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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

The New York City Bar Association, through its Immigration and Nationality Law, Criminal Courts, and Criminal Justice Operations committees, applauds the New York Court of Appeals' recent decision in *People v. Peque, Diaz, & Thomas,* requiring a judge to advise a non-citizen criminal defendant that pleading to a felony may result in deportation.

The Court of Appeals' acknowledgement of the "truly unique" nature of deportation is particularly welcome. The *Peque* Court held that deportation is such a severe consequence of a criminal conviction that an immigrant defendant's plea cannot truly be voluntary and intelligent without a trial judge's advisal that deportation may result. The Court also detailed the punitive aspects of immigration detention and deportation, including the permanent exile of individuals with deep family and community roots who financially support their families—particularly common in New York, a city of immigrants since the 1650s.

We urge the trial and appellate courts to extend the *Peque* ruling to misdemeanors and violations. We also urge the State Legislature to amend New York Criminal Procedure Law ("NYCPL") 220.50(7) to include misdemeanors and violations, and to authorize automatic vacatur if the record establishes that the court failed to issue the statutory warning. Though the Court noted that it had no occasion to consider whether its holding should apply to misdemeanor pleas, the rationale underlying the Court's decision would seem to apply in all criminal cases because a conviction for some misdemeanors and violations can also lead to deportation. Thus, as described below, there is no rational reason to limit a court's obligation to advise to felony cases. Also, the Court's requirement that a defendant establish prejudice to obtain a remedy will leave many noncitizen defendants with virtually no access to a meaningful remedy for a clear due process violation.

The City Bar has long supported reforms to improve due process and access to justice for noncitizens in criminal court and immigration proceedings, including reform of immigration laws that deport noncitizens for minor crimes, resources for the provision of accurate immigration advice to noncitizen defendants, and appointed counsel and reduced detention.

MISDEMEANOR AND VIOLATION PLEAS

The City Bar supports a judicial extension of the *Peque* ruling beyond felonies to misdemeanors and violations, and also supports an amendment to NYCPL 220.50(7) to include misdemeanor and violation pleas.[1] Currently, both the judge's statutory duty to advise (NYCPL 220.50(7)) and *Peque,* which outlines how defendants may seek vacatur of their guilty pleas if the judge does not comply with this duty, require no advisals to be given by judges accepting misdemeanor or violation pleas from noncitizen defendants.

Misdemeanor offenses also commonly trigger deportation proceedings, due to the harsh nature of federal immigration laws. For example, even a single misdemeanor conviction for drug possession, or two marijuana violations, trigger deportation proceedings, even if the defendant was sentenced to no jail time, had a very small amount of drugs, is in need of substance abuse treatment, or is a long-time lawful permanent resident. Harsh immigration consequences also attach to misdemeanors as minor as shoplifting or turnstile jumping. Moreover, in sheer numbers, misdemeanor pleas in New York dwarf felony pleas. In New York, 75% of prosecutions in 2010 and 2011 were for misdemeanors and violations.[2] 99.6% of misdemeanor convictions stem from guilty pleas.[3]

For these reasons, the City Bar has previously supported legislation that requires trial judges to advise non-citizen defendants of potential immigration consequences of their plea regardless of whether the case is a felony, misdemeanor, or violation. We reiterate this support today. While *Peque* is an important affirmation of the due process rights of noncitizens, the interests of justice require an adequate warning mechanism for noncitizen defendants in all criminal cases. This could be accomplished through a judicial extension of *Peque*, or an amendment to NYCPL 220.50(7).

AUTOMATIC VACATUR

Furthermore, the City Bar supports an amendment to NYCPL 220.50(7) which would allow a defendant to vacate a plea if the Court fails to advise of immigration consequences, a remedy not available under either the statute or *Peque*. NYCPL 220.50(7) currently provides no remedy for a judge's failure to comply. Likewise, *Peque* provides no effective enforcement mechanism to require that advisals be consistently given. Rather, instead of automatic vacatur, *Peque* requires a defendant to file a post-judgment motion to vacate in the trial court, in which the defendant must establish that (s)he individually suffered prejudice from the lack of warning.

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[1] Current New York Senate Bill 116 and Assembly Bill 7283 would amend NYCPL 220.50(7) to include misdemeanor pleas (but not violations), but does not go so far as to require automatic vacatur with a remedy. *See* http://assembly.state.ny.us/leg/?bn=A07283&term=2013.

[2] Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1776 (2012).

[3] Mosi Secret, *Low Bail, but Weeks in Jail Before Misdemeanor Trials*, N.Y. TIMES, Dec. 3, 2010, at A27.

The City Bar does not believe this is an adequate remedy. If due process requires a warning to protect noncitizens' rights, defendants should not unfairly bear the burden to prove prejudice, as Chief Justice Lippman said in his *Peque* dissent. Several jurisdictions have statutes authorizing vacatur if the court fails to issue the required warning. New York should do the same.

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