research/annotate.asp#foreign. And according to two leading immigration judges, a "majority of . . . [deportation] decisions are rendered orally from the bench immediately at the conclusion of the proceedings without the benefit of a transcript or time for research or reflection." *A View Through The Looking Glass*, 39 Fordham Urb. L.J. at 95. Thus, it is unsurprising that it is virtually certain that a noncitizen processed through immigration court while in prison in New York will be deported: in 2013, between 81 percent and 94 percent of such inmates were deported after participating in deportation hearings through

Downstate Correctional Facility in Fishkill, Ulster Correctional Facility, and Bedford Hills Correctional Facility. [11, 12]

The IRP's expedited deportation proceedings routinely result in noncitizens receiving deportation orders while serving their state sentences, followed by a transfer to ICE for further detention and deportation upon release from state custody. New York's thorough participation in the deportation process through the IRP demonstrates how deportation has become a definite and

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[11] *U.S. Deportation Outcomes by Charge*, Transactional Records Access Clearinghouse, Syracuse University ("TRAC"), http://trac.syr.edu/phptools/immigration/court_backlog/deport_outcome_charge.php (last updated June 2013). The Respondent in *Thomas* incorrectly suggests that outcomes in deportation proceedings are "far from certain" because in 2013 "only 59.2 percent" of noncitizens who faced deportation for "a criminal conviction or a national security or terrorist threat" in New York immigration courts were deported. (*Thomas* Resp't Br. at 42). As shown in the text above, the percentage of noncitizens in state prison being deported, which is a much more relevant population, is considerably higher. The lower percentage on which Respondent relies is inapposite because it includes cases in which deportation was based on grounds other than a criminal conviction, i.e., on national security and terrorism grounds or for "criminal acts," which include acts for which a conviction is unnecessary. *About The Data*, TRAC, http://trac.syr.edu/phptools/immigration/charges/about_data.html (last visited July 24, 2013). Nevertheless, a deportation rate of 59.2 percent for noncitizens with an underlying criminal conviction would still represent a significant majority of such persons.

[12] "All female inmates with a legal immigration document lodged against them are released to the custody of the New York City ICE District Office through Bedford Hills Correctional Facility. Male inmates who have ICE detainers, ICE warrants, or deportation orders that are under appeal are released to the custody of the New York City ICE District Office through the Downstate Correctional Facility." *Department Procedures for Processing Criminal Aliens*, *supra* 16, at 2.

immediate consequence of conviction for the vast majority of noncitizens in New York State prisons since *Ford* was decided.

B. Under Contemporary Immigration Law, Deportation Is A Definite And Largely Automatic Consequence for A Broad Class of Noncitizen Defendants Who Plead Guilty Today To Any of A Wide Range of New York Felony Offenses

As a result of the significant amendments to the Immigration and Nationality Act of 1952 ("INA"), Pub. L. No. 82-14, 66 Stat. 163, as amended, 8 U.S.C. §§ 1101 *et seq.*, that Congress enacted through AEDPA and IIRIRA, "[u]nder contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is *practically inevitable* but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for [a limited class] of noncitizens convicted of particular classes of offenses. *See* 8 U.S.C. § 1229b." *Padilla*, 130 S. Ct. at 1480 (footnote omitted and emphasis added). *See also id.* at 1478 ("The 'drastic measure' of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes." (citation omitted)). This practical inevitability for a broad class of noncitizen defendants pleading guilty in New York today means that deportation has a "definite,

immediate and largely automatic effect on [most noncitizen] defendant[s'] punishment[s]." *People v. Catu*, 4 N.Y.3d 242, 244 (2005) (quoting *Ford*, 86 N.Y.2d at 403).

AEDPA and IIRIRA considerably expanded the class of deportable offenses under federal law; drastically limited the opportunities for noncitizens convicted of deportable crimes to obtain discretionary relief from deportation; and streamlined deportation proceedings, including by allowing most noncitizens convicted of deportable offenses who are not lawfully admitted permanent residents to be administratively deported without a hearing before an immigration judge. The result is largely automatic deportation for the significant number of noncitizen defendants who plead guilty to any of the wide range of New York felony offenses that fall within either of two expansive federal categories: (1) "aggravated felonies," 8 U.S.C. § 1101(a)(43), which includes many nonviolent felonies and misdemeanors and is the "category of crimes singled out for the harshest deportation consequences," *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010); and (2) a long list of other offenses—including controlled substance offenses and crimes involving moral turpitude ("CIMT"), 8 U.S.C. § 1227(a)(2)—for which conviction can render a noncitizen *both* deportable and

ineligible to apply for discretionary cancellation of removal under 8 U.S.C. § 1229b, if committed during a certain time period.

These two expansive categories and some of the common New York offenses that fall within them are discussed below.

1. Aggravated Felonies

When initially adopted in 1988, the term "aggravated felony" referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344, 102 Stat. 4469, 4470. Since then, through AEDPA, IIRIRA, and other acts, Congress has expanded the definition of "aggravated felony" to cover approximately 40 specified types of criminal offenses enumerated in 21 statutory subsections. 8 U.S.C. § 1101(a)(43)(A)-(U). The government has argued successfully that aggravated felonies encompass not only violent but also many nonviolent offenses, including misdemeanors. For example, a noncitizen may be automatically deported as an aggravated felon if he or she pleads guilty in New York to the Class A misdemeanors of petit larceny or criminal possession of stolen property in the fifth degree, N.Y. Penal Law §§ 155.25, 165.40, and is sentenced to one year of imprisonment. *See Brooks v. Attorney General*, 207 F. App'x 205, 206

(3d Cir. 2006) (conviction under N.Y. Penal Law § 165.40 constituted aggravated felony under 8 U.S.C. § 1101(a)(43)(G)); *U.S. v. Graham*, 169 F.3d 787, 789 (3d Cir. 1999) (same for conviction under N.Y. Penal Law § 155.25). *See also A View Through The Looking Glass*, 39 Fordham Urb. L.J. at 92 ("Some non-violent, fairly trivial misdemeanors are considered aggravated felonies under our immigration laws.").

The approximately 40 types of aggravated felonies can generally be classified into four groups: (1) certain specified offenses regardless of the associated sentence, such as murder, rape, sexual abuse of a minor, drug trafficking, and firearm trafficking, 8 U.S.C. §§ 1101(a)(43)(A)-(C), (E), (H)-(L), (N)-(O), (Q), (T); (2) specified offenses for which a sentence of imprisonment of one year or more is imposed, such as theft, burglary, forgery, crimes of violence, perjury, and obstruction of justice, 8 U.S.C. § 1101(a)(43)(F)-(G), (R)-(S); (3) fraud or deceit offenses in which the loss to the victim exceeds $10,000, 8 U.S.C. § 1101(a)(43)(D), (M); and (4) offenses constituting an attempt or conspiracy to commit an aggravated felony. 8 U.S.C. § 1101(a)(43)(U).

The following is a non-exhaustive list of some New York offenses that have been determined by federal courts or the Board of Immigration Appeals

to be aggravated felonies under 8 U.S.C. §§ 1101(a)(43)(A), (B), (F), (G), (R), or (S): attempted burglary in the second degree, attempted burglary in the third degree, attempted robbery in the third degree, burglary in the first degree, burglary in the second degree, criminal contempt in the first degree, criminal possession of a weapon in the second degree, criminal possession of stolen property in the fourth degree, criminal sale of a controlled substance in the third degree, forgery of documents in the second degree, forgery of public record documents in the second degree, manslaughter in the first degree, menacing in the second degree, misdemeanor criminal possession of stolen property, misdemeanor sexual abuse of a minor, misdemeanor theft (petty larceny), robbery in the second degree, statutory rape, and hindering prosecution in the first degree.[13]

[13] N.Y. Penal Law §§ 120.14, 125.20(1), 125,20(2), 130.25(2), 130.60(2), 140.20, 140.25, 140.30, 155.25, 160.05, 160.10(1), 165.40, 165.45, 170.10(1), 170.10(2), 205.65, 215.51(b)(i), 220.39(1), 265.03(1)(b); *Pascual v. Holder*, 2013 WL 3388382 (2d Cir. Feb. 19, 2013); *Brooks v. Holder*, 621 F.3d 88 (2d Cir. 2010); *Vargas-Sarmiento v. U.S. Dep't of Justice*, 448 F.3d 159 (2d Cir. 2006); *U.S. v. Velasquez*, 2006 U.S. App. LEXIS 13665 (3d Cir. June 1, 2006); *Caesar v. Gonzales*, 2006 U.S. App. LEXIS 13528 (2d Cir. May 26, 2006); *U.S. v. Hidalgo-Macias*, 300 F.3d 281 (2d Cir. 2002); *Perez v. Greiner*, 296 F.3d 123 (2d Cir. 2002); *U.S. v. Fernandez-Antonia*, 278 F.3d 150 (2d Cir. 2002); *U.S. v. Vigil-Medina*, 2002 U.S. App. LEXIS 4961 (4th Cir. Mar. 26, 2002); *Williams v. INS*, 2002 U.S. App. LEXIS 25126 (3d Cir. Nov. 19, 2002); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *U.S. v. Drummond*, 240 F.3d 1333 (11th Cir. 2001); *U.S. v. Borbon-Vasquez*, 2000 U.S. App. LEXIS 31861 (2d Cir. June 13, 2000); *U.S. v. Graham*, 169 F.3d 787 (3d Cir. 1999); *Kendall v. Mooney*, 273 F. Supp. 2d 216 (E.D.N.Y. 2003); *Rivas v. Ashcroft*, 2002 U.S. Dist. LEXIS 16254 (S.D.N.Y. Aug. 29, 2002); *Matter of*

A noncitizen convicted of any one of these aggravated felonies is subject to virtually automatic deportation, regardless of whether he or she has been lawfully admitted to the United States. Under federal law, such a noncitizen is "conclusively presumed to be deportable," 8 U.S.C. § 1228(c); may be subject to "expedited removal" through "special removal proceedings," i.e., through the IRP, 8 U.S.C. § 1228(a); may be deported without a hearing before an immigration judge if they have not been lawfully admitted, 8 U.S.C. § 1228(b); and may be ineligible to obtain judicial review of a final deportation order. 8 U.S.C. § 1252(a)(2)(C).

In addition, a noncitizen convicted of an aggravated felony is generally barred from obtaining discretionary relief from deportation, including cancellation of removal, 8 U.S.C. § 1229b(a)(3); asylum, 8 U.S.C. § 1158(b)(2)(B)(i); voluntary departure, 8 U.S.C. § 1229c(a)(1), (b)(1)(C), and, in many cases, waiver of inadmissibility. 8 U.S.C. § 1182(h). *See also Moncrieffe*, 133 S. Ct. at 1682 (federal law "prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how

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Small, 23 I. & N. Dec. 448 (B.I.A. 2002); *Matter of Aldabesheh*, 22 I. & N. Dec. 983 (B.I.A. 1999).

compelling his case"). By way of example, an individual who has come to the United States fleeing persecution in his or her country of nationality may be barred from seeking asylum by a misdemeanor conviction deemed an aggravated felony. This is because IIRIRA provides that, for purposes of the "particularly serious crime" bar to asylum, an asylum-seeker "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(i), as amended by IIRIRA, Pub. L. No. 104-208, § 604, 110 Stat. 3009-690. Thus, a Chinese dissident, an Iranian Jew, or an ethnic Albanian fleeing persecution on the basis of political opinion, religion, or nationality could be denied asylum and sent back to his or her persecutors because of a misdemeanor shoplifting offense.

Although in extremely narrow circumstances a noncitizen convicted of an aggravated felony may be eligible for deferral of removal under the United Nations Convention Against Torture if it is "more likely than not" the individual will be tortured upon returning to his or her home country, 8 C.F.R. § 208.16 *et seq.*, or for withholding of removal if the individual's "life or freedom would be threatened" in their home country "because of his or her race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C.

§ 1231(b)(3)(B)(ii), the standards for such relief are strict and the relief is rarely granted. In 2012, the immigration courts adjudicated 29,796 CAT applications and granted a mere 643. U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2012 Statistical Year Book*, at M1 (Revised March 2013), http://www.justice.gov/eoir/statspub/fy12syb.pdf. Also in 2012, the immigration courts denied withholding of removal to 10,269 applicants and granted it to 1,910 applicants only. *Id.* at K4. And even those individuals granted withholding of removal may still be deported to a third country allowing their entry, just not the country in which they face persecution. Because these statistics include applicants with and without criminal convictions, the number of applicants with criminal convictions who may have benefitted from these discretionary forms of relief is likely much smaller.

2. Crimes Involving Moral Turpitude And Controlled Substance Offenses

In addition to aggravated felonies, there is a long list of other offenses that make deportation nearly as automatic for the large number of noncitizens pleading guilty to them who have been lawful permanent residents ("LPRs") for less than five years, and have had a lawful continuous residence in the United

States for less than seven years at the time of the offense. *See* 8 U.S.C. § 1229b(a), (b). These offenses include:

- any crime involving moral turpitude ("CIMT") for which a sentence of one year or longer may be imposed, 8 U.S.C. § 1227(a)(2)(A)(i);[14, 15]
- any two CIMTs that do not arise out of a single scheme of misconduct, 8 U.S.C. § 1227(a)(2)(A)(ii); and
- any controlled substance offense, i.e., "violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U.S.C. § 1227(a)(2)(B)(i).

The following is a non-exhaustive list of some types of offenses in New York and other jurisdictions that have been determined by federal courts or the Board of Immigration Appeals to be crimes involving moral turpitude:

[14] A CIMT has been vaguely defined as a depraved or immoral act, or a violation of the basic duties owed to fellow man, or recently as a "reprehensible act" with a mens rea of at least recklessness. *See, e.g., Matter of Olquin-Rufino*, 23 I. & N. Dec. 896 (B.I.A. 2006). Traditionally, a CIMT involves an intent to commit fraud, commit theft with intent to permanently deprive the owner, or inflict great bodily harm, and includes certain reckless or malicious offenses and offenses with lewd intent.

[15] The INA provides a limited exception: a noncitizen remains cancellation-eligible if the individual: (1) has committed only one CIMT; (2) was not sentenced to a term of imprisonment in excess of six months; and (3) the offense of conviction carries a maximum possible sentence of one year or less. *See* 8 U.S.C. § 1182(a)(2)(A)(II); *Matter of Garcia*, 25 I. & N. Dec. 332 (B.I.A. 2010).

adultery in the third degree, assault, assault with a knife, breach of the peace, bribery, burglary, carrying a concealed weapon with intent to use, check fraud, child abandonment, child abuse, compulsory prostitution (attempt), contributing to the delinquency of a minor, credit card fraud or forgery, discharging a firearm into a dwelling or at an occupied vehicle, disorderly conduct, domestic assault, driving offenses (e.g., DUI and suspended license, hit and run), embezzlement, failure to register as a sex offender, forcible sexual battery, harassing phone calls, illegal possession of a credit card, indecent assault and battery, indecent exposure, issuing bad checks, kidnapping (e.g., abduction, unlawful transport), malicious mischief, manslaughter in the second degree, money laundering in the third degree, passing a forged instrument (attempt), obstruction of justice, perjury, criminal possession of stolen property in the fifth degree, receipt of stolen property, reckless endangerment in the third degree, robbery, sale or solicitation of controlled substances, soliciting a lewd act, stalking, state tax evasion, statutory rape in the third degree, theft (e.g., petit larceny, grand larceny), unemployment fraud, use of a false driver's license, voluntary homicide, voluntary manslaughter, and vagrancy for prostitution.[16]

[16] *See* N.Y. Penal Law §§ 120.00(1), 125.15(1), 120.25, 130.25(2), 165.40, 470.10(1); *Chaunt v.*

The controlled substances category also comprises a long list of common misdemeanor and felony offenses. For the purposes of immigration law, *see* 8 U.S.C. § 1227(a)(2)(B)(i), controlled substances refer to an expansive list of

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U.S., 364 U.S. 350 (1960); *Fuentes-Cruz v. Gonzales*, 489 F.3d 724 (5th Cir. 2007); *Garcia-Maldonado v. Gonzales*, 491 F.3d 284 (5th Cir. 2007); *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007); *Hashish v. Gonzales*, 442 F.3d 572 (7th Cir. 2006); *Reyes-Morales v. Ashcroft*, 435 F.3d 937 (8th Cir. 2006); *Recio-Prado v. Gonzales*, 456 F.3d 819 (8th Cir. 2006); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003); *Garcia v. Attorney General*, 329 F.3d 1217 (11th Cir. 2003); *De Leon-Reynoso v. Ashcroft*, 294 F.3d 1143 (3d Cir. 2002); *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001); *Montero-Ubri v. INS*, 229 F.3d 319 (1st Cir. 2000); *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999); *Wittgenstein v. INS*, 124 F.3d 1244 (10th Cir.1997); *Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996); *U.S. v. Del Mundo*, 97 F.3d 1461 (9th Cir. 1996); *Palmer v. INS*, 4 F.3d 482 (7th Cir. 1993); *Knoetze v. U.S. Dep't of State*, 634 F.2d 207 (11th Cir. 1981); *U.S. v. Cox*, 536 F.2d 65 (5th Cir. 1976); *U.S. ex rel. Sollazzo v. Esperdy*, 285 F.2d 341 (2d Cir. 1961); *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961); *Wyngaard v. Kennedy*, 295 F.2d 184 (D.C. Cir. 1961) (per curiam); *Babouris v. Esperdy*, 269 F.2d 621 (2d Cir. 1959); *Rico v. INS*, 262 F. Supp. 2d 6 (E.D.N.Y. 2003); *Henry v. U.S. v. Brown*, 127 F. Supp. 2d 392 (W.D.N.Y. 2001); *Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001); *U.S. v. Kiang*, 175 F. Supp. 2d 942 (E.D. Mich. 2001); *Wyngaard v. Rogers*, 187 F. Supp. 527 (D.D.C. 1960); *Petition of Moy Wing Yin*, 167 F. Supp. 828 (D.N.Y. 1958); *Matter of Tobar-Lobo*, 24 I. & N. Dec. 143 (B.I.A. 2007); *Matter of Solon*, 24 I. & N. Dec. 239 (B.I.A. 2007); *Matter of Ajami*, 22 I. & N. Dec. 949 (B.I.A. 1999); *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (B.I.A. 1999); *Matter of Bart*, 20 I. & N. Dec. 436 (B.I.A. 1992); *Matter of Wojtkow*, 18 I. & N. Dec. 111 (B.I.A. 1981); *Matter of Pataki*, 15 I. & N. Dec. 324 (B.I.A. 1975); *Matter of Goodalle*, 12 I. & N. Dec. 106 (B.I.A. 1967); *Matter of Nodahl*, 12 I. & N. Dec. 338 (B.I.A. 1967); *Matter of Alfonso-Bermudez*, 12 I. & N. Dec. 225 (B.I.A. 1967); *Matter of Mueller*, 11 I. & N. Dec. 268 (B.I.A. 1965); *Matter of S*, 8 I. & N. Dec. 344 (B.I.A. 1959); *Matter of LR*, 7 I. & N. Dec. 318 (B.I.A. 1956); *Matter of DG*, 6 I. & N. Dec. 488 (B.I.A. 1955); *Matter of RP*, 4 I. & N. Dec. 607 (B.I.A. 1952); *Matter of B*, 4 I. & N. Dec. 297 (B.I.A. 1951); *Matter of R*, 4 I. & N. Dec. 192 (B.I.A. 1950); *Matter of A*, 3 1. & N. Dec. 168 (B.I.A. 1948); *Matter of M*, 2 I. & N. Dec. 469 (B.I.A. 1946); *Matter of Y*, 2 I. & N. Dec. 600 (B.I.A. 1946); *Matter of E*, 1 I. & N. Dec. 505 (B.I.A. 1943); *Matter of R*, 1 I. & N. Dec. 540 (B.I.A. 1943).

substances regularly published by the federal government as required by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, which created "a comprehensive regime to combat the international and interstate traffic in illicit drugs." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). The list includes the following relatively common controlled substances, among dozens of others, of which the possession, manufacture, sale, or distribution may lead to a criminal conviction under New York Penal Law: amphetamines, anabolic steroids, Barbiturates, crack cocaine, cocaine, Demerol, Ecstasy, heroin, LSD, marijuana, methamphetamines, morphine, opium, OxyContin, PCP, Percocet, phenobarbitals, Quaaludes, Valium, and Xanax. *Controlled Substances*, U.S. Dep't of Justice, Drug Enforcement Administration, Office of Diversion Control (May 28, 2013), http://www.deadiversion.usdoj.gov/schedules/index.html; *see, e.g.*, N.Y. Penal Law §§ 220.03, 220.06, 220.09, 220.16, 220.18, 220.21, 220.31, 220.34, 220.39, 220.41, 220.43, 221.15, 221.20, 221.25, 221.30, 221.35, 221.40, 221.45, 221.50, 221.55. The U.S. Supreme Court has noted that "virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i)." *Padilla*, 130 S. Ct. at 1478 n.1.

As a result, for a noncitizen in New York conviction for a controlled substance offense or felony deemed a CIMT (and certain misdemeanors if the sentence is greater than six months) will make deportation practically inevitable if he or she has been an LPR for less than five years and committed the offense within a seven-year period of continuous residence. This is because the conviction will render him or her *both* deportable and ineligible for cancellation of removal under 8 U.S.C. § 1229b—which is the "limited remnant[]" of discretion left after AEDPA and IIRIRA through which the U.S. Attorney General may consider the equities of an individual's case. *Padilla*, 130 S. Ct. at 1480.[17] As a result, such a noncitizen is left with seeking relief through the Convention Against Torture or by withholding of removal, for which the eligibility standards are strict and the grant rates are exceeding low (as shown above), or by applying for asylum under 8 U.S.C. § 1158(a). But eligibility for asylum is limited too: it is generally unavailable if not filed for within one year of a noncitizen's arrival in the United

[17] Compared to the 23,639 noncitizens in deportation proceedings in immigration court in 2012 based on criminal charges other than aggravated felonies, *U.S. Deportation Proceedings in Immigration Courts*, TRAC (2012), http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php, the Attorney General granted cancellation of removal only to 3,919 LPRs throughout the nation. *FY 2012 Statistical Year Book*, *supra* 17, at R3.

States, 8 U.S.C. § 1158(a)(2)(B), and requires demonstrated proof of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); *see also Carcamo-Flores v. INS*, 805 F.2d 60, 62-63 (2d Cir. 1986). Tellingly, the 2012 asylum denial rates for the New York immigration judges determining asylum applications for individuals in detention are reported to be between 70 percent and 92 percent. *Judge-by-Judge Asylum Decisions in Immigration Courts FY2007-2012*, TRAC, http://trac.syr.edu/immigration/reports/306/include/denialrates.html (last visited July 25, 2013). Thus, there appears to be very little chance of asylum for noncitizens in New York State prisons, including those detained by the Department of Homeland Security, who are facing deportation because of a conviction for a CIMT or controlled substance offense.

Therefore, as a result of AEDPA and IIRIRA, for the significant number of noncitizens who plead guilty today to any of the wide range of New York felony (and misdemeanor) offenses that are deemed an aggravated felony, CIMT, or controlled substance offense, the "severe 'penalty'" of deportation has become a definite and largely automatic consequence of conviction and, thus,

should be considered a direct and not a collateral consequence. *Padilla*, 130 S. Ct. at 1481 (quoting *Fong Yue Ting v. U.S.*, 149 U.S. 698, 740 (1893)). This conclusion is amply supported by the Court's due process jurisprudence, notwithstanding *Ford*.

For example, considering the expedited deportation proceedings and early releases to ICE authorized by the IRP and ECPDO, and the effects of AEDPA and IIRIRA, it is fair to conclude that deportation has become an equally "direct" and even more "significant" consequence of conviction than postrelease supervision, which the Court held to be a direct consequence in *Catu*, 4 N.Y.3d at 244-45. Like postrelease supervision, deportation has become a "distinct but integral part" of the sentence imposed on the vast majority of noncitizen defendants pleading guilty to felony offenses in New York today. 4 N.Y.3d at 244 (citation omitted); *see also Padilla*, 130 S. Ct. at 1481 (deportation is "intimately related to the criminal process" and "[o]ur law has enmeshed criminal convictions and the penalty of deportation"). Indeed, for the 74 percent of foreign-born individuals in New York State prisons released directly to and detained by ICE, postrelease detention is more significant than postrelease supervision because it entails automatic confinement. In these respects, detention and deportation should

be characterized as "one of the core components of a [noncitizen] defendant's sentence" like "a term of probation or imprisonment, a term of postrelease supervision, [or] a fine," *Harnett*, 16 N.Y.3d at 205: detention and deportation occurs largely automatically as a result of a defendant's plea and sentence; deportation imposes banishment from the United States that can be as bad or worse than prison, often after an intervening term of postrelease detention; and it is qualitatively more punishing and "significant" than being supervised by a parole officer and temporarily constrained by a curfew, travel restrictions, or substance abuse testing and treatment. *Catu*, 4 N.Y.3d at 245.

In these and other respects, the consequences of deportation are vastly different than the consequences of violating postrelease supervision found to be collateral in *People v. Monk*, 21 N.Y.3d 27, 33 (2013). As shown above, for a broad class of noncitizens pleading guilty in New York, deportation is not "speculative at the time of the guilty plea", *id.* at 33, or dependent "upon how a defendant acts . . . in the future," *id.* at 32, but practically inevitable based on the offense pled to during allocution and, in some cases, on the court-imposed sentence. Thus, to a noncitizen facing deportation as a result of a state conviction, his or her "potential [deportation] under the agreed-upon plea is central to the

sentence." *Monk*, 21 N.Y.3d at 33 (Rivera, J., dissenting); *see also Padilla*, 130 S. Ct. at 1481 ("[W]e are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult" to "divorce the penalty [of deportation] from the conviction."); *St. Cyr*, 533 U.S. at 322-23 ("'Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" (citation omitted)); *Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, U.S. Dep't of Justice, 7 (Sept. 2010), http://www.justice.gov/civil/docs_forms/REVISED%20Padilla%20v.%20Kentucky%20Reference%20Guide_11-8-10.pdf. ("[A] removal action against an alien may be the most immediate and significant consequence of a guilty plea.").

The consequence of deportation stands in stark contrast also to the consequences that flow from designation as a sex offender under the Sex Offender Management and Treatment Act ("SOMTA"), which the court held were collateral consequences in *Harnett*, 16 N.Y.3d at 206. There, the Court's holding relied on the conclusions that SOMTA is a remedial and not a punitive statute, 16 N.Y.3d at 206; SOMTA becomes significant only at the end of an offender's prison term, *id.* at 204; an offender can be civilly committed under SOMTA only after several

layers of state review culminating in a jury trial, *id.* at 204; and the "large majority of people who are 'detained sex offenders' . . . will suffer no consequences from that designation", *id.* at 206, because "at most six percent of those detained sex offenders whose cases came up . . . were likely to be subjected to civil commitment." *Id.* at 205. Deportation could not be more different: it is penalizing and not remedial in nature, *Padilla*, 130 S. Ct. at 1481 (deportation is a "particularly severe penalty" that is "intimately related to the criminal process"); the IRP shows that it becomes significant within the first few days of a noncitizen's prison term; a noncitizen can be deported and permanently exiled from his or her home and family with minimal procedural protections that fall far short of an adversarial jury trial; and the large majority of noncitizens in state prison are actually deported as a result of their plea-based convictions. *See Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile. . . . [and] [t]he stakes [for a noncitizen] are indeed high and momentous." (citation omitted)).

For the reasons stated above, deportation should no longer be labeled a collateral consequence but rather a direct consequence (or at least a unique consequence akin thereto) of a noncitizen defendant's criminal conviction.

III. Due Process Requires Automatic Vacatur of A Plea-Based Conviction Where A Trial Court Fails To Notify A Noncitizen Defendant About The Possibility of Deportation

For the reasons discussed above in Point II, deportation should be deemed a direct consequence and a noncitizen defendant's plea-based conviction for a felony offense automatically vacated where a trial court fails to fulfill its constitutional duty and adequately notify a noncitizen on the record about the possibility of deportation. In *Catu*, 4 N.Y.3d at 245, and *Van Deusen*, 7 N.Y.3d at 745-46, the Court required automatic vacatur for a court's failure to adequately notify a defendant about postrelease supervision because it was a direct consequence of conviction, and the rationale for those decisions applies with equal force in this context. Automatic vacatur is particularly appropriate where a trial court's statements during a plea colloquy serve to misinform a noncitizen defendant about the risk of deportation. Nevertheless, trial courts can easily fulfill their constitutional duty by giving the statutory notification of N.Y. Crim. Proc. Law § 220.50(7) to all noncitizens pleading guilty to a felony offense.

As in *Catu* and *Van Deusen*, vacatur is warranted in the above-mentioned scenario without a court engaging in harmless error analysis or having to determine through collateral proceedings whether a defendant received

ineffective assistance of counsel. *See Van Deusen*, 7 N.Y.3d at 745-46 (reversal of conviction was required "even though the defendant did not establish that he would have declined to plead guilty if he had known about the postrelease supervision"); *Catu*, 4 N.Y.3d at 245 (rejecting applicability of harmless error rule and declining to reach defendant's alternative claim of ineffective assistance of counsel).[18] As the Court concluded in *Catu*, harmless error analysis is inappropriate in this context because its rules "were designed to review trial verdicts and are difficult to apply to guilty pleas." *Id.* at 245 (quoting *People v. Coles*, 62 N.Y.2d 908, 910 (1984) (citing *People v. Grant*, 45 N.Y.2d 366 (1978))). In addition, such rules were originally enacted to avoid the "needless expense" of retrying cases where the outcome would be the same, and they are an exception to "the common-law rule which required reversal if there had been any error at trial, however slight." *Grant*, 45 N.Y.2d at 378. In the context of vacating a plea for constitutional error, there is no concern with paying for a second, identical trial and, thus, no need to displace the common law rule.

[18] *Cf. People v. Crimmins*, 36 N.Y.2d 230, 238 (1975) (dictum) (noting error that "operate[s] to deny any individual defendant his fundamental right to a fair trial" requires a "reviewing court [to] reverse the conviction . . . quite without regard to any evaluation as to whether the errors contributed to the defendants' conviction").

Additionally, engaging in harmless error analysis under the Fifth Amendment raises the specter of a problematic and burdensome collateral inquiry into whether defense counsel complied with the Sixth Amendment and adequately informed a defendant of the deportation consequences of a plea. However, federal courts recognize, as should the Court in these cases, that the Fifth and Sixth Amendments afford defendants distinct rights, and compliance with the commands of one does not cure a violation of the other. *See Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (rejecting argument that a "knowing and voluntary plea supersedes errors by defense counsel"); *U.S. v. Akinsade*, 686 F.3d 248, 255 (4th Cir. 2012) ("While we have recognized the inter-relationship between the [the Fifth and Sixth] amendments in the context of guilty pleas, we have never suggested that the sufficient protection of one right automatically corrects any constitutional deficiency of the other." (citation omitted)).

In the plea context, the Fifth and Sixth Amendments play separate but related roles. Fifth Amendment due process functions to ensure that a defendant has a "full understanding" of the consequences of a guilty plea before the defendant waives his or her constitutional rights and a court accepts the plea. *Ford*, 86 N.Y. 2d at 402-03; *see also Brady v. U.S.*, 397 U.S. 742, 748 (1970)

(court has a duty to ensure defendant pleading guilty does so "with sufficient awareness of the relevant circumstances and likely consequences"). The right to the effective assistance of counsel under the Sixth Amendment functions to ensure that during discussions between defendant and defense counsel, the defendant receives "competent" advice that is "reasonable[] under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The interaction of these two amendments helps to ensure that a plea will withstand constitutional challenge because a Fifth Amendment warning about deportation consequences should prompt a Sixth Amendment discussion between the defendant and defense counsel about whether the plea is advisable given those consequences. *See Frye*, 132 S. Ct. at 1406-07 (court may "establish[] at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered"); *Zhang v. U.S.*, 506 F.3d 162, 169 (2d Cir. 2007) (court statement regarding consequences of plea "provided [defendant] an opportunity to pursue those consequences more fully with his attorney or with an immigration specialist").[19] As these cases demonstrate, the reality is that just because the Sixth

[19] *See also, e.g., Nunez v. Conway*, 2010 WL 234826, at *14 (S.D.N.Y. Jan. 20, 2010) ("[T]he

Amendment requires defense counsel to provide competent advice does not guarantee that he or she will independently do so in every case. For example, defense counsel may not have realized the client is a noncitizen, or may not have adequately fulfilled their constitutional duty for any number of reasons.

In addition to the reasons stated above, the Court should adopt the automatic vacatur rule proposed herein because it is far preferable to a rule that burdens courts with having to conduct needless and disfavored "spin-off . . . collateral proceedings that seek to probe murky memories" to determine whether a trial court's error was harmless. *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). IDP's proposed rule is comparatively simple to apply because trial courts are already obligated to provide the statutory notification and, if they fail to do so, deciding vacatur would require a review of the trial record only.

Finally, an automatic vacatur rule offers the salutary benefit of incentivizing trial courts to be especially vigilant about fulfilling their duties under the Fifth Amendment. Such vigilance is critical at a time when society's and the

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court's statement [regarding immigration consequences] invited Nunez to consult his lawyer . . . if he was concerned about the matter."); American Bar Association Standards for Criminal Justice, Pleas of Guilty, 14-1.4(c) (3d ed. 1999) ("Before accepting a plea of guilty . . . . [t]he court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea.").

U.S. Supreme Court's ideas of justice for immigrants are changing and becoming more attuned to ensuring fundamental fairness for the Nation's immigrants and their families.

CONCLUSION

For the reasons stated herein, in Defendants-Appellants' briefs, and in the records on these appeals, the Court should hold that constitutional due process requires automatic vacatur of a noncitizen defendant's plea-based conviction for a felony offense where a trial court fails, prior to accepting the defendant's plea of guilty, to advise the defendant on the record that if the defendant is not a citizen of the United States, the court's acceptance of the plea may result in the defendant's deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

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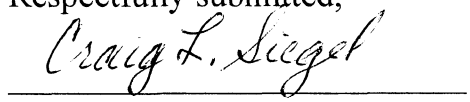
Respectfully submitted,



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