COMMITTEE ON IMMIGRATION AND NATIONALITY LAW

A.5285 **M. of A. Lopez**

THE BILL IS APPROVED WITH TECHNICAL RECOMMENDATIONS

The Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York submits this memorandum in support of A5285 (Lopez).

A5285 would amend sections 170.10, 180.10, 210.15 and 220.50 of the New York Criminal Procedure Law (CPL) to provide that at arraignments and before a court accepts a guilty plea to any offense, the court must warn the defendant that if he or she is not a citizen of the United States, the court's acceptance of that guilty plea may be grounds for his deportation, immigration detention, exclusion from admission to the United States, or denial of citizenship. The bill would also amend existing sections 220.50, 220.60 and 440.10 of the CPL to permit a plea withdrawal pre-sentencing and a conviction vacatur and plea withdrawal post-judgment, respectively, if the court fails to give the required advisal prior to entry of a guilty plea, and the defendant shows that plea acceptance may have negative immigration consequences. Upon the plea withdrawal, the entire accusatory instrument, as it existed at the time of the plea, would be restored. A5285 would promote fairness and integrity in the criminal justice system by extending to noncitizen defendants charged with lesser offenses the fair warning right now given to

felony defendants under current CPL §220.50(7). That section currently requires the court to give an immigration advisal prior to the entry of a guilty plea, but only when the plea is to a felony count of an indictment or superior court information.

Particularly since the enactment of sweeping immigration law changes in 1996,[1] the devastating impact of immigration detention and deportation on noncitizens and their families often ensues from relatively minor offenses such as many New York misdemeanors, and even some New York violations (which are not crimes under New York law).[2] These consequences, in many cases mandatory detention and deportation with consideration of any equities disallowed, may result even when the convicted defendant is a long-time lawful permanent resident with deep family and community ties to the United States, even if he serves no jail time, and even when under state law, his plea is later vacated pursuant to a rehabilitative program such as a drug treatment or domestic violence counseling program.[3]

For many non-citizen defendants who are lawfully in the United States or have the potential to obtain lawful status, the most important consideration in whether to plead guilty to a particular offense may be whether that offense would render them deportable, ineligible to become a lawful permanent resident or citizen, or ineligible for relief from

[1] The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, together dramatically expanded the criminal grounds of deportability and restricted the availability of discretionary relief from removal.

[2] A significant number of New York misdemeanors and violations will or may make a noncitizen removable from the United States and/or ineligible for citizenship. For example, immigrants are barred from applying for citizenship for five years for such minor infractions as two turnstile-jumping offenses, and in some cases are mandatorily deportable for even one such offense. A lawful permanent resident with a single violation for unlawful possession of marijuana is also barred from citizenship for five years. Under some circumstances, that same violation will subject her to detention without the possibility of release on bond, and removal without the possibility of any available avenue of relief.

[3] See 8 U.S.C. §1101(a)(48)(admission or finding of guilt coupled with any restriction imposed on liberty constitutes a "conviction" for immigration purposes); Matter of Roldan-Santoyo, 22 I&N Dec. 546 (BIA 1999)(holding that a person "remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure").

deportation. Yet without a warning, many non-citizen defendants plead guilty to lesser New York offenses unaware of these potential immigration consequences. The interests of justice require a warning mechanism that puts the non-citizen defendant on notice, so that he may make an informed choice as to whether, and to what, to plead guilty.

The generally acknowledged standard of judicial conduct is to advise a non-citizen defendant that a guilty plea may have immigration consequences. This standard makes no distinction between whether the plea is to a felony or otherwise.[4] Furthermore, of the twenty-two jurisdictions that currently mandate immigration warnings to their criminal defendants-- including other immigrant-heavy states such as California, Florida, and Texas-- twenty have acknowledged the reality that immigration consequences may ensue from non-felony convictions by requiring their immigration warnings in non-felony proceedings.[5] New York stands starkly alone with Maine[6] in this regard--at no point during non-felony proceedings in New York is an immigration warning currently required.

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[4] ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-1.4(c). That standard provides: "Before accepting a plea of guilty or *nolo contendere*, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including . . ., if the defendant is not a United States citizen, a change in the defendant's immigration status. The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea."

[5] California, Connecticut, Washington, DC, Florida, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, North Carolina, Ohio (but not as to minor misdemeanors), Oregon, Rhode Island, Texas, Washington, and Wisconsin all extend their warnings to non-felony proceedings. See Cal. Penal Code § 1016.5 (West 1995); Conn. Gen. Stat. Ann. § 54-1j (West 1994); D.C. Code Ann. § 16-713 (West 1994); Fla. R. Crim. P. 3.172(8) (West 1995); Ga. Code Ann. § 17-7-93 (1997); Haw. Rev. Stat. § 802E-1 (West 1994); Mass. Gen. Laws Ann. ch. 278, §29D (West 1994); Md. R. 4-242(e) (Michie 2001); Minn. Rule Crim. Proc. 15.01(10)(c) (2000); Mont. Code Ann. § 46-12-210(1)(f) (1997); Neb. Rev. St. §29-1819.02 (West 2003), N.M. Dist. Ct. R.Cr.P. 5-303(E)(5) (1992); N.Y. Crim. Proc. Law § 220.50(7) (McKinney 2001 Cum. Supp. Pamphlet); N.C. Gen. Stat. § 15A-1022(a)(7) (West 1994); Ohio Rev. Code Ann. § 2943.031(A) (Anderson 1993); Ore. Rev. Stat. § 135.385(2)(d) (1997); R.I. Gen. Laws § 12-12-22 (West 2003), Tex. Code Crim. Proc. Ann. art. 26.13(a)(4) (West 1994); Wash. Rev. Code Ann. § 10.40.200 (West 1995); Wis. Stat. Ann. § 971.08(1)(c) (West 1994).

[6] Me. R. Crim. P. 11(b)(5) (West 2002) (advisals only for class A, B, and C crimes, also characterized as felonies).

That New York requires such a warning only before a felony plea may even promote the misconception among New York's non-citizen defendants and their defense attorneys that only felonies carry negative immigration consequences. A5285 would help eliminate this misconception, align New York with the overwhelming majority of other states that have addressed the issue, and require under law what is promoted under standards of judicial conduct. Non-citizens charged with lesser offenses would be provided the critical warning that affords fair notice to investigate and understand the potential immigration consequences of a guilty plea.

By providing a plea withdrawal remedy upon a court's failure to administer the immigration warning prior to the entry of a guilty plea, A5285 would also ensure that the advisal is consistently given when required and, in those cases where the advisal is not so given, provide an appropriate remedy for non-citizen defendants who suffer negative immigration consequences.

Consistent with its proposed changes to provide an explicit remedy for the court's failure to give the immigration advisal, A5285 would delete language in current CPL §220.50(7) that provides that the court's failure to give the required immigration advisal to felony defendants prior to the entry of a guilty "shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization."

A withdrawal provision is necessary in order to make the advisal requirement meaningful and to assure consistent application in all state's courts. No statistics exist to establish how often the currently required immigration advisal is administered, and

undoubtedly practices differ from court to court and from county to county. Legal practitioners have affirmed, however, that in some counties courts often fail to provide the immigration advisal on the record.[7] The explicit remedy exclusion has led to the statute being treated by some courts more as an optional advisory provision, rather than a mandatory provision. A5285's replacement of this remedy exclusion with an affirmative plea withdrawal remedy would surely promote more consistent application of an immigration advisal when required.

While some may be concerned that the proposed remedy provisions would lead to a large increase in the number of collateral attacks by non-citizens on their plea convictions, there are several indicators that such a result would not be the case. First, A5285 specifies that the proposed remedy provisions would not inure to a non-citizen defendant if a court's failure to provide an immigration advisal occurred prior to the law's effective date. Moreover, ten jurisdictions already provide for a remedy upon a court failure to give a required immigration warning.[8] According to prosecutors in California and Connecticut, the opening up of floodgates – such as abuse of motions to vacate based on failure to comply with the advisement provision – has not materialized in

[7] According to Richard M. Greenberg, the Attorney-in-Charge of the Office of the Appellate Defender, which provides appellate and post-conviction representation to indigent clients whose convictions arose in New York and Bronx Counties, in his experience the advisal required by CPL §220.50(7) is infrequently given, and by his estimate given on the record in fewer than 10% of the plea cases. See Affirmation of Richard M. Greenberg, Attorney-in-Charge, Office of the Appellate Defender (March 9, 2004)(on file with the New York State Defenders Association). Edward J. Nowak, Monroe County Public Defender, affirms that more often than not, Monroe County judges have failed to advise noncitizen criminal defendants of the possible immigration consequences of their guilty pleas before accepting their pleas. See Affirmation of Edward J. Nowak, Monroe County Public Defender (March 8, 2004)(on file with the New York State Defenders Association).

[8] California, Connecticut, the District of Columbia, Florida, Massachusetts, Nebraska, Ohio, Texas, Washington, Wisconsin. See Cal. Penal Code § 1016.5 (West 1995); Conn. Gen. Stat. Ann. § 54-1j (West 1994); D.C. Code Ann. § 16-713 (West 1994); Fla. R. Crim. P. 3.172(8)(West 1995); Mass. Gen. Laws Ann. ch. 278, §29D (West 1994); Neb. Rev. St. §29-1819.02 (West 2003), Ohio Rev. Code Ann. § 2943.031(A) (Anderson 1993); Tex. Code Crim. Proc. Ann. art. 26.13(a)(4) (West 1994); Wash. Rev. Code Ann. § 10.40.200 (West 1995); Wis. Stat. Ann. § 971.08(1)(c) (West 1994).

those states.[9] Finally, an intended practical effect of A5285's proposed changes is to provide non-citizen defendants the opportunity, once alerted, to make the necessary inquiries and receive appropriate advice in advance of the entry of a guilty plea. In many cases, this should serve to render the convictions less, rather than more, vulnerable to successful collateral attack.

In conclusion, A5285 would improve New York's present system of providing fair warning to non-citizen defendants of the potentially grave immigration consequences of a guilty plea. It would eliminate a misleading distinction between felony pleas and pleas to lesser offenses, and render the immigration warning more meaningful by providing a possible remedy if there is a failure to warn and prejudice results. It would promote higher standards of practice among the players in the criminal justice system, thus promoting confidence in that system among New York's diverse immigrant population.[10]

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[9] According to Penny Schneider, the Assistant Director of the Training Division in the Los Angeles District Attorney's Office, the California immigration advisal and plea withdrawal provision, similar to that in S-3367[B][C], has neither inundated the state courts with collateral attacks on convictions nor created problems or extra work for the District Attorney's office. (Telephone Interview with Penny Schneider, Assistant Director of Training Division, Los Angeles District Attorneys Office (April 29, 2004).) Assistant State Attorney John Wahlen confirms that the Connecticut immigration advisal and plea withdrawal provision has not overwhelmed the courts by increasing the number of collateral attacks by noncitizens on their plea convictions, nor posed a problem for the state's prosecutors. (Telephone Interview with John Wahlen, Assistant State Attorney, Office of Chief State's Attorney (April 29, 2004))6.

[10] The Committee recommends, however, two technical corrections to A5285. As currently drafted, Section 9 of A5285 sets forth the act's effective date as "the first of November next succeeding the date on which it shall have become a law, provided, however, that the amendment to subdivision 7 of section 220.50 of the criminal procedure law made by section five of this act shall not affect the repeal of such subdivision and shall be deemed repealed therewith." Section 9 refers to a repeal of subdivision (7) of §220.50, but A5285 does not effect any repeal. To correct what is apparently a technical error, we recommend that Section 9 simply read: "This act shall take effect on the sixtieth day after enactment, " in accordance with the Sponsor's Memo, or "This act shall take effect on the first of November next succeeding the date on which it shall have become a law" (leaving out the language of the proviso). Also to correct what is apparently a technical error, we suggest that on lines 5 and 6 of Section 2 (amending CPL 170.10), the phrase "is an information, a prosecutor's information or a misdemeanor complaint," should be moved to follow the first four words of the sentence, "Where the accusatory instrument."