

Court of Appeals
of the
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

- against -

ROMAN BARET,

Defendant-Respondent.

**BRIEF FOR AMICI CURIAE NEW YORK STATE DEFENDERS ASSOCIATION, INC.,
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, YATES COUNTY
ASSIGNED COUNSEL PROGRAM, LEGAL AID SOCIETY OF THE CITY OF NEW
YORK, MONROE COUNTY PUBLIC DEFENDER'S OFFICE, QUEENS COUNTY BAR
ASSOCIATION, LEGAL AID BUREAU OF BUFFALO, INC., BROOKLYN DEFENDER
SERVICES, HISCOCK LEGAL AID SOCIETY, NEIGHBORHOOD DEFENDER
SERVICE OF HARLEM, ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT
PRISONERS SOCIETY, INC., BRONX DEFENDERS, LEGAL AID SOCIETY OF
NASSAU COUNTY, QUEENS LAW ASSOCIATES, OFFICE OF THE APPELLATE
DEFENDER, APPELLATE ADVOCATES, CENTER FOR APPELLATE LITIGATION,
AND IMMIGRANT DEFENSE PROJECT**

Jonathan E. Gradess
New York State Defenders
Association, Inc.
194 Washington Avenue,
Suite 500
Albany, New York 12210
Telephone: (518) 465-3524
Facsimile: (518) 465-3249

Marc Fernich
New York State Association
of Criminal Defense Lawyers
810 7th Avenue, Suite 620
New York, New York 10019
Telephone: (212) 446-2346
Facsimile: (212) 459-2299

Brendan White
New York State Association
of Criminal Defense Lawyers
148 East 78th Street
New York, New York 10075
Telephone: (212) 861-9850
Facsimile: (212) 861-9870

Norman L. Reimer
National Association of
Criminal Defense Lawyers
1660 L Street, NW, 12th Floor
Washington, DC 20036
Telephone: (202) 872-8600
Facsimile: (202) 872-8690

Joel B. Rudin
National Association of
Criminal Defense Lawyers
200 W 57th Street, Suite 900
New York, New York 10019
Telephone: (212) 757-7600
Facsimile: (212) 980-2968

Manuel D. Vargas
Dawn M. Seibert
Immigrant Defense Project
28 West 39th Street, Suite 501
New York, New York 10018
Telephone: (212) 725-6485
Facsimile: (800) 391-5713

CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. Part 500.1(f), proposed *amici curiae* each state as follows:

New York State Defenders Association, Inc. states that it has no parents, subsidiaries, or affiliates.

New York State Association of Criminal Defense Lawyers states that it has no parents, subsidiaries, or affiliates.

National Association of Criminal Defense Lawyers states that it has no parents, subsidiaries, or affiliates.

Yates County Assigned Counsel Program states that it has no parents, subsidiaries, or affiliates.

Legal Aid Society of the City of New York states that it has no parents, subsidiaries, or affiliates.

Monroe County Public Defender's Office states that it has no parents, subsidiaries, or affiliates.

Queens County Bar Association states that it is a nonprofit organization whose affiliate is the Queens Volunteer Lawyers Program.

Legal Aid Bureau of Buffalo, Inc. states that it has no parents, subsidiaries, or affiliates.

Brooklyn Defender Services states that it has no parents, subsidiaries, or affiliates.

Hiscock Legal Aid Society states that it has no parents, subsidiaries, or affiliates.

Neighborhood Defender Service of Harlem states that it has no parents, subsidiaries, or affiliates.

Erie County Bar Association Aid to Indigent Prisoners Society, Inc. states that it is a nonprofit organization whose parent is the Bar Association of Erie County.

Bronx Defenders states that it has no parents, subsidiaries, or affiliates.

Legal Aid Society of Nassau County states that it has no parents, subsidiaries, or affiliates.

Queens Law Associates states that it has no parents, subsidiaries, or affiliates.

Office of the Appellate Defender states that it has no parents, subsidiaries, or affiliates.

Appellate Advocates states that it has no parents, subsidiaries, or affiliates.

Center for Appellate Litigation states that it has no parents, subsidiaries, or affiliates.

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). IDP has no other parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. The advice regarding deportation is critical to an immigrant defendant.....	6
II. The professional standards supporting this duty in New York pre-date the 1996 immigration laws.....	8
A. Criminal defense attorneys in New York have a long tradition of providing advice regarding immigration consequences of criminal convictions, and seeking dispositions that avoided these consequences.....	10
B. Competent defense attorneys in New York have generally adhered to these standards and effectively represented their immigrant clients by providing immigration advice and, where possible, avoiding adverse consequences.	22
III. The rule articulated in <i>Padilla v. Kentucky</i> applies under New York law to remedy <i>Padilla</i> violations pertaining to uninformed pleas entered in New York at least from the passage of AEDPA and IIRIRA in 1996 onward.....	27
A. <i>Padilla</i> offers a remedy under a reasonable definition of a “new” rule.	28
B. Even if the Court deems <i>Padilla</i> “new,” the <i>Pepper</i> factors counsel in favor of retroactive application of <i>Padilla</i> for guilty pleas entered from at least 1996 and thereafter.	29
i. The “purpose of the new rule” supports the provision of a remedy.	30

ii.	The rule announced in <i>People v. Ford</i> was not relied on by the criminal defense bar, which as a matter of professional responsibility responded to dramatic changes in immigration law and widely advised clients about the deportation consequences of criminal convictions.	32
iii.	Retroactive application of Padilla will have a limited effect on the administration of justice.....	33
	CONCLUSION	35
	APPENDIX A: Separate Statements Of Interest for <i>Amici Curiae</i>	A-1
	APPENDIX B: Sample Trainings & Resources On The Immigration Consequences Of Criminal Convictions.....	B-1
	APPENDIX C: Immigrant Representation Practice Tips Published in New York State Defenders Association’s Backup Center Report	C-1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Chaidez v. United States</i> , 133 S. Ct. 1103 (2013).....	<i>passim</i>
<i>Colwell v. State</i> , 111 Nev. 807 (2003)	28
<i>Commonwealth v. Sylvain</i> , 466 Mass. 422 (2013)	29
<i>Danforth v. Minnesota</i> , 552 U.S. 264 (2008).....	5, 27
<i>Danforth v. State</i> , 761 N.W.2d 493 (Minn. 2009)	28
<i>Hernandez v. State</i> , 124 So.3d 757 (Fla. 2012)	30 n.49
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	34
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	9
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965).....	32
<i>Michel v. INS</i> , 206 F.3d 253 (2d Cir. 2000)	25
<i>In re Nunez</i> , No. A045-237-711, 2009 WL 2981799 (BIA Aug. 28, 2009)	25
<i>Padilla v. Kentucky</i> , 559 U.S. 356 (2010).....	<i>passim</i>

<i>People v. Baret</i> , 99 A.D.3d 408 (1st Dep’t 2012), <i>lv. granted</i> , 21 N.Y.3d 1002 (2013)	29
<i>People v. Bennett</i> , 28 Misc. 3d 575, 903 N.Y.S.2d 696 (Crim. Ct. Bronx Co. 2010).....	8
<i>People v. Burgos</i> , 37 Misc. 3d 394, 950 N.Y.S.2d 428 (Sup. Ct. N.Y. Co. 2012).....	8
<i>People v. Eastman</i> , 85 N.Y.2d 265 (1995).....	5, 6, 28 n.48
<i>People v. Favor</i> , 82 N.Y.2d 254 (1993).....	5, 27, 28, 29
<i>People v Jackson</i> , 78 N.Y.2d 638 (1991).....	34
<i>People v. Maxson</i> , 482 Mich. 385 (2008)	30 n.49
<i>People v. Mitchell</i> , 80 N.Y.2d 519 (1992).....	29, 32
<i>People v. Pepper</i> , 53 N.Y.2d 213 (1981).....	<i>passim</i>
<i>People v. Peque</i> , 22 N.Y.3d 168 (2013).....	<i>passim</i>
<i>People v. Picca</i> , 97 A.D.3d 170 (2d Dep’t 2012).....	4
<i>People v. RajPaul</i> , 100 A.D.3d 1183 (3d Dep’t 2012).....	29
<i>In re Ramos</i> , 23 I. & N. Dec. 336 (BIA 2002).....	24
<i>Rhoades v. State</i> , 149 Idaho 130 (2010).....	27

<i>In re Solon</i> , 24 I. & N. Dec. 239 (BIA 2007)	7 n.6
<i>State v. Garcia</i> , 834 N.W.2d 821 (S.D. 2013)	30 n.49
<i>State v. Kennedy</i> , 229 W. Va. 756 (2012)	30 n.49
<i>State v. Knight</i> , 145 N.J. 233 (1996)	30 n.49
<i>State v. Smart</i> , 202 P.3d 1130 (Alaska 2009)	30 n.49
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	34
<i>State ex rel Taylor v. Steele</i> , 341 S.W.3d 634 (Mo. 2011)	30 n.49
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	5, 27
<i>United States v. Graham</i> , 169 F.3d 787 (3d Cir. 1999)	7 n.5
<i>Williams v. INS</i> , 54 F. App'x 55 (3d Cir. 2002)	7 n.4

Statutes & Rules

8 U.S.C. § 1101	7, 24, 25
8 U.S.C. § 1182	7, 24, 26
8 U.S.C. § 1226.....	7
8 U.S.C. § 1227	<i>passim</i>
8 U.S.C. § 1229b.....	24, 25
8 U.S.C. § 1251	2

AEDPA, Pub. L. No. 104-132, 110 Stat. 1214.....	<i>passim</i>
IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546.....	<i>passim</i>
N.Y. Crim. Proc. Law	
§ 170.40.....	26
§ 440.10.....	27, 29 n.47, 35
§ 440.30(4).....	35
N.Y. Penal Law	
§ 120.00.....	7
§ 120.25.....	23
§ 145.00.....	23
§ 155.25.....	7, 23, 25
§ 160.05.....	25
§ 160.10.....	24
§ 165.40.....	7, 23, 25
§ 170.20.....	23
§ 170.30.....	23
§ 175.35.....	23
§ 220.06.....	24
§ 220.30.....	13 n.14
§ 220.39.....	24
§ 221.15.....	7
§ 240.20.....	25
§ 240.30.....	23

N.Y. Veh. & Traf. Law	
§ 511.....	23, 26
§ 1192(4).....	26
Other Authorities	
<i>Alien Defendants Face Greater Deportation Risks</i> , 11 BNA Criminal Practice Manual #4, Feb. 12, 1997	15
Association of Bar of the City of New York, <i>The Immigration Consequences of Deferred Adjudication Programs in New York City</i> (June 2007).....	20
Client Advisory Board of the New York State Defenders Association, <i>Client-Centered Representation Standards</i> (2005)	21 n.32
Edward Bendik & Patricia Cardoso, <i>Immigration Law Considerations for the Criminal Defense Attorney</i> , 61 N.Y. St. B.J. 33 (1989)	8, 9
<i>Illegal Aliens Arrested in Yates County</i> , Finger Lake Times, March 13, 2001.....	23 n.33
<i>Illegal Aliens Plead Guilty</i> , Finger Lake Times, March 15, 2001.....	23 n.33
Gary Muldoon, <i>Collateral Effects of a Criminal Conviction</i> , 70 N.Y. St. B.J. 26 (July/August 1998).....	9, 20
Indigent Defense Organization Oversight Committee, <i>General Requirements for All Organized Providers of Defense Services to Indigent Defendants</i> (1996)	11 n.9
John F. Simanski & Lesley M. Sapp, <i>Annual Report Immigration Enforcement Actions: 2012</i> (Dec. 2013)	8
Lawrence N. Gray & New York State Bar Association, <i>New York Criminal Practice</i> (2d ed. 1998).....	20
Manual Vargas, <i>Deportable for Jumping a Turnstile: Why You and Your Non-Citizen Client Must Consider Immigration-Related Consequences of Criminal Convictions and/or Conduct</i> , New York State Defenders Association Public Defense Backup Center Report, Vol. XII, No. 9, 10-12.....	15, 16

Manuel D. Vargas, <i>Representing Immigrant Defendants in New York (1997-2011)</i>	3
Manuel Vargas, <i>Representing Non-Citizen Criminal Defendants in New York State, Including a Quick Reference Chart for New York Offenses</i> (NYSDA 1998)	16
Marcy L. Kahn & Christopher H. Benbow, <i>Revisiting Constitutional Retroactivity in New York after Danforth Should Padilla and Other Supreme Court Guilty Pleas Counsel Cases Prompt a Change from Eastern Teague or Adherence to Chaidez?</i> , 99 Cornell L. Rev. Online 87 (2013)	33, 34
Muldoon & Feuerstein, <i>Handling a Criminal Case in New York</i> § 21:232 (Thomson/West 2002)	20
Memorandum from Benita Jain of <i>amicus</i> IDP, dated Feb. 20, 2014	18 n.26
Memorandum from Jared LaPorta of <i>amicus</i> NYSDA, dated Feb. 17, 2014.....	<i>passim</i>
<i>New York State Bar Association Standards for Providing Mandated Representation</i> (2005).....	21 n.32
New York State Defenders Association Public Defense Backup Center Report, Vol. XIII, No. 7, 1 (Aug. 1998)	17
New York State Defenders Association, <i>Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State</i> (2004)	21 n.32
New York State Defenders Association, <i>Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State</i> , Std. VII(A)(7).....	21
Phyllis Kaplan, <i>New and Severe Immigration Consequences of Criminal Convictions</i> , New York State Defenders Association Public Defense Backup Center Report, Vol. XI, No. 6 (July 1996).....	10, 11

SUMMARY OF ARGUMENT

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the U.S. Supreme Court recognized that the professional norms obligating a criminal defense attorney to advise an immigrant client that a guilty plea carries the harsh penalty of deportation had existed “[f]or at least the past 15 years.” *Id.* at 372 (referencing professional norms going back to the early 1990s). This observation followed: “We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.” *Id.* The vast compilation of training programs, publications, and other resources described in this brief demonstrate that New York criminal defense attorneys generally responded promptly and diligently to the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996, and thereafter properly advised clients about the harsh new consequences of criminal conviction.¹ However, some did not. For an unfortunate immigrant who was represented by a defense attorney who neglected to take advantage of these widely available resources, a post-conviction remedy under *Padilla* may now represent the immigrant’s only chance of avoiding the “enormous penalty” of deportation. *People v. Peque*, 22 N.Y.3d 168 (2013). Given that an immigrant’s fate in immigration court is often sealed

¹ AEDPA, Pub. L. No. 104-132, 110 Stat. 1214; IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546.

once she enters a guilty plea, it would be unjust to deny such an immigrant an opportunity to litigate a *Padilla* claim for the reason that her criminal case was no longer pending on the date that the Supreme Court issued its decision in *Padilla*, which recognized the existence of a constitutional duty going back “at least” to the passage of AEDPA and IIRIRA.

Deportation has been closely linked to criminal convictions since well before the passage of AEDPA and IIRIRA. *See, e.g.*, former INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1994) (listing criminal offenses triggering deportation under pre-1996 law). However, AEDPA and IIRIRA greatly increased the categories of criminal judgments that triggered presumptively mandatory detention and deportation, extending them to many non-violent and misdemeanor offenses, and significantly curtailed the availability of discretionary relief from removal.²

In recognition of the devastating impact of these new laws on their immigrant clients, New York criminal defense attorneys immediately began to educate themselves in order to effectively represent these clients, advising them about the risk of deportation, and endeavoring to negotiate dispositions that avoided the harsh penalty of deportation. Soon after passage of AEDPA and IIRIRA, indigent defense and other legal organizations across New York State organized training programs to prepare criminal defense attorneys for this new and

² *See* AEDPA and IIRIRA, *supra* note 1.

dramatically altered landscape in criminal defense representation. *See infra* sec. II.A & Appendix B (non-exhaustive list of relevant criminal defense training sessions between 1996 and 2010). These trainings were supplemented by authoritative and widely distributed publications intended to help criminal defense attorneys fulfill their professional obligations to their immigrant clients. *See, e.g.,* Manuel D. Vargas, *Representing Immigrant Defendants in New York* (1997-2011); Appendix C (listing relevant New York State Defenders Association publications). These trainings and published resources taught defense attorneys how to advise immigrant clients accurately, and to negotiate dispositions whenever possible that allowed them to remain in the United States with their families. In many cases, attorneys secured dispositions that provided appropriate criminal justice sanctions but eliminated or mitigated the risk of deportation. The vast majority of these dispositions involved misdemeanor or low-level, non-violent felonies, where deportation was mutually recognized by the defense and prosecution as an unjust and disproportionate penalty.

Despite the widely available training programs and other resources, some attorneys failed to keep up with the changed legal landscape. They performed deficiently and failed to provide critical information to their clients about the harsh new reality of deportation following conviction. The people now harmed by this incompetence include long-time Lawful Permanent Residents (LPRs) who face

presumptively mandatory deportation based on old convictions for minor, non-violent offenses, and who entered guilty pleas with no awareness that the convictions assured eventual deportation. Many LPRs are the mothers, fathers, husbands, and wives of U.S. citizens, and for many of them the United States – and New York in particular – is the only home they have ever known. These immigrants often have strong claims to relief under *Padilla* because as longtime U.S. residents with extensive family ties, it is evident that they would have rationally rejected the plea if properly advised about the risk of deportation and therefore that they meet the standard for demonstrating prejudice from their counsel’s deficient performance. *See People v. Picca*, 97 A.D.3d 170, 183-84 (2d Dep’t 2012) (prejudice factors include family ties within the United States, length of residence in the U.S., and the potential sentence on the charged offense). For this group the stakes could not be higher - their ability to remain in the United States with their families hinges on the availability of a remedy under New York law for a *Padilla*-based constitutional deprivation. If a *Padilla* remedy is not deemed available retroactively, those who entered pleas prior to March 31, 2010 (the date of the *Padilla* decision) are at great risk of having their families torn apart and their lives destroyed by deportation, even though their attorneys failed to live up to professional norms and expectations at the time of their guilty pleas. To prevent such injustice, it is imperative that the Court allow these immigrants their

day in court. *Padilla* retroactivity under state law will simply allow lower courts to consider the merits of the claims, and to recognize that some convictions were tainted by ineffective assistance of counsel.

Under federal law, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* is a “new” rule under federal law that does not apply to federal convictions that were final on March 31, 2010. *See Chaidez v. United States*, 133 S. Ct. 1103 (2013). But this Court is not bound by federal law as applied in *Chaidez*. *See Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (federal law “does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*”). The *Teague* rule was specifically designed for federal habeas corpus review of state court convictions. Its strict limitations accommodate federal-state comity interests, concerns that do not arise in the context of a state court’s review of its own judgments. Accordingly, this Court should apply a retroactivity analysis better suited to advance New York’s unique interests in the availability of a remedy for a constitutional violation on state post-conviction review.

Padilla fits New York’s definition of an “old” rule. *See People v. Favor*, 82 N.Y.2d 254, 263 (1993) (rule is old when it “merely applies previously established principles in a new factual setting”); *accord People v. Eastman*, 85 N.Y.2d 265,

275 (1995). However, should the Court deem *Padilla* a “new” rule, it should apply the test used to determine a remedy for violations of new state rules. *See People v. Pepper*, 53 N.Y.2d 213 (1981). The *Pepper* analysis requires balancing three factors: 1) the purpose to be served by the new rule; 2) the extent of the reliance by law enforcement authorities on the old rule; and 3) the effect on the administration of justice of a retroactive application of the new rule. *Id.* at 220. The analysis under *Pepper* leads to the conclusion that an immigrant with an old conviction entered in ignorance of the deportation consequence should be allowed a chance to prove her *Padilla* claim. It would be deeply unjust to allow an immigrant to be deported, and her life destroyed – torn from her husband and children, banished from her home to a country she may have never known – on the basis of an ill-informed, unconstitutional plea. Fundamental fairness demands that the courthouse doors remain open, at least, to *Padilla* claims arising from pleas entered after AEDPA and IIRIRA, not merely for those cases that were pending when *Padilla* was decided or came after *Padilla*.

ARGUMENT

I. The advice regarding deportation is critical to an immigrant defendant.

This Court has noted the “severe qualities” of deportation, describing them as “punitive qualities not entirely unlike the core components of a criminal sentence.” *Peque*, 22 N.Y.3d at 190-91. The components of the deportation

process can include: 1) detention for months or years during removal proceedings, and sometimes for an extended period after the removal order; 2) conditions of detention that are generally worse than those in penal institutions; 3) rare, if any, in-person contact with family members remaining in the U.S.; 4) loss of employment, which deprives the immigrant and his family of critical financial support; and 5) the heavy burden of beginning life anew in a country that in some cases is more foreign to the immigrant than the U.S. *See id.* at 189. Under immigration law, even low-level criminal offenses such as misdemeanor marijuana possession (N.Y. Penal Law § 221.15),³ possession of stolen property (N.Y. Penal Law § 165.40),⁴ petit larceny (N.Y. Penal Law § 155.25),⁵ and simple assault (N.Y. Penal Law § 120.00)⁶ may trigger deportation; with a one year sentence, these misdemeanors (with the exception of marijuana possession) may even be deemed aggravated felonies requiring virtually mandatory deportation and a lifetime bar to re-admission following deportation. *See* 8 U.S.C. §§ 1101(a)(43); 1182(a)(9)(A); 1227(a)(2)(a)(iii). In addition, broad categories of offenses require mandatory immigration detention while administrative authorities and courts determine whether an immigrant is deportable or has available relief. *See* 8 U.S.C. § 1226(c). In 2012, the Department of Homeland Security detained an all-time

³ *See* 8 U.S.C. § 1227(a)(2)(B)(i).

⁴ *See Williams v. INS*, 54 F. App'x 55 (3d Cir. 2002).

⁵ *See United States v. Graham*, 169 F.3d 787 (3d Cir. 1999).

⁶ *See In re Solon*, 24 I. & N. Dec. 239 (BIA 2007).

high of 477,523 non-citizens and removed 199,445 “criminal aliens,” another record-setting figure. *See* John F. Simanski & Lesley M. Sapp, *Annual Report Immigration Enforcement Actions: 2012*, 5, 7 (Dec. 2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf. Given these devastating consequences, the advice regarding deportation is critical to an immigrant’s decision to enter a guilty plea.

II. The professional standards supporting this duty in New York pre-date the 1996 immigration laws.

The standards governing New York criminal defense attorneys’ representation of immigrant clients supported the duty to advise regarding deportation well before the 1996 immigration laws. *See People v. Bennett*, 28 Misc. 3d 575, 581, 903 N.Y.S.2d 696, 701 (Crim. Ct. Bronx Co. 2010) (“[T]he New York State Bar Association has been publishing articles advising criminal attorneys to study and advise their clients regarding the immigration consequences of guilty pleas and criminal convictions since 1989”); *accord People v. Burgos*, 37 Misc. 3d 394, 407, 950 N.Y.S.2d 428, 441 (Sup. Ct. N.Y. Co. 2012) (“[T]reatises dating back to 1982 . . . support the concept that defense attorneys have an affirmative duty to advise criminal defendants of the immigration consequences of their pleas.”). To support its conclusion, the court in *Bennett* pointed to Edward Bendik & Patricia Cardoso, *Immigration Law Considerations for the Criminal*

Defense Attorney, 61 N.Y. St. B.J. 33 (1989), and Gary Muldoon, *Collateral Effects of a Criminal Conviction*, 70 N.Y. St. B.J. 26 (1998).

The United States Supreme Court has also recognized the long existence of such standards. In *Chaidez*, the Court pointed out that “as early as 1968, . . . the American Bar Association instructed criminal lawyers to advise their non-citizen clients about the risks of deportation.” 133 S. Ct. at 1113 n.15. The Court in *INS v. St. Cyr* found that “[e]ven if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance” prior to 1996. 533 U.S. 289, 323 n.50 (2001). As support for this assertion, the Court noted that “the American Bar Association’s Standards for Criminal Justice provide that, if a defendant will face deportation as a result of a conviction, defense counsel ‘should fully advise the defendant of these consequences.’” *Id.* at 323 n.48 (quoting 3 ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed. 1982)). And the *Padilla* Court relied upon pre-1996 standards for its conclusion that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”⁷ *Padilla*, 559 U.S. at 367 (citing National Legal Aid & Defender Assn., Performance Guidelines for Criminal Defense

⁷ In light of these norms, the *Padilla* Court held that in 2002, when the *Padilla* defendant entered his guilty plea, an attorney’s failure to advise regarding deportation constituted deficient performance.

Representation § 6.2 (1995), and ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), 197 (3d ed.1993)).

These early standards set the scene for the New York defense bar’s rapid response to AEDPA and IIRIRA. In the following section, *amici* describe the practice resources that proliferated in New York State as a result of AEDPA and IIRIRA. *Amici* also discuss several case histories where prior to *Padilla* criminal defense attorneys throughout New York State complied with the duty recognized in *Padilla* and were able to negotiate dispositions that avoided the harsh consequence of deportation for their clients.

A. Criminal defense attorneys in New York have a long tradition of providing advice regarding immigration consequences of criminal convictions, and seeking dispositions that avoided these consequences.

Soon after the enactment of AEDPA on April 24, 1996, and IIRIRA on September 30, 1996, the criminal defense bar began to spread the word about the severe ramifications of these laws on immigrant clients. The July 1996 edition of *amicus* New York State Defenders Association Public Defense Backup Center Report featured an article that focused the defense bar’s attention on the terrible impact of these new laws on immigrant clients. See Phyllis Kaplan, *New and Severe Immigration Consequences of Criminal Convictions*, New York State Defenders Association Public Defense Backup Center Report, Vol. XI, No. 6 (July

1996).⁸ The article highlighted the expanded grounds of automatic deportation for aggravated felonies, stated that relief from removal had been greatly restricted, warned that “a ‘good plea’ may have dire consequences for the immigrant defendant,” and concluded by notifying defense attorneys to “[l]ook for more Information and Training Sessions in the Fall.” NYSDA circulated nearly 1,500 copies of this edition of the Backup Center Report, including a free copy for every defender office in New York State, and posted a summary on its website. And the promise of training sessions in the near future was fulfilled. Between September 1996 and December 1996 (the month in which Roman Baret pleaded guilty), there were multiple training sessions in New York aimed specifically at educating criminal defense attorneys on the changes in defense practice necessitated by AEDPA and IIRIRA.⁹

The largest such training session of which *amici* are aware was held on November 20, 1996 at the New York County Courthouse, sponsored by The Legal Aid Society of the City of New York (LAS), NYC Assigned Counsel Plan, New York City Bar Association, and New York County Lawyers Association, among

⁸ On file with counsel for *amici*.

⁹ These training sessions may also have been prompted by First Department standards governing organizations providing mandated representation; these July 1996 standards mandated that indigent defense organizations provide, and require their attorneys to attend, training on collateral consequences such as deportation. See Indigent Defense Organization Oversight Committee, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants* (1996) (on file with counsel for *amici*).

others.¹⁰ NYSDA publicized the training program in its October 1996 Public Defense Backup Center Report.¹¹ Also, an alert was circulated to criminal defense attorneys citywide, including assigned counsel, notifying them of the changes in the immigration laws, and inviting them to this free training.¹² The alert was entitled “Changes in Law have Dire Consequences for all Immigrants in Criminal Court,” and it specifically advised that the changes in the law affected Legal Permanent Residents, that the automatic deportation grounds were expanded, and discretionary relief curtailed.¹³ Approximately 400 defense attorneys attended the training, which included the following sessions: 1) “Why is it Important (overview of immigration law)”; 2) “What Makes Your Client Deportable and Ineligible for

¹⁰ One of the presenters, Norman Reimer, now Executive Director of *amicus* National Association of Criminal Defense Lawyers, then a New York criminal defense attorney and bar leader, described the training thus:

The target was very definitely the practicing bar, and attendance far exceeded our expectations – approximately 400 attorneys participated. Indeed, we ended up moving from one of the larger courtrooms to a room known as the Central Jury Room, the largest facility in the courthouse. The room was filled to capacity, and I even have a recollection of some standing along the walls, by the door, and spilling into the hall.

E-mail communication from Norman Reimer (on file with counsel for *amici*).

¹¹ On file with counsel for *amici*.

¹² The Alert, Agenda, and Chart are on file with counsel for *amici*.

¹³ Another presenter, Manny Vargas, now Senior Counsel with *amicus* Immigrant Defense Project, formerly of the Immigration Law Unit at LAS, added this:

The November 20, 1996 program included training and handouts for the New York criminal defense community on what convictions would make immigrant clients deportable and ineligible for relief from deportation under the new laws. For example, I am certain that the training informed defense lawyers that a plea to a drug trafficking offense would put a lawful permanent resident client at risk of automatic deportation under the new laws.

Memorandum from Manuel Vargas, dated Jan. 15, 2014 (on file with counsel for *amici*).

Relief? What Makes Your Client Deportable but Relief May be Possible?"; 3) "Interviewing Your Client: Defense Strategies"; and 4) "Questions and Answers." The training materials featured a "Quick Reference Chart for Determining Immigration Consequences of the Most Commonly Charged New York Penal Law Offenses." This user-friendly 24-page chart classified New York offenses in three ways: 1) Makes your client mandatorily deportable, i.e. aggravated felony; 2) Makes your client deportable but client may be eligible for relief; and 3) Does not make your client deportable.¹⁴

In 1996, LAS represented the vast majority of immigrant defendants in New York City. LAS recognized the changes in defense attorney practice necessitated by AEDPA and IIRIRA, and took steps to prepare its attorneys.¹⁵ Thus, in December 1996 LAS offered a two-part training session entitled "Immigration Consequences of Crimes."¹⁶ This program presented basically the same information as the November 20, 1996 training described above. In addition to this training, LAS continued its current practice, started in the late 1980s, of making

¹⁴ The chart clearly identified the charge to which defendant Baret pled guilty (N.Y. Penal Law § 220.30, criminal sale of a controlled substance) as a drug trafficking aggravated felony.

¹⁵ Many LAS attorneys had already received training in immigrant representation, as LAS began offering periodic training programs on the immigration consequences of criminal convictions in 1985. See Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, *et al.* in *St. Cyr*, No. 00-767, at App. L-7.

¹⁶ See Declaration of Legal Aid Society, dated March 5, 2014 (on file with counsel for *amici*).

specialized attorneys available in-house to provide immigration advice to its criminal defense attorneys.¹⁷

The training sessions described above were followed by a series of training programs all around New York State aimed at educating the criminal defense bar on effective representation of immigrant clients in the post-1996 era. Between November 1996 and December 2000, there were at least forty trainings in New York State on the immigration consequences of criminal convictions. *See* Appendix B. These training sessions were held in such diverse locations as Rochester, Glens Falls, Poughkeepsie, Kerhonkson, Mineola, White Plains, Islip, Hempstead, and Westbury, as well as in New York City. *See id.* During the years 1997 to 2000, *amicus* NYSDA featured a CLE program on the immigration consequences of convictions at each of its annual trainings for defense attorneys. *See id.*

Furthermore, NYSDA used all the tools at its disposal to promptly and diligently alert defense attorneys statewide about the changes in criminal defense practice prompted by AEDPA and IIRIRA – in person trainings, print media, website materials, and the creation of a new resource center offering hotline support. In its April 1997 Backup Center Report, NYSDA highlighted a February 1997 article that analyzed the impact of AEDPA and IIRIRA on criminal defense

¹⁷ *See id.*

practice. *See Alien Defendants Face Greater Deportation Risks*, 11 BNA Criminal Practice Manual #4, Feb. 12, 1997, at 1.¹⁸ Also, at its July 1997 annual training, NYSDA presented a session that virtually replicated the November 1996 comprehensive criminal immigration training held in New York City.¹⁹ At this training, among other informative materials, NYSDA distributed the “Quick Reference Chart for Determining Immigration Consequences of the Most Commonly Charged New York Penal Law Offenses.”

In September 1997, NYSDA created the Criminal Defense Immigration Project,²⁰ which offered free telephone hotline consultation on individual cases, as well as regular trainings and publications, all aimed at highlighting the changes in defense practice occasioned by AEDPA and IIRIRA. The “Defense Practice Tips” section of the Oct./Nov. 1997 Backup Center Report contained a succinct primer on effective immigrant representation post-AEDPA and IIRIRA. *See Manuel Vargas, Deportable for Jumping a Turnstile: Why You and Your Non-Citizen Client Must Consider Immigration-Related Consequences of Criminal Convictions and/or Conduct*, New York State Defenders Association Public Defense Backup

¹⁸ On file with counsel for *amici*.

¹⁹ Training agenda and materials on file with counsel for *amici*.

²⁰ The Criminal Defense Immigration Project was renamed the Immigrant Defense Project (NYSDA/IDP) shortly thereafter. In 2009, IDP became a more independent organization, but continued to collaborate closely with NYSDA. At that point, the NYSDA project once again became known as the Criminal Defense Immigration Project.

Center Report, Vol. XII, No. 9, 10-12 (Oct./Nov. 1997).²¹ The article described the manner in which AEDPA and IIRIRA “dramatically increased the negative immigration consequences” of criminal convictions and conduct. *Id.* at 10. It taught defense attorneys how to spot issues with deportability, inadmissibility, and denial of citizenship in their criminal cases. *See id.* at 10-12. The article also informed defense attorneys that the Immigrant Defense Project (NYSDA/IDP) was developing a comprehensive manual to guide New York defense attorneys through effective non-citizen representation. *See id.* In 1998, NYSDA/IDP published a 241-page treatise on the interplay between criminal law and immigration law. *See Manuel Vargas, Representing Non-Citizen Criminal Defendants in New York State, Including a Quick Reference Chart for New York Offenses* (NYSDA 1998) (on file with counsel for *amici*).²² This manual included the following chapters: 1) “Reasons to Consider the Immigration Consequences of a Noncitizen Criminal Defendant Client’s Case,” 2) “Determining Your Criminal Defendant Client’s Citizenship and Immigration Status,” 3) “Possible Immigration Consequences of a Noncitizen Criminal Defendant Client’s Case,” 4) “Specific New York Dispositions: Conviction or Sentence to Term of Imprisonment for Immigration Purposes,” and 5) “Strategies for Avoiding the Potential Negative Immigration

²¹ On file with counsel for *amici*.

²² This manual has been updated regularly and is now in its fifth edition (2011); it is still distributed free of charge to every public defender office in New York State.

Consequences of a New York Criminal Case.” *See id.* at ix-xiii. Appendix A contained an updated version of the “Quick Reference Chart for Determining Immigration Consequences of the Most Commonly Charged New York Penal Law Offenses.” *See id.* at A-1. Other appendices featured relevant provisions of the Immigration and Nationality Act, as well as pertinent case law relating to aggravated felonies, crimes involving moral turpitude, and “particularly serious crimes” that might bar asylum or withholding of removal. *See id.*, Appendices C, D, & F. NYSDA shipped a free copy of this manual to every public defense office and assigned counsel program in the state and offered it to private attorneys for \$25. *See New York State Defenders Association Public Defense Backup Center Report, Vol. XIII, No. 7, 1 (Aug. 1998).*²³

Perhaps most importantly, since 1997, NYSDA/IDP’s free telephone immigration consultation hotline has provided criminal defense lawyers an opportunity to discuss the ramifications of specific plea offers with an immigration lawyer.²⁴ The NYSDA immigration hotline responded to approximately 2,454

²³ On file with counsel for *amici*.

²⁴ This is an example of a typical consultation, made in approximately 2002:

A New York criminal defense attorney called to discuss plea strategy for his long-time legal permanent resident client facing criminal charges for alleged possession of more than one pound of marijuana. Because his client had never been arrested before, the prosecution agreed to a plea to the lowest-level marijuana possession misdemeanor offense (§221.10 of the New York Penal Law -- Criminal Possession of Marijuana, 5th degree). However, under the current immigration laws, this plea might still trigger deportation. With our advice, the attorney therefore structured his client’s plea allocution to admit to possession of

calls between September 1997 and August 2000.²⁵ Approximately 50% of these calls were from criminal defense attorneys, and about 30% of those were from New York attorneys who practiced in courts outside of New York City. Furthermore, between October 1997 and December 2000, the Backup Center Report featured 36 articles aimed at educating defense attorneys on effective immigrant representation through case law updates, practice tips, and information on federal enforcement. *See* Appendix C.

Through the hotline, numerous CLE programs, and publications, NYSDA/IDP offered strong support for defense attorneys statewide between 1997 and 2009. NYSDA/IDP made resources easily available to all defense attorneys, through training presentations held on-site at indigent defense organizations, assisting defense providers to develop expertise internally or to use NYSDA/IDP's hotline as an "outsourcing" of expertise, and offering training sessions specifically geared to meet the needs of assigned counsel attorneys.²⁶ Between 2001 and 2009, NYSDA/IDP responded to an approximate average of 1,450 inquiries for legal

only 25 grams of marijuana for his client's personal use, thereby qualifying the disposition for an exception to deportability. As a result of the disposition worked out with our advice, the client should avoid deportability altogether if he never travels outside the United States, and should be eligible for cancellation of removal if placed in removal proceedings after any trip abroad.

This consultation is recorded in an internal document generated by *amicus* Immigrant Defense Project, and is on file with counsel for *amici*.

²⁵ Data relating to the NYSDA immigration hotline for 1997-2000 is recorded in an internal document generated by *amicus* NYSDA and is on file with counsel for *amici*.

²⁶ *See* Memorandum from Benita Jain of *amicus* IDP, dated Feb. 20, 2014 (on file with counsel for *amici*).

assistance each year.²⁷ During the same period, NYSDA/IDP conducted, on average, 44 legal and community educational training sessions each year.²⁸ Between 2001 and 2008, NYSDA/IDP published at least 82 articles, updates, and other materials in the Backup Center Report, aimed at keeping defense attorneys updated on the latest legal developments impacting immigrant representation. *See* Appendix C. NYSDA/IDP also updated *Representing Non-Citizen Criminal Defendants in New York State* three times. Since approximately 2002, NYSDA/IDP has created and regularly updated the following resource materials:

- Immigration Consequences of Convictions Summary Checklist
- Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses
- Aggravated Felony Practice Aids
- “Particularly Serious Crime” Bars on Asylum and Withholding of Removal²⁹

These materials were supplemented by other NYSDA/IDP publications. *See, e.g.,* *New Developments in Representing Noncitizens Post-September 11* (2001), *Citizenship Guide for Lawful Permanent Residents* (2007); *Immigrants & Pleas in Problem-Solving Courts: A Guide for Noncitizen Defendants & Their Advocates* (August 2007).³⁰ In 2006, NYSDA/IDP launched a new website

²⁷ *See* Memorandum from Jared LaPorta of *amicus* NYSDA, dated Feb. 17, 2014 (on file with counsel for *amici*).

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

(www.immigrantdefenseproject.org) containing practice tips, strategic advisories, and litigation updates.³¹

In addition to the NYSDA/IDP efforts, other New York organizations offered trainings on this topic. From 1996 to 2010, numerous diverse organizations in New York State sponsored at least 135 trainings attended by defense attorneys on the immigration consequences of criminal convictions. *See* Appendix B. Various publications also educated defense attorneys on immigrant representation between 1996 and 2010. *See, e.g.,* Gary Muldoon, *Collateral Effects of a Criminal Conviction*, 70 N.Y. St. B.J. 26 (July/August, 1998); Lawrence N. Gray & New York State Bar Association, *New York Criminal Practice* (2d ed. 1998); Muldoon & Feuerstein, *Handling a Criminal Case in New York* § 21:232 (Thomson/West 2002); Association of the Bar of the City of New York, *The Immigration Consequences of Deferred Adjudication Programs in New York City* (June 2007), <http://www.nycbar.org/pdf/report/Immigration.pdf>.

Responding to the changes in criminal defense practice wrought by AEDPA and IIRIRA, standards governing representation of indigent clients promulgated by the New York State Bar Association (NYSBA) and NYSDA included a requirement that counsel advise immigrant clients regarding immigration

³¹ *See id.*

consequences, and litigate with an eye towards avoiding these consequences.³²

The relevant NYSBA standard states that:

Effective . . . representation at the trial court stage [of a criminal case] means, at a minimum: (a) Obtaining all available information concerning the client’s background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences including but not limited to deportation . . . ; [and] (e) Providing the client with full information concerning such matters as . . . immigration . . . consequences under all possible eventualities.

NYSBA Standards § I-7. The NYSBA standards are not aspirational; they are intended to “establish the minimum requirements for a mandated representation system.” *NYSBA Standards* at 2. Similarly, the NYSDA standards require counsel to “be fully aware of, and make sure the client is fully aware of . . . all direct and potential collateral consequences of a conviction by plea.” New York State Defenders Association, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State*, Std. VII(A)(7), 12-13. Specifically, NYSDA standards require that every defense attorney “assesses immigration and collateral consequences of a client’s criminal conviction [and]

³²See *New York State Bar Association Standards for Providing Mandated Representation* (2005), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26702> [hereinafter *NYSBA Standards*]; New York State Defenders Association, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), http://www.nysda.org/docs/PDFs/Pre2010/04_NYSDAStandards_ProvidingConstitutionallyStatutorilyMandatedReprsntatn.pdf; Client Advisory Board of the New York State Defenders Association, *Client-Centered Representation Standards* (2005), http://www.nysda.org/docs/PDFs/Pre2010/05_ClientCenteredStandards.pdf.

acts to prevent such consequences.” Client Advisory Board of the New York State Defenders Association, *Client-Centered Representation Standards*, Std. 17. All of this occurred well before the Supreme Court’s 2010 decision in *Padilla*.

The result of the change in criminal defense practice norms necessitated by AEDPA and IIRIRA was that attorneys who met prevailing norms of practice learned to advise their clients regarding the immigration consequences of criminal convictions. Furthermore, in many cases, competent attorneys achieved dispositions that avoided the life-upending consequence of deportation, with its concomitant permanent separation from loved ones, loss of employment prospects, and, for some, banishment from the only home they had ever known. *See Peque*, 22 N.Y.3d at 189.

B. Competent defense attorneys in New York have generally adhered to these standards and effectively represented their immigrant clients by providing immigration advice and, where possible, avoiding adverse consequences.

Diligent attorneys in New York have generally followed the norms described in the previous section since at least 1996, and accordingly advised their clients of immigration consequences of a guilty plea. The following case examples illustrate that, prior to *Padilla*, defense attorneys across New York State also achieved dispositions that avoided immigration consequences:

- **Avoidance of inadmissibility ground - Yates County, 2001:** An immigrant client was charged for using false documents to obtain a Non-Driver’s License Identification card at the Department of Motor

Vehicles.³³ He had come to the United States on a student visa (and had recently missed a deadline to renew it). The arraignment charges were felonies, N.Y. Penal Law § 170.30 (first degree criminal possession of a forged instrument) and N.Y. Penal Law § 175.35 (offering a false instrument for filing in the first degree). A plea to either charge would have likely presented a bar to getting a green card or another visa. The defense attorney negotiated a plea to a misdemeanor, N.Y. Penal Law § 170.20 (third degree criminal possession of a forged instrument) with a sentence of time served (about three days) and a \$1,000 fine, which did not bar the client from legalizing his status.³⁴

- **Avoidance of loss of refugee status and inadmissibility ground - Monroe County, pre-2009:** A refugee client was charged with three misdemeanor counts – criminal possession of stolen property (N.Y. Penal Law § 165.40) and two counts of aggravated harassment (N.Y. Penal Law § 240.30) – that arguably involved moral turpitude.³⁵ He also faced a charge for unauthorized operation of a motor vehicle (N.Y. Veh. & Traf. Law § 511). The defense attorney negotiated a plea to unauthorized operation of a motor vehicle, which allowed the refugee to remain safely in the U.S., and also preserved his eligibility for a green card.
- **Avoidance of deportation ground – Bronx County, 2006:** A Lawful Permanent Resident in his teens was charged with reckless endangerment (N.Y. Penal Law § 120.25) and multiple misdemeanors including petit larceny (N.Y. Penal Law § 155.25) and criminal mischief (N.Y. Penal Law § 145.00).³⁶ The District Attorney initially offered to resolve the felony charge for a plea to reckless

³³ See *Illegal Aliens Arrested in Yates County*, Finger Lake Times, March 13, 2001 (on file with counsel for *amici*); *Illegal Aliens Plead Guilty*, Finger Lake Times, March 15, 2001 (same).

³⁴ See Memorandum dated 1/14/14 from defense attorney Dianne S. Lovejoy, Administrator of *amicus* Yates County Assigned Counsel Program (on file with counsel for *amici*) (“This information was given to all of the other assigned attorneys by me, so that they could work out similar results for their Clients. . . . The attorneys in the Finger Lakes region have always been aware of immigration issues for the large migrant population working in agriculture and related factory jobs here.”).

³⁵ Drew DuBrin, Special Assistant Public Defender in charge of the appeals section of *amicus* Monroe County Public Defender’s office, has provided a signed letter (on file with counsel for *amici*) attesting to his belief that the account of the case contained in this brief is accurate.

³⁶ The client’s counsel at Bronx Defenders has provided a signed letter (on file with counsel for *amici*) attesting to her belief that the account of the case contained in this brief is accurate.

endangerment with a sentence greater than one year, which would have placed the client at risk of presumptively mandatory deportation as an aggravated felon. *See* 8 U.S.C. §§ 1101(a)(43)(F); 1227(a)(2)(a)(iii); *In re Ramos*, 23 I. & N. Dec. 336, 347 (BIA 2002). If deported on the basis of an aggravated felony, he would have also faced a lifetime bar to re-admission to the U.S. *See* 8 U.S.C. § 1182(a)(9)(A). In light of this, the criminal defense attorney continued to negotiate, and the District Attorney eventually agreed to accept a plea to reckless endangerment with a sentence of 364 days, with two disorderly conduct pleas to resolve the open misdemeanor cases. This disposition saved the client from deportation.³⁷

- **Avoidance of aggravated felony removal ground – approx. 2002:** A Lawful Permanent Resident was charged with criminal sale of a controlled substance in the third degree, N.Y. Penal Law § 220.39, a plea to which would have exposed him to presumptively mandatory deportation as an aggravated felon.³⁸ *See* 8 U.S.C. §§ 1101(a)(43)(B); 1227(a)(2)(a)(iii). His criminal defense attorney negotiated a plea to criminal possession of a controlled substance, N.Y. Penal Law § 220.06(5), in exchange for a sentence in state prison. This rendered the client removable but eligible for a discretionary grant of cancellation of removal. *See* 8 U.S.C. §§ 1227(a)(2)(B)(i); 1229b(a).³⁹
- **Avoidance of aggravated felony removal ground – New York County, 2006:** A longtime Lawful Permanent Resident with a serious mental illness was charged with robbery in the second degree [N.Y. Penal Law § 160.10(2)(a)], which carried a minimum sentence of three and a half years, for robbing another woman of her umbrella.⁴⁰ The defense attorney recognized that a conviction for robbery in the second degree with a sentence of a year or more would expose her to

³⁷ The client had lived lawfully in the U.S. for more than five years before he committed the criminal act, so even though it may have constituted a crime involving moral turpitude, it did not render him deportable because it was his only one. *See* 8 U.S.C. § 1227(a)(2)(A)(i)&(ii).

³⁸ The client's attorney, George Terezakis, has provided a signed letter (on file with counsel for *amici*) attesting to his belief that the account of the case contained in this brief is accurate.

³⁹ Years later, when ICE placed the client in removal proceedings, the Immigration Judge considered the client's positive equities – long residence in the United States, close family ties including a U.S. citizen wife and children, and work history as a diesel mechanic – and awarded relief from removal.

⁴⁰ The client's counsel at LAS has provided a signed letter (on file with counsel for *amici*) attesting to his belief that the account of the case contained in this brief is accurate.

presumptively mandatory deportation as an aggravated felon. *See* 8 U.S.C. § 1101(a)(43)(G); 8 U.S.C. § 1227(a)(2)(a)(iii).⁴¹ The defense attorney felt that the case was overcharged, in that the People could not establish the alleged “physical injury” to the victim. The People were unwilling to agree to a disposition of robbery in the third degree (N.Y. Penal Law § 160.05) with a sentence of less than one year, so the attorney advised the client to take the case to trial. The client was convicted of robbery in the third degree. At sentencing, the defense attorney argued for a sentence of less than one year in an effort to avoid the aggravated felony removal ground. The judge imposed a six month sentence along with five years of probation, leaving the client deportable but eligible to seek discretionary relief from deportation in the form of cancellation of removal. *See* 8 U.S.C. § 1229b(a).⁴²

- **Avoidance of deportation ground – Richmond County, 2009:** A Lawful Permanent Resident was apprehended after attempting to steal a bottle of perfume from Sephora, a store at the Staten Island Mall.⁴³ She was issued a desk appearance ticket charging her with two misdemeanors – petit larceny (N.Y. Penal Law § 155.25) and criminal possession of stolen property in the 5th degree (N.Y. Penal Law § 165.40). Her defense attorney realized that these charges were likely to be deemed “crimes involving moral turpitude” (“CIMTs”) triggering deportability. *See* 8 U.S.C. § 1227(a)(2)(A)(i); *Michel v. INS*, 206 F.3d 253, 270 (2d Cir. 2000) (deferring to BIA determination that N.Y. Penal Law § 165.40 is a crime involving moral turpitude); *In re Nunez*, No. A045-237-711, 2009 WL 2981799 (BIA Aug. 28, 2009) (holding that N.Y. Penal Law § 155.25 is a CIMT). Therefore, he sought a plea to a violation such as disorderly conduct (N.Y. Penal Law § 240.20) or an adjournment in contemplation of dismissal. However, he was faced with an inflexible

⁴¹ The defense attorney consulted with the Immigration Law Unit at LAS in New York City regarding the immigration consequences of the case as charged, and of potential alternative dispositions.

⁴² ICE eventually placed the client in removal proceedings, where the Immigration Judge considered the client’s long residence in the United States (over 25 years at that time), work history (albeit limited due to her mental illness), and her struggles to address her mental illness, and granted cancellation of removal.

⁴³ The client’s defense attorney, Gary M. Kaufman, has provided a signed letter (on file with counsel for *amici*) attesting to his belief that the account of the case contained in this brief is accurate.

policy at the Richmond County District Attorney's office of not offering such dispositions in cases arising from the Staten Island Mall. Accordingly, the defense attorney filed a motion to dismiss the charges pursuant to N.Y. Crim. Proc. Law § 170.40, arguing that deportation of a young woman with no prior criminal history, for such a minor event, was not in the interests of justice. The judge granted the motion, thereby allowing the client to avoid deportation.

- **Avoidance of deportation ground – New York County, 2009:** A Lawful Permanent Resident who suffered from cognitive challenges due to lead poisoning in his youth was pulled over for a traffic infraction, and the officer smelled marijuana in the car.⁴⁴ The incident yielded charges for violations of N.Y. Veh. & Traf. Law § 1192(4) (driving while ability impaired by drugs) and N.Y. Veh. & Traf. Law § 511(1)(a) (knowingly operating a motor vehicle while license suspended). The defense attorney knew that a plea to N.Y. Veh. & Traf. Law § 1192(4) exposed the client to a risk of deportation for a controlled substance conviction, as well as permanent inadmissibility. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i). Thus, she negotiated a plea to the unlicensed driving offense, N.Y. Veh. & Traf. Law § 511(1)(a), in satisfaction of both charges, avoiding the grounds of removal and inadmissibility.

These stories were replicated all over New York State in the years preceding *Padilla*. Diligent defense attorneys took advantage of the available resources, observed the practice norms described in the preceding section, advised their clients accordingly, and fought hard to obtain dispositions that allowed these clients to remain in the United States with their loved ones. Unfortunately, despite all the resources available to support defense attorneys in representing immigrant clients, not all attorneys lived up to their constitutional duty. Accordingly, in order not to leave clear constitutional violations unredressed, the Court must provide a

⁴⁴ The client's attorney at Neighborhood Defender Service of Harlem has provided a signed letter (on file with counsel for *amici*) attesting to her belief that the account contained in this brief is accurate.

possibility of a remedy pursuant to *Padilla* for those immigrants for whom such a remedy may provide their only hope of remaining in the United States with their loved ones.

III. The rule articulated in *Padilla v. Kentucky* applies under New York law to remedy *Padilla* violations pertaining to uninformed pleas entered in New York at least from the passage of AEDPA and IIRIRA in 1996 onward.⁴⁵

The Court is not bound to apply *Teague* retroactivity analysis as employed in *Chaidez*. See *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (federal law “does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under *Teague*”). The *Teague* rule restricts the availability of a remedy for constitutional violations in order to accommodate interests in comity and finality that are unique to federal habeas review. See *People v. Favor*, 82 N.Y.2d 254, 263 n.3 (1993). Accordingly, this Court should apply a retroactivity analysis better suited to advance New York’s unique interests in the availability of a remedy for a constitutional violation on post-conviction review.⁴⁶ See, e.g., *Rhoades v. State*, 149 Idaho 130, 136 (2010) (“Idaho courts must independently review requests for retroactive application of newly-announced principles of law

⁴⁵ The question of the applicability of *Padilla* to pleas entered prior to the passage of AEDPA and IIRIRA in 1996 is not before the Court, and thus *amici* do not address it.

⁴⁶ *Amici* also support the argument made in the proposed Brief of New York Legal Academics as *Amici Curiae* that *Padilla* operates to provide redress for a Sixth Amendment violation asserted in an initial N.Y. Crim. Proc. Law § 440.10 motion, as this is the equivalent of the direct appeal for the purpose of presenting an ineffective assistance of counsel claim in New York.

under the *Teague* standard”); *Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009) (declining to adopt the federal definition of a “watershed rule” in favor of a “fundamental fairness” inquiry); *Colwell v. State*, 118 Nev. 807, 819 (2003) (“We adopt the general framework of *Teague*, but reserve our prerogative to define and determine within this framework whether a rule is new and whether it falls within the two exceptions to nonretroactivity”).

A. *Padilla* offers a remedy under New York’s a reasonable definition of a “new” rule.

The Court should decline to adopt the broad definition of a “new” rule applied to bar a remedy for a *Padilla* violation under *Teague*. See *Chaidez*, 133 S. Ct. at 1107 (a rule is new if “not *dictated* by precedent”). This Court has expressed disapproval of that definition: “Manifestly, this standard, which was devised to address the applicability of recent judicial decisions to collateral habeas corpus proceedings, would dramatically expand the class of cases in which retroactivity is in issue, since few decisions made by an appellate court such as ours are truly ‘dictated’ or compelled by precedent.” *Favor*, 82 N.Y.2d at 263 n.3; accord *People v. Eastman*, 85 N.Y.2d 265, 275 (1995). The Court clarified that “[w]hatever criteria are used to define the concept of a ‘new’ rule of law, care must be taken to assure that it remains a relatively narrow one.” *Id.* at 263. Thus, “retroactivity should not be in question when a court’s ruling merely applies previously established principles in a new factual setting.” *Id.*

In the wake of *Chaidez*, the Supreme Judicial Court of Massachusetts held that “*Padilla* did not announce a ‘new’ rule for the simple reason that it applied a general standard—designed to change according to the evolution of existing professional norms—to a specific factual situation.” *Commonwealth v. Sylvain*, 466 Mass. 422, 435 (2013).⁴⁷ Prior to *Chaidez*, New York appellate courts had uniformly held that *Padilla* applied retroactively because it was a *Strickland* application and therefore an “old” rule. *See People v. Baret*, 99 A.D.3d 408 (1st Dep’t 2012), *lv. granted*, 21 N.Y.3d 1002 (2013); *People v. Rajpaul*, 100 A.D.3d 1183 (3d Dep’t 2012). To avoid the fundamental unfairness of denying an immigrant a remedy for a plea obtained in violation of constitutional standards, when the plea is the basis for the destruction of the immigrant’s life in the United States, this Court should likewise hold that *Padilla* is a *Strickland* application that applies retroactively to remedy unconstitutional pleas.

B. Even if the Court deems *Padilla* “new,” the *Pepper* factors counsel in favor of retroactive application of *Padilla* for guilty pleas entered from at least 1996 and thereafter.

This Court has applied *Pepper* to determine retroactivity for new state rules of criminal procedure.⁴⁸ *See People v. Mitchell*, 80 N.Y.2d 519, 525-26 (1992). If

⁴⁷ The systemic finality concerns are of a similar magnitude, in that Massachusetts’ post-conviction vehicle also contains no time limit for filing a post-conviction motion. *Compare* N.Y. Crim. Proc. Law § 440.10 *with* Mass. R. Crim. P. 30(b).

⁴⁸ Retroactivity is only in question pursuant to *Pepper* if the Court deems *Padilla* a “new” rule. *See Favor*, 82 N.Y.2d at 262-63 (finding that the “threshold question” under the *Pepper* test is whether the rule is “new”).

the Court decides that *Padilla* represents a “new” rule it should likewise apply *Pepper* here to declare *Padilla* retroactive under state law.⁴⁹

The *Pepper* test requires the weighing of three factors: “(a) the purpose to be served by the new standards, (b) the extent of the reliance . . . on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.” *Pepper*, 53 N.Y.2d at 220. Each of these factors supports the availability of a remedy for *Padilla* violations pertaining to pleas entered prior to the date *Padilla* was decided.

i. The “purpose of the new rule” supports the provision of a remedy.

The paramount purpose of the rule recognized in *Padilla* is to ensure that counsel has informed his immigrant client about the risk of deportation. *See Padilla*, 559 U.S. at 374. This Court has agreed that deportation is “an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants.” *Peque*, 22 N.Y.3d at 192 (citing *Padilla*, 559 U.S. at 364). The Court observed that unlike other significant consequences attendant to a guilty plea “the deportation process deprives the defendant of an exceptional degree of physical liberty by first detaining and then forcibly removing

⁴⁹ Other state courts have adopted a similar test in departing from *Teague*. *See, e.g., State v. Garcia*, 834 N.W.2d 821, 824-26 (S.D. 2013); *Hernandez v. State*, 124 So.3d 757, 764-65 (Fla. 2012); *State v. Kennedy*, 229 W.Va. 756, 774-75 (2012); *State ex rel Taylor v. Steele*, 341 S.W.3d 634, 650-51 (Mo. 2011); *State v. Smart*, 202 P.3d 1130, 1135-36 (Alaska 2009); *People v. Maxson*, 482 Mich. 385, 393 (2008); *State v. Knight*, 145 N.J. 233, 251 (1996).

him from the country.” *Id.* The Court further noted that “[c]onsequently, the defendant may not only lose the blessings of liberty associated with residence in the United States, but may also suffer the emotional and financial hardships of separation from work, home, and family.” *Id.* This Court concluded that “fundamental fairness” requires that the “defendant [be] aware of the risk of deportation because deportation frequently results from a noncitizen’s guilty plea and constitutes a uniquely devastating deprivation of liberty.”⁵⁰ *Id.* at 193. The corollary to that conclusion is that a plea entered by a defendant who was unaware that it would lead to mandatory deportation constitutes “manifest injustice,” which alone can militate heavily in favor of retroactivity. *See Pepper*, 53 N.Y.2d at 220 (“[T]he extent of the reliance and the nature of the burden on the administration of justice are of substantial significance only when the answer to the retroactivity question is not to be found in the purpose of the new rule itself.”). Thus, for an

⁵⁰ Although this Court was referring to the court’s duty to make a non-citizen aware of the risk of deportation, the reasoning applies with even greater force to counsel’s duty to inform an immigrant client of the risk of deportation as a result of a guilty plea. *Peque* acknowledges that counsel’s duty to advise the client regarding the specific consequences of the plea is of greater importance than the court’s duty to notify generally of certain consequences:

Although both of those rights exist to preserve the defendant’s entitlement to a fair trial or plea proceeding, they operate in discrete ways in the plea context. The right to effective counsel guarantees the defendant a zealous advocate to safeguard the defendant’s interests, give the defendant essential advice specific to his or her personal circumstances and enable the defendant to make an intelligent choice between a plea and trial, whereas due process places an independent responsibility on the court to prevent the State from accepting a guilty plea without record assurance that the defendant understands the most fundamental and direct consequences of the plea.

Peque, 22 N.Y.3d at 190-91.

immigrant who entered a guilty plea between (at least) 1996 and 2010 without realizing that she was assuring her eventual deportation, fundamental fairness (or the prevention of “manifest injustice”) requires that the Court allow her the chance to prove the merits of her *Padilla* claim.⁵¹

- ii. **The rule announced in *People v. Ford* was not relied on by the criminal defense bar, which as a matter of professional responsibility responded to dramatic changes in immigration law and widely advised clients about the deportation consequences of criminal convictions.**

The “reliance” prong of *Pepper* is primarily directed at “old” legal rules that governed police or judicial practices. *See, e.g., Mitchell*, 80 N.Y.2d at 528 (discussing the court’s reliance upon the prior rule which allowed the examination of jurors outside defendant’s presence); *Pepper*, 53 N.Y.2d at 222 (discussing the reliance of prosecutors and law enforcement on the prior rule regarding the proper procedures for eliciting statements from defendants). The *Padilla* rule, which governs the relationship between a lawyer and her client, is not the subject of any legitimate reliance by police or prosecutors.

In any event, New York defense attorneys responded promptly and diligently to the 1996 amendments to the immigration laws, in recognition of the devastating impact of these laws on their immigrant clients. The series of training

⁵¹ The injustice is magnified when one considers that retroactivity jurisprudence is judge-made law, not based on the Constitution. *See Linkletter v. Walker*, 381 U.S. 618, 629 (1965) (“[T]he Constitution neither prohibits nor requires retrospective effect,” having “no voice upon the subject.”).

programs in 1996 grew into a steady stream of CLE programs and published resources between 1996 and 2010, and clearly establishes that the criminal defense bar did not sit back and rely on *Ford* in the wake of AEDPA and IIRIRA. Instead, the professional norms evolved quickly after the passage of AEDPA and IIRIRA to strengthen the expectation that counsel would advise immigrant clients regarding deportation, and would seek negotiated resolutions that avoided immigration consequences. *See supra*, sec. II.A.

iii. Retroactive application of Padilla will have a limited effect on the administration of justice.

The third *Pepper* factor also supports retroactive application. First, in *amici*'s experience, the immigrants most likely to prevail on *Padilla* claims are those who have the most to lose if convicted of the charges they originally faced – those with deep roots in the U.S. and for whom avoiding removal is of paramount concern, who can therefore meet the required prejudice showing. By definition, this category of claimants has a strong incentive to avoid the risk of a removable conviction by pleading guilty to a non-deportable offense following vacatur of the deportable plea, and may be willing to accept a plea of equivalent or even greater seriousness in *penal* terms to avoid the immigration consequence. District Attorneys similarly have an incentive to offer such pleas in order to avoid relitigation of old cases. *See* Marcy L. Kahn & Christopher H. Benbow, *Revisiting Constitutional Retroactivity in New York after Danforth: Should Padilla and Other*

Supreme Court Guilty Plea Counsel Cases Prompt a Change from Eastman-Teague, or Adherence to Chaidez?, 99 Cornell L. Rev. Online 87, 107, 107 n.98 (2013) (describing repleader policies of the Office of New York County District Attorney and the Office of the Special Narcotics Prosecutor of the City of New York in response to valid *Padilla* claims – replacing the original conviction with an offense that avoids deportation). This sort of resolution of a case that is re-opened due to a constitutional violation does little to upset the administration of justice.

Second, *Padilla* claims entail application of the prejudice prong of *Strickland*, which inherently limits the potential for *Padilla* claims to upset the administration of justice. *Strickland*'s prejudice requirement is specifically intended to “serve the fundamental interest in the finality of guilty pleas.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); see *People v Jackson*, 78 N.Y.2d 638, 641 (1991) (requiring showing of prejudice for *Rosario* claims raised in a N.Y. Crim. Proc. Law § 440.10 motion to accommodate “society’s interest in the finality of judgments”). *Strickland*'s prejudice requirement imposes a “high bar” that ensures that only a defendant who demonstrates that it would have been “rational under the circumstances” to reject the plea agreement achieves vacatur. *Padilla*, 559 U.S. at 371-72. The Court in *Strickland* encouraged analysis of the prejudice prong, if dispositive, without addressing the performance prong, as a way of lessening the burden on defense attorneys and the “entire criminal justice system.” *Id.* at 697.

This approach allows a judge to dismiss a motion filed pursuant to N.Y. Crim. Proc. Law § 440.10 without a hearing if, for instance, the defendant fails to allege sufficient facts to establish prejudice. *See* N.Y. Crim. Proc. Law § 440.30(4). For all these reasons, *Padilla* retroactivity does not implicate *Pepper*'s concern that "every defendant to whose case it was relevant, no matter how remote in time and merit, would become [the] beneficiary" of the new rule. *Pepper*, 53 N.Y.2d at 222. Therefore, this last factor militates in favor of offering a remedy for *Padilla* violations pertaining to convictions that were final on the date of the decision.

CONCLUSION

Whether or not she ultimately achieves relief from deportation, an immigrant defendant deserves an opportunity to make an informed and effectively counseled decision whether to plead guilty to a charge that could have catastrophic, life-altering consequences. The courthouse doors should remain open to these constitutional challenges, including those that involved ineffective assistance of counsel that occurred before 2010. For the foregoing reasons, *amici* urge this Court to hold that *Padilla v. Kentucky* offers the possibility of relief for Mr. Baret and other defendants who similarly were deprived of the effective assistance of counsel regarding the immigration consequences of their guilty pleas entered at least after the passage of AEDPA and IIRIRA in 1996.

Dated: New York, New York
March 13, 2014

Respectfully submitted,

By: 

Manuel D. Vargas
Dawn M. Seibert
IMMIGRANT DEFENSE PROJECT
28 West 39th Street, Suite 501
New York, New York 10018
Telephone: (212) 725-6485
Facsimile: (800) 391-5713
E-mail: mvargas@immigrantdefenseproject.org

Jonathan E. Gradess
NEW YORK STATE DEFENDERS ASSOCIATION
194 Washington Avenue, Suite 500
Albany, New York 12210
Telephone: (518) 465-3524
Facsimile: (518) 465-3249

Marc Fernich
NEW YORK STATE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
810 Seventh Avenue, Suite 620
New York, New York 10019
Telephone: (212) 446-2346
Facsimile: (212) 459-2299

Brendan White
NEW YORK STATE ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
148 East 78th Street
New York, New York 10075
Telephone: (212) 861-9850
Facsimile: (212) 861-9870

Norman L. Reimer
NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
1660 L Street, NW, 12th Floor
Washington, DC 20036
Telephone: (202) 872-8600
Facsimile: (202) 872-8690

Joel B. Rudin
NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
200 West 57th Street, Suite 900
New York, New York 10019
Telephone: (212) 757-7600
Facsimile: (212) 980-2968

Counsel for Proposed Amici Curiae

APPENDIX A: Separate Statements Of Interest for *Amici Curiae*

New York State Defenders Association, Inc. (“NYSDA”) is a not-for-profit membership association of more than 1,800 public defenders, legal aid attorneys, 18-B counsel, private practitioners, and others throughout the state. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to more than 6,000 lawyers who serve as public defense counsel in criminal cases in New York. The Backup Center also provides technical assistance to counties that are considering changes and improvements in their public defense systems. New York State contractually obligates NYSDA, through the Backup Center, “to review, assess and analyze the public defense system in the state, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities.” In this capacity, NYSDA has issued numerous reports identifying trends and problems and suggesting norms and best practices to improve the state’s public defense system.

From the inception of the Backup Center, NYSDA has sought to improve the quality of representation provided to foreign nationals. In 1997, recognizing that proper criminal defense representation of individuals who are not U.S. citizens was growing more complicated, NYSDA announced the creation of a criminal

defense immigration project that eventually became the freestanding Immigrant Defense Project (“IDP”). NYSDA’s current Criminal Defense Immigration Project (“CDIP”) continues NYSDA’s mission of improving the representation offered to clients, including foreign nationals, in criminal and family court matters. The CDIP provides training and consultation to criminal defense lawyers concerning issues at the intersection of immigration and criminal law.

New York State Association of Criminal Defense Lawyers is a non-profit organization of more than 750 criminal defense attorneys who practice in the State of New York; it is the largest private criminal bar association in the State. Its purpose is to provide assistance to the criminal defense bar to enable its members to better serve the interests of their clients and to enhance their professional standing.

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with informal affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense

lawyers. The American Bar Association recognizes NACDL as an informally affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the United States Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular relevance here is NACDL's extensive and continuing history of involvement in this critically important issue, including educating lawyers – through trainings as well as published and online resources -- in order to effectively represent their immigrant clients, including providing advice on the adverse immigration consequences that can derive from nature of the disposition of their case. NACDL also filed as an amicus in the U.S. Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), and in *INS v. St. Cyr*, 533 U.S. 289 (2001). NACDL strongly supports the retroactive application of *Padilla* in New York State and across the nation.

The Yates County Assigned Counsel Program provides legal representation to individuals who cannot afford counsel in criminal proceedings arising out of Yates County, New York. Yates County has a large migrant population working in agriculture and related factory jobs, both in Yates County and neighboring counties. Thus, for many years, defense attorneys have sought to advise their non-citizen clients about the potential immigration consequences of criminal charges,

and to advocate for advantageous plea dispositions to eliminate or mitigate those consequences.

The Legal Aid Society (“Legal Aid”), located in New York City, is the nation’s oldest and largest not-for-profit law firm for low income persons. Legal Aid provides a full range of legal services including criminal defense representation, as well as civil legal services. Legal Aid’s Criminal Defense Practice is one of the largest public defender programs in the country and serves as the primary provider of indigent defender services in New York City. The Civil Practice’s city-wide Immigration Law Unit, established decades ago, advises immigrants and criminal defense attorneys in the immigration consequences of criminal case dispositions. The Unit also specializes in representing detained and non-detained noncitizens with criminal convictions in removal proceedings before the immigration court, the Board of Immigration Appeals, and federal district and circuit courts.

Monroe County Public Defender’s Office (“Public Defender’s Office”) provides legal representation to individuals who cannot afford counsel in criminal and Family Court proceedings arising out of Monroe County, New York. Monroe County includes the City of Rochester and has a population of approximately three-quarters of a million people. The Public Defender’s Office handles criminal cases in town and village justice courts, Rochester City Court, and County and

Supreme Courts. The office also handles cases in Family Court and on appeal to the state's intermediate and highest appellate courts. The office employs approximately sixty full-time attorneys and, in 2012, handled nearly 26,000 cases. Many of the Public Defender Office's clients are noncitizens.

For years, the Public Defender's Office has made it part of its representation of its noncitizen clients to provide accurate advice on the immigration consequences that might arise from their criminal and Family Court proceedings and to seek to minimize those consequences. Indeed, since 2005, the Public Defender's Office has had in place an in-house immigration expert system, wherein staff members have been able identify the office's noncitizen clients, consult with an in-house immigration expert, advise their clients on the immigration consequences of particular dispositions, and negotiate dispositions that either minimize or altogether avoid unfavorable immigration consequences.

The Queens County Bar Association ("QCBA") was organized in 1876 and is one of the first organized bar associations in the State of New York. Queens County is one of the most ethnically diverse counties in the United States with some 50 different languages being spoken in the county. Many immigrant families have settled in Queens County, where their children attend school and they celebrate the various religious and festive holidays of their particular heritage while at the same time assimilating into American culture. The members of QCBA

and the clients they represent have a vital interest in the administration of justice. One of the missions of QCBA is to assume leadership in fostering continued improvement in the administration of justice under our constitutional form of government. QCBA believes it is important to protect the interests of many of the immigrant families in our community who have relatives facing removal from the United States. It is important that these individuals be allowed to assert their rights to due process and their constitutional right to the effective assistance of counsel when they have entered guilty pleas, in many circumstances ten or twenty years earlier, without the full knowledge and understanding of the consequences of the plea.

The Legal Aid Bureau of Buffalo, Inc. (LABB) is a private non-profit legal services organization that contracts with Erie County to represent all indigent defendants charged with crimes in Buffalo City Court pursuant to the county's obligation (County Law § 18-b) to provide counsel to those who cannot afford their own attorney. Each year, LABB staff attorneys handle approximately 12,000 cases in Buffalo City Court. In addition, LABB attorneys represent in superior court all indigent defendants charged in Erie County with class "D" and "E" felonies.

LABB attorneys who appear in Buffalo City Court, and Supreme Court, Erie County, and Erie County Court follow a standard protocol. Specifically, they ask

every client about his/her citizenship or immigration status. If the client reveals a noncitizen status, the LABB attorney consults with the New York State Defenders Association Immigration Center. Until June 1, 2013, the Center's Director was Joanne Macri (who has since become the Director of Regional Initiatives for the Office of Indigent Legal Services). Attorneys forward an e-mail fact summary of the case to the new Immigration Center Director, Felipe Alexandre, who provides his expert opinion about the impact of a potential guilty plea on the client's immigration status based upon his review of the case law and relevant statutes. Clearly, the LABB attorneys' goal is to resolve the client's charges in a way that mitigates any potential negative consequences. Always mindful of the importance of providing effective representation in situations where criminal convictions could impact their clients' immigration status, the LABB is careful to consult with immigration experts at the New York State Defenders Association before representing noncitizen clients on guilty pleas in either Buffalo City Court or superior court.

Brooklyn Defender Services ("BDS") protects the due process and civil legal rights of poor Brooklyn residents who have been charged with crimes or prosecuted in child welfare matters. BDS's mission is to serve people without the economic means to hire an attorney. BDS's operating principle is that all people deserve respect, individualized care, and the fullest extent of legal protections

whether accused of a crime or facing a civil legal obstacle to justice and opportunity. Founded in 1996, BDS is the only public defender office to serve Brooklyn residents exclusively. Today, BDS is one of New York State's largest legal service providers, providing criminal defense, family defense, and immigration legal services to more than 43,000 clients every year. Since at least November 1998, BDS has held periodic on-site trainings for its defense attorneys on the immigration consequences of criminal dispositions and strategies for avoiding these consequences. Those trainings were conducted by IDP, a legal resource center founded in 1997, until BDS launched its own Immigration Unit in September 2009, and began conducting these in-house trainings itself.

The Hiscock Legal Aid Society ("HLAS") was founded in 1949 to provide free legal assistance to indigent residents of Onondaga County. HLAS's mission statement reads: "The Hiscock Legal Aid Society promotes the fundamental right of every person to equal justice under the law by providing high quality legal representation to individuals and families in need."

HLAS originally emphasized providing civil legal assistance to those in need; family, housing, and unemployment matters continue to represent the most numerous cases in its Civil Program. In 1965, HLAS contracted with the Onondaga County Bar Association to administer the first Assigned Counsel Program and established an in-office Appeals Program to handle appeals from

criminal convictions. HLAS's Appeals Program currently handles criminal and Family Court cases on appeal to the state's intermediate and highest appellate courts. HLAS also provides complete legal representation to adults in Family Court cases, as well as parole revocation and extradition defense.

The office currently employs a staff of 56, including 30 attorneys. Nearly 5,000 cases are handled each year. Many of its clients are noncitizens, and it provides legal services in immigration matters as part of the Upstate New York Immigration Law Project. In collaboration with the Legal Aid Society of Rochester and the Legal Aid Society of Northeastern NY, this Project provides representation in matters such as applications for work permits, travel documents, and petitions for asylum and temporary protected status. Through both appellate and immigration work HLAS has seen the negative consequences that inaccurate immigration advice can have on both our clients and their families. As part of the services provided, HLAS has strived to identify and resolve possible immigration consequences to its clients.

The Neighborhood Defender Service of Harlem ("NDS") is a lead innovator in holistic public defense practice. NDS represents clients using a team-based, client-centered, holistic defense model. A core aspect of holistic representation is the commitment to search for the underlying issues that bring clients into contact with the criminal justice system, and to work with clients to help to avoid or

minimize future contact with the system. As a part of its holistic approach, NDS has incorporated immigration defense and immigration services into the representation it has provided its noncitizen clients for many years, long before *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). Since 2008, NDS has employed an in-house immigration attorney to consult with clients.

The Erie County Bar Association Aid to Indigent Prisoners Society, Inc. (Assigned Counsel Program) (the “Program”) is a project of the Bar Association of Erie County. The Program coordinates the assignment of attorneys to represent individuals who are charged with a crime or a violation which could result in incarceration and who cannot afford to retain an attorney. It handles all matters, both misdemeanor and felony, in each of the 40 Justice Courts in Erie County, as well as most of the felony work in Superior Court. In addition, it provides representation in cases in Buffalo City Court that the Legal Aid Bureau cannot accept because of conflicts among multiple defendants. For many years, the Program’s assigned counsel panel attorneys have sought to advise their noncitizen clients about the potential immigration consequences of criminal charges, and to advocate advantageous plea dispositions to eliminate or mitigate those consequences.

The Bronx Defenders (“BXD”), founded in 1997, is a non-profit holistic, community-based public defenders service that provides client-centered civil,

criminal, and family defense legal services, social services, and community programs to low-income Bronx residents. Working collaboratively with its clients, BxD seeks to end cycles of poverty, addiction, violence, family separation, and court involvement. BxD's holistic representation has included immigration services since 2003 and is currently composed of nine immigration attorneys and one legal advocate who provide advice on criminal cases as well as represent clients in removal proceedings. Since 2003, these attorneys have been working with noncitizens facing criminal charges to both fully understand any and all potential immigration impact of the criminal charges against them and different dispositions as well as advocating to mitigate negative immigration consequences by fighting for alternative plea agreements. BxD's advocates represent noncitizens facing removal in immigration court and work with their families and their communities to ensure that every noncitizen gets zealous, effective, and compassionate legal representation.

The Legal Aid Society of Nassau County was incorporated in 1950. It provides legal representation to individuals who cannot afford counsel in criminal proceedings arising out of Nassau County, New York. Of the thousands of clients its attorneys represent each year, nearly 20% are noncitizens. For many years, its attorneys have sought to advise their noncitizen clients about the potential

immigration consequences of criminal charges, and to advocate advantageous plea dispositions to eliminate or mitigate those consequences.

Queens Law Associates (“QLA”) is an alternative public defender office. Founded in 1996, QLA provides indigent defense to 24,000 individuals in the criminal justice system in Queens. Queens is the most ethnically diverse county in the United States. Immigrants in Queens make up more than half of the workforce and the foreign-born make up at least 50% of the population, more than any borough in New York City. QLA’s Immigration Project provides Padilla advisals and direct representation to immigrants, including green card holders, who face the possibility of detention and deportation. It assists immigrants who face barriers to accessing indigent services because they do not speak English, do not know their legal rights, may be distrustful of government or law enforcement agents.

The Office of the Appellate Defender (“OAD”) is a not-for-profit law firm devoted to providing excellent legal representation to indigent persons convicted of felonies in Manhattan and the Bronx. OAD was created in 1988 by a resolution of the Administrative Board of the Courts in order to train new appellate attorneys. Other than The Legal Aid Society, OAD is New York City’s longest-standing institutional indigent defense office and its oldest provider of appellate representation to indigent persons convicted of felonies. Since 1997, OAD has

provided its attorneys with specialized training in immigration law, in recognition of the unique issues facing clients who are noncitizens.

Appellate Advocates (“AA”) is a not-for-profit corporation formed in 1995 for the purpose of providing high quality appellate representation to criminal defendants who cannot afford private counsel. Pursuant to a contract with the City of New York, AA represents indigent defendants who are appealing convictions from courts in Brooklyn, Queens, and Staten Island. AA is assigned to appeals from plea and trial convictions by the Appellate Term, the Appellate Division, Second Department, and the Court of Appeals. In addition to appellate practice, AA has expanded the representation of its clients to include trial-level litigation of motions pursuant to the Drug Law Reform Acts, hearings pursuant to the Sex Offender Registration Act, and motions seeking various forms of post-conviction relief.

Roughly 25% of AA’s clients are noncitizens. The impact of a criminal conviction, even for a seemingly minor offense with a negligible sentence, can carry severe immigration consequences. For each of AA’s noncitizen clients, we must assess the case to determine what strategy to pursue in order to nullify or mitigate any harm to the client’s immigration status. AA keeps abreast of developments concerning the intersection of criminal law and immigration law, hosts in-house trainings on the subject, and utilizes IDP and the handful of

attorneys funded by the Office of Indigent Legal Services for advice on handling both the direct appeals and the post-conviction relief motions filed on behalf of noncitizen clients.

The Center for Appellate Litigation (“CAL”) is a New York not-for-profit law firm located in lower Manhattan, that handles appeals and post-conviction proceedings on behalf of criminal defendants in cases assigned by the Appellate Division, First Department. CAL’s clients are among society’s most disenfranchised: isolated by often lengthy prison terms, they are among those most urgently needing quality legal representation in their efforts to obtain equal justice under the law. CAL’s immigrant clients face additional barriers to justice, as the immigration consequences of their convictions are sometimes more dire than the state-law penal consequences. Since CAL’s founding in 1997, the immigration consequences of its clients’ convictions have been an ever-present focus of its attorneys’ efforts, recognizing that as federal immigration laws have become ever more draconian, even convictions for low-level offenses can lead to deportation for lawful permanent residents, asylum seekers, and undocumented immigrants. To further its efforts, CAL has not only provided regular training to its attorneys on immigration issues, but has also partnered with organizations that can provide attorneys and clients with specialized immigration advice.

The Immigrant Defense Project 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 lawyers, immigration lawyers, and immigrants. Since 1997, IDP and its former parent organization, the 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).

**APPENDIX B: Sample Trainings & Resources On The Immigration
Consequences Of Criminal Convictions**

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
11/20/1996	New York, New York	Changes in Law have Dire Consequences for all Immigrants in Criminal Court	American Civil Liberties Union Immigrants' Rights Project, Assigned Counsel Plan New York City, Center for Immigrants' Rights, Legal Aid Society of New York City, National Immigration Project of the National Lawyers Guild, New York City Bar Association, New York County Lawyers Association, Northern Manhattan Coalition for Immigrant Rights
12/11/1996	New York, New York	Immigration consequences of crimes	Legal Aid Society of New York City
12/23/1996	New York, New York	Immigration consequences of crimes	Legal Aid Society of New York City
2/13/1997	Mineola, New York	Immigration Consequences of Criminal Convictions	Criminal Court Bar Association of Nassau County
3/18/1997	Queens, New York	1996 immigration law amendments and their impact on Immigration Consequences of Criminal Convictions	Assigned Counsel Plan New York City
7/19/1997	White Plains, New York	Immigration Consequences of Criminal Convictions	New York State Defenders Association
10/22/1997	New York, New York	Immigration consequences of crimes and representation strategies	Office of the Appellate Defender
10/28/1997	Brooklyn, New York	Immigration Consequences of Drug Crimes	Brooklyn Treatment Court
1/9/1998	Poughkeepsie, New York	Immigration Consequences of Criminal Convictions	Dutchess County Public Defender
1/23/1998	New York, New York	Immigration Consequences of Criminal Convictions	New York Association for New Americans
1/24/1998	New York, New York	Immigration Consequences of Criminal Convictions	Legal Aid Society of New York City, Criminal Defense Division

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
2/24/1998	New York, New York	Immigration Consequences of Criminal Convictions	Legal Aid Society of New York City, Criminal Defense Division
3/14/1998	New York, New York	Immigration Consequences of Criminal Convictions	New York State Defenders Association
6/3/1998	Central Islip, New York	Immigration Consequences of Criminal Convictions	Suffolk County Legal Aid Society
7/9/1998	New York, New York	Immigration Consequences of Criminal Convictions	Puerto Rican Bar Association and New York Women's Bar Association
9/28/1998	New York, New York	Immigration Consequences of Criminal Convictions	Center for Appellate Litigation and Office of Appellate Advocates
11/12/1998	Bronx, New York	Immigration consequences of crimes and trial strategies	Bronx Defenders
11/17/1998	Brooklyn, New York	Immigration consequences of crimes and trial strategies	Brooklyn Defender Services
1/26/1999	Central Islip, New York	CLE Training on Immigration Consequences of Crimes	Suffolk County Bar Association
2/1/1999	Brooklyn, New York	Immigration Consequences of Criminal Convictions	Brooklyn Domestic Violence Court, sponsored by the Center for Court Innovation
2/8/1999	New York, New York	CLE Training on Immigration Consequences of Crimes	Legal Aid Society of New York City, Criminal Appeals Bureau
3/9/1999	New York, New York	Immigration consequences of crimes and trial strategies	Legal Aid Society of New York City, Criminal Defense Division
4/21/1999	New York, New York	CLE Training on Immigration Consequences of Crimes	Manhattan Supreme Court Criminal Defense Lawyer Trainer, co-sponsored by New York City Bar Association and New York State Defenders Association
4/24/1999	Rochester, New York	CLE Training on Immigration Consequences of Crimes	Monroe County Public Defender
5/12/1999	Hempstead, New York	CLE Training on Immigration Consequences of Crimes	Legal Aid Society of Nassau County

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
5/26/1999	New York, New York	CLE Training on Immigration Consequences of Crimes	Manhattan Supreme Court Criminal Defense Lawyer Trainer, co-sponsored by New York City Bar Association and New York State Defenders Association
7/30/1999	Glen Falls, New York	New developments in criminal representation within immigration law	New York State Defenders Association
9/9/1999	Westbury, New York	Immigration consequences of "aggravated felony" criminal convictions	Criminal Court Bar Association of Nassau County
10/16/1999	New York, New York	CLE Training on Immigration Consequences of Crimes	New York State Association of Criminal Defense Lawyers
2/26/2000	New York, New York	Criminal issues in immigration cases involving domestic violence victims	New York City Bar Association
3/13/2000	New York, New York	Immigration Consequences of Criminal Convictions	New York County Defenders
4/24/2000	New York, New York	Symposium on collateral consequences of criminal convictions	New York City Bar Association
5/9/2000	New York, New York	Immigration consequences of criminal activity	New York City Bar Association
5/10/2000	Brooklyn, New York	Immigration Consequences of Criminal Convictions	New York Supreme Court, Kings County
5/17/2000	Bronx, New York	Immigration Consequences of Criminal Convictions	New York Supreme Court, Bronx County
5/31/2000	Queens, New York	Immigration Consequences of Criminal Convictions	New York Supreme Court, Queens County
7/27/2000	Kerhonkson, New York	Immigration Consequences of Criminal Convictions	New York State Defenders Association
10/17/2000	New York, New York	Crime-related provisions of the 1996 immigration law	New York City Bar Association
10/28/2000	Brooklyn, New York	CLE Training on Immigration Consequences of Crimes	Brooklyn Law School
1/17/2001	Bronx, New York	Immigration Consequences of Criminal Convictions	Bronx Defenders
2/5/2001	New York, New York	Immigration Consequences of Criminal Convictions	New York Supreme Court

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
3/13/2001	Hauppauge, New York	Immigration Consequences of Criminal Convictions	Suffolk County Bar Association
3/9/2002	New York, New York	Defending non-citizens accused of crimes	New York State Association of Criminal Defense Lawyers
10/18/2002	New York, New York	Immigration Consequences of Criminal Convictions	Legal Aid Society of New York City
10/30/2002	New York, New York	Immigration Consequences of Criminal Convictions	Bronx Office of Court Administration
11/6/2002	New York, New York	Immigration Consequences of Criminal Convictions	Bronx Defenders
11/19/2002	New York, New York	Immigration Consequences of Criminal Convictions	Office of the Appellate Defender
5/2/2003 - 5/3/2003	New York, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
5/16/2003 - 5/17/2003	Buffalo, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
6/16/2003	New York, New York	Immigration Consequences of Drug and Alcohol-related Convictions	New York City Bar Association
12/2/2003	New York, New York	Training on Immigration Consequences of New York Criminal Dispositions	New York County Defender Services
12/11/2003	New York, New York	Immigration Consequences of Criminal Convictions	Office of the Appellate Defender
3/24/2004	New York, New York	Presentation on Immigration Consequences of Criminal Convictions	New York State Bar Association
4/12/2004	New York, New York	Immigration Consequences of Criminal Convictions	New York State Supreme Court Appellate Division, First Dept.
6/4/2004- 6/5/2004	New York, New York	Immigration Consequences of New York and New Jersey criminal dispositions	New York State Defenders Association
6/11/2004 - 6/12/2004	Buffalo, New York	Immigration Consequences of New York and New Jersey criminal dispositions	New York State Defenders Association
6/11/2004	Buffalo, New York	Advanced Seminar II for In-House Immigration Experts	New York State Defenders Association
6/25/2004	Brooklyn, New York	Collateral Consequences of Conviction	New York State Association of Criminal Defense Lawyers
8/8/2004	New York, New York	General training on criminal/immigration issues for pro bono criminal defense attorneys	National Immigration Project of the National Lawyers Guild

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
9/10/2004	New York, New York	Immigration Consequences of Criminal Dispositions	New York State Association of Criminal Defense Lawyers
2/8/2005	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Defender Services
2/15/2005	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Defender Services
3/12/2005	New York, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
3/15/2005	Queens, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association, City University of New York Community Legal Resource Network
5/9/2005	White Plains, New York	Immigration Consequences of Criminal Convictions	New York Judicial Institute
5/10/2005	New York, New York	Deportation issues in Resentencing under Rockefeller Drug Law Reforms	Proskauer Rose and Cadwalader Wickersham & Taft
6/21/2005	New York, New York	Deportation issues in Resentencing under Rockefeller Drug Law Reforms	Proskauer Rose and Cadwalader Wickersham & Taft
9/27/2005	New York, New York	Collateral Consequences of Conviction: Addressing the Hidden Consequences of Criminal Proceedings	New York County Lawyers Association
5/18/2006	Rochester, New York	Collateral Consequences of a Criminal Conviction	Monroe County Bar Association
6/9/2006	Canandaigua, New York	Immigration Consequences Arising From Criminal Dispositions	New York State Defenders Association, Ontario County Defenders Association
6/30/2006	New York, New York	Immigration Consequences of Criminal Dispositions	New York University Brennan Center
7/24/2006	Corning, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
9/20/2006	New York, New York	Immigration Consequences of Criminal Dispositions	New York City Bar Association's Criminal Justice Operations Committee
10/14/2006	Syracuse, New York	Immigration Update at Annual Syracuse Trainer	New York State Association of Criminal Defense Lawyers
10/24/2006	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Defender Services

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
10/26/2006	New York, New York	Immigration Consequences of Criminal Dispositions	Office of the Appellate Defender
11/16/2006	New York, New York	Immigration Consequences of Criminal Dispositions and alternatives to incarceration	Center for Court Innovation
12/6/2006	New York, New York	Immigration Consequences of Criminal Dispositions	Center for Appellate Litigation and Appellate Advocates
2/29/2007	Brooklyn, New York	Immigration Consequences of a Criminal Conviction	New York State Association of Criminal Defense Lawyers
3/14/2007	Bronx, New York	Immigration Consequences of Criminal Dispositions	Bronx Women's Bar Association
3/27/2007	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Bar Association
6/19/2007	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Kings County Criminal Bar Association
7/24/2007	Saratoga, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
10/13/2007	Brooklyn, New York	Weapons for the Firefight	New York State Association of Criminal Defense Lawyers
10/25/2007	New York, New York	Immigration Consequences of Criminal Dispositions	New York County Public Defenders Office, New York City Bar Association
10/29/2007	New York, New York	Immigration Consequences of Criminal Dispositions	Queens Law Associates, New York City Bar Association
11/3/2007	Rochester, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
12/4/2007	New York, New York	Immigration Law – It Isn't Just For Immigration Lawyers Anymore! What You Need to Know	New York City Bar Association
1/14/2008	New York, New York	Immigration Consequences of Criminal Dispositions	Immigrant Defense Project
2/5/2008	New York, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Defender Services
2/20/2008	New York, New York	Immigration Consequences of Criminal Dispositions	Staten Island Legal Defense Services
3/1/2008	New York, New York	Immigration Consequences of Criminal Dispositions	New York State Defenders Association
4/10/2008	White Plains, New York	Immigration Consequences of Criminal Convictions	New York Judicial Institute
4/28/2008	New York, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Bar Association

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
5/8/2008	Queens, New York	Immigration Consequences of Criminal Convictions	Assigned Counsel Plan, Second Department
5/12/2008	Rochester, New York	Immigration Consequences of Criminal Convictions	New York State Unified Court System Family Violence Task Force Seminar
5/13/2008	New York, New York	Immigration consequences as related to inadmissibility/deportability	New York State Bar Association, Immigration Committee
5/15/2008	White Plains, New York	Immigration Consequences of Criminal Convictions	New York Judicial Institute
5/16/2008	Saratoga, New York	Immigration Consequences of Criminal Convictions	New York Judicial Institute
6/23/2008	Rye Brook, New York	Collateral Consequences of a Criminal Conviction	New York Judicial Institute
7/7/2008	Rye Brook, New York	Collateral Consequences of a Criminal Conviction	New York Judicial Institute
8/25/2008	Rye Brook, New York	Collateral Consequences of a Criminal Conviction	New York Judicial Institute
9/13/2008	New York, New York	Advanced criminal/immigration issues	Law Offices of Norton Tooby, National Immigration Project of the National Lawyers Guild, New York University Law School Immigrant Rights Clinic
10/14/2008	New York, New York	Immigration Consequences of Criminal Dispositions	Neighborhood Defender Service of Harlem
12/9/2008	New York, New York	Recent developments in criminal/ immigration law	Neighborhood Defender Service of Harlem
1/9/2009	Queens, New York	What a Criminal Defense Lawyer Needs to Know about Immigration Law	Queens Law Associates
2/5/2009	Brooklyn, New York	Immigration consequences of contact with the criminal justice system	Families for Freedom, Immigrant Defense Project
2/10/2009	Brooklyn, New York	Immigration Consequences of Criminal Convictions: what defenders need to know	Brooklyn Defender Services
2/18/2009	New York, New York	The Intersection of Criminal & Immigration Law – What You Don’t Know May Hurt Your Client	New York City Bar Association
3/19/2009	New City, New York	Immigration Consequences of Criminal Convictions	Rockland Bar Association Criminal Law Committee

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
3/20/2009	New York, New York	Immigration consequences of problem-solving court dispositions	National Association of Criminal Defense Lawyers
4/1/2009	New York, New York	Introduction to NDS's Participation in the Immigrant Defense Project's Protocol for the Development of a Public Defender Immigration Service Plan	Neighborhood Defender Service of Harlem
4/1/2009	New York, New York	Immigration Consequences of Criminal Dispositions	Neighborhood Defender Service of Harlem
4/3/2009	Batavia, New York	Immigration Consequences of Criminal Convictions	Genesee County Public Defenders
4/22/2009	New York, New York	The Effect of a Criminal Plea on Immigration Status	Bronx County Bar Association
4/24/2009	New York, New York	What a criminal defense lawyer needs to know about immigration law	New York County Lawyers Association
4/29/2009	Central Islip, New York	Immigration Consequences of Criminal Dispositions	Suffolk County Legal Aid Society
5/4/2009	New York, New York	The Criminal Lawyer's Guide to Immigration Law: Questions and Answers	New York City Bar Association
5/16/2009	Marcy, New York	Immigration Consequences of Criminal Convictions	Oneida County Bar Association Continuing Legal Education Seminar
5/29/2009	New York, New York	The Criminal Lawyer's Guide to Immigration Law: Questions and Answers	New York City Bar Association
7/23/2009	Hudson, New York	CLE Training on Immigration Consequences of Crimes	Columbia County Public Defenders' Office
7/24/2009	New York, New York	Immigration Consequences of Criminal Dispositions	Brennan Center's Community Oriented Defender Network Conference
9/12/2009	Batavia, New York	Intersection of criminal and immigration law and the use of court interpreters	Genesee County Magistrates
9/26/2009	New York, New York	Training on criminal and immigration issues	New York State Defenders Association, Immigrant Defense Project, New York University School of Law, Law

Date of Training	Location (City, State)	Name of Training Program	Host / Sponsor
			Office of Norton Tooby, National Immigration Project of the National Lawyers Guild
10/7/2009	Batavia, New York	Immigration Consequences of Criminal Convictions	Genesee County Bar Association
10/20/2009	Brooklyn, New York	Immigration Consequences of Criminal Dispositions	Brooklyn Defender Services
10/21/2009	Westchester, New York	Collateral Consequences: How does involvement in the criminal justice system impact a client with immigration issues?	Westchester County Bar Association
11/10/2009	Rochester, New York	CLE Training on Immigration Consequences of Crimes	Monroe County Bar Association
11/10/2009	Rochester, New York	CLE Training on Immigration Consequences of Crimes	Monroe County Public Defender
12/12/2009	Ontario, New York	CLE Training on Immigration Consequences of Crimes	Ontario County Criminal Defense Bar and Public Defender Office
2/24/2010	Rochester, New York	Advanced issues relating to Immigration Consequences of Criminal Convictions	Monroe County Public Defender
3/10/2010	Nassau, New York	CLE Training on Immigration Consequences of Crimes	Legal Aid Society of Nassau County
3/22/2010	New York, New York	Immigration Consequences and Criminal Defense: Ethics and Practice	New York Supreme Court Appellate Division, First Department

APPENDIX C: Immigrant Representation Practice Tips Published in New York State Defenders Association's *Backup Center Report*

October-November 1997¹

- Deportable for Jumping a Turnstile: Why You and Your Non-Citizen Client Must Consider Immigration-Related Consequences of Criminal Convictions and/or Conduct

February 1999

- Mandatory INS Detention Follows Most Deportable Offense Convictions
- INS Deportations of Noncitizens in 1998 at All-Time High
- Early Parole For Deportation Suspended, Now Being Re-activated

March 1999

- Youthful Offender Adjudication Likely to Equal Conviction For Deportation Purposes
- Supreme Court Denies Cert—Government Sought to Overturn 2nd Circuit Decision Finding AEDPA Restriction Not Retroactive

June 1999

- Early Parole for Deportation on Hold for Most Noncitizens
- Court Challenge to New Mandatory INS Detention Policy Yields Mixed Results
- Federal Appellate Court Finds New York Misdemeanor May Serve as Aggravated Felony
- First Department Reduces Robbery Sentence by One Day to Block Deportation

July-August 1999

- INS Announces New Policy of Release on Bond in Some Instances for Noncitizens Released from Criminal Custody prior to 10/19/98

September 1999

- BIA Holds NY Youthful Offender Adjudication is a Conviction for Deportation Purposes
- US Court in Brooklyn Rules AEDPA Relief Restriction not Retroactive

¹ Articles published prior to 2000 are on file with *amicus* New York State Defenders Association and are available at the Court's request.

November 1999

- BIA Holds TX Felony DWI is an Aggravated Felony, Triggering Mandatory Deportation

January-February 2000²

- DWI While License Suspended or Revoked Is a Crime Involving Moral Turpitude—Simple DWI Is Not
- Two Federal Courts in New York Reduce Sentences of One Year and One Day to Less than One Year in Order to Avoid Deportation
- INS Deportation of Noncitizens with Criminal Convictions Up 12% in 1999
- ABA Publishes New Standards Requiring Judges and Defense Counsel to Advise Defendants Pleading Guilty about Immigration Consequences
- Early Parole for Deportation Reactivated

March 2000

- Parole Division Issues New Guidelines for Conditional Parole for Deportation
- NYSDA Files Another Amicus Brief Challenging Retroactive Application of New Immigration Laws
- 2nd Edition of Immigration Manual for New York Defense Lawyers Now Available

August 2000

- BIA panel finds conviction vacated under NYCPL 440 not a “conviction”
- Some panels find certain youthful offender dispositions are not convictions
- Recent Developments on Retroactivity of Harsh 1996 Immigration Amendments
- DOJ Proposed Regulations Follow Court Decisions That Found AEDPA Restrictions on Relief from Deportation Not Applicable to Some Cases Pending in 1996
- Federal Judges Rule That AEDPA and IIRIRA Restrictions on Relief From Deportation Are Not Applicable to Cases Not Yet Pending in 1996 but Involving Pre-1996 Criminal Conduct or Convictions
- 2nd Circuit Finds Noncitizen Deportable for Pre-1988 Aggravated Felony Conviction

² Articles published in 2000 and subsequently yearly are located online at <http://www.nysda.org/TheReport.html>.

October 2000

- BIA Holds NY Youthful Offender Dispositions Not Convictions for Immigration Purposes
- 2nd Circuit Holds that AEDPA and IIRIRA Restrictions on Relief from Deportation Are Not Applicable to Individuals Who Pled Guilty Before Those Laws Passed
- 2nd Circuit Holds That a Misdemeanor Can Be an Aggravated Felony
- Other Defense-Relevant BIA and Second Circuit Immigration and Nationality Decisions

November 2000

- 2nd Department Again Dismisses an Appeal Because an Immigrant Defendant Was Deported
- Supreme Court to Review Challenges to INS Indefinite Detention
- INS Using NY Felony DWI-Related Offenses as Aggravated Felonies for Deportation Purposes
- New Federal Law Will Expand Grants of Automatic Citizenship to Certain Foreign-Born Children of U.S. Citizens

January-February 2001

- US Supreme Court to Hear Appeal of Decision Striking Down Retroactive Application of the 1996 Repeal of a Waiver of Deportation for Certain Lawful Permanent Resident Immigrants
- BIA Refuses to Reconsider Holding That NY YO Dispositions Are Not Convictions
- 2nd Circuit Refuses to Rehear Decision Holding a Misdemeanor May Be Deemed an "Aggravated Felony" for Illegal Reentry Sentencing Purposes
- 106th Congress Adjourned Without Passing Legislation to Repeal Any of the Retroactive Provisions of the Harsh 1996 Immigration Laws Immigration Cases
- Federal Court Authorizes Appointment of CJA Counsel in Federal Habeas Proceedings for Noncitizen Petitioner Challenging Removal Order
- New York County Supreme Court Grants Resentencing to Avoid Deportation
- INS Releases Memo Authorizing the Exercise of Favorable Prosecutorial Discretion in Low Priority Immigration Cases

June 2001

- US Supreme Court Affirms 2nd Circuit Decision Striking Down Retroactive

Application of 1996 Repeal of Waiver of Deportation for Certain Immigrants

- US Supreme Court Holds That Government May Not Indefinitely Detain Deportable Immigrants Who Cannot Be Returned to Their Countries of Origin
- Supreme Court Upholds Constitutionality of Law Allowing Citizen Mothers but Not Citizen Fathers to Confer Citizenship on Child Born Outside the US
- BIA Holds Multiple Convictions for Simple DUI Do Not Aggregate into a Crime Involving Moral Turpitude
- BIA Says Misdemeanor Sexual Abuse of a Minor Not Necessarily an Aggravated Felony
- 2nd Circuit Holds Offense Involving Mere Possession of Counterfeit Securities Not Necessarily an Attempt to Commit Offense Involving Fraud or Deceit, an Aggravated Felony
- California Finds Wrong Advice About Immigration Consequences of a Guilty Plea is IAC
- 1-Page Immigration Consequences of Convictions Checklist Available on NYSDA Web Site

July-December 2001

- US Enacts New Regulation and Legislation Expanding INS Authority to Detain Noncitizens After 9/11
- 2nd Circuit Holds DWI Offense Not a "Crime of Violence" Constituting an Aggravated Felony for Immigration Purposes
- US Sentencing Commission Reduces for Some the Sentence Enhancement Applied to Those Convicted of Unlawfully Entering the US After Being Deported Following Conviction of an Aggravated Felony
- NYSDA's Immigrant Defense Project to Provide Legal Support to Immigrants Placed in Removal Proceedings Based on Criminal Charges
- Updated Removal Checklist in Criminal Charge Cases Available on NYSDA Web Site

January-February 2002

- Federal Courts Issue Decisions Favorable to Immigrants in INS Detention and/or Removal Proceedings Based on Criminal Charges
- Help From the Immigrant Defense Project
- Pro Bono Referral in Selected Cases
- Removal Defense Checklist in Criminal Charge Cases Updated
- Legal Resource Materials Training, and Backup Center Support for Those

Representing Noncitizens Detained After Sept. 11

- New Immigration Law Resource for Criminal Lawyers Published by ABA

May-June 2002

- Any State Drug Felony May Now Be Deemed an Aggravated Felony for Immigration Purposes
- Post-September 11 Law Enforcement Targeting of Immigrants Continues
- Immigrant Defense Project Adds Two New Staff Members

July-August 2002

- 2nd Circuit Says LPRs Convicted of Aggravated Felony Can't Apply for Family Hardship Discretionary Waiver of Deportation
- NYSDA Submits Two Amicus Curiae Briefs in 2nd Circuit Cases Raising Issues Involving Interplay Between Criminal and Immigration Law
- NY Manslaughter 2nd Should Not Be a "Crime of Violence" for Aggravated Felony Purposes
- Supreme Court's Invalidation of the Government's Retroactive Application of a 1996 Mandatory Deportation Provision Should Apply to Immigrants Convicted After Trial as Well as Those Convicted by Guilty Plea
- Updated Removal Defense Checklist in Criminal Charge Cases Available

November-December 2002

- BIA Now Holds That ANY State Drug Felony Will Result in Mandatory Deportation for ALL Classes of Immigrants. Some Long-term Lawful Permanent Residents Convicted of NY Misdemeanor Drug Possession May Still Apply for Discretionary Relief From Deportation
- 2nd Circuit Clarifies Standards for Temporary Stays in Immigration Appeals
- 2nd Circuit Holds That Attorney's Affirmative Misrepresentation of Deportation Consequences of Guilty Plea Rendered Counsel Ineffective and Plea Invalid
- National Defending Immigrants Partnership Launched
- Updated Removal Defense Checklist in Criminal Charge Cases Available on NYSDA Website
- Immigrant Defense Project Moves to the Battery Park Area in Lower Manhattan

March-April 2003

- 2nd Circuit Says More Drug Offenses May Be Deemed "Aggravated Felonies" for Illegal Reentry Sentence Enhancement Purposes
- 2nd Circuit Issues Unfavorable Rulings on Retroactive Application of Bar on

Relief From Deportation to Pre-1996 Trial Convictions

- IDP Alert Prepared for Noncitizens Subject to Special Registration Who Have Arrests or Convictions
- Draft Patriot II Act Would Further Limit Longtime LPR's Ability to Avoid Deportation Based on Past Criminal Convictions
- Through DIP, New Jersey Defense Lawyers and New York Public Defense In-House Experts Receive IDP Help
- Updated IDP Resource Materials Posted on NYSDA's Website

May-June 2003

- US Supreme Court Finds Mandatory Detention of Deportable Immigrants With Criminal Convictions Constitutional During Immigration Proceedings
- 2nd Circuit Issues Favorable Decisions That Reduce the Likelihood That Certain NY Crimes Will Be Deemed a "Crime of Violence"
- 2nd Circuit Upholds Dismissal of Illegal Reentry After Deportation Charge Based on a Finding of Fundamental Unfairness of the Prior Deportation Proceedings
- New York City Exempts Police Officers From New Immigrant Status Confidentiality Policy
- IDP Pro Bono Counsel Meade Recognized by NYSBA for Work on Behalf of Immigrants

October-November-December 2003

- Updated and Supplemented 3rd Edition of Manual on Representing Noncitizen Defendants Now Available
- 2nd Circuit Limits Use of Information in Pre-Sentence Reports in Deportation Proceedings
- Defender Organizations Develop In-House Immigration Expertise
- New Immigration Resources Available
- State Court of Appeals Hears Argument in Two Cases Where Noncitizen Defendants Sought Vacatur of Their Guilty Pleas Based on Incorrect [Advice] Regarding Deportation
- Practical Tips to Avoid Aggravated Felonies

January-February 2004

- Counsel's Incorrect Advice About Deportation Issues May Allow Noncitizen Defendants to Seek Vacatur of Guilty Pleas
- BIA Issues Decision That Increases Likelihood Certain NY Crimes Will Be

- Deemed a "Crime of Violence" for Immigration Purposes
- Cert Granted on DWI With Bodily Injury as "Crime of Violence"

June-July-August 2004

- DMV Policy Results in Criminal Charges Lodged Against Noncitizens—How to Defend Against Charges to Minimize Immigration Consequences
- 2nd Circuit Holds That an Individual With a pre-1996 Trial Conviction May Be Able to Pursue Waiver of Deportation Existing Under pre-1996 Law
- Updated Removal Defense Checklist in Criminal Charge Cases Available

September-December 2004

- US Supreme Court Rules That State DWI Offenses That Require Mere Accidental or Negligent Conduct Are Not "Crimes of Violence" for Immigration Purposes
- "Operation Predator" Targets Noncitizen Residents Convicted of Sex-Related Offenses—How to Defend Against Charges to Minimize Immigration Consequences
- New Regulations Issued on "212(c)" Waivers of Deportation for LPRs With Convictions Pre-April 1, 1997; Nunc Pro Tunc Relief Granted for Immigrants Improperly Denied 212(c) Relief Before Having Served Five Years for an Aggravated Felony
- DMV Policy Continues to Result in Criminal Charges Lodged Against Noncitizens
- Continuation of the National Defending Immigrants Partnership
- Updated Removal Checklist in Criminal Charge Cases Available on NYSDA Website

January-February 2005

- 2nd Circuit Leaves Open Question of Whether 2nd Drug Possession Offense Constitutes "Aggravated Felony"

August-September 2005

- 2nd Circuit Rules NY Felony Reckless Assault Is a "Crime Involving Moral Turpitude," But Attempt is Not

November-December 2005

- House of Representatives Passes Bill That Would Severely Impact on Rights of

Immigrants Who Are Undocumented or Have Criminal Records

January-March 2006

- Senate Considers Legislation Severely Impacting the Rights of Undocumented Immigrants and Immigrants With Criminal Dispositions

June-July 2006

- US Supreme Court Grants Cert on Whether a State Drug Possession Offense Constitutes a "Drug Trafficking" "Aggravated Felony"
- 2nd Circuit Finds NY First-Degree Manslaughter is a Crime of Violence
- IDP Launches New Website

November-December 2006

- Criminal Defense of Immigrants in State Drug Cases—The Impact of *Lopez v Gonzales*

August-September 2007

- Board of Immigration Appeals Holds that a Conviction under the First Subsection of the New York Misdemeanor Assault Statute is a Conviction of a Crime Involving Moral Turpitude
- In a Recent Unpublished Decision, the Board of Immigration Appeals Considers Whether a New York State 2nd Degree Harassment Conviction May Constitute a Charge of Deportability as a "Crime of Domestic Violence"
- New York State Legislature Passes and Governor Spitzer Signs Legislation that Authorizes Early Release for Deportation for Noncitizen Inmates Sentenced or Resentenced to Definite Terms of Imprisonment
- NYSDA Publishes and Begins Distribution of Updated and Supplemented Fourth Edition of IDP Immigrant Defense Manual

January-February 2008

- Board of Immigration Appeals Issues Two Decisions That Leave Unclear Whether a New York Immigrant Convicted of More Than One Simple Possession Drug Offense Will Be Deemed Subject to Mandatory Deportation as a "Drug Trafficking" Aggravated Felon
- The Impact of the BIA Decisions in *Matter of Carachuri* and *Matter of Thomas* On Removal Defense of Immigrants with More Than One Drug Possession Conviction