REPORT ON LEGISLATION
BY THE IMMIGRATION AND NATIONALITY LAW COMMITTEE
THE CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND THE CRIMINAL ADVOCACY COMMITTEE

A.4319	**M. of A. Dinowitz**
S.689	**Sen. Hoylman**

AN ACT to amend the criminal procedure law, in relation to the right of a defendant who has entered a plea of not guilty to an information which charges a misdemeanor to a jury trial.

THIS BILL IS APPROVED

The New York City Bar Association's Immigration and Nationality Law, Criminal Justice Operations and Criminal Advocacy Committees ("the Committees") respectfully submit this report in support of A.4319/S.689 (the "Bill"), which would eliminate the prohibition of a right to a jury trial for B misdemeanors in New York City Criminal Courts. This Bill would promote fairness and transparency for non-citizen New Yorkers in our criminal courts, and would place all individuals charged with certain misdemeanors on a level playing field with regard to the right to a jury trial, regardless of the location of their trial or the individual's immigration status. The City Bar's over 25,000 members include attorneys in private practice, government service, non-profit practice, and academia. The Immigration and Nationality Law Committee is comprised of immigration attorneys, government employees, immigration law scholars, and attorneys specializing in human and civil rights. The Criminal Justice Operations and Criminal Advocacy Committees focus broadly on issues concerning the practice of criminal law. This report is based upon committee members' expertise and experience counseling clients.

Under New York law, "B misdemeanors" are subject to a maximum term of imprisonment of six months or less. Currently, New York Criminal Procedure Law (NYCPL) § 340.40[2] mandates that trials for B misdemeanors within New York City must be conducted as bench trials. For those facing similar charges outside New York City, there is no similar prohibition on jury trials. This Bill would eliminate that disparity and make jury trials available to people charged with B misdemeanors whether they are in New York City or elsewhere in the state. In addition, the Bill would mitigate the effects of a New York Court of Appeals decision, *People v. Suazo*, 32 N.Y.3d 491 (2018), which holds that non-citizens facing B misdemeanor charges in New York City Criminal Courts must demonstrate that conviction would result in their deportation before receiving a jury trial. Due to the sensitive nature of information about immigration status, and the complexity of determining the likelihood of removal or other immigration consequences of

misdemeanors, the Court of Appeals decision creates significant uncertainty of entitlement to a jury trial and raises constitutional questions.

New York was the target of increased immigration enforcement throughout the Trump Administration. During that time, New York State has experienced several major enforcement operations, including the arrests of 225 immigrants over a six-day period in April 2018 and 118 immigrants in January 2019. The Immigrant Defense Project documented a 1700% increase in ICE arrests since 2016.[1] Both documented and undocumented immigrant New Yorkers were arrested. By extending the right to a jury trial to individuals regardless of their location or immigration status, New York State can demonstrate its commitment to ensuring the law applies equally to all its residents.

NY CPL § 340.40[2], (Modes of Trial), as amended by chapter 815 of the law of 1971, mandates bench trials by a single judge for B misdemeanor charges within the New York City Criminal Court system. This amendment was enacted in response to the high volume of misdemeanor cases within New York City Criminal Courts pending at the time of the amendment.[2] However, in recent years, the number of misdemeanor cases in New York City Criminal Courts has decreased significantly.[3] As of 2017, accounting for population and geographic size, the number of New York City misdemeanor arrests converge with misdemeanor arrests for the rest of the State, diminishing the need for the existing provision.[4] Moreover, as expressed by the New York Court of Appeals, there are lingering constitutional issues related to the implementation of NYCPL § 340.40[2].

The constitutionality of the New York City provision was called into question by the New York Court of Appeals in *People v. Suazo*, 32 N.Y.3d 491 (2018). In *Suazo*, the non-citizen defendant was charged with a B misdemeanor and requested a jury trial. The defendant argued that the potential consequence of deportation was severe enough to trigger his right to a jury trial as guaranteed by the Sixth Amendment of the United States Constitution. The trial court denied the defendant's motion, and following a bench trial, found the non-citizen defendant guilty of the B misdemeanor charges. The Appellate Division affirmed the trial court's ruling and conviction. *Id*. at 495. The Court of Appeals reversed the Appellate Division, holding that deportation was a penalty severe enough to trigger the Sixth Amendment guarantee of a jury trial. However, the court went on to state that not every non-citizen would receive this right. Instead, a non-citizen must first "demonstrate[e] that a charged crime carries the potential penalty of deportation" to be afforded a jury trial under this provision. *Id.* at 493.

One major drawback to the rule enunciated by the Court in *Suazo* is that it would require individuals to disclose their immigration status in criminal proceedings in open court. In removal

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[1] "*The Courthouse Trap: How ICE Operations Impacted New York's Courts in 2018*." Immigrant Defense Project (January 2019), https://www.immigrantdefenseproject.org/wp-content/uploads/TheCourthouseTrap.pdf (all websites last visited May 24, 2021).

[2] *People v. Urbaez*, 10 N.Y.3d 773, 775 (2008)

[3] Patten, M., Hood, Q. O., Low-Weiner, C., Lu, O., Bond, E., Hatten, D., & Chauhan, P. (2018, December). *Trends in Misdemeanor Arrests in New York, 1980 to 2017* at 19, New York: New York., http://misdemeanorjustice.org/wp-content/uploads/2018/12/FINAL.pdf

[4] *Id*. at 21-22.

proceedings in federal immigration courts, the government bears the burden of proving an individual's alienage.[5] Criminal court proceedings are public and are documented through court transcripts and records, such that an individual's admission of alienage could be used against them in removal proceedings in immigration court. As a result, many non-citizens may forego the constitutional right to a jury trial out of fear of discussing their immigration status in open court. Additionally, apart from potential consequences in removal proceedings, courts have found that the mere conjecture of unlawful immigration status may unfairly prejudice fact-finders against a witness.[6]

Furthermore, the Court of Appeals in *Suazo* left open the question of which types of immigration consequences, other than deportation, would give rise to the right to a jury trial. For instance, the Court did not decide whether a defendant would be entitled to a jury trial if he or she is otherwise removable beyond the charged misdemeanor offense. Such uncertainty produces an additional chilling effect on a non-citizen defendant's exercise of their right to a jury trial. In addition, the United States Supreme Court, in *Jae Lee v. United States,* 137 S. Ct. 1958 (2017) determined that avoiding deportation was a fundamental, if not determinative, consideration for a non-citizen defendant, such that an attorney would be ineffective in failing to advise defendants about the potential immigration consequences of accepting a plea versus going to trial, regardless of the likelihood of success at trial. This principle is aligned with the longstanding holding of the Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010) and its progeny, recognizing that deportation is a unique and severe consequence that therefore implicates a defendant's Sixth Amendment right to counsel. These cases highlight the importance of a non-citizen defendant's right to effectively weigh the risks of taking a plea or exercising their right to a jury trial.

Another reason to repeal CPL 340.40 is the incongruous result of the *Suazo* decision. Because New York City is the only locality, under CPL 340.40, that mandates that trials for B misdemeanors be conducted as bench trials, and because *Suazo* now mandates that non-citizens facing deportation be permitted jury trials, arguably the only population not permitted jury trials in criminal matters in New York State are United States citizens accused of B misdemeanors in New York City. This incongruous and unfair result is reason itself to repeal CPL 340.40(2).

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[5] *See U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the government." (internal citations omitted); *see also, I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 229 n1 (2d Cir. 2014) ("Ordinarily, in removal proceedings, the government bears the initial, but limited, burden of proving an individual's removability by establishing his 'identity and alienage'…"); *Matter of Sandoval*, 17 I. & N. Dec. 70, 79 (BIA 1979) ("In fact, in many deportation cases the sole matters necessary for the Government to establish are the respondent's identity and alienage").

[6] *See People v. Torriente*, 131 A.D.2d 793, 794, 517 N.Y.S.2d 159, 160 (1987); *People v. Garcia*, 146 A.D.2d 584, 584, 536 N.Y.S.2d 834, 834 (1989); *see also, Sanchez v. Davis*, 888 F.3d 746, 751 (5th Cir. 2018) ("a defendant's illegal status is considered so inflammatory that it is often the subject of *motions in limine*, the point of which is to ensure that testimony is not revealed to the jury that is so prejudicial that even a subsequent instruction to disregard cannot undo the damage"); *DeJesus-Andujar v. Pash*, No. 15-0414-CV-W-DGK-P, 2015 WL 9009302, at 3 (W.D. Mo. Dec. 15, 2015) ("We recognize that numerous cases have held that a witness's status as an illegal immigrant is inadmissible at trial, because it has limited if any probative value even as to the witness' credibility; any marginal probative value of such evidence is outweighed by the potential that it will unfairly prejudice the jury against the witness").

The Committees recognize the challenges this Bill would create by affording a jury trial to all individuals charged with B misdemeanors in New York City Criminal Courts. In 2017, there were approximately 470 bench trials (including B misdemeanors) in New York City. Within the Kings County District Attorney's Office in 2018, at least 127 trials were conducted as bench trials. As of 2018, there were at least 2,666 pending B misdemeanor cases in New York City's Criminal Courts. A right to a jury trial for everyone charged with a B misdemeanor would require increased staffing and resources for New York City Criminal Court. Recognizing the potential increase in jury trials that this Bill creates, the Committees also call on the Legislature to allocate appropriate resources and funding to implement this Bill in a manner that maintains case completion times and is consistent with the highest standards of procedural due process.

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New York City has over 3.3 million foreign-born residents.[7] This Bill is essential to ensure equal treatment of defendants, regardless of their county of residence and their immigration status. The Bill would not only level the playing field for defendants in all five boroughs, but will also ensure that non-citizen defendants would not have to choose between disclosing their immigration status in criminal court and forgoing their right to a jury trial. For these reasons, the City Bar supports the Bill.

Our recommendation encompasses an understanding that adequate funding will be required by and provided to the New York City Criminal Court, affected district attorney's offices and public defender organizations. While at some level we anticipate that the legislation, if enacted, may lead to fewer convictions and lower or lesser sentences across the city's misdemeanor docket and thereby translate into some cost savings, we are mindful that the overall costs associated with increasing access to jury trials are not insignificant. There must, therefore, be a funding structure in place adequate to cover these associated costs.

Immigration & Nationality Law Committee
Danny Alicea, Chair

Criminal Justice Operations Committee
Tess M. Cohen, Chair

Criminal Advocacy Committee
Brian Adam Jacobs, Chair

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Contact
Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org

[7] New York City Comptroller, "*Our Immigrant Population Helps Power NYC Economy*" (Jan. 11, 2017), https://comptroller.nyc.gov/reports/our-immigrant-population-helps-power-nyc-economy/.

* This report was first issued in April 2019, during the terms of the following committee chairs: Immigration & Nationality Law Committee, Victoria Neilson; Criminal Justice Operations Committee, Sarah Berger and Criminal Advocacy Committee, Brian Adam Jacobs.