Committee on Immigration
The Council of the City of New York

Mr. Gary Altman, members of the Committee on Immigration, and other City Councilmembers: My name is Michelle Fei and I'm the Co-Director of the Immigrant Defense Project. IDP is one of the few – if not only – organizations in New York City that focuses exclusively on criminal-immigration matters. So I'm particularly grateful for this opportunity to speak about the negative effects of entering a guilty plea. I also would like to take this time to talk about one way that these negative effects can be mitigated: through judicial advisals that warn of immigration consequences before a guilty plea is entered in criminal court.

The 1996 laws that dramatically changed the landscape for immigrants who encountered the criminal justice system have now been in effect for the past 13 years. But even today, all sorts of folks – from immigrants and their families to prosecutors to criminal defense attorneys to community-based organizations – remain amazed at just how devastating the effects of this law can be. We don't typically think that green card holders who have lived here all their lives can be deported. But the truth is they are. And these are not extreme, uncommon, or hypothetical examples. To the contrary, they are common, everyday, real occurrences.

Let me give you one real-life example. I'll call her Gabrielle. Gabrielle was a young client of IDP's who had come to the US at a very young age and had a green card. When she was a teenager, she got busted smoking pot with some of her friends. She pled guilty to criminal possession of marijuana because no one told her that this guilty plea could affect her immigration status. Upon coming back from visiting her grandmother in St. Lucia, she was shackled and spent the next three years getting shuffled between seven detention facilities throughout the country. Gabrielle now says that if she had known how her guilty plea could have so disruptive and disturbing, she would have taken the Youthful Offender adjudication she was offered, which would have avoided this drawn-out, traumatic experience.

On the IDP hotline – through which we field more than 1500 calls a year, often more than 20 calls a day – we hear all the time from family and friends who cannot fathom how getting caught smoking a joint once has now resulted in permanent exile from the US; from criminal defense attorneys who never thought they needed to ask what their clients' immigration status was; from immigration advocates who, despite the nature of their work, are still bewildered by how a country built by immigrants can nevertheless treat their own so shamefully. So let me be clear: when we talk about noncitizens getting deported because of guilty pleas, we really do mean *everyone* who is not a citizen – including green card holders who have been here "all their lives," tourists who fell in love and decided to stay with their partners, and undocumented youth who crossed the border in order to support their families.

The guilty pleas that get noncitizens in trouble, too, range from simple violations (which technically aren't even considered crimes) to serious felonies. We know there are those who believe that immigrants who commit serious crimes don't deserve a chance to stay in the US. IDP disagrees; we feel that immigrants who encounter the criminal justice system pay for their crimes just like anyone else does. They shouldn't face additional penalties just because they happened to not have been born in the US. But even if you bought the argument that these

immigrants should be mandatorily detained and deported, I think most would feel uncomfortable exiling someone who jumped a turnstile, got caught smoking up with friends, or shoplifted. Yet that's precisely what happens – with astonishing frequency – to immigrants all across the US, including those who have their green cards.

These problems are especially acute in New York City, where, as we all know, immigrants make up 36 percent of our population. When immigrants plea guilty in criminal cases – often not because they are in fact guilty but rather because they're told it's the easiest way to dispose of their cases – the sad likelihood is that, no matter what their immigration status, no matter how serious their convictions are under criminal law, they often find themselves on the path towards deportation. That's because Immigration is increasingly stationed at local jails and prisons in order to identify and lodge detainers on every individual who could be removable. In NYC, obviously, this is happening full force at Rikers. Even worse, once these immigrants are picked up by Immigration, they're getting shipped off to places as far away as Louisiana, Alabama, and Texas. They're far from their families, friends, and other resources that can help them fight their deportation cases. And because there's no right to counsel in immigration court, the overwhelming majority of noncitizens are left to defend themselves against deportation literally by themselves.

IDP is currently working with Rikers to present immigration workshops for noncitizens who have detainers lodged against them. In fact, we're presenting a pilot workshop to NYC Department of Correction upper management next month, with plans to start conducting these workshops to Rikers inmates soon thereafter. And even though we think Rikers is an ideal setting to help immigrants understand what they face and what they can do before they get sent to distant and remote detention centers, we'd all be much more effective in preventing families and communities from getting ripped apart if we made sure more was done at earlier stages.

Mandatory detention and deportation might be the most serious effects of entering a guilty plea. But they're certainly not the only ones. And for many immigrants and their families and communities, the other negative consequences can be just as upsetting. Let me provide a partial list, excerpted and adopted from a report published by the New York City Bar's Committee on Criminal Justice Operations (found at http://www.nycbar.org/pdf/report/Immigration.pdf), that offers a bird's eye view of the range of other consequences that can result from a guilty plea:

- Inability to obtain an official I.D. card
- Inability to work
- Inability to get housing
- Inability to get health insurance
- Inability to go to college
- Inability to travel outside of the US
- Inability to renew green card
- Ineligibility for lawful permanent residence (i.e., green card status)
- Ineligibility for citizenship
- Initiation of deportation proceedings
- Ineligibility for waivers and other forms of relief from deportation
- Ineligibility for asylum even if faced with persecution abroad

- Inability to live or work safely in the country of deportation
- Lengthy or permanent exile from the US
- Enhanced sentences upon reentry into the US

I think it's clear to all that guilty pleas, whether in criminal or problem-solving courts, can wreak havoc. That's why the Immigrant Defense Project wholeheartedly supports judicial advisals that provide warnings that any guilty plea – whether it's to a felony, misdemeanor, or violation – can cause immigration consequences. Now, shouldn't criminal defense attorneys warn their clients about immigration consequences? Yes, they should. But the truth is, unfortunately, that many still don't. IDP is making progress in that direction – including through a protocol we've come up with to implement immigration service plans for public defenders throughout New York. Still, it's not enough. When it comes to problems of this scale, we need all players to pitch in. Will advisals independently solve the crisis of mass exiles of immigrants from the US? Probably not. But they can sure make a difference. Many immigrants might think twice about entering guilty pleas. They might still decide entering a guilty plea is still their best option. But they'd do so knowing they made an informed decision through a process they could regard as fair and just.

I'd like to push it one step further. Having an advisal is not quite enough. It needs to meet certain minimum requirements. So far, New York's advisal is woefully inadequate. States with far fewer immigration populations have done way better to protect their immigrant constituents. New York's advisal has lagged behind on a variety of fronts. It only covers felonies. It's not mandatory. It has no standard language. It expressly disallows redress for failure to provide warning. It's only delivered when a guilty plea is about to be entered.

It's time for New York to have an advisal that's substantive. By that I mean that it has to cover felonies, misdemeanors, and violations since even minor offenses can trigger the same mandatory detention and deportation that serious offenses do. It has to be delivered all the time, not just by whim, so that our criminal justice system provides a standard to which it must be consistently held. It has to include language that all judges must deliver in order to ensure accountability. It has to allow for remedies, if not properly delivered, to actually have teeth. And it has to give immigrants time to consider plea alternatives – for example, even by providing an opportunity to call IDP's hotline – in order to be meaningful.

In closing, I sincerely urge the Committee to move forward to effectuate such an advisal scheme throughout our courts in order to provide New York's immigrant communities with fairer proceedings and to instill greater confidence by all in our criminal justice system.

NYLAG
NEW YORK
LEGAL ASSISTANCE GROUP

Yisroel Schulman, Esq.
President & Attorney-In-Charge

January 30, 2009
Testimony Before the New York City Council, Immigration Committee
by the New York Legal Assistance Group, Immigrant Protection Unit

Effects of Entering a Guilty Plea on Immigration Status under New York's Criminal Law

Introduction

Under the New York Penal Law, lesser crimes are categorized as *misdemeanors*, while more serious crimes are labeled *felonies*. Those terms have specific meanings within the New York Penal Law, but in the context of federal immigration law, convictions for either misdemeanors or felonies can have severe consequences for a non-citizen defendant, which can lead to a great deal confusion amongst non-citizens charged with crimes and the defense attorneys tasked with defending them in the criminal courts. While there has been a critical effort to educate the defense bar in New York about immigration consequences of criminal convictions, spearheaded by the Immigrant Defense Project of the New York State Defenders Association, criminal defense attorneys should not be the only safeguard to ensure that a non-citizen charged with committing a crime does not unwittingly plead guilty to a charge that can have far-reaching immigration law consequences.

Plea-bargaining is unfamiliar to many immigrants.

Guilty pleas to misdemeanors are often the result of plea-bargaining. The practice of plea-bargaining is a significant part of the criminal justice system in the United States and here in New York. However, most immigrants are unfamiliar with the concept of plea-bargaining, as there are relatively few other countries in the world that use plea-bargaining as extensively as we do in the United States. This lack of familiarity, coupled with cultural and language barriers between criminal defendants and their defense attorneys can lead many immigrants to be uncertain what exactly it means when they plead guilty to a lesser charge. Often, the only thing an immigrant understands when entering a

guilty plea is that they are not going to jail and the case is going to be resolved. And while it may be true that entering a guilty plea for a lesser charge may be a desirable outcome in the criminal justice context if the defendant was initially charged with a more serious crime, that immigrant may still face serious immigration consequences for pleading guilty to that misdemeanor.

Guilty pleas for misdemeanor crimes can still have serious immigration consequences.

Convictions for misdemeanor crimes under the New York State Penal law can have severe immigration consequences for non-citizens. For immigrants, refugees and asylees who have yet to become permanent residents, a single misdemeanor conviction can result in a bar to ever becoming a lawful permanent resident. For lawful permanent residents, a single misdemeanor conviction may render them inadmissible under immigration law, becoming an effective bar to ever travelling outside the country. Also, lawful permanent residents may be subject to deportation for two misdemeanor convictions. Convictions for two misdemeanor crimes can become a barrier to a lawful permanent resident naturalizing and becoming a U.S. citizen.

In light of these possible consequences, a non-citizen defendant would certainly think twice about pleading guilty to a lesser charge in order to avoid the uncertainty of a criminal trial, if by doing so they would clearly be jeopardizing their immigration status.

Immigrants should be aware the possible consequences before entering guilty pleas.

Failure to consider the immigration consequences of a guilty plea to a misdemeanor can have tragic results. Families may be torn apart, sons and daughters may be unable to travel to their home countries to see dying parents, long-time residents may be unable to ever naturalize and become citizens of the country they call home. A simple warning that pleading guilty may lead to immigration consequences would encourage many to think twice, and hopefully would lead to more non-citizen defendants consulting with immigration attorneys.

TESTIMONY BEFOREW THE COMMITTEE ON IMMIGRATION OF THE NEW YORK CITY COUNCIL

January 30, 2009

New York, New York

Prepared By Joanne Macri, Esq.
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Thank you for the opportunity to testify at the January 30, 2009 hearing considering the impact of New York State advisals as to immigration consequences on noncitizen defendants. As you may be aware, the New York State Defenders Association ("NYSDA") is a not-for-profit membership organization that has been providing support to New York's criminal defense community since 1967. Its mission is to improve the quality and scope of publicly supported legal representation to low income people.

NYSDA's Defense Back Up Center is committed to offering support to its association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others dedicated in developing and supporting high quality legal defense services for all people, regardless of income. Among its many initiatives, NYSDA provides defense attorneys, immigration lawyers, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. In seeking to improve the quality of justice for non-citizens accused of crimes, NYSDA has an interest in the fair and just administration of the nation's immigration laws relating to individuals who have been convicted or accused of crimes.

The Urgent Need for Amendment of the CPL to Expand New York State Advisals

This testimony addresses the need to ensure that indigent immigrants are provided sufficient advisal/notification relating to the consequences of criminal conduct of which they may be rightly or wrongly accused. We propose this Committee consider supporting the expansion of various sections of the New York 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.

NYSDA also encourages this Committee and the New York City Council to further explore earlier visited possibilities of introducing legislation that would amend 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 any

plea withdrawal, it would be expected that the entire accusatory instrument, as it existed at the time of the plea, would be restored. 1

As the immigration laws enacted under the reforms made in 1996 continue to be interpreted by the Department of Justice and the courts, there is an ever-increasing list of criminal offenses that will subject immigrants to permanent removal from the United States, and an ever-decreasing source of discretionary waivers available under the statute to override such consequences. Accordingly, immigrants charged with criminal offenses need effective counsel to represent them within the criminal justice system so that they can make informed decisions affecting the entire course of their lives and those of their families.

A. The Human Cost is High and Affects Immigrants and Citizens Alike

The immigration consequences of a conviction often far outweigh the criminal consequences, and a terrible human cost can result from an immigrant's conviction of even a minor offense. For example, dozens of offenses including many misdemeanors are classified as "aggravated felonies." The immigration consequences for conviction of an aggravated felony include:

- permanent banishment from the United States, causing permanent separation from U.S. citizen family. For example, a lawful permanent resident who has resided in the U.S. for decades, who is married to a U.S. citizen and has U.S. citizen children will be deported and permanently barred from returning if convicted of an aggravated felony;
- forced return to areas of persecution. A person convicted of any aggravated felony is barred from seeking asylum, and faces severe legal hurdles to being allowed to remain temporarily in the United States even after establishing a clear probability that he or she will be persecuted on the basis of political belief, religion, or national origin if deported;
- long prison sentences for those who attempt to illegally re-enter the United States after conviction and deportation. Under 8 U.S.C. § 1326(b), a sentence enhancement of up to twenty years in federal prison can be imposed for a person who re-enters the U.S. after deportation if the person was convicted of an aggravated felony beforehand.

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1 NYSDA acknowledges the New York City Council's previous consideration of a state advisal bill, Bill A5285 (Lopez) and would support consideration of a similarly proposed legislation bill.

Prosecutions of the nonviolent offense of illegal re-entry, often in an attempt to rejoin family, represent a startling proportion of criminal cases handled in federal court and of prisoners in federal penitentiaries;

- permanent ineligibility for U.S. citizenship or other immigration benefits, even after complete rehabilitation.

These penalties are especially severe considering the host of minor offenses that are classified as aggravated felonies. For example, a misdemeanor conviction of theft with a one-year suspended sentence is classed as an aggravated felony, *even though no jail time was imposed or served.* Immigrants convicted of these offenses currently are subject to deportation and removal from the United States. Furthermore, in most states, they are provided with the proper advice or advised of the immigration consequences that would enable them to make a knowing and informed decision as to how to possibly arrange to plead to an alternate offense carrying a similar criminal penalty but no immigration consequences.

Not only immigrants but also their U.S. citizen family members bear the brunt of these penalties. In 2000, it was estimated that 12.5% of households in the United States had at least one foreign-born householder (parent or spouse). One out of six children living in the United States live with at least one foreign born householder, and the majority (77%) of these children are U.S. citizens.2 When an immigrant is deported, it is frequently U.S. citizen family members including children who suffer. It is estimated that 1.6 million family members in the U.S. are separated from their husbands, wives and children to removal since immigration reform legislation was passed in 1996 (i.e., est. 540,000 reported to be U.S. citizen family members directly impacted by removal of loved ones from the United States). 3

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2 This and other statistics about population cited in the proposal come from "Profile of the Foreign-Born Population of the United States, 2000," from *Current Population Reports, U.S. Studies* from the U.S. Census Bureau's reports on the 2000 census. The report is available at www.census.gov/prod/2002pubs/p23-206.pdf, or look at the census website for material on the "foreign born." The census contains extensive statistics on the foreign-born, but not on immigration status. A certain number of the foreign born now are U.S. citizens, or may have obtained citizenship from birth.

3 Human Rights Watch Report Forced Apart: Families Separated and Immigrants Harmed By United States Deportation Policy; 2007 Report.

B. Promoting Change Within the Criminal Justice System as Related to Immigrant Rights

It is well recognized by this Committee that immigrants face many negative immigration consequences, including detention, deportation, and ineligibility for citizenship, as a result of even minor criminal charges, pleas, and sentences. The criminal grounds triggering deportation, detention, and other negative immigration consequences have greatly expanded over the years through amendments to immigration law as well as case law interpretation. The extent of these negative immigration consequences often turns on whether the criminal disposition falls within certain immigration law categories including, but not limited to, "aggravated felonies," "crimes involving moral turpitude," "controlled substance offenses," and other categories. The scope of these categories is not necessarily intuitive—an "aggravated felony" in immigration law, for example, has been interpreted to cover neither offenses that are neither aggravated nor felonies. Similarly, dispositions that are not convictions under state law—such as a deferred adjudication program that results in the dismissal of all charges—may be considered "convictions" under immigration law and thus may trigger many of the categories described above that lead to deportation.

The nuances of immigration law as they relate criminal dispositions for noncitizens are complicated and confusing and often challenging even for the most veteran of criminal defense counsel. As a result, it is recommended that defendants be uniformly advised by the state courts that lack of citizenship in most criminal cases may result in possible immigration consequences and should be met with an opportunity for further consultation with an immigration specialist before a plea is accepted by the court.

The devastating immigration consequential outcomes are often unexpected and unintended by anyone in the criminal justice system, even in the context of the city's innovative diversion programs and problem-solving courts. These courts and programs are designed to provide defendants with the means to break out of the cycle of recidivism and to overcome traditional barriers to reentry and reintegration into society following a criminal disposition. In these programs, defendants are given the opportunity to seek rehabilitation and treatment and earn a reduction in or dismissal of their charge which will allow them the opportunity to return to their families and communities as productive, law-abiding individuals. However, because of the potential immigration barriers and consequences affiliated with these programs (i.e.,

programming denied to lawful permanent residents and noncitizens in some cases, immigration detainers lodged to prevent admission to the program and subsequent immigration penalties due to the admission of the offense required for programming), many of the city's residents are not able to reach this ultimate goal or for those who do engage in programming, many will still be subject to the threat of removal from the United States.

The interests of justice require a warning mechanism that puts the noncitizen 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 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 Maine6 in this regard--at no point during non-felony proceedings in New York is an immigration warning currently required. That New York CPL requires such a warning only before a felony plea may even promote the misconception among New York's non-citizen

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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) (Michigan 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).

defendants and their defense attorneys that only felonies carry negative immigration consequences.

New York State should join 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.

In addition, allowing a withdrawal-of-plea 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 Offering a uniform advisal system to New York State courts will surely promote more consistent application of an immigration advisal when required. At least ten jurisdictions already provide for a remedy upon a court failure to give a required immigration warning.8

In conclusion, providing a more uniform, mandatory and expansive state advisal/notice of immigration consequences will 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).

We appreciate the New York City Council's interest in a higher standard of practice among members of the criminal justice system and support any efforts of this Council to inspire

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

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).

confidence in that system as encouraged to fairly and justly address the needs of New York State's diverse immigrant population.

Respectfully Submitted,

Joanne Macri, Esq.

New York State Defenders Association

Defense Back Up Center – Immigration Project