New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against -

Bronx County
Ind. No. 3433/08

FRANCISCO MELO-CORDERO,
Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT IN SUPPORT OF DEFENDANT-APPELLANT MELO-CORDERO

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PRELIMINARY STATEMENT

Amicus Curiae Immigrant Defense Project ("*amicus*") is a nonprofit organization devoted to the defense of the rights of noncitizens who have been accused or convicted of crimes. *Amicus* respectfully offers this brief in support of Defendant-Appellant Melo-Cordero to apprise the Court of significant fairness and constitutional concerns raised by the trial court's denial of Defendant-Appellant's post-conviction motion. The trial court found that Defendant-Appellant had failed to establish prejudice, relying in part on the fact that Immigration and Customs Enforcement ("ICE") had not yet placed Defendant-Appellant in removal proceedings. Forcing a noncitizen to wait to challenge an unconstitutional conviction until ICE has initiated a removal proceeding risks serious, irreparable harm to that noncitizen, even if she successfully defends against the removal proceeding. This brief highlights relevant provisions of immigration law and federal immigration enforcement practice that bear on the Court's consideration of these issues.

INTEREST OF *AMICUS CURIAE*

Amicus the Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center dedicated to defending the legal, constitutional, and human rights of noncitizens. A nationally recognized expert on the intersection of criminal and immigration law, IDP supports, trains, and advises both criminal defense and immigration lawyers, as well as noncitizens themselves, on issues that involve the intersection of immigration and criminal law. Since 1997, IDP, with its former parent organization the New York State Defenders Association, has produced and maintained the only legal treatise for New York defense counsel representing noncitizen defendants. *See* Manuel D. Vargas, *Representing Immigrant Defendants in New York* (5th ed. 2011). IDP seeks to improve the quality of justice for noncitizens accused or convicted of crimes and therefore has a keen interest in ensuring that noncitizen defendants receive meaningful judicial review of their Sixth Amendment claims.

Numerous courts, including the United States Supreme Court and the New York Court of Appeals, have accepted and relied on *amicus curiae* briefs prepared and submitted by IDP in many of the key cases involving the intersection of immigration and criminal laws. *See, e.g.,* Brief of *Amici Curiae* IDP et al. in Support of Petitioner in *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (No. 11-820); Brief of *Amici Curiae* IDP et al. in support of Petitioner in *Padilla v.*

Kentucky, 559 U.S. 356, 130 S. Ct. 1473 (2010); Brief of *Amici Curiae* IDP et al. in Support of Defendant-Appellee in *People v. Baret*, __ N.Y.3d __, 2014 WL 2921420 (N.Y. 2014) (No. 105); Brief of *Amicus Curiae* IDP in Support of Defendants-Appellants Peque, Thomas, and Diaz in *People v. Peque*, 3 N.E.3d 617, 22 N.Y.3d 168 (N.Y. 2013) (Nos. 163, 164, 165) (cited in *Peque*, 22 N.Y.3d at 23, 25 n.4); Brief of *Amici Curiae* IDP et al. in Support of Defendants-Appellants Ventura and Gardner in *People v. Ventura*, 958 N.E.2d 884, 17 N.Y.3d 675 (N.Y. 2011); Brief of *Amici Curiae* IDP et al. in Support of Defendant-Appellant in *People v. Badia*, 106 A.D.3d 514 (1st Dep't 2013); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Baret*, 99 A.D.3d 408 (1st Dep't 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Chacko*, 99 A.D.3d 527 (1st Dep't 2012); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellee in *People v. Mercado* S.C.I. No. 1106/2004 (appeal pending in Appellate Division, First Department); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Lambert*, 115 A.D.3d 987 (2d Dep't 2014); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Harrison*, 115 A.D.3d 980 (2d Dep't 2014); Brief of *Amicus Curiae* IDP in Support of Defendant-Appellant in *People v. Andrews*, 108 A.D.3d 727 (2d Dep't 2013).

SUMMARY OF ARGUMENT

When a defense attorney fails to inform a noncitizen client that a guilty plea subjects her to deportation, or erroneously informs the client that the plea will not subject her to deportation, and the noncitizen pleads guilty in reliance upon the attorney's deficient advice, a serious injustice results. *See People v. McDonald*, 1 N.Y.3d 109 (2003) (misadvice regarding immigration consequences constitutes deficient performance under the Sixth Amendment); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (constitutionally competent counsel must provide accurate, affirmative advice regarding immigration consequences). If the noncitizen can demonstrate that she would have rationally rejected the plea if competently advised, the guilty plea violates the Sixth Amendment. *See id.* at 372.

The trial court in the instant case found that Defendant-Appellant's plea to N.Y. Penal Law § 120.05(2) rendered him subject to deportation for conviction of a crime of domestic violence under the Immigration and Nationality Act ("INA"). *See People v. Melo-Cordero*, Ind. 3433-2008 (Bronx Sup. Dec. 6, 2013), slip op. at 2; *see also* 8 U.S.C. § 1227(a)(2)(E)(i). Defendant-Appellant alleged that his attorney had told him that he could avoid deportation by entering the plea, and requested a hearing on the issue of counsel's ineffectiveness. *See Melo-Cordero*, slip op. at 3, 5. This allegation of misadvice, if proven by a preponderance of evidence, would support a finding of deficient performance under the Sixth

Amendment. *See McDonald*, 1 N.Y.3d 109. Notwithstanding this, the trial court refused to schedule a hearing, instead relying on the fact that ICE had not yet initiated removal proceedings to find that Defendant-Appellant had failed to establish that he suffered prejudice as a result of his attorney's incorrect advice. *See Melo-Cordero*, slip op. at 5.

Defendant-Appellant's Brief asserts, and *amicus* agrees, that the trial court's reasoning is legally invalid. *See Brief of Defendant-Appellant*, p. 18-22. Furthermore, irreparable harm results to a noncitizen who must wait until Immigration and Customs Enforcement (ICE) initiates a removal proceeding to challenge an unconstitutional conviction, *regardless of the eventual outcome of the removal proceeding*.

Noncitizens have a legal duty to maintain contact with the Department of Homeland Security ("DHS").[1] Any contact between a deportable noncitizen and DHS is likely to lead to a removal proceeding and civil detention during its pendency. Therefore, prohibiting a noncitizen from proactively challenging an unconstitutional conviction leaves her with the choice between failing to satisfy the legal duty to maintain contact with DHS, and placing herself at risk of detention

[1] DHS bears general responsibility for national security. ICE is an agency within DHS; one piece of its mission is the civil and criminal enforcement of federal laws governing immigration. United States Citizenship and Immigration Services ("USCIS") is another DHS agency that handles, among other things, applications for immigration and citizenship benefits [such as Lawful Permanent Resident ("green card") applications]. *See generally* http://www.dhs.gov/department-components.

and deportation. It also presents the risk of serious, irreparable harm to that noncitizen *regardless of the eventual outcome of the removal proceeding.*

When a noncitizen must wait to file a 440 motion until ICE commences a removal proceeding, the following dire consequences may ensue: 1) deportation based on an unconstitutional conviction prior to the completion of the litigation of the 440 motion; 2) detention during the pendency of the removal proceeding in conditions worse than criminal incarceration; 3) transfer to a detention center far from family, friends, potential legal counsel, and the court that will decide the 440 motion; and 4) an inability to afford representation in one or both proceedings, exacerbated by a lack of income while detained. Therefore, the trial court's decision is not only incorrect as a matter of law, but also presents a significant risk of serious, irreparable harm to noncitizens with constitutionally invalid convictions. Thus, this Court must reverse the trial court decision.

ARGUMENT

I. Noncitizens have a legal duty to maintain contact with DHS; for a deportable noncitizen such contact may result in a removal proceeding and detention during its pendency.

There is no statute of limitations for an ICE enforcement action. *See generally* 8 U.S.C. § 1227(a)(2). Any contact between a deportable noncitizen and DHS is likely to lead to a removal proceeding and civil detention during its pendency. Provisions of the immigration laws that necessitate contact between noncitizens and DHS officers make the commencement of a removal proceeding against a deportable noncitizen almost unavoidable.

For instance, USCIS requires that: 1) Lawful Permanent Residents (LPRs) periodically renew their green cards;[2] 2) noncitizens register a current address with the agency; *see* 8 U.S.C. § 1305(a); and 3) some categories of LPRs who obtained LPR status through family members continue to present themselves to USCIS officers for scrutiny. *See* 8 U.S.C. § 1186a(a)-(h). An application for nearly any affirmative benefit, such as LPR status, or to renew a green card, requires the noncitizen to submit fingerprint data.[3] At any of the afore-mentioned points of intercept, USCIS may use the fingerprint data to check the Federal Bureau of

[2] *See* USCIS, *How Do I Renew or Replace my Permanent Resident Card?* (Oct. 2013), http://www.uscis.gov/sites/default/files/USCIS/Resources/B2en.pdf.
[3] *See* USCIS, *Instructions for I-485, Application to Register Permanent Residence or Adjust Status*, 2 (June 20, 2013), http://www.uscis.gov/sites/default/files/files/form/i-485instr.pdf; *see also* USCIS, *E-Filing Tips and Frequently Asked Questions*, http://www.uscis.gov/forms/file-my-application-online-e-filing/e-filing-tips-and-frequently-asked-questions#21.

Investigation's National Crime Information Center files.[4] Therefore, for noncitizens that are deportable for criminal convictions, the question is not *whether* ICE will seek to remove them from the United States, but *when*.

Prohibiting a noncitizen from proactively challenging an unconstitutional conviction leaves her with the choice between failing to satisfy the legal duty to maintain contact with DHS, and placing herself at risk of detention and deportation. It is also patently unfair because the removal proceeding itself may cause significant, irreparable harm *even if the noncitizen successfully defends against removal*.

II. Requiring a noncitizen to delay challenging an unconstitutional conviction until ICE has initiated removal proceedings risks serious, irreparable harm to that noncitizen.

Some noncitizens do not realize that a guilty plea has rendered them deportable until ICE has taken steps toward their removal from the United States by issuance of an immigration detainer, arrest at home or work, or receipt of a Notice to Appear in Removal Proceedings ("NTA"). But other noncitizens receive this devastating information from another source, commonly when seeking advice about renewing or replacing a green card, or applying for citizenship. Noncitizens in the latter group are then faced with the difficult choice of filing a challenge to

[4] *See generally* USCIS, *Fingerprints*, http://www.uscis.gov/forms/fingerprints; *see also* NCIC 2000 Operating Manual, sec. 1.4(10), *http://xlms.gbi.state.ga.us/xlms/ncic/ORI.htm* ("USCIS has been authorized full access to all NCIC files").

the unlawful conviction promptly, or delaying the 440 motion until ICE initiates a removal proceeding.[5] Waiting to challenge an unconstitutional conviction until ICE commences a removal proceeding may cause serious, irreparable harm to the noncitizen.

A. ICE may deport a noncitizen based on an unconstitutional conviction before the 440 litigation concludes.

The most serious consequence of forcing a noncitizen to delay filing a challenge to an unconstitutional conviction is that ICE may deport the noncitizen prior to resolution of the 440 motion. The removal proceeding is on a schedule independent of the 440 motion. A *pending* post-conviction relief case does not affect the finality of the conviction for immigration purposes, *see* 8 U.S.C. § 1101(a)(48), and so the immigration judge can order the defendant removed, and removal can be effected, during the pendency of a 440 motion.

There is no right to a continuance in immigration court to seek post-conviction relief. *See Matter of Perez-Andrade,* 19 I&N Dec. 433 (BIA 1997); *Matter of Sibrun,* 18 I&N Dec. 354 (BIA 1983); 8 C.F.R. § 1003.29. And a collateral attack on a conviction is legally irrelevant to the removal proceeding, even when vacatur of the conviction would remove the basis for deportation. *See Matter of Polanco*, 20 I&N Dec. 894 (BIA 1994).

[5] Filing the 440 motion increases the risk of a removal proceeding, because the prosecutor may alert ICE to the 440 filing and the underlying conviction.

In practice, immigration proceedings for detained noncitizens are frequently completed in significantly less time than it takes to litigate a 440 motion. *See Demore v. Kim*, 538 U.S. 510, 529 (2003) (reciting Department of Justice statistics indicating that in 85% of removal proceedings involving detained respondents, proceedings were completed in an average time of 47 days and a median of 30 days, and that in the remaining cases involving an administrative appeal, such appeal took an average of four months with a median of slightly less than four months). In contrast, 440 motions typically take at least several months, and sometimes years, to litigate. For example, the instant 440 motion has been pending for over 15 months. If Defendant-Appellant had waited to file the 440 motion until placed in removal proceedings, there is a very real possibility that ICE would have deported him while the motion was pending.

B. Living in constant fear of detention and deportation is immensely stressful.

Living in constant fear of detention and deportation causes significant stress.[6] In dramatic enforcement actions, ICE sometimes effectuates surprise arrests of deportable noncitizens at their homes, usually in the early morning hours, or at their workplaces.[7]

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[6] *See* Julia Preston, *Amid Steady Deportation, Fear and Worry Multiply Among Immigrants*, N.Y. Times, Dec. 20, 2013, http://www.nytimes.com/2013/12/23/us/fears-multiply-amid-a-surge-in-deportation.html?pagewanted=all.

[7] *See* Peter L. Markowitz, et al., *Constitution on ICE: A Report on Immigration Home Raid*

Some noncitizens decide to file a 440 motion proactively, thereby risking possible removal proceedings, for the chance to vacate the unconstitutional conviction and alleviate the intolerable stress. It is unjust to prohibit a noncitizen from seeking vacatur of an unconstitutional conviction when it is the only way to avoid living in constant fear of detention and deportation.

C. Once ICE initiates a removal proceeding, the proceeding itself presents a serious hardship to a noncitizen, *regardless of the eventual outcome.*

The hardships attendant to removal proceedings are significant, even if the noncitizen ultimately successfully defends against removal. Noncitizens with criminal convictions are very often detained during the pendency of the proceedings. ICE may detain the person in another state, thus removing her from the critical support of family and friends.[8]

There is no right to counsel in immigration court,[9] or on a 440 motion.[10] The cost of retaining counsel for representation in removal proceedings is

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Operations, Cardozo Immigration Justice Clinic (New York, N.Y. 2009), http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf; Julia Preston, *Sweep Coincides with Delay on Deportation Policy Changes*, N.Y. Times, May 29, 2014, http://www.nytimes.com/2014/05/30/us/politics/immigrant-raid-coincides-with-deportation-policy-delay.html (describing May 2014 "sweep" where ICE agents detained noncitizens at their homes and workplaces).

[8] *See* Human Rights Watch, *Locked Up Far Away: The Transfer of Immigrants to Remote Detention Centers in the United States* (2009), http://www.hrw.org/sites/default/files/reports/us1209webwcover.pdf.

[9] Indigent noncitizens detained in New York City, or in nearby New Jersey detention centers, have access to a pro bono immigration attorney through the recently-created New York Family Unity Project (NYFUP), *see http://www.vera.org/project/new-york-immigrant-family-unity-project.* NYFUP is the only "public defender program in the country for immigrants facing

exorbitantly high, as is the cost of securing counsel for representation on a 440 motion. If detained and not working during the removal proceeding, the high cost of securing attorneys for two separate proceedings likely becomes prohibitive.[11]

The injuries stemming from a removal proceeding based on an unconstitutional conviction are serious and possibly irreparable, regardless of the eventual outcome of the removal proceeding. Thus, it is unjust to force a noncitizen to wait to challenge an unconstitutional conviction until ICE has initiated a removal proceeding.

1. ICE frequently detains noncitizens during removal proceedings.

In 2012, DHS detained an all-time high of 477,523 noncitizens.[12] In the experience of *amicus* and others, the government takes an expansive view of the

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deportation." *Id.* It does not serve noncitizens detained in any other locations, such as upstate New York. Also, ICE may detain a noncitizen and initiate a removal proceeding anywhere in the country. For example, if a noncitizen from New York traveled and attempted to reenter the country in Miami, and a Customs and Border Patrol Agent identified a deportable conviction on her record, she may be detained and placed in a removal proceeding in Florida. *See* National Immigration Project of the National Lawyers Guild, et al., *Deportation 101*, 23 (May 2010), http://www.nationalimmigrationproject.org/Deportation101_LowRes_January_2011.pdf/ (airports and other points of entry are trigger sites for detention and deportation of, *inter alia*, Lawful Permanent Residents with deportable convictions).

[10] The court must appoint an attorney if it orders a hearing on the 440 motion. *See* N.Y. County Law § 722(4). However, a court may deny a 440 motion if the pleadings are insufficient. *See* N.Y. Crim. Proc. Law § 440.30(4). Pro se 440 motions are routinely denied due to insufficient pleadings. *See, e.g., People v. Garcia*, 42 Misc.3d 1205 (Sup. Ct., Bronx County 2013); *People v. Hendy*, 2012 N.Y. Slip Op. 32255(u) (Sup. Ct. Kings County July 5, 2102); *People v. Saint-Fermin*, 2011 WL 7396537 (Sup. Ct., N.Y. County Dec. 1, 2011).

[11] *See* American Bar Association, *Reforming the Immigration System*, 5-8 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf (In 2008, 84% of detained immigrants nationwide lacked counsel in immigration court).

legislation authorizing mandatory detention of noncitizens with criminal convictions during the pendency of removal proceedings.[13] Thus, it is likely that ICE will initially detain a noncitizen who may fall within one of the mandatory detention grounds in 8 U.S.C. § 1226(c). Noncitizens can contest the application of the mandatory detention statute in arguments to the IJ or a federal district court judge. However, these challenges may only lodge *after* a noncitizen has been detained and suffered a deprivation of liberty.

The mandatory detention grounds are very broad, encompassing nearly all criminal grounds of removability. *See* 8 U.S.C. §§ 1226(c), 1227(a)(2), 1182(a)(2). They apply to noncitizens convicted of, *inter alia*, any crime related to a controlled substance (excepting, in some circumstances, one conviction for simple possession of 30 grams or less of marijuana for personal use); any crime related to a firearm; and more than one crime involving moral turpitude ("CIMT"), a term of art that reaches conduct as minor as petit larceny (in some circumstances, even one CIMT will trigger mandatory detention). *See* 8 U.S.C. § 1226(c); *see also Gomez v. Napolitano*, No. 11 Civ. 1350 (JSR), 2011 WL 2224768 (S.D.N.Y. May 31, 2011) (respondent with two convictions for N.Y. Penal Law § 155.25

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[12] *See* John F. Simanski & Lesley M. Sapp, *Annual Report Immigration Enforcement Actions: 2012*, 5 (Dec. 2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf.

[13] *See* American Bar Association, *supra* note 11, at 1-52 ("Commentators have argued that DHS interprets the mandatory detention provisions as broadly as possible to require detention of noncitizens whose detention might be disputable as a matter of law").

subject to mandatory detention). Eligibility for discretionary relief, such as cancellation of removal, is irrelevant under the mandatory detention statute. Likewise, the IJ may not consider a credible post-conviction challenge to the conviction justifying mandatory detention. Absent an extraordinary, discretionary judgment by ICE, a noncitizen subject to the mandatory detention statute will remain incarcerated until she vacates the deportable conviction or otherwise prevails in immigration court.

Even if the noncitizen establishes that she is not subject to mandatory detention, that victory does not entail her release; it merely means that she is subject to detention as a discretionary matter pursuant to 8 U.S.C. § 1226(a). While bond and parole are available in DHS's discretion, there is no guarantee that the noncitizen will have the funds to meet the bond set. *Amicus* has observed that the Department of Homeland Security ("DHS") has a practice relative to noncitizens with criminal convictions and no apparent relief eligibility - detain without bond or set a high bond.[14] Moreover, if DHS were to set bond in an affordable amount, it could revoke the bond or parole at any time. *See* 8 U.S.C. § 1226(b). IJs have the power to review bond determinations for noncitizens

[14] *See* NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, & Families for Freedom, *Insecure Communities, Devastated Families*, 2 (July 23, 2012), http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf (hereinafter *Insecure Communities*) (Between 2005 and 2010, "ICE detained over 31,000 New Yorkers without a bond setting, or with a bond amount that was prohibitively high").

detained under 8 U.S.C. § 1226(a), *see* 8 C.F.R. § 1003.19, but similarly do not generally grant low bond amounts for noncitizens convicted of crimes and who are not clearly eligible for relief from removal.

It is inherently unjust to force a noncitizen to endure immigration detention while challenging an unconstitutional conviction that is the basis for such detention. Furthermore, the following features of immigration detention compound the injustice: 1) ICE frequently transfers noncitizens to detention centers far from home; 2) the conditions of immigration detention are generally worse than criminal incarceration; and 3) detention correlates negatively with the ability to secure counsel.

2. ICE commonly transfers noncitizens to detention centers far from New York State.

While in detention, the noncitizen could be moved anywhere in the country, and, thus, separated from her family and potential 440 counsel, and cut off from her support network. [15] A sister of a noncitizen who was transferred from New York to New Mexico gives this account:

> Ever since they sent him there, it's been a nightmare. My mother has blood pressure problems, and her pressure goes up and down like crazy now, because of worrying about him and stuff. [His wife] has been terrified. She cries every night. And his baby asks for him, asks

[15] *See* Human Rights Watch, *supra* note 8, at 79-83 (detailing the emotional and psychological toll of ICE's sudden, unannounced detainee transfers).

> for "Papa." He kisses his photo. He starts crying as soon as he hears his father's voice on the phone even though he is only one.... Last week [my brother] called to say he can't do it anymore. He's going to sign the paper agreeing to his deportation.[16]

Recent data shows that ICE transfers nearly 2/3 of noncitizens detained in New York to detention centers far from New York City.[17] From 2005 to 2010, ICE sent over 18,000 New Yorkers to detention centers in Texas, Louisiana, and other distant locations.[18]

In additional to the significant emotional harm, a transfer out of the New York area can make litigation of the 440 motion very difficult. ICE often refuses to honor a writ from a New York trial court to produce the noncitizen for a hearing on the 440 motion.[19] Although phone or video testimony is possible, see *People v. Wrotten*, 14 N.Y.3d 33, 37-38 (2009), the noncitizen has a right to be present for the 440 hearing. *See* N.Y. Crim. Proc. Law § 440.30(5). She may waive this right, s*ee id*., and such a waiver may be advisable if the hearing is necessary to a

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[16] *Id*. at 82.
[17] *See* N.Y. Immigrant Representation Study, Study Grp. on Immigrant Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 363 (2011), http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf (hereinafter *Immigrant Representation Study*).
[18] *See Insecure Communities, supra* note 14, at 3. For an extensive discussion of the harms triggered by the massive system of ICE transfers, *See* Human Rights Watch, *supra* note 8.
[19] *See* Families for Freedom and New York University Immigrant Rights Clinic, *Justice Detained, Justice Denied: Immigration Customs Enforcement Prevents Immigrants from Fighting Unlawful Criminal Convictions*, 22 (July 2014), http://familiesforfreedom.org/sites/default/files/resources/Justice%20Detained%2C%20Justice%20Denied-%20Immigration%20and%20Customs%20Enforcement%20Prevents%20Immigrants%20from%20Fighting%20Unlawful%20Criminal%20Convictions%20%20.pdf.

favorable decision on the 440 motion. However, the system should endeavor to avoid creating a situation where noncitizens in out-of-state detention centers are routinely forced to waive their personal appearance for the chance to vacate the conviction that is the basis for detention and deportation.

ICE's practice of transferring noncitizens to detention centers far from New York State compounds the harm that inheres in immigration detention. Additionally, although immigration detention is "civil," and not intended to punish, the living conditions at immigrant detention centers can be quite unpleasant.

3. The conditions of immigration detention are generally worse than criminal incarceration.

The Court of Appeals has recognized that noncitizens are detained in living conditions that are generally worse than criminal incarceration. *See People v. Peque*, 22 N.Y.3d 168, 189 (2013) ("[I]mmigrant detention resembles criminal incarceration, and the conditions of that detention are such that in general, criminal inmates fare better than do civil detainees") (internal quotations omitted).[20] Immigration detention centers have faced widespread criticism for inadequate

[20] *See* Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 Am. Crim. L. Rev. 1441, 1445 (2010). Dr. Schriro, currently Commissioner of the Connecticut Department of Emergency Services and Public Protection, was the Commissioner of the New York City Department of Corrections from 2009 to 2014. *See* http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=537634. Prior to that, she served as Special Advisor to Secretary of Homeland Security Janet Napolitano and was the founding Director of ICE's Office of Detention Policy and Planning. *See id.*; *see also* Schriro, *supra* at 1441 n.a1.

medical care.[21] At many detention centers, detainee movement is largely restricted to the housing unit.[22] Access to "recreation, religious services, the law library, and visitation" may be inadequate.[23] Sufficient access to legal resources is critically important, given the high percentage of detainees that lack legal representation.

4. Detention correlates negatively with the ability to secure counsel.

The majority of detained noncitizens – approximately 80% - are unrepresented in immigration court.[24] It stands to reason that at least the same percentage of detained noncitizens will be unable to secure representation in the post-conviction relief case.[25] This is critical because noncitizens with criminal convictions often have two ways to avoid deportation - vacating the conviction that is the basis for deportation, or establishing that the conviction does not fall within a removal ground. If a noncitizen must wait until ICE commences removal proceedings to file a 440 motion, she is forced to litigate both cases concurrently,

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[21] *See* Human Rights Watch, *supra* note 8, at 39; *see also* Schriro, *supra* note 20, at 1450-51. (detailing the inadequacy of ICE standards governing the provision of medical care for noncitizen detainees).
[22] *See* Dora Schriro, *Immigration Detention Overview and Recommendations*, 21 (Oct. 6, 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[23] *See id.*
[24] *See* American Bar Association, *supra* note 11.
[25] Although NYFUP ensures access to counsel for indigent noncitizens detained in the New York City area, *see supra* note 9, ICE transfers nearly 2/3 of noncitizens initially detained in New York to other locations. *See Immigrant Representation Study, supra* note 17. The representation rate for noncitizens transferred to detention centers outside of the New York City area is 21%. *See id.*

often from detention, and quite possibly without the aid of counsel in one or both cases.[26]

The harm that flows from such a scenario is stark. Unrepresented noncitizens experience substantially lower success rates in immigration court.[27] *Amicus* has observed that the same is true for pro se litigants in the post-conviction relief context. Therefore, it is patently unfair to require a noncitizen to wait to file a challenge to an unconstitutional conviction until she is detained, without a job, and in dire need of costly representation in two separate cases.

[26] The inability to afford an attorney can have serious detrimental effects on the immigration case. *See* Ian Urbina & Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. Times, March 30, 2013, http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html?pagewanted=all (according to an experienced immigration judge, "[d]ozens of detainees who could have qualified to stay gave up after months in detention, . . . because they had no prospects of ever finding counsel to help them").

[27] *See Immigrant Representation Study, supra* note 17, at 363-64; *cf. Moncrieffe v. Holder*, __ U.S. __, 133 S.Ct. 1678, 1690-91 (2013) ("[N]oncitizens are not guaranteed legal representation and are often subject to mandatory detention, where they have little ability to collect evidence").

CONCLUSION

Requiring a noncitizen to delay challenging an unconstitutional conviction until ICE commences a removal proceeding presents a significant risk of serious, irreparable harm to that noncitizen. This requirement is unjust, and unwarranted under Sixth Amendment case law. The trial court incorrectly reasoned that Defendant-Appellant could not establish prejudice because ICE had not yet initiated a removal proceeding. Thus, *amicus* respectfully requests that this Court reverse the Supreme Court's order dismissing Defendant-Appellant's petition for post-conviction relief.

Dated:

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