



NEW YORK  
CITY BAR

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The Honorable Kathy Hochul  
Governor of the State of New York  
Executive Chamber  
New York State Capitol Building  
Albany, NY 12224

**Re: Support for A.3057 (AM Cruz) / S.5826 (Sen. Kavanagh), requiring notice of risk of deportation of non-citizens, prior to accepting a plea**

Dear Governor Hochul:

On behalf of the New York City Bar Association's Immigration and Nationality Law Committee and Criminal Courts Committee, we write to express our support for A.3057 (AM Cruz) / S.5826 (Sen. Kavanagh) ("the Bill") which was passed by both houses of the state legislature and urge you to sign this Bill into law. The predecessor version of this Bill (A.9877-A / S.2903-A) also passed both houses of the Legislature but was subsequently vetoed. We urge you to reconsider the Bill and, for the reasons set forth below, believe the Bill fully addresses the concerns articulated in your veto memorandum.

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has approximately 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

## **Why the Bill should be enacted: immigrants have a constitutional right to be notified of potential immigration consequences of guilty pleas**

Immigrants who face charges in the criminal legal system also face potentially severe and life-changing impacts, such as detention, deportation, and ineligibility to ever become U.S. citizens. They may also be subject to prolonged and sometimes permanent family separation. As such, New York must take action to ensure that no immigrant enters a plea without getting a clear, accurate notification from the court that there could be an immigration penalty and are alerted to the need for expert legal advice on this complex overlap between immigration and criminal law.

Enacting standardized court notification language to ensure that judges reinforce defense counsel's duty to provide individualized advice will create a much fairer process. Immigrants have the constitutional right to receive sound immigration advice about all the dire immigration consequences that may attach to their criminal court pleas. Many New Yorkers, including those with green cards, do not receive accurate legal advice about such immigration consequences. What is more, countless immigrants are only alerted to the negative immigration impacts when it is too late, after Immigration and Customs Enforcement has commenced deportation proceedings.

## **What the Bill provides: that the court must warn the defendant of the potential immigration consequences of taking a guilty plea to any offense**

The Bill provides that at arraignment and before a court accepts a guilty plea to any offense, the court must warn the defendant that accepting a guilty plea may be grounds for deportation, exclusion from admission to the United States, or denial of citizenship. The intended effect of the Bill is to provide non-citizens the opportunity, once alerted, to make the necessary inquiries and receive appropriate advice about potential immigration consequences in advance of the entry of a guilty plea, if they have not already done so. In most cases, this should render the convictions less, rather than more, vulnerable to collateral attack. Without a warning, many non-citizen defendants plead guilty to a lesser offense, unaware that even a non-felony conviction can have potential immigration consequences. The interests of justice require a warning mechanism that puts the non-citizen defendant on notice so that they may make an informed choice as to whether to plead guilty.

The Bill also provides for vacatur of a judgment if the court fails to give the required advisal and the defendant establishes that the plea carries potential or actual immigration consequences. If the vacatur is granted, the accusatory instrument is restored, and the case returns to a pre-plea posture. By providing this remedy upon a court's failure to comply with the law, the Bill ensures that the advisal is consistently given, and, in cases where the advisal is not given, ensures that non-citizens are not detained, deported, or otherwise penalized by immigration authorities on the basis of a conviction entered in violation of their constitutional rights. Notably, the retroactive vacatur

provision of this Bill only applies to non-final criminal court cases since the date of the Court of Appeals decision in *People v. Peque*, 22 N.Y.3d 168 (2013).<sup>1</sup> Even then, the retroactive remedy provided for in the Bill is mandated only where a defendant is able to show that a conviction has adverse immigration consequences *and* that the trial court did not issue a warning that complies with the Bill. It is anticipated that the universe of cases that this retroactive provision may apply to is extremely limited and narrow in scope.

### **Why the Bill matters: it clarifies the law and brings New York in line with the majority of jurisdictions that require immigration warnings from the court**

Twenty-eight jurisdictions – including in federal court, multiple states across the country, and the District of Columbia – require immigration warnings from the court by statute, in both felony and non-felony proceedings, demonstrating recognition of the fact that immigration consequences may ensue in non-felony cases.<sup>2</sup> The current New York statute requires such a warning only before a felony plea – which not only ill-serves immigrant defendants taking non-felony pleas that may lead to adverse immigration impacts, but may even *promote* the misconception – among both non-citizen defendants and their defense attorneys – that only felonies carry negative immigration consequences. This Bill will help eliminate this misconception and align New York with the overwhelming majority of other jurisdictions that have addressed the issue.

Significantly, the Bill is not duplicative of a defense attorney’s constitutional duty to advise a criminally accused person of potential *deportation* consequences resulting from a conviction. Rather, the Bill codifies into law a more expansive warning of adverse immigration consequences than what is required by defense counsels pursuant to the United States Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010),<sup>3</sup> and a more expansive judicial

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<sup>1</sup> “Non-final” is a legal term of art wholly defined by caselaw and strictly limits the universe of cases in which the retroactive provision of the Bill may apply. *See Burke v. Crosson*, 85 N.Y.2d 10 (1995); *see also*,

<sup>2</sup> *See* Fed R. Crim. P. 11(b)(1)(O); Alaska R. Crim. P. 11(c)(3)(C); Ariz. R. Crim. P. 17.2(b)(1); Cal. Penal Code Ann. § 1016.5; Conn. Gen. Stat. § 54-1j; D.C. Code § 16-713; Fla. Rule Crim. Proc. 3.172(c)(8); Ga. Code Ann. § 17-7-93(c); Haw. Rev. Stat. Ann. §§ 802E-1 - 802E-4; Idaho Crim. R. 11(d)(1); 725 Ill. Comp. Stat. Ann. § 5/113-8; Iowa Ct. R. Crim. 2.8(2)(b)(3); Mass. Gen. Laws, ch. 278, § 29D; Me. R. Crim. P. 11(h); Md. R. 4-242(e); Minn. R. Crim. P. 15.01(6)(1); Mont. Code. Ann. 46-12-210(1)(f); Neb. Rev. Stat. Ann. § 29-1819.02; N.C. Gen. Stat. § 15A-1022; N.M. R. Crim. P. 5-303(f)(5); ORC 2943.031; Or. Rev. Stat. § 135.385(d); R.I. Gen. Laws § 12-12-22; Tenn. R. Crim. P. 11(b)(1)(J); Tex. Code. Crim. Proc. Art 26.13(a)(4); Vt. Stat. Ann., Tit. 13, § 6565(c)(1); Wash. Rev. Code § 10.40.200; Wis. Stat. 971.08.

<sup>3</sup> *See People v. Lovell*, 188 A.D.3d 1255, 1257, [2d Dept 2020]; *see also, Garcia v. United States*, 2012 WL 5389908, at 5, 2012 U.S. Dist LEXIS 158506 [N.D.Cal., No. CR 97-022 MEJ] (noting that *Padilla* does not require defenses counsels to warn defendants of other severe immigration consequences, including exclusion from the United States).

warning than what is required pursuant to the New York Court of Appeals decision in *People v. Peque*, 22 N.Y.3d 168, 197 n9 (2013) (expressly reserving the question of whether an immigration warning is required in misdemeanor cases).<sup>4</sup>

In many misdemeanor and violation cases, immigration consequences attach without any consideration of individual equities – even when someone is a long-time lawful permanent resident with deep ties to this country, even if they serve no jail time, and even if the conviction is years or even decades old. That is because many kinds of state court convictions have the consequence of rendering a non-citizen susceptible to removal from the United States, or of barring a non-citizen from relief from removal, consequences that are not always immediately apparent at the time of pleading.<sup>5</sup>

**How the Bill promotes conviction integrity: it ensures individuals are apprised of the potential for adverse immigration consequences resulting from guilty pleas, making such convictions less vulnerable to legal challenges**

Lastly, the Bill maintains conviction integrity and finality in the criminal justice process by ensuring that individuals are fully apprised of severe immigration consequences prior to accepting a guilty plea. Without this safeguard, the criminally accused are deprived of fully understanding the consequences of a plea agreement and convictions are vulnerable to legal challenges – thereby potentially depriving victims of justice years after a defendant has pleaded guilty to a crime. In this regard, the Bill provides a necessary safeguard to ensure that all parties reach finality in a criminal proceeding.

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The Bill improves New York’s present system of providing fair warning to non-citizen defendants about the potentially grave immigration consequences of a guilty plea, renders the immigration warning more meaningful by providing a remedy if the law is violated, and promotes

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<sup>4</sup> See *People v. Amantecatl*, 74 Misc.3d 88, 91 [App Term, 2d, 2nd, 11th, & 13th Jud Dists 2022] (noting that the *Peque* court did not determine that adverse immigration warnings are required in misdemeanor cases).

<sup>5</sup> The City Bar has long supported such notice to non-citizen defendants, not just for felony pleas but also for pleas to misdemeanors and violations. See “*Padilla v. Kentucky*: The New York City Criminal Court System, One Year Later,” June 2011, <https://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf> (All websites last accessed August 4, 2023) (noting that, in *Padilla v. Kentucky*, the U.S. Supreme Court held that criminal defense attorneys have a Sixth Amendment duty to advise noncitizen defendants about the immigration consequences of their criminal convictions, and further noting that the case “reinforce[s] a longstanding criticism of the current New York law: that by focusing only on felony cases, the New York law ... may create the misimpression that only felonies lead to deportation and other immigration penalties”); “New York City Bar Association Applauds Court of Appeals’ Ruling Regarding Due Process Rights of Immigrant Defendants in *People v. Peque*; Urges Extension of Ruling to Misdemeanor and Violation Pleas and Enactment of a Meaningful Statutory Remedy for the Court’s Failure to Advise Regarding Deportation,” Feb. 2014, <https://www2.nycbar.org/pdf/report/uploads/20072657-SupportforPeoplev.PequeAppealsDecision.pdf> (applauding Court of Appeals’ decision in *People v. Peque* requiring a judge to advise a noncitizen criminal defendant that pleading guilty to a felony may result in deportation; urging trial and appellate courts to extend the *Peque* ruling to misdemeanors and violations; and urging State Legislature to amend CPL 220.50(7) to include misdemeanors and violations, and to authorize automatic vacatur if court fails to issue such warning).

higher standards of practice among all players in the criminal system. New York can prevent undue harm to immigrant communities and ensure finality in the criminal justice process by clarifying existing legal protections and providing a remedy to those whose rights have been violated. For these reasons, we urge you to sign A.3057 / S.5826 into law.

Respectfully,

*Danny Alicea*

Danny Alicea, Chair  
Immigration & Nationality Law Committee

*Carola Beeney*

Carola Beeney, Co-Chair  
Criminal Courts Committee

*Anna G. Cominsky*

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Cc: Hon. Catalina Cruz  
Hon. Brian Kavanagh

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